

## ACQUISITION ADVISORY PANEL

Meeting Minutes

May 17, 2005

The Auditorium, Federal Deposit Insurance Corporation (FDIC)

Washington, D.C.

The Acquisition Advisory Panel (AAP) convened its fifth meeting on May 17, 2005 in the Auditorium at the Federal Deposit Insurance Corporation (FDIC), Washington D.C. Ms. Marcia Madsen, Chair of the Acquisition Advisory Panel, opened the meeting at approximately 09:25 AM.

The Chair welcomed everyone to the fifth AAP meeting and noted that the day would be very full with guest speakers voicing differing opinions on various issues relating to the Panel's charter. She requested that the focus of the meeting be on the Panel's working group issues.

Ms. Laura Auletta, the AAP's Designated Federal Officer, called the roll. The following Panel members were present:

Louis M. Addeo  
Frank J. Anderson, Jr.  
Dr. Allan V. Burman  
Marshall J. Doke, Jr.  
Deidre A. Lee  
Thomas Luedtke  
Marcia G. Madsen  
Joshua I. Schwartz  
Roger D. Waldron

The following Panel members arrived after the meeting convened:

Carl DeMaio (9:55 a.m.)  
Jonathan Lewis Etherton (11:25 a.m.)  
Melanie R. Sabelhaus (10:22 a.m.)

The following Panel members were not in attendance:

David Drabkin  
James A. (Ty) Hughes, Jr.

Ms. Madsen expressed her gratitude for the effort the day's presenters had put into bringing their materials to the Panel. The guest speakers and their affiliations were as follows:

Glenn Baer	Contract Services Association (ARINC)	(Attachment 1)
Jan Menker	Contract Services Association (Concurrent Technologies)	(Attachment 2)
Marilyn Glynn	Office of Government Ethics	(Attachment 3)
Henry Kleinknecht	DoD Office of Inspector General	(Attachment 4)
Richard Joliffe	DoD Office of Inspector General	(Attachment 4)
Terry McKinney	DoD Office of Inspector General	(Attachment 4)
Eugene Waszily	GSA Office of Inspector General	(Attachment 5)
Kathleen Tighe	GSA Office of Inspector General	(Attachment 5)

Patricia Ellis	Defense Industry Initiative (Raytheon)	(Attachment 6)
Richard Bednar	Defense Industry Initiative (Crowell & Moring)	(Attachment 7)
Beth Daley	Project on Government Oversight	(Attachment 8)
Scott Amey	Project on Government Oversight	(Attachment 8)

Ms. Madsen thanked Ms. Bethany Noble, Special Government Employee and Private Sector Coordinator for her continuing support to the Panel. The Chair introduced Mr. Rob Smith, a summer associate at her firm (Mayer, Brown, Rowe and Maw LLP) who volunteered to assist the Panel.

The Chair introduced the first guest speaker, Mr. Glenn Baer from the Contract Services Association (CSA). Mr. Baer thanked the Panel for the invitation to speak and announced that CSA was formally releasing its Services Contracting Task Force’s report on *“Removing Federal Services Acquisition Barriers and Balancing Public and Private Interests”* at this meeting. [Note: the full report can be found under the link to “Reference Material” at <http://www.acqnet.gov/aap>]. In his presentation (Attachment 1), Mr. Baer stated that the objective of CSA’s task force was to take a fresh look at service acquisition issues. Initially, the task force segregated types of service into approximately 30 categories, but upon review felt that, for its purposes, services were either commercial or developmental. Because it determined that regulatory guidance for developmental services adequately protected public and private sectors, CSA’s task force focused its attention on commercial services. Mr. Baer presented specific recommendations including: 1) amending the definition of commercial items; 2) revising Service Acquisition Reform Act (SARA) language to allow for increased use of time & material (T&M) service contracting; 3) amending Advisory and Assistance Services restrictions; 4) amending FAR language on pricing of commercial services to allow for variety of approaches to determining price reasonableness; and 5) amending the General Services Administrations’ (GSA) schedule program to improve its utility.

The next presenter, also from CSA, was Ms. Janice Menker. Her focus was on CSA’s regulatory recommendations associated with acquisition planning and FAR Part 37 (Attachment 2). CSA believes that the level of acquisition planning typically associated with procurement of hardware systems should be applied to the procurement of services. Ms. Menker stated that T&M contracts are commonly used in industry and that best value contracting is necessary, but requires both an understanding of the market and an appreciation that past performance for the service sector has unique challenges. She raised questions associated with incentivization under service contracts and post-award contract administration. Ms. Menker stated that distinctions between professional and non-professional services are blurring and therefore, procurement laws to protect labor may no longer be necessary. Other recommendations included: 1) focusing more attention in the FAR on services; 2) providing more education and training on services; and 3) realigning Part 37 with other FAR parts.

Mr. Baer and Ms. Menker answered questions from Panel members. Panel Member Deidre Lee asked if expanding E-Buy to allow access to postings by all interested vendors would help with the challenge of proper scoping on schedules. Mr. Baer responded that CSA working groups were looking at publicizing and scoping as different challenges but that reducing existing redundancy within the various schedules would likely result in a reduction of scope problems and that the CSA working group’s recommendations on E-Buy to expand communications and advertising of requirements across all schedules would enhance competition. Ms. Lee stated that the Department of Defense (DoD) had endorsed E-Buy because once the determination has been made that schedule work is within scope, those schedule holders are notified; if all vendors on all schedules were to be notified, it would create a greater challenge. Mr. Baer agreed and said that he would take Ms. Lee’s scope issue back to the CSA

working group. Ms. Lee then asked if having separate schedules is valuable. Mr. Baer stated that he would also take this question back to the working group.

Panel Member Roger Waldron noted that CSA's presentation had captured the process well; that on a particular schedule, vendors can see the requirement, but others cannot. On performance-based requirements, there may be multiple solutions under more than one schedule. Mr. Waldron noted that the Federal Supply Schedule (FSS) had an initiative to go to a single schedule for corporate contracts entitled Consolidated Services Schedule and asked Mr. Baer his perspective. Mr. Baer responded that the CSA working group had considered recommending a single schedule, but determined that this was not necessarily the answer. Mr. Waldron asked if CSA had contemplated what the optimum number of schedules should be – that perhaps 42 is enough, but a single schedule is too few. Mr. Baer agreed to take the issue to the CSA working group.

Mr. Waldron asked Ms. Menker to elaborate on industry's use of T&M contract vehicles. She stated that in certain industries it is routine to pay by the hour and used Otis Elevator as an example where the T&M is the normal contracting approach. She explained that the working group had performed a Google search and found that T&M pricing arrangements are readily available in the private sector, but indicated that perhaps this was not basis enough to make an overarching statement that T&M vehicles are commonly used by industry. Mr. Waldron asked if they had examined what mechanisms are within the T&M vehicles to protect the parties. Ms. Menker said that CSA would look into the question.

Panel Member Allan Burman asked if CSA had examined whether the system is broken in terms of acquiring services. Ms. Menker stated that her working group concluded that the system was not necessarily broken, but that the focus has been on weapons systems hardware acquisitions with its more tangible outcome, and this conclusion had led to discussion on defining services. Dr. Burman asked Ms. Menker how well performance-based acquisition is working in the services environment, noting that this technique is reliant on defining desired outcome. Ms. Menker stated that the consensus in her working group is that notwithstanding the labeling of requirements as performance-based, statements of work are still fairly specific and identified outcomes are not well articulated. She believes additional investigation and training on how to translate requirements into a meaningful performance-based description are needed.

Panel Member Marshall Doke stated that in the assigned background reading, the DoD Inspector General (DoD IG) opposed T&M contract vehicles because of cost control and labor inefficiency concerns, and asked Ms. Menker if CSA had addressed these concerns, and if so, did it have any recommendations. Ms. Menker stated the working group had discussed the need to monitor T&M contracts diligently, but that T&M is a valuable approach. She believes that commercial concerns more diligently monitor the T&M vehicles. Mr. Doke asked Mr. Baer how an entity assesses the reasonableness of the proposed amount of time in a competitive environment, noting that he understands how labor rates are determined to be reasonable. Mr. Baer suggested that one way is to look at past or current contracts and that while it is not expressly detailed in the FAR, this is a common practice at GSA. Mr. Doke stated that Ms. Menker had said that contracts cannot fix poor requirements definitions and asked if she recommends that the laws be amended prior to determining an adequate remedy to poor requirements definition. She responded that equal attention needs to be paid and that little attention has been paid to the requirements side.

Panel Member Frank Anderson asked Mr. Baer to confirm that CSA was recommending an expansion to the definition of commercial services. Mr. Baer responded by stating that CSA believes that

“commercial items and commercial services can coexist in the same definition” and that this would allow more products to be available to the Federal Government. Mr. Baer then explained that it is CSA’s opinion that making a distinction between services and ancillary services is unnecessary and confusing. Mr. Anderson requested that Mr. Baer elaborate on a statement he had made previously about vendors needing to be sensitive to the Government’s need for pricing information. Mr. Baer referred the Panel to FAR line-in/line out verbiage recommendations in CSA’s full report which established the expectation that vendors offering commercial items to the Government in the absence of competition should anticipate having to provide current and past contracts to assist the Contracting Officer’s analysis of proposed price.

Panel Member Joshua Schwartz thanked Ms. Menker and Mr. Baer for their presentations. Professor Schwartz referred to language on CSA’s presentation slides that suggests that commercial services can be defined by acceptance of the service in the marketplace. Professor Schwartz asked if the focus should be on whether the marketplace has established a reasonable price for the item rather than acceptance of the item. Following some discussion, Mr. Baer agreed that what makes an item commercial is that the marketplace can establish a reasonable price. Following discussion by Panel Members Joshua Schwartz and Frank Anderson regarding the setting of prices by the marketplace for developmental items, Mr. Baer acknowledged that until a product has a history of being priced in the marketplace, it is difficult for a contracting officer to determine price reasonableness and that existing requirements for competition, market research and other methodologies must continue to be utilized to assess the reasonableness of any commercial price. In response to a question posed by Professor Schwartz on how to deal with what he termed as an “emerging service,” Mr. Baer said that with technology cycles now at 18-month intervals, many new commercial items are entering the marketplace. He said the CSA working group would look at the question of emerging commercial services and how to price them, and provide feedback to the Panel.

Panel Member Frank Anderson commented that the acquisition community’s approach has been that the complexity of the pricing of an item is a significant factor in determining whether that item can be characterized as commercial. He believes instead that it should be a 2-step process; first, determination whether the item is commercial, followed by activity to determine how to price the item. Panel Member Joshua Schwartz stated that the approach taken on determining what constitutes a commercial item and the effort associated with that process impact the acquisition workforce.

Panel Member Marshall Doke asked the CSA representatives if they felt a certain number of sales were required to allow an item to be characterized as commercial. Mr. Baer stated that the CSA working group currently considers if there are sufficient numbers of sales to demonstrate market acceptance of the product, but that the group would look at whether one sale could qualify the item as commercial.

Panel Member Frank Anderson clarified his earlier comments by stating that the current practice of identifying a commercial item creates a two-step process - determination of whether the item is commercial, followed by pricing - and the fact the item is difficult to price does not impact its commerciality. Mr. Baer agreed, but said that CSA would revisit the issue. Panel Chair Marcia Madsen noted that the Panel’s Commercial Practices working group is struggling with the issue of sharing risk or risk recognition mechanism when one is looking to the marketplace to establish the level of price risk for an item. She then asked Mr. Baer whether CSA has performed research into what it takes to either have a market or to have a commercial market price. Mr. Baer replied that the CSA working group had not, but would take the questions under discussion. Ms. Madsen suggested that he would likely be invited to one or more Panel working groups to speak.

Panel Member Joshua Schwartz commented that during both Ms. Menker's and Mr. Baer's presentations, he heard what appeared to be perfectly reasonable recommendations, but that if implemented, they would have distinct impacts on the Government's processes, capabilities and staffing levels, and that the acquisition workforce has paid a "hidden cost" as a result of the procurement reforms of the last 15 years that had not received sufficient attention. He believes that procurement reforms do not make sense if investments in the workforce are not made. Professor Schwartz then referred back to Panel/CSA dialogue earlier in the morning on demands on the contracting officer's time to control possible abuses arising from use of T&M contracts and contract administration in general, and noted that according to a Government Accountability Office (GAO) study, resources are not being applied in those areas. He then asked the CSA representatives why, based on their experience and knowledge, this application of resources is not being made, suggesting it might be lack of training, staffing issues, other priorities, and cultural issues. Mr. Baer agreed with Professor Schwartz's observations and stated that he believes "there is almost a crisis in the acquisition workforce. The number of actions is up; the number of people is down. To be able to take on additional challenges would require additional investment on behalf of the Federal sector in order to keep up with the pace of these acquisitions." Mr. Baer attributed the increase in streamlined contracting approaches such as FSS to these workforce considerations. He then recommended that the Federal workforce be bolstered and noted that this was especially necessary because of the retirement of large numbers of experienced acquisition professionals. Ms. Menker agreed, stating that a crisis exists and greater investment in the workforce is important.

Panel Member Marshall Doke asked the CSA representatives whether a commercial organization would use T&M contracts if its staff were reduced or did not have sufficient training. Ms. Menker answered that their subcontractors use T&M when necessary to get the job done. Mr. Baer stated that the beliefs that the T&M approach is easier and that defining a requirement as performance-based is difficult contribute to choosing the T&M approach.

Panel Member Schwarz elaborated on earlier discussion of the Federal workforce. In addition to changing the culture and bolstering training and staffing levels, he stated that the expertise required to procure sophisticated services requires a level of sophistication in the workforce and cited performance-based contracting as an example.

Panel Chair Marcia Madsen said commercial buyers, particularly of IT, have made statements to the Panel regarding the use of T&M contracts - it is not favored except for diagnostic or developmental work, and their preference is to use fixed price vehicles. Ms. Madsen asked the CSA representatives if its members, buyers and sellers, have been questioned about use of T&M contracts. Ms. Menker said that they had only touched upon it in the CSA working groups, but they would pursue the question within the groups. Ms. Madsen said that concluding T&M to be the industry norm is not helpful and that the questions should be what is the correct balance, what are T&Ms' limitations, and where does it make sense to use T&M. Ms. Madsen then asked Mr. Baer to elaborate on CSA's recommendation to change the definition from "non-governmental" to "other than Federal Government." She stated that she believed the DoD IG would object and cited the example of the IG's report on the tanker lease; the IG does not view governmental sales, whether foreign, state, or local, as a test of commerciality. She asked if CSA had considered this. Mr. Baer responded that they had not specifically and that their approach had been to take a "clean-sheet" approach with the overarching goal of expanding the Government's access to commercial products. He stated that they are aware of firms that sell off-the-shelf commercial communications *services* that would qualify as commercial *items* if the definition were to be changed to Federal purposes. He agreed to take the issues under consideration. Ms. Madsen noted that the Panel was seeing various perspectives on the subject. Ms. Madsen thanked

CSA for its study and for its presentations to the Panel, and expressed the Panel's desire to hear from CSA again.

Panel Chair Marcia Madsen announced formation of a new Panel working group to examine questions on restrictions associated with inherently governmental functions. The purpose of the working group is to look at how commercial practices, commercial items and interagency vehicles impact the work of Federal agencies and employees: Do current restrictions still make sense? Are restrictions being observed? Who is responsible for compliance? How are contractor employees being utilized and under what constraints? Do restrictions need to be standardized? Is the restriction on personal services still meaningful? Is it still being followed? Are there special ethical considerations that need to be addressed?

Ms. Madsen stated that Panel Member Tom Luedtke had volunteered to chair the new cross-cutting working group and stated that the working group would not be examining FAIR Act or A-76 issues, but instead, the Government functions, and who is performing them.

Noting that the first public statement received by the Panel was submitted by the Office of Government Ethics (OGE), Panel Chair Marcia Madsen introduced the next presenter, Ms. Marilyn Glynn, Acting Director of the OGE who is also functioning as OGE's General Counsel.

Ms. Glynn began her presentation (Attachment 3) by thanking the Panel for the invitation to discuss issues that had been emerging for at least a decade in the Federal ethics officer community, namely, potential vulnerabilities arising as a result of the functional distinctions between Government and contractor employees becoming less clear. She said that she did not intend to discuss any particular scandal or particular deficient procurement process. She asked the Panel to consider perceived trends that project potential ethics problems, and to find ways to prevent them. She noted that she is an ethicist, not an expert in contracting and was not recommending a rigid prescription to deal with ethics that might have unintended consequences. She then discussed the Executive Branch's ethics program, which is designed to protect the integrity of Government operations and processes. Her office's primary responsibility is to promote integrity of Government employees. While she noted that the program does not deter all unethical behavior by Government employees, the Government does have ways to punish misconduct. But, she added, "contractor employees are neither subject to most Federal ethics requirements, nor are they subject to direct discipline by the Government" and that Government employees' duty is to the Government, contractor employees to their private employer. Government and contractor employees work so closely on a day-to-day basis, it is difficult to distinguish whether employees are Government or contracted. Ms. Glynn wants to ensure that with heavy reliance on contractors, Government's interests are not compromised. She stated that OGE has been advised of particular areas of concern: advisory services, management & operations contracts (e.g., labs and large programs), outsourcing contracts (e.g., A-76) and large indefinite delivery/indefinite quantity (IDIQ) service contracts involving decentralized ordering. She then spoke of categories of problems: financial conflicts of interest; impartiality concerns; misuse of information, authority and Government property – all which if involved a Government employee would be covered by criminal, civil or administrative regulation.

