

Note to Readers

The Acquisition Advisory Panel is posting the draft of its report for public comment. The findings and recommendations in the report have been adopted over the 18 months of the Panel's work. These collective findings and recommendations have been incorporated into the attached draft of the Panel's report and will not change. However, the Panel is providing the draft for comment to identify any errors of fact or problems with readability. While the Panel is not required to accept further public comment, we have tried to provide maximum transparency into the Panel's processes through 31 public meetings and through posting materials on our website. ***Comments on this draft should be submitted by January 5, 2007*** and should be addressed to the Panel's Executive Director/Designated Federal Officer by e-mail at Laura_G._Auletta@omb.eop.gov or FAX to (202) 395-5105. Comments submitted through regular mail should be addressed to Laura Auletta, Office of Federal Procurement Policy, 725 17th Street NW, Room 9013, Washington, DC 20503.

The Panel is grateful to the witnesses who testified before the Panel and to the many members of the public who submitted statements. The insight gained from the witnesses and the exchange of views has been invaluable in shaping this report. In many instances, approaches under consideration by the Panel were revised or adjusted based on input from the witnesses who helped the Panel see many different perspectives.

DRAFT
Final Panel Working DRAFT
December 2006

**REPORT OF THE
ACQUISITION ADVISORY PANEL**

TO THE

OFFICE OF FEDERAL PROCUREMENT POLICY

AND THE

UNITED STATES CONGRESS

December 2006

DRAFT
Final Panel Working DRAFT
December 2006

INTRODUCTION

The Panel Project

Background

The Federal government is the single largest buyer in the world. Each year Federal agencies spend nearly \$400 billion a year for a range of goods and services to meet their mission needs.¹ Some acquisitions are highly specialized – advanced fighter jets, precision munitions, nuclear submarines – for which there is no non-governmental or commercial demand. Other goods and services are readily available and purchased from the commercial marketplace. From laptop computers and off-the-shelf software to information technology (“IT”) consulting services, software development, and engineering services. Federal agencies rely upon common commercial goods and services to conduct their business. In addition, commercial products may be modified to meet government needs. In all of these circumstances government acquisition process intersects with the private sector and the Federal government can benefit from knowing how commercial buyers approach the acquisition process.

Importance Of The Commercial Market To Government Acquisition

Effective and efficient access to products and services available in the commercial market can help government agencies to achieve their various missions. The pace at which technology advances requires that government have access to commercial technology and technology based services. Agencies have a significant interest in acquiring such products and services at a reasonable price and without undue administrative burden. Of course, in light of the involvement of public funds, acquisition must be conducted in a manner that is fair and furthers the public interests in transparency and accountability.

Over the last two decades, significant study and effort has been dedicated to the acquisition of goods and services available in the commercial market by the federal government. For example, in 1986, the Blue Ribbon Commission on Defense Management highlighted the need for DOD to expand its use of commercial products and processes and to eliminate barriers that discouraged application of innovative technology to DOD contracts.²

Congress later chartered the “Section 800 Panel”³ to assess laws affecting defense procurement. In early 1993, the Section 800 Panel proposed a variety of reforms, including: stronger policy language favoring the use of commercial and nondevelopmental items; a new statutory definition of commercial items; and an expanded exemption for “adequate price competition” in the Truth in Negotiations Act.

¹ See <https://fpds.gov>; see also <http://www.whitehouse.gov/omb/procurement/index.html>.

² The President’s Blue Ribbon Commission on Defense Management (The Packard Commission), A Quest for Excellence: Final Report to the President and Appendix (Washington, D.C.: The Packard Commission, June 1986).

³ The Section 800 Panel was chartered by Section 800 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 800, 104 Stat. 1485, 1587 (1990).

DRAFT

Final Panel Working DRAFT

December 2006

Following the efforts of the Section 800 Panel, Congress enacted a series of procurement reforms in the mid-1990s that were intended to enable the government to streamline the acquisition process and to obtain greater access to products and services available in the commercial market. These reforms primarily were introduced through the Federal Acquisition Streamlining Act of 1994 (“FASA”)⁴ and the Federal Acquisition Reform Act of 1996⁵ (“FARA”).

FASA and FARA required, and were followed by, various changes to the Federal Acquisition Regulation (“FAR”). For example, FASA introduced a strong preference for the acquisition of commercial items.⁶ The statutory definition of commercial items refers to categories of products and services.⁷ The same is true of the regulatory definition in the FAR.⁸

Since the FASA and FARA reforms, agencies have sought to purchase commercial items and otherwise rely on the techniques addressed in those statutes with varying degrees of success. Those efforts were the subject of considerable analysis, including by GAO in reports regarding use of the Multiple Award Schedule, task and delivery order contracts, and interagency contracting.

Congress enacted further reforms. For example, Congress passed the Services Acquisition Reform Act of 2003 (“SARA”), which introduced other reforms related to commercial items as well as to the acquisition workforce. SARA also chartered this Panel to study current laws, regulations, and government-wide acquisition policies with regard to commercial practices, and to recommend appropriate reforms.

Trends In Acquisition

Since the FASA and FARA reforms were enacted a decade or more ago, a number of events have affected government contracting. For example, the events of September 11, 2001, and subsequent conflicts in Afghanistan and Iraq, as well as the Katrina aftermath, have influenced what the government buys and how much it spends. From fiscal year 2000 to fiscal year 2005, government purchasing increased nearly 75% from \$219 billion to more than \$380 billion.⁹

Over the last decade, a number of trends have affected government contracting. Services now comprise a greater percentage of the government’s acquisition budget. Between 1990 and 1995 the government began spending more on services than goods.¹⁰ Currently, procurement

⁴ Pub. L. No. 103-355, 108 Stat. 3243 (1994).

⁵ Pub. L. No. 104-106, 110 Stat 186 (1996). FARA was later renamed the “Clinger-Cohen Act.”

⁶ See 10 U.S.C. § 2577 (codifying preference).

⁷ See 41 U.S.C. § 403(12).

⁸ See FAR 2.101.

⁹ “Trending Analysis Report since Fiscal year 2000,”

http://www.fpdsng.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls.

¹⁰ Calculations based on the Federal Procurement Report published by the Federal Procurement Data Center for fiscal years 1990-1995.

DRAFT

Final Panel Working DRAFT

December 2006

spending on services accounts for more than 60% of total procurement dollars.¹¹ In FY 2005, DOD obligated more than \$141 billion on service contracts, a 72% increase since FY 1999.¹²

While procurement spending has increased, products and services often are purchased through relatively large orders under contracts with broad scopes of work. Contracting agencies often rely on indefinite delivery contracts, such as interagency contracts, under which orders are issued for products or services. Orders under the types of contracts discussed above often can be larger in amount than individual contracts. Orders under such contract vehicles can be significant in terms of size, and may exceed \$5 million. Purchases under the Multiple Award Schedules also have more than doubled in value over the last decade.¹³

There also are fewer acquisition professionals in the government to award and administer contracts as the government's contracting workforce has reduced in size over the last decade. The federal acquisition workforce has declined by nearly 50 percent since personnel reductions in the mid-1990s.¹⁴ Despite recent efforts to hire acquisition personnel, there is an acute shortage of federal procurement professionals with between five and 15 years of experience. This shortage will become more pronounced in the near term because roughly half of the current workforce is eligible to retire in the next four years.¹⁵

Over the last decade or so, consolidation has occurred in certain parts of industry that contract with the government, including but not limited to aerospace and defense. As a result, certain contractors are now performing work that previously was performed by other companies.

In sum, a variety of trends and factors have influenced government contracting and continue to do so. Effective and efficient access to the commercial market place, and will continue to play, a major role in helping to enable agencies to purchase the products and services they need.

Current Commercial Practices: What Are They?

Because Congress tasked the Panel¹⁶ to assess current laws, regulations, and government-wide acquisition policies with a view toward "ensuring effective and appropriate use of commercial practices and performance-based contracting," the Panel considered it critical to identify current commercial practices.

¹¹ Total Actions by PSC standard report from FPDS-NG run Dec. 2006.

¹² See Government Accountability Office, *Defense Acquisitions: Tailored Approach Needed to Improve Service Acquisition Outcomes*, GAO-07-20 (Nov. 2006), at 1.

¹³ See General Accounting Office, *Federal Acquisition: Trends, Reforms, and Challenges*, GAO/T-OIG-00-7 (Mar. 7, 2000), at 6-7.

¹⁴ Report on the Federal Acquisition Work Force: Fiscal Years 2003 and 2004 (Federal Acquisition Institute Report 2003-2004), Executive Summary, p. vii.

¹⁵ Testimony before the Acquisition Advisory Panel of S. Assad, Director, Defense Procurement and Acquisition Policy, June 13, 2006, p. 57-58 (testimony on file with the Panel).

¹⁶ See Pub. L. No. 108-136, sec. 1423(c)(1).

DRAFT

Final Panel Working DRAFT

December 2006

Rather than make assumptions regarding current commercial practices, the Panel sought input. Specifically, over the course of its eighteen months of study, the Panel broadly solicited and received substantial testimony and other input from government, industry, and other members of the public regarding acquisition practices. As part of its study, the Panel also issued questionnaires to private sector buyers and government buying agencies to assess current practices and to identify potential areas for improvement in the way the government buys.

The Panel thus was able to conduct its assessment of current laws, regulations, and government-wide acquisition policies with the benefit of an understanding of current commercial practices, as described by industry. Industry input included private sector buyers with experience in large, complex acquisitions of services, such as information technology services. Such buyers described the competitions that they conducted, and their efforts to ensure that prices were fair and reasonable. It is clear from the many private sector buyers who testified before the Panel that the bedrock principle of current commercial practice is competition.

The Panel also benefited from the experience and insights provided by government acquisition personnel regarding the various practices that were introduced or encouraged by procurement reforms in the last decade. The Panel inquired about what agencies were doing, what worked, and what did not. The inputs described above provided critical information for the Panel's work.

Commercial Purchases and Practices: The Special Challenge Of Government

Our Supreme Court has observed that when the government enters the commercial market, it generally subjects itself to the same contract rules as private parties.¹⁷ Although there are exceptions set forth in federal statutes regulations and the Constitution, this suggests that the Federal government take advantage of commercial practices where possible.

Due to its special status as the sovereign, and in light of the statutes and regulations that apply to government contracting, however, government agencies are not in a position to take full advantage of the practices of the private sector. For example, agencies generally may not award contracts based solely on consideration of a company's prior performance or enter into long-term strategic agreements. Agencies are subject to appropriations laws, and may be limited to use of annual appropriations. As discussed above, agencies also are required to abide by competition statutes and regulations.

On the other hand, government can take advantage of many approaches used in the commercial market. Doing so can foster effective and efficient access to products and services.

The Panel has made an effort to achieve balance, recognizing the time pressures on the acquisition system, but also has tried to implement current commercial practices regarding

¹⁷ *Lynch v. United States*, 292 U.S. 571, 579 (1934). See also *Mobil Oil Exploration and Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000).

DRAFT

Final Panel Working DRAFT

December 2006

competition, and to provide transparency and accountability necessary to expenditure of taxpayer funds.

Report Structure

This Report is divided into seven Chapters. Each chapter sets forth the background of the issues, followed by the Panel's findings and recommendations. We have provided a relatively detailed Executive Summary that explains the Panels findings and recommendations – as well as the Panel process. However, the Executive Summary is not the Report. The chapters are as follows:

Chapter 1 – Commercial Practices

Chapter 2 – Improving Implementation Of Performance-Based Service Acquisition
(PBSA) In The Federal Government

Chapter 3 – Interagency Contracting

Chapter 4 – Small Business

Chapter 5 – The Federal Acquisition Workforce

Chapter 6 – Appropriate Role Of Contractors Supporting Government

Chapter 7 – Report On Federal Procurement Data

DRAFT
Final Panel Working DRAFT
December 2006

EXECUTIVE SUMMARY

As the Panel's Findings and Recommendations took root in its working groups and were presented to and debated and adopted by the full Panel during public meetings, certain themes began to emerge and intersect across the working groups. This executive summary does not list all of the findings and recommendations. Instead, it is intended to share those key themes that became apparent over the course of the Panel's deliberations. For clarity and consistency, this material is presented in accordance with the Panel's statutory charter.

I. Statutory Charter: Ensure Effective And Appropriate Use Of Commercial Practices

While nobody expects the government to ever be a truly commercial buyer given Constitutional constraints on funding, the need to be accountable for the expenditure of public funds, the statutory constraints aimed at providing full and open competition, and achievement of certain social and economic objectives, the Panel's many commercial sector witnesses echoed recurring themes that could be adopted by the government.

A. Enhance Competition

1. **Findings**

Requirements Definition is Key to Achieving Benefits of Competition. Commercial firms testifying before the Panel described a vigorous acquisition planning phase when buying service solutions. Acquisition process governance is considered of equal importance to selecting the right contractor. They obtain "buy in" of the business case from all organizational stakeholders. These organizations invest the time and resources necessary to clearly define requirements first, in order to achieve the benefits of competition in an efficient market: high quality, innovative solutions at the best prices. They apply multi-functional resources to perform ongoing rigorous market research and are thus able to provide well-defined performance-based requirements conducive to a best value solution at fixed prices.

Government Frequently Fails to Invest in Requirements Definition. Public sector officials and representatives of government contractors testified that the government frequently is unable to define its requirements sufficiently to allow for fixed price solutions. Ill-defined requirements also fail to produce meaningful competition for services solutions, relying instead on time and materials ("T&M") contracts based on fixed hourly rates. The causes for this failure to define requirements were described by many witnesses, including the Government Accountability Office ("GAO") and agency inspectors general ("IGs"). Major contributors to this problem are a culture focused on "getting to award" and budgetary time pressures combined with a strained workforce and lack of internal expertise in the market. Additional problems associated with unclear roles and responsibilities in the use of interagency or government-wide contracts, another area under this Panel's statutory purview, also contribute. The government's difficulties in defining requirements are well documented. Recently, the GAO and IGs have found that orders under interagency contracts frequently contain ill-defined requirements.

DRAFT

Final Panel Working DRAFT

December 2006

2. Recommendations

The Panel's recommendations seek to improve the environment for healthy competition using a 360 degree approach, providing tools to enhance transparency, requirements analysis and definition, requirements for greater use of competition, and positive pressures, in the form of protest authority and transparency that will result in agencies applying an appropriate level of discipline to the structure of their acquisitions.

The Panel could not make recommendations regarding competition without an aim toward nurturing a healthy environment conducive to achieving the benefits of competition. Therefore, the Panel recommends that agencies establish centers of expertise in requirements analysis and definition, and obtain express advance approval of the requirements from the key stakeholders (*e.g.*, program manager and contracting officer) to closely resemble the buy-in obtained in

DRAFT

Final Panel Working DRAFT

December 2006

direction changes. Finally, these buyers use relatively short-term contracts, especially for services that involve complex technology requirements.

Competition for Government Contracts as well as its Approaches to Acquiring Commercial Services Differs Significantly from Commercial Practice. The Extent to which Each of these Approaches Achieves Competition Varies. Even where the government attempts to adopt commercial approaches, competition for government contracts differs in significant respects from commercial practice. Contributing factors include fiscal constraints imposed by the annual appropriations process, the need to accomplish urgent missions with limited time and personnel, policies and statutory requirements requiring transparency and fairness in expenditure of public funds, use of the procurement system to accomplish a host of government social and economic objectives, and the audit and oversight process designed to protect taxpayers from fraud, waste, and abuse. But there is an unequivocal mandate for competition that runs through the statutes and regulations governing federal procurement. Yet, the Panel found government implementation of competition varies from very structured processes on the one hand, to ill-defined requirements and minimal, if any, head-to-head competition on the other.

Comparing the emphasis on competition in commercial practice with actual government-wide competition statistics, the Panel found that nearly one-third of the government's dollars obligated in fiscal year 2004 was awarded without competition accounting for \$108 billion. About one-fourth, or \$98 billion was awarded noncompetitively in fiscal year 2005. Even when competed, the percent of dollars awarded when only one offer was received has doubled from 2000 to 2005. Spending on services was \$216 billion in fiscal year 2004 and \$220 billion in fiscal year 2005, accounting for more than 60% of total obligations for each year. At least 20% to 24% of these services were awarded non-competitively in fiscal years 2004 and 2005. However, the Panel believes that the amount of non-competitive awards is underreported for orders under multiple award contracts available for interagency use. This lack of transparency is significant given that 40% or \$142 billion of all government obligations were spent under interagency contracts in 2004. But even without visibility into the level of competition on orders, there is significant evidence to give cause for concern. Both the GAO and the DoD IG have found that agencies continue to award a large proportion of orders for services noncompetitively. The GAO placed interagency contracts on their High Risk Series for 2005, finding, in part, that the orders under these contracts frequently fail to comply with competition requirements.

In addition to the concerns regarding the level of competition for orders under interagency contracts, the Panel also has significant concern regarding the level of meaningful competition achieved. Interagency contracts are generally indefinite delivery/indefinite quantity and, based on a statutory preference, generally result in multiple awards. Where services are sought, the initial competition for these contracts typically includes a loosely defined statement of the functional requirements in the solicitation, focusing on hourly rates for various labor categories, with the expectation that more clearly defined requirements will be provided at the order level where more meaningful competition will occur. However, the Panel heard testimony and reviewed GAO and IG reports describing ill-defined requirements at the order level. Costly and complex services are procured using orders under these contracts. Of the \$142 billion obligated

DRAFT

Final Panel Working DRAFT

December 2006

under interagency contracts in fiscal year 2004, \$66.7 billion was awarded in single transactions exceeding \$5 million, with services accounting for 64% or \$42.6 billion. For fiscal year 2005, interagency contract obligations totaled \$132 billion with \$63.7 billion in single transactions over \$5 million, with services accounting for 66% or \$42 billion.

So what has happened to dampen the expectation for this more rigorous competitive process at the order level? There appear to be several key checks and balances missing that would otherwise contribute to a healthier competitive environment. For instance, except recently for DoD, it is not required that all eligible contractors be informed of an order requirement. Also, there is little transparency, even into sole source orders, as there is no public notification or synopsis requirement. Even where competition is used at the order level, there is no protest option for contractors under multiple award contracts, reducing transparency and accountability, including, for instance, the need for clearly stated requirements, evaluation criteria and the incentive to evaluate using reasonable trade offs based on these criteria. And, finally, there is no requirement for a detailed debriefing at the task order level, denying contractors the opportunity to become more competitive on future order requirements.

But the Panel does recognize that these multiple award contracts provide significant benefits to the government, not the least of which is a reduced administrative cost accruing to those agencies that would otherwise have to conduct full and open competitions for their recurring service needs. Multiple award contracts are an effective tool allowing a strained acquisition workforce to meet mission needs in a streamlined fashion. However, there was never an expectation that these streamlined vehicles would not produce meaningful competition. Therefore, the Panel sought to achieve a balance – one that would introduce more pressure to encourage competition but not unduly burden these contracts as tools for streamlining. While nearly half of the dollars spent under these contracts are awarded in single transactions over \$5M, the majority of the transactions fall under this threshold. Therefore, in addition to its other recommendations, the Panel recommends applying additional requirements at this threshold, thereby impacting a significant dollar volume but not the majority of transactions.

2. Recommendations

To emphasize the importance of competition to achieving the best outcomes, the Panel recommends expanding government-wide the current DoD requirements to notify all eligible contractors under multiple award contracts of order opportunities or to ensure the receipt of three offers. The Panel also felt that while a pre-award notification of sole source orders might unduly burden the streamlined purpose of these multiple award contracts, post-award notification would suffice in providing transparency and the positive pressures that transparency imparts while bolstering public confidence. And for single orders with an expected value in excess of \$5 million where a statement of work is required, the Panel recommends that agencies 1) provide a clear statement of the requirements; 2) disclose the significant evaluation factors and subfactors and their relative importance; 3) provide a reasonable response time for proposal submissions, and; 4) document the selection decision to include the trade off of price/cost to quality in best value awards. Additionally, the Panel recommends post-award debriefings for disappointed

DRAFT

Final Panel Working DRAFT

December 2006

offerors for orders in excess of \$5 million where statements of work and evaluation criteria are used in the selection. The Panel found that contractors expend significant bid and proposal costs in competing for individual orders under multiple award contracts and that debriefings encourage meaningful competition by providing disappointed offerors information that assists them in becoming more competitive on future orders. Concerned that the government is purchasing costly and complex services without a commensurate level of deliberation, transparency and review to ensure an appropriate level of discipline, the Panel recommends limiting the statutory restriction on protests of orders under multiple award contracts to orders valued at \$5 million or less.

With respect to the GSA Federal Supply Schedules Program, the Panel recommends a new services schedule for information technology that would reduce the burden on contractors normally resulting from a lengthy process of negotiating labor rates with GSA that produce little meaningful price competition because services of this type are requirement specific. The meaningful competition results from an offeror responding to a specific order requirement with an appropriate and well-priced labor mix resulting in a quality solution. This new services schedule would *require* competition at the order level.

C. Adopt More Commercial Practices

1. Findings

Commercial Buyers Rely on Competition for the pricing of goods and services, using well-defined requirements that facilitate competitive, fixed price offers. Commercial practice strongly favors fixed-price contracts in the context of head-to-head competition in an efficient market. In the absence of competition, which is relatively rare, commercial buyers rely on their own market research, and benchmarking, and often seek data on similar commercial sales. In some cases, they may obtain certain cost-related data, such as wages or subcontract costs, from the seller to determine a price range.

While commercial buyers avoid time-and-materials (“T&M”) contracts, viewing them as too resource intensive to monitor, they do use them for specific types of work, for instance, repair, building capital equipment designed in-house, and engineering/development work. When T&M contracts are used, commercial buyers plan for and apply the necessary in-house resources to effectively monitor these contracts.

2. Recommendations

The Panel’s statutory charge requires it to make recommendations with a view toward protecting the best interests of the Federal government. These recommendations seek to improve the government’s ability to establish fair prices. The Panel recommends restoring the statutory definition of commercial services found in the Federal Acquisition Streamlining Act (“FASA”). FASA intended for services that were offered and sold in substantial quantities in the commercial marketplace to be defined as commercial, thereby allowing more streamlined purchasing per FAR Part 12. This would mirror how commercial buyers purchase in an efficient market using

DRAFT

Final Panel Working DRAFT

December 2006

competition. However, the regulatory implementation of the definition of commercial services allowed services not sold in substantial quantities in the commercial marketplace, or those “of a type,” to nonetheless be classified as commercial and acquired using the streamlined purchasing procedures of FAR Part 12. This can leave the government at a significant disadvantage by restricting the available tools for determining fair and reasonable prices when limited or no competition exists. Restoring the statutory definition would not preclude purchasing services not sold in substantial quantities in the commercial marketplace, but would require that such services be purchased using FAR Part 15 procedures.

The Panel also recommends specific regulatory revisions that would provide a more commercial-like approach to determining price reasonableness when no or limited competition exists. The recommendation revises what “other cost or pricing data” the contracting officer can request when no or limited competition exists for a commercial item or service. To protect contractors from contracting officers who might be tempted to default immediately to seeking cost data from the contractor before attempting other means to establish price reasonableness, the Panel has provided an order of precedence, favoring market research first and limited information from the contractor last. In no event may the contracting officer require detailed cost breakdowns or profit, and shall rely instead on price analysis. The contracting officer may not require contractor certification of “other cost or pricing data,” nor may it be the subject of a post-award audit or price redetermination.

The Panel’s concerns regarding the use of T&M contracts are based largely on price and contract management. However, in considering a recommendation in this area, we had to balance our concerns for the risk these contracts place on the government, especially given GAO findings that the government does not provide sufficient surveillance, with our concern to protect the government’s ability to perform its mission uninterrupted. The Panel, therefore, recommends enforcing the current policies limiting the use of T&M contracts. This includes the recently enacted Section 1432 of SARA that allows the use of these contracts using FAR Part 12 procedures if they are competed. The Panel also recommends, whenever practicable, establishing procedures to convert work being done on a T&M basis to a performance-based effort. Finally, to limit the government’s risk under these contracts, the government should not award a contract or task order unless the overall scope of the effort, including the objectives, has been sufficiently described to allow efficient use of the T&M resources and to provide effective government oversight of the effort. While a written public statement from association representing contractors advised the Panel to recommend repealing the competition requirement for commercial item T&M contracts under SARA, the Panel could not ultimately support this given its findings regarding competition.

DRAFT

Final Panel Working DRAFT

December 2006

D. Equality Under Legal Presumptions

1. Findings

Government Contractors Not on a Level Playing Field. Although the presumption of good faith applies equally to both parties to a commercial contract in the event of a performance dispute with the government, contractors do not enjoy the same legal presumptions regarding good faith of the parties. Current precedent provides that the government enjoys an enhanced presumption of good faith and regularity in such a dispute.

2. Recommendation

In addition to protecting the best interests of the government, the Panel's statutory charter also called on it to make recommendations with a view toward ensuring fairness. The Panel recommends legislation to ensure that contractors, as well as the government, enjoy the same legal presumptions, regarding good faith and regularity, in discharging their duties and in exercising their rights in connection the performance of any government procurement contract, and either party's attempt to rebut any such presumption that applies to the other party's conduct shall be subject to a uniform evidentiary standard that applies equally to both parties. In enacting new statutory and regulatory provisions, the same rules for contract interpretation, performance, and liabilities should be applied equally to contractors and the government unless otherwise required by the United States Constitution or the public interest.

II. Statutory Charter: Review Laws And Regulations Regarding The Performance Of Acquisition Functions Across Agency Lines Of Responsibility, And The Use Of Government-Wide Contracts

A. Enhance Accountability And Transparency

1. Findings

Accountability and Transparency Lacking. Government-wide contracts are referred to in this report as interagency contracts and multi-agency contracts interchangeably. The performance of acquisition functions across agency lines is almost exclusively accomplished through the use of interagency contracts. The Panel finds that interagency contracts play a critical streamlining role, allowing agencies to achieve their missions with fewer resources devoted to procurement while affording the government the opportunity to leverage its buying power. But in 2005, GAO placed interagency contracts on its High Risk series due, in part, to ordering under these contracts that failed to adhere to laws, regulations, and sound contracting practices, and for a lack of oversight and accountability. GAO found that the causes of such deficiencies stem from the increasing demands on the acquisition workforce, insufficient training, and in some cases inadequate guidance. GAO also noted that the fee-for-service arrangement used for interagency contracts create incentives for the contracting agency to increase sales volume that results in too great a focus on meeting customer demands and not enough on complying with fiscal rules ordering procedures. GAO raised concerns that the lines of responsibility for key functions such

DRAFT

Final Panel Working DRAFT

December 2006

as describing requirements, negotiating terms, and conducting oversight are not clear among: (i) the agency that manages the interagency contract, (ii) the ordering agency, and (iii) the end user.

The Comptroller General of the United States told the Panel that while it is known that these contracts are proliferating, outside of the GSA Schedules program and the Government-wide Acquisition Contracts (“GWACs”), there is no reliable data on how many such contracts exist, how much money is involved and the nature of the services acquired under them. As evidence of their popularity, interagency contract obligations in fiscal year 2004 totaled \$142 billion or 40% of the government’s obligations in that year.

With the proliferation has come extensive oversight by Congress, GAO, the IGs, outside organizations and the media of various federal agencies. Among the GAO and IG findings on ordering deficiencies is a significant failure to comply with competition requirements, use of ill-defined requirements and T&M pricing without sufficient government surveillance. Some GAO and IG findings identify “interagency assisting entities” that use interagency contracts. These interagency assisting entities provide fee-for-service acquisition support to other agencies. The Panel recommendations address these entities. The Panel also found a trend in agencies establishing enterprise-wide contract vehicles that operate much like an interagency contract, except their use is restricted to a single agency. While the Panel recognizes that some competition among agencies for these requirements is good, inefficient duplication threatens to dilute the overall value of interagency contracts to the government.

With the rapid growth in public funds spent under these interagency contracts and with the assisting entities that use them, the Panel believes it is critical to confront the lack of accountability and transparency to improve public confidence in these vehicles and ensure they fulfill their promise for reducing overall administrative costs to the government. It is notable that despite the significant dollars spent under these contracts, there is no consistent, Government-wide policy regarding their creation and reauthorization (or continuation).

2. Recommendations

Many of the issues identified by the GAO, agency IGs and Panel witnesses on the misuse of these vehicles are related to the internal controls, management and oversight, and division of roles and responsibilities between the vehicle holder and ordering agency. These issues can best be addressed with a government-wide policy that requires agencies to specifically and deliberately address these matters at the point of creation and continuation rather than attempting to remedy these problems at the point of use. The current lack of procedural requirements and transparency allows for the proliferation of these vehicles in a largely uncoordinated, bottom-up fashion, based on short term, transaction related benefits instead of on their ultimate value as a tool for effective government-wide strategic sourcing. The Panel recommends that under guidance issued by OMB, agencies formally authorize the creation or expansion of multi-agency contracts, enterprise-wide contracts, and assisting entities. The Panel’s recommendations maintain approval for the creation and expansion at the agency level (except for GWACs). The

DRAFT

Final Panel Working DRAFT

December 2006

Panel provides a list of considerations to be included in this OMB guidance to address responsible management of these contracts and assisting entities.

The Panel also made recommendations to improve transparency regarding these contracts. First, the Panel recommends OMB conduct a survey of existing vehicles and Assisting Entities to establish a baseline. The draft OFPP survey, developed during the Working Group's deliberations includes the appropriate vehicles and data elements. The Panel believes that establishing a database identifying existing contracts and assisting entities as well as their characteristics is the most important near-term task. It is the view of the Panel the most expeditious means of assembling such information is in the form of a survey as currently drafted by OFPP in support of the OMB task force examining Interagency and Agency-Wide Contracting. The information gathered should allow for agency and public use. This survey is already underway.

From the outset of the Panel's work, we have been frustrated by the lack of data available to conduct a thorough analysis of interagency contracts and the orders placed under them. The Federal Procurement Data System ("FPDS") has traditionally been a transactions-based database, collecting information only on transactions that obligate funds. Therefore, while agencies input their order information, there was no efficient way to identify it as an order under an interagency contract, except for the GSA Schedules program.

In 2004, FPDS-Next Generation ("FPDS-NG"), a new technology solution, replaced FPDS. Twenty-seven years of collected contract data was migrated into the new system. But at the same time as the system migration, new reporting elements were added. For instance, FPDS-NG now collects information on interagency contracts. However, adding a new collection requirement on any ongoing contract or order creates a myriad of unavoidable migration issues. Moreover, information on the extent of competition at the order level is not reliable due to a number of issues including: (i) automatic DoD coding of all GSA schedule orders as full and open competition, (ii) coding of other orders as full and open based on the contract, and (iii) system migration rule failure.

The Panel also is concerned with the amount of incorrect data entered into the system by agencies, such as the ultimate value (base plus options) requiring the Panel to rely solely on the transaction value of an order, significantly less than the estimated value.

The data section of the report documents a long history of inaccurate data input by agencies. For example, the Panel's survey of PBA contracts and orders found that of the sample reviewed, 42% that were entered in FPDS-NG as performance based, clearly were not (with some agencies admitting to FPDS-NG coding errors). Among other recommendations for data improvement, the Panel has made several to focus attention on the importance of agencies inputting accurate data, including a statutory amendment assigning Agency Heads the accountability for accurate input. In those limited circumstances where the Panel and FPDS-NG staff were able to obtain data on interagency contracts, the Panel recommends providing public access to that data online.

DRAFT

Final Panel Working DRAFT

December 2006

III. Statutory Charter: Ensuring Effective And Appropriate Use Of Performance-Based Contracting

Performance-based Contracting, now called Performance-based Acquisition (“PBA”), is an approach to obtaining innovative solutions by focusing on mission outcomes rather than dictating the manner in which the contractor’s work is to be done. Those outcomes are then measured and the contractor compensated on the basis of whether or not the outcomes are achieved.

During the Panel’s public deliberations, there was some debate as to the value of this technique. Witness testimony, as well as written public statements, was mixed on PBA merits. One member and some public comments questioned the validity of PBA for government uses after more than a decade of attempts to implement have failed to produce expected results. Others, however, noted significant successes using PBA. And though a 1998 OFPP study found generally positive results, the Panel found no systematic government-wide effort to assess fully the merits of the process. Many spoke to the challenges in implementing the technique, most of which focused on the acquisition workforce, including those who define requirements. Even commercial organizations told the Panel that implementing the technique can be difficult, especially identifying the appropriate performance standards to measure. Despite the difficulty, it remains the preferred commercial technique seen as critical to obtaining transformational and innovative solutions. Ultimately, the Panel determined that in view of a lack of data supporting either that the technique is unworkable in the federal government sector or that PBA’s costs outweigh its benefits, the Panel’s statutory mandate was clear: improve the effectiveness and appropriate use of PBA. As such the Panel recommendations should not be interpreted as offering a long-term endorsement of PBA. Rather the Panel aims are directed at improving current implementation and at providing a solid basis for a more thorough assessment of its value. Thus, the Panel agreed that the overall statement of the issue is “Why has PBA not been fully implemented in the federal government?”

A. Improve PBA Implementation

1. Findings

Uncertainty Remains on How and When to Apply PBA. Government officials testifying before the Panel related the challenges they face in applying PBA that included when and how to apply it and the time and resources required for the technique. They also spoke to the cultural emphasis of “getting to award” that shortchanges both the requirements definition process and effective post-award contract management. A 2002 GAO survey of 25 contracts reported as PBA found while most contained at least one PBA attribute, only 9 contained all of the required elements and may have used extremely restrictive work specifications. GAO concluded that the study raised concern about whether agencies have an understanding of PBA and how to maximize its benefits. A Rand Corporation study of the U.S. Air Force Air Logistics and Product Centers in 2002 found uncertainty over which services were suitable for PBA, confusion with the use of “Statement of Work” and “Statement of Objectives,” and about what constitutes a measurable performance standard. The Panel’s own survey of randomly selected PBAs from the

DRAFT

Final Panel Working DRAFT

December 2006

top ten contracting agencies reflect similar problems, including an inability to identify and align performance measures and contract incentives to ensure desired outcomes are achieved. A multi-association group representing government contractors told the Panel that many of the solicitations they receive that would be appropriate for PBA are still not described in terms of outcomes and those that are frequently do not identify measures to achieve those outcomes. This multi-association group provided the Panel with a sampling of such solicitations. As a result of these findings, the Panel concluded that PBA's potential for generating transformational solutions to agency challenges remains largely untapped.

FPDS-NG data are insufficient and perhaps misleading regarding use and success of PBA. At the suggestion of a written public statement, the Panel conducted its own survey of contracts and orders that were coded in FPDS-NG as performance-based. Of the 76 contracts and orders randomly selected from the top ten contracting agencies, the Panel received 55 that contained sufficient documentation to support the review. While 36% were determined to have the elements of a PBA, another 22% required significant improvement. And of the sample reviewed, 42% were clearly not PBA with some agencies admitting that the contracts were mistakenly coded as performance-based in FPDS-NG. Finally, it is important to note that FPDS-NG data is collected at the time of contract or order award and is not designed to collect information to assess cost savings or other similar measures of success.

2. Recommendations

Based on these findings, the Panel recommended more guidance to assist agencies in the efficient and appropriate application of PBA, including

- An Opportunity Assessment Tool that acknowledges the resource investment required by PBA and helps agencies identify those acquisitions likely to derive the most immediate benefit from such an investment;
- A Best Practices Guide on developing measurable performance standards; and
- Improved guidance on types of incentives appropriate for various contract vehicles

Other Panel recommendations seek to provide a framework for a discipline in defining outcomes and appropriate measures during acquisition planning, and with monitoring post-award. The recommendation for a Baseline Performance Case, prepared by the government, would assist agencies in developing and communicating appropriate outcomes, measures and expectations to prospective offerors. The Panel recommends a Performance Improvement Plan, prepared by the contractor, to serve as a tool to ensure that the contractor and agency are regularly assessing performance, expectations, and the need for continuous improvement to respond to shifting priorities

DRAFT

Final Panel Working DRAFT

December 2006

As a signal of the cultural change PBA requires throughout the contract life cycle, the Panel recommends redesignating the traditional Contracting Officers Technical Representative (“COTR”) as a Contracting Officers Performance Representative (“COPR”). The COPR should receive training in PBA and be involved in the development of the Baseline Performance Case and key measures. The Panel recommends that the Federal Acquisition Institute and the Defense Acquisition University jointly develop a formal educational certification program for COPRs.

Finally, in recognition of the concerns raised by some regarding the appropriate use of and cost-benefits of this technique, the Panel makes two recommendations. First, the Panel recommends improved data on PBA usage and enhanced oversight by OFPP on proper implementation using an “Acquisition Performance Assessment Rating Tool” or “A-PART.” Currently, OMB uses a “Program Assessment Rating Tool” or “PART” as a systematic method for measuring program performance across the Federal government. It essentially includes a series of questions that help the evaluator determine whether a program is meeting the mission requirements it was designed to support. The use of the PART has helped improve the clarity of OMB guidance on the Government Performance and Results Act (“GPRA”) as well as engaged OMB more aggressively in reviewing its implementation. The Panel recommends that OFPP develop a checklist that reflects how well a particular acquisition comports with the basic elements of a PBA to provide a more methodological and accountable approach to PBA implementation. While the Panel anticipates the need for such rigor until agencies are comfortable and competent in using the tool, we believe the requirement should sunset after three years unless its continued use is deemed useful by OMB and the agencies. Second, the Panel recommends that OFPP undertake a systematic study on the challenges, costs and benefits of using PBA techniques five years from the date of the Panel’s final report.

IV. Statutory Charter: Review All Federal Acquisition Laws And Regulations, And . . . Policies . . . Make Recommendations . . . Considered Necessary . . . To Protect The Best Interests Of The Federal Government [And] To Ensure The Continuing Financial And Ethical Integrity Of Acquisition . . .

Because the state of, and the problems of, the federal acquisition workforce was not one of the topics specifically identified by Congress in the legislation establishing the Panel, some might wonder why the Panel addressed this topic. From the beginning, the Panel clearly understood that providing the insight and assistance that Congress sought could not be accomplished without addressing the federal acquisition workforce. Through the Panel’s review of numerous GAO and IG reports and extensive witness testimony, it is clear that the knowledge and skill base necessary to successfully operate the acquisition system and to secure good value for the government and taxpayers has outstripped the resources available to operate the system.

Without an analysis and recommendations on the state of this workforce, there is a risk that problems stemming from the shortcomings of the acquisition workforce would be misunderstood. And certainly, addressing the specifics of the Panel’s statutory charter, PBA, commercial practices, and interagency contracting, inevitably have an impact on the acquisition workforce, both in terms of identifying problems with these techniques and the recommendations

DRAFT

Final Panel Working DRAFT

December 2006

to improve them. Finally, those readers who are familiar with the 1972 Commission on Government Procurement, and more recently, the National Performance Review, will recall that these initiatives recognized the importance of an effective workforce to the acquisition system.

A. Focus On The Acquisition Workforce

1. Findings

Even though there are now available a variety of simplified acquisition techniques, the demands on the workforce, both in terms of the complexity of the federal acquisition system as a whole as well as the volume and nature of what is bought, has markedly increased since the 1980s. A qualitatively and quantitatively adequate and adapted workforce is essential to the successful realization of the potential of the procurement reforms of the last decade. Without such a workforce, successful federal procurement is unachievable. But demands on the workforce have grown. Just since 9/11, the dollar volume of procurement has increased by 63 percent. And while acquisition reform made low dollar purchases less complex, high dollar purchasing became more complex with the emphasis on best value, past performance evaluations and PBA, placing greater demands on the workforce including requiring more sophisticated market expertise. The streamlined purchasing vehicles, such as purchase cards and interagency contracts, we now know are subject to management challenges associated with appropriate and effective use. Accompanying these trends is a structural change in what the government is purchasing, with an emphasis on high dollar complex services. In general, the demands placed on the acquisition workforce have outstripped its capacity. And while the current workforce has remained stable in the new millennium, there were substantial reductions in the 1990s accompanied with a lack of attention to providing the training necessary to those remaining to effectively operate the more complex buying climate. There are currently too few people in the pipeline, with between 5 and 15 years of experience to mitigate the eventual retirements of the most experienced acquisition workforce.

Lack of a Consistent Definition for and Accounting of the Workforce. Assessing workforce needs and proposing solutions for these challenges has been made difficult by the continued inconsistent definitions and accounting of the workforce. An accurate understanding of the key *trends* about the size and composition of the federal acquisition workforce cannot be had without using a consistent benchmark and none is currently available. The definitions for the DoD workforce and the civilian workforce are not consistent and have changed or been reported differently over time. The reports on the workforce, therefore, do not facilitate trend analysis.

The Panel recognized that these issues about the acquisition workforce have long roots. To assist the Panel in analyzing the available information about the size, composition, competencies and effectiveness of the acquisition workforce, and to help identify gaps and inconsistencies in the data, the Panel engaged a contractor, Beacon Associates, to collect and analyze the voluminous available data. Beacon created a report that has been used extensively by the Panel in developing its recommendations.

DRAFT

Final Panel Working DRAFT

December 2006

Agencies have not Engaged in Systematic Human Capital Planning to Assess their Acquisition Workforce in the Present or for the Future. While the GAO has recognized improved progress in this area, there is a wide variance between agencies in terms of their progress. And while some agencies have undertaken an analysis of the competencies necessary for the workforce, they do not attempt to address the demands these competencies place on the workforce of the future nor the degree to which their existing workforce possess these competencies. In fact, GAO found that the civilian agencies generally lacked reliable, consistent and complete data on the composition of the current workforce, including data on the knowledge, skills and abilities of the existing workforce.

Despite the variations in the way the acquisition workforce has been defined and counted over time and among agencies, no one is counting contractor personnel that are used to assist, support and augment the Acquisition Workforce. Witness testimony before the Panel, a 2006 DoD IG Report, and the experience of members of the Panel makes clear that many agencies make substantial use of contractor resources to carry out their acquisition functions. But because there is no count of such contractor support, much of which is accomplished outside of the bounds of OMB Circular A-76, the government lacks information on which to make a determination of whether this reliance is cost effective.

While the private sector invests substantially in a corps of highly sophisticated, credentialed and trained business managers to accomplish sourcing, procurement and management of functions, the government does not make comparable investments. Testimony before the Panel point to two reasons for this disparity. First, the most successful commercial organizations have built a procurement workforce on the understanding that smart buying is important to profitability. Second, the private sector pays better, has superior approaches to recruitment and retention, and considers procurement integral to business success.

2. Recommendations

Remedying what the Panel found as the structural barriers to assessing the acquisition workforce is an important first step to assessing how the acquisition workforce can better fulfill its mission. Therefore, the Panel provides a specific recommendation to OFPP to prescribe a single, consistent government-wide definition of the acquisition workforce using a combined methodology designed to address the broader understanding of the functions outside of procurement that must be addressed while preserving a count that does not overstate the resources available to conduct and manage procurement. The Panel's belief in the urgency of accurately assessing the acquisition workforce on a government-wide basis is reflected in its recommendation that using this combined methodology, OFPP should collect this data within a year of the issuance of Panel's final report. Consistent with this recommendation, OFPP should also be responsible for the creation, implementation and maintenance of a mandatory government-wide database for members of this acquisition workforce. The Panel notes that the Commission on Government Procurement recommended a similar system in 1971.

DRAFT

Final Panel Working DRAFT

December 2006

Human capital planning requires prompt attention. Chief Acquisition Officers (“CAOs”) should be responsible for assessing the current and future needs of their agencies, including forthrightly identifying and acknowledging gaps, and taking immediate steps to address these gaps through hiring, allocation of resources, and training. The CAO should be responsible for developing a separate Acquisition Workforce Human Capital Strategic Plan as part of the overall Human Capital Management Plan. This plan should assess the effectiveness of contractor personnel supplementing the acquisition workforce. OFPP should be delegated the responsibility for reviewing and approving agency Human Capital Plans regarding the acquisition workforce and for identifying trends, good practices, and shortcomings.

The Panel recommends identifying and eliminating obstacles to the speedy hiring of new talent and a government-wide acquisition intern program to attract first-rate entry level personnel into the acquisition career fields. Concurrently, incentives to retain qualified, experienced personnel need to be created. To address the training needs of the acquisition workforce, the Panel recommends the statutory reauthorization of the SARA Training Fund and provision of direct funding/appropriations for it. Additionally, OMB should issue guidance directing agencies to assure that funds in agency budgets identified for acquisition workforce training are actually expended for that purpose and require Agency Head approval before such funds are diverted for other uses. OFPP should also conduct an annual review of whether agency acquisition workforce training funds are sufficient to meet agency needs per the agency’s human capital plan.

Because both DoD and the civilian agencies provide for waivers to the congressionally established training and education standards, such waivers should be guided by sufficient oversight. The Panel recommends that permanent waivers be granted by agencies only after an objective demonstration that the grantee possesses the competencies and skills necessary to perform the duties and that temporary waivers should only be granted to allow sufficient time to acquire any lacking education or training. And CAOs (or equivalent) should report annually to OFPP on the agency’s usage of waivers, justifying their usage and reporting on plans to overcome the need to rely excessively on waivers. Upon review of these reports, OFPP should provide an annual summary report on the use of waivers of congressionally established training and education standards. In order to promote consistent quality, efficiency and effectiveness in the use of government training funds, OFPP should convene a 12-month study panel to consider whether to establish a government-wide Federal Acquisition University and/or alternative recommendations to improve training. And finally, in light of OFPP’s unique government-wide focus, the Panel recommends establishing in OFPP a senior executive with responsibility for Acquisition Workforce Policy throughout the federal government.

V. Statutory Charter: Protect The Best Interests Of The Government...Amend Or Eliminate Any Provisions That Are Unnecessary For The Effective, Efficient, And Fair Award And Administration Of Contracts

The Panel recognized early in its deliberations that the Panel’s statutory charter would necessarily impact small business. In terms of ensuring the fair award of contracts, certainly

DRAFT

Final Panel Working DRAFT

December 2006

with respect to government-wide contracts, the interests of small business must be represented. The statutory requirement that agencies afford the maximum practicable small business participation in federal acquisition reflects the critical role of small businesses in stimulating the Nation's economy, creating employment, and spurring technological innovation. The Panel identified findings and recommendations that impact efficient and effective acquisition planning and fairness in the competition of multiple award contracts.

A. Improve Small Business Participation

1. Findings

Inconsistent Statutory and Regulatory Framework Governing the Use of Various Small Business Preference Programs Hinders Efficient and Effective Use of the Programs. The Panel found potentially conflicting guidance between the statutory and regulatory provisions governing the priority of the various small business contracting programs. For example, the Small Business Act appears to mandate a priority for the HUBZone program by providing that contracting officers "shall" use the HUBZone contracting mechanism in certain circumstances "notwithstanding any other provision of law." At the same time, other provisions of law appear to suggest parity between the HUBZone and 8(a) programs. The potential inconsistency between the statutory framework and the regulatory guidance has created confusion among contracting officials and has hindered the proper application of these programs to ensure small business goal achievements.

But the Panel also found that there are no express guidelines governing a contracting officer's decision in selecting the appropriate small business contracting techniques. This lack of guidance not only deprives a contracting official of published standards against which to exercise discretion, but also obfuscates that decision-making process.

The contracting community does not properly apply and follow the governing contract bundling definition and requirements in planning acquisitions. Continuing its focus on ensuring small businesses are afforded sufficient opportunities to participate in government contracting and that acquisition planning is efficient and effective, the Panel found that there continues to be confusion about what constitutes contract bundling and the procedures that apply for addressing it. Furthermore, the reporting and review provisions contain little in the way of clear procedures, instructions, or techniques for mitigating the effects of bundling once such acquisitions are identified and justified during the acquisition planning phase. This lack of guidance contributes to the workload pressures facing our acquisition workforce, undermining its ability to plan and award acquisitions efficiently.

Agency officials need targeted training to better acquaint them with the requirements and benefits of contracting with small businesses. The Panel found that because senior program managers play such an important role in shaping an acquisition during the planning stages, it is imperative that they understand the governing small business contracting requirements as well as the benefits of contracting with small business. Such an understanding would also serve to

DRAFT

Final Panel Working DRAFT

December 2006

lessen the pressure on contracting officials to explain such requirements, thereby improving efficiency and the overall effectiveness of agencies in meeting small business goals.

Cascading procurements fail to balance the Government's interest in quick and efficient contracting with governing requirements for the maximum practicable small business contracting opportunities. Cascading procurements (sometimes called tiered procurements) are a costly substitute for government market research. Essentially, these procurements tier the evaluation of offers based on the socioeconomic status of the offeror. For example, an agency may establish a four-tiered evaluation, beginning with 8(a), HUBZone, small business, and finally large business offerors. The contracting officer's evaluation of offers will then cascade to each succeeding tier until a winning offeror is identified. If the winner is found in tier one, then the proposals of all other tiered offerors will never be considered for award. This controversial contracting technique, fails to balance the interests of the government and contractors. Proposal preparation is costly for government contractors, large and small alike. As a result, recent legislation limits their use in the Department of Defense. The new legislation requires the contracting officers to first conduct the required market research, and to document the contract file before engaging in cascading procurements. But the Panel has determined that the recent enhancements to the Central Contractor Registration database have improved the contracting officer's capability to conduct this type of market research, thereby obviating the need for such procurements. Cascading procurements place an undue financial burden on small and large contractors that is not outweighed by the administrative convenience of this technique.

There is No Explicit Statutory Authority For Small Business Reservations in Otherwise Full and Open Competitions for Multiple Award Contracts. While the Panel recognizes the great efficiencies offered by these contracts, especially those available for multi-agency use, the desire for efficiency must be balanced against the sometimes negative impact these contracts can have on small business opportunities. The Panel found that, often, these contracts have such broad coverage, either geographically, functionally, or both, that they effectively preclude small businesses from competing with large businesses under full and open competitions for the multiple awards. And if there are small businesses that receive awards under these contracts, there is no specific statutory or regulatory authority for agencies to reserve orders under these contracts for small business competition in order to achieve agency goals.

2. Recommendations

The Panel recommends a simple and specific amendment to the Small Business Act that would provide consistent statutory language enforcing the intended parity among the various small business programs and affording contracting officers the discretion and flexibility to develop acquisition strategies appropriate to agency small business goal achievements. The Panel also recommends specific statutory and regulatory revisions clarifying that contracting officers should exercise their discretion to select the appropriate small business contracting methods based on agency small business goal achievements and market research on the availability of small business vendors. With respect to the concerns over the implementation of contract bundling requirements, the Panel recommends additional training and the creation of an interagency group

DRAFT

Final Panel Working DRAFT

December 2006

to develop best practices and strategies to unbundle contracts and mitigate the effects of contract bundling.

Finding that acquisition planning and compliance with requirements would be better served if all stakeholders in the acquisition planning phase were better trained, the Panel recommends that OFPP coordinate the development of a government-wide small business contracting training module targeting program managers and acquisition team members. The training module should not only educate these officials on the requirements, but also the value and benefits of contracting with small businesses, including acquainting them with the substantial capabilities, sophistication and innovation of the Nation's small business concerns. The Panel also recommends a statutory prohibition on the use of the cascading procurement technique, finding that they place an undue financial burden on contractors, thereby limiting their participation in government procurement.

Finally, with respect to multiple award contracts, the Panel recommends specific statutory amendments that would allow contracting officers to reserve, for small business competition only, a portion of the multiple awards in a competition not suitable for a total small business set-aside. The Panel further recommends express authority to reserve certain orders under these multiple award contracts for competition by the small business multiple awardees only. These authorities will afford contracting officers who wish to take advantage of these streamlined acquisition vehicles greater opportunities in meeting agency small business goals as well.

VI. Statutory Charter: Ensure The Continuing Financial And Ethical Integrity Of Acquisitions

The government has realized for some time that it cannot achieve its mission without the support of contractors. A 1991 GAO report stated that contractors were “essential for carrying out functions of the government.” Since this report, the government’s spending on services has exceeded that spent on goods. Spending on services in 2006 accounts for 61% of total procurement dollars.

Given the growth of services, the expanded role of contractors and the government’s reliance on them in the workplace, the Panel believes that addressing the “blended” workforce was essential though not specifically called out in its authorizing statute.

A. Focus On Effective, Efficient And Responsible Use Of Contractor Support

1. Findings

Several developments have led Federal agencies to rely increasingly on the use of contractors as service providers. Since the mid 1990s, the federal acquisition workforce has been reduced by 50 percent, and hiring virtually ceased, creating what has been termed the “bathtub effect,” a severe shortage of procurement professionals with between 5 and 15 years of experience. The impact of this shortage is likely to be felt more acutely soon, as half of the current workforce is eligible to retire in the next four years. The impact of these events has left its mark on

DRAFT

Final Panel Working DRAFT

December 2006

government operations, creating a shortage of certain capabilities and expertise in government ranks. In order to meet mission requirements and stay within hiring ceilings, some agencies have contracted for this capability and contractors are increasingly performing the functions previously done by civil servants. This has largely occurred outside of the discipline of OMB Circular A-76 procedures, meaning there is no clear and consistent governmentwide information on the numbers of and functions performed by this growing cadre of service providers.

The “blended” or “multi-sector” workforce, where contractors are co-located and work side-by-side with federal managers and staff, has blurred some boundaries. While the A-76 outsourcing process provides a certain rigor and discipline to distinguishing between “inherently governmental” and commercial functions, the application of these terms is less clear outside of this context. The challenge is determining when the government’s reliance on contractor support impacts the decision-making process such that the integrity of that process may be questioned.

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 many sectors of the contractor community, has increased the potential for organizational conflicts of interest (“OCIs”). Based on the language in FAR 9.5, the case law has divided OCIs into three groups: (i) biased ground rules; (ii) unequal access to information; and (iii) impaired objectivity.¹⁸ And while the FAR instructs but provides little guidance to already strained contracting officers to identify, evaluate, and avoid or mitigate such conflicts, the GAO is sustaining more protests for the government’s failure to do so. With respect to protection of contractor confidential or proprietary data, the Panel recognizes the increased threat of improper disclosure as more and more contractor employees engage in support of the government’s acquisition function.

Government employees face civil and criminal penalties for not acting impartially in their official duties in exchange for personal gain, and some have suggested that similar civil and criminal statutes be applied to contractor employees performing acquisition functions. But the Panel found that many contractors have established extensive ethics and compliance programs. Further, the Sarbanes-Oxley Act of 2002 requires specific accountability and controls relating to fiduciary duties.

As the extent of service contracting has grown, the current ban on personal services contacts has created two unfortunate responses. Except as authorized by statute, the government is prohibited from entering into personal services contracts (“PSCs”). The FAR cautions that such relationships not only result from inappropriate contract terms, but also from the manner in which the contract is administered. In order to comply with the PSC prohibition, government managers may find themselves crafting cumbersome and inefficient processes to manage the work of contractor personnel to avoid an appearance that they are exercising continuous supervisory control. Some testimony before the Panel indicates that others simply ignore the ban.

¹⁸ See Daniel I. Gordon, *Organization Conflicts of Interest: A Growing Integrity Challenge*, 35 Pub. Cont. L.J. 25, 2005.

DRAFT

Final Panel Working DRAFT

December 2006

2. Recommendations

The Panel recommends that OFPP update the principles for Agencies to apply in determining which functions must be performed by civil servants. These principles are needed so that those not specifically engaging in A-76 studies understand their applicability to the blended workforce.

