Public Comments on the Presidential Memorandum on Government Contracting

(Received in response to the May 29, 2009 Federal Register Notice of a public meeting and request for comments.)

PUBLIC COMMENTS BY TOPIC AREA

Competition

American Subcontractors Association (ASA)
Chamber of Commerce
Coalition for Government Procurement
Homeland Security & Defense Business Council
International Association for Contract and Commercial Management (IACCM)
Mark Werfel, LLC
Multi-associations
OMB Watch
Project on Government Oversight (POGO)
US Public Interest Research Group (PIRG)

Contract Type

Aerospace Industries Association (AIA)
American Shipbuilding Association
American Subcontractors Association (ASA)
Council of Defense and Space Industry Associations (CODSIA)
Homeland Security & Defense Business Council
International Association for Contract and Commercial Management (IACCM)
Mark Werfel, LLC
McKenna Long & Aldridge
OMB Watch
Project on Government Oversight (POGO)

Acquisition Workforce

American Subcontractors Association (ASA)
Coalition for Government Procurement
International Association for Contract and Commercial Management (IACCM)
Mark Werfel, LLC
Multi-Association
National Partnership for Women & Families

Multi-sector Workforce (Section 321)

American Federation of Government Employees, AFL-CIO
American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)
Center for American Progress
Group of Unions
International Association for Contract and Commercial Management (IACCM)
Multi-associations
National Employment Law Project (NELP)
National Treasury Employees Union (NTEU)
OMB Watch
Strategic Analysis
The Partnership for Working Families

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AEROSPACE INDUSTRIES ASSOCIATION

Marion C. Blakey
President and Chief Executive Officer

June 8, 2009

Office of Management and Budget
725 17th Street, N.W.
ATTN: Ms. Julia Wise
Washington, D.C. 20503

Submitted via: http://www.regulations.gov

Subject: AIA Comments Regarding the Presidential Memorandum on Government Contracting issued on March 4, 2009

Dear Ms. Wise:

The Aerospace Industries Association (AIA) is pleased to respond to the request for comments published in the May 29, 2009, Federal Register, regarding the Presidential Memorandum on Government Contracting issued on March 4, 2009. With respect to contract type, the Memorandum states "there shall be a preference for fixed-price type contracts; cost-reimbursement contracts shall be used only when circumstances do not allow the agency to define its requirements sufficiently to allow for a fixed-price type contract." These policy statements are consistent with the long-standing preference in the Federal Acquisition Regulation (FAR) for fixed-price type contracts (note FAR 16.301-2, "cost-reimbursement contracts are suitable for use only when uncertainties involved in contract performance do not permit costs to be established with sufficient accuracy to permit any kind of fixed-price contract").

AIA is concerned that the pendulum may be swinging back towards the inappropriate use of fixed-price contracts for complex research and development contracts. For the Department of Defense, section 818 of the National Defense Authorization Act for Fiscal Year 2007 (Public Law 109-364) shifted the paradigm for major defense acquisition programs from senior level approval for fixed-price development to senior level approval for cost-reimbursement development. Inappropriate use of fixed-price contracts for complex research and development requirements has never resulted in a successful program.

During Congressional hearings in the late 1950's, Congress expressed a belief that increasing the contractor's share of the risk in development contracting would sharpen competition and force contractors to achieve more economical and efficient methods of development and production. The Department of Defense responded by moving away from cost reimbursable toward fixed-price type contracts. "Total package procurement" (fixed pricing development and several years of production prior to the start of system development) was seen as the panacea to preclude "buy-ins" and control costs. More complex total package procurements, like the C-5A and F-14 contracts resulted in contractors losing so much money

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that they required contract relief in order to continue performance and the use of total package procurement was ultimately prohibited.

In the 1960s, fixed-price development contracts led to unprecedented claims against the Government. The Navy found its shipbuilding programs so tied up in litigation that progress on those programs was at a virtual stop. Of necessity, the Navy shifted away from fixed-price development and instead prescribed the use of cost type contracts in programs where the requirements were in flux and the risk of performance was too great to be managed in a fixed price environment.

By the 1980's, many fixed-price development contracts resulted in large contractor losses. In response, legislation was passed on September 29, 1988, requiring the Under Secretary of Defense (Acquisition, Technology and Logistics) to approve all fixed-price development contracts over $25 million (subsequently repealed by section 818 of Public Law 109-364 as noted above). The Navy A-12 development contract is perhaps the most visible example of the failed approach of using fixed-price development for complex weapons systems. The A-12 was terminated for contractor default in 1991 with litigation continuing for over eighteen years (the most recent action being a decision on June 2, 2009, by the United States Court of Appeals of the Federal Circuit).

Unreasonable transfer of risk to the contractor does not achieve desired results and may ultimately increase costs to the Government. Past experience has demonstrated that the nature of complex state-of-the-art weapon system development is risky and that addressing these risks by forcing the use of an inappropriate contract type results in delays, disputes, cost overruns, and failures that further damage the credibility of the procurement process. To quote a 1987 Under Secretary of Defense (Acquisition) memo, "In the final analysis, the Government as customer bears the ultimate risk of performance and schedule shortcomings in difficult development efforts since no contract (whether fixed price or not) can compel delivery of the desired product at the desired time. . . At the most, a fixed price contract can only increase a contractor's cost risk, not guarantee his (sic) timely performance."

Some in the acquisition community believe that fixed-price development contracts improve cost credibility; they do not. Use of fixed-price development for major systems drove companies close to bankruptcy and deprived programs of the contract flexibility to deal with normal research and development risks, such as the need for redesign or retesting. When contractors lose substantial amounts of money performing defense contracts, the Department of Defense is harmed as well. Program managers are burdened with negotiating frequent contract changes, and the often-resulting claims, to accommodate evolving requirements and technologies as contractors struggle to continue program performance in this environment.

The Presidential Memorandum directed the Director of the Office of Management and Budget, in collaboration with other specified officials and councils, and with input from the public, to develop and issue Government-wide guidance to "govern the appropriate use and oversight of all contract types, in full consideration of the agency's needs, and to minimize risk and maximize the value of Government contracts generally, consistent with the regulations to be promulgated pursuant to section 864 of Public Law 110-417." The Federal Register Notice

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asked for public comments on several questions including, "Does the Federal Acquisition Regulation provide sufficient information on the appropriate use and management of various contract types to minimize risk and maximize value?"

AIA believes the FAR already provides sufficient information on the appropriate use of contract types, and the OMB Government-wide guidance to be issued on this question should emphasize the concepts in FAR 16.103, Negotiating contract type, and FAR 16.104, Factors in selecting contract types. For example, FAR 16.103 (a) states "selecting the contract type is generally a matter for negotiation and requires the exercise of sound judgment; a firm-fixed-price contract, which best utilizes the basic profit motive of business enterprise, shall be used when the risk involved is minimal or can be predicted with an acceptable degree of certainty." FAR 16.104 (d) directs contracting officers to consider the type and complexity of the requirement when selecting the type of contract by stating, "Complex requirements, particularly those unique to the Government, usually result in greater risk assumption by the Government. This is especially true for complex research and development contracts, when performance uncertainties or the likelihood of changes makes it difficult to estimate performance costs in advance. As a requirement recurs or as quantity production begins, the cost risk should shift to the contractor, and a fixed-price contract should be considered."

Moreover, the OMB guidance to be issued should emphasize that a fixed-price contract is suitable only for acquiring supplies when there is a stable design based on verified specifications so that the Government and the contractor can establish fair and reasonable prices at contract outset (note FAR 16.202-2 states "A firm-fixed-price contract is suitable...for acquiring supplies...on the basis of reasonably definitive functional or detailed specifications"). A fixed-price contract is not suitable for contracts with high cost risks such as the development of a major weapon system with ambitious state-of-the-art performance requirements. The risks of complex development programs likely preclude the use of fixed-price contracts for the following reasons:

- Detailed specifications have not yet been proven;
- System testing is not complete;
- Performance uncertainties exist, preventing realistic cost estimates at contract outset; and
- Contractors must price the contingent risks resulting in higher fixed prices.

Section 864 of the National Defense Authorization Act for Fiscal Year 2009 (Public Law 110-417) requires revisions to the FAR to include guidance regarding when and under what circumstances cost-reimbursement contracts are appropriate, the acquisition plan findings necessary to support a decision to use cost-reimbursement contracts, and the acquisition workforce resources necessary to award and manage cost-reimbursement contracts. Attached are AIA's recommended changes to the FAR to implement section 864.

AIA concurs with the long-standing preference for fixed-price contracts in Government contracting. However, it is critical that Government contracting officers retain the flexibility to select the appropriate contract type based on factors including the complexity of the requirement, the maturity of the technology, and the stability of the design. We must break

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away from the historical temptation to return to the disastrous policy of fixed-price development. AIA encourages OMB to emphasize the existing policies in FAR part 16 in the pending Government-wide guidance.

Sincerely,

Marion C. Blakey

Attachment

MCB:rjp

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Attachment

AIA Recommendation for Changes (Bolded and Italized)

DRAFT FAR Case to implement Section 864 of FY09 NDAA (Regulations on the Use of Cost-Reimbursement Contracts)

Subpart 16.104—Factors in Selecting Contract Types

There are many factors that the contracting officer should consider in selecting and negotiating the contract type. They include the following:

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(l) ***Acquisition Workforce Resources. A cost reimbursement contract requires adequate Government resources to award and manage the contract.***

Subpart 16.3—Cost-Reimbursement Contracts

16.301 General.

16.301-1 Description.

Cost-reimbursement types of contracts provide for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer.

16.301-2 Application.

Cost-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. ***The contracting officer shall consider the factors in 16.104 before selecting and negotiating a cost-reimbursement contract.***

Subpart 7.1—Acquisition Plans

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7.105 Contents of written acquisition plans.

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(b) Plan of action—

*****

(4) Acquisition considerations.

(i) For each contract contemplated, discuss contract type selection (see Part 16); use of multiyear contracting, options, or other special contracting methods (see Part 17); any special clauses, special solicitation provisions, or FAR deviations required (see Subpart 1.4); whether sealed bidding or negotiation will be used and why; whether equipment will be acquired by lease or purchase (see Subpart 7.4) and why; and any other contracting considerations. Provide rationale if a performance-based acquisition will not be used or if a performance-based acquisition for services is contemplated on other than a firm-fixed-price basis (see 37.102(a), 16.103(d), and 16.505(a)(3)). ***If a cost-reimbursement contract is contemplated, provide a discussion of the factors (see 16.104) that support this decision.***

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Public Comments on the Government Contracting Memo

Fixed Price Development

Presenter: Eleanor R. Spector

June 18, 2009

Policy Background

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- Government Contracting Memo consistent with the FAR

"There shall be a preference for fixed-price type contracts; cost reimbursement contracts shall be used only when circumstances do not allow the agency to define its requirements sufficiently to allow for a fixed-price type contract."

- AIA concerned with inappropriate use of fixed-price contracts for complex research and development. Such use has never resulted in a successful program.

Historical Use

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- 1960's "Total Package Procurement" led to Grumman (F-14) and Lockheed (C-5A) losing so much money that contractual relief was required to continue performance.
- Fixed-price contracts for lead ships led to claims and bailouts in the 1970's.
- Contractors lost substantial amounts of money in the 1980's (e.g., AMRAAM, C-17, T-45, A-12). A-12 contract termination in litigation for 18 years.
- 1988 law (repealed in 2007) required USD approval of fixed-price development contracts over $25M.

Aerospace Industry Margins

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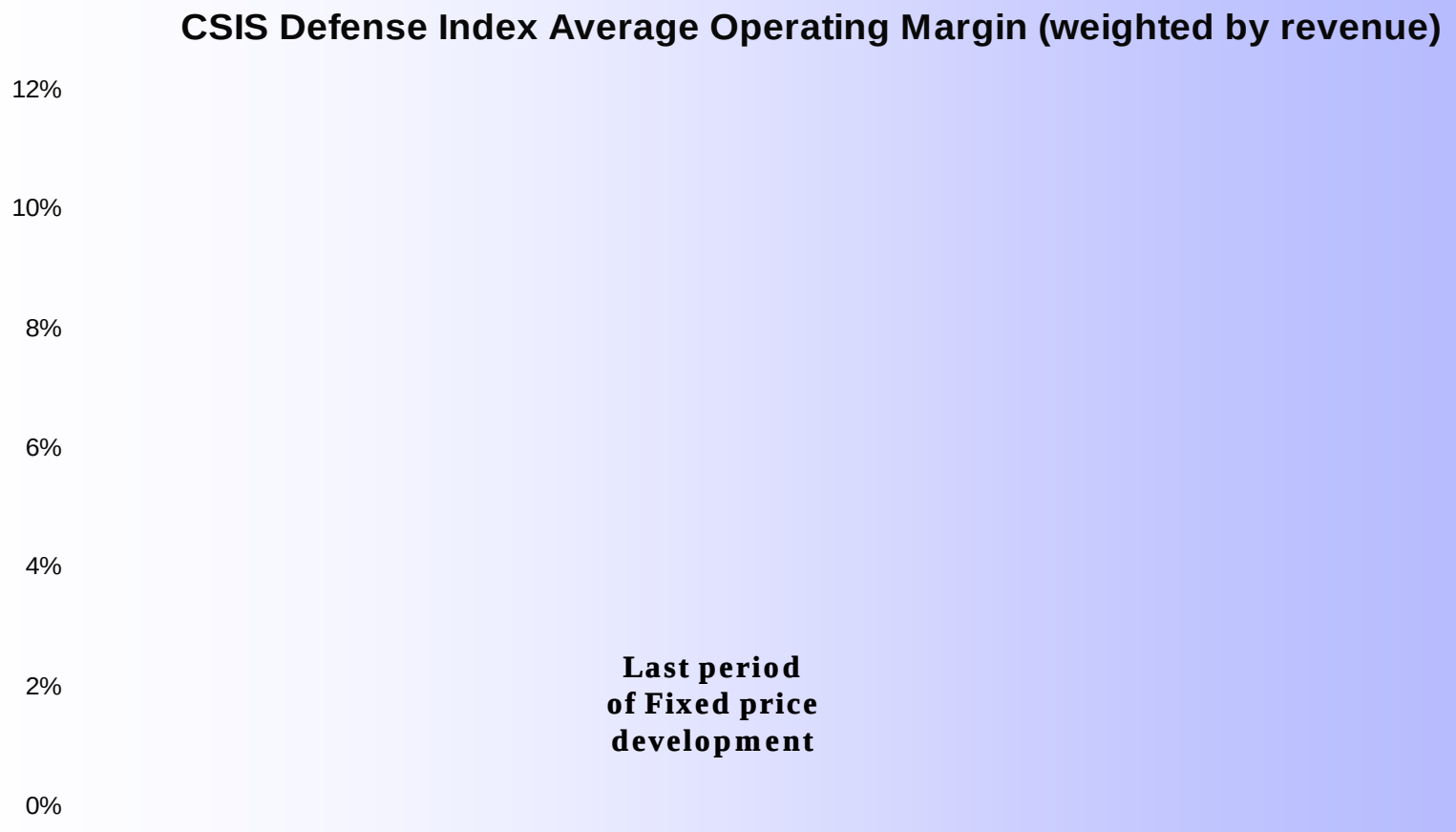
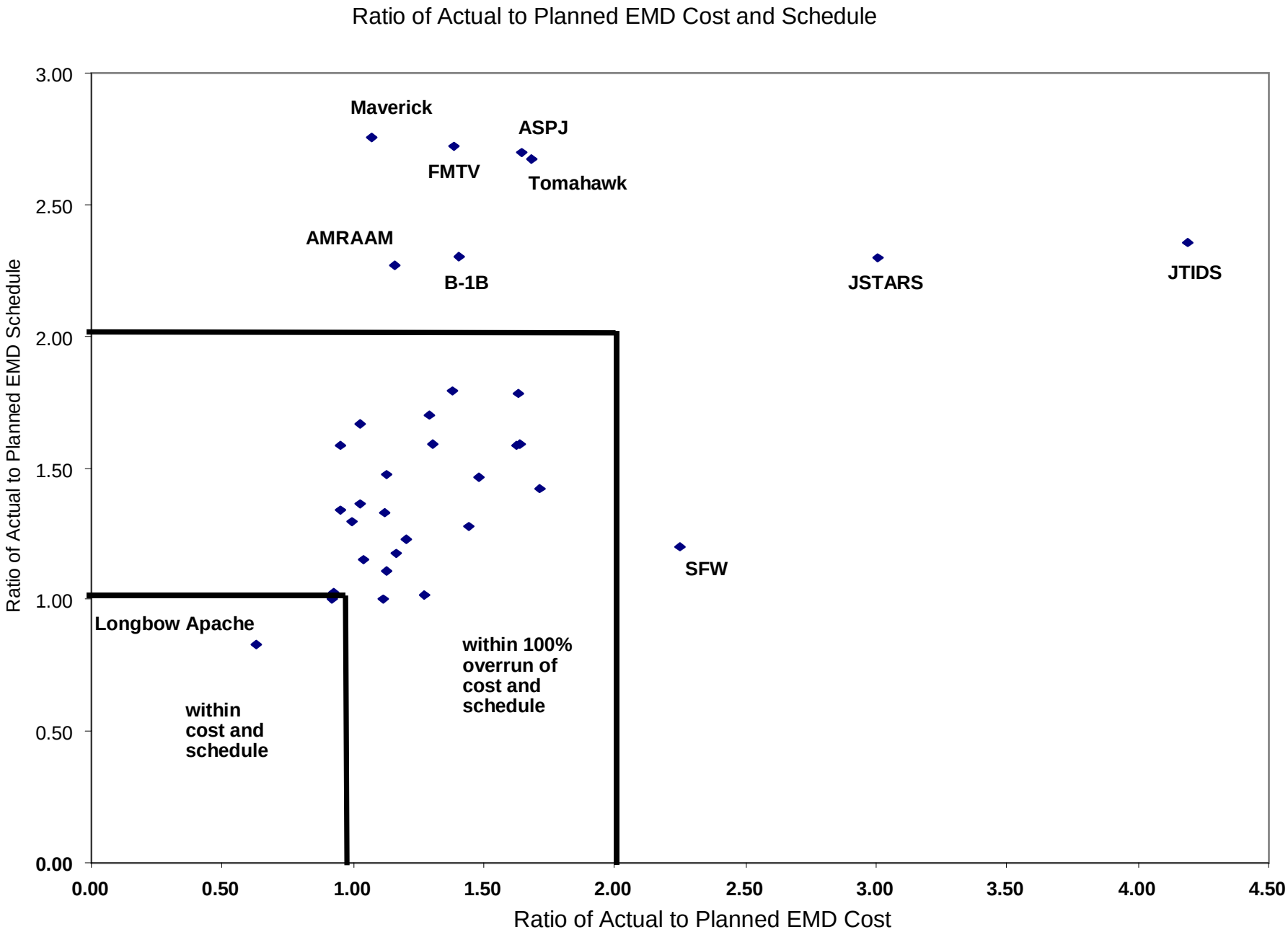


Note: CSIS Defense Index comprises 36 publicly-traded companies with majority revenues derived from US defense business. Boeing Military results have also been included.

Sources: FactSet, Company Reports, CSIS Analysis.


Ratio of Actual to Planned EMD Cost and Schedule
Ratio of Actual to Planned EMD Schedule
Ratio of Actual to Planned EMD Cost
3.00
2.50
2.00
1.50
1.00
0.50
0.00
0.00
0.50
1.00
1.50
2.00
2.50
3.00
3.50
4.00
4.50
Maverick
ASPJ
FMTV
Tomahawk
AMRAAM
B-1B
JSTARS
JTIDS
SFW
Longbow Apache
within 100% overrun of cost and schedule
within cost and schedule

Source: DAU

Historical Observations

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- Cost growth on fixed-price development contracts equivalent to that on cost reimbursable contracts and Government struggles with claims and terminations.
- Fixed-price development for major systems drove companies close to bankruptcy and prohibited the flexibility to do necessary redesign and retesting.
- Competition fosters over-optimism in technical accomplishment, schedule, and cost. Contractor proposal becomes basis for budget, with no cost reserves.

Appropriate Use

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- Minimal risk that can be predicted with some certainty
- Verified specifications (testing complete)
- Stable design, minimal changes
- Cost estimates based on historical costs for the same product

When the above criteria are not met, contractors must price cost contingencies, or take “bet your company” risks

Alternative Approach

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- Emphasize appropriate risk apportionment between Contractor and Government commensurate with program phase.
- Cost reimbursable contract most appropriate – excellent product for future production more important than cost or schedule.
- Improve collaboration on requirements.
- Price and fund to high cost confidence level.

Conclusions

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- Cost growth results from optimism in competition, lack of technology maturity, requirements growth, unrealistic cost estimates, no contingency funding.
- Forced use of fixed-price development contracts has not controlled cost growth but transfers risks to contractors.
- Current FAR policy is appropriate: Use fixed-price development contracts only if program risk permits realistic pricing and an equitable allocation of program risk between Government and contractor.

Finally, From 6/09 A-12 Appeals Court Decision

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- "We also observe that the CEOs of both MDC and GD, in a letter dated June 27, 1990, stated that 'it was a mistake for the U.S. Navy to stipulate this type of contract and it was a mistake for the contractors to accept it. Both are at fault'."
- "Alas, the law of contracts does not allow us to deviate from established principles of law and equity."

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES

PUBLIC COMMENTS ON THE GOVERNMENT CONTRACTING MEMORANDUM

OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT

JUNE 8, 2009

INTRODUCTION

The American Federation of Government Employees, AFL-CIO (AFGE), which represents more than 600,000 federal employees throughout the United States and overseas, welcomes the opportunity to provide comments to the Obama administration and the Office of Management and Budget (OMB) about the President's efforts to establish a framework for improving the federal acquisition system and managing the federal workforce.

AFGE supported the election of President Obama and was pleased that he came to the White House pledging to restore the American people's faith in the public sector and curb the drive to privatize government services. Our support for the President was reinforced in March 2009 when he announced significant reforms in government contracting, including a call for all inherently governmental work to be returned to federal employees. AFGE has long insisted that such tasks should always be performed by reliable and experienced federal employees who put the public interest first.

The Department of the Army has shown extraordinary leadership in insourcing functions that were inappropriately outsourced, determining which functions are inherently governmental, and taking stock of the contractor workforce, and we encourage the rest of the federal government to follow suit.

Our members understand that cleaning up the federal contracting problems left behind by the Bush administration will take a significant amount of work. That's why AFGE is pushing on a number of fronts to reform the contracting system and begin the process of returning certain functions to the federal government. Below are our specific comments to the questions presented by OMB.

TABLE of COMMENTS

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I. APOLITICAL PROCUREMENT

[Area 4(d): How do federal contracting policies affect practices in the private sector labor market?]

The time has come when action can finally be taken to improve the lives of federal contractor employees. However, it is imperative in doing so that we don't politicize the procurement process. Significant or repeat violators of workplace, tax, and environmental laws should not receive federal contracts, and contractors generally should be expected to adhere to clear standards for pay, health care, and retirement benefits for federal contractor employees.

If federal contractors generally are required to meet clear standards for their employees' pay and compensation, there is no need to put `a thumb on the scale' with preferences and set-asides in order to steer contracts to contractors who have better labor records but who are also more expensive.

It may be tempting to use preferences for small businesses as a precedent for giving a new preference to federal contractors with better labor records. However, such an explicitly political preference, although well-intentioned, would be the first of its kind. All previous preferences have been for small businesses, the blind and the handicapped, and Federal Prison Industries.

Preferences based on a contractor's labor record would open up the procurement process to additional political preferences which would undermine the integrity of the procurement process and most likely the interests of both federal employees and contractor employees.

The firms most likely to qualify for special political preferences would be large contractors. Consequently, the special political preference would require taxpayers to pay more than they otherwise would to firms that would bear no resemblance to the small and disadvantaged businesses that benefitted from earlier preferences. And that would clearly be contrary to President Obama's March 4, 2009, Government Contracting memorandum.

Earlier preferences have resulted in significant and systematic waste, fraud, and abuse. Indeed, contractors with preferences regularly pass on work to ineligible contractors, both legally and illegally. Enforcement of illegal subcontracts is rare. In fact, preferences can be used to steer work towards certain contractors. Some contractors might even establish small subsidiaries just to qualify for special political preferences and thus win large contracts, but then pass on the work to ineligible entities. Because this special political preference would benefit large contractors, rather than small businesses, the harm to taxpayers would surely be far worse.

AFGE believes that, as the effort to reconstruct the federal government's executive branch civil service begins again, we must not implement reforms - no

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matter how well-intentioned - that would lead to inefficient and unfair decisions to contract out federal employees. If the special political preferences were used in public-private competitions or direct conversions, i.e., giving work performed by federal employees to contractors without public-private competition, federal employees would be at a distinct disadvantage. No matter how much more efficient, federal employees could still lose because the purpose of the special political preference is to give work to more expensive contractors.

Moreover, if a pitched legislative battle is necessary to enact a special political preference, it would clearly be better for working Americans if that fight was instead about requiring contractors generally to adhere to clear standards for pay, health care, and retirement benefits. That battle could benefit all federal contractor employees instead of the small minority who work for contractors with better labor records.

Our proposal would not politicize the procurement process or undermine its integrity; nor would it result in inefficient or unfair decisions to contract out work performed by federal employees. Instead, our proposal would be a win-win-win for federal employees, contractor employees and taxpayers, and result in a more honest and apolitical procurement process.

We are still cleaning up the mess left behind by the previous Administration which completely politicized the procurement process, using it as a tool to reward friends, thus becoming ensnared in scandal after scandal. Even with noble intentions, it is imperative that we don't repeat those mistakes by trying to use the procurement process to reward another set of friends.

II. OMB CIRCULAR A-76

[Area 4(c) What criteria should agencies use in deciding whether a government activity should be competed?]

Impose an A-76 Moratorium

AFGE is asking the Obama administration to suspend the use of the A-76 process until much-needed reforms have been implemented and cancel ongoing A-76 studies.

A 2006 DoD Inspector General report and two 2008 Government Accountability Office (GAO) reports detail how poor guidance from the Bush Administration OMB on the A-76 process resulted in systematically overstated savings and understated costs as well as a disproportionately adverse impact on older, female, and African-American civil servants.

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- DoD Inspector General (IG) D-2006-028

  "DoD had not effectively implemented a system to track and assess the cost of the performance of functions under the competitive sourcing program...The overall costs and the estimated savings of the competitive sourcing program may be either overstated or understated. In addition, legislators and Government officials were not receiving reliable information to determine the costs and benefits of the competitive sourcing program and whether it is achieving the desired objectives and outcomes...DoD had not implemented a comprehensive system to track and assess the quality of contractor and MEO (in-house) performance under the competitive sourcing program...Accordingly, Congress and Government officials do not have an effective management tool to assess the quality of either contractor or MEO performance under the competitive sourcing program."

- Government Accountability Office (GAO-08-195)

  "(W)ithout clear guidance, and in light of its plans to examine the activities of two thirds of its workforce, we believe that the (Forest Service) is at risk of subjecting inherently governmental and core-commercial activities to future competitive sourcing competitions...

  "For fiscal years 2004 through 2006, we found that the Forest Service lacked sufficiently complete and reliable cost data to...accurately report competitive sourcing savings to Congress...(W)e found that the Forest Service did not consider certain substantial costs in its savings calculations, and thus Congress may not have an accurate measure of the savings produced by the Forest Service's competitive sourcing competitions. Although OMB provides guidance on how to calculate the savings, the guidance does not specify all of the costs that should be included in the calculations, thus providing the Forest Service with some discretion on which costs to include.

  "Some of the costs the Forest Service did not include in the calculations substantially reduce or even exceed the savings reported to Congress. For example, regarding the IT infrastructure competition, the Forest Service did not include the $40 million that it cost to make the transition to the MEO. This amount is $5 million more than the $35 million in savings that the agency reported to Congress.

- Government Accountability Office (GAO-09-14)

  "[The Department of Labor's (DoL)] savings reports, while adhering to OMB reporting guidance, exclude many of the costs associated with competitive sourcing and are unreliable. In reporting its estimated $15.7 million in savings due to competitive sourcing from fiscal years 2004 through 2007, DOL excluded a number of substantial items, including the time in-house staff spent on competition activities, precompetition planning, certain transition costs, and postcompetition review activities.

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"OMB does not require agencies to report these costs because they reflect what would be incurred as part of an agency's typical management responsibilities. However, our analysis shows that these costs can be substantial and that excluding them overstates savings achieved by competitive sourcing. For example, we found that including in-house staff time spent on competition activities would have doubled the costs reported for one competition.

"In addition, DoL competition savings reports are unreliable and do not provide an accurate measure of competitive sourcing savings. All three of the competitions that we randomly selected and analyzed had inaccuracies. For example, DoL excluded contract administration costs from one competition's savings figure, overstating savings by about $185,000 a year, or 25 percent. In addition to these inaccuracies, DoL used projections to estimate savings for seven of its competitions when actual numbers should have been used, sometimes resulting in overstated savings. In one competition, actual staffing costs were 45 percent higher than those originally projected. Finally, the cost baseline used by DoL to estimate savings was inaccurate and misrepresented savings in some cases, such as when preexisting, budgeted personnel vacancies increased the savings attributed to completed competitions...

"We have previously reported that other federal agencies—the Department of Defense (DoD) and the Department of Agriculture's (USDA) Forest Service, in particular—did not develop comprehensive estimates for the costs associated with competitive sourcing. This report identifies similar issues at DoL.

"Without a better system to assess performance and comprehensively track all the costs associated with competitive sourcing, DoL cannot reliably assess whether competitive sourcing truly provides the best deal for the taxpayer."

<u>Reforming the A-76 Process</u>

AFGE urges the Obama Administration to work with representatives of federal employees to reform the A-76 circular to make the process more accountable to taxpayers and more fair to federal employees. Below are several of the reforms proposed by AFGE:

- Conversion Differential. Increase the conversion differential to finally take into account the often significant costs of conducting A-76 studies, including preliminary planning costs, consultants costs, costs of federal employees diverted from their actual jobs to work on privatization studies, transition costs, post-competition review costs, and proportional costs for agencies' privatization bureaucracies (both in-house and out-house).

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- Length of studies. Double the minimum cost differential for studies that last longer than 24 months—measured from the beginning of preliminary planning until the award decision.

- Overhead. Eliminate the arbitrary 12% overhead charge on in-house bids.

- Inherently Governmental. Adhere to the statutory definition of "inherently governmental", pending a satisfactory redefinition.

- Vacancies. Prohibit the filling of vacant commercial federal employee positions with contractors as well as entering into a contract to provide the services that had been provided by those employees without first conducting an A-76 study.

- Transparency. Require agencies to make all information that is available to contractors as part of A-76 studies, including information on FedTeds, available to federal employees and their union and bid protest representatives.

- Support In-house Providers. Require agencies to provide winning in-house bidders (i.e,, Most Efficient Organizations) with all resources obligated by the awards.

- Health Care Costs. Correct implementation of the exclusion of health care costs from the contracting out cost comparison process to ensure that Congressional intent is realized.

- Recompetition. Prohibit recompetition of an in-house workforce when its performance period expires, absent a formal and public determination by the head of the agency prior to the end of that performance period that the in-house workforce failed to achieve a majority of the requirements established in the performance agreement.

- Waivers. Require that waivers to any of the rules governing the A-76 process should be available to the public (affected employees and their representatives should receive special notice) before the waivers are implemented.

- Enforcement. Establish a nonpolitical entity to enforce public-private competition laws and regulations, allowing a forum for affected employees to bring challenges to agency actions with the authority to require agency compliance before contracting can occur. OMB officials acknowledge that they have insufficient resources to enforce the A-76 Circular. In the FY2008 Defense Authorization Act and FY2008 Omnibus Appropriations Act, federal employees were given the right to bring a protest to the Government Accountability Office for agency failures to adhere to the public-private competition rules. Unfortunately, this forum has proven to be an inadequate

solution to agency rule-breaking, with GAO declining to hear almost all protests filed by affected federal employees for procedural reasons.

- Notice and Comment. Require all government-wide public-private competition rules to be formally published, with a notice and comment period, rather than issued via memorandum.

- Agency Tender Resources. Require agencies to provide adequate resources to the in-house team competing in an A-76 study, including designated, full-time legal counsel with expertise in procurement and the public-private competition process.

- Training. Develop a standardized training and certification program required for all individuals substantially involved in any public-private competition or oversight thereof, including all officials named in the A-76 Circular, members of the Preliminary Work Statement team and the MEO team, advisers to the MEO team, and the source selection authority and/or board. This training program should be overseen and conducted by government personnel.

- Illegal Preference for Contractors. Remove language in the A-76 Circular that expresses a bias towards the use of contractors instead of government personnel.

<u>Alternatives to the A-76 Process.</u>

Agencies should be encouraged to use Business Process Reengineering (BPR) in lieu of OMB Circular A-76 privatization reviews to achieve improvements in the delivery of services. As noted earlier, even the Bush Administration, however belatedly, was moving in this direction. Given the success of federal employees in OMB Circular A-76 privatization reviews, agencies should avoid incurring the costs and controversies of A-76 studies. Here are some related recommendations AFGE offers:

- Document all internal reengineering efforts: Agencies reinvent themselves constantly, often for the better. However, these success stories are rarely reported. Agencies should documents all of their BPR efforts, both to show the American people that agencies are conscientious stewards of their tax dollars and to show other agencies how they might improve their services.

- Don't sabotage the pro-change environment. Federal employees, after the last eight years, are yearning for opportunities to make their agencies more efficient. Consequently, internal reengineering efforts cannot be used by management as subterfuge to change the collective bargaining status of affected federal employees. Similarly, BPR should not be implemented with savings assumptions or downsizing formulae. A particular internal reengineering effort may result in a reduction in the size of the workforce.

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However, that determination must be made on the basis of the BPR in question, not as a result of a general assumption or formula.

- Labor-management partnerships should be established for developing and implementing internal reengineering efforts. The right of represented employees to negotiate over the impact and implementation of the changes wrought by BPR should be respected.

- AFGE wanted to work with the Army Corps of Engineers on some significant High Performing Organizations (HPOs). However, the Corps used on HPO to strip several hundred employees of their collective bargaining rights – without any plausible rationale – forcing AFGE and other affected unions to successfully petition the Congress to revoke the authority of the Corps to implement any other HPOs.

III. INHERENTLY GOVERNMENTAL FUNCTIONS

Area 4: (a) Managing the multi-sector workforce – How might the current definition of inherently governmental function be clarified to improve management of the multi-sector workforce?
(b) What types of criteria might help agencies identify non-inherently governmental functions that are critical to an agency, with respect to its unique missions and structure, and need to be performed by federal employees in order for the agency to maintain control of its mission and operations?
(c) What criteria should agencies use in deciding whether a government activity should be competed?
(e) If there are laws, regulations, policies, or agency practices that a commentator believes have involved a misclassification of a function as inherently governmental or as commercial, please identify these and outline your concern in as much detail as possible, so that this can help to inform our review.

The federal government exists to serve the American public, and this obligation remains with the government, whether or not the government contracts with the private sector to perform particular functions. The government must keep for itself those functions necessary to carry out its missions and maintain control over all government actions in order to fulfill this obligation.

Due to federal hiring restrictions, increasing requirements, and the indiscriminate privatization of the Bush Administration, the federal government has contracted out to the private sector functions that are inherently governmental, closely related to inherently government functions, or mission-essential and should never have been performed by the private sector.

Bush Administration OMB officials inappropriately watered down the statutory definition of inherently governmental when they overhauled the A-76 Circular and pressured agencies to designate functions as commercial that managers considered inherently governmental or at least "inappropriate for contractor performance". By imposing privatization quotas, Bush Administration OMB

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officials pressured agencies to review for privatization functions that managers often preferred to retain in-house. And by allowing agencies to contract out work without any consideration of in-house performance, more and more functions that are considered inherently governmental or otherwise inappropriate for contractor performance were ultimately turned over to contractors, many of whom have been either inadequately supervised or supervised by other contractors.

The Department of Homeland Security (DHS) is an example of an agency that has critical and sensitive work performed by contractors. According to the GAO, DHS uses contractors to prepare budgets, develop policy, support acquisition, develop and interpret regulations, reorganize and plan, and administer A-76 efforts. In contracting out such work, agency officials don't even bother to subject those contractors to extra surveillance, let alone look for opportunities to bring such work back in-house.

The Bush Administration's drive to privatize was characterized by two faulty assumptions: (1) that the federal government should provide a preference to relying on the private sector for the performance of commercial functions and (2) that every function that the government needs performed is commercial unless proven otherwise. While these assumptions have been extremely beneficial to the finances of federal contractor executives, they have failed the American public and driven up the costs of government. The first assumption is also a violation of federal law (10 U.S.C. 129(a)) requiring the Department of Defense to use the most cost effective source to perform commercial services.

As President Obama stated in the March 4, 2009 memorandum on government contracting, the federal government has an overriding obligation to American taxpayers to perform its functions efficiently and effectively. To this end, the preference for using the private sector to perform any services (commercial or otherwise) should be abolished. In addition, all services needed by the government should be considered inherently governmental until otherwise determined by appropriate government officials.

Overriding Concerns

Previous efforts to define the term "inherently governmental" have focused on the characteristics of particular functions. While these definitions have been somewhat useful, there are other overriding concerns that should first be considered before turning to the character of the function.

Technical Expertise/Institutional Memory

Agencies must develop and retain the technical expertise and institutional memory needed to manage and provide all functions necessary to meet their missions. This expertise is not limited to that needed merely to oversee contractor performance but also to make decisions for the agency about those functions and to perform those functions if necessary. In

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addition, no function should be contracted to the private sector if to do so would endanger the future technical capacity and institutional memory of the agency.

In the private sector, the rush to outsource functions considered routine has left many companies without the in-house expertise to effectively communicate with the contractors hired to do these functions. Too much outsourcing leads an entity to lose sight of what it needs from a function and how those goals can be achieved. Many private companies, and state and local governments, have insourced work in recent years so that they own the expertise rather than relying on someone else to tell them both what they need and how much it will cost.

Federal agencies should undertake this same process. In the mad dash to hire contractors to perform tasks that, at first glance, seem to be commercial, agencies have been drained of in-house expertise in a multitude of functions. In-house technical expertise in all functions performed by an agency, in addition to contract management skills, is necessary to perform essential management functions. Most federal government contracting horror stories start with inadequate agency knowledge of the technical aspects of the work and unreasonable reliance on contractors to oversee themselves.

Risk

No function should be contracted out if it poses too great a risk of creating a contractor monopoly or interfering with an agency's ability to perform its mission. Agencies face two kinds of risk when contracting for a function. First, if an agency relies too heavily on contracting to perform a function, it is possible that a contractor, by virtue of its work for an agency, could develop an exclusive expertise so that the agency cannot perform the function without a particular contractor. Second, the agency is ultimately responsible for performing a function, even if the selected contractor fails. The agency must determine the impact of contractor failure and whether it could interfere with the agency's mission. Contract oversight is useless if an agency can't penalize poor performance by removing the contractor without negatively impacting the mission. An agency must be able to reconstitute a function in-house if a selected contractor cannot satisfactorily perform the function.

Transparency and Accountability

No function should be contracted out if contractor performance could cause confusion to the public about whether or not the government is acting. As President Obama stated in a January 21, 2009 memorandum, transparency is important because it promotes accountability and provides information for citizens about what their government is doing. In order to

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determine what the government is doing, the public must be able to discern when the government is or is not acting.

Decision-making

Agencies must maintain sufficient in-house capability to be thoroughly in control of the policy and management of the agency. In so doing, government officials must be involved in the decision-making process to a greater degree than merely making the final policy decision on the basis of analysis and/or advice by a contractor or contractors. Agency officials must approve the analytical process leading to the decision options and use discretion and make the value judgments throughout the process.
For too long, important functions performed by rank-and-file federal employees have been considered to be commercial because their work is ultimately signed off on by a federal employee manager, even though that federal employee manager spot-checks only a small number of the judgments and recommendations made by rank-and-file federal employees. In other words, the judgments and recommendations of those rank-and-file federal employees are, effectively, determinations that bind their agency. This work is inherently governmental and should never be performed by a contractor.

Development and Maintenance of the Federal Workforce

Human resources must be treated as a critical business function, not just an administrative process. Agencies must place great importance on acquiring, developing, and retaining employees with the knowledge, skills, abilities, and experience needed to meet agencies' missions.

Before contracting with the private sector to perform any function, agencies must determine whether the work involved is a necessary part of internal workforce development. For example, some functions may seem to be commercial in the abstract but provide necessary experience for employee career progression to inherently governmental functions. Similarly, some functions that may seem to be commercial must be performed by military personnel for purposes of career progression or combat rotation.

A major reason cited by agency officials for turning to contractors is a lack of authority to hire additional federal employees. Personnel ceilings must be removed in order to develop and maintain an adequate federal workforce.

Personal services contracts are generally prohibited because they harm the development and maintenance of the federal workforce. There must be a clear understanding that the government does not contract out jobs but rather functions – functions that can be measured and for which the government can assess the quality of the work performed by a contractor.

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The contracting out of individual jobs leads to contractors working side-by-side with federal employees, so that the work product cannot be differentiated. The prohibition on personal services contracts should be retained and enforced.

In his final appearance as GAO Chief before Congress in 2008, David Walker suggested that any redefinition of inherently governmental should, as a general rule, consider recurring governmental needs as inherently governmental.[1] Thus, any government function that must be performed for long or indefinite periods of time should be considered inherently governmental and performed by federal employees. Contracts should require a finite or deliverable product which is different from the normal, routine work products of the agency.

Contractor Oversight

Agencies must ensure that they have the ability to oversee contracts, including the ability to:

- specify the work assignments, products, tasks, and responsibilities of the contractor;
- monitor the work of the contractor; and
- evaluate the work of the contractor.

Agencies must maintain an in-house workforce in every function in case of contractor failure and to provide a useful benchmark for determining whether contracted services are being provided at a reasonable cost and level of quality.

Integration with Inherently Governmental Functions

Some functions, while perhaps considered to be commercial in the abstract, are so integrated with inherently governmental functions that they cannot be separated. If poor performance by a contractor would interfere with the agency's mission, then these functions should not be performed by contractors.

Specific Training/Experience/Expertise Needed

Many functions needed by the government require unique training, experience and/or expertise that can only be acquired by performing the

[1] *Need for Balance? Publicness in the Inherently Governmental Dialogue***,** Larkin Dudley, Sept 2008.
http://www.maxwell.syr.edu/pa/minnowbrook3/PDF%20Files/Phase%20II%20Papers/Dudley%20-%20Balancing%20PublicnessV2.pdf

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function. Even if retired or former federal employees might be currently available to perform the function as contractor employees, these functions should not be contracted out, because the government would cease to develop employees with the experience/expertise needed to perform the function in the future.

Particular Circumstances

No function should be contracted out until the agency examines the particular circumstances in which the function is performed and whether segregating that function will negatively impact agency flexibility and efficiency. In many situations, agencies utilize federal employees to perform more than one function. For example, at the United States Military Academy at West Point, the employees who perform custodial work are often used to assist in performing public works functions when the custodial workload allows. Segregating the custodial workforce from the public works workforce would negatively impact agency flexibility and efficiency.

Recommendations

In order to encourage agencies to re-establish the boundary between functions that are commercial and functions that are or closely associated with inherently governmental functions, AFGE recommends the following:

- Stop compiling directories of inherently governmental jobs. AFGE urges the Obama Administration to cancel the direction provided to agencies in the revised OMB Circular A-76 to publish inventories of inherently governmental jobs. The FAIR Act deliberately did not include such a requirement.

- Do commercial inventories over – but without OMB pressures. Agencies should be directed to refile their most recent FAIR Act inventories without fear or favor from OMB. Absent OMB pressure, it is likely that a significant number of jobs will be reclassified from commercial. OMB's role should be restricted to reviewing the lists to ensure some degree of uniformity. However, the composition of the inventories should be exclusively determined by agency officials.

- Use inventories to find in-house staffing shortages. Explicitly involving their staffing and manpower personnel, agencies should be directed to review their most recent in-house inventories in order to determine whether they possess sufficient numbers of qualified federal employees to perform their agencies' missions. Where insufficient, the agencies should be required to develop plans to increase staffing. Moreover, the A-76 process should not be used where agencies have been determined to be understaffed.

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Functions in need of Particular Attention

Below we mention some specific functions that are currently performed by contractors or have been deemed appropriate for contractor performance under the FAIR Act Inventory or A-76 public-private competition process that we find particularly troubling. This list is by no means exhaustive and is meant to highlight a few of the more egregious situations that have been brought to our attention by federal employees. We find that these functions are inherently governmental or closely associated with inherently governmental functions and should only be performed by government personnel.

- Information
  - All activities involved in responding to FOIA and Privacy Act requests, including records maintenance
  - Management and security of classified material
  - Information technology governance
  - Access to individuals' private information

- Communication
  - Representing an agency before the public, including preparing or presenting testimony; participating in hearings; preparing executive-level correspondence; attending conferences on behalf of the agency; conducting community relations; responding to questions or requests for information or services (e.g., call centers); communication with foreign governments; communication with state or local governments; waste, fraud, and abuse hotline operators; public affairs; park rangers; and museum operations
  - Representing an agency before any other governmental entity, including drafting or sending inter-agency communication
  - Representing an agency before Congress, including congressional affairs, preparing or presenting testimony before Congress; and preparing or presenting required reports

- Rules and Regulations
  - Drafting regulations, policies, or other rules
  - Interpreting or enforcing laws, regulations, policies, or other rules
  - Providing legal advice to government officials

- Rights, Privileges, Payments, Collections, and Entitlements
  - Federal licensing and permitting
  - Determining eligibility to participate in any entitlement or benefit program
  - Immigration officers and investigate assistants
  - The collection, control, and disbursement of fees, royalties, duties, fines, taxes and other public funds

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- Physical Security
  - Physical security of military installations and other federal buildings
  - Firefighters and police officers
  - Operation and maintenance of locks and dams on navigable waterways
  - Prisoner detention, guarding, and transport

- Financial Management
  - Financial management, including budget preparation and drafting, internal auditing, and asset management and disposal
  - Determining budget policy, guidance, and strategy

- Procurement
  - Acquisition planning and related support activities
  - Contract oversight and administration, including market research, developing statements of work, developing solicitations, technical evaluation of contract proposals; managing contractors; quality assurance; evaluation of contractor performance, and investigations of waste, fraud, and abuse
  - Any situation that could allow a contractor to access confidential business information, information on individuals, and/or any other sensitive information

- Military
  - 50% of depot-level maintenance and repair
  - Core logistics capability necessary to ensure a timely and effective military response to mobilizations

- Management
  - Program management and support
  - Services that involve or relate to reorganization and planning activities
  - Conduct of public-private competitions
  - Classifying functions as inherently governmental or commercial (including preparation of a FAIR Act inventory), and determining which functions or portions of functions are suitable for possible private sector performance
  - Determining federal program priorities or budget requests

- Personnel
  - All functions related to all aspects of human resources, including hiring, labor management relations, and reductions-in-force
  - Creation of position descriptions and/or performance standards for federal employees
  - Representing an agency before government personnel, including labor relations and supervision
  - Any situation where the function performer might be assumed to be a government official
  - Agency EEO and health and safety compliance

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- Background investigations and security clearances for federal employees and contractor employees

IV. DIRECT CONVERSIONS

[Area 4(c) What criteria should agencies use in deciding whether a government activity should be competed?]