Ms. Glynn stated that she does not believe there is a single solution to stem unethical contractor behavior and that the rigid legalistic approach applicable to Federal employee is both unwarranted and unworkable for contractor employees. She made several recommendations. Agencies could use Federal Acquisition Regulation (FAR) Part 9.5, Organizational and Consultants Conflicts of Interest, as the basis of addressing contractor employee conflicts of interest either as an educational tool aimed

at contracting officers and agencies or as a baseline for more tailored language targeting unique situations, employees or contracts noting that some agencies have already tailored FAR Part 9.5. Ms. Glynn's second recommendation was to anticipate conflicts of interests with tailored clauses such as the Food and Drug Administration's (FDA) requirement to have conflict of interest plans, including a requirement for contractor employees to execute conflict of interest and non-disclosure agreements. She suggested that model contract clauses be developed that could then be further tailored to meet agency-unique requirements. Ms. Glynn's third recommendation involved training and education to promote awareness of the contractor conflict of interest issues to the acquisition community, both Government and contractor. She said that GAO recently reported that DoD's Defense Acquisition Regulation Supplement (DFARS) includes a requirement for Defense contractors to have standards of conduct, internal controls, and employee ethics training. This report also commented on DoD's apparent lack of knowledge on contractors' compliance with the DFARS requirements. Language in the FY06 authorization bill would require DoD to conduct a study of contractor ethics. Ms. Glynn referred to comments made by the CSA presenters on the crisis in the Federal acquisition workforce, and asked rhetorically if there are sufficient numbers of acquisition professionals to enforce current acquisition rules. She concluded her prepared remarks by observing "if you wait for a scandal to occur, you can lose the luxury of choosing your own remedy."

Panel Member Carl DeMaio thanked Ms. Glynn for OGE's written statement and her oral presentation. He asked her if, with the clamor in the newspaper regarding ethical issues, there is a risk of over reacting. She replied that she does not believe there is any ethics crisis in Government procurement, but there have been complaints that not enough attention has been paid to ethics especially in agencies where contractors are in the Federal workplace. She advised that when a scandal occurs, there can be a rush to respond with overly restrictive rules and it is better to look at the issues in a deliberative way prior to a crisis occurring. Mr. DeMaio asked her if, in her opinion, the high profile scandal (Darlene Druyun) she referred to in her presentation has contributed to a rush to judgment. She responded that she would have given the same speech eight or ten years ago. Mr. DeMaio referred to her 5<sup>th</sup> slide and asked if the types of risks listed (financial conflicts of interest; impartiality concerns; misuse of information, authority, and property) are present in the private sector between two firms and if she had looked at how the private sector reconciles the conflicts? Ms. Glynn said that the conflicts do exist in the private sector and that because these issues involve human beings, situations occur regardless of whether they involve Government or contractor employees. She added that large companies have ethics programs because of sentencing guidelines and the need to demonstrate to the Justice Department that the company is addressing conflict of interest issues in the workplace.

Panel Member Carl DeMaio noted that the discussion was referring to contractors overseeing their own staffs and then asked Ms. Glynn if she is aware of ethics programs delivered to companies' subcontractors. She answered that she had not, but that such programs may exist. Mr. DeMaio asked rhetorically if it isn't Government employees' responsibility to ensure contractors are "acting in the public interest." He contrasted this approach to requiring regulation, oversight and training on the supply side. Ms. Glynn responded with several points: 1) what may look like bad conduct may not necessarily be a violation of law; and, 2) Government employees should not be supervising contractors. Contracting officials should be performing their oversight function, but perceived misconduct may not actually be a violation. She cited a situation where a contractor was fired for viewing pornography in a Federal workplace, but shortly re-hired by another company. Ms. Glynn said no one knows exactly how to handle that type of situation.

Panel Member Dr. Allan Burman thanked Ms. Glynn for her presentation. He commented that when he was at the Office of Federal Procurement Policy (OFPP), there were numerous ethics rules that

made it difficult for military members leaving the service to work in private industry and that the Panel should consider unintended consequences of its recommendations. He recommended that the Panel get data on the problems and then explore potential impacts of new regulations on an agency's ability to accomplish its mission. Dr. Burman noted that many new agencies rely on contractors to accomplish the mission and this has to be considered when contemplating how to proceed. Ms. Glynn agreed, saying she had not recommended new regulations; instead, current authorities could be clarified or additional training on existing contracting officer authorities might be beneficial.

Panel Member Marshall Doke thanked Ms. Glynn for her presentation and noted that Sarbanes-Oxley has brought attention to the issue of internal controls for financial reporting. He said that the Committee of Sponsoring Organizations (COSO) report says that the key to lawful and statutory compliance is the tone from the top and that there had been a suggestion earlier that the tone from the top in Government is different for contractors than for Government employees. He then asked Ms. Glynn if prosecution of Government employees is pursued as vigorously as for contractor employees. Ms. Glynn replied that she has read academic research that indicates the tone from the top is the most important aspect of an ethics program. She said she had no hard data to support the suggestion that prosecution of contractors is pursued more vigorously than Government employees, but that based on anecdotal information, her guess is prosecution enforcement of ethical principles is greater with Federal employees because more tools are available.

Panel Member Marshall Doke followed up by asking if OGE has addressed the tone at the top at the local level as opposed to agency level. Ms. Glynn responded that ethics training occurs at all levels of Government organizations. Mr. Doke asked if OGE audits all levels. Ms. Glynn responded that if his question was does OGE conduct a scientific study of the tone at the various levels, the answer is no.

Panel Chair Marcia Madsen asked if the examples Ms. Glynn provided during the day's presentation would have been the same as those she would have provided in a speech ten years ago. Ms. Glynn responded yes, and elaborated, saying that the examples she had cited represented problems in the past, but they are having more impact today with increased contracting out, especially in the area where contractors are providing advice to agencies on policy matters. In some agencies, contractors are indistinguishable from Government employees and have significant input on internal agency deliberations. Ms. Glynn contrasted the type of "close scrubbing" government employees involved in sensitive deliberations receive of their financial disclosures to what is done regarding contractor employees... "essentially nothing."

Panel Chair Marcia Madsen asked Ms. Glynn if OGE maintains data or works with agency officials on the impact of the issues on service contracts. Ms. Glynn stated that OGE does not because its authority is over Government employees, not contractors and that she was "using this panel as ... vehicle to communicate what's been said for a number of years in the ethics community." Ms. Madsen said that it is difficult to connect the examples to AAP charter commercial practices or interagency core issues, but if agency ethics officers have information relating to services contracting, the Panel would be happy to speak with them. Ms. Glynn stated she understood the Chair's point, and noted that even if procurements are not tainted, contractors appearing to be Government employees are behaving improperly. She cited as an example last year's story on Los Alamos where journalists described contractor employees as Department of Energy employees, leading the public to believe DOE employees were operating "without much restraint." She then expressed her hope that the Panel could address the situation. Ms. Madsen responded that there may be someplace in the working group for the discussion of the issue and suggested that it might fall under the category of problems with internal

Government controls. Panel Chair Marcia Madsen thanked Ms. Glynn for her presentation and called for a 5-minute break.

Upon reconvening, Panel Chair Marcia Madsen introduced the next Panel presenters, Henry Kleinknecht (Director), Richard Jolliffe and Terry McKinney from the DoD IG Office (Attachment 4) and noted that they had worked on many IG reports associated with Panel issues - commercial services and interagency contracts. Mr. Kleinknecht began with an overview of how the IG's office became involved in review of commercial practices. He said that a Naval Air Systems Command (NAVAIR) hotline complaint included allegations that a sole source interagency contract for training services had been awarded to a contractor who had employed a person who was involved sexually with a Government employee in the program office. Upon review, the IG found that NAVAIR was improperly using a reimbursable order to the Naval Undersea Warfare System. The situation involved improperly "banking" funds and improper contractor pre-selection. He told the Panel of an allegation that a Seattle-based small business manufacturer of aviation parts procured through Defense Logistics Agency (DLA) was precluded from selling the parts directly to the Air Force that ultimately resulted in large mark-ups to the Government and the taxpayer.

Mr. Kleinknecht explained that when the DoD IG began looking at commercial practices, Federal Acquisition Reform Act (FARA) & Federal Acquisition Streamlining Act (FASA) streamlining initiatives were being implemented including their emphasis on buying more commercial products and broadening the definition of commercial items. This allowed more sole source items to qualify as commercial items and eliminated the requirement for contractor submission of cost and pricing data. Mr. Kleinknecht discussed the role of the Truth in Negotiation Act (TINA) in pricing stating that a former Director of Defense Procurement believes TINA is necessary to ensure the integrity of pricing, but that where there is competition, the market establishes pricing. Mr. Kleinknecht said, "So if we've got competition, market pricing, we're in good shape. But in cases where we don't have competition, the quantitative benefits of TINA compliance far exceed the cost of Government oversight." He explained that a review had been performed on the cost of complying with TINA and found that it equates to 1.2% of the cost of the procurement.

Mr. Kleinknecht discussed DoD IG's issues regarding the current definition of a commercial item - "of a type customarily used by the general public." He asked what this means: "Is it something that is used by the general public? Is it something that's similar to something used by the general public?" Does it have to be sold to the public, or just offered for sale?" He continued with a discussion on classification of items that have been amended with "modifications of a type customarily available and minor modifications of a type not customarily available." He concluded the definition "basically allows just about everything we buy to be classified as a commercial item."

Mr. Kleinknecht discussed the distinction between definitions for commercial items and commercial services. For services, it must be of a type offered and sold competitively in substantial quantities. He noted that FASA included "in substantial quantities" for items, but that FARA removed this restriction. And, unlike items, the service must be sold competitively. Mr. Kleinknecht explained that contracting officers are responsible for making the commercial item determination and in doing so, must decide what is necessary to establish that the proposed price is fair and reasonable. He presented an order of precedence. If the contract will be awarded competitively, nothing else is needed. If not competitive and other than cost or pricing data is required, the contracting officer should first ask for information related to established catalogue/market prices or previous contract prices. He explained that after FARA and FASA, because items were increasingly being determined to be commercial, significant

price increases occurred. This, he said, is attributable to the loss of a price baseline and that “price analysis is only as good as the last price you paid is good.”

Mr. Kleinknecht said that the contracting officer’s second order of precedence is market research on sole source commercial items to determine a fair and reasonable price, noting this is very difficult. The third, final area of requested pricing information is cost or pricing data which should only be requested as a last resort because per the Government’s pricing policy, unnecessary submission of cost or pricing data “leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional contractor and Government resources (FAR 15.402-3). Mr. Kleinknecht noted that a previous speaker had stated that to determine price reasonableness of a commercial item’s price requires a lot of work on the part of the contracting officer. He contrasted this with the situation where the contracting officer receives cost or pricing data; the analysis to determine reasonableness is an easy and quick process. He also commented that while contracting officers may request other than cost or pricing data, “whether the contractor will provide the appropriate information is another thing also.” He said that approximately 3 years ago, the Director of Defense Procurement issued guidance stating that for sole source commercial item procurements, solicitations should include FAR 52.215-20 to ensure the contractor will provide prices on recent sales in quantities similar to the solicited/proposed quantity. Mr. Kleinknecht believes it makes sense to price an item commercially if the vendor is truly selling the item commercially in a similar quantity, but that if the vendor is not able to provide sales information, the item should not be classified as commercial. While elaborating on a list of examples (Attachment 4, pages 10 & 11) of commercial item determinations, Mr. Kleinknecht stated that within DoD, simplified price analysis is occurring per FAR Part 12, but he questioned its effectiveness. Further, he stated, once the determination is made, the contractor is not required to provide cost data or evidence of commercial sales. Feedback to the IG from contracting officers indicates that they believe that the definition of a commercial item is too broad and not in keeping with the intent of Congress.

Mr. Kleinknecht provided a list of audits his organization has accomplished in the area of commercial practices and explained that modifications to the Boeing 767 aircraft under the proposed Air Force tanker lease were too significant to characterize as minor. He said legislation now requires cost or pricing data for minor modifications in excess of \$500,000. Because Boeing would not allow access to sales information on the 767 aircraft, the Air Force used the internet to gather pricing information. Mr. Kleinknecht also does not recommend the use of a fixed price vehicle for procuring a significant modification with no established baseline from which to negotiate quantity discounts. His presentation lists major IG audit findings associated with procurement of commercial items/use of price analysis including: discounted catalog prices for sole source commercial items are significantly higher than cost-based prices; sole source spare parts are more costly than competitively purchased parts whether characterized as commercial or non-commercial; DoD buyers are not taking advantage of direct vendor delivery; DoD’s use of price analysis on noncommercial items has led to paying more than if establishing prices through cost analysis; and, for the tanker lease, no commercial market existed to establish a reasonable price.

Mr. Kleinknecht discussed establishment of a rapid improvement team to resolve audit issues with Allied Signal/Honeywell. Pricing of items had been a major concern and initially, notwithstanding lack of commercial prices, the vendor characterized all parts as commercial. In the end, the contract awarded was based on FAR Part 15, not Part 12. A majority of the pricing effort focused on the 20% of the parts representing 80% of the cost. The DoD IG auditors adopted this “80-20 rule” on subsequent vendor parts’ pricing reviews.

Mr. Kleinknecht summarized DoD IG audit findings on services and interagency contracting (Attachment 4, pages 16 – 19): lack of good market research, sole source awards lacking adequate justification, program and contracting offices having “desired” contractors, non-definitive scope of work, personal services, missing periods of performance, funding problems with MIPRs, expired appropriations, bona fide need issues, use of incorrect appropriations, insufficient tracking/monitoring of funds, fair opportunity not given to all contract awardees, down-select procedure issues, unsuitable/out-of-scope awards under multiple award contracts, sub-task order issues, misuse of FSS, out-of-scope awards under FSS, lack of fair & reasonable price determination, use of cost-reimbursable contracts for follow-up requirements, lack of firm fixed price, performance-based contracts (PBCs) on repetitive purchases, and overuse of T&M contract vehicles.

In response to a question from Panel Member Carl DeMaio, Mr. McKinney, the DoD IG expert on interagency services contracting, discussed the down-select issue in more detail. Mr. McKinney described a situation where under a multi-award contract, a Government agency requested pricing (rough order of magnitude) and scope estimates to perform a requirement, but then only negotiated with a single contractor. Upon Mr. DeMaio’s further questioning, Mr. McKinney stated that he is “not a fan of down-select at all” and indicated that a similar situation occurs with sub-task orders – a selection is made at one level, but the subtasks are awarded to a single contractor. Mr. DeMaio noted that private sector presenters had consistently told the Panel that the down-select process is a useful tool. Mr. McKinney explained his objections stem from the fact that the scope of the requirement is not initially well defined and that once the scope is defined, not all contractors are given a fair opportunity to compete. Panel Chair Marcia Madsen stated that she did not believe that the down-select process Mr. McKinney described equates to the definition of down-select used by industry.

Mr. Kleinknecht continued his review of presentation slides (Attachment 4, page 19) detailing additional audit issues with service and interagency contracting: lack of assurance that prices are fair and reasonable; failure to review labor hours/mix/rates; failure to obtain discounts on large supply purchases; inadequate review of contractor price lists; lack of documentation to support prices; limited surveillance on service contracts; payment of invoices without review; procurement of level-of-effort; lack of contract/order surveillance plans; failure to appoint a contracting officer representative (COR); poorly trained CORs; and lack of reporting contractor performance.

Mr. Kleinknecht presented the DoD IG’s position on performance-based contracting for logistics support (PBL) (Attachment 4, pages 20-24) noting that the IG has had little involvement in performance-based contracting except for logistics. He provided historical background and stated DoD requires aggressive implementation of PBL. He said there have been claims of large cost savings resulting from PBL acquisition strategy, but three IG audits have concluded, “the information used in the business case analysis was questionable, and overstated the costs of DoD performance and likely benefits.” One audit discounted the \$1B savings claimed by the program office noting that they had not considered costs the Government assumed including establishment of a two-tiered pricing arrangement, Government oversight, failure to utilize material already available at the depots, and increased infrastructure costs. He added that the negotiated contract did not include all benefits enumerated in the acquisition plan to include reduced repair cycle time and reliability improvements. Additionally, the business case estimated prices were significantly lower than the Navy was charged.

Mr. Kleinknecht presented FY 2004 DoD contracting information for service acquisitions over \$25,000 (Attachment 4, page 25) based on Department’s DD350 database. He said that while there have been questions regarding the database, he believes that while not exact, the dollars shown are close to being correct. He called out several figures - \$14B for performance-based service cost

contracts, \$2.2B for performance-based T&M contracts, \$6.5B R&D performance-based cost contracts, \$3B non-competitive commercial services, and \$41.6B for non-competitive supplies. Panel Chair Marcia Madsen thanked Mr. Kleinknecht and solicited questions from Panel members. Panel Member Marshall Doke asked Mr. Kleinknecht if the Honeywell solution is an approach the IG recommends. Mr. Kleinknecht replied that the approach worked very well and resulted in reduced prices and inventory and a long-term contract. Mr. Doke noted that he believes the primary reason contractors resist providing cost or pricing data is that data consists of more than just accounting information, it is any fact associated with management judgment relating to make or buy decisions. He then cited a situation where Lockheed's decision to seek labor cost reductions with the union as representative of how encompassing cost or pricing data can be and suggested that if a reasonable timeframe could be established within which the contractor would be subject to certifying accuracy and completeness, contractors would be less likely to resist submission of data. He asked Mr. Kleinknecht if this was consistent with his Honeywell example. Mr. Kleinknecht replied that Honeywell's major issue was a CAS waiver from certified cost or pricing data. He noted that he did not believe the Defense Contract Audit Agency (DCAA) agreed with the Under Secretary of Defense for Acquisition and Technology's decision to grant the Honeywell waiver, but that because a team of IG/DLA/DCAA pricing experts was reviewing all Honeywell costs, the DoD IG agreed with the decision. Mr. Doke observed that it is obvious that putting together a pricing team for every procurement is impossible, and asked if the level of Government access to data was provided to a "satisfactory degree," would the IG support the approach. Mr. Kleinknecht responded that the IG would and that when too much information is provided it becomes burdensome to the contractor. He again emphasized the benefits of focusing on the 20% of parts that comprise 80% of costs.

