Statement

of

David Z. Bodenheimer, Esq.
Partner
Crowell & Moring LLP
Washington, DC

Before the

House Committee on Homeland Security's
Subcommittee on Management, Investigations, & Oversight

Concerning

Playing by Its Own Rules: TSA's Exemption from the Federal Acquisition Regulation and How It Impacts Partnerships with the Private Sector

August 1, 2007

Introduction

Mr. Chairman and Members of the Committee. Thank you for holding these hearings today on the Transportation Security Administration's (TSA) exemption from fundamental federal procurement rules requiring competition, external oversight, and due process protections. As part of the national mobilization to combat terrorism after the attacks on September 11, 2001, TSA received exemptions from such rules in order to expedite procurement of critical anti-terrorism needs. Nearly six years later, the time is ripe to ask how TSA's continued exemption from basic procurement rules can be justified. In particular,

- Payoff. What successful TSA acquisitions demonstrate the need for, and benefits of, continued TSA exemptions?

- Uniqueness. Why does TSA need special emergency authority that no other part of the Department of Homeland Security (DHS) has?

- Cost/Benefit. Do the benefits of TSA's exemption outweigh the costs and risks of forgoing competition, oversight, and other bedrock procurement rules?

I am David Bodenheimer, a partner in the law firm of Crowell & Moring LLP in Washington, DC where I am head of the Homeland Security practice and specialize in government contracts. As part of this practice, I have advised clients, published articles, and lectured extensively on Homeland Security and government contract matters. In addition, I serve as Co Vice-Chair of the ABA Science and Technology Section's Special Committee on Homeland Security. Prior to entering private practice, I served six years (1982-88) as a civilian attorney for the United States Department of the Navy where I handled a broad spectrum of government contract matters in the field, at the Commands, and as Assistant to the General Counsel. However, I appear before your Committee today in my personal capacity and the views that I express are my own.

Since its inception in 2001, TSA has borne heavy responsibilities for establishing and implementing security measures for protecting our transportation systems from terrorist attacks and other catastrophic threats. The magnitude of this task is underscored by the sheer size of the transportation infrastructure, its geographic dispersion, and the non-stop movement of passengers and cargo both domestically and internationally. For undertaking these Herculean tasks, the TSA team deserves our gratitude for its efforts to make our transportation system safer.

In the acquisition arena, TSA's exemption from competition rules and the Federal Acquisition Regulation (FAR) have not yielded the anticipated payoff – faster, more efficient contract awards producing on-time deliveries, within-budget costs, and concrete results meeting the TSA mission. To the contrary, TSA procurements have a disheartening history of schedule delays, cost overruns, and performance shortfalls, as documented in Congressional hearings, Government Accountability Office (GAO) reviews, and Inspector General and audit reports. History tells us that following the rules – including competition and the FAR – will yield faster, cheaper, and better acquisition results than will continuing with TSA's exemption.

As a starting point, we need to look at the scope of TSA's exemption from acquisition statutes and regulations. The next step is to consider the need for, and benefits of, continuing this exemption. Finally, the exemption should be weighed against the fundamental procurement principles that TSA may disregard under its current authority. By returning TSA to the acquisition fold applicable to nearly every other procuring agency, both TSA and the taxpayers should benefit in all of the following areas:

- Assuring "full and open" competition;
- Enhancing efficiency and consistency for DHS and TSA acquisitions;
- Improving GAO oversight of TSA procurements; and
- Avoiding "emergency exemption" creep beyond TSA needs.