AFGE urges the Obama administration to enforce the prohibitions against giving work last performed by federal employees to contractors without first conducting a full and fair public-private competition.

Despite the extensive use of the A-76 privatization process and the resulting proof of the superiority of in-house workforces, much work is contracted out without any public-private competition, i.e., without any proof that giving work to contractors is better for taxpayers or better serves those Americans who depend on the federal government for important work.

Federal employees represented by AFGE have experienced several direct conversions in recent years. In some of these situations, contracts have been awarded by an agency during a "surge" with the understanding that they would be short-term. But over time the contracts have expanded, with agencies bringing in contract employees to work side by side with government workers, without even an attempt at a public-private competition to determine if the contracting is more efficient for the agency and for taxpayers.

Congress, on a bipartisan basis, has, repeatedly, prohibited agencies from perpetrating such conversions. For example:

- Since FY04, the Defense Appropriations Bill has prevented any function performed by more than ten federal employees in DoD from being contracted out without public-private competition.

- Since the FY06 predecessor of the Financial Services Appropriations Bill, all non-DoD agencies have been required to operate under the same prohibition.

- Since the FY06 Defense Authorization Bill, no functions performed by ten or more federal employees in the Department of Defense can be contracted out without public-private competition.

- Since the FY08 Defense Authorization Bill, all non-DoD agencies have been required to operate under the same prohibition.

- Since the FY08 Military Construction-Veterans Affairs Appropriations Bill, the Department of Veterans Affairs has been specifically prohibited from contracting out without public-private competition any work performed by more than ten employees in its department.

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- Since the FY09 Financial Services Appropriations Bill, all non-DoD agencies are prohibited from contracting out without public-private competitions functions performed by fewer than ten federal employees.

Even Bush Administration OMB officials opposed direct conversions, at least rhetorically. The A-76 Circular, as revised in May 2003, requires agencies to conduct a public-private competition before converting any work last performed by federal employees to contractor performance. Unfortunately, Bush Administration OMB officials chose to be very selective when enforcing the prohibitions in the A-76 circular and in the laws against direct conversions.

During the 2008 campaign, President Obama pledged to correct this problem. For example, in an October 20, 2008, letter to AFGE National President John Gage, then Senator Obama committed to cleaning up waste and mismanagement at the Transportation Security Administration (TSA), singling out "an enormous $1.2 billion sole source contract for human resources without regard to the rules that require them to allow current TSA employees to compete for that work".

In another letter to AFGE's Gage, sent on the same date, then Senator Obama was "deeply troubled to learn of the VA's initial plans to contract out work (required of the department as a result of enactment of an expansion of G.I. bill benefits), using a closed bidding process that lacked an opportunity for current VA employees to compete to keep their jobs, despite their excellent track record and the large numbers of veterans in those jobs. I am glad that VA reversed itself and decided to administer the program in-house."

AFGE urges the Obama Administration to ensure that all agencies, particularly VA and DoD, comply with all competition requirements established in law and the A-76 circular.

V. INSOURCING

[Area 4(b) What types of criteria might help agencies identify non-inherently governmental functions that are critical to an agency, with respect to its unique missions and structure, and need to be performed by federal employees in order for the agency to maintain control of its mission and operations?]

AFGE is pleased that Congress and the Obama administration have approved and implemented laws to encourage federal agencies to bring contracted work back into government. We believe that the public interest is best served when functions that are inherently governmental, closely related to inherently governmental functions, or mission-essential are performed by government employees within a defined chain of command and subject to vigorous oversight. To properly insource federal jobs, AFGE recommends that the Obama administration continue the practice, first established in the Intelligence Community, of creating a reliable and systematic inventory of federal tasks and reviewing it regularly. Insourcing simply cannot occur without a true inventory

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of jobs being performed in federal agencies by federal employees and contractors. The government must provide federal employees with full and fair opportunities to compete for new work as well as outsourced work.

As mentioned earlier, the Department of the Army has taken the lead in establishing a service contractor inventory and selecting important functions to insource.

Here are some of the steps that have been taken to adopt insourcing policies:

- In the FY08 Defense Authorization Bill, DoD was required to ensure that consideration is given, on a regular basis, for using federal employees to perform new work and functions that are performed by contractors that could be performed by federal employees. Particular emphasis was placed on insourcing three types of contracts: inherently governmental work wrongly contracted out, work contracted out without competition, and work contracted out that is being poorly performed. The use of the A-76 circular was not required for insourcing the three types of contracts discussed above. Another provision established a requirement for DoD to develop a comprehensive inventory of its service contracts. The Army quickly complied with both requirements and reports that it has insourced almost 1,400 inherently governmental jobs, saving taxpayers $300 million.

- The FY09 Omnibus Appropriations Bill requires non-DoD agencies that are subject to the FAIR Act to develop and implement policies and procedures for insourcing new and outsourced work. In a mid-December 2008 letter organized by AFGE, a dozen federal and non-federal AFL-CIO affiliates also urged retention of this provision.

The following are AFGE recommendations in this area:

- Analysis of contracted work. The Obama Administration should direct agencies to have their contractor workforces examined by independent third parties to determine the extent to which functions that are inherently governmental, closely related to inherently governmental, or mission-essential, are actually performed by contractors. Schedules should be established for incrementally returning those wrongly contracted out functions back in-house.

- Government must develop contractor inventories and insource critical functions. AFGE urges the Obama Administration to require agencies to develop contractor inventories so that agencies can identify each of their service contracts, using the methodology developed by the Department of the Army, and then direct agencies to establish schedules for insourcing functions that are inherently governmental, closely related to inherently

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governmental, and mission-essential, along the lines required for all agencies.

- Every agency subject to the FAIR Act should be required to develop an inventory to track the cost, quality, and manpower of its service contracts, along the lines already laid down by the Department of the Army. Such contractor inventories should be published and made available to the public. Agency officials should be directed to review their contractor inventories for contracts for functions that are inherently governmental, closely related to inherently governmental, or mission-essential, and develop schedules for bringing this work in-house. Agency officials should be directed to review their contractor inventories for contracts that are being poorly performed or which were awarded without competition and determine which ones are most suitable for insourcing.

- Agencies should be required to provide OMB with periodic reports that discuss savings and improvements generated through insourcing of contracts. The Office of Personnel Management (OPM) should be directed to provide agencies with explicit guidance that details the availability and flexibility of hiring authorities in the insourcing context. OPM should be further directed to help agencies develop policies that expedite insourcing efforts.

- Agencies should be freed from in-house headcounts and civil service personnel ceilings and allowed to use funding to hire new employees to perform a service in-house as surely as they can already contract out for its performance. OMB should direct agencies to use their contractor inventories to discretely program and budget for contract services work.

CONCLUSION

AFGE is ready to assist the Obama administration and OMB in establishing a new framework for improving the federal acquisition system and managing – and nurturing - the federal workforce. The first step towards meaningful reform should be passage and enactment of The CLEAN UP (Correction of Longstanding Errors in Agencies Unsustainable Procurements) Act (S. 924, H.R. 2736), legislation introduced recently by Senator Barbara Mikulski (D-MD) and Representative John Sarbanes (D-MD). As AFGE National President John Gage declared, "The CLEAN UP Act is vital to any serious effort to save taxpayer dollars and restore integrity to the federal sourcing process. All Americans who depend on the federal government for important services have a compelling interest in making sure this important legislation becomes law."

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The CLEAN UP Act would:

- establish overarching principles to govern sourcing, which would ensure that inherently governmental, closely associated with inherently governmental, and mission-essential functions are performed by reliable and experienced federal employees, while allowing other functions to shift between federal employees and contractors, depending on which is more efficient and effective, consistent with agency needs and any competition requirements;

- encourage agencies to insource new functions in order to avoid sole-source and limited competition contracts;

- ensure that agencies incrementally insourcing inherently governmental, closely associated with inherently governmental, and mission-essential functions that have been wrongly contracted out;

- require that all agencies establish inventories of their service contracts, in part, so that contracts that are poorly performing or are appropriate for insourcing can be quickly identified;

- ensure that agencies identify where they are now or will later experience shortages of federal employees;

- establish internal business process reengineering as an alternative to the costly and controversial OMB Circular A-76 privatization process;

- recommend that critically needed reforms to the A-76 process finally be undertaken; and

- suspend all use of the A-76 process until the reforms required by The CLEAN UP Act have been substantially implemented.

Thank you for the opportunity to comment on this important matter.

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July 17, 2009

Submitted via www.regulations.gov

Ms. Julia Wise
Office of Federal Procurement Policy

Re: Public Comments on the Government Contracting Memorandum (March 4, 2009)

Dear Ms. Wise:

The AFL-CIO submits this letter pursuant to the Federal Register notice of May 29, 2009 inviting comments on the Presidential Memorandum on Government Contracting issued on March 4, 2009.

The AFL-CIO commends the Obama Administration for pursuing reforms to the government contracting system to better ensure that government work is not inappropriately contracted out, and to address problems in the contracting system that result in wasted taxpayer resources and poor contractor performance.

The last eight years saw a dramatic increase in spending on government contracts and a hollowing out of the federal workforce responsible for overseeing these contracts. At the same time, the former administration was relentless in its efforts to privatize government work and shift work to private contractors who could operate with minimal oversight. These policies operated to the clear detriment of both taxpayers and working families. We welcome the Obama Administration's interest in getting the contracting system back on track.

We urge the Administration to strictly enforce the prohibitions against direct conversions; to suspend the use of the A-76 process until a reformed process can be developed with the full input and involvement of federal employees and their unions; and to promote efforts to in-source work that has been inappropriately contracted out.

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We further urge the Administration to better enforce existing requirements that the government contract only with responsible sources – companies with the performance track record, record of business ethics and integrity, and operational capacity to deliver a quality product to the government in a timely, responsible manner. In particular, we urge the Administration to better enforce the requirement that companies have a satisfactory record of business ethics and integrity in order to be found responsible, and to disqualify companies with records of serious or pervasive violations of the law. The Administration should ensure that contracting officers make maximum use of the misconduct database established under the Clean Contracting Act, P.L. 110-417 in evaluating prospective contractors' responsibility. In addition, the Administration should expand the database, as authorized by the Act, to include information about *all* violations of federal law, including those that do not involve a penalty or fine, so that contracting officers have comprehensive information about a prospective contractors' legal non-compliance available to them.

Thank you for your consideration of these comments, and for undertaking this important initiative to reform and improve the government contracting system and to preserve and restore the federal workforce.

Sincerely,

William Samuel/lkr

William Samuel
Director of Government Affairs

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July 17, 2009

Office of Federal Procurement Policy
Office of Management and Budget
Regulatory Secretariat (VPR)
1800 F Street, NW
Washington, DC 20405
Submitted via e-mail to jwise@eop.omb.gov

RE: Presidential Memorandum on Government Contracting

Dear Ms. Wise:

The American Subcontractors Association, Inc. (ASA) is a national trade association representing more than 5,000 construction subcontractors, specialty contractors, and suppliers. ASA members work in virtually all of the construction trades and on virtually every type of horizontal and vertical construction. ASA has great interest in any initiative that would offer greater openness, transparency and fairness to the government construction procurement process. We appreciate the opportunity to respond to questions that will shape President Obama's policy on contracting with the federal government.

ASA and the rest of the construction industry have been involved in numerous efforts to reform the way contracts with the federal government are managed. The Prompt Pay Act of 1982 and the amendments of 1988 established many important details of payment practices which have allowed construction subcontractors to perform federal contracts with the confidence that they will get paid promptly for work properly performed. During debates on the Federal Acquisition Streamlining Act of 1994 and the Federal Acquisition Reform Act of 1996, ASA and its allies stood up for specialty trade contractors and other small businesses, which were faced with real threats to their ability to compete on federal construction contracts. In these last two reform efforts, the quest for more efficient acquisition not only missed the intended goal, but brought about procedures that have inhibited full and open competition.

After FASA and FARA, agencies reduced the size of the federal acquisition workforce dramatically. With this reduction in workforce came a loss of specialized knowledge about industries, laws and contract management procedures, as well as a breakdown in effective communication with contractors as a result. Many construction firms have since lost confidence in federal procurement. Government and taxpayers ultimately suffer as the best specialty trade contractors avoid federal construction.

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Area 1: Maximizing the use of competition

What are the government's greatest barriers to using competition and what steps can be taken to maximize competitive practices?

Poor plans and specifications hamper competition in government contracting. Only when contracting officers offer complete and accurate plans and specifications for construction projects can the competitive process run smoothly. If potential bidders are not clear about the requirements of the project, the government will not get what it expects in the number and quality of firms submitting bids. Clear and complete information is essential to the success of competition and the project.

Contract bundling and unnecessarily large contracts limit the competitive process since so few firms can compete for these mega-contracts. Policymakers continually express a desire to avoid contract bundling but no changes have been implemented. The government should take up the challenge to avoid bundled contracts.

What effect, if any, do the following factors have in selecting a competition strategy: nature of the requirements (type of supplies or services), complexity, marketplace, knowledge level of the requirements, terms and conditions, time available for competing the work, dollar value, socio-economic requirements?

Clear and complete solicitations will allow construction firms to determine projects for which they can compete. Effective communication is the key. If contractors know what they are bidding on, the competitive process and ultimately the project will meet the government's needs and taxpayers will reap the benefits. Contracting officers should clearly announce specific contractor requirements in all solicitations, distribute announcements as widely as possible and continue to promote online marketplaces to ensure all qualified contractors have the opportunity to submit bids.

Some projects are just too big or complex to allow many firms to compete. In these cases, agencies can bolster competition by breaking down projects to enable more firms to bid. Many construction firms do not have the experience, expertise or manpower to compete for overly complex projects, projects with short timelines, or high dollar value projects. Contracting officers must do everything in their power to promote competition, communicate requirements and/or break projects into manageable pieces.

Area 2: Improving practices for selecting the right contract type

What policies and practices pose the greatest obstacles to the government's ability to achieve good outcomes in various contract types?

Poor plans and specifications doom construction projects from the outset. Contracting officers can ensure a good outcome in a timely and efficient manner by communicating the government's needs clearly to contractors. Construction contractors should not be responsible for correcting designs and requirements for projects.

Like any construction owner, many federal agencies struggle to ensure that prime contractors manage the subcontracting process effectively. In order to effectively

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manage a construction contract, a contracting officer must know what subcontractors are on the project and ensure that subcontractor flow down provisions are followed. ASA supports subcontractor bid listing both as a means for contracting officers to identify the subcontractors working on government projects and as a deterrent to bid shopping. Bid listing requires prime contractors to list the subcontractors and actual price of subcontracts on the bid date. With bid listing, the government gets the quality it expects to receive, as well as the information to manage construction projects.

Contracting officers also need the resources and knowledge to assure that a prime contractor is effectively managing its subcontractors, including complying with required flow down requirements. Quick references, such as the ConsensusDOCS 752 – Subcontract for Federal Government Construction Projects, can help contracting officers working with the construction industry to understand relevant FAR requirements. This document represents the best practices in federal subcontracting, and ensures compliance with FAR legal and ethical requirements such as verifying employees, complying with ethics rules, and federal Prompt Pay Act requirements.

Area 3: Strengthening the acquisition workforce

What are the top skills gaps in the federal acquisition workforce (broadly defined to include not only contracting officers but also requirements and planning officials, and program and project managers, and technical representatives responsible for managing contract performance on the contracting officer's behalf, etc.)?

The acquisition workforce must know the industries with which they work, not just specific projects and requirements. The government should develop more focused industry tracks within acquisition training programs and increase the size of the acquisition workforce so that acquisition professionals can specialize in a certain industry. Construction contracts are different than information technology and major systems contracts. For example, a contracting officer for a construction contract may need to know how to evaluate the validity of a surety bond, how to ascertain the adequacy of the assets supporting an individual surety bond, and what remedies are appropriate when a subcontractor or supplier reports it has not been paid. Contracting officers who specialize in one type of procurement can hone their knowledge, leading to a more efficient and effective operation.

Conclusion

The Obama Administration and Congress must commit money to support the acquisition workforce. With adequate numbers, resources and education, the acquisition workforce can ensure that taxpayer dollars are well managed. Contracting officers will be more effective in their jobs. Communication will improve. Contracts and projects will be managed more effectively. Ultimately, the government will get what it needs at the best value.

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ASA applauds the Obama Administration for its work on this initiative to reform the way the federal government procures goods and services. We look forward to the results of this public comment opportunity, and to working with the Administration as it formulates new policy initiatives. If you have any questions, please do not hesitate to contact me.

Very respectfully,

Emily Yunker
Manager of Government Relations

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John D. Podesta
Testimony
Office of Management and Budget hearing about President Obama's Government Contracting Memorandum
June 18, 2009

Good afternoon. I am John Podesta, the President and CEO of the Center for American Progress. Thank you for giving me the opportunity to testify.

As previous panelists have made clear, the federal contracting process needs to be reformed to limit waste and ensure the government's interests are upheld. The Center for American Progress and its sister organization The Center for American Progress Action Fund have long advocated the kinds of reforms President Barack Obama has indicated he wants to pursue, including improved transparency and oversight, increased competition, and preventing the contracting out of essential government functions—something I had considerable experience with during the Clinton administration, particularly with respect to employees making benefit decisions.[1]

These changes are essential, but I want to focus on a less well-known but equally critical set of reforms. These reforms will improve the quality of the jobs that are created when the federal government contracts out.

I want to make three quick points:

First, the federal government has a key role in promoting high standards for the treatment of contract workers and those efforts can have significant effects in the broader labor market.

Second, far too many contracted workers work under poor conditions for low pay and few benefits, which is bad for workers but also imposes costs on the government and taxpayers and makes it hard for high-road companies to compete.

Finally, improving accountability for how contractors treat their workers and encouraging companies to pay decent wages and provide benefits can support key aspects of the president's agenda—including to ensure that taxpayers receive value for contracted work and to help rebuild the middle class.

Let me briefly expand on those points.

First, the federal government's contracting policies can have tremendous influence on the millions of employees that directly perform contracted work. But it is also important to understand that nearly a quarter of the country's civilian workforce is employed by companies that the federal government contracts with, according to the Department of Labor.[2] This means the government is in the position to help integrate higher standards among a much broader group than just contract employees themselves.

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Through numerous laws and executive orders, the United States has regularly expressed its intent to influence practices in this regard—and historical evidence bears out its effectiveness. For example, Executive Order 11246, signed in 1965, requires that all individuals working for federal contractors have an equal opportunity for employment. This procurement policy has been key to creating equal opportunity and has promoted a dramatic increase in the percentage of women and minorities who are managers at firms that contract with the federal government.

For example, studies show that both minority and female employment increased significantly faster in contractor than in noncontractor establishments—12 percent faster for black females, 3 percent faster for white females, 4 percent faster for black males, and 8 percent faster for other minority males.[3]

Second, improving accountability and promoting better pay and benefits in contracting can help workers, businesses, and the government. Estimates from the Economic Policy Institute—which are rough because the federal government does not keep or make publicly available quality data—indicate that 20 percent of all federally contracted workers earn poverty-level wages and often do not receive benefits.[4]

That means that one in five workers on a federal contract does not earn enough to keep a family of four out of poverty.

And low wages are much more common in some contracted industries. Paul Light estimates that 80 percent of service contract workers earn low wages.[5]

When contract workers are poorly compensated on the front end, taxpayers often bear additional costs on the back end, such as for Medicaid and food stamps.[6] In practice, this amounts to something like a government subsidy for low-road companies, while high-road companies are placed at a competitive disadvantage.

Furthermore, research by the Center for American Progress finds that there is a correlation between contractors' failure to adhere to basic labor standards and wasteful practices and sometimes even illegal activity.[7] Contractors that frequently violate labor laws are among the most wasteful of taxpayer funds, with histories of tax evasion and fraud. To add insult to injury, many companies charge the government higher rates under the terms of the contract than they pay their contracted workers.

Third, high standards are a good value for taxpayers. They reduce the government's unintentional "subsidies" for low-road companies and the likelihood that companies will operate in a wasteful fashion while also promoting increased competition.

For example, after Maryland implemented a living wage standard, the average number of bids for contracts in the state increased nearly 30 percent—from 3.7 to 4.7.[8] Nearly half of contracting companies interviewed by the state of Maryland said that the new labor standards encouraged them to bid on contracts because it leveled the playing field. Several companies commented that in the future they will only bid on living wage

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contracts because of the leveling effect it has on competition. One current contractor noted that her contract was the first state procurement for which her firm had submitted a bid. She explained that without strong labor standards, "the bids are a race to the bottom. That's not the relationship that we want to have with our employees. [The living wage] puts all bidders on the same footing."

As subsequent witnesses will make clear, state and local governments are leading the way to promote higher standards for the treatment of contract workers.[9] New York City has become a model of transparency with its public Vendex database containing important information about contracting companies, California for its rigorous evaluation process, and El Paso, TX, for its efforts to promote health care coverage among contracted workers. These and other governments have implemented the kinds of reforms that the federal government can and should replicate.

Reforming federal contracting to promote higher labor standards and improve accountability would not only be the right thing to do for workers and taxpayers, but is also doable within the existing contracting framework.[10] And perhaps most importantly, these reforms support many other goals of the Obama administration, such as increased transparency, limiting wasteful contracting, and perhaps most importantly, rebuilding the middle class.

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[1] See for example, Scott Lilly, "A Return to Competitive Contracting," Center for American Progress, May 14, 2007; David Madland and Michael Paarlberg, "Making Contracting Work for the United States: Government Spending Must Lead to Good Jobs," Center for American Progress Action Fund, December 8, 2008.

[2] Office of Federal Contract Compliance Programs, "Facts on Executive Order 11246," revised January 4, 2002, available at http://www.dol.gov/esa/OFCCP/regs/compliance/aa.htm (last accessed June 12, 2009).

[3] Jonathan S. Leonard, "The Impact of Affirmative Action on Employment," *Journal of Labor Economics* 2 (4) (October 1984): 439-463.

[4] Kathryn Edwards and Kai Filion, "Outsourcing poverty: Federal contracting pushes down wages and benefits," *Economic Policy Institute*, February 11, 2009.

[5] Jane Zhang, "How Government Adds to Ranks of Uninsured," *The Wall Street Journal*, March 25, 2008.

[6] See for example, Carol Zabin, Arindrajit Dube, and Ken Jacobs, "The Hidden Public Costs of Low Wage Jobs in California" (Berkeley, CA: University of California Institute for Labor and Employment, 2004) and UNITE HERE! "Conduct Unbecoming: Sweatshops and the U.S. Military Uniform Industry" (New York: UNITE HERE!, 2006).

[7] David Madland and Michael Paarlberg, "Making Contracting Work for the United States: Government Spending Must Lead to Good Jobs," Center for American Progress Action Fund, December 8, 2008.

[8] Office of Policy Analysis, "Impact of the Maryland Living Wage," Maryland Department of Legislative Services, December 2008.

[9] See for example, Paul K. Sonn and Tsedeye Gebreselassie, "The Road to Responsible Contracting," National Employment Law Project, June 2009.

[10] See for example, David Madland, Karla Walter, Paul K. Sonn, and Tsedeye Gebreselassie, "Making Contracting Work: Promoting Good Workplace Practices in the Federal Procurement Process," Center for American Progress Action Fund and National Employment Law Project, June 2, 2009.

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Comments for June 18 Hearing – Issue of Maximizing Competition
Chris Braddock – U.S. Chamber of Commerce

The President's March 4, 2009 Memorandum on Government Contracting includes a request for comments in several areas, including:

> *Government wide guidance to "govern the appropriate use and oversight of sole-source and other types of noncompetitive contracts and to maximize the use of full and open competition and other competitive procurement processes.*

The principle of maximizing the use of competition in awards is a foundation in government contracting. The Competition in Contracting Act (CICA), as implemented in FAR Part 6, already requires the use of competitive procedures in all but specifically listed circumstances. A sole source contract can only be awarded if certain conditions are met, including criteria for minimizing sole-source awards (FAR 6.302-1).

The Office of Federal Procurement Policy issued a memo on July 18, 2008, on "Effective Practices for Enhancing Competition." This memo notes that there had not been a decline in the percentage of competed dollars. It also notes that more can be done to promote the appropriate use of tools and effective practices to improve and increase the use of competition. The Chief Acquisition Officers Council (CAOC) was directed to establish a competition working group to facilitate agency collaboration on effective practices that promote competition. An attachment to the memo includes numerous highlights of agency competition initiatives.

There are advantages to single award contracting that are also important to avoid oversimplifying and defaulting to competition in every case. The potential advantages are, for example:

- The potential for lower overall contract cost, due to efficiencies and overhead savings
- Reduced administrative and task management burden for the Government
- Increased flexibility and responsiveness for Government customers
- Improved synergy across integrally related tasks
- Enhanced small business participation, due to goals and decreased fragmentation

Current law and regulations provide adequate coverage of the use of competition and the narrow exceptions. A well trained and sufficient numbers of acquisition employees will be able to use this framework to achieve the intended objectives without a hard and fast one size fits all approach. The judgment needed to apply the right approach is the critical element in success and avoiding wasteful, inefficient use of procurement dollars. The use of competition should be maximized, but competition just for the sake of competition will not ensure successful outcomes.

DRAFT

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"Opportunities and Challenges for Strengthening Government Procurement and Acquisition Policies"

June 18th, 2009

The Coalition for Government Procurement

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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.

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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.

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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

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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.

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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 the 2009 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.

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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

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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

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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.

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COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIO
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July 6, 2009

Ms. Julia Wise
Office of Management and Budget
725 17th Street, N.W.
Washington, D.C. 20503

Submitted via: http://www.regulations.gov

Subject: Public Comments on the President's Government Contracting Memorandum

Dear Ms. Wise:

The undersigned members of the Council on Defense and Space Industry Associations (CODSIA)[1] appreciate the opportunity to respond to the request for comments published in the May 29, 2009 *Federal Register* regarding the President's Memorandum on Government Contracting issued on March 4, 2009. This letter specifically addresses the discussion of contract type in the President's Memorandum.

The Aerospace Industries Association made a presentation at the June 18 public meeting on the President's Memorandum and submitted written comments specifically addressing the inherent difficulties of using fixed-price contracts for research and development efforts, under most circumstances. AIA offered the view that a fixed-price contract should only be used for complex weapon or space systems when there are verified specifications (i.e., testing has been completed), stable designs, and cost estimates based on historical costs for the same product. The undersigned members of CODSIA would like to associate ourselves with and endorse the points made by AIA in those submissions.

We concur with the long-standing preference for fixed-price contracts in Government contracting. It is critical, however, that Government contracting officers retain the flexibility to select the appropriate contact type based on factors including the complexity of the requirements, the maturity of the technology, and the stability of the design. As the AIA documents so vividly illustrate, the historical penalty for using fixed-price contracts for complex weapon systems research and development has been higher than anticipated cost due to unpredictable technical challenges and changes, followed by large claims, extensive litigation, failed programs and incalculable damage to the

[1] CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues, at the suggestion of the Department of Defense. CODSIA consists of seven associations -the Aerospace Industries Association (AIA), the American Shipbuilding Association (ASA), the National Defense Industrial Association (NDIA), the Professional Services Council (PSC), the American Council of Engineering Companies (ACEC), TechAmerica, and the U.S. Chamber of Commerce. CODSIA's member associations represent thousands of government contractors nationwide. The Council acts as an institutional focal point for coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

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industrial base. Although the product evolution cycle is different in the shipbuilding industry, the use of fixed-price development contracts for those complex platforms and systems is equally as precarious.

CODSIA also endorses the multi-association industry presentation on Contract Types that promotes a "full contracting toolbox" that allows a contracting officer to select the appropriate contract type, including cost-reimbursement contracts, without stigma. CODSIA encourages OMB to emphasize the existing policies in FAR part 16 in the Government-wide guidance required by the President's Memorandum.

Please do not hesitate to contact Bettie McCarthy, CODSIA's Administrative Officer, should you need further information or have questions. She can be reached at 703-875-8059.

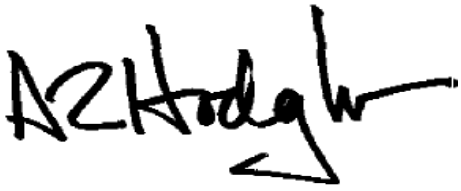
Sincerely,

Kirsten Koepsel
Director - Intellectual Property
& Industrial Security
Aerospace Industries Association

Alan Chvotkin
Executive Vice President and Counsel
Professional Services Council

Cindy Brown
President
American Shipbuilding Association

R. Bruce Josten
Executive Vice President for Government
Affairs
U.S. Chamber of Commerce



A.R. "Trey" Hodgkins, III
Vice President, National Security
And Procurement Policy
TechAmerica

Richard Corrigan
Policy Committee Representative
American Council of Engineering
Companies

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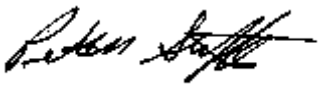

Peter Steffes
Vice President, Government Policy
National Defense Industrial Association

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Executive Brief on Federal Contracting and Procurement: The Impact of Laws, Regulations and Initiatives on the Homeland Security & Defense Industry

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EXECUTIVE SUMMARY

The issue of fair and open contracting has always been of concern to both government and industry. With the creation of the U.S. Department of Homeland Security, the largest agency in the history of the U.S. government was created with numerous urgent missions that required substantial outsourcing. Working toward an environment that provides successful outcomes and achieves mission objectives is the ideal of both the government and contracting community. Recently, with the President's Memorandum and several already existing initiatives, the climate has shifted toward enforcement and oversight rather than management and operational considerations. Assuring a competitive contracting process, selecting the proper contracting vehicle, and achieving effective oversight are critical goals; however, the move toward enforcement burdens both the contractor and procurement communities with an atmosphere of "blame" rather than one that facilitates mission execution.

On March 4, 2009, President Obama issued a Memorandum regarding government contracts that drew considerable attention in the media, throughout government, and in industry.[1] 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.

This paper explores the President's Memorandum, mandatory disclosure rules, the Federal Acquisition Streamlining Act, revisions to the Federal Acquisition Regulation, the False Claims Act, among numerous other legislative and administrative initiatives that seek to improve the federal contracting process. The cumulative and unintended consequences of these changes are discussed and explored with suggestions on how to assure the Department can achieve its programmatic goals through an open and fair procurement and acquisition process.

This Executive Brief also summarizes the context and challenges of some of the recently enacted and pending reforms, including:

- Competition: Enhanced competition for task and delivery orders.
- Contract Type: Additional guidance on the use of cost-reimbursement vs. fixed-price contracts, and more emphasis on the use of fixed-price contracts.
- Oversight: New means to monitor contractor performance, including possible violations of law, through self-disclosure requirements and a greater role for investigative personnel in contract administration.
- Conflicts of Interest: Statutory and regulatory measures to further specify how conflicts should be addressed, which may limit contracting flexibility.

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OVERVIEW

The Homeland Security & Defense Business Council ("Council"), a non-partisan, non-profit organization of the leading small, medium and large companies that provide the products, services and technologies for every program that encompasses our nation's homeland security mission, has prepared this paper to address the topics identified in the President's Memorandum and to identify (i) the status and key changes in these areas of the law; (ii) congressional initiatives that are reviewing further changes; and (iii) how industry in general and the Council members in particular might approach and assist the Government in addressing these areas of focus.

In each of the areas highlighted in the President's Memorandum, statutory, regulatory, and other initiatives directed at the same objectives already are underway (See table in appendix A). In other instances, existing law and regulations adequately address the concerns. As government debates what gaps preclude our nation from achieving an even more effective, efficient and successful process, it is incumbent upon industry to be an active participant in that discussion. The concern is that the focus and increased spotlight may create an atmosphere of blame rather than one that facilitates achieving "programmatic goals."

The federal contracting market is substantial and growing, reaching roughly $500 billion in fiscal year 2008. Government contracting is subject to an intricate web of statutes, regulations, and policies. Public interest is significant. Oversight is persistent. Competition for contracts can be fierce.

As one would expect, managing the contracting process on behalf of the U.S. Government requires expertise, skill, and business judgment. Yet, as acquisition spending has increased substantially over the last decade, the Government has experienced a decline in the size of its acquisition workforce, as has been addressed in reports such as the January 2007 report of the Acquisition Advisory Panel. As a result of contracting reforms initiated in the 1990s, the federal acquisition workforce began to shrink as reforms were implemented that were thought to require fewer resources. Agencies such as DHS, in turn, increasingly have relied on contractors to perform functions for which the agency did not have sufficient personnel. This practice, in turn, has led to questions whether inherently governmental functions related to acquisition are being properly outsourced. Congress also has expressed concern about organizational conflicts of interest and personal conflicts of interest on the part of contractors as their roles have evolved.

Concerns also have arisen whether the acquisition reforms of the 1990s, such as increased use of task and delivery order contracts, have yielded the intended benefits. In particular, the Government Accountability Office, agency Inspectors General, and Congress have questioned the adequacy of competition for orders. Congress also has expressed concern that agencies are becoming overly reliant on cost-reimbursement contracts. These and other concerns have led to a series of legislative, regulatory, and management initiatives discussed below, that provide the framework for the President's March 4 Memorandum.

The Memorandum calls for the Office of Management and Budget ("OMB"), in collaboration with other agencies, to develop and issue by July 1, 2009 "Government-wide guidance to assist agencies in reviewing, and creating processes for ongoing 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." This corrective action may include "modifying or canceling such contracts" in accordance with law. The Memorandum notes that the amounts spent on federal contracts had more than doubled since 2001, with significant increases in the dollars awarded without "full and open competition" and in cost-reimbursement contracts. It states that reversing these trends "could result in savings of billions of dollars each year for the American taxpayer."

The Memorandum further calls for OMB to develop and issue by September 30, 2009, Government-wide guidance to:

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> (1) govern the appropriate use and oversight of sole-source and other types of noncompetitive contracts and to maximize the use of full and open competition and other competitive procurement processes;
>
> (2) govern the appropriate use and oversight of all contract types, in full consideration of the agency's needs, and to minimize risk and maximize the value of Government contracts generally, consistent with the regulations to be promulgated pursuant to section 864 of Public Law 110-417;
>
> (3) assist agencies in assessing the capacity and ability of the Federal acquisition workforce to develop, manage, and oversee acquisitions appropriately; and
>
> (4) clarify when governmental outsourcing for services is and is not appropriate, consistent with section 321 of Public Law 110-417.

The consultation process directed by the Memorandum will include the Federal Acquisition Regulatory Council and other agencies, including DHS.

I. AREAS OF REFORM

In many respects, the President's Memorandum reinforces existing law and policy. In others, it appears to embrace initiatives that are underway through recent or pending legislation and amendments to the Federal Acquisition Regulation ("FAR").

A. The Contract Review

The Memorandum calls for development and issuance of guidance to "assist agencies in reviewing, and creating processes for ongoing 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."

Depending on the guidance issued, this review may require contractors to assist agencies in supporting the need for, and efficacy of, their contracts. In some instances, due to their workload, contracting officials within agencies may benefit from the additional support that a contractor can provide. The assurance that the contract (if performed to specification) will meet the agency's needs must come from the agency.

B. Competition

In part because of the cost savings and transparency it offers, competition is a particular area of emphasis in the President's March 4 Memorandum. The Memorandum states that "[e]xcessive reliance by executive agencies on sole-source contracts (or contracts with a limited number of sources) creates a risk that taxpayer funds will be "spent on contracts that are wasteful, inefficient, subject to misuse, or otherwise not well designed to serve" the needs of the U.S. Government or the taxpayer. The Memorandum states that it is Government policy that agencies "shall not engage in noncompetitive contracts except in those circumstances where their use can be fully justified and where appropriate safeguards have been put in place to protect the taxpayer." It calls for guidance to "govern the appropriate use and oversight of sole-source and other types of noncompetitive contracts and to maximize the use of full and open competition and other competitive procurement processes."

1. Context

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For more than two decades, the Competition in Contracting Act of 1984 ("CICA") has required agencies to engage in "full and open competition" when awarding contracts, subject to specified exceptions. Under existing statutes and regulations, agencies generally must publicize their efforts to award contracts, define their requirements in a manner that is the least restrictive to foster competition, identify to potential competitors the factors to be used to evaluate the proposals, and apply those factors in evaluating proposals and making an award. One of the current statutory exceptions to competition is that only one source can perform the work. When an agency relies on that exception, it must prepare a Justification and Approval to document the basis for its determination that a single source can perform the required work or provide the required product.

2. The Struggle Over Orders

Partly due to acquisition reforms over the last decade, the emphasis on competition has been diminished in practice, including through relatively large orders placed under multiple award contracts. Congress, the U.S. Government Accountability Office ("GAO"), and agency Inspectors General ("IGs"), among others, have noticed the lack of competition and expressed concern. For example, DHS has been the focus of a targeted competition mandate from Congress. The Department of Homeland Security Appropriations Act, 2009, requires[1] all DHS contracts above the Simplified Acquisition Threshold ($100,000) to be awarded using competitive procedures unless awarded under the Small Business Act, through an interagency contract funded by an agency other than DHS, or in other limited circumstances. The Secretary of DHS may waive this provision. The Act also calls for a study by the DHS IG of departmental contracts awarded other than through full and open competition "to assess departmental compliance with applicable laws and regulations."[2]

To a significant degree, orders rather than contracts *per se* are the critical area of concern. Task and delivery orders under multiple award contracts and the Federal Supply Schedule – which together have comprised a significant portion of acquisition spending over the last decade – have been a particular area of concern for Congress, GAO, and the IGs. In the Federal Acquisition Streamlining Act of 1994 ("FASA")[3], Congress required that the award of multiple award task or delivery order contracts be subject to full and open competition and included specific requirements for competitions for subsequent orders. The FASA standard was a "fair opportunity to be considered" for each task or delivery order, subject to limited exceptions.[4]

3. Seeking A Fair Opportunity

Despite the statutory mandate for a "fair opportunity to be considered," agencies did not consistently promote competition or justify exceptions to competition in the years after FASA was enacted.[5] A number of acquisition reforms have been introduced over time to bolster competition for orders under multiple award contracts. For example, Section 803 of the National Defense Authorization Act ("NDAA") for Fiscal Year ("FY") 2002[6] sought to enhance the competition requirements for DoD orders under multiple award contracts. Regulatory efforts also have tried to encourage greater competition for orders.

Continuing this trend, Section 843 of the NDAA for FY2008 attempts to strengthen the competitive procedures for task orders over $5 million awarded by DoD and civilian agencies such as DHS by requiring that the agency provide all contractors a fair opportunity to be considered, which is not met unless all such contractors are provided: (1) a notice of the order that includes a clear statement of the agency's requirements; (2) a reasonable period of time to provide a proposal in response; and (3) disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating such proposals and the factors' importance, as well as certain information regarding an award when one is made.[7] Following Section 843, orders over $5 million thus are subject to enhanced competition that approximate the safeguards to be applied when contracts are awarded. This approach for orders makes sense as a fair number of contracts do not exceed $5 million in value.

Section 863 of the NDAA for FY2009 requires a change to the FAR to require greater competition under all multiple award contracts, including the Federal Supply Schedule, for all orders over the Simplified Acquisition Threshold.

All such orders are to be made on a "competitive basis," unless one of four CICA exceptions to competition is met or a law expressly authorizes or requires a purchase to be made from a specified source. The enhanced competition procedures must require fair notice of the intent to make a purchase to be given to all offerors and must afford all offerors "a fair opportunity to make an offer and have that offer fairly considered by the official making the purchase." Agencies also will be required to publicize sole-source orders over the Simplified Acquisition Threshold.

It remains to be seen if the new competition regulations will produce the desired result. Ensuring a fair opportunity to compete for task orders has been a challenging endeavor, and will require continued focus as the new round of reforms is implemented and tested.

4. Oversight For Competition

Audits and investigations, such as GAO reports, are one (but not the only) means to ascertain if agencies are following the laws and regulations that seek to increase competition. When Congress initially encouraged the use of multiple award contracts in FASA, it limited protest jurisdiction to the contention that the order increases the scope, period, or maximum value of the contract under which the order was issued. This meant that regardless of the magnitude of the order at issue, contractors could not protest the terms of any solicitation for task or delivery order proposals or the methodology employed by the agency in making an award of an order. In addition to concerns regarding the fairness of the competitions for orders that GAO and IG reports identified, it was discovered that many orders were relatively large. Following the recommendation of the Acquisition Advisory Panel that protest jurisdiction be extended over relatively large orders, Section 843(e) of the NDAA for FY2008[8] permits the filing at GAO of protests regarding orders valued in excess of $10 million. This approach permits timely oversight of concerns regarding the fairness of order competitions that are brought to light by interested parties during the competition or just after it has been completed. At that juncture, the agency still has time to correct any prejudicial deficiencies in a meaningful way for the benefit of the agency and the competitive process. Section 843(e) limits the statutory authority for these protests to three years after enactment of the bill.

Although multiple award contracts offer the prospect of an initial competition followed by further competitions for discrete orders, the President's Memorandum recognizes that the Government has not yet achieved the full competitive promise (and benefits) of these contract vehicles. This may be due, in part, because acquisition officials occasionally have placed a greater emphasis on efficiency or expediency than on the desired competition.[9] The demands on a limited acquisition workforce may be a contributing factor.

5. Competition – A Continuing Focus

The recent emphasis on competition is not limited to orders under multiple award contracts. For example, the American Recovery and Reinvestment Act of 2009[10] ("Recovery Act") requires that contracts funded under the Act should be awarded as fixed-price contracts through competitive procedures to the "maximum extent possible." Although it applies only to major defense acquisition programs, Section 203 of the pending S. 454 places a strong emphasis on competition through the life cycle of a program.

Competition thus is, and likely will remain, a focus of acquisition reform in coming years. Even when the rules have been clear, it often has proven challenging in practice to ensure that interested parties have an open and fair chance to compete to provide the best value to the Government.

C. Contract Type

According to the President's Memorandum, dollars obligated under cost-reimbursement contracts nearly doubled from FY2000 to 2008, rising from $71 billion to $135 billion. The Memorandum also notes that overall spending roughly doubled from 2001 to 2008, when it reached $500 billion. Over this period, therefore, the amount spent on cost-reimbursement contracts has been roughly comparable in regard to the percentage of spending.

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The Memorandum states that cost-reimbursement contracts "shall be used only when circumstances do not allow the agency to define its requirements sufficiently to allow for a fixed-price type contract." It calls for guidance to "govern the appropriate use and oversight of all contract types, in full consideration of the agency's needs, and to minimize risk and maximize the value of Government contracts generally, consistent with the regulations to be promulgated pursuant to section 864 of Public Law 110-417," which is the NDAA for FY2009. The Memorandum thus embraces the approach required by Section 864.

1. Section 864

Section 864 requires the FAR to be amended to include guidance regarding (i) when and under what circumstances cost-reimbursement contracts are appropriate, (ii) the findings necessary to support a decision to use a cost-reimbursement contract, and (iii) the resources necessary to award and manage cost reimbursement contracts. Section 864 further provides that within one year of the promulgation of the new regulations, each IG for agencies that award contracts or orders that total over $1 billion in the prior fiscal year are to review agency compliance with the regulations.

The Recovery Act emphasizes the use of fixed-price contracts for contracts awarded under the Act. As noted above, Section 1554 provides that contracts under the Act are to be awarded as fixed-price contracts through competitive procedures to the "maximum extent possible." Agencies must post a notice on recovery.gov regarding any contract awarded with Recovery Act funds that is not fixed-price and not awarded using competitive procedures.

2. Fixed Prices vs. Cost-Reimbursement Contracts: The Current FAR View

The President's directive for new guidance, and the acquisition reforms discussed above, should be viewed in context. Part 16 of the FAR currently provides guidance regarding when to use fixed-price and cost-reimbursement contracts. It is unclear to what extent the new guidance will deviate from the approach in the current FAR. The FAR states, for example, that selection of a contract type "is generally a matter for negotiation and requires the exercise of sound judgment."[11] It lists eleven specific factors for the contracting officer to consider in selecting and negotiating the contract type, including such matters as price competition, type and complexity of the requirement, and urgency of the requirement.[12]

Under fixed-price contracts, the contractor assumes "maximum risk and full responsibility for all costs and resulting profit or loss."[13] According to the current FAR, a firm-fixed-price contract is suitable for commercial items or "for acquiring other supplies or services on the basis of reasonably definite functional or detailed specifications."[14] The FAR cautions that complex requirements "particularly those unique to the Government, usually result in greater risk assumption by the Government,"[15] referring to cost-based contracts. This is "especially true for complex research and development efforts, when performance uncertainties or the likelihood of changes makes it difficult to estimate performance costs in advance."[16]

As the FAR notes, fixed-price contracts are not appropriate in certain circumstances. For example, the FAR states that cost-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."[17] The FAR cautions about the use of fixed-price contracts for research and development.[18]

3. Contract Type: The Challenge Going Forward

Fixed-price contracts thus require well-defined requirements to optimize the balance of risks. The adequacy of requirements definition was a particular focus and concern of the Acquisition Advisory Panel.[19] As the Panel found, it can be a significant challenge for agencies to assemble the resources and devote the time needed to prepare a clear and accurate statement of their requirements, as is necessary for a full and fair competition for a fixed-price contract.

The President's Memorandum, and other reforms, are pressing agencies to use fixed-price contracts to a greater extent. Based on the contract type, the FAR recognizes that doing so will shift a greater risk of performance to contractors. To make this transition fair, and to better enable the Government to receive a fair price that accurately reflects the allocation of risk, agencies will need to exert additional efforts to define and refine their requirements. Pursuant to Section 864, the contemplated FAR amendments are to address the resources needed to award and manage cost-reimbursement contracts. Although not addressed by Section 864, the resources needed to facilitate award of fixed-prices are also a significant concern.

The emphasis on fixed-price contracts will require better requirements definition to ensure a fair allocation of risk. Ill-defined requirements increase the risk that the Government may not acquire what it truly needs or wants. In addition, although cost-reimbursement contracts may require more resources to administer, formation of fixed-price contracts (which are more dependent on accurate and precise specifications and requirements definitions) may require more work by agency personnel in the formation process.

D. Oversight

The Memorandum states that it is "essential" that the Government "have the capacity to carry out robust and thorough management and oversight of its contracts in order to achieve programmatic goals, avoid significant overcharges, and curb wasteful spending." It further states that "[i]mproved contract oversight" could "significantly" reduce the amounts spent on contracts.

There are many reasons short of "waste" that cost overruns occur on contracts. Requirements may not be clearly defined or may evolve over time. Work may prove to be more difficult than anticipated. As discussed above, the FAR recognizes that cost-type contracts are to be used precisely when it is difficult to estimate what the work will cost.

Effective oversight of government contracts unquestionably is necessary and beneficial to the public. As with the emphasis on contract type, however, the emphasis on oversight in the President's Memorandum should be placed into context. Oversight in government contracting has been the focus of transformative change over the last year. Some facets of this oversight, at least initially, do not require Government resources because they rely on contractor disclosures. These changes may fundamentally alter how government contracts are managed and substantially increase the risks of performance. That, in turn, may have significant (and adverse) ramifications on contract pricing.

