PROFESSIONAL SERVICES COUNCIL
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STATEMENT OF

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GOVERNMENT MANAGEMENT, ORGANIZATION
AND PROCUREMENT

COMMITTEE ON OVERSIGHT AND
GOVERNMENT REFORM

U.S. HOUSE OF REPRESENTATIVES

"CONTRACTING REFORMS: EXPERT RECOMMENDATIONS AND PENDING BILLS"

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Introduction

Mr. Chairman, Ranking Member Bilbray, members of the subcommittee, thank you for the invitation to testify at today's hearing. I am Alan Chvotkin, Executive Vice President and Counsel of the Professional Services Council (PSC).

PSC is the national trade association of the government professional and technical services industry. This year, PSC and the Contract Services Association of America (CSA) merged to create a single, unified voice representing the full range and diversity of the government services sector. Solely focused on preserving, improving, and expanding the federal government market for its members, PSC's more than 300 member companies represent small, medium, and large businesses that provide federal agencies with services of all kinds, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, environmental services, and more. Together, the association's members employ hundreds of thousands of Americans in all 50 states.

Whether assisting citizens seeking compensation for radiation illness, providing support to military men and women stationed at home and abroad, or developing scientific analyses to better protect sensitive wildlife habitats, PSC members are among the leading small, mid-tier and large companies providing the full range of professional services to every federal agency. PSC member companies employ tens of thousands of individuals in every region of the country. These dedicated employees provide government customers and taxpayers with good value, specialized expertise and innovative solutions. Our members believe strongly in the mutual benefit that is achieved when the government and its private sector suppliers work closely together to ensure the delivery of better outcomes for America's citizens.

Over the past decade, the government's missions have rapidly evolved, increased in complexity, and require new technology, thus resulting in growing challenges for the government and its workforce, and a substantial increase in the government's reliance on contractors. The evidence suggests that these challenges and trends will continue well into the future.

<u>Contracting Myths</u>

Before I comment on the specific legislative provisions, I want to address the importance of addressing all of these issues in a fact-based manner. All too often the complexities and nuances of federal procurement have either been misstated or misinterpreted and led to the creation of numerous myths about federal contracting. Words and terms matter and as we examine avenues to enhance the quality of the federal acquisition process, it is important to proceed with well-understood definitions, sound data, and an accurate assessment of the current environment. I've attached to my statement three papers that address and debunk some of the more common current myths about government contracting.

In fiscal year 2007, the federal government spent more than $400 billion on the purchase of goods and services, through more than 30 million individual contract transactions. Despite the current rhetoric, it is heartening and important to note that, even with its size and complexity, the federal acquisition system actually works quite well. The procurement system is a tool to acquire goods and services to meet federal agency mission needs; it is not an end product itself. Clearly,

it is also a system that faces many challenges and has areas where improvements are needed. But the bottom line is that this system as a whole serves the public well. Real fraud and abuse, while deeply troubling whenever it is uncovered, is actually relatively rare and the government has in place a wide array of generally effective statutes and standards that apply to entities seeking to do business with it.

Regulating Business

As you know, any organization wishing to do business with the government must comply with all of the general application laws and regulations for maintaining a business, including all relevant tax, environmental and labor provisions. Each area of law or regulation is enforced and adjudicated through its own experienced and knowledgeable entities at the federal, state and local levels. For example, Congress has given responsibility to the Internal Revenue Service to write regulations to implement the tax laws. The Environmental Protection Agency has primary responsibility for implementing the environmental laws, the Department of Labor for labor laws, and so on. Many of these agencies also have internal administrative enforcement authority while the Justice Department is generally charged with civil and criminal enforcement at the federal level.

Taken together, this layering of statutes and regulations across the government, at all levels, provides a construct under which all businesses in the nation must operate. But for government contractors, there is much more.