With respect to conflicts of interest, the Panel concluded that it is not necessary to adopt any new Federal statutes to impose additional requirements upon contractors or their personnel. Rather, where appropriate, the obligations should be imposed through contract clauses, the goal of which should be ethical conduct, not technical compliance. Such clauses would not necessarily impose specific prohibitions upon contractors and/or their personnel; rather, it might be possible to achieve an appropriate level of integrity and ethical conduct with general ethical guidelines and principles and/or by requiring appropriate disclosures. The Panel does not believe that the requirements imposed on contractors and their personnel – through the contract and solicitation clauses or otherwise – should incorporate the extensive and complex requirements imposed on Federal employees. The Panel is concerned about the possibility of over-regulation and its attendant costs, particularly as it applies to small businesses, noting that the imposition of burdensome requirements could discourage such businesses from contracting with the Government.

Thus, the Panel recommends that the FAR Council, in its unique role as the developer of government-wide acquisition regulations, take the following action: review existing rules and regulations, and to the extent necessary, create new, uniform, government-wide policy and clauses dealing with OCIs and personal conflicts of interest (“PCI”), and protection of contractor confidential and proprietary data, described in more detail in this report. The Panel recognized that numerous agencies have considered these issues, and in many cases identified and implemented effective measures to address them. However, there has been no standardization, and there is no central repository or list of best practices available. The Panel concluded that the identification and adoption of government-wide policies and standardized contract clauses in these areas would be beneficial and that the FAR Council, as the developers of government-wide acquisition regulations, was the appropriate organization to perform this task. The FAR Council should work with DAU and FAI to develop and provide training and techniques to help procurement personnel identify and mitigate potential OCIs and PCIs, remedy conflicts when they occur, and appropriately applying tools for the protection of confidential data.

Finally, the Panel recommends replacing the ban on PSCs with guidance on the appropriate and effective use of such contracts. In implementing this recommendation, the government should be allowed to direct or supervise the contractor employee’s workforce concerning the substance of work or tasks performed. This new flexibility, however, should be accompanied by retention of the current prohibitions on government involvement in purely supervisory activities (e.g. hiring, leave approval, promotion, performance ratings, etc.). Because this recommendation represents a significant departure from the decades of prohibition on personal services, the Panel recommends that GAO review the new policy five years after implementation to identify the benefits of the changes and any unintended adverse consequences or abuses by agencies.

DRAFT

Final Panel Working DRAFT

December 2006

DRAFT
Final Panel Working DRAFT
December 2006

**REPORT OF THE
ACQUISITION ADVISORY PANEL**

TO THE

OFFICE OF FEDERAL PROCUREMENT POLICY

AND THE

UNITED STATES CONGRESS

December 2006

DRAFT

Final Panel Working DRAFT
December 2006

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DRAFT

Final Panel Working DRAFT
December 2006

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DRAFT
Final Panel Working DRAFT
December 2006

INTRODUCTION

The Panel Project

Background

The Federal government is the single largest buyer in the world. Each year Federal agencies spend nearly \$400 billion a year for a range of goods and services to meet their mission needs.¹ Some acquisitions are highly specialized – advanced fighter jets, precision munitions, nuclear submarines – for which there is no non-governmental or commercial demand. Other goods and services are readily available and purchased from the commercial marketplace. From laptop computers and off-the-shelf software to information technology (“IT”) consulting services, software development, and engineering services. Federal agencies rely upon common commercial goods and services to conduct their business. In addition, commercial products may be modified to meet government needs. In all of these circumstances government acquisition process intersects with the private sector and the Federal government can benefit from knowing how commercial buyers approach the acquisition process.

Importance Of The Commercial Market To Government Acquisition

Effective and efficient access to products and services available in the commercial market can help government agencies to achieve their various missions. The pace at which technology advances requires that government have access to commercial technology and technology based services. Agencies have a significant interest in acquiring such products and services at a reasonable price and without undue administrative burden. Of course, in light of the involvement of public funds, acquisition must be conducted in a manner that is fair and furthers the public interests in transparency and accountability.

Over the last two decades, significant study and effort has been dedicated to the acquisition of goods and services available in the commercial market by the federal government. For example, in 1986, the Blue Ribbon Commission on Defense Management highlighted the need for DOD to expand its use of commercial products and processes and to eliminate barriers that discouraged application of innovative technology to DOD contracts.²

Congress later chartered the “Section 800 Panel”³ to assess laws affecting defense procurement. In early 1993, the Section 800 Panel proposed a variety of reforms, including: stronger policy language favoring the use of commercial and nondevelopmental items; a new statutory definition of commercial items; and an expanded exemption for “adequate price competition” in the Truth in Negotiations Act.

¹ See <https://fpds.gov>; see also <http://www.whitehouse.gov/omb/procurement/index.html>.

² The President’s Blue Ribbon Commission on Defense Management (The Packard Commission), A Quest for Excellence: Final Report to the President and Appendix (Washington, D.C.: The Packard Commission, June 1986).

³ The Section 800 Panel was chartered by Section 800 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 800, 104 Stat. 1485, 1587 (1990).

DRAFT

Final Panel Working DRAFT

December 2006

Following the efforts of the Section 800 Panel, Congress enacted a series of procurement reforms in the mid-1990s that were intended to enable the government to streamline the acquisition process and to obtain greater access to products and services available in the commercial market. These reforms primarily were introduced through the Federal Acquisition Streamlining Act of 1994 (“FASA”)⁴ and the Federal Acquisition Reform Act of 1996⁵ (“FARA”).

FASA and FARA required, and were followed by, various changes to the Federal Acquisition Regulation (“FAR”). For example, FASA introduced a strong preference for the acquisition of commercial items.⁶ The statutory definition of commercial items refers to categories of products and services.⁷ The same is true of the regulatory definition in the FAR.⁸

Since the FASA and FARA reforms, agencies have sought to purchase commercial items and otherwise rely on the techniques addressed in those statutes with varying degrees of success. Those efforts were the subject of considerable analysis, including by GAO in reports regarding use of the Multiple Award Schedule, task and delivery order contracts, and interagency contracting.

Congress enacted further reforms. For example, Congress passed the Services Acquisition Reform Act of 2003 (“SARA”), which introduced other reforms related to commercial items as well as to the acquisition workforce. SARA also chartered this Panel to study current laws, regulations, and government-wide acquisition policies with regard to commercial practices, and to recommend appropriate reforms.

Trends In Acquisition

Since the FASA and FARA reforms were enacted a decade or more ago, a number of events have affected government contracting. For example, the events of September 11, 2001, and subsequent conflicts in Afghanistan and Iraq, as well as the Katrina aftermath, have influenced what the government buys and how much it spends. From fiscal year 2000 to fiscal year 2005, government purchasing increased nearly 75% from \$219 billion to more than \$380 billion.⁹

Over the last decade, a number of trends have affected government contracting. Services now comprise a greater percentage of the government’s acquisition budget. Between 1990 and

⁴ Pub. L. No. 103-355, 108 Stat. 3243 (1994).

⁵ Pub. L. No. 104-106, 110 Stat 186 (1996). FARA was later renamed the “Clinger-Cohen Act.”

⁶ See 10 U.S.C. § 2577 (codifying preference).

⁷ See 41 U.S.C. § 403(12).

⁸ See FAR 2.101.

⁹ “Trending Analysis Report since Fiscal year 2000,”

http://www.fpdsgn.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls.

DRAFT

Final Panel Working DRAFT

December 2006

annual appropriations. As discussed above, agencies also are required to abide by competition statutes and regulations.

On the other hand, government can take advantage of many approaches used in the commercial market. Doing so can foster effective and efficient access to products and services.

The Panel has made an effort to achieve balance, recognizing the time pressures on the acquisition system, but also has tried to implement current commercial practices regarding competition, and to provide transparency and accountability necessary to expenditure of taxpayer funds.

Report Structure

This Report is divided into seven Chapters. Each chapter sets forth the background of the issues, followed by the Panel's findings and recommendations. We have provided a relatively detailed Executive Summary that explains the Panels findings and recommendations – as well as the Panel process. However, the Executive Summary is not the Report. The chapters are as follows:

Chapter 1 – Commercial Practices

Chapter 2 – Improving Implementation Of Performance-Based Service Acquisition (PBSA) In The Federal Government

Chapter 3 – Interagency Contracting

Chapter 4 – Small Business

Chapter 5 – The Federal Acquisition Workforce

Chapter 6 – Appropriate Role Of Contractors Supporting Government

Chapter 7 – Report On Federal Procurement Data

DRAFT

Final Panel Working DRAFT

December 2006

2. Recommendations

The Panel's recommendations seek to improve the environment for healthy competition using a 360 degree approach, providing tools to enhance transparency, requirements analysis and definition, requirements for greater use of competition, and positive pressures, in the form of protest authority and transparency that will result in agencies applying an appropriate level of discipline to the structure of their acquisitions.

The Panel could not make recommendations regarding competition without an aim toward nurturing a healthy environment conducive to achieving the benefits of competition. Therefore, the Panel recommends that agencies establish centers of expertise in requirements analysis and definition, and obtain express advance approval of the requirements from the key stakeholders (*e.g.*, program manager and contracting officer) to closely resemble the buy-in obtained in commercial practice. Additionally, the Panel recognizes a need for a centralized source of market research information to facilitate more robust but efficient acquisition planning. Therefore, the Panel recommends that the General Services Administration ("GSA") establish a market research capability to monitor services acquisitions by government and commercial buyers, collect publicly available information, and maintain a database of information regarding transactions. In addressing the GAO and IGs concerns about ill-defined requirements in orders under interagency contracts, the Panel recommends criteria for upfront requirements planning by ordering agencies before access to vehicles is granted.

Specific to the Panel's charter to provide recommendations for the efficient and appropriate use of performance-based acquisition ("PBA"), the Panel made several recommendations to the Office of Federal Procurement Policy ("OFPP") to provide more guidance on the use of this technique in order to assist agencies with defining their requirements and establishing measurable performance standards and appropriate contract incentives. A recommendation for a formal PBA educational certification program for technical representatives and other acquisition team members will enhance the efficiency and effectiveness of analyzing and describing requirements.

B. Encourage Competition

1. Findings

Commercial Buyers of Services Rely Extensively on Competition. The numerous commercial organizations invited to address the Panel expressed their strong preference for head-to-head competition. They use rigorous market research and requests for information ("RFIs") to identify capabilities and suppliers. They provide significant opportunities for information exchange with potential suppliers and typically ensure that they retain at least two or three suppliers throughout negotiations. Sole source engagements are rare. Even after the contract is signed, competition remains a distinct possibility. These commercial buyers reserve the right to recompete or bring the service in-house before the contract has run full term. Six Sigma-style continuous monitoring and evaluation is used to measure performance and suppliers face the prospect of losing business if performance doesn't meet targets or if technology or strategic

DRAFT**Final Panel Working DRAFT**

December 2006

and complex services are procured using orders under these contracts. Of the \$142 billion obligated under interagency contracts in fiscal year 2004, \$66.7 billion was awarded in single transactions exceeding \$5 million, with services accounting for 64% or \$42.6 billion. For fiscal year 2005, interagency contract obligations totaled \$132 billion with \$63.7 billion in single transactions over \$5 million, with services accounting for 66% or \$42 billion.

So what has happened to dampen the expectation for this more rigorous competitive process at the order level? There appear to be several key checks and balances missing that would otherwise contribute to a healthier competitive environment. For instance, except recently for DoD, it is not required that all eligible contractors be informed of an order requirement. Also, there is little transparency, even into sole source orders, as there is no public notification or synopsis requirement. Even where competition is used at the order level, there is no protest option for contractors under multiple award contracts, reducing transparency and accountability, including, for instance, the need for clearly stated requirements, evaluation criteria and the incentive to evaluate using reasonable trade offs based on these criteria. And, finally, there is no requirement for a detailed debriefing at the task order level, denying contractors the opportunity to become more competitive on future order requirements.

But the Panel does recognize that these multiple award contracts provide significant benefits to the government, not the least of which is a reduced administrative cost accruing to those agencies that would otherwise have to conduct full and open competitions for their recurring service needs. Multiple award contracts are an effective tool allowing a strained acquisition workforce to meet mission needs in a streamlined fashion. However, there was never an expectation that these streamlined vehicles would not produce meaningful competition. Therefore, the Panel sought to achieve a balance – one that would introduce more pressure to encourage competition but not unduly burden these contracts as tools for streamlining. While nearly half of the dollars spent under these contracts are awarded in single transactions over \$5M, the majority of the transactions fall under this threshold. Therefore, in addition to its other recommendations, the Panel recommends applying additional requirements at this threshold, thereby impacting a significant dollar volume but not the majority of transactions.

2. Recommendations

To emphasize the importance of competition to achieving the best outcomes, the Panel recommends expanding government-wide the current DoD requirements to notify all eligible contractors under multiple award contracts of order opportunities or to ensure the receipt of three offers. The Panel also felt that while a pre-award notification of sole source orders might unduly burden the streamlined purpose of these multiple award contracts, post-award notification would suffice in providing transparency and the positive pressures that transparency imparts while bolstering public confidence. And for single orders with an expected value in excess of \$5 million where a statement of work is required, the Panel recommends that agencies 1) provide a clear statement of the requirements; 2) disclose the significant evaluation factors and subfactors and their relative importance; 3) provide a reasonable response time for proposal submissions, and; 4) document the selection decision to include the trade off of price/cost to quality in best

DRAFT**Final Panel Working DRAFT**

December 2006

of responsibility for key functions such as describing requirements, negotiating terms, and conducting oversight are not clear among: (i) the agency that manages the interagency contract, (ii) the ordering agency, and (iii) the end user.

The Comptroller General of the United States told the Panel that while it is known that these contracts are proliferating, outside of the GSA Schedules program and the Government-wide Acquisition Contracts (“GWACs”), there is no reliable data on how many such contracts exist, how much money is involved and the nature of the services acquired under them. As evidence of their popularity, interagency contract obligations in fiscal year 2004 totaled \$142 billion or 40% of the government’s obligations in that year.

With the proliferation has come extensive oversight by Congress, GAO, the IGs, outside organizations and the media of various federal agencies. Among the GAO and IG findings on ordering deficiencies is a significant failure to comply with competition requirements, use of ill-defined requirements and T&M pricing without sufficient government surveillance. Some GAO and IG findings identify “interagency assisting entities” that use interagency contracts. These interagency assisting entities provide fee-for-service acquisition support to other agencies. The Panel recommendations address these entities. The Panel also found a trend in agencies establishing enterprise-wide contract vehicles that operate much like an interagency contract, except their use is restricted to a single agency. While the Panel recognizes that some competition among agencies for these requirements is good, inefficient duplication threatens to dilute the overall value of interagency contracts to the government.

With the rapid growth in public funds spent under these interagency contracts and with the assisting entities that use them, the Panel believes it is critical to confront the lack of accountability and transparency to improve public confidence in these vehicles and ensure they fulfill their promise for reducing overall administrative costs to the government. It is notable that despite the significant dollars spent under these contracts, there is no consistent, Government-wide policy regarding their creation and reauthorization (or continuation).

2. Recommendations

Many of the issues identified by the GAO, agency IGs and Panel witnesses on the misuse of these vehicles are related to the internal controls, management and oversight, and division of roles and responsibilities between the vehicle holder and ordering agency. These issues can best be addressed with a government-wide policy that requires agencies to specifically and deliberately address these matters at the point of creation and continuation rather than attempting to remedy these problems at the point of use. The current lack of procedural requirements and transparency allows for the proliferation of these vehicles in a largely uncoordinated, bottom-up fashion, based on short term, transaction related benefits instead of on their ultimate value as a tool for effective government-wide strategic sourcing. The Panel recommends that under guidance issued by OMB, agencies formally authorize the creation or expansion of multi-agency contracts, enterprise-wide contracts, and assisting entities. The Panel’s recommendations maintain approval for the creation and expansion at the agency level (except for GWACs). The

DRAFT

Final Panel Working DRAFT

December 2006

III. Statutory Charter: Ensuring Effective And Appropriate Use Of Performance-Based Contracting

Performance-based Contracting, now called Performance-based Acquisition (“PBA”), is an approach to obtaining innovative solutions by focusing on mission outcomes rather than dictating the manner in which the contractor’s work is to be done. Those outcomes are then measured and the contractor compensated on the basis of whether or not the outcomes are achieved.

During the Panel’s public deliberations, there was some debate as to the value of this technique. Witness testimony, as well as written public statements, was mixed on PBA merits. One member and some public comments questioned the validity of PBA for government uses after more than a decade of attempts to implement have failed to produce expected results. Others, however, noted significant successes using PBA. And though a 1998 OFPP study found generally positive results, the Panel found no systematic government-wide effort to assess fully the merits of the process. Many spoke to the challenges in implementing the technique, most of which focused on the acquisition workforce, including those who define requirements. Even commercial organizations told the Panel that implementing the technique can be difficult, especially identifying the appropriate performance standards to measure. Despite the difficulty, it remains the preferred commercial technique seen as critical to obtaining transformational and innovative solutions. Ultimately, the Panel determined that in view of a lack of data supporting either that the technique is unworkable in the federal government sector or that PBA’s costs outweigh its benefits, the Panel’s statutory mandate was clear: improve the effectiveness and appropriate use of PBA. As such the Panel recommendations should not be interpreted as offering a long-term endorsement of PBA. Rather the Panel aims are directed at improving current implementation and at providing a solid basis for a more thorough assessment of its value. Thus, the Panel agreed that the overall statement of the issue is “Why has PBA not been fully implemented in the federal government?”

A. Improve PBA Implementation

1. Findings

Uncertainty Remains on How and When to Apply PBA. Government officials testifying before the Panel related the challenges they face in applying PBA that included when and how to apply it and the time and resources required for the technique. They also spoke to the cultural emphasis of “getting to award” that shortchanges both the requirements definition process and effective post-award contract management. A 2002 GAO survey of 25 contracts reported as PBA found while most contained at least one PBA attribute, only 9 contained all of the required elements and may have used extremely restrictive work specifications. GAO concluded that the study raised concern about whether agencies have an understanding of PBA and how to maximize its benefits. A Rand Corporation study of the U.S. Air Force Air Logistics and Product Centers in 2002 found uncertainty over which services were suitable for PBA, confusion with the use of “Statement of Work” and “Statement of Objectives,” and about what constitutes a

DRAFT

Final Panel Working DRAFT

December 2006

measurable performance standard. The Panel's own survey of randomly selected PBAs from the top ten contracting agencies reflect similar problems, including an inability to identify and align performance measures and contract incentives to ensure desired outcomes are achieved. A multi-association group representing government contractors told the Panel that many of the solicitations they receive that would be appropriate for PBA are still not described in terms of outcomes and those that are frequently do not identify measures to achieve those outcomes. This multi-association group provided the Panel with a sampling of such solicitations. As a result of these findings, the Panel concluded that PBA's potential for generating transformational solutions to agency challenges remains largely untapped.

FPDS-NG data are insufficient and perhaps misleading regarding use and success of PBA. At the suggestion of a written public statement, the Panel conducted its own survey of contracts and orders that were coded in FPDS-NG as performance-based. Of the 76 contracts and orders randomly selected from the top ten contracting agencies, the Panel received 55 that contained sufficient documentation to support the review. While 36% were determined to have the elements of a PBA, another 22% required significant improvement. And of the sample reviewed, 42% were clearly not PBA with some agencies admitting that the contracts were mistakenly coded as performance-based in FPDS-NG. Finally, it is important to note that FPDS-NG data is collected at the time of contract or order award and is not designed to collect information to assess cost savings or other similar measures of success.

2. Recommendations

Based on these findings, the Panel recommended more guidance to assist agencies in the efficient and appropriate application of PBA, including

- An Opportunity Assessment Tool that acknowledges the resource investment required by PBA and helps agencies identify those acquisitions likely to derive the most immediate benefit from such an investment;
- A Best Practices Guide on developing measurable performance standards; and
- Improved guidance on types of incentives appropriate for various contract vehicles

Other Panel recommendations seek to provide a framework for a discipline in defining outcomes and appropriate measures during acquisition planning, and with monitoring post-award. The recommendation for a Baseline Performance Case, prepared by the government, would assist agencies in developing and communicating appropriate outcomes, measures and expectations to prospective offerors. The Panel recommends a Performance Improvement Plan, prepared by the contractor, to serve as a tool to ensure that the contractor and agency are regularly assessing performance, expectations, and the need for continuous improvement to respond to shifting priorities

DRAFT

Final Panel Working DRAFT

December 2006

to improve them. Finally, those readers who are familiar with the 1972 Commission on Government Procurement, and more recently, the National Performance Review, will recall that these initiatives recognized the importance of an effective workforce to the acquisition system.

A. Focus On The Acquisition Workforce

1. Findings

Even though there are now available a variety of simplified acquisition techniques, the demands on the workforce, both in terms of the complexity of the federal acquisition system as a whole as well as the volume and nature of what is bought, has markedly increased since the 1980s. A qualitatively and quantitatively adequate and adapted workforce is essential to the successful realization of the potential of the procurement reforms of the last decade. Without such a workforce, successful federal procurement is unachievable. But demands on the workforce have grown. Just since 9/11, the dollar volume of procurement has increased by 63 percent. And while acquisition reform made low dollar purchases less complex, high dollar purchasing became more complex with the emphasis on best value, past performance evaluations and PBA, placing greater demands on the workforce including requiring more sophisticated market expertise. The streamlined purchasing vehicles, such as purchase cards and interagency contracts, we now know are subject to management challenges associated with appropriate and effective use. Accompanying these trends is a structural change in what the government is purchasing, with an emphasis on high dollar complex services. In general, the demands placed on the acquisition workforce have outstripped its capacity. And while the current workforce has remained stable in the new millennium, there were substantial reductions in the 1990s accompanied with a lack of attention to providing the training necessary to those remaining to effectively operate the more complex buying climate. There are currently too few people in the pipeline, with between 5 and 15 years of experience to mitigate the eventual retirements of the most experienced acquisition workforce.

Lack of a Consistent Definition for and Accounting of the Workforce. Assessing workforce needs and proposing solutions for these challenges has been made difficult by the continued inconsistent definitions and accounting of the workforce. An accurate understanding of the key *trends* about the size and composition of the federal acquisition workforce cannot be had without using a consistent benchmark and none is currently available. The definitions for the DoD workforce and the civilian workforce are not consistent and have changed or been reported differently over time. The reports on the workforce, therefore, do not facilitate trend analysis.

The Panel recognized that these issues about the acquisition workforce have long roots. To assist the Panel in analyzing the available information about the size, composition, competencies and effectiveness of the acquisition workforce, and to help identify gaps and inconsistencies in the data, the Panel engaged a contractor, Beacon Associates, to collect and analyze the voluminous available data. Beacon created a report that has been used extensively by the Panel in developing its recommendations.

DRAFT

Final Panel Working DRAFT

December 2006

Agencies have not Engaged in Systematic Human Capital Planning to Assess their Acquisition Workforce in the Present or for the Future. While the GAO has recognized improved progress in this area, there is a wide variance between agencies in terms of their progress. And while some agencies have undertaken an analysis of the competencies necessary for the workforce, they do not attempt to address the demands these competencies place on the workforce of the future nor the degree to which their existing workforce possess these competencies. In fact, GAO found that the civilian agencies generally lacked reliable, consistent and complete data on the composition of the current workforce, including data on the knowledge, skills and abilities of the existing workforce.

Despite the variations in the way the acquisition workforce has been defined and counted over time and among agencies, no one is counting contractor personnel that are used to assist, support and augment the Acquisition Workforce. Witness testimony before the Panel, a 2006 DoD IG Report, and the experience of members of the Panel makes clear that many agencies make substantial use of contractor resources to carry out their acquisition functions. But because there is no count of such contractor support, much of which is accomplished outside of the bounds of OMB Circular A-76, the government lacks information on which to make a determination of whether this reliance is cost effective.

While the private sector invests substantially in a corps of highly sophisticated, credentialed and trained business managers to accomplish sourcing, procurement and management of functions, the government does not make comparable investments. Testimony before the Panel point to two reasons for this disparity. First, the most successful commercial organizations have built a procurement workforce on the understanding that smart buying is important to profitability. Second, the private sector pays better, has superior approaches to recruitment and retention, and considers procurement integral to business success.

2. Recommendations

Remedying what the Panel found as the structural barriers to assessing the acquisition workforce is an important first step to assessing how the acquisition workforce can better fulfill its mission. Therefore, the Panel provides a specific recommendation to OFPP to prescribe a single, consistent government-wide definition of the acquisition workforce using a combined methodology designed to address the broader understanding of the functions outside of procurement that must be addressed while preserving a count that does not overstate the resources available to conduct and manage procurement. The Panel's belief in the urgency of accurately assessing the acquisition workforce on a government-wide basis is reflected in its recommendation that using this combined methodology, OFPP should collect this data within a year of the issuance of Panel's final report. Consistent with this recommendation, OFPP should also be responsible for the creation, implementation and maintenance of a mandatory government-wide database for members of this acquisition workforce. The Panel notes that the Commission on Government Procurement recommended a similar system in 1971.

DRAFT

Final Panel Working DRAFT

December 2006

supervisory control. Some testimony before the Panel indicates that others simply ignore the ban.

2. Recommendations

The Panel recommends that OFPP update the principles for Agencies to apply in determining which functions must be performed by civil servants. These principles are needed so that those not specifically engaging in A-76 studies understand their applicability to the blended workforce.

With respect to conflicts of interest, the Panel concluded that it is not necessary to adopt any new Federal statutes to impose additional requirements upon contractors or their personnel. Rather, where appropriate, the obligations should be imposed through contract clauses, the goal of which should be ethical conduct, not technical compliance. Such clauses would not necessarily impose specific prohibitions upon contractors and/or their personnel; rather, it might be possible to achieve an appropriate level of integrity and ethical conduct with general ethical guidelines and principles and/or by requiring appropriate disclosures. The Panel does not believe that the requirements imposed on contractors and their personnel – through the contract and solicitation clauses or otherwise – should incorporate the extensive and complex requirements imposed on Federal employees. The Panel is concerned about the possibility of over-regulation and its attendant costs, particularly as it applies to small businesses, noting that the imposition of burdensome requirements could discourage such businesses from contracting with the Government.

Thus, the Panel recommends that the FAR Council, in its unique role as the developer of government-wide acquisition regulations, take the following action: review existing rules and regulations, and to the extent necessary, create new, uniform, government-wide policy and clauses dealing with OCIs and personal conflicts of interest ('PCI'), and protection of contractor confidential and proprietary data, described in more detail in this report. The Panel recognized that numerous agencies have considered these issues, and in many cases identified and implemented effective measures to address them. However, there has been no standardization, and there is no central repository or list of best practices available. The Panel concluded that the identification and adoption of government-wide policies and standardized contract clauses in these areas would be beneficial and that the FAR Council, as the developers of government-wide acquisition regulations, was the appropriate organization to perform this task. The FAR Council should work with DAU and FAI to develop and provide training and techniques to help procurement personnel identify and mitigate potential OCIs and PCIs, remedy conflicts when they occur, and appropriately applying tools for the protection of confidential data.

Finally, the Panel recommends replacing the ban on PSCs with guidance on the appropriate and effective use of such contracts. In implementing this recommendation, the government should be allowed to direct or supervise the contractor employee's workforce concerning the substance of work or tasks performed. This new flexibility, however, should be accompanied by retention of the current prohibitions on government involvement in purely

DRAFT

Final Panel Working DRAFT

December 2006

CHAPTER 1

COMMERCIAL PRACTICES

REPORT OF THE ACQUISITION ADVISORY PANEL

December 2006

DRAFT

Final Panel Working DRAFT

December 2006

TABLE OF CONTENTS

Part I – Background. Government Efforts to Use Commercial Practices

- A. Introduction
- B. “Commercial Items” and Commercial Practices: Definition and Procurement Policies
 - 1. Statutory Definition: “Commercial Items”
 - 2. Statutory Preferences and Exemptions for “Commercial Items”
- C. Legislative and Regulatory Origins
 - 1. The Origins of Current Government “Commercial” Practices
 - 2. The Commercial Item Exemption from the Original Truth in Negotiations Act
 - 3. The Commission on Government Procurement
 - 4. DoD Directive 5000.37
 - 5. 1984 Congressional Reforms
 - 6. The President’s Blue Ribbon Commission on Defense Management
 - 7. Congressional Directives of the Late 1980s and Early 1990s
 - 8. DFARS Parts 210 and 211
 - 9. The Section 800 Acquisition Advisory Panel
 - 10. The Federal Acquisition Streamlining Act of 1994
 - 11. The Regulatory and Practical Implementation of FASA
 - 12. The Federal Acquisition Reform (“Clinger-Cohen”) Act of 1996
 - 13. Recent Congressional and Executive Changes
 - 14. The Services Acquisition Reform Act of 2003
 - 15. Restrictions on Use of Commercial Items
- D. Time and Materials and Labor Hour Contracts
 - 1. Definition and Description – The Current Rule
 - 2. Recent Legislative Developments
 - 3. OFPP’s Rule
- E. Competition
 - 1. A History of Difficulty in Achieving Competition
 - 2. The Current Situation
 - 3. The Competition in Contracting Act
 - a. Background
 - b. Competition Under CICA Procedures

DRAFT

Final Panel Working DRAFT

December 2006

- (i) Acquisition Planning
- (ii) Synopsis
- (iii) Solicitation
- (iv) Negotiations
- (v) Award
- (vi) Post-Award

- 4. The Use of Interagency Vehicles
- 5. Indefinite Delivery Indefinite Quantity (IDIQ) Contracts
 - a. Background
 - b. "Fair Opportunity"
 - c. Section 803 Revisions to "Fair Opportunity"
 - d. Competition under Multiple Award IDIQ Contracts
- 7. GSA Federal Supply Schedule
 - a. Background
 - b. Market Prices
 - c. Streamlined Ordering Process
 - (i) Policies and Procedures for Ordering Services
 - (ii) Schedule BPAs
 - (iii) Brand Name

F. Pricing – The Current Regulatory and Oversight Scheme

- 1. Overview
- 2. The Current Truth in Negotiations Act
 - a. What is Cost or Pricing Data?
 - b. Information Other Than Cost or Pricing Data

G. GSA Schedule Pricing Policies

Part II – Findings

- 1. Commercial "Best Practices" Generally
- 2. Defining Requirements
- 3. Competition in the Commercial Marketplace
- 4. Contract Terms and Conditions Used in Commercial Contracts
- 5. Pricing of Commercial Contracts by Commercial Buyers
- 6. "Commercial Practices" Adopted by the Government
- 7. Time & Materials Contracts
- 8. Statutory and Regulatory Definitions of Commercial Services

DRAFT

Final Panel Working DRAFT

December 2006

9. Time Required for Commercial Services Contracts
10. Impact of the Annual Budget and Appropriations Processes
11. Unequal Treatment of the Contracting Parties

PART III – RECOMMENDATIONS

1. Definition of Commercial Services
2. Improving the Requirements Process
3. Improving Competition
4. New Competitive Services Schedule
5. Improving Transparency and Openness
6. Time & Materials Contracts
7. Protest of Task & Delivery Orders
8. Pricing When No or Limited Competition Exists
9. Improving Government Market Research
10. Unequal Treatment of the Contracting Parties

Appendix A – Proposed Changes to FAR Parts 12 and 15 to Implement Recommendation 8,
Pricing When No or Limited Competition Exists

Appendix B – Statutory Evolution of “Commercial Item”

DRAFT

Final Panel Working DRAFT

December 2006

FASA and FARA set the stage for simplifying the process for entering into contracts, and attempting to align government contracting more closely with commercial practices.⁹

In the late 1980's and early 1990's, senior government officials, including the Secretary of Defense and the Vice-President, were concerned that the Government was paying too much and not obtaining the latest technology because of regulatory impediments.¹⁰ Key concerns cited were military unique requirements and complex regulatory requirements associated with cost-based contracting such as the Truth in Negotiations Act ("TINA"), government specific Cost Accounting Standards ("CAS"), and associated reporting, auditing, and oversight mechanisms.¹¹ Other concerns cited in the NPR were burdensome rules for smaller purchases.¹² As discussed below, for acquisitions of commercial items the presumption in FASA and FARA is that a fair and reasonable price should be determined by reference to the market, rather than by examination of a seller's costs. FASA and FARA focused on obtaining the benefits of the commercial marketplace through competition, historical pricing, benchmark pricing, etc. However, in circumstances where market forces are not active, this presumption is questionable.¹³

In 1986, the Blue Ribbon Commission on Defense Management, chaired by former Deputy Secretary of Defense David Packard, highlighted the need for DoD to expand its use of commercial products and processes and to eliminate barriers that discouraged application of innovative technology to DoD contracts.¹⁴ The Packard Commission's recommendations clearly focused on the power of the commercial marketplace to produce more cheaply than the defense acquisition system.¹⁵ The report also contained a separate section on competition wherein the Commission noted that foremost among commercial practices is competition, "which should be used aggressively in the buying of systems, products and professional services."¹⁶

In January 1993, the Section 800 Panel, which specifically focused on laws affecting defense procurement, published its 1800-page report that made recommendations in the areas of procurement reform, electronic commerce, and military specifications, among others. The 800 Panel proposed a new approach to the acquisition of commercial items, both as end-items and as

⁷ The Advisory Panel on Streamlining and Codifying Acquisition Laws (known as the Section 800 Panel) was created in response to Section 800 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510.

⁸ Report of the Nat'l Performance Review, *Reinventing Procurement PROC 13*, Ch. 3 (Sept. 7, 1993).

⁹ Carter, *supra* note 4, at 170-71.

¹⁰ See National Performance Review Report: Foster Reliance on the Commercial Marketplace (Sept. 14, 1993).

¹¹ This concern is reflected in the Packard Commission Report, the Section 800 Panel, created by Congress, and the National Performance Review Report.

¹² Report of the Nat'l Performance Review, *PROC09: Lower Costs and Reduce Bureaucracy in Small Purchases through the Use of Purchase Cards* (1993).

¹³ See U.S. GAO, *DOD Contracting: Efforts Needed to Address Air Force Commercial Acquisition Risk*, GAO-06-995, 2-3 (Sept. 2006).

¹⁴ See Packard Comm'n Report.

¹⁵ Packard Comm'n Report at 60.

¹⁶ Packard Comm'n Report at 62.

DRAFT

Final Panel Working DRAFT

December 2006

the views of all stakeholders; *i.e.*, the government users and buyers, the holders of government contracting vehicles, and the contractor community.

Significantly, the Panel attempted to ascertain *current* commercial practices, particularly for services acquisition by large commercial buyers of services and the professionals that support the procurement process for those companies. The Panel gained a heightened awareness that there exists in the private sector a large, vigorous, and rapidly-growing market for the acquisition of professional services, particularly information technology (“IT”), and IT-heavy business management and financial services. When large, private-sector companies acquire services, they may engage in an “outsourcing” transaction. For example, a company may seek a vendor to manage its IT resources, its human resources department, or support financial institutions transaction processes. In some outsourcing transactions, a company may acquire vendor services to support its own performance of such functions.

American corporations are hiring services vendors, both domestic and foreign, at a rapid pace to drive down costs and improve their profitability. These companies are supported, both internally and externally, in their procurement processes by highly trained and experienced executives and consultants. Indeed, there are services acquisition specialists who work only in the private sector. Moreover, major private-sector buyers are acquiring services from many of the same companies who sell services to the Government. The Commercial Practices Working Group and the Panel set out to learn as much as possible about the acquisition processes used by large private sector buyers. The Working Group met over 40 times in the past 17 months. The full Panel also has heard directly from a number of private sector buyers about their acquisition practices. At the same time, the Panel recognized that the Government has created its own set of practices that it identifies as “commercial,” characterized by FAR Part 12, use of interagency and indefinite delivery indefinite quantity (IDIQ) contracts, the GSA Multiple Award Schedule, and relief from submission of certified cost or pricing data.

The questions upon which the Panel has focused include: (1) how the Government can take advantage of commercial practices; (2) what is working and what is not in the current government “commercial” framework, and how that compares to what the commercial market is doing now; (3) how the Government’s commercial-like practices can be refined and improved by reference to current commercial best practices; and (4) how to strike the right balance to obtain access to commercial markets while achieving mission performance, honoring various social policy goals, and obtaining a reasonable level of oversight to protect the Government from fraud and abuse (recognizing that the Government will never be a truly commercial buyer). These are significant questions to have tackled, and the expectation is that this debate will continue for some time. However, it is very useful, a decade out from FASA and FARA, to benchmark current commercial best practices based on the huge volume of private sector services transactions and to compare the current Government “commercial” approach.

DRAFT

Final Panel Working DRAFT

December 2006

B. “Commercial Items” and Commercial Practices: Definition and Procurement Policies

The term “commercial items” has evolved as various acquisition reforms have attempted to simplify government procurement and to harness the efficiency of the commercial marketplace. As the Section 800 Acquisition Advisory Panel observed, “[T]he primary purpose of defining a commercial item [is] to be able to exempt items so defined from the reach of [statutes and regulations that] have created barriers to the acquisition of commercial items.”²⁴ Accordingly, this categorical approach to procurement consists of four components: (1) the gateway definition of “commercial items;” (2) the application of the definition to a particular item or service; (3) the determination of the appropriate pricing mechanism; and (4) the preferences and exemptions afforded to such items as qualified supplies or services.

1. Statutory Definition: “Commercial Items”

The current statutory definition for “commercial items” is set out in the Office of Federal Procurement Policy Act.²⁵ It includes tangible items of the type traditionally used by the public, but it also includes items that have evolved from tangible commercial items and items that have been modified through processes traditionally available to the general public or in such a way that does not significantly alter the nongovernmental function of the item. Notwithstanding the use of the term “items,” the definition also embraces two forms of services: (1) services in support of tangible, commercial items and (2) standalone services, provided that such services are offered and sold competitively in substantial quantities based on established catalog or market prices. In full, the current statutory definition provides:

The term “commercial item” means any of the following:

(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—

(i) has been sold, leased, or licensed to the general public;

or

(ii) has been offered for sale, lease, or license to the general public.

(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

²⁴ 8 Streamlining Defense Acquisition Laws: Report of the Acquisition Law Advisory Panel to the United States Congress 18 (Jan. 1993).

²⁵ 41 U.S.C. § 403(12).

DRAFT

Final Panel Working DRAFT

December 2006

procurement requirements, including the Truth in Negotiation Act's ("TINA") cost or pricing data requirements³¹ and certain cost accounting standards ("CAS").³² In addition, Congress provided exemptions from many government-unique laws that were perceived as barriers to the procurement of "commercial items."³³

C. Legislative and Regulatory Origins

To fully understand the contemporary usage of the term "commercial items," it is necessary to consider its origins—as a component of the larger development of modern acquisition policy and as a reaction to perceived problems associated with those policies. Federal acquisition policy incorporates three core principals: (1) conducting procurements competitively whenever practicable so that the Government receives quality goods and services at a fair price and interested parties have a reasonable opportunity to compete; (2) maintaining the transparency of the acquisition process; and (3) ensuring that the Government's acquisition process has, and is seen as having, integrity.

1. The Origins of Current Government "Commercial" Practices

The start of the modern acquisition era is appropriately demarcated by the end of the Second World War.³⁴ In the immediate aftermath, Congress enacted the framework for modern acquisition procedures: the Armed Services Procurement Act of 1947³⁵ and its civilian counterpart, the Federal Property and Administrative Services Act of 1949.³⁶ For the most part, current federal acquisition policy developed from this framework—though it was shaped, to a great extent, by the unique concerns of the second half of the twentieth century, including the large peacetime military establishments associated with the Cold War, the Federal Government's expanding role in the domestic sphere, the rapid development of civilian and military technologies, and the equally rapid expansion of government spending.³⁷

²⁸ Pub. L. No. 103-355, 108 Stat. 3243 (1994).

²⁹ Pub. L. No. 104-106, div. D, tit. XLII, 110 Stat. 649.

³⁰ 10 U.S.C. § 2377 (codifying preferences).

³¹ 10 U.S.C. § 2306a(b)(1)(B).

³² 41 U.S.C. § 422(f)(2)(B)(i).

³³ See Pub. L. No. 103-355, § 8105, 108 Stat. 3243, 3392. See also Pub. L. No. 104-106, div. D, tit. XLII, § 4203, 110 Stat. 642, 654-55 (rendering inapplicable certain procurement laws regarding commercially available off-the-shelf items). The Federal Acquisition Reform Act was renamed the "Clinger-Cohen Act" by the Omnibus Consolidated Appropriations Act for Fiscal Year 1997, Pub. L. No. 104-208, tit. VIII, § 808, 110 Stat. 3009, 3009-393 (1996).

³⁴ It appears that the stresses of war are equally beneficial for the advancement of federal procurement policies as they are for medicine. As the 1972 Commission on Government Procurement explained, "The most significant developments in procurement procedures and policies have occurred during and soon after periods of large-scale military activity." Comm'n on Gov't Procurement Report VOL. 1 at 163 (1972).

³⁵ Pub. L. No. 80-413, 62 Stat. 21 (1948) (codified as amended at 10 U.S.C. § 2301 *et seq.*).

³⁶ Pub. L. No. 81-152, 63 Stat. 377 (1949) (codified as amended at 40 U.S.C. § 471 *et seq.*).

³⁷ S. Rep. No. 103-259, at 1-2 (1994), reprinted in 1994 U.S.C.C.A.N. 2561, 2562.

DRAFT

Final Panel Working DRAFT

December 2006

While the Government sought to acquire more services and supplies—in particular, the newly emerging aerospace and electronic technologies of the 1950s and 1960s—the procurement system was becoming exponentially more complex.³⁸ These trends proved prohibitive to achieving all of the Government’s principal goals outlined above: the complexity discouraged competitive participants and there was concern that the volume of negotiated acquisitions made it increasingly difficult for the Government to safeguard itself against inflated cost estimates in negotiated contracts.³⁹

2. The Commercial Item Exemption from the Original Truth in Negotiations Act

In 1962, Congress enacted Public Law 87-653 to facilitate fair price terms in noncompetitive contracts.⁴⁰ The law amended the Armed Services Procurement Act to require “oral or written discussions” with all firms “within a competitive range” and promoted the use of advertising over single-party negotiated contracts—all in an effort to increase competition. The law also contained a provision requiring contractors to submit and certify detailed cost or pricing data to provide the Government with sufficient information to negotiate a fair price—now popularly referred to as the Truth in Negotiations Act (“TINA”).⁴¹

TINA exempted certain acquisitions from its requirements for certified cost or pricing data , including acquisitions that involved “commercial items sold in substantial quantities to the general public.” In full, the exemption clause stated:

Provided, That the requirements of this subsection need not be applied to contracts or subcontracts where the price negotiated is based on adequate price competition, established catalog or market prices of commercial items sold in substantial quantities to the general public, prices set by law or regulation or, in exceptional cases where the head of the agency determines that the requirements of this subsection may be waived and states in writing his reasons for such a determination.⁴²

³⁸ Comm’n on Gov’t Procurement Report VOL. 1 at 177-78 (1972).

³⁹ *Id.* at 178. *See also* S. Rep. No. 87-1884 (1962), reprinted in 1962 U.S.C.C.A.N. 2476. [Note: prior to 1984 enactment of the Competition In Contracting Act, the Armed Services Procurement Act and the Federal Property and Administrative Services Act relied on sealed bidding for competition. Negotiated procurement was permitted , but as an exception to formal advertising requiring a written justification. While competition for negotiated procurements was required, if practicable, negotiated contracts were frequently non-competitive.] *See* S. Rep. No. 98-50 (1983), reprinted in 1984 U.S.C.C.A.N. 2174-84.

⁴⁰ S. Rep. No. 87-1884 (1962), reprinted in 1962 U.S.C.C.A.N. 2476.

⁴¹ Public Law 87-653 may have actually discouraged increased participation and competition among vendors. The 1993 Report of the Acquisition Law Advisory Panel (“Section 800 Panel”) argued that TINA “greatly impedes commercial buying.” *Acquisition Law Advisory Panel Report* at 6.

⁴² Pub. L. No. 87-653, 76 Stat. 528 (1962) (emphasis in original).

DRAFT

Final Panel Working DRAFT

December 2006

TINA was the first statute to use the term “commercial items.” To qualify under the “commercial item” exemption—and avoid TINA’s data submission requirements—a contractor had to proffer established catalog or market prices “sold in substantial quantities to the general public.” The definition did not encompass modification or development, and it did not apply to items not yet sold to the general public, even if those items were being developed for use by the general public.

3. The Commission on Government Procurement

During the 1960s and 1970s, the federal acquisition system was perceived as being plagued by cost overruns, inefficiencies, and burdensome government specifications. A 1970 General Accounting Office study of 57 major Department of Defense (“DoD”) systems found 38 systems with at least a 30 percent cost increase from the point of contract award.⁴³ Although this percentage was historically consistent with past cost overruns, the sheer volume of government contracting yielded staggering dollar amounts that proved unpalatable.⁴⁴ Government-unique specifications also proved a major impediment to the efficient procurement of otherwise suitable, commercially developed products and services. By way of a popular illustration, the military specifications for fruitcake once ran eighteen pages.⁴⁵

In 1969, Congress established the Commission on Government Procurement to study and recommend to Congress methods “to promote the economy, efficiency, and effectiveness” of procurement by the executive branch.⁴⁶ The Commission’s authority subsequently was extended,⁴⁷ and in 1972 it issued its report to Congress. Among its many recommendations, the Commission advocated for the creation of the Office of Federal Procurement Policy and the consolidation of federal acquisition regulations, leading to the passage of the Office of Federal Procurement Policy Act of 1974 and, ultimately, the promulgation of the Federal Acquisition Regulation (“FAR”).⁴⁸

The idea that the Federal Government could benefit from the broader use of commercial items did not go unnoticed by the Commission in its 1972 Report. In fact, the Commission urged Congress to promote the acquisition of commercial products over “Government-designed items to avoid the high cost of developing unique products.”⁴⁹ This recommendation, however, did not lead to appreciable statutory reforms—at least, not in the 1970s.

⁴³ U.S. GAO, *Status of the Acquisition of Selected Major Weapon Systems*, B-163058, Chapter 2 12 (1970); Comm’n on Gov’t Procurement Report VOL. 1 at 182.

⁴⁴ *Id.*

⁴⁵ Stephen Barr, ‘Reinvent’ Government Cautiously, Study Urges, Wash. Post, July 28, 1993, at A17, citing Brookings Institute Study. Of course, that should be understood in the context that the Government buys fruitcakes by the truckload (quite different from the “Joy of Cooking” recipe identified in the article).

⁴⁶ Pub. L. No. 91-129, 83 Stat. 263 (1969).

⁴⁷ Pub. L. No. 92-47, 85 Stat. 102 (1971).

⁴⁸ Pub. L. No. 93-400, 88 Stat. 796 (1974).

⁴⁹ Acquisition Law Advisory Panel Report at 3 (citing Comm’n on Gov’t Procurement Report, Pt. D).

DRAFT

Final Panel Working DRAFT

December 2006

Government if the modifications required to meet Government requirements (i) are modifications of the type customarily provided in the commercial marketplace or (ii) would not significantly alter the inherent nongovernmental function or purpose of the item in order to meet the requirements or specifications of the procuring agency;

(D) An item meeting the criteria set forth in subparagraphs (A), (B), or (C) need not be deemed other than “commercial” merely because sales of such item to the general public for other than Governmental use are a small portion of total sales of that item; and

(E) An item may be considered to meet the criteria in subparagraph (A) even though it is produced in response to a Government drawing or specification; provided, that the item is purchased from a company or business unit which ordinarily uses customer drawings or specifications to produce similar items for the general public using the same workforce, plant, or equipment.⁸⁹

“The Panel believed that the primary purpose of defining a commercial item was to be able to exempt items so defined from the reach of those statutes and implementing regulations that have created barriers to the acquisition of commercial items.”⁹⁰ To further this end and to eliminate many of the shortfalls identified above, the Panel expanded Part 211’s definition to include items that were modified in a way “customarily provided in the commercial marketplace” or in a manner that “would not significantly alter the inherent nongovernmental function or purpose of the item.”⁹¹ More fundamentally, the definition was expanded to include “services,” provided that those services were acquired in support of tangible commercial items.⁹² The Panel tied its definition of services to a requirement that they be offered contemporaneously to the general public under similar terms and conditions and that the commercial and government services be provided by the same workforce, plant, or equipment. The Panel thus wanted to be sure that the services had a solid anchor in the commercial marketplace. However, the Panel did not include standalone, or “pure,” services within the definition of a commercial item.⁹³

⁸⁹ *Id.* at 17-18.

⁹⁰ *Id.* at 18.

⁹¹ *Id.*

⁹² *Id.* at 17.

⁹³ *Id.* at 19. The Panel concluded that “it did not have sufficient information to recommend exempting ‘pure’ service contractors from additional Government-specific statutes and regulations.” *Id.* This would have been the natural effect of including “pure services” within the definition of a commercial item.

DRAFT

Final Panel Working DRAFT

December 2006

other than certified cost of pricing data” to the extent necessary to determine price reasonableness.¹⁰⁴

11. The Regulatory and Practical Implementation of FASA

Following the passage of FASA, the Executive Branch began the difficult task of implementing its statutory requirements.¹⁰⁵ On September 18, 1995, DoD, GSA, and NASA issued a final rule, which included a regulatory definition for “commercial items.”¹⁰⁶ For the most part, this definition tracked the definition in FASA—though it did little to clarify some of its more archaic terms.¹⁰⁷ The definition did seek to clarify what would qualify as permissible “minor modifications” by providing specific factors that could be used to adjudge the nature of those modifications.¹⁰⁸ The regulatory definition also adjusted the scope of the definition of standalone services, permitting qualification based on established “market prices” in addition to catalog prices. (The statutory definition did not include the terms “market prices,” rather it only referred to “[s]ervices offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog prices for specific tasks performed. . . .”¹⁰⁹)

The final regulation slightly revised the definition of commercial services by adding the term “of a type.” The regulatory drafters were concerned that without this change, the Government would be limited to acquiring services based only on “established catalog prices.” They cited lawn-cutting and janitorial services as examples of commercial services that were priced based on the size of the task rather than existing catalog prices. The drafters also expressed concern that the intent of the law – providing for the acquisition of commercial services that are sold in substantial quantities in the commercial marketplace – could easily be circumvented by the creation of a catalog.¹¹⁰ Based on the record and testimony examined by the Panel, the drafters never intended for the “of a type” language to extend the definition of commercial services beyond those sold in substantial quantities in the commercial marketplace.¹¹¹

¹⁰⁴ Pub. L. No. 103-355, tit. I, § 1203, 108 Stat.3275 (1994).

¹⁰⁵ For an overview of FASA’s implementation, see U.S. GAO, *Acquisition Reform: Regulatory Implementation of the Federal Acquisition Streamlining Act of 1994*, GAO/NSIAD 96-139 (June 1996).

¹⁰⁶ 60 Fed. Reg. 48,231, 48,235 (Sept. 18, 1995).

¹⁰⁷ Compare Pub. L. No. 103-355, tit. VIII, § 8001(a), 108 Stat. 3243, 3384 (1994) (defining “commercial items”), with 60 Fed. Reg. at 48,235 (also defining “commercial items”). Among the terms that the implementing agencies failed to clarify were “established catalog and market prices.” See 60 Fed. Reg. at 48,235.

¹⁰⁸ 60 Fed. Reg. at 48,235.

¹⁰⁹ Pub. L. No. 103-355, tit. VIII, § 8001, 108 Stat. 3385.

¹¹⁰ Memorandum from the Commercial Items Drafting Team to the FAR Council and the Project Manager, FASA Implementation Project, (Nov. 16, 1994) (on file with Commercial Items Drafting Team).

¹¹¹ Some of the comments received by the Panel from service industry associations have assumed that the “of a type” language expands the definition of commercial services far beyond what Congress of the FAR drafters ever intended.

DRAFT

Final Panel Working DRAFT

December 2006

fixed prices for the specific tasks to be performed remains the preferred option for the acquisition of either commercial or non-commercial items.”¹⁵⁰

Despite the preference for any other contract type, the use of T&M contracts by the Government is widespread. The GSA Office of the Inspector General reported to the Panel in May 2005, that of recent studies of 523 Federal Technology Service contract awards, valued at over \$5.4 billion, the IG found (i) 58% of all awards were inadequately competed; (ii) of those solicitations open to competition, 1/3 of the orders representing 53% of the aggregate sales dollars received only one bid, and (iii) over 60% of all orders were awarded on a time and materials basis.¹⁵¹

3. OFPP’s Proposed Rule

It should be noted that the amendment section 1432 made to FASA section 8002(d) is not self-executing. Rather, implementation of section 8002(d) requires the Office of Federal Procurement Policy (OFPP) to revise FAR’s current commercial items policies and associated clauses. The OFPP, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued a notice in the Federal Register soliciting comments regarding amendment to the FAR to account for T&M contracts.¹⁵² Subsequently, OFPP and the Councils issued a proposed rule,¹⁵³ which is yet to be finalized.

The proposed rule allows an agency to purchase any commercial service on a T&M basis if it uses competitive procedures and prepares a D&F containing sufficient facts and rationale to justify that a firm fixed-pricing arrangement is not suitable. With respect to the contents of the D&F, the rule provides that the rationale supporting use of a T&M contract for commercial services should establish that it is not possible at the time of placing the contract or order to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of certainty. If the need is of a recurring nature and is being acquired through a contract extension or renewal, the rule requires that the D&F reflect why knowledge gained from the previous acquisitions could not be used to further refine requirements and acquisition strategies in a manner that would enable purchase on a fixed-price basis. The stated goal of the proposed rule is to ensure that T&M contracts are used only when in the best interests of the Government.

E. Competition

1. A History of Difficulty in Achieving Competition

The long history of public contracting problems and the various legislative attempts at solutions was discussed and reported in the Report of the Commission on Government

¹⁵⁰ *Id.*

¹⁵¹ Test. of Eugene Waszily, GSA IG, AAP Pub. Meeting (May 17, 2005) Tr. at 198-99.

¹⁵² 69 Fed. Reg. 56316 (Sept. 20, 2004).

¹⁵³ 70 Fed. Reg. 56318 (Sept. 26, 2005).

DRAFT

Final Panel Working DRAFT

December 2006

for the GSA schedules.¹⁵⁸ CICA provided a statutory basis for the schedule program as a means to meeting agency needs for a broad range of commercial products that would be provided to various using agencies in small quantities and at diverse locations.¹⁵⁹ As discussed below, the use of the GSA schedules for the acquisition of services has exploded since the late 90's. As this growth has occurred, GSA has developed approaches for obtaining competition among schedule contract holders that are different from the typical processes used under FAR Part 15 (and 14). Although prices on the schedules are deemed fair and reasonable, and orders can be placed directly in accordance with the applicable regulations, GSA also has developed additional tools, discussed further below, that allow buyers to enhance competition and seek further price reductions from schedule contract holders.

Second, also as discussed below, orders placed under multiple award contracts (such contracts usually awarded initially through Part 15 procedures) are subject to the requirement for a "fair opportunity to compete" among the contract holders if a waiver is not exercised. There is no requirement that these "mini-competitions" be synopsized¹⁶⁰ or that unsuccessful offerors for an order receive a debriefing. Data requested by the Panel indicates that significant numbers of large orders, in excess of \$5 million, have been placed under these vehicles.

3. The Competition in Contracting Act¹⁶¹

a. Background

In 1982, contracting officers of various agencies testified before Congress to the effect that, while competition in government contracting was the requirement, it was not the practice. Congress attempted to reform the procurement process in 1984 by passing the Competition in Contracting Act (CICA). CICA provided that competition, rather than the common practice of "formal advertising" (sealed bidding) should be the norm. At the time, negotiated procurement was not required to be competitive, so Congress was concerned about the increasing use of non-competitive negotiations.