1. Mandatory Disclosure – Crossing Boundaries In Oversight And Ceding Contract Management

As the result of a final rule issued[20] in November 2008, FAR 52.203-13(c)(2) now requires disclosure "whenever, in connection with the award, performance, or closeout of [the] contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor" has committed a "violation of Federal criminal law involving fraud, conflict of interest, bribery or gratuity violations" in Title 18 of the U.S. Code or a "violation of the civil False Claims Act (31 U.S.C. 3729-3733)." This disclosure obligation for a contract continues until "until at least 3 years after final payment." Certain key terms in FAR 52.203-13, such as what constitutes "credible evidence" of a violation, are not defined.

The disclosures required by FAR 52.203-13 must be made to the agency IG, with a copy to the contracting officer. If the violation at issue pertains to an order against a Government-wide contract, a multiple award schedule contract such as the Federal Supply Schedule, or other procurement instrument intended for use by multiple agencies, the disclosure must be made to the IG of the ordering agency and the IG of the agency responsible for the basic contract.

The mandatory disclosure rule in current FAR 52.203-13 was the product of a request by the Department of Justice for a disclosure requirement for contractors as well as to the Close the Contractor Fraud Loophole Act.[21] The regulatory history for the mandatory disclosure rule reflects considerable support from agency IGs for the final rule. The Act was in reaction to a proposed mandatory disclosure rule that exempted commercial item contracts and contracts

performed entirely overseas. The Act (and now the FAR) covers both classes of contracts. Contractors should pay special attention to ascertain if their contracts and subcontracts incorporate the current verison of FAR 52.203-13.

Inclusion of this FAR clause is not the only concern for contractors. When FAR 52.203-13 was revised to implement the disclosure requirement, the FAR also was revised to add to the potential causes for suspension and debarment a "knowing failure" to disclose matters within the scope of the mandatory disclosure rule, regardless of whether FAR 52.203-13 applies. Contractors that are not subject to FAR 52.203-13 thus nonetheless may have disclosure obligations. The potential causes for debarment or suspension in the FAR now include the knowing failure by a principal, until 3 years after final payment on any government contract, to timely disclose to the Government, in connection with the award, performance or closeout of the contract or subcontract thereunder, credible evidence of (1) a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of U.S. Code; (2) a violation of the civil False Claims Act, or (3) a "[s]ignificant overpayment(s)" on the contract.[22] This new "cause" applies to the knowing failure to report under all contracts, including current contracts entered into prior to the effective date of the mandatory disclosure rule until 3 years after final payment, and thus is retroactive in effect. The FAR now provides that a contractor's "record of integrity and business ethics" may be considered in assessing past performance.[23]

The mandatory disclosure rule and the related changes in the suspension and debarment and past performance contexts herald a new and potentially troubling dynamic in government contracting. As this rule and other recent and pending reforms reflect, the acquisition system is increasingly being run based upon enforcement and oversight concerns rather than upon management and operational considerations. That may be in tension with one of the goals expressed in the President's Memorandum, which is to rely on oversight to "achieve programmatic goals."

From a contractor's perspective, compliance programs are more important than ever. Contractors must protect themselves through robust internal control systems, ethics awareness, and effective ethics training. What in the past were "voluntary" disclosures now may be viewed as obligatory. What once were routine acquisition management and contract administration issues may require increased contractor scrutiny to mitigate the risks inherent in the new mandatory disclosure requirements. Particularly in light of the type of matters that previously have resulted in False Claims Act investigations and proceedings, which some contractors considered matters of contract interpretation or other performance disputes, some contractors may opt to emply a conservative approach, and disclose matters even while disclaiming any belief that there is "credible evidence" of any violation of law.

The contracting officer also has a different role. IGs will assume a greater importance in contract administration. This formal new role for the IG may make contracting officers more reluctant to address and resolve concerns that arise during performance for fear of being second-guessed. At a minimum, contracting officers must strike a delicate balance in managing and overseeing contract performance.

2. Other Reporting And Disclosure Requirements

Other reforms emphasize oversight concerns through making adverse information about contractors more available to the public. Section 872 of the NDAA for FY2009 mandates the establishment of a database of negative information regarding contractors for use by DoD acquisition officials. The database covers the most recent 5-year period for contractors with contracts valued at $500,000 or more. The database will encompass such matters as civil or administrative judgments resulting in a finding of fault and requiring payments for $5,000 or more, settlements for more than $5,000 or more that include a finding of fault on the part of the contractor, and default terminations of federal contracts. Section 872 calls for the FAR to be amended to require contractors with more than $10 million in federal contracts to submit information to OFPP for inclusion in the database. Section 2313 of H.R. 1107 would expand this database to cover civilian agencies.

H.R. 1360 (the "Contractor Accountability Act") would require each agency to report to Congress and publish a list of contractors that are not fulfilling their contractual obligations. The Act would require an agency to certify that it has "exercised oversight over each contract or order sufficient to ensure that each contractor is fulfilling the obligations

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specified in the contract or order" but does not specify how an agency is to determine whether a contractor is fulfilling its obligations or whether an agency view that a contractor is not fulfilling its obligations must be adjudicated or otherwise determined to be accurate through some process before it is published. The Act would not require the publication of information that is exempt from release under the Freedom of Information Act ("FOIA").[24]

The Recovery Act further emphasizes oversight for covered acquisitions and activities. Sections 1521-1528 of the Act establish the Recovery Accountability and Transparency Board to review whether competition and reporting requirements have been met or whether other abuses are occurring with recovery funds.

Sections 1152(c)–(d) of the Recovery Act require recipients of recovery funds from federal agencies to submit a report to the agency, including a list of all projects for which fund were spent or obligated and information about any subcontracts or subgrants awarded by the recipients. The information in these reports is to be made available on the Internet.

3. Spotlight On Government And Potential Consequences

Changes in reporting and oversight in this new era of contracting are not limited to contractors. On March 13, 2009, the Defense Contract Audit Agency ("DCAA") issued new guidance regarding the reporting of "significant/sensitive unsatisfactory conditions related to actions of government officials."[25] The actions at issue are not those which fall within the category of "suspected irregular conduct," such as violations of "criminal and penal statutory provisions," which previously were reportable and are to be handled in accordance with current practice.

Rather than elevate the "unsatisfactory conditions" through the official's management chair for resolution, the new guidance provides that DCAA may report them directly to the DoD IG following DCAA's internal review. The "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." One example listed in the DCAA memorandum of a reportable action is "where a contracting officer ignores a DCAA audit report and takes an action that is grossly inconsistent with procurement law and regulation, (*e.g.*, awards a contractor unreasonable or excessive costs and/or profit)." The DCAA guidance states that a simple disagreement between an audit position and a contracting officer's decision is not reportable as an unsatisfactory condition. It is unclear at this early juncture how contracting officials will respond to the letter and spirit of the new DCAA guidance.

4. Looking Ahead

As stated in the March 4 Memorandum, the President's goal is to be able to use the oversight to "achieve programmatic goals," among other objectives. As the current and pending acquisition reforms show, contract oversight (and, to some extent, management) increasingly is being formalized and directed through investigative and enforcement channels. These changes may provide greater visibility into certain contract matters, but it is less clear that this information will foster a greater capability (or willingness) on the part of contracting officials to act on the information. Routing information to investigators – particularly of matters that have not yet been fully investigated or proven to be a problem – may make contracting officials less willing to act. Publication of lists of contractors that are purportedly not fulfilling their obligations – which itself may be a matter of dispute – could cause significant competitive harm to contractors that might not be remediable if, it turns out, the Government's view of the contractor's actions (or its interpretation of what the contract or order required) was incorrect. Although bills such as H.R. 1360 caution that they would not require the release of information that is exempt from release under the FOIA, the competitive harm from identification of a company as purportedly failing to fulfill its contract obligation may be difficult to assess.

As the new DCAA guidance reflects, contracting officials also may find themselves under considerable scrutiny. Even where contracting officials' conduct does not rise to the level of a reportable incident – as undoubtedly will be true

in the vast majority of cases – the relationship between contracting officials and their audit advisors may shift in ways that might not have been fully contemplated.

E. Inherently Governmental Activities And Acquisition Workforce

The President's March 4 Memorandum identifies the acquisition workforce and the outsourcing of services as key areas for the Government to address. As shown above, workforce issues (including who can or will perform necessary tasks) permeate many aspects of acquisition.

With regard to the acquisition workforce, the Memorandum states that "it is essential that the Federal Government have the capacity to carry out robust and thorough management and oversight of its contracts in order to achieve programmatic goals, avoid significant overcharges, and curb wasteful spending." With regard to government outsourcing of services, the Memorandum observes that "the line between inherently governmental that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. As a result contractors may be performing inherently governmental functions." The Memorandum further directs OMB to issue guidelines to assist agencies in assessing the acquisition workforce and to clarify when governmental outsourcing of services is and is not appropriate, consistent with law.

The memorandum's directives to OMB regarding the assessment of the acquisition workforce and reassessment of "government outsourcing" mark an affirmation of recent Congressional and Executive branch initiatives rather than a new beginning. Over the last four years, there has been growing consensus – crossing political lines – that the acquisition workforce is in need of repair. Similarly, there has been an increasing recognition that the growth of services and the resulting blended workforce (government and contractor personnel working side-by-side or cubicle-by-cubicle) have created new challenges for the Government in managing its operations. Although there is less consensus regarding the role of outsourcing in the Government, there is a recognition that at a minimum, additional conflict of interest safeguards and improved oversight of services are needed. Future debate will center on the definition of "inherently governmental functions" and the role contractors may play in supporting such functions. In order to effectively participate in shaping future policy addressing the acquisition workforce and government outsourcing of services, it is critical to understand how the Government got to this point and the initiatives already underway addressing these issues.

II. HOW DID THE U.S. GOVERNMENT (AND DHS) GET TO THIS POINT?

Fundamental shifts in the federal procurement system since the mid-1990s have profoundly altered the procurement landscape with significant implications for contractors today. In coupling acquisition reforms with the reductions in acquisition workforce, the general view was that streamlined procurement processes would allow the Government to buy more while using fewer administrative resources to do so.

A. Structural Shifts In The Procurement System

The 1990s saw a major shift in the acquisition system, with a focus on streamlined awards, commercial items, interagency contracts, and a less resource-intensive process. The changes were intended to reduce regulatory burdens, making the procurement system more efficient and "commercial-like." These acquisition reforms had their intended effect – the acquisition system was streamlined, and more commercial products and services entered the federal marketplace.

The acquisition of services also expanded rapidly. Services now account for more than 60 percent of Federal Government purchases. The growth reflects the new services-based economy, as well as the Government's overall downsizing and corresponding reliance on the private sector for support services. For example, in the early to mid-1990s, products accounted for the vast majority of purchases under the Federal Supply Schedule ("FSS") program. By FY 2006, services accounted for 64 percent of total sales ($22.6 billion of $35.1 billion) under the program. The significant growth areas for services under the FSS program were, and remain, professional, management, technical and engineering, and

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information technology services. Similarly, at DHS, services accounted for $7.9 billion or 67 percent of total procurement dollars in FY2005 with $1.2 billion obligated for four types of professional and management support services: program management and support, engineering and technical, other professional and other management support.[26]

During this period, the downsizing of the acquisition workforce became a management mandate. For example, the NDAA for FY1996 required DoD to reduce its acquisition workforce by 25% by the end of FY2000. Furthering the trend, DoD's workforce in 2004 was less than half its acquisition workforce in 1990.[27] Unfortunately, the cutbacks of the 1990s were followed by a lack of investment and strategic human capital planning for the acquisition workforce over the course of this decade. The reduction in the acquisition workforce reflects a "brain drain" that has shifted procurement expertise from the public sector to the private sector. In particular, over the last 15 years, the Government saw a significant reduction in its requirements development capabilities. That shortfall, as discussed above, may have adverse ramifications in light of the new emphasis on the use of fixed-price contracts.

In retrospect, the timing of the workforce cuts and the lack of investment in the workforce could not have been worse. As the Acquisition Advisory Panel noted in expressing its concern regarding the state of the acquisition workforce, "[a] qualitatively and quantitatively adequate and adapted workforce is essential to successful realization of the potential for the procurement reforms of the last decade."[28] The reductions in the acquisition workforce did not anticipate or account for fundamental shifts in the purchasing profile or the purchasing volume of the Federal Government. Procurement spending has exploded; since 9/11, the dollar volume of procurement has increased 63 percent as of January 2007.[29]

The rapid growth of services acquisitions has taxed a depleted workforce. Generally, services acquisitions are more difficult to specify, assess, and measure than product acquisitions. As a result, additional analysis and enhanced judgment are typically needed to assess the technical approach and skills necessary to perform a task. Fundamental to this analysis is sound requirements development. The lack of acquisition resources has made the evaluation, award, and administration of services contracts increasingly difficult.

In response, agencies increasingly have relied on contractors to provide acquisition support and requirements development. As the Acquisition Advisory Panel stated:

> In some cases, contractors are solely or predominantly responsible for the performance of mission-critical functions that were traditionally performed by civil servants, such as acquisition program management and procurement, policy analysis, and quality assurance. In many cases contractor personnel work alongside federal employees in the federal workspace; often performing identical functions. This type of workplace arrangement has become known as a "blended" or "multisector" workforce.[30]

The blended workforce not only raises questions regarding the potential performance of "inherently governmental functions" by contractors, it also raises organizational conflict of interest ("OCI") and personal conflict of interest ("PCI") questions. As the Panel noted, "the growth in the use of contractors to perform acquisition functions that in the past were performed by federal employees, coupled with the increased consolidation in may sectors of the contractor community, has increased the potential for organizational conflicts of interest."[31]

There are three basic types of conflicts of interest: 1) biased ground rules; 2) unequal access to information; and 3) impaired objectivity. FAR Part 9.5 provides basic information regarding OCIs; it provides little guidance to contracting officers on how to identify, evaluate, and avoid or mitigate OCIs. As the Panel noted, GAO is sustaining an increasing number of OCI-related protests. The use of contractor personnel also raises concerns regarding the protection of contractor confidential, proprietary information and the potential for improper disclosure.

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B. DHS's Outsourcing And Acquisition Workforce Challenges

The creation of DHS highlighted the challenges facing the entire acquisition system. Managing new mission requirements and the corresponding explosion of procurement spending with a downsized acquisition workforce has proved daunting for DHS. The challenges facing the entire procurement system were made all the more difficult given the management and organizational hurdles in creating DHS out of a myriad of pre-existing and disparate Federal entities.

With regard to outsourcing of services, DHS relied heavily on management and professional services contractors in rapidly standing up its new organization. As GAO noted in a September 2007 Report regarding DHS, "a lack of staff and expertise to get programs and operations up and running drove decisions to contract for professional and management support services."[32] Often these contracts involved broad statements of work that were difficult to effectively manage or to use for measuring contractor performance.

Further, according to GAO, DHS officials generally did not assess the risk associated with contracting for services that closely support the performance of inherently governmental functions.[33] The risk identified by GAO was the possible loss of Government control over discretionary decision making. GAO made the following recommendations to improve DHS's risk management of services that closely support inherently governmental functions:

- Establish strategic-level guidance for determining the appropriate mix of government and contractor employees to meet mission needs;
- Assess risk of selected contractor services as part of the acquisition planning process, and modify existing guidance and training to address when to use and how to oversee those services in accordance with federal acquisition policy
- Define contract requirements to clearly describe roles, responsibilities of selected contractor services as part of the acquisition planning process;
- Assess program office staff and expertise necessary to provide sufficient oversight of selected contractor services; and
- Review contracts for selected services as part of the acquisition oversight program.[34]

DHS generally concurred with GAO's recommendations.

With regard to its acquisition workforce, a timely November 2008 GAO Report[35] highlights the challenges facing DHS. According to the report, DHS has made progress in filling contract specialist positions but much work remains to be done. For example, DHS increased its government contract specialist population from 577 to 1041 from 2003 to the end of FY 2007. At the same time, GAO reported that contract specialist vacancy rates still ranged from 12 percent to 35 percent across DHS's procurement offices. GAO noted that DHS had hired contractors to perform some acquisition support functions.

GAO commented that DHS "faces staffing shortages in other acquisition-related positions, including certified program managers, business and financial management staff and technical support staff.[36] GAO found that DHS had undertaken several initiatives focused on the acquisition workforce, much of it designed to address the shortage in contract specialists, but concluded that DHS needed a more strategic focus. In conclusion, GAO recommended that DHS:

- Establish an interim working definition of acquisition workforce that more accurately reflects the employees performing acquisition-related functions to guide current efforts, while continuing to formally add career field to the definition;

- Determine whether the department's current initiatives related to recruiting and hiring are appropriate for acquisition-related career fields other than contract specialists and, if so develop plans to implement the initiatives within the broader acquisition workforce;

- Develop a comprehensive implementation plan to execute the existing DHS acquisition workforce initiatives. The implementation plan should include elements such as performance goals, time frames, implementation actions and related milestones, and resource requirements;

- Direct the Chief Human Capital Officer and the Chief Procurement Officer to establish a joint process for coordinating future acquisition workforce planning efforts with the components for the purpose of informing department wide planning efforts; and

- Improve the collection and maintenance of date on the acquisition workforce.[37]

DHS generally concurred with GAO's recommendations and provided additional information where it had taken supplemental actions to address acquisition workforce challenges. For example, DHS provided an updated definition for personnel considered part of the acquisition workforce.

C. Congressional And Executive Branch Responses To Outsourcing And Acquisition Workforce Challenges Inherently Governmental

In directing OMB to clarify when government outsourcing for services is appropriate, the President's Memorandum cites section 321 of the NDAA for FY2009, Pub. L. 110-417. Section 321 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 the mission of the Federal department of agency. The definitions of inherently governmental subject to review are the following:

- The Federal Activities Inventory Reform Act of 1998 (Public Law 105-270; 31 U.S.C. 501 note);

- Section 2383 of title 10, United States Code;

- Office of Management and Budget Circular A-76;

- The Federal Acquisition Regulation; and

- Any other relevant Federal law or regulation, as determined by the Director of the Office of Management and Budget in consultation with the Chief Acquisition Officers Council and the Chief Human Capital Officers Council.

OMB also is charged with developing a single consistent definition for inherently governmental function. OMB must 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 departmental or agency personnel to ensure the department or agency maintains control of its mission and operations. OMB also must develop criteria that would identify positions that are to be performed by employees of the Government or members of the Armed Forces to ensure maintenance of sufficient organic expertise and technical capability. OMB is also responsible for establishing criteria to ensure agencies develop guidance implementing the definition of inherently governmental and the

criteria for identifying critical functions. Finally, OMB must provide criteria to ensure that agencies develop guidance for the management of decisions regarding staffing. OMB must seek the views of the public regarding these matters.

D. OCIs And PCIs

The issues relating to contractor OCIs and PCIs have received heightened attention from Congress, federal agencies, and the acquisition community.[38] 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 NDAA for FY 2009 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 CO; (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 shall be revised to include a contract clause or set of clauses for use in solicitations and contracts that incorporates the PCI policies developed under Section 841 pertaining to contractor employees performing acquisition functions closely associated with inherently governmental functions and that sets out the contractor's responsibilities in monitoring its employees. The new FAR clauses will likely 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.

The Weapons System Acquisition Reform Act of 2009,[39] which became law on May 22, 2009, includes provisions that will alter the approach to OCIs for DoD and may lead to a new approach Government-wide. 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 the NDAA for FY2007[40] 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.

E. Acquisition Workforce

Congress has also addressed acquisition workforce management. Section 855 of the NDAA for FY2008 establishes a position of Associate Administrator for Acquisition Workforce Programs within OFPP responsible for

supervision of the acquisition workforce training funds, development of a cross cutting human capital strategic plan for the government as well as development of programs and policies to increase the quality and quantity of the acquisition workforce. Section 855 further mandates that each agency's Chief Acquisition Officer establish an acquisition workforce human capital plan that addresses the agency's acquisition workforce recruitment, development, and training needs. Finally, Section 855 mandates each agency to operate acquisition training programs and requires OFPP to issues policies to promote performance standards for acquisition training.

Congress addressed the status of the Acquisition Workforce Training Fund (41 U.S.C. § 433(h)(3)). Section 854 of the NDAA for FY2008 repealed the sunset provision of the Acquisition Workforce Training Fund making it permanent. The Acquisition Workforce Training Fund is used pay for the development of government-wide acquisition training developed and implemented by the Federal Acquisition Institute. Congress authorized agencies to designate acquisition positions as shortage category positions and to re-employ retired acquisition personnel without the re-employed employee losing his or her annuity. This authority expires on December 31, 2011.

Finally, Congress has recognized (at least for now) that it will take a sustained, long-term management focus to rebuild the acquisition workforce. Last year, Congress mandated the first step in that process. Section 869 of the NDAA for FY 2009, authorizes and directs OFPP to develop the Acquisition Workfocre Development Strategic Plan for Federal agencies other than the Department of Defense to develop a specific and actionable 5-year plan to increase the size of the acquisition workforce, and to operate a government-wide acquisition intern program, for such Federal agencies. This plan is the responsibility of the new Associate Administrator for Acquisition Workforce Programs and will be funded by the Acqusition Worforce Training Fund. The plan must be developed by October, 2009. The Acquisition Workforce Development Strategic Plan must, at a minimum examine the following matters:

- The variety and complexity of acquisitions conducted by each Federal agency covered by the plan, and the workforce needed to effectively carry out such acquisitions;

- The development of a sustainable funding model to support efforts to hire, retain, and train an acquisition workforce of appropriate size and skill to effectively carry out the acquisition programs of the Federal agencies covered by the plan, including an examination of interagency funding methods and a discussion of how the model of the Defense Acquisition Workforce Development Fund could be applied to civilian agencies;

- Any strategic human capital planning necessary to hire, retain, and train an acquisition workforce of appropriate size and skill at each Federal agency covered by the plan;

- Methodologies that Federal agencies covered by the plan can use to project future acquisition workforce personnel hiring requirements, including an appropriate distribution of such personnel across each category of positions designated as acquisition workforce personnel under section 37(j) of the Office of Federal Procurement Policy Act (41 U.S.C. § 433(j));

- Government-wide training standards and certification requirements necessary to enhance the mobility and career opportunities of the Federal acquisition workforce within the Federal agencies covered by the plan;

- If the Associate Administrator recommends as part of the plan a growth in the acquisition workforce of the Federal agencies covered by the plan below 25 percent over the next 5 years, an examination of each of the matters specified in paragraphs (1) through (5) in the context of a 5-year plan that increases the size of such acquisition workforce by not less than 25 percent, or an explanation why such a level of growth would not be in the best interest of the Federal Government.

It took the better part of two decades for the acquistion workforce to reach its current state. It will likely take a similar amount of time to rebuild the numbers, skills, and capabilities of the acquisiton workforce. The development of a

governmentwide Acquisition Workforce Development Plan will lay the foundation for the sustained effort necessary to rebuild the acquisition workforce.

F. Legislative Initiatives Going Forward

Other legislative initiatives are underway that bear on the areas discussed above. For example, False Claims Act reform is underway. S. 386 (the "Fraud Enforcement and Recovery Act of 2009") which was signed into law on May 20)[41] , introduces a series of changes to the civil False Claims Act that expand liability for contractors. For example, the bill redefines "claim" to cover false claims submitted to a "contractor," "grantee," or "other recipient" if the Government provides or has provided any portion of the amount claimed or will reimburse the contractor, grantee, or other recipient. It also imposes liability for "knowingly and improperly" retaining government funds, such as overpayments that the contractor is obligated to return.

On February 24, 2009, Sen. Grassley introduced S. 458, the False Claims Act Clarification Act of 2009. A similar bill (H.R. 1788, The False Claims Act Correction Act of 2009) was introduced in the House. This pending legislation includes the following provisions, among others:

- S. 458 permits Government employees (or family members) to be relators using information obtained in their Federal employment if: (1) the relator disclosed the allegations to the IG and advised his/her supervisor and the Attorney General of such disclosure; and (2) the Government does not file suit on those allegations within 18 months. S. 458 provides that DOJ "may" move to dismiss claims brought by Government employees whose duties include uncovering and reporting the type of fraud alleged and the employee, as part of his/her duties, is participating in or knows of an investigation or audit of the alleged fraud, or if the material allegations were derived from a filed indictment, information, or open investigation or audit.

- S. 458 and H.R. 1788 would repeal the public disclosure bar as a jurisdictional defense that may be raised by defendants; only DOJ could file a motion to dismiss based upon public disclosure. In addition, the House bill requires even DOJ to meet a higher standard of public disclosure by changing what constitutes "public disclosure" to require that "all essential elements of liability" of the claim "are based exclusively on the public disclosure." Further, a public disclosure includes "only disclosures that are made on the public record or have otherwise been disseminated broadly to the general public." A claim is "based on" a public disclosure "only if the person bringing the action derived . . . knowledge of all essential elements of liability . . . from the public disclosure."

- Both bills extend the statute of limitations (Senate bill – 10 years, House bill – 8 years), and allow the Government to intervene at any time adding new claims or information and the complaint would "relate back" to the date of the relator's original filing to the extent that the Government's claim arises out of the conduct, transactions, or occurrences addressed in the original filing.

It remains to be seen which of these provisions are enacted. This much appears clear: reform is on the way and the risks to contractors are increasing.

III. PRIVATE SECTOR VIEW AND ROLE

The issues addressed in the President's Memorandum of March 4, 2009 were raised throughout his campaign and by members of the House and Senate from both sides of the aisle. At times, the rhetoric regarding federal contracting has merely created good sound bites rather than creating an atmosphere in which real solutions can be crafted. No doubt all signs point to increased oversight by both the Administration and Congress -- the final hearing of the House Homeland Security Committee in 2008 was entitled: "Waste, Abuse and Mismanagement: Calculating the Cost of DHS Failed

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Contracts." In addition to the President's Memorandum, a new Senate ad hoc subcommittee was established for the 111th Congress on Contracting Oversight.

Partly in response to these initiatives, but mostly because industry's voice and perspective was seemingly lost in the cacophony of the debate, the Council embarked on this review of existing law, as well as the proposed and pending changes and challenges in Federal contracting, particularly as it impacts the U.S. Department of Homeland Security. Underlying this study is the Council's viewpoint, in line with the May 2008 statement of a bipartisan group of House and Senate Homeland Security leaders, that industry supports wholeheartedly more explicit requirements and performance standards in major contracts to ensure successful outcomes.

The Council and its members – the leading providers of homeland security solutions – support processes that provide for:

1. Quality contracting;
2. Quality acquisition management; and
3. Quality people.

It is crucial that public sector leaders recognize that the initial process of quickly creating the Department of Homeland Security and protecting our nation required, at its initial outset, a higher reliance on outside contractors. It resulted in a contracting and procurement environment that was, in many ways, uniquely complex and challenging. The private sector recognizes and supports efforts to wean certain government contractors off of inherently government employee positions. The private sector also recognizes that a proper blending of public sector requirements and private sector expertise will provide the American people the best value, the greatest efficiency and the best outcomes. Going forward, a key issue is whether the lessons that have been learned from any prior mistakes, burdensome procedures and unintended consequences will be incorporated into future projects. We must learn from our past mistakes and not be defined by them.

It must also be recognized that the private sector plays a critical role in the special coordinated and collaborative homeland security mission. Members of the Council and other private sector companies will not win future contracts if they do not deliver and implement product and service solutions, and provide world-class experts and practitioners to the projects as needed. It is imperative that the foundation upon which a successful federal procurement system is built be underpinned by credibility, trust, and competence.

The challenge is to find a balance between the need to strengthen oversight – including applying aggressive controls and having experience and well-trained acquisition management – and the need to maintain flexibility to adjust to rapidly changing conditions on the ground and ensure a successful mission.

Contracts that contain overly burdensome procedural requirements, a prolonged budget process, multiple decision-making layers, long reporting chains, overlapping management and operations, narrow work restrictions, and insufficiently trained managers present challenges and impede success at a time when today's homeland security needs demand flexibility and adaptability. Emphasis must be placed be on the desired result, not merely the process.

IV. CONCLUSION

In sum, existing law already embraces many of the procurement, enforcement, and compliance issues that the President's Memorandum targets. In many instances, relevant reforms have been recently enacted and are in the process of implementation. The private sector recognizes that some gaps in the process remain and that a number of these areas continue to present considerable challenges that will require a persistent, and possibly protracted, effort to address them. Only when industry and government can work together cooperatively – rather than as adversaries – will the nation achieve its highest level of security.

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APPENDIX A: Summary of Key Acquisition Provisions

Provision	Topic	Key Aspects
Section 843(a) of NDAA for FY2008	Competition	For orders over $5 million, agencies must provide all contractors a fair opportunity to be considered, which is not met unless all such contractors are provided: (1) a notice of the order that includes a clear statement of the agency's requirements; (2) a reasonable period of time to provide a proposal in response; (3) disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating such proposals, and their importance. Agencies also must provide certain information to unsuccessful offerors regarding an award.
Section 843(e) of NDAA for FY2008	Competition/Oversight	Permits the filing at GAO of protests regarding orders valued in excess of $10 million.
Section 863 of the NDAA for FY2009	Competition	Requires a change to the FAR to require greater competition under all multiple award contracts, including the Federal Supply Schedule, for all orders over the Simplified Acquisition Threshold. All such orders are to be made on a "competitive basis," subject to certain exceptions. The enhanced competition procedures must require fair notice of the intent to make a purchase to be given to all offerors and must afford all offerors "a fair opportunity to make an offer and have that offer fairly considered by the official making the purchase."
Section 864 of NDAA for FY2009	Contract Type	Requires the FAR to be amended to include guidance regarding (i) when and under what circumstances cost-reimbursement contracts are appropriate, (ii) the findings necessary to support a decision to use a cost-reimbursement contract, and (iii) the resources necessary to award and manage cost reimbursement contracts
Section 1554 of the American Recovery and Reinvestment Act of 2009	Competition/Contract Type	Requires that contracts funded under the Act should be awarded as fixed-price contracts through competitive procedures to the "maximum extent possible."
Section 321 of NDAA for FY2009	Inherently Governmental	Directs OMB to review the current, various definitions of "inherently Governmental function" in statute and regulation to determine whether the definitions ensure that only government employees perform such functions or other critical functions necessary for the corresponding agency or department mission

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Section 855(a) of NDAA for FY2008	Acquisition Workforce	Creates the position of Assistant Administrator, charged with the supervision of the acquisition workforce training fund administration and development of a human capital strategic plan and programs and policies to increase the quality and quantity of the acquisition workforce
Section 855(b) of NDAA for FY2008	Acquisition Workforce	Mandates each agency to operate acquisition training programs and requires the OFPP to issue policies to promote performance standards for acquisition training
Section 855(e) of NDAA for FY2008	Acquisition Workforce	Requires an agency's CAO to establish an acquisition human workforce capital plan that addresses the agency's acquisitions workforce recruitment, development, and training needs within one year of the Act's enactment
Section 869 of NDAA for FY2009	Acquisition Workforce	Directs OMB to develop a Acquisition Workforce Development Strategic Plan

This Chart will be available and updated on the Council's website: www.homelandcouncil.org in addition to a comprehensive table of legislative initiatives.

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1 Pub. L. 110-329, Division D, secs. 525(a), (b).

2 *Id.*, sec. 525(d).

3 Pub. L. 103-355.

4 41 U.S.C. § 253j; 10 U.S.C. § 2304c(b).

5 See, e.g., U.S. General Accounting Office, *Contract Management: Civilian Agency Compliance with Revised Task and Delivery Order Regulations*, GAO-03-983 (Washington, DC: August 2003), at page 7.

6 Pub. L. 107-107.

7 *See* Pub. L. 110-181, sec. 843(b)(2).

8 *See* Pub. L. 110-181, sec. 843(e).

9 *See* U.S. General Accounting Office, *Contract Management: Civilian Agency Compliance with Revised Task and Delivery Order Regulations*, GAO-03-983 (Washington, DC: August 2003), at 10-11; U.S. Government Accountability Office, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-874 (Washington, DC: July 2004), at 6.

10 Pub. L. 111-5.

11 FAR 16.103(a).

12 *See* FAR 16.104.

13 *See* FAR 16.202-1.

14 FAR 16.202-2.

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[15] FAR 16.104(d).

[16] FAR 16.104(d).

[17] FAR 16.301-2.

[18] *See* FAR 36.006(b), (c).

[19] *See Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress, January* 2007 at 100.

[20] 73 Fed. Reg. 67064.

[21] Pub. L. 110-252, Title VI, Chapter 1.

[22] *See* FAR 9.406-2 and 9.407-2.

[23] *See* FAR 42.1501.

[24] 5 U.S.C. § 552.

[25] DCAA Memorandum for Regional Directors, Mar. 13, 2009, available at *http://image.exct.net/lib/fefd167774640c/d/1/DCAA%20Report%20.pdf.*

[26] U.S. Government Accountability Office, *Department of Homeland Security: Improved Assessment and Oversight Needed to Manage Risk of Contracting for Selected Services* GAO-07-990 (Washington, DC: September 17, 2007).

[27] *Commission on Army Acquisition and Program Management in Expeditionary Operations, "Urgent Reform Required: Army Expeditionary Contracting" October 31, 2007 at 91.*

[28] *See Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress, January 2007, at 18*.

[29] *Id.*

[30] *Id.*

[31] *Id. at 24*.

[32] U.S. Government Accountability Office, *Department of Homeland Security: Improved Assessment and Oversight Needed to Manage Risk of Contracting for Selected Services* GAO-07-990 (Washington, DC: September 17, 2007) at 13.

[33] *Id.* at 19.

[34] *Id.* at 25.

[35] U.S. Government Accountability Office, *Department of Homeland Security: A Strategic Approach Is Needed to Better Ensure the Acquisition Workforce Can Meet Mission Needs* GAO-09-30 (Washington, DC: November 19, 2008).

[36] *Id.* at 10-12.

[37] *Id.* at 28-29.

[38] *See, e.g.,* U.S. Government Accountability Office, *Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DoD Contractor Employees*, GAO-08-169 (Washington, DC: March 7, 2008) (recommending a written code of business ethics applicable to contractor employees).

[39] Pub. L. 111-23.

[40] Pub. L. 109-364, sec. 813.

[41] Pub. L. 111-21, sec. 4.

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Government contract reform

July 15

2009

This document provides IACCM's initial input and comments regarding the current state of public procurement practice and in particular the role of contract practice and policy in securing public sector goals.

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BACKGROUND

The International Association for Contract & Commercial Management is a non-profit organization first incorporated in New York in 1999. Its goal is to provide a global forum for innovation in trading relationships and practices. In this capacity, it provides unique insights to the purpose and contribution of the contracting process and contract management capabilities in both public and private sector. The IACCM membership currently includes representatives from more than 2,000 public and private sector organizations, typically those with large revenues, international interests and dealing with complex or high-risk contract relationships.

The Association's mission is "to develop and maintain the international standards for defining and managing trading relationships and for the certification of individuals and organizations responsible for their creation and performance. IACCM develops and communicates leading practices that support economic growth and organizational successes, by ensuring commitments are ethical, achievable and sustainable".

It is in this capacity that we offer input to the Administration's work on contract reform.

The composition and management of IACCM result in unique insights and capabilities.

- Membership is drawn from 111 countries, providing international understanding and perspectives, including to the approach taken by other major governments.
- Our constituency embraces the three communities that most impact contract management and negotiation: Legal, Procurement and Contract Management staff representing both buy-side and sell-side viewpoints.
- More than 25% of our members are at the level of Director or above.
- Our use of advanced networking technologies enables on-demand research and communication across more than 50 worldwide 'communities of interest' (see Appendix 1).
- Web-based communities and knowledge management have enabled dynamic approaches to skill development, benchmarking and learning. Top companies and organizations worldwide participate in IACCM's distinctive and successful Managed Learning programs.
- Our collaborative behaviors result in extended capabilities and perspectives that embrace other key stakeholder groups, functionally and geographically. (This submission includes input from one partner organization, the International Center For Complex Project Management.)

In consequence, within our field of expertise, IACCM is viewed as providing 'thought leadership'.

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PURPOSE OF THIS SUBMISSION

The purpose of this submission is as follows:

- To establish our credentials and indicate our readiness to contribute to the contract reform process.
- To provide initial input and comments regarding the current state of public procurement practice and in particular the role of contract practice and policy in securing public sector goals.

SUMMARY

IACCM applauds the Administration's recognition of the key role performed by contracting excellence and the need for reform. It is not alone in this recognition and IACCM and its partners are already actively involved in a variety of initiatives by major US allies.

While public procurement by its nature faces unique challenges, it is the view of those contributing to this initial input that there are substantial opportunities for improvement to contract structures, policies and practices. In particular, it is our opinion that while the nature of acquisition has changed fundamentally in recent years, contracting vehicles and their management has remained firmly rooted in the past. This results in missed opportunities and an unacceptably high rate of failure in key projects and procurements. (See Appendix 3, Rand Report on EU Public Procurement, based on IACCM research).

Specifically, the last 10 years has seen dramatic growth in outsourcing and a steady move towards outcome based relationships. Yet within most organizations, the structure of contracts, the methods of their supervision and the skills of those charged with their oversight have not kept pace with this fundamental shift in implied risk and responsibility. Hence we observe the need for far-reaching re-appraisal and change:

- The portfolio of contract types must reflect the relative risk and complexity of the relationship required for its successful execution
- Within these contracts, the bidding procedures and risk allocations must be sufficiently flexible to allow for market conditions, economic realities and the urgency of the acquisition
- Internal process and systems for all contracting parties must offer efficient and effective controls over performance and change management, in particular ensuring high quality and timely exchange of information between all stakeholders that allows proactive and collaborative management of outcomes
- Contract management competency must be enabled across the organization and its performance measured and supported where appropriate by specific specialist skill groups, equipped through training and learning processes that are up to date, on-demand, and reflect best practice methods and knowledge

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IACCM is the only organization to have undertaken worldwide studies in contract negotiation and contract management competence, including our annual surveys of the most frequently negotiated terms (see Appendix 4) and our benchmarking of the Most Admired Organizations for Post-Award Contract Management (see Appendix 2 summary report attached).

Our work has established that there is a critical link between the approach to contracting and associated risk management, and the outcome of major projects and acquisitions (hence our connection with other thought-leading Associations, such as ICCPM). IACCM and its members perceive the following as key areas in which new practices are developing and are requisite for 'state of the art' contracting:

1. Recognize that contracting has both strategic and operational importance
2. View contracting competence as a source of economic value
3. Ensure contract terms, policies and practices support the desired relationship
4. Pursue 'ease of doing business' as a source of competitive advantage
5. Invest in tools and systems that automate control and support portfolio management
6. Develop appropriately skilled and trained professional staff
7. Increase focus on post-award relationship governance and value realization
8. Ensure integration of contract management to support advanced approaches to risk management and corporate governance
9. Undertake contract-related research and benchmarking on a regular basis
10. Drive continuous improvement through defined ownership and accountability

IACCM will welcome the opportunity to share its knowledge, insights and research capabilities with the Administration and assist in achieving the types of reform that – in the words of President Obama – create the "capacity to carry out robust and thorough management and oversight of contracts in order to achieve program goals, avoid significant overcharges, and curb wasteful spending."

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INITIAL INPUT AND COMMENTS ON THE FOUR CURRENT ISSUES IN PUBLIC PROCUREMENT PRACTICE, OUTLINED BY THE GOVERNMENT

ISSUE 1:

Govern the appropriate use and oversight of sole-source and other types of non-competitive contracts and to maximize the use of full and open competition and other competitive procurement processes.

Important to define "best value" clearly in RFPs and less usage of bids in complicated procurements

Unclear representation of "best value" in the RFP (request for proposal) may countermand the benefits that arise out of competitive procurement processes. Therefore, the request for proposal should indicate what "best value" means, as it is not always the lowest price. Bids should be used for commodities only, RFP's for more complicated procurements.

Where price isn't as important: Driving competition by defining it in terms of public service outcomes

In certain types of contracts, service and outcome may be more important than basic price. In government contracting the speed of the service may be much more important to the public. Hospital waiting times, insurance transactions, availability of welfare checks and security of personal data in transaction processing are all examples where the quality of the service is more important than price alone. These types of contracts are often difficult to compare and the competition needs to be defined in terms of public service outcomes.

Competition undermined by requirement to comply with unnecessary procedures

The harmful and unnecessary practice of requiring vendors to comply with requirements is ancillary to the goal of obtaining the necessary products and services at the best value. Most governmental procurements have so many other requirements, including MBE/WBE utilization, minimum wage/benefit requirements, local sourcing, and many other expensive compliance requirements that vendors must charge more and this may lead to a situation where some qualified vendors simply don't bother to do business with governmental customers.

Unnecessary complexity that may arise out of driving competition in every case: (From the Rand paper)

Complexity causes multiple problems: for example, drawn out and multi party negotiations waste time, Standard terms are often inappropriate, and benchmarking, practical due diligence, complexity of pricing models and evaluation systems all make the system too complicated to manage with an appreciation and judgement of the true costs and the public interest benefits.

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ISSUE 2:

Govern the appropriate use and oversight of all contract types, in full consideration of the agency's needs, and to minimize risk and maximize the value of Government contracts generally, consistent with the regulations to be promulgated pursuant to section 864 of Public Law 110-417

Today's business conditions demand different contract terms

The frame agreements that were developed need a major re-think. A general failure of contract terms and structures to reflect today's business conditions is being observed. In particular, they are not effective at appropriate allocations of risk in an environment where the focus is increasingly on high value services and where the need for flexibility and adaptability have become key to success.

Contracts that need to be at the risk of the customer

Innovation contracts, particularly for government in the IT and defense sectors often need to be at the risk of the customer: capital risk can be taken by government in areas where innovation is critical and it can often be taken more cost effectively. In both cases this may be sensible if the product or service being requested has to be compatible with existing systems

Considering the ability to bear risk

Risk should be allocated in a way which takes into account the parties' different ability to bear risk, ie where the parties are equally well-placed to manage risks, risks should be borne by the party best able to bear them ("Risk-neutrality").

ISSUE 3:

Assist agencies in assessing the capacity and ability of the Federal acquisition workforce to develop, manage, and oversee acquisitions appropriately;

There is broad agreement across the IACCM membership that capacity and ability are key issues in today's environment. These challenges exist within individual skills and also in terms of wider organizational and process capability.

IACCM was the first organization in this field to develop a robust skills assessment and benchmarking tool, based on internationally agreed skills requirements. This web-based tool enables both individual and team assessments and benchmarks within the team and across the wider professional community.

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This has been supported by the development of robust and dynamic on-line training and formal certification. The IACCM approach provides materials that are regularly updated to reflect the latest ideas and methods and they are supported through collaborative team interactions and mentoring.

IACCM's capabilities are increasingly enhanced by those of organizations with which it forms collaborative relationships. These include a range of academic and private sector institutions, as well as other non-profit associations.
IACCM also developed one of the first Capability Maturity Models to support assessment of the contract management process and to assist in gap analysis and benchmarking. This tool, also web-based, assesses nine core areas of competency.

In combination, the extended IACCM community offers the capability to assess and develop capacity and ability across the Federal acquisition workforce and also that of other key stakeholder groups, internal and external.

ISSUE 4:

Clarify when governmental outsourcing for services is and is not appropriate, consistent with section 321 of Public Law 110-417 (31 U.S.C. 501 note).

Large sections of the IACCM membership are actively involved in outsourcing of services and offer unique capabilities and insights in this area. We undertake regular research, using this professional community to gain rapid and accurate information and forecasts. We are uniquely positioned to contribute to this debate.

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APPENDIX 1

IACCM Communities of Interest

- Alliances / Teaming
- Automation / Software tools and systems for contract management / procurement
- Best Practices and Benchmarking
- Bid / Commitment Management
- Business strategy
- Change Management
- Contract clauses / model agreements / contract standards
- Contract localization (international comparative law and standards) and language
- Contract Management
- Contract Structure and Standards
- Customer relationship management
- Dispute management / Alternative Dispute Resolution
- Distribution relationships
- Ethics, Compliance and Governance
- Export Controls & Compliance, Import / Export
- Financing and lease / rental agreements
- Global and International Agreements
- Government / Public Sector
- Intellectual Property
- IT Procurement / Contracting
- Leadership Topics for contract management
- Legal precedent / regulatory changes
- Managed Certification Program
- Managing organizational interfaces (Legal, Project Management, Product Management, Finance, Sales etc)
- Negotiation
- OEM Agreements
- Oil & Gas / Petrochemical
- Organization and management (building the business case; creating, managing and selling the CM function; defining organization, roles etc.)
- Outsourcing / Offshoring
- Payment Securities & Other Guarantees
- Performance measurement / balanced scorecards
- Pricing / Financial Terms
- ProActive Think Tank
- Procurement policy
- Procurement strategy and segmentation
- Product commercialization and lifecycle management
- Professional skills
- Project Management / Project Risk
- Regulatory issues / compliance
- Revenue Recognition
- RFI / RFP models and processes
- Risk management
- Sales Policy
- Security issues
- Service levels, balanced scorecards
- Software licensing
- Sourcing (identifying sources of supply)
- Staffing and Recruitment
- Strategic Sourcing
- Sub-contracting
- Supplier / Vendor relationship management

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- Supply chain
- Sustainability / Social Responsibility
- Training and Development

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Post Award Contract Management

Appendix 2

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Best Practice report

IACCM Research 2009

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Executive summary

Today's business environment demands the ability to respond rapidly to change. The erosion of traditional integrated organizational structures means that this ability depends increasingly on external providers.

The quality of the processes through which business relationships are formed and managed has therefore become a critical factor in business performance. This has resulted in a strong focus on the role of contracts and their effective management throughout relationship lifecycles. The competence of an organization's contract management functions thus is not only a key indicator of its integrity, but also demonstrates its commitment to superior value delivery for customers and shareholders.

It is this background that led to the commissioning of this report and underlying 'best practice' research.

Historically, some organizations have deployed re-engineering to great effect, such as Toyota cutting contracting cycle times on complex procurement by more than 75% and IBM generating more than $150m in savings and cost reductions through redesigning its contract management policies and processes. Examples such as these suggest the value potential of contracting excellence. However, IACCM established some time ago that these anecdotal achievements were not supported by standard practice guiding the contract management function or process. There was an observed lack of knowledge around what 'best practice' was and based on which companies could benchmark their contract management functions.

In an effort to identify the "top performing" companies in post award Contract Management and research the characteristics associated with best practice in this area, IACCM conducted a survey of 10,000 contracts, procurement and legal professionals worldwide and asked them to nominate the companies they most admire for the quality of their contract management performance. Four hundred organizations were identified and, in September 2008, IACCM announced the top 25 most admired contract management performers in the world.

In the next phase, interviews were conducted with selected nominated firms, to develop a comprehensive illustration of best practice in the area. It was found that relatively few companies excelled on an enterprise basis – illustrating the fact that contract management is not at this point viewed as a cross-enterprise capability. Additionally, it was clear that 'excellence' applied to certain aspects of their operation and not to the entire process.