Panel Member Marshall Doke followed-up with a question concerning Air Force guidance on cost or pricing data that characterizes estimates as cost or pricing data and expressed his opinion that this is incorrect. He asked Mr. Kleinknecht if the IG had reviewed this issue. Mr. Kleinknecht responded that his office does not usually track estimates relative to actual costs incurred. In response to further questioning, he stated that the IG has not reviewed the Air Force guidance. He explained that the Air Force takes a liberal approach to commercial item determinations and that only price analysis is performed. The DoD IG is beginning a review of a \$700-\$800M contract where the audit will compare a pre-FASA/FARA cost-based scenario to a FASA/FARA commercial price analysis-based scenario to demonstrate the differences in the costs paid by the Government.

Panel Chair Marcia Madsen asked if, in addition to Honeywell and Parker Hannefin, there have been other similar supply audits. Mr. Kleinknecht responded that DLA has performed similar audits. He cited one pricing review in which he participated where no contract was awarded because the contractor would not agree to share cost data. He attributed the success of the Honeywell review and resulting contract to their management's agreement to provide cost data noting that the contract includes clauses that protect both parties. If Honeywell's costs rise significantly due a changing environment, the part is re-priced and if the Government's requirement increases significantly, re-pricing is possible. Mr. Kleinknecht also stated cost performance improvements are built into the contract - Honeywell agreed to lower prices in the out-years if they are able to lower their costs. In response to a question from Ms. Madsen, Mr. Kleinknecht agreed that DLA would be able to provide the Panel with a list of their strategic supplier initiatives and recommended the Panel speak with representatives from Honeywell. Ms. Madsen asked if he believes that the cost-based model he had described would work for procurement of services. He responded that he had not considered the issue, but that it would be interesting to find out the cost of commercial services.

In response to a question from Panel Member Roger Waldron, Mr. Kleinknecht stated that the Honeywell contract had been awarded on a sole source basis and that they had been very careful to ensure that parts that could be procured competitively had not been included in the contract. Mr. Waldron asked if Mr. Kleinknecht believes this model should be applied elsewhere. Mr. Kleinknecht responded that he believes that the model is appropriate for sole source procurements, not for a competitive environment. He stated that DLA should look into establishing long-term competitive contracts for parts because much effort is expended on successive competitive procurements and that even for sole source procurements, significant effort goes into successive sole source negotiations. He believes long-term contracts have reduced workload significantly.

Panel Member Roger Waldron asked the DoD IG representatives if, since making major investments in training on proper use of governmentwide contracts, the DoD IG has received any positive feedback from the impacted contracting community. Mr. McKinney responded that the DoD and GSA IGs have worked closely together identifying problems with DoD purchases through GSA and that GSA contracting officers are receiving a lot of training and following the "FAR a lot better. It's definitely getting better." He speculated that it would probably be a year before corrections are complete. Mr. Waldron asked Mr. McKinney for his observations on the use of GSA contract vehicles from a DoD perspective. Mr. McKinney replied that the reasons DoD uses the interagency agreements is "they can get who they want, and secondly, there was a banking system sort of set up to where funds could be transferred over there and held over for years." He believes that the DoD personnel no longer bank funds, but that eliminating the ability to go outside of DoD to get the desired vendor will take longer to fix. He said historically, any program office could, without its own agency's contracting shop's scrutiny, go to GSA to fulfill a requirement. The IG's preference is for requirements to be routed through a DoD contracting officer prior to being sent outside the department so that a determination can be made on whether a DoD contract vehicle can satisfy the requirement.

Panel Member Joshua Schwartz remarked that the IGs had provided an impressive list of audit issues which in his opinion appear to be linked with inadequate training and staffing. Mr. McKinney agreed with this assessment and stated that reductions in the DoD workforce are another reason why requirements are being sent outside the department. He addressed the issue of training, noting that the focus for many years was on procurement training for items and that training on buying services had been a lower priority. He believes with the increasing dollars spent on services, there has been more emphasis on training on services, but that there is a "long ways to go." Professor Schwartz asked Mr. Kleinknecht to provide more detail on the Honeywell strategic supplier alliance, specifically the teaming and personnel aspect of the alliance and if the Government is staffed to expand this approach. Mr. Kleinknecht responded that in his opinion it does not take a lot of people to implement this approach, but a few key people are necessary. He expressed his concern at the turnover in DLA team membership. He recommends a core of 10 key people be established within the Government to work these types of initiatives, but turnover must be minimized.

Panel Member Frank Anderson asked if "tenure of key personnel" is an important principle. Mr. Kleinknecht responded the right people must stay, noting that some believe Darleen Druyun "was there too long, she knew too much."

Panel Member Lou Addeo observed that not much had been discussed regarding the tools that would enable Government personnel to manage pre- and post-award processes. He asked whether tools are being developed to supplement Government personnel in performing repetitive actions and if good knowledge-based systems are being utilized. Mr. Kleinknecht responded he did not believe there are. He cited the Honeywell strategic alliance, saying the approach worked well, but that no tools were

utilized. He noted that the current emphasis in Federal procurement is to characterize many things as commercial in nature. He feels the Honeywell strategic alliance could be characterized as a commercial best practice – but without calling the items commercial. Mr. Addeo asked if investments are being made in knowledge management systems to support procurement, and auditing to replace manual labor in competitive processes. Mr. Kleinknecht replied no, every contractor is different and auditors have more access to information than contracting officers. Mr. Addeo then asked if the auditors are using a manual process to get information they need. Mr. Kleinknecht responded yes, but that once the initial pricing is done by a few key people, all the parts are on contract and the work is done for pricing all future orders.

Panel Member Jonathan Etherton asked for clarification on earlier comments on interagency contracting. He interpreted DoD IG comments made during the morning to mean that issues identified as problems have been related to either failure to follow existing guidance or the guidance itself requires clarification. He asked if there are deeper flaws that involve the interagency contracting model the Panel should be reviewing. Mr. McKinney responded the initial breakdown is with people failing to follow procedures. He stated again that across the Government, a perception existed that revolving funds allowed money to be converted to no-year money and thus, funds could be banked. He suggested that an audit tool could be developed to assist with determining where mistakes are being made. He referenced the heavy marketing campaigns that imply money can become no-year money and able to be used in the future. Mr. Kleinknecht cited an example where programmatic slippages on a valid requirement lead the program manager to bank money to avoid expiration of funding.

Panel Member Jonathan Etherton asked for clarification of the earlier discussion on cost and price analysis of commercial items and if the cost approach, when no competition exists, is the way to achieve reliable pricing. Mr. Kleinknecht stated that for sole source procurements, price analysis is a difficult process. When a requirement is competitively awarded, characterization of the item as commercial does not negatively impact pricing; however, he sees no pricing benefit of the sole source commercial approach especially considering the critical safety nature of many DoD items.

Panel Chair Marcia Madsen asked if he is concerned when an item is price-based and competitive. Mr. Kleinknecht replied that it is not a concern even if the item is commercial as long as there is some quantity of commercial sales.

At 12:37 PM, Panel Chair Marcia Madsen recessed the Panel meeting for lunch. At 1:24 PM, she reconvened the Acquisition Advisory Panel public meeting. She welcomed Ms. Kathy Tighe, Counsel to the GSA Inspector General and Mr. Gene Waszily, Assistant IG for Auditing at GSA.

Mr. Waszily thanked the Panel for the invitation to speak. He introduced statistics for GSA procurements (Attachment 5) noting that GSA is the principal procurement agency for the U.S. Government. He explained that they had contemplated titling their presentation “*The Good, The Bad & The Ugly*.” “*Good*” because of marked improvements in the past five years in Federal Government procurement, GSA IG’s mission of helping, and positive corrective actions taken in response to identification of problems. He stated that their expertise is at the master contract level and they are unfamiliar with the task order level except when another agency’s inspector general requests assistance. He stated that GSA does between \$49B & \$50B in contracting per year and about 65% of that amount is for services. Mr. Waszily attributed this growth in services acquisition to the reduction of 400K acquisition civilian personnel positions in the 90’s, movement to desktop and web-based technologies, a need to upgrade computer technologies, loss of skills (such as close-out) and increasing defense requirements. The focus on customers, using a more business-like orientation, and doing more

with less has driven many procurement entities from being an administrative or cost center to being a profit center. He listed legislation that has had an impact on acquisition – FASA, Clinger-Cohen, and Services Acquisition Reform Act (SARA) – and said the frequency of changes has created a challenge to “stay ahead of the curve.”

Mr. Waszily introduced Ms. Kathy Tighe to speak on the commercial item definition and its impact on the acquisition community. Ms. Tighe categorized vendors by the types of sales: vendors who sell only to the Government through schedules, vendors who have schedule sales and non-schedule sales to the Government, and vendors who have both Government and commercial sales. She stated that while vendors are frequently unwilling to provide data to the Government relating to their commercial customers, when the data is provided, the IG has discovered that the commercial contracts are not of the type that allows comparisons to the MAS contracts. She stated that there are often additional terms and conditions in the commercial contracts that are not present in the Government’s IDIQ master contracts. Ms. Tighe explained that performing price analysis to include market research and comparing prices to those on other contract prices is especially challenging for services because of the difficulty of comparing services provided. She cited as an example, the differences in labor categories, associated descriptions, necessary qualifications and labor rates from one vendor to the next.

Ms. Tighe briefly discussed problems associated with the manner in which vendors charge for “other direct costs” known as “ODCs” under T&M task orders because they are usually negotiated at the task order level. Problems include: 1) ODCs not directly related to the service, 2) ODC values that eclipse the value of the service, and 3) cost duplication occurring when ODCs typically imbedded in a labor rate are charged separately. She stated that the duplication problem is particularly challenging because GSA negotiates the labor rate, but the ODC is negotiated at the task order level. She suggested that a clear definition of ODC is needed in addition to more transparency into GSA’s pricing of fully burdened labor rates. She noted that GSA is addressing the transparency issue and stated that once data is available, it needs to be provided to contracting officers.

Mr. Waszily then reviewed differences between private sector and Government approaches to procuring services. Private sector attempts to buy an outcome with a fixed amount of money, while Government tends to use a T&M approach, “really acquiring a defined service but not with a defined outcome.” He explained that in 2003, the GSA IG surveyed 5,000 procuring officials who had used GSA’s Federal Supply Schedules and received 2,000 respondents. Two-thirds of orders placed by respondents were T&M. Mr. Waszily said that even on very large value orders, labor rates were not lower than the stated rate of the schedule. However, he explained, the survey found that when large procurements utilized a blanket purchase agreement (BPA) approach off of the schedules, 81% of the resulting contract reflected lower prices than the schedule. This approach was only used by 14% of respondents.

Mr. Waszily reported that GSA recently reviewed 523 task orders valued at \$5.4B placed by contracting officers at the Federal Technology Service and found 58% were inadequately competed. One-third of the solicitations open for competition received only one bid. Sixty percent were T&M, where the Government assumed all project risk. Mr. Waszily described the private sector business model as being customer-focused where the overall objective is to keep costs low to allow for more profit. He explained that this model is “intrinsic” to the Government process as well, but it not as strong. He contrasted the mission of the private sector with the Government’s - explaining mission is first and that procurement is “of less importance to the mission-oriented Government person than it might be to the person running a business where the prime driver is to make a profit and to stay in business.” Mr. Waszily said that if the service is being provided within budget without impeding

mission, Government personnel tend to focus on mission and do not want to “shift horses” developing relationships with new vendors. Mr. Waszily added that since downsizing of the federal workforce in the 1990s, many services being procured are for a supplemental workforce, and that Government personnel do not want to shift vendors to replace their contracted workforce.

Mr. Waszily stated that franchise funds and governmentwide acquisition shops have taken what “typically had been a cost center as far as a procurement shop, and they’ve turned them into somewhat of a profit center or at least a breakeven operation for their organization.” While he expressed his opinion that this is a good business model – getting lower rates from vendors than GSA and charging a small fee to defray costs – to him, it appears the Government is competing with itself.

Mr. Waszily said the vehicles and associated policies are not flawed, but they are misapplied. He discussed several problems identified by auditors. He said small disadvantaged businesses receiving awards commonly serve as a “passthrough” to large firms who actually perform the work. Another problem is that small dollar orders “morph” into very large efforts. He cited a \$200K 3-month effort that grew non-competitively to \$81M over four years. Another problem cited was the situation where the customer agency directs the contracting officer of the acquisition center to hire specific contractors who then prepared the Government estimate and helped in solicitation development. A problem also occurs when “folks who purportedly were competing” for an award end up as subcontractors to the ultimate winner.

Mr. Waszily provided an example where too much control was vested in an individual intent on wrongdoing - a situation where a Colonel in Korea on a military installation took \$700,000 in bribes.

Mr. Waszily contrasted the concept of governmentwide contracting with his perception of reality explaining that conceptually the initial competition among highly qualified vendors in specialized services is prequalification that should allow agencies to get the best solution in a very timely manner when individual requirements materialize. However, he said that when the actual requirements are competed, often only one bid is received. He attributed the lack of competition on Governmentwide Acquisition Contracts (GWACs) to corporate mergers over time, the current high volume of service requirements, limited resources and the expense of putting bids together. He said also that industry tells the IG that they do not always see solicitations advertised, but noted that often the solicitations are emailed directly to the GWAC vendors. Mr. Waszily has concerns that very large awards for non-specific, generally defined service requirements are being awarded based on a very judgmental selection method. He believes if competed, many of these requirements would result in more measurable awards with better prices. Mr. Waszily said that GSA has seen little use of performance-based contracting and that while there had been discussion in the past about using 3, 4, or 5 schedule holders off of different schedules in combination to devise unique solutions, no action has materialized.

Panel Member Carl DeMaio thanked Mr. Waszily and Ms. Tighe for their presentations. In response to Mr. DeMaio’s question, Mr. Waszily confirmed his belief that existing laws and regulations are sufficient, but implementation, training, transparency, and oversight should be improved. Mr. DeMaio asked if the GSA IG has seen improvement based on implementation of the GSA and DoD program entitled “*Get It Right*.” Mr. Waszily replied that the initiative was kicked off in August, but already they had seen “material improvement.” He commented on the importance of the participation of customer agencies, especially DoD because 80%-85% of GSA’s business is with DoD.

Mr. Waszily addressed the significant challenges within the acquisition workforce including reduced numbers and experience relative to a decade ago and the current large turnover in the acquisition workforce. He called out the role of the contracting officer as being very demanding, and a field where there is significant turnover.

In response to Panel Member Melanie Sabelhaus's request for comment on the impact of the reduced federal acquisition workforce on the interests of small business, Mr. Waszily replied that small business is at a disadvantage because with fewer acquisition resources, agencies are in some instances bundling requirements without explicitly reserving a portion for small business. He said the "worst case scenario" seen is where some agencies rely on large businesses to ensure small business participation and will no longer deal directly with the small business community. He noted that large businesses may require the small business to perform as subcontractors at a lower rate than they received as primes on their original contracts with the Government. He added that small business participation has been somewhat reduced and small businesses feel "beholden" to large firms.

Panel Member Al Burman asked Mr. Waszily to clarify what he had meant by "inadequately competed" awards during his presentation. Mr. Waszily replied that situations involving inadequately scoped requirements include use of inappropriate schedules (procurement of biological equipment on a vehicle for IT), inappropriately short windows of time between the release of the solicitation and the bid closing date, and extremely narrowly defined requirements which limited competition. Dr. Burman asked Mr. Waszily if anything needs to be done to ameliorate the situation where only one bid is received in response to solicitations off of schedules. Mr. Waszily stated that he had been referring to situations where limited responses are received when solicitations were sent to all GWAC holders for large dollar requirements. He explained that they expect that because the GWAC holders have been identified as well qualified and the "absolute best 8 or 12 best companies in the world to do this work," price would become the most important element. He said instead, price is subordinate and it is disconcerting when only one bid is received. In response to a question from Dr. Burman, Mr. Waszily confirmed that the single offeror is usually the incumbent contractor. Dr. Burman stated that from the contractors' perspectives, they must make judgments on how their resources are spent and if, in a best value acquisition situation they believe an incumbent has performed well, companies may decide not to expend significant effort attempting to unseat that incumbent. Discussion followed that highlighted the fact that many of these large dollar procurements are for broad support supplementing the workforce. Mr. Waszily noted that even though this type of contract is low risk for the contractor and would typically result in a lowered commercial rate, the GSA IG is not seeing lower rates.