Although drafts of CICA used the term "effective competition," the conferees ultimately adopted "full and open competition" as the standard for federal procurement. The Report of the House Government Operations Committee on CICA explained the benefits of competition:

The Committee has long held the belief that any effort to reform Government procurement practices must start with a firm commitment to increase the use of competition in the Federal marketplace. Competition not only provides substantially reduced

¹⁵⁸ 41 U.S.C. § 259(b)(3). The term "full and open competition" is defined in 42 U.S.C. § 403 (6) to mean that "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement."

¹⁵⁹ H. Conf. Rep. No. 98-861 (1984), as reprinted in 1984 U.S.C.C.A.N. ____ page ____.

¹⁶⁰ FAR 16.505(a)(1).

¹⁶¹ Pub. L. No. 98-369, 98 Stat. 1175 (1984) (codified as amended in scattered sections of the U.S.C.)

DRAFT

Final Panel Working DRAFT

December 2006

costs, but also ensures that new and innovative products are made available to the Government on a timely basis and that all interested offerors have an opportunity to compete.¹⁶²

The premise that underlies this strong preference for “full and open competition” is the economic premise that has long been recognized by the courts as the basis for a free market economic system—that competition brings consumers the widest variety of choices and the lowest possible prices.¹⁶³

The Senate Committee specifically provided a definition of competition for federal procurement in its report. “In government contracting, competition is a marketplace condition which results when several contractors, acting independently of each other and of the government, submit bids or proposals in an attempt to secure the government’s business.”¹⁶⁴

CICA defined “full and open competition” to mean “all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.”¹⁶⁵ In addition, to ensure that agencies did not lightly sidestep the competition requirement, Congress established requirements to justify departures from full and open competition. For example, CICA provided that full and open competition could be avoided only through one of seven limited exceptions,¹⁶⁶ and it required a written justification & approval (“J&A”) document to be filed if one of the exceptions was invoked.¹⁶⁷ In addition, Congress mandated that the head of each agency designate a Competition Advocate and required that all J&A’s for procurements of \$500,000 or more be approved by the Competition Advocate for each agency.¹⁶⁸

CICA expressly recognized and permitted the use of competitive negotiations, rather than sealed bids, required that the Government’s requirements and evaluation factors be clearly expressed so that offerors could understand the ground rules, and mandated that the Government follow its stated requirements and evaluation factors in the source selection process. CICA expressly recognized and permitted best value selections based on technical, cost, and other factors, rather than just cost. In a best value source selection, the Government can choose the overall best value for the particular requirement; however, cost must be a consideration under CICA – it cannot be ignored. To support a best value selection, the source selection official must justify the trade off between the cost and technical merit of the offers in the competitive range. Thus, for each best value procurement, the government buyer has a record of the basis for the selection.

¹⁶² H.R. Rep. No. 98-1157, at 11 (1984).

¹⁶³ *ATA Def. Indus., Inc. v. United States*, 38 Fed. Cl. 489, 500 (1997) (citing Adam Smith, *Wealth of Nations* 112 (1776)).

¹⁶⁴ S. Rep. No. 97-665, at 2.

¹⁶⁵ 41 U.S.C. § 403(6).

¹⁶⁶ 10 U.S.C. § 2304(c); 41 U.S.C. § 253(c).

¹⁶⁷ 10 U.S.C. § 2304(f)(1)(A); 41 U.S.C. § 253(f)(1)(A).

¹⁶⁸ FAR 6.501.

DRAFT

Final Panel Working DRAFT
December 2006

b. Competition Under CICA Procedures

Acquisition Planning. The statute and the FAR require agencies to use advance procurement planning and develop specifications using appropriate market research that meets the agency's needs. Specifications may be stated in functional, performance or design terms as the agency requires. However, unless an exception applies, requirements must be stated in a manner designed to achieve full and open competition.¹⁶⁹

Synopsis. Current procedures require contracting officers to synopsize contract actions expected to exceed \$25,000 via the Internet to the single government point-of-entry (GPE) known as Federal Business Opportunities (FedBizOpps).¹⁷⁰ Publication is to insure that all responsible sources are permitted to submit offers consistent with the definition of "full and open competition" at 41 U.S.C. § 403(6) which provides:

- (6) The term "full and open competition," when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement."

Typically, for a procurement expected to exceed the simplified acquisition threshold, the FAR requires a synopsis to be published at least 15 days prior to the issuance of the solicitation. Once the solicitation is issued, agencies must allow at least 30 days response time for receipt of offers, making the minimum period between the publication of synopsis and the receipt of offers 45 days.¹⁷¹

For commercial items, agencies may establish a shorter period for issuance of the solicitation or use the combined synopsis/solicitation procedures set out in FAR 12.603. In such case the solicitation response time may be determined so as to "afford potential offerors a reasonable opportunity to respond" considering "the circumstances of the individual acquisition, such as the complexity, commerciality, availability, and urgency."¹⁷² The time required for synopsis may be affected, even in the case of commercial items, by the requirements of certain trade agreements. Under the WTO Government Procurement Agreement or a Free Trade Agreement,¹⁷³ the time between publication of the notice and receipt of offers must be no less than 40 days.

Solicitation. Once a solicitation is issued in the form of a Request for Proposals (RFP) or Invitation for Bids (IFB), interested vendors submit their offers and the selection process begins.

¹⁶⁹ 41 U.S.C. § 253a; FAR 11.002, 15.2.

¹⁷⁰ The synopsis is required by the OFPP Act (41 U.S.C. § 416), and the Small Business Act (15 U.S.C. § 637(e)). FAR 5.003 and 5.102(a)(1) requires the Government to use the GPE known as FedBizOpps at <http://www.fedbizoppss.gov>.

¹⁷¹ FAR 5.203.

¹⁷² FAR 5.203 (b).

¹⁷³ FAR subpart 25.4.

DRAFT

Final Panel Working DRAFT

December 2006

offeror's unique technical solution or intellectual property; 93) not revealing an offeror's specific price; (4) not disclosing past performance references, and (5) not violating the Procurement Integrity Act by revealing source selection information.

Award. Awards are made on the basis of the solicitation factors and subfactors by a Source Selection Official who, using his or her discretion and independent judgment, makes a comparative assessment of the competing proposals, trading off relative benefits and costs. The Source Selection decision must be reflected in a written statement that explains the rationale for award.¹⁸²

Post-Award. Unsuccessful offerors are entitled to a debriefing, if timely requested, regarding the conduct of the procurement and the evaluation of their proposals. The debriefing must disclose at least: (1) the government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal; (2) the overall evaluated cost or price and technical rating of the awardee and the debriefed offeror, and past performance information on the debriefed offeror; (3) the overall ranking of all offerors, if one exists; (4) a summary of the rationale for award; (5) for commercial items, the make and model of the item to be delivered by the awardee; (6) reasonable responses to questions about whether the solicitation procedures were followed.¹⁸³

An offeror who believes that the solicitation or the source selection process was unfair may protest and obtain an independent outside review of the award decision under an Administrative Procedure Act standard of review which provides that the decision may be overturned only upon a showing that the decision was arbitrary and capricious (which includes within its definition that the decision violated law or regulation).¹⁸⁴

4. The Use of Interagency Vehicles

In 1993, the Section 800 Panel Report¹⁸⁵ again discussed the fundamental role of competition in public procurement. Agencies complained about the time and delays involved in considering multiple proposals and their perceived inability to eliminate proposals that did not have an opportunity for success from consideration.¹⁸⁶ The Section 800 Panel gave serious consideration to amending the competition statute to provide for "adequate and effective

¹⁸² FAR 15.308.

¹⁸³ FAR 15.506.

¹⁸⁴ 31 U.S.C. §§ 3351-3666; 28 U.S.C. §1491(b)

¹⁸⁵ Acquisition Law Advisory Panel Report, Ch. 1.,

¹⁸⁶ The complaint of difficulty in winnowing down the offers to those with the best chance of success was not a new one. Congress had addressed this very issue in considering the potential definition of "effective competition" in enactment of CICA. The CICA conferees expressed their view that the procurement process "should be open to all capable contractors who want to do business with the Government. The conferees do not intend, however, to change the long-standing practice in which contractor responsibility is determined by the agency after offers are received." H.R. Rep. No. 861, 98-1422 (1984).

DRAFT

Final Panel Working DRAFT

December 2006

advisory and assistance services, the Section 800 Panel recommended a revision of the authority for IDIQ vehicles. While noting the issue of agencies expanding the scope of such vehicles as a problem, the Section 800 Panel believed that flexibility was necessary to permit award of contracts for supplies or services in which the detailed requirements, timing of work, and definite dollar value could not be determined at the time the basic contract was awarded.¹⁹¹ Without this ability, the Section 800 Panel expressed concern that legitimate requirements and tasks would be unnecessarily delayed or result in improper sole source justifications or inappropriate undefinitized contract actions.

The Section 800 Panel then recommended a new statute that would provide some structure around the use of IDIQ contracts. First, the basic contract had to be awarded pursuant to full and open competition (or a permissible properly approved exception). The competition for the basic contract was required to have provided: (i) "a reasonable description of the general scope, nature, complexity, and purposes of the supplies or services;" (ii) meaningful evaluation criteria, properly applied; and (iii) if multiple awards were made, a clear method of competing or allocating delivery or task orders among contracts.¹⁹² If properly awarded, then with respect to delivery orders or task orders issued under that contract, no notice (synopsis) or separate competition (or justification) was required.¹⁹³ At the time, the Section 800 Panel believed that the potential for abuse of these vehicles was the expansion of the contract scope or period by a delivery or task order. Thus, the Panel recommendation prohibited any such expansion without use of full and open competition.¹⁹⁴

In enactment of FASA,¹⁹⁵ Congress largely accepted the Section 800 Panel approach. FASA required that award of IDIQ contracts be subject to full and open competition and include specific requirements for solicitations for such contracts, including specification of the contract period and the maximum quantity or dollar value to be procured. In addition, Congress stated that the solicitation should contain:

A statement of work, specifications or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract.¹⁹⁶

¹⁹¹ *Id.* at 1-32, 33.

¹⁹² *Id.* at 1-52-53.

¹⁹³ *Id.* at 1-53.

¹⁹⁴ *Id.* "The Panel believes that this statutory rule structure will meet the legitimate needs for having contracts in place to responsively provide supplies or perform services when the quantities, timing and exact nature are not known in advance. As important, it will prevent the improper use of such contracts to avoid competing new or expanded requirements when competition is appropriate, or ensure proper approval of the justification when it is not." *Id.*

¹⁹⁵ 41 U.S.C.A. § 253j; 10 U.S.C.A. § 2304a-d

¹⁹⁶ 41 U.S.C.A. § 253h; 10 U.S.C.A. § 2304a.

DRAFT

Final Panel Working DRAFT

December 2006

these concerns, Congress enacted section 804 of the National Defense Authorization Act for Fiscal Year 2000.²⁰³ This provision directed that the FAR be revised to provide guidance regarding the appropriate use of multiple award IDIQ contracts. The guidance, at a minimum, was to identify specific steps that agencies should take to ensure that: (1) all contractors are afforded a fair opportunity to be considered for the award of task and delivery orders and (2) the statement of work for each order clearly specifies all tasks to be performed or property to be delivered. In April 2000, the FAR was revised to address these topics.

Under the FAR revisions, fair opportunity requires, with limited exceptions, that all awardees are afforded a fair opportunity to be considered for each order exceeding \$2,500. The current FAR gives contracting officers significant discretion in applying the fair opportunity standard. For example, FAR 16.505(b)(1)(ii) provides that contracting officers “need not contact each of the multiple awardees … if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order.”

Protests of task order awards are not authorized, except for cases where the order increases the scope, period, or maximum value of the contract under which the order is issued.²⁰⁴ FASA did require that each agency issuing task or delivery order contracts appoint an ombudsman to review complaints regarding the fair opportunity process.²⁰⁵

c. Section 803 Revisions to “Fair Opportunity”

Notwithstanding the measures to further define the fair opportunity standard and the discretion afforded by the FAR, Congress continued to have concern regarding the adequacy of competition under multiple award contracts, particularly for services. For example, Section 803 of the National Defense Authorization Act for Fiscal Year 2002 required DoD to promulgate regulations requiring competition in the purchase of services by DoD under multiple award contracts. It required that DoD’s regulations must provide for DoD the award of orders “on a competitive basis,” absent a waiver.²⁰⁶ The statute provided that the purchase of services would be made on a “competitive basis” only if it was made pursuant to procedures that required “fair notice” of the intent to make a purchase to be given to “all contractors offering such services under the multiple award contract” and afforded all contractors that respond “a fair opportunity to make an offer and have that offer fairly considered” by the official making the purchase.²⁰⁷ Thus, Section 803 went beyond the FAR in that, when implemented, it would require agencies to solicit offers from all contract holders to meet the “fair opportunity” test.

²⁰³ Pub. L. No. 106-65 (Oct. 5, 1999).

²⁰⁴ 10 U.S.C. § 2304c(d).

²⁰⁵ 10 U.S.C. § 2304c(e).

²⁰⁶ See Pub. L. No. 107-107, § 803(b)(1).

²⁰⁷ *Id.* § 803(b)(2).

DRAFT

Final Panel Working DRAFT

December 2006

DoD's implementing regulations, which became effective in October 2002, require that each order of services exceeding \$100,000 shall be placed on a "competitive basis." The regulations provide that an order is made on such a basis only if the contracting officer:

- (1) Provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection, to all contractors offering the service under the multiple award contract; and
- (2) Affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.²⁰⁸

The regulations also permit the contracting officer to waive the competition requirement under certain circumstances.²⁰⁹ As discussed below, the DoD regulations also cover ordering procedures for services under schedule contracts.

GAO continued to express concern in 2003 regarding the level of competition under fair opportunity.²¹⁰ In July 2004, GAO issued another report regarding DoD's implementation of Section 803.²¹¹ GAO found that competition requirements were waived for nearly half of the task orders surveyed. GAO noted that, as a "result of the frequent use of waivers, there were fewer opportunities to obtain the potential benefits of competition—improved levels of service, market-tested prices, and the best overall value for the taxpayer."²¹² GAO found that, in the majority of cases where waivers were invoked, it was done at the request of the government program office "to retain the services of contractors currently performing the work."²¹³ The report further found that roughly two-thirds of the cases in which waivers were invoked were in federal supply schedule orders.²¹⁴ For orders that were available for competition, buying organizations awarded more than one-third after receiving only one offer.²¹⁵

In its July 2004 report regarding Section 803, GAO recommended that DoD:

- develop additional guidance on the circumstances under which the logical follow-on and unique services waivers may be used;

²⁰⁸ See DFARS 216.505(c).

²⁰⁹ See DFARS 216.505(b).

²¹⁰ U.S. GAO, *Contract Management: Civilian Agency Compliance with Revised Task and Delivery Order Regulations*, GAO-03-393, 7 (2003).

²¹¹ U.S. GAO, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-874 (2004).

²¹² *Id.* at 6.

²¹³ *Id.* at 3.

²¹⁴ *Id.* at 6.

²¹⁵ *Id.* at 3.

DRAFT

Final Panel Working DRAFT

December 2006

award of an FSS contract.²³⁰ Offerors under an FSS solicitation do not compete against other offerors; rather, prices are assessed against the standard of a “fair and reasonable price.” For services, the FAR states:

GSA has already determined that the prices of fixed-price services and rates for services offered at hourly rates under schedule contracts to be fair and reasonable. [B]y placing an order against a schedule contract..., the ordering activity has concluded that the order represents the best value...and results in the lowest overall cost alternative (considering price, special features, administrative costs, *etc.*) to meet the Government’s needs.²³¹

To be awarded a base schedule contract, a vendor has to provide GSA with information about its commercial sales practices and identify categories of customers who then become the basis of negotiation. Utilizing a most favored customer approach, GSA negotiates with its vendors to obtain the best prices afforded their preferred customers for like requirements of similar scale. The essence of GSA Schedule contract price analysis is a comparison of the prices offered to the Government with the prices paid by others in the commercial marketplace for the same or similar items, including services, under similar conditions. This pricing approach, combined with GSA’s Price Reductions clause (GSAM 552.238-75), is designed to maintain a specific, commercially-competitive pricing relationship throughout the duration of the contract. The focus of this threshold negotiation is to leverage the government’s volume buying to achieve a position similar to that of the most competitive commercial customer from the particular vendor.²³² The resulting price is, thus, deemed “fair and reasonable.”²³³

b. Market Prices

As discussed above, orders placed under the schedules are deemed to be the product of a competitive procedure because the items and services are routinely sold in substantial quantities in the commercial marketplace. GSA attempts to ensure that the prices and labor rates of an FSS contract are reasonable through analysis of commercial pricing policies and practices and use of pre-award audits by the GSA IG of those commercial prices. In recent years GSA has increased the surveillance of commercial prices. The number of pre-award audits is increasing. During fiscal year 2003 to 2005, the number of pre-award audits performed increased from 18 to 40 to 70.²³⁴ According to GSA, the goal is set at 100 in fiscal year 2006.²³⁵ In FY 1995, GSA

²³⁰ As of the date of this report, more than 17,000 companies have Schedule contracts.

²³¹ FAR 8.404(d).

²³² FSS Procurement Information Bulletin 04-2.

²³³ FAR 8.404(d).

²³⁴ GAO-05-229 at 14-15.

²³⁵ *Id* at 17.

DRAFT

Final Panel Working DRAFT
December 2006

conducted 154 pre-award audits. GSA MAS contracts contain over 10 million products from more than 17,000 commercial vendors.²³⁶

c. Streamlined Ordering Process

The use of GSA schedules provides for a simplified ordering process. For instance, as long as ordering activities (*i.e.*, buyers) comply with the regulatory ordering policies and procedures established by GSA and set forth in FAR 8.405, the order is not subject to the requirements of FAR Part 13 (Blanket Purchase Agreements), FAR Part 14 (Sealed Bidding), FAR Part 15 (Contracting By Negotiation), or FAR Part 19 (Small Business Programs)(except for the requirement at FAR 19.202-1(e)(1)(iii) dealing with bundling in small business procurements). Buyers still must comply with all FAR requirements regarding bundled contracts, if the order meets the definition for a bundled contract at FAR 2.101(b). The GSA schedules also may be used to meet agency small business goals.

Once a contractor's products or services are placed on the GSA schedules, any agency may order pursuant to the ordering procedures set forth in FAR 8.4.

Although GAO generally lacks jurisdiction to hear protests involving the issuance of delivery and task orders,²³⁷ GAO has determined that its bid protest jurisdiction under the Competition in Contracting Act²³⁸ does extend to competitions conducted under FSS contracts.²³⁹

Orders under the schedules may be protested, regardless of the size of the order.

Policies and Procedures for Ordering Services. While there are no dollar limits for orders placed under GSA Schedule contracts, the ordering procedures specified in the FAR differ depending on a number of factors, including dollar thresholds. More specifically, the ordering procedures vary depending on (1) whether the acquisition is for supplies or services, (2) if services, whether they are of a type requiring a statement of work, *i.e.*, statement of the buyer's requirements, (3) the dollar value of the purchase (*i.e.*, below the micro-purchase threshold, currently set at \$3,000, or above the micro purchase threshold established by category of supply or service), and (4) whether a Blanket Purchase Agreement ("BPA") is being established under the schedule contract for the fulfillment of repetitive needs for supplies or services. For any

²³⁶ GSA Data at ____.

²³⁷ 41 U.S.C.A. § 253j(d); 10 U.S.C.A. § 2304c(d).

²³⁸ See 31 U.S.C.A. § 3551 *et seq.*

²³⁹ E.g., *Savantage Fin. Servs., Inc.*, B-292046, B-292046.2, June 11, 2003, 2003 CPD ¶ 113; *See Sys. Plus, Inc. v. United States*, 68 Fed. Cl. 206 (2005), where the extent of the authority for review of FSS competitions has been called into question. In recently rejecting a challenge to an agency decision not to implement a stay of performance in regard to the award of an order under a schedule contract, the U.S. Court of Federal Claims distinguished FAR Part 15 procurements from the competitions conducted under FAR subpart 8.4 for purposes of the statutory stay outlined in the statute that sets forth GAO's bid protest jurisdiction.

DRAFT

Final Panel Working DRAFT

December 2006

874-1, Consulting Services, under the Schedule 874- Mission Oriented Business Integrated Services (MOBIS). The e-Buy system will show the list of 3,995 vendors available under SIN 132-51 and 1,741 vendors under SIN 874-1 (as of 6/8/2006). The agency will then select the vendors to whom to send e-mail notifications about the RFQ (“select all vendors” is also available). However, the rest of the vendors within the two SINs may still view the RFQ in the bulletin board and submit quotes. Under, FAR 8.405-2(c)(4) and (d), the ordering agencies must provide the RFQ including the statement of work and the evaluation criteria to any Schedule contractor who requests it and they must also evaluate all responses received. The agency can decide reasonable response time.

Postings on e-Buy have been continually increasing since its inception in August 2002. In fiscal year (“FY”) 2003, 13,282 solicitations were posted. Postings increased to 25,582 in FY 2004 and 41,179 in FY 2005. Finally, in FY 2006, there have been 48,423 postings representing an approximately 18 percent increase over the last year. On average, three quotes have been received per closed RFQ during FY 2005 and FY 2006.

Regardless of whether ordering activities use e-Buy, the ordering activity, not GSA, is responsible for establishing the dollar thresholds for BPAs and orders, developing a quality SOW when required, conducting the competition including selecting appropriate vendors to receive an RFQ when e-Buy is not used, and evaluating and selecting the schedule contractor to fulfill their requirements.

As with task orders under multiple award contracts, Section 803 also applies to orders under FSS contracts. DoD regulations impose the requirements of Section 803 for services orders over \$100,000 under GSA schedule contracts.²⁵⁸ As implemented in DFARS 208.405-70, DoD’s regulations require that a DoD order for supplies or services exceeding \$100,000 must provide fair notice either to all applicable Schedule holders or to as many Schedule contractors as practicable to reasonably ensure receipt of at least three offers. The Procedures, Guidance and Information (PGI) for DFARS 208.405-70 specifically mentions “e-Buy” as one medium that provides fair notice to all the GSA schedule contractors. At the time of this report, GSA has under consideration, a proposed rule that will make Section 803 applicable government-wide.

Schedule BPAs. Blanket Purchase Agreements under GSA schedules also are used as a tool to streamline the ordering process. BPAs originally were designed to provide a simplified method for government agencies to meet their repetitive needs for unpredictable quantities of commodities.²⁵⁹ With the addition of services priced at hourly rates to the Federal Supply Schedules, schedule BPAs for these services in some ways more closely resemble indefinite-delivery, indefinite-quantity (IDIQ) services contracts in their application and use than traditional FAR Part 13 BPAs with their individual purchase limitations.²⁶⁰ BPAs under GSA schedules may be single BPAs or multiple BPAs. Schedule BPAs also may be established for the use of a

²⁵⁸ See DFARS 208.405-70.

²⁵⁹ FAR 8.405-3(a)(1).

²⁶⁰ FAR Subsection 13.303-5(b).

DRAFT

Final Panel Working DRAFT

December 2006

Acquisition Council and the Defense Acquisition Regulations Council (“Councils”) followed suit and, on September 28, 2006, the Councils issued an interim rule amending the FAR to require agencies to publish on the Government-wide Point of Entry (“GPE”) or e-Buy, the justification to support the use of brand name specifications.

The interim rule stated that, as a general rule, contract specifications should emphasize the necessary physical, functional, and performance characteristics of a product – not brand names. In addition, the interim rule requires that brand name orders exceeding \$25,000 to be placed against the FSS program must be posted on e-Buy. As part of the posting, the ordering agency is required to include the documentation or justification supporting the brand name requirement. For non-FSS acquisitions, including simplified acquisitions, the interim rule requires posting of the justification or documentation supporting the brand name requirement to the FedBizOpps website.

F. Pricing – The Current Regulatory and Oversight Scheme

1. Overview

Under current law, contracts that are priced or performed on the basis of cost are subject to the requirement for submission of certified cost or pricing data if they are above the \$650,000 threshold.²⁶⁷ There are exceptions to this requirement, as discussed further below, for competitively awarded contracts (although non-competitive modifications to such contracts may be covered) and for contracts for commercial items (the exception also covers modifications to commercial item contracts).

For commercial item contracts under FAR Part 12, the Government still must determine whether the price is fair and reasonable. Where commercial item contracts are competitively awarded, price reasonableness is easily established. Where commercial item contracts are acquired non-competitively, an issue arises as to what data should reasonably be required to support the contractor’s proposed pricing. For price-based acquisitions of commercial items, FAR 15.403-3(c) describes the process the contracting officer must utilize. The contracting officer is directed, “at a minimum” to use price analysis to determine fair and reasonable prices whenever a commercial item is acquired. If price analysis is not sufficient, the contracting officer is directed to use other sources (*e.g.*, market information), and if that is insufficient, authority exists to obtain information other than cost or pricing data.

In the grey area, where there is little or no competition, where exceptions to fair opportunity are used, or where there is an inadequate response to the competition, questions arise as to what types of data the contracting officer can and should obtain in connection with commercial items, whether pressures to get to award discourage asking for information other than cost or pricing data, and what the government audit community does with such data; *i.e.*, is the mindset to treat it no differently than cost or pricing data?

²⁶⁷ FAR 16.403-4(a).

DRAFT

Final Panel Working DRAFT

December 2006

For defense articles, considerable controversy has arisen since this Panel was appointed regarding whether such articles should be considered “commercial items” and whether price-based acquisition of such items should be permitted.

2. The Current Truth in Negotiations Act

The Truth in Negotiations Act (“TINA”)²⁶⁸ requires a contractor to submit certain factual information to the Government for purposes of contract negotiations. The contractor must submit this “cost or pricing data” to the Government and certify that the data are “accurate, complete, and current.”²⁶⁹

Specifically, unless an exception applies, TINA requires submission of cost or pricing data before the award of any negotiated prime contract, subcontract, or modification to any contract that is expected to exceed \$650,000. Unless an exception applies, cost or pricing data also may be required for contract actions over the simplified acquisition threshold if the data are necessary to determine whether the offered contract or modification price is fair and reasonable.²⁷⁰ The FAR encourages²⁷¹ contracting officers to “use every means available to ascertain whether a fair and reasonable price can be determined before requesting cost or pricing data.”

There are several exceptions to the requirement that a contractor submit cost or pricing data.²⁷² A contractor does not have to provide cost or pricing data if the agreed upon price was based on “adequate price competition”²⁷³ or “prices set by law or regulation.”²⁷⁴ Finally, submission of cost or pricing data is not required for contracts for “commercial items” or modifications to such contracts (provided that such modifications would not change the contract from one for a commercial item to one other than for a commercial item).²⁷⁵ Notwithstanding, the contracting officer may require information other than cost or pricing data to support a determination of price reasonableness or cost realism.²⁷⁶ The Government may not require submission of cost or pricing data if an exception applies.²⁷⁷

Cost or Pricing Data. Cost or pricing data is broadly defined as:

all facts that, as of the date of agreement on the price of a contract (or the price of a contract modification), or, if applicable consistent

²⁶⁸ 10 U.S.C. § 2306a; 41 U.S.C. § 254b.

²⁶⁹ See 10 U.S.C. § 2306a(a)(2), 41 U.S.C. § 254b(a)(2).

²⁷⁰ See FAR 15.403-4(a)(2).

²⁷¹ FAR 15.402(a)(3).

²⁷² See 10 U.S.C. § 2306a(b); 41 U.S.C. § 254b(b); FAR 15.403-1.

²⁷³ See FAR 15.403-1(b)(1).

²⁷⁴ FAR 15.403-1(b)(2).

²⁷⁵ See FAR 15.403-1(b)(3).

²⁷⁶ See FAR 15.403-1(b).

²⁷⁷ See 10 U.S.C. § 2306a(b); 41 U.S.C. § 254b(b).

DRAFT

Final Panel Working DRAFT

December 2006

with [TINA], another date agreed upon between the parties, a prudent buyer or seller would reasonably expect to affect price negotiations significantly. Such term does not include information that is judgmental, but does include the factual information from which a judgment was derived.²⁷⁸

The FAR further states:

Cost or pricing data are factual, not judgmental; and are verifiable. While they do not indicate the accuracy of the prospective contractor's judgment about estimated future costs or projections, they do include the data forming the basis for that judgment. Cost or pricing data are more than historical accounting data; they are all the facts that can be reasonably expected to contribute to the soundness of estimates of future costs and to the validity of determinations of costs already incurred.²⁷⁹

Thus, cost or pricing data includes a variety of information including, but not limited to, cost information on which the contractor based its price.

The FAR provides some specific guidance in identifying broad categories of information that qualify as cost or pricing data. It states that cost or pricing data includes "such factors as –

- (1) Vendor quotations;
- (2) Nonrecurring costs;
- (3) Information on changes in production methods and in production or purchasing volume;
- (4) Data supporting projections of business prospects and objectives and related operations costs;
- (5) Unit-cost trends such as those associated with labor efficiency;
- (6) Make-or-buy decisions;
- (7) Estimated resources to attain business goals; and
- (8) Information on management decisions that could have a significant bearing on costs.²⁸⁰

Information Other Than Cost or Pricing Data. When one of the exceptions discussed above applies, the contracting officer "shall not require submission of cost or pricing data to support any action (contracts, subcontracts, or modifications)."²⁸¹ Therefore, the prohibition on obtaining such data is explicit. The FAR also states, however, that the contracting officer "may

²⁷⁸ 10 U.S.C. § 2306a(h)(1); 41 U.S.C. § 254b(h)(1). *See also* FAR 2.101.

²⁷⁹ FAR 2.101.

²⁸⁰ *Id.*

²⁸¹ *See* FAR 15.403-1(b).

DRAFT

Final Panel Working DRAFT
December 2006

rebut the presumptions and contrasted actions by government officials accused of fraud or quasi-criminal wrongdoing with their actions of the type that may be taken by a private party to a contract.³¹⁵ In fact, many of the cases discussed by Judge Wolski can be distinguished on the basis of actions taken by a government official in the Government's sovereign or contractual capacities.

The comments of the American Bar Association's Section of Public Contract Law (consisting of lawyers in private practice, industry, and government service) were contained in a letter to the Panel from the Section dated June 22, 2006. The Section noted that courts and boards of contract appeals, over time, have applied some presumptions to conduct of government employees acting in the contractual area, not merely the sovereign area. Much of the confusion, the Section said, comes from the mingling of (a) the duty of good faith and fair dealing (as recognized by Section 205 of the Restatement 2d of Contracts) that is implied into every contract with (b) the presumption of good faith that attaches to government employees acting in a sovereign capacity. The Section also noted that the unequal treatment of the Government and contractors by the misapplication of the doctrine has been compounded by some judges who have imposed a higher standard of proof on contractors in order to overcome the presumption. The Section concluded by recommending the following language:

The contractor and the Government shall enjoy the same legal presumptions, if any, in discharging their duties and in exercising their rights in connection with the performance of any Government contract, and either party's attempt to rebut any legal presumption that applies to the other party's conduct shall be subject to a uniform evidentiary standard that applies equally to both parties.

Representatives of the ABA Section discussed the recommendation at a meeting of the Panel and responded to numerous questions and comments by Panel members, including acceptance of several revisions to the quoted recommendation made during the meeting.

Part II – Findings

1. Commercial “Best Practices” Generally

Finding: “Best practices” by commercial buyers of services include a clear definition of requirements, reliance on competition for pricing and innovative solutions, and use of fixed-price contracts.

Discussion:

The Panel found a number of common “best practices” among commercial buyers in the commercial market place. Commercial buyers invest the time and resources necessary up front

³¹⁵ *Id.* at 769.

DRAFT

Final Panel Working DRAFT

December 2006

to clearly define their requirement. They use multidisciplinary teams to plan their procurements, conduct competitions, and monitor contract performance throughout the terms of the contract. They rely on well-defined requirements and competitive awards to reduce prices and to obtain innovative and high quality goods and services. Commercial buyers establish objective measures of performance and continuously monitor contract performance. They rely on carefully crafted standardized terms and conditions, developed with vendor input, to manage risk and ensure quality performance.

Commercial buyers also told the Panel that, when feasible, they preferred fixed-priced contracts. Well-defined performance-based requirements facilitated the use of fixed-price contracts. These same buyers avoided the use of cost-based contracts whenever possible. They indicated that cost-based contracts were too expensive and too burdensome on the company to manage. These commercial buyers typically use relatively short-term contracts; usually 3-5 years with some contracts lasting 7 years. Commercial buyers usually reserve the right to recompete before the contract has run full term.

2. Defining Requirements

Finding: Commercial organizations invest the time and resources necessary to understand and define their requirements. They use multidisciplinary teams to plan their procurements, conduct competitions for award, and monitor contract performance. They rely on well-defined requirements and competitive awards to reduce prices and to obtain innovative, high quality goods and services. Procurements with clear requirements are far more likely to meet customer needs and be successful in execution.

Discussion:

Effective services competition in the private sector rests upon a robust requirements-building process.³¹⁶ Gathering of requirements is a fundamental first step in commercial organizations' services acquisition strategy.³¹⁷ Companies with deep experience in services acquisition value acquisition process governance as highly as selecting the awardee providing the best functional expertise.³¹⁸ For buyers, detailed statements of work communicating specific contract requirements and expected levels of service quality are essential to a successful relationship with vendors.³¹⁹

Private sector companies spend significant amounts of time and resources developing business cases for services acquisition.³²⁰ They get the stake holders involved and use highly qualified personnel to develop the business cases. Business case development helps to prevent

³¹⁶ Test. of Janice Menker, Concurrent Tech. Corp., AAP Pub. Meeting (May 17, 2005) Tr. at 32 (culture change to focus on requirements definition is difficult, but the best written contract cannot fix poor requirements definition).

³¹⁷ Test. of Mark Stelzner, EquaTerra, AAP Pub. Meeting (Aug. 18, 2005) Tr. at 360.

³¹⁸ *Id.*

³¹⁹ Test. of Robert Miller, Procter & Gamble, AAP Pub. Meeting (Mar. 30, 2005) Tr. at 80.

³²⁰ Test. of Todd Furniss, Everest Group, AAP Pub. Meeting (Mar. 30, 2005) Tr. at 122.

DRAFT

Final Panel Working DRAFT

December 2006

false trade-offs. Cost reduction is just one component of the business cases. They have found that too much focus on cost reduction can lead to missed opportunities and, in some cases, reduce service quality in other areas of the organization.³²¹ Stated differently, total cost of service acquisition does not equal total value captured through sourcing.³²² Companies that conducted successful sourcing transactions focused on total value when planning requirements. They also used specifications with well-defined scopes of desired services.³²³

3. Competition in the Commercial Marketplace

Finding: Commercial buyers rely extensively on competition when acquiring goods and services. Commercial buyers further facilitate competition by defining their requirements in a manner that allow services to be acquired on a fixed-price basis in most instances.

Discussion:

Commercial buyers strongly prefer head-to-head competition among vendors. Successful commercial organizations rely on competition to deliver the best quality and the greatest value. As a result, they minimize use of sole-source, or other contract forms that restrict competition. One company testified that its standard practice is to send RFPs to four leading vendors and hold discussions with at least two of the four.³²⁴ Consultants recommend maintaining competition throughout the procurement process.³²⁵

Competition in the commercial marketplace is achieved by starting with an in-depth analysis of company needs, internal strengths and weaknesses and strategic goals.³²⁶ The process often begins with wide-ranging requests for information (“RFIs”) to gather information about services and vendors available in the commercial marketplace.³²⁷ Competition does not end when the sourcing transaction contract is signed. Rather, Six Sigma-style, continuous evaluation is the predominant model for continuously measuring vendor/supplier performance.³²⁸ Vendors expect ongoing monitoring, and continually face the prospect of losing business if technology or strategic direction changes, or if service metrics fall below target levels.³²⁹ Commercial companies with robust sourcing activities are aligned around common objectives, with buy-in at all levels of the organization, so that vendors and company employees managing

³²¹ *Id.* at 121; Test. of Tony Scott, Walt Disney Co., AAP Pub. Meeting (Apr. 21, 2006) Tr. at 11.

³²² Furniss Test., AAP Pub. Meeting (Mar. 30, 2005) at 116.

³²³ Testimony of Ronald Casbon, Bayer, AAP Pub. Meeting (Aug. 18, 2005) Tr. at 218.

³²⁴ Miller Test., AAP Pub. Meeting (Mar. 30, 2005) at 79.

³²⁵ See Furniss Test., AAP Pub. Meeting (Mar. 30, 2005) at 142.

³²⁶ See notes 1 – 32, *infra*, and accompanying text.

³²⁷ See notes 14–16, *infra*, and accompanying text.

³²⁸ See notes 13, 33 – 34, 44 – 48, *infra*, and accompanying text.

³²⁹ See notes 47 – 48, *infra*, and accompanying text.

DRAFT

Final Panel Working DRAFT

December 2006

(b) Finding: The Panel received evidence from witnesses and through reports by inspectors general and the GAO concerning improper use of task and delivery order contracts, multiple award IDIQ contracts, and other government-wide contracts, including federal supply schedule contracts, including improper use of these vehicles by some assisting entities. Nonetheless, the Panel strongly believes that when properly used these contract vehicles serve an important function and that the government derives considerable benefits from using them. Accordingly, the Panel has made specific recommendations in an effort to balance corrections to the identified problems while preserving important benefits of such contract vehicles.

Discussion:

Evidence received by Panel through witnesses and reports identified recurring problems with multiple award IDIQ contracts, and other government-wide contracts, including federal supply schedule contracts. These problems include poorly defined requirements, lack of effective competition, the use of sole source awards without adequate justification, fiscal law violations, and the failure to manage the work once awarded. While these problems are serious and need to be addressed, they do not reflect underlying deficiencies in the contract vehicles. Rather they indicate management and contract administration failures that can be corrected. The Panel also heard testimony of corrective action taken by agencies to address these problems.

(c) Finding: The evidence received by the Panel regarding federal supply schedule and multiple award contracts included the following:

(1) Solicitations for task and delivery order contracts often include an extremely broad scope of work that fails to produce meaningful competition.

Discussion:

The Panel noted the testimony expressing concern and criticism regarding the extremely broad scope of work in the solicitations for task and delivery order contracts.³³¹ The Panel noted that many agencies have put in place, for example, broadly defined contracts for IT services.

The Panel noted the testimony expressing concern and criticism regarding the extremely broad scope of work in the solicitations for task and delivery order contracts.³³² For example, many agencies opt for broadly defined contracts for IT services in an effort to encourage multiple bidders and, ultimately, multiple awardees. These efforts seek to encourage flexibility and spur competition on future task orders.

³³¹ U.S. DoD IG, *DoD Use of Multiple Award Task Order Contracts*, Audit Rep. No. 99-116, 4-7 (1999); U.S. GAO, *Contract Management: Few Competing Proposals for Large DOD Information Technology Orders*, GAO/NSIAD 00-56, 12-13 (2000); Test. of Henry Kleinknecht, DOD IG, AAP Pub. Meeting (June 29, 2006) Tr. at 54-56.

³³² U.S. DoD IG, *DoD Use of Multiple Award Task Order Contracts*, Audit Rep. No. 99-116, 4-7 (1999); GAO/NSIAD 00-56; Kleinknecht Test. at 54-56.

DRAFT

Final Panel Working DRAFT

December 2006

Testimony from large private sector buyers stated that those buyers were capable of defining their requirements for information technology services and competing them head-to-head – without resort to a secondary ordering process. The Panel questions whether the large IDIQ contracts being used by the government involve sufficient rigor in the requirements process for the base contract and whether there is meaningful competition for these contracts and for task orders issued under these contracts.

(2) Orders placed under task and delivery order contracts frequently indicate insufficient attention to requirements development.

Discussion:

The Panel heard criticism that orders often are placed under task and delivery order contracts with insufficient attention to requirements development. Testimony before the Panel by senior agency procurement officials³³³ and oversight organizations strongly indicates that these orders frequently involve insufficient requirements development.

(3) The ordering process under task and delivery order contracts, in some instances, occurs without rigorous acquisition planning, adequate source selection, and meaningful competition.

Discussion:

Reviews by GAO and the DoD IG over several years have repeatedly called into question the competitiveness of the ordering process under task and delivery order contracts. These reviews have found overuse of the waiver authority to direct the work to a particular contractor. A review currently underway by the DoD IG indicates that the proportion of sole-source orders is significant.³³⁴ In addition to the concerns about the waivers, GAO found in 2004 that for orders that were available for competition, buying organizations awarded more than one-third of the orders after receiving only one offer.

Although anecdotal, the Panel is familiar with situations where a statement of work was issued with proposals due in two or three days. The Panel observes that the contract holders confronted with such solicitations readily determine that it is not worth the time and cost to submit a proposal.

Testimony before the Panel indicated concern that the Schedules may be used, in some instances, for large services procurements without adequate planning and source selection procedures.³³⁵ Agencies placing large orders typically use a form of negotiated, best value-like

³³³ Test. of Glenn Perry, DoE, AAP Pub. Meeting (Feb. 23, 2006), Tr. at 136,140-44, 146-51. Test. of Shay Assad, DPAP, AAP Public Meeting (June 14, 2006) Tr. at 25-28, 55-58, 96-97.

³³⁴ U.S. DoD IG, *Acquisition – FY 2005 DoD Purchases Made Through the General Services Administration*, D-2007-007, (2006).

³³⁵ Perry Test. at 177-78.

DRAFT

Final Panel Working DRAFT
December 2006

(7) The unit price structure commonly used on Federal Supply Schedule Contracts and many Multiple Award Contracts is not a particularly useful indicator of the true price when acquiring complex professional services.

Discussion:

The current structure of the GSA Schedules was established for acquiring commercial commodities based on unit prices. Unit prices are not a particularly useful indicator of the true price for acquisition of complex professional services such as design, development and implementation of IT systems. Obtaining best value for these acquisitions depends on the capabilities and expertise of a vendor, the mix of skills, and well-defined requirements -- not merely hourly rates.

For such transactions, the Panel found that commercial practice for acquisition of such services involves careful requirements definition, head-to-head competitive negotiations, and best value source selection procedures.

(8) Finding: Competition based on well-defined requirements is the most effective method of establishing fair and reasonable prices for services using the Federal Supply Schedule.

Discussion:

The Panel noted the comments from GAO and others regarding the use of pre and post-award audits of vendor commercial pricing to aid in negotiation and establishment of the prices most favorable to the government. With particular reference to services, the Panel finds that competition for services awards that is based on good quality requirements definition likely will be more effective than reliance on certifications and audits in establishing fair and reasonable prices for services on the Schedule.

7. Time & Materials Contracts

Finding: Commercial buyers have a strong preference for the use of fixed-price contracts and avoid using Time and Materials contracts whenever practicable. Although difficult to quantify precisely due to limited data, the government makes extensive use of time and materials contracts.

Discussion:

Commercial buyers who spoke with the Panel provided many sound reasons not to use time and materials ("T&M") contracts.³³⁷ They noted that commercial clients in-source, or bring

³³⁷ See Bajaj Test. at 203-06.

DRAFT

Final Panel Working DRAFT
December 2006

The definition of stand-alone “commercial services” in 41 U.S.C. § 403(12)(F) is:

Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog [or market] prices³⁴⁴ for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

The definition of a “commercial item” in subsection (12)(A) of the same statutory section, however, refers to any item that is “of a type” customarily used by the general public (with additional requirements). The omission of the phrase “of a type” from the statutory definition of stand-alone “commercial services” is significant.

This definition for commercial services is adopted in FAR 2.101 as follows:³⁴⁵

(6) Services *of a type* offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed. For purposes of these services –

(i) Catalog price means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(ii) Market prices means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors. (emphasis added).

³⁴⁴ The words “or market” were added by Pub. L. No. 104-106 § 4204 (Feb. 10, 1996).

³⁴⁵ FAR 2.101 also provides the following definition for commercial services directly related to a commercial item:

(5) Installation services, maintenance services, repair services, training services, and other services if –
(i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and
(ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.

DRAFT

Final Panel Working DRAFT

December 2006

separate government business divisions with corresponding price lists for services in order to meet that schedule requirements including MFC pricing.³⁵⁹

In adopting this recommendation the Panel was also concerned that the current schedule structure for professional IT services remains static at a time of increased dynamism in the commercial sector. Currently, the IT schedule program includes over 4,000 contractors offering professional IT services.³⁶⁰ This number represents a dynamic market cutting across all types and sizes of commercial firms. In addition, each year the IT schedule receives over 1,200 offers.³⁶¹ Under the IT Schedule, approximately 64 percent or \$10.8 billion out of \$17.0 billion FY 2006 sales was for services.³⁶² However, the basic pricing strategy for negotiating and awarding schedule contracts is built on a framework established at a time when supplies accounted for the vast majority of purchases under the schedules program. Over time, the framework has evolved to accommodate the addition of professional IT services to the schedules program but the accommodation reflects trying to put a square peg in a round hole. Accordingly, the Panel's recommendation will foster a more dynamic model, improve efficiency and reduce costs for government and industry, and foster greater competition and transparency.

5. Improving Transparency and Openness

(a) Recommendation: Adopt the following synopsis requirement.

Amend the FAR to establish a requirement to publish, for information purposes only, at FedBizOpps notice of all sole source orders (task or delivery) in excess of the simplified acquisition threshold placed against multiple award contracts.³⁶³

Amend the FAR to establish a requirement to publish, for information purposes only, at FedBizOpps notice of all sole source orders (task or delivery) in excess of the Simplified Acquisition Threshold placed against multiple award Blanket Purchase Agreements.

Such notices shall be made within ten business days after award.

Discussion:

Transparency into government requirements by the public serves two important purposes. First, it promotes competition by familiarizing the public with what the government buys and the opportunity for vendors of similar products and services to sell to the government thus providing for new entrants into the government market place and greater competition. Second, transparency promotes public confidence in the awarding of government contracts.

³⁵⁹ *Id.* at 26-27, 78; Leinster Test. at 102; Trowel Test. (Jan. 31, 2006) at 113.

³⁶⁰ GSA Data at ____.

³⁶¹ GSA Data, IT Acquisition Center (FCI).

³⁶² GSA Data, *Contractors Report of Sales - Sales by Service/Commodity Code for FY 2006*, (Oct. 16, 2006).

³⁶³ Multiple award contracts has the same meaning here as in Section 803 of the National Defense Authorization Act for 2002, Pub. L. No. 107-107).

DRAFT

Final Panel Working DRAFT

December 2006

(a) Current policies limiting the use of time-and-materials contracts and providing for the competitive awards of such contracts should be enforced.

(b) Whenever practicable, procedures should be established to convert work currently being done on a time-and-materials basis to a performance-based effort.

(c) The government should not award a time-and-materials contract unless the overall scope of the effort, including the objectives, has been sufficiently described to allow efficient use of the time-and-materials resources and to provide for effective government oversight of the effort.

Discussion:

The issues that give rise to concern by the Panel over the use of time & materials contracts in the government are price and contract management. The Panel has carefully considered how best to deal with these issues so as to protect the government's interests and allow the government to continue to perform its mission uninterrupted. Clearly, an arbitrary limitation on the use of T&M contracts is not appropriate nor is a solution that shifts all of the risk to the private sector.

However, it is not unreasonable to require the government when it chooses to use T&M contracts, to obtain price competition by defining its requirements and requiring the competitors for the work to define their labor categories so that adequate price comparisons can be performed. Similarly, it is not unreasonable for the government to ensure up-front in its acquisition planning process, that it has sufficient resources to manage T&M contracts and that those resources are identified as already required by FAR Part 7 or that T&M contracts not be used.

Finally, in order to get a firm grasp on how much T&M contracting is being done throughout the government and to ensure that it is being managed aggressively, the government should account for its use of T&M contracts through the budget execution process, reporting annually at the conclusion of the fiscal year the dollars and personnel purchased through the use of T&M contracts.

7. Protest of Task & Delivery Orders

Recommendation: Permit protests of task and delivery orders over \$5 million under multiple award contracts. The current statutory limitation on protests of task and delivery orders under multiple award contracts should be limited to acquisitions in which the total value of the anticipated award is less than or equal to \$5 million.

Discussion:

The Panel has serious concerns about the use of task order to conduct major acquisitions of complex services without review. The Panel has obtained and analyzed data from FPDS-NG

DRAFT

Final Panel Working DRAFT

December 2006

on price analysis. The contracting officer should not request that this information be certified as accurate, complete, or current, nor shall such information be the subject of any postaward audit or price redetermination with regard to price reasonableness. This information would be exempt from release under the Freedom of Information Act (5 U.S.C. 552(b)).

See proposed regulatory changes in Appendix D.

9. Improving Government Market Research

Recommendation: GSA should establish a market research capability to monitor services acquisitions by government and commercial buyers, collect publicly available information, and maintain a database of information regarding transactions. This information should be available across the government to assist with acquisitions.

Discussion:

This internal government group should collect data regarding significant services buys regardless of whether they are made in the private sector or by government and regardless of whether they are made through Part 15, the Schedules or task/delivery order contracts. The data should include size of transaction, whether it is competitive, the type of competition, the scope and elements of work, the type of contract (e.g., fixed price, T&M or cost-based) the price or prices paid, the period of performance, the terms, and other data that affects the value of the transaction. This group will make its expertise and data available to other civilian and military agencies to assist in analysis and design of services acquisitions, and to provide current market data for comparison of price and terms.

10. Unequal Treatment of the Contracting Parties

(a) Recommendation: Legislation should be enacted providing that contractors and the Government shall enjoy the same legal presumptions, regarding good faith and regularity, in discharging their duties and in exercising their rights in connection with the performance of any government procurement contract, and either party's attempt to rebut any such presumption that applies to the other party's conduct shall be subject to a uniform evidentiary standard that applies equally to both parties.

Discussion:

When the government acts in a sovereign or regulatory capacity, either under its Constitutional authority or pursuant to an Act of Congress, the courts have held that those actions are entitled to a strong presumption of regularity when they are challenged in court.³⁶⁴ Indeed, this approach is specified in the statutory provisions that Congress has enacted authorizing

³⁶⁴ *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415, 416 (1971)

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if such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services

, offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions the services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D), regardless of

DRAFT

Final Panel Working DRAFT

December 2006

(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

4. The Services Acquisition Reform Act of 2003⁵

The term 'commercial item' means any of the following:

(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that—

- (i) has been sold, leased, or licensed to the general public; or
- (ii) has been offered for sale, lease, or license to the general public.

(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

(C) Any item that, but for—

- (i) modifications of a type customarily available in the commercial marketplace, or

(ii) minor modifications made to meet Federal Government requirements, would satisfy the criteria in subparagraph (A) or (B).

(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.

(E) Installation services, maintenance services, repair services, training services, and other services if ~~such services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D) and if the source of such services~~

- (i) ~~offers such services to the general public and the Federal Government contemporaneously and under similar terms and conditions the services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D), regardless of whether such services are provided by the same source or at the same time as the item;~~ and

~~(ii) offers to use the same work force for providing the Federal Government with such services as the source uses for providing such services to the general public the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.~~

⁵ Pub. L. No. 103-355, § 8001(a) (Oct. 13, 1994), as modified by Pub. L. No. 104-106 § 4204 (Feb. 10, 1996), Pub. L. No. 106-65 §805 (Oct. 5, 1999), and Pub. L. No. 108-136, §1433 (Nov. 24, 2003).

DRAFT

Final Panel Working DRAFT

December 2006

(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.

(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

(H) A nondevelopmental item, if the procuring agency determines, in accordance with conditions set forth in the Federal Acquisition Regulation, that the item was developed exclusively at private expense and has been sold in substantial quantities, on a competitive basis, to multiple State and local governments.

5. Current FAR Definition of “Commercial Item” (as distinguished from the current statutory definition)

“Commercial item” means—

(1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and—

(i) Has been sold, leased, or licensed to the general public; or,

(ii) Has been offered for sale, lease, or license to the general public;

(2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;

(3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for --

(i) Modifications of a type customarily available in the commercial marketplace; or

(ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. Minor modifications means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;

(4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;

(5) Installation services, maintenance services, repair services, training services, and other services if--

(i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and

DRAFT

Final Panel Working DRAFT

December 2006

(ii) *The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;*

(6) *Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for a specific service performed or a specific outcome to be achieved. For purposes of these services—*

(i) *"Catalog price" means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and*

(ii) *"Market prices" means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.*

(7) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.⁶

⁶ FAR 2.101



Subtitle C -- Civilian Agency Acquisitions

Section 8201 Relationship to other provisions of law

Section 8202 Definitions

Section 8203 Preference for acquisition of commercial items

Section 8204 Inapplicability of certain provisions of law

Subtitle D -- Acquisitions Generally

Section 8301 Inapplicability of certain provisions of law

Section 8302 Flexible deadlines for submission of offers of commercial items

Section 8303 Additional responsibilities of advocates for competition

Section 8304 Provisions not affected

Subtitle B of the Act addresses Armed Services acquisitions and is not specifically implemented by this case. However, most of the Act's provisions related to Armed Services acquisitions closely parallel the civilian agency provisions. The DOD-unique sections of Title VIII will be implemented in the DOD FAR Supplement (DFARS) at a later date under a separate tasking. These sections remaining to be implemented are:

Subtitle B Armed Services Acquisitions

Section 8101 Establishment of a new chapter in Title 10

Section 8102 Relationship to other provisions of law

Section 8103 Definitions

Section 8104 Preference for acquisition of commercial items

Section 8105 Inapplicability of certain provisions of law

Section 8106 Presumption that technical data under contracts for commercial items are developed exclusively at private expense

At the kickoff meeting at the Office of Federal Procurement Policy (OFPP), Dr. Steven Kelman, Administrator of OFPP, and Ms Colleen Preston, Deputy Under Secretary of Defense for Acquisition Reform, challenged the drafting teams to be innovative and aggressive in drafting implementing language for the regulation and to "think out of the box." Dr. Kelman stated that although the Act decreased the burden on the system and increased room for contracting officer judgment, the revised regulations were necessary to bring these important changes to reality. This challenge was reiterated during our Team meetings by our Legislative Team Liaisons who continually prodded us to "do something different." The Team took these challenges very much to heart and endeavored throughout our discussions to challenge every assumption, practice and policy by asking "How does the commercial market place address this issue?" As a result, the Team developed proposed FAR language that took a "different" approach to the government's acquisition of commercial items.

Team Objectives.

The Team established a series of objectives that guided our discussions and drafting of the proposed FAR language and would result in the development of revisions that were a clear break from past practices for the acquisition of commercial items. Our objectives were to:

-- Finally, FAR 15.804-3, as well as the new Truth in Negotiations Act legislative amendments, already discusses both catalog prices and market prices as going hand-in-hand. To separate the two concepts would be contrary to commercial practice and also cause confusion in the acquisition community that already deals with catalog and market prices together. The type of service provided, not the existence of a catalog, should be the only factor determining whether or not a service meets the definition of a commercial item. If the government is buying a service commonly sold by commercial firms to other businesses, then the government should emulate commercial practice as much as possible. This was clearly the thrust of the new legislation and the rationale for the Team's proposed revision to the definition.

Part 12. Acquisition of Commercial Items.

- Subpart 12.3 - Preparing solicitations and contracts for commercial items.

-- The Act and much of the related congressional report language, discusses the concept of uniform contract clauses for commercial items. The Act states that, to the maximum extent possible, "...only those contract clauses - (A) that are required to implement provisions of law or executive order applicable to acquisitions of commercial items or commercial components, as the case may be; or (B) that are determined to be consistent with standard commercial practice" may be included in contracts for commercial items. In order to implement this and other requirements of the Act, the Team concluded that a standardized solicitation and contract format would be the most straightforward method. In addition, such an approach, if streamlined and with sufficient flexibility, would serve as an incentive to contracting officer to use it by simplifying the process and reducing procurement lead-time.

