

ACQUISITION ADVISORY PANEL
Meeting Minutes
December 16, 2005
The Auditorium, Federal Deposit Insurance Corporation
Washington, D.C.

The Acquisition Advisory Panel (AAP) convened its fifteenth meeting on December 16, 2005 in the auditorium at the Federal Deposit Insurance Corporation (FDIC), Washington D.C. Ms. Marcia Madsen, Chair of the AAP, opened the meeting at approximately 09:10 AM.

The Panel Chair welcomed everyone to the meeting and stated that the day's agenda included a presentation by the National Academy of Public Administration (NAPA) and a discussion of Panel Member Marshall Doke's proposal on commercial practices. In addition, four Working Groups (Commercial Practices, Small Business, Workforce, and Appropriate Role) would present their preliminary recommendations to the full Panel.

The guest speaker and her affiliation were as follows:

<u>Presenter</u>	<u>Affiliation</u>	<u>Attachment</u>
Ms. Hannah Sistare	NAPA	Attachment 1

Panel Members providing presentations on behalf of four of the Panel's Working Groups were as follows:

<u>Presenter</u>	<u>Working Group</u>	<u>Attachment</u>
Mr. David Javdan	Small Business	Attachment 2
Mr. Marshall Doke/Prof. Joshua Schwartz	Commercial Practices (Doke Proposal)	Attachment 3
Professor Joshua Schwartz	Federal Acquisition Workforce	No Attachment
Mr. Thomas Luedtke	Appropriate Role of Contractors	No Attachment
Mr. Ty Hughes	Commercial Practices	Attachment 4

The Chair turned the meeting over to the Designated Federal Officer (DFO), Ms. Laura Auletta, to call the roll. The following Panel Members were present:

- Mr. Frank J. Anderson, Jr.
- Dr. Allan V. Burman
- Mr. Marshall J. Doke, Jr.
- Mr. Jonathan Lewis Etherton
- Mr. James A. (Ty) Hughes, Jr.
- Mr. David A. Javdan (arrived at 9:28 AM)
- Ms. Deidre A. Lee
- Mr. Thomas Luedtke
- Ms. Marcia G. Madsen
- Mr. Joshua I. Schwartz
- Mr. Roger D. Waldron (arrived at 9:29 AM)

The following Panel Members were not in attendance:

Mr. Louis Addeo
Mr. Carl DeMaio
Mr. David A. Drabkin

The Chair introduced the guest speaker, Ms. Hannah Sistare, Director of the Human Resources Management Consortium of NAPA and Executive Director of the National Commission on Public Service Implementation Initiative. Ms. Sistare discussed a white paper recently released by NAPA entitled “Managing Federal Missions with a Multisector Workforce: Leadership for the 21st Century” (Attachment 1). The white paper focuses on identification of issues associated with the increasing use of non-Federal employees within the public sector workspace. Ms. Sistare explained that there have been significant increases in both the scope and complexity of Government reform in the last decade. The reform agenda, she said, has emphasized strategic management of human capital as an enabler to build organizations that are mission-driven and results oriented, and that Federal managers increasingly use workers who are not part of the Federal civil service to carry out the Federal missions. Shifting demographics, she noted, present an opportunity to leverage the multisector workforce in new ways, and targeted research is needed to identify the challenges, opportunities and competencies required to lead the multisector workforce. She said that reasons for the change in the workforce include difficulty acquiring hard-to-find skills, the drive to save money, and the need to augment capacity on an emergency basis. Ms. Sistare explained that there are challenges associated with varying levels of personnel benefits afforded members of different sectors, application of differing ethical rules, and issues associated with managing and supervising. She raised several questions concerning the impact on our constitutional system, administrative law and ethical norms. Ms. Sistare solicited comments and questions from the Panel Members.

Panel Member Al Burman commented that the issues she had introduced were similar to those that many of the AAP’s Working Groups have been reviewing. Dr. Burman said that while the AAP’s efforts on the multisector workforce were required to be complete prior to those of the Academy, the AAP might be able to capitalize on Academy activity. In response to an inquiry from Panel Chair Marcia Madsen, Ms. Sistare explained that even though the Academy’s view is from the Government’s perspective, several private sector acquisition groups had been contacted for their perspective on the issues. In response to questions from Panel Member Joshua Schwartz, Ms. Sistare stated that NAPA’s initiative may conclude that certain occupations should be considered core Government competencies that should not be subject to outsourcing to private industry. Professor Schwartz asked for her comments regarding the ability of agencies to accommodate surges in workload requirements resulting from events like Hurricane Katrina. Indicating that she recently had been appointed to a Special Inspector General for Iraq advisory group reviewing how best to handle surge requirements, Ms. Sistare stated that more pre-planning should be accomplished that includes identification of workforce composition, identification of employees and funding source(s) for their salaries, and development of processes and procedures.

Noting that the issues raised during her presentation did not appear to be unique to the United States, Panel Member Tom Luedtke asked Ms. Sistare if she was aware of studies performed within other countries on the topics. She replied that only limited non-U.S. research had been identified to date. Panel Member Jonathan Etherton commented that many requirements for

contractor support services, the personnel that make up a portion of the blended workforce, are satisfied by utilizing interagency contract vehicles. He suggested that NAPA might review contracting issues to include competition, contract management, and accountability.

Panel Chair Marcia Madsen introduced Panel Member David Javdan, Chair of the Panel's Small Business Working Group. Mr. Javdan reviewed Working Group findings previously presented at the November 18th AAP meeting including the adequacy of guidance on: 1) selecting small business contracts methods, 2) defining requirements to facilitate small business contracting opportunities, 3) reserving prime contracts for small businesses in multiple award procurements, and 4) placing small business orders against multiple award contracts. Mr. Javdan presented ten (10) preliminary Working Group recommendations (Attachment 2):

1. Propose a legislative amendment eliminating the statutory HUBZone priority to afford contracting officials greater flexibility in utilizing small business contracting programs;
2. Provide explicit regulatory guidance to clarify that contracting officials may exercise discretion and flexibility in selecting the appropriate small business contracting methods based on the status of an agency's small business goal achievements;
3. Propose a regulatory amendment specifically prohibiting or limiting use of cascading procurements;
4. Require a systems review, and, if necessary, upgrade Federal Procurement Data System – Next Generation (FPDS-NG) to ensure that it provides agencies real-time access to goal achievements data;
5. Require agencies to report specific data on contract bundling to FPDS-NG to allow objective statistical assessment of its effects on small business;
6. Amend the governing definition of the term “*contract bundling*” to provide a simpler and less subjective definition;
7. Require creation of a governmentwide bundling database or central repository of best practices for unbundling contracts and mitigating effects of contract bundling;
8. Encourage development of a governmentwide training module targeting acquisition team members and program managers to acquaint them with the value, benefits and requirements of contracting with small business;
9. Provide guidance on the practice of reserving prime contracts for small businesses in full and open multiple award procurements to ensure greater consistency and transparency in the applications of small business contracting requirements to such procurements; and,
10. Amend governing regulations to clarify the application of small business contracting mechanisms to orders against multiple award contracting vehicles.