Panel Member Tom Luedtke asked Mr. Waszily if significant numbers of competitions resulted in receipt of no bids. Mr. Waszily replied that because the sample the GSA IG reviewed had been drawn from existing contracts, they could not answer that question. However, he stated he not aware that this is a significant issue.

Panel Member Joshua Schwartz asked the GSA IG representatives for their perspectives on the pace of acquisition reform relative to the available acquisition workforce and whether "we'd do well to discourage significant change for awhile because we just need to assimilate what we've got under our belt..." Ms. Tighe stated she and Mr. Waszily agreed that changes arising from enactment of FASA, Clinger-Cohen and SARA were sometimes necessary, but that problems arise with implementation due to the pace of change and time required for legislation to result in regulatory change and subsequent flow-down to contracting officers. She agreed with Professor Schwartz's assessment and would consider it a virtue to reduce the number of changes because it is difficult to see improvements when contracting officers are struggling to keep up with the pace of change.

Panel Member Marshall Doke stated that one of the Panel's statutory requirements is to make recommendations associated with the ethical integrity of Government acquisition. He explained that the Panel had received a written public statement alleging that the GSA IG refused to investigate a situation where 29 GSA employees had received only an administrative action instead of prosecution. Mr. Doke cited language in the IG report that pointed to GSA improprieties associated with acquisitions and asked whether Government employees are appropriately sanctioned for wrongdoing compared to violations committed by contractor employees. He asked Ms. Tighe to comment on the perception that punishment is being unfairly administered. Ms. Tighe responded that she saw no difference between actions taken against contract and Government employees and that GSA is very concerned about the actions of some GSA contracting officials, but that the actions against them appeared appropriate. She continued that OGE investigates criminal cases.

Mr. Doke asked Ms. Tighe if criminal referrals are made for Government employees. She responded, "We refer it criminally if it calls to be referred criminally" and added that "even a modest amount of potential criminality will go to a U.S. Attorney's Office or Department of Justice" because it is required although she could not provide the number of cases reviewed for prosecution purposes.

Panel Member Marshall Doke said that the same written public statement received by the Panel contains allegations associated with a published bid protest and that the protest states that the Government agency's solicitation's use of "invitation for bids" and "proposals" interchangeably made the Government appear that it did not know what it is doing. Mr. Doke then asked Ms. Tighe if GSA reviews bid protest decisions to determine issues that should be more closely examined. Ms. Tighe responded that review of bid protest decisions is not a routine GSA IG activity, but that issues raised do get sent their way. She stated that her office does not want to get involved in active protests. Mr. Doke asked if after the protest decision is made and egregious problems have been identified that need correcting, does the IG get involved. Ms. Tighe responded that they review abuses wherever the information about them is obtained, but they do not routinely review bid decisions.

Panel Member Lou Addeo thanked Ms. Tighe and Mr. Waszily for their presentations and asked questions relating to slides 2 & 3 and the final slide. He noted the "explosion" of the use of multiple award schedules and asked what volume is attributable to the war effort, and if analysis is being performed to examine the increase. Mr. Waszily responded that it is not possible to discern the effort directly related to the war, but that supplies are more closely associated with war effort, thus growth is more measurable. He said procurement of supplies has more than doubled to \$3B. He attributed increasing use of schedules to a number of factors including "the general defense build-up in a macro sense," war effort, modernization of systems and functions, and the downsizing of the civilian workforce. He described the schedules as "ready-made" and a very effective way of meeting requirements rather than running many separate competitions. Mr. Addeo was concerned whether redistribution of contracting signaled the development of a "bubble," and asked what time frame the Panel's recommendations should address, noting the focus of the issues to date has been on current issues. Mr. Waszily replied that even though he believes the war and creation of the Department of Homeland Security created a bubble, schedule use will increase because Federal agencies are "squeezed" to be more efficient and this has already resulted in agencies becoming more competitive in satisfying their requirements. He said, "...as the dollars shrink, then, the pencils get sharpened." Mr. Waszily cited the trend in the private sector to focus on core mission and outsource support services, and that the Government is adopting this trend.

Referring to a previous discussion relating to receipt of a single bid on GWAC task order solicitations, Panel Member Roger Waldron asked if the GSA IG had considered what the appropriate number, mix,

overlap, and structure of GWAC vehicles should be. Mr. Waszily replied that there are too many overlapping vehicles offering the same services, but that many of the vehicles are “closing down.” He felt it unfair to vendors to be required to be on all the different GWACs to ensure coverage for the same type service.

Panel Member Deidre Lee asked the GSA presenters to comment on the difficulty with determining the level and degree of service that is provided by agencies other than GSA. Mr. Waszily responded that Mr. David Drabkin, GSA’s Deputy Chief Acquisition Officer has been proactive in going out to other agencies, especially franchise fund agencies, to assess how they are using GSA contract vehicles. He noted, however, that GSA’s jurisdiction for the most part does not go beyond GSA confines. He said GSA has developed a partner relationship with DoD that allows exchange of information, but it is difficult to assess other Federal agencies’ use until major problems occur on particular procurements.

In response to a question from Panel Member Joshua Schwartz on adequacy of the numbers, training and sophistication of GSA’s workforce, Mr. Waszily replied that they are improving. He stated that systematic deficiencies existed relating to focus on customer satisfaction and growing the business at the expense of following the rules. He said workforce education is problematic because the various vehicles have different rules and “the contracting officer is basically a lone ranger out there, and they’re trying to negotiate with a Fortune 500 company.” Mr. Waszily explained that while great effort is being made to recruit qualified individuals into acquisition, there is a lot of turnover particularly of those with less than 5 years experience. He said that the private sector uses buyers who are specialists in the product, but in Government, procurement officials are generalists focused on rules and regulations.

Panel Member Jonathan Etherton referred to Mr. Waszily’s earlier discussion about an Federal Supply Service survey revealing that 81% of BPAs, a methodology used 14% of the time, developed off of schedules resulted in pricing lower than the underlying schedules. Mr. Etherton asked Mr. Waszily to elaborate and discuss whether BPAs should be used more broadly. Mr. Waszily attributed lower pricing on BPAs to more definitive requirements, companies’ sense that they will get a level of business and in some instances orders in excess of the order limitations. Mr. Etherton then asked Mr. Waszily to discuss the adequacy of guidance on T&M contracts and the framework for their appropriate use. Mr. Waszily replied that the FAR identifies T&M as the least preferred type of contracting and that they should be used when there is a high level of unknowns and the risk is high. He believes the T&M vehicle should not be used when there is a sense of predictability even recognizing that it is an expedient method of contracting and low risk for the contractor. Use of T&M contracts provides no incentive for the contractor to be efficient.

In response to a question from Panel Chair Marcia Madsen on availability of recent studies referenced on slide 11, Ms. Tighe stated that the studies are on the GSA IG’s website in a compendium report.

Panel Chair Marcia Madsen thanked the GSA IG representatives and then introduced the next two speakers from the Defense Industry Initiative (DII), Mr. Dick Bendnar, National Coordinator of DII, and Patricia Ellis, Raytheon and Chair of DII Working Group. Ms. Madsen explained that DII was established following the Ill Wind scandals to address issues of ethics, compliance and voluntary disclosure.

Mr. Bednar thanked the Panel for the opportunity to speak and stated that DII remarks would focus on one important issue, integrity in public contracting. He explained that DII has no permanent staff, but instead works through volunteer organizations, and was established because industry saw the need to

address abuses against integrity. He introduced Ms. Ellis, Raytheon's Vice President for Ethics and Compliance. Ms. Ellis (Attachment 6) thanked the Panel for the opportunity to speak on behalf of DII member companies on their approach to ethics and compliance. She stated that for DII companies, "good ethics is good business" and there is no need for additional Government regulations on ethics. She provided some DII historical background beginning with its establishment in 1986 and explained its governing principles including adoption of written company codes of conduct that encourage reporting of violations and sharing of best practices among member firms. She stressed DII's philosophy that defense contractors are accountable to the public and an essential requirement of an ethics program is company leadership commitment. She explained that the codes of conduct developed when DII was established were rule-based and narrowly compliance-focused on labor, material, relationships with vendors, conflicts of interest, etc. She said that while ethics "hotlines" for reporting violations were established, they were not viewed as positive by employees and often used for non-ethics related workplace complaints. She discussed the need for development of trust and openness to overcome barriers and employee fear of retaliation for coming forward with bad news. She said that over time, companies learned that rules to ensure compliance with ethical standards are important, but a best practice has evolved that focuses on value-based culture. He said that the same values that achieved strategic goals within a business are also the same values that employees can use to guide them in their ethical decision making and that, in fact, ethics programs do enable the desired culture.

Ms. Ellis elaborated on company codes of conduct saying they are simple, easy to understand and begin with a company-unique statement of values. She said that training programs on ethics are more robust than in the past and "ethics lines" are viewed as a resource where employees can get advice. Ms. Ellis stated that corrective action for ethics violations can take many forms from adjustment of compensation to removal. She closed her formal remarks by stressing the importance of culture and shared values.

Mr. Bednar began his presentation (Attachment 7) by explaining that the February 8, 2005 OGE written public statement to the Panel reflects OGE's concerns on the applicability of laws and regulations relating to conflicts of interest for contractor employees. He stated that a fundamental public policy principle is that decision makers should act on the merits of a situation without being subject to undue influence, and expressed DII's belief that laws, regulations and administrative and contractual remedies currently exist to "deal with individuals who stray." He believes that the issue is increasingly important because "contractors are working shoulder to shoulder with Government employees with multiple opportunities for creation of conflicts of interest." Mr. Bednar stated that contractor employees act with integrity because integrity is integral to the culture of the company and that this is driven by management's expectation that integrity is a condition of employment. He described the environment 20 years ago "when the process was infested with allegations of fraud and abuse both within the Pentagon and our industry" that resulted in the establishment of the Packard Commission. He explained that the commission found that no additional laws or regulations were necessary and that DII and other industry groups work in partnership to develop a unified approach to ethical issues. Important themes include taking action against those employees who demonstrate an ethical failure and the establishment of a mechanism by which companies report violations of law to the Government. Because of the complexity of Government contracting and the diversity of industry, he believes it impossible to develop rules for every situation. That, coupled with the existing broad range of Government sanctions and penalties, contributes to DII's position that the preferred model for companies' relationship with the Federal Government is "value-based self-governance."

Mr. Bednar recommended that the language at DFARS 203.7000 laying out expectations for contractor standards of conduct be incorporated into the FAR. The DFARS language includes requirements for companies to have a written code of ethics, ethics training, reviews of internal compliance controls, methods for reporting offenses and encouragement of employees to report suspected misconduct, disciplinary action for violators, voluntary disclosure to the Government of violations and cooperation with Government investigators.

Panel Member Carl DeMaio thanked the DII representatives for their presentations and called out the Raytheon ethics system as being well thought out but added that not all companies have adopted the principles discussed including the principle that leadership sets the tone. He asked if any of the 65 signatories to DII's charter have been in the news lately for significant ethics violations. Mr. Bednar replied that if Mr. DeMaio was referring to recent AF ethics violations initiated by an Air Force official and responded to by a Boeing employee, the answer is that Boeing is a member of DII. Mr. Bednar stated that Boeing's response to the violations reflected its adherence to DII principles. Ms. Ellis pointed out that the two individuals involved – Druyun from the Air Force and Sears from Boeing – were aware of the rules, but made a decision not to follow those rules. Mr. Bednar said that Boeing's response was “a perfect example of why DII principles work, because instead of trying to hide the situation or run away from it or deny it, Boeing stepped up to the problem immediately.” Mr. Bednar said that Boeing has fortified internal controls and the Government has recognized the need for review of crosschecks, internal controls and assignment of responsibilities.

Panel Member Carl DeMaio asked the DII representatives to comment on how contractors deal with ethics of their subcontractors. Mr. Bednar replied, speaking only for DII member companies, that the ethics message begins at the top and without ethical leadership, rules will not be sufficient. He elaborated further on the importance of visible ethical leadership. Ms. Ellis said that the CEO of Raytheon frequently (almost 90% of the time) addresses ethics-related topics when speaking at public forums and asks employees if he is doing enough. Mr. DeMaio asked if there are companies where ethics standards are stipulated for subcontractors, and if so, does the company perform audits of its supply chain. Ms. Ellis replied that Raytheon's VP and General Counsel provided an ethics training for the company's 200 top suppliers in October. Contracts with suppliers include terms and conditions that require adherence to Raytheon's code of conduct. In response to a follow-up question from Mr. DeMaio, Ms. Ellis confirmed that it is a commercial practice to include ethical standards in supplier contracts and to clarify what the standards are.

Panel Chair Marcia Madsen asked the DII representatives if it is a commercial practice to include ethics terms and conditions in contracts with suppliers when the ultimate customer is not DoD. Mr. Bednar referred the Panel to the DII website (DII.com) which provides information to Government subcontractors and commercial suppliers on information and methodologies on how to develop a code of conduct, but noted that there is no one-size-fits-all code. He said that DII has worked with Aerospace Industries Association, Professional Services Council and National Defense Industrial Association to develop ethics programs and training.

Panel Member Deidre Lee asked the DII representatives a series of questions: 1) to elaborate on what is meant by “tone at the top,” what message DII recommends be sent to the public sector, and if there is any particular Government agency where tone-at-the-top is done well; 2) their opinion on whether ethics should be a separate group or integrated throughout an organization; and 3) their opinion on follow-up study of the Darleen Druyun Defense Science Board study results. Mr. Bednar stated that DII recommendations for improving the relationship and process provided to the Undersecretary of Defense for Acquisition, Technology and Logistics included a recommendation that a career civil

servant be appointed as DoD Chief Ethics Officer (not Compliance) responsible for establishing an ethics “apparatus,” training oversight and ensuring “good electrical connection with industry.” He continued that DII believes a mechanism for developing relationships between Government and industry senior leadership is the Defense Acquisition Excellence Council, and responsibilities within the acquisition process should be distributed to provide checks and balances.

Ms. Ellis provided the Panel with more detail on how Bill Swanson, CEO of Raytheon sets the ethical tone for the organization. He encourages employees to be forthcoming with bad news, takes tough measures against employees not acting as expected, and speaks on ethics at forums and in letters to shareholders. She explained that the Raytheon Board of Directors received ethics training and this was publicized to employees. Mr. Bednar discussed the reasons for ethics failures including individuals not knowing how to react when put in an ethical dilemma, and a perception one must meet schedule, budget, and delivery or obligate funds. He explained that individuals must be comfortable with missing these milestones if, “as a consequence, you’re going to make the correct ethical decision.”

Panel Member Marshall Doke told the story of a CEO who had union welders attach a trailer hitch to his pickup truck. Upon learning of it from the union steward, the company ethics compliance officer sent a bill for the estimated amount to the CEO. The CEO wrote a check in payment to the welder, but also made a copy of the check which he sent to the union, who in turn made distribution of the copy to employees. Mr. Doke said that this incident influenced ethical conduct more than the impact of 2 years of ethics training.

Panel Member Marshall Doke asked Mr. Bednar if DoD has adopted codes of conduct, and has conducted ethics reviews and training similar to actions taken by DII. Mr. Bednar responded affirmatively and stated that DoD and DII hold an annual forum where ethics best practices, ideas and approaches are shared. He explained that DII has made recommendations to DoD emphasizing and encouraging the use of a DoD ethics hotline, an internal practice within every DII company. In response to Mr. Doke’s request, Mr. Bednar agreed to provide the Panel with DII’s ethics recommendations to DoD.

Panel Member Lou Addeo thanked Mr. Bednar and Ms. Ellis and asked rhetorically if the pressures to make schedule, budget, and deadlines are not an integral part of business. Mr. Bednar agreed saying that firms have to make a profit and DoD must intelligently apply its funding, but that employees must know that these pressures cannot drive unethical behavior, and the expectation is that they will do the right thing. He explained that leadership is very important and emphasized that employees will do “what they perceive the boss really wants, not what the rule is, but what the boss really wants.”

Panel Member Joshua Schwartz thanked the DII representatives for their time and thoughtful consideration and stated that he has a sense that DII and OGE had been “talking right past each other” on the ethics issues raised by OGE. He said he believes there is agreement on DII’s basic approach, but that OGE had raised a new subset of problems relating to the increased frequency of contractors’ service personnel embedded within Government agencies. Professor Schwartz described this ethics problem as being three-cornered – the individual contractor employee, the employer, and the Government, and recommended that DII review the OGE slides presented earlier in the day because they focused on situations in which the individual contractor employee finds him/herself. Professor Schwartz asked if DII or member firms have considered addressing “this brave new world of conflicts that can arise because contractor personnel may find themselves in these...embedded situations.” Mr. Bednar responded that they have studied the larger issues about conflicts of interest, but not specifically those associated with the embedded contractor employee. He suggested that it is an area

DoD and DII should look at jointly, but new rules and regulations to cover the situation may not be necessary.

Ms. Ellis stated that Raytheon employees take online training on conflicts of interest and the company has a certification program wherein employees disclose conflicts of interest. Mr. Bednar sited an example where the Corps of Engineers wanted to arrange an offsite meeting with contractor and Government employees at a resort with golfing opportunities, but counsel advised against contractor participation. He said that now more contractor and Government employees are indistinguishable from each other in Government offices except for the color of the security badges.