-- The proposed standard solicitation contemplates use of negotiated procedures for selection of the successful offeror. While sealed bids could be used for commercial items, the Team expects that the government's best interest will be served by use of negotiated procedures as is typically done in the commercial market place. Moreover, the concept of the firm bid rule in government contracts is itself alien to commercial practices.

-- The Team proposes establishment of three solicitation provisions (Instructions to Offerors, Evaluation, and Representations and Certifications) and two contract clauses (Contract Terms and Conditions and Contract Terms and Conditions Required to Implement Statutes or Executive Orders). The specific language of these provisions and clauses is discussed below. The Team believes this approach is appropriate for a very large percentage of our commercial item acquisitions, would serve to simplify the process for contracting officers and contractors and aid in the implementation of the requirements of the Act.

-- The Team proposes the establishment of a new form, the Standard Form XXXX, Solicitation/Contract/Order for Commercial Items. The proposed SF XXXX combines features of the SF 33, Solicitation, Offer and Award; the SF 1447, Solicitation/Contract; and the DD 1155, Order for Supplies and Services. The most significant element is the addition of acceptance blocks at the bottom of the form (patterned after the DD Form 1155). This will allow suppliers of commercial items to utilize the SF XXXX to document receipt of the supplies or

---- 41 U.S.C. 416(a)(3), Minimum Response Times under the Office of Federal Procurement Policy Act. Section 8302 of the Act modifies 41 U.S.C. 416(a) to provide flexible deadlines for the submission of bids or proposals for the procurement of commercial items; and

---- 41 U.S.C. 43, Walsh-Healey Act. The Walsh-Healey Act does not apply to items "offered for sale on the open market." The Team interprets this phrase as an exception for commercial items.

-- Section 8003 (b) of the Act requires that the FAR contain a list of provisions of law that are inapplicable to subcontracts under either a contract for the acquisition of commercial items or a subcontract for the acquisition of commercial items or components. The language of Section 8003 (b) of the Act regarding which laws are inapplicable to subcontracts is very similar to the prime contracts language discussed above except for the phrase "...that is enacted after the date of the enactment of the Federal Acquisition Streamlining Act of 1994..." which does not appear in Section 8003 (b). For this reason, the list of laws not applicable to subcontractors will not be limited to laws enacted after 13 October 1994 and will therefore be much broader than that applying to prime contractors. Once completed, the list will be reflected in 12.702 (c).

Part 52. Solicitation Provisions.

- 52.212-1 Instructions to Offerors - Commercial Items.

-- This provision contains information unique to government procurement that is provided to all offerors to ensure that they understand the solicitation requirements. The information has been simplified and tailored to meet the requirements of commercial items. For the most part, the simplified paragraphs in the new provision do not contain new concepts, nor were they intended to do so. The information is compiled from a number of FAR provisions prescribed in Parts 14 and 15. The paragraph entitled "Late Offers" contains a new concept that a late offer received prior to the evaluation of offers may be considered if it offers significant cost or technical advantages to the government. This concept was taken from a provision that is currently being used in solicitations by Public Health Service.

- 52.212-2 Evaluation - Commercial Items

-- The new solicitation provision included at 52.212-2, "Evaluation - Commercial Items" contains information unique to government procurement that has been simplified and tailored to meet the requirements of commercial items. Again, the new provision does not contain new concepts and is generally compiled from provisions prescribed in Parts 14 and 15. As mentioned earlier in this report, this provision utilizes "best value" techniques in the selection of successful offerors, and includes the use of past performance in the evaluation of offers as required by Section 8002 (e)(3) of the Act.

- 52.212-3 Offeror Representations and Certifications - Commercial Items.

-- There are numerous FAR certifications required to comply with laws or executive orders. Instead of using the certification language contained in the FAR, the Team

drafted one provision at FAR 52.212-3, Offeror Representations and Certifications - Commercial Items, which distills the required certifications into a single provision for the acquisition of commercial items. Again, this effort was substantially based on a previous DOD effort that resulted in a provision currently found at DFARS 252.211-7020. The DOD provision combined a number of representations associated with FAR Part 19 into one provision. Certifications Regarding Payments to Influence Federal Transactions (31 U.S.C. 1352), Procurement Integrity Certification (41 U.S.C. 423), and Taxpayer Identification Number (TIN) (26 U.S.C. 6050M) were added to the DOD provision.

-- FAR 52.212-3 satisfies the requirements contained in the following FAR certifications:

- FAR 52.203-11, Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions
- FAR 52.204-3, Taxpayer Identification
- FAR 52.219-1, Small Business Concern Representation
- FAR 52.219-2, Small Disadvantaged Business Concern Representation
- FAR 52.219-3, Women-Owned Small Business Representation
- Paragraph (1) of FAR 52.203-8, Requirement for Certificate of Procurement Integrity

-- Certifications required by executive orders are still being reviewed and will be added as necessary.

Part 52. Contract clauses.

Section 8002 of the Act requires the FAR be amended to contain a list of clauses for the acquisition of commercial items which will include, to the maximum extent practicable, only those clauses -

- (a) that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items or commercial components; or
- (b) that are determined to be consistent with standard commercial practice.

The Team implemented this requirement by creating two clauses for inclusion in contracts for commercial items. The first clause contains provisions that the Team believes are consistent with customary commercial practices. The second clause contains requirements that implement

provisions of law or executive orders that are applicable to government acquisitions of commercial items or commercial components.

- 52.202-1 Definitions.

-- This clause was revised to include the definitions of "commercial item," "component" and "commercial component." This was necessary to ensure that the contractors had access to the definitions when preparing solicitations and contracts for their subcontractors and suppliers.

- 52.212-4 Contract Terms and Conditions - Commercial Items.

-- This clause contains the terms and conditions the Team believes are consistent with customary commercial practice. The clause addresses general areas that previous studies have identified as the "core" areas covered by commercial contracts. These "core" areas were identified by DOD as part of the implementation of Section 824(b) of Pub. L. 101-189 (and the resulting DFARS Part 211), and in an earlier study prepared by Wendy Kirby formerly of the law firm Hogan & Hartson (See Tab B).

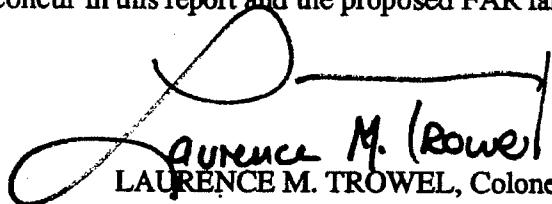
-- This clause represents the core terms and conditions of a government contract for commercial items and is intended to respond to the Act's requirement to limit clauses to those "...that are determined to be consistent with standard commercial practice."

-- Some of the concepts in this clause are required to implement statutes or executive orders and a few represent unique government procurement practices. However, the Team believes all the concepts in this clause are either consistent with customary commercial practice or, if not consistent, would represent an improvement over customary commercial practice from the perspective of a commercial industry. An example of the latter is the provision that failure of the parties to reach agreement on any request for relief, claim, appeal or action arising under or related to the contract shall be a dispute to be resolved in accordance with the clause at FAR 52.233-1, Disputes, which is incorporated by reference. While this is required to comply with the Contract Disputes Act of 1978, it also represents a significant benefit to both parties by providing a dispute resolution procedure under the contract in lieu of the more uncertain commercial practice of resorting to formal legal proceedings. Similarly, FAR 52.212-4 provides that the government will pay an interest penalty in accordance with the Prompt Payment Act for late payments. This language eliminates the need to include FAR 52.232-25, Prompt Payment; a clause the public complained was too confusing. FAR 52.212-4 also contains a simple statement allowing the assignment of claims. This statement replaces FAR 52.232-27, Assignment of Claims. Where an element within the clause at FAR 52.212-4 implements a statute or executive order, the paragraph contains the appropriate statutory cite.

-- Several concepts included in the clause at 52.212-4 are significant changes from standard government practices and represent what the Team believes are very close to commercial practices. These include language stating that all changes to the contract be made only by written agreement of the parties; that the government's right to inspect and test is limited to items

Bill Mounts, Office of the Deputy Under Secretary of Defense for Acquisition
Reform (DUSD(AR))
Alan Brown, Office of Federal Procurement Policy (OFPP)

All members of the Drafting Team concur in this report and the proposed FAR language.


LAURENCE M. TROWEL, Colonel, USAF
Team Leader
Commercial Item Drafting Team

Tabs:

- Tab A - Proposed FAR Language
- Tab B - White Paper, Uniform Commercial Code
- Tab C - Sample Combined CBD Synopsis/Solicitation
- Tab D - Title VIII, Pub. L. 103-355

DRAFT**Final Panel Working DRAFT****December 2006****Appendix C****SARA-CPWG: Statutory Revision for R-4 New Competitive Services Schedule****SUGGESTED PLACEMENT:** 41 U.S.C. § 253h(g); add the following as related guidance.**AUTHORITY TO ESTABLISH A NEW MULTIPLE AWARDS SCHEDULE FOR PROFESSIONAL SERVICES**

- (1) GSA Federal Supply Schedules program.-- Under the Multiple Awards Schedule program of the General Services Administration referred to in section 309(b)(3) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 259(b)(3)) that is administered as the Federal Supply Schedules program, the Administrator of General Services may establish a new information technology (IT) Multiple Awards Schedule for professional services under which prices for each order are established by competition and not based on posted rates. Under this new Schedule model, prices would be determined exclusively at the order level based on competition for the specific requirement to be performed in accordance with the ordering procedures established by the General Services Administration. The ordering procedures for the new Schedule shall strongly encourage the use of "e-Buy," GSA's electronic request for quote (RFQ) tool, as a means to assure competition. This new Schedule model shall be reviewed in two years after implementation to see whether the process is producing competition and better pricing. If so, the Administrator of General Services may expand the new Schedule model to the other professional services Schedules.

DRAFT

Final Panel Working DRAFT

December 2006

APPENDIX D

Proposed Changes to FAR Parts 12 and 15 to Implement Recommendation 8 Pricing When No or Limited Competition Exists

12.209 Determination of price reasonableness.

(a) While ~~t~~The contracting officer must establish price reasonableness in accordance with 13.106-3, 14.408-2, or Subpart 15.4, as applicable for any commercial item, which includes commercial services. ~~a~~As discussed below, the contracting officer should be aware of customary commercial business terms and conditions when pricing commercial items. Commercial item prices are affected by factors that include, but are not limited to, speed of delivery, length and extent of warranty, limitations of seller's liability, quantities ordered, length of the performance period, and specific performance requirements. The contracting officer must ensure that contract terms, conditions, and prices are commensurate with the Government's need.

(b) Competition, market research, and comparisons to prior prices that have been determined to be reasonable typically should enable the contracting officer to determine that an offered price for a commercial item is fair and reasonable without further information from the offeror. If the contracting officer is unable to make such a determination on that basis (e.g., no offers are solicited), the contracting officer may request the information in (i) or (ii) below from the offeror in the following order of preference, provided that the contracting officer should not request more information than is necessary to determine that an offered price is reasonable:

(i) Prices paid for the same or similar commercial items under comparable terms and conditions by both government and commercial customers. The contracting officer must limit requests for sales data relating to such items during a relevant time period. (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)).

(ii) Available information regarding price or cost that may support the price offered, such as wages, subcontracts, or material costs. The contracting officer must, to the maximum extent practicable, limit the scope of the request to information that is in the form regularly maintained by the offeror as part of its commercial operations. (10 U.S.C. 2306a(d)(2) and 41 U.S.C. 254b(d)). The contracting officer shall not require the offeror to provide information regarding all cost elements, detailed cost breakdowns, or profit, but instead shall rely on price analysis (see 15.404-1(b)).

(c) A determination of price reasonableness shall be based on the information referenced in paragraph (b) of this section. The contracting officer shall not request that any information provided by the offeror pursuant to paragraph (b) be certified as accurate, complete, or current, nor shall such information be the subject of any postaward audit with regard to price reasonableness.

DRAFT

Final Panel Working DRAFT

December 2006

CHAPTER 1A

COMMERCIAL PRACTICES

REPORT OF THE ACQUISITION ADVISORY PANEL

December 2006

DRAFT

Final Panel Working DRAFT

December 2006

released by the Office of the Secretary of Defense, (2) allocated by the Secretary of the relevant Service; and (3) sub-allocated (or allotted) by the Comptroller of the relevant program authority.⁵ Each of those administrative approvals can be delayed or can, sometimes unexpectedly, involve holding back some portion of the funds apportioned to the program. After these steps are completed, the relevant program management office is authorized to obligate the funds to specified programs activities and execute agreements to spend the money. Although there is more variation in the length of time required to complete the different Department's and Agencies' release and allocation processes, those processes generally require approximately three weeks to complete. Thus, the overall apportionment, release, and allocation process requires approximately six weeks from the date the appropriations bill is enacted until the procurement official is empowered to obligate funds.

B. The Decreasing Amount Of Time Available To Obligate Federal Funds Resulting From Delays In The Appropriations Process

Federal procurement officials do not know the precise amount of money their programs will be finally provided in any given year until the congressional budgeting and appropriations processes, *and* the Executive Branch apportionment, release, allocation, and any sub-allocation processes are all completed. Although the congressional appropriations processes should be completed before the beginning of the fiscal year,⁶ in practice, they may not be finalized until several months of the fiscal year have passed. Although some necessary spending occurs in the interim pursuant to continuing resolutions, agencies generally may not spend, or commit themselves to spend, money in advance of or in excess of appropriations.⁷

Although procurement officials may experience substantial delay before the annual spending may be initiated, the date at the end of the fiscal year by which most funds must be obligated is inflexible. Many appropriations acts expressly provide that the appropriations are annual (or 1-year) appropriations, and all appropriations are presumed to be annual, unless the relevant appropriations act expressly provides otherwise.⁸ “If an agency fails to obligate its annual funds by the end of the fiscal year for which they were appropriated, they cease to be available for incurring and recording new obligations and are said to have expired.”⁹ In addition, if money is not obligated, the potential to use those funds “may not be extended beyond the fiscal year for which [the appropriation] is made absent express indication in the appropriation act itself.”¹⁰

In sum, procurement officials are caught in a bind. They do not control when the congressional and Executive Branch processes will ultimately release funds for obligation, but

⁵ See 31 U.S.C. §§ 1513(d), 1514.

⁶ See, e.g., OMB Circular No. A-11, § 10.5 (available at http://www.whitehouse.gov/omb/circulars/a11/current_year/a11_toc.html).

⁷ The Antideficiency Act, 31 U.S.C. § 1341.

⁸ 31 U.S.C. § 1301(c); III GAO, *Principles of Federal Appropriations Law*, ch.5, at 5-4.

⁹ III GAO, *Principles of Federal Appropriations Law*, ch.5, at 5-6.

¹⁰ *Id.* at 5-5; 71 Comp. Gen. 39 (1991).

DRAFT

Final Panel Working DRAFT

December 2006

regardless of when that authority arrives, most of the money must be obligated by the end of the fiscal year. As a matter of standard operating procedure, procurement officials are warned that they will never receive the money for which they are responsible as quickly as they expect, and once the funds are received, they must be executed quickly or be lost.

During hearings and as part of other information gathering, the Panel received numerous complaints from procurement officials that, in practice, the amount of time available for obligating funds has been declining during recent years. Procurement officials generally perceive that this tightening of the annual schedule results in inefficiencies.

To analyze the source and extent of the delay in delivering spending authority to procurement officials, as explained above, there are two potential sources: (1) the congressional budget and appropriations processes, or (2) the Executive Branch apportionment and allocation processes.

Although the Executive Branch processes require some decision-making with respect to difficult or disputed apportionment or allocation issues, these processes appear to operate more mechanically than the congressional budget process. This results, in part, from the fact that the projections which were used to formulate the congressional budget originate in the spending agencies,¹¹ and those agencies monitor the congressional budget and appropriations processes closely. In short, Executive Branch procurement officials become adept at obtaining authorization to obligate funds as soon possible following final appropriation. Moreover, technology expedites the apportionment and allocation processes, as the relevant forms are submitted electronically to OMB and the relevant agencies.¹² Approvals from OMB generally follow within one to three weeks of submission of an apportionment requests,¹³ and from our discussions with relevant officials, there is no reason to believe that inordinate delays occur during the agencies' allocation processes.

The delay experienced by procurement officials with respect to receiving final authorization to obligate monies needed to operate government programs – and the decreasing amount of time they have to complete their annual procurement responsibilities – appears to result primarily from the congressional budget and appropriations processes. During the past ten years, there have been years in which the appropriations process experienced particularly severe delay. For instance, for fiscal year 2003, 11 of the appropriations bills were completed on February 20 – four and one-half months into the subject fiscal year – and were enacted as part of a large omnibus bill.¹⁴ But even putting aside the worst years, the trend is clearly toward delayed completion of the appropriations process. For instance, for fiscal years 2004-2006, the median

¹¹ See OMB Circular A-11, § 10.5.

¹² For instance, a SF 132 form proposing an apportionment plan must be submitted by the spending agencies as part of an Excel spreadsheet. See OMB Circular A-11, § 121 (available at http://www.whitehouse.gov/omb/circulars/a11/current_year/s121.pdf).

¹³ See OMB Circular A-11, § 10.5.

¹⁴ See <http://thomas.loc.gov/home/approp/app03.html>.

DRAFT

Final Panel Working DRAFT

December 2006

Third, there is a general understanding among procurement officials that the compression of the amount of time during which procurement decisions can be made is resulting in less than optimal procurement decisions ultimately being made. Although one would likely assume that attempting to effect a significant percentage of a program office's contract execution in a relatively short amount of time at the end of the year would result in inefficient decisions, the Government Accountability Office has noted that it previously "conducted several studies of year-end spending and has consistently reported that year-end spending is not inherently more or less wasteful than spending at any other time of the year."¹⁹ However, it must be noted that the most recent GAO study was performed in 1998,²⁰ before the substantial delays in appropriations legislation described above, and before the substantial supplemental appropriations being used for a substantial percentage of DoD's total funding. In light of these recent developments, the Panel believes that the large volume of procurement execution being effected late in the year is having a negative effect on the contracting process and is a significant motivator for many of the issues we have noted with respect to, among other things, lack of competition and poor management of interagency contracts.

¹⁹ III GAO, *Principles of Federal Appropriations Law*, ch.5, at 5-17 (citing, among others, *Federal Year-End Spending: Symptom of a Larger Problem*, GAO/PAD-81-18 (Oct. 23, 1980)).

²⁰ See *id.* (citing *Year-End Spending: Reforms Underway But Better Reporting and Oversight Needed*, GAO/AIMD-98-185 (July 31, 1998)).

DRAFT

Final Panel Working DRAFT

December 2006

CHAPTER 2

IMPROVING IMPLEMENTATION OF PERFORMANCE-BASED SERVICE ACQUISITION (PBSA) IN THE FEDERAL GOVERNMENT

REPORT OF THE ACQUISITION ADVISORY PANEL

December 2006

DRAFT

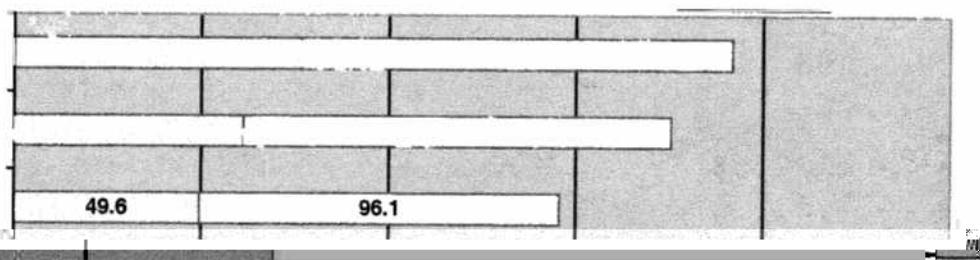
Final Panel Working DRAFT
December 2006

TABLE OF CONTENTS

- I. Introduction and Background
 - A. Introduction To Performance-Based Service Acquisition
 - B. Current Federal Implementation of Performance-Based Acquisition
 - C. PBSA Regulatory Guidance and Recent Efforts to Improve the FAR's PBSA Provisions
- II. Statement of the Issue and Findings: Why Has Performance-Based Services Acquisition Not Been Fully Implemented in the Federal Government?
- III. Recommendations: Improving Implementation of Performance-Based Acquisition in the Federal Government

Appendix One: Bibliography of PBSA Reports and Studies

Appendix Two: FINAL PBSA Rule and Side-by-Side Comparison



DRAFT

Final Panel Working DRAFT

December 2006

At one time, PBSA was confined to basic, non-technical and support services such as security, laundry, grounds maintenance, and facility maintenance. Today, use has expanded considerably, particularly in the information technology (IT) arena. The Department of Health and Human Services website, for example, outlines a broad range of services as suitable for performance-based contracting methodologies.⁸

U.S. Department of Health and Human Services – Services Suitable for PBSA		
Facility support services		
e.g., security, laundry, grounds maintenance, facility maintenance, equipment repair, other than IT		
Administrative and clerical support, e.g., data entry, court reporting, typing, editing, distribution		
Aircraft maintenance and test range support	Transportation, travel and relocation services	
Logistics/conference support	Medical services	Research and Development
Research support services	Telephone call center operations	Training
Environmental remediation	Technical assistance	Management support
IT and telecommunications services to include maintenance and support services		
Studies and analyses		Surveys

Growing experience with performance-based contracts has also helped agencies to identify services that are not well suited to PBSA. In August 2003, for example, the U.S. Department of Agriculture added to FAR and OFPP lists the following services as offering limited opportunity for PBSA:

- Hazardous Substance Cleanup;
- Education and Training Services; and
- Lease or Rental of Equipment/Facilities.⁹

Government officials anticipate continued refinement in their understanding of what services are suitable for PBSA's. In testifying before the panel, David Sutfin, Chief, GovWorks Division of the Department of Interior noted, "...the proper application of performance based contracting is an area where I think we're all weak, and we need help. Not every service contract lends itself to a performance based contract, and there is, I think, a rush now to use this contracting technique without fully understanding when it works and when it doesn't work: what are the risks inherent in using performance based contracting and what are the advantages?"¹⁰

⁸ KNOWnet, the Acquisition SuperSite,
<http://www.knownet.hhs.gov/acquisition/performdr/LAI/UnitOne/program.htm>

⁹ Memorandum from _____ to _____, USDA Transports & Logistics, (Aug. 19, 2003).

¹⁰ AAP Pub. Meeting (June 14, 2005) Tr. at 327

DRAFT

Final Panel Working DRAFT

December 2006

well, this sounds fabulous, but my contracting officer will never do this. Then thirdly, boy, great ideas, but our general counsel will never let this happen. We need to get those people together in a room and make sure everybody's on the same page. Until that happens, we're not going to see a lot of changes.”³⁰

Private sector experience and transformational change

The Panel received compelling testimony on current contracting practices in the private sector, where PBSA is being used to achieve transformational business process change. Private sector practitioners chiefly discussed functional outsourcing (e.g. an entire corporate Human Resources function). Several witnesses emphasized the importance of an organization identifying and understanding its high-level strategic objectives. Those objectives support the definition of program outcomes. Witnesses stressed that, in order to be successful in achieving strategic goals, entities must let go of current and past practices to make room for fundamental change.

Mr Robert Zahler, testified that, “Too much time is spent focusing on the inputs to these processes, and not enough time on the outputs: what do you want from the result? ...Classic RFPs in my industry – and I think probably in the Federal side, also – spend enormously too much time documenting historical facts: what did we do, how did we do it, what did it cost. They have some high-level stuff of maybe what they want in the future, but all too little of that. Rather, the RFP should say, "Here are my objectives. Here are my requirements. Here's how I want to interrelate with you. Come back and give me a solution.”³¹

Mr. Michael Bridges, an attorney with General Motors (GM), said they even go as far as trying to keep current practitioners out of the procurement process. The purpose is two fold: 1) to give competitors freedom to suggest a broad range of end-to-end solutions and, 2) to ensure the selected supplier has authority in the day-to-day management of new systems and processes. “We have attempted to avoid the *how* of contracting. Very much back to our model: we are not the experts. We expect the integrators who come into GM and want to bid on major services projects to bring that expertise. You know, with the 2,000 egos ... we try to keep them out of that process and let our suppliers provide that expertise. So to the point that was made a moment ago, the how is left to the suppliers as much as possible, and we feel that the best way to do that is to stay out of the day-to-day management. Bid at a high level in terms of high level, firm fixed price requirements and turn the suppliers loose to deliver the value that they feel they need to deliver to get that done and innovate to add to margin.”³²

Todd Furniss, Chief Operating Officer of the Everest Group, also emphasized the need to move beyond current practices. “So you can see that if you're focused on the myopic, you can actually do something quite counterproductive to corporate objectives. In fact, one of the terms

³⁰ *Id.* at 178.

³¹ AAP Pub. Meeting (Apr. 19, 2005) Tr. at 28..

³² AAP Pub. Meeting (Aug. 15, 2005) Tr. at 158. .

DRAFT**Final Panel Working DRAFT**

December 2006

Status of OFPP Implementation Recommendations

Recommendation	Implementation Status
1. Modify the FAR Part 2 to include definitions for: 1) performance work statement, 2) quality assurance surveillance plan, 3) statement of objectives, and 4) statement of work to support changes to Part 37. Modify FAR Parts 11 and 37 to broaden the scope of PBSA and give agencies more flexibility in applying PBSA to contracts and orders of varying complexity.	Partially Addressed in February 2, 2006 Final Rule
2. Modify the list of eligible service codes for PBSA, as articulated in the Federal Procurement Data System (FPDS) or FPDS B Next Generation (FPDS-NG) manual, to more accurately reflect services to which PBSA can be applied.	Implemented by OFPP Memorandum of 9/7/04 entitled "Increasing the Use of Performance-Based Acquisition."
3. Revise FPDS instructions to ensure agencies code contracts and orders as PBSA if more than 50 percent of the requirement is performance based, as opposed to the current 80 percent requirement.	Implemented by OFPP Memorandum of 9/7/04 entitled "Increasing the Use of Performance-Based Acquisition."
4. Allow agencies that do not input data to FPDS to submit supplemental reports in order to accurately reflect their progress toward meeting goals.	Implemented by OFPP Memorandum of 9/7/04 entitled "Increasing the Use of Performance-Based Acquisition."
5. Consider allowing agencies to establish interim goals but expect agencies to apply PBSA to 50 percent of their eligible service contracts (see recommendation 2 above) by 2005, in line with DOD policy.	Original target of 50% changed to 40% by OFPP Memorandum of 9/7/04 entitled "Increasing the Use of Performance-Based Acquisition."
6. OFPP should rescind its 1998 Best Practices Guide and consider developing web-based guidance to assist agencies in implementing PBSA. This guidance should be kept current and should include practical information, such as samples and templates that agencies would find useful. The website should include "The Seven-Steps to Performance-Based Service Acquisition Guide" and may include elements of existing guidance. The working group will explore the development of a web-based PBSA site for guidance, samples, and templates.	Implemented by OFPP Memorandum of 9/7/04 entitled "Increasing the Use of Performance-Based Acquisition."

On July 21, 2004, the Civilian and Defense FAR Councils proposed amendments to the FAR to implement many, but not all of the Interagency Task Force recommendations.³⁷ The general thrust of the proposed FAR amendments was to give federal agencies more flexibility so as to encourage its consistent use where appropriate.

³⁷ 69 Fed. Reg. 43712 (July 21, 2004).

DRAFT

Final Panel Working DRAFT

December 2006

objective statement of agency requirements, while the Statement of Objectives may be drawn at a higher level of generality. The major distinction made in the Final rule is that if the agency drafts a statement of objectives then the contractor will prepare the performance work statement to respond to the agency request. The Final Rule also makes it clear that the SOO does not become part of the contract.

- As defined, the Statement of Objectives does not insist on complete specification in objective terms of the results desired from contract performance.

Although the Interagency Task Force had recommended an amendment to FAR 37.102 to add term type contracts to the list of exclusions from the mandate for use of performance-based contracting techniques where practicable, that recommendation did not appear in the proposed FAR revisions nor in the Final Rule.³⁸

The proposal to amend the FAR provisions applicable to performance-based service acquisition also addressed performance standards and quality assurance surveillance plans. The proposed revisions would have provided the following:

(2) Measurable performance standards. These standards may be objective (e.g., response time) or subjective (e.g., customer satisfaction), but shall reflect the level of service required by the Government to meet mission objectives. Standards shall enable assessment of contractor performance to determine whether performance objectives and/or desired outcomes are being met.

(d) PBSA contracts or orders may include performance incentives to promote contractor achievement of the desired outcomes and/or performance objectives articulated in the contract or order. Performance incentives may be of any type, including positive, negative, monetary, or non-monetary. Performance incentives, if used, shall correspond to the performance standards set forth in the contract or order.

The provisions in the final rule however failed to provide the same level of detail as that offered above. The February 2, 2006 provisions read as follows:

37.603 Performance standards. (a) Performance standards establish the performance level required by the Government to meet the contract requirements. The standards shall be measurable

³⁸ Compare 69 Fed. Reg. at 43712, with Interagency Task Force on Performance-Based Service Acquisition at 3.

DRAFT

Final Panel Working DRAFT

December 2006

services identified by OFPP. While initially the focus was on relatively low level support services with straightforward metrics, PBSA techniques today are applied to a wide variety of contracts including professional support and information technology services. IT services in particular constitute a large portion of the federal government's services funding today and require sophisticated measures to account for contractor success in achieving agency business outcomes. The HHS website described above gives a sample of the breadth of coverage.

In spite of both the breadth of service offerings eligible to use performance-based techniques and OMB's requirement to pursue the approach, the Panel has heard from a number of commenters that there remains uncertainty on when and how to use performance-based contracting methods to acquire services. Ronne Rogin, points out that there is an issue in determining where performance-based contracting has the best fit. She states that in spite of the regulatory definition, not everyone understands the best application of it. Her comments are very similar to those cited earlier in various Government Accountability Office reports.

The Panel heard similar issues raised by government staff of various agencies attempting to put performance-based contracts in place as well as from various industry associations citing the same complaint. The Multi-Association Task Force's testimony to the panel noted that "agencies do not seem to understand how to define requirements, write SOW/SOO's, identify meaningful quality baselines and measures, identify effective incentives, and manage the contract and outcomes post-award."⁴³ The Procurement Round Table (PRT) in its Position Paper, "A Proposal for a New Approach to Performance-based service acquisition" raises a similar concern about the practicality of employing "clear, specific, objective and measurable terms "when future needs are not fully known or understood, requirements and priorities are expected to change during performance and the circumstances and conditions of performance are not reliably foreseeable."⁴⁴ The PRT proposes to limit PBSA usage to "common, routine, and relatively simple services."⁴⁵ They propose a quality based selection process similar to that followed by the Brooks Architecture and Engineer Act for acquiring "long-term and complex" services.⁴⁶

As noted above, the Final Rule on Performance-Based Acquisition published in the January 3, 2006 Federal Register and effective on February 2, 2006 makes a number of improvements to both the definition and to the implementation of PBSA to address some of these concerns. For example, the new rule stresses that the technique is not only a contracting effort, but also an agency management approach that requires the assistance of program officials as well as contracting staff for successful implementation. In that regard, the rule adopts the name "Performance-Based Acquisition," eliminating the word "Contracting" to buttress that point. In addition, it makes it clear that task orders as well as contracts may be performance-based and

⁴³ Multi-Ass'n Test. at ____.

⁴⁴ Procurement Round Table, *A Proposal for a New Approach to Performance-based service acquisition* ____ (DATE).

⁴⁵ *Id.* at ____.

⁴⁶ *Id.* at ____.

DRAFT

Final Panel Working DRAFT

December 2006

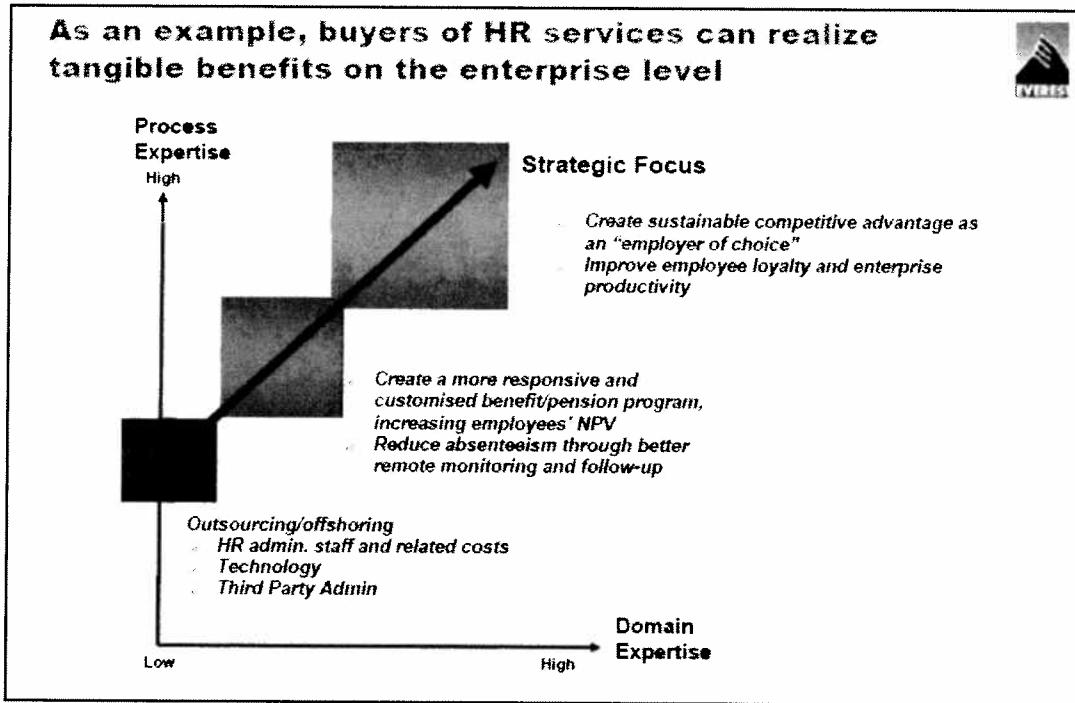
Degree of PBSA Implementation Difficulty by Contract Type

Type of Service	Current Contract Type	PBSA Implementation Difficulty Low/Moderate/High	Specific Challenges
Basic logistical and support services	Firm fixed price	Low	➤ None.
	CPIF or CPAF	Low	➤ None.
	CPFF or Time and Materials	Moderate	➤ Overcoming reliance on buying hours in favor of developing performance standards. ➤ Linking performance to meaningful incentives/disincentives.
	Indefinite Quantity Contract (IQC)	Moderate	➤ Developing relevant performance standards in advance of specific requirements.
Complex professional and technical services	Firm fixed price	Moderate	➤ Establishing outcomes and performance standards attributable to the contractor's efforts.
	CPIF or CPAF	Moderate	➤ Establishing outcomes and performance standards attributable to the contractor's efforts.
	CPFF or Time and Materials	High	➤ Establishing outcomes and performance standards attributable to the contractor's efforts. ➤ Overcoming reliance on buying hours in favor of developing performance standards. ➤ Linking performance to meaningful incentives/disincentives.
	IQC	High	➤ Establishing outcomes and performance standards attributable to the contractor's efforts. ➤ Developing relevant performance standards in advance of specific requirements.

DRAFT

Final Panel Working DRAFT

December 2006



The Panel is concerned that there may be a tendency of contractors to not be open to a broader set of responses outside the government's original statement of work. Contractors are fearful of losing the bid if they do not mimic the statement of work closely in their responses. As a result, many competitions are reduced to careful alignment of proposals with the government's specific approach and/or price shoot-outs, and the potential for innovation is largely forfeited.

The Panel concedes that defining a strategic vision and compelling an institution to coalesce around it are extremely difficult endeavors. Stove-piped organizations, and institutional and cultural conservatism greatly inhibit the ability to define and execute against strategic objectives. The right people must be involved, including senior leadership and vital stakeholders, to bring a broad perspective on what to buy, as well as which vehicle to use. If the critical parties are not at the table, it is extremely difficult to break through cultural barriers that inhibit success.

Finding 4: Within Federal Acquisition Functions, There Still Exists a Cultural Emphasis on "Getting to Award."

Many witnesses reinforced the notion that PBSA is a process that requires a significant preliminary effort to clarify agency needs, engage in innovative solutions development, and craft the right measures and incentives. This increased up-front investment of time, training and resources flies in contrast to the traditional culture of most acquisition shops under significant pressure from internal clients to get contracts awarded quickly. Client demand is exacerbated by

DRAFT

Final Panel Working DRAFT

December 2006

Finding 7: FPDS Data Are Insufficient and Perhaps Misleading Regarding Use and Success of PBSA

As noted previously there have been few efforts to document the use and benefits of performance-based contracting methods in a systematic fashion. The 1998 OFPP study cited earlier offers some information on PBSA benefits but that is now considerably out of date. In addition, reviews of contracts described as performance-based have raised questions about whether all performance-based elements as noted in the FAR definition were in fact being used. A number of GAO studies moreover have called into question the cost and performance benefits purportedly achieved through performance-based techniques. Clear data on both usage and effects are needed to address fully the benefits and provide agencies and OFPP a stronger basis for continuing to promote its use.

Panel-Initiated Review of Selected Federal Contracts

To further test the conclusions on usage provided by the ad hoc studies available, the Panel initiated its own review of agency PBSA contracts with a goal of making its own determination of how effectively the PBSA methodology has been applied.

Based on a Federal Procurement Data System –Next Generation (FPDS-NG) report on fiscal year 2004 transactions coded as performance-based, the Panel selected orders and contracts from the top ten contracting agencies. A total of 80 orders or contracts were selected randomly using the following general guidelines:

1. Actions reported in excess of \$20 Million, where possible
2. Actions falling generally within the service codes of management and professional or Information Technology (IT) to allow for comparisons

The Office of Federal Procurement Policy (OFPP) requested the pertinent documentation for a total of 80 orders and contracts in a memo dated March 17, 2006 to the following agencies:

- Department of Defense
- Department of Agriculture
- Department of Energy
- General Services Administration
- Health and Human Services
- Department of Homeland Security
- Department of Interior
- Department of Justice
- National Aeronautics and Space Administration
- Department of Veteran's Affairs

Due to various circumstances and mutual agreement to remove several contracts from the request, an actual total of 76 orders and contracts were requested. The Panel received and reviewed 64 of the 76 requested transactions. Nine of the 64 were missing documentation

DRAFT

Final Panel Working DRAFT

December 2006

necessary to complete the assessment, and although the Panel staff had initiated a follow up request for information, none was received. Therefore, the following analysis is based on a total of 55 reviewed orders and contracts submitted by 10 agencies or 72% of the sample.⁵⁶ All agencies responded.

The review evaluated requirements, metrics and standards, surveillance plans, and the inclusion of any incentives. Similar to the findings in the September 2002 GAO study, the Panel-initiated review found a range in the degree to which the contracts exhibited PBSA characteristics. A total of 36%⁵⁷ of the contracts reviewed to date contain the elements of a PBSA. Another 22% required significant improvement in one or more of the elements characteristic of a PBSA.

Of the orders and contracts coded as performance-based in FPDS-NG and reviewed, 42% were clearly not performance-based. This assessment often came directly from the agency in responding to the request. One agency response noted “You may include all contracts referenced under Paragraph B and C as NOT PBSA (4 Total).” Another agency stated “Reviewed: determined not to be performance based.” And yet another agency said they had researched a particular contract finding that “It is not a PBSA contract. The 279 was erroneously coded in the FPDS-NG system at the time of initial award. I have corrected all of the 279s⁵⁸ to avoid any further misinformation.”⁵⁹

The largest weakness found, in those that required significant improvement in one or more elements of a PBSA, was in the metrics and standards. Although requirements were often stated as outcomes appropriately, some more prescriptive than others, the measures were not adequately linked to the specific outcome, and/or the quality attribute being measured was inadequate or insufficient (e.g. timeliness). Although timeliness is a valid attribute, it is insufficient as a stand alone performance measure, as any contract expectation is on-time delivery. It was clear throughout these orders and contracts that a performance-based approach was intended but the execution was lacking to some degree. The greatest success appears to be within the Information Technology (IT) Service Contracts where service level agreements (SLAs) define performance levels and objective measurements and standards.

Another repeating shortfall was in the Quality Assurance Surveillance Plan (QASP) area. There appears to be some confusion with respect to the difference between a QASP and a contractor submitted Quality Control Plan (QCP). In some cases, where a QCP was submitted by the contractor as a requirement of the contract, there was no correlating translation, QASP or otherwise, for government surveillance. It was often unclear as to how the performance data would be collected or monitored.

⁵⁶ Contracts other than requested or agreed to for substitution were not included herein.

⁵⁷ Percentages rounded.

⁵⁸ Refers to the Standard Form 279 used for reporting transactions to FPDS-NG.

⁵⁹ Information provided to Panel staff.

DRAFT

Final Panel Working DRAFT

December 2006

Definition: Transactional Performance-Based Acquisitions typically use a Performance Work Statement approach for acquiring services. Under this model, the agency identifies a baseline need/problem, and has already substantially determined what work is to be done. In this case, the agency is more concerned with ensuring that work being done meets certain cost, quality or timeliness attributes. The agency is willing to assume the risk that the work being done may not solve the baseline need/problem.

Under this approach measurable performance standards would relate to the quality and attributes of the work actually done, with limited or no measurement on impact of work on agency's need/problem.

The guidance should provide explicit examples of cases where Transformational vs. Transactional PBSA models would be used, as well as examples of cases of acquisitions that would not be ripe candidates for PBSA. In compiling these examples, OFPP should depict actual agency experiences in using PBSA in different service areas. Ideally the complete implementation of Recommendation 10 will help create an evolving database of PBSA examples.

- **Provide an Agency PBSA “Opportunity Assessment” Tool:** The Panel recommends the guidance include a self-assessment tool that would include standardized questions an agency should consider when evaluating its acquisition portfolio for PBSA opportunities. Among other factors pertinent to PBSA, the self-assessment tool included in the guidance should help an agency analyze a service to determine:
 - a) whether a performance-related baseline problem exists (cost, quality, timeliness, impact to agency mission)
 - b) the level of risk associated with the service not being optimally provided (importance to mission of the service being provided optimally);
 - c) the level of confidence the agency has in its own “work statement” to solve the baseline problem;
 - d) the amount of risk the agency wants to assume for managing the service impact on its own vs. shifting to a vendor;
 - e) the readiness of the Program to measure the impact of the service on its program performance goals/mission, as well as the readiness of Program staff to participate in a PBSA process

The creation of a PBSA Opportunity Assessment Tool reflects the Panel’s view that implementing this new approach to acquisition in government will take time—requiring a more prioritized and strategic approach to when to use PBSA models. By focusing on “low hanging fruit” agencies can build competency and experience in PBSA and achieve early “wins” for the taxpayer.

DRAFT

Final Panel Working DRAFT

December 2006

In devising this guidance, OFPP should seek the input of the OFPP PBSA Inter-Agency Working Group that it has already established.

Recommendation 3:

Publish a Best Practice Guide on Development of Measurable Performance Standards for Contracts

OFPP should issue a “Best Practice Measures Guide” on the development and selection of performance measures for PBSA contracts. This recommendation is driven by testimony taken by the Panel, as well as numerous reviews of individual PBSAs, that has underscored the difficulty agencies face in devising and selecting good performance measures to include in both PBSA solicitations as well as inclusion in contract awards.

As part of OMB Circular A-11, OMB has already issued general guidance on the development of performance measures. However, this guidance relates to programmatic performance, rather than performance standards for individual contracts. The Panel believes that a Best Practice Measures Guide is critical to providing instruction and illustration in the use of measures as part of PBSA.

In developing a Best Practice Measures Guide, the following criteria should be as a minimum addressed to guide agency selection of PBSA performance measures:

- **Measurement “Chain” or “Logic Model”** Performance measures should be defined using a structured framework (such as a Value Chain or Logic Model) that define expected performance from an acquisition: starting first with the outcomes the agency seeks to achieve with the acquisition and then proceeding to demonstrate alignment between the specific outputs and/or activities conducted under a PBSA contract and those outcomes.
- **Baseline & Outcome Measure(s):** PBSA’s should be grounded in at least one or more measures that directly assess the agency’s baseline need/problem relating to the service being acquired. Baseline measures will not only help provide a “starting point” of current performance from which vendors can analyze and propose innovative solutions, but also can be used during and after an acquisition to indicate whether a service has had the desired outcome on the agency. Common baseline measures will largely assess how an acquisition has resulted in the program being able to:
 - Achieve improved performance toward program goals, including improved service levels or impact to agency customers, and/or
 - Address a major cost management issue facing the program, resulting in cost savings or enhanced ability by the program to operate in a more economical or efficient manner.

For Transactional PBSAs, baseline measures might not be included in the final contract awarded, but would be helpful to include in a Performance Work Statement to improve the

DRAFT

Final Panel Working DRAFT

December 2006

likely that contract management and monitoring measures will evolve over time, while the baseline outcome measures will remain the same.

Recommendation 4:

Modify FAR Parts 7 and 37 to Include an Identification of the Government's Need/Requirements by Defining a "Baseline Performance Case" in the PWS or SOO. OFPP should issue guidance as to the content of Baseline Performance Cases.

The Panel received consistent testimony indicating that the private-sector considers the definition of client needs/requirements upfront in an acquisition is one of the most important aspects of PBSA. There are questions whether the federal government has been consistent in clearly defining its needs/requirements up front—a deficiency that some believe may have led to poorly executed contracts and in some cases contract failures. In addition, the importance of conducting extensive market research before proceeding with a PBSA was underscored by numerous private sector experts.

The Panel recommends that the FAR be revised to require that agencies publish a formal "Baseline Performance Case" as part of its use of a PBSA. As part of the OFPP guidance, the Baseline Performance Case would include:

- **Outcome Performance Measures:** Identifying and explaining performance measures that capture the outcome sought by an agency in a particular service area (as defined in the guidance required in Recommendation #4)
- **Baseline Performance State:** Using the outcome performance measures, the agency would assess the current level of performance in a particular service area. In addition to measuring the baseline, some qualitative description of the performance problems/needs would be provided.
- **State-of-Practice:** The agency would describe the current "state-of-practice" in the service area as determined from its market research. Stating the assumptions of the agency in this regard would allow outside bidders to identify areas of innovation that the agency might have missed in reviewing potential private and public-sector solutions to its need/requirement.
- **PBSA Approach:** Based on the analysis described above, the agency would then select and justify either the use of a Transformational PBSA or a Transactional PBSA.
- **SOO or PWS:** The agency would include the SOO or PWS as part of the "Baseline Performance Case" and solicit proposals from vendors.

The creation of a Baseline Performance Case (to include the SOO and PWS) would provide the much-needed structure and discipline to ensure that the federal government improves its definition of performance needs/requirements up front in an acquisition.

DRAFT

Final Panel Working DRAFT

December 2006

Recommendation 5:

Improve Post-Award Contract Performance Monitoring and Management, Including Methods for Continuous Improvement and Communication through the Creation of a “Performance Improvement Plan” that would be Appropriately Tailored to the Specific Acquisition

One of the challenges of long-term complex service contracts is the fact that needs change over time and that as a result performance priorities may also need to be adjusted to reflect these changing circumstances. In addition, as some have noted, relationships play a key role in the assessment of contractor performance. Responsiveness and customer satisfaction are as important in many cases as technical achievement. Many practitioners have stressed the need for effective ongoing communications between the government and the contractor to ensure that contractor performance remains on target in meeting the mission needs of the agency.

To reflect that need for addressing shifting priorities and again to respond to Finding Five regarding the need for improved post-award contract management, the Panel recommends that contractors be required to develop and submit at pre-determined milestones a Performance Improvement Plan (PIP) that agency staff would assess and approve. This plan would serve as a means for ensuring that both the agency and the contractor are regularly communicating and assessing the need, both for continuous improvement and responsiveness to shifting priorities. The PIP should, at a minimum, do the following:

- Include reporting of required performance standards under the QASP,
- Identify gaps in performance along with an explanation for them,
- Suggest changes in work product to achieve improved performance and reflect changing circumstances, and
- Identify eligibility for contract incentives, if any.

Recommendation 6:

OFPP Should Provide Improved Guidance on Types of Incentives Appropriate for Various Contract Vehicles

As the Panel noted in Finding Six, the use of incentives remains troublesome, with confusion existing about what types of incentives are appropriate and with some expressing difficulties in being able to acquire the additional up front funding to meet these requirements. A number of agency PBSA guides including that of the Office of the Secretary of Defense address the types of incentives available and offer tips on how best to use them.

However there is no useful database for identifying the level of use of various types of incentives in PBSA efforts, nor does there exist in-depth guidance for practitioners on how best to apply them. A continuing theme of many of the witnesses who have appeared before the panel is that more guidance and more training are needed for the basic elements of PBSA to be

DRAFT

Final Panel Working DRAFT

December 2006

4. Select Transformational or Transactional PBSA Model

This step reflects the two categories of PBSA suggested by the Panel—as part of an effort to move beyond a one-size-fits-all use of PBSA and provide clarification on when to use a SOO vs. PWS.

5. Focus on Key Performance Indicators

This refinement reflects the Panel's desire to limit the number of performance measures included in a PBSA contract to a "sampling" or representative index of measures.

6. Select the Right Contractor

This step remains the same.

7. Manage, Monitor and Improve Performance

This step would be modified to include the establishment of milestones for the vendor to prepare "Performance Improvement Plans" as well as the agency's review and use of those plans to monitor and improve performance.

Recommendation 8:

Contracting Officer Technical Representatives (COTR's) in PBSA's should receive additional training and be re-designated as Contracting Officer Performance Representatives (COPR's).

Both Findings Four and Five point to deficiencies in post-award contract performance monitoring and management, with contracting staff in particular continually being pressured to focus on getting to contract award. For a performance-based contract to be successful, both elements of the process must be pursued: identifying desired business results up front and then being able to monitor performance.

The Panel believes that improvements in workforce capacity and capability regarding contract oversight in particular may make a significant difference in seeing that performance-based acquisitions are successfully carried out. One way to recognize the importance of this performance monitoring role and to shift the culture is, in circumstances where that individual is overseeing PBSAs, to re-designate the COTR as a COPR. Making this change highlights the distinctive nature of the position while affording those filling it with sufficient education and training to meet demanding oversight requirements. In addition to the traditional contract management and monitoring responsibilities of a COTR, the COPR would also assist the Integrated Project Team and CO in

- Soliciting input from program and technical staff regarding the approach to be used for acquisition performance management,
- Creating a baseline performance case,
- Developing the SOO or PWS and,

DRAFT

Final Panel Working DRAFT

December 2006

- Selecting key performance measures.

In addition, the Panel recommends that program staff and line contracting officers associated with performance-based acquisitions be given advanced training in performance management—particularly in the development of performance measures and post-award contract performance monitoring and management. Specifically for the creation of the COPR, the Defense Acquisition University and the Federal Acquisition Institute should jointly develop a formal educational certification program for those occupying this new position. For Transformational PBSA's, every effort should be made to see that key staff receive appropriate training and skill sets.

Recommendation 9:

Improved Data on PBSA Usage and Enhanced Oversight by OFPP on Proper PBSA Implementation Using an “Acquisition Performance Assessment Rating Tool” A-PART.

Under Finding Seven, the Panel noted the lack of good data on the use and success of PBSA across the government. In addition, where agencies have purported to have conducted performance-based acquisitions, the Government Accountability Office in a number of cases has questioned whether the procurement would actually meet the criteria included in the Federal Acquisition Regulation. As one way to regularize and make more consistent the Administration's ability to oversee and assess the performance of PBSA's, the Panel recommends that OFPP see that a tool similar to the Office of Management and Budget's (OMB) Program Assessment Rating Tool (PART) is developed.

OMB uses the PART as a systematic method for measuring program performance across the Federal government. It essentially includes a series of questions that help the evaluator to see whether the program is in fact meeting the mission requirements it was designed to support. The use of the PART has helped improve the clarity of OMB guidance on the Government Performance and Results Act (GPRA) as well as engaged OMB more aggressively in reviewing its implementation.

In a similar vein, the Panel is recommending that OFPP develop a checklist that reflects how well a particular acquisition comports with the basic elements of the seven steps guide. Using this methodological and accountable approach to PBSA implementation not only provides better data, but also helps agencies learn how to implement PBSA in a more structured and accountable manner. The Panel feels this rigor is needed in the early stages of PBSA's implementation until agencies are comfortable and competent in the use of the tool. This requirement would sunset after three years, unless OMB and agencies felt the use of the A-PART process should continue.

Using the A-PART, agencies should then fill out the questions upon award of a performance-based contract and maintain the information on file. Each year OFPP should sample the A-PART documents to see if PBSA implementation is in fact being handled properly

DRAFT

Final Panel Working DRAFT

December 2006

in each agency, with revised guidance provided to the agencies based on the results of these annual assessments.

In addition, OMB guidance on FPDS reporting should be revised to reflect the distinction between Transformational and Transactional performance-based acquisitions (including both contracts and task orders) as described in Recommendation One.

Recommendation 10:

OFPP should undertake a systematic study on the challenges, costs and benefits of using performance-based acquisition techniques five years from the date of the Panel's delivery of its final report.

While the Panel has heard many witnesses point to either the benefits or shortfalls of adopting performance-based techniques for acquiring services, there has been no systematic government-wide effort to assess fully the merits of the process. As noted previously by the Panel, the last such study was conducted by OFPP in 1998 and while the results were positive, some questioned the validity of its findings. As such the Panel recommendations should not be interpreted as offering a long-term endorsement of PBSA. Rather the Panel aims are directed at improving current implementation and at providing a solid fact-based record for a more thorough assessment of its value.

In light of the concerns raised by so many witnesses on the lack of training and guidance for carrying out performance-based acquisitions, the Panel believes that a concerted effort to address these deficiencies should help to make performance-based acquisitions more effective. However, a systematic review would offer a much more solid basis for concluding whether significant cost and programmatic benefits are in fact achieved through the adoption of performance-based acquisition methods.

As part of this review, OFPP should use the FPDS to identify the various types of performance-based acquisitions in use across the agencies, and examine selected A-PARTS assessments and agency Performance Improvement Plans to assess their contributions to improving the effectiveness of performance-based acquisition awards.