Several Panel Members asked for clarification of the Working Group's recommendations, particularly its first recommendation. Panel Member Jonathan Etherton noted that significant legislative history exists with respect to creation of the HUBZone concept, and that it is considered a model for addressing socioeconomic goals; therefore, he suggested that the recommendation reflect recognition of the thought process behind existing HUBZone legislation. Mr. Javdan agreed that Recommendation #1 should be rephrased to more accurately reflect the Working Group's intent; the recommendation was not meant to imply HUBZone priority should be eliminated [Recommendation #1 was eliminated in a subsequent update of the briefing slides].

Panel Chair Marcia Madsen invited Panel Members Marshall Doke and Professor Joshua Schwartz to lead a discussion on Mr. Doke's proposal, "Commercial Rules for Government Contracts," and explained that they would discuss a *revised* proposal and compromise they had reached (Attachment 3). Ms. Madsen turned the meeting over to Mr. Doke who provided an overview of the revised commercial practices proposal. He recommended that laws governing interpretation of, performance of, and liabilities of the United States and its Agencies under Federal Government contracts should generally be the same as those applicable to contracts between private parties, unless the Constitution, Federal or State statutes, or the Federal Acquisition Regulation (FAR) stipulate otherwise. There was much discussion on Mr. Doke's proposal, the language of which follows below:

- (1) "Except as otherwise either required by the Constitution...or expressly required by a Federal statute or by a contract clause..., the rules of law that govern of interpretation of, performance of, and liabilities of, the United States and its agencies under Federal Government contracts for the acquisition of goods and services shall be the same as the rules of law generally applicable to contracts between private individuals and business entities.
- (2) (a) The FAR Council shall promptly undertake a systematic review of contract clauses mandated by the FAR to determine (i) whether and to what extent particular provisions depart from commercial norms in the private sector in respects not required by Federal statutes or the Constitution of the United States, and (ii) whether or not there is a good public policy basis for any such departures from such commercial norms that are not required by Federal statutes or the Constitution.

(b) The Council shall initiate the process of instituting changes in the existing mandatory contract clauses to bring them into conformity with commercial norms applied in the private sector where departures from such norms are neither required by the Constitution ...nor by existing Federal statutes and do not have a good basis in public policy.
- (3) Nothing in this statute shall alter the existing rules of law governing the "choice of law" for disputes relating to Federal Government contracts. Federal acquisition law shall be interpreted to produce a nationally uniform body of principles that shall constitute Federal law and, except as expressly otherwise provided by law, shall not be construed to vary from state to state.
- (4) Nothing in this statute shall alter the existing rules of law governing formation of Federal Government acquisition contracts."

Following Mr. Doke's presentation, Panel Member Joshua Schwartz provided additional comments on the commercial practices proposal. Professor Schwartz explained that, in his view, the issues are more in the policy realm than in the legal realm. He strongly agreed with Mr. Doke that the one-sided application of the presumptions of regularity and good faith have no strong basis in law or policy. Professor Schwartz then addressed proposal 2, that FAR clauses be maintained as acceptable departures from commercial norms, and the requirement that the FAR Council review all such clauses. Professor Schwartz's discussion further included the

importance of having one body of law to govern all Federal contracts, and that the issue does not involve contract formation rules.

Panel Members discussed the scope of the actual problem the proposal addresses, various remedies currently available under Government contracts, the impact of presumptions and estoppels upon litigation, the likelihood of the proposal making its way through Congress, the possibility of a more focused mandate for FAR Council review, the possibility of tailoring the proposal to affect only commercial items, unintended consequences of the proposal, proposal verbiage and whether it attempts to apply FAR Part 12 standards to the rest of the FAR, and benefits of the proposal. Panel Chair Marcia Madsen suggested that individual Panel Members look more closely at the merits and issues of the proposal and submit their ideas in writing to Mr. Doke and Professor Schwartz for consideration.

At 12: 25 PM, the Chair recessed the Panel for a one-hour lunch break, and reconvened the meeting at 1:25 PM. Ms. Madsen asked Panel Member Joshua Schwartz to discuss the recommendations of the Panel's Federal Acquisition Workforce Working Group (no attachment). Professor Schwartz acknowledged the efforts of Beacon Associates, contracted to compile information on the Federal acquisition workforce. He presented the following preliminary findings/target areas for recommendations:

1. Measurement and Reporting

- There is a compelling need to standardize definitions of workforce and to institutionalize this standardization within all agencies;
- There is a compelling need to improve and standardize data collection and reporting on the acquisition workforce across agencies;
- There is a need to prescribe with specificity the variables on which data is to be collected and reported;
- There is a compelling need to maintain consistency of data collection and reporting within each agency as those longitudinal trends can be much more reliably assessed than has been possible to date;
- There is a need to collect and report, in consistent form, across agencies, and across years, data on agency compliance with Clinger-Cohen mandates, including educational and certification requirements.

2. Qualitative Assessment

- There is a need to try to develop, standardize, and implement measures of effectiveness and competency of the acquisition workforce that go beyond sheer numbers and demographic variables;
- Develop a consistent approach to human capital planning for the acquisition workforce across agencies, and from year to year should be mandated;
- Demand analysis needs to become part of the human capital planning process. Whether because of the difficulty of the task, or concerns about the political spin of the results, agencies need to undertake serious and consistent efforts to determine acquisition workforce numbers and capabilities needed.

3. Training, Development and Assessment of Adequacy of Acquisition Workforce

- There should be a focus on creating attractive career paths in a unified acquisition workforce;
- Mobility within the unified Government workforce can help retain talented and trained people instead of losing them chronically to the private sector;
- Competition by agencies to retain their best acquisition professionals is desirable;
- Training and assessment of competency and effectiveness needs to focus on meeting the challenges created by the complexity of the overall procurement system as well as the sophistication of the goods and services being acquired and the complexity of the procurement procedures applicable to particular acquisitions;
- Training alone is not enough. Ongoing assessment of competency and effectiveness is necessary;
- Ways must be found to measure outputs of workforce development; it is not enough to measure inputs;
- Ongoing attention must be paid to ethical and other issues that may be raised by integrated workforce of contractors and Government employees including, but not limited to, organizational conflict of interest (OCI) issues;
- There are important crossover issues intersecting with the work of the Appropriate Role Working Group both with respect to inherently governmental and closely related activities and personal service contract issues;
- A possible area to address in conjunction with the work of the Appropriate Role Working Group, is consideration of the role of contractor support in meeting the acquisition workforce challenges. This requires consideration of OCI issues as well.

Professor Schwartz opened the floor for comments and questions. Panel Member discussion of the Working Group findings included consideration of retention of personnel availability of data for use by the Working Group in formulating recommendations, a unified workforce model, grade structure for the acquisition workforce, civil service hiring practices and policies, skill levels of the existing workforce, centralized purchasing for complex procurements, overlap and competition for manpower and skill-sets between organizations, and the flow of Government personnel into the private sector, and not back into Government service.

Panel Chair Marcia Madsen introduced Panel Member Thomas Luedtke, Chair of the Appropriate Role of Contractors Supporting the Government Working Group (no attachment). Mr. Luedtke briefed the following Working Group preliminary recommendations, and noted that more will be forthcoming:

1. The Office of Management and Budget (OMB) should issue new guidance on the blended workforce and include in the guidance greater flexibility on use of personal services. This preliminary recommendation was based on the following findings:
 - a. Demands on the Federal Government cannot be met by the existing civil service workforce alone; therefore, agencies must increasingly rely on contractors to perform mission work.
 - b. The amount and types of services performed by contractors have expanded. This expansion has created questions as to what truly is “inherently governmental.”
 - c. The increasing occurrence of the “blended workforce” raises issues relating to personal services.