The Scope of TSA's Acquisition Exemption

TSA and its exemption from federal acquisition rules arose out of the emergency legislation enacted in the wake of the 9/11 terrorist attacks.[1] This exemption states:

> The acquisition management system established by the Administrator of the Federal Aviation Administration under section 40110 shall apply to acquisitions of equipment, supplies, and materials by the Transportation Security Administration, or, subject to the requirements of such section, the Under Secretary may make such modifications to the acquisition management system with respect to such acquisitions of equipment, supplies, and materials as the Under Secretary considers appropriate, such as adopting aspects of other acquisition management systems of the Department of Transportation.[2]

The scope of this exemption is specifically defined in the referenced "section 40110" allowing the Federal Aviation Administration (FAA) to issue procurement rules "notwithstanding provisions of Federal acquisition law." This exemption cuts through a wide spectrum of acquisition statutes and regulations, including the following: (1) Competition in Contracting Act; (2) Office of Federal Procurement Policy Act (except for Procurement Integrity

---

[1] Aviation and Transportation Security Act, Pub. L. No. 107-71 (2001) *codified* at 49 U.S.C. § 114(o); *see Resource Consultants, Inc.,* B-290163, June 7, 2002, 2002 CPD ¶ 94 ("In the aftermath of the terrorist hijackings and crashes of passenger aircraft on September 11, 2001, the Congress passed and the President signed, the Aviation and Transportation Security Act").

[2] *See* Pub. L. No. 109-90, Title V, § 515, 119 Stat. 2084 (Oct. 18, 2005) (extending exemption to acquisition of services; *Knowledge Connections, Inc.,* B-298172, Apr. 12, 2006, 2006 CPD ¶ 67 (applying exemption to services).

Act provisions); (3) Federal Acquisition Streamlining Act (except for whistleblower provisions); (4) Small Business Act (except for a general duty to provide "reasonable opportunities" to small businesses); (5) procurement protest system provisions (31 U.S.C., Chapter 35(V)); and (6) the Federal Acquisition Regulation (FAR). 49 U.S.C. § 40110(d). As Senator Snowe explained, TSA "is exempt from every major procurement law" and may "sidestep normal competitive bidding practices" under this authority.[3]

Assessing the Need for, and Benefits of, TSA's Exemption

TSA received its acquisition exemption in the midst of a national emergency in 2001. This raises key questions of whether (1) TSA still needs this emergency acquisition authority; and (2) this emergency authority has produced faster, cheaper, and better acquisitions.

Assessing the Need for Continued Exemption

In times of war or national emergency, exceptions to major procurement laws may be necessary in order to meet urgent needs of the troops, disaster victims, or other public exigencies. However, wholesale exemptions are no longer necessary for TSA because the major procurement statutes and regulations incorporate built-in safeguards to allow emergency contracting to meet urgent needs of the agency and the public. For example, both the Competition in Contracting Act (CICA) and the FAR carve out special exceptions to the requirement for "full and open competition" when the agency determines that "an unusual and compelling urgency" exists. 41 U.S.C. § 253(c)(2); FAR § 6.302-2.

Indeed, the revisions to the FAR in 2006 now assist agencies in meeting urgent needs by devoting an entire section of the regulation to "emergency acquisitions." 71 Fed. Reg. 38247 (2006); FAR Part 18. In particular, this recent FAR revision "identifies acquisition flexibilities that are available for emergency acquisitions." As a result, agencies have sufficient authority within the existing statutory and regulatory framework without the need for any broad exemption like that applicable to TSA.

In addition, the question arises as to why TSA alone needs a special emergency exemption not available to any other part of DHS – or even to the military departments. As Senator Snowe stated, "TSA is one of the few federal agencies and the only agency within the Department of Homeland Security that is exempt from federal procurement laws."[4] TSA should be able to achieve its critical mission as readily under the FAR as the rest of the DHS contracting community and the military departments.

---

[3] Sen. Snowe's News Release, "Snowe Brings Increased Transparency, Accountability to Transportation Security Administration Contracting" (July 13, 2006).

[4] *Id.*

Weighing the Benefits of the TSA Exemption

If TSA's emergency exemption had contributed to a record of acquisition successes, a continuation of this exemption might be a worthy consideration. However, the past six years do not readily demonstrate the benefits of TSA's exemption. To the contrary, TSA's acquisitions not only have drawn bipartisan criticism, but also have accumulated a history of delays, overruns, and other problems documented in GAO and DHS reports, as illustrated below.