DRAFT

Final Panel Working DRAFT

December 2006

8. Federal Acquisition Streamlining Act of 1994. See, among others, 10 USC 2220 and 41 USC 263.
9. Government Performance and Results Act of 1993
10. Clinger-Cohen Act of 1996
11. "Guide to Best Practices for Performance-Based Service Contracting" 1998
12. Department of Energy: Lessons Learned Incorporated in Performance-Based Incentive, July 23, 1998 <http://www.gao.gov/archive/1998/rc98223.pdf>
13. National Laboratories: DOE Needs to Assess the Impact of Using Performance-Based Contracts, May 3, 1999 <http://www.gao.gov/archive/1999/rc99141.pdf>
14. Contract management: Trends and Challenges in Acquiring Services, May 22, 2001 -GAO Testimony before the Subcommittee on Technology and Procurement Policy, Committee on Government Reform, House of Representatives. <http://www.gao.gov/new.items/d01753t.pdf>
15. GAO-02-179t Contract management: Improving Services Acquisitions, October 30, 2001 <http://www.gao.gov/new.items/d02179t.pdf>
16. "Guidance Needed for Using Performance-Based Service Contracting" GAO, September 20, 2002 <http://www.gao.gov/new.items/d021049.pdf>
17. President's Management Agenda <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf>
18. GAO Report 03-443 Federal Procurement: Spending and Workforce Trends, April 30, 2003. <http://www.gao.gov/new.items/d03443.pdf>
19. "Performance-Based Service Acquisition – Contracting for the Future" Interagency Task Force on Performance-Based Service Acquisition, July 2003 <http://www.whitehouse.gov/omb/procurement/0703pbsat.pdf>
20. Section 1431 of the Services Acquisition Reform Act of 2003, Additional Incentive for use of Performance-based Contracting for Services and Section 1433, Clarification of Commercial Services Definition (Title XIV of the National Defense Authorization Act for Fiscal Year 2004). <http://reform.house.gov/UploadedFiles>Title%20XIV%20of%20H.R.%201588%20Conference%20Report.pdf>
21. FAR Case 2004-004, Incentives for the Use of Performance-Based Contracting for Services. This case implements Section 1431 and 1433 of the Services Acquisition Reform Act of

DRAFT**Final Panel Working DRAFT****December 2006****APPENDIX TWO:
FINAL PBSA Rule and Side-by-Side Comparison****FEBRUARY 2, 2006 EFFECTIVE PBSA FAR REGULATION****SUBPART37.6—PERFORMANCE-BASED ACQUISITION 37.604****Subpart 37.6—Performance-Based Acquisition**

37.600 Scope of subpart. This subpart prescribes policies and procedures for acquiring services using performance-based acquisition methods.

37.601 General. (a) Solicitations may use either a performance work statement or a statement of objectives (see 37.602). (b) Performance-based contracts for services shall include— (1) A performance work statement (PWS); (2) Measurable performance standards (i.e., in terms of quality, timeliness, quantity, etc.) and the method of assessing contractor performance against performance standards; and (3) Performance incentives where appropriate. When used, the performance incentives shall correspond to the performance standards set forth in the contract (see 16.402-2). (c) See 12.102(g) for the use of Part 12 procedures for performance-based acquisitions.

37.602 Performance work statement. (a) A Performance work statement (PWS) may be prepared by the Government or result from a Statement of objectives (SOO) prepared by the Government where the offeror proposes the PWS. (b) Agencies shall, to the maximum extent practicable— (1) Describe the work in terms of the required results rather than either “how” the work is to be accomplished or the number of hours to be provided (see 11.002(a)(2) and 11.101); (2) Enable assessment of work performance against measurable performance standards; (3) Rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost-effective methods of performing the work. (c) Offerors use the SOO to develop the PWS; however, the SOO does not become part of the contract. The SOO shall, at a minimum, include— (1) Purpose; (2) Scope or mission; (3) Period and place of performance; (4) Background; (5) Performance objectives, i.e., required results; and (6) Any operating constraints.

37.603 Performance standards. (a) Performance standards establish the performance level required by the Government to meet the contract requirements. The standards shall be measurable and structured to permit an assessment of the contractor’s performance. (b) When offerors propose performance standards in response to a SOO, agencies shall evaluate the proposed standards to determine if they meet agency needs.

FAR 7.103(r):

(r) Ensuring that knowledge gained from prior acquisitions is used to further refine requirements and acquisition strategies. For services, greater use of performance-based contracting methods and, therefore, fixed-price contracts (see 37.602-5) should occur for follow-on acquisitions.

FAR 7.103(r):

(r) Ensuring that knowledge gained from prior acquisitions is used to further refine requirements and acquisition strategies. For services, greater use of performance-based contracting methods (see 37.602-5) should occur for follow-on acquisitions.

FAR 7.103(r):

DELETED “and, therefore, fixed-price contracts” from the statement “For services, greater use of performance-based acquisition methods and, therefore fixed-price contracts*** should occur for follow-on acquisitions” because the Councils believe the appropriate contract type is based on the level of risk and not the acquisition method.

DRAFT

Final Panel Working DRAFT

December 2006

<p>FAR 16.505(a)(3): (3) Performance-based work statements must be used to the maximum extent practicable if the contract or order is for services (see 16.204-3(a)). FAR 16.505(a)(3): Performance-based work statements must be used to the maximum extent practicable if the contract or order is for services (see 16.204-3(a)).</p>	<p>FAR 16.505(a)(3): (3) Performance-based acquisition methods must be used to the maximum extent practicable if the contract or order is for services (see 16.204-3(a)). CHANGED: Performance work statements must be used to the maximum extent practicable. Performance-based acquisition methods must be used to the maximum extent practicable.</p>
<p>FAR 37.000:</p> <p>This part prescribes policy and procedures that are specific to the acquisition and management of services by contract. This part applies to all contracts for services regardless of the type of contract or kind of service being acquired. This part requires the use of performance-based contracting to the maximum extent practicable and prescribes policies and procedures for use of performance-based contracting methods (see subpart 37.6). Additional guidance for research and development services is in Part 35; architect-engineering services is in Part 36; information technology is in Part 39; and transportation services is in Part 47. Parts 35, 36, 39, and 47 take precedence over this part in the event of inconsistencies. This part includes, but is not limited to, contracts for services to which the Service Contract Act of 1965, as amended, applies (see Subpart 22.10).</p>	<p>FAR 37.000:</p> <p><i>This part prescribes policy and procedures that are specific to the acquisition and management of services by contract or orders. This part applies to all contracts for services regardless of the type of contract or kind of service being acquired. This part requires the use of performance-based acquisition to the maximum extent practicable and prescribes policies and procedures for use of performance-based acquisition methods (see subpart 37.6). Additional guidance for research and development services is in Part 35; architect-engineering services is in Part 36; information technology is in Part 39, and transportation services is in Part 47. Parts 35, 36, 39, and 47 take precedence over this part in the event of inconsistencies. This part includes, but is not limited to, contracts for services to which the Service Contract Act of 1965, as amended, applies (see Subpart 22.10).</i></p> <p>FAR 37.000</p> <p>ADDED “or orders” after “contracts” to clarify the Subpart applies to contracts and orders</p> <p>Various Subparts in Part 37: CHANGED the terminology from “performance-based service acquisitions” to “performance-based service acquisitions” to “performance-based acquisitions” since Part 37 only relates to service acquisitions.</p>

FAR 37.102(e)

ADDED a requirement that the agency program officials describe the need to be filled using performance-based acquisition methods to the maximum extent practicable to facilitate performance-based acquisitions.

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FAR 37.602(b):

(b) When preparing statements of work, agencies shall, to the maximum extent practicable --

(1) Describe the work in terms of "what" is to be the required output rather than either "how" the work is

FAR 37.602(b):

DRAFT

Final Panel Working DRAFT

December 2006

(4) Avoid combining requirements into a single acquisition that is too broad for the agency or a prospective contractor to manage effectively.	
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DRAFT

Final Panel Working DRAFT
December 2006

CHAPTER 3

INTERAGENCY CONTRACTING

REPORT OF THE ACQUISITION ADVISORY PANEL

December 2006

DRAFT

Final Panel Working DRAFT

December 2006

TABLE CONTENTS

I. Introduction and Background

- A. Introduction
- B. Background

1. Types Of Interagency Contract Vehicles

- a. Multi-Agency Contract
- b. Government-with Acquisition Contract (GWAC)
- c. GSA Schedules Program
- d. Enterprise-wide Contract Vehicles
- e. Interagency Assisting Entities

2. Parties Involved in Interagency Contracting

3. Creation and continuation in Interagency Contracting

- a. Incentives to Use Interagency Contract Vehicles
- b. Incentives to Create Interagency Contract Vehicles
- c. Oversight Concerns

4. Transparency

- a. Data on Use
- b. Data on Management
- c. Data and Transparency

II. Issues and Findings - Creation and Continuation

- A. Proliferation
- B. Inconsistent Oversight

- 1. Lack of Transparency
- 2. Little Systematic Coordination Among Vehicles
- 3. No Consistent Standards for Creation and Continuation
- 4. No Procedures for Aligning Vehicles to Leverage Government Purchasing Power
- 5. No Central Database or Consistent Methodology to Help Agencies Select Appropriate Contract Vehicles

- C. Incentives for Creation Don't Always Translate Into Benefits for the Taxpayer
- D. Some Diversity is Desirable
- E. Focus on Process of Creation and Continuation will Improve Use of the Vehicles

DRAFT**Final Panel Working DRAFT****December 2006**

to include DOD's use of the GSA Client Support Centers to include DOD's use of interagency vehicles in the Department of Treasury, the Department of Interior and the National Aeronautics and Space Administration. Section 812 of the same bill requires the establishment of a management structure within the Department of Defense for the management of services acquisition, including those services procured through interagency contract vehicles. Section 817 of the John Warner National Defense Authorization Act for Fiscal Year 2007 further expands the scope of the DOD IG review of agency governmentwide acquisition contracts to include the National Institutes of Health and the Department of Veterans Affairs. The Panel noted these developments in formulating its recommendations, but at this time has refrained from drawing any conclusions about the specific proposals and actions.

Finally, criticism of the Federal response to the Hurricane Katrina disaster has led to discussions about the degree to which interagency contract vehicles may be among the most useful tools for allowing Federal agencies to acquire goods and services for national emergencies. Interagency contract vehicles, such as the General Services Administration Schedules program, can potentially offer a broad range of goods and services to assist with disaster preparation and recovery. In response, section 833 of the John Warner National Defense Authorization Act for Fiscal Year 2007 allowed that the GSA may authorize state and local governments to use Federal Supply Schedules for goods or services that are to be used to facilitate recovery from a major disaster declared by the president or to facilitate recovery from terrorism or nuclear, biological, chemical, or radiological attack.² Beginning with sound agency advance planning, interagency vehicles could provide pre-negotiated line items, special terms and conditions that would allow for rapid deployment of assistance to affected communities.

Although the identification of sources and issues continued to the end of the review process, the Panel focused on identifying the scope of the issues it would consider in making its recommendations. Four basic questions concerning interagency contract vehicles were identified:

What are they?

Why do agencies use them?

How do agencies use them?

How should agencies use them?

As in other areas, the Panel believes that there is no privileged perspective from which to answer these four questions. There are a number of valid stakeholders with disparate points of view that must be considered. These stakeholders are identified in the next section.

² Public Law 109-364, § 833,

DRAFT**Final Panel Working DRAFT****December 2006**

In sorting through the various audits, studies, reviews, presentations and commentaries, the Panel strove to avoid duplicating the audit work of the GAO or the agency inspectors general. It attempted to look at higher level policy issues of a systemic nature appropriate for review by such an independent panel. In following the Section 1423 charter, the Panel has developed recommendations for changes to laws, regulations, and policies to:

- Establish overarching goals and acquisition planning mechanisms to balance competing policy mandates;
- Address systemic issues identified in GAO, IG and other reports;
- Foster restructuring and consolidation of programs and vehicles where appropriate;
- Import applicable best practices from both Government and private sector experience;
- Increase the scope of competitive forces in interagency vehicle transactions;
- Address acquisition workforce issues related to the use of interagency vehicles; and
- Establish reliable and meaningful data collection to allow for effective management and oversight.

As will be seen below, the Panel's recommendations fall into two broad categories. The first set of issues is clustered around the creation and continuation of interagency vehicles and the organizations that use them to provide acquisition assistance across the federal Government. The Panel concluded that some of the most fundamental issues associated with interagency and enterprise-wide vehicles could be best addressed by establishing more formal procedural requirements for initially establishing such vehicles and subsequently for authorizing their continued use. The second related set of issues is associated with the use of such vehicles by federal agencies. This category includes issues associated with competition, pricing, acquisition workforce requirements, and the methodology of choosing the most appropriate vehicle for a specific procurement action.

DRAFT**Final Panel Working DRAFT**

December 2006

FINDINGS	RECOMMENDATIONS
B1. Lack of Transparency	<p>1: Increased transparency through identification of vehicles (e.g. GWACs, MACs, enterprisewide) and Assisting Entities. OMB conduct a survey of existing vehicles and Assisting Entities to establish a baseline. The draft OFPP survey, developed during the Working Group's deliberations should include the appropriate vehicles and data elements.</p>
B1. Lack of Transparency B2. Little Systematic Coordination Among Vehicles B5. No Central Database or Consistent Methodology to Help Agency Select D. Some Diversity is Desirable	<p>2: Make available the vehicle and assisting entity data for three distinct purposes.</p> <ul style="list-style-type: none"> (a)Identification of vehicles and the features they offer to agencies in meeting their acquisition requirements (yellow pages). (b)Use by public and oversight organizations to monitor trends in use. <ul style="list-style-type: none"> i.Improved granularity in fee calculations ii.Standard FPDS-NG reports (c)Use by agencies in business case justification analysis for creation and continuation/reauthorization of vehicles.
B1. Lack of Transparency	<p>3: OMB institutionalize collection and public accessibility of the information, for example through a stand alone database or module within transactions-based FPDS-NG.</p>
B4. No Procedures for Aligning Vehicles to Leverage Government Purchasing Power E. Focus on Process of Creation and Continuation will Improve Use of the Vehicles C. Incentives for Creation Don't Always Translate Into Benefits for the Taxpayer	<p>4: OMB direct a review and revision, as appropriate, of the current procedures for the creation and continuation/reauthorization of GWACs and Franchise Funds to require greater emphasis on meeting specific agency needs and furthering the overall effectiveness of governmentwide contracting. GSA should conduct a similar review of the Federal Supply Schedules. Any such revised procedures should include a requirement to consider the entire landscape of existing vehicles and entities to avoid unproductive duplication.</p>
B4. No Procedures for Aligning Vehicles to Leverage Government Purchasing Power	<p>5: For other than the vehicles and entities described in #4 above, institute a requirement that each agency, under guidance issued by OMB, formally authorize the creation or expansion of the following vehicles under its jurisdiction:</p> <ul style="list-style-type: none"> (a)Multi-agency contracts (b)Enterprisewide vehicles (c)Assisting entities



DRAFT

Final Panel Working DRAFT

December 2006

vehicles such as the GSA Schedules program and GWACs are not governed by the Economy Act, but by specific statutes and regulations. To address this, DoD issued series of guidance on financial management policy for non-Economy Act transactions utilizing non-DoD contracts.⁵

Described below are brief overviews of these vehicles and entities.

1. Types of Interagency Contract Vehicles

a. Multi-Agency Contract

The authority for interagency acquisitions comes from specific statutory authority (e.g., Government Employees Training Act) or, when specific statutory authority does not exist, the Economy Act. The Economy Act of 1932, as amended (31 USC 1535), authorizes an agency to place orders for goods and services with another Government agency when the head of the requesting agency determines that it is in the best interest of the Government and decides ordered goods or services cannot be provided as conveniently or cheaply by contract with a commercial enterprise. Congress amended the Act in 1942 to allow military servicing agencies the authority to contract and extended the authority to the civilian agencies in 1982. Congress further amended the Act under the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub.L. 103-355, Title I, § 1074, Oct. 13, 1994, 108 Stat. 3271) to require advance approval by a requesting agency's Contracting Officer (or, as implemented in FAR 17.503(c), an official designated by the agency head) as a condition for using Economy Act authorities, as well as establishment of a system to monitor procurements awarded under the Act. FASA provided additional specific conditions that must be met before making Economy Act transactions. Namely, unless the servicing agency is specifically authorized by law or regulations, in order to utilize a servicing agency's contract, the requesting agency must document (verify or demonstrate or certify) that the servicing agency has either an appropriate pre-existing contract available for use or that it has specialized expertise that is not resident within the requesting agency. (§ 1074(b)(2))

According to the FAR, multi-agency contract means “a task-order or delivery-order contract established by one agency for use by Government agencies to obtain supplies and services, consistent with the Economy Act.”⁶ As stated in the 1932 House Report of the 72d Congress, the legislative intent behind the creation of multi-agency contracts was the administrative efficiency and cost savings associated with the utilization of an existing contract by other agencies with similar needs.

Out of this broad interagency contracting authority evolved several more targeted initiatives such as statutory authorities providing for the GWACs. GWACs were established pursuant to the Clinger-Cohen Act, 40 U.S.C. 11314(a)(2) (formerly cited as 40 U.S.C. 1424(a)(2)), for information technology. GWAC's, although a subset of multi-agency contracts,

⁵ See DoD Policy Guidance at: <http://www.acq.osd.mil/dpap/specIFICpolicy/>

⁶ FAR 2.101.

DRAFT**Final Panel Working DRAFT**
December 2006

year, two billion dollar ceiling, and the orders are placed by the DISA contracting officers at one percent fees.

b. Governmentwide Acquisition Contract (GWAC)

Governmentwide Acquisition Contracts (“GWACs”) are a subset of multi-agency contracts. However, unlike non-GWAC multi-agency contracts, they are not subject to the requirements and limitations of the Economy Act. The FAR defines a GWAC as --

- A task-order or delivery-order contract for information technology established by one agency for Governmentwide use that is operated—
- (1) By an executive agent designated by the Office of Management and Budget pursuant to section 5112(e) of the Clinger-Cohen Act, 40 U.S.C. 1412(e) [later recodified under §11314(a)(2)]; or
 - (2) Under a delegation of procurement authority issued by the General Services Administration (GSA) prior to August 7, 1996, under authority granted GSA by the Brooks Act, 40 U.S.C. 759 (repealed by Pub. L. 104-106). The Economy Act does not apply to orders under a Governmentwide acquisition contract.¹⁰

From 1965 until 1996, GSA was the sole authority for the acquisition of IT and telecommunications across the entire federal Government. The authority was set forth in Section 111 of the Federal Property and Administrative Services Act of 1949 and was referred to as the Brooks Act. The Brooks Act was repealed in 1996 by the Clinger Cohen Act which vested government wide responsibility for IT in Office of Management and Budget (OMB). Having been delegated IT procurement authority from GSA prior to the enactment of Clinger-Cohen Act, GSA’s Federal Technology Service (FTS) operated under the previously granted authority. Beginning in the year 2000, all agencies offering GWAC programs were required to report revenues and costs in accordance with OMB guidance and federal financial accounting standards.

As of September 2005, there were four executive agents with GWAC authority: the Department of Commerce (DOC), GSA’s newly created Federal Acquisition Service, the National Aeronautics and Space Administration (NASA), and the National Institutes of Health (NIH). (The ITOP GWAC program previously managed by the Department of Transportation (DOT) was relocated to GSA in June 2004). As part of its executive agent designation, OMB requires that these agents submit an initial business case, annual activity reports, and a quality assurance plan (QAP) covering, among other things, training of executive agent staff and

¹⁰ FAR 2.101

DRAFT**Final Panel Working DRAFT****December 2006**

customers, order development and placement, procedures for implementation of orders including contract administration responsibilities, and management review (OMB, "Executive Agent Designation Additional Provisions"). OMB stated that it intended the GWAC QAPs to "serve as models that may be adopted and tailored by other agencies that manage a significant amount of interagency acquisitions." (*ibid.*) Due to management controls by OMB over their creation and continuation, existing GWAC programs are well defined when compared to other IDIQ multi-agency contracts.

Accessing a GWAC is done in two different ways. In a usual situation, a customer agency (i.e., requesting agency) chooses an appropriate GWAC program to use and enter into a memorandum of understanding or an interagency agreement with the host agency (i.e., servicing agency). It then forwards a requirements package, including project funding and fees, to the host agency for assisted acquisition service. Typically, upon acceptance, the host agency contracting officer issues a solicitation among the contractors within the program and, with the assistance of the customer agency, evaluates the proposals received. A task or delivery order is then issued by the host agency's contracting officer and the resulting order is managed jointly by the technical representatives of the customer agency and the host agency's contracting officer. In contrast, when direct order and direct billing authority is available, the customer agency may choose to manage its own project and funding after receiving the delegation of authority from the host agency. In this scenario, a customer agency follows the ordering procedures set forth by the host agency to solicit proposals and make award directly to the contractor, and thus, no interagency transfer of funds is needed.

The legislation authorizing GWACs did not provide meaningful guidance with respect to how financial transactions should be accounted for and fees managed under these contracts. As a result, according to GAO, host agencies are left to choose on their own whether these transaction fees would be accounted for through existing revolving funds or in stand-alone accounts.¹¹ As of July 2002, GSA and NIH operated under revolving funds, while NASA and Department of Commerce operated their GWACs in stand-alone reimbursable accounts¹². This issue of fee management is discussed in more detail in a later section of this report.

A closer look into each of the GWACs follows:

¹¹ (GAO-02-734, p9).

¹² *Id.*

DRAFT

Final Panel Working DRAFT

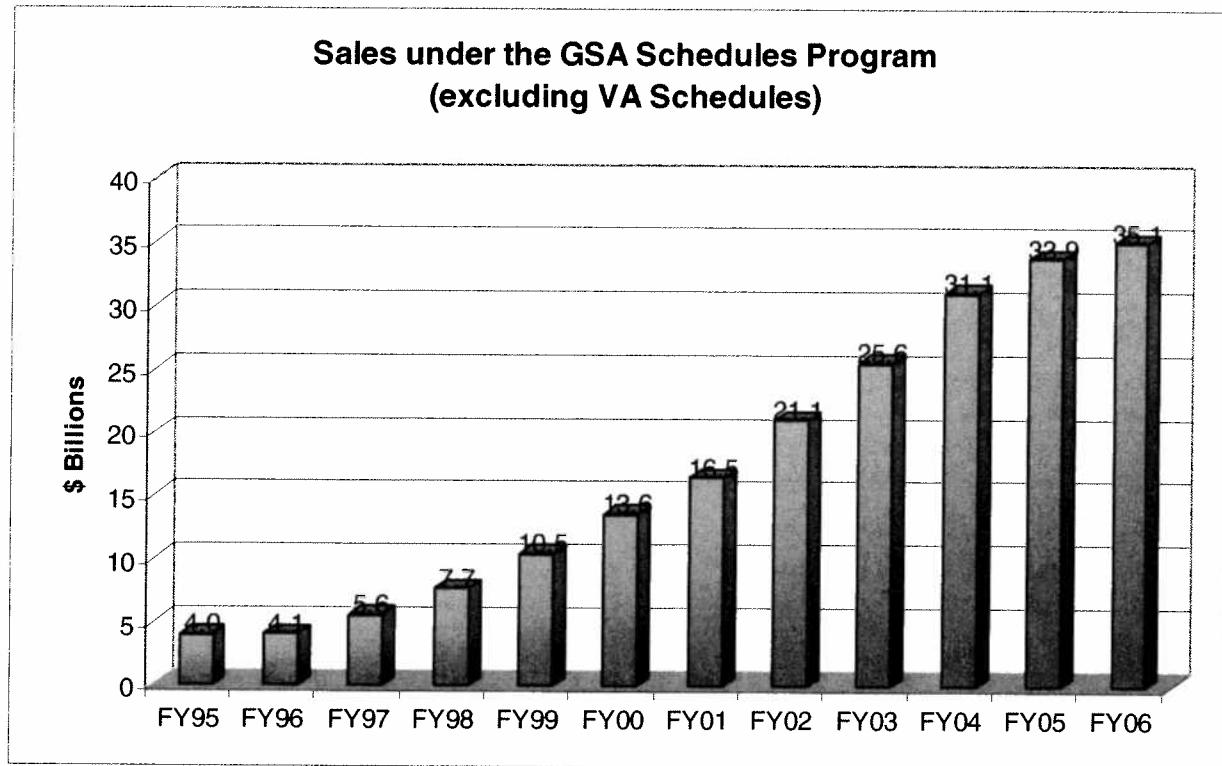
December 2006

Governmentwide Acquisition Contracts (GWACs)						
CONTRACT	DESCRIPTION	CEILING	# CONTRACTS	TERM (incl. options)	FEE	TOP CUSTOMERS
Department of Commerce (DOC)						
COMMITS	Commerce Information Technology Solutions (COMMITS) - Set-aside for SB	\$1.5B	N/A	8/2000-6/2009	N/A	DOC, EPA, DoD
COMMITS NexGen	Commerce Information Technology Solutions (COMMITS) NexGen - Set-aside for SB	\$8B	55	1/2005-1/2015	0.5%-1.75%	DOC
General Services Administration (GSA)						
ANSWER	Applications'N Support for Widely-diverse End-user Requirements (ANSWER)	\$25B	10	12/1998-4/2009	0.75%	HHS, Air Force, Army
Millennia	Provides Large System Integration and Development Projects	\$25B	9	4/1999-4/2009	0.75% (Capped at \$25,000)	EPA, Army, DHS
Millennia Lite	Provides IT Solutions in Four Functional Areas	\$20B	36	4/2000-4/2010	0.75%	Army, Air Force, HHS
HUBZone	Historically Underutilized Business Zone (HUBZone) - Set-aside for HUBZone SB	\$2.5B	61 (36 Awardees)	1/2003-1/2008	0.75%	DOJ, EPA, Navy
8(a) STARS	8(a) Streamlined Technology Acquisition Resources for Services (STARS) - Set-aside for 8(a); Replaced 8(a) FAST	\$15B	423	6/2004-6/2011	0.75%	Air Force, Army, DoD
(Alliant)	(Coming soon); Will replaces ANSWER, Millennia, & Millennia Lite	\$50B	25-30	10yrs	0.75%	N/A
(Alliant SB)	(Coming soon); Set-aside for SB	\$15B	20 est.	10yrs	0.75%	N/A
(VETS)	(Coming Soon); Veterans Technology Services (VETS) - Set-aside for Service-Disabled Veteran-Owned SB	\$5B	TBD	10yrs	0.75%	N/A
Department of Health and Human Services (HHS)						
CIO-SP2i	Chief Information Officer Solutions and Partners 2 Innovations	\$19.5B	45	12/2000-12/2010	0.5%-1%	HHS, DoD, DOT
IW2nd	Image World 2 New Dimensions	\$15B	24	12/2000-12/2010	0.25%-1%	DoD, Treasury, USDA
ECS III	Electronic Commodity Store (ECS) III	\$6B	65	11/2002-11/2012	1%	DoD, HHS, DOJ
National Aeronautics and Space Administration (NASA)						
SEWP	Scientific and Engineering Workstation Procurement (SEWP) - IT Products	\$5.6B	25 (16 Awardees)	Various (7/2001-9/2007)	0.65% with \$10,000 Order Cap	DoD, GSA, NASA, DOJ, HHS
SEWP IV	(Coming Soon); Scientific and Engineering Workstation Procurement(SEWP) IV - IT Products	\$5.6B	26-39 est.	7yrs	0.65% with \$10,000 Order Cap	N/A

DRAFT

Final Panel Working DRAFT

December 2006



As of October 2006, approximately 17,900 Schedule contracts were in place. About 81 percent of those were awarded to small businesses. Small business received 37.6 percent or \$13.2 billion of the \$35.1 billion Schedule sales in Fiscal Year 2006. Compared to the previous three fiscal years, the small business participation in the Schedules Program has grown steadily greater.²⁰

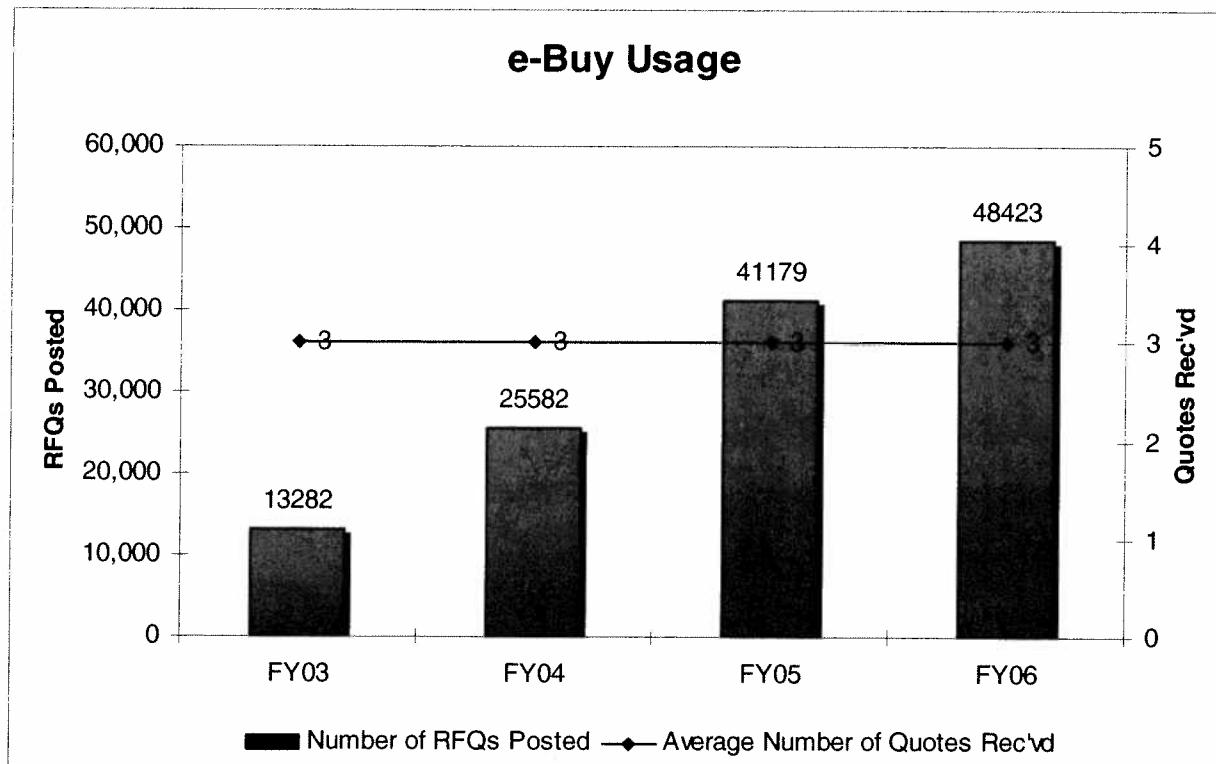
The Program is intended to provide Federal agencies with a simplified process for obtaining commonly used commercial supplies and services at prices associated with volume buying. Using commercial item acquisition procedures in FAR Parts 12, 15, 16, and 38, GSA awards indefinite delivery contracts to commercial firms to provide supplies and services at stated prices for given periods of time. The operating assumption is that the price for such supplies and services has been tested in the market, and that a price can be established as fair and reasonable without an initial price competition among multiple offerors. Schedule contracts allow for orders to be issued on a firm-fixed-price, fixed-price with economic price adjustment, or on a time-and-materials basis. The contracts are known as "evergreen" and are typically awarded with a 5-year base period and three 5-year options. They include conditions under which a contractor may offer a price discount to authorized users without triggering mandatory across-the-board price reductions. Under the GSA Schedule Program's continuous open

²⁰ Source: GSA Data, "Final FY 2006 Schedule Data - Contracts in Effect"; "Contractors Report of Sales - Schedule Sales FY 2006 Final" dated 10/24/2006.

DRAFT

Final Panel Working DRAFT

December 2006

**d. Enterprisewide Contract Vehicles**

An emerging contract vehicle that is modeled after interagency vehicles is the so-called enterprisewide contract. As these vehicles are intended to serve as an alternative to interagency contracts, they share certain features with those vehicles (IDIQ ordering vehicles), but their use is generally confined within the boundaries of a single agency. Because of their similarities to interagency vehicles and that fact that a growing number are being established within agencies as alternatives to existing interagency vehicles, the Panel has expanded its review and recommendations to cover these vehicles.

Enterprisewide contract vehicles are intra-agency IDIQ contracts established solely for use by an agency's major internal constituent sub-organizations. Such vehicles do not, however, operate under the more flexible statutory authority enjoyed by GSA for the Schedules program. The agency creates these vehicles for a variety of reasons to include: ability to tailor requirements for agency-unique purposes, improved consistency of processes and requirements across the enterprise, ability to establish and enforce inclusion of tailored terms and conditions, perception of reduced administrative overhead, availability of better spend analysis information, ability to aggregate requirements, and avoidance of incurring the fees that would otherwise be sent to the GSA or another outside agency.

An example of such a vehicle is the SeaPort-e program administered by Naval Sea Systems Command (NAVSEA). SeaPort-e is a program intended to improve the acquisition of

DRAFT

Final Panel Working DRAFT

December 2006

services across 22 functional areas using IDIQ contracts awarded in seven regional zones covering the United States. NAVSEA claims that SeaPort-e offers many of the same advantages as interagency contract vehicles, such as streamlined acquisition of services, while also providing for improved collection of business intelligence data,²¹ additional competition, and the ability to measure performance in such areas as customer satisfaction. Other agencies, such as the Department of Homeland Security, and the United States Postal Service have established additional enterprise-wide vehicles as alternatives to existing interagency contract vehicles.

As of December 2006, the SeaPort-e program awarded 935 prime contracts with a yearly rolling admissions process.²² SeaPort-e is described as the Virtual SYSCOM's²³ "mandatory acquisition vehicle of choice," meaning that SYSCOM customers must obtain Senior Executive Service (SES) or Flag Officer level approval to use an interagency assisting entity in place of SeaPort-e.²⁴ Even if a SYSCOM contracting officer executes an unassisted award, he must obtain business case approval to use a vehicle other than SeaPort-e, such as GSA's Federal Supply Schedules program.

The stated goal of SeaPort-e is to eventually ensure that all Virtual SYSCOM work within its scope falls under SeaPort-e unless it does not make business sense to do so. Existing NAVSEA contracts will be allowed to expire and the work under them will be migrated into SeaPort-e. The SeaPort-e program manager testified to the Panel, that the business intelligence data uniquely available under SeaPort-e should facilitate improved strategic purchasing in the Virtual SYSCOM. He also testified that no additional Navy personnel were added or needed to manage the SeaPort-e program representing a significant administrative savings to the Navy especially when compared to fees otherwise paid for the use of other interagency contracts.²⁵

e. Interagency Assisting Entities

Interagency assisting entities, such as the franchise funds, are not contracts, but are part of the interagency contracting landscape. The working group decided to include consideration of assisting entities in its review and recommendations for several reasons. An agency's use of an assisting entity involves relying on an outside organization for performance of contracting functions. Assisting entities also rely almost exclusively on interagency vehicles to meet customer agencies' needs. Use of an assisting entity also involves the transfer of funds from one agency to another.

²¹ Relevant business intelligence data include information on spending by individual activities under specific task orders for specific engineering services. Testimony of J. Punderson, SeaPort-e program manager, August 18, 2005, p 304.

²² See the List of Prime Vendors at: <https://auction.seaport.navy.mil/Bid/PPContractListing.aspx>

²³ The Virtual SYSCOM for purposes of SeaPort-e includes NAVAIR, NAVFAC, NAVSUP, SPAWAR, and NAVSEA. Punderson, pp. 296-297.

²⁴ Punderson, pp. 299-303.

²⁵ Punderson, p. 345. .

DRAFT**Final Panel Working DRAFT**

December 2006

other support systems. This authority to retain funds provides great operating flexibility to those six agencies that are granted franchise fund authority.

From a contract administration standpoint, this arrangement creates unique challenges. A typical transaction may involve multiple parties including -- the customer agency's program office, its contracting officer, its finance office, the assisting entity's contracting officer, the assisting entity's finance office, and the contractor. A recent GAO report pointed out that the customer agency and the franchise fund, who "share responsibility for ensuring value through sound contracting practices such as defining contract outcomes and overseeing contractor performance," had not adequately defined requirements and delineated responsibilities.³³ The GAO report concluded that the two franchise funds, GovWorks and FedSource, and the Department of Defense had failed to coordinate to adequately "define outcomes," "establish criteria for quality," and "specify necessary criteria for contract oversight" resulting in these entities not being able to demonstrate value.³⁴

Listed below are several well-known Interagency Assisting Entities:

AGENCY	PROGRAM NAME	FUND TYPE	AUTHORIZATION
DOI	GovWorks	Franchise Fund	31 U.S.C. 501 note (GMRA), Reauthorization Required
	National Business Center	Working Capital Fund	43 U.S.C. 1467; 31 U.S.C. 1535 (Economy Act)
GSA	Federal Systems Integration and Management Center (FEDSIM)	Acquisition Services Fund	40 U.S.C. 321, 40 USC 501; 40 USC 11302(e); Permanent
	FTS Client Support Center		
Treasury	FedSource	Franchise Fund	31 U.S.C. 322, note (GMRA); Permanent (PL 108-447 §219)
Veterans Affairs	BuyIT.gov	Franchise Fund	GMRA, Permanent (PL 109-114 §208)
HHS	Program Support Center	Service and Supply Fund, Franchise Fund	42 U.S.C. 231; GMRA, Reauthorization Required

³³ (GAO-05-456, "Franchise Funds Provide Convenience, but Value to DOD is Not Demonstrated" quote from section titled "What GAO Found.")

³⁴ Ibid, pgs 21-24.

DRAFT**Final Panel Working DRAFT****December 2006**

Enterprisewide Contracts. There is no uniform policy for establishing or monitoring these IDIQ contracts. According to the SeaPort-e Program Manager's testimony to the Panel, the decision to make SeaPort-e an enterprisewide contract was driven among other considerations by the need for business intelligence data not readily available through the various interagency contracts that had previously been used to fulfill requirements. SeaPort-e reports a number of performance metrics to include cycle time to award, business volume, small business participation and workload.³⁵

a. Incentives to Use Interagency Contract Vehicles

While acquisition reform streamlined the process for purchases under the simplified acquisition threshold, purchasing above that threshold remains complex and technical.³⁶ This is particularly true of services contracting which has become increasingly more sophisticated and complex especially in the areas of information technology and professional and management support. Services now account for 60% of the Government's yearly contract spending.³⁷ In response to a Panel request for data, FPDS-NG provided the following breakout of supplies and services purchased in Fiscal Year 2004 using interagency contracts:

³⁵ NAVSEA presentation slides for public testimony to Panel, August 18, 2005

³⁶ GAO-02-449T, March 7, 2002

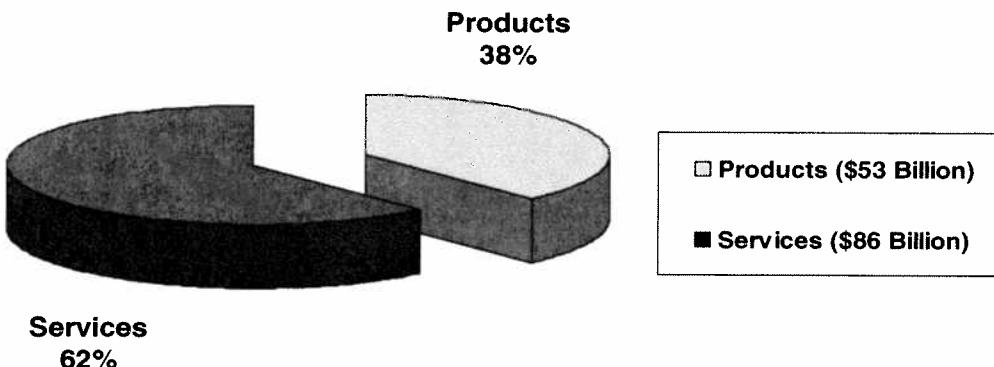
³⁷ For FY 2004, services accounted for 60% of total spending or 80% if weapons systems are excluded from the base.

DRAFT

Final Panel Working DRAFT
December 2006

Services to Product Breakout for FY 2004 Interagency Contract Spend

Total Interagency Contract Spend = \$139,346,384,302



Source: Ad-Hoc Report prepared for Panel by the Federal Procurement Data Center (FPDC), Nov. 2005

A number of factors have led agencies to turn to interagency contract vehicles to meet demands for services. The major factors are summarized below.

Workforce. The reliance on interagency contracts and their proliferation has been driven to a significant degree by reductions in the acquisition workforce accompanied by increased workloads and pressures to reduce procurement lead-times.³⁸ In its testimony on the High Risk Update in February 2005,³⁹ GAO stated that “These types of contracts have allowed customer agencies to meet the demands for goods and services at a time when they face growing workloads, declines in the acquisition workforce, and the need for new skill sets.” Interagency contracts allow requiring agencies to meet mission needs while focusing human capital resources on core mission rather than procurement. For instance, the chart below shows the interrelationship of the DOD workforce reductions mapped against overall growth in GSA’s Federal Supply Schedules program. Although the Department of Defense and NASA have recently issued guidance or procedures for activities to follow for using interagency vehicles,

³⁸ GAO-02-179T, November 1, 2001

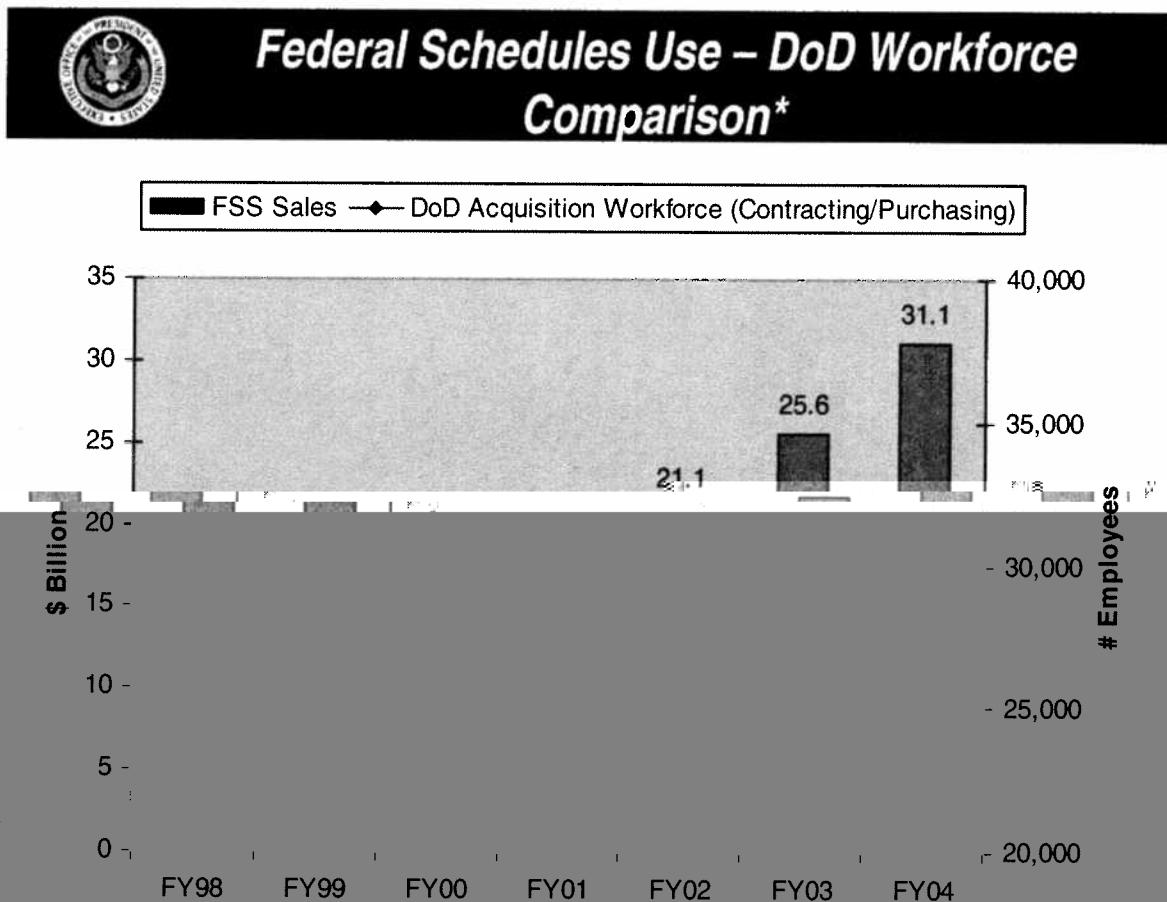
³⁹ GAO-05-350T, February 2005)

DRAFT

Final Panel Working DRAFT

December 2006

agencies have not issued general guidance or procedures for reviewing and determining the best vehicles for meeting agencies' mission needs.



Funding Constraints. Workforce pressures alone have not fueled the increased use of interagency contracts. The Panel heard testimony from Government witnesses that the funding profiles have placed significant pressures on requiring agencies that can lead them to "park" one year money with holders of vehicles that can offer the benefit of extending the use of customer funds into a subsequent fiscal year.⁴⁰ Franchise funds, in particular, offer the ability to retain funds beyond an appropriations period to customers if they are able to demonstrate a bona fide need for the acquisition during the period in which the funds are available. In fact, at the Department of Interior (DOI) GovWorks franchise fund website (<http://www.govworks.gov>), until recently contained a slide presentation via a link called "The Right Choice" that emphasized this benefit in its marketing material.⁴¹

⁴⁰ Testimony of Lisa Akers (GSA) and Timothy Tweed (DoD) on 6/14/05.

⁴¹ GovWorks website contains an explicit statement (answer #13 under Client Questions at <http://www.govworks.gov/home/faqs.asp>) opposing the use of GovWorks to park funds.

DRAFT

Final Panel Working DRAFT December 2006

The Department of Defense, the largest user of interagency contract vehicles, has taken a series of actions to control the use of DOD funds under interagency agreements not governed by the Economy Act. The most recent guidance from the Under Secretary of Defense (Comptroller), dated October 16, 2006, requires all non-Economy Act orders greater than \$500,000 be reviewed by a DoD contracting officer prior to sending the order to the non-DoD activity.⁴² A memo issued on March 27 from the same source requires deobligation of expired funds and establishes an availability limit of one year from the date of obligation for funding for severable services. Funding for the acquisition of goods require a certification that the acquisition represents a specific, bona fide need of the fiscal year in which the funds are obligated.⁴³

Perceived Flexibilities. Agencies have also used interagency vehicles to avoid and waive competition in order to retain the services of incumbent contractors.⁴⁴ This is most likely due to the fact that public synopsis is not required on these vehicles. Also, multiple award contracts are viewed as desirable because they are perceived by some to provide for a reduced basis for oversight through the protest process. Current management and oversight systems enforce laws, regulations, and policies that clarify requirements regarding proper use of the flexibilities associated with these vehicles, but agencies have recognized the need for improvements in such systems.

According to a report by the GAO,⁴⁵ holders of the vehicles also added value to their offerings, attracting both contractors and consumers.

In August 1997, GSA revised its acquisition regulations to expand access to commercial products and services and to implement greater use of commercial buying practices and streamline purchasing for customers. GSA believed that these changes would lead to more participation in the MAS [multiple award schedules] program by both large and small businesses—procedures more consistent with commercial practice would increase competition and thereby provide federal agencies a wider range of goods and services at competitive prices. Beginning in the late 1990s, MAS program sales increased significantly.⁴⁶

⁴² Memorandum from the Under Secretary of Defense (Comptroller) entitled "Non-Economy Act Orders" (Oct. 16, 2006); Available at: <http://www.acq.osd.mil/dpap/specificepolicy/>

⁴³ Memorandum from the Under Secretary of Defense (Comptroller) on Proper Use of Interagency Agreements with Non-Department of Defense Entities Under Authorities Other Than the Economy Act (Mar. 27, 2006).

⁴⁴ (GAO-05-207).

⁴⁵ (GAO-05-229).

⁴⁶ GAO-05-229, February 2005, p. 5

DRAFT

Final Panel Working DRAFT

December 2006

b. Data on Management

Agencies that hold interagency contract vehicles also maintain differing levels and types of post award data. For instance, while GWAC holders report yearly to the Office of Management and Budget (OMB) using uniform reporting elements on performance and financial management and Franchise Funds report to the Chief Financial Officer's Council (CFOC), there is no consistent approach across the government for collecting and reporting performance data on interagency contracts. Additionally, the data that has been collected and reported has been identified by GAO as lacking or inaccurate. In 2002, GAO found that agencies were not accurately identifying or reporting the full cost of the GWAC programs they were managing. This precluded GAO from discerning if the fees collected were a reflection of costs incurred by the vehicle holder.⁵¹ In its High Risk Series Update testimony, GAO stated that the fee-for-service feature of these interagency contracts creates an incentive to increase volume to support other programs and leads to focusing on meeting customer demands at the expense of complying with regulations.⁵² In a report on DOD's use of franchise funds, GAO states that while the franchise funds business-operating principles require that they maintain and evaluate cost and performance benchmarks against their competitors,

...the franchise funds did not perform analyses that DOD could have used to assess whether the funds deliver good value. The funds' performance measures generally focus on customer satisfaction and generating revenues. These measures create an incentive to increase sales volume and meet customer demands at the expense of ensuring proper use of contracts and good value.⁵³

c. Data and Transparency

As we begin to think in more strategic terms, we also note that procurement data reporting through FPDS-NG and its predecessor dating back to the 1970s, has been exclusively transaction-based. But the system is capable, with enhancement, of providing data that can inform strategic decision-making both during the creation and continuation phase as well as at the point of use. OMB's Memorandum "Implementing Strategic Sourcing," dated May 20, 2005 states that strategic sourcing is a

...collaborative and structured process of critically analyzing an organization's spending and using this information to make business decisions about acquiring commodities and services more effectively and efficiently. This process helps agencies optimize performance, minimize price, increase achievement of socio-

⁵¹ (GAO-02-734).

⁵² (GAO-05-350T).

⁵³ (GAO-05-201, p 16)

DRAFT**Final Panel Working DRAFT****December 2006**

economic acquisition goals, evaluate total life cycle management costs, improve vendor access to business opportunities, and otherwise increase the value of each dollar spent.

Before an agency creates or continues an interagency or enterprisewide vehicle and applies the resources necessary to manage such a vehicle, data on similar vehicles would provide essential market research for informing a cost-benefit analysis. Data on the costs and performance measures of such vehicles would also inform rational decisions on their use, driving the market to more efficiently ‘cull’ the numbers of such vehicles to only the highest performing most cost-effective ones.

Part II -- Issues and Findings - Creation and Continuation

Given the increased amount of taxpayer dollars flowing through these vehicles for the fulfillment of mission-critical requirements, the lack of a consistent governmentwide policy on the creation and continuation of interagency contracts is notable. There are no uniform standards for their creation and no governmentwide measures to support their continuation based on desired performance. Certainly industry witnesses have told the Panel repeatedly that aligning incentives is essential for success.⁵⁴

There is little doubt that interagency contracts can and do provide significant benefit and efficiencies, but these efficiencies have been narrowly viewed primarily as transaction efficiencies such as reduced pre-award lead time and protest risk. Interagency contracts broadly defined are important to the operation of the federal acquisition process. Witnesses speaking on the subject before the Panel identified the benefits of interagency contracts and several remarked that they viewed them as essential for meeting mission needs.⁵⁵ However, the focus on transaction-based value hides the even greater efficiencies to be gained if employed toward the goal of creating strategic governmentwide efficiencies. Unfortunately, the lack of readily available, reliable and timely data on the use and management of interagency contracts has hampered the Government’s ability to realize the more strategic value of these contracts. This lack of data is a barrier to strategic planning as well as oversight, on both an enterprise-wide and governmentwide basis.

The Panel believes that meaningful improvements to interagency contracting practices can be achieved by agencies focusing their efforts on a sound and consistent process that provides oversight during the creation and the continuation (or reauthorization) of these contracts. Many of the issues identified by the GAO and agency IGs dealing with the misuse of these vehicles are related to the internal controls, management and oversight, and division of

⁵⁴ Testimony from Todd Furniss, Everest Group, March 30, 2005; Peter Allen, TPI, April 19, 2005; Daniel Masur, Outsourcing Attorney, September 27, 2005.

⁵⁵ Testimony, Scott Amey for the Project on Government Oversight (POGO), May 17, 2005, Ashley Lewis for the Department of Homeland Security (DHS), June 14, 2005, David Sutfin for Department of the Interior, June 14, 2005, Martin Johnson for the Department of the Treasury, July 12, 2005, ****

DRAFT

Final Panel Working DRAFT

December 2006

roles and responsibilities between the vehicle holder and ordering agency. These issues can best be addressed with a Government-wide policy that requires agencies to specifically and deliberately address these matters at the point of creation and continuation rather than attempting to remedy these problems at the point of use. The current lack of an established process and limited transparency allows for the proliferation of these vehicles in a largely uncoordinated, bottom-up fashion, focusing attention on the short term, transaction-based benefits of reduced procurement lead time. The Panel and the working group received testimony from government witnesses who stated that interagency vehicles are often utilized when an agency does not have ample time to fully define its acquisition requirements. Establishing guidelines for the creation and continuation of these vehicles will help to ensure they are used as an effective tool for enterprise-wide and Governmentwide strategic sourcing.

A. Proliferation

The pressures and incentives to create and use these vehicles, coupled with inconsistent or lacking oversight and little transparency has created an environment biased towards the uncoordinated proliferation of interagency contracts. GAO has noted that they are attracting rapid growth of taxpayer dollars (GAO-05-207) with Fiscal Year 2004 FPDS-NG data showing total obligations of \$139 Billion or 40% of the total Governmentwide spend for the year.⁵⁶ In addition, the Panel is concerned about the impact of using IDIQ contracts for enterprise-wide programs such as the Navy's Seaport-e and the Department of Homeland Security's (DHS) Enterprise Acquisition Gateway for Leading Edge (Eagle) for IT Services and First Source for IT commodities replicating vehicles similar in purpose to interagency vehicles within the confines of a single agency.

An uncoordinated proliferation of these contracts has consequences on the stakeholders that include requiring agencies, holders of the vehicles, industry, and those agencies responsible for oversight. That is why the Panel has determined it necessary to include both interagency and enterprise-wide contracts within the scope of its recommendations. Failing to do so could lead to the unintended consequence of fostering even greater uncoordinated enterprise-wide contract creation, exacerbating negative consequences for stakeholders.

In addition, holders of interagency contracts and their customer agencies must have the necessary expertise to award and manage orders under these interagency contracts. The GAO and agency IGs have noted that curtailed investments in human capital have produced an acquisition workforce that often lacks the training and resources to function effectively⁵⁷ in an environment of more complex contracting vehicles and service requirements. GAO testimony stated that contracting personnel are expected to have greater knowledge of market conditions,

⁵⁶ Data was reported as of November 2005 in a report prepared in response to a Panel request.

⁵⁷ GAO-03-443, April 2003, GAO-01-1074R, August 22, 2001, GAO-05-350T, February 2005, GAO-02-179T, November 1, 2001, GAO-05-274, March 2005, GAO-03-556T, Testimony of Vic Avetissian, Committee on Government Reform, March 16, 2005, GAO-05-207, January 2005, IG reports/testimony (May 17, 2005 before the AAP)

DRAFT

Final Panel Working DRAFT

December 2006

schedule contracts.⁶⁴ In addition, the Board recommended that its three largest GWACs - Millennia, Millennia Lite and Applications 'N Support for Widely Diverse End-User Requirements (ANSWER) be merged into a single GWAC.

3. No Consistent Standards for Creation and Continuation

There are no consistent governmentwide standards applicable to the creation of interagency and enterprise-wide vehicles and no performance standards to justify their continuation or relevance. As discussed earlier, the GWACs, schedules, and franchise funds have specific processes in place, but each focuses on different elements of a business case. There is no standard process at all for the creation and continuation of non-GWAC multi-agency IDIQ contracts and enterprise-wide programs. The treatment of various types of funding within agencies may preclude the objective measurement of tradeoffs of costs versus the benefits associated with the creation of such vehicles. As noted above, some of the justifications advanced for the creation of the Navy's SeaPort-e program included the savings associated with fees that would no longer have to be paid to GSA and the fact that no additional contracting personnel would be required in the Navy to administer the vehicle. While this approach reflects well the financial incentives from an internal NAVSEA perspective, it is not clear that this calculation accurately captures the overall costs to the government associated with the creation and operation of this or similar programs. Given the amount of taxpayer dollars spent on interagency contracting, it is notable that there is no governmentwide policy focusing on rational business cases for creation and performance measures that align incentives with desired behaviors and key management agenda initiatives. For instance, business cases should require the identification of the mission need to be fulfilled, management and governance structure, including the resources and tools that will be applied by a servicing agency to manage an interagency contract. Proper business planning requires management deliberation and accountability and identify the roles and responsibilities of the requiring and servicing agency and the means by which this is communicated. Currently, there are no consistent procedures or policies for allocating roles and responsibilities among the stakeholders in transactions using these vehicles. Measures that focus on competition, performance-based contracting and small business goals would drive desired behaviors. Clearly identifying those responsible for these measures would drive agencies to allocate responsibility. But key to having such standards and measures is a system for the governmentwide monitoring of vehicle performance and relevance. Again, while individual programs such as GWACs have such a system, interagency and enterprise-wide contracts, on a governmentwide basis, have no such process.