Among these top performers, there was a high degree of consensus on the areas of performance that are most important, but limited commonality in the steps they have taken to date. Among the highlights:

- All but one of the best in class firms have a defined career path for Contract Management professionals.

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- All of those interviewed have defined processes in place for contract review, knowledge management and information exchange.
- In the area of professional development and training, 3 of the top 5 use programs structured by IACCM and 11 of the top 25 have adopted IACCM professional certification.
- The top performing organizations have defined team interfaces for relevant stakeholder groups in the management of projects, regular reporting with executive management and visible understanding by executives of the importance of the Contract Management discipline.
- All participants perceive the transition from negotiation to implementation as a key period in the performance lifecycle and most endeavor to ensure some continuity of personnel.
- Most participants utilize risk registers and are focused on improving risk management techniques in post-award contract management.
- Many of those interviewed highlight the importance of requirement definition, but there is a split between those who expect greater precision and those who believe 'best practice' will be achieved through an ability to manage uncertainty.
- Most of those interviewed are wrestling with deployment of appropriate technology and identifying the best metrics to support more accurate analysis of contract management value.

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Rank	Company
1	IBM
2	Accenture
3	Hewlett Packard
4	BT
5	Boeing
6	Cardinal Health
7	EDS
8	Intel
9	Qualcomm
10	Bechtel
11	Centrica
12	Procter & Gamble
13	Chevron
14	BAE Systems
15	CH2 M Hill
16	J & J
17	Lockheed Martin
18	ABN Amro
19	Coca - Cola Enterprises
20	Fluor Corp.
21	Saudi Aramco Oil Company
22	Bank of America
23	EXL Holdings
24	Capgemini
25	General Motors

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The Six Foundational areas of Post Award Contract Management

IACCM research suggested that the following six foundational areas are generally recognized as important to the value contribution of post-award contract management:

1. Developing an effective working relationship between buyer and provider
2. Requirements definition
3. Transition
4. Measurements / Service Levels
5. Performance management
6. Change management

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Developing an effective working relationship

- Contract management is viewed as a process adopted consistently across regions
- Contract management is executed as a team effort with consistent roles and authorities, both within contract management and across other groups and functions
- Increasing investment seen in assisting knowledge transfer to partners

Requirements Definition

- Post-award teams to
  - a) review requirements during transition and
  - b) ensure responsive mechanisms for continuing review and update throughout the contract life-cycle.
- Checklists/guidebooks to assist contract managers in obtaining detailed and precise definition of requirements
- Regular reporting and review to ensure that needs and deliverables remain aligned

Transition

- Standardized approach to interpreting the signed agreement and communicating it within the group
- Reviews to ensure clear integration between strategy, procurement, contracting and contract management, prior to the final approval of the contract
- Use of tools to identify resource requirements to support perceived workload

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Measurements, Service levels and Performance agreements

- Constantly monitor contracts with high criticality and complexity, broad scope, and longer duration to ensure they are delivering value as intended
- Structured contract audit process which periodically reviews the health of each account against their objectives

Change Management

- "Lessons learnt" or other repositories of past contracting experiences to promote best practice sharing and transfer of knowledge across teams and relationships
- Embedded systems that support data access and transfer between customer and provider
- Categorizing contracts based on the levels of future uncertainty and likelihood of change and variability

Career development

- Designated contract management, job roles
- Structured group with specific career paths
- Substantial investments in skills development and training
- Contract managers have visibility and status in the organization

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APPENDIX 3: The Top Negotiated Terms

Negotiators Admit That They Are On The Wrong Agenda

This is the 8th year that IACCM has conducted its annual survey of the 'most frequently negotiated terms and conditions'. The study attracted a record input from more than 4,000 qualified participants from legal, procurement, contract and commercial management groups worldwide. Almost 1,000 corporations and organizations were represented.

Negotiators tell us that they remain entrenched in fighting traditional battles. The top negotiated terms remain largely unchanged. If anything, the focus has become more protective and risk averse. For example, the biggest mover (up 5 places to number 5) is Confidentiality / Non-disclosure – in a sense oddly symbolic in an era when public pressure is for increased openness and transparency.

And in the end, that is the startling thing about this year's survey. It has become increasingly apparent that what we negotiate is out of step with business needs. This year, we have confirmed that many of the negotiators themselves believe they are negotiating the wrong things.

A New Environment Needs New Contracting Practices

In a series of surveys and follow-on discussion groups, it has become clear that the commitments and obligations required to compete in today's highly competitive and fast-changing environment have changed. Yet the rules and the procedures by which contracts are governed have not. External influences such as regulation have combined with the traditionalism and parochialism of the law to stifle adaptation.

Specifically, the global economy has swung increasingly towards services. Most major manufacturers have sought to avoid the pressures of 'commoditization' by moving towards packaged solutions and services. In addition, new forms of contract relationship – such as outsourcing – have become common. All these relationship types demand outcome-based commitments, weakening the traditional principle of caveat emptor and making the ability to bear and manage risk into a source of competitive advantage.

As if this shift in value propositions were not enough, we have also witnessed an era in which the speed of change has augmented the role and purpose of contracting. Successful deals that deliver economic value require lifetime management. The contract and the process through which it is created and managed become key instruments for relationship governance. Traditional contract standards and the focal areas for negotiation help little in providing such a framework. Liabilities, Indemnities, IP rights, Liquidated Damages are all topics that prepare for failure and disagreement. They are at best negative incentives and in general, imbalance in the negotiated allocation of risk results in an environment of self-protection, constrained information flows and a culture of blame.

So if today's contracts are focused on protection, is that really a bad thing? After all, lawyers and contract negotiators are charged with protecting the company or organization from risk.

The reason today's focus is wrong is because it is lop-sided. It concentrates on assumed failure and does little to establish the framework for success. Therefore it does not manage risk because it fails to enable opportunities, growth, mutual benefit. The focus of negotiation today stifles collaboration and results in many contracts being dangerously incomplete when they are signed. This is because battles over the allocation of risk frequently prolong negotiations and divert attention from the real issues, which are what the parties want to achieve and how best they can do it.

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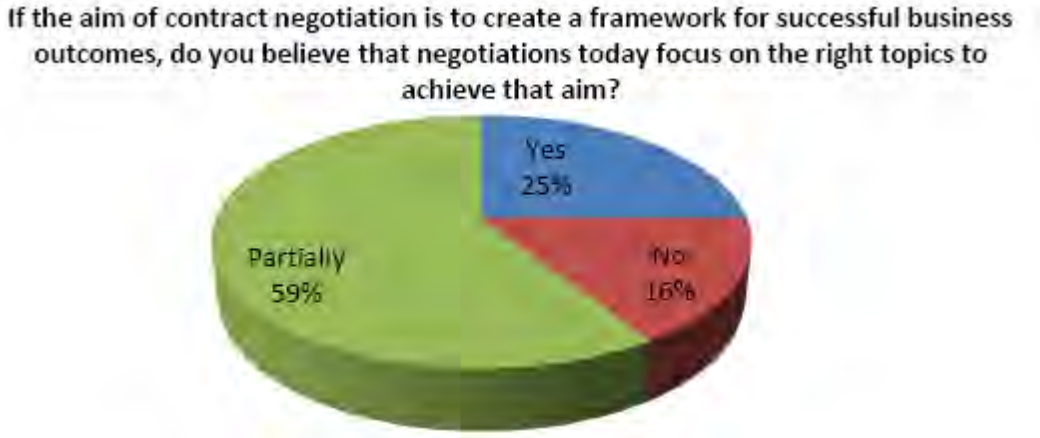
The Negotiators' View

How do we know that negotiators themselves sense this weakness? Because this year we asked them whether they believed the terms that receive greatest focus today are resulting in optimised business outcomes. And 75% said no.



When asked where negotiating time should be focused, the Top Ten list was transformed to reflect the business reality of a world where agreements are more complex, subject to faster and more regular change, and increasingly focused on services, solutions and outcomes. The 'new' top terms are dominated by the need to ensure certainty over the basic intentions of the deal and then to ensure it remains on track and is adjusted in the face of changed conditions or requirements. This revised focus for negotiations presumes that the parties will establish procedures for more open information flows and greater transparency – implying their intent to collaborate and to work together to manage risks and optimise results. Terms such as liability and indemnities occupy the place they should – as last-resort fall-backs in the event that well-crafted intentions become derailed.

So what is preventing the change?

Since both buy-side and sell-side negotiators feel similar shifts are desirable, it is perhaps surprising that the current Top Ten shows no sign of movement. But in fact, it seems that few are translating their belief into action – and that is because they feel they are alone in their belief. Two thirds say that they could not achieve this change because the other side would not support it. Large numbers also blame internal forces – term and policy stakeholders who would not allow such a move. Yet our interviews suggest that none have actually tested their hypothesis – they simply assume no one else would be willing to change.

A shift of this sort is not easy. It demands different involvement in the negotiation and probably – for many – much earlier introduction to the team. There are a range of obstacles to this change, but that does not mean they could not be overcome – and the rewards in doing so could be very significant.

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In subsequent articles, IACCM will lay out the steps needed for change and will also describe the projects it is undertaking to make this shift possible.

	TOP 30 TERMS in 2008	↑↓	2007	2006	2005
1	Limitation of Liability	-	1	1	1
2	Indemnification	-	2	2	2
3	Price / Charge / Price Changes	-	3	4	6
4	Intellectual Property	-	4	3	3
5	Confidential Information / Data Protection	↑	10	7	8
6	Service Levels and Warranties	↑	7	11	10
7	Delivery / Acceptance	↑	9	8	9
8	Payment	-	8	9	4
9	Liquidated Damages	↑	11	10	12
10	Applicable law / Jurisdiction	↓	6	6	5
11	Warranty	↑	13	14	14
12	Service Withdrawal or Termination	↓	5	5	7
13	Responsibilities of the Parties	New	-	-	-
14	Scope and Goals	New	-	-	-
15	Insurance	↓	12	12	15
16	Dispute Resolution	-	16	17	-
17	Change Management	New	-	-	-
18	Audits / Benchmarking	↓	17	18	17
19	Invoices / Late Payment	↓	14	19	-
20	Assignment / Transfer	↓	19	16	16
21	Business Continuity / Disaster Recovery	↑	24	22	19
22	Rights of Use	↓	18	15	-
23	Freight / Shipping	↓	21	21	22
24	Communications and Reporting	New	-	-	-
25	Entirety of Agreement	↓	23	23	21
26	Force Majeure	↓	22	27	20
27	Most Favored Client	↓	20	20	18
28	Export / Import Regulations	-	28	28	23
29	Information Access and Management	New	-	-	-
30	Security	↓	25	24	24

This second chart shows the views of negotiators worldwide regarding the areas that should receive greater focus in order to derive better business outcomes. This consolidated view disguises the variations between

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buyers and sellers, between functional groups, between jurisdictions and industries. It is those differences and their implications that we will describe in subsequent reports.

	Top 30 Today	Top 30 in the future
1	Limitation of Liability	Scope and Goals
2	Indemnification	Change Management
3	Price / Charge / Price Changes	Responsibilities of the Parties
4	Intellectual Property	Communications and Reporting
5	Confidential Information / Data Protection	Service Levels and Warranties
6	Service Levels and Warranties	Price / Charge / Price Changes
7	Delivery / Acceptance	Delivery / Acceptance
8	Payment	Limitation of Liability
9	Liquidated Damages	Dispute Resolution
10	Applicable law / Jurisdiction	Indemnification
11	Warranty	Audits / Benchmarking
12	Service Withdrawal or Termination (cause / convenience)	Intellectual Property
13	Responsibilities of the Parties	Confidential Information / Data Protection
14	Scope and Goals	Payment
15	Insurance	Information Access and Management
16	Dispute Resolution	Business Continuity / Disaster Recovery
17	Change Management	Applicable law / Jurisdiction
18	Audits / Benchmarking	Most Favored Client
19	Invoices / Late Payment	Entirety of Agreement
20	Assignment / Transfer	Warranty
21	Business Continuity / Disaster Recovery	Liquidated Damages
22	Rights of Use	Invoices / Late Payment
23	Freight / Shipping	Assignment / Transfer
24	Communications and Reporting	Service Withdrawal or Termination (cause / convenience)
25	Entirety of Agreement	Rights of Use
26	Force Majeure	Other
27	Most Favored Client	Insurance
28	Export / Import Regulations	Product Substitution
29	Information Access and Management	Enterprise Definition / Future Acquisitions / Divestiture
30	Security	Freight / Shipping

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Appendix 4: Evaluating Public Procurement Contracting

(added as a separate attachment)

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LEADERSHIP WE CAN BELIEVE IN?

Our new President and his Administration seem to be headed toward little change instead of change that we can believe in by failing to hold civil service and industry leaders accountable for the situations that they led us into. I cite the acquisition workforce being allowed to atrophy under their watch, misdirection regarding contract type, and oversimplification regarding competition.

Workforce. While admittedly I don't have the data available to those in civil service, during my past career as an Army employee, I saw the effect of Presidential (Bill Clinton and George W. Bush) policy to sharply reduce the workforce. Clerical positions were eliminated, those clerks were then allowed to migrate into professional positions, numbers of professional positions were also reduced, and so, numbers of new and younger hires were thereby curtailed. Now, it seems that Agencies are desperately seeking competent staff by recruiting at higher grades from the ever-smaller pool remaining, which may well have a lower quality than that of years ago. Employees were given bonuses to retire early while contract support augmentees were recruited from the private sector (often the same people) at significantly higher contract prices than the salaries previously represented (plus Federal retirement annuities). A weak acquisition staff wastes more resources in contracting than their salaries represent. Meanwhile, DOD looked at a new employee pay system that would marginally shift "pennies" of annual salary increases based on questionable performance assessments while missing billions in acquisition program targets. Often, subjective data was misrepresented as objective, and then represented as "results."

Contract Type. Contracting officers select contract type. For decades, at the highest level, leaders pushed a reprised preference for fixed price contracts over cost type. The appropriate contract type offers the best a) balance of risk for the situation and responsibilities for the parties, and b) results. Fixed price contracts, when poorly set, may greatly exceed cost type contract values. The academically correct supposition that fixed priced deliverables must be delivered is often eluded in practice. Wrong contract type?, than either fix the situation or the contracting officer; and President Obama isn't the action officer for that.

Interestingly, my efforts to offer a new 21st Century contract type (Multiple Award Requirements Contracts, crafted for such rapidly changing markets as commercial information technology) were opposed or ignored at first, and then adopted (but ineffectively). Meanwhile, the $1.7 billion ANNUAL waste item that I identified to the DOD IG (subsequently becoming a President's Management Council (PMC) item) continues since the mid-1990s.

Previously, a single contract was awarded competitively; but soon after award, commercial market changes obsoleted product which were replaced – but now priced non-competitively. Unit prices skyrocketed to just under those in GSA Schedules, despite multi-hundred million dollar totals (the $1.7 billion waste quantified by the PMC).

The heart of my suggestion was to perpetuate effective competition and accountability throughout contract life and to establish mutual commitment to a positive business relationship. To do so, multiple master contracts would be awarded instead of a single, inflexible one. Next, Government is committed to order all work exclusively from master contract holders based on best value -- price and performance factors (customer satisfaction, product quality) measured using an information network established at contract award.

I met with Dr Steve Kelman (who led the US Office of Federal Procurement Policy then) and his staff. Dr Kelman agreed with multiple awards over his staff's objections, enacting this change in the Federal Acquisition Streamlining Act of 1994. The commitment step was not. Master contract holders could compete, but so could any other source (including others losing master contract competitions but with GSA Schedules). Documenting source selection rationale was famously marginal, if done

. Without the pressure of a commitment to master contract holders, using a "pressure cooker without a seal" analogy, the situation was the same old pot with the same ongoing waste.

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Competition can be a good thing, if properly done; but it's not an objective itself, the best contract arrangement is; proven by results. As stated above, initial competition can get attractive initial results; but once competitive pressure is lost, the Government's power is effectively as well. This is why buy-ins occur – contractors are driven to proposing loss situations, hoping to get well by non-competitively priced contract changes or spare parts. My view: bad business for all because all guess how to take advantage of the other contracting party. A great "pre-nup" shouldn't be a couple's objective when dating or when heading for the alter, but how to grow the marriage over time for the benefit of the couple, their family and society.

The worst acquisition ever?: The M-16 rifle provided to US troops during the Viet Nam War, which the Army knew would jam, and so cost the lives of an untold many. No one was held accountable – deja vu?

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General Comment

This note seeks enactment of a new acquisition process and contract type for modified commercial systems such as the USAF Aerial Tanker program, and repeats my op ed piece published in Defense News on July 13, 2009. This may be framed as either Defense issue or a Government Reform one. The problem is best articulated as a Defense issue and the solution best articulated as one of Government Reform. Solicitations would contain new provisions to allow the interaction that I recommend. Contract performance periods would be made longer and more flexible than currently.

My prior idea on Multiple Award Requirements Contracts as a new contract type (but different to this) was presenetd to Dr Kelman, who then headed OFPP, its elements enacted by FASA and in FARA, but not as I intended and for that reason were ineffective - and actually backfired.

Enactment seems necessary, as a practical matter, for a new contract type; and given history, this means careful enactment.

Given I was unable to upload the .pdf file, here's the text:

What Went Wrong With U.S. Air Force Aerial Tanker Program
By Mark Werfel
Although only partial information is publicly available, significant missteps are evident. What is needed is a new government approach when acquiring modified commercial systems (MCS) that more clearly specifies requirements and provides

the company with a process to know up front which of its products is more desirable to the buyer.

Any acquisition starts with a strategy that determines the outcome. This program has a commercial aircraft baseline, modified for tanker use by adding a bladder to hold fuel and a straw to deliver it. The aircraft size drives performance, cost and payload. So the commercial nature of the design and the aircraft size are the core strategic factors.

Prior to submitting its proposal, Boeing asked what size aircraft the Air Force wanted, implying that size would drive its offer, perhaps more than (or more clearly than) expressed source-selection criteria. The Air Force awarded the contract to Northrop-EADS based on the large Airbus A330. Boeing, when it lost, argued that the Air Force was misleading about wanting a midsize aircraft — Boeing proposed the 767 instead of the much larger 777 — and seemingly expected a future acquisition for the larger plane.

In the upcoming competition, Boeing hints that it will propose the 777, given the history.

Boeing, with a choice of aircraft to propose, needed more clarity than the solicitation offered. I'd expect that as a leading aircraft manufacturer with significant experience in military and commercial contracting, Boeing was correct.

The company's initial question and later comments imply a failure of the conventional source-selection process to clearly communicate the customer's strategic requirement — aircraft size — and accountability for responding when questions are asked, as Boeing claims it was misled.

This was a paramount matter, pointing to the formulation of its proposal strategy: which plane to offer?

Commercial designs have overlapping capabilities for different market segments. Military customers seeking an MCS solution understand that it will not be optimized for them, but the disadvantage of lower performance can be offset by lower pricing and low technological risk. System development costs are spread over a larger commercial base, with the military paying for additional development needed only for the military.

Further, commercial technology has generally been proved in the marketplace.

In this high-value MCS scenario, it would seem that each offerer could have government discussions promptly after solicitation release regarding which of that firm's systems is preferred, allowing it to make a better-informed decision about which solution to propose.

This is not technical leveling, where one offerer is improperly nudged toward improvement by comparison of its proposal with another's, but a comparison of one firm's solution with another of its own, done at an appropriately high engineering level.

The government's response regarding which system it considers more desirable would be documented, and subsequently must be verifiable at award and consistent with the source-selection decision.

This will be harder to do, but should reduce costly second-guessing and target-missing during solicitation reading and proposal formulation, reduce protest risk, and result in better solutions. Improved clarity allows a superior proposal and solution.

Timing MCS acquisitions to the marketplace is an obvious necessity. It is myopic to consider aircraft based on a soon-to-end production line, and doing so ignores long-term realities. Older aircraft typically offer a lower cost, but also less performance, with risks of higher-than-proposed life-cycle costs and problematic logistic support over time. This can be exacerbated when commercial customers exit to buy newer configurations — rendering older ones obsolete, but still on government contract.

Clearly, the timing of a new aerial tanker buy should roughly coincide with (and be based on) the new commercial configuration.

This new approach, to be
more realistic, would accommodate some imprecision. Commercial aircraft market deliveries may start later than first anticipated, or the military might want to delay ordering to observe initial performance once fielded.

The government might be able to benefit further when buying MCS by taking advantage of commercial market imprecision. If there's a lull in commercial

buying, could MCS be offered at a lower price by shifting government deliveries so the manufacturer can stabilize production? If so, the contract scope can be set on a multiyear or program-life basis that permits acceleration of MCS ordering for lower prices, or for wartime and surge requirements.
What won't this fix? The innate desire of military and political leaders to distort government use of free-market offerings. å
Mark Werfel is President of Mark Werfel LLC, Annandale, Va.

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Ms. Julia Wise
Office of Federal Procurement Policy
Office of Management and Budget
Washington, DC

Re: Multi-Association Comments on the President's Memorandum on Government Contracting

Dear Ms. Wise:

The undersigned organizations submit this letter for the record at the June 18, 2009 public meeting on implementation of Section 321 of the National Defense Authorization Act (NDAA) for Fiscal Year 2008. We supported the enactment of this provision of the NDAA and offer this letter and its attachments to support its implementation by OMB. Congress concluded that the patchwork of guidance for determining what government employees must do, i.e., "inherently governmental functions," and what constitutes "functions closely related to inherently governmental functions" and commercial activities excepted by the Competitive Sourcing Official under OMB Circular A-76, fails to adequately guide agencies in making these key, total work force, decisions.

In the attached material, we propose a definition of "inherently governmental" that relates to the existing OMB guidance and the examples in FAR 7.503(c). We also offer definitions of "critical functions and positions." We do not, and we respectfully urge the Executive Branch not, to suggest examples of critical functions and positions. While we considered FAR 7.503(d) in making our recommendations, we consciously decided that critical functions and positions were in some cases broader and in some cases narrower, than the examples in FAR 7.503(d). As FAR 7.503(d) itself states, it provides, "examples of functions generally not considered inherently governmental functions … [but] may approach being in that category because of the nature of the function, the manner in which the contractor performs the contract, or the manner in which the Government administers contractor performance." The examples of functions listed thus depends upon at least the circumstances listed in the FAR itself. This important consideration of interrelated circumstances has at times been lost in the use of this FAR provision to "define" the phrase "functions closely associated with inherently governmental functions."[1] To follow FAR 7.503(d) too closely in implementing Section 321 would perpetuate this fundamental flaw in the current framework.

As we analyzed the history of this issue, the congressional purpose behind the enactment of Section 321, and alternatives to meet the congressional direction in that section, we adopted the decision tree in figure 1 to help address these issues.

[1] 10 USC §2383 is the only statute that seeks to define the term "closely associated with inherently governmental functions." Other statutes simply cross-reference to 10 USC §2383. It is inappropriate to enshrine in a statute, e.g. 10 USC §2383, a definition that can be significantly modified unilaterally through regulations, although we recognize that there are numerous examples, even the federal procurement context, where this approach has been used.

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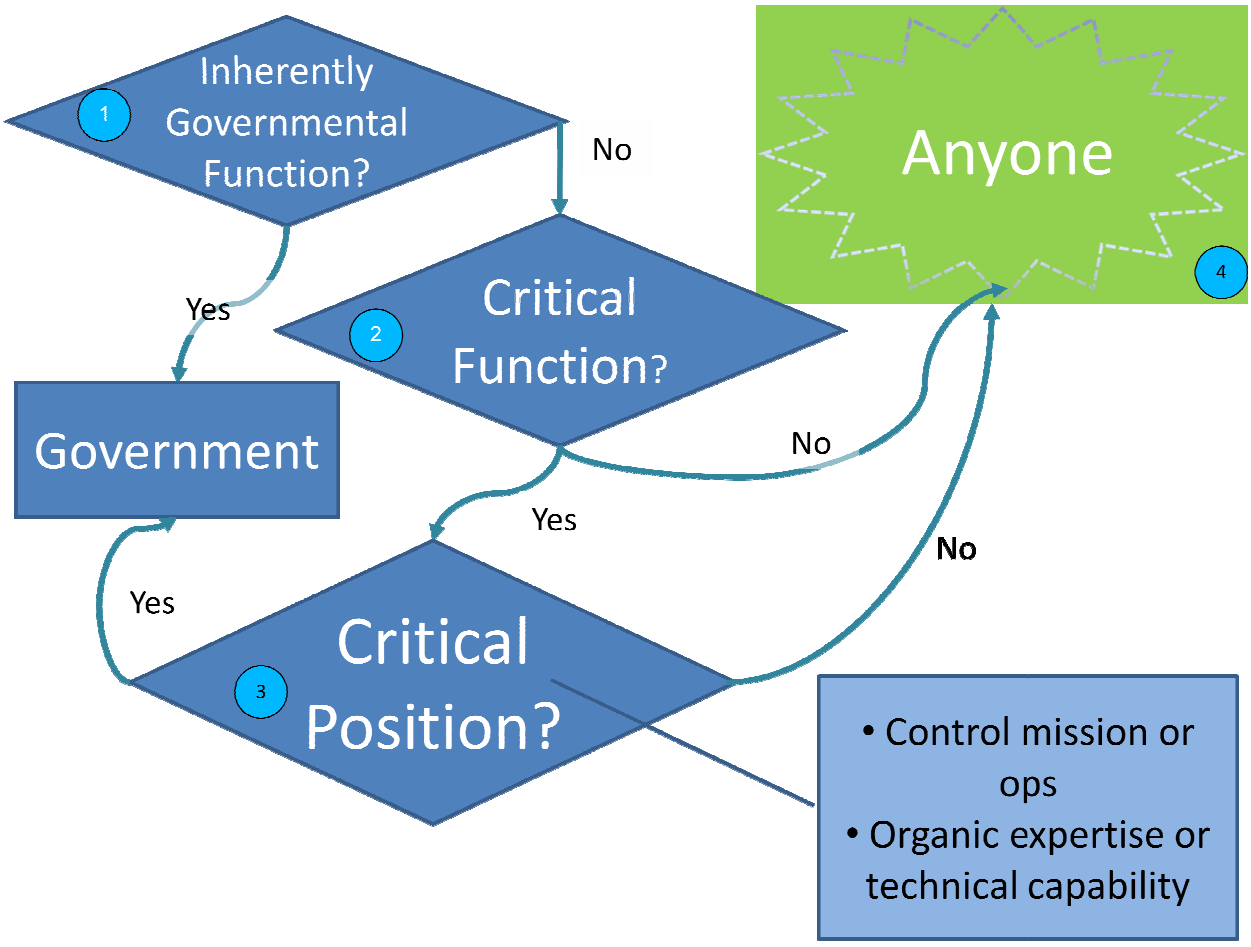

Figure 1

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We tried to carefully distinguish between a function – an activity that an employee performs – and the position that the employee holds. A position can perform and be responsible for many functions. Likewise many positions may perform the same function. The threshold issue is whether an activity is so "intimately related to the public interest" that a public employee must perform it, and thus it becomes an "inherently governmental" function. Inherently governmental functions will be the uniformly applicable no matter the agency, i.e. an inherently governmental function at one agency will be an inherently governmental function at every other agency. Thus, in every agency, all "inherently governmental" functions will be performed by government[2] employees.

Critical functions, in contrast, are those that are so important to the agency's missions or its operations that the function must be controlled by government employees. Furthermore, what constitutes a "critical function" may vary from agency to agency depending on each agency and its missions. Moreover, not every critical function must be performed exclusively by government employees as long as the agency maintains control of functions by having government employees fill supervisory positions that can control the function, i.e., critical positions.

We also agree that there are positions that need to have sufficient government employees to learn and gain experience to fill vacated positions exercising inherently governmental functions and vacated critical positions. We do not envision this requiring that all persons needed to fill positions exercising inherently governmental functions or critical positions be government employees. In fact, only using government employees to fill all of these positions would be unwise as it discourages bringing new ideas and perspectives to governmental service. But it would likewise be unwise to rely solely on the private sector to fill all such positions.
Each agency will face different circumstances and decisions when seeking to get the remaining work done, and these circumstances will also change over time. In the vast majority of cases, the work will involve neither inherently governmental functions nor critical positions. We believe that perhaps the best guidance that can be presented for purposes of determining who should do this remaining work is to offer a list of factors that may be pertinent to the workforce decision. We do not believe any factor in the following list (with a few possible exceptions such as the type of funding) will always require either government employees or contractor employees to fill the position in question. We also do not believe this list to be all inclusive.

We offer the following factors (in *no* order of priority) as a beginning point for consideration:

- Congressional personnel ceilings
- The types of available funding
- Duration of services

[2] We use government rather than agency employee here because, in some instances, one agency may choose to use federal employees of another agency to perform these inherently governmental functions. One example is when a contracting officer employed by the General Services Administration awards a contract or a task order funded by another agency for supplies or services needed by the requesting agency.

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- Available qualified, government employees
- Ability to timely hire qualified government employees
- Management flexibility
- Costs
- Operational requirements
- Ability to control quality
- Need for innovation/change
- Higher quality
- Public perceptions
- Statutes or treaty obligations
- Existing sources of the services
- BRAC impacts
- Budget stability
- Agency business models - large contractor work force versus small contractor work force
- Past practices
- Mission imperatives
- Statutory or other deadlines for implementation

As GAO observed in1991,[3] concerns about contractors performing inherently governmental functions is not new. The current framework does not mention the key to these debates - does the government through its elected and appointed officials and through its employees maintain control of governmental missions and operations. The addition of critical functions and position analysis with total manpower planning will improve each agency's ability to ensure it controls its missions and operation. These new tools are a vast improvement over mandates to increase or decrease government employees to address such concerns. Nonetheless, no one should assume that this or any other approach will be the proverbial panacea that will forever put to rest these debates because the problems are complex, interrelated and change with time, technology and our collective views on what government and the private sector do best.

Aerospace Industries Association
American Council of Engineering Companies
Associated General Contractors
National Defense Industrial Association
Professional Services Council
TechAmerica
U.S. Chamber of Commerce

[3] Government Contractors: Are Service Contractors Performing Inherently Governmental Functions, GAO/GGD-92-11 (November 1991) page 2.

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New Definitions of Inherently Governmental Function, Critical Functions and Critical Positions

A. **Inherently Governmental Functions**. "Inherently governmental function" means a function that is so intimately related to the public interest as to mandate performance by Government employees. A function is a task or action that an individual performs. An inherently governmental function includes functions that require either the exercise of significant[4] discretion in applying Government authority, or making decisions for the Government that require significant value judgments. Inherently governmental functions normally fall into two categories: the act of governing, *i.e.,* the substantial discretionary exercise of Government authority or of significant monetary transactions and entitlements.

(1) An inherently governmental function involves, among other things, the interpretation and execution of the laws of the United States so as to—

(i) Bind the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise through the exercise of significant judgment;

(ii) Determine, protect, and advance United States economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(iii) Significantly affect the life, liberty, or property of private persons;

(iv) Commission, appoint, direct, or control officers or employees of the United States performing inherently governmental functions or in critical positions; or

(v) Exert ultimate control over the acquisition, use, or disposition of the property, real or personal, tangible or intangible, of the United States, including the collection, control, or disbursement of Federal funds.

(2) Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to Government officials or project specific services (such as technical planning, analysis and development of documentation and strategies required for decision making by Government officials, design, or construction). They also do not include functions that are primarily ministerial and internal in nature.

(3) The following examples of inherently governmental functions are not all inclusive:

(i) Directing the conduct of criminal investigations for the government.

(ii) Controlling prosecutions by the government and issuing decisions on behalf of the US government.

(iii) Commanding any military personnel of the United States, especially the leadership of military personnel who are members of the combat, combat support, or combat service support role.

(iv) Conducting foreign relations and the determination of foreign policy.

[4] A-76 uses "substantial" while the FAR uses "significant" when it mentions discretion. The FAIR Act does not use any phrase to modify the term "discretion."

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(v) Determining agency policy through determining the content and application of regulations, statements of policy binding on persons employed by the agency or otherwise, or directing agency action when no policy applies, among other things.

(vi) Determining Federal program priorities for budget requests.

(vii) Directing or controlling of Federal employees who are in critical positions as determined under guidelines issued by the Office of Management and Budget[5].

(viii) Directing or controlling intelligence and counter-intelligence operations.

(ix) Selecting or rejecting individuals for Federal Government employment, when the decision involves discretionary exercise of hiring authority.

(4) The approval of position descriptions and performance standards for Federal employees performing inherently governmental functions or in critical positions.

(5) Determining what Government property is to be disposed of and on what terms when that determination involves the discretionary exercise of disposal or sale authority.

(6) In Federal procurement activities with respect to prime contracts—

(i) Determining what supplies or services the Government will acquire if doing so involves discretionary exercise of authority to set government requirements;

(ii) Participating as a voting member on any source selection boards;

(iii) Providing final approval to any contractual documents, to include documents defining requirements, incentive plans, and evaluation criteria that will bind the Government;

(iv) Making contract award decisions and signing contractual documents committing the Government;

(v) Administering contracts (including decision making and signing contractual documents, ordering changes in contract performance or contract quantities, taking action based on evaluations of contractor performance, and accepting or rejecting contractor products or services) when the administration involves the discretionary exercise of contractual authority;

(vi) Terminating contracts; and

(vii) Determining finally whether contract costs are reasonable, allocable, and allowable; and

(viii) Participating as a voting member on performance evaluation boards.

(6) Approving agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.

(7) Conducting administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in Government programs except as to alternative dispute resolution procedures.

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[5] If federal employees can occupy positions that do not perform inherently governmental functions or are not critical, those employees, aka commercial employees, can be overseen by a private employee, commercial employee because they are performing commercial work. This assumes the directing and control is not so detailed as to become personal services.

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(8) Approving Federal licensing actions and inspections when the approval involves the discretionary application of licensing criteria.

(9) Determining budget policy, guidance, and strategy.

(10) Collecting, controlling, and disbursing of fees, royalties, duties, fines, taxes, and other public funds that require the discretionary application of criteria to these activities or that are not controlled by defined processes and procedures to minimize risk of misuse, unless authorized by statute, such as 31 U.S.C. 952 (relating to private collection contractors) and 31 U.S.C. 3718 (relating to private attorney collection services). Examples of defining processes and procedures that have adequate controls include but are not limited to —

(i) Collection of fees, fines, penalties, costs, or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or during other monetary exchanges, where the amount to be collected is easily calculated or predetermined and the funds collected can be easily controlled using standard cash management techniques; and

(ii) Routine voucher and invoice examination.

(11) Controlling treasury accounts.

(12) Administration of public trusts.

(13) Approving agency Congressional testimony, responses to Congressional correspondence, or responses to audit reports from the Inspector General, the Government Accountability Office, or other Federal audit entity.

B. **Critical Functions and Positions**. Critical functions are not inherently governmental functions but are so important to ensuring an agency achieves its missions or operates in accordance with its policy that the function must be controlled by government employees. A critical position[6] is a position, job or billet that oversees a critical function, but not necessarily in a direct supervisory role. Each agency using reasonable judgment determines what positions are critical to it based on its missions; how it operates, e.g., extensive organic staff vs. extensive use of service or other contractors overseen by the agency; and any pertinent laws or regulations. To effectively control a critical function, the person filling the critical control position must either have the requisite subject matter expertise to rigorously evaluate the work of those performing the pertinent critical function, or government staff, or contractor staff acting independently from those contractors performing the work that can supply requisite expertise. Having organic government staff is the preferred approach. Contractor employees can perform critical functions but not fill critical positions.

(1) Critical functions are often tasks that require exercising judgment and discretion to provide advice that those performing an inherently governmental function will consider in performing that function. For example, a critical position may be a subject matter expert who either oversees or evaluates the work product of a contractor providing advice or studies that

[6] OMB Circular A-76 uses the term "activity", without definition, to mean a function that a person performs, e.g. an inherently governmental activity, and a collection of positions that are a logical grouping for purposes of competing for performance by a contractor or government employees.

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the agency may rely upon in performing its mission, altering it operations, formulating regulations or providing agency positions to other agencies or other branches of government.

(2) Critical positions oversee contractors who:

(i) are working where a reasonable person might assume that they are agency employees or representatives, or:

(ii) interpret agency policies,

(3) A function is critical if the function involves more than ministerial services or more than the compilation of objective facts or data, *and* the work product could also significantly influence:

(i) budgets;

(ii) agency missions, operations or potential reorganization;

(iii) requirements definition, planning, evaluation, award or management of agency contracts;

(iv) evaluating, mediating or otherwise facilitating arbitration or alternative dispute resolution; or

(v) legal advice to other than the agency office of legal counsel.

(4) A function may also be considered critical if:

(i) those performing the function have access to health information, personally identity information, confidential business information or to other sensitive information submitted to the government, or;

(ii) the performance of the function exposes individuals to immediate physical harm if performed improperly, e.g., armed security activities, prisoner detention, or supporting interrogations.

C. **Organic expertise and technical capability**. In accordance with total workforce plans, positions should also be identified to ensure the agency has adequate in-house expertise and capability to fill positions exercising inherently governmental functions and critical positions. Consideration of directly hiring personnel to fill inherently governmental functions and critical positions should balance the benefit of varied technical experience against internal agency experience.

A Better Framework for the Sourcing Decision

- Current doctrine and force structure require contractors to perform vital roles for all US government programs
- Gen. Petraeus has recently, and repeatedly, testified contractors are necessary for US to succeed in Iraq and Afghanistan
- This and past Congresses believe agencies used contractors inappropriately

Let’s consider all services

All services = uniforms

+ agency civilian employees

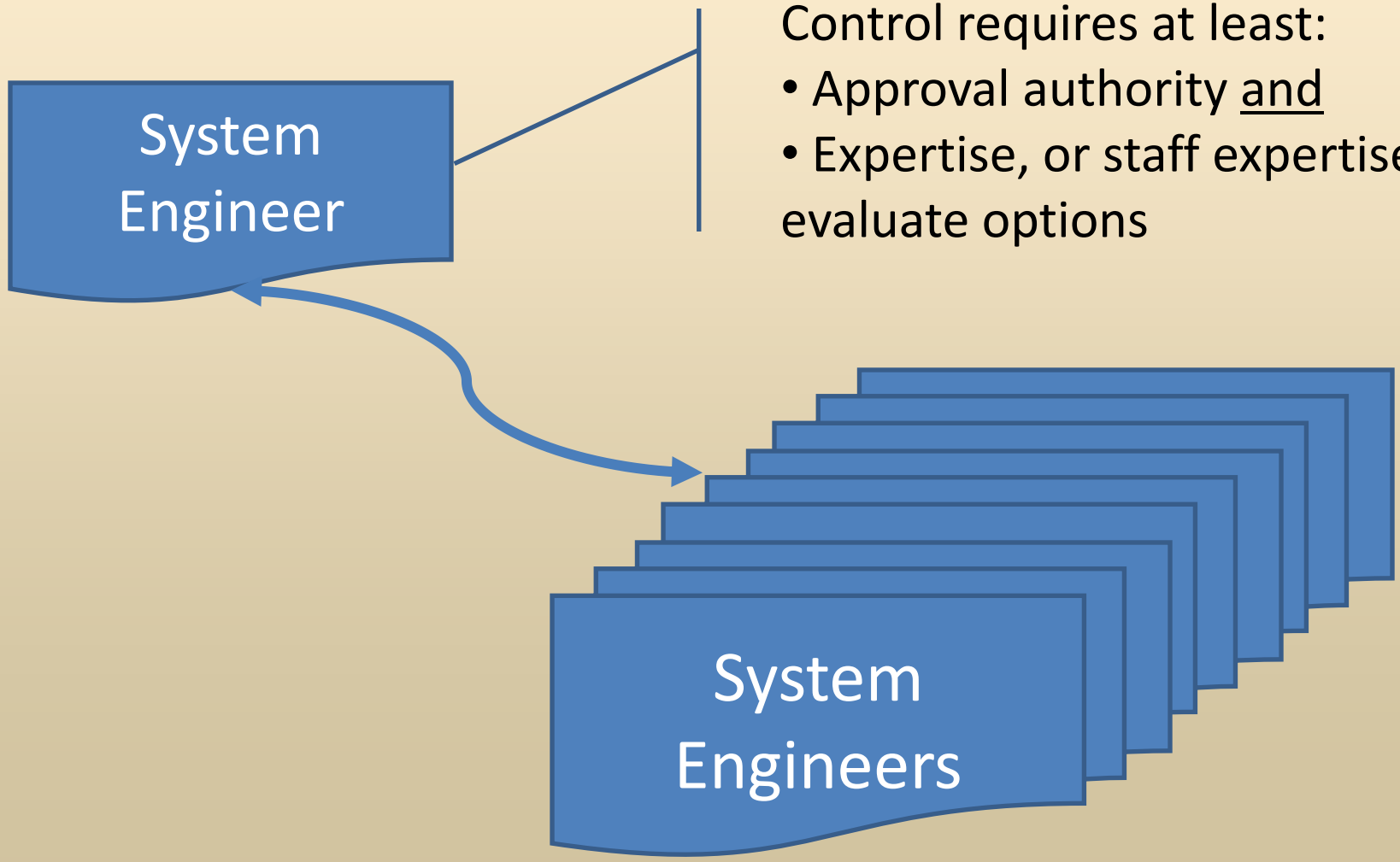
+ other agencies’ employees

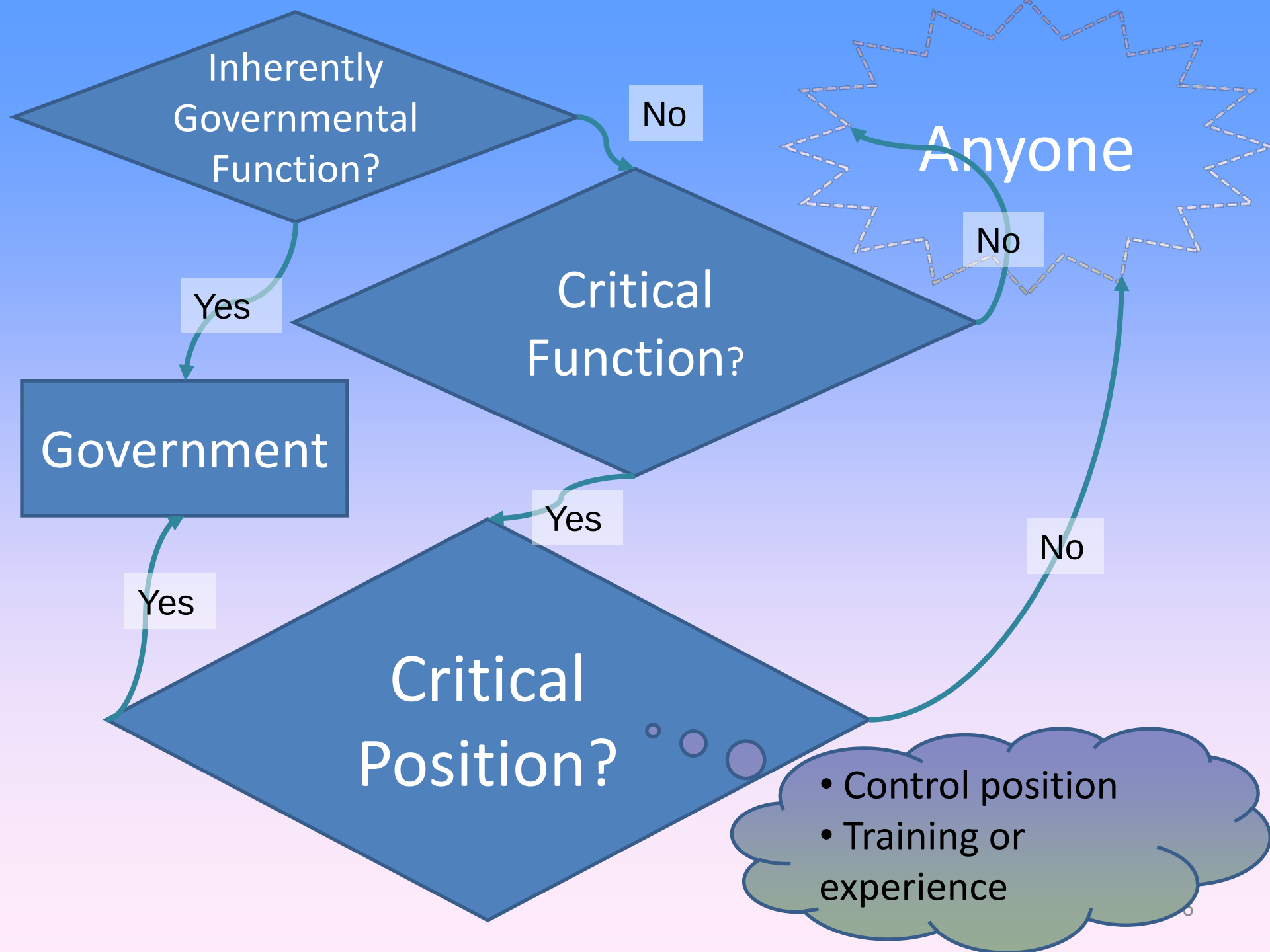
+ contractors

Fundamental Goals

- Each agency must control:
  - How it pursues its mission
  - How it operates
  - Development of resources to do both

All Positions Performing Critical Functions Need Not Be Filled by Govt to Maintain Control




Inherently Governmental Function?
No
Anyone
No
Yes
Critical Function?
Government
Yes
Yes
No
Critical Position?
• Control position
• Training or experience

Remember

Just because a function, position or activity is not inherently governmental does **not** mean the private sector should do it or even compete to do it.

The complexity involved in the decision to hire or contract is hard to overstate for positions that do not perform inherently governmental functions or are not critical positions.

Maximizing the Use of Competition

- 67% of Dollars Competed in FY 2008
  - Civilian: 75%
  - DoD: 64%
- CICA, as implemented in FAR Part 6, requires the use of competitive procedures in all but specifically listed circumstances
- Sole source contract can only be awarded if certain conditions are met

Maximizing the Use of Competition

- Current Laws and Regulations Provide Adequate Coverage of the Use of Competition
- Following and Utilization of the Current Regulatory Requirements is Needed

Maximizing the Use of Competition

- There Can be Advantages to Single Award Contracting, which should not be Oversimplified
  - –Increased flexibility and responsiveness for Government customers
  - –Improved synergy across integrally related tasks
  - –Urgent and Compelling: Saves time, money, and lives

Maximizing the Use of Competition

- The use of competition should be maximized, but competition just for the sake of competition will not ensure successful outcomes

A Federal Workforce To Develop, Manage & Oversee Acquisitions Adequately

- Industry concurs with previous Government assessments of the workforce that concluded shortcomings in numbers, skills and experience in the Federal acquisition workforce are significant problems
- Also concur with focus on development, management and oversight – must address the full spectrum of functions in the acquisition arena

Challenges

- Problem only grows with the retirement of the "baby boomers" – with an interruption by economic conditions – should not lull efforts
- Efforts to recruit, hire, educate, train and retain personnel remain insufficient to meet needs
- Hiring practices inhibit the ability to bring applicants onboard in a timely fashion
- Personnel policies must be updated to reflect the work habits of newer generations
- Congress and the Administration must provide adequately funds to address these issues

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National Employment Law Project

Testimony of Tsedeye Gebreselassie
Staff Attorney
National Employment Law Project

Public Meeting on the Presidential Memorandum on Government Contracting
Office of Management and Budget
June 18, 2009

Members of the Office of Management and Budget, thank you for this opportunity to testify on reforming the federal contracting process.