- TSA Procurements Generally
    - Sen. Snowe. "TSA has a record of mismanagement and lack of transparency in its acquisitions that provide little justification for a permanent exemption from the FAR."[5]
    - Sen. Kerry. "The TSA has been the subject of several Department of Transportation and DHS Inspector General investigations regarding the mismanagement of contracts that have cost taxpayers hundreds of millions of dollars."[6]
    - DHS IG. "[W]e conducted audits and reviews of individual DHS contracts, such as the Transportation Security Administration's (TSA's) screener recruiting and TSA's information technology services. . . . Common themes and risks emerged from these audits, primarily the dominant influence of expediency, poorly defined requirements, and inadequate oversight that contributed to ineffective or inefficient results and increased costs."[7]
- IT Managed Services
    - DHS IG. "Another example of where an expedited schedule led to DHS acquisition deficiencies is TSA's information technology managed services contract with Unisys. . . . By the beginning of fiscal year 2006, TSA had spent most of the contract ceiling, 83 percent, without receiving many of the contract deliverables critical to airport security and communications."[8]

---

5 *Id.*

6 Sen. Kerry's Letter to Kip Hawley (TSA Administrator) (Dec. 13, 2005).

7 *Procurement Practices of the Department of Homeland Security: Hearings Before the House Comm. on Oversight and Government Reform,* 110th Cong., 1st Sess. (2007) (statement of DHS IG Richard Skinner).

8 *Code Yellow: Is the DHS Acquisition Bureaucracy A Formula for Disaster? Hearings Before House Comm. on Government Reform,* 109th Cong., 2nd Sess. 69 (2006) (statement of DHS Asst. IG David Zavada) (hereinafter *"2006 House Code Yellow Hearings"*).

- Secure Flight
  - GAO. "TSA has not followed a disciplined life cycle approach to manage systems development, or fully defined system requirements. Rather, TSA has followed a rapid development method to develop the program quickly. This process has been ad hoc, resulting in project activities being conducted out of sequence, requirements not being fully defined, and documentation containing contradictory information or omissions."[9]

- Transportation Security Operations Center
  - House Report. "Moreover, an unnecessary decision to accelerate the construction deadline cost TSA between $400,000 and $600,000, not including approximately $575,000 in unjustified 'approved construction change orders.'"[10]

- Transportation Worker Identification Credential Program (TWIC)
  - GAO. "TSA experienced problems in planning for and overseeing the contract to test the TWIC program, which contributed to a doubling of TWIC testing contract costs and a failure to test all key components of the TWIC program."[11]

In summary, the proven benefits of the exemption from major acquisition laws is not readily apparent from TSA's six years of acquisition experience with this exemption.

Assuring "Full and Open" Competition

The Competition in Contracting Act (CICA) does not apply to TSA. 49 U.S.C. §§ 114(o) and 40110. Instead, TSA may award noncompetitive contracts based upon its "best interest" and a "rational basis" standard.[12] TSA's threshold for sole-source contracts is even lower than the

---

[9] GAO, *Aviation Security: Significant Management Challenges May Adversely Affect Implementation of the Transportation Security Administration's Secure Flight Program* 1 (Feb. 9, 2006) (GAO-06-374T); *see also* GAO, *Homeland Security: Progress Continues, but Challenges Remain on Department's Management of Information Technology* 30 (Mar. 29, 2006) (GAO-06-598T).

[10] *2006 House Code Yellow Hearings* 25 (House Comm. on Government Oversight Report, *Waste, Abuse, and Mismanagement in Department of Homeland Security Contracts* (July 2006) citing DHS IG Report).

[11] GAO, *Transportation Security: TSA Has Made Progress in Implementing the Transportation Worker Identification Credential Program, but Challenges Remain* 12 (Apr. 12, 2007) (GAO-07-681T).