- d. There is inconsistent application across the Government of what work constitutes “inherently governmental” and “personal services.” Some differences appear to be driven by differing missions; others from differing interpretations of the same rules in similar situations.
2. There should be additional training on management of the blended workforce. Unless more management rigor is applied to current concepts and applications of “inherently governmental” and “personal services,” confusion and problems will continue.

Mr. Luedtke entertained questions and comments from Panel Members.

Panel Member discussions of the Working Group’s preliminary findings included consideration of: competitive sourcing efforts, blended workforce contractor accountability under performance-based contracts, third-party contractor access to other contractors’ information as OCIs and inherently governmental functions, and possible exceptions to the prohibition on personal services contracts.

Following a ten-minute break, Panel Chair Marcia Madsen reconvened the Panel meeting at 2:40 PM. She introduced Panel Member Ty Hughes, Co-Chair of the Commercial Practices Working Group who briefed the following Working Group preliminary recommendations (Attachment 4), and noted that more recommendations would be forthcoming:

1. Revise the definition of “commercial item:”
 - a. Revise the definition to include only items for which the commercial market establishes prices;
 - b. Clarify the discretion of Government agencies to require information other than certified cost or pricing data for determination of fair and reasonable price;
 - c. Define “commercial services” separately from “commercial item.”
2. Define “commercial services” separately:
 - a. Distinguish among (i) performance-based services, (ii) services associated with installation, operation or maintenance of commercial items, and (iii) consulting type services;
 - b. Require competition for acquisition of commercial services under FAR Part 12;
 - c. Proceed under FAR Part 15 for non-competitive acquisition of services.
3. Other preliminary recommendations:
 - a. Standardize basic contract terms for FAR Part 12 contracts rather than relying on each vendor’s proposed terms (e.g., payment, termination, remedies for breach, warranties, acceptance, etc.);
 - b. Provide statutory authority for contractor indemnification for third party claims arising out of Government use of a commercial item or service;
 - c. Require Truth in Negotiation Act (“TINA”) data for non-commercial modifications of commercial items (the greater of \$500K or 5% of item value) (Clarify current language);
 - d. Reaffirm the benefits of and preference for competition.

Mr. Hughes solicited questions and comments from AAP Members, who then engaged in discussions of the Commercial Practices Working Group's preliminary recommendations including consideration of the following: differences between sectors of the commercial marketplace and whether the Government can emulate the private sector through adoption of a single standardized set of terms and conditions, advance payments as a commercial term, competition for services priced at an hourly rate, time and materials contracting, discretionary use of FAR Part 12, vice FAR Part 15, requirements definitions and wording of statements of work, and contractor indemnification contract clauses.

The Chair thanked Mr. Hughes for his presentation, and, after ascertaining that there were no additional questions or comments regarding the day's four Working Group presentations, she turned the meeting over to the DFO for adjournment.

Below is a list of additional materials and/or information requested by the Panel during the guest speaker's presentation:

- Ms. Hannah Sistare, NAPA:
 - List of bibliographies for "Managing Federal Missions with a Multi-Sector Workforce: Leadership for the 21st Century"
 - Copies of associated literature

The DFO adjourned the fifteenth Acquisition Advisory Panel meeting at 3:10 PM.

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



MAR 14 2006

Ms. Marcia Madsen
Chair
Acquisition Advisory Panel

ACADEMY INITIATIVE

MANAGING FEDERAL MISSIONS WITH A MULTISECTOR WORKFORCE: LEADERSHIP FOR THE 21ST CENTURY

November 16, 2005

INTRODUCTION

The public sector has seen a significant increase in the scope and complexity of government reform in the last decade. This reform agenda has focused on using the strategic management of human capital as an enabler to build organizations that are mission-driven and results oriented. The current Administration has placed a special emphasis on performance management and accountability. Agency leaders and managers recognize that effective management of their people, and the processes and systems that sustain the workforce are essential for effective service delivery to the public. As leaders and managers strive to improve what they do and how they work, they are exploring alternative workforce solutions in order to deliver improved government services. Federal managers are no longer relying solely on federal employees to be the first face to the customer for service delivery. Shifting demographics present an opportunity to leverage the multisector workforce in new ways. As such, targeted research is needed to identify challenges, opportunities and competencies needed to lead the multisector workforce and accomplish the federal mission.

WHAT IS THE MULTISECTOR WORKFORCE?

The “multisector workforce” is a term we have chosen to describe the federal reality of a mixture of several distinct types of personnel working to carry out the agency’s programs. It is not meant to suggest that such a workforce is unitary. To the contrary, it recognizes that federal, state and local civil servants (whether full- or part-time, temporary or permanent); uniformed personnel; and contractor personnel often work on different elements of program implementation, sometimes in the same workplace, but under substantially different governing laws; different systems for compensation, appointment, discipline, and termination; and different ethical standards.

BACKGROUND

The federal government has purchased goods and services from the private sector since the founding of our republic. This is particularly the case with equipment and supplies during times of war. The government has long contracted for the construction of major public works projects such as dams and highways. During the 1960s and 1970s as new social programs were enacted, the government began to rely more significantly on third parties for program implementation and delivery. State and local governments, as well as private non-profits and profit making service

companies, began to play a significant role during this period. Today, contract employees can be found working side by side with civil servants.

The trend toward using workers who are not part of the federal civil service to carry out federal missions has escalated greatly in recent years. Many motives and reasons have been associated with the change; e.g., to utilize existing service delivery mechanisms, to acquire hard to find skills, to save money, to have the private sector do work that is not inherently government, to augment capacity on an emergency basis, and to reduce the size of government, to name those most often cited.

Accurate figures on the size of the components of the multisector workforce do not exist. Indeed, there is no common agreement on a definition of the multisector workforce. Paul Light has done some of the most comprehensive analysis of the data that is available. His most recent assessment is that in 2002, there were 5,168,000 million contractor jobs and 2,860,000 grantee jobs supported by the federal government. Federal government employees that year included 1,756,000 civil servants and 1,456,000 uniformed military personnel, plus 875,000 postal service workers.

Although the multisector workforce can be very broadly considered as including positions created through grants and even mandates and regulations, the immediate focus of this project is an analysis of management challenges relevant to executives and managers working with contractors and subcontractors to the federal government. Thus the management issues raised in this paper and in the Phase II proposal specifically address the federal and contractor segments of the multisector workforce. Subsequent activities may examine other areas such multisector challenges among the intergovernmental sectors, as well as other tools of indirect government such as grants.

THE CHALLENGE

“A revolution has taken place in the ‘technology’ of public action over the last fifty years, both in the United States and, increasingly, in other parts of the world,” states Lester M. Salamon, an Academy fellow and public administration scholar. He describes this revolution as a shifting away from government activities focused almost exclusively on the first-hand delivery of goods or services. In Salamon’s judgment, government has moved, as a result of a public groundswell of dissatisfaction with the costs and efficacies of government programs over the past half-century, toward a vision in which the public sector is a “highly indirect” provider that finances the work of a variety of “third party” private sector sources. Other reasons for the movement of government from a direct to an indirect provider include the need for skills and expertise not traditionally found in government, the desire to reduce the number of “government workers” relative to those working in the market economy, the growing need for operating flexibility, and requirements to respond to new requirements or a temporary surge in the need for a particular capability.