My organization, the National Employment Law Project (NELP), is a non-profit policy and advocacy center that works with national and grassroots partners across the country on new policies for creating good jobs.

President Obama's directive to modernize the federal acquisition system to improve accountability and results is badly needed. It also represents an important opportunity to address another national priority: rebuilding America's middle class by creating more good jobs across our economy.

NELP has just completed a comprehensive report on the experiences of state and local governments over the last fifteen years with contracting reforms seeking to create good jobs and deliver better quality services. Often referred to as "responsible contracting" policies, the experiences of states and cities with these reforms demonstrate that promoting purchasing from responsible employers that create good jobs is a "win-win" for workers and taxpayers alike. States and cities have generally found that promoting purchasing from employers that invest in their workforces with living wages and benefits, and that comply with workplace, tax and other laws, delivers higher quality, more reliable services, and minimizes the hidden costs to taxpayers that result when employers pay low wages.

The experiences of states and cities with these reforms have been overwhelmingly successful and provide a roadmap for reforming the federal contracting process. Moreover, translating such reform to the federal level requires no new legislative authority since the federal

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procurement laws already instruct the government to purchase from responsible vendors that offer the best value for the government.

I will briefly outline some of the key findings that have emerged from the state and city experiences with responsible contracting reforms. They highlight the advantages that this approach offers not just for working families but for the taxpayers and the government as well.

1. Responsible Contracting Factors in the Hidden Public Costs of Low-Wages and Benefits

First, states and cities have found that evaluating bidders' proposals based simply on bid price without factoring in wages and benefits skews the evaluation and selection process. This is because contractors that pay low wages and do not provide quality, affordable health benefits to their workers generate substantial indirect costs to the government as their employees are forced to rely on taxpayer-funded safety net programs for support. As Maryland Delegate Tom Hucker, the sponsor of Maryland's Living Wage Law explains in our forthcoming report, "Before the passage of the living wage law, we effectively had a policy of subsidizing low road employers. This distorted the state's contracting and budgeting processes."

There is a growing body of research quantifying the indirect costs of such low-wage work. The costs are chiefly generated by Earned Income Tax Credit payments, health benefits under Medicaid, and other benefits and income supports that the government provides to workers whose employers pay them low wages and provide limited benefits. In California, for example, the University of California found that $10.1 billion that federal and state taxpayers spent in 2002 on public assistance programs went to families of low-wage workers but that this cost would have been slashed to $3.2 billion if the employers had paid a living wage and provided quality, affordable health benefits. Other studies have calculated the corresponding figures for other states.

To ensure a more accurate assessment process, states and cities have adopted reforms that factor into the evaluation process the wages and benefits that contractors provide. One state (Maryland) and more than 140 municipalities have done this by adopting living wage policies. Other states and cities have adopted policies that factor in the type, quality and affordability of contractors' health benefits into the bid evaluation process. While the specific approaches vary, the key innovation here is making wages and benefits a consideration in the contracting process.

2. Responsible Contracting Enhances Competition

A second important lesson from the states and cities is that responsible contracting reforms that factor into the selection process contractors' wages, benefits, and records of complying with workplace, tax and other laws can actually enhance competition by leading more vendors to submit bids for government contracts.

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For example, Maryland found that the average number of bidders for state contracts increased from 3.7 bidders to 4.7 bidders after it adopted its living wage policy. Where employment practices are not made part of the evaluation process and bids are assessed chiefly based on low price, responsible employers are often unwilling to go to the expense of submitting bids, knowing that they will be at an inherent disadvantage on account of their higher labor costs. Almost half of the vendors interviewed by Maryland's Department of Legislative Services said that the living wage law encouraged them to bid on state contracts because it leveled the playing field with regard to labor costs. Several vendors reported that in the future, they would only bid on living wage contracts because of "the leveling effect it has on competition."

Many of the procurement officials that NELP has spoken to at the state and local level report similar experiences with their responsible contracting policies. As Carol Isen, Director of Labor Relations for the San Francisco Public Utilities Commission explained, "In order to encourage bidders possessing the requisite experience to spend the resources necessary to prepare bids for a large public workers construction project, it is paramount to eliminate the prospect of low bids from contractors whose qualifications to perform the work have not been examined by the owner."

3. Responsible Contracting Provide Higher Quality Services

A third key lesson from state and local experiences with responsible contracting reforms is that vendors that provide good wages and benefits and that respect workplace laws deliver better results for government agencies and the taxpayers by providing higher quality and more reliable services.

For example, studies of living wage policies have found that when government agencies shift from low-wage contractors to those that provide living wages and quality benefits, the results include reduced turnover and improvements in service quality. In a leading case study, the San Francisco Airport saw annual turnover for security screeners plummet from 94.7 percent to 18.7 percent when their hourly wage rose from $6.45 an hour to $10 an hour under a living wage policy. In addition, 35 percent of employers reported improvements in work performance, 47 percent reported better employee morale, and 45 percent reported improvements in customer service.

The benefits of this reduced workforce turnover can be substantial. Recruitment and training costs for replacing employees are significant, typically estimated at 25 percent of the annual salary costs for a position each time it must be filled. In the San Francisco Airport study, the reduced turnover saved employers about $4,275 per employee in turnover costs.

Improved screening out of contractors with records of significant workplace law violations has also been found to be a key strategy for improving the quality of contracted services. As early as the 1980's, an audit by the Department of Housing and Urban Development of HUD sites found a "direct correlation between labor law violations and poor quality construction" on seventeen HUD projects, and noted further that poor quality work would lead to excessive

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maintenance costs. More recently, a survey of New York City construction contractors by New York's Fiscal Policy Institute found that contractors with workplace law violations were more than five times as likely to have a low performance rating than contractors with no workplace law violations.

In response, over the past decade, increasing numbers of states have adopted responsible contracting reforms that include enhanced review to screen out contractors with records of significant violations of workplace, tax and other laws. The best systems use model questionnaires and publicly announced weighting formulas, developed with input from all relevant stakeholders, to put prospective bidders on notice of the process and provide a fair means of evaluating individual firms' information. To date, states including California, Illinois, Ohio, Massachusetts and Connecticut have adopted versions of these model reforms.

* * *

These state and local experiences highlight how responsible contracting reforms offer important advantages for government and working families alike. By modernizing the contractor selection process to take into account workplace practices such as wages, benefits and compliance with workplace laws, the government can improve competition, reduce the indirect public costs of low-wage work, and deliver higher quality services for federal agencies and the taxpayers.

Thank you for your time and attention. We would be delighted to work with OMB and the federal government going forward on specific approaches for incorporating these reforms into the federal acquisition system.

Tsedeye Gebreselassie
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(212) 285-3025

Attachment:

Paul K. Sonn and Tsedeye Gebreselassie, *The Road to Responsible Contracting: Lessons from States and Cities for Ensuring that Federal Contracting Delivers Good Jobs and Quality Services* (New York, NY: National Employment Law Project, June 2009).

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NELP
National Employment Law Project

THE ROAD TO RESPONSIBLE CONTRACTING

Lessons from States and Cities for Ensuring That Federal Contracting Delivers Good Jobs and Quality Services

By Paul K. Sonn and Tsedeye Gebreselassie

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About NELP

For forty years, the National Employment Law Project (NELP) has worked to restore the promise of economic opportunity for working families across America. In partnership with grassroots and national allies, NELP promotes policies to create good jobs, enforce hard-won workplace rights, and help unemployed workers regain their economic footing.

To learn more about NELP, please visit our website at www.nelp.org.

About the Authors

Paul K. Sonn is legal co-director of NELP. Previously, Paul co-directed the Economic Justice Project at New York University's Brennan Center for Justice, which merged with NELP in 2008. For fifteen years, he has worked on policies for promoting good jobs. He is a graduate of Yale Law School.

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Acknowledgements

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The Road to Responsible Contracting:

Lessons from States and Cities for Ensuring That Federal Contracting Delivers Good Jobs and Quality Services

By Paul K. Sonn and Tsedeye Gebreselassie

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Executive Summary

Contracting by federal government agencies to purchase goods and services totals more than $500 billion annually and finances millions of jobs across our economy. Following years of concern about unaccountable federal contractors wasting taxpayer dollars, President Barack Obama has launched a badly needed initiative to modernize the federal procurement system. But as the federal government works to improve oversight and performance by federal contractors, an equally pressing problem needs attention as well: the fact that federal contracting is financing millions of poverty wage jobs across our economy, and supporting employers that are significant or repeat violators of workplace, tax and other laws.

These employment practices—in addition to hurting families and communities—undermine the quality of services that government agencies receive, and impose substantial costs on the taxpayers as contractors' employees turn to publicly funded safety net programs for support. Despite longstanding requirements that federal agencies contract only with "responsible" vendors, and growing awareness of the consequences of failing to do so, the past administration put the brakes on efforts to address this problem.

The Obama Administration's contracting reform initiative provides an important opportunity to reverse the role that federal procurement is playing in creating bad jobs, and use it instead to address one of the most pressing needs facing the nation: rebuilding a base of middle-class jobs across our economy.

The experiences of cities and states over the past decade with a range of "responsible contracting" policies offer a roadmap for how the administration can ensure that federal contracting promotes the creation of good jobs by prioritizing businesses that engage in responsible employment practices. This report surveys responsible contracting policies developed and tested by states and cities across the country, and recommends the following key reforms in the federal contracting system:

1. Institute **more rigorous responsibility screening** of prospective bidders to ensure that federal contracts are not awarded to employers that are **significant or repeat violators of workplace, tax or other laws.**

2. Establish a **preference for employers that provide good jobs** in the contractor selection process, prioritizing firms that provide **living wages, health benefits and paid sick days.**

3. Quickly bring on-line, expand and improve the newly authorized **national contractor misconduct database** mandated by the 2008 National Defense Authorization Act.

4. **Strengthen monitoring and enforcement** of contractors' compliance with existing and new workplace standards.

By incorporating these approaches into the federal contracting system, the government can ensure that contracting delivers the best value for the taxpayers by rewarding employers that invest in their workforces with quality jobs.

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Background

Federal Contracting Is Creating Millions of Substandard Jobs

Wages Are Low, Benefits Are Minimal and Violations Are Common in Much of the Federally Contracted Workforce

The federally contracted workforce is large and has been growing rapidly. But while federal agency purchasing has become a key source of employment in communities across the country, the federally contracted workforce includes millions of substandard jobs with employers that pay poverty wages, provide meager benefits and violate workplace, tax and other laws.

The scale of federal contracting more than doubled during the Bush Administration, fueled both by the Iraq War and political opposition to growth in the federal workforce. That opposition often led to use of contractors for functions that could more accountably and efficiently be performed by federal employees. The government should therefore reevaluate the scale of past outsourcing and bring back "in house" many functions that today are performed by federal contractors.

By all indications, a substantial and increasing number of jobs with federal contractors are substandard, paying low wages and providing limited benefits.

However, even once a more appropriate balance between federal employment and outsourcing is restored, the federally contracted workforce will undoubtedly remain large. Federal contracting for goods and services today totals more than $500 billion.[1] Because the government does not collect data on federal contract workers, estimates of the number of workers employed by federal contractors vary widely. The Economic Policy Institute (EPI) has conservatively estimated that between 2000 and 2006, the number of federal contract workers increased from 1.4 million to 2 million, representing 43 percent of all employees who do work for the government.[2]

By all indications, a substantial and increasing number of jobs with federal contractors are substandard, paying low wages and providing limited benefits. According to the EPI analysis, nearly 20 percent of all federal contract workers in 2006 earned less than the federal poverty level of $9.91 an hour. And fully 40 percent earned less than a living wage.[3] Moreover, many of these workers do not receive employer-provided health benefits.[4]

Contributing to this problem is the fact that federal contracting in low-wage industries has grown significantly over the past eight years. For example, the Center for American Progress found that spending on federal contracts in four major low-wage industries—utilities and housekeeping, property maintenance and repair, clothing and apparel, and food preparation—nearly doubled between 2000 and 2007.[5]

Similarly, because the federal contracting system does not provide for rigorous responsibility screening of potential contractors, federal agencies continue to award contracts to firms that are significant or repeat violators of workplace, tax and other laws. As documented by the Center for American Progress, during the Bush Administration, firms that had repeated

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violations of labor, employment and tax laws, and that had overbilled taxpayers for their work, were awarded new federal contracts despite long histories of noncompliance.[6]

Federal Contractors Providing Substandard Jobs Impose Significant Public Costs on Taxpayers and Undermine the Quality of Services Received by Government Agencies

Federal contractors providing poverty wages and limited benefits impose significant costs on taxpayers because their employees must rely on public safety net programs to make ends meet. Conversely, studies of government contracting show that employers that pay good wages and comply with workplace, tax and other laws frequently offer quality and reliability advantages over those that do not. But the contract pricing and evaluation process used by federal agencies currently ignores these costs and benefits, thus distorting the selection process.

Recent studies have documented the heavy burden on public safety net programs—and resulting costs for the taxpayers—caused by workers whose employers pay low wages and do not provide health care and other benefits.

Recent studies have documented the heavy burden on public safety net programs—and resulting costs for the taxpayers—caused by workers whose employers pay low wages and do not provide health care and other benefits. These studies measure the direct cost to taxpayers in Earned Income Tax Credit payments, health benefits under the Medicaid program, and other benefits and income supports when workers are paid poverty wages and do not receive employer-provided health benefits.

For example, an analysis by the University of California found that $10.1 billion of the $21.2 billion that federal and state taxpayers spent in 2002 on public assistance programs in California went to families of low-wage workers.[7] The $10.1 billion included $3.6 billion in Medicaid costs and $2.7 billion for the Earned Income Tax Credit. The $10.1 billion cost would have been reduced to $3.2 billion if employees in those families had earned a wage of at least $14.00 an hour and had received employer-provided health benefits.[8] Similar analyses have demonstrated corresponding public costs attributable to low-wage employers in New York, Wisconsin and Illinois.[9]

The bulk of the costs to the taxpayers identified in these analyses are paid by the federal government through the Medicaid program and the federal Earned Income Tax Credit.[10] These hidden public costs to the federal government partially offset the savings that low-wage contractors may appear to offer federal agencies. However, the contract pricing and evaluation systems currently used by federal agencies do not take into account these indirect costs.

Furthermore, a growing body of research demonstrates that in many industries, contractors that provide good wages and benefits and respect workplace laws deliver higher quality services for government agencies and the taxpayers. For example, as discussed in greater detail below, studies of local living wage policies have found that better paid workforces typically enjoy decreased employee turnover (with corresponding savings in re-staffing costs), increased productivity, and improvements in the quality and reliability of the services that they provide.[11] In a leading case study, the San Francisco airport saw annual turnover for security screeners plummet from 94.7 percent to 18.7 percent after it instituted a living wage policy. As a result,

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In a leading case study, the San Francisco airport saw annual turnover for security screeners plummet from 94.7 percent to 18.7 percent after it instituted a living wage policy. As a result, employers saved about $4,275 per employee in turnover costs and reported improvements in employee performance, employee morale, and customer service.

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In construction contracting in particular, research has indicated that high road contractors that comply with workplace laws and provide quality training, wages and benefits typically have better skilled and more productive workforces that increase the quality of public construction work, with resulting savings for the taxpayers. As early as the 1980's, an audit by the U.S. Department of Housing and Urban Development (HUD) of seventeen HUD sites found a "direct correlation between labor law violations and poor quality construction" on HUD projects, and found that the quality defects on these sites contributed to excessive maintenance costs. The HUD Inspector General concluded that "[T]his systematic cheating costs the public treasury hundreds of millions of dollars, reducing workers' earnings, and driving the honest contractor out of business or underground."[13]

More recently, a survey of New York City construction contractors by New York's Fiscal Policy Institute found that contractors with workplace law violations were more than five times as likely to have a low performance rating than contractors with no workplace law violations.[14] Other studies have found that construction workers who receive higher wages and quality training are at least 20 percent more productive than less skilled and lower paid workers.[15] Conversely, a study examining the impact of repealing prevailing wage laws in nine states found that the resulting drop in construction worker wages correlated with significant increases in cost overruns and delays on construction projects, and led to a workforce that was less skilled and less productive.[16]

[A]n audit by the U.S. Department of Housing and Urban Development (HUD) of seventeen HUD sites found a "direct correlation between labor law violations and poor quality construction" on HUD projects, and found that the quality defects on these sites contributed to excessive maintenance costs.

Yet despite the recognized quality advantages and offsetting savings generated by better paid workforces, the federal contracting system does not currently provide any systematic way to factor them in during the contract pricing and evaluation process. As a result, they remain largely ignored, skewing the selection process towards low road contractors.

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The Federal Contracting System Does Not Do Enough to Promote Responsible Contractors That Offer the Best Value for the Government

The Federal Contracting System Is Intended to Promote Purchasing from Responsible Contractors That Offer the Best Value for the Government, But It Does Not Do So in Practice

The federal contracting system currently does little to factor into the contractor selection process the advantages for taxpayers and workers alike of employers that provide good jobs. However, authority to do so already exists under the federal procurement statutes, which in fact are intended to promote purchasing from responsible contractors that offer the best value for the government.

Federal contracting statutes and the Federal Acquisition Regulation (FAR) require that the government do business with "responsible" contractors.[17] Only employers with "a satisfactory record of integrity and business ethics" (among other things)—a standard that should encompass an employer's record of compliance with workplace, tax and other laws—may be deemed "responsible."[18] Contracting agencies have broad authority to take into account a range of other factors in defining responsibility.[19] And for some categories of contracts, federal agencies are already authorized to use "prequalification"—a key responsible contracting approach that, as discussed below, allows agencies to limit competition to a list of approved bidders that have shown they meet certain basic eligibility criteria.[20]

Federal contracting statutes and the Federal Acquisition Regulation (FAR) require that the government do business with "responsible" contractors.

In practice, however, the government does a poor job of ensuring that it does business only with responsible firms. The government has never systematically collected information about prospective contractors' compliance with workplace, tax and other laws. Only very general information about the firms that are awarded government contracts is available to the public and there has been no central government database with federal contractor responsibility information. Moreover, as the U.S. Government Accountability Office (GAO) found in 2005, federal agencies do not even have access to accurate listings of previously debarred or suspended contractors in order to ensure that they do not award new contracts to such firms.[21] As a result, the government continues to award billions of dollars in contracts to firms with histories of fraud, workplace violations and criminal misconduct.[22] A 2009 GAO study reported little improvement, finding that businesses that had been suspended or debarred for "egregious offenses ranging from national security violations to tax fraud [continued to] improperly receiv[e] federal contracts."[23]

The National Defense Authorization Act of 2008, which mandates the creation of a federal contractor responsibility database by late 2009, represents an important first step toward addressing this problem.[24] The new database will require all contractors awarded federal contracts or grants over $500,000 to disclose a wide range of past violations—including criminal convictions and findings of liability, as well as past suspensions, debarments, and non-responsibility determinations.[25]

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However, this new database will need significant improvements in order to provide federal agencies with all of the information they will need to institute more rigorous contractor responsibility review. First, the database should be expanded to include all violations of federal statutes, especially those relating to the workplace, and to include pending litigation and settlements. Second, the database should be made available to the public, so that taxpayers and stakeholders can scrutinize the compliance histories of firms receiving taxpayer funds and submit information about violations that contractors have erroneously failed to disclose. Third, the database should include information on the performance of contractors on federally-assisted state and local contracts, which the authorizing legislation instructs the government to do "to the maximum extent practicable."[26] As the government taskforce that recommended the creation of the database noted in calling for state and local procurement data to be included, contractor fraud, law-breaking and non-responsibility are of equal concern for state and local governments, as "[m]obility permits fraudulent contractors and service providers to move between levels of government and across jurisdictions with little fear of detection."[27]

Beyond more effective responsibility screening, under the federal procurement system contractor selections are supposed to be based on an evaluation of which contractor would offer the "best value" for the government and the taxpayers.[28] Under this approach, agencies are instructed to balance bid price with other relevant cost and non-cost factors including business history, staff reliability and expertise, and cost considerations that may not be reflected in the bid.[29] In fact, a 1994 presidential executive order directs agencies to "place more emphasis on past contractor performance, and promote best value rather than simply low cost in selecting sources for supplies and services." [30]

As part of their best value assessment, agencies may consider quality and reliability factors, such as a bidder's history of complying with workplace laws, or whether it provides wages and benefits sufficient to attract and retain a stable, qualified workforce. And agencies may similarly take into account the indirect and hidden costs that result from low wages when they assess best value.

Some agencies have begun to do this—for example, by including prospective contractors' compliance with workplace and safety standards as evaluation factors[31] or by recognizing that the provision of fringe benefits generally improves staff retention.[32] However, such considerations have not been broadly or systematically included by agencies in the evaluation process. Nor have agencies established systems to facilitate efficient gathering and evaluation of such information by procurement staff. As a result, many agencies' contracting decisions are still made chiefly based on price. And especially in labor intensive, low-wage industries, low price correlates closely with low wages and benefits.

Because the federal contracting process is meant to prioritize purchasing from responsible vendors that offer best value for the government and taxpayers, adopting new safeguards to promote these goals more effectively—especially for contracting in low-wage industries—does not require new statutory authority.

Existing Labor Standards Are Not Enough

While existing federal contracting rules include important labor standards, by themselves they are not enough to ensure that the advantages offered by contractors that provide quality jobs

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are factored into the contractor selection process. The current system should be supplemented with responsible contracting reforms to ensure that high road employers receive priority in the federal contracting process.

The Davis-Bacon Act requires payment of prevailing wages and benefits to employees performing construction-related work on federally funded projects.[33] The Service Contract Act requires the same for federally contracted service workers such as janitors, security guards and cafeteria workers.[34] The purpose of these prevailing wage laws is to ensure that federally financed purchasing does not drive down wages and benefits in the private sector.[35] Accordingly, these laws require contractors on federally funded projects to provide wages and benefits that mirror those paid by other employers in their locality and industry, as determined by U.S. Department of Labor (DOL) wage surveys. As a result, the wages and benefits guaranteed under these prevailing wage laws vary widely. In industries that are largely low-wage and in regions of the country where there is little union presence, the prevailing wage can be barely above the minimum wage—for example, $6.55 an hour for a laborer or carpenter in Orlando, Florida, or $8.96 an hour for a laundry worker in Dallas, Texas.[36]

Reforming DOL's methodology for determining construction industry prevailing wages—which was weakened substantially by the Reagan Administration in the early 1980's—can help ensure more adequate wages on federally funded construction projects.

Reforming DOL's methodology for determining construction industry prevailing wages—which was weakened substantially by the Reagan Administration in the early 1980's—can help ensure more adequate wages on federally funded construction projects. But even with such improvements, the prevailing wage laws are just one tool for promoting responsible employment practices on federally funded projects. Because prevailing wages mirror local industry standards, they will never consistently guarantee living wages and adequate benefits in all regions and occupations. Moreover, they do not address contractors' records of violating workplace, tax and other laws. They should therefore be supplemented with responsible contracting reforms to ensure that federal spending creates good jobs for communities and provides quality services for the taxpayers.

Past Initiatives to Promote Responsible Contracting Were Halted by the Bush Administration

The federal contracting system's failure to promote purchasing from responsible contractors has been recognized for many years. During the Clinton Administration, the Federal Acquisition Regulation Council explored options for more effectively promoting responsible employers in the federal contracting process. Regulations to begin that process by requiring more rigorous responsibility review were published in December 2000.[37] However, the Bush Administration halted those reforms when it took office in 2001, and took no action in the following years to address the problem. This retreat from reform together with the unprecedented growth in federal contracting during the Bush years has exacerbated the extent to which federal spending today supports low road employers that deliver poor value for the taxpayers and substandard jobs for their workforces.

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Lessons from the States and Cities:

Responsible Contracting Reforms Deliver Good Jobs and Quality Services

As the Obama Administration undertakes reform of the federal contracting process to improve accountability and results, the experiences of states and cities with responsible contracting policies offer key lessons. Over the past decade or more, state and local governments have developed a range of new responsible contracting policies to promote public purchasing from employers that create quality jobs, minimize hidden public costs, and deliver more reliable services to the taxpayers. These successful experiences point the way for federal reform.

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This section highlights some of the key responsible contracting strategies that cities and states are finding effective in reorienting their public contracting programs to promote high road employment practices and deliver better services for the taxpayers.

1. Responsibility Standards and Review

The most basic contracting reform that has been instituted by states and cities has been more rigorous responsibility review of prospective contractors to ensure that public contracts are not awarded to employers with records of significant or repeated violations of workplace, tax and other laws. Like the federal system, most state and local public contracting laws instruct government agencies to purchase only from responsible contractors. But until recently, most public bodies did not have systems for ensuring thorough review, nor did they examine in particular potential contractors' records of compliance with workplace, tax and other laws. The cities and states that have adopted more rigorous systems of responsibility review have found that they offer key advantages for the government, workers and contractors alike.

The move towards more rigorous responsibility screening has reflected a growing recognition that employers with poor compliance records are generally bad business risks that provide unreliable services and present hazards for both workers and taxpayers. Illustrative was the picture revealed by an investigation into the construction program of Florida's Miami-Dade County Public School District. Seventy-seven recently built schools in the county were found to have water leaks, and nearly forty had developed mold and mildew. In at least fourteen cases, county engineers determined that shoddy construction was directly at fault.[38] The district also had to pay more than $7.8 million to finish abandoned projects even after contractors had been paid in full.[39] An audit found that a key practice contributing to these results was the district's failure to adequately evaluate contractors before they were retained, giving "more than $228 million in repeat business to at least twenty-one contractors who had delayed jobs, turned in bad work, or failed to finish projects."[40]

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Key State and Local Responsible Contracting Strategies

Strategy	*Description*	*Advantages for the Government and the Taxpayers*	*Advantages for Workers*
Responsibility Standards and Review	Screen out repeat violators of workplace, tax and other laws. Specifically: • Make responsibility review the first step in the bidder evaluation process, where appropriate through a "prequalification" phase • Use a standardized responsibility questionnaire and quantified point system • Publish the names of firms seeking to bid or prequalify, in order to allow the public to report relevant information	Higher quality and more reliable services Increased competition among responsible contractors Reduced project delays and cost overruns Reduced monitoring, compliance and litigation costs Stronger incentives for compliance	Better jobs
Living Wages	Favor contractors that pay living wages	Reduced staff turnover and recruitment costs Higher quality and more reliable services A means of factoring the public costs of low wages into contractor selection	Better wages
Health Benefits	Favor contractors that provide quality, affordable health benefits	Reduced staff turnover and recruitment costs Higher quality and more reliable services A means of factoring the public costs of uninsured workers into contractor selection	Quality, affordable health benefits
Paid Sick Days	Favor contractors that provide paid sick days	Reduced staff turnover and recruitment costs Higher quality and more reliable services Savings from reduced workplace illness	Paid sick days Reduced risk of workplace illness
Proper Employee Classification	Certification by contractors that all workers are properly classified and are covered by workers compensation and unemployment insurance	Leveled playing field for all contractors Improved tax compliance resulting in increased state and federal revenue Savings from reducing the ranks of the uninsured	Workers' compensation and unemployment insurance coverage for injured and unemployed workers

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Similar experiences can be found in jurisdictions across the country. As noted earlier, a past HUD audit found a direct correlation between workplace law violations and poor quality construction. And a survey in New York City found that contractors with workplace law violations were more than five times as likely to have a low performance rating than contractors with clean records of workplace law compliance.[41]

In response to these problems, state and local agencies have adopted more rigorous systems for assessing contractor responsibility and screening out firms with poor compliance records. The key components of these reforms have included:

- Making responsibility review the first step in the bidder evaluation process, not the last, often by establishing a preliminary "prequalification" phase
- Using a model questionnaire and quantified point system for weighing responsibility factors
- Requiring disclosure of firms seeking to bid or prequalify to bid, in order to allow the public to provide information relevant to their record of responsibility

In the past, many public agencies conducted responsibility reviews only as the last step in the contractor selection process after proposals had been submitted and evaluated and a presumptive finalist had been chosen. Conducting the review at the end is widely recognized as discouraging rigorous scrutiny. Often by that point the agency has decided that the finalist firm is the best candidate and accordingly is reluctant to deem it ineligible. Moreover, the finalist firm will frequently have invested substantial resources in preparing its bid, making it more likely to contest or litigate a finding that it is not responsible. These factors and the reality that a finding of non-responsibility at the end of the process can result in substantial delay all serve to discourage rigorous review.

Making the responsibility evaluation the first step in the process, rather than the last, removes these disincentives to thorough screening. The most common approach that states and cities have used to do this has been establishing a preliminary "prequalification" phase through which firms apply for eligibility to bid on contracts with a public agency. During prequalification, firms are evaluated to determine whether they meet the agency's responsibility standards so that they may be placed on its approved bidders list. Typically, the names of firms applying for prequalification are published in order to allow the public the opportunity to provide relevant information for consideration during the prequalification process.

Responsibility review is generally based on a variety of factors—including the company's record of legal compliance, financial stability, experience and references—that are weighed together in order to evaluate the candidate firm. The best responsible contracting systems use model questionnaires and publicly announced weighting formulas, developed with input from all relevant stakeholders, to put prospective bidders on notice of the process and provide a fair means of evaluating individual firms' information.

One of the first states to adopt this type of responsible contracting reform was **California**, which in 1999 began promoting improved responsibility review and prequalification for public works projects contracted by state agencies.[42] The California Department of Industrial Relations (DIR) has developed a model questionnaire that is used by many of the state's agencies. The questionnaire inquires into applicant firms' violations of laws and regulations,

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history of suspensions and debarments, past contract performance, financial history and capitalization.[43] Although questionnaire responses and financial statements submitted by contractors are not open to public inspection, the names of contractors applying for prequalification are public records, allowing the public to supplement the process by providing relevant information that applicants may have failed to volunteer.

In addition to the questionnaire, California agencies electing to use prequalification are instructed to use a uniform and objective system for rating bidders, typically based on a composite numerical score derived from the candidate's answers on the questionnaire and its financial disclosure statements. The DIR provides agencies with a model scoring system, which evaluates potential bidders on a point system and recommends a "passing score."[44] For example, a passing score on a bidder's "compliance with occupational safety and health laws, workers' compensation and other labor legislation" is 38 points, out of a possible maximum score of 53 points. Participation in a state-approved apprenticeship program yields five points, while bidders that do not maintain apprenticeship programs receive zero points. A bidder with four or more Davis-Bacon violations receives zero points, one with three violations receives three points, and one with two or fewer violations receives five points.[45] Thus, the better a bidder's history of workplace law compliance, the better its prequalification score.

Enhanced contractor responsibility review using a quantified point system and prequalification has become an increasingly common best practice in recent years. In 2004, **Massachusetts** adopted a similar system (mandatory for public works projects over $10 million, optional for those between $100,000 and $10 million) that requires firms to achieve a threshold prequalification score before they are eligible to bid on public works projects.[46] Points are allocated based upon an evaluation of the following prequalification criteria: management experience (50 points); references (30 points); and capacity to complete (20 points).[47] Management experience includes consideration of the firm's safety record, past legal proceedings, including compliance with workplace, tax and other laws, past terminations, and compliance with equal employment opportunity goals. To prequalify, contractors must satisfy certain mandatory requirements, and then receive a score of at least half of the available points in each category, and of at least 70 points overall.[48]

Connecticut also adopted improved responsibility review and a prequalification system in 2004 for bidders on public works projects larger than $500,000.[49] It evaluates prospective bidders based on their integrity, work history, experience, financial condition, and record of legal compliance.[50] The **Illinois** Department of Transportation uses a similar system to evaluate prospective bidders' capacity to perform public contracts based on a range of factors that includes past compliance with labor and equal employment opportunity laws.[51] And the **Ohio** School Facilities Commission has adopted model responsibility criteria that local school boards are encouraged to use for school construction contracting. The policy includes required certifications by contractors that they meet certain minimum workplace standards and have not been penalized or debarred for minimum wage or prevailing wage law violations.[52]

The same approach has increasingly been used at the municipal level. The city of **Oregon**, **Ohio**, for example, requires potential bidders to disclose past legal violations or litigation, especially concerning workplace laws, as part of prequalifying to bid on municipal public works projects.[53] **Los Angeles** adopted a comprehensive "responsible contractor policy" in 2000. Like the state policies discussed, it directs city agencies to review potential bidders' history of labor,

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employment, environmental and workplace safety violations,[54] and uses a detailed questionnaire asking bidders to disclose and explain past and pending litigation, past contract suspensions, and outstanding judgments.[55] Full transparency is a key feature of the Los Angeles policy, which makes bidders' responses to the questionnaire subject to public review.[56] This allows the public to assist the agency in its review process by providing relevant information that the applicants may not have volunteered. A catalog of responsible contractor and prequalification laws from across the nation is available from the National Alliance for Fair Contracting.[57]

"[Front end responsibility screening] is more effective and more beneficial to the public than a reactionary system. When you get a bad contractor on the back end, they've already done the damage, and then it's a costly process of kicking them out. On the other hand, if you have a very strong prequalification system that can be vigorously enforced and a uniform system of rating bidders that is published—so everyone knows where they stand before they compete—then you get a level playing field and a pool of good contractors."

—Russell Strazzella, City of Los Angeles

As Russell Strazzella, a chief construction inspector for the Los Angeles Bureau of Contract Administration explained, "[front end responsibility screening] is more effective and more beneficial to the public than a reactionary system. When you get a bad contractor on the back end, they've already done the damage, and then it's a costly process of kicking them out. On the other hand, if you have a very strong prequalification system that can be vigorously enforced and a uniform system of rating bidders that is published—so everyone knows where they stand before they compete—then you get a level playing field and a pool of good contractors."[58]

As a result of these reforms, the combination of improved responsibility screening and prequalification have come to be viewed in the public contracting field as a best practice and a key management strategy. As Daniel McMillan and Erich Luschei wrote recently in the Construction Lawyer, "Public owners in numerous states now view prequalification as a useful, if not essential, element to ensure successful completion of construction projects. Public officials today often point to newly adopted prequalification programs to assure the public that problems encountered on prior projects will not be repeated, including problems of poor workmanship, delays, and cost overruns."[59]

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—Daniel McMillan and Erich Luschei, *The Construction Lawyer*

In fact, many contractors prefer prequalification, and procurement professionals have found that it can improve competition by encouraging more qualified bidders to submit proposals. According to Carol Isen, Director of Labor Relations for the San Francisco Public Utilities Commission's Infrastructure Division, enacting a prequalification requirement for that agency was partly a response to concerns voiced by the construction industry. "In order to encourage bidders possessing the requisite experience to spend the resources necessary to prepare bids for a large public works construction project," she explained, "it is paramount to eliminate the prospect of low bids from contractors whose qualifications to perform the work have not been examined by the owner."[60]

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Recommendation for Federal Reform:

To ensure that the government does not contract with significant or repeat violators of workplace, tax and other key laws, the federal contracting system should **incorporate more rigorous responsibility review at the front end of the selection process and should encourage expanded use of prequalification where appropriate.**

2. Living Wages

Another major focus of local and state responsible contracting policies has been promoting public purchasing from firms that pay their employees a living wage. The recognition driving these policies is that high road employers that pay living wages not only create the types of good jobs that communities need, but also have more stable workforces that deliver better services for the taxpayers and minimize the hidden public costs of low wages. Studies of the effects of local living wage policies have confirmed these results, finding that higher wages have led to decreased employee turnover and increased productivity, improving the quality and reliability of contracted services.[61]

> **"Before the passage of the living wage law, we effectively had a policy of subsidizing low road employers. This distorted the state's contracting and budgeting processes. Now under the living wage system, contract bids and prices more accurately reflect the true price to taxpayers of the services being purchased."**
>
> —Maryland Delegate Tom Hucker

More than **140 cities** and one state, **Maryland**, have adopted living wage laws for their contracting programs over the past fifteen years.[62] They generally mandate a wage floor above the state or federal minimum wage for businesses that receive contracts—and in some cases, economic development subsidies—from state or local governments.

Typically the wage floor is based on the hourly wage that a full-time worker would need to support her family at some multiple of the federal poverty guidelines. Representative of this approach is St. Louis, which defines its living wage as 130 percent of the federal poverty guidelines for a family of three,[63] translating to $14.57 per hour as of 2009.[64]

A central policy goal for cities and states in adopting living wage standards for procurement has been ensuring that taxpayer dollars create better quality jobs for communities. But governments have equally found that living wage benchmarks have improved the contracting process both by reducing the hidden public costs of the procurement system, and by shifting purchasing towards more reliable, high road contractors.

For example, when Maryland became the first state to enact a living wage law for service contractors in 2007, it did so in part to respond to the rising costs for taxpayers of low-wage jobs in the state and the distorting effect those costs were having on the state's procurement system. "Before the passage of the living wage law, we effectively had a policy of subsidizing low road employers. This distorted the state's contracting and budgeting processes," explained Maryland Delegate Tom Hucker, the measure's sponsor. "Now under the living wage system, contract bids and prices more accurately reflect the true price to taxpayers of the services being purchased."[65]

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In addition to reducing the hidden costs of low-wage employment, municipalities have found that shifting their purchasing to living wage contractors has often improved the quality and reliability of contracted services. A substantial body of research demonstrates that higher wages substantially reduce employee turnover, yielding a more stable workforce and reducing new employee recruitment and training costs.

For example, a University of California study using statewide data found that among workers earning less than $11.00 an hour, a $1.00 increase in wages is associated with a 7 percent decrease in turnover.[66] The effect of wage rates on turnover has also been demonstrated by a series of studies of living wage policies. The San Francisco airport found that annual turnover among security screeners plummeted from 94.7 percent to 18.7 percent when their hourly wage rose from $6.45 to $10.00 an hour under a living wage policy.[67] The reduced turnover saved employers about $4,275 per employee per year in restaffing costs—a savings that offset a substantial portion of the higher wages.[68] Similarly, a study of home care workers in San Francisco found that turnover fell by 57 percent following implementation of a living wage policy.[69] And a study of the Los Angeles living wage law found that staff turnover rates at firms affected by the law averaged 17 percent lower than those at firms that were not,[70] and that the decrease in turnover offset 16 percent of the cost of the higher wages.[71]

Research on the effects of living wage policies has also found that they generally improve worker performance, productivity and morale. In a survey of San Francisco airport employers affected by the agency's living wage policy, 35 percent reported improvements in work performance, 47 percent reported better employee morale, 44 percent reported fewer disciplinary issues, and 45 percent reported that customer service had improved.[72] In each case, only a very small percentage reported any worsening of these factors.[73] In Boston, firms affected by the city's living wage policy also reported improved morale and increased work effort among their employees.[74]

Studies of living wage policies have generally shown only a modest impact on costs, if any. In Baltimore—which passed the first living wage ordinance in the country in 1994—researchers compared pre and post-living wage contracts and found that contract costs for the city rose just 1.2 percent, which was lower than the rate of inflation.[75] And a survey of 20 cities that had passed living wage ordinances found that in most municipalities, contract costs increased by less than one-tenth of 1 percent of the overall city operating budget.[76]

Maryland found that the average number of bidders for state service contracts increased once its living wage policy took effect—from an average of 3.7 bidders to 4.7 bidders.

Finally, by increasing the ability of firms that pay their workers more than the minimum wage to compete for public service contracts, living wage laws can increase the competitiveness of the procurement process as a whole. In a 2008 assessment of Maryland's living wage law after its first year in operation, almost half of bidders interviewed reported that the living wage requirement encouraged them to bid on state contracts because it meant that contractors that paid very low wages would not automatically be able to underbid them. Maryland found that the average number of bidders for state service contracts increased once its living wage policy took effect—from an average of 3.7 bidders to 4.7 bidders. As one current contractor explained, "I would rather our employees work with a good wage. If a living wage is not mandated, the bids are a race to the bottom. That's not the relationship that we want to have with our employees. [The living wage] puts all bidders on the same footing."[77]

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Recommendation for Federal Reform:

In order to take into account the quality advantages of contractors that pay living wages and the hidden public costs generated by those that do not, the federal contractor selection process should **establish a preference for employers that pay a living wage.**

3. Health Benefits

City and state responsible contracting reforms have also responded to the impact on their governments of employers that do not provide health benefits. Many have found that contractors that do not provide quality, affordable health benefits to their workforces impose a substantial burden on the public health care system, as their uninsured workers turn to emergency rooms and the Medicaid program for care. To address this problem, growing numbers of cities and states have reformed their contracting systems to ensure that these public costs are taken into account during the contract pricing and award process.

These reforms have taken a variety of approaches. **El Paso**, Texas gives contractors that provide their employees health benefits a preference in the contracting process by making provision of health benefits a positive evaluation factor—along with price, reputation, technical qualifications, and past performance—that is weighed by city agencies in making their contract award decisions. The health benefits that bidders provide are rated on a scale of 0 to 10, and the resulting score then represents 10 percent of the overall best value score for the bid. Price remains the most significant factor accounting for between 40 and 70 percent.

> **"For [El Paso], with our high rate of uninsured, it costs much more money to have people not insured than it does to have people insured. It is a huge drain on our economy and on our tax base. It is important to factor those costs into the contracting process. Where an employer is providing health benefits and saving our health system money, those savings should be weighed when evaluating the bids. Our philosophy is that for these types of things we have to pay a little bit up front or a whole lot at the back end."**
>
> —Suzy Byrd, El Paso City Representative

Former El Paso Mayor Raymond Caballero, who instituted the policy, reports that while the bids that the city receives from contractors that provide health benefits may tend to be a little higher, the net impact on the taxpayer is about the same because of offsetting public health care system savings.[78] As El Paso city representative Suzy Byrd explains, "[F]or [El Paso], with our high rate of uninsured, it costs much more money to have people not insured than it does to have people insured. It is a huge drain on our economy and on our tax base. It is important to factor those costs into the contracting process. Where an employer is providing health benefits and saving our health system money, those savings should be weighed when evaluating the bids. Our philosophy is that for these types of things we have to pay a little bit up front or a whole lot at the back end."[79]

Houston and **San Francisco** have used a related approach for addressing the indirect public costs of contractors' health benefits practices. They require contractors to either provide health benefits to their employees, or pay into a fund to offset the cost of services for uninsured workers. San Francisco's Health Care Accountability Ordinance (HCAO), which has been in effect since 2001, requires city service contractors to either provide health benefits at no

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cost to covered employees or make payments of $2.00 per employee per hour worked to the city Department of Public Health (DPH) in order to partially offset the costs of services for uninsured workers.[80] As of December 2008, the DPH had collected nearly $2.5 million to offset such costs from contractors who did not provide health coverage.[81]

Similarly, under Houston's "Pay or Play" (POP) program, contractors must offer health benefits to covered employees ("play") or contribute $1.00 per hour worked by these employees to offset the costs of providing health care to uninsured Houston residents ("pay"). A contractor that decides to "play" must contribute a minimum of $150 toward the employee's monthly health benefits premium, and the employee cannot be required to pay more than half of the monthly cost.[82] As explained in Houston Mayor Bill White's executive order and the city ordinance establishing the POP program, contractors that did not provide health insurance benefits were increasing the ranks of uninsured Houston residents and contributing to escalating costs facing public health care programs.[83] In response, the POP program aimed to level the playing field for responsible bidders that already provided health benefits to their employees.[84]

Orlando requires bidders seeking construction contracts of $100,000 or more to provide their workers with health benefits or increase hourly wages by 20 percent.[85] According to Orlando's public works director, this policy is especially important at times of high unemployment, when employers may be less likely to provide health benefits because the pool of prospective job seekers is large.[86]

Other states and cities have created incentives for contractors to provide health benefits as part of living wage policies. **Maryland**, for example, under its state living wage law for service contractors, provides a credit towards the required living wage for the prorated hourly value of contractors' health benefits contributions.[87] As the law's sponsor, Maryland State Delegate Tom Hucker explained, "By factoring health care contributions into its living wage requirement, the Maryland law levels the playing field for contractors that provide health benefits and brings the costs of the uninsured into the open during the contracting process."[88]

The Maryland law follows the approach used by many of the more than 140 cities that have enacted municipal living wage laws. These city ordinances typically require contractors that do not provide health benefits to pay their employees an additional hourly wage supplement to help them purchase health insurance. The supplement also ensures that contractors that provide benefits are not placed at a disadvantage.

Finally, other states and cities have gone further and simply mandated that all public contractors provide health benefits to their employees. **New Mexico**, for example, under a 2008 executive order, has instructed state agencies to include in bidding documents a requirement that prospective contractors provide health benefits to their New Mexico employees, and requires contractors to maintain a record of the number of employees who have accepted coverage.[89]

Health benefits requirements have become especially common for public construction contracting—an area where the hidden public costs of contractors that do not provide health benefits are believed to be especially significant. Nearly **two dozen Massachusetts cities and towns** have adopted such health benefits requirements as conditions for prequalifying to bid on city construction projects.[90]

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Recommendation for Federal Reform:

The federal contractor selection process should **establish a preference for employers that provide quality, affordable health benefits.**

4. Paid Sick Days

Local governments have increasingly recognized that employers that provide their employees with paid sick days enjoy more stable and productive workforces. In response, they have begun to adopt new policies to encourage employers to do so—both within the public contracting process and more broadly.

When employers do not provide paid days off when staff members are ill, employees must choose between going to work sick or losing a day of pay—something many low-wage workers cannot afford. Many inevitably go to work sick, spreading illness to others and hurting productivity.

The first local sick days requirements were enacted as part of living wage laws, many of which require businesses performing city contracts to provide their employees a specified minimum number of paid sick days—often together with paid holidays and vacation days.[91] More recently, cities such as San Francisco and Washington, D.C. have gone farther by requiring that most or all employers in those cities provide these protections.[92]

As with other high road employment practices, evidence suggests that providing paid sick days helps employers retain a motivated and skilled workforce and reduces hidden public costs. Analyses have found that the modest costs of paid sick days are more than compensated for by the savings from increased productivity, reduced turnover, and reduced public health costs. For example, a report by the Institute of Women's Policy Research estimating the likely costs and savings from the Health Families Act, a proposed federal paid sick leave law, projected a net savings of at least $8 billion to employers and taxpayers as a result of reduced turnover, higher productivity and cost savings to the public health care system.[93] As Donna Levitt, manager of San Francisco's Office of Labor Standards Enforcement explained, "We found that requiring city contractors to provide paid time off that employees may use when they are sick results in a healthier, more stable and more productive workforce."[94]

Analyses have found that the modest costs of paid sick days are more than compensated for by the savings from increased productivity, reduced turnover, and reduced public health costs.