Noting that the Panel had just established a working group on inherently governmental functions, Panel Chair Marcia Madsen encouraged DII to provide input to the group on the topic. She asked if DII could provide the Panel with best practices information. Mr. Bednar responded that immediately following a forum, briefing presentations are posted to the DII website and DII also prepares a publicly available annual report on best practices. Ms. Madsen recommended that DII take up inherently governmental functions as an issue at its next best practices forum (June 2005). Mr. Bednar responded that it was too late for June, but said it would be an excellent topic for a program soon. Ms. Madsen thanked Mr. Bednar and Ms. Ellis for their presentations.

Panel Chair Marcia Madsen welcomed two representatives from the Project on Government Oversight (POGO), a Government watchdog organization. Ms. Beth Daley introduced herself as the spokesman for POGO and described the organization as a politically independent, non-profit that seeks to promote Government accountability and prevent undue special influence. She stated that POGO is almost 25 years old and began with a focus on military procurement. POGO focuses on 5 areas of investigation of abuse of power: defense, contract oversight, open Government, homeland security, and energy/environment. Ms. Daley explained that POGO receives information from many sources – Congress, media, Government officials, and subject matter experts - conducts investigations of allegations, and issues reports which outline findings and recommendations. Ms. Daley introduced Mr. Scott Amey, currently POGO's general counsel. Mr. Amey apologized for Danielle Brian's, POGO's Executive Director, inability to attend the day's Panel meeting due to a family situation.

Mr. Amey stated that one of the biggest problems facing the acquisition community is the way industry and Government are perceived and noted "one scandal can ruin the reputation of 20 years of good service." He said that procurement scandals such as those associated with Darleen Druyen, Federal Technology Schedule (FTS) scope issues, misuse of purchase cards, Iraq sole source contracts, and C-130J call into the question the integrity of the acquisition system. He identified several issues as procurement myths with no supporting evidence including having to use Japanese radios in the first Gulf War, equal allocation of overhead and "hordes of contractors being turned off of Government work because of red tape."

Mr. Amey explained that distinctions are being made between acquisition of services and that of goods. POGO believes that more oversight is needed of services acquisitions because often there is no clear deliverable. However, POGO feels that making differentiations between goods and services contributes to the creation of damaging procurement policies, and has concerns that current reform has lead to less oversight of services.

Mr. Amey discussed allocation of risk, noting that during the AAP public meetings he had attended, representatives from industry discussed the significant risks businesses are taking to increase innovation and profits. Mr. Amey suggested that the Government needs to take risk, but asked

rhetorically at what point too much risk to taxpayer dollars has been assumed. He said that it is very difficult to make comparisons between the Government and commercial markets because of the Government's monopsonistic situation. He identified five Government procurement vulnerabilities: negotiations, competition, accountability, transparency and contracting vehicles. He said that the newly proposed ASIA 2005 Bill proposed by Representative Davis and other acquisition reform initiatives are industry driven, but noted that POGO believes Senator McCain's will "rein in going further." He said that comment is being solicited on consequential damages and post-award audit issues because of industry concerns.

Mr. Amey said that POGO is concerned about the idea the Government should function like a commercial entity and market because the Government has considerations such as schedule, sites of award and lack of competition. He observed that at AAP public meetings industry has said that it loves competition in the commercial market, but it does not like competition when it comes to the Government sector. POGO believes the Government should be as aggressive about negotiating as are private sector contractors with their vendors and that Government should "re-embrace" the notion of the arm's length cooperation with contractors instead of the partnerships that developed in the 1990s. Mr. Amey made the point that the Government should go the extra mile to get cheaper prices than GSA listed schedule prices based on the volume of Government purchases. POGO is also concerned that FTS and FSS provide only a fair opportunity for industry to be considered for award and that this is not full and open competition. Mr. Amey also explained that POGO receives information from a lot of contracting officials, auditors and small businesses, and they report "fear of political influence within an agency, from Congress or from industry prevents aggressive negotiating."

Mr. Amey cited statistics gathered from the Federal Procurement Data System-Next Generation (FPDS-NG) to support POGO's position that the Government may not be conducting enough full and open competitions. Out of \$300B, \$109B was awarded non-competitively, and an additional \$40B did not meet fair opportunity lower threshold on IDIQ vehicles. He said while he has no documentation to support it, the Associated Press and some Government insiders say the non-competitive awards are as high as 70%. He quoted the GSA IG's report that 58% of FTS awards are inadequately competed, and because there appears to be no clear definition of competition, he questioned whether some awards are "phony" and if there is sufficient transparency.

Noting that POGO has been a long-time critic of competitive no-bid contracts, Mr. Amey said reasons for one-bid situations include industry consolidation and vendors not wishing to utilize scarce resources against an incumbent. He warned that under best value competitions where there is a solutions-based process and focus, it is important not to lose sight of price comparisons to protect taxpayers' dollars. He expressed POGO's position that IDIQ vehicles stifle price competition and allow for "unfettered discretion to award contracts" by the contracting officer, notwithstanding some oversight of the process. Industry, he said, avoids competition when dealing with the Federal Government even though industry representatives have advised the Panel on outsourcing and strategic planning.

Mr. Amey stated that he finds the "culture of partnership" between the Federal Government and industry disturbing. The relationship should instead be an "arms' length cooperative arrangement. Citing the Darleen Druyun matter, Mr. Amey said that bid protests should be strengthened because even though GAO has provided recommendations on re-procurement procedures, they have no legal authority to impose the recommendations. Mr. Amey said that contract bundling hurts both small business and competition. He next discussed oversight of federal contracts, noting that significant cuts in oversight occurred in the late 90s and early 2000s. POGO believes that this reduction in oversight

was “probably industry driven.” Mr. Amey asked rhetorically where are the Executive Branch and contracting officials on oversight of C-130J and Future Combat Systems program. He questioned whether it was appropriate to characterize the C-130J as a commercial item, and expressed his belief that the definition of commercial item will be addressed by Senator McCain in the 2006 Authorization Bill. Mr. Amey interprets some of Senator McCain’s actions as stemming from a belief that more controls are necessary in Government contracting to include those on the revolving door and ethics.

Mr. Amey explained that GAO reported that the number of pre- and post-award audits has declined. Although there had been an intent to increase the numbers of pre-award audits, that increase has not materialized. Mr. Amey recommended that the acquisition community “re-embrace” TINA, Cost Accounting Standards and audit processes in order to reinstate the declining controls.

Mr. Amey commented that the day’s presentations and those of previous public meetings highlighted that the acquisition workforce is undermanned and overworked. He said that GAO would be issuing a report on civilian and DoD agency workforce numbers, but that in recent Senate testimony, DoD reported a 50% reduction in its acquisition workforce. POGO believes the reduction is bad for morale and that the current numbers are not sufficient to protect the taxpayer, especially in light of the significant increase in contract award dollars.

Mr. Amey stated that POGO has been very concerned about the lack of transparency and available documentation to support award decisions. He recommended that task and delivery orders be tracked via FPDS-NG just as contracts are and computerized and available immediately to ensure good Government and to reduce misuse of Freedom of Information Act redactions. He cited an example of a Halliburton/KBR Iraq oil contract that was estimated to be 30% redacted. He added that the redactions were contractor driven and when a second version with significantly less redactions was provided, it was apparent that the original version had unnecessary redactions. Mr. Amey continued that it is very important that vendors have timely access to Requests for Proposals (RFPs), Requests for Information (RFIs), Requests for Quotes (RFQs) and solicitations to ensure adequate competition. He stated that POGO believes SmartBUY is sufficiently transparent and recommends all solicitations over \$25,000 be advertised on FedBizOpps.

Mr. Amey questioned the degree to which information is protected from disclosure and asked who decides what data should be withheld. He added that POGO believes that if taxpayer dollars are involved, there should be very little that is not subject to public scrutiny, and that disclosure and transparency enhance the integrity of the process.

Mr. Amey’s next topic of discussion was best value contracting which POGO believes to be “good in theory, but a license to use unfettered discretion.” He said that DoD weapons programs are examples where because there is little monitoring and little contract documentation, the Government’s requirements are not met and there is both scope and requirements creep.

Mr. Amey expressed POGO’s concerns with the monitoring of incentives associated with PBC vehicles. POGO feels that performance-based contracting should be utilized when the service is relatively simple, and well-defined goals can be articulated.

Mr. Amey expressed POGO’s position that interagency contract vehicles are characterized by problems with negotiations, competition, accountability and transparency. He said that consolidation of GWACs represents a beginning of these vehicles being reined in. He added that while POGO had previously fought to ban some interagency vehicles, the organization now recognizes the vehicles have

a role with increased oversight and transparency. He pointed out that industry representatives presenting to the Panel had expressed that they do not like using a T&M approach. He then questioned industry claims of widespread use of commercial practices. He asked rhetorically, “Why are we even adopting practices that aren’t accepted or adopted in the commercial marketplace?” He suggested that the Panel review Conference Report 108-354 for its discussion of the use of T&M contracting approach.

Mr. Amey stated POGO’s position that share-in-savings contracting is problematic due to the difficulty in establishing a reliable baseline. He said that, notwithstanding suggestions from GSA employees that the data was flawed, a GAO study found that Department of Energy contract costs utilizing share-in-savings had increased from 8 to 56 percent. He added because of the significant up-front costs associated with share-in-savings, the level of small business participation is dampened.

Differentiating between fraud and honest mistakes, Mr. Amey said that procurement fraud cannot be tolerated. He challenged the idea espoused in a recent article that a certain degree of fraud is acceptable under the Government Purchase Card program, given the program’s overall savings.

Mr. Amey stated that while strongly supporting the Government’s purchase of commercial items, POGO believes there are problems associated with characterizing items as commercial when the item is not sold in substantial quantities in the marketplace. POGO advocates eliminating the “of a type” commercial items terminology. Mr. Amey also expressed POGO’s concern with large businesses being award recipients of DoD other transaction agreements (OTAs) when the original intent of their introduction was to attract innovative nontraditional contractors, adding that under OTAs, contractors are not subject to Competition In Contracting Act, TINA, CAS and Public Integrity Act requirements.

Mr. Amey concluded his prepared remarks by stating that POGO believes approaches such as best value, solutions oriented and performance-based contracting are working; however, use should be limited to appropriate circumstances with the right level of Government oversight. He said that determining how much oversight is appropriate is a significant challenge and recommended that the Panel solicit input from retired contracting personnel and procurement experts including Professor Steven Schooner, Professor Charles Tiefer, Angela Styles, and Stephen Daniels. He stated that he intends to submit a 2002 POGO paper on the Federal procurement system to the Panel.

Panel Chair Marcia Madsen thanked Ms. Daly and Mr. Amey for their presentation.

Panel Member Marshall Doke asked about POGO’s source of funding. Ms. Daly responded that POGO receives funds from private foundations, large and small foundations, and individuals and that it does not accept contributions from corporations, labor unions, the Government, or any entity it is investigating. She stated that the list of donors is included in POGO’s annual report which is posted on its website.

Panel Member Marshall Doke asked if POGO had input on best value contracting where the Government is paying a price premium for meeting more than the Government’s minimum requirement. He noted that some small business contractors are concerned that in best value contracting, responsibility factors including management, key personnel and experience are utilized when the responsibility determination is in itself a determination of ability to perform at a satisfactory level. Mr. Amey responded that POGO has seen instances where the Government has paid more than it should, but that it did not have specific instances to report.

Panel Member Carl DeMaio thanked POGO for its good work promoting transparency. Citing POGO's presentation slide #19, he asked rhetorically if by better defining requirements at the front end, does that not address problems associated with both the fluidity of best value requirements and measuring poor performance under a performance-based contracting scenario. Mr. Amey stated that in trying to move to a solutions-based approach with fewer requirements and a focus on output, determining the level of oversight needed is a challenge in that problems meeting established standards may not be determined until delivery of the end product. POGO believes this is too late in the process because many taxpayer dollars have been spent and it may be too late for a satisfactory remedy. Mr. DeMaio requested that POGO keep an open mind and stated that the Panel is trying to address some of the concerns that have been raised. Mr. DeMaio said he believes that the biggest Government acquisition problem is that it has not clearly defined what it wants to procure.

Panel Member Carl DeMaio asked POGO to comment on testimony presented earlier in the day by representatives from OGE. Mr. Amey said POGO's June report published a list of the top 20 Government contractors whose senior procurement executives and lobbyists had recently gone through the revolving door. He said that POGO believes the Government has a very serious problem that the public is just now realizing because of Darleen Druyun. POGO believes most people are trying to be compliant, but this is difficult because rules and regulations are complicated and convoluted. Mr. Amey suggested that while there has been a cry for passage of even more ethics rules, POGO believes the response should be measured and not piecemeal. In response to concerns that contractors continue to be awarded Government contracts following their involvement in ethical misconduct, Mr. Amey said POGO established a database of violators which it currently is expanding to cover violations of the Arms Export Control Act, environmental laws, contractor fraud, False Claims Act, and SEC violations. Panel Chair Marcia Madsen explained that Congress's charter to the Panel is to review commercial practices, interagency vehicles and performance-based contracting and that while the Panel will review all POGO submissions, she requested they focus on the charter areas.

Panel Member Al Burman thanked POGO for its presentation to the Panel. Dr. Burman explained that agencies want to interest vendors in offering solutions without telling them how to perform the job, and that this is not compatible with a low price approach where vendors are pricing the exact same solution. He said the performance-based approach should be utilized in circumstances where the expected outcome can be well defined, and that a quality assurance surveillance plan developed up-front is key to measuring results. In response to a request from Dr. Burman, Mr. Amey agreed to look again at this issue.

Panel Member Jonathan Etherton thanked the POGO representatives for their presentation. He asked Mr. Amey for more detail on how to implement his general recommendation to scale back the use of interagency contracts. Citing examples of Departments of Labor, Energy, and Defense interagency contract problems, Mr. Amey stated that interagency vehicles are too widespread across agencies and that consolidation of vehicles would allow for better oversight. He said that GAO is the best source for detailed recommendations because it has access to information. Mr. Etherton noted that the Panel's Interagency working group had begun posting documents to the Panel's website and suggested that if POGO identifies studies of interest, it should send them to the Panel. Mr. Amey indicated that he frequently reviews the website and refers reporters and officials to it. Ms. Daley thanked the Panel for its transparency in making its process and resources available to the public.

Panel Member Marshall Doke asked Mr. Amey to suggest names of contracting officers or program managers who would consider speaking to the Panel. Mr. Amey said he could not reveal any of his sources, but recommended a Government contracting blog where contracting officials, most of whom

are retired, discuss contracting issues and critique legislation. In response to requests, Mr. Amey agreed to review the blog and suggest names to the Panel, encourage individuals he knows to submit written public comments or speak at the June public meeting, and submit the blog URL to the Panel. Panel Chair Marcia Madsen thanked the POGO representatives for their presentation and flexibility with the day's schedule.

Panel Chair Marcia Madsen introduced Mr. Robert Cooper who had requested an opportunity to make an oral public comment to the Panel. Mr. Cooper identified himself as a retired Government employee (Army Weapons Command, Pentagon, NAVAIR, IG, OFPP, Office of Management and Budget (OMB)) who currently works part time for CACI. He stated that after having attended all of the AAP public meetings, he felt that a more focused consideration of contract administration and services was needed noting that Dr. Kelman, [former OFPP Administrator], had "lamented that contract administration was the stepchild of acquisition." Mr. Cooper said that administration of services is performed by ill-trained CORs whose function is to make floor checks and review invoices, and noted that administration of supplies involves at least seventy Part 42 Administrative Contracting Officer functions. He said the FAR emphasizes that how a contract is administered impacts the determination of whether a service is inherently governmental or personal in nature. He discussed several problems he sees with a PBC approach as it relates to administration. First, PBC is developing in a level of effort cultural environment where administration is relatively simple. Secondly, he believes the emphasis on measurable standards may evolve to a checklist mentality for administration. He expressed his concern with the velocity of business - \$1B per day - which he believes creates a fierce environment for contracting professionals operating in what he referred to as "fishbowl." He cited the reported limited use of authority to procure commercial products valued up to \$5M using simplified measures as being reflective of operational apprehension. Mr. Cooper recommended that as it reviews issues relating to inherently governmental business, the Panel review a book by Dan Gutmann entitled *Shadow Government*.

Panel Chair Marcia Madsen thanked Mr. Cooper and noted that the Panel's Interagency Working Group is looking at how the GWACs and interagency contract vehicles are being administered.

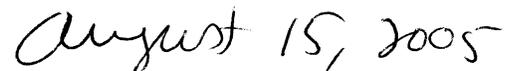
#### ADJOURNMENT

Panel Chair Maria Madsen adjourned the fifth Acquisition Advisory Panel meeting at approximately 4:50 PM.

I hereby certify that, to the best of my knowledge, the foregoing minutes are accurate and complete.