Yet Salamon’s new governance has not evolved without its fair share of problems. Many critics of the private sector’s symbiotic relationship with public governance bodies note that the same accountability issues that plagued the classical model of the direct provider government continue to infest Salamon’s *new governance* model. Among them is Dan Guttman, also an Academy fellow and public administration scholar. Guttman writes, “Increased reliance on contractors to perform basic governmental functions calls into question a basic presumption of accountability – i.e., that officials must and can be accountable to taxpayers for the basic work of government.”¹

Therein lies the rub, for while new tools are available to government leaders who aim to provide important and needed services to their constituencies, the fact remains that the new model still contains inherently political features, which arguably makes it prone to the same inefficiencies and cost inflations that plagued the classical model. Guttman notes, “The challenge today is to learn from past successes, to understand our legacy of unanswered questions, and to use past experience and present reality to undergird action.”

The foregoing developments have created a multisector workforce in many federal programs. This combination of quite dissimilar types of personnel generates management and accountability issues for federal administrators who are increasingly being challenged to demonstrate results.

In the spring of 2004, the Academy Big Idea Public Service Positioning Committee determined to address this issue and the public service management issues it presents. Following presentations to the Academy Board in June 2004, the Positioning Committee formed a small Working Group (WG) to undertake Phase I of this project. It is not the purpose of the project to approve or disapprove the increased performance of federal functions by “third parties.” Rather, it is to recognize the reality of the extensive reliance on such third parties with a view toward identifying and clarifying the roles of those parties, as well as identifying and developing tools so that the federal government can determine the appropriate parameters on these roles and increase its capacity to manage the multisector workforce effectively, efficiently and with equity.

The WG’s initial deliberations and research show that increased use of a multisector workforce raises several overarching policy questions. Data have been collected to identify specific management issue categories and inform policy development in these areas:

- What is the impact on our constitutional system, administrative law and ethical norms when a multisector workforce carries out government missions?
- What are the implications of increased use of multisector workforces on the federal workforce?
- What tools exist or need to be developed to improve management of the multisector workforce and accountability to the public?
- What capabilities and competencies are needed to improve management of the multisector workforce?
- How do we begin to document the effectiveness and the cost benefits of various competitive sourcing efforts?
- To what degree should the government extend application of human capital standards (strategic alignment, workforce deployment, leadership and knowledge management, performance culture, talent, and accountability) to the various components of the multisector workforce?

The cumulative effect of these questions drives good governance advocates to seek new tools and solutions that improve the performance, results and accountability of the public management system at all levels of government.

Scope and Methodology

In Phase I of the project, the WG has collected, analyzed and reviewed current literature about the management challenges relevant to achieving organizational missions using a multisector workforce. The WG also generated public management questions that need to be addressed. The WG has reported regularly to the Public Service Panel and worked with it to refine terms and to set the scope and direction for the data collection.

The search methodology included identifying materials in the Academy's publication library, reviewing books, accessing university databases through George Washington University, soliciting papers through an association's academic partners, and conducting Internet searches using the Social Science Research Network and a review of contemporary articles primarily through the *Government Executive* magazine, trade journals and public policy publications.

The depth and breadth of the literature search focused on management issues directly applicable to the multisector workforce. The initial review indicates many of these studies identified specific management issues, which we hoped to address as they are "ripe for additional research." *The Tools of Government*, edited by Lester M. Salamon,² provided a definitive discussion on public administration tools and management challenges inherent in delivering government services through third parties and offered preliminary solutions for improving this area. In general, we found limited empirical information on the effectiveness and efficiency of competitive sourcing efforts.

The WG initially identified twenty categories for data collection: accountability, acquisition, contract workforces, definitions, framework documents, governance, grantees, human capital issues, industry models, legal issues, management issues, organizational culture, organizational structure, resources, rules and regulations, social equity, systems, theoretical underpinnings, tools, and values. Once the data collection was underway, these categories were combined and reduced to six mission-critical issues: accountability, acquisition, human capital and management, social equity and values, legal and governance issues, and organizational culture.

Analysis

The research agenda will examine the literature currently collected, build on the experiences of those agencies currently using multisector workforces, and focus on key issues as identified by agency leaders. Each of the six mission-critical issues (i.e., accountability, acquisition, human capital and management, social equity and values, legal and governance issues, and organizational culture) is defined below. The accompanying questions for each category identify possible areas for future exploration based on the literature collected thus far. This analysis by category represents a point of departure for further study.

Accountability

A traditional definition of accountability focuses on identifying and using tools to exercise control and prevent abuse of power. According to Lester Salamon³ this definition can be

broadened to focus on two areas – “accountability for what and to whom.” Through practical application, this definition can be expanded to include “and how” as it applies to oversight.

According to the President’s Management Agenda, which articulates goals for transforming government, agencies are charged with managing people, efficiently and effectively and in accordance with the merit system principles, veterans' preference, and related public policies to support the agency shared vision. Federal managers have the primary role in ensuring accountability of government services. However, recent transformation efforts are focusing on sharing and cascading accountability for delivering results through all levels of an agency. The core issue of accountability is characterized in the following manner: The federal manager is responsible for spending public funds, exercising public authority, protecting the public’s trust and delivering results to citizens as part of the mission of each individual agency. Increasingly, the federal manager is using multisector workforces to accomplish this mission and achieve results. Using multisector workforces requires a dispersion of administrative authority and reduces the level of control that the federal manager has over the process, yet this does not reduce oversight responsibilities or the requirement for delivering results. Moreover, the federal manager is ultimately accountable for program successes and disasters, arguably more so now with Performance and Accountability Rating Tool (PART) and performance based rewards and advancement. This paradox raises several questions that warrant closer examination.

- Who should be held accountable for the accomplishment of federal missions performed by workers from other sectors?
- How can they be held accountable?
- How do we assign roles and responsibilities to the federal manager to ensure accountability for the performance of the multisector workforce, not just that of federal employees?
- Traditional tools for accountability include the budget, contracts, and grants. Are there other tools, resources/influencers, case studies, information sharing and/or best practices to improve government performance and our leadership in this area?
- Are there different accountability issues when the work is being done by other levels of government?
- How do we align the policies affecting the multisector workforce through the roles of human resources specialists, acquisition specialists and managers?
- Where contractors have been engaged with inadequate analysis of the task or specification of performance requirements, rewards and sanctions, what consequences and follow-up occurred?
- What systems can be developed to address contract administration accountability issues such as identifying contractors who have been temporarily suspended and documenting issues of waste, fraud, and abuse?
- How do we evaluate outsourcing activities to validate cost savings over time?
- How do we improve post award accountability?

- Are peer reviews or other models applicable to government accountability?

Acquisition

The Federal Acquisition Regulation (FAR) defines acquisition as “acquiring of supplies or services by the federal government with appropriated funds through purchase or lease.” Contracting is the tool the government uses to determine and implement the components of the business arrangement. Recently, the Task Force on Services Contracting, “Removing Federal Services Acquisition Barriers and Balancing Public and Private Interest,” under the cognizance of the Contract Services Association in counsel with agency officials, reviewed FAR’s Part 37 regulations and concluded that “many of the processes, procedures, and policies contained in the FAR need to be revised to assure the government has full and free access to all commercial capabilities available.” Most of these rules have evolved over time and do not necessarily focus on the complexities that developed over time as a consequence of using a variety of contracting mechanisms to procure services. Acquisition management challenges for consideration include:

- How do we develop, implement and evaluate contracting vehicles to ensure agencies have needed competencies, obtain surge capacity, acquire needed flexibility and resolve specific issues?
- How do we streamline and improve the use of regulations as a mechanism for accountability?
- What is the impact of the government no longer directly employing the workforce that is conducting new research and development and building new innovations and technology?
- Has the definition of “inherently governmental” shifted – however subtly – so that contractor personnel are performing functions that ought to be performed by federal employees?
- Are there emerging best practices for acquisition by government agencies that use multisector workforces?