⁶⁴ The eight specialty GWACs are: the Access Certificates for Electronic Services, Disaster Recovery, Outsourcing Desktop Initiative for NASA, Reverse Auctions, Safeguard, Seat Management, Smart Card and Virtual Data Centers.

DRAFT**Final Panel Working DRAFT****December 2006****C. Incentives for Creation Don't Always Translate Into Benefits for the Taxpayer**

GAO noted in 2005 that the fee-for-service arrangement of interagency contracts “...creates an incentive to increase sales volume in order to support other programs of the agency that awards and administers an interagency contract. This may lead to an inordinate focus on meeting customer demands at the expense of complying with required ordering procedures.” With the trend toward greater agency reliance on internal contracts and enterprise-wide programs, the competition for customers may put greater pressure on holders of new and existing interagency contracts and the interagency assisting agencies to focus on meeting demands that are counter to the interests of taxpayers, such as waiving competition to retain incumbent contractors.⁶⁶

D. Some Diversity is Desirable

While the Panel believes that proliferation dampens the potential benefits of interagency contracts, it does not find that administrative monopolies are beneficial either. Some competition among vehicles is seen as desirable and even fundamental to maintaining the health of government contracting. Armed with the necessary information on how many interagency and enterprise-wide vehicles exist, and institutionalizing standards for their creation and continuation, the government can make informed decisions on how many and what type of vehicles provide for appropriate leveraging and which vehicles are best and most responsibly managed to obtain maximum taxpayer value. Agency contracting officials should have reasonable alternative contracting vehicles available for meeting agency mission needs coupled with meaningful data and information about the different options for contracting within their own agencies and through other entities.

E. Focus on Process of Creation and Continuation will Improve Use of the Vehicles

The Panel believes that maximum leverage for improving interagency contracting can be gained by focusing its efforts on a sound and consistent process for the creation of these vehicles along with a monitoring process for the continuation (or reauthorization) of them. Many of the issues related to the misuse of these vehicles identified by the GAO and IG reports relate to roles and responsibilities, internal controls, and management and oversight. These issues can best be addressed with a governmentwide policy that requires agencies to specifically and deliberately address these matters at the point of creation and continuation rather than attempting to fix these problems at the point of use. The current lack of process and visibility allows for the proliferation of these vehicles in a largely uncoordinated, bottom-up fashion, focusing attention on the short term, transaction-based benefits of reduced procurement lead time instead of on their

⁶⁶ (GAO-05-207).

DRAFT

Final Panel Working DRAFT
December 2006

ultimate benefit as a tool for effective enterprise wide and governmentwide strategic sourcing at reduced administrative costs.

DRAFT

Final Panel Working DRAFT

December 2006

**Interagency Contracting
Recommendations**

- 1. Increased transparency through identification of vehicles (e.g. GWACs, MACs, enterprisewide) and Assisting Entities. OMB conduct a survey of existing vehicles and Assisting Entities to establish a baseline. The draft OFPP survey, developed during the Working Group's deliberations should include the appropriate vehicles and data elements.**

The Panel believes that the most important near-term task in the interagency contracting creation and continuation area is establishing a database identifying existing vehicles and assisting entities as well as their characteristics. It is the view of the Panel the most expeditious means of assembling such information is in the form of a survey as currently drafted by the Office of Federal Procurement Policy (OFPP) in support of the Office of Management and Budget task force examining Interagency and Agency-Wide Contracting.

The OFPP draft survey is intended to gain a clearer understanding of the following:

- The number of interagency contracts that are currently in operation; the scope of these vehicles; the primary users; and the main rationale for their establishment;
- The level of acquisition activity conducted by Intragovernmental Revolving Funds (including the Franchise Funds) on behalf of other agencies;
- The number of enterprisewide contracts currently in operation to address common needs that could be (or have been) satisfied through an existing interagency program, the scope of these vehicles; and the main rationale for their establishment.

The Panel recognizes that such a survey provides no more than a snapshot of agency activities associated with interagency contracting. Such a survey will provide an immensely greater degree of transparency for the stakeholders. The results of such a survey should serve as a bridge to the more institutionalized database recommended in #3 below. In order to better serve that end, the Panel also recommends that the OFPP and the interagency task force consider expanding the requirements of the draft survey to include vehicles currently in the planning stages.

- 2. Make available the vehicle and assisting entity data for three distinct purposes.**
 - a. Identification of vehicles and the features they offer to agencies in meeting their acquisition requirements (yellow pages).**
 - b. Use by public and oversight organizations to monitor trends in use.**
 - i. Improved granularity in fee calculations**
 - ii. Standard FPDS-NG reports**

DRAFT**Final Panel Working DRAFT****December 2006****c. Use by agencies in business case justification analysis for creation and continuation/reauthorization of vehicles.**

The Panel believes that the data gathered in the initial baseline survey should be structured in such a way as to allow for agency and public use. As noted above, the information should be viewed as a bridge to an institutionalized collection process. The Panel believes that three major purposes should guide the structuring of information consistent with the findings.

First, the data should provide a detailed overview of vehicles and services available from assisting entities to allow agency procurement officials and managers to weigh the best acquisition strategy for meeting agency mission needs. The information should be structured in such a manner to allow “apples to apples” comparisons among the benefits of using different vehicles and entities as well as the fees associated with their use. The data should allow agency officials to make accurate comparisons between the cost to the agency of the fees involved with using another agency vehicle and the internal costs of replicating the capability within the agency.

Second, the data should be organized to allow oversight organizations, such as the Government Accountability Office and the agencies’ inspectors general greater visibility into the existing and planned vehicles and entities, trends in their use, and the degree and nature of any overlap among them. In particular, the initial survey should provide the groundwork for a meaningful comparison of the manner in which fees are calculated among different vehicles and entities to indicate whether a more systematic approach to fee establishment would be feasible or desirable.

Third, consideration of the information from the survey should be standard practice for any agency considering creating a new interagency or enterprise-wide vehicle or continuing an existing one. The Panel believes that a major component of a proper business case justification must be a reasonable and detailed understanding of other alternative acquisition approaches that are available in the Federal government or to specific requirement holders in a prospective customer agency.

3. OMB institutionalize collection and public accessibility of the information, for example through a stand alone database or module within transactions-based FPDS-NG.

As noted, the Panel believes that the initial OFPP survey should serve as the foundation for an institutional base of data and information on vehicles and entities. An institutional database with timely updates will be critical for the agencies’ success in managing the vehicles and entities under their jurisdiction. Such a database will also be critical for agency managers to develop sound acquisition strategies involving interagency contracting capabilities to meet their agency’s mission needs. The Panel believes that such benefits will offset the costs of collecting and maintaining this information.

DRAFT

Final Panel Working DRAFT

December 2006

assisting entities that represent unproductive duplication or for which there is no longer a valid business case.

The Panel believes that this process must have teeth rather than be a pro forma review. The standard for the review should be the degree to which the vehicle or assisting entity is tracking to (or meeting) the performance measurements established at its inception. The OMB guidance on continuation should provide sufficient clarity to allow agency decisions on continuation/reauthorization to be subject to meaningful review and audit by oversight organizations.

With respect to the appropriate review timeframes, the Panel believes that there is no “one size fits all” approach. The Panel recognizes that each type of vehicle or class of assisting entity will justify OMB establishing different continuation/reauthorization review periods. A major consideration in establishing such review periods should be the nature and length of contracts and options under the vehicles or being managed by the assisting entities. A continuation/reauthorization review period for a given vehicle that is significantly shorter than the contract periods under the vehicle could present an agency with a serious obstacle to appropriate action if a continuation/reauthorization review indicates that the vehicle should be terminated rather than continued.

7. Have the OMB interagency task force define the process and the mechanisms anticipated by recommendations #5 and #6.

The Panel believes that OMB should be the responsible agency for preparing and issuing the guidance to implement recommendations #5 and #6. The process should be the result of collaboration with the chief acquisition officers and senior procurement executives of the individual agencies having jurisdiction over interagency, enterprisewide, or assisting entities. The current OMB Task Force on Interagency Contracting, formed to address the management concerns raised by the Government Accountability Office, has the breadth of participation to allow a balance between the need for explicit guidance with clear performance measures and the need for a reasonable degree of flexibility in implementation. The Panel believes that the OMB Task Force should remain in existence until the task of promulgating procedures and mechanisms for these vehicles and entities has been completed.

8. OMB promulgation of detailed policies, procedures, and requirements should include:

- a. Business case justification analysis (GWACs as model).
- b. Projected scope of use (products and services, customers, and dollar value).
- c. Explicit coordination with other vehicles/entities.
- d. Ability of agency to apply resources to manage vehicle.
- e. Projected life of vehicle including the establishment of a sunset, unless use of a sunset would be inappropriate given the acquisitions made under the vehicle.

DRAFT

Final Panel Working DRAFT

December 2006

duplication or overlap has been identified. The analysis should also include identification of any cost savings associated with the implementation of the recommendations and proposed measures to address the unintended negative consequences of such recommendations. Finally, OMB should include in each analysis formal consideration of whether to require OMB-level approval on a case-by-case basis of agency decisions to create or continue vehicles or assisting entities that are not otherwise covered under a statutorily mandated process.

DRAFT

Final Panel Working DRAFT

December 2006

CHAPTER 4

SMALL BUSINESS

REPORT OF THE ACQUISITION ADVISORY PANEL

December 2006

DRAFT

Final Panel Working DRAFT

December 2006

TABLE OF CONTENTS

I.	Introduction.....
A.	Statement of Issues
B.	Methodology
II.	The Process of Structuring Acquisition Strategies to Afford Small Business Participation
A.	Background
1.	Guidance in Using Small Business Contracting Programs.....
2.	Guidance with Contract Consolidation.....
B.	Findings.....
1.	Guidance in Using Small Business Contracting Programs.....
2.	Guidance with Contract Consolidation.....
C.	Recommendations.....
1.	Guidance in Using Small Business Contracting Programs.....
2.	Guidance with Contract Consolidation.....
III.	The Ability of Small Business to Compete in the Multiple Award Contracting Environment.....
A.	Background
1.	Competition for Multiple Award Contracts
2.	Competition for Task Orders
B.	Findings.....
1.	Competition for Multiple Award Contracts
2.	Competition for Task Orders
C.	Recommendations.....
1.	Competition for Multiple Award Contracts
2.	Competition for Task Orders

DRAFT

Final Panel Working DRAFT

December 2006

APPENDICES

Appendix 1: 2004 Small Business Goal Achievements by Major Federal Department

Appendix 2: Summary of Small Business Subcontracting Requirements and Issues

DRAFT

Final Panel Working DRAFT

December 2006

Source: FPDS Annual Reports.

As discussed in greater detail later in this Chapter, the small business goal achievements on multiple award multi-agency contracting vehicles also has been mixed. The small business share of awards against GSA's Federal Supply Schedule ("FSS" or "Schedule") has been among the most significant, representing about 80 percent of the Schedule contract awards and 37.6 percent, or \$13.2 billion, of FSS sales in FY 2006.¹⁰

Taken together, federal agencies have made significant progress in expanding small business contracting. However, although the government has achieved the overall small business goal of not less than 23 percent of the total value of prime contract awards, agencies have fallen short of the statutory goals for the small business subcategories of WOSBs, HUBZone and SDVO SBCs.

A. Statement of Issues

In reviewing small business issues, the Panel focused on five general areas of consideration: commercial practices, performance-based service acquisitions, interagency contracts, workforce, and inherently governmental functions. The Panel identified two primary issues relating to interagency contracting, commercial practices, and workforce.

First, the Panel analyzed the extent to which federal services acquisition strategies are structured to afford small business participation on the prime contracting level. Specifically, in light of the varied small business goal achievements, the Panel reviewed existing laws, regulations and policies to ensure that there is adequate guidance in selecting specific small business contracting mechanisms and appropriate interagency contracting vehicles to facilitate small business goal achievements. The Panel further analyzed the laws and policies governing the process for defining requirements. The Panel's primary objective in this regard was to identify effective incentives and acquisition planning tools to encourage small business contracting in the face of a shrinking acquisition workforce and the recent initiative to leverage spending through strategic sourcing.

Second, the Panel examined the adequacy of guidance for utilizing small business contracting methods against multiple award task order contracts, including government-wide agency contracts ("GWACs") and the GSA schedules. The Panel's underlying objective in this second area was to identify salient policies and practices that may be used to build on successful small business goal achievements, particularly in the context of commercial item buys from GSA's Schedule. Further, the Panel sought strategies to promote small business contracting opportunities, without compromising the overarching goals of contracting integrity, competition and efficiency.

¹⁰ GSA Data, *Contractors Report of Sales – Schedule Sales FY2006 Final* (Oct. 24, 2006).

DRAFT

Final Panel Working DRAFT

December 2006

from the different agencies.¹⁹ The Government uses this data to determine whether or not the agency is meeting its small business goals.²⁰

The SBA has attempted to reconcile the Act's various programs, including the various set aside and sole source provisions, in its regulations.²¹ For example, the regulations provide discretion to the CO by stating that the CO should consider setting aside the SBA's requirement for 8(a), HUBZone, or SDVO SBC participation before considering setting aside the requirement as a small business set-aside.²²

The FAR has also attempted to reconcile the various programs through its regulations.²³ For example, the FAR provides that before deciding to set aside an acquisition for SBCs, HUBZone SBCs, or SDVO SBCs, the CO should review the acquisition for offering under the 8(a) program.²⁴ According to the FAR, if the acquisition is offered to the SBA, SBA regulations give first priority to HUBZone 8(a) concerns.²⁵ As noted above, this regulation now conflicts with the SBA's regulations and leaves less discretion to the CO.

The courts and GAO also have attempted to address the preferences within the Small Business Act and interpret the implementing regulations. In Contract Management, Inc. v. Rumsfeld, the court ruled that "the SBA and FAR regulations pertaining to the HUBZone program sufficiently promote the congressional objective of parity between the HUBZone and 8(a) programs."²⁶ In USA Fabrics, Inc., the protester challenged an agency's decision to set aside the acquisition for SBCs and not to set aside the procurement for HUBZone SBCs.²⁷ The GAO

¹⁹ See FPDS Next Generation, www.fpds.gov.

²⁰ These goals are summarized as follows: SBCs-23%; SDBs-5%; WOSBs-5%; HUBZone-3%; and SDVO SBCs-3%. 15 U.S.C. § 644(g)(1). Because these statutory goals are Government-wide, the percentages are based on the aggregate of all Federal procurement. The Act also requires that each Federal department and agency have an annual goal that presents, for that agency, the maximum practicable opportunity for SBCs. *Id.* This agency goal is separate from the Government-wide goal.

²¹ The SBA implements its statutory programs in its regulations as follows: 8(a) BD, 13 C.F.R. pt. 124; SDB, 13 C.F.R. pt. 124; HUBZone, 13 C.F.R. pt. 126; and SDVO, 13 C.F.R. pt. 125. The SBA has not yet issued regulations implementing the WOSB program.

²² 13 C.F.R. §§ 124.503(j), 125.19(b), & 126.607(b).

²³ The FAR states that CO's must set aside acquisitions exceeding the simplified acquisition threshold for competition restricted to HUBZone SBCs and must consider HUBZone set-asides before considering HUBZone sole source awards or small business set-asides. 48 C.F.R. § 19.1305(a). Further, the FAR provides that a CO shall set aside any acquisition over \$100,000 for small business participation when there is a reasonable expectation that offers will be obtained from at least two responsible SBCs offering the products or services of different SBCs. *Id.* § 19.502-2(b). Further, the FAR provides that the contracting officer may set-aside acquisitions exceeding the micro-purchase threshold for competition restricted to SDVO SBCs and shall consider service-disabled veteran-owned small business set-asides before considering SDVO SBC sole source awards. *Id.* § 19.1405(a).

²⁴ 48 C.F.R. § 19.800(e).

²⁵ 48 C.F.R. § 19.800(e). This is no longer true. The SBA amended its regulations to provide that "... the contracting officer shall set aside the requirement for HUBZone, 8(a) or SDVO SBC contracting before setting aside the requirement as a small business set-aside." 13 C.F.R. § 126.607(b).

²⁶ *Contract Mgmt., Inc. v. Rumsfeld*, 291 F. Supp. 2d 1166, 1177 (D. Hawaii 2003); *aff'd* 434 F.3d 1145 (th Cir. 2006).

²⁷ *USA Fabrics, Inc.*, B-295737; B-295737.2, 2005 CPD ¶ 82 (Apr. 19, 2005).

DRAFT

Final Panel Working DRAFT

December 2006

defining and addressing bundling.⁴² Both the SBA and the FAR have further defined these bundling provisions in regulations.⁴³ Recently, the SBA and the FAR Council amended their regulations to address interagency contract vehicles and bundling.⁴⁴ Specifically, these regulations state that orders placed against an FSS contract or multiple award indefinite delivery indefinite quantity (IDIQ) contract awarded by another agency must comply with all requirements for a bundled contract when the order meets the definition of “bundled contract.”⁴⁵

Bundling, as defined by the Small Business Act, is not *per se* prohibited. The statute allows an agency to bundle its requirements, if the agency has performed sufficient market research and has justified the bundled action.⁴⁶ In sum, a bundled procurement is justified if the agency will derive measurably substantial benefits as a result of consolidating the requirements into one large contract.⁴⁷ This is true even if the acquisition involves “substantial bundling.”⁴⁸

The Act requires all agencies to provide SBA’s Procurement Center Representative (PCR) with a copy of the solicitation when the procurement renders small business prime contractor participation unlikely and the statement of work includes goods or services currently being performed by SBCs.⁴⁹ If the bundling is justified, the PCR will work with the procuring activity to preserve small business prime and subcontract participation *to the maximum extent practicable*.⁵⁰ If the requirement involves “substantial bundling,” the agency is required to specify actions designed to maximize small business participation as subcontractors at various tiers under the contract.⁵¹

⁴² 15 U.S.C. §§ 632(o), 644(a) & 644(e).

⁴³ See 13 C.F.R. § 125.2, 48 C.F.R. §§ 2.101, 7.104(d)(2)(i), 7.107 and subparts 19.2, 19.4.

⁴⁴ 48 C.F.R. §§ 2.101, 8.404(c)(2), 16.505(a)(7)(iii); 13 C.F.R. § 125.2(d)(1)(iii).

⁴⁵ 48 C.F.R. § 8.404(c)(2); *see also* 48 C.F.R. § 16.505(a)(7)(iii); 13 C.F.R. § 125.2(d)(1)(iii); *Sigmatech, Inc.*, B-296,401 (Aug. 10, 2005) (GAO sustained a protest challenging the bundling of system engineering and support services with other requirements under a single-award BPA issued under awardee’s FSS contract).

⁴⁶ The Small Business Act requires the agency to perform certain “market research to determine whether consolidation of the requirements is necessary and justified” before proceeding with a bundled acquisition strategy. 15 U.S.C. § 644(e)(2)(A); *see also* 13 C.F.R. § 125.2(d)(3); 48 C.F.R. § 10.001(a)(3)(vi).

⁴⁷ 15 U.S.C. § 644(e)(2)(B); *see also* 13 C.F.R. § 125.2(d)(5)(i); 48 C.F.R. § 7.107(a).

⁴⁸ 13 C.F.R. § 125.2(d)(7); 48 C.F.R. § 7.107(e). Substantial bundling is \$7 million or more for the Department of Defense; \$5 million or more for the National Aeronautics and Space Administration, the General Services Administration and the Department of Energy; and \$2 million or more for all other agencies. 13 C.F.R. § 125.2(b)(2)(i); 48 C.F.R. § 7.104(d)(2)(i).

⁴⁹ 15 U.S.C. § 644(a); *see also* 13 C.F.R. § 125.2(b)(3); 48 C.F.R. § 19.202-1(e).

⁵⁰ *See* 15 U.S.C. §§ 644(a) (create procurement that encourages small business prime participation); 15 U.S.C. § 644(e) (“To the maximum extent practicable, procurement strategies used by the various agencies having contracting authority shall facilitate the maximum participation of small business concerns as prime contracts, subcontractors, and suppliers); 15 U.S.C. § 644(e)(3) (maximize small business participation at the subcontract levels).

⁵¹ 15 U.S.C. § 644(e)(3); *see also* 13 C.F.R. § 125.2(d)(7), 48 C.F.R. § 7.107(e).

DRAFT

Final Panel Working DRAFT

December 2006

consolidation has grown with the increased use of interagency contracting vehicles.⁶⁴ Further, testimony received demonstrates that there are still SBCs that believe contract consolidation has resulted in a decline in contract awards to SBCs (despite the fact that Federal purchasing has increased).⁶⁵

Meanwhile, other reports concerning contract bundling have commented on the need for timely and accurate data on bundling.⁶⁶ According to one GAO report, only 4 agencies reported a total of 24 bundled contracts in FY 2002 and 16 agencies reported no bundled contracts despite FPDS data indicating that there were 928 bundled contracts (of which 33% were awarded to SBCs even though, by definition, a small business is precluded from award of a bundled contract).⁶⁷ Similarly, a report by the SBA's Inspector General's (IG's) office reveals that procuring agencies are incorrectly applying the statutory definition of bundling to their requirements or simply failing to notify the SBA of such actions.⁶⁸ Specifically, the report stated that officials at two of four agencies contacted did not know they were mandated to report

2001, at 5 (Oct. 2002), available at www.sba.gov/advo/research/rs221tot.pdf ("for every increase of 100 bundled contracts there was a decrease of 60 contracts to small business; and for every additional \$100 awarded on bundled contracts there was a decrease of \$12 to small business. At a level of \$109 billion in FY 2001, bundled contracts cost small businesses \$13 billion annually. This is making it increasingly difficult for small businesses to compete and survive in the federal marketplace."). We note that the report issued by the Office of Advocacy utilized a definition for the term "bundling" different than set forth in statute but nevertheless provides data on a "type" of contract consolidation.

⁶⁴ OFPP has stated that bundling has been "exacerbated by the use of contract vehicles that are not uniformly reviewed for contract bundling. Orders under agency multiple award contracts (MACs), multi-agency contracts, Government-Wide Acquisition Contracts (GWACs) and GSA's Multiple Award Schedule program are not subject to uniform reviews for contract bundling issues." OFPP, *Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Businesses*, at 5. According to the report issued by the SBA's Office of Advocacy, there were over 10,000 consolidated orders/modifications issued in FY 1992 - FY 2001 off the FSS for a total of over \$50 million. Office of Advocacy, U.S. Small Bus. Admin., *The Impact of Contract Bundling on Small Business FY 1992 – FY 2001*, at 5, 15, 27 (the most frequently used contract vehicles for bundling are GSA Schedules, MACs, BOAs and IDIQ contracts).

⁶⁵ See Testimony of William Correa, Paragon Project Resources, May 23, 2005, p. 30; see also Amey, p. 329; Lozano at p.1-2.

⁶⁶ GAO, GAO-04-454, *Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain*, at 6; IG, *Audit of the Contract Bundling Process*, No. 5-20 at 8-9; OFPP, *Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Businesses*, at 8.

⁶⁷ U.S. Government Accountability Office, GAO-04-454, *Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain*, at 2. The report takes issue with the data showing that 33% of the bundled contracts were awarded to SBCs since, by definition, a small business is precluded from award of a bundled contract. *Id.* at 6.

⁶⁸ Office of the Inspector General, U.S. Small Bus. Admin., *Audit of the Contract Bundling Process*, No. 5-20 at 4-5 (May 20, 2005); GAO, GAO-04-454, *Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain*, at 6 (agencies are confused by statutory definition of bundling). According to the report, officials at two of four agencies contacted did not know they were mandated to report all potential bundlings. *Id.* at 5. Further, the IG noted three instances where an agency did not classify a procurement as bundled, but the SBA Procurement Center Representative (PCR) did. Audit of the Contract Bundling Process, at 6.

DRAFT

Final Panel Working DRAFT

December 2006

longer considered a bundled contract and therefore there are no reporting and review requirements.

Testimony shows that staffing is short at the procuring agencies, and many experienced procurement officials are retiring, which leaves new and untrained procurement officials the task of structuring the acquisition.⁷⁷

If the contracting community better understands contract bundling, mitigation of bundled requirements, and the impact of such bundling on small businesses, it could alleviate some of the concern many have that bundling is detrimental to SBCs.

Moreover, there have been several reports issued that attempt to address the impact of contract bundling, the results and findings of which differ.⁷⁸ Some reports directly attribute bundling to a decrease in contract awards to SBCs. However, one of these reports used a definition for the term “bundling” that differs from the statutory term for its analysis. Meanwhile, a recent report showed that only 4 agencies reported a total of 24 bundled contracts in FY 2002 and 16 agencies reported no bundled contracts despite FPDS data indicating that there were 928 bundled contracts (of which 33% were awarded to SBCs despite the fact SBCs, by statute, cannot receive a bundled contract).

There is also confusion regarding the requirement of and need to mitigate the impact of contract bundling on small businesses. For example, if the bundling is justified, and assuming the agency realizes it must report the requirement to the SBA’s PCR, the PCR will work with the procuring activity to preserve small business prime and subcontract participation *to the maximum extent practicable*. If the requirement involves “substantial bundling,” the agency is required to specify actions designed to maximize small business participation as subcontractors at various tiers under the contract. Thus, the statute requires agencies to mitigate the effects of bundling on SBCs, but does not provide specific strategies on such mitigation. The implementing regulations provide a little more direction, but do not provide enforceable requirements. For example, the SBA’s regulations state that the agency will make “recommendations” on maximizing small business participation. Likewise, if the bundling is “substantial,” the agency must merely document actions designed to maximize small business participation as primes and subcontractors. There is no requirement that the agency take certain mitigation actions. At least one procurement official acknowledged that “every case is really an individual case. I don’t think you can just say we are going to consolidate all aspects of a base operation for every base. . .”⁷⁹ Another procurement official acknowledged that in some cases, the procuring agency has

⁷⁷ Testimony of Thomas Reynolds, September 27, 2005, p. 31 (“Currently where I am stationed at, we have got approximately 15 people trying to manage a \$1.4 billion a year cost reimbursement contract. We are now getting pressure to try and award more small business contracts out of this large management contract, which is fine. There’s still only 15 people there. How are they going to do that?”).

⁷⁸ GAO, GAO-04-454, *Impact of Strategy to Mitigate Effects of Contract Bundling on Small Business is Uncertain; IG, Audit of the Contract Bundling Process*, No. 5-20; OFPP, *Contract Bundling: A Strategy for Increasing Federal Contracting Opportunities for Small Businesses*; Office of Advocacy, U.S. Small Bus. Admin., *The Impact of Contract Bundling on Small Business FY 1992 – FY 2001*, (Oct. 2002).

⁷⁹ Testimony of Ronald Poussard, U.S. Air Force, September 27, 2005, p. 176.

DRAFT

Final Panel Working DRAFT

December 2006

statutory provisions for each program, *e.g.*, anticipated award price limits for sole source or competitive awards, awards to be made at fair market price etc.

Thus, the Panel recommends that the SBA and FAR regulations be amended to comply with these statutory changes and to resolve any current conflicts. The Panel recommends the following:

- Delete 48 C.F.R. § 19.800 (e)
~~Before deciding to set aside an acquisition in accordance with subpart 19.5 [small businesses], 19.13 [HZ], or 19.14 [SDVO] the contracting officer should review the acquisition for offering under the 8(a) program. If the acquisition is offered to the SBA, SBA regulations (13 C.F.R. § 126.607(b)) give first priority to HUBZone 8(a) concerns.~~
- Amend 48 C.F.R. § 19.201(c) to add the following at the end of the paragraph:
*** * *In order to achieve the Government-wide and agency goals, the contracting officer is provided the discretion in deciding whether to utilize the 8(a) BD, HUBZone or SDVO SBC Programs for a specific procurement. The contracting officer must comply with all other statutory and regulatory requirements related to the conduct of market research and the use of the various small business programs.**
- Amend 13 C.F.R. § 124.504(j) to read as follows:
The contracting officer ~~should~~ **shall** consider setting-aside the requirement for HUBZone, 8(a), or SDVO SBC participation before considering setting aside the requirement as a small business set aside.
- Rerumber paragraphs (b) through (e) as (c) through (f) and add a new paragraph (b) to 13 C.F.R. § 125.2 to read as follows:
In order to achieve the Government-wide and agency goals, the contracting officer is provided the discretion in deciding whether to utilize the 8(a) BD, HUBZone or SDVO SBC Programs for a specific procurement. The contracting officer must comply with all other statutory and regulatory requirements related to the conduct of market research and the use of the various small business programs.
- Amend 13 C.F.R. § 125.19(b) to read as follows:
If the contracting officer determines that §125.18 does not apply, the contracting officer ~~shall~~ **should** consider setting aside the requirement for 8(a), HUBZone, or SDVO SBC participation

DRAFT

Final Panel Working DRAFT

December 2006

Although this new statutory provision is meant to deter the use of cascading procurements, it nonetheless still allows such procurements in limited situations. For the reasons set forth in the findings and above, the Panel believes that the use of cascading procurements should be precluded. If a contracting officer performs adequate market research, he/she will know whether there are two or more 8(a), HUBZone, SDVO SBCs or small businesses that can offer on the requirement. Therefore, the Panel recommends that Congress repeal this new provision and that language should be added to preclude the use of cascading procurement. This language should be included in 41 U.S.C. § 253, to apply to the civilian agencies, and 10 U.S.C. § 2304 to apply to the DoD. The recommended amendments are as follows:

- Add a new paragraph to 10 U.S.C. § 2304 as follows:
 - (l) The Secretary of Defense shall prescribe guidance for the military departments and the Defense Agencies prohibiting the use of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract.**
- Add a new paragraph to 41 U.S.C. § 253 as follows:
 - (j) The Federal Acquisition Regulation shall prescribe guidance for the executive agencies prohibiting the use of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract.**

2. Guidance with Contract Consolidation

As discussed above, in analyzing the issues involving small business participation in consolidated contracts, the Panel made two findings. First, the Panel determined that the contracting community does not properly apply and follow the governing contract bundling

GUIDANCE ON USE OF TIERED EVALUATIONS OF OFFERS FOR CONTRACTS AND TASK ORDERS UNDER CONTRACTS.

(j) *Guidance Required.* -- The Secretary of Defense shall prescribe guidance for the military departments and the Defense Agencies on the use of tiered evaluations of offers for contracts and for task or delivery orders under contracts. (b) *Elements.*--The guidance prescribed under subsection (j) shall include a prohibition on the initiation by a contracting officer of a tiered evaluation of an offer for a contract or for a task or delivery order under a contract unless the contracting officer-- (1) has conducted market research in accordance with part 10 of the Federal Acquisition Regulation in order to determine whether or not a sufficient number of qualified small businesses are available to justify limiting competition for the award of such contract or task or delivery order under applicable law and regulations; (2) is unable, after conducting market research under paragraph (1), to make the determination described in that paragraph; and (3) includes in the contract file a written explanation of why such contracting officer was unable to make such determination.

DRAFT

Final Panel Working DRAFT

December 2006

definition and requirements. Second, the Panel determined that agency officials need targeted training on the general requirements and benefits of contracting with small businesses.

Specifically, the Panel recommends that:

- The OFPP create an interagency task force to develop best practices and strategies to unbundle contracts and mitigate the effects of contract bundling.
- The OFPP coordinate the development of a government-wide training module for all federal acquisition team members and program managers to acquaint them with the legislative and regulatory requirements of contracting with small business, as well as contract bundling. The training module should include a segment on the laws and regulations regarding bundling, and subcontracting with small businesses, with the goal of developing a common understanding and standard implementation of small business subcontracting goals across Government. Training should emphasize uniform guidance to large businesses in relation to developing and/or specifying categorical small business goals for Small Business subcontracting plans. Training also should emphasize processes for determining realistic and achievable goals based on both the objective of achieving government-wide small business utilization goals, and consideration and analysis of the unique functional and programmatic requirements of each particular solicitation.

III. The Ability of Small Business to Compete in the Multiple Award Contracting Environment

A. Background

As discussed elsewhere in this Report, the Federal Acquisition Streamlining Act of 1994 (FASA)¹⁰³ formalized the task or delivery order contracting technique, whereby the government acquires supplies or services during the contract period by issuing an order to the contractor. Generally, the government is only obligated to acquire a stated minimum of supplies or services, and the contractor is only obligated to provide a stated maximum. Congress established a preference for the award of multiple contracts when utilizing the technique, and a requirement that each contractor be provided a "fair opportunity" to compete for an order, with limited exception.¹⁰⁴ Contracting officers were given wide latitude in conducting competitions for

¹⁰³ Pub. L. No. 103-355, 108 Stat. 3423 (1994).

¹⁰⁴ FAR 16.505(b).

DRAFT

Final Panel Working DRAFT

December 2006

Reserving prime contract awards for SBCs ensures that SBCs have an opportunity to compete, as prime contractors, for future orders. Without the mechanism, SBCs would be unable to compete for award for prime contracts under many of the broadly written statements of work utilized in today's contracting environment,¹³⁸ relegating SBCs exclusively to a subcontracting role. Procuring agencies created the reservation mechanism as a result of concern about their ability to achieve their small business prime contracting goals when utilizing multiple award contracts competed on a full and open basis.¹³⁹ In a report on multiple-award contracting, GAO examined the practices of six federal organizations and noted that most of the organizations had taken some action to enhance small business participation. Three of the six organizations that GAO reviewed had reserved one or more prime contract awards for SBCs under full and openly competed contracts.¹⁴⁰ GAO singled out the Department of Transportation's (DOT's) "comprehensive" initiative to promote small business competition, where the agency divided its information technology services requirement into three functional areas, and reserved one award in each functional area for a small business and a small disadvantaged business participating in the 8(a) BD program.¹⁴¹ GAO concluded that DOT's approach "appears to have been successful," noting that ten of 20 contracts were awarded to small businesses, and small business prime contractors received 39 percent of the orders issued.¹⁴² SBA's regulations specifically cite the reservation of prime contract awards for SBCs in the context of full and open multiple award procurements as a way for agencies to mitigate bundling.¹⁴³ In fact, because GAO has held that if an agency reserves one or more prime contract awards for SBCs the procurement is "suitable" for award to an SBC and therefore does not meet the definition of bundling in the Small Business Act, agencies that reserve awards for SBCs do not have to comply with the regulatory bundling analysis and justification provisions.¹⁴⁴

Finally, without guidance, the procurement mechanism will continue to be applied, most likely inconsistently. There are infinite variations on the small business "reserve." Agencies are reserving contracts for the various types of SBCs, e.g., 8(a), Small Disadvantaged Business (SDB), HUBZone, Service-Disabled Veteran-Owned (SDVO). Agencies reserve awards for SDBs, even though there is currently no authority to conduct SDB set-asides.¹⁴⁵ Contracts are reserved for 8(a) concerns, even though 8(a) contracts are defined by statute as contracts that are awarded sole source or on the basis of competition limited exclusively to 8(a) concerns.¹⁴⁶ In

Award Contracting at Six Federal Organizations, GAO/NSIAD-98-215, 10-11 (1998); Michael J. Benjamin, *Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies*, 31 Pub. Con. L.J. 429, 465-6 (2002).

¹³⁸ See Benjamin Test. at 440-1.

¹³⁹ See GAO/NSAID-98-215 at 8-11.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 10-11.

¹⁴² *Id.* at 11.

¹⁴³ 13 C.F.R. § 125.2(b)(6)(i)(C).

¹⁴⁴ See 15 U.S.C. § 632(o)(2); 13 C.F.R. § 125.2(d); *Phoenix Scientific Corp.*, B-286817, Feb. 22, 2001 CPD ¶ 24.

¹⁴⁵ 61 Fed. Reg. 26041, 26048 (1996).

¹⁴⁶ Generally, dollars awarded to an 8(a) concern only count towards an agency's 8(a) prime contracting goals if the contract was an 8(a) contract. In light of the narrow definition of an 8(a) contract, it is questionable whether SBA can accept a contract that has been reserved for 8(a) concerns into the 8(a) BD program, where orders will not be

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DRAFT

Final Panel Working DRAFT

December 2006

addition, the 8(a), HUBZone, and SDVO small business programs take precedence over the small business set-aside program.¹⁴⁷ Arguably, an agency could violate the law by reserving a contract for SBCs, if the contracting officer is aware that two or more responsible 8(a), HUBZone, or SDVO SBCs are likely to submit fair market price offers in response to the solicitation.

2. Competition for Task Orders

Based upon the Small Business Working Group's review of governing laws, policies, practices, available data, and court and administrative board decisions, the Panel developed one specific finding concerning the ability of SBCs to compete for orders under multiple award contracts. Specifically the Panel has determined that explicit guidance is necessary for utilizing small contracting reservations for orders against multiple award contracts. The Panel recognizes that agencies are limiting competition for orders to SBCs under full and openly competed multiple award IDIQ contracts. The Panel has determined that the procurement mechanism is not contrary to the fair opportunity provisions, but contrary to the Section 803 requirements applicable to DoD orders for services valued over \$100,000. However, in the context of orders under the MAS program, Section 803 does not prevent agencies from limiting competition for orders to SBCs. Finally, the Panel recognizes that because there is no express authority for the procurement mechanism, there are also no implementing regulations, which has resulted in inconsistent or confusing utilization of the procurement mechanism.

Agencies are awarding multiple-award contracts that allow competition for orders to be limited to SBCs,¹⁴⁸ even though there is no express legal authority to limit competition for orders based on socioeconomic status.¹⁴⁹ Agencies are limiting competition for MAS orders to SBCs,¹⁵⁰ even though there is no express legal authority to limit competition for MAS orders to

competed exclusively among 8(a) concerns. Assuming that SBA can accept such an offer, because competition for that particular contract is limited to 8(a) concerns, it is questionable whether any order awarded to the 8(a) concern can be counted towards the agency's 8(a) prime contracting goals if the 8(a) concern competed with non-8(a) concerns for the order. 15 U.S.C. § 637(a)(1)(D); 13 C.F.R. § 124.501(b).

¹⁴⁷ FAR 19.501(c)-(e); 13 C.F.R. § 125.19.

¹⁴⁸ See *LB&B Assoc., Inc. v. United Sates*, Case No. 05-1066c, United States Court of Federal Claims; *Prof'l Performance Dev. Group, Inc.*, B-294054, Sep. 30, 2004, 2004 CPD ¶ 191; *Size Appeal of the Dep't of the Air Force*, SBA No. SIZ-4732 (2005); Mary Mosquera, *21 Firms to Compete in New Treasury Initiative*, Wash. Post, Nov. 14, 2005, at D4 (Department of Treasury's five-year, \$3 billion TIPPS-3 contract, where orders under \$250,000 will be set aside for SBCs).

¹⁴⁹ See FAR subpart 16.5, part 19.

¹⁵⁰ See *Client Network Services, Inc. v. U.S.*, 64 Fed. Cl. 784 (Fed. Cl. 2005); *Systems Plus, Inc.*, B-297215; *Information Ventures, Inc.*, B-297225, Dec. 1, 2005, 2005 CPD ¶ 216; *Planned Systems International, Inc.*, B-292319.7, Feb. 24, 2004, 2004 CPD ¶ 43; *CMS Information Services, Inc. - Reconsideration*, B-290541.2, Nov. 13, 2002; *CMS Information Services, Inc.*, B-290541, Aug. 7, 2002, 2002 CPD ¶ 132; *Size Appeal of Client Network Services, Inc.*, SBA No. SIZ-4686 (2005); *Size Appeal of the MIL Corporation*, SBA No. SIZ-4641 (2004); *Size Appeal of Advanced Management Technology, Inc.*, SBA No. SIZ-4638 (2004); *Size Appeals of Vistronix, Inc. and Department of Justice*, SBA No. SIZ-4585 (2003); *Size Appeal of Vistronix, Inc.*, SBA No. SIZ-4550 (2003); *Size Appeal of Jason Associates, Inc.*, SBA No. SIZ-4489 (2002); *NAICS Appeal of SCI Consulting, Inc.*, SBA No. NAICS-4488 (2002); *Size Appeal of Advanced Technologies and Laboratories International, Inc.*, SBA No. SIZ-

(cont...)

DRAFT

Final Panel Working DRAFT

December 2006

writing that that no additional qualified contractors exist.¹⁶⁰ As of September, 2005, 4402 of 5086 contractors on GSA's Schedule 70 (General Purpose Commercial Information Technology Equipment, Software, and Services) are SBCs (approximately 87%). As of the same date, 1166 of 1666 contractors on GSA's 874 MOBIS Schedule (Mission Oriented Business Integrated Services) are SBCs (approximately 70%). Thus, under these very popular Schedules, a DoD procuring activity could provide notice of its intent to purchase to a small percentage of SBCs on the Schedule and easily receive at least three offers.

Finally, without guidance, the procurement mechanism will continue to be applied, most likely inconsistently. As reflected in Section III(A) of this Report, there have been numerous size protest and appeal decisions concerning size status, and thus eligibility, for orders that were awarded pursuant to competition limited to SBCs.¹⁶¹

C. Recommendations

1. Competition for Multiple Award Contracts

An agency must conduct market research to determine whether a total or partial small business set-aside is appropriate before issuing any solicitation, including a solicitation where multiple contracts will be awarded. *See FAR §§ 10.001, 10.002, 19.502-2, 19.800(e), 19.1305, 19.1405, 38.101(e); 13 C.F.R. § 125.19(b).* If a set-aside is not appropriate, then a solicitation for multiple awards will be issued on a full and open competitive basis. As discussed in the Background and Findings under Section III of this Report, some procuring agencies are reserving one or more prime contracts for SBCs in the context of full and open multiple award procurements. The Working Group found that reserving multiple award contracts for SBCs helps procuring agencies achieve their annual small business prime contracting goals and mitigates the effects of bundling. There is no express legal authority for a small business reserve in the context of a full and open procurement. In fact, reserving contracts based on socio-economic status under full and open multiple award procurements may be contrary to the Competition in Contracting Act and its implementing regulations. Consequently, the Panel recommends that 10 U.S.C. § 2304a(d)(3) and 41 U.S.C. § 253h(d)(3) be amended to provide a new paragraph (C):

(3) The regulations implementing this subsection shall --

¹⁶⁰ Section 803(b)(4) of the National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001); *see also* DFAR 216.505-70.

¹⁶¹ *LB&B Assoc., Inc. v. U.S.*, 68 Fed. Cl. 765 (Fed. Cl. 2005); *Client Network Servs., Inc. v. United States*, 64 Fed. Cl. 784 (2005); *Sys. Plus, Inc.*, B-297215; *Planned Sys. Int'l, Inc.*, B-292319.7, Feb. 24, 2004, 2004 CPD ¶ 43; *CMS Info. Servs., Inc. - Reconsideration*, B-290541.2, Nov. 13, 2002; *CMS Info. Servs. Inc.*, B-290541, Aug. 7, 2002, 2002 CPD ¶ 132; *Size Appeal of Client Network Servs., Inc.*, SBA No. SIZ-4686 (2005); *Size Appeal of the Dep't of the Air Force*, SBA No. SIZ-4732 (2005); *Size Appeal of the MIL Corp.*, SBA No. SIZ-4641 (2004); *Size Appeal of Advanced Mgmt. Tech., Inc.*, SBA No. SIZ-4638 (2004); *Size Appeals of Vistronix, Inc. & Dep't of J.*, SBA No. SIZ-4585 (2003); *Size Appeal of Vistronix, Inc.*, SBA No. SIZ-4550 (2003); *Size Appeal of Jason Assoc., Inc.*, SBA No. SIZ-4489 (2002); *NAICS Appeal of SCI Consulting, Inc.*, SBA No. NAICS-4488 (2002); *Size Appeal of Advanced Techs. & Labs. Int'l, Inc.*, SBA No. SIZ-4484 (2002); *Size Appeals of SETA Corp. & Fed. Emergency Mgmt. Agency*, SBA No. SIZ-4477 (2002).

DRAFT

Final Panel Working DRAFT

December 2006

(1) The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor must furnish any additional quantities, not to exceed the stated maximum. The contracting officer should establish a reasonable maximum quantity based on market research, trends on recent contracts for similar supplies or services, survey of potential users, or any other rational basis.

(2) To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order.

(3) The contract may also specify maximum or minimum quantities that the Government may order under each task or delivery order and the maximum that it may order during a specific period of time.

(4) A solicitation and contract for an indefinite quantity must—

* * * *

(iv) State the procedures that the Government will use in issuing orders, including the ordering media, and, if multiple awards may be made, state the procedures and selection criteria that the Government will use to provide awardees a fair opportunity to be considered for each order (see 16.505(b)(1)) **and state whether competition for particular orders may be limited based on socio-economic status;**

* * * *

The Panel further recommends that FAR § 16.505 be amended to provide:

(b) Orders under multiple award contracts—

(1) Fair opportunity.

(i) The contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding \$2,500 issued under multiple delivery-order contracts or multiple task-order contracts, except as provided for in paragraph (b)(2) of this section.

(ii) The contracting officer may exercise broad discretion in developing appropriate order placement procedures. The

DRAFT**Final Panel Working DRAFT****December 2006**

contracting officer should keep submission requirements to a minimum. Contracting officers may use streamlined procedures, including oral presentations. In addition, the contracting officer need not contact each of the multiple awardees under the contract before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order. The competition requirements in Part 6 and the policies in Subpart 15.3 do not apply to the ordering process. However, the contracting officer must—

(A) Develop placement procedures that will provide each awardee a fair opportunity to be considered for each order and that reflect the requirement and other aspects of the contracting environment;

(B) Not use any method (such as allocation or designation of any preferred awardee) that would not result in fair consideration being given to all awardees prior to placing each order;

(C) Tailor the procedures to each acquisition;

(D) Include the procedures in the solicitation and the contract; and

(E) Consider price or cost under each order as one of the factors in the selection decision.

(iii) The contracting officer should consider the following when developing the procedures:

(A) (1) Past performance on earlier orders under the contract, including quality, timeliness and cost control.

(2) Potential impact on other orders placed with the contractor.

(3) Minimum order requirements.

(4) The amount of time contractors need to make informed business decisions on whether to respond to potential orders.

(5) Whether contractors could be encouraged to respond to potential orders by outreach efforts to promote exchanges of information, such as—

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DRAFT

Final Panel Working DRAFT

December 2006

(6) Whether competition for orders will be limited based on socio-economic status.

* * * *

The Panel further recommends that DFAR § 216.505-70 be amended to provide:

(a) This subsection--

- (1) Implements Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107);
- (2) Applies to orders for services exceeding \$100,000 placed under multiple award contracts, instead of the procedures at FAR 16.505(b)(1) and (2) (see Subpart 208.4 for procedures applicable to orders placed against Federal Supply Schedules);
- (3) Also applies to orders placed by non-DoD agencies on behalf of DoD; and
- (4) Does not apply to orders for architect-engineer services, which shall be placed in accordance with the procedures in FAR Subpart 36.6.

* * * *

(c) An order for services exceeding \$100,000 is placed on a competitive basis only if the contracting officer--

- (1)(i) Provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection, to all contractors offering the required services under the multiple award contract; and
- (2)(ii) Affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.; or

(2) (i) Provides a fair notice of the intent to make the purchase, including a description of the work the contractor shall perform and the basis upon which the contracting officer will make the selection, to all small business contractors offering the required services under the multiple award contract; and

DRAFT

Final Panel Working DRAFT

December 2006

(d) *Evaluation.* The ordering activity shall evaluate all responses received using the evaluation criteria provided to the schedule contractors (**unless competition was limited based on socio-economic status (see 8.405-5(b)(1))**). The ordering activity is responsible for considering the level of effort and the mix of labor proposed to perform a specific task being ordered, and for determining that the total price is reasonable. Place the order, or establish the BPA, with the schedule contractor that represents the best value (see 8.404(d)). After award, ordering activities should provide timely notification to unsuccessful offerors. If an unsuccessful offeror requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the award decision shall be provided.

The Panel also recommends that DFAR § 208.404-70 be amended to provide:

(a) This subsection--

- (1) Implements Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107) for the acquisition of services, and establishes similar policy for the acquisition of supplies;
- (2) Applies to orders for supplies or services under Federal Supply Schedules, including orders under blanket purchase agreements established under Federal Supply Schedules; and
- (3) Also applies to orders placed by non-DoD agencies on behalf of DoD.

* * * *

(c) An order exceeding \$100,000 is placed on a competitive basis only if the contracting officer provides a fair notice of the intent to make the purchase, including a description of the supplies to be delivered or the services to be performed and the basis upon which the contracting officer will make the selection, to--

- (1) As many schedule contractors as practicable, consistent with market research appropriate to the circumstances, to reasonably ensure that offers will be received from at least three contractors that can fulfill the requirements, and the contracting officer--
 - (i)(A) Receives offers from at least three contractors that can fulfill the requirements; or

DRAFT

Final Panel Working DRAFT

December 2006

- (B) Determines in writing that no additional contractors that can fulfill the requirements could be identified despite reasonable efforts to do so (documentation should clearly explain efforts made to obtain offers from at least three contractors); and
 - (ii) Ensures all offers received are fairly considered; or
- (2) As many small business schedule contractors as practicable, consistent with market research appropriate under the circumstances, and the contracting officer receives offers from at least three small business schedule contractors that can fulfill the work requirements; or**
- (2)(3) All contractors offering the required supplies or services under the applicable multiple award schedule, and affords all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.**
- (d) See PGI 208.405-70 (Pop-up Window or PGI Viewer Mode) for additional information regarding fair notice to contractors and requirements relating to the establishment of blanket purchase agreements under Federal Supply Schedules.

DRAFT

Final Panel Working DRAFT

December 2006

Appendices

Small Business Goal	Small Business Actual	Total SDB Actual	8(a) Goal	8(a) Actual	Other SDB Goal	Other SDB Actual
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DRAFT

Final Panel Working DRAFT

December 2006

contracting officers to subcontractor complaints. Most recently, Defense Contract Management Agency issued an Information Memorandum No. 05-022, August 24, 2005, that provides administrative contracting officers and contract administrators with guidance on the remedies available to them for the untimely payment to subcontractors. An inquiry has been made as to the existence of similar guidance for civilian agencies.

Since Public Law 95-507, subcontracting on large federal contracts has become important to small business. Based on data from the Small Business Administration (SBA), the dollars paid to small subcontractors increased by 40 percent from fiscal year 1993 to fiscal year 2001.

Prompt Payment – Background, Current Practices and Oversight

Federal agencies maintain a high degree of interest in their contractor teams efficiently working together to achieve program and mission goals. A program where prime contractors consistently pay subcontractors on time can indicate financial solvency on the part of all involved, as well as satisfactory subcontractor performance. Failure to pay, however, can portend financial difficulties on the part of the prime or unacceptable performance on the part of the subcontractor and, as a result, increase the risk of program failure.

According to Defense Contract Management Agency Memorandum No. 05-022, Contracting Officers and Contract Administrators have the following remedies available when prime contractors fail to pay subcontractors in accordance with the terms and conditions of a subcontract or subcontract invoice:

- **Recommend removal of the prime from the Direct Billing Program for not following approved payment procedures, in coordination with DCAA.**
- **Assign high risk ratings on prime contractor subcontracting plans for failure to manage subcontracts.**
- **Decrement billing rates, in coordination with DCAA.**
- **Implement fee or payment withholding.**
- **Suspend or reduce progress payments.**
- **Document poor subcontract management in contract performance ratings**
- **Disallow unpaid subcontract costs for financing and interim payments.**

DRAFT

Final Panel Working DRAFT

December 2006

Legislation and Regulations Affecting Federal Primes and Subcontracts

1. **Public Law 85-536.** Passed in 1958, this legislation amended the Small Business Act of 1953 and authorized a voluntary subcontracting program. Prior to 1978, this statute was implemented most effectively in the Armed Services Procurement Regulations (ASPR), a predecessor to the FAR. It required large contractors receiving contracts over \$500,000 with substantial subcontracting opportunities to establish a program that would enable minority business concerns to be considered fairly as subcontractors or suppliers.
2. **Public Law 95-507.** Passed in 1978, this legislation amended Section 8(d) of the Small Business Act and created the foundation for the Subcontracting Assistance Program, as it is known today. It changed the participation of large contractors in the program from voluntary to mandatory, and it changed the language of the law from "best efforts" to "maximum practicable opportunities." Key features include:
 - a. A requirement that all Federal contracts in excess of \$100,000 (as amended) provide maximum practicable opportunity for small and small disadvantaged business to participate; and
 - b. A requirement that all Federal contracts in excess of \$500,000 (\$1,000,000 in the case of construction contracts for public facilities) is accompanied by a formal subcontracting plan containing separate goals for small business and small disadvantaged business.
3. **Public Law 98-577 (The Small Business and Federal Procurement Enhancement Act of 1984).** This legislation amended the Small Business Act as follows:
 - a. By providing that small and small disadvantaged businesses be given the maximum practicable opportunity to participate in contracts and subcontracts for subsystems, assemblies, components, and related services for major systems; and
 - b. By requiring Federal agencies to establish procedures to ensure the timely payment of amounts due pursuant to the terms of their subcontracts with small and small disadvantaged businesses.
4. **Public Law 99-661 (The National Defense Authorization Act of 1987).** Section 1207 of this statute required the Department of Defense to establish as its objective a goal of five percent of the total combined amount obligated for contracts and subcontracts entered into with small and small disadvantaged businesses in each of fiscal years 1987, 1988, and 1989. Also, the use of SDB set-asides was authorized. (Subsequent legislation extended this period through the year 2000; however, the set-aside aspect of the program was suspended in fiscal year 1996.)
5. **Public Law 100-180 (The National Defense Authorization Act of 1988 and 1989).** Section 806 required the Secretary of Defense to increase awards to small and small disadvantaged business.

DRAFT

Final Panel Working DRAFT

December 2006

CHAPTER 5

THE FEDERAL ACQUISITION WORKFORCE

REPORT OF THE
ACQUISITION ADVISORY PANEL

December 2006

DRAFT

Final Panel Working DRAFT

December 2006

TABLE OF CONTENTS

I.	Background
A.	Why Focus on the Acquisition Workforce?.....
B.	The Problem of Counting the Workforce
C.	The Beacon Report
II.	Issues to Consider
III.	Acquisition Workforce-Related Findings
IV.	Acquisition Workforce Recommendations.....