Ms. Marcia G. Madsen  
Chair  
Acquisition Advisory Panel



# Task Force on Services Contracting

## Removing Federal Services Acquisition Barriers And Balancing Public and Private Interest

Prepared for  
Acquisition Advisory Panel  
Glenn D. Baer  
May 17, 2005



CSA in counsel with agency officials created the opportunity for this Task Force recognizing that *The procurement of Services now exceed Products within the federal government*

## *The Charter*

*Review legislation and regulations relative to services and from a “clean sheet” approach identify barriers and proposed changes to assure the government has full and balanced access to all service categories*

-

*What regulations are obsolete,  
What currently works  
What barriers exist*

Categories of Services Working Group - one of four groups formed others addressed : Acquisition Management and Planning (PBSA), Multi agency vehicles and Small Business issues

# Task Force Components

- The objective was to take a fresh look at services acquisition issues. Some of the work of the Task Force was built on the on-going efforts of various industry coalitions and Task Forces.
- In addition to the leadership of the Contract Services Association, the Task Force consisted of representatives from the Professional Services Council, the National Defense Industrial Association, and the Information Technology Association of America; dozens of volunteers from individual companies and law firms. The Task Force also included representatives from the U.S. Army Forcecom and the Defense Acquisition University,



Initial efforts were to review various categories of services and analyze any unique characteristics that might impact their acquisition in the federal marketplace

- Engineering Services
- Communication Services / Internet / Van services
- Security and Guard Services
- Advisory and Assistance Services
- Consulting Service
- Mechanical, Electrical, HVAC, Plumbing Services
- Telecommunication Services / wire and wireless
- Research and development services
- Travel Services
- Commercial Aviation and transportation
- Aviation maintenance and flight services
- Accounting and legal services
- Medical / Dental services
- Training Services
- Automotive and mechanical services
- Architectural Services

- Financial / Insurance Services
- Profit / non-profit Services
- Construction Services/ Masonry, Carpentry, Paving, Roofing etc.
- Food/ Catering Services
- Child Care Services
- Fire Support Services
- Janitorial / Lawn Maintenance Landscaping /Painting Services
- Laboratory Services
- Moving Services
- Rental / Leasing Services
- Printing Services
- Mortuary Services
- Information technology Services



**From a review of major services categories the working group felt these services can be classified as either**

*Commercial Services – Sold to the general public*

*Developmental Services – Sold under federal government standards and specifications*

***The working Group assessed that the regulatory guidance addressing developmental items and services was balanced and protected the public and private sectors interest and proposed no further changes***

# Categories of Services Working Group Recommendations

The working group considered barriers in commercial items acquisition  
In developing recommendation it was clear some would required  
legislative as well as regulatory change

## Legislative

- Amend Commercial Item Definitions – FASA
- Revise SARA language increasing the use Time and Material contracting.
- Amend Advisory and Assistant Services restriction to align with Task Order contracting rules

- The definition of commercial services does not need to be conceptually different from commercial items.
- If the service is of a type offered and sold to the commercial marketplace sufficiently to establish a credible basis for demonstrating market acceptance, then the service should qualify as a commercial item.

The definition does not need to state that:

- Can be performed by a different source or time as an item
- Has to be sold at a catalog or market price
- Cannot be acquired under T&M contracts.

# Commercial Item Definition Legislative Revisions

- FASA identified commercial items as:

- *Sold to non-government customers*

propose non-Federal Government purposes

(1) ***Any item, other than real property, that is of a type customarily used by the general public or by other than Federal Government entities for purposes other than Federal Government purposes,***

- Requirements for separate definitional groupings should be eliminated: Ancillary Services and separate treatment for specific tasks to be performed

No commercial distinction Ancillary and Non-ancillary

(5) ***Any Service of a type offered and sold in the commercial marketplace for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions.***

**ARINC**

Engineering Services, LLC

YOU WON'T BELIEVE WHAT WE CAN DO.®

**The Task Force recognizes that the use of Time and Material (T&M) and Labor-Hour (LH) contracts for the acquisition of services is a common commercial practice. The Regulations should address this fact.**



SARA provided statutory authority for the limited use of T&M contracts based on competition

**The Task Force recommends that SARA be amended so that the requirement for competition or justified sole source be permitted in the award of commercial services T&M contracts.**

**It is also important that any such change in legislation or regulation also recognize that the use of T&M contracts can be placed at the prime and subcontract levels**

**It was the Working Groups position that the realities of what is and what is not A&AS, as defined in the FAR can be confusing and often blurred in contract requirements. The similarities between task order contracting and A&AS would question the necessary of any distinction**



**Section 813 of the National Defense Authorization Act for Fiscal Year 2005 extends the performance period for “multiyear task and delivery order contracts” awarded by DOD to a base five-year term with an extension for up to an additional five years. This revision did not change the five-year maximum period of performance for a subset of task orders, Advisory and Assistance Services.**

**Both types of contracts should be treated the same,**

**The Task Force recommends that Congress amend title 10 to provide similar periods of performance for *all* types of task and delivery order contracts.**

## ***“Commercial Item” definition changes***

**No need to separately define “Items” from “Services”**

**Change “governmental” restriction to “non-federal”**

**Remove two tier definition, Ancillary & Specific Outcomes**

**Moved the cost reasonableness elements within the definition and to FAR parts 12, 13 and 15.**

*The Task Force clearly recognized price reasonableness is a critical issue for federal buyers of commercial items and deserves promenade treatment*

## A Commercial Service Is:

**Any "thing", "class of procurement", that is not manufactured or does not require manufacturing, i.e. a service is not a tangible product, even though the service it self may produce some tangible outcome or output."**

*However, the Task Force decided there was no a need to bring this definition into the FAR*



# Categories of Services Proposed Reasonableness Changes

## FAR 12.209 Determination of Price Reasonableness

### FAR Subpart 13.106-3 (1) and (ii) (iii) (3) Award and Documentation

### FAR 15 402 (i) Pricing Policy

***Adding references to commercial services after references to commercial items***

***Recognize that reasonableness can be assessed in a variety of ways including competition, market surveys that include a review of past or active vendor contracts,***

***Clarify that review of any catalogue or other published prices if available.***

It is important that vendors dealing with the federal government recognize the overarching need for data that support the reasonableness of all prices offered

Contracting through the Federal Supply Schedules (FSS) managed by the General Services Administration (GSA) remains an extremely desirable and productive approach for fulfilling Federal agency requirements.

The Working group fully supported the principals of the “Get it Right” Campaign

From this perspective, the working group developed a number of recommendations intended to improve the utility of Schedule contracts by providing increased transparency



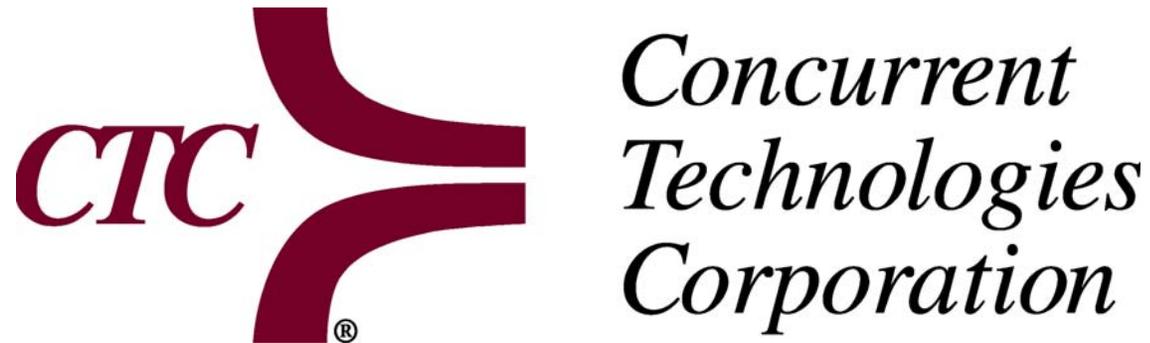
Enhancements to E-Buy - Transmit opportunities across all schedules and SINs to enhance competition.

Categorization of Services - Recommend GSA examine the service categorization under each schedule and reduce cross schedule redundancy – Can reduce scope confusion

Recognize the risk difference between “Assisted” (third Party) Procurement from “Unassisted” (Requiring agency) Procurement in policy guidance.

***Clarifying the Message - Notwithstanding the clear guidance issued on October 2004 by DOD encouraging the use of third party vehicles, the reaction of the services in local implementation guidance seem to be discourage the use of these proven acquisition tools***

**The Realities that Services Acquisitions now Dominate Federal Discretionary Spending would Suggest that the Legislation and the FAR be revised to assure the guidance is balanced protecting both public and private interest and that the Federal Government has full and free access to all Commercial Items and Services**



**Presentation to SARA Panel**  
**Acquisition Management and Planning, Part 37**

**Janice M. Menker, DPA, CPCM**  
**Director, Government Acquisition Policy, CTC**  
**Tuesday, May 17, 2005**

# Outline

- **Objective and Focus**
- **Issues**
- **Findings**
- **Recommendations**
- **Conclusions – Remaining Steps**



# Objectives and Focus

- **Clean slate approach**
  - Identify issues and concerns
  - Differentiate legislative vs. regulatory actions
- **What “Could” vs. What “Should”**
  - Services vs. PBSA
- **Underlying FAR principles convey**
  - Acquisition Planning and methodologies apply to services
- **“Systems thinking” can be applied**
- **Protecting government’s interest – It is the public’s money!**



# Issues

- **Focus on technique – not requirement**
  - ID/IQs are now the norm
  - Focus on PBSA tends to concentrate on “how” – the technique and not “what” – the requirement
  - PBSA is a procurement method
- **Service or Services require same planning and project management discipline as hardware**
- **Overlapping issues and concerns among groups**
  - Price reasonableness, competition, small business concerns



# Findings

- **Pre-Award – Acquisition Planning**
  - Focus on services missing
  - Culture evolved based on goods
  - Acquisition planning skill applies also to services
  - Market research, critical thinking, life cycle support, availability in the market place critical skills



# Findings (continued)

- **Types of Contracts**
  - Industry norm is T&M/LH
  - Milestone billing or performance based payments may be more appropriate



# Findings (continued)

- **Award**
  - Best Value is necessary
  - Decision factors require understanding of the market
  - Past performance is a challenge
    - Metrics and indicators currently focus on hardware type events – schedule and cost
    - Better service sector indicators may be quality of service; responsiveness to client, cost control
  - Requires more analysis and focus



# Findings (continued)

- **Incentives**

- Traditional hardware/systems approach is cost, schedule and performance generally linked to improving system performance
- Such finite or concrete measures may not apply
- Award Fee is viable, but currently subjective vs. objective
- Baselines may not exist to identify improvements
- Additional investigation required



# Findings (continued)

- **Post Award**
  - Is DCMA adequately prepared to administer services contracts?
  - Services contractors may have little investment in property, plan or equipment
  - GAO Report (GAO 05-274)
    - Reviewed 90 contracts
    - 26 had no administration nor personnel identified to administer
    - Generally found administration to be weak



# Findings (continued)

- **Professional vs. Non-professional**
  - Distinction is blurring
    - Technology is changing delivery methods
  - Distinctions among Walsh-Healy, Davis-Bacon and Service Contract Act – may no longer be required
- **Additional research required to determine if still applicable**



# Recommendations

- **Issue a questionnaire to services sector**
  - SARA Panel questionnaire
  - Task Force questionnaire received limited response
- **“Performance Based” is a tool or technique-*not the end result***
  - Federal agencies could disseminate the “Benefits to Both Parties” prepared by the Task Force
- **More focus on “services” through-out the FAR**
  - Task Force recommends
  - Changes to the FAR Part 7, Acquisition Plan format to better incorporate services issues
  - Acquisition Planning could more clearly be required for FAR Part 8, 12 and 13 procurements
  - Changes to FAR Part 15 to better incorporate services
- **Education and Training**
  - Better integration of requirements and contract domains
  - Culture Change is a challenge
  - Contracts cannot correct or fix poor requirement definitions



# Part 37

- FAR Part 37 thoroughly examined
- Not necessary to identify specific services
- More focus on small business and applicability of Part 19 to service acquisitions
- All of Part 37 could reasonably be moved to other FAR sections
- Additional analysis and investigation to re-align FAR Part 37 elsewhere in the FAR



# Conclusion

- **Legislative corrections identified**
- **Regulatory changes may still be needed**
- **Services Working Group members desire to continue working with DDP and SARA panel to identify regulatory changes**



# Ethics and Contractor Employees

Acquisition Advisory Panel

FDIC Auditorium, 801 17th Street, NW

Washington, DC

May 17, 2005

Marilyn L. Glynn

Acting Director

U.S. Office of Government Ethics

# Ethics in Government and the Role of Contractor Employees

**Government Ethics:** System of laws and rules to make sure that Government employees are accountable for the trust placed in them

**Contractor Employees:** Mainly accountable to their private employers

**Concern:** Without eroding fundamental distinction between Government employees and contractor employees, need to recognize potential for conflicting interests of contractor employees

# Vulnerable Situations

- Services contracts
- Close interaction between contractor and Government personnel
- Government accustomed to relying on Federal personnel for similar services

# Specific Types of Contracts Where Ethics Issues Arise

- Advisory services contracts
- Management and Operation contracts
- Post-outsourcing (e.g., A-76) contracts
- Large indefinite delivery contracts involving task orders

# Examples of Types of Conflicts

- Financial Conflicts of Interest
- Impartiality Concerns
- Misuse of Information
- Misuse of Authority (Actual or Apparent)
- Misuse of Government Property

# Possible Remedies

## Organizational Conflict of Interest:

- Awareness of possible uses of FAR subpart 9.5
- Agency FAR supplement option
- Consider changes to subpart 9.5

# Possible Remedies

## Contract Clauses:

Model clauses developed by agencies to deal with different conflict situations

# Possible Remedies

## Education:

- Draw attention to need to consider issues of contractor employee conflicts
- Address both Government contracting officials and contractor ethics programs

# Possible Remedies

Compliance:

Need for monitoring and/or other  
compliance measures

# Conclusion

Need to work proactively to anticipate vulnerabilities before ethics problem arises



# Contract Management

Briefing for Acquisition Advisory Panel on  
Commercial Practices/Commercial Items,  
Contracts for Services and Interagency  
Contracting, and Performance Based  
Contracts for Logistics Support

May 17, 2005

# Commercial Practices/Commercial Items

## Background

- The Federal Acquisition Streamlining Act of 1994 (FASA) and the Federal Acquisition Reform Act of 1996 (FARA) were designed to **streamline acquisition laws, facilitate the acquisition of commercial products, and eliminate unnecessary statutory impediments to efficient and expeditious acquisition.** One impact of the Acts was to **significantly broaden the commercial item definition and allow more sole-source items to qualify for the “commercial item” exception to cost or pricing data.**
- The Truth in Negotiations Act of 1962 (TINA) allows DoD to obtain cost or pricing data (certified cost information) from Defense contractors to **ensure the integrity of DoD spending** for military goods and services that are not subject to marketplace pricing.
- In June 1995, the Director, Defense Procurement provided comments on the benefits of TINA, marketplace pricing, and the differences between DoD and commercial procurement environments.

# Commercial Practices/Commercial Items

## Background (continued)

- “The requirements of TINA are necessary to ensure the integrity of DoD spending for military goods and services that are not subject to marketplace pricing. **When there is a market that establishes prices by the forces of supply and demand, the market provides the oversight.** DoD procures many highly complex military systems in the absence of supply/demand situations for these relatively low volume, unique military goods. The requirements of TINA address legitimate and necessary differences between DoD and commercial procurement environments.”
- “While DoD recognizes the need for TINA, it also is moving to increase competition and decrease the number of pricing actions that would require cost or pricing data. The implementation of FASA, with its emphasis on encouraging the acquisition of commercial end items and increased competition, will bring the requisite market forces to bear on prices, and thus exempt contractors from the requirement to submit cost or pricing data. **Absent this competition, the quantitative benefit to the Government of TINA compliance far exceeds the cost of Government oversight.**”

# Commercial Practices/Commercial Items

## Guidance

FAR 2.101 -- Definitions. “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;

# Commercial Practices/Commercial Items

## Guidance (continued)

- (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;
- (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.

# Commercial Practices/Commercial Items

## Guidance (continued)

FAR 15.402 -- Pricing Policy. Contracting officers must –

(a) Purchase supplies and services from responsible sources **at fair and reasonable prices**. In establishing the reasonableness of the offered prices, the contracting officer **must not obtain more information than is necessary**. To the extent that **cost or pricing data are not required** by 15.403-4, the contracting officer must generally use the following **order of preference** in determining the type of information required:

(1) No additional information from the offeror, if the price is based on adequate price competition, except as provided by 15.403-3(b).

(2) Information other than cost or pricing data:

(i) Information related to prices (e.g., established **catalog** or market prices or **previous contract prices [price analysis]**), relying **first** on information available within the **Government**; **second**, on information obtained from **sources other than the offeror**; and, **if necessary**, on information obtained from the **offeror**. When obtaining information from the offeror is necessary, unless an exception under 15.403-1(b) (1) or (2) applies, such information submitted by the offeror shall include, at a minimum, appropriate **information on the prices at which the same or similar items have been sold previously, adequate for evaluating the reasonableness of the price**.

(ii) Cost information, that does not meet the definition of cost or pricing data at 2.101.

# Commercial Practices/Commercial Items

## Guidance (continued)

### FAR 15.402 -- Pricing Policy. (continued)

3) *Cost or pricing data.* The contracting officer should use every means available to ascertain whether a fair and reasonable price can be determined **before requesting cost or pricing data.** Contracting officers **must not require unnecessarily the submission of cost or pricing data, because it leads to increased proposal preparation costs, generally extends acquisition lead time, and consumes additional contractor and Government resources.**

### FAR15.403 -- Obtaining Cost or Pricing Data.

15.403-1 -- Prohibition on Obtaining Cost or Pricing Data (10 U.S.C. 2306a and 41 U.S.C. 254b).

(a) Cost or pricing data shall not be obtained for acquisitions at or below the simplified acquisition threshold.