Human Capital and Management

The standards for strategically managing human capital require agencies to align human capital plans with the mission and strategic goals of the agency, to conduct workforce planning activities, to develop leadership and knowledge management activities, to develop a results-oriented performance culture, to recruit and retain a talented workforce, and to establish an accountability system. In light of the increasing practice of using multisector workforces, we must examine how these standards apply and determine whether we have the tools necessary to apply these standards to the total workforce.

- What special skills are needed to manage a multisector workforce?
- What tools, systems and best practices exist to model effective management of the third party workforce?
- How do we address the need to improve the skills and competencies of the current employee and supervisory workforce so they are able to work with, as well as oversee and manage, the multisector workforce?
- Can federal performance management systems – including pay-for-performance systems – be designed to support coordination, oversight, and management of the multisector workforce?
- How do we develop and institutionalize a workforce planning system that accommodates a view of the entire multisector workforce needed to accomplish the mission, not just the federal component?
- How can government assure that third party workforces will provide the skills and competencies needed?
- How do we build project management capacity and acquisition skills needed to improve our management of federal contracts?
- How do we sustain core competencies to ensure effective project management, oversight and termination of contracts if necessary?
- What role do labor unions play as representatives of employees in the workforce, when half of that workforce is a contractor workforce and the balance are federal employees?
- How can we help managers avoid pitfalls such as supervising contractors and allowing contractors to provide personal services?
- What is the impact of contractors supervising other contractors on behalf of the federal government or supervising federal employees?

Social Equity and Values

The Academy defines social equity as, “*The fair, just and equitable management of all institutions serving the public directly or by contract; the fair, just and equitable distribution of public services and implementation of public policy; and the commitment to promote fairness, justice, and equity in the formation of public policy.*” Moreover, values form a framework which surrounds all of the interactions of the people within a system. Individuals use values and related beliefs to interpret events and give meaning to communications. Common values and beliefs are the bond (glue) which holds an effective organization or team together. Managers rely on organizational values to make difficult decisions.

The government has articulated beliefs, values and social equity goals through a series of public laws, policies and implementing regulations in areas such as the Civil Service Reform Act and the Veterans Preference Act, which apply specifically to the civil service, as well as more general local, state and national employment laws such as the Civil Rights Act, the National Rehabilitation Act, the Fair Labor Standards Act, the Equal Pay Act, and the Family and Medical Leave Act, to name a few. This system of laws exists to assure that the federal civil service is merit based, protects employees and the public from prohibited personnel practices, and promotes legislated values and social equity goals. As federal missions are increasingly performed by contractors and non-profit partners, it is appropriate to examine first, the impact of that shift on these long standing values and goals, and second, what inconsistencies exist between those who have sworn to the oath of office and those who have entered into employment agreements with outside contractors.

Government has an obligation to the public to persistently pursue and perfect the marriage of equity and governance.⁴ Available management strategies to address equity considerations include: ensuring procedural fairness, equal access, consistency in the level of services delivered, and on-going barrier analyses. As we employ multisector workforces, managers need to focus on a number of social equity and values issues such as:

- What is the impact of contracting out on the actual delivery of services, i.e., who is served, who is not served, and how the public need is being met?
- What impact does contracting out have on the values and goals inherent in the federal government's treatment of its own workforce? If there is a negative impact, can or should it be remedied?
- How do we address the fact that the federal government has traditionally addressed equity values in employment, whereas many who are increasingly doing the work of government do not?
- Does it make a difference that federal employees take the Oath of Office, while contractor employees do not?
- Should contractors be required to take an appropriate oath? Currently, federal employees take the Oath of Office below.

“I do solemnly swear [or affirm] that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.”

Legal and Governance Issues

Governance is broadly defined as the traditions and institutions by which authority is exercised including: 1) The process by which governments are selected, monitored and replaced; 2) the capacity to formulate and institute policy; 3) the respect of citizens for the institutions that govern economic and social interactions. Contractors provide goods and services on a contractual basis. They are responsible for meeting the terms of their contracts and for complying with applicable regulations and laws. Federal employees have in addition, taken a public pledge to uphold the Constitution and discharge the duties of their offices. The overarching question concerns what administrative laws need to be revised, amended or eliminated to facilitate the effectiveness and efficiency of the multisector workforce.

- Is there a changing paradigm of government management from a governance focus to an entrepreneurial (business) focus? How does the growth of the multisector workforce contribute to that phenomenon?
- What is the impact on our Constitutional system and administrative law norms when government activities are performed by a multisector workforce through various contracting and grant vehicles?
- How do we stay true to the public purpose of administrative laws such as freedom of information, open meetings, enforcement proceedings, avoidance of conflict of interest and public participation with respect to the activities of government contractors? How do we address this issue across Federal, state and local government lines?
- What constitutes a “coherent framework of laws,” management principles, and organizational practices to assure that government officials have the tools they need to account for the work of the government?
- Contract specialists currently consider costs, contracting vehicles, and performance, but do not always consider the impact of constitutional and administrative law as part of the equation for determining the business arrangement. Should we work to ensure that the contracting specialists have knowledge of and consider the impact of constitutional and administrative law norms when making contracting decisions?
- How can we determine the best alternatives for establishing a governance structure for the multisector workforce? The three visions identified by Guttman⁵ are below.
 - “Presumption of regularity/public law” -presumes officials have the capability to oversee and control “work performed by both government and contractor personnel.”
 - Governance/accountability - a bipartisan consensus that public purposes are best performed by a mix of “public, private and civil society institutions” with a focus on the means to ensure accountability. This assumes “the application of modern management and social science techniques, use of political stakeholders and contractors to supplement the workforce, and transparency as an aid to management techniques and nongovernmental watchdogs.”

- “Muddling through/Common law” – which has become the defacto model in the absence of coherent congressional and executive oversight.

Organizational Culture

C. K. Leman in his article, “Direct Government” proposes that an agency’s mission and culture provide an organizational framework for recruitment, retention and effective management of the agency. This framework defines the work and shapes what needs to be done. One of the primary goals of the President’s Management Agenda is to create throughout the federal sector a strong, results-oriented performance culture. The components of such a culture include individual managerial performance expectations aligned with organizational strategic goals; performance management systems that distinguish levels of performance; effective employee and management relationships; and accountability systems.

- Considering meetings, teambuilding techniques, labor management partnerships, training, communication vehicles, work group design, performance and feedback instruments, which are the most effective techniques for organizing and integrating the multisector workforce around an agency’s culture and mission?
- Currently, government managers have limited knowledge of the rules and norms by which the private sector operates. What do managers need to know about the private sector to be effective managers of the multisector workforce? What do managers need to teach the private sector about government?
- How do we develop systems that allow for comparable recognition of effort by all parts of the multisector workforce? Currently, agencies may directly award traditional cash and honorary recognition for accomplishing results only to federal employees.
- The research indicates that differences in work status (contractor vs. federal employee) have similar weight in the workplace as other demographics of race, gender, etc. What is the impact of this finding?
- What happens to the culture of an organization when different employees are working under different pay and benefit plans?
- How has the relationship between the employee and the federal government changed as a result of increased use of the multisector workforce? How has it changed the “psychological contract” with respect to employee concerns in areas such as job security, recruitment, retention and pay for performance?
- What measures and performance management systems should be employed with the multisector workforce to ensure effectiveness of that workforce?