Recommendation for Federal Reform:

The federal contractor selection process should **establish a preference for employers that provide paid sick days to their employees.**

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5. Proper Employee Classification

A significant workplace abuse that has become a special focus of state and local responsible contracting policies involves employers illegally "misclassifying" their workers as independent contractors—a problem that has become widespread in construction and low-wage industries. While the chief responses to this problem extend far beyond public contracting, protection against misclassification can and should be a part of responsible contracting reform, since misclassification can distort the public contracting process.[95]

Under employment laws, workers in construction and low-wage industries seldom qualify as bona fide "independent contractors"—essentially, a form of entrepreneur who is in business for him or herself. Many employers nonetheless attempt to treat their workers as independent contractors in order to evade payroll, workers' compensation, and unemployment insurance taxes, workplace law obligations, and provision of employer-provided health benefits. According to a 2000 study commissioned by the U.S. Department of Labor, as many as 30 percent of firms illegally misclassify their employees as independent contractors.[96]

In addition to harming workers, independent contractor misclassification costs the government billions each year in lost tax revenue. For example, the Fiscal Policy Institute estimated that independent contractor misclassification in New York State results in an annual loss of $500 million to $1 billion in evaded workers' compensation premiums.[97] In Illinois, estimates are that in 2005, the state lost $53.7 million in unemployment insurance taxes, $149 million to $250 million in income taxes, and $97.9 million in workers' compensation premiums as a result of independent contractor misclassification.[98]

Independent contractor misclassification has serious potential to distort the contracting process, since employers that engage in this misclassification enjoy a substantial—and illegal—cost advantage over law-abiding employers. To respond to this problem, many municipal level responsible contracting laws now require review of contractors' records of worker classification, both during the performance of public contracts and in determining a firm's eligibility to bid for such work. Representative of this approach are ordinances in **Worcester** and **Somerville**, Massachusetts, which require contractors to certify on a weekly basis that they are properly classifying their workers as employees and are complying with all workers, compensation and unemployment tax laws. Contractors that fail to comply face sanctions that include payment of liquidated damages and removal from the project until compliance is secured. Contractors with three or more violations are permanently barred from receiving municipal contracts.[99]

By screening out employers that engage in misclassification, these responsible contracting policies strengthen incentives for complying with the law, minimize the loss of tax revenue as a result of misclassification, and prevent law abiding employers from being unfairly undercut in the bidding process.

Recommendation for Federal Reform:

Improved responsibility review for federal contractors should **require employers to certify that they have not misclassified employees as independent contractors and have paid employment taxes for all of their workers.**

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Conclusion and Recommendations

These experiences of states and cities with a variety of responsible contracting strategies provide a roadmap for how federal procurement should be reformed. States and cities have found that rewarding employers that invest in their workforces with quality jobs not only benefits communities, but can also reduce hidden public costs and deliver more reliable contract services for the taxpayers.

Drawing on these best practices, **the federal government should adopt responsible contracting reforms** as it modernizes the federal contracting system. Specifically, the government should **make serious law-breakers ineligible** for federal contracts and **establish a preference for employers that provide good jobs.** To do this, the government should:

1. Institute **more rigorous responsibility screening** of prospective bidders to ensure that federal contracts are not awarded to employers that are **significant or repeat violators of workplace, tax or other laws.** This enhanced screening should incorporate:
    - **Front end review** of prospective bidders before bids are evaluated—the approach that has been found more reliable than review conducted later in the selection process. Where appropriate, such front end review should take the form of **prequalification,** which states and cities have found to be especially effective and is preferred by many responsible contractors.
    - **Disclosure of names** of companies undergoing responsibility review in order to allow the public the opportunity to provide relevant information about firms' compliance records.
    - Review of prospective bidders' records of **misclassifying employees as independent contractors**—a widespread abuse that hurts workers and constitutes a form of tax evasion.

2. Establish a **preference for employers that provide good jobs** in the contractor selection process. A preference provides a way to factor into contractor selection the benefits these employers afford not just workers, but also the taxpayers through reduced **hidden public costs** and **performance improvements** associated with high road employment practices. Specifically, preference should be given in the contractor selection process to employers that:
    - Pay a **living wage** to their employees.
    - Provide **quality, affordable health benefits** to their employees and their families.
    - Provide **paid sick days** to their employees.

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3. Quickly bring on-line the newly authorized **national contractor misconduct database** mandated by the 2008 National Defense Authorization Act, and continue improving it to make it a more powerful tool for responsible contracting. Specifically, the administration should:

   - **Expand the database** to include **all violations** of federal statutes, especially those relating to the workplace, and to include **pending litigation and settlements**.
   - **Expand the database** to cover contractor misconduct reported by **state and local agencies**, including misconduct on **federally assisted contracts and grants.**
   - **Make the database transparent** by allowing access by the public.

4. **Strengthen monitoring and enforcement** of contractors' compliance with existing and new workplace standards through:

   - **Expanded hiring and training** of contracting officers and staff within the U.S. Department of Labor's Wage and Hour Division and Office of Federal Contract Compliance Programs.
   - **Reporting** of contractor and subcontractor **wages and benefits**.
   - **Targeted enforcement** focusing on industries and regions known for pervasive violations of prevailing wage and other laws.
   - **Improved monitoring** of existing contracts.
   - Greater use of the **suspension and debarment** process to screen out unqualified contractors.

The vast majority of these reforms would require **no new legislation**. They can and should be implemented under the federal procurement system's mandate that agencies purchase from responsible contractors that offer the best value for the government.

By drawing on these best practices that have proven effective in states and cities, the federal government can deliver improved accountability and results for the taxpayers, while promoting the quality jobs that our communities need.

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Endnotes

1 Federal contract spending in fiscal year 2008 totaled nearly $518 billion. *See* http://www.usaspending.gov.

2 Kathryn Edwards and Kai Filion, *Outsourcing Poverty: Federal contracting pushes down wages and benefits* (Washington D.C.: Economic Policy Institute, Feb. 2009), p. 1, available at http://epi.3cdn.net/10d36747ba0e683ef9_hwm6bxwnl.pdf.

3 Analysis by the Economic Policy Institute (on file with the National Employment Law Project). The EPI analysis defines a living wage using the U.S. Department of Labor's Lower Living Standard Income Level (LLSIL) for a family of four.

4 Edwards and Filion, p. 3.

5 David Madland and Michael Paarlberg, *Making Contracting Work for the United States: Government Spending Must Lead to Good Jobs* (Washington D.C.: Center for American Progress, Dec. 2008), p. 4, *available at* http://www.americanprogressaction.org/issues/2008/pdf/contracting_reform.pdf.

6 *Id.*, p. 20.

7 Carol Zabin, Arindrajit Dube and Ken Jacobs, *The Hidden Public Costs of Low-Wage Jobs in California* (Berkeley, CA: University of California Institute for Labor and Employment, Nov. 2004), p. 13, *available at* http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1037&context=ile.

8 *Id.*, p. 32.

9 Annette Bernhardt, Anmol Chaddha and Siobhán McGrath, *When Work Doesn't Pay: The Public Cost of Low-Wage Jobs in New York State* (New York, NY: National Employment Law Project, Dec. 2008), p. 18, *available at* http://www.nelp.org/page/-/EJP/PublicCostReport08.pdf?nocdn=1; Laura Dresser, *When Work Doesn't Pay: The Hidden Costs of Low-Wage Jobs in Wisconsin* (Madison, WI: Center on Wisconsin Strategy, Dec. 2006), *available* at http://www.cows.org/pdf/rp-low-wage-jobs.pdf; Nik Theodore and Marc Doussard, *The Hidden Public Cost of Low-Wage Work in Illinois* (Chicago, IL: Center for Urban Economic Development at the University of Illinois, Sept. 2006), *available at* http://www.uic.edu/cuppa/uicued/Publications/RECENT/HiddenPublicCostMain.pdf.

10 For Medicaid, federal taxpayers pay between 50 and 77 percent of the cost, depending on the state. In the coming years, the federal government's share of Medicaid costs will be even greater, as it has been temporarily increased during the recession to provide budget relief to the states. *See* Henry J. Kaiser Commission, Medicaid's Federal-State Partnership: Alternatives for Improving Financial Integrity (Feb. 2004), *available at* http://www.kff.org/medicaid/upload/Medicaid-s-Federal-State-Partnership-Alternatives-for-Improving-Financial-Integrity.pdf ; Henry J. Kaiser Commission, American Recovery and Reinvestment Act (ARRA): Medicaid and Health Care Provisions (March 2009), *available at* http://www.kff.org/medicaid/upload/7872.pdf.

11 *See infra* p. 14.

12 Michael Reich, Peter Hall, and Ken Jacobs, *Living Wages and Economic Performance: The San Francisco Airport Model* (Berkeley, CA: Institute of Industrial Relations at the University of California, Berkeley, 2003), pp. 10, 58, 60, *available at* http://www.irle.berkeley.edu/research/livingwage/sfo_mar03.pdf.

13 The HUD Inspector General found that "Poor workmanship quality, in our opinion, results from the use of inexperienced or unskilled workers and shortcut construction methods… Poor quality work led to excessive maintenance costs and increased risk of defaults and foreclosures…" U.S. Department of Housing and Urban Development, Office of Inspector General, *Audit Report on Monitoring and Enforcing Labor Standards* (1983) (on file with the National Employment Law Project), *cited in* Dale Belman and Paula Voos, *Prevailing Wage Laws in Construction: The Costs of Repeal to Wisconsin* (Madison, WI: University of Wisconsin, Jan. 1996), p. 5, *available at* http://www.faircontracting.org/NAFCnewsite/prevailingwage/Prevailing%20Wage%20Studies/PrevailingWage%20Laws%20in%20Construction,%20Cost%20of%20Repeal%20to%20Wisconsin.pdf.

14 Moshe Adler, *Prequalification of Contractors: The Importance of Responsible Contracting on Public Works Projects* (New York, NY: Fiscal Policy Institute, May 2003), p. 5, *available at* http://www.columbia.edu/~ma820/prequalification.doc.

15 "The Economic Development Benefits of Prevailing Wage" (New York, NY: Fiscal Policy Institute, May 2006), p. 2 (citing studies), *available at* http://www.faircontracting.org/pdf/FPIbrief_May06.pdf. *See also* Harley Shaiken, *The High Road to a Competitive Economy: A Labor Law Strategy* (Washington D.C.: Center for American Progress, June 2004), pp. 7-8 (surveying earlier research finding that unionization, by decreasing turnover and increasing wages, increases productivity), *available at* http://www.americanprogress.org/kf/unionpaper.pdf.

16 Peter Philips, Garth Mangum, Norm Waitzman, and Anne Yeagle, *Losing Ground: Lessons from the Repeal of Nine "Little Davis-Bacon" Acts* (Salt Lake City, UT: University of Utah Economics Department, Feb. 1995), p. iii, *available at* http://www.faircontracting.org/NAFCnewsite/prevailingwage/new/losingground.pdf. The study also found that injuries increased by 15 percent, wages fell by 22 percent, and construction training fell by 40 percent where state prevailing wage laws were repealed.

17 41 U.S.C. § 403(7); 48 C.F.R. § 9.103.

18 41 U.S.C. § 403(7); 48 C.F.R. § 9.104-1.

19 *Id.*

20 48 C.F.R. § 236.272.

21 U.S. Government Accountability Office, *Federal Procurement: Additional Data Reporting Could Improve the Suspension and Debarment Process*, GAO-05-479 (July 2005), *available at* http://www.gao.gov/new.items/d05479.pdf.

22 Madland and Paarlberg, p. 20.

23 U.S. Government Accountability Office, *Excluded Parties List System: Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds*, GAO-09-174 (Feb. 2009), *available at* http://www.gao.gov/new.items/d09174.pdf.

24 Pub. L. 110-417 § 872, 112 Stat. 4356 (2008); Project on Government Oversight, *Myths about a Federal Contractor Responsibility Database,* Oct. 15, 2008, http://pogoarchives.org/m/co/fcmd/database-myths.pdf.

25 Pub. L. 110-417 § 872(c), 112 Stat. 4356 (2008).

26 Pub. L. 110-417 § 872(c)(7), 112 Stat. 4356 (2008) (providing that the "[t]o the maximum extent practical, [the database should include] information similar to [the information required of federal contractors] in connection with the award or performance of a contract or grant with a State government").

27 National Procurement Taskforce Legislation Committee, *Procurement Fraud: Legislative and Regulatory Reform Proposals* (June 9, 2008), p. 19, *available at* http://pogoarchives.org/m/co/npftflc-white-paper-20080609.pdf.

28 For example, under the competitive negotiated acquisition procurement approach, agencies are instructed that "[t]he objective of source selection is to select the proposal that represents the best value." *See* 48 C.F.R. § 15.302.

29 48 C.F.R. § 15.304; 41 U.S.C. § 253b.

30 Exec. Order No. 12,931, 59 Fed. Reg. 52387 (1994).

31 *See, e.g. Matter of Morgan-Keller, Inc.*, B-298076.2, 2006 WL 2136651 (Comp. Gen. Aug. 1, 2006).

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32 For example, in *Matter of Comprehensive Health Services, Inc.*, B-285048.3, 2001 CPD P 9 (Comp. Gen. Jan. 22, 2001), the Department of Veterans Affairs, seeking bidders to provide employee health services, issued a request for proposal (RFP) where past performance and technical factors combined were worth significantly more than price in the award decision. A protest was filed by an unsuccessful bidder whose price was lower than the successful bidder. The Comptroller General noted that the protestor's bid provided for reduced fringe benefits, which would increase the risk of losing current employees. In denying the protest, the Comptroller General found that the agency's decision to prioritize retention of qualified staff over price was reasonable.

33 40 U.S.C. § 276a.

34 41 U.S.C. § 351(a). A third federal prevailing wage law, the Walsh-Healey Public Contracts Act, provides for payment of prevailing wages to workers employed under federal contracts for the purchase of certain goods. 41 U.S.C. § 35(a). However, since 1963 when the federal court in *Wirtz v. Baldor Electric Co.*, 337 F.2d 518 (D.C. Cir. 1963) established procedural requirements that blocked U.S. Department of Labor wage determinations under Walsh-Healey, the agency has been unable to implement the act, leaving these workers without meaningful prevailing wage protection.

35 As Solicitor of Labor Charles Donahue testified, "There is the possibility also that under the pressure of bid competition an ordinarily fair contractor may reduce the wages of employees in order to improve the chances that his bid will be accepted. This action, of course, would further depress wage rates. When, as at present, a low bid award policy on service contracts is coupled with a policy of no labor standards protection, the trend may well be in certain areas for wage rates to spiral downward." *Service Contract Act of 1965: Hearing on H.R. 10238 Before the Special Subcomm. on Labor of the H. Comm. on Education and Labor*, 89th Cong. 1st Sess. 5 (1965).

36 U.S. Department of Labor Wage Determinations, *available at* http://www.wdol.gov.

37 65 Fed. Reg. 50,256 (2000).

38 Marcos Feldman, *Best Value in Publicly Funded Projects: Contractor Selection in Two County GOB Projects* (Miami, FL: Research Institute on Social and Economic Policy at Florida International University, Aug. 2006), p. 6, *available at* http://risep.artforstruggle.org/wp-content/uploads/2009/04/best_value_in_publicly_funded_projects.pdf, *citing* Debbie Cenziper, *Water Leaks Plague Schools*, Miami Herald, Apr. 13, 2003.

39 *Id., citing* Charles Savage, State Audit Shreds Dade Schools, Miami Herald, June 29, 2002.

40 *Id., quoting* Debbie Cenziper, Water Leaks Plague Schools, Miami Herald, Apr. 13, 2003. *See also* William O. Monroe, *Operational Audit of Capital Construction Activities For Miami-Dade County District School Board, July 1, 2000 through Apr. 30, 2002*, Report No. 03-026 (State of Florida Auditor General, Sept. 2002), *available at* http://www.myflorida.com/audgen/pages/pdf_files/03-026.pdf. The audit recommended that MDCPS "enhance its contractor prequalification procedures to ensure that appropriate consideration is given to past performance of contractors."

41 *See infra* p. 4.

42 Cal. Pub. Cont. Code §20101.

43 California Department of Industrial Relations, *Prequalification of Contractors Seeking to Bid on Public Works Projects: The 1999 State Legislation and the Model Forms Created by the Department of Industrial Relations*, http://www.dir.ca.gov/od_pub/prequal/PubWksPreQualModel.doc.

44 *Id.*

45 This scoring formula applies for bidders with gross revenues less than $50 million. For those with gross revenues above $50 million, a bidder with up to four Davis-Bacon violations may still receive five points.

46 Mass. Gen. Laws ch. 149 § 44D 1/2; 810 Mass. Code Regs. § 9.00 *et seq.*

47 810 Mass. Code Regs. § 9.05(4) (listing prequalification criteria and subfactors); "Massachusetts Application for Prime General Contractor Certificate of Eligibility" (asking prequalification candidates to disclose whether, within the past five years, they have been involved in litigation relating to "a violation of any state or federal law regulating hours of labor, unemployment compensation, minimum wages, prevailing wages, overtime pay, equal pay, child labor or workers' compensation"), http://www.mass.gov/Eoaf/docs/dcam/dlforms/certification/prime_general_contractor_application_1_20_09.doc.

48 *Id.*; 810 Mass. Code Regs. § 9.08(9).

49 Conn. Gen. Stat. Ann. §§ 4a-100(c)(5), (f).

50 *Id.; see also* Conn. Gen. Stat. Ann. §§ 31-57a, 31-57b; "Contractor Prequalification Frequently Asked Questions," http://www.das.state.ct.us/Business_Svs/PreQual/Prequal_FAQ.asp; Interview with Peter Hunter, Prequalification Contracting Analyst for the Connecticut Department of Administrative Services (on file with the National Employment Law Project).

51 Ill Admin. Code tit. 44, § 650.240.

52 Ohio Schools Facilities Commission, Resolution 07-98, Attachment A, *available at* http://www.osfc.state.oh.us/LinkClick.aspx?fileticket=DnuI5vfrOdk%3d&tabid=146.

53 Oregon, Ohio Mun. Code ch. 180, § 180.01, *available at* http://www.oregonohio.org/images/stories/docs/engineering/bestbidcriteriacode.pdf.

54 Los Angeles, Cal., Admin Code ch. 1, div. 10, art. 14, § 10.40 et seq (2000), *available at* http://bca.lacity.org/site/pdf/cro/CRO%20Contractor%20Responsibiliy%20Ordinance.PDF.

55 "Los Angeles Construction Contractor Responsibility Questionnaire," http://bca.lacity.org/site/pdf/cro/CROQ%20Construction.PDF *and* "Los Angeles Services Contractor Responsibility Questionnaire," http://bca.lacity.org/site/pdf/cro/CROQ%20Service.PDF.

56 Los Angeles, Cal., Admin Code ch. 1, div. 10, art. 14, § 10.40(c) (2000), *available at* http://bca.lacity.org/site/pdf/cro/CRO%20Contractor%20Responsibiliy%20Ordinance.PDF

57 *See* http://www.faircontracting.org/pdf/f.php. *See also* Foundation for Fair Contracting of Massachusetts, *Compendium of Cities and Towns in Massachussets with "Responsible Employer" Ordinances* (on file with the National Employment Law Project).

58 Interview with Russell Strazzella, construction inspector for the Los Angeles Bureau of Contract Administration (on file with the National Employment Law Project).

59 Daniel D. McMillan and Erich R. Luschei, *Prequalification of Contractors by State and Local Agencies: Legal Standards and Procedural Traps,* Construction Lawyer (Spring 2007).

60 Interview with Carol Isen, Director of Labor Relations for the San Francisco Public Utilities Commission (on file with the National Employment Law Project).

61 *See infra* p. 14.

62 Local and state living wage laws have often been enacted to supplement existing state prevailing wage laws. Living wage laws sometimes fill in gaps in coverage under prevailing wage laws, or establish a more adequate minimum wage floor in occupations where the prevailing wage is very low. For a list of state prevailing wage laws, see http://www.dol.gov/esa/whd/state/dollar.htm.

63 St. Louis, Mo. Ordinance No. 65597 §3(B), *available at* http://www.mwdbe.org/livingwage/LivWageOrd.pdf;

64 St. Louis Living Wage Adjustment Bulletin, *available at* http://www.mwdbe.org/livingwage/LvgWgAdjustment09.pdf.

65 Interview with Maryland State Delegate Tom Hucker (on file with the National Employment Law Project).

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66 Arindrajit Dube and Michael Reich, *Compensation Practices, Turnover, Training and Productivity among California Businesses*, Unpublished Manuscript (Berkeley, CA: Institute for Industrial Relations at the University of California at Berkeley, June 2004).

67 Reich, Hall and Jacobs,, p. 10.

68 *Id.*, pp. 10, 58.

69 Candace Howes, *Living Wages and the Retention of Homecare Workers in San Francisco*, Industrial Relations, Vol. 44, No. 1 pp. 139-163, Jan. 2005.

70 David Fairris, David Runstein, Carolina Briones and Jessica Goodheart, *Examining the Evidence: The Impact of the Los Angeles Living Wage Ordinance on Workers and Businesses* (Los Angeles, CA: Los Angeles Alliance for a New Economy), p. 106, *available at*: http://www.losangeleslivingwagestudy.org/docs/Examinig_the_Evidence_full.pdf.

71 *Id.*, p. 109.

72 Reich, Hall and Jacobs, p. 60.

73 *Id.*

74 Mark D. Brenner and Stephanie Luce, *Living Wage Laws in Practice: The Bosston, New Haven and Hartford Experiences* (Amherst MA: University of Massachusetts, Political Economy Research Institute, 2005), *available at* http://www.peri.umass.edu/fileadmin/pdf/research_brief/RR8.pdf.

75 Christopher Niedt, Gret Ruiters, Dana Wise and Erica Schoenberger, *The Effects of the Living Wage in Baltimore*, Working Paper No. 119 (Washington D.C.: Economic Policy Institute, Feb. 1999), *available at* http://epi.3cdn.net/63b7cb4cbcf2f33b2d_w9m6bnks7.pdf.

76 Andrew J. Elmore, *Living Wage Laws & Communities: Smarter Economic Development, Lower Than Expected Costs* (New York, NY: Brennan Center for Justice at New York University School of Law, Nov. 2003), *available at* http://nelp.3cdn.net/4fdbdbf70be73ca80f_6tm6b5suw.pdf.

77 Department of Legislative Services, *Impact of the Maryland Living Wage* (Dec. 2008), *available at* http://www.chamberactionnetwork.com/documents/LivingWage.pdf.

78 Interview with former El Paso Mayor Raymond Caballero (on file with the National Employment Law Project). *See also* Jim Yardley, *A City Struggles to Provide Health Care Pledged by U.S*, New York Times, Aug. 7, 2001 (reporting that Mayor Caballero was "pushing to change municipal contracting practices in favor of companies that provide private insurance for their employees"), *available at* http://query.nytimes.com/gst/fullpage.html?res=9C06E0D61E3CF934A3575BC0A9679C8B63&sec=&spon=&pagewanted=all.

79 Interview with El Paso City Representative Suzy Byrd (on file with the National Employment Law Project).

80 San Francisco, Cal. Admin Code ch. 12Q, *available at* http://www.municode.com/content/4201/14131/HTML/ch012q.html. In 2007, San Francisco enacted a related ordinance that effectively broadened this policy beyond city contractors to apply to all larger employers in the city. *See* San Francisco, Cal. Admin Code ch. 14, *available at* http://www.municode.com/content/4201/14131/HTML/ch014.html.

81 Analysis by the City of San Francisco Office of Labor Standards Enforcement (on file with the National Employment Law Project).

82 Houston, Tex. Exec. Order No. 1-7, *available at* http://www.houstontx.gov/aacc/1-7.pdf.

83 *Id.*

84 *Id.* (providing that "contractors who do not provide health insurance benefits for their workforce impose a burden on… individuals and businesses whose health insurance premiums increase because of shifting costs onto those payers."). *See also* Houston Affirmative Action and Contract Compliance Division, Pay or Play Program, Annual Report Fiscal Year 2008 (on file with the National Employment Law Project); Interview with Elena Marks, Director of Health and Environmental Policy for the City of Houston (on file with the National Employment Law Project).

85 Orlando, Fla. Policy and Procedures § 161.3(G)(7)(b) (providing that "[t]he Construction Contractor… shall provide said workers with health benefits. The Contractor may satisfy this health benefits requirement by providing to the workers on this project either 1) health benefits through a bona fide program or 2) by increasing the hourly wage by 20 percent. Evidence of the existence of a bona fide health benefits program, satisfactory to the City, must be submitted to the Public Works Department.") (on file with the National Employment Law Project).

86 Interview with Alan R. Oyler, Public Works Director for the City of Orlando (on file with the National Employment Law Project).

87 Maryland Division of Labor, Licensing and Regulation, Living Wage Frequently Asked Questions, Question 18, http://www.dllr.state.md.us/labor/livingwagefaqs.shtml#1.

88 Interview with Maryland State Delegate Tom Hucker (on file with the National Employment Law Project).

89 N.M. Exec. Order 2007-049, *available at* http://www.generalservices.state.nm.us/spd/eo_2007_049.pdf.

90 Foundation for Fair Contracting of Massachusetts, Compendium of Cities and Towns in Massachussets with "Responsible Employer" Ordinances (on file with the National Employment Law Project). Examples of responsible contractor and prequalification laws from across the nation, some of which include health benefits requirements, have been compiled by the National Alliance for Fair Contracting. *See* http://www.faircontracting.org/pdf/f.php.

91 *See, e.g.* San Diego, Cal. Mun. Code § 22.4220(c) (mandating ten paid sick, vacation, and/or personal leave days, and another ten unpaid leave days for illness or to care for an ill family member), *available at* http://docs.sandiego.gov/municode/MuniCodeChapter02/Ch02Art02Division42.pdf; Oakland, Cal. Mun. Code ch. 2.28.030B (mandating twelve paid sick, vacation, and or personal leave days and another ten unpaid leave days for illness or to care for an ill family member), *available at* http://bpc.iserver.net/codes/oakland/; Nassau County, N.Y tit. 57 § 3(b) (twelve paid days off for sick leave, vacation, and/or personal necessity), *available at* http://www.nassaucountyny.gov/agencies/Comptroller/LivingWage/Amended_Living_Wage_Law.pdf.

92 San Francisco, Cal. Admin. Code ch. 12W (San Francisco Paid Sick Leave Ordinance), *available at* http://www.sfgov.org/site/olse_index.asp?id=49389; Washington, D.C. Accrued Sick and Safe Leave Act, D.C. Code Ann. § 32-131.01 et seq. (Washington D.C. Accrued Sick and Safe Leave Act).

93 Vicky Lovell, *Valuing Good Health: An Estimate of Costs and Savings for the Healthy Families Act*, Publication #B248 (Washington, D.C.: Institute for Women's Policy Research, Apr. 2005), p. 14, *available at* http://www.iwpr.org/pdf/B248.pdf.

94 Interview with Donna Levitt, Manager of San Francisco's Office of Labor Standards Enforcement (on file with the National Employment Law Project).

95 For the full reform agenda for responding to worker misclassification, *see* National Employment Law Project, *Rebuilding a Good Jobs Economy: A Blueprint for Recovery and Reform* (Nov. 2008), pp. 9-10, *available at* http://www.nelp.org/page/-/Federal/NELP_federal_agenda.pdf?nocdn=1; National Employment Law Project, Summary of Independent Contractor Reforms (July 2008), *available at* http://nelp.3cdn.net/ed7571b66f5e2cc263_fom6bn8pp.pdf.

96 Lalith de Silva, *et al*, *Independent Contractors: Prevalence and Implications for Unemployment Insurance Programs*, Prepared for the U.S. Department of Labor Employment and Training Division by Planmatics, Inc. (Feb. 2000), *available at* http://wdr.doleta.gov/owsdrr/00-5/00-5.pdf.

97 Fiscal Policy Institute, *New York State Workers' Compensation: How Big is the Coverage Shortfall?* (New York, NY: Fiscal Policy Institute, Jan. 25, 2007), *available at* http://www.fiscalpolicy.org/publications2007/FPI_WorkersCompShortfall_WithAddendum.pdf.

98 Michael Kelsay, James Sturgeon and Kelly Pinkham, *The Economic Costs of Employee Misclassification in the State of Illinois* (Kansas City, MO: University of Missouri-Kansas City, Dec. 6, 2006), *available at* http://www.faircontracting.org/NAFCnewsite/prevailingwage/pdf/Illinois_Misclassification_Study.pdf.

99 Somerville, Mass. Code of Ordinances ch. 2, § 2-355, *available at* http://www.municode.com/Resources/gateway.asp?pid=11580&sid=21; Worcester, Mass Rev. Ordinances ch. 2, § 35, *available at* http://www.ci.worcester.ma.us/pur/reo.html.

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national partnership for women & families
Because actions speak louder than words.

July 17, 2009

Mr. Jeffrey B. Liebman
Executive Associate Director
Office of Management and Budget

Re: Public Comments on the Government Contracting Memorandum

Dear Mr. Liebman:

Thank you for the opportunity to submit comments regarding the President's Government Contracting Memorandum and efforts by the federal government and the Office of Management and Budget (OMB) to improve federal contracting.

The National Partnership for Women & Families is a national, non-partisan nonprofit advocacy organization committed to promoting equal opportunity for women, access to quality health care for all, and policies that help women and men meet both work and family responsibilities. Founded as the Women's Legal Defense Fund, the National Partnership wrote the original Family and Medical Leave Act and led the coalition that fought for its passage for nine years. The National Partnership is currently the leading national organization in the fight to make sure that all workers have access to paid, job-protected sick days to care for themselves and their families and in the efforts to create paid family and medical leave.

In its effort to improve the oversight and competitiveness of the government contracting system, it is essential that OMB also ensure that the federal government use its contracting authority to create good quality jobs. Quality jobs provide basic labor protections—such as job-protected paid sick days—to workers, and ensure that workers receive paid time off following the birth or adoption of a new child, or to care for their own or a family member's serious health condition. Requiring or incentivizing the provision of paid sick days and paid family and medical leave will improve public health for all of us, make the contract workforce more stable and productive by reducing turnover, improve the economic condition of the federal contract workforce, and set an example for the rest of the private sector.

Paid Sick Days and Paid Family and Medical Leave Improve the Public Health

All workers get sick, or have a family member who needs care; but not all workers have time to get better or to provide the caregiving their families need. Workers without paid sick days or paid family and medical leave face the impossible choice of going to work sick—or

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sending a child to school or daycare sick—or losing a paycheck. In order to protect public health, the federal government should take steps to ensure that the firms that are selected for contracting by the federal government provide their workers with job-protected paid sick days and paid family and medical leave.

Paid Sick Days

The recent H1N1 virus outbreak highlighted the need for job protected paid sick days. We all agreed it was sound advice when officials at the Centers for Disease Control & Prevention warned, "This is a serious event... If you have a fever and you're sick or your children are sick, don't go to work and don't go to school." But nearly half of private-sector workers (48 percent) do not have access to paid, job-protected sick days. [1] Seventy-nine percent of low-income workers—the majority of whom are women—do not have a single paid sick day.[2] For them, staying home when sick means going without pay and perhaps risking their jobs.

The problem is particularly acute for working women, who are disproportionately affected because they are more likely to work part-time (or cobble together full-time hours by working more than one part-time position) than men. Only 16 percent of part-time workers have paid sick days, compared to 60 percent of full-time workers.[3] Women also have primary responsibility for meeting family caregiving needs. Almost half of our nation's working mothers report that they must miss work when a child is sick – but 49 percent of those mothers do not get paid when they miss work to care for a sick child.[4]

In June 2009, Human Impact Partners, a non-profit project of the Tides Center, and the San Francisco Department of Public Health released a health impact assessment commissioned by the National Partnership for Women & Families and funded by the Annie E. Casey Foundation. The health impact assessment found that providing employees with paid sick time will significantly improve the nation's health.[5]

The study found that guaranteed paid sick days would reduce the spread of pandemic and seasonal flu. More than one-third of flu cases are transmitted in schools and workplaces.[6] Staying home when infected could reduce by 15 – 34 percent the proportion of people impacted by pandemic influenza.[7] Without preventive strategies, more than two million people in this country could die in a serious pandemic flu outbreak.[8]

It also found that, if all workers had paid sick days, workers would be less likely to spread food-borne disease in restaurants and there would be fewer outbreaks of gastrointestinal

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[1] Vicky Lovell, Institute for Women's Policy Research, Women and Paid Sick Days: Crucial for Family Well-Being, 2007.
[2] Economic Policy Institute, Minimum Wage Issue Guide, 2007, www.epi.org/content.cfm/issueguides_minwage
[3] Vicky Lovell, Institute for Women's Policy Research, No Time to be Sick, 2004.
[4] Kaiser Family Foundation, "Women, Work and Family Health: A Balancing Act," Issue Brief, April 2003.
[5] Human Impact Partners, "A Health Impact Assessment of the Healthy Families Act," June 2009, http://www.humanimpact.org/PSD/NationalPaidSickDaysHIA_report.pdf
[6] *Id.* at 32.
[7] *Id.* at 35.
[8] *Id.* at 33.

disease in nursing homes.[9] In addition, paid sick days may contribute to less severe illness and a reduced duration of disability due to sickness, because workers with paid sick days are 14 percent more likely to visit a medical practitioner each year,[10] which may translate into fewer severe illnesses and hospitalizations.

Finally, the study found that parents who had paid time off are more than five times more likely to care for their sick children.[11] This indicates that parents who lack paid sick days are having to make terrible choices – such as sending a sick child to school or day care.

Paid Family and Medical Leave

While paid sick days help workers care for short term illnesses, paid family and medical leave allows workers time away from work to recover from longer term illnesses.
Providing paid family and medical leave helps ensure that workers can perform essential caretaking responsibilities for newborns and newly-adopted children. Parents who are financially able to take leave are able to give new babies the critical care they need in the early weeks of life, laying a strong foundation for later development.

Paid family and medical leave helps the fast-growing number of workers who are caring for older family members. Thirty-five percent of workers, both women and men, report they have cared for an older relative in the past year.[12] Roughly half of Americans 65 years of age and older participate in the labor force. Many require time away from work to care for their own health and the health of a family member.[13]

In 2003, experts estimated that 44 million adults in the United States over age 18 provided support to older people and adults with disabilities who live in their communities.[14] They need job supports today, and even more workers will need them in the future, because so many adults are in the workforce and because people are living longer and with more chronic conditions. Half of the labor force will be caregivers within the next five years.[15] The caregiving that these workers perform is essential to public health. Caregiving improves health outcomes for the family members who are the recipients of the caregiving, and it decreases the cost on the health care system.

Given the importance of public health to the federal government and the integral role that paid sick days and paid family and medical leave play in public health, the federal government should make sure that its contracting dollars are spent in a way that improves public health by

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[9] *Id.* at 38.
[10] *Id.* at 28.
[11] *Id.* at 24.
[12] Families and Work Institute, Highlights of the 2002 National Study of the Changing Workforce, 2002.
[13] AARP Public Policy Institute, Update on the Aged 55+ Worker, 2005.
[14] Family Caregiver's Alliance: Caregiving and Retirement: What Happens to Family Caregivers Who Leave the Workforce (2003).
[15] AARP, How Employers Can Support Working Caregivers, July 30, 2007, http://www.aarp.org/states/nd/articles/how_employers_can_support_working_caregivers_1.html (accessed June 9, 2009).

giving a preference to or requiring that contractors give their workers job-protected paid sick days and paid family and medical leave.

Paid Sick Days and Paid Family and Medical Leave Will Improve the Stability and Productivity of the Federal Contracting Workforce

Requiring paid sick days and paid family leave of federal contractors would strengthen the working conditions of the federal contracting workforce and thus increase the value that the federal government receives from the contract. Research confirms what working families and responsible employers already know: when businesses take care of their workers, they are better able to retain them, and when workers have the security of paid time off, they demonstrate increased commitment, productivity and morale, and their employers reap the benefits of lower turnover and training costs.[16] Furthermore, studies show that the costs of losing an employee (advertising for, interviewing and training a replacement) is often greater than the cost of providing short-term leave to retain existing employees. The average cost of turnover is 25 percent of an employee's total annual compensation.[17]

Paid sick days and paid family and medical leave are cost effective for businesses because they prevent workers from coming to work sick. This reduces the spread of infection at work and ensures that workers who are at work are capable of performing their tasks. In this economy, businesses cannot afford "presenteeism," when sick workers come to work rather than stay at home. "Presenteeism" costs our national economy $180 billion annually in lost productivity. For employers, this costs an average of $255 per employee per year and exceeds the cost of absenteeism and medical and disability benefits.[18]

Paid Sick Days and Paid Family and Medical Leave Protect the Economic Stability of Families

Paid sick days and paid family and medical leave will help the federal contract workforce weather the very difficult economic times we are facing. The historic pace at which our economy is shedding jobs is devastating millions of working families—shaking the financial ground beneath their feet. Last month, the unemployment rate rose to 9.4 percent—the highest level since 1983. The unemployment rate for African Americans and Hispanics is even higher.

That means millions of families that once relied on two incomes are struggling to manage on one income, or no income at all. Access to employer-provided health insurance has declined, and family wealth is disappearing at a record pace. In fact, in the 18-month period ending in December 2008, total family wealth decreased by $15 trillion—the fastest decline in any 18-

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[16] Corporate Voices for Working Families, "Innovative Workplace Flexibility Options for Hourly Workers," 2009; Families and Work Institute, "2008 Guide to Bold New Ideas for Making Work Work," 2008.

[17] Employment Policy Foundation 2002. "Employee Turnover – A Critical Human Resource Benchmark." HR Benchmarks (December 3): 1-5 (www.epf.org, accessed January 3, 2005

[18] Ron Goetzal, et al, Health Absence, Disability, and Presenteeism Cost Estimates of Certain Physical and Mental Health Conditions Affecting U.S. Employers, Journal of Occupational and Environmental Medicine, April 2004.

month period since the government began collecting such data. One in nine mortgages is delinquent or in foreclosure, and credit card defaults continue to rise.[19]

When workers are stretched so thin, having to take time off for the flu or strep throat, treatment for a serious medical condition, or to care for a new child can lead to financial disaster for families. One in six workers report that they or a family member have been fired, suspended, punished or threatened with being fired for taking time off due to personal illness or to care for a sick relative, according to a 2008 University of Chicago survey commissioned by the Public Welfare Foundation.[20] Similarly, without some form of wage replacement, the FMLA's promise of job-protected leave is out-of-reach for millions of women and men. In fact, in one survey 78 percent of employees who qualified for FMLA leave and needed to take it did not do so because they could not afford to go without a paycheck.[21] More than one-third of the men and women who use the FMLA (34 percent) receive no pay during leave, and another large segment of the population has a very limited amount of paid leave available.[22]

Thus, by requiring or incentivizing paid sick days and paid family and medical leave, the government will be taking steps to ensure the financial security of the families of workers in the federal contracting workforce.

The Federal Government Should Use its Contracting Dollars in a Manner that Protects the Rights of Workers

Given the significant amount of money spent by the federal government in contracting, policies regarding federal contracting can have a large, beneficial effect on the private workforce. The federal contracting process already includes several policies that support the rights of workers – the requirement to pay prevailing wages and benefits, requirements regarding non-discrimination, and data collection requirements. Including a requirement or preference for contractors that provide paid sick days and paid family and medical leave will fit well with existing contractor requirements and will be a catalyst to move the private sector to provide paid sick days and paid leave to all workers.

OMB Should Require Federal Contractors to Report their Paid Sick Days and Paid Family and Medical Leave Practices

One part of requiring or incentivizing the provision of paid sick days and paid family and medical leave for federal contract workers should include OMB collecting data regarding existing policies among federal contractors for the provision of job-protected paid sick days and paid family and medical leave. This data can be used to show how extensive these

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[19] Center for American Progress, http://www.americanprogress.org/issues/2009/05/econ_snapshot_0509.html, May 2009.

[20] National Opinion Research Center, University of Chicago, "Paid Sick Days: A Basic Labor Standard for the 21st Century," 2008.

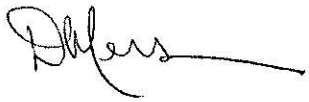
[21] David Cantor et. al., Balancing the Needs of Families and Employers: Family and Medical Leave Surveys 2000 Update (2000) 2-16.

[22] *Id.*

practices are among federal contractors and to allow federal agencies to compare potential contractors regarding their paid sick days and paid family leave policies.

If you have any questions regarding these issues, please contact Karen M. Minatelli, Director of Work & Family Programs, National Partnership for Women & Families, at (202) 986-2600 or kminatelli@nationalpartnership.org.

Sincerely,



Debra L. Ness

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July 16, 2009

via electronic submission:
http://www.regulations.gov

Mr. Jeffrey B. Liebman
Executive Associate Director
Office of Management and Budget
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, N.W.
Washington, D.C. 20503

RE: Public Comments on the Government Contracting Memorandum

Dear Mr. Liebman:

We are writing jointly on behalf of the more than 750,000 federal employees represented by the National Treasury Employees Union (NTEU) and the American Federation of Government Employees, AFL-CIO (AFGE), to express our views on the March 4, 2009 Presidential Memorandum on Government Contracting. The Office of Management and Budget (OMB) has requested comments on this matter in light of the President's Memorandum ordering a government-wide review of the federal contracting system. 74 Fed. Reg. 25775 (May 29, 2009). We greatly appreciate OMB's decision to solicit input from all interested parties in considering this important issue.

AFGE and NTEU have long maintained that federal employees, given the appropriate tools and resources, do the work of the federal government better and more efficiently than any private entity. The prior administration, however, distrusted federal employees and pursued an unwavering agenda of targeting federal employee jobs for public-private competition. Competitive sourcing was one of its top five initiatives. As part of that Administration's efforts, we saw the rules of competition overhauled, quotas set for competed jobs, and grades given to agencies on their efforts in conducting competitions. These changes had nothing to do with ensuring fair play; rather, they

were intended uniquely to benefit private contractors and to disadvantage dedicated federal employees, at the expense of the federal taxpayer. The changes undoubtedly had the desired effect: federal contract spending has exploded, nearly doubling from $207 billion in 2000 to $400 billion in 2008.

This government-wide privatization blitz has resulted in contractors performing functions that are clearly inherently governmental or closely associated to inherently governmental functions. In the Department of Defense, the Department of Justice, and other agencies delivering vital services, contractors perform critical and sensitive work such as law enforcement, government facility security, prisoner detention, budget planning, acquisition, labor-management relations, hiring, and security clearances. According to the Government Accountability Office (GAO), the Department of Homeland Security uses contractors to prepare budgets, develop policy, support acquisition, develop and interpret regulations, reorganize and plan, and administer A-76 efforts.

We have all witnessed the dangers associated with such an aggressive outsourcing agenda that rigs the system in favor of privatization. Examples range from the Mellon Bank fiasco in 2001 involving the deliberate destruction of tax returns and checks to the debacle at Walter Reed Army Medical Center involving the systemic replacement of federal workers with private companies charged with facilities management, patient care and guard duty. When privatization fails, millions and millions of tax dollars are wasted on inefficiencies and damage control, and federal workers are expected to pick up the pieces and complete the jobs that private contractors abandon.

One of the most egregious examples of misguided outsourcing is the tax privatization effort pursued by the IRS even over the objections of the National Taxpayer Advocate (who is appointed by the Secretary of the Treasury and charged with representing taxpayer interests before the IRS and Congress). This aggressive outsourcing was undertaken pursuant to authority given to the Secretary of the Treasury by the American Jobs Creation Act of 2004, Pub.L. No. 108-357, 118 Stat. 1625. The Secretary's decision to exercise his authority to enter into tax collection contracts was an unmitigated disaster. That effort was roundly criticized; it was not cost-effective, it lacked customer service for multilingual taxpayers, it was secretive (private collection agencies refused to disclose operational plans), and it proved manipulative to taxpayers. Further, the IRS had to assign 65 of its own employees to oversee the work of

just 75 private collection agency employees. Given the obvious failures of this undertaking, the IRS recently (and voluntarily) abandoned its privatization of tax collection initiative. The statutory authority must, however, be repealed. Nothing is as inherently governmental as the collection of taxes, and all steps must be taken to assure that IRS never again undertakes efforts to privatize tax collection.

After fighting for eight years against ill-advised policies, such as these, that took federal workers for granted, we are very pleased to see that this Administration is focused on leveling the playing field, ensuring accountability of contractors, and reaffirming the core principle that, as a general matter, the work of the federal government is best performed by government employees. We firmly believe that federal employees are the best value for taxpayers' dollars and welcome the opportunity for them to demonstrate their effectiveness and efficiency.

While OMB has requested comments on several areas, we focus our comments on the fourth area of inquiry in which we have first-hand experience to offer: managing the multi-sector workforce. Specifically, OMB has solicited input on, among other questions, clarifying the definition of inherently governmental[1]; identifying non-inherently governmental functions that should still be performed in-house; in-sourcing; and the impact of federal contracting policies on the private sector labor market. These issues are addressed below.

1. **How might the current definition of inherently governmental be clarified to improve management of the multi-sector workforce?**

NTEU and AFGE believe that OMB need only clarify that the term "inherently governmental" is defined exclusively by the Federal Activities Inventory Reform (FAIR) Act and subpart 7.5 of part 7 of the Federal Acquisition Regulation (FAR). All

[1] We note that the Department of Defense Authorization Act for FY 2009, Pub.L. No. 110-417, 122 Stat. 4411, imposed a similar obligation on OMB to review the definitions of "inherently governmental functions" and to adopt a single consistent definition for that term.

other conflicting definitions, whether found in the A-76 Circular or agency directive, must be abandoned.[2]

The FAIR Act defines "inherently governmental" as "a function which is so intimately related to the public interest as to mandate performance by Government employees." 31 U.S.C. § 501 note; see also subpart 7.5 of part 7 of the FAR. Listed functions include "those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the Government." 31 U.S.C. § 501 note; see also subpart 7.5 of part 7 of the FAR. This definition is long-standing and provides both sufficient guidance and needed flexibility in determining which functions are best reserved for government workers.

Over the years, problems in the application of this definition have arisen from deliberately created inconsistencies in internal government directives, rather than from the statutory definition itself. AFGE and NTEU believe that by unequivocally reaffirming the FAIR Act definition and expressly repudiating any inconsistencies, OMB will restore a workable construct of inherently governmental and level the playing field. The specific inconsistencies that we believe OMB should address are discussed below.

First, OMB should clarify that an inherently governmental function requires the exercise of "discretion," without any qualifiers. This clarification would eliminate the confusion stemming from the 2003 revisions to the A-76 Circular, which referred to "substantial official discretion" and the 1992 Office of Federal Procurement Policy (OFPP) letter, which referred to "substantial discretion." These additional modifiers inappropriately elevate the level of discretion needed to show that a position is inherently governmental and insulate only the highest agency positions from outsourcing.