# Commercial Practices/Commercial Items

## Guidance (continued)

15.403-1 -- Prohibition on Obtaining Cost or Pricing Data (10 U.S.C. 2306a and 41 U.S.C. 254b). (continued)

(b) *Exceptions to cost or pricing data requirements.* The contracting officer shall not require submission of cost or pricing data to support any action (contracts, subcontracts, or modifications) (but may require information other than cost or pricing data to support a determination of price reasonableness or cost realism) --

(1) When the contracting officer determines that prices agreed upon are based on adequate price competition (see standards in paragraph (c)(1) of this subsection);

(2) When the contracting officer determines that prices agreed upon are based on prices set by law or regulation (see standards in paragraph (c)(2) of this subsection);

(3) *When a commercial item is being acquired* (see standards in paragraph (c)(3) of this subsection);

(4) When a waiver has been granted (see standards in paragraph (c)(4) of this subsection); or

(5) When modifying a contract or subcontract for commercial items (see standards in paragraph (c)(3) of this subsection).

# Commercial Practices/Commercial Items

## Guidance (continued)

**Director, Defense Procurement Guidance.** On August 2, 2000, the Director, Defense Procurement issued a memorandum to the Defense community on “**Obtaining Information for Pricing Sole-Source Commercial Items.**” The Director Stated:

“Please **remind you contracting professionals** that the clause at FAR 52.215-20 should be **included in the solicitations for sole-source commercial items** when the contracting officer has a reasonable expectation that **the offeror will request a commercial item exception to a requirement for submission of certified cost or pricing data**, and that the offeror will need to provide, at a minimum, appropriate information on the prices at which the same or similar items have been previously sold.”

FAR 52.215-20 states:

“ (ii) *Commercial item exception.* For a commercial item exception, the offeror shall submit, at a minimum, information on prices at which the same item or similar items have previously been sold in the commercial market that is adequate for evaluating the reasonableness of the price for this acquisition.”

(A) For catalog items, . . . Also explain the basis of each offered price and its relationship to the established catalog price, including how the proposed price relates to the price of recent sales in **quantities similar to the proposed quantities.**

# Commercial Practices/Commercial Items

## Commercial Item Determinations

- “All of these items fall into **groups of equipment** that are “of a type” (shares **common traits or characteristics that distinguish the end items/parts as an identifiable group or class; and has the features of the group or class**), and “sold” to the “general public.” The items are **manufactured, assembled, and tested** by the **same workforce**, in the same facilities with the **same equipment**, and under the same quality system as our commercial products.”
- “As you know, FAR Part 12, Acquisition of Commercial Items, was designed to provide the Department of Defense with greater access to commercial items with a **preference for simplified price analysis as a means of determining price reasonableness**. Additionally, the FAR re-write revised the definition of **commercial items to include “similar or of a type” items**, thus expanding the commercial market.”
- “He stated it is **not politically popular** at this juncture **to restrict commercial determinations**.”

# Commercial Practices/Commercial Items

## Contracting Officer and Contractor Statements

- “. . . NSNs that are determined to be sole source to [the contractor] meet the definition of commercial item per FAR 2.101(3)(ii), based on the **items are being manufactured on an integrated production line**, with little differentiation between the commercial and government items.”
- “I have determined that the items described above are commercial within the broad definition set forth in FAR 2.101. Still, I do not believe that this definition as written captures the **intent or spirit that was intended by Congress when this legislation was developed**. Congress’ intent was to allow the Government the advantages of the commercial marketplace in procuring supplies and services. I do not believe its intent was to create such **broad sweeping categories that everything purchased in the aerospace industry could be determined commercial**, but provide none of the advantages of the commercial marketplace.”

# Commercial Practices/Commercial Items

## Audit Coverage

- Commercial and Noncommercial Sole-Source Items Procured on Contract N000383-93-G-M111, Report No. 98-064, February 6, 1998
- Sole-Source Prices for Commercial Catalog and Noncommercial Spare Parts, Report No. 98-088, March 11, 1998
- Commercial Spare Parts Purchased on a Corporate Contract, Report No. 99-026, October 30, 1998
- Sole-Source Commercial Spare Parts Procured on a Requirements Type Contract, Report No. 99-217, August 16, 1999
- Sole-Source Noncommercial Spare Parts Orders on a Basic Ordering Agreement, Report No. 99-218, July 27, 1999
- Procurement of the Blade Heaters for the C-130 and P-3 Aircraft, Report No. D-2000-099, March 8, 2000
- Sole-Source Spare Parts Procured From an Exclusive Distributor, D-2004-012, October 16, 2003
- Acquisition of the Boeing KC-767A Tanker Aircraft, D-2004-064, March 29, 2004
- Audit of Spare Parts Procurements from AeroControlex Group, Project No. D2004-CH-0189, Ongoing
- Audit of the Air Force Strategic Supplier Initiative with Hamilton Sundstrand Corporation, Project No. D2005-CH-0183, Ongoing

# Commercial Practices/Commercial Items

## Audit Issues

- DoD paid modestly **discounted catalog prices** for **sole-source commercial items** that were **significantly higher than previous cost-based prices**.
- DoD paid **significantly higher prices for commercial** and noncommercial spare parts purchased on a sole-source basis, **than previous competitive purchases** of the same items.
- DoD paid **higher prices for commercial items** and **failed to take advantage of commercial practices such as direct vendor delivery** that would help offset the higher commercial prices.
- DoD, **using price analysis**, paid prices that were **higher than fair and reasonable as determined by cost analysis**.
- **No commercial market exists** in order to establish reasonable prices by the forces of supply and demand and the **commercial item procurement strategy did not provide sufficient cost or pricing data** to conclude that prices negotiated **represent a fair expenditure** of DoD funds.
- DoD, **using cost analysis**, **obtained fair and reasonable prices** for sole-source commercial items, and also improved delivery times and reduced Government inventory.

# Commercial Practices/Commercial Items

## **DLA/Honeywell Strategic Supplier Alliance** (to resolve audit issues)

- Used a Rapid Improvement Team Process (Facilitator, DoD, DLA, IG, DCAA, Honeywell).
- Tailored Support (Contractor or DLA inventory items based on demand and economic order quantities, profit based on level of support)
- Long-term FAR Part 15 contract (CAS Waiver)
- **No commercial item determinations**
- One Pass **Cost-Based** Pricing (DLA, DCAA, and IG review cost data with Honeywell pricer to determine fair and reasonable prices, economic order quantities, and support method)
- Results were lower prices, reduced number of negotiated orders, reduced administrative lead-time, and reduced Government inventory.
- Pricing problems easily resolved

# Commercial Practices/Commercial Items

## **Consumer Report Recommends**

To get a good price when buying a new car:

- Learn the Lowest Cost
- Always bargain up from the cost, never down from the sticker price

# Contracts for Services and Interagency Contracting

## Audit Coverage

- Contracts for Professional, Administrative, and Management Support Services, Report No. D-2000-100, March 10, 2000
- Multiple Award Contracts for Services, Report No. D-2001-189, September 30, 2001
- Contract Actions Awarded to Small Businesses, Report No. D-2003-029, November 25, 2002
- Contracts for Professional, Administrative, and Management Support Services, Report No. D-2004-015, October 30, 2003
- Contracts Awarded for the Coalition Provisional Authority by the Defense Contracting Command – Washington, Report No. D-2004-057, March 8, 2004
- DoD Purchases Made Through the General Services Administration (Draft Report)

# Contracts for Services and Interagency Contracting

## Audit Issues

- Lack of Good Market Research
  - Contracts and Task Orders awarded on a sole-source basis. (Exceptions claimed without support)
  - Program and Contracting offices have “desired” contractors.
- Scope of Work not Definitive
  - Requirements written are very broad and in general terms.
  - Conversely, some contracts clearly disclosed personnel services contracts.
  - Missing periods of performance.
- Numerous Funding Problems when MIPR’s are Used
  - Used expired appropriations to award contracts.
  - No bona fide need in the Fiscal Year.
  - Used funds of wrong appropriation.
  - Not tracking and monitoring funds.

# Contracts for Services and Interagency Contracting

## Audit Issues (continued)

- Use of Multiple-Award Contracts Needs Improvement
  - Fair opportunity not given to all awardees.
  - Use of down-select procedures.
  - Work was awarded that was not suitable or within scope for a multiple award contract.
  - Use of sub-Task Orders
- Misuse of Federal Supply Schedules
  - Out of scope purchases.
  - No determination that a fair and reasonable price is being paid.
- Use of Cost-Reimbursable Contracts for Follow-up Requirements
  - Lack of FFP performance-based contracts on repetitive purchases.
  - Overuse of T&M contracts.

# Contracts for Services and Interagency Contracting

## Audit Issues (continued)

- Fair and Reasonable Prices not Assured
  - Reviews of labor hours, labor mixes, and rates not being performed.
  - Discounts for large Federal Supply Schedule buys not obtained.
  - Poor reviews of contractor price lists to determine fair prices.
  - No support for prices paid.
- Little Surveillance on Service Contracts
  - Invoices paid without review.
  - Purchasing level of effort, so it is difficult to determine whether we get what we paid for.
  - Lack of surveillance plans.
  - COR's not always appointed or lack knowledge of their roles.
  - Lack of reporting contractor performance.

# Performance-Based Contracting for Logistics Support

## Performance-Based Logistics (PBL)

- PBL first proposed by the Aerospace Industries Association as a preferred sustainment strategy in 1999.
- DoD endorsed the strategy as part of Future Logistics Enterprise and Quadrennial Defense Review.
- Deputy Secretary of Defense requires each Service to aggressively implement PBL.

# Performance-Based Contracting for Logistics Support

## PBL Questions

- Can PBL contracts improve performance and also reduce costs?
- Does industry have innovative and creative solutions to improve performance and reduce costs?
- Is DoD willing to pay more for improved performance on PBL contracts?
- How does DoD evaluate performance, both technical and cost?

# Performance-Based Contracting for Logistics Support

## Audit Coverage

- Commercial Contract for Total Logistics Support of the Aircraft Auxiliary Power Units, Report No. D-2000-180, August 31, 2000
- Industrial Prime Vendor Program at the Air Force Air Logistics Centers, Report No. D-2002-112, June 20, 2002
- F/A-18E/F Integrated Readiness Support Teaming Program, Report No. D-2003-120, August 8, 2003

# Performance-Based Contracting for Logistics Support

## Audit Issues

- The information used in the business case analysis was questionable and overstated the cost of DoD performance and likely benefits.
- The impact of transferring management responsibility for procurement and management of consumable items for selective “prime” customers from DLA was not considered
- The program improved availability but was using 55 additional personnel to manage material and failed to use \$9 million of available material in Defense Depots.
- The program did not consider issues relating to supply infrastructure, contracting methods, and inventory investment.

# Performance-Based Contracting for Logistics Support

## Audit Issues (continued)

- The cost-plus contract did not effectively implement the performance based material management and reliability improvement described in the acquisition plan. The contract failed to:
  - Reduce repair cycle times.
  - Achieve a minimum 10 percent reliability improvement from baseline calculations.
  - Reduce and effectively monitor infrastructure support costs to include Navy inventory investment.
  - Procure items directly from OEMs to reduce pass-through cost.
  - Accurately charge fleet customers.

# FY 2004 DD 350 Contract Actions Over \$25K (\$billions)

	<u>Competitive</u>		<u>Non-Competitive</u>		<u>Totals</u>		<u>Performance Based</u>	
	<u>Actions</u>	<u>Dollars</u>	<u>Actions</u>	<u>Dollars</u>	<u>Actions</u>	<u>Dollars</u>	<u>Actions</u>	<u>Dollars</u>
<b><u>RDT&amp;E</u></b>								
Fixed Price	5,896	1.44	1,820	1.55	7,716	2.99	1,150	0.33
Cost	19,202	20.22	4,670	8.49	23,872	28.71	5,244	6.59
Time & Materials	3,439	0.68	813	0.12	4,252	0.8	2,322	0.34
Labor Hours	153	0.05	57	0.01	210	0.06	32	0.01
Not Specified	0	0	0	0		0	1	0
<b>Totals</b>	<b>28,690</b>	<b>22.39</b>	<b>7,360</b>	<b>10.17</b>	<b>36,050</b>	<b>32.56</b>	<b>8,749</b>	<b>7.27</b>
<b><u>Other Services</u></b>								
Fixed Price	181,896	41.99	66,055	9.96	247,951	51.95	43,184	14.86
Cost	35,267	22.96	6,752	6.22	42,019	29.18	14,414	14.32
Time & Materials	11,111	5.32	3,966	1.47	15,077	6.79	4,944	2.29
Labor Hours	2,467	0.37	951	0.19	3,418	0.56	418	0.07
Not Specified	23,688	6.15	0	0	23,688	6.15	5,000	1.99
<b>Totals</b>	<b>254,429</b>	<b>76.79</b>	<b>77,724</b>	<b>17.84</b>	<b>332,153</b>	<b>94.63</b>	<b>67,960</b>	<b>33.53</b>
<b>Total Services</b>	<b>283,119</b>	<b>99.18</b>	<b>85,084</b>	<b>28.01</b>	<b>368,203</b>	<b>127.19</b>	<b>76,709</b>	<b>40.80</b>
<b>Commercial Services<sup>1</sup></b>	<b>83,968</b>	<b>14.35</b>	<b>29,561</b>	<b>3.03</b>	<b>113,529</b>	<b>17.38</b>		
<b><u>Supply</u></b>								
Fixed Price	176,263	40.67	77,730	41.66	253,993	82.33	0	0
Cost	1,494	3.24	3,222	10.91	4,716	14.15	0	0
Time & Materials	354	0.18	638	0.33	992	0.51	0	0
Labor Hours	52	0.02	48	0.20	100	0.22	0	0
Not Specified	63,152	4.69	0	0	63,152	4.69	0	0
<b>Totals</b>	<b>241,315</b>	<b>48.80</b>	<b>81,638</b>	<b>53.10</b>	<b>322,953</b>	<b>101.90</b>	<b>0</b>	<b>0</b>
<sup>1</sup> Commercial Services are included in RDT&E and Other Services Totals								

Presentation For Attachment 5  
The Federal Acquisition Advisory Panel

*CONTRACTING FOR SERVICES*

*May 17, 2005*

*Kathleen Tighe*

*Counsel to the Inspector General*

*Eugene Waszily*

*Assistant Inspector General  
for Auditing*

U.S. GENERAL SERVICES ADMINISTRATION



# *Contracting Explosion*

	<u>1997</u>	<u>2004</u>
<b>Multiple Award Schedules</b>	<b>\$ 5.5 billion</b>	<b>\$ 32.5 billion</b>
<b>Federal Technology Service</b>	<b>2.5 billion</b>	<b>8.5 billion</b>
<b>Public Buildings Service</b>	<b>5.0 billion</b>	<b>8.0 billion</b>

**Over 65% of these \$49 billion in contracts are for services.**

# *Reasons for Contract Growth*

- **Reduction of more than 400,000 civilian personnel during 1990s.**
- **Technology moved to the desktop and the WEB.**
- **Older information systems need replacing.**
- **Skills to meet mission requirement unavailable in-house.**
- **National defense and military requirements mushroom.**

# *10 Years of Change*

- *Fewer Procurement Staff.*
- *Do more with less.*
- *Satisfy the customer.*
- *Deliver ahead of schedule.*
- *Increase business volume \$\$\$.*

# *10 Years of Change*

- **Federal Acquisition Streamlining Act**
- **Clinger-Cohen Act**
- **Services Acquisition Reform Act**

*I'm running as fast as I can just to stay  
in P.l.a.c...e !!*



**Procurement personnel are having difficulty adjusting to newer procurement regulations and new customer demands, while trying to run like a business within the confines of government environment that has competing priorities.**

# *Commercial Items*

- Services of a type that have been offered for sale in the commercial marketplace are commercial items.
- Labor rates proposed are to include wages, benefits, and overhead. However, there is not a standard to define what costs are included or even to require the contractor to disclose what is included in the rate.

# Commercial Items

- Many contractors sell only to the government.
  - In fact, many now set up a separate corporation or division to do government business.
    - Some refuse to disclose commercial customer data.
    - Some say the government does not buy the way the private sector does.
- Pricing is difficult to assess for companies doing only government business. Same job title for other firms on same contract Schedule have different standards.

TITLE: *Systems Project Manager*

Company	A	\$ 175	per hour
	B	115	per hour
	C	92	per hour

# *Commercial Items*

- Contracting Officers may not be able to evaluate other direct costs, especially items that may already be in the labor rate.  
  
(Few procurement personnel understand accounting.)
- Contracting Officers need a clear understanding of what other direct costs are – ODCs sometimes do not appear to be in direct support of a service or eclipse the value of the service.

# *Run Like A Business*

- Most business arrangements for services call for the purchase of an outcome. Pricing tends to be fixed or based on some formula.
- Our 2003 survey of Federal Supply Schedules users in four agencies received 1976 responses pertaining to task orders for services totaling \$2.4 billion.

## Found:

- Only 1/3 of contracts were awarded on a firm fixed price basis.
- Only half of all orders valued at \$10 million or more achieved lower labor pricing, even though price reductions should be anticipated with individual orders above \$500,000.
- Of those using blanket purchasing agreements, 81% obtained better pricing, but this format was used only 14% of all awards.

# *Run Like A Business*

- More recent studies of 523 Federal Technology Service contract awards, valued at over \$5.4 billion, found:
  - 58% of all awards were inadequately competed.
  - Of those solicitations open to competition, 1/3 of the orders representing 53% of the aggregate sales dollars received only one bid.
  - Over 60% of all orders were awarded on a time and materials basis. The government carries all the risks.