[12] *See* TSA Acquisition Management System (linking to FAA Acquisition Management Policy § 3.2.2.4) (http://www.tsa.gov/join/business/index.shtm); GAO, *Transportation Security Administration: High-Level Attention Needed to Strengthen Acquisition Function* 14 (May 2004) (GAO-04-544).

old competition standard – maximum "practical" competition – that Congress found to be inadequate and ineffective prior to the enactment of CICA.[13]

In support of CICA's mandate for competition, Congress established an overwhelming case for how competitive procurements serve the public interest:

- Cost Savings. "First, competition in contracting saves money. Studies have indicated that between 15 and 50 percent can be saved through increased competition."

- Cost Control. "In addition to potential cost savings, competition also curbs cost growth. According to an October 1979 Rand Corporation analysis . . . , competitive procurement has led to improvements in system performance and on-schedule delivery by contractors, which have subsequently lowered real cost growth."

- Innovation. "Competition may also promote significant innovative and technical changes. In some cases, competition serves as an incentive for firms to be more progressive in developing cost-reducing design changes and improvements in manufacturing technology in order to gain advantage over their competitors."

- Fair Play. "The last, and possibly the most important, benefit of competition is its inherent appeal of 'fair play.' Competition maintains the integrity in the expenditure of public funds by ensuring that government contracts are awarded on the basis of merit rather than favoritism."[14]

More than twenty years later, the case for competition pursuant to CICA remains equally compelling, as Congress continues to find in recent hearings:

> Experience has proven that there is a direct connection between an agency failing to adequately compete a contract and poor performance on that contract. The billions wasted in no-bid, sole-source contracts awarded after Hurricane Katrina stand as a testament to that fact.[15]

---

13 *See* Defense Acquisition Regulation (DAR) § 3-101(d); Federal Procurement Regulation (FPR) § 1-3.101.

14 S. REP. NO. 98-50, at 3 (1983).

15 *Responsibility in Federal Homeland Security Contracting: Hearings Before House Comm. on Homeland Security,* 110th Cong., 1st Sess. (2007) (statement of Chairman Thompson).

> Competition in federal contracting protects the interests of taxpayers by ensuring that the government gets the best value for the goods and services it buys. Competition also discourages favoritism by leveling the playing field for competitors while curtailing opportunities for fraud and abuse.[16]

In fact, DHS officials have agreed that "competitive contracting is the preferred way to go" and that noncompetitive contract modifications have contributed to cost overruns.[17]

CICA not only mandates competition, but also establishes concrete requirements to enforce transparency and accountability. In particular, CICA requires high-level review and written justifications for high-dollar sole-source procurements. 41 U.S.C. § 253(f). In addition, such justifications must be available for public review, thus enhancing effective oversight. *Id.*[18] Such requirements may not only facilitate GAO and DHS IG oversight, but also assist TSA in performing its acquisition functions.[19]

In summary, a powerful case exists for Congressionally-established "full and open" competition under CICA. Given that CICA specifically allows flexibility for urgent procurements and emergencies, TSA should be able to accomplish its mission **and** obtain the undeniable benefits of competition – including cost savings, controlled cost growth, innovation, and fair play – without any need for a special "TSA-only" exemption from CICA.

Enhancing Efficiency and Consistency Within DHS

With its exemption, TSA is also not subject to the Office of Federal Procurement Policy Act and the Federal Acquisition Regulation that establish government-wide rules offering economy-of-scale efficiencies and cross-cutting consistency. 49 U.S.C. §§ 114(o) and 40110.

Congress established the Office of Federal Procurement Policy (OFPP) "to provide overall direction of Government-wide procurement policies, regulations, procedures, and forms

---

16 *2006 House Code Yellow Hearings* 11 (incorporating House Comm. on Government Reform's Report on *Waste, Abuse, and Mismanagement in Department of Homeland Security Contracts*).

17 *2006 House Code Yellow Hearings* 87 (statement of Elaine Duke) (agreeing that "competitive contracting is the preferred way to go"); *id.* (statement of Rick Gunderson) (agreeing that when a $104 million contract "grows to $700 million, it is not competitive all the way through").