DRAFT

Final Panel Working DRAFT

December 2006

procurement Personnel Information system” for overseeing the development and maintenance of a competent acquisition workforce.² In fact, the 1972 Commission had to resort to its own survey in order to obtain information on the federal acquisition workforce sufficient to perform its analysis.³ A recurring theme has been the need to re-conceptualize and reorganize the procurement function in a manner that helps to make procurement an effective and efficient tool for achieving agency missions. Indeed, the Office of Federal Procurement Policy was created to address this very concern. The 1972 Commission specifically recommended that OFPP be tasked with determining the overall acquisition workforce needs of the government and seeing that they were met.⁴

The National Performance Review in the 1990’s echoed these sentiments, leading with the statement that “No matter how good a policy may be on paper, it will not be effective without well-motivated, competent people to implement it.”⁵ The NPR, while reducing the federal workforce,⁶ made recommendations for changes in the management of the procurement system that emphasized a broader role for line managers, encouraged the creation of competitive enterprises within government; expanded the use of the GSA Schedules, and emphasized acquisition of commercial items (as did the Section 800 Panel Report). Many of these proposals were subsequently enacted as part of FASA, FARA and the Government Management Reform Act of 1994. As a consequence of implementation of many of these proposals, and the increased use of interagency contracts, there are more people whose responsibilities touch on the acquisition function. In addition, a consensus has emerged that a functional definition of the acquisition workforce should not be limited to persons engaged in entering contracts. Rather, the acquisition function and workforce should be understood to include, as well:

- Agency personnel responsible for determining and defining agency requirements for goods and services
- Agency personnel responsible for intimate familiarity with the markets in which the agency will seek goods and services to meet agency needs
- Agency personnel responsible for monitoring and measuring contract performance, including testing of goods, auditing, contract administration, and evaluation of contractor performance

² *Id.*

³ *Id.*

⁴ *Id.* ch. 5..

⁵ National Performance Review, Reinventing Federal Procurement, PROC02 (Sept. 14, 1993); compare the statement of the 1972 Commission “People are the most critical part of any effective procurement process. We have good people throughout all levels of procurement organizations today, but nowhere is it more apparent that concerted management attention is needed than in the area of organizing and planning for the procurement workforce of the future.” Comm’n Report, ch.5 at 46.

⁶ During the 1990s, the overall federal workforce was reduced by about half a million people. See Jacques S. Gansler, *A Vision of the Government as a World-Class Buyer: Major Procurement Issues for the Coming Decade* 19 (Univ. of Md. 2002).

DRAFT

Final Panel Working DRAFT

December 2006

Note that if we want to employ consistent measures over the course of the last quarter century, we are compelled to employ the narrowest definitions of the acquisition workforce, looking only at data on 1102s and 1105s. But even this approach may offer a distorted benchmark, as the proportion of contracting officers, for instance that are designated as 1102s, may not be consistent over time, and across agencies.

Undoubtedly, the traditional FAI count of the acquisition workforce casts too narrow a net in gauging the resources available to do the government's acquisition work. For instance, the Panel is aware that there are today some agencies, such as GSA, in which there are more non-1102 contracting officers than there are 1102 contracting officers. In such agencies the FAI data (which counts only 1102s) is extremely misleading. On the other hand, broader measures of the acquisition workforce such as those used in the DoD counting methods (discussed below) may overstate the resources of the acquisition workforce because they include many people doing non-Acquisition-related work in Acquisition organizations. This is particularly true of the "Acquisition Organization" definition of the acquisition workforce described below, but it has some relevance even to the more carefully constructed AT&L workforce definition that is also described below. Specifically, as explained below, the AT&L definition includes personnel in acquisition-related organizations who perform technology-related functions. There is no denying that these personnel play an important role in the acquisition process; yet many of these personnel have other responsibilities besides acquisition and their inclusion in a count of the acquisition workforce may therefore result in overstating the resources available for the performance of acquisition functions, and may thus disguise the extent of the sharp decline in personnel trained for core acquisition functions.

Definitions Make a Difference

Parsing different definitions of the Acquisition Workforce is a highly technical matter that some might doubt will yield information of policy importance. In fact, however, discrepancies in definition and measurement of the workforce are so large in magnitude as to drown out the evidence of the changes that we are trying to measure and understand, unless we properly take account of these differences in definition and measurement. This is visible if we examine the widely differing approaches that have been used in recent years to count the Department of Defense acquisition workforce.

Counting the Defense Acquisition Workforce

There are at least three different ways of counting the Defense Department portion of the acquisition workforce that have been used over the last 15 years. The measures employed by the Department of Defense itself, moreover, historically have not been

¹³ *Id.* at 38, tbl. 4-1. Because the 1982 count for what was then labeled the "Acquisition Workforce" did not list the occupational series comprised therein, a rigorous comparison between this 2004 "logistics occupations populations" count and the 1982 count for the "Acquisition Workforce" is not possible.

DRAFT

Final Panel Working DRAFT

December 2006

commensurable with those used to measure the Acquisition Workforce of civilian agencies. The three approaches to counting the DoD acquisition workforce are as follows:

FAI Count for DoD

The Federal Acquisition Institute has counted the DoD component of the federal acquisition workforce using the same categories as it uses to count that workforce across the face of the federal government. Thus data has been collected and reported on the number of 1102s and 1105s, and the numbers in some of the other 1100 occupational series within the Defense Department. By summing up the data FAI has reported for the Army, Air Force, Navy and Other DoD we can generate an FAI count for the DoD acquisition workforce. This is the narrowest measure of the acquisition workforce for DoD.

Acquisition Organization Count (for DoD)

By contrast, Section 912(a) of the National Defense Authorization Act for Fiscal Year 1988, defines the term “defense acquisition personnel” to include all personnel employed in any of 22 listed “acquisition organizations,” regardless of the employee’s own occupation, but excluding civilian DoD employees employed at maintenance depots. This version of the Acquisition Workforce count is usually known as the “Acquisition Organization” Count. The House Armed Services Committee historically has requested that DoD use this count in reporting acquisition workforce levels to the Committee.¹⁴ Moreover, the series of reductions in the Acquisition Workforce mandated by Congress in the 1990s was gauged with reference to this Acquisition Organization count.

The overbreadth of this Acquisition Organization approach is apparent if one examines the list of Acquisition Organizations. Any organization whose mission includes significant acquisition programs is included in this list, even though many, and in some cases most, of its employees are primarily engaged in other functions. For instance, the Missile Defense Agency is included in this list even though many of its personnel undoubtedly are primarily engaged in other functions. The DoD Inspector General has noted that the Acquisition Organization workforce count includes “non-acquisition personnel performing support functions” including “firefighting, police, human resources, administration, accounting, legal, engineering technicians, supply, transportation and trades (such as equipment and facilities operations and maintenance).”¹⁵ On the other hand, in a different respect, the Acquisition Organization count is too narrow as well, because it excludes any personnel engaged in acquisition functions outside of the listed “acquisition organizations.” Clearly, there are some such personnel.

The ATL Count (for DoD)

¹⁴ U.S. DOD IG, *Human Capital: Report on the DoD Acquisition Workforce Count*, D-2006-073, 7 (2006).

¹⁵ *Id.* .

DRAFT

Final Panel Working DRAFT

December 2006

overstated in important respects because it includes almost *all personnel* in such organizations, no matter how remote their function is from the acquisition process.

- In this respect, the ATL count seeks to strike a compromise between the narrow occupational categories-based definition of the Acquisition Workforce employed by FAI and the overbroad approach of the Acquisition Organization count.
- But this compromise is necessarily imperfect if the AT & L count is to be employed as a gauge of the resources available for acquisition functions. Although every member of the category II grouping included in the AT&L count may have some degree of involvement in acquisition functions, many of these category II personnel spend most of their time on non-acquisition functions.

(It is theoretically conceivable that the concerns raised by the last bullet point might be addressed by having Category II positions rated according to the percentage of their normal workload that is devoted to acquisition-related activities. We could thus translate the gross number of Category II personnel into a smaller number of full time equivalent positions devoted purely to acquisition. But the drawbacks of any such alternative approach are also evident. First, it might well prove unmanageable in practice. Second, this suggestion may founder on the fact that a significant portion of the time of many category II employees will be devoted to activities that inextricably intertwine acquisition and program functions. At most this kind of approach might warrant a pilot study to see if it is readily operationalizable and whether it yields useful information for human capital managers.)

A different response to the concern noted in the last bullet point above can be found in the provision for inclusion or exclusion of individual employees from the Acquisition Workforce count under the rubric of category III. Indeed, Category III provides the AT&L workforce definition with flexibility that both the FAI and Acquisition Organization approaches lack. This feature provides some ability to adjust the workforce definition and count to respond to the concern stated above—that category II may have the effect of overstating the resources that are available for acquisition functions. On the other hand, this same flexibility is also the source of a potential weakness in the Refined Packard Model. That is, by allowing organizations to make individualized determinations as to inclusions and exclusions from the Acquisition Workforce, this provision could potentially open the door to nonuniformity and inconsistency in the definition and counting of the federal acquisition workforce. This could particularly be a problem if this approach were extended to agencies beyond the Department of Defense. A consistent, detailed and uniform methodology for making these category III determinations would have to be applied uniformly by all agencies for this to yield comparable results across the face of different federal agencies.

DRAFT

Final Panel Working DRAFT

December 2006

3. Is the existing workforce sufficiently qualified by background, aptitude, credentials, skills and training to perform the missions that it has been assigned in a manner that assures the effective, efficient and lawful operation of the federal procurement system?
4. Are additional data collection, workforce assessment and human capital planning measures necessary so that the federal government can assure that it can match the workforce “supply” to the functional demand for acquisition management today and in the future?

III. Acquisition Workforce-Related Findings

Finding #1:

The federal acquisition workforce is an essential key to success in achieving the government’s missions. Procurement is an increasingly central part of the government’s activities. Without a workforce that is qualitatively and quantitatively adequate and adapted to its mission the procurement reforms of the last decade cannot achieve their potential, and successful federal procurement cannot be achieved.

Discussion

The experience of Acquisition Advisory Panel members, the testimony received by the panel, and the data collected and surveyed by the Panel all make clear the centrality of the acquisition workforce to the accomplishment of the government’s missions. Both the increased dollar volume of procurement and the qualitative evidence confirm that we have entered what GAO has labeled a “new environment in which there is heavy reliance on contractors to perform functions previously performed by the government.”²⁵ The importance of this trend, already evident, was magnified in the response to the events of September 11, 2001, and the conflicts in Afghanistan and Iraq. As the Comptroller General has noted, expenditures on federal acquisition have increased over 65% since 2001, reaching the level of \$388 billion in fiscal year 2005.²⁶

We have also witnessed a constant stream of reports that document qualitative shortfalls in the performance of the acquisition system -- shortfalls that have been attributed in significant part to inadequate human resources in the acquisition workforce.²⁷ Significantly, among these

²⁵ U.S. GAO, *Highlights of a GAO Forum: Federal Acquisition Challenges and Opportunities in the 21st Century*, GAO-07-45SP, 11-12 (2006).

²⁶ *Id.* at 4.

²⁷ A selective listing of a much larger body of reports includes: U.S. GAO, *High-Risk Series: An Update*, GAO-05-207 (2005); U.S. GAO, *DoD Acquisitions: Contracting for Better Outcomes*, GAO-06-800T (2006); U.S. GAO, *Contract Management: DoD Vulnerabilities to Contracting Fraud, Waste and Abuse*, GAO-06-838R (2006); U.S. GAO, *Defense Acquisitions: Assessments of Selected Major Weapon Programs*, GAO-06-391 (2006); U.S. GAO,

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DRAFT

Final Panel Working DRAFT

December 2006

Finding #2-1:

- **The dollar volume of federal government procurement has increased dramatically since 9/11/2001. Procurement obligations have increased 60% in the last five years. [update data]**

Finding #2-2:

- **In the last twelve years the qualitative nature of the procurement activity has also changed, placing markedly greater demands on the Acquisition Workforce for capability, training, time, and sophistication.**

Finding #2-2-1:

- **There has been a pronounced shift from acquisition of goods to acquisition of services. Service contracting places additional demands on the acquisition workforce, both in the requirements definition and contract formation process, particularly in the realm of performance-based service acquisition, but also on the contract management side.**

Finding #2-2-2:

- **There has been a dramatic shift of federal procurement dollars to the federal supply schedules and other forms of interagency contracting. Although this is often perceived, correctly, as part of the solution to the government's procurement problems and its acquisition workforce shortcomings, it also opens the door to certain problems:**
 - **Heavy reliance on the schedules and other forms of interagency contracting can alleviate the burdens on understaffed agencies insofar as “getting to the initial award,” but too often contributes to subsequent problems that arise when ordering agencies fail to define their requirements adequately, fail to use these vehicles appropriately, fail to secure competition in using these vehicles, or fail to manage contract performance under these vehicles. Some of these problems are more acute with respect to assisting entities as opposed to direct ordering vehicles.**

Finding #2-3:

- **Many transactions have been simplified by the federal acquisition reforms of the last decade. This is particularly true of the purchase card**

DRAFT

Final Panel Working DRAFT

December 2006

in which these qualitative changes have increased the burdens on the acquisition workforce have been too little noticed, and too little understood.

Acquisition workforce burdens frequently resulted from changes in the acquisition system adopted in the last fifteen years. The proponents of these reform initiatives may not have recognized the acquisition workforce demands that they would create, especially when the impact of all of these changes is aggregated. Our point is that the potential for successful mission achievement through acquisition of goods and services, and the pursuit of best value for the government in that process, are both undermined when the acquisition workforce lacks the resources to implement these newer procurement techniques and methods properly.

It is well known that service contracting continues to represent an increasing share of the federal acquisition pie.³² Less well known are the additional demands that service contracting places on the acquisition workforce. Service contracts require additional attention to a variety of steps in the contract formation process, especially in the stage of requirements definition. They also demand additional attention to contract management in order to enable the government to ensure that it is receiving the services for which it has contracted.

All of these phenomena are highlighted within the realm of performance-based services acquisition. As the Panel's findings and recommendations indicate, the proper use of performance-based service acquisition has yet to be mastered by most agencies.³³ In particular, agencies need help in learning to develop and deploy measurable performance standards for such contracts. To some extent, of course, this entails a learning curve, as agencies gain experience with, and adapt to, the proper use of a novel technique for procurement. But the fact remains that the proper use of performance-based services acquisition is –and will remain-- labor intensive for the acquisition workforce, even though it may ultimately save resources for the government as a whole. For instance, as the Panel has recommended, proper use of PBSA should include the development of a “Baseline Performance Case” as part of the associated Performance Work Statement or Statement of Work.³⁴ The findings and recommendations of the Panel on PBSA also emphasize the need for improved contract performance monitoring through the development of contract-specific “Performance Improvement Plans.”³⁵ The acquisition workforce impact of our Panel’s PBSA recommendations are specifically addressed in PBSA recommendation 9 which proposes that the expanded role of contracting officer technical representatives (COTRs) in monitoring and managing performance under PBSA contracts be recognized with enhanced training in PBSA and redesignation of such COTRs as Contracting Officer Performance Representatives.³⁶

³² *Id.*

³³ See Report at _____. (PBSA Ch.)

³⁴ See Report at _____. (PBSA Rec. 5)

³⁵ See Report at _____. (PBSA Rec. 6)

³⁶ See Report at _____. (PBSA Rec. 9). This recognition also underlies the recommendation of the Panel that for more far-reaching performance-based acquisitions (“transformational” PBSA) the COPR be required to be project management certified. Test. of _____, AAP Pub. Meeting (Mar. 17, 2006) Tr. at 24-25.

DRAFT

Final Panel Working DRAFT

December 2006

The Panel's findings regarding Interagency Contracting reflect the mushrooming growth of the federal supply schedules and other forms of interagency contracts.³⁷ As we have noted, usage of interagency contracts is often perceived, correctly, as a solution to problems of inadequate acquisition workforce and skill sets in the agencies that rely on such interagency contracts.³⁸ But heavy reliance on interagency contracts can also contribute to problems as well.³⁹ Specifically, reliance on the schedules and other forms of interagency contracting can alleviate the burdens on understaffed agencies insofar as "getting to the initial award." But where the ordering agencies' acquisition functions are understaffed or the acquisition workforce lacks appropriate skills and training, inappropriate use of such vehicles leads to characteristic kinds of problems. Such problems include failure to use these vehicles appropriately, including out of scope task orders, failure to secure competition in using these vehicles, and failure to manage contract performance under these vehicles. Again we emphasize that this is not to say that the shift to interagency contracting vehicles is undesirable or inappropriate. This trend has enabled many agencies to meet basic needs in a timely fashion. But too often this has been done while sweeping under the rug problems of securing competition, out-of-scope use of contract vehicles, and contract management.

A key objective of procurement reform in the last decade has been to simplify the process of acquisition. Certainly, a number of the new techniques introduced and expanded in this time period have had the effect of simplifying the transactions to which they apply. As we have noted, this is particularly true of the purchase card, the micro-purchase threshold and the simplified acquisition threshold. As we explain below, both here and in connection with Finding #3, however, the aggregate effect of the procurement reforms and other procurement system changes over the last fifteen years has been to complicate other kinds of transactions, and to make the overall system of procurement more complex.

The simplified transactions, such as the purchase card, micropurchases, and transactions below the simplified acquisition threshold represent the overwhelming bulk of procurement transactions if we simply count transactions. But even the simplified purchase card transactions have a more complex impact on the acquisition workforce than was initially appreciated, because of the need to institute appropriate purchase card management and controls.⁴⁰

But it is the remaining share of procurement –outside the ambit of simplified procedures-- that actually requires most of our attention going forward. This remaining share has been estimated to represent only 1% of the transactions, but involves 85% of the procurement

³⁷ See Report at _____ (Interagency \$ share for most recent FY available)

³⁸ Test. of Geraldine Watson, GSA, AAP Pub. Meeting (Aug. 18, 2005) Tr. at 37.

³⁹ *Id.* at 38.

⁴⁰ See OMB, *Improving the Management of Government Charge Card Programs* August 9, 2005) App. B to OMB Circular A-123. The current version of this document is found at http://www.whitehouse.gov/omb/circulars/a123/a123_appendix_b.pdf.

DRAFT

Final Panel Working DRAFT

December 2006

complexity of the acquisition system, taken as a whole, has become a major challenge to the acquisition workforce.⁴⁷

Finding #4:

There are substantial problems with the data that are available on the federal acquisition workforce.

Finding #4-1:

- Data has not been collected in a consistent fashion from year to year or across agencies**

Finding #4-2:

- The acquisition workforce has been defined differently for DoD and for civilian agencies over the period of the acquisition reforms and the acquisition workforce cutbacks that have occurred in the last 15 years.**

Finding #4-3:

- A significant policy issue is presented as to how broadly to define the composition of the acquisition workforce—whether to include all of the functions that complement or support the acquisition function? A broad definition is more consistent with modern understanding and commercial practices regarding the acquisition function, but risks overstating acquisition workforce resources.**

Discussion

The basis for these findings is contained in the discussion in the background section of this chapter, entitled “The Problem of Counting the Workforce.”⁴⁸ To recap only briefly the Federal Acquisition Institute has counted the federal procurement workforce using a narrow definition of that workforce limited to traditional procurement specialties. By contrast, the DoD has used two different approaches that recognize the close interrelationships between requirements setting and technical procurement activities and between program and technology management and the work of monitoring contractor performance and managing the legal and economic relationship between the government and the contractor. There is good reason for

⁴⁷ Test. of Eugene Waszily, GSA IG, AAP Pub. Meeting (May 17, 2005) Tr. at 247-48; Test. of Stan Soloway, Professional Services Council, AAP Pub. Meeting (Nov. 18, 2005), Tr. at 14.

⁴⁸ See Report at _____.

DRAFT

Final Panel Working DRAFT

December 2006

recognizing these close relationships, and for rejecting the idea that there should be an adversary or arm's-length relationship between procurement personnel and their "customers."

Nonetheless, as explained above, these approaches risk overstating the personnel resources available for acquisition by including personnel whose primary responsibilities lie elsewhere. Moreover, we have documented that the trends affecting the acquisition workforce are significantly different depending on which approach to defining and counting that workforce one employs.⁴⁹ Thus there is indeed a significant policy issue at stake in deciding how broadly to define the acquisition workforce

To see why this issue is complex, rather than one-sided, consider the case of agency personnel responsible for defining agency requirements for goods and services to be secured through the procurement process. Certainly the evidence we have received from commercial organizations supports the conclusion that the procurement function is a critical part of management and should not be isolated from organization components that "consume" or complement the goods and services being acquired.⁵⁰ Accordingly, there are good reasons why personnel with operational responsibility who are in a position to determine and define the government's requirements in contracting should be considered part of the broad acquisition workforce.

On the other hand, however, if we are trying to gauge the personnel available for carrying out the acquisition function, it is equally important to bear in mind that many of the personnel who should play a key role in requirements-definition are not, and should not be, engaged full time in the work of acquisition. This same point is at least equally true of project managers, who play a vital role in the acquisition cycle, but are not and should not be available full time for the work of acquisition. Nor are they interchangeable with those personnel who possess the necessary expertise to negotiate the legal requirements of the process of procurement.

The preference for broader definitions of the acquisition workforce that has developed over the last ten years appears to us to reflect a desirable effort to break down barriers between contracting personnel and those who will work with the goods and services to be acquired. At the same time, it would be a mistake to count the latter groups of personnel as though they are engaged full time in the acquisition process.

In short, both the broad and a narrow approach to defining the acquisition workforce add to an accurate understanding of the resources that are available to meet the different demands faced by the acquisition workforce. Therefore, in recommending that OFPP promulgate a uniform approach to data collection on the federal acquisition workforce, we have specified that that definition should employ a dual approach that tracks both narrow contracting specialties, and a broader conception of the interconnected acquisition workforce.⁵¹

⁴⁹ See Report at ____-____, above.

⁵⁰ Test. of Robert Miller, Procter & Gamble, AAP Pub. Meeting (March 30, 2005) Tr. at 99-100.

⁵¹ See Recommendations #1-1 and #1-2, and accompanying discussion at pages ____-____.

DRAFT

Final Panel Working DRAFT

December 2006

Finding #5:

The Federal Government does not have the capacity in its current acquisition workforce necessary to meet the demands that have been placed on it. Because of the absence of human capital planning to date, the Panel cannot definitively conclude whether this is the result of a numbers problem, but has received testimony raising serious concerns about the number, skill sets, deployment, and role in the acquisition process of the acquisition workforce.

- **There were substantial reductions in the acquisition workforce during the decade of the 1990s.⁵²**
- **One result of this is that hiring of new acquisition professionals virtually ceased during this time period.**

Finding #5.1:

- **There were cuts in some agency training budgets in the 1990's that meant the existing workforce was not trained to adapt to the increasingly complex and demanding environment in which they were called upon to function.**
- **Despite recent efforts to devote more attention and funding to workforce training, in many agencies these efforts do not appear to meet the existing and future needs for a trained acquisition workforce**

⁵² In addition to the statistics presented in the Background section of this Chapter, we note the following:

- As of September 30, 1990 the Federal Acquisition Institute reported a total census in 27 "logistics occupations" of 165,739. By September 2000 the comparable statistic had declined to 122,787. Fed. Acquisition Personnel Info. Sys., *Report on the Federal Acquisition Workforce Fiscal Year 1991* 2 (September 1992); Fed. Acquisition Personnel Info. Sys., *Report on the Federal Acquisition Workforce—1100 Series Fiscal Year 2000* 2 (DATE?). This represents a decline of 25.9%.
- As of September 30, 1991, the Federal Acquisition Institute reported a total "procurement workforce" consisting of 1101s, 1102s, 1104s, 1105s, 1106s, and 1150s numbering 67,546. By September 2000 the comparable figure had declined to 57,150, a decline of 15.4%. In the same time period 1102s declined from 31,436 to 26,751, a decline of 14.9%. 1105s declined from 6,754 to 3,414, a drop of 50%. *Report on the Federal Acquisition Workforce Fiscal Year 1991* at 3; *Report on the Federal Acquisition Workforce—1100 Series Fiscal Year 2000* at 3. This represents a decline of
- Using the much more inclusive DoD Acquisition Organization counting methodology (described in the Background section of this chapter), the DoD Acquisition Workforce declined from 460,516 in FY 1990 to 230,556 in FY 1999, a decline of 50%. DOD IG, *DoD Acquisition Workforce Reduction Trends and Impacts*. D-2000-088, 5-6 (2000).

DRAFT

Final Panel Working DRAFT

December 2006

- Since 1999 the size of the acquisition workforce has remained relatively stable, while the volume and complexity of federal contracting has mushroomed.⁵³

Finding #5-2:

- The drought in hiring, the inadequacy of training in some agencies, and the increased demand for contracting have together created a situation in which there is not, in the pipeline, a sufficient cadre of mature acquisition professionals who have the skills and the training to assume responsibility for procurement in today's demanding environment.
 - Frequently described as a "bathtub" situation, there appears to be an acute shortage of procurement personnel with between 5 and 15 years of experience.
 - Moreover, the relative sufficiency of the senior end of the acquisition workforce is seriously threatened by retirements.
 - A key challenge, accordingly, is to retain a high proportion of the senior workforce while development of the mid-level workforce goes forward.
 - There is strong competition for a limited and shrinking pool of trained and skilled procurement professionals within the federal government.
 - This imbalance between supply and demand is exacerbated by the strong competition that the private sector offers the government in trying to recruit the shrinking pool of talented procurement professionals. The government is losing this competition.
 - On the other hand, at least in major metropolitan areas, the government has not been able to compete very successfully for the services of talented procurement professionals who have been working within the private sector. The government does not have a salary structure and career ladders that are likely to attract experienced procurement professionals from the private sectors.
 - The slowness of the government's hiring process has also been an obstacle to hiring talented people for the acquisition workforce.

Finding #5-3:

⁵³ As noted above, in the text accompanying footnotes 20-23, the DoD acquisition workforce continued to decline in this time period, substantially so by some of the available measures. The overall FAI count for the "procurement workforce" government-wide (consisting of 1101s, 1102s, 1105s, 1106s, and 1150s) grew very modestly from 57,784 to 58,161—growth of .6 %. FAI, *Report on the Federal Acquisition Workforce—1100 Series Fiscal Year 1999* 3 (DATE); *Report on the Federal Acquisition Workforce, Fiscal Years 2003 and 2004* at 39, *tbl. 4-2*.

DRAFT

Final Panel Working DRAFT

December 2006

- A widely noted result of the inadequacy of Acquisition Workforce personnel resources to meet the demands of procurement government-wide is that scarce resources have been skewed toward contract formation and away from contract management.**

Finding #5-4:

- The Panel concludes that one important way to improve retention of qualified personnel within the federal acquisition workforce is to expand opportunities for such personnel to secure advancement by moving to different organizations within the federal government.**

Finding #5-5:

- Inadequacy in the acquisition workforce is, ultimately, “penny wise and pound foolish,” as it seriously undermines the pursuit of good value for the expenditure of public resources.**

Discussion

Witnesses before the panel have confirmed the inadequacy of the existing acquisition workforce. For instance, Shay Assad, Director of Defense Procurement and Acquisition Policy acknowledged that “We’ve got a crisis within DoD in terms of our people.”⁵⁴ More specifically, he recognized that the problem relates to the age and experience level structure of the existing workforce, with a “huge shortage” of personnel with between 5 and 15 years of experience in acquisition.⁵⁵ Although a much more adequate workforce exists at more senior levels of experience, in the view of Mr. Assad, retirements among this cohort are a major threat to the continuing adequacy of the workforce. As Assad noted, it is essential that retention of this senior cohort be improved because, “we don’t have anyone to replace them.”⁵⁶

Other witnesses before the panel also portrayed a crisis as to the adequacy of the existing and future acquisition workforce.⁵⁷ A representative of the DoDIG confirmed: “I think they are understaffed. You know, we had that big cutback a few years ago, and I don’t think we’ve ever

⁵⁴ Test. of Shay Assad, DPAP, AAP Pub. Meeting (June 14, 2006) Tr. at 57.

⁵⁵ *Id.* at 58; see also Test. of Ashley Lewis, DHS, AAP Public Meeting (June 14, 2005) Tr. at 327 (“Really, it’s the youngsters and the middle people that there seems to be a void, you know. That part is, in my view, that’s where we seem to have the deficit.”); Test. of David Sutfin, DoI GovWorks Division, AAP Pub. Meeting (June 14, 2005) Tr. at 336.

⁵⁶ Assad Test. at 58.

⁵⁷ Test. of Terry McKinney, DoD IG, AAP Pub. Meeting (May 17, 2005) Tr. at 177; Test. of Glenn Baer, CSA, AAP Pub. Meeting (May 5, 2005) Tr. at 68-69; Test. of Jan Menker, CSA, AAP Pub. Meeting (DATE) Tr. at 70.

DRAFT

Final Panel Working DRAFT

December 2006

gotten back to the point where we can handle all the workload.”⁵⁸ The workforce shortcomings are both quantitative and qualitative. A representative of the GSA IG’s office explained: “You have a huge transition in the acquisition work force. . . . [T]here are certainly not as many contracting folks out there today as there were five or 10 years ago, and a lot of the folks who are in the procurement arena now really don’t have as much experience as the ones who have left. And the turnover in acquisition is exceedingly high right now.”⁵⁹

Greg Rothwell, who recently retired as Chief Procurement Officer for the Department of Homeland Security, described the situation confronted by DHS by saying that the acquisition workforce resources had been “gutted.”⁶⁰ He also gave specific examples of acquisition programs that lacked appropriate staffing, including a \$3 billion program that did not have a single full time equivalent employee.⁶¹ The result, described by Mr. Rothwell’s testimony, was that the agency was forced to pass every acquisition to another agency, whether or not that agency had special expertise in the area of the procurement.⁶² Needless to say, he did not believe that this was a sound acquisition practice.⁶³ Mr. Rothwell also reported that prior to Hurricane Katrina FEMA was staffed for acquisition at a level less than one sixth of what had been determined to be an appropriate level.⁶⁴ Mr. Rothwell, who had worked in procurement in ten different federal agencies across the span of a 34 year career in the federal government, summarized his conclusions about the state of the workforce as follows:

It is a huge challenge for our particular time. There are not enough people; they are not well enough trained, and they need to be valued and inspired when you get into the workforce, and again, if you’re in one of those agencies that already does that, that’s great. You know, because I do run into agencies where you do have, you know, sufficient staffing, well trained and things. I’m just suggesting that there are many agencies that are critical to this country where that is not the case.⁶⁵

Thus, although Mr. Rothwell did not paint a monolithic portrait of the state of the federal workforce, he recognized serious shortcomings in many important agencies.

Other basic factual conclusions stated in our findings on workforce adequacy issues are supported by documents that we have reviewed and the testimony that we received. Some key points are as follows:

⁵⁸ McKinney Test.,at 177.

⁵⁹ Waszily Test. at 222.

⁶⁰ Test. of Greg Rothwell, DHS, AAP Pub. Meeting (Mar. 17, 2006) Tr. at 215.

⁶¹ *Id.* at 218.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 224.

⁶⁵ *Id.* at 221.

DRAFT

Final Panel Working DRAFT

December 2006

- There were substantial reductions in the acquisition workforce during the decade of the 1990s.

For instance, the DoD Acquisition Workforce, as measured by the Acquisition Organization Count dropped from 460,516 at the end of FY 1990 to 230,566 at the end of FY 1999.⁶⁶

- The drought in hiring and the inadequacy of training has created a situation in which there is not, in the pipeline, a sufficient cadre of mature acquisition professionals who have the skills and the training to assume responsibility for procurement in today's demanding environment.
- There is strong competition for a limited and shrinking pool of trained and skilled procurement professionals within the federal government.⁶⁷
- This imbalance between supply and demand is exacerbated by the strong competition that the private sector offers the government in trying to recruit the shrinking pool of talented procurement professionals. The government is losing this competition.⁶⁸
- On the other hand, at least in major metropolitan areas, the government has not been able to compete very successfully for the services of talented procurement professionals who have been working within the private sector.⁶⁹ The government does not have a salary structure and career ladders that are likely to attract experienced procurement professionals from the private sectors.⁷⁰
- A widely noted result of the inadequacy of Acquisition Workforce personnel resources to meet the demands of procurement government-wide is that scarce resources have been skewed toward contract formation and away from contract management.⁷¹

This finding is supported by a host of GAO reports that confirm, with depressing regularity, the insufficiency of resources devoted to contract management.⁷² And a number of respected

⁶⁶ U.S. DOD IG, *DoD Acquisition Workforce Reduction Trends and Impacts*, D-2000-088, 4 (2000).

⁶⁷ Test. of Neal Couture, NCMA, AAP Pub. Meeting (July 27, 2005) Tr. at 19, 23, 25.

⁶⁸ Marshall Test. at 48.

⁶⁹ Lewis Test. at 326.

⁷⁰ Test. of William Kovacic, George Washington Univ. Law School, AAP Pub. Meeting (Oct. 27, 2005) Tr. at 146.

⁷¹ Test. of Linda Dearing, U.S. Coast Guard, AAP Pub. Meeting (July 12, 2005) Tr. at 197.

⁷² See note 79, below.

DRAFT

Final Panel Working DRAFT

December 2006

acquisition activity. Among these, for example, are two reports prepared by the Federal Acquisition Institute, a December 2003 report addressing competencies for the federal acquisition workforce generally, and a February 2004 report addressing competencies required in the acquisition workforce specifically for the competitive sourcing process.⁷⁵ These reports endeavor to identify the specific fundamental competencies required for procurement personnel. They *do not*, however, attempt to assess workload demands for these competencies for the future, nor do they attempt to assess the degree to which members of the existing federal procurement workforce possess these capabilities.

Similarly, a pathbreaking study of the Acquisition Workforce done for DoD in 1999, the Acquisition 2005 study,⁷⁶ deliberately excluded issues of appropriate workforce size from its purview,⁷⁷ focusing instead on the qualitative competencies needed for the future workforce. Subsequently, in an April 2002 report,⁷⁸ GAO examined DoD's plans to reshape its acquisition workforce to respond to the October 2000 recommendations of DoD's Acquisition 2005 Task Force. GAO reported that DoD was taking significant steps to address the human capital challenges that it had recognized in making its October 2000 recommendations. But a substantive evaluation of the effectiveness of those measures was not undertaken by GAO, and was viewed as premature.⁷⁹ A comprehensive independent review of the adequacy of human capital planning efforts for the acquisition workforce at DoD as yet has not been performed, it appears.

On the civilian agency side, GAO examined agency human capital planning efforts to meet future needs for the acquisition workforce in a December 2002 Report.⁸⁰ Although GAO concluded that the six particular civilian agencies examined in that December 2002 study were all progressing in human capital planning to address acquisition workforce needs, a wide variety of progress levels was observed. This ranged from the Department of Energy, which reported completion of an analysis of the existing workforce, projection of future needs, and the completion of the requisite gap analysis, to agencies that had only begun analysis of the current workforce, to those that not developed any formal acquisition workforce plan.⁸¹ Significantly, GAO also found that agencies lacked reliable, consistent and complete data on the composition

⁷⁵ FAI, *Report on Competencies for the Federal Acquisition Workforce* (December 2003); FAI, *Report on Competitive Sourcing Competencies* (Feb. 12, 2004).

⁷⁶ DoD Acquisition 2005 Task Force, *Shaping the Civilian Acquisition Workforce of the Future* (Oct. 2000).

⁷⁷ Test. of Joe Johnson, DAU, AAP Pub. Meeting (July 12, 2005) Tr. at 72. Mr. Johnson explained there: "We deliberately ruled out, in view of the short time period . . . [available to produce this study] –we ruled out issues of the size of the workforce. That's a very important thing that you need to know upfront. We felt that if we had to go there, there was no way we could deliver a product [on time] because we would be into some very contentious issues. We limited ourselves to saying, what should the workforce be able to do in 2005?"

⁷⁸ U.S. GAO, *Acquisition Workforce: Department of Defense's Plans to Address Workforce Size and Structure Challenges*, GAO-02-630 (2002).

⁷⁹ *Id.* at 2.

⁸⁰ U.S. GAO, *Acquisition Workforce: Status of Agency Efforts to Address Future Needs*, GAO-03-55 (2002).

⁸¹ *Id.* at 5-7.

DRAFT

Final Panel Working DRAFT

December 2006

- **For successful modern businesses, the acquisition function is regarded as a key contributor to the bottom line. Investment in a state-of-the-art acquisition workforce is essential to profitability.**
- **Similarly, investment in a quality federal acquisition workforce is critical to mission success and obtaining best value for the expenditure of public resources.**

Discussion

As stated in our finding here, the testimony before the Acquisition Advisory Panel by leaders of private sector organizations indicates that sophisticated private sector organizations employ a corps of highly sophisticated, highly credentialed and highly trained business managers to carry out the sourcing, procurement and contract management functions that they undertake.⁸⁶ The testimony of Professor Robert Marshall explains why the most successful private sector organizations have invested so substantially in human resources for acquisition: they have built their procurement workforce on the understanding that “buying best is a very important part of their profitability.”⁸⁷

The practices of the private sector certainly corroborate our conclusion (Finding #1) that investment in human capital for the acquisition workforce is likewise critical to the accomplishment of the government’s missions. However, the government lacks staffing for these functions comparable to that of the private sector. Professor (now Federal Trade Commissioner) William Kovacic explained that “the private sector pays its people better, has superior approaches to recruiting and retaining, and that’s the important part, retaining, the requisite human capital and treats procurement as an integral element of the profitability of the enterprise.”⁸⁸

If we expect the government to take advantage of the practices of successful commercial organizations, we need to close this gap by recruiting, training and retaining procurement professionals with appropriate capability.

Finding #10:

The pace of acquisition reform initiatives has outstripped the ability of the federal acquisition workforce to assimilate and master their requirements so as to implement these initiatives in an optimal fashion. An important objective of Acquisition Workforce

⁸⁶ Test. of Ronald Casbon, Bayer Corporate Business Services, & Larry Trowel, General Electric Transportation, AAP Pub. Meeting (Aug. 18, 2005) Tr. at 252-53; Test. of Todd Furniss, The Everest Group, AAP Pub. Meeting (Mar. 30, 2005) Tr. at 114-15.

⁸⁷ Marshall Test. at 46.

⁸⁸ Kovacic Test. at 146.

DRAFT

Final Panel Working DRAFT

December 2006

- **Data should be collected both about the narrow contracting specialties (along the lines of the current FAI count) and about the broader acquisition-related workforce (along the lines of the current DoD AT&L workforce count methodology).**

Discussion

This recommendation follows directly from Finding #1 and Findings #4 through #4-3. Together these establish:

- first, that the role played by the acquisition workforce is critical to the success of federal acquisition programs and to the ultimate missions of the federal government, and,
- second, that accurate data that can be used as a baseline for human capital planning has not been collected and maintained.

Because of the importance of the federal acquisition workforce, it is essential that we promptly rectify the situation with regard to data collection.

The need for achieving consistency over time in the definition of the acquisition workforce and in associated data collection is readily apparent. Such consistency is essential to accurately depicting and understanding the trends that have affected the acquisition workforce. And it is equally essential to human capital planning for the acquisition workforce that will ensure that we have the capacity to meet the demands placed on the federal acquisition workforce in the future.

The importance of achieving consistency in counting methodology across agencies should also need little explanation. Meaningful comparisons between agencies are not possible without a consistent methodology. Even as we urge that additional human capital resources be made available for the federal acquisition workforce, we have to accept the reality that there will be, for the future, a problem of optimizing the allocation of scarce resources in managing our Nation's acquisition activities. Indeed, we owe it to the Nation's taxpayers to proceed with a strong assumption that acquisition workforce resources must be stretched to achieve optimal efficacy in their deployment. That makes it all the more essential that data about the acquisition workforce be collected using consistent and sensible definitions for all agencies.

Having said that much, we recognize that there are pros and cons to several of the different approaches to workforce definition and counting that have been employed by FAI and by the Defense Department as described in the background section of this chapter.⁹⁰ As noted in Finding # 4-3 and the accompanying discussion, a broad definition of the acquisition workforce accords with the modern understanding that the acquisition function should be divorced from the programs whose operation it is intended to support. To take just one example that arose

⁹⁰ See Pt. I of this Ch., ____-____.

DRAFT

Final Panel Working DRAFT

December 2006

- The problem is further exacerbated by the government's inability to compete successfully with the private sector for the services of talented and experienced procurement professionals. This means both that the government far too often loses the services of the best personnel in the shrinking pool of experienced acquisition professionals within the government. At the same time the government is unable to compete successfully for experienced and able acquisition personnel already serving within the private sector.

It is clear that this situation, many years in the making, cannot be rectified immediately. But precisely because there can be no overnight "fix" for these workforce shortcomings, efforts to improve the strength of the acquisition workforce must begin as promptly as possible.

Another reason that we must insist here that prompt corrective action is needed is that, in order to proceed confidently on a strong empirical foundation, the process of correction itself requires a process of planning and assessment. It is important to note that our recommendations do not say that most agencies should immediately go out and hire substantial numbers of acquisition professionals. Although many members of the panel are personally confident that substantial additional hiring is needed in many agencies, some of us were less certain that a shortfall in sheer numbers of acquisition personnel is demonstrable for most agencies. We nonetheless reached a broad consensus that the existing acquisition workforce lacks the functional capacity to perform the tasks and meet the demands that face it. Moreover, we were in agreement that the workforce in most agencies does not have the right skill sets, experience levels, and capabilities that are demanded of it.

There are at least three additional reasons why we cannot simply urge an immediate hiring push for the federal acquisition workforce. First is the fact that we have for many years failed to collect data on the federal acquisition workforce in a consistent manner, over time, and across agencies. Second, federal agencies have failed to undertake the kind of need-based human capital planning for the acquisition workforce that is strongly recommended here. Third, we know that contractors are playing a key role in supporting the federal acquisition workforce, but we do not have data regarding how many of them there are or what they are doing. Accordingly, though we are confident that the federal acquisition workforce needs enhancement, the human capital planning process must get underway to guide this process.

We have taken special care to balance this recommendation so as to make clear the urgency of the needs addressed here, while at the same time acknowledging the need for evidence-based measures to improve the acquisition workforce, in the form of a deliberate human capital planning process. We would be troubled if the need for a careful process of human capital planning were used as an excuse not to begin rapid enhancement of the acquisition workforce. Conversely, we would be equally troubled if the workforce improvement project were to go forward without institutionalizing the reforms in workforce accounting and human capital planning that we have recommended here. Adherence to this evidence-based approach

DRAFT

Final Panel Working DRAFT

December 2006

challenges and the opportunities of career opportunities in federal acquisition. Internship programs may also capitalize on the increased visibility that the acquisition function enjoys in a post-Katrina world, and in the light of our experience in Iraq, where the role played by contractors has likewise become more visible. But it would be foolhardy to assume that the increased visibility of acquisition programs is sufficient by itself to draw attention to the entry level opportunities that exist in the field of acquisition. Hence, internship programs may find a more receptive audience because of the recent public attention to the importance of the acquisition function, but it is still important that we aggressively market the field of acquisition through initiatives like this government-wide internship program.

It is pertinent to ask why this is envisioned as a government-wide internship program? One obvious reason is that many government agencies have not instituted such programs on their own. Perhaps with the development of a robust human capital planning requirement as recommended here that would ultimately change. But a second reason for advocating a government-wide internship program is to more effectively market the full range of acquisition career opportunities across the face of the federal government. Interested entry level candidates should thus be made aware of the range of choices and the diversity of career opportunities. In addition, like the database for existing acquisition personnel recommended here (Recommendation # 1-3), a government-wide program would help to foster a government wide market for acquisition professionals. Ultimately, the payoff for this would be in encouraging successful acquisition professionals to make a career in federal acquisition, with improved opportunities for promotion and retention within the federal government resulting from increased opportunities for inter-agency mobility.

Recommendation #3-2: Hiring Streamlining Necessary

- **In order to compete effectively for desirable personnel, OFPP and agencies need to identify and eliminate obstacles to speedy hiring of acquisition workforce personnel.**

Discussion

As indicated in our findings, federal agencies increasingly face difficulty in competing with the private sector for recruiting promising young acquisition professionals and those who wish to become acquisition professionals. Although there are a variety of impediments that need to be addressed in order to change this situation, one important area where improvement is needed concerns the hiring process. Federal agencies are seriously handicapped if they cannot act expeditiously to make offers of employment to promising candidates. By the time such offers come through, too often, the candidates are no longer available. This situation needs to be changed.

Recommendation #3-3: Need to Retain Senior Workforce

DRAFT

Final Panel Working DRAFT

December 2006

- **OFPP and agencies need to create and use incentives for qualified senior, experienced acquisition workforce personnel to remain in the acquisition workforce.**

Discussion

As indicated in Finding #5-2, the cumulative effect of inadequate hiring and inadequate training, juxtaposed with the increased demands on the federal acquisition workforce (see Finding #2 and its subordinate component findings) has been to create the situation in which we lack a sufficient cadre of mature acquisition professionals who have the skills and training necessary to assume responsibility for the federal government's procurement in today's demanding environment. As noted in Finding #5-2, moreover, the shortfall is presently particularly acute at the level of procurement personnel with between 5 and 15 years of experience. With the bathtub profile that was described in our record, there is, for the immediate present, a less acute shortfall at the senior level. But this relative sufficiency is threatened by retirements and by the strong competition that the private sector offers for the services of talented and experienced acquisition professionals.

Accordingly, it is particularly important that OFPP and agencies be prepared to work vigorously to retain mid-level and senior acquisition professionals. As noted above, efforts to build up the acquisition workforce must also have strong components focused on entry-level hiring. But these efforts cannot, no matter how successful, yield the top level leadership that we need for our acquisition workforce over the next few years. Accordingly, it imperative that we use strong incentives to lengthen the federal acquisition careers of senior and midlevel personnel in the acquisition workforce, while we are recruiting, training, and developing their successors. We need to hold on to the scarce human resources at the middle level so that they can develop into senior acquisition leaders. But at the same time, because of the thin ranks of this mid-level cohort we need also to hold onto senior leadership within the acquisition workforce. At each level we need to "buy time" so that we can develop future leadership from more junior levels.

Recommendation #3-4: Training

- **In order to ensure the availability of sufficient funds to provide training to the Acquisition Workforce OMB should issue guidance directing agencies to:**
 - **Assure that funds in agency budgets identified for Acquisition Workforce training are actually expended for workforce training purposes, by appropriate means including "fencing" of those funds.**
 - **Require Head of Agency approval for use of workforce training funds for any other purpose**
 - **Provide OFPP an annual report on the expenditure of Acquisition Workforce Training Funds identifying any excesses or shortfalls**
- **OFPP should conduct an annual review to determine whether the funds identified by each agency for training of its acquisition workforce are sufficient to meet the**

DRAFT

Final Panel Working DRAFT

December 2006

Recommendation #3.6: Acquisition Workforce University

- In order to promote consistent quality, efficiency and effectiveness in the use of government training funds, OFPP should convene a 12 month study panel to consider whether to establish a government-wide Federal Acquisition University and/or alternative recommendations to improve training.**

Discussion

This recommendation represents a compromise. At present, our federal government maintains two formally discrete organizations devoted to the training of personnel already in the federal acquisition workforce, the Defense Acquisition University and the Federal Acquisition Institute. The question is whether this represents an inefficient duplication of functions, as opposed to a necessary and appropriate recognition of the distinctive needs of defense acquisition practice. At present, we have a compromise in the form of co-location of these two organizations with a mandate for cooperation.

Some of our panel members believe that, given the evolution of modern federal acquisition practice, the differences between military procurement and civilian procurement have become relatively trivial, and thus conclude that a genuinely unified organization should take charge of all federal acquisition workforce training. This first group further believes that a rational and efficient program of *functional specialization* in training would not follow the lines of the divisions between agencies. Other members of the panel were not persuaded that there is a sufficient degree of convergence in the training curriculums appropriate for acquisition personnel in different agencies to make full unification of training responsibility the best solution. This latter group expressed concern that a unified training structure might be insufficiently attentive to the specialized needs of some agencies, including military organizations. In particular, the needs of weapons system buyers for specialized program management training was noted.

Accordingly, we ultimately reached consensus that it is appropriate to study the desirability of unifying responsibility for training of the federal acquisition workforce. We recommend that OFPP convene a 12 month study panel to review and report on this issue.

Recommendation #4: An Acquisition Workforce Focus is Needed in OFPP

- There should be established in the Office of Federal Procurement Policy a senior executive with responsibility for Acquisition Workforce Policy throughout the federal government.**

DRAFT

Final Panel Working DRAFT

December 2006

Recommendation 5 [Editorial note: This recommendation was adopted by the Panel without assignment of a number, and has now been assigned this designation as Recommendation 5.]

- **To the extent that agencies can demonstrate that they have implemented any recommendations (or parts thereof) that require a report to OFPP, the process established by OFPP should include criteria for a waiver from the reporting requirements; any waiver should include a requirement for a sunset.**

Discussion

Recommendation 5 was suggested to make sure that the requirements that we propose to not engender unnecessary paperwork for the agencies that must implement them. In general, reporting requirements imposed on agencies here are designed to be action-forcing and attention-directing. Specific reporting requirements are designed to focus the attention of the agency Chief Acquisition Officer on the specific components of a successful human capital planning effort for the agency's portion of the federal acquisition workforce. These reports are designed in turn to place the OFPP in a position to keep tabs on whether each agency is complying with these procedural mandates, and achieving the substantive benchmarks that are applicable.

Nevertheless, we would not wish to elevate paperwork generation over substantive compliance. Thus, if a particular agency can demonstrate that it has already complied with a functional reporting mandate recommended here, it need not generate a duplicative report. OFPP is directed to respect this rule of non-duplication in generating criteria for waiver of the reporting requirements here. In addition, waivers must contain a sunset provision to make sure that the justification for waiving a particular requirement remains applicable so long as the waiver remains in force.

DRAFT

Final Panel Working DRAFT

December 2006

Appropriate Role Of Contractors Supporting The Government

I. Introduction

Fifteen years ago, the GAO found, “Service contracts are essential for carrying out functions of the government because the government does not have employees in sufficient numbers with all the skills to meet every requirement.”¹ This observation is even more accurate today, as the disparity between the number and complexity of Federal government programs and the number and skill-sets of Federal employees available to implement those programs continues to grow. In the 12 years following issuance of the 1991 GAO Report, the Federal civilian workforce dropped 13.6 percent, from 2.2 million to 1.9 million workers in September 2003.² Meanwhile, during this same period, there was a significant increase in the dollar amount and number of contracts with private sector firms. Between 1990 and 1995 the government began spending more on services than goods.³ Currently, procurement spending on services accounts for more than 60% of total procurement dollars.⁴ Contributing to this trend, Congress has adopted legislation, and several Administrations have implemented policies, that encourage the use of contractors to perform certain functions and activities that have in the past been performed by government employees.⁵

As a result of these developments and others, Federal agencies are increasingly relying on private sector contractors. As the Comptroller General recently stated: “The Government has and is going to increasingly rely on the private sector in general and contractors in particular to be able to deliver a whole range of products and services.”⁶ Some of the reasons for this trend are “to acquire hard to find skills, to save money, to have the private sector do work that is not inherently governmental, to augment capacity on an emergency basis, and to reduce the size of government.”⁷

Currently, acquisition of goods and services from contractors consumes over one-fourth of the Federal government’s discretionary spending, and many Federal agencies rely extensively on contractors in the performance of their basic missions.⁸ In some cases, contractors are solely

¹ U.S. GAO, *Government Contractors: Are Service Contractors Performing Inherently Governmental Functions? Report to the Chairman, Federal Service, Post Office and Civil Service Subcommittee, Committee on Governmental Affairs, U.S. Senate*, GAO/GGD-92-11, 6 (1991).

² Office of Personal Management, Workforce Information and Planning Group (year).

³ Calculations based on the Federal Procurement Report published by the Federal Procurement Data Center for fiscal years 1990-1995.

⁴ Total Actions by PSC standard report from FPDS-NG run Dec. 2006.

⁵ See, e.g., Federal Workforce Restructuring Act, Pub. L. No. 103-266 (Mar. 30, 1994); Federal Activities Inventory Reform Act of 1998 (FAIR Act), Pub. L. No. 105-270 (Oct. 18, 1998).

⁶ Test. of David Walker, GAO, AAP Pub. Meeting (Mar. 29, 2006) Tr. at 245.

⁷ Nat'l Academy of Pub. Admin., *Managing Federal Missions with a Multisector Workforce: Leadership for the 21st Century 2* (Nov. 16, 2005).

⁸ Examples include the Department of Energy, the Centers for Medicare and Medicaid, and the National Aeronautics and Space Administration. See U.S. GAO, *Comptroller General's Forum: Federal Acquisition Challenges and Opportunities in the 21st Century*, 4 GAO-07-45SP, 1 (2006).

DRAFT

Final Panel Working DRAFT

December 2006

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.⁹

These developments have created issues with respect to the proper roles of, and relationships between, Federal employees and contractor employees in the multisector workforce.¹⁰ In particular, although Federal law prohibits contracting for activities and functions that are inherently governmental, uncertainty about the proper scope and application of this term has led to confusion, particularly with respect to service contracting outside the ambit of OMB Circular A-76. Moreover, as the Federal workforce shrinks, there is a need to assure that agencies have sufficient in-house expertise and experience to perform critical functions, make critical decisions, and manage the performance of their contractors.¹¹ In addition, concerns have been raised regarding the appropriateness of the current prohibition of “personal services contracts.”¹²

Concurrently, the increase in service contracting has raised two separate conflict-of-interest issues. First, questions have been raised as to whether contractor employees working to support Federal agencies should be required to comply with some or all of the ethics rules that apply to Federal employees, particularly in the multisector workforce where contractor employees are working alongside Federal employees and are performing identical functions. Second, the increased participation of contractors in developing projects that are subsequently open to market competition and the increased use of contractors to evaluate contract proposals and to evaluate the performance of other contractors raise important questions about how to address potential organizational conflicts of interest and how to preserve the confidentiality of proprietary information.

⁹ “Multisector workforce” is a term adopted by the National Academy of Public Administration to describe the current mix of personnel working in the government:

The “multisector workforce” is a term we have chosen to describe the federal reality of a mixture of several distinct types of personnel working to carry out the agency’s programs. It is not meant to suggest that such a workforce is unitary. To the contrary, it recognizes that federal, state and local civil servants (whether full- or part-time, temporary or permanent); uniformed personnel; and contractor personnel often work on different elements of program implementation, sometimes in the same workplace, but under substantially different governing laws; different systems for compensation, appointment, discipline, and termination; and different ethical standards.

NAPA Report at 2.

¹⁰ GAO-07-45SP, *supra* note ___, at 8.

¹¹ *Id.*

¹² FAR 37.101 - 37.104.

DRAFT

Final Panel Working DRAFT

December 2006

functions.¹⁶ The FAIR Act retains essentially the same definition of IGF as OFPP Policy Letter 92-1.

Although there has been some degree of inconsistency among agencies in the categorization of various functions under Circular A-76 and the FAIR Act, in part due to the lack of specificity in the appendices, for the most part agencies have been able to identify discrete commercial functions that can and should be competed under the framework specified in A-76. However, there has been little, if any, attention paid to the obverse issue: whether agencies are inappropriately contracting out functions that, while not necessarily inherently governmental in a strict sense, have traditionally been performed by Federal workers and are critical to the performance of the agency's mission.¹⁷

In addition to contracting out significant portions of the acquisition function – as discussed elsewhere in this Report¹⁸ – most, if not all, agencies have contracted out major portions of their information technology and communications functions. Moreover, some agencies have contracted out substantive, mission-critical functions, often without considering the potential adverse implications of such a step for the future. One example of this trend is the growing use of Lead System Integrators (“LSI”). The GAO has described LSIs as “prime contractors with increased program management responsibilities [and] greater involvement in requirements development, design, and source selection of major system and subsystem subcontractors.”¹⁹ Historically, the designs of complex, multiyear programs and projects have been created by Federal employees, but with LSIs that is often not the case. Even more troubling, in some cases the Government no longer has Federal employees with the requisite skills to oversee and manage LSIs.