# *Run Like A Business*

*Keep Customer Happy*

*Earn a Profit*

Keep Costs Low to Earn More Profit / Stay  
Competitive

# *Many Government Customers*

- **Mission Focused**
- **Have a Budget for the Required Service**
- **Often Have Previous Experience with a Vendor and are Satisfied or,**
- **Looking to Replace a Workforce that was Down-sized**

# *Subtle Message to Procurement Office*

**Get Me Who I Want  
When I Want Them  
Just Keep Me Within Budget  
And Let Me Do My Mission Work**

**OR**

**What I Need Are Personnel Here 24 / 7  
Having The Skills to Do  
Whatever Comes Through The Door  
(Replace a Workforce That Was Down-sized)**

- If You Can't Do That, I Will Just Go to Another Procurement Shop Who Can.**

# *Procurement Shops*

## **Must Earn Fees or Go Out of Business**

**While procurement personnel still want to do a professional job for the taxpayer as well as the Client Agency, we have seen many awards that go beyond *bending the rules*.**

### *Examples*

- Using the non-competitive small disadvantaged business program to make sole source awards for the small firm to pass the actual work and 95% of the funds to a larger firm.
- Making small dollar contract awards of short duration and then modifying them in terms of scope and value:
  - In one case, a 3-month \$200,000 award was modified 9 times over 4 years and grew in value to over \$81,000,000.

## **We have identified Contract Awards Where:**

- **The Client Agency told the Contracting Center who to hire.**
- **The Contractor prepare the “independent government estimate of cost” for its contract.**
- **The Contractor brought the Client Agency to the Contracting Center and then developed the contract.**
- **The “competitors” for the contract all become sub-contractors to the eventual winner.**
- **90% of the contract’s value was for services or equipment not part of the original contract’s scope nor were the add-ons evaluated for price reasonableness.**

# *Potential For Fraud*

- Once the Contracting organization permits one party to control the entire procurement process, it greatly increases the exposure to fraud and abuse.
- Military Contact Liaison Office for a base in Korea was headed by a Colonel who demanded bribes from all contractors. Because the contracting officers allowed the Colonel to have final say over awards, he took well over \$700,000 in bribes before being caught and convicted.

# *Governmentwide Acquisition Contracts*

- Sound concept to select the “best of the best” contractors in their respective area of expertise ready to bid on specific projects when defined.
- Effective in helping agencies meet mission needs.
- Often the notion of spirited competition is not achieved. In about 1/3 of awards only 1 bid received.
- Many awards are crafted without a specific objective defined. Rather a laundry list of services and functions to be performed over a period of years, often awarded on a time and materials basis using source selection methodology. Outsourced workforce.

# *Performance Based Contracting*

We have seen little in the way of performance-based contracts.

**DEFENSE INDUSTRY INITIATIVE  
ON BUSINESS ETHICS AND CONDUCT (DII)**

**Federal Acquisition Advisory Panel  
The DII Experience: From Compliance to Values**

**Public Meeting  
May 17, 2005**

**Presented by:**

**Patricia J. Ellis, V.P.  
Business Ethics and Compliance  
Raytheon Company**

## DII Background

---

- **Defense Industry Initiative on Business Ethics and Conduct (DII) established in 1986**
- **Self-organized and self-governed industry effort to embrace and practice ethical business conduct in the defense business**
- **Compliance is a given for an ethical company**
- **Six founding principles**

Commitment to self-governance

## DII Background/DII Principles

---

- **Adopt a written Code of Ethical Conduct**
- **Train employees to understand the Code**
- **Encourage reporting of violations of the Code, within an atmosphere free of fear of retribution**
- **Implement systems to monitor compliance and procedures for self-disclosure to the Government**

## DII Background/DII Principles

---

- **Share best practices with other firms in the industry**
- **Be accountable to the public**

Enduring principles

# DII Background/Companies Establish Ethics Programs

- **Senior leadership commitment**
- **Principal responsibility assigned to a senior officer/manager**
  - Principal representative to the DII
- **Code of Conduct**
  - Ethical conduct is the expected condition
  - Rules employees must not violate
- **Training**
  - “Talking Heads” tell employees the rules; what you must do/must not do

# DII Background/Companies Establish Ethics Programs

- **Hot Lines (a few helplines)**
  - Whistleblowing
- **Corrective actions enforce the rules**

Prevent unlawful conduct

## DII Ethics Programs – Early Lessons

---

- **The majority of hotline calls are not about unlawful conduct; managers and supervisors have many other day to day issues (i.e. fair treatment, environmental responsibility, workplace safety, gift giving/receiving)**
- **Laws and regulations are complex, unclear; sometimes there is no rule**
  - **What's the right decision?**
- **Fear of retaliation is a real barrier to surfacing issues**
  - **How do we build trust, openness, candor?**

## DII Ethics Programs – Early Lessons

---

- **Good people can feel pressure to do bad things – why?**
- **Business is dynamic; new issues emerge, i.e. computer use in the workplace, privacy, conflicts of interest**

The road to a good ethics program is never ending

## DII Ethics Programs/A New Vision

---

- **Rules are important knowledge but.....**
- **Culture is as important as the rules**
- **Values drive culture; leaders drive behaviors**
- **Values produce employees who do what's right**

Leadership sets the tone

# Ethics Programs: Why Values Based?

---

- **Culture is a system of shared Values**
- **Senior leaders see Values as how organizations achieve goals**
- **The same Values that achieve strategic goals guide ethical decision-making – including a culture of compliance, prevention**
- **Ethics programs (Codes of Conduct, training, communications, Ethicslines) enable the desired culture**
- **Ethics is linked to the success of the business**

Ethics is strategically relevant

## Ethics Programs/Values Based

---

- **Leadership commitment, attention, involvement**
  - High level reporting/oversight
  
- **Code of Conduct**
  - Statement of values unique to company
  - Simple, clear, practical guidelines for behavior
  
- **Training**
  - Annual interactive discussion of real workplace issues
  - Provide a framework for decision-making when there are no rules
  - Mandatory compliance training

## Ethics Programs/Values Based

---

- **Ethics Lines**

- Asking questions/seeking advice
- It's OK to raise questions

- **Corrective actions**

- Accountability at all levels
- Improve internal systems/controls

Enabling responsible conduct

## Culture of Integrity – an Ethics “Safety Net”

---

- **Unanticipated situations, unique circumstances, difficult to solve issues handled by reference to shared Values**
- **Shared Values are group norms, expectations that problems will be solved in an ethical manner**
- **Process for problem-solving encourages asking questions, seeking advice rather than rote rules**
- **ACTION Model – a framework for decision-making**

Culture is Powerful

# Action – Decision Making Model

---

- A**    **Act Responsibly**
- C**    **Consider Ethical Principles**
- T**    **Trust Your Judgment**
- I**    **Identify the Impact on Stakeholders**
- O**    **Obey the Rules**
- N**    **Notify the Appropriate Persons**

“Relying on formal rules, policies and procedures will not result in outstanding anything, be it customer service, innovation or quality”

**Leading by Leveraging Culture**

**Jennifer A. Chapman and Sandra Eunyoung Cha**

**California Management Review, Vol. 45, No 45 Summer 2003**



# **DEFENSE INDUSTRY INITIATIVE ON BUSINESS ETHICS AND CONDUCT (DII)**

## **Federal Acquisition Advisory Panel DII Observations and Recommendations**

**Public Meeting**

**May 17, 2005**

**Presented by:**

**Richard J. Bednar  
DII Coordinator  
Senior Counsel  
Crowell & Moring LLP**



## **DII Observations and Recommendations**

---

- **PROPOSITION:** Whether Federal acquisition laws and regulations need modification to ensure that contractors perform their vital role with integrity?
- It is the DII experience that contractors will not act with integrity simply because there is a rule mandating ethical conduct; rather, they will act with integrity if integrity is the company's culture.



## DII Observations and Recommendations

---

- **The President’s Blue Ribbon Commission on Defense Management (“Packard Commission”, June 1986), which inspired the establishment of the DII, in its final report observed:**
  - **“Congress must resist its inveterate tendency to legislate management practices ... .”**
  - **“DoD must displace systems and structures that measure quality by regulatory compliance ... .”**
  - **“Defense contractors and DoD must each assume responsibility for improved self-governance to assure the integrity of the contracting process. Excellence in defense management will not be achieved through legions of government auditors, inspectors, and investigators. It depends on the honest partnership of thousands of responsible contractors and DoD, each equally committed to proper control of its own operations.”**



## **DII Observations and Recommendations**

---

- **The 65 plus signatories to the DII principles govern themselves according to those principles of self governance by embracing and practicing ethical business conduct.**

### **DII Principles**

- 1. Have and adhere to written Codes of Conduct;**
- 2. Train employees in those Codes;**
- 3. Encourage internal reporting of violations of the Code, within an atmosphere free of fear of retribution;**



## DII Observations and Recommendations

---

### DII Principles (cont'd)

- 4.** Practice self-governance through the implementation of systems to monitor compliance with federal procurement laws and the adoption of procedures for voluntary disclosure of violations to the appropriate authorities;
- 5.** Share with other firms their best practices in implementing the principles, and participate annually in “Best Practices Forums”; and
- 6.** Be accountable to the public.



## DII Observations and Recommendations

---

- The DII signatories are so strongly committed to these principles that, when an ethical failure does occur within the organization, appropriate and responsible disciplinary and corrective action is promptly taken.
- Regulations which prescribe ethical conduct will not tend to improve the ethical environment in which Government and Contractors work together.



## **DII Observations and Recommendations**

---

- **Regulations tend to reduce ethical conduct to merely following rules.**
- **Regulations tend not to encourage good conduct, but to tee up penalties for bad conduct.**
- **The Government already has a broad range of sanctions and penalties to deal with unethical conduct, running from denial of a contract award to debarment to referral for criminal prosecution.**
- **The DII Model of values-based self-governance should be the preferred model.**



## **DII Observations and Recommendations**

---

- **The DFARS already mirrors the DII principles by stating the expectations [not mandating] for contractor standards of conduct in DFARS 203.70.**
- **These expectations are:**
  - 1) A written code of Business ethics and conduct and ethics training.**
  - 2) Periodic review of internal controls for compliance with standards of conduct and the special requirements of Government contracting.**



## **DII Observations and Recommendations**

---

- **A method for employees to report suspected misconduct, and encouragement to make such reports.**
- **Internal and/or external audits, as appropriate.**
- **Disciplinary action for improper conduct.**
- **Voluntary disclosure to appropriate Government officials of suspected violations of law.**
- **Cooperation with Government investigation or corrective actions.**



## **DII Observations and Recommendations**

---

- **One constructive recommendation this committee could make, without adding to prescriptive regulations, is to elevate to the FAR the statement of expectation of contractor standards of conduct now expressed in the DFARS.**

Project On Government Oversight  
Exposing Corruption, Exploring Solutions

Presentation Before the  
Acquisition Advisory Panel  
May 17, 2005

666 11th Street NW, Suite 500, Washington DC 20001  
(202) 347-1122 [www.pogo.org](http://www.pogo.org)

# Who is POGO?

Founded in 1981,  
POGO is a politically-independent,  
nonprofit watchdog that strives  
to promote a government that  
is accountable to the citizenry.

# POGO's Mission

To investigate, expose, and seek to remedy systemic abuses of power, mismanagement, and subservience by the federal government to powerful special interests

# **POGO's**

## **Five Areas of Investigation**

- Defense
- Contract Oversight
- Open Government
- Homeland Security
- Energy and Environment

# How POGO Works



# Recent Procurement Scandals

- Darleen Druyun
- FTS
- Purchase Cards
- Iraq Sole Source Contracts
- C130J
- Abu Ghraib

# Urban Procurement Myths

- Having to turn to Japan for radios during the first Gulf War
- Equal Allocation of Overhead
- Hordes of companies turned off from government work because of "red tape"

# Contracting Comparisons

- Goods v. Services
  - Some distinctions, but services actually need MORE oversight
  - Differentiating goods and services is facilitating damaging procurement policies
  - The 1980s - 1990s spare parts horror stories will be reborn in tomorrow's service acquisition rip-offs

# Contracting Differences

- Commercial v. Government: The differences
  - Shareholder money v. taxpayer dollars
  - Innovation v. risks
  - Defense industry consolidation and monopsony position of government makes comparison to commercial model largely irrelevant

# Vulnerabilities

1. Negotiations
2. Competition
3. Accountability
4. Transparency
5. Contracting Vehicles

# Vulnerabilities (cont'd)

- Death by a 1000 paper cuts – each year new industry-driven reforms
  - Acquisition System Improvement Act of 2005 -- H.R. 2067 (ASIA)
  - ARWG 2005 Legislative Package – no TINA, no control clauses, increased CAS thresholds for commercial items, CAS waivers, limit small business to subcontracts, no transparency

# Negotiations

- Commercial system would work if the government operated like the commercial market
- Government should aggressively negotiate like contractors negotiate with their vendors
- Should be arms-length cooperation not partnerships with industry
- There are no incentives to reduce prices

# Negotiations (cont'd)

- Government should not merely accept schedule prices or contractor proposals
- FTS & FSS awarded without full and open competition
- Fear of political interference from within an agency, Congress, or the industry prevents aggressive negotiating

# Competition

- Full & Open competition should be **REQUIRED**
  - \$109 billion of awards are straight non-competitive awards
  - \$40 billion that does not meet the looser “fair opportunity to be considered” standard for ID/IQ contracts
- No phony competitions
  - Examine the definition of competition
  - Too much sole source contracting
  - “Competitive” one-bid contracts
  - Best value can mean best price

# Competition (cont'd)

- Schedules and ID/IQs stifle price competition
- Contractors say: “Avoid public procurements like the plague ... with as little competition as possible.” ([Fedmarket.com](http://Fedmarket.com) 6/25/04)
- DOD grants too many competition waivers ... hindering innovation and best value
- Should strengthen bid protests
- Bundling hurts small business

# Accountability

- There should be no more bad-mouthing oversight by federal contracting community
- Continuous monitoring is essential
  - Sen. McCain saves the day with review of the C-130J and FCS
  - GAO found that in government contracting offices, monitoring “is not as important” as awarding contracts
- Audits -- CO's only tools ensuring fair and reasonable prices
  - GAO is “hindered” by decline in pre-award & post-award audits
  - Post-award audits average annual recovery \$18 million
  - Increase in pre-award audits never materialized
  - Contractors want no post-award audits

# Accountability (cont'd)

- Re-embrace TINA, CAS, Audits
- Workforce overworked & understaffed
- Over 5000 contracting personnel cut over 10 years
  - Nearly 50% at DOD
  - Bad for moral
  - Insufficient for protecting taxpayer dollars
  - Absurd considering the explosion of contract award dollars

# Transparency

- No public confidence that the system is truly full and open
  - Little or no documentation of CO decisions
  - NO transparency of delivery/task orders
  - Misuse of redactions
- Vendors need to know about all opportunities for government business
- Public and vendors must see RFPs, RFIs, RFQs, and solicitations
- SmartBuy not transparent, need for all contracts over \$25,000 to be on Fed Biz Ops

# Contracting Vehicles

- Best value contracting
  - Good in theory, but a license to use unfettered discretion
  - Fosters scope or requirements creep
  - Misused contract vehicles
- Performance-based contracting
  - How well are incentives measured and monitored?
  - DOE relies on unvalidated contractor performance data
  - Should only be used in instances with simple easily specified services

# Contracting Vehicles (cont'd)

- Interagency contracts – HIGH RISK
  - Rapid growth from \$14.7 billion in FY 2000 to \$32.5 billion in FY 2004
  - Lack of compliance with competition requirements
  - Lack of reduced costs envisioned
  - 60% lacked documentation proving effective negotiations
  - Outside the scope
    - Responsibility on both contractors and the government
  - No justification or documentation
  - Inadequate monitoring
  - Excludes small businesses
  - Must scale back use

# Contracting Vehicles (cont'd)

- Time & Material (T&M) and Labor hour (LH)
  - Two industry witnesses have testified that they do not prefer to use T&M contracts and would not use them for IT work
  - Billing without producing a product or service
  - The Senate receded from an amendment placing additional safeguards and limitations
  - GSA IG found “heavy use without justification”

# Contracting Vehicles (cont'd)

- Share in Savings
  - No reliable baselines
  - Energy contracts show increased costs of 8% to 56%
  - Too risky for small businesses
- Purchase Card fraud is not tolerable
  - Non-competitive micropurchases without checks or balances

# Contracting Vehicles (cont'd)

- Commercial Items
  - POGO 100% behind purchasing truly commercial items
  - Should restrict definition to items actually “sold” in substantial quantities in commercial marketplace
  - Should eliminate “of a type” commercial item definition
- Other Transaction Authority
  - Expanded to DHS
  - Congressional intent lost – up to 97% to “traditional” contractors
  - No controls (*i.e.*, CICA, TINA, CAS, PIA)

# Conclusions

- Best Value (*i.e.*, reduced costs, enhanced efficiency, solutions-oriented, performance-based contracting) works
  - In limited circumstances
  - With government oversight
- POGO urges you to invite or receive testimony from retired contracting personnel

# Contact Information

POGO

666 11th Street NW,

Suite 500

Washington DC 20001

(202) 347-1122

[www.pogo.org](http://www.pogo.org)

E-Mail: Scott - [scott@pogo.org](mailto:scott@pogo.org)

Danielle - [pogo@pogo.org](mailto:pogo@pogo.org)