PHASE TWO: NEXT STEPS

At the conclusion of Phase I, the Working Group determined that management issues arising from the growth of the multisector workforce have not been addressed in any systematic manner. Focused research designed to identify issues and solutions is sparse. As a consequence, the Academy proposes to address the need for results-oriented research and new approaches through Phase II of the project.

Moving forward, the Academy will appoint a panel composed of experienced Fellows in public governance, human capital, competitive sourcing, administrative law, and management theory. This panel will examine the key management challenges identified in Phase I and propose targeted areas for directed study based on the utility, magnitude and urgency of the issue. The panel will then develop a series of reports to illustrate the barriers, challenges, opportunities, and emerging practices for each study issue.

The Panel will also sponsor discussion forums on this project. The first forum will present the preliminary findings of Phase I and host thought leaders on this issue in the six mission-critical areas of accountability, acquisition, human capital and management, social equity, ethics and values, legal governance and organizational culture. This will be an interactive forum to share the research and the targeted issues with a group of experienced human resource practitioners & thought leaders. The outcomes of the forum will be knowledge sharing and prioritization of targeted issues, as well as suggestions for follow up projects and partnerships. A second forum will focus on emerging practices at federal agencies and bureaus.

The primary outcomes for Phase II are:

- sponsor forums to inform the thinking and elevate the issues
- identify issues, barriers and critical success factors for effective utilization of multisector workforces
- serve as a catalyst for projects by other individuals and institutions
- a model and new tools for high performance using multi-sector workforces that can be transferred to other sites – used by federal agencies
- a Resource Guide on multisector workforce that is based on the work of Phase One.

MULTISECTOR WORKFORCE MANAGEMENT WORKING GROUP

Roslyn Kleeman, *Chair** – Distinguished Executive-in-Residence, Department of Public Administration, School of Business and Public Management, George Washington University; Chair, Coalition for Effective Change. Former Staff, Office of Presidential Personnel, The White House; Director, Federal Workforce Future Issues and Senior Associate Director, General Government Division, U.S. General Accounting Office; Project Director, U.S. Office of Management and Budget; President's Advisory Council on Management Improvement; Acting Director and Deputy Director, Women's Action Program, U.S. Department of Health, Education, and Welfare.

Melissa Allen* – Executive Advisor, Booz, Allen, Hamilton. Former Senior Human Resource Advisor, U.S. Department of Homeland Security; Assistant Secretary for Administration and Deputy Assistant Secretary for Administration, U.S. Department of Transportation; Deputy Associate Director, U.S. Office of Management and Budget; Program Analyst, U.S. Department of Treasury. Former positions with the Department of the Navy: Chairwoman, Manpower Action Council; Assistant Personnel Services Officer; Program Analyst.

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Brad Huther - Distinguished Adjunct Professor in Residence, School of Public Affairs, American University; Director, Intellectual Property Initiatives, U.S. Chamber of Commerce; President and Chief Executive Officer, International Intellectual Property Institute. Former Senior Advisor, U.S. Department of Commerce; Special Attaché and Consultant, World Intellectual Property Organization; Chief Operating Officer, Bureau of the Census. Former positions with U.S. Patent and Trademark Office: Associate Commissioner and Chief Financial Officer; Assistant Commissioner for Finance and Planning; Deputy Assistant Commissioner for Administration; Deputy Assistant Commissioner for Operations.

Janice Lachance* – Management Consultant, Analytica. Former Director, Deputy Director, Chief of Staff, Director of Communications and Policy, U.S. Office of Personnel Management; Director of Communications, Congressional and Political Affairs, American Federation of Government Employees, AFL-CIO; Communications Director, Congressman Tom Daschle; Administrative Assistant, Congresswoman Katie Hall; Staff Director and Counsel, Subcommittee on Antitrust and Restraint of Trade, Committee on Small Business, U.S. House of Representatives; Legislative Assistant, Congressman Jim Mattox.

Christopher Mihm* – Managing Director, Strategic Issues, U.S. Government Accountability Office. Former positions with U.S. General Accounting Office: Director, Strategic Issues; Assistant Director, Federal Management Issues; Evaluator.

Hannah Sistare* – Director, Human Resources Management Consortium, National Academy of Public Administration; Executive Director, National Commission on Public Service Implementation Initiative. Former Majority Staff Director, Minority Staff Director, Counsel, Senate Governmental Affairs Committee; Legislative Director, Senator Fred Thompson; Independent Research and Writing Consultant; Vice President for Public Policy, Joseph E. Seagram and Sons, Inc.; Special Counsel to the Secretary, U.S. Department of Health and Human Services; Chief of Staff to Senator Charles Percy.

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STANDING PANEL ON THE PUBLIC SERVICE

Robert Tobias, *Chair** - Director and Distinguished Adjunct Professor, Institute for the Study of Public Policy Implementation, American University; Member, IRS Oversight Board. Former positions with National Treasury Employees Union: National President; Executive Vice President; General Counsel. Former Member, Commercial Activities Panel.

PROJECT STAFF

Dan Driscoll, *Research Associate*

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Academy Initiative: The Multisector Workforce Initiative was launched by the Public Service Big Idea Positioning Committee which was established by the Academy in 2004. Phase I of this project has been developed by a Working Group of the Positioning Committee, with the cooperation of the Academy Standing Panel on the Public Service. The research and development projects that will be undertaken in Phase II of this initiative will be under the direction of the Academy's Human Resources Management Consortium with the ongoing cooperation of the Standing Panel on the Public Service.

¹ From "Making Reform Work: Contracting for Government," by Dan Guttman (1997).

² The Tools of Government: A Guide to the New Governance/edited by Lester M. Salamon, Oxford University Press, 2002

³ Salamon, (2002)

⁴ *Introducing Public Administration*, 3rd Edition, New York: Long, Inc., Shafritz & Russell, 2003

⁵ *Government by Contract: Constitutional Visions: Time for Reflection and Choice.*" GW University Law School, Dan Guttman 2004