While in the short run such contracts may appear to be the best – or at least the simplest – way for an agency to implement a particular project or program, they can have serious adverse consequences in the long run. Such consequences include the loss of institutional memory, the inability to be certain whether the contractor is properly performing the specified work at a

¹⁶ The OMB guidelines for preparing FAIR Act inventories recognizes a non-statutory category of functions, referred to as “commercial A,” which are “commercial activities deemed unsuitable for competition” by an agency. Agencies designating function in this category must provide written justifications each of them. See, in general, OMB Memorandum M-05-12, from David H Safavian, Director of OFPP, regarding 2005 FAIR Act inventories (May 23, 2005), <http://www.whitehouse.gov/omb/memoranda/fy2005/m05-12.pdf>.

¹⁷ This may be due, in part, to the fact that since the early 1980s, OMB has pushed agencies to privatize commercial functions, at times utilizing goals and targets, which were sometimes perceived as informal quotas. Agencies that are reluctant to privatize functions performed by their existing workforce – which could require downsizing and/or reductions in force – are generally more willing to contract out new or expanded functions (since such contracts could give them credit toward meeting OMB’s targets), without necessarily considering the long-term implications of such a step.

¹⁸ See Panel Report, Chapter 5, The Federal Acquisition Workforce, Finding 7 and Discussion.

¹⁹ Paul L. Francis, Director, Acquisition and Sourcing Management, testimony before the Subcommittee on Airland, Committee on Armed Services, U.S. Senate, March 2005.

DRAFT

Final Panel Working DRAFT

December 2006

proper price,²⁰ and the inability to be sure that decisions are being made in the public interest rather than in the interest of the contractors performing the work. If, for example, NASA were to contract out the function of designing and constructing the next generation of satellites, without retaining a core group of Federal workers with knowledge of – and responsibility for – the details of the project, it could permanently lose the capacity to perform one of its critical, core functions.

III. Personal Services Contracts

[W]e have now a definition and a rule based on a ban . . . on personal service contracts that's been with us for years and years and doesn't take proper recognition of where we are as a work force today.²¹

Under the FAR, the Federal Government is prohibited from awarding “personal services contracts” (“PSC”) unless specifically authorized by statute to do so.²² A PSC is defined in the FAR as a contract that, by its express terms or as administered, makes the contractor personnel appear to be Government employees.²³ The United States Office of Personnel Management (“OPM”) defines PSCs as contracts “that establish an employer-employee relationship between the Government and contractor employees involving close and continual supervision of contractor employees by Government employees rather than general oversight of contractor operations.”²⁴ The key indicator of a personal services contract, according to the FAR and OPM, is whether the Government exercises relatively continuous supervision and control over the contractor personnel performing the contract.²⁵ The FAR also provides a list of other elements that may indicate whether a personal services contract exists.²⁶

A. History of the Prohibition of PSCs

The exact origins of the ban on PSCs are obscure and “cannot be established from a review of the Comptroller General’s decisions.”²⁷ In the nineteenth century, executive branch

²⁰ For example, the Army’s investigation of the Abu Ghraib interrogator scandal in Iraq found that “it is very difficult, if not impossible, to effectively administer a contract when the [Contracting Officer’s Representative] is not on site,” particularly where contractor employees greatly outnumbered the government employees responsible for oversight of the contract. See MG George R. Fay, AR 15-6 *Investigation of the Abu Ghraib Detention Facility and the 205th Military Intelligence Brigade* 50, 52 (2004).

²¹ Test. of William Woods, GAO, AAP Pub. Meeting (Mar. 29, 2006) Tr. at 274.

²² FAR 37.104(b).

²³ *Id.*

²⁴ Contracting Branch, OPM, *Competitive Sourcing, Procurement Policy and Procedure* (Jun. 30, 2003), <http://www.opm.gov/procure/pdf/USOPMCCompetitiveSourcingPolicy.pdf>.

²⁵ FAR 37.104(c)(2).

²⁶ FAR 37.104(d).

²⁷ Russell N. Fairbanks, *Personal Service Contracts*, 6 Mil. L. Rev. 1, 39 & n. 139 (1959).

DRAFT

Final Panel Working DRAFT

December 2006

service law], which requires that all appointments of officers and employees be made by the head of the department or agency, or, with respect to field services, by a subordinate officer to whom that duty has been delegated. Also, the services rendered by the contractor's employees would not be subject to direct supervision such as is generally exercised over Federal employees.”³⁵ Because the Government provided the contractor with all the necessary cleaning supplies and left “nothing but labor of the individual to be furnished,” the Comptroller General concluded that the services had to be performed by Government employees.³⁶ However, the decision noted that if the Government had procured all supplies and equipment as well as services from the contractor, the contract would have been considered non-personal in nature.³⁷

Personnel Ceilings

In a 1952 decision, the Comptroller General identified another rationale for the ban on personal services contracts: the concern that they could be used by Executive Branch agencies to circumvent limits on the number of authorized employees. The Comptroller General recommended termination of a contract for processing of shipping orders and purchase requisitions that had been let by the Army Engineer Supply Office because the personnel ceiling for the Department of Defense had been reached. The Comptroller General explained that “it would be unreasonable to presume that the Congress, while imposing a ceiling on the number of graded civilian employees that could be employed in the Department of Defense, intended to authorize the procurement by contract from outside sources of services which would be performed by the employees of the type involved but for the personnel ceiling.”³⁸ The Comptroller General also stated that the contract violated the “long-standing rule that persons performing purely personal services for the Government be placed on Government pay rolls and made subject to its supervision.”³⁹ The Comptroller General relied on two factors in defining what constituted “personal services”: (1) the Government furnished everything necessary for the performance of the services except the employees, who could have been hired by the Government; and (2) the services were of a type usually performed by classified employees and were of a continuing or indefinite duration.⁴⁰

The Pellerzi-Mondello Opinions

In October 1967, Leo Pellerzi, the General Counsel of the United States Civil Service Commission (“CSC”), issued an opinion that addressed whether several NASA technical support service contracts being utilized at the Goddard Space Center were in violation of applicable personnel statutes. The opinion was issued in response to a referral from the U.S. District Court

³⁵ *Id.* at 701-02 (internal citations omitted).

³⁶ *Id.* at 702.

³⁷ *Id.*

³⁸ Letter from Comptroller General Warren to the Secretary of the Army, B-113,739, 32 Comp. Gen. 427, 430-431 (Apr. 3, 1953).

³⁹ *Id.*

⁴⁰ *Id.*

DRAFT

Final Panel Working DRAFT

December 2006

in a case challenging the legality of the contracts.⁴¹ The principles identified in the opinion were subsequently incorporated into FAR Part 37.

The opinion identified the appropriate “standards of review to be applied in determining whether or not an employer-employee relationship has been established between [a Government agency] and private contractor employees by the terms and performance of each of the support service contracts.”

In the absence of clear legislation expressly authorizing the procurement of personnel to perform the regular functions of agencies without regard to the personnel laws, we must insist on scrupulous adherence to those laws and the policies they embody. Accordingly, contracts which, when realistically viewed, contain all the following elements, each to any substantial degree either in the terms of the contract, or in its performance, constitute the procurement of personal services proscribed by the personnel laws.

- Performance on-site.
- Principal tools and equipment furnished by the Government.
- Services are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.
- Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
- The need for the type of service provided can reasonably be expected to last beyond one year.
- The inherent nature of the service or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order:
 - To adequately protect the Government's interest or
 - To retain control of the function involved, or
 - To retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

Applying these standards, the contracts under review and all like them are proscribed unless an agency possesses a specific exception from the personnel laws to procure personal services by contract.

In August 1958, Mr. Pellerzi's successor as General Counsel of the CSC, Anthony L. Mondello, issued a supplemental opinion that linked the criteria for judging the relationship between the Government and the employees of a contractor to the definition of “employee” expressed in 5 U.S.C. § 2105(a). This opinion emphasized that the “touchstone of legality under

⁴¹ *Lodge 1858 Am. Fed. of Gov't Emp. v. Adm'r NASA*, 424 F. Supp. 186 (D.D.C. 1976), *aff'd in part, vacated in part*, 580 F.2d 496 (D.C. Cir.), *cert. denied*, 439 U.S. 927 (1978).

DRAFT

Final Panel Working DRAFT

December 2006

it.”⁵³ And, in *Goutos v. United States*, the Court held “[i]t is settled law that a Government employee is entitled only to the rights and salary of the position to which he was *appointed* by one having the proper authority to do so.”⁵⁴

Summarizing the decisions of the Supreme Court and the Court of Claims, it is clear that an individual cannot hold a position as a Government employee (and thus be a party to an employer-employee relationship) unless he or she has been appointed to such a position by a person authorized to make the appointment.⁵⁵

Moreover, appointment as a Federal employee requires “a significant degree of formality” and “evidence that definite, unconditional action by an authorized federal official designating an individual to a specific civil service position is necessary to fulfill the appointment requirement of 5 U.S.C. § 2105(a).”⁵⁶ Indicia of appointment include whether the person’s compensation and benefits are paid and funded by the civil service system, whether a SF-50 or other appointive document was executed, and whether the oath of office was administered.⁵⁷

C. Exception for Temporary Expert and Consultant Services Contracts

The FAR prohibition explicitly does not apply where a statute authorizes PSCs. One such statute is 5 U.S.C. § 3109 which authorizes agencies to acquire temporary consultants or experts. This authority originated in section 15 of the Administrative Expenses Act of 1946, which authorized executive departments to procure temporary services of experts or consultants by contract.⁵⁸ The statute was designed as an exception to the prohibition against PSCs for contracts that do not exceed one year in duration, and its use is conditioned upon the existence of explicit language in an appropriation act or other statute. However, the list of statutes authorizing such use has become so voluminous that this restriction has little effect.⁵⁹

Under the statute, agencies may “contract” for both individual consultants and for organizations of consultants.⁶⁰ However, different rules apply to the different types of contractors. When “procuring by contract,” the services of an *individual* under the authority of this statute, the agency actually temporarily appoints the person into the civil service

⁵³ 424 U.S. 392, 402 (1976) (internal citations omitted).

⁵⁴ 552 F.2d 922, 924 (1976) (internal citations omitted) (emphasis in original); *accord, Bielic v. United States*, 456 F.2d 690 (1972); *Dianish v. United States*, 183 Ct. Cl. 702 (1968).

⁵⁵ *Baker, supra*, 614 F.2d at 268.

⁵⁶ *Horner v. Acosta*, 803 F.2d 687, 692-93 (1986).

⁵⁷ *Id.* at 694.

⁵⁸ 60 Stat. 810 (codified as 41 U.S.C. § 5).

⁵⁹ The list of cross references at 31 U.S.C. § 3109 contains 161 statutory provisions authorizing temporary hires under this section.

⁶⁰ Letter from Comptroller General Warren to the Comm'r, United States Section, Int'l Boundary and Water Comm., United States & Mexico, 27 Comp. Gen. 695, 695-98 (May 17, 1948).

DRAFT

Final Panel Working DRAFT

December 2006

another government contract or through an evaluation of
⁷⁹ proposals.

Although the case law has discussed a number of conflicts that arise with increasing frequency in each of these categories, the examples provided in the FAR do not appear to address adequately the range of possible conflicts that can arise in modern Government contracting.

C. Case Law

The GAO discussed the various categories of OCIs in *Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc.*, B-254397, *et al.*, Jul. 27, 1995, 95-2 CPD ¶ 129 at 8-10. The Court of Federal Claims began citing the *Aetna* decision and description of OCIs in *Vantage Assocs., Inc. v. United States*, 59 Fed. Cl. 1, 10 (2003). These decisions, along with others, address methods of identification and mitigation of OCIs. The GAO and the Court of Federal Claims have denied protests where an agency both recognized actual or potential OCIs and either avoided, neutralized, or mitigated the OCI in a reasonable manner.⁸⁰ However, protests were upheld where it was concluded that the contracting officers and/or agencies did not go far enough in recognizing or mitigating OCIs.⁸¹

D. Consequences and Possible Improvements

The public expects there to be no preferential treatment for particular contractors, no self-interest in the decision making process, and no hidden agenda impacting contractor selections. Moreover, the cost and delay associated with resolving potential OCIs after-the-fact adversely affects agency programs and the public interest. Yet, “the more we integrate non-Federal employees, contractors or call them blended workforce, into the actual governing and

⁷⁹ FAR 9.505-3.

⁸⁰ See, e.g., *Deutsche Bank*, B-289111, Dec. 12, 2001, 2001 CPD ¶ 210 (proposed use of subcontractor to perform tasks where prime contractor had potential conflict due to prior work for the agency was deemed acceptable mitigation); *LEADS Corp.*, B-292465, Sep. 26, 2003, 2003 CPD ¶ 197 (protest denied because mitigation plan – agency consideration of potential OCI and decision to assign work carefully to avoid the appearance of impropriety – was sufficient). Compare *Sci. Applications Int'l Corp.*, B-293601, *et al.*, May 3, 2004, 2004 CPD ¶ 96 (protest sustained for lack of consideration to potential OCI) with *Sci. Applications Int'l Corp.*, B-293601.5, Sept. 21, 2004, 2004 CPD ¶ 201 (corrective actions remedied prior OCI, making award possible).

⁸¹ See, e.g., *Alion Sci. & Tech. Corp.*, B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2 (protest sustained where agency assessment that a “maximum potential” for OCI of 15 percent of tasks was sufficiently low to permit award was fundamentally flawed; further, the agency’s assessment of possible impacts of OCI was inadequate and understated the potential for conflicts); *Greenleaf Constr. Co., Inc.*, B-293105.18, .19, Jan. 17, 2006, 2006 CPD ¶ 19 (protest sustained where agency failed to reasonably consider or evaluate potential OCI due to financial arrangement between contractor and evaluator); *Celadon Labs., Inc.*, B-298533, Nov. 1, 2006, __ CPD ¶ __ (protest sustained where agency failed to evaluate impact of contractors performing technical evaluation being employed by firms that promote competing technologies); *PURVIS Sys., Inc.*, B-293807.3, .4, Aug. 16, 2004, 2004 CPD ¶ 177 (protest sustained where agency failed to reasonably consider or evaluate potential OCI created by awardee’s participation in evaluation of its own work – and the work of its direct competitors – on undersea warfare systems).

DRAFT

Final Panel Working DRAFT

December 2006

administration of our agencies, the larger the gap we have and the more difficult it is for us to insure the integrity of Government decision making.”⁸² Much of the difficulty arises when contractor personnel have substantial responsibilities in selecting systems or contractors for award, sometimes effectively making evaluation and/or award decisions for agencies, even if they do not themselves actually make the formal award.

Although FAR 9.5 provides considerable leeway to contracting officers and agencies for considering avenues to address actual or potential OCIs, lack of guidance regarding identification and mitigation of conflicts – particularly for the increasingly common unfair competitive advantage or impaired objectivity conflicts – leads to variable results and inconsistent application of the regulations. Uniform regulations providing guidance to contracting officers and contracting agencies could help to reduce the frequency of failures to identify and mitigate OCIs.

V. Personal Conflicts Of Interest

With the growth of the multisector workforce, in which contractor employees are working alongside Federal employees and are performing identical functions, questions have been raised as to whether contractor employees working to support Federal agencies should be required to comply with some or all of the ethics rules that apply to Federal employees.⁸³

There are numerous statutory and regulatory provisions applicable to Federal employees that seek to protect against conflicts of interest and promote the integrity of the government’s decision-making process. These provisions are intended to avoid preferential treatment, self-dealing, and hidden agendas, and to ensure that persons entrusted to act for the government are acting in the best interest of the government. In short, the rules address the basic obligation of public service. This obligation is described as:

[The] responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in [5 CFR Part 2635].⁸⁴

⁸² Test. of Steve Epstein, Director of Standards of Conduct , Department of Defense, AAP Pub. Meeting (May 18, 2006) Tr. at 90.

⁸³ *Id. See also* Test. of Marilyn Glynn, U.S. Office of Gov’t. Ethics, AAP Pub. Meeting (May 17, 2005) Tr. at 78, 107.

⁸⁴ 5 CFR 2635.101(a).

DRAFT

Final Panel Working DRAFT

December 2006

participating in Government matters that would have beneficial or adverse financial effects on them.

18 U.S.C. § 209 prohibits Federal employees from receiving any salary or supplementation of their salary from private sources as compensation for their services to the Government. This ban on outside compensation for Government work is designed to prohibit an executive branch employee from serving two masters in the performance of his or her official duties.⁹²

18 U.S.C. § 201(b) prohibits a public official from seeking, accepting, or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his or her official duty. This section is commonly referred to as the prohibition on bribery, and it is one of the few statutes in this area that apply to contractor personnel as well as to Government employees.⁹³

B. Non-Criminal Ethics Statutes

Congress has also enacted non-criminal statutes that impose limitations on outside earned income and employment;⁹⁴ impose limitations on the acceptance of travel and related expenses from non-Federal sources;⁹⁵ impose limitations on the acceptance of gifts and travel generally;⁹⁶ and impose restrictions on partisan political activities.⁹⁷

Other statutes authorize and direct agencies to collect financial information from certain officials and employees in order to monitor for and prevent financial conflicts of interest.⁹⁸ The extent of the information required from a particular employee and whether that information will be made public or not depends upon the seniority of the employee.

C. The Procurement Integrity Act

Under the Procurement Integrity Act, additional ethics provisions apply to employees who participate in the award or administration of Federal contracts, 41 U.S.C. § 423. Such employees are prohibited from accepting compensation from the awardee of a contract on which they had participated for a period of one year after the employee's involvement.⁹⁹ The statute

⁹² See OGE Report, *supra* note ___, at 34.

⁹³ Epstein Test., *supra* note ___, at 92-93. A separate statute, 5 U.S.C. § 1352, prohibits recipients of Federal funds, including contractors, from using any of those funds to attempt to influence Federal officials.

⁹⁴ 5 U.S.C. App. §§ 501-505.

⁹⁵ 31 U.S.C. § 1353.

⁹⁶ 5 U.S.C. § 7301.

⁹⁷ 5 U.S.C. §§ 7321-7326, known as the Hatch Act.

⁹⁸ 5 U.S.C. App. §§ 101-111, 401-408, 501-505; *see also* 5 CFR Part 2634.

⁹⁹ 41 U.S.C. § 423(d).

DRAFT

Final Panel Working DRAFT

December 2006

public goals has been accomplished by a mix of “state, market and civil society actors.”¹³⁶ This development has presented a challenge to the ability of Federal government officials to retain the capacity to supervise and evaluate the work of the government, whether such work is performed by contractors or Federal employees. During the same period, civil service personnel ceilings have been imposed, which has ensured that as the government has grown, reliance on contractors has also increased.¹³⁷ To compound the challenge, many agencies have been unable to recruit and retain an adequate number of skilled professionals to be able to do the complex types of work that are now part of their missions.¹³⁸ This problem has also affected the acquisition workforce, which has faced new challenges as the quantity and complexity of Federal contracting has grown.¹³⁹

Finding 2: The existence of a multisector workforce, where contractor employees are co-located and work side-by-side with Federal employees, has blurred the lines between: (1) functions that are considered governmental and functions that are considered commercial; and (2) personal and non-personal services.

As early as 1962, a Cabinet-level report to President Kennedy on government contracting practices (known as the “Bell Report”) concluded that reliance on third parties to perform the work of government “blurred the traditional dividing line between the public and private sectors.”¹⁴⁰ As one commentator has pointed out, such blurring was not an accident; in that the architects of this change acknowledged that it would challenge traditional notions of official accountability for work performed by non-government actors.¹⁴¹

Finding 3: Agencies must retain core functional capabilities that allow them to properly perform their missions and provide adequate oversight of agency functions performed by contractors.

It is axiomatic that Federal government officials need to maintain the skills and competencies required to manage and implement all of the government’s work – including that performed by the growing contractor workforce.¹⁴² However, as discussed above, there is reason

¹³⁶ Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 Pub. Cont. L.J. 321, 322-23 (2004).

¹³⁷ *Id.* at 323.

¹³⁸ See, e.g., Testimony of Barney Klehman, Director of Contracting, Missile Defense Agency, AAP Pub. Meeting (March 29, 2006) Tr. at 144-147, 153-154.

¹³⁹ *Id.* See also, David M. Walker, *The Future of Competitive Sourcing*, 33 Pub. Cont. L.J. 299, 301 (2004).

¹⁴⁰ *Report to the President on Government Contracting for Research and Development in Systems Development and Management: Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives*, 87th Cong. 191-263 app. I (1966).

¹⁴¹ Guttman, *supra* note ___, at 330.

¹⁴² Bell Report, *supra* note ___.

DRAFT

Final Panel Working DRAFT

December 2006

“encouraged the procurement of complex defense systems under contracts requiring ongoing contractor support throughout the systems’ lifecycle.”¹⁵⁰

The degree to which contractors are performing functions that were previously performed by government employees, and the specific functions that are being performed by those contractors varies both agency to agency and within agencies. Some agencies use contractors sparingly, while some rely on contractors for the vast majority of the work the agency accomplishes. Furthermore, the functions that are considered core or inherently governmental at some agencies have been performed by contractors for decades at other agencies.

There is currently no way to accurately quantify this trend. OMB Circular A-76 and the Fair Act focus on traditional commercial activities and therefore do not account for the tremendous increase in the “shadow” workforce of contractors who are stepping into positions that were traditionally held by Government employees.

While the FAIR Act requires agencies to produce inventories of the functions they consider commercial and those that are considered inherently governmental, along with the numbers of positions in the agency that fall under those designated functions, these inventories do not reveal the number of contractor personnel performing various functions, particularly those functions that were generally performed by government employees in the past. Moreover, because the categories of functions are broadly stated in the FAIR Act inventories, those inventories do not provide the level of detail required to do the type of agency-by-agency analysis that will render meaningful results in determining how the government is applying the inherently governmental standard. Neither would the available information provide sufficient data to determine how many contractors are performing work that probably would have been performed by government employees in the past.

Finding 6: The use of contractor employees to perform functions previously performed by government employees combined with consolidation in many sectors of the contractor community has increased the potential for organizational conflicts of interest.

As explained above, the potential for OCIs has increased significantly in recent years. The contracting community needs more expansive and detailed guidance for identifying, evaluating, and mitigating OCIs. The current FAR language provides significant leeway to contracting officers to address OCIs, but recent decisions by the GAO and the courts indicate that, in many instances, appropriate investigation and/or analysis is not performed. This has created a substantial, negative impact on agency performance and on the public’s impression of the procurement process.

¹⁵⁰ Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369, 374 (2004).

DRAFT

Final Panel Working DRAFT

December 2006

Finding 7: There is a need to assure that the increase in contractor involvement in agency activities does not undermine the integrity of the Government's decision-making processes.

Just as the trend toward more reliance on contractors poses a threat to the government's long-term ability to perform its mission, the trend raises the possibility that the government's decision-making processes can be undermined.

For example, it is now commonplace for agencies to utilize contractors to perform activities historically performed by Federal contract specialists. Although these contractors are not authorized to obligate the United States,¹⁵¹ they provide, among other things, analysis, market research, and other acquisition support to the Federal decision makers. Unless the contractor employees performing these tasks are focused upon the interests of the United States, as opposed to their personal interests or those of the contractor who employs them, there is a risk that inappropriate decisions will be made. Commenting on this topic, David Walker, Comptroller General of the United States, recently offered the following advice:

We have to keep in mind that there are certain things that you can privatize, but there is one thing you can never privatize. You can never privatize the duty of loyalty to the greater good. The duty of loyalty to the collective best interest of all, rather than the narrow interest of a few: that is what public service is all about; that is what public servants are all about.¹⁵²

Finding 8: There are numerous statutory and regulatory provisions that control the activities of government employees. These measures are designed to protect the integrity of the government's decision-making process. Recent, highly publicized violations of these laws and regulations by government employees were adequately dealt with through existing legal remedies and administrative processes. Additional laws or regulations controlling government employee conduct are not needed at this time.

The Panel finds that the existing system of statutes and regulations governing the conduct of Federal government employees is adequate to effectively deal with ethical violations. Adding new prohibitions or increasing the already severe penalties available to punish violators would be unlikely to provide additional deterrence.

Finding 9: Most of the statutory and regulatory provisions that apply to Federal employees do not apply to contractor employees, even where contractor employees are co-located and work side-by-side with Federal employees and are performing similar functions.

¹⁵¹ Such authority has always been considered an inherently governmental function reserved to Federal employees.

¹⁵² Walker, *The Future of Competitive Sourcing*, *supra* note ___, at 303-04.

DRAFT

Final Panel Working DRAFT

December 2006

address “the distinctions between government employees and contractor personnel.”¹⁵³ This guide addresses a wide range of topics that arise in the multisector workforce, including among others, personal services vs. non-personal services contracts, proper identification of contractor personnel, use of government resources, and time management. The Missile Defense Agency, which is staffed in large part by contractor employees, has also identified procedures to avoid the creation of an employer-employee relationship with contractor personnel.¹⁵⁴

Such policies generally prohibit Federal employees working side-by-side with contractor employees from reviewing and directing the work of those contractor employees; and require the involvement of the contractor supervisor in day-to-day operations. Agencies would obviously prefer to avoid such inefficiencies, which cost them time and money. Removing the FAR prohibition would simplify the process and ease pressure on an overburdened Federal workforce. It is likely that it would also enable contractors to realize cost savings because they would be able to remove a layer of on-site management. Such cost savings should then flow to the Government and the taxpayer.

VII. Recommendations

Recommendation 1: The Office of Federal Procurement Policy should update the principles for agencies to apply in determining which functions must be performed by government employees.

In view of the fact that 15 years have passed since the OFPP’s last comprehensive analysis of what constitutes an inherently government function, and the fact that there have been numerous changes in the way the Government operates and the way that contractors are utilized since that time, the Panel concluded that it would be appropriate for OFPP to consider the current governmental and contractor landscape and adopt a set of general principles and best practices for identifying those functions that should be performed by civil servants.

Those principles would then be applied on an individualized, agency-by-agency basis, consistent with each agency’s missions and the need to retain the capability to perform those missions. In those instances where an agency is relying on contractors for assistance, the Panel believes that it is critical for the agency to have adequate and knowledgeable staff to establish appropriate requirements for its contracts and to manage contractor performance.

The Panel did not believe that there was any need for OFPP to adopt a new formal definition of what constitutes an IGF. In the Panel’s view, it does not matter whether a particular function is considered to be “Inherently Governmental” or whether – to use the terminology utilized in FAIR Act inventories – it is considered “Commercial Category A.” What is important in this context is whether a given function ought to be performed by Federal employees. Unfortunately, agencies do not always analyze their personnel needs or their acquisition of

¹⁵³ Air Force Materiel Command, *Guide for the Government-Contractor Relationship* (May 2005).

¹⁵⁴ Test. of Barney Klehman, *supra* note ___, at 180.

DRAFT

Final Panel Working DRAFT

December 2006

services with the objective of maintaining agency capability to perform core functions. There is no reason to be less attentive to these issues in a reduction in force situation, or in deciding whether to perform new projects or programs with Federal employees or through a contract.

The Panel expressly stated that it is not recommending that OMB revise A-76, but it recognized that OMB might conclude that it would be appropriate to do so to better assure the agencies' ability to perform their core functions.

Recommendation 2: Agencies must ensure that the functions identified as those which must be performed by government employees are adequately staffed with Federal employees.

Once an agency determines that certain of its functions should be performed by Government employees, it must assure that it has sufficient qualified employees to actually perform those functions. Agencies must focus on these issues when they are reducing their personnel levels, whether through a formal reduction in force or otherwise. The same is true when contracting for services. Agencies must not simply take the easy way out by contracting for critical functions because they have had difficulty recruiting and retaining qualified employees in certain areas. The Panel emphasized that this recommendation would not require any revision in agency practices in complying with A-76 or in preparing their FAIR Act inventories.

The Panel decided not to make any recommendation with respect to the issue of whether OMB should make agency compliance with these principles mandatory, or whether OMB should impose reporting requirements upon the agencies. OMB should analyze the services for which agencies are contracting (other than through A-76) in determining how to structure these principles and whether to make them mandatory.

Recommendation 3: In order to reduce artificial restrictions and maximize effective and efficient service contracts, the current prohibition on personal service contracts should be removed. Government employees should be permitted to direct a service contractor's workforce on the substance of the work performed, so long as the direction provided does not exceed the scope of the underlying contract. Limitations on the extent of government employee supervision of contractor employees (e.g. hiring, approval of leave, promotion or performance ratings, etc.) should be retained.

The Panel recognized that, despite the existing prohibition of PSCs in the FAR, many (if not all) agencies have contractors performing activities that fit within the prohibition as it is currently defined, in part because it would be very inefficient to structure the workplace to preclude direct instructions to contractor personnel. When service contractor personnel and Federal employees are working together on a program or project, there is no good reason to prohibit the Federal employee in charge from giving directions or assignments directly to contractor personnel so they can work as a true team. For example, contractors and agency

DRAFT

Final Panel Working DRAFT

December 2006

personnel routinely work in integrated project teams in technical areas. It is unrealistic to expect that in such situations, Government employees will not provide technical direction, and it would be inefficient to impose such a prohibition.

Even apart from efficiency concerns, it is antithetical to good government practices to have regulations in place that cannot realistically be complied with and thus are routinely violated and not enforced.

Under the Panel's recommendation, Federal employees would still be precluded from involvement in personnel decisions regarding contractor employees, such as hiring, promotions, bonuses, and performance ratings.

Although there is no express statutory prohibition, the prohibition has been in place for so long, and there have been so many rationales for it, the Panel concluded that Congress should clearly and unambiguously resolve the issue through statute, rather than await a regulatory revision.

Recommendation 4: **Consistent with action to remove the prohibition on personal services contracts, the Office of Federal Procurement Policy should provide specific policy guidance which defines where, to what extent, under which circumstances, and how agencies may procure personal services by contract. Within five years of adoption of this policy, the Government Accountability Office should study the results of this change.**

The Panel recognized that it was possible that some types of service contracts should still be prohibited; therefore, it recommended that OFPP provide specific guidance to agencies, consistent of course with whatever limitations Congress might impose.

For example, an agency Inspector General or CFO should not be able to direct the performance of a contractor hired to audit the agency's records and practices. And in a performance-based contract, the contractor should have full authority to determine how best to achieve the required performance. And there are circumstances in which it would not be appropriate for Government managers to micro-manage contractor activities.

The Panel also recognized that not every Federal employee should be authorized to provide direction to contractor personnel.

Since the recommended changes in this area would reverse prohibitions that had been in place for decades, the Panel concluded that GAO should conduct a study within five years after the adoption of the recommended OFPP guidance in which it would identify the benefits of the changes and any unintended adverse consequences or abuses by agencies.

Recommendation 5: **The FAR Council should review existing rules and regulations, and to the extent necessary, create new, uniform, government-wide**

DRAFT

Final Panel Working DRAFT

December 2006

The Panel was concerned about the possibility of over-regulation and its attendant costs, particularly as it applies to small businesses, noting that the imposition of burdensome requirements could discourage such businesses from contracting with the Government. In part for that reason, it struck from the recommendation draft language that would have required all PCI-related obligations on prime contractors to necessarily “flow down” to all subcontractors.

The Panel recognized the benefits that have been achieved through voluntary agreements, as epitomized by the Defense Industry Initiative (DII), noting it as a model that should be considered by the FAR Council. In addition, the FAR Council should consider the DII suggestions that (1) values-based self-governance should be the preferred model for all Federal contractors, and (2) the DFARS regulatory scheme should be incorporated into the FAR. To the extent that the FAR Council adopts these suggestions, it should also decide the appropriate scope and applicability of such provisions.

The Panel recognized that many companies already have extensive – and effective – ethics policies and programs, and in many cases such companies also do business with non-government entities. It would be inefficient – and confusing to their workforce – to make them create a separate program applicable to their work with the Federal government. Therefore, where existing standards of conduct, codes of ethics, etc. satisfy the principles of the Federal government’s ethics system, those internal rules would not need to be revised. However, the contractors would have to be held accountable – through appropriate clauses in the contract – for enforcing them.

The Panel had initially proposed a sub-recommendation under which the FAR Council would have been directed to analyze existing statutes and regulations to determine if they provide sufficient tools to deter – and to appropriately hold contractors accountable for – violations of PCI and OCI requirements, or whether additional tools are needed. However, the Panel determined that this sub-recommendation was unnecessary, since it concluded that if the FAR Council identified a regulatory or statutory gap, it would make appropriate recommendations through the appropriate channels.

Recommendation 5-3: Protection of Contractor Confidential and Proprietary Data.

The FAR Council should provide additional regulatory guidance for contractor access and for protection of contractor and third party proprietary information, including clauses for use in solicitations and contracts regarding the use of non-disclosure agreements, sharing of information among contractors, and remedies for improper disclosure.

The Panel is aware that many agencies have addressed the issue of how best to protect confidential and/or proprietary information from release or from improper use by competitors. However, others have not. The Panel concluded that substantial benefits could be achieved through the development of standardized, government-wide guidance and contract clauses that could be implemented by agencies, rather than having to develop such clauses individually.

DRAFT

Final Panel Working DRAFT

December 2006

Uniformity would also be helpful in those ever more common situations where a given contractor doing work for one agency obtains access to information that had been provided to another agency.

The Panel urged the FAR Council to identify and, if possible, standardize the ways in which contractors and/or agencies would be able to enforce violations of non-disclosure agreements.

The Panel contemplated that the clauses and principles identified by the FAR Council would be included in the FAR.

The Panel emphasized that it was not seeking to address long-standing issues related to appropriate use of the intellectual property of the Government or of another contractor. Rather, the issue is what can be done to prevent the improper disclosure of proprietary information, particularly since in many cases contractors are required under the contract to share such information with the Government and with other contractors.

Recommendation 5-4: Training of Acquisition Personnel.

The FAR Council, in collaboration with the Defense Acquisition University (DAU) and the Federal Acquisition Institute (FAI), should develop and provide (1) training on methods for acquisition personnel to identify potential conflicts of interest (both OCI and PCI), (2) techniques for addressing the conflicts, (3) remedies to apply when conflicts occur, and (4) training for acquisition personnel in methods to appropriately apply tools for the protection of confidential data.

The Panel noted that in many instances a salutary policy is promulgated, but it is not effectively implemented because the individuals who have the responsibility are not trained on how to implement it.

There would be two aspects to the recommended training: first, to educate procurement personnel so that they are sensitized to the issues and are aware that something ought to be done to address potential OCIs, PCIs, and disclosure issues; and second, to provide uniform guidance on how to respond to such issues so these officials do not have to reinvent the wheel.

Recommendation 5-5: Ethics Training for Contractor Employees.

Since contractor employees are working side-by-side with government employees on a daily basis, and because government employee ethics rules are not all self-evident, consideration should be given to a requirement that would make receipt of the agency's annual ethics training (same as given to government employees) mandatory for all service contractors operating in the multisector workforce environment.

DRAFT

Final Panel Working DRAFT

December 2006

Although the Panel recognized that contractor personnel who work alongside civil servants would generally not be subject to all of the same ethics rules, it thought that it would be helpful if they understood the rules applicable to the Federal workers with whom they work. For example, it would be a good idea if contractor personnel understood why a co-worker could not accept an expensive lunch or gift.

However, the Panel only recommended that agencies consider implementing such a training program for their contractor personnel, as opposed to recommending that all agencies be required to do so. In addition, the scope and content of whatever training was offered would be decided on an agency-by-agency basis.

The Panel found that the costs associated with such training would be minimal, since the contractor personnel could simply attend training already being provided to Government employees, or – in some agencies – would receive the training at their convenience over the Internet.

An agency could enforce a requirement that contractor personnel attend the Federal training the same way it enforces other training requirements, such as safety training.

The Panel considered recommending the converse to this recommendation (i.e., to require Federal employees in a blended workforce environment to attend ethics training sessions given to contractor personnel), but it decided not to adopt such a recommendation, in part because it would be unwieldy in circumstances where a Federal employee worked alongside personnel from several different contractors.

Recommendation 6: Enforcement.

In order to reinforce the standards of ethical conduct applicable to contractors, including those addressed to contractor employees in the multisector workforce, and to ensure that ethical contractors are not forced to compete with unethical organizations, agencies shall ensure that existing remedies, procedures, and sanctions are fully utilized against violators of these ethical standards.

The Panel emphasized that contractors need to be held accountable for complying with ethical standards and principles identified in Recommendation No. 5, so there need to be consequences attached to any such violations.

The Panel concluded that the enforcement tools that currently exist (e.g., suspension and debarment) are sufficient – if they are properly utilized – and that there is no need for Congress to adopt additional statutory remedies. However, the Panel also concluded that additional training in when and how to use these remedies is important.

The Panel emphasized that in addition to protecting the Government's interests directly, it was also important to assure that unethical entities do not have an unfair competitive advantage over ethical companies.

DRAFT

Final Panel Working DRAFT

December 2006

The Panel considered whether to recommend an amendment to existing law that would expressly authorize the imposition of a lifetime ban upon repeated violators, but it decided not to do so.

DRAFT

Final Panel Working DRAFT

December 2006

CHAPTER 7

REPORT ON FEDERAL PROCUREMENT DATA

REPORT OF THE ACQUISITION ADVISORY PANEL

December 2006

DRAFT**Final Panel Working DRAFT****December 2006****Report on Federal Procurement Data****PART I – Background****Government Efforts to Track Contract Spending****A. Introduction**

The Panel's decision to develop findings and recommendations related to the government's procurement data was the result of its efforts to obtain such data in support of the various working groups of the Panel. The Federal Procurement Data System – Next Generation (FPDS-NG) is the only governmentwide system that tracks federal procurement spending. The system does not track any other kind of federal expenditures such as grants or loans. The Panel's results with obtaining usable data were mixed. Based on these experiences, we believed we might be able to identify some opportunities to improve the reliability and transparency of data on procurement spending. While the Panel has attempted to address the accuracy of data in general and the transparency of it in particular, this report is not a full scale review of FPDS-NG, but rather the result of the Panel's targeted requests for data.

And despite some frustration, the Panel recognizes that the FPDS-NG system was newly implemented in 2004, achieving a remarkable migration of 10 million transactions from the legacy system, and, as such, should not be subject to blanket criticism. The Panel has, after all, obtained important insights through this data, bringing to light the prescience of Congress in directing this Panel to review interagency contracts and which supports GAO's inclusion of these contracts on its High Risk series in 2005. However, the Panel did meet with some significant frustrations that it has attempted to address.

B. History of the Federal Procurement Data System

In 1972, the Commission on Government Procurement reported that no single Government organization was responsible for collecting and reporting on what executive agencies were buying or the total value of those purchases.¹ The Commission found that

- The Congress needs this basic information to make informed decisions on matters of broad public policy relating to procurement programs.
- The executive branch needs this information to determine the policy necessary for managing the procurement process.
- Interagency support activities need this information to develop and improve the services offered.

¹ Final Report of the Commission on Government Procurement, Part D, *Acquisition of Commercial Products*, Ch. 2 (December 1972).

DRAFT

Final Panel Working DRAFT

December 2006

The contract was competed and awarded to Global Computer Enterprises, Inc. in April 2003. The system became operational in October 2003, entering into a transition period lasting two years, during which time the contractor was to work with federal agencies to ensure data transfer and integrate contract writing systems with the new FPDS-NG.³

D. A History of Criticism – Accuracy of Agency Reporting Questioned

From its inception, the Federal Procurement Data System has been plagued with claims that the data itself is inaccurate. These claims have often been misinterpreted as a *system* failure when, in fact, the GAO has been abundantly clear that the failure is largely one of inaccurate or untimely data input by the agencies responsible for reporting. The Government Accountability Office (GAO) performed its first review of the system in 1980, the first year a report was issued on governmentwide data from the system. At that time, only 27 data elements were required on each procurement action in excess of \$10,000. The GAO found that it was "...unlikely that accurate and complete Government-wide data for fiscal year 1979 will be available in the near future."⁴ The GAO cited the number of agencies late in reporting their data to the Federal Procurement Data Center (FPDC) and with respect to accuracy said

“Furthermore, we noted that, once fully operational and debugged, the system will still have limitations. For example, the system relies on the integrity of many individuals to prepare the individual Contract Action Reports and to prepare them correctly. If for some reason a report is not prepared, the data on the contract award will not enter the system. The Center has no means of knowing whether data is reported for all contracts.

The Center has developed a comprehensive edit program to enhance the accuracy of the data received. This edit program will detect inconsistencies and omission, such as identifying failure to complete or fill in any of the items shown on the reporting form. Nevertheless, errors can go undetected in certain instances. For example, if the wrong dollar amount or type of contract is reported, the Center would have no way of discovering the errors.”⁵

³ U.S. General Accounting Office, *Improvements Needed to the Federal Procurement Data System – Next Generation*, GAO-05-960R (Washington, D.C.: September 27, 2005), pg. 1

⁴ PSAD-80-33, “The Federal Procurement Data System-Making It Work Better,” page ii, Comptroller General’s Report To The Chairman, Subcommittee on Human Resources, Committee on Post Office and Civil Service House of Representatives, April 18, 1980.

⁵ PSAD-80-33, “The Federal Procurement Data System-Making It Work Better,” page ii, Comptroller General’s Report To The Chairman, Subcommittee on Human Resources, Committee on Post Office and Civil Service House of Representatives, April 18, 1980, pg. 9

DRAFT**Final Panel Working DRAFT****December 2006**

Since the time of this letter, OFPP and GSA have worked closely with DoD and a fully operational interface is expected by December 2006. The Panel notes that, unlike GAO, the Panel staff did not have difficulty accessing and obtaining data from the Standard Reports template. However, much like GAO, Panel staff was not prepared to effectively use the Ad-Hoc reporting function of FPDS-NG even after training. This may well have been because the Panel's data requests have been quite complex. GSA has since upgraded that tool to provide a more user-friendly experience. And while the Findings section of this report will address the problems encountered in obtaining certain interagency contract information, the Panel was able to obtain basic, high level information about interagency contracting from FPDS-NG.

On September 26, 2006, nearly a month after the Panel's last public meeting, the President signed the Federal Funding Accountability and Transparency Act of 2006, a bipartisan sponsored Senate bill that would require OMB to oversee the development and maintenance of a single online and easily searchable web site, free to the public, that would provide disclosure of information related to the entities and organizations that received federal funds. Clearly, while this is out of the scope of FPDS-NG, it would seem that the nearly 25 years of findings on the inaccuracy of data have taken their toll. In the Senate Committee Report, a discussion of the available systems provide part of the data, states:

“There are a number of weaknesses with FPDS that make it ineffective for providing timely, accurate information on procurement actions: first, not every agency is required to report to FPDS, meaning that the only way to gain an accurate count of procurement spending is to ask each agency individually. Second, the database is undependable, often providing data that is unusable or unreliable.”¹⁶

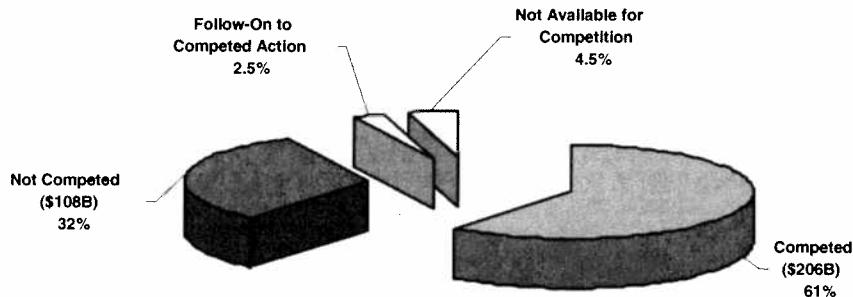
¹⁶ S. Homeland Security and Governmental Affairs, Comm., Federal Funding and Accountability Transparency Act of 2006, S. Comm. Print, 109-329 (2006)

DRAFT

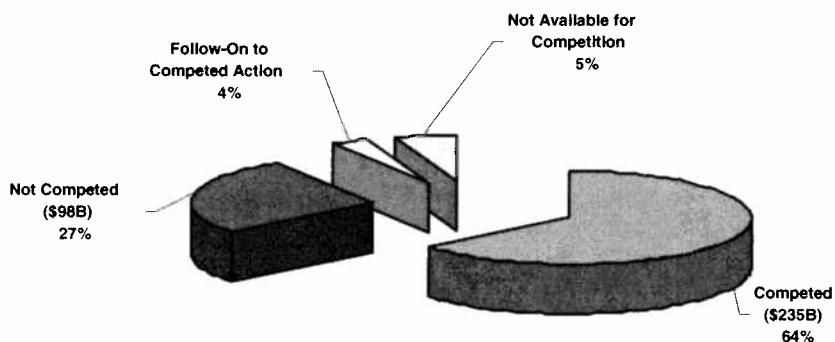
Final Panel Working DRAFT

December 2006

FPDS-NG FY 2004 Competition Report - Supplies and Services (Total Obligations = \$338B)



FPDS-NG FY 2005 Competition Report - Supplies and Services (Total Obligations = \$365B)



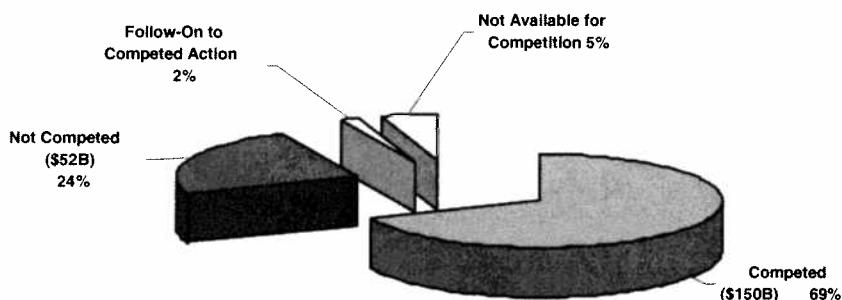
The following charts are based on data that is not available through a standard report and was provided by FPDC in response to a Panel request:

DRAFT

Final Panel Working DRAFT

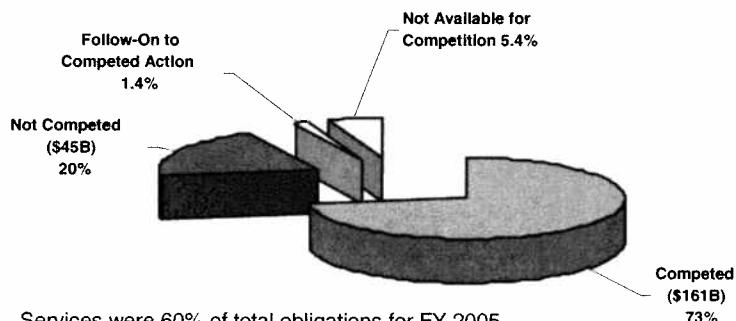
December 2006

**FPDS-NG FY 2004 Total Services by Extent
Competed (Total Obligations = \$216B)**

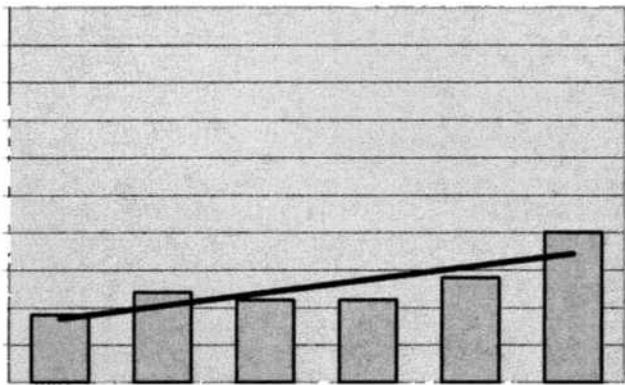


Services were 64% of total obligations for FY 2004
based on comparison with Standard Report "Competition
Report."

**FPDS-NG FY 2005 Total Services by Extent
(Total Obligations = \$220B)**



Services were 60% of total obligations for FY 2005
based on comparison with Standard Report



DRAFT

Final Panel Working DRAFT

December 2006

“extent competed” options as were available on definitive contracts 9e.g., full and open competition). In December 2004 this policy was changed to allow for a clear choice at the order level, competitive or non-competitive delivery order, with an accompanying validation rule that would require the selection of an exception to fair opportunity for non-competitive delivery orders. While this was implemented, the validation rules are not functioning as intended. Second, all DoD Federal Supply Schedule orders are automatically coded by DoD as “full and open competition.” Finally, most of the other orders derived their extent competed from the master contract.

2. Current value and estimated value of orders under Interagency Contracts is not available from migrated data

The legacy FPDS system collected a single “Dollars Obligated” field. Although the benefit of the estimated, current and ultimate value was identified, at the time of migration, existing legacy systems did not capture or collect this data as part of the business process. As with all the additional elements, they were only collected on new transactions.

3. Current value and estimated value of orders under Interagency Contracts is not entered correctly by agencies

The instructions for reporting were unclear until the posting of a new user’s manual with guidance and specific examples. The system is designed to do the math. Agency personnel were supposed to enter only the value of a modification, such as an option. The system would then add that value to any previously entered value to arrive at the value-to -date. But agency personnel were inputting the cumulative value with the modification. The system would then add that to the previous value to arrive at a highly overstated current value. It was this problem that forced the Panel to use only transactional data.

4. Inaccurate user data entry compromises the usefulness of data

Finding 3 above illustrates this point. Without the current and projected value of orders, the dollars associated with these contracts cannot be understood. But this was certainly not the only example of inaccurate user data found. DoD confirmed that they were surprised that the Department had spent \$185 million in soybean farming between fiscal years 2000 and 2005. Department officials thought a more likely explanation could be found in looking at the long NAICS code list. The NAICS code for soybean farming is listed first suggesting that it is simply selected to avoid going through the entire list. This impacts the government’s understanding of its spending behavior while preventing contractors from using the system for market research. DoD’s automatic coding of GSA Federal Supply Schedule orders obfuscates the actual competitive nature of potentially billions of dollars in public expenditure. Impossible pairings of Supply and NAICS codes were uncovered, billions of dollars of GSA Federal Supply Schedule orders were identified as non-commercial, another \$10 billion was either not reported by agencies or mischaracterized as something other than a GSA schedule order. Frequently,

DRAFT

Final Panel Working DRAFT

December 2006

6. OMB should establish, within 90 days of this report, a standard operating procedure that ensures sufficient and appropriate Department and Agency personnel are made available for testing changes in FPDS-NG and participating on the Change Control Board

The Panel believes it is essential for the continued maintenance of the system that the Departments and Agencies provide both operational and policy expertise as warranted. Full testing suffers if agencies are not sufficiently bound to participate. The problem identified with the validation rule might have been caught earlier if there were more robust testing. The Panel heard from one FPDC staff member that there are times when only one individual is available to test large numbers of changes.

7. Agency internal reviews (e.g., Procurement Management Reviews, Inspector General audits) should include sampling files to compare FPDS-NG data to the official contract/order file

To reinforce the need for greater accuracy, the Panel recommends that internal agency Procurement Management Reviews and IG audits include a comparison of FPDS-NG data to the official contract/order file. This should not be a stand-alone audit of the accuracy of this data, but rather a standard element considered, on an on-going basis, during any review the agency undertakes to provide consistent oversight in this area.

8. The OFPP Interagency Contracting Working Group should address data entry responsibility as part of the creation and continuation process for interagency and enterprise-wide contracts.

This recommendation addresses the concerns expressed by the GAO when reviewing interagency contracts and determining that there is not always a clear delineation of the roles and responsibilities between ordering agencies, contract holders, and the user.

9. The Government Accountability Office (GAO) should perform an audit that covers not only the quality of FPDS-NG data but agency compliance in providing accurate and timely data.

During its review of data concerns, the Panel spoke with GAO officials who told us that they intended to perform another audit of FPDS-NG. The Panel recommends that this audit cover agency compliance in providing accurate and timely data as an integral element to assessing the quality of FPDS-NG data.

10. OFPP should ensure that FPDS-NG reports data on orders under interagency and enterprise-wide contracts, making this data publicly available (i.e., standard report(s)).

The OFPP Interagency Contracting Working group shall provide the specific guidelines consistent with the reports requested by the Panel to include competition information at the order

DRAFT

Final Panel Working DRAFT

December 2006

Again, there was significant debate regarding the funding of FPDS-NG. Some members were concerned that there should be a sustained source of funding through an appropriation arguing that there is a cost to doing business and if collecting and reporting on what the government buys is of value, then the government should recognize this and fund it. This point of view believed that collecting the money from agencies via a “pass the hat” process put FPDS-NG in an unstable funding position with too many other competing interests at the agency level. But those favoring the “pass the hat” method said it is currently working to support the needs of the Integrated Acquisition Environment, including FPDS-NG. However they recommended that those agencies that budget for the IAE need to also ensure they actually provide those funds when the time comes. Therefore, the Panel generally settled on a recommendation which would have OMB ensure that the funds agencies provide are sufficient to ensure that the systems are financed as a shared service and sufficient to meet the objectives of the system.

15. Within one year, OMB shall conduct a feasibility and funding study of integrating data on awards of contracts, grants, cooperative agreements, inter-agency service support agreements (ISSAs) and Other Transactions through a single, integrated and web-accessible database searchable by the public.

The Panel acknowledging that FPDS-NG is only intended to provide data on expenditures through contracts, recognized the ongoing discussion in Congress of a bipartisan sponsored bill that would provide visibility into the volume of monies expended through grants, cooperative agreements, ISSAs and Other Transactions as well as contracts. The Panel recommended a feasibility and funding study as an interim step.¹⁹

¹⁹ This recommendation has been overtaken by events. In August 2006, the Congressional Budget Office (CBO) released an estimate of \$15 million for implementing S. 2590, the Federal Funding and Accountability Transparency Act of 2006. The President signed the bill into law on September 26, 2006 and OMB is currently working towards implementation.

DRAFT

Final Panel Working DRAFT

December 2006

Appendix A - DRAFT STATUTORY REVISION FOR RECOMMENDATION #4:

41 U.S.C. § 417

United States Code Annotated Currentness

Title 41. Public Contracts
Chapter 7. Office of Federal Procurement Policy (Refs & Annos)
§ 417. Record requirements

(a) Establishment and maintenance of computer file by executive agency; time period coverage

Each executive agency shall establish and maintain for a period of five years a computer file, by fiscal year, containing unclassified records of all procurements greater than the simplified acquisition threshold in such fiscal year.

(b) Contents

The record established under subsection (a) of this section shall include--

(1) with respect to each procurement carried out using competitive procedures--

(A) the date of contract award;

(B) information identifying the source to whom the contract was awarded;

(C) the property or services obtained by the Government under the procurement; and

(D) the total cost of the procurement;

(2) with respect to each procurement carried out using procedures other than competitive procedures--

(A) the information described in clauses (1)(A), (1)(B), (1)(C), and (1)(D);

(B) the reason under section 253(c) of this title or section 2304(c) of Title 10, as the case may be, for the use of such procedures; and

(C) the identity of the organization or activity which conducted the procurement.

(c) Record categories

The information that is included in such record pursuant to subsection (b)(1) of this section and relates to procurements resulting in the submission of a bid or proposal by only one responsible source shall be separately categorized from the information relating to other procurements included in such record. The record of such information shall be designated "noncompetitive procurements using competitive procedures".

(d) Transmission and data system entry of information

Heads of Executive Agencies shall ensure the timely and accurate transmission of The
information included in the record established and maintained under subsection (a) of this

DRAFT

Final Panel Working DRAFT

December 2006

section ~~shall be transmitted~~ to the General Services Administration ~~for entry and shall be entered into~~ the Federal Procurement Data System or successor system referred to in section 405(d)(4) of this title.