Second, OMB should expressly repudiate the presumption in the 2003 revisions to the A-76 Circular that a government function is commercial in nature unless affirmatively shown

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[2] The Correction of Long-standing Errors in Agencies Unsustainable Procurement Act (CLEAN UP Act) (S. 924/H.R. 2736), which was introduced in the United States Senate on April 29, 2009 by Sen. Barbara Mikulski (D-MD) and in the United States House of Representatives on June 4, 2009 by Rep. Paul Sarbanes (D-MD), adopts the FAIR Act definition of inherently governmental.

otherwise. This presumption is not only bad policy, but it is also at odds with the FAIR Act's definition that simply delineates between commercial and inherently governmental functions. Each function must be evaluated on its own merits. In fact, if the FAIR Act includes any presumption at all, it presumes the opposite--namely, that a function is inherently governmental (because it is performed by the government) unless a contrary showing is made. A function is only designated commercial (and therefore subject to performance by a private contractor) if the agency head determines that the function does not satisfy the definition of an inherently governmental function. The 2003 revisions have caused confusion among agency personnel charged with making this decision, and they should therefore be repudiated as inconsistent with the FAIR Act.[3]

Third, by explicitly reaffirming the FAIR Act's definition of inherently governmental, OMB would also eliminate confusion arising from the 2003 revisions to the Circular that significantly narrowed the definition of inherently governmental in several respects. These problems are discussed below.

a. The FAIR Act includes "the collection, control or disbursement of appropriated and other Federal funds" as an inherently governmental function. The 2003 Circular narrowed that function to include only the "establishment of policies or procedures for the collection, control or disbursement of appropriated or other federal funds." (Emphasis added.) The Circular then drew a false distinction between the collection of taxes (which was deemed inherently governmental) and assisting in the collection taxes by locating and contacting taxpayers to remind them of their tax liability (which was deemed non-inherently governmental). All such activities, however, are inextricably intertwined and are necessary parts of the tax collection process. By reaffirming the FAIR Act's definition of inherently governmental, OMB would permanently eliminate this misguided distinction.

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[3] Reflecting this confusion, agencies have been required to provide written justification for any decision to designate a function as inherently governmental. This approach puts the burden on agencies to justify an inherently governmental finding, while agencies should instead be required to justify a finding of commercial. Accordingly, OMB should summarily rescind this requirement as inconsistent with the FAIR Act.

b. Further, the 2003 Circular eliminated from the list of inherently governmental functions "the interpretation and execution of the laws of the United States so as . . . to commission, appoint, direct, or control officers or employees of the United States." The erroneous elimination of this provision suggests that contractors may hire and manage federal employees, activities that are unequivocally inherently governmental. OMB must make clear that contractors may not exercise such authority over federal workers.

c. The FAIR Act also includes prefatory language that inherently governmental functions "involve[] . . . the interpretation and execution of the laws of the United States" so as to yield certain listed results, such as binding the United States to take an action. The 2003 revisions to the Circular narrowed this language to include as inherently governmental only those activities that actually involved binding the United States. This change represents an artificial distinction and too narrowly defines inherently governmental. Agencies should not be permitted to designate a function as commercial because the individual who interpreted the law did not actually have the authority to act on that interpretation and bind the United States. Only a small segment of the government workforce has the actual authority to bind the United States to a course of action.

In short, we believe that the FAIR Act's current definition of "inherently governmental" is all that is necessary to guide agencies in determining when federal employees should perform the work of the federal government. It is not the definition that has proven difficult to administer. The difficulties and confusion arose from limiting interpretations in the A-76 Circular and other policies promulgated by a contractor-friendly administration committed to providing every advantage to private contractors. OMB can simply reaffirm the FAIR Act's definition of inherently governmental, thereby eliminating confusion and restoring uniformity in the contracting out process.

2. What criteria might help agencies to identify non-inherently governmental functions that are critical to an agency, with respect to its unique missions and structure, and need to be performed by federal employees in order for the agency to maintain control of its mission and operations?

We have learned from the public-private competition process over the years that there are certain functions performed by federal workers that arguably fall short of satisfying the definition of inherently governmental but must, nonetheless, be performed in-house. This realization has begun to gain traction as the Congress considers the CLEAN UP Act, which refers to "mission-essential functions" in addition to inherently governmental functions. We are pleased that there is recognition that some work should be performed in-house because of its close association with an agency's mission or its inextricable connection to inherently governmental functions.

As implied by OMB's question itself, the unique mission of each agency will dictate the factors that an agency should consider in determining if an activity is so closely related to inherently governmental work that it should be performed in-house, even if it itself does not satisfy the definition of inherently governmental. For example, the IRS's mission is to administer the tax laws effectively and efficiently, which necessarily involves the handling of sensitive tax return information, including social security numbers. In light of this unique mission, the IRS should consider whether certain supporting functions, while perhaps not technically satisfying the FAIR Act's definition of inherently governmental, are nonetheless so critical to the IRS that they need to be performed by federal employees so that the IRS can maintain control of its mission and operations.

Further, because the discussion of inherently governmental involves functions (as opposed to positions), a single employee might perform both inherently governmental and commercial work. Instances where an employee performs "mixed" work seem particularly appropriate for designation as functions that are critical to an agency and need to be performed by a federal employee.

NTEU's and AFGE's interest here is to ensure that contracting out fiascos, such as the one involving Mellon Bank, are avoided. In that lamented episode, the IRS awarded a contract to Mellon Bank in 2001 to send returns to an IRS facility for processing while depositing the taxpayer checks for taxes owed in an agency account at the bank. The IRS had determined that this work was not inherently governmental. Employees of Mellon Bank, under pressure to meet an IRS contract deadline and unable to do so, destroyed tens of thousands of tax returns--perhaps as many as 80,000--containing checks totaling

about $1 billion. This incident sharply underscores that this type of work is so critical to the IRS's mission to administer the tax laws effectively and efficiently that the IRS should allow only federal employees to perform it.

3. What criteria should agencies use in deciding whether an activity should be in-sourced?

Congress has indicated the direction that should be taken in evaluating the insourcing of new and contracted out functions. See Omnibus Appropriations Act for FY 2009, Pub.L. No. 111-8, 123 Stat. 689. AFGE and NTEU also fully support the efforts outlined in the CLEAN UP Act (S. 924, H.R. 2736), which was proposed in late February, to "revive the civil service, save taxpayer dollars, restore good government, and reduce waste, fraud, and abuse in contracting out."[4] Such measures go a long way toward repairing the outsourcing abuses that have arisen over the past eight years. The CLEAN UP Act, for example, would extend certain in-sourcing initiatives implemented at the Department of Defense to the entire federal government. These initiatives include requiring agencies to develop inventories of specific contracts that have been outsourced and then to analyze whether those contracts actually include inherently governmental work, whether there was a competition prior to outsourcing the work, and whether the contracts are being poorly performed. NTEU and AFGE firmly believe that this analysis is an essential predicate to deciding whether an activity is a good candidate for in-sourcing.

The Federal Protective Service (FPS) is an excellent candidate for insourcing consideration that meets these criteria. The security of federal buildings is an inherently governmental function, or at the very least closely associated with inherently governmental function. And as recent reports by

[4] There are other bills that are similarly aimed at rectifying competitive sourcing errors of the past several years, such as H.R. 2647, FY 2010 Department of Defense Authorization Act, Sections 328 and 329 of which contain reforms that would be applicable government-wide; H.R. 796, which would amend the Internal Revenue Code of 1986 to repeal the authority of the Secretary of the Treasury to enter into private debt collection contracts; and H.R.3170 & S.1432, the House and Senate Financial Services and General Government Appropriations Acts for FY 2010, which would continue the moratorium on A-76 studies government-wide. AFGE and NTEU support these legislative efforts as well.

the DHS Inspector General and the Government Accountability Office have shown, the work is poorly performed by contractors.

In addition to the efforts outlined in the various pieces of proposed legislation, we maintain that OMB can further advance the government's interest in assisting agencies to identify which functions should not have been outsourced. Other criteria that agencies should consider include the following:

- Has there been an actual monetary savings realized as a result of the contract? Agencies should document the actual costs associated with each of the contracts listed in their inventory and determine whether that figure is consistent with the contractor's bid. If--as we suspect is often the case--the documented expenses exceed the bid, the work should be re-examined for in-sourcing.

- Has the contractor defaulted on the statement of work? Agencies should examine their list of contracts to determine whether, in fact, federal employees are performing outsourced activities rather than contractors. We are aware of several examples of failed contractor performance that has led to certain outsourced activity being performed by federal workers. The IRS mailroom contractor, for instance, was unable to deliver the same level of services that agency employees had performed prior to the reduction in force,[5] and other IRS employees were required to perform work that the contractor had promised in its statement of work. Further, a contractor that was to provide toll-free services of the IRS's Area Distribution Centers informed the IRS--after the contract was awarded--that it could not fulfill the requirements of the contract and IRS employees were called in to complete the work.

- Was the contract renewed without a re-competition? Agencies should be required to examine their contract services to determine whether work was re-competed once a contract term had run. Under the prior administration's aggressive contracting out agenda, contracts were often automatically renewed without any scrutiny.

[5] It bears noting that the IRS mailroom outsourcing initiative displaced many disabled agency employees.

- What other costs do agencies incur during the contracting out process? OMB should ask agencies to begin to document all associated costs of outsourcing to determine whether there is a savings to taxpayers. For example, agencies should consider average costs associated with the public announcement of competition, including time spent in preparing for the announcement, litigation costs, oversight costs (such as the time and expense of dedicating 65 IRS employees to oversee the work of 75 contractor employees), and all other expenses. The A-76 process should be revised so that it is more accountable to taxpayers and fairer to federal employees.

For work that is currently performed by federal employees, OMB should encourage agencies to seek improvements in the delivery of services through internal reorganizations rather than OMB Circular A-76 privatization reviews. Given the success of federal employees in privatization reviews, agencies should avoid incurring the costs and controversies of A-76 studies.

In addition, we urge the Administration to enforce the prohibitions against contracting out work performed by federal employees without conducting an A-76 study. Congress has repeatedly prohibited agencies from perpetrating such conversions, yet executive agencies regularly engage in this practice.

4. How do federal contracting policies affect practices in the private sector labor market?

This Administration should improve the lives of federal contractor employees by requiring all contractors to be compliant with labor, tax, and environmental laws and to provide their employees with appropriate levels of pay and benefits before they can bid on federal contracts. Providing special preferences to particular contractors could undermine the integrity of the procurement process.

These considerations, as well as those contained in the various pieces of legislation currently being considered by the Congress, will go a long way to undo the damage of the past administration and to reaffirm the principle that the work of the government is best performed by federal employees.

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In conclusion, we believe that the type of work that should be competed will become clear once OMB reaffirms the FAIR Act definition of inherently governmental, advises agencies on processes to bring government work back to federal employees, and suggests ways to determine whether certain seemingly commercial activities are nevertheless critical to the agency mission. We do not believe that the list of remaining functions will be nearly as long as under the prior administration. It further believes that, even after a competition, existing federal employees will represent the most cost-effective approach.

Thank you, again, for the opportunity to submit our views on these critical issues. We are hopeful that OMB will reverse the past eight years of misguided pressures to outsource federal employee work that has taken an immeasurable toll on employee morale. Federal employees should be given a fair chance to demonstrate that they are the best equipped and most efficient people to perform the work of the federal government and safeguard the interests of the taxpayers in getting the best value for their money.

Sincerely,

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TO: Ms. Julia Wise (jwise@omb.eop.gov)
Office of Federal Procurement Policy, OMB

FROM: OMB Watch

RE: Public Comments on the Government Contracting Memorandum

DATE: July 17, 2009

OMB Watch exists to increase government transparency and accountability; to ensure sound, equitable regulatory and budgetary processes and policies; and to protect and promote active citizen participation in our democracy. Since our launch of FedSpending.org, the first aggregated, searchable online database of federal spending, in October 2006, OMB Watch has become more heavily involved in overseeing the federal procurement process, including pushing the federal government to open the process to the public, and advocating for sensible reforms bringing increased accountability and fiscal responsibility to the procurement process.

These comments are submitted in response to the March 4 Presidential Memorandum on Government Contracting,[1] which establishes a framework for improving critical components of the federal acquisition system and management of the federal government's "multi-sector" workforce of federal employees and private sector contractors. We applaud the Obama administration for tackling this complicated and politically charged sector of government and believe this process creates the opportunity to develop and institute some desperately needed reforms.

Importance of Transparency

OMB Watch strongly supports the Obama administration's drive to strengthen the federal acquisition system and recommends several courses of action to further that objective. Overall, these recommendations are guided by OMB Watch's belief in the power of transparency and access to government information to transform government processes and produce better outcomes for the public. Without greater transparency, issues of waste, fraud, and abuse; conflicts of interest; and poor performance will continue to plague the federal procurement process.

Transparency of the Contracting Process

It is crucial for the Obama administration to infuse as much transparency as possible throughout the procurement process. Current practices that conceal information on a contracting officer's process to reach a decision on a contract award, the details of a contract, and the evaluation of a contractor's performance reinforce problems of the federal procurement system, including a lack of accountability,

[1] Presidential Memorandum, Government Contracting, March 4, 2009. http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government.

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resistance to reform, and abuse of the contracting process that results in waste and fraud. An open contracting process that includes details of the decision-making process, copies of enacted contracts, and more and better performance data would instill the impetus among agencies, contracting officers, and contractors to improve performance with the knowledge that the public will have access to information on their actions.

In order to fix these problems, the government should release more information about the processes contracting officers use to make contracting decisions. In addition, the government needs to require greater disclosure of information to the public about all contracts and contractors through an online, searchable database, and obligate agencies to make available performance data of contractors and other related information – such as contractors' compliance with workplace safety and environmental laws – to federal employees and the public. The federal government can disclosure this information through existing databases such as USASpending.gov, the Past Performance Information Retrieval System (PPIRS) and the newly mandated federal contractor integrity database.[2]

Currently, very little information about these parts of the federal procurement process is available to the public as both the PPIRS and new contractor integrity database are not made available to the public. In fact, Federal Acquisition Regulation (FAR) § 42.1503 requires that performance reviews "not be released to other than Government personnel and the contractor whose performance is being evaluated...." The rationale is that public release "of such information could cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations."[3]

On the contrary, OMB Watch believes disclosure of such information – with pertinent safeguards to protect vital business information –would foster better and more extensive competition because both contractors and contracting officers would become more responsive to increased public scrutiny of contracting decisions and processes. This would not only help develop better performance and behavior from contractors, but also help to foster better decisions and behavior from federal contracting officers. More exposure of these decisions will further ensure the relationship between contractors and their lobbyists and federal employees does not violate federal ethics and conflict of interest regulations.

Additionally, opening the procurement process in this way is likely to encourage other contractors to submit more bids if they feel the merits of a bid, and not personal relationships or influence with contracting officials, determine the winner of a contract. Disclosure of this information will help to level the playing field in contract competitions by helping to ensure more contracts are competed and more contractors submit bids for those competitions.

Consolidation of Contracts

It is essential for the federal government to loosen the current contractor oligopoly as much as possible to increase competition within the acquisition process. After years of mergers and acquisitions and an over-reliance on non-competitive contracts, especially within military contracting, a very small number of contractors receive a massively disproportionate share of federal contracting dollars. In FY 2008, the

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[2] For more information on USASpending.gov, visit www.usaspending.gov; for more information on the Past Performance Information Retrieval System, visit www.ppirs.gov; for more information on the federal contractor integrity database, see Public Law 110-417, Sec. 872, October 14, 2008. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ417.110.pdf.

[3] FAR § 42.1503 Procedures. http://www.acquisition.gov/far/current/html/Subpart%2042_15.html#wp1075411.

top 25 government contractors, or 0.01%, (out of 193,259 total contractors) received 41.39 percent of all contracting dollars, according to USASpending.gov. The top 100 contractors received 58.32 percent of all contracting dollars.[4] This creates a reliance on certain contractors by the government and an inherently non-competitive system across some of the most expensive and important government procurements.

Without wading into difficult antitrust waters to breakup large contractors, the government can increase competition within the contracting process by de-bundling contract requirements. According to Scott Amey, general counsel at the Project on Government Oversight (POGO), the current practice of agencies lumping "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." Moreover, Amey insists, "[b]reaking apart multi-supply or service contracts would also assist the government in reducing the multiple layers of subcontracting now prevalent in federal contracting...."[5]

Conventional wisdom dictates that de-bundling contracts would cost the government more money because it would prevent large contractors from using economies of scale to provide a good or service at a lower cost compared to a smaller competitor. OMB Watch believes, however, that the lack of competition for bundled contracts – due to the inability of smaller contractors to bid on massive multi-part contracts – reduces the incentive for large contractors to provide the lowest possible cost to the government. In fact, use of multi-supply or service contracts "can drive up costs while adding little value" to the contract because large contractors act as a middleman – adding a fee for their services, of course – and employ an army of subcontractors to carry out the multiple part contract.[6]

To remedy this, the federal government must stipulate within FAR that all federal agencies must minimize use of multi-supply or service contracts. The regulation would provide impetus to contracting officers to limit multiple services and supply contracts, thereby introducing more competition within the procurement process by preventing the largest contractors from crowding out smaller and less well-connected companies. Moreover, the regulation would help to drive down costs, as the absence of middleman fees would be reduced, and allow many more small companies to compete for a contract that used to be a piece of larger multiple part contract.

Contractor Performance Data

Poor performance on past contracts should be a critical factor in awarding future contracts. Unfortunately, this is not currently the case. It is important for the federal government to provide contracting officers with all the tools necessary to examine a contractor's past performance to help level the playing field between contracting companies competing for taxpayer dollars. This will help contracting officers be better stewards of taxpayer dollars by allowing them to make more informed decision in contracting competitions.

A recent case sheds light on the possible benefits of using past performance in contract decisions. In June 2007, the Army awarded the fourth iteration of the Logistics Civil Augmentation Program (LOGCAP IV) in Afghanistan to two contractors: Flour International, DynCorp International. The

[4] See USASpending.gov. http://www.usaspending.gov/fpds/tables.php?tabtype=t2&subtype=t&year=2008.
[5] Testimony of Scott Amey, General Counsel, Project on Government Oversight, before the House Committee on Oversight and Government Reform, Subcommittee on Management, Organization, and Procurement, pp. 4, June 16, 2009. http://www.pogo.org/pogo-files/testimony/contract-oversight/co-cfc-20090616.html.
[6] Ibid. pp. 4.

government awarded the previous LOGCAP contract solely to KBR, but accusations of misdeeds under the previous contract caused the Army to rethink the sole-source selection. The inclusion of multiple contractors, according to the Army, allowed the government to mitigate risk by not having to rely on only one source.

The past performance of KBR played a central role in the government's decision of the outsourcing of LOGCAP IV, according to a press release from Sen. Byron Dorgan (D-ND), chairman of the Democratic Policy Committee (DPC).[7] Over the past several years, the DPC has held multiple hearings examining the faulty contract work of KBR in Iraq and Afghanistan. According to a press release put out by the senator's office, the Army in fact did use KBR's past performance as a central reason to bypass the award of LOGCAP IV to KBR in Afghanistan. While past performance data should be a determining factor when making contracting decisions, contracting officers should not have to rely on a congressional committee to hunt the information down.

In order to improve the use of relevant performance data on contractors, the Obama administration should work to improve PPIRS by implementing the Government Accountability Office's (GAO) recommendations in *Federal Contractors: Better Performance Information Needed to Support Agency Contract Award Decisions* and by expanding and opening to the public the contractor integrity database congressionally mandated in the FY 2009 National Defense Authorization Act.[8]

In July 2009, the federal government amended FAR to require mandatory use of PPRIS by all contracting officers.[9] Despite this improvement, it is still important the government improve the quality of data in PPRIS. According to the GAO, the government has yet to meet the recommendations of a 2005 Office of Federal Procurement Policy (OFPP) interagency group tasked with generating pertinent and timely performance information. The recommendations included standardizing the different contracting ratings used by various agencies; requiring more meaningful past performance information, including terminations for default; developing a centralized questionnaire system for sharing government-wide; and possibly eliminating multiple systems that feed performance information in PPIRS.[10]

GAO, in turn, recommended standardizing evaluation factors and rating scales government-wide for documenting contractor performance and establishing policy for documenting performance-related information that the government does not currently capture systematically across agencies, such as contract terminations for default and a prime contractor's management of its subcontractors. GAO also recommended developing system tools and metrics for agencies to use in monitoring and managing the documenting of contractor performance, such as contracts requiring an evaluation and information on delinquent reports.[11]

Implementation of these recommendations, together with mandatory use of PPIRS, should help to

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[7] "PENTAGON AWARDS NEW LOGCAP IV CONTRACT FOR AFGHANISTAN TO TWO OTHER FIRMS, BYPASSING KBR" Press Release from Sen. Byron Dorgan (D-ND), July 8, 2009. http://www.ombwatch.org/files/budget/dorgankbrpressrelease.pdf

[8] GAO, *Federal Contractors: Better Performance Information Needed to Support Agency Contract Award Decisions*, GAO-09-374, April 23, 2009. http://www.gao.gov/new.items/d09374.pdf. Public Law 110-417, Sec. 872, October 14, 2008. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ417.110.pdf.

[9] See FAR § 42.1502 Policy. http://www.acquisition.gov/far/current/html/Subpart%2042_15.html#wp1075411.

[10] GAO, *Federal Contractors*, GAO-09-374, pps. 19-20, April 2009. http://www.gao.gov/new.items/d09374.pdf.

[11] Ibid. pp. 21.

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address the shortcomings of the collection and use of performance data in the procurement system indentified by the GAO report, including "a lack of accountability and lack of system tools and metrics" and "[v]ariations in evaluation and rating factors." The GAO also concluded that there was a "reluctance to rely more on past performance...[due to] skepticism about the reliability of the information and difficulty assessing relevance to specific acquisitions."[12] Improving the quality and utility of information collected about contractor performance is the key to reducing this skepticism.

The Obama administration should focus on improving the quality of contractor performance data so it is both relevant and usable by contracting officers. Instituting a system where federal employees who are independent from managing a particularly contract competition and implementation are responsible for collecting performance data on that particular contract would help to bring more independence to performance data collection. This would also improve the quality of data collected.

Furthermore, the government needs to expand the contractor misconduct database congressionally mandated in the FY 2009 National Defense Authorization Act to increase the type of data that contracting officers have access to. The database authorized would catalog civil and criminal misconduct by contractors, but it is circumscribed to those contractors that receive a contract from the Department of Defense. Currently, this type of data on contract performance exists across various agencies in unconnected and disjointed databases and websites. In the absence of such a unified database provided by the government, the Project on Government Oversight (POGO) has compiled a prototype database.[13] This prototype shows the potential of a centralized database to help inform future contracting decisions by the federal government.

While the Defense Department is the largest contracting agency in the federal government, other large contracting agencies include the Department of Homeland Security, Energy, and the National Aeronautics and Space Administration (NASA). It is reasonable to believe that contracting officers within those other agencies would benefit from access to a database of information on misdeeds and poor performance by any contractor that receives a government contract. Therefore, the government needs to expand the misconduct database to include all contractors across the federal government and, like our recommendation for the PPIRS database, make the information available to the public.

Selecting the Right Contract Type

Within the procurement process, selecting the right contract vehicle is vitally important to the government's ability to achieve good contracting outcomes. Currently, contracting officers too often select an inappropriate contract for a particular situation, and the government does not adequately impart the details of acquisition regulation to contracting officers. The federal government needs to implement GAO's recommendations in *Contract Management: Minimal Compliance with New Safeguards for Time-and-Materials Contracts for Commercial Services and Safeguards Have Not Been Applied to GSA Schedules Program* and stipulate the minimal use of multi-supply or service contracts.[14]

According to the GAO report, a statutory change to FAR, effective February 2007, allows contracting officers to use time-and-materials (T&M) contracts to acquire commercial services. T&M contracts are

[12] Ibid. Executive Summary.
[13] For more information POGO's Federal Contractor Misconduct Database, visit http://www.contractormisconduct.org/index.cfm.
[14] GAO, Contract Management: Minimal Compliance with New Safeguards for Time-and-Materials Contracts for Commercial Services and Safeguards Have Not Been Applied to GSA Schedules Program, GAO-09-579, June 24, 2009. http://www.gao.gov/new.items/d09579.pdf.

precarious because the government bears the risk of cost overruns. Despite safeguards included in FAR § 12, including a requirement that contracting officers prepare a detailed determination and findings that no other contract type is suitable, contracting officers routinely failed to perform the appropriate determination and findings and continually used T&M contracts in inappropriate situations. Moreover, most contracting officers had the mistaken impression that the fixed labor rate in T&M contracts constituted a fixed-price contract.[15]

The GAO recommended that the Administrator of OFPP amend FAR § 16.6, which deals with T&M, labor-hour and letter contracts, and FAR § 16.2, which deals with fixed price contracts, to make it clear that contracts with a fixed hourly rate and an estimated ceiling price are T&M or labor-hour contracts, not fixed-price type contracts.

The GAO also called for OFPP to amend FAR § 8.4, which pertains to the Government Services Administration (GSA) schedules program, to explicitly require the same safeguards for commercial T&M services (i.e., the FAR § 12 determination and findings and the justification for changes to the ceiling price – that are required in FAR § 12.207). Additionally, GAO called on OFPP to provide guidance to contracting officials on the requirements in FAR § 12.207 for the detailed determination and findings for T&M or labor-hour contracts for commercial services and encourage agencies to provide training regarding the determination and findings requirement.[16]

Furthermore, the OFPP needs to amend the FAR to prevent the excessive use of multi-supply or service contracts and the resultant multiple layers of subcontractors. Multiple layers of subcontracting, found in large multi-supply or service contracts, are so problematic – not only in the difficulty of creating transparency among the layers, but also in the contracts' tendency to drive up costs while adding little value – the FY 2009 National Defense Authorization Act directed the Defense Department to minimize excessive use of multiple layers of subcontractors.[17] The federal government must expand this directive across the entire government and provide oversight to ensure those types of contracts are actually minimized. Regulation and oversight would provide contracting officers with the impetus to limit multiple services and supply contracts, and thereby prevent the boondoggle of multiple layers of subcontractors. If the federal government institutes these remedies, less waste will result from the use of inappropriate contract vehicles by contracting officers.

Inherently Governmental/Commercial Model

The determination of what is an inherently governmental function and what is commercial within the procurement process is a difficult task. OMB Watch supports the government's drive to clarify the current definition of inherently governmental function, but believes that the ambiguous distinction between inherently governmental and commercial will not improve with clarification of the current definition of inherently governmental function. Instead, OMB Watch believes that the federal government must reexamine the inherently governmental/commercial model.

Any further distinction between inherently governmental and commercial functions by the government would jeopardize the general applicability of the inherently governmental test across government

[15] See FAR § 12.207 Contract Type. http://www.acquisition.gov/far/current/html/Subpart%2012_2.html#wp1087410; GAO, Contract Management, GAO-09-579, executive summary, June 2009. http://www.gao.gov/new.items/d09579.pdf.
[16] GAO, Contract Management, GAO-09-579, pp. 29, June 2009. http://www.gao.gov/new.items/d09579.pdf.
[17] Public 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.

agencies. On the other hand, the definition of the terms as they stand provide little direction for agencies to determine what activities stay in house and what jobs are contracted out. Thus, any list of inherently governmental or commercial activities based on these definitions is inherently flawed.

Therefore, government agencies must start by defining their core competencies and the activities that help the agency meet its statutory and performance obligations. Once an agency defines its core competencies, it can proceed to a more traditional review of commercial versus inherently governmental activities to determine which noncore activities it might be able to contract out and which should stay in because of lower cost.[18]

According to Paul Light, a government process expert, the result of this procedure would produce "a multi-tiered work force built around a relatively small center of civil servants who hold clearly indentified core competencies, a larger group of civil servants who perform noncore functions for clearly defined reasons, and a still larger group of employees who were not civil service employees who perform noncore functions on behalf of the federal government under contracts, grants, and mandates."[19]

Inherently Governmental Function Criteria

The criteria upon which the federal government bases its decisions on which functions to contract out and which functions should stay in house matter immensely. There are two instances where OMB Watch believes all outsourcing activities should be forbidden.

First and foremost, in order to prevent possible conflicts of interest, the federal government should not allow any contractor to oversee or manage a federal contract. This includes managing collection of performance information, conducting pre-award audits, or any activities that help in the selection of winning contract bids. There have been recent problems at the General Services Administration during the Bush administration with just this type of outsourcing[20] and any other instances of contracting oversight being privatized need to be identified and eliminated.

Second, to prevent the disclosure of sensitive, personal information of U.S. citizens held by the federal government, the contracting process should be reformed to eliminate the use of private contractors in areas where they will encounter sensitive personal information. This includes tax enforcement and management of tax records, health care delivery and management of health care histories, particularly at the Department of Veterans Affairs, and any other work at federal agencies that would encounter or work directly with sensitive citizen data. The federal government should not allow contractors to handle, analyze, store, or manipulate such information under any circumstances.

[18] For a full treatment of this analysis, see Paul C. Light, *The True Size of Government* (Washington, DC: The Brookings Institution, 1999), pps. 170-3.
[19] Ibid. pp. 173.
[20] See OMB Watch Questions GSA's Approach to Accountability, December 14, 2006. http://www.ombwatch.org/node/3118

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Testimony of Leslie Moody

Public Meeting on the Presidential Memorandum on Government Contracting

June 18, 2009

Good morning. My name is Leslie Moody and I am the Executive Director of the Partnership for Working Families, a national network of organizations that work to reshape urban economies on the basis of shared equity and the development of a new urban middle class. We work in about 25 cities across the country. The oldest organizations in our network formed over a decade ago. Since that time, Partnership organizations have built a broad range of experience of how local government can be a positive force for strengthening and supporting the middle class, by leveraging all of its powers – purchasing and contracting, direct employment, subsidy and regulation – to maximize middle class job creation. Many of the lessons of our work can be translated to the federal level, and I appreciate your giving me the opportunity to talk about some of those lessons today.

It is important to frame this work with the economic evidence. According to the Economic Policy Institute, our national economy and most of our regional and urban economies are now characterized by higher levels of inequality than at any time since the great depression. This was true even before the current economic crisis took hold. Much of this inequality stems from the rapid growth of low-wage, no-benefit jobs, and emergence of whole industries whose profitable business models rely on impoverishing workers. Our partnerships with local governments have shown that government can help reverse this trend toward low-wage job growth. Instead, private profit that is generated from public contracts should provide clear public benefit in the form of high-quality, family-sustaining jobs and shared prosperity for workers, neighborhoods and communities.

How do we balance the public interest in healthy competition with the goal of creating middle class jobs? By encouraging healthy competition and by rewarding companies who use public contracts to benefit the whole community. We have learned that too often, competitive contracting processes mean eliminating standards and rewarding the worst actors in the marketplace. When competition for public contracts rests solely on the lowest-bidder, workers and taxpayers suffer. Workers lose health care, hard-fought wage gains and retirement benefits. Taxpayers not only lose quality of service, but they end up paying for the hidden costs of privatization, like the cost of providing public health insurance to un- and under-employed workers and their families or the costs of ameliorating bad service provision after-the-fact.

Communities where poverty-wage contracts are awarded suffer as well: parents struggle to raise their families, local economies contract as workers lose discretionary spending and the promise of our democracy diminishes. Low wages and lack of benefits in federally contracted

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work can lead to high-turnover, not only undercutting the value that taxpayers get for their contracting dollar but also in some cases posing threats to national security.

On behalf of our network, I want to offer a few guidelines that should shape all public contracting, to ensure that the federal government leverages its purchasing power and public resources to create maximum benefit for all communities. When the government as an employer manages, trains and inspires public employees to perform well, they remain the best stewards of public assets and services. Federal contracting must preserve the highest ideals of public service, which are embodied in the existing public workforce.

Cities and counties in California, Massachusetts, Wisconsin, Vermont and the District of Columbia among others have developed tools to ensure that contracting is done in a way that gets the best value for taxpayers while helping to build strong local economies. We can learn from them by following these key principles.

1. Protect the middle class. Take as a basic principle that federal contracting should not create poverty wage jobs. In fact, data analyzed by the Economic Policy Institute and included in a forthcoming report from the National Employment Law Project shows that, in fact, this happens all too often. Instead, federal contracting should be setting a high community standard, which includes middle class wages, high service delivery standards, efficiency and quality. Federal contracts should only be given to the highest quality bidders, who, as employers, demonstrate they can provide the community with good jobs/benefits and have a well trained workforce that can perform at the highest level benefiting taxpayers and the entire community.

All federal service contractors should be required to demonstrate that they pay living wages and health care, and offer paid sick leave. Contracting processes should reward bidders who provide high quality training, create higher quality jobs, and can provide workers with career ladders and portable credentials. Decisions to contract out work that is currently performed by federal employees should preserve existing job quality. The moral authority of the federal government – its credibility and effectiveness – are denigrated by the creation of poverty-wage jobs.

2. Protect taxpayers. Our organizations have found that local contracting initiatives fail to save money, or appear to save funds based on only the most cursory and flawed analysis. Contracting should only be permitted if it meets the following standards:

- Save real money. Cost benefit analysis, which includes an assessment of broad costs like impact on residents' health and safety, loss of accountability and institutional knowledge, should show a minimum of 20% savings. The District of Columbia, Massachusetts and Wisconsin all have strong state provisions that define the cost benefit calculation required to anchor contracting decisions.

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- Include responsible contractor standards. In an effort to strengthen standards for the provision of city services, the San Jose City Council voted in 2008 to revise the City's competition policy, which would require all contractors that perform city services to adhere to the same standards that are expected of city employees. Specifically, the competition policy requires contractors to provide information on job standards (including turnover, worker training and screening for new workers), performance measures that will be used to evaluate the delivery of services, and third tier review which mandates employers to disclose previous contract breaches, violations in labor or environmental laws and unethical business practices. The policy creates a fair and level playing field for all contractors, thereby allowing high quality employers to compete for service contracts, and establishing significant barriers for low-wage contractors that seek to outsource city services, and replace middle income jobs with low- wage positions that fail to provide high quality services for community residents.

- Maintain the ability to actually do the work. When the federal government contracts whole areas of work, taxpayers lose the institutional knowledge and capacity to maintain oversight and to have the meaningful option to take the work back in-house if contracting fails. When the City of San Diego considered massive privatization last year, community leaders and residents insisted that the city maintain the ability to do any privatized work. The decision to privatize recycle bin pick-up, for example, permitted only portions of the city's jurisdiction to be performed by private entities. By maintaining public control over portions of the work, the City established that it would still be able to cancel contracts and reclaim the work if private entities failed to meet service standards. This is a key element in ensuring that taxpayers have the capacity to reverse decisions when deals go bad.

3. Protect quality public services. We tend to think anyone can do public work, but the fact is that many of the core functions of government shouldn't be contracted out because doing so jeopardizes public safety, health and welfare. Only government oversight can provide the accountability necessary to safeguard our communities. Returning to the City of San Diego – one of the biggest recent contracting decisions revolved around public workers who perform dead animal pickup. That's right, the workers who go out and clean streets by safely removing the pets and wild animals who met their untimely death on public roads and sidewalks, posing huge health hazards. When the idea was first floated, the Center on Policy Initiatives (a Partnership affiliate) asked what would be the impact of privatizing this work. Their own research showed the intense level of commitment public workers had to providing high level services. By the time the San Diego City Council had begun to consider the measure, the public had started to ask a lot of tough questions. Suddenly it became clear that entrusting this work to

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outside entities who would not necessarily provide such a high level of service might be a bad idea. The Mayor of San Diego worked up a long list of services to privatize, but the Council started with dead animal pickup because it seemed relatively simple. Their inability to resolve key questions of safety and service provision derailed discussions of how to contract out much more complex pieces of work.

Final thoughts:

The biggest lesson of our work at local level has been that implementation and monitoring are key. NELP's forthcoming report shows that where existing federal bid processes require some nominal documentation of responsible contracting, it has not been implemented fully. Don't let us down – we're counting on you to make it happen right.

The federal government has a moral responsibility not to subsidize and perpetuate employment practices that leave people in poverty. Instead, our government should be a model employer and overseeing the quality of jobs created by outsourcing should be as must a priority as the quality of jobs and work performed by public employees. I urge you to learn from the lessons of the cities and states that have found ways to ensure that public contracts create strong middle class jobs, and help build the communities we all want to live in.

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Exposing Corruption Exploring Solutions
Project On Government Oversight

July 17, 2009

Ms. Julia Wise
Executive office of the President
Office of Management and Budget
Office of Federal Procurement
Washington, D.C. 20503

Re: Public Comments on the Government Contracting Memorandum

The Project On Government Oversight (POGO) provides the following public comment regarding The Presidential Memorandum on Government Contracting, issued on March 4, 2009. (74 Fed. Reg. 25775, May 29, 2008). That notice requested comments on: (1) maximizing the use of competition; (2) improving practices for selecting contract types; (3) strengthening the acquisition workforce; and (4) clarifying when functions should be performed by federal employees and when contractors may be appropriately considered. As an independent nonprofit organization committed to achieving a more accountable federal government, POGO supports the implementation an improved federal contracting system.

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.

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;[1] 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.[2] In short, poor contracting decisions are placing taxpayer dollars – and sometimes lives – at risk.

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[1] http://www.fpdsng.com/downloads/agency_data_submit_list.htm.
[2] The Federal Acquisition Streamlining Act of 1994 (FASA) (Public Law 103-355), the Federal Acquisition

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,[3] 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.[4] These moves follow efforts in the two most recent National Defense Authorization Acts to improve federal contracting.[5]

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.[6] The President's budget also mentions concerns with risky contract types, wasteful spending, and contracts awarded without full and open competition.[7]

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."[8] 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.[9] One useful report is the DoD IG report "Summary of DoD Office

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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.

[3] 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.

[4] 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.

[5] 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.

[6] 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/.

[7] 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.

[8] 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/.

[9] GAO, *Defense Acquisitions: Actions Needed to Ensure Value for Service Contracts*, GAO-09-643T, April

of Inspector General Audits of Acquisition and Contract Administration," dated April 22, 2009.[10] 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.[11]

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,[12] 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."[13]

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,[14] and federal contracting data shows that the Department of Homeland Security

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

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

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

[12] 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.

[13] Id., at p. 8.

[14] http://www.acq.osd.mil/dpap/cpic/cp/docs/dodfy2008competitionreport.pdf and USAspending.gov

competes approximately 70 percent of its contracts.[15] 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,[16] 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.[17]

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.[18]

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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.

[15] 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.

[16] 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.

[17] 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.

[18] 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.

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.[19]

5. Make the revolving door database of senior level DoD acquisition officials publicly available.[20] 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.[21]

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.[22]

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

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http://edocket.access.gpo.gov/2009/pdf/E9-555.pdf.

[19] 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.

[20] 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.

[21] 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.

[22] http://www.lanl.gov/news/index.php/fuseaction/nb.story/story_id/9654.

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 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.[23]

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.[24]

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.[25] 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.[26]

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.[27]

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.[28]

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[23] 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.
[24] 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.
[25] 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.
[26] 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.
[27] Id., at pps. 4-5.
[28] 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.

6. Enhance the acquisition workforce through improvements in hiring, pay, training, and retention.[29]

7. Require comprehensive agency reviews of outsourcing practices, especially for contract-related management and consulting services contracts.[30]

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.[31]

9. Hold agencies accountable when they divert small business contracts to large corporations and thereby skew small business procurement numbers.[32]

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

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[29] Expedited hiring authority was granted for the defense acquisition workforce last year (Pub. Law 110-417, sec. 833), and therefore the civilian agencies should be granted the same authority.

[30] 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.

[31] http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h572ih.txt.pdf.

[32] 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.

working for the government using a process similar to FAIR Act inventories of government employees filed by federal agencies.

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 Orszag, the Director of the Office of Management and Budget, to Senator Lieberman stated that "cost-reimbursement contracts place substantial risk on the government."[33] 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."[34]

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."[35]

POGO has additional concerns with the government placing taxpayer dollars at risk by over-designating many items and services as commercial.[36] 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?

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[33] 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.

[34] Id., at p. 2.

[35] 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.

[36] 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.

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. 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."[37] 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.

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[37] FAR Subparts 16.601(c).
http://www.acquisition.gov/FAR/current/html/Subpart%2016_6.html#wp1080953.

POGO urges the Office of Federal Procurement Policy to consider these realistic contracting improvements. Thank you for your consideration of this comment. If you have any questions, you may contact me at (202) 347-1122.

Sincerely,

Scott H. Amey
General Counsel
scott@pogo.org

AMERICAN SHIPBUILDING ASSOCIATION

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July 15, 2009

Ms. Julia Wise
Office of Federal Procurement Policy
Office of Management and Budget
725 Seventeenth Street, NW
Washington, DC 20503

RE: Public Comments on the Government Contracting Memorandum

Dear Ms. Wise:

The American Shipbuilding Association respectfully submits this response to the request for comments published by the Office of Management and Budget in the *Federal Register* on May 29, 2009 (74 Fed. Reg. 25775), regarding the President's Memorandum on Government Contracting that was issued on March 4, 2009. This letter specifically addresses the discussion of contract type in the President's Memorandum as it pertains to new ship construction contracts between the Navy and our member shipyards.

The American Shipbuilding Association (ASA) is the national trade association for the shipbuilding industry. ASA represents both management and labor at the six largest shipyards in the country that construct, overhaul, and repair the large capital ships for the United States Navy and Coast Guard. ASA member shipyards collectively employ more than 90% of all the workers engaged in ship construction in the United States. Many of them are the largest private sector employers in the states in which they operate. ASA also represents over 100 partner companies engaged in the design and manufacture of ship systems, components, technologies, equipment, and in providing technical support services.

On March 24, 2008, ASA submitted similar comments on the Department of Defense (DoD) interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 818 of the National Defense Authorization Act for Fiscal Year 2007 (DFARS Case 2006-D053). Section 818 requires DoD to modify regulations regarding the determination of contract type for major development programs to address assessment of program risk. DoD published the interim rule in the *Federal Register* on January 24, 2008 (73 Fed. Reg. 4117) with a request for public comments, which are to be considered by DoD in forming the still-pending final rule.

The President's Memorandum for the Heads of Executive Departments and Agencies on Government Contracting states 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 type contract." The Memorandum also directs the Office of Management and Budget (OMB) to develop and issue by September 30, 2009, Government-wide guidance to "govern the appropriate use and oversight of all contract types, in full consideration of the agency's needs, and to minimize risk and maximize the value of Government contracts generally, consistent with the regulations to be promulgated pursuant to section 864 of Public Law 110-417," among other things. Section 864 calls for a revision of the Federal Acquisition Regulation (FAR) to address the use of cost-reimbursement contracts.

Both the President's Memorandum and the DoD interim rule appear to introduce additional burden on the Navy Program Managers and contracts personnel at DoD to justify why they would want to issue a shipbuilding contract on a cost-type basis. It is critical to all stakeholders in the shipbuilding process for DoD to continue weighing very carefully the unique aspects of that process in DoD's adherence to its own rule and to OMB's guidance as an obvious stakeholder itself. Ironically, the increased costs associated with such things as subsequent disputes, for example, that can often result from fixed-price contracting are precisely the type of problem that Congress attempts to solve through legislation like Sections 818 and 864, and that the President seeks to solve through the Memorandum on Government Contracting.

History demonstrates the periodic recurrence of a misperception regarding defense related contracts that have developmental characteristics or components, whereby they are included in broader efforts to increase requirements that government contracts in general be fixed-price (or, price-based rather than cost-based). Resorting to such efforts is a notion that is recycled from time to time in an attempt to control cost overruns, which is usually driven by a Legislative Branch and/or Executive Branch response to negative publicity or perception. Proponents of this rationale will typically say that "the market" or "markets" should dictate government contracts just as they do private contracts. The flaw in a fixed-price approach for DoD, however, is that it is impossible for the commercial market to adequately apply to defense development contracts.

Many defense contracts are inherently developmental because DoD obviously wants to stay on the cutting edge of technology to keep our nation's war fighters supplied with the best in equipment and capability. This is prevalent for things like weapons, communication, detection, navigation, and propulsion systems and components, which permeate the products manufactured by the shipbuilding and airplane industries in particular. DoD's understandable efforts to keep abreast of the ever-elusive cutting edge of technology are more troublesome for shipbuilding than for something like aircraft manufacturing, however. This is because it takes years to build a single aircraft carrier, submarine, destroyer, or auxiliary ship, whereas aircraft can be manufactured in volume and with a relatively quick turnaround. Also, the development of multiple prototypes is separately budgeted for a series of aircraft, but not for ships.

Every ship has to be delivered to the Navy as an end product. The lead ship of a class is especially developmental because it also serves as the "prototype" for its class. Throughout the production of all the ships of a class, though, technology continues to

change and improve on a constant basis. These concerns are uniquely acute not only for the lead ship of a class, but usually with at least the next three ships that follow in that class as well. Although their construction phases and delivery dates are staggered, the first several ships of a class are often built – and thus developed – concurrently.

The first several ships of a class are analogous to a Low-Rate Initial Production (LRIP) phase for aircraft and other weapons systems, which are treated as developmental. While there is no such thing as LRIP in shipbuilding programs, the fact that the first several ships of a new class have the same degree of risks and uncertainties inherent in LRIP should not be disputed. For purposes of contract type selection in any program, government departments and agencies should focus on whether a product, system, or item is still developing or has reached maturity. Due to the inherently high level of risk and uncertainty associated with the first several ships of a new class, they should be viewed as developmental products that are procured most efficiently through cost-type contracts.

The President's Memorandum and the DoD interim rule are both flawed in that regard because their requirements should be in reverse order for shipbuilding contracts. For the first several ships of a class, the burden placed upon the Milestone Decision Authority should most often be to explain why a fixed-price contract type is selected rather than why a cost-type contract is selected. Especially for the lead ship of a class, selection of a fixed-price type contract would usually defy logic in that it would represent an unrealistic, inefficient, and irresponsible decision. Fixed-price type contracts should generally not be utilized before a shipbuilding program enters full rate production.

Even beyond the first several ships of a class, each ship in that class will differ in varying degrees from all of the others. Despite its class affiliation and common general design, every ship delivered to the Navy is actually a unique end product. This is due not only to the multiple change orders and new requirements issued by the Navy during the years it take to build a single ship, but also to the fact that the production of an entire series or class of ships can take decades to complete. Some of these issues for shipbuilding seem to get overlooked or forgotten whenever general efforts to maximize the use of fixed-price government contracts are revisited, as we see now.

During the 1980s, there was a push for fixed-price government contracts that proved to be disastrous for both the government and industry in shipbuilding. President Reagan assembled a Blue Ribbon Commission on Defense Management led by such notables as David Packard of Hewlett-Packard fame and Dr. William J. Perry, who was a technology expert prior to his tenures as Secretary of Defense and Under Secretary of Defense for Research and Engineering. The Blue Ribbon, or Packard Commission, as it was known, issued a report in 1986 explaining that a fixed-price requirement for new weapons systems is problematic for both the government and for industry in defense acquisition. Contract type should be determined by the degree of risk involved.

This was not a unique or new observation, though. Prior to the 1980s, the same authoritative conclusion had been drawn by a Harvard University study during the late 1950s and early 1960s. In focusing on the development and acquisition of new weapons

technology and systems, these studies demonstrated why price-based contracting, as opposed to cost-type contracting, is fraught with problems when applied to something like shipbuilding. Fixed-price shipbuilding contracts during the 1960s led to claims against the government that were incredibly problematic for shipbuilding programs as litigation amassed to sort out fluctuating requirements and increased performance risk, causing shipbuilding programs to all but grind to a halt and thereby creating further costly delays. Shipbuilding claims also led to contractual relief and bailouts during the 1970s.