Acquisition Advisory Panel

Cross-Cutting Issues: Small Business Working Group

Preliminary Recommendations

December 16, 2005

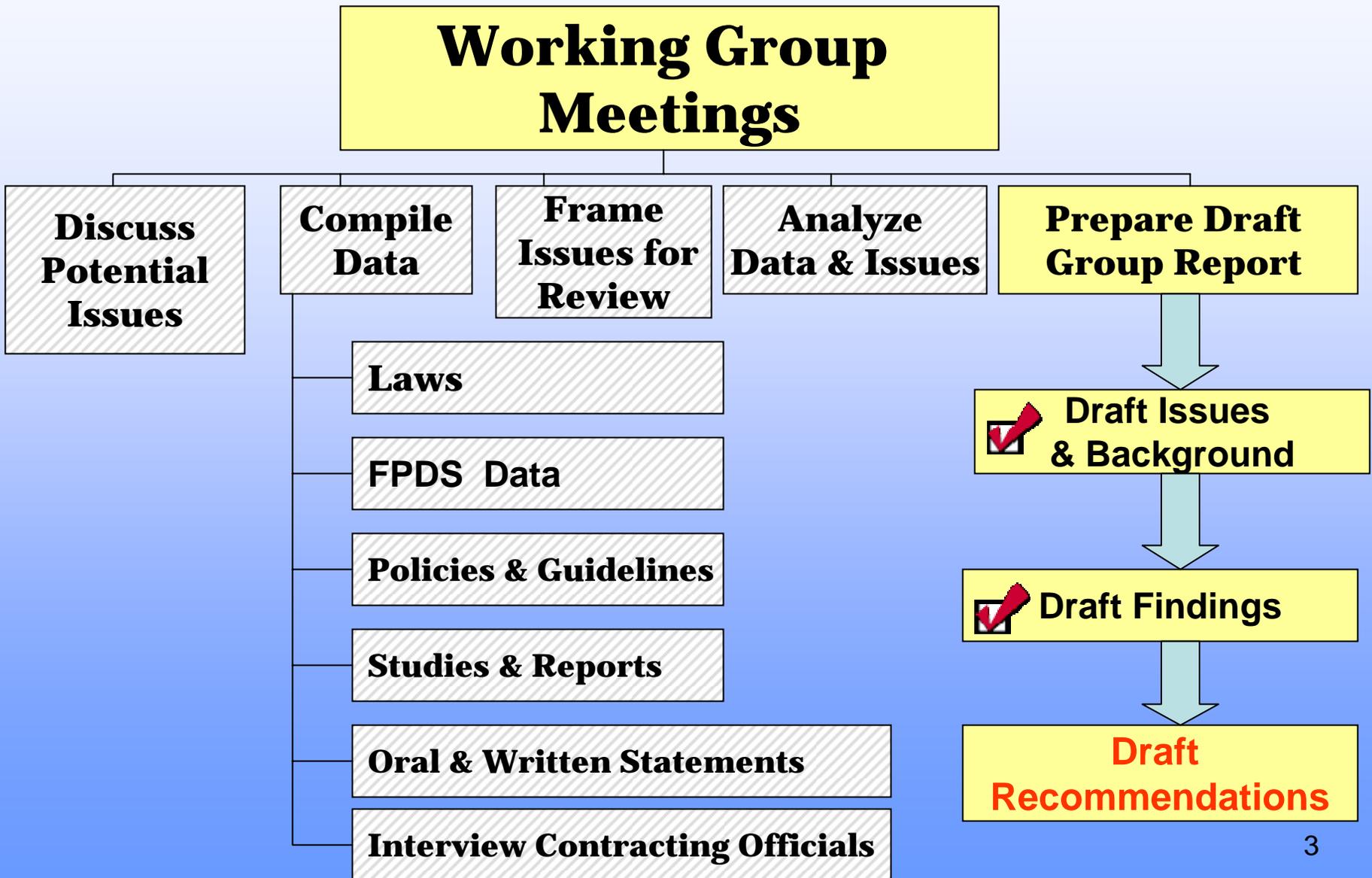
*These slides contain preliminary working group recommendations
for discussion purposes only.*

They have not been approved by the Acquisition Advisory Panel

Small Business Working Group Panel Members

- **David Javdan, Chair**
 - General Counsel, U.S. Small Business Administration
- **Louis Addeo**
 - President, AT&T Government Solutions
- **Deidre Lee**
 - Assistant Commissioner for Integrated Technology Services, Federal Acquisition Service, GSA
- **Roger Waldron**
 - Acting Senior Procurement Executive, GSA

Small Business Working Group Process



Issues: Structuring Procurements to Afford Small Business Participation

- Adequacy of guidance in selecting among the myriad of small business contracting methods
- Adequacy of guidance in defining requirements to facilitate small business contracting opportunities

Issues: Small Business Competition Under Multiple Award Contracts

- Adequacy of guidance in reserving prime contracts for small businesses in full and open multiple award procurements
- Adequacy of guidance in utilizing small business contracting methods when placing orders against multiple award contracts

Recommendation # 1: Structuring Acquisitions

- Provide explicit regulatory guidance to clarify that contracting officials should exercise their discretion and flexibility in selecting the appropriate small business contracting methods based on the status of the agency's small business goal achievements

Recommendation # 2: **Structuring Acquisitions**

- Propose a regulatory amendment specifically prohibiting or limiting the use of cascading procurements

Recommendation # 3: Structuring Acquisitions

- Require a systems review and if necessary upgrade of FPDS-NG to ensure that it provides agencies real-time access to goal achievements data

Recommendation # 4: Structuring Acquisitions

- Require agencies to report to FPDS-NG specified data on contract bundling to allow objective statistical assessment of its effects on small businesses

Recommendation # 5: **Structuring Acquisitions**

- Amend the governing definition of the term “contract bundling” to provide a simpler and less subjective definition

Recommendation # 6: **Structuring Acquisitions**

- Require the creation of a government-wide bundling database or central repository of best practices for unbundling contracts and mitigating the effects of contract bundling

Recommendation # 7: Structuring Acquisitions

- Encourage the development of a government-wide training module targeting acquisition team members and program managers to acquaint them with the value, benefits and requirements of contracting with small business

Recommendation # 8: **Competition for Multiple Award Contracts**

- Provide guidance on the practice of reserving prime contracts for small businesses in full and open multiple award procurements to ensure greater consistency and transparency in the applications of small business contracting requirements to such procurements

Recommendation # 9: **Competition Under Multiple Award Contracts**

- Amend governing regulations to clarify the application of small business contracting mechanisms to orders against multiple award contracting vehicles

Next Steps

- Complete draft of specific recommendations for Panel review
- Post draft recommendations on Panel's web site for public comment
- Finalize Working Group draft report

[These slides were revised after the public meeting on December 16, 2005 for clarity. Original version available from the DFO].

Commercial Rules for Government Contracts

Acquisition Advisory Council
(December 16, 2005)

Marshall Doke

ABBREVIATED SUMMARY

This Is A Proposal For Legislation To Provide That The Law Governing The Interpretation Of, The Performance Of, And The Liabilities Of The United States And Its Agencies Under Federal Government Contracts Shall Be The Same As The Rules Of Law Generally Applicable To Contracts Between Private Parties, Except As Otherwise Required By The Constitution, Federal Statutes, Or By A Contract Clause Mandated By The Federal Acquisition Regulation.

Additional Proposed Legislation Also Is Recommended.

Background

A. Sovereignty

B. The King Can Do No Wrong

Sovereign Immunity

- Federal Government

- State Governments and Subdivisions
 - Counties
 - Municipalities
 - School Districts
 - Other Local Government Entities

Types of Sovereign Immunity

- Liability

- Suit

Waiver of Sovereign Immunity

Federal Government

Tucker Act

Federal Tort Claims Act

States

Local Governments

The Federal Government Acts in Dual Capacities

1. Sovereign
2. Contractor

The Two Characters Which the Government Possesses As A Contractor And As A Sovereign Cannot Be Fused.

Horowitz v. United States, 267 U.S. 458 (1925).

If The Government Comes Down From Its Position Of Sovereignty And Enters The Domain Of Commerce, It Submits Itself To The Same Laws That Govern Individuals There.

Cooke V. United States, 91 U.S. 237 (1875).