18 CICA's legislative history confirms that Congress viewed the mandate for written justifications to be "necessary to permit effective oversight of the use of noncompetitive procedures." S. REP. NO. 98-297, at 5 (1983).

19 *See* Sen. Snowe's News Release, "Snowe Brings Increased Transparency, Accountability to Transportation Security Administration Contracting" (July 13, 2006) ("GAO conducted an investigation into TSA's acquisition office which required staff to rummage through boxes of files to piece together the details of 21 contracts it was reviewing"); GAO, *Transportation Security Administration: High-Level Attention Needed to Strengthen Acquisition Function* 13-14 (May 2004) (GAO-04-544).

for executive agencies and to promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government." 41 U.S.C. § 404(a). Indeed, a "uniform procurement system" represented one of the key objectives of the OFPP Act, as amended.[20] These key Congressional objectives for efficiency and uniformity are undermined when the "Government-wide" procurement system is fragmented and TSA may play by its own unique acquisition rules.

This fragmentation of the procurement system creates two parallel sets of rules with differences and conflicts – ranging from subtle to significant – between the FAR and the separate TSA Acquisition Management System (TSAAMS) set of clauses. Examples include:

- Cost or Pricing Data. The FAR establishes a uniform threshold of $650,000 for obtaining cost or pricing data. FAR § 15.403-4(a). In contrast, TSAAMS 3.2.2.3-27 sets a $1,000,000 threshold, while TSAAMS 3.2.2.3-26 imposes yet another threshold of $550,000.

- Environmental. The FAR includes the Pollution Prevention and Right-to-Know Information clause (FAR 52.223-5), but not Clean Air & Clean Water clause (deleted over 5 years ago). The TSAAMS has the opposite – the outdated Clean Air & Clean Water clause (3.6.3-2), but no Pollution Prevention clause.

- Buy American. The FAR recognizes certain exceptions to honor international trade agreements (FAR § 25.1101), but the TSAAMS does not mention them (3.6.4-2).

Other differences include TSAAMS provisions (3.6.4-2 and 3.2.2.3-27) that omit FAR provisions recognizing commercial item exceptions (FAR § 25.1101(a)(1) and § 15.403-3(c)).

This fragmentation cuts against the OFPP and FAR objectives of efficiency and uniformity in such areas as contract administration, compliance, training, and research. For contract administration, contractors – particularly small businesses – bear a heavy burden of tracking, updating, implementing, and flowing down not just one, but two, separate regulatory regimes if TSA is to have the benefit of competition from companies with government-wide experience. For compliance, contractors need a system of policies, procedures, and training to assure that their personnel are following the rules; this burden multiplies when contractors must address two separate sets of regulatory requirements. For training and research, separate FAR and TSA systems undermine the OFPP objectives of "development of a professional acquisition workforce Government-wide" and coordination of "Government-wide research and studies." With TSA's exemption, such training and research must be done twice – once to cover the FAR's general rules and then again for the unique aspects of TSA acquisitions.

---

20 S. REP. NO. 98-50, at 6 (1983).

Improving GAO Oversight Over TSA Procurements

With its exemption, TSA is not subject to the procurement protest system provisions (31 U.S.C., Chapter 35(V)) applicable to other agencies. 49 U.S.C. §§ 114(o) and 40110. As a result, GAO lacks jurisdiction to oversee TSA acquisitions through the protest process.[21]

For TSA acquisitions, the only protest option is the FAA's Office of Dispute Resolution for Acquisitions (ODRA).[22] While the ODRA protest process is available, the GAO protest process offers compelling advantages:

- Unparalleled Experience. For more than 80 years, GAO has served an a forum for resolving protests involving federal agencies;[23]

- Established Precedent: Over the many decades of its protest review, GAO has generated thousands of precedent-setting decisions informing both agencies and contractors of what conduct passes muster;[24]

- Unquestioned Independence. GAO has a well-earned reputation for independence and objectivity.