The results of maximizing the use of fixed-price shipbuilding contracts during the 1980s were that: (1) larger shipyards tended to bid conservatively higher on fixed-price contracts for fear of not recouping their costs; and (2) smaller shipyards tended to bid unrealistically lower on fixed-price contracts in order to gain entry into the naval shipbuilding business. This led to another round of disputes between shipyards and the Navy, which resulted again in an excessive amount of litigation and incalculable damage to the shipbuilding industrial base for many years afterward. The increased costs associated with the disputes and with the settlement of litigation were, again, the opposite of the intended effect driving the fixed-price approach in the first place.

DoD is aware of the cyclical nature of these factors in the evolution of government contracting. It is important not only for purposes of developing the OMB guidance and the DoD rulemaking, but also for the efficient administration of shipbuilding contracts generally that the federal government maintain its institutional memory, broader historical perspective, and awareness of the problems associated with the well-intended, yet inaccurate thinking that the best way to control costs in defense acquisition and development contracts is through a price-based approach. ASA asserts that the FAR currently provides sufficient information on the appropriate use and management of various contract types to minimize risk and maximize the value of government contracts.

DoD appears to be seeking to allow enough flexibility into its shipbuilding contract type determination process to adequately accommodate the realities of the developmental aspects of those contracts. As the President's Memorandum directs, ASA strongly encourages OMB to collaborate with DoD in carefully developing guidance on the appropriate use and oversight of shipbuilding contracts. Doing so will be crucial to fulfilling the directives of the President's Memorandum and the congressional intent behind Sections 818 and 864. It is also in the best interests of OMB, DoD, the Navy, the national shipbuilding industrial base, and the taxpayers.

Your consideration of these comments is very much appreciated.

Sincerely,

Cynthia L. Brown
President

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STRATEGIC ANALYSIS

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June 30, 2009

Ms. Julia Wise
Office of Federal Procurement Policy
Office of Management and Budget
Executive Office of the President
Washington, D.C.

Reference Public Comments on the Presidential Memorandum on Government Contracting, issued March 4, 2009

Dear Ms. Wise,

Thank you for allowing me to address a few of my concerns as the owner of a service-disabled, veteran-owned business. Strategic Analysis, Inc. (SA) is a company that is dedicated to support contractor work for the US Government (USG) and has been in existence for over twenty (20) years. Because SA's clients are procuring services under very large, multi-disciplinary contract vehicles, SA is now in the position of bidding on very large procurements for such services. To successfully accomplish this work, SA has built a strong, multi-disciplinary staff. For some procurements, SA remains a small business, but for many SA is categorized as large.

My comments principally address your point number 4, managing the multi-sector workforce. SA's staff is highly integrated with the staffs of many USG agency clients. As such, SA finds itself in a position of managing the interface between what is inherently governmental and that which is not. I see the current definition in the FAR as reasonable and do not recommend changes. Departments and agencies of the USG have begun to in-source jobs ahead of actual reviews of which positions are truly "inherently governmental" based on the current definition. A closer adherence to the current definition would provide more benefit to the Government and the taxpayer than trying to change the definition.

I believe a more significant problem for the USG is agency inconsistencies in definitions for and policies associated with organizational conflicts of interest (OCI) (and personal conflicts of interest, as well). During the last decade, it appears that the USG has allowed companies with clear conflicts of interest to enter into contracts for services related to acquisition, policy support, operations and other areas where the companies have vested interests. This is something that is directly affecting our business as firms with broader reach and different motives are moving into positions of trust. I believe this is bad for the USG and inherently wrong.

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Suggestion: I believe that a more aggressive push to eliminate contracting situations involving Organizational Conflicts of Interest would provide the USG with a bigger impact. Firewalls, OCI Plans and other risk mitigation mechanisms are not effective. Ultimately, companies should be forced to work on the inside or compete for performance contracts, not both. A focus on strengthening OCI regulations now would improve the functioning of Government immediately and be far more effective than a redefinition of "inherently governmental."

As an example of one Agency's approach, I am attaching DARPA Instruction Number 70 dated May 12th 2008.This instruction clarifies "inherently governmental" in their context and simply states "…a contractor cannot concurrently be a SETA and R&D performer, without prior written approval or a waiver from the DARPA Director. Includes contractor and any affiliates or their successors in interest as prime, subcontractor, cosponsor, joint venturer, consultant or in any similar capacity." It is such a clear definition of OCI that allows the Agency to use contractor support without fear of placing a company into a conflict and allows the USG to be confident that it is receiving unbiased support.

Thank you for taking the time to consider our point of view. I am available to talk further about the issues if you so desire. The outcome of the matter that your office is considering is critical to our business.

Sincerely,

Bradford L. Smith, Jr.
Chief Executive Officer

cc:
Virginia
Senator Mark Warner
Senator James Webb
Representative James P. Moran
Representative Glenn Nye, III

Ohio
Senator Sherrod Brown
Senator George Voinovich
Representative Mike Turner

Colorado
Senator Michael F. Bennet
Senator Mark Udall
Representative Doug Lamborn

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DEFENSE ADVANCED RESEARCH PROJECTS AGENCY
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ARLINGTON, VA 22203-1714

MAY 12 2008

DARPA Instruction No. 70 CMO

SUBJECT: Contractor Relationships: Inherently Governmental Functions, Prohibited Personal Services, and Organizational Conflicts of Interest

References: (a) DARPA Instruction No. 70, "Contractor Relationships: Inherently Governmental Functions, Prohibited Personal Services, and Organizational Conflicts of Interest," June 25, 2007 (hereby rescinded)
(b) Federal Acquisition Regulation, Subpart 7.5, "Inherently Governmental Functions," current edition
(c) FAR, Subpart 9.5, "Organizational and Consultant Conflicts of Interest," current edition
(d) Defense Federal Acquisition Regulation Supplement, Subpart 203.70, "Contractor Standards of Conduct," current edition
(e) DoD Directive 5500.7, "Standards of Conduct," November 29, 2007

1. PURPOSE

This Instruction rescinds reference (a) and updates the Defense Advanced Research Projects Agency (DARPA) policy regarding actual and potential organizational conflicts of interest, prohibited personal services, and utilization of contract employees; and is subject to the requirements and limitations set forth in the Federal Acquisition Regulation (FAR), Defense Federal Acquisition Regulation Supplement (DFAR), and DoD Directive 5500.7, "Standards of Conduct" (references (b) through (e)).

2. APPLICABILITY AND SCOPE

The provisions of this Instruction apply to all DARPA Government employees. Government employees shall ensure that their relationships with contractor and subcontractor employees are in accordance with this Instruction.

3. DEFINITIONS

3.A. Consultant. The "Consultant" is generally recognized as a Subject Matter Expert and will be called upon on an ad hoc basis to provide advice, alternatives, or recommendations on a specific matter. He or she may also be tasked with conducting studies or analyses of specific issues.

3.B. Contractor Employee. "Contractor Employee" includes, but is not limited to, general and administrative support personnel, technical consultants, financial analysts, and Scientific, Engineering, and Technical Assistance (SETA) contractors. The term encompasses all contractor personnel providing contract support to DARPA.

3.B.1. R&D Performer. An "R&D Performer" is a contractor that is under contract to DARPA to perform specific research and development related to a specific program. This definition includes both prime and subcontractors.

3.B.2. SETA Contractor. "SETA" stands for Scientific, Engineering, and Technical Assistance. The role of a SETA contractor is to provide support to a program, as a technical, management, financial, and/or administrative specialist.

3.C. Independent Verification and Validation. "Independent Verification and Validation" (IV&V) is the verification and validation of a system or software product performed by an organization that is technically, managerially, and financially independent from the organization responsible for developing the product.

3.D. Inherently Governmental Function. "Inherently Governmental Function" means functions that are so intimately related to the public interest as to mandate performance by a Government employee. This definition is a legal determination: an inherently governmental function means that the function requires either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: the act of governing (i.e., the discretionary exercise of Government authority), and monetary transactions and entitlements.

3.E. Organizational Conflict of Interest. "Organizational Conflict of Interest" means that, due to other activities or relationships with other persons, a person is rendered unable or potentially unable to provide impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person or entity has an unfair competitive advantage, or any combination thereof.

3.F. Personal Services Contract. A "Personal Services Contract" is a contract that, by its express terms or as administered, makes contractor employees appear to be, in effect, Government employees. By contrast, a "nonpersonal services contract" is a contract in which the personnel rendering services are not subject—either by the contract's terms or by the manner of its administration—to the supervision and control normally present in relationships between the Government and its employees.

3.G. Service Contract. A "Service Contract" is a contract to perform an identifiable task, rather than to furnish an end item of supply. A service contract may be either a personal or nonpersonal services contract. A service contract can also cover services

performed by either professional or nonprofessional personnel, whether on an individual or organizational basis, and includes tasks that are identifiable and specifically described in a Statement of Work.

3.H. Solicitation. "Solicitation" means any request to submit bids, proposals, quotations, or other offers to the Government. As used in this Instruction, "solicitation" may include requests for proposals, broad agency announcements, research announcements, and other program announcements.

4. POLICY

4.A. General

4.A.1. This Instruction provides policy guidance on proper use of contractor employees at DARPA. Three areas are addressed: Inherently Governmental Functions, Prohibited Personal Services, and Organizational Conflict of Interest (OCI).

4.A.2. The typical role of an on-site contractor employee at DARPA is to provide support to a program or a particular DARPA office by providing technical and/or financial expertise, administrative assistance, or all three, that is not presently available to DARPA from within its own employee structure.

4.A.3. Due to the inherent potential for OCI, in accordance with FAR 9.503, a contractor cannot concurrently be a SETA and R&D Performer, without prior written approval or a waiver from the DARPA Director. Additional guidance on OCI is provided in Section 4.4 of this Instruction.

4.B. Inherently Governmental Functions

4.B.1. Contractor employees shall not be assigned functions that are inherently governmental. Section 7.5 of the FAR provides more information on what is and what is not considered inherently governmental functions. The following list from the FAR, Section 7.5, contains examples of functions common at DARPA that are inherently governmental. The list is not intended to be exhaustive, but merely illustrative:

4.B.1.a. Determining and approving Agency policy; for example, approving content and application of DARPA Instructions, Guides, and Policy Memoranda;

4.B.1.b. Determining and approving Federal program priorities for budget requests;

4.B.1.c. Finalizing or signing congressional testimony or responses to congressional correspondence, or determining Agency responses to audit reports from the

Inspector General, the Government Accountability Office, or other Federal audit entity;

4.B.1.d. Directing and controlling Federal employees, including the selection or non-selection of individuals for Federal Government employment, interviewing individuals for employment, and approving position descriptions and performance standards for Federal employees;

4.B.1.e. Awarding, administering, or terminating Government contracts, including determining whether contract costs are reasonable, allocable, and allowable;

4.B.1.f. Participating as a voting member on any board that determines source selection award or award fee;

4.B.1.g. Determining and approving the terms of disposal of Government property (although DARPA may delegate authority to contractor employees to dispose of property at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the Agency or required by higher authority);

4.B.1.h. Determining and approving which supplies or services are to be acquired by the Government (although DARPA may delegate authority to contractor employees to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the Agency or required by higher authority);

4.B.1.i. Approving Agency responses to Freedom of Information Act (FOIA) requests (other than routine responses that, because of statute, regulation, or Agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and approving Agency responses to administrative appeals of denials of FOIA requests; and

4.B.1.j. Serving as Contracting Officer's Representative (COR).

4.C. Prohibited Personal Services. All DARPA support contracts must be nonpersonal service contracts. DARPA shall not award "personal services" contracts, unless specifically authorized by statute and with the prior written approval of the Director, Contracts Management Office, in accordance with DFARS 237.104(b)(iii)(A)(2).

4.D. Organizational Conflicts of Interest

4.D.1. Two underlying principles of avoiding OCI are:

4.D.1.a. Anticipating and preventing the existence of conflicting roles that might bias the contractor personnel's judgment; and

4.D.1.b. Preventing unfair competitive advantage by exposing a contractor employee to proprietary information or source selection information relevant to a DARPA solicitation but not available to all competitors.

4.D.2. When OCI situations become apparent, DARPA will identify the particular source of conflict, eliminate the conflict whenever possible, and when elimination without endangering the mission objectives is not possible, mitigate the conflict to an acceptable risk level.

4.D.3. Whenever a contractor organization has employees or subcontractors performing SETA work and also has employees or subcontractors working, or seeking to work, as R&D Performers on a DARPA program, particular care must be taken to prevent, eliminate, or mitigate the potential for an OCI. Even if the SETA work has been concluded prior to issuance of the solicitation for related R&D performance, an unfair competitive advantage may already have been gained.

4.D.4. If an individual or entity wishes to perform concurrently as a SETA and as a DARPA R&D performer, prior written approval of the DARPA Director is required. As with any other potential conflict situation, a mitigation plan must be submitted to and approved by the Contracting Officer (CO). If the CO makes a written determination that the mitigation plan sufficiently avoids, neutralizes or mitigates the OCI, it is forwarded to the DARPA Director for higher level review and approval. The DARPA Director will sign the appropriate endorsement on the CO's written determination, indicating approval or disapproval. The CO is encouraged to consult with counsel whenever the CO believes such consultation would be beneficial; OCI determinations submitted for DARPA Director consideration should be coordinated in advance with counsel.

4.D.5. Administrative procedures for handling potential OCIs include:

4.D.5.a. For early identification of potential conflicts, every DARPA solicitation must require the offeror and any proposed subcontractors to affirm whether they are providing Scientific, Engineering, and Technical Assistance or similar support to any DARPA technical office(s) through an active contract or subcontract, including contracts or subcontracts awarded by DARPA Agents. All affirmations must state which office(s) the offeror supports and identify the prime contract numbers. Affirmations shall be furnished at the time of proposal submission.

4.D.5.b. Whether or not there are ongoing contracts, all facts relevant to potential organizational conflicts of interest (FAR 9.5) must be disclosed by offerors. The disclosure shall include the offeror's mitigation plan, which is a description of the action the offeror has taken or proposes to take to avoid, neutralize, or mitigate such conflict. Proposals that fail to fully disclose potential conflicts of interests and/or do not

include plans to mitigate this conflict will be returned without technical evaluation and withdrawn from further consideration for award.

4.D.5.c. Once the CO identifies a potential OCI, the CO must take necessary steps to avoid, neutralize, or mitigate the OCI. This generally will involve reviewing the offeror's mitigation plan, conferring with the affected technical office personnel, consulting with counsel, and making a written determination whether the plan sufficiently avoids, neutralizes or mitigates the OCI. A sample written determination memorandum is included as Attachment 1. See 4.D.4, above, for actions requiring higher level approval of the mitigation plan.

4.D.5.d. Proposal evaluation may continue while the mitigation plan is being reviewed. However, if the mitigation plan review process is completed prior to, or as part of proposal evaluation, and the offeror's mitigation plan is disapproved, then their proposal will not be evaluated.

4.D.6. Government personnel should, to the maximum extent practicable, prepare DARPA's Statements of Work (SOW). If a contractor assists in preparing a SOW to be used in competitively acquiring services—or provides material leading directly and predictably to such a SOW—that same contractor may not supply the services unless either (1) that contractor is the sole source for the services, or (2) that contractor did not participate in preparing that part of the SOW to which he plans to propose.

4.D.7. If a contractor prepares and furnishes complete specifications covering nondevelopmental items to be used in a competitive acquisition, that contractor shall not be allowed to furnish these items, either as a prime contractor or a subcontractor.

4.D.8. The CO responsible for each solicitation will retain the discretion to determine the existence of, or the potential for, OCI. However, the existence of certain factors, including, but not limited to the following, creates a rebuttable presumption of OCI: allowing contractor and DARPA personnel to maintain joint offices or frequently occupy physical office space together at any location; allowing contractor employees access to the DARPA fiscal database; or allowing contractor employees access to contractual or programmatic documentation unrelated to contracts for which they have administrative responsibilities.

4.D.9. Consultant and IV&V services shall also be governed by this Instruction. Because the role of Consultant is generally focused on a specific matter and the Consultant would not ordinarily have access to broad programmatic data, the Consultant and any firm he or she may be affiliated with would ordinarily only be excluded from competing as an R&D Performer on those programs relative to the matter investigated. Likewise, because the IV&V contractor is specifically focused on testing a specific software product, they would ordinarily only be excluded from competing as an

R&D Performer on those programs which they are verifying and validating.

4.D.10. DARPA support contracts should include DARPA OCI clauses that are appropriate and effective. An example of OCI clauses is included in Attachment 3.

4.D.11. Contracts issued for DARPA shall flow down the same OCI clauses to each subcontractor as are applied to the prime contractor by including such instructions within the ARPA Order/Procurement Guidance.

4.E. Switching from SETA to R&D Performer and Vice Versa. A contractor may decide it is in its best interest to switch from being a SETA to an R&D Performer, or vice versa. In these cases, the contractor will seek guidance from the CO regarding termination of the existing contract and whether or not the OCI is sufficiently mitigated by the termination to allow the contractor to compete as a Performer. If a contractor wishes to terminate its contract, it must submit a written request. The Contracting Officer and Technical Office Director will then provide input to the Director, DARPA regarding the impact of such a termination. The Director, DARPA provides written approval or disapproval to the Contracting Officer regarding the request. The Contracting Officer will then negotiate and terminate the contract if approved. Once the contractor assumes its new role, its employees will not be permitted to participate in any programs in which the contractor participated to a significant extent in its previous role.

5. RESPONSIBILITIES

5.A. The Director, DARPA, shall:

5.A.1. Assess and, as appropriate, either approve or disapprove in writing all situations in which an individual or entity wishes to act concurrently as a SETA and as a DARPA R&D performer.

5.A.2. Grant or deny written OCI waivers requested by a Contracting Officer in accordance with FAR 9.503 and applicable law.

5.B. The Office Directors shall:

5.B.1. Ensure Government employees are not supervising contractor employees.

5.B.2. Ensure contractor employees are not performing tasks that are considered inherently governmental functions.

5.B.3. Ensure each Agent solicitation contains appropriate language describing the requirement for offerors to disclose whether they are currently providing support to any DARPA office through an active contract and which office(s) the offeror supports.

5.B.4. Review Agent support contracts to ensure DARPA OCI clauses are present, appropriate, and effective.

5.B.5. Ensure ARPA Orders/Procurement Guidance (AO/PGs) are reviewed and approved by Government employees. Contractor employee access to the DARPA financial database is restricted to authorized contractor employees.

5.B.6. Inquire of the contractor employee whether he or she has signed the contractually-required non-disclosure agreement (included as Attachment 2) before beginning official duties at DARPA.

5.C. The Director, Contracts Management Office (CMO) shall:

5.C.1. Ensure each DARPA CMO-issued solicitation contains appropriate language describing the requirement for offerors to disclose whether they are currently providing support to any DARPA office through an active contract and which office(s) the offeror supports.

5.C.2. Review support contracts issued by DARPA to ensure OCI clauses are present, appropriate, and effective.

5.C.3. Ensure a mitigation plan has been submitted to the Contracting Officer and to the Director, DARPA, when an individual or entity wishes to act both as a SETA and as a DARPA R&D performer.

5.C.4. Assist Contracting Officers in determining whether to request written OCI waivers from the Director, DARPA.

5.C.5. Provide training, in conjunction with DARPA General Counsel, to DARPA Government personnel to ensure full understanding of appropriate use of support contracts and OCI issues.

5.D. DARPA General Counsel (GC) shall:

5.D.1. Provide counsel to DARPA personnel regarding all OCI legal matters.

5.D.2. Coordinate on all mitigation plans prior to submission to the DARPA Director for consideration.

5.D.3. Recommend policy to the Director, DARPA for OCI matters.

5.E. Contracting Officers, Program Managers, and Contracting Officer's Representatives (CORs) shall:

5.E.1. As early in the acquisition process as possible and in conjunction with DARPA General Counsel, analyze planned acquisitions in order to identify and evaluate

potential OCI. All personnel shall avoid, neutralize, or mitigate significant potential conflicts before contract award.

5.E.2. For each solicitation, review all proposals to determine whether the potential exists for OCI.

5.F. DARPA Government employees shall:

5.F.1. Comply with procurement integrity, ethics, and standards of conduct laws and regulations.

5.F.2. Not send contractor employees as their substitute to Government employee-required meetings, training, or informational sessions.

5.F.3. Ensure that contractor employees identify themselves as contractor employees at all times, including in e-mail and phone communications, and particularly in situations where they could be perceived as Government or DARPA representatives.

5.F.4. Not request or require contractor employees to perform tasks outside of the Statement of Work for their existing contract that could be perceived as a conflict of interest. Additional tasks are negotiated through the CO.

5.F.5. Not participate in the hiring or firing of contractor employees. Government personnel may review and discuss resumes of prospective contractor employees to determine whether the proposed contractor employee is adequately qualified to meet program requirements, but Government personnel are not authorized to conduct job interviews or perform reference checks on proposed contractor employees.

5.F.6. Not supervise, counsel, or otherwise discipline contractor employees.

5.F.7. Not approve leave requests or work hours for contractor employees; rather, Government personnel shall direct contractor employees to the contractor program manager or task manager for appropriate guidance.

6. EFFECTIVE DATE

This Instruction is effective immediately.

Anthony J. Tether
Director

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Attachments – 3

A1. Sample Written Determination Memorandum
A2. Individual Nondisclosure Agreement for DARPA
A3. Sample Organizational Conflict Of Interest Clauses

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A1. SAMPLE WRITTEN DETERMINATION MEMORANDUM

MEMORANDUM FOR RECORD

FROM: _____/Contracting Officer

SUBJECT: Written Analysis of Potential Conflict of Interest Concerning <fill in company>

1. In accordance with FAR 9.506(b)(1), the following written analysis and recommendation is provided concerning the proposal for "<proposal name>" submitted by <company> under Broad Agency Announcement <announcement number>.

2. BACKGROUND. <Describe the situation, what facts have been collected>

3. REGULATORY GUIDANCE. FAR Part 9 charges the Contracting Officer to identify and evaluate potential conflicts of interest and "avoid, neutralize, or mitigate significant potential conflicts before contract award. Any situation which might bias a contractor's judgment and provide unfair competitive advantage must be closely examined." The FAR lists categories of support which could lead to a biased or unfair competitive advantage: 1) providing systems engineering and technical direction; 2) preparing specifications or work statements; 3) providing evaluation services; and 4) obtaining access to proprietary information.

4. RESULTS.

Providing systems engineering and technical direction

Preparing specifications or work statements

Providing evaluation services

Obtaining access to proprietary information

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5. RECOMMENDATION. <Add recommendation here>

6. DARPA Instruction 70, requires the Director, DARPA to assess and, as appropriate, either approve or disapprove all situations in which an individual or entity wishes to act both as a SETA and as a DARPA R&D performer.

7. ENDORSEMENT. Based on the recommendation above, I hereby Approve/Disapprove (Circle one) <contractor> to perform the <fill in name of effort> effort entitled, "<proposal>" while performing as a SETA for <fill in company>.

Anthony J. Tether
Director

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A2. INDIVIDUAL NONDISCLOSURE AGREEMENT FOR DARPA

Various criminal statutes, the Federal Acquisition Regulation (FAR), and implementing Department of Defense (DoD) regulations govern the actions of personnel participation in the procurement process, including the solicitation, evaluation, and negotiation of proposals. The integrity of the procurement process requires that proposers be treated fairly and that neither conflicts of interest nor the appearance of impropriety taint the consideration of proposals. Proposer-provided information and official government information must be safeguarded. Unauthorized contacts, conflicts of interest, disclosure of sensitive procurement information, and the appearance of impropriety must be avoided.

By signing this agreement, I agree to protect all proprietary, business sensitive, and government non-public information (including, but not limited to information marked "Source Selection Information," see FAR 2.101 and 3.104, contractor bid or proposal information, hereinafter referred to as "information"), either written or verbal, supplied to me or coming into my possession through my duties in support of DARPA. Specifically, information that may come into my possession as a part of my duties, or about which I gain knowledge during the course of my duties, will be used only for performance of those duties and I will not communicate, transmit, or otherwise divulge any such information for any other purpose. Upon the termination of my duties, I agree to surrender any materials in any form that contain such information to the government office which initially furnished them to me.

I understand that my violation of the terms and conditions of this agreement may result in disciplinary action against me. I acknowledge that I may incur criminal or civil liability to the United States Government for the improper disclosure of information.

This agreement is effective as of the date I assumed my duties at DARPA.

Date _____

Printed Name _____

Signature _____

Name of Company _____ Phone Number _____

Mailing Address _____

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A3. SAMPLE ORGANIZATIONAL CONFLICT OF INTEREST CLAUSES (IAW FAR 9.5)

A. Purpose: The primary purpose of this clause is to ensure that: (1) the Contractor's objectivity and judgment are not biased because of its past, present, or currently planned interests (financial, contractual, organizational, or otherwise) which related to work under this contract, (2) the Contractor does not obtain an unfair competitive advantage by virtue of its access to non-public information regarding the Government's program plans and actual or anticipated resources, and (3) by virtue of its access to proprietary information belonging to others, the contractor does not obtain any unfair competitive advantage.

B. Scope: The restrictions described herein shall apply to performance or participation by the Contractor and any of its affiliates or their successors in interest (hereinafter collectively referred to as "contractor") in the activities covered by this clause as prime contractor, subcontractor, cosponsor, joint venturer, consultant, or in any similar capacity.

(1) Maintenance of Objectivity: The Contractor shall be ineligible to participate in any capacity in contracts, subcontracts, or proposals therefore (solicited or unsolicited) which stem directly from the Contractor's performance of work under this contract or are directly related to this contract, for example under the same Program or Project. Furthermore, unless directed in writing by the Contracting Officer, the Contractor shall not perform any services under this contract on any of its own products or services or the products or services of another firm if the Contractor is, or has been substantially involved in their development or marketing. In addition, if the Contractor under this contract advises the Government on the preparation of, or prepares complete, or essentially complete, Statements of Work of objectives for competitive acquisitions, the Contractor shall be ineligible to perform or participate in any capacity in any contractual effort which is based on such Statements of Work or objectives. Nothing in this subparagraph shall preclude the Contractor from competing for follow-on contracts involving the same or similar services.

(2) Access To and Use of Government Information: If the Contractor, in the performance of this contract, obtains access to information such as plans, policies, reports, studies, financial plans, or data which has not been released or otherwise made available to the public, the Contractor agrees that without prior written approval from the Contracting Officer, it shall not: (a) use such information for any private purpose unless the information has been released or otherwise made available to the public, (b) compete for or accept work based on such information for a period of six months after the completion of the contract, or until such information is released or otherwise made available to the public, whichever occurs first, (c) submit an unsolicited proposal to the Government which is based on such information until one year after such information is released or otherwise made available to the public, and (d) release such information

unless such information has previously been released or otherwise made available to the public by the Government.

(3) Access To and Protection of Proprietary Information: The Contractor agrees that, to the extent it receives or is given access to proprietary data, trade secrets, or other confidential or privileged technical, business or financial information (hereinafter referred to as "proprietary data") under this contract, it shall treat such information in accordance with any restrictions imposed on such information. The Contractor further agrees to enter into a written agreement for the protection of the proprietary data of other contractors and to exercise diligent effort to protect such proprietary data from unauthorized disclosure. In addition, the Contractor shall obtain from each employee who has access to proprietary data under this contract, a written agreement which shall in substance provide that such employee shall not, during his/her employment by the Contractor or thereafter, disclose to others or use for their benefit, proprietary data received in conjunction with the work under this contract.

C. Subcontracts: The Contractor shall include this clause, including this paragraph, in consulting agreements and subcontracts of any tier when directed by the Contracting Officer. The terms "contract," "contractor," and "contracting officer" will be appropriately modified to preserve the Government's rights.

D. Representations and Disclosures:

(1) The Contractor represents that it has disclosed to the Contracting Officer, prior to award, all facts relevant to the existence or potential existence of organizational conflict or interest as that term is used in FAR Subpart 9.5.

(2) The Contractor agrees that if after award it discovers an organizational conflict of interest with respect to this contract, a prompt and full disclosure shall be made in writing to the Contracting Officer which shall include a description of the action the Contractor has taken or proposes to take to avoid or mitigate such conflict(s).

E. Remedies and Waiver:

(1) For breach of any of the above restrictions or for nondisclosure or misrepresentation of any relevant facts required to be disclosed concerning this contract, the Government may terminate this contract for default, disqualify the Contractor from subsequent related contractual efforts, and pursue such other remedies as may be permitted by law or this contract. If, however, in compliance with this clause, the Contractor discovers and promptly reports an organizational conflict of interest (or the potential therefore), subsequent to contract award, the Contracting Officer may terminate this contract for convenience of the Government if such termination is deemed to be in the best interest of the Government.

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(2) The parties recognize that this clause has potential effects which will survive the performance of this contract and that it is impossible to foresee each circumstance to which it might be applied in the future. Accordingly, the Contractor may, at any time, seek a waiver from the Contracting Officer by submitting a full written description of the requested waiver and the reasons in support thereof. If it is determined to be in the best interests of the Government, the Contracting Officer will grant such a waiver.

F. Modification: Prior to a contract modification involving a change to the Statement of Work, or an increase in the level of effort or extension of the term of the contract, the Contractor shall be required to submit either an organizational conflict of interest disclosure or an update of the previously submitted disclosure or representation.

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July 6, 2009

Mr. Jeffrey B. Liebman,
Executive Associate Director
Office of Management and Budget
Eisenhower Executive Office Building
1650 Pennsylvania Avenue, N.W.
Washington, DC 20503

Re: Public Comments on the Government Sourcing Memo

Dear Mr. Liebman:

On behalf of the undersigned unions, we thank President Obama for offering a compelling vision for how the federal government, including its dedicated civil service workforce, can improve the lives of all Americans. His March memo lays the foundation for significant reforms that will ensure that federal agencies provide the highest quality services and create a sourcing process that is more accountable to taxpayers and more fair to working Americans.

Here are our recommendations for carrying out the President's vision:

Area 4(a)
1. return inherently governmental functions as well as those functions that are closely related to inherently governmental and mission-essential but which have been wrongly contracted out to in-house performance and impose safeguards to ensure that such functions can no longer be contracted out;

2. redefine "inherently governmental"--using, among other things, the definitions found in section 5 of the Federal Activities Inventory Act of 1998 (31 U.S.C. 501 note) and subpart 7.5 of part 7 of the Federal Acquisition Regulation, as well as The CLEAN UP Act (S. 924 and H.R. 2736); and then enforce that redefinition—as well as the prohibition against personal services contracts—to ensure that federal employees perform all functions necessary for an agency to perform its mission, always taking into account the imperatives, among others, to

a) retain in-house technical expertise and institutional memory;

b) determine whether the agency has the capacity to oversee contractor performance;

c) retain in-house all functions related to determining work to be performed by a contractor as well as monitoring and evaluating a contractor's performance of that work;

d) avoid risks associated with contractor monopolies and non-performance;

e) ensure transparency and accountability in any contractual relationships;

f) develop, train, and maintain the federal civil service; and

g) retain in-house all functions on which decisions to commit the federal government are ultimately based as well as those functions ultimately necessary to carry out inherently governmental functions;

Area 4(c)
3. ensure that no commercial functions currently or most recently performed by federal employees are contracted out in whole or in part without first formally determining that such conversions would be in the interest of taxpayers, including the performance of any requirements in rule or law for public-private competitions;

4. correct numerous inequities in the OMB Circular A-76 privatization process—including adding a strictly enforced limitation on how long OMB Circular A-76 privatization studies can last, adding a prohibition on automatic recompetition, abolishing the automatic 12% overhead charge on in-house bids, and increasing the minimum cost differential to take into account quantifiable costs (preliminary planning, consultants, and reassigning federal employees to work on OMB Circular A-76 privatization studies) as well as nonquantifiable costs—and establish a reliable methodology to track the cost and quality of work reviewed under the circular;

5. establish a reliable process for agencies to reengineer their services as an alternative to the costly and controversial OMB Circular A-76 privatization process, especially given that in-house workforces won 83% of the studies conducted since the process was revised in May 2003, according to the previous administration;

Area 4(d)
6. improve the lives of contractor employees by requiring all contractors to be compliant with labor, tax, and environmental laws and to provide their employees with appropriate levels of pay and benefits before they can bid on federal contracts—rather than by providing special preferences to particular contractors, which could undermine the integrity of the procurement process;

Area 4(b)
7. provide federal employees with opportunities to perform new functions, particularly those similar to work already performed by other federal employees;

8. ensure that, if commercial functions performed by federal employees are reviewed for outsourcing, federal employees have comparable opportunities to perform outsourced functions;

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9. rebuild the in-house human resources workforce and ensure that the federal hiring process facilitates, rather than complicates, appropriate insourcing; and

10. establish inventories of service contracts so that agencies can identify whether a particular contract is well-performed, includes functions that should only be performed by federal employees, or is appropriate for insourcing.

We look forward to working with the President and the Congress to clean up the mess left behind by the previous administration and make lasting and long-overdue reforms to the sourcing process. Indeed, the best first step for undertaking this important effort would be expeditious enactment of The CLEAN UP Act, the landmark sourcing reform legislation introduced by Senator Barbara Mikulski (D-MD) and Representative John Sarbanes (D-MD). Thank you for your consideration of our proposals.

Sincerely,

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO

AMERICAN FEDERATION OF TEACHERS, AFL-CIO

ASSOCIATION OF CIVILIAN TECHNICIANS

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO

DEPARTMENT FOR PROFESSIONAL EMPLOYEES, AFL-CIO

FEDERAL EDUCATION ASSOCIATION / NATIONAL EDUCATION ASSOCIATION

INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS, AFL-CIO

INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO

INTERNATIONAL FEDERATION OF PROFESSIONAL AND TECHNICAL ENGINEERS, AFL-CIO

METAL TRADES DEPARTMENT, AFL-CIO

NATIONAL AIR TRAFFIC CONTROLLERS ASSOCIATION, AFL-CIO

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, AFL-CIO

NATIONAL TREASURY EMPLOYEES UNION

PROFESSIONAL AVIATION SAFETY SPECIALISTS, AFL-CIO

UNITED POWER TRADES ORGANIZATION

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US Public Interest Research Group, as our name indicates represents the public interest: consumers and taxpayers – a constituency that now, perhaps more than ever, will watch very closely how their money is spent by the government. We also represent state level organizations and campaigners all over the country. We have the ability to keep citizens engaged in their government. Our comments reflect this responsibility.

On the most basic level, awarding lucrative contracts to firms and people who break the law or simply fail to get the job done – over and over again – fails the American taxpayers. The American people understand this about their own lives. If an individual was hired to deliver packages, and the packages never arrived at their destination or when they did, they were damaged, the worker would not be shocked if he was terminated. If an individual was applying for a job with a large private consulting firm, and hadn't paid her taxes, her file would be flagged. Why our government continues to reward failure, fraud, abuse and tax evasion is lost on the average American taxpayer. It would be great to change the headlines we've been reading for years that have chronicled outrageous waste and mismanagement of contracts from Afghanistan to New Orleans.

What we've seen suggests that past performance and compliance with the law may not have been given a high priority when determining awards. Some examples:

- In February of 2005, a backup tape that contained over 1.2 million records of federal employees, including US Senators, went missing from Bank of America headquarters. The tapes were not encrypted. In May of 2005 a laptop was stolen from Bank of America which contained 18,000 records of California consumers that was not properly encrypted. In September of that same year, another security breach. The result? Despite this record, the government rewarded them with millions of dollars in additional contracts, including data processing for several different government agencies.

- A House Government Oversight Committee investigation revealed that Blackwater avoided paying $50 million in federal taxes by improperly classifying its security guards in Iraq and Afghanistan as "independent contractors" so that the firm could claim it was a "small business" – edging out the actual small businesses bidding for the contract.

- General Electric sold the U.S. military defective helicopter and airplane engine blades. The government launched a criminal investigation and GE settled the case in July of 2006. However, at the same time GE was defending this defective product that could have endangered the lives of

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our military personnel, the government awarded GE the majority of a $2.4 billion contract to develop its engine for Joint Strike Fighter aircraft. In fact 46% of GE's contracts that year were not competitively bid.

- Since 2000, Kellogg Brown and Root, which was a Halliburton subsidiary, has repeatedly been accused of defrauding the federal government. The Defense Contract Audit Agency identified approximately $279 million in "unsupported and questionable" expenses. Shortly after negotiating the outcome for those charges, the Army contracted with Halliburton and KBR for $5 billion to provide logistic support. Last year, it was discovered that KBR failed to pay nearly $100 million in payroll taxes by alleging that many Americans contracted in Iraq were based in a tax haven in the Caribbean.

- A House Committee report on Hurricane Katrina contracting revealed that $8.75 billion that have been plagued by waste, fraud, abuse, and mismanagement also revealed that 70% of the contracts were awarded without open competition; the contracts were poorly planned and subject to little oversight; and contractors excessively relied on subcontractors to do the work.

The examples are endless, detailed in hundreds of reports, yet have been largely ignored and unchecked. We are hopeful that this Administration will take serious actions to change this disturbing pattern.

There needs to be a renewed focus on vigorously enforcing the mechanisms - some of which are already in place -- to promote competition, question the exceptions, and enforce best practices. But all of the guidance in the world will be meaningless unless those who have been charged with implementing them – such as the "Competition Advocates" – diligently do their job with tremendous support from executive leadership. This has to be a priority for leadership in every agency. We applaud the Administration's interest in correcting these egregious practices and look forward to continuing the dialogue.

Bottom line: Contractors who fail to meet basic responsibilities should not be considered for more work. A lack of competition and a shortage of consideration of competence needlessly puts taxpayers and their money at risk. The Administration needs to demonstrate clear leadership, provide metrics on its actions and use oversight staff to conduct actual oversight.

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EMAIL ADDRESS
sdees@mckennalong.com

July 16, 2009

Office of Management and Budget
725-17th Street, N.W.
Washington, D.C. 20503

Attention: Ms. Julia Wise

Re: Public Comments on the Government Contracting Memorandum Cost-Reimbursement Contracts For Development of Major Systems

Dear Ms. Wise:

Your Office is receiving comments regarding the Presidential Memorandum on Government Contracting issued on March 4, 2009. The subject of the comments set forth in this letter is the stated preference for fixed-price type contracts and why that preference is inappropriate when contracting for the development of major systems.

Although these comments are set forth on the letterhead of our law firm, I base these comments on my forty-six years of experience in procurement law. In point of fact, our law firm is the oldest and largest group of government contract lawyers in the United States and our firm was involved in addressing the problems arising in a large number of the programs described below. A few of us are sufficiently aged that we can remember and recite the sorry history of using fixed-price contracts for development of complex systems. Before I attempt to review that history for your Office, let me make one disclaimer: no client, contractor, or trade association has requested me to submit these comments.

Looking Back — Know The History

> "Those who cannot remember the past are condemned to repeat it."
> George Santayana

In the early 1960s, based on suggestions from Congress, DOD was looking for ways to control costs. At least by June 1964, an Assistant Secretary of the Air Force was proposing that a contractor should price an entire program (from research and development into production) at the outset of development. The price would include the development, prototype, testing, and initial production. Under one version, the price even might include logistic support such as the

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supply of spare parts. While some referred to the proposal as cradle-to-grave contracting or bundle bidding, it became officially known as "Total Package Procurement." Secretary of Defense Robert McNamara is often credited for that new procurement philosophy. Under Total Package Procurement, the contractor would assume complete responsibility for development and initial production without knowing what would be required to complete the detailed design and arrive at solutions for various technical problems to be encountered in the future.

Later commentators synthesized the problem as one of dealing with "unknown unknowns." The problems that might be encountered in completing development of a complex weapons system were unknown. Moreover, the solutions which might be required to solve those problems were also unknown, undoubtedly requiring advances in the state of the art which could not be anticipated at the time of bidding. The result of this philosophy was disastrous at the outset and every attempt over the years to return to fixed-price contracting for development of major systems has also brought disaster — both for the government and the contractor. It is safe to say that few, if any, fixed-price contracts for development of a major weapons system have ever succeeded in avoiding the need later to rescue the contractor — in addition to the need to accept program delays.

The Total Package Procurement method was used in the mid-1960s to procure the C-5A, the AH-56 Cheyenne Helicopter, the short range attack missile (SRAM), and the F-14. Fixed-price contracting also was used by the Navy to buy a new class of frigates. In every case, there were huge overruns and in at least one case, the program had to be canceled. The C-5A contract was eventually completed but with huge overruns. The Cheyenne Helicopter contract was terminated (after the deaths of two test pilots) because the Army simply was asking for more capability than designers could achieve in the 1960s. The SRAM (a small nuclear capable attack missile to be carried by a strategic bomber) was eventually completed but, again, with a large overrun.

These claims were eventually settled on lump sum bases, sometimes using Public Law 85-804 in and around 1971. In each case, after an extensive negotiation, the government ended up paying more than the amount of the fixed-price but less than the actual costs. Many of the settlements were engineered at the highest levels by then Deputy Secretary of Defense Packard in consultation with the Congress.

Also beginning in the 1960s, the Navy used the fixed-price contracting method to acquire a number of major new ships. The new DD963 destroyer, the new Landing Helicopter Attack Ship, the new 680 and 688 submarines, and contracts for FFGs (frigates) awarded to at least three yards all fell victim to this flawed contracting process. The claims efforts by the contractors and the claims defense efforts by the government went on through much of the 1970s and "wasted" millions of dollars. As an example, at one point, the Department of the Navy had dozens of attorneys and contract claims personnel housed in Mississippi responding to just two of these claims. The claims were only settled when Secretary of the Navy Hidalgo had the

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wisdom and the courage to use Public Law 85-804 to make lump sum settlements. Somewhere in the range of a billion dollars of ships claims were settled on bases that permitted the contractors to recover between 50 percent and 75 percent of their costs. Both the government and the contractors were losers.

After these later ship contracts were awarded, but long before the claims had been submitted and settled, the Department of Defense realized the mistake it had made. The Department issued DOD Directive 5000.1 to establish acquisition policy for major defense systems. Total Package Procurement was specifically banned and the Directive went on to read "[c]ost type prime and subcontracts are preferred when substantial development effort is involved."

Unable to remember the lesson of history for very long, DOD began in the late 1970s to relax the ban which had been set forth in DOD Directive 5000.1 A more flexible policy remained in place which gave government contracting officials leeway to determine which type of contract vehicle to use. The DOD, and particularly the Navy, began to slide back to inappropriate fixed-price contracting.

Then in 1987, the Directive was again updated and stated "fixed-price contracts are normally not appropriate for research and development phases. For such efforts, a cost-reimbursement contract is preferable because it permits an equitable and sensible allocation of program risk between the contracting parties."[1]

Congress, too, appeared to have learned the lesson. After extensive study and evaluation, the Surveys & Investigations Staff of the House Committee on Appropriations issued a report in 1987 concluding that the nature of the work in research and exploratory development contracting "most frequently necessitates" the use of the cost-reimbursement type contract.[2] Based on those findings, the House Appropriations Committee led the way by inserting very specific language in

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[1] *See also* the Federal Acquisition Regulation at 48 C.F.R. § 35.006(c) (1984-98: "Because the absence of precise specifications and difficulties in estimating costs with accuracy (resulting in a lack of confidence in cost estimates) normally precludes using fixed-price contracting for R&D, the use of cost-reimbursement contracts is usually appropriate."

[2] The Report stated: "Although Navy officials at the headquarters level have predicted immense success for the acquisition policy, the opinions expressed by Navy and other Service field procurement officials and technical experts indicated that [fixed price contracting] generally [has] proved unsuitable in an R&D environment." *See* Surveys & Investigations Staff, Report to the Comm. on Appropriations, U.S. House of Representatives: Navy Fixed Price Contracting in the Research, Development, Test and Evaluation (RDT&E) Account, 100th Cong., 1st Sess. (1987).

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the Defense Appropriations Act for FY1988. The language demanded that DOD not obligate or expend any of the appropriated funds for "fixed price type contracts in excess of $10,000,000 for the development of a major system or subsystem unless the Under Secretary of Defense for Acquisition determines, in writing, that program risk had been reduced to the extent that realistic pricing can occur, and that the contract type permits an equitable and sensible allocation of program risk between the contracting parties." (Public Law 100-202, Sec. 8118.) Similar language was included in the Defense Appropriations Acts for the following four years.

Unfortunately, a significant number of contracts for the development of major systems were awarded or funded by DOD without complying with this Congressional mandate. The best known instance of failure with disastrous results was the award in 1988 of a contract to General Dynamics and McDonnell Douglas for RDT&E of the A-12 Avenger on a fixed-price basis and with a price for low rate production. There were other examples including the award to AT&T for the development and initial production of a Reduced Diameter Array to search for the latest, quiet Russian nuclear submarines and the second phase of the V-22 helicopter development. All of these programs produced classic examples of encountering unforeseen problems which required additional research and development to achieve — or attempt to achieve — scientific breakthroughs to solve problems. They presented classic examples of "unknown unknowns." All of these resulted in huge overruns and two led to extended and expensive litigation.

Looking Forward

Against this background, it has been particularly disconcerting to watch some in Congress shift the emphasis from requiring approval for fixed-price development of major programs to requiring approval of cost-reimbursement contracts. (See § 818 of the National Defense Authorization Act for FY 2007). It is equally disconcerting to hear some in the present administration blame cost-reimbursement contracting for overruns.

It is undoubtedly true that in many procurements, where the requirements are clear, the parties can fairly use a fixed-price contract. It is also true that in some cases the unit cost can be fixed and the only thing that is uncertain is the eventual quantity of services required. However, when we look at overruns occurring in procurements for major weapons systems, cost-reimbursement contracting definitely is *not* the problem.

More thoughtful analyses of troubled programs usually conclude that there are a number of causes. These include, first, attempting to acquire too much capability and advance the state of the art in one procurement of a compound weapons system. Requirements seek a near impossible (or sometimes actually impossible) combination of speed, control, weapons carrying capability, weight, maneuverability, etc. — too much to be accomplished on time and on budget. As Secretary Gates has recognized, it is better to scale back the requirements slightly and have greater confidence in achieving the goals. The concept of spiral development also permits subsequent versions of a weapon system to improve on the initial base.

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The second usual reason for a troubled program is the lack of sufficient attention by contract administrators, technical experts, and cost analysts so that progress and problems are identified early. This country has a serious and substantial shortage of contract administration personnel. The Administration and Congress must address these shortages.

Third, building on these two failures, there is always a reluctance by the procuring agency to acknowledge problems and report progress or lack thereof honestly and promptly. None of these problems is solved by using a fixed-price contract to shift the risk of "unknown unknowns" to the contractor.

In summary, the United States should not forget history and therefore be condemned to repeat earlier mistakes. At least with respect to the development of major systems, cost-reimbursement contracting should be the preferred alternative. (Please note that even in cost-reimbursement contracting, award fee and incentive fee provisions can provide rewards and penalties which create incentives to perform on budget and on schedule.) Switching to a preference for fixed-price contracting for the development of complex systems not only is not the answer but, rather, is a prescription for a whole new generation of delayed programs, claims, and litigation.

Sincerely,

C. Stanley Dees

CSD:dm