The United States, When They Contract With Their Citizens, Are Controlled By The Same Laws That Govern The Citizens In That Behalf. All Obligations Which Would Be Implied Against Citizens Under The Same Circumstances Will Be Implied Against Them.

United States V. Bostwick, 94 U.S. 53 (1877).

More Recent Cases Express The View That:

When The United States Enters Into Contractual Relations, Its Rights And Duties Therein Are Governed Generally By The Law Applicable To Contracts Between Private Individuals.

Lynch V. United States, 292 U.S. 571 (1934).

United States V. Winstar Corp., 518 U.S. 839 (1996) (Plurality Opinion).

Mobile Oil Exploration & Producing Southeast, Inc. V. United States, 530 U.S. 604 (2000) (Majority Opinion).

Franconia Associates V. United States, 536 U.S. 129 (2002) (Unanimous Opinion).

Note The Word “Generally” In The Statement Of The Rule.

Exceptions to Government Being Subject to Common-Law Commercial Contract Rules:

1. Constitution of the United States
 - a. Appropriations Clause
 - b. Treaties
 - c. Commerce Clause
2. Federal Statutes (Examples Only)
 - a. Authorization and Appropriation Act Limitations
 - b. Defense Production Act
 - c. Forfeiture of Claims
 - d. False Statement Act
 - e. False Claims Act
 - f. Truth-in-Negotiations Act

Judicial Exceptions to Supreme Court's Statements

1. Some Judicial Exceptions May Result From Failure to Recognize or Apply The Distinction Between The Government's Actions In Its Sovereign And Contractual Capacities
2. Some Courts Fail to Explain Reasoning

Presumption of Regularity of Actions of Government Officials

- Historical Basis Is Presumption Against Misconduct
- Historically Applied To Private Parties As Well As Government Officials
- Common Law Uses Presumption As Rule Of Evidence
- In Government Contracts, Presumption Used to Favor Government In Disputes

The presumption is that government officials perform their duties correctly and fairly, and the burden to overcome that presumption is a heavy one.

Imperial Properties/Construction. Inc., ASBCA 49899, 01-1 BCA ¶ 31,382.

Examples of Presumption of Regularity Favoring Government

The Reasonableness Of Reprourement Costs Was Properly Tested.

Solar Laboratories, Inc., ASCBA No. 19957, 76-2 BCA
¶ 12,115 at 58, 197-98.

The Government's Deduction From Contract Payments Was Justified.

W.B.&A., Inc., ASBCA No. 32524, 89-2 BCA
¶ 21,736 at 109,329.

The Government Test Results Were Accurate.

Tempo, Inc., ASBCA Nos. 32589 et al., 95-2 BCA
¶ 27,618 at 137, 661-62.

Estoppel

Doctrine of Equitable Estoppel May Be Invoked To Avoid Injustice.

Some Cases Hold Affirmative Misconduct Is A Prerequisite For Invoking Equitable Estoppel Against The Government.

See Rumsfield v. United Techs. Corp., 315 F.3d 1361 (Fed. Cir. 2003).

Some Decisions Say The Government Will Not Be Estopped On The Same Terms As Other Litigants.

Zacharin v. United States, 213 F.3d 1366 (Fed. Cir. 2000).

Presumption of Good Faith

Presumption Originally Applied To Both Parties To Contracts.

In Government Contracts, There Is A Strong Presumption That Government Officials Act In Good Faith.

Torncello v. United States, 681 F.2d 756 (Ct. Cl. 1982).

Presumption May Be Appropriate For Actions In Government Sovereign Capacity, But Should Not Be Used To Give Government An Advantage In Contractual Disputes.

Section 1423 Of SARA Directed Acquisition Advisory Panel To Review Laws, Regulations, And Policies With A View Toward Ensuring Effective And Appropriate Use Of Commercial Practices.

This Panel Has Opportunity To Recommend A Bold Stroke To Comply With The Congressional Mandate By Recommending Legislation To Implement Supreme Court's Language.

Recommendation

- Original Recommendation – May 5, 2005
- Revised Recommendation – December 12, 2005

Four Paragraphs In Revised Recommendation For
Legislation:

(1) Except as otherwise either required by the Constitution of the United States or expressly required by a federal statute or by a contract clause required by the Federal Acquisition Regulation to be included in the particular contract, the rules of law that govern of interpretation of, performance of, and liabilities of, the United States and its agencies under federal government contracts for the acquisition of goods and services shall be the same as the rules of law generally applicable to contracts between private individuals and business entities.

(2) (a) The Federal Acquisition Regulation Council shall promptly undertake a systematic review of contract clauses mandated by the Federal Acquisition Regulation to determine (i) whether and to what extent particular provisions depart from commercial norms in the private sector in respects not required by federal statutes or the Constitution of the United States, and (ii) whether or not there is a good public policy basis for any such departures from such commercial norms that are not required by federal statutes or the Constitution of the United States.

(b) The Council shall initiate the process of instituting changes in the existing mandatory contract clauses to bring them into conformity with commercial norms applied in the private sector where departures from such norms are neither required by the Constitution of the United States nor by existing federal statutes and do not have a good basis in public policy.

(3) Nothing in this statute shall alter the existing rules of law governing the "choice of law" for disputes relating to federal government contracts. Federal acquisition law shall be interpreted to produce a nationally uniform body of principles that shall constitute federal law and, except as expressly otherwise provided by law, shall not be construed to vary from state to state.

(4) Nothing in this statute shall alter the existing rules of law governing formation of federal government acquisition contracts.

Commercial Practices Working Group Acquisition Advisory Panel

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Recommendation #1

- ✍️ Revise definition of “commercial item”
 - ✍️ Revise the definition of commercial item to only include items for which the commercial market establishes prices
 - ✍️ Clarify discretion of government agent to require information other than certified cost or pricing data for determination of fair & reasonable price
 - ✍️ Define “commercial services” separately from commercial item

Related Unresolved Issues #1

- ✍ Pricing of new products where they are commercial in nature but market forces have not yet established pricing or terms of offering
- ✍ Establishing price when the government is the predominant buyer and prior government contracts establish the “market” price
- ✍ Pricing complex commercial transactions (e.g., an aggregation of commercial items and commercial services with performance based objectives)
- ✍ “Commercial” divisions or sectors that sell only to the government

Recommendation #2

- ✍ Define “commercial services” separately
 - ✍ Distinguish among (i) performance-based services, (ii) services associated with installation, operation, or maintenance of commercial items, and (iii) consulting type services
 - ✍ Require competition for the acquisition of commercial services under FAR Part 12
 - ✍ Proceed under FAR Part 15 for non-competitive acquisition of services

Related Unresolved Issues #2

- ✍ Some vendors simply will not sell commercial services under Part 15
 - ✍ Solution: Expand government authority to require information other than certified cost of pricing data, e.g., direct labor rates, overhead, and profit, *etc.*?
- ✍ Government audit rights in disclosure of information other than cost or pricing data
- ✍ Remedy for inaccurate disclosure

Other Recommendations

- ✍ Standardize basic contract terms for Part 12 contracts rather than relying on each vendor's proposed terms (e.g., payment, termination, remedies for breach, warranties, acceptance, etc.)
- ✍ Provide statutory authority for indemnification of contractor for third party claims arising out of government use of commercial item or service
- ✍ Require TINA data for noncommercial modifications of commercial items (the greater of \$500k or 5% of item value)
- ✍ Reaffirm benefits of and preference for competition