As one of the critical reforms established by CICA, Congress determined that an effective protest function required additional teeth.[25] First, because many agencies rendered protests meaningless by proceeding with contract performance pending protest resolution, Congress established a statutory stay of performance to assure effective relief. 31 U.S.C. § 3553(c). In contrast, protests under ODRA generally do not stay contract performance.[26] Second, CICA generally provides for payment of successful protest costs (31 U.S.C. § 3554(c)), while ODRA

---

21 *See, e.g., Knowledge Connections, Inc.,* B-298172, Apr. 12, 2006, 2006 CPD ¶ 67 (dismissing protest against TSA for lack of jurisdiction).

22 14 C.F.R. §§ 17.11 – 17.21; FAA ODRA website (procedures, cases, and background) (http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc70/).

23 H.R. REP NO. 98-1157, at 23 (1984) (nearly 60 years of experience in the 1980s).

24 *Id.* (GAO's "decisions are relied upon for guidance by Congress, the courts, and the procurement community, including executive branch contracting agencies").

25 *Id.* at 25.

26 *J.A. Jones Management Services,* 99-ODRA-00140 (Sept. 29, 1999) ("The FAA's Acquisition Management System ('AMS') includes a presumption in favor of continuing procurement activities and contract performance during the pendency of bid protests"); *accord Glock, Inc.,* 03-TSA-003 (Oct. 28, 2003).

procedures place significant restrictions on such recovery. 14 C.F.R. § 17.21(c). Third, Congress must receive notification if agencies fail to implement corrective action specified by GAO. 31 U.S.C. § 3554(b)(2) & (e). In contrast, ODRA includes no such mechanism for Congressional or GAO notification and oversight for TSA acquisitions.

While comparative assessments of GAO and ODRA effectiveness are complex undertakings, one measure would be the advancement of competition in federal procurements. By this yardstick, the ODRA protest function has had limited success.

- Denied Protests. As a general rule, ODRA protests against sole source procurements have failed.[27]

- No Remedy. Even while sustaining the protest, ODRA has declined to overturn the award and reopen the competition.[28]

- Limited Success. In over a decade, ODRA has apparently sustained only two protests against sole-source procurements.[29]

In general, GAO has applied greater scrutiny, with greater success, in enforcing competition in federal contracting.[30] As a result, the availability of the GAO protest process would not only assure greater due process protections for competing contractors, but also benefit both TSA and the taxpayer by spurring greater, more vigorous competition.

Avoiding "Emergency Exemption" Creep

For good reason, emergency exemptions have been extended to procuring agencies in times of war and national emergency. However, history has repeatedly underscored the risks of leaving such emergency authority in place too long. Too often, the emergency becomes the

---

[27] *J&J Electronic Systems,* ODRA-05-346 (June 3, 2005) (denied); *Aviation Research Group,* ODRA-99-138 (Oct. 28, 1999) (summary dismissal); *Raisbeck Commercial Air Group, Inc.,* ODRA-99-117 (May 14, 1999) (summary dismissal); *Wilcox Electric, Inc.,* ODRA-96-8 (Oct. 9, 1996) (denied).

[28] *Haworth Incorp.,* ODRA-98-74 (June 2, 1998) (holding that ODRA did not have to follow CICA and recommend termination of improperly awarded contract).

[29] *Hasler, Inc.,* ODRA-07-404 (Jan. 16, 2007) (finding rejection of lower-priced, technically compliant offer to be improper); *Raytheon Co.,* ODRA-01-177 (June 15, 2001) (sustaining protest against sole-source award after FAA requested independent review by the General Services Board of Contract Appeals (GSBCA) that had developed great experience and expertise in protests at that time).

[30] *See, e.g., eFedBudget Corp.,* B-298627, Nov. 15, 2006, 2006 CPD ¶ 159; *Europe Displays, Inc.,* B-297099, Dec. 5, 2005, 2005 CPD ¶ 214; *WorldWide Language Resources, Inc.,* B-296984.2, Nov. 14, 2005, 2005 CPD ¶ 206; *Sabreliner Corp.,* B-288030, Sept. 13, 2001, 2001 CPD ¶ 170; *Lockheed Martin Systems Integration – Owego,* B-289190.2, May 25, 2001, 2001 CPD ¶ 110.

routine and the exemption swallows the governing procurement rules. The emergency authorities during the Korean War and the Katrina aftermath illustrate these risks.

Korean War Emergency Authority. In the Armed Services Procurement Act of 1947, Congress established a statutory "emphasis . . . upon formal advertising as a proven method and upon competition as a means of procuring Government supplies, with a fair and equal opportunity for suppliers and at prices brought about by competition in the market."[31]

> Then came the Korean hostilities, and, on December 15, 1950, the President issued a national emergency proclamation, which has not since been revoked. Immediately upon its issuance, the Secretary of Defense directed that all procurement be undertaken under the authority of section 2304(a)(1) of the Armed Services Procurement Act of 1941. This section permits negotiation of contracts during the period of a national emergency proclamation of the President. Such use of the national emergency authority in subsection (a)(1) effectively suspended the duties, limitations, and requirements specified in the other 16 exceptions where negotiation is permitted by the act of 1947.
>
> * * *
>
> In 1955 and 1956, this committee, on inquiry, developed the fact that 94.19 percent of the defense procurement dollar was contracted for under the authority of the Presidential Korean National Emergency Proclamation (sec. 2304(a)(1)).[32]

Congress ultimately had to intervene by amending the Armed Services Procurement Act and reaffirming "the congressional intent and policy that formal advertising, the proven method of public procurement, shall be the rule, where it is feasible and practicable."[33]

Katrina Authority. After Hurricane Katrina, federal agencies quickly employed available emergency authority in order to respond more quickly to urgent needs of the Katrina victims.

> In the case of Hurricane Katrina, full and open competition has been the exception, not the rule. The urgent needs in the immediate aftermath of Hurricane Katrina provided a compelling justification for the award of noncompetitive contracts. Yet as the immediate emergency receded, the percentage of contract dollars awarded without full and open competition actually increased. In September 2005, the month after Hurricane Katrina, 51% of the

---

31 H.R. REP. NO. 87-1638, at 2 (1962).

32 *Id.*

33 *Id.* at 3; *see* Pub. L. No. 87-653.

> contract dollars awarded by the Federal Emergency Management Agency were awarded without full and open competition. Rather than declining after September, the percentage of contract dollars awarded noncompetitively increased to 93% in October.[34]

TSA Exemptions. Even if TSA procurements were not currently far out of the federal procurement mainstream, history warns that "emergency exemption" creep will drive an ever widening gap between TSA and the rest of the federal contracting community. As discussed above, such disharmony will further undermine some of the most fundamental Congressional directives, including CICA's "full and open competition" mandate, the OFPP Act's "Government-wide" initiatives for efficiency and uniformity in federal contracting, and GAO's oversight through the protest process for enforcing competitive fair play in the public marketplace.

Conclusion

Six years have passed since TSA received its emergency exemption from the major procurement laws governing other federal agencies. With the passage of time, bipartisan Congressional investigations, GAO reviews, and DHS IG audits have yet to identify tangible benefits resulting from TSA's sweeping exemption. On the other hand, both TSA and the taxpayer stand to gain from the Congressionally recognized values flowing from "full and open competition," "Government-wide" efficiencies of common regulations and training, and effective GAO protest oversight. Accordingly, the time is ripe to end TSA's exemption from major procurement laws and to bring TSA acquisitions into the federal procurement mainstream.

Thank you for your leadership on the TSA acquisition process that directly affects one of the most visible and vital components of America's critical infrastructure – our transportation system. Bringing greater competition, efficiency, and oversight to the TSA acquisition process will serve not only the interests of TSA and DHS, but the public at large.

This concludes my statement and I would be happy to answer any questions you might have.

3904178_1

---

[34] *House Comm. on Government Reform – Minority Staff: Waste, Fraud, and Abuse in Hurricane Katrina Contracts* 2 (Aug. 2006).