Regulating Government Contractors

There are numerous laws and regulations that apply to firms that want to do business with any agency of the federal government – such as registering in the government's central contractor registration (CCR) system, agreeing to unique audit and/or competition rules, meeting the government's unique accounting and billing standards, or agreeing to utilize small business for a certain percentage of subcontracting opportunities. For these government-wide procurement requirements, most federal agencies follow the uniform Federal Acquisition Regulation (FAR) requirements. The FAR is maintained by three lead agencies – DoD, NASA and GSA – and policy is provided by those agencies under the leadership of the Administrator of the Office of Federal Procurement Policy in the Office of Management and Budget. However, in a recent column I wrote for Government Services Insider, I questioned whether we have a true uniform Federal Acquisition Regulation; actions by Congress and the regulatory agencies, and even by individual procurements, are actually moving us farther away from a uniform, government-wide, set of acquisition regulations. A copy of that column is attached.

Beyond these general rules, frequently there are specialized laws and regulations that apply when doing business with specific agencies of the federal government or for specific types of activities. For example, the Department of Homeland Security has a restriction on the types of companies with which it can do business. The Defense Department has an entirely separate set of specialized rules to guide the procurement of its major weapons systems and many of its own purchases. In those specialized areas, each federal agency is responsible for developing, publishing and maintaining separate acquisition regulations that supplement the government-wide regulations. Each agency is also responsible for writing its own contracts and monitoring compliance with agency-specific requirements.

In addition, a myriad of laws and regulations provide the authority and responsibility for government officials – primarily but not exclusively contracting officers and grants officers – to ask the right questions and take the right actions against those who fail to follow the laws and regulations. If a contracting officer is concerned about putting the federal government at risk by doing business with an entity – whether an individual, a company, a university or a non-profit organization – he or she has wide latitude with regard to the information that can be sought from existing government sources or directly from that concern. These procedures and protections generally apply equally to both contracts and grants.

But there are important constraints on the government's flexibility. For example, the government may not act arbitrarily and it must adhere to its own regulations and procedures. One of these is respect for due process before denying work to an individual or a contractor unless the government has an urgent need to protect its interests. There are also long-standing and appropriate procedures to protect small business from arbitrary agency decisions about the competency of these businesses to perform on federal contracts.

I mention all of this because it is important to recognize the many layers that exist to protect the government's interests and equities. It is equally important to recognize that this extensive regime of rules and regulations has evolved over many years in an effort to strike the proper balance between protecting the government's interest and maintaining a vibrant and effective marketplace that can support the government's diverse and increasingly complex mission. The government marketplace is vastly different and far more regulated than the commercial marketplace and we do not suggest that the two can be or should be identical. However, a balance is vital to ensure that the government has the access to the widest possible array of suppliers and solutions.

Unfortunately, no matter what laws or regulations are in place, a system this large and complex will have problems. With so many rules, it is not surprising that federal agencies or contractors may fail to adhere perfectly and completely to all of them. With so many dollars spent, unethical government and contractor employees will seek to enrich themselves at the expense of the taxpayer and the agency mission.

As PSC President Stan Soloway noted last year[1], no one wants to see his or her tax dollars go to companies or individuals that routinely and blithely violate the law. For the most part, the existing system prevents that from happening. Nonetheless, it is always appropriate to strive for improvement. While the discussion is wholly appropriate, overly simplistic statutory or regulatory language that ignores the policy, implementation, due process and other dimensions involved is the wrong way to start.

But because these cases are a distinct minority, policymakers should focus on how to appropriately punish such behavior while still guarding against imposing new and often untenable burdens on the entire federal procurement system. Overly punitive measures unnecessarily increase costs to government or its suppliers, all in the name of achieving the

[1] See Stan Soloway's 4/9/07 Washington Technology column, "The debate on contractor responsibility flares anew," online at http://www.washingtontechnology.com/print/25_05/30430-1.html.

unachievable. In the end, this is a delicate balancing act; this hearing offers an important opportunity to make progress toward that balance.

Indeed, each of the topics being discussed today raise complex and difficult questions of interpretation of and compliance with highly regulated areas, yet none of them have been adequately answered. Nor is this a new debate; it dates back to the Clinton Administration's so-called "blacklisting" initiative, ostensibly developed to ensure that the government did not award contracts to unethical companies or individuals. At that time, many of the government's own senior career contracting leaders opposed that initiative; then, as now, any such rule is both unnecessary and un-executable.

Acquisition Workforce

Before addressing the specific legislative proposals or SARA Panel recommendations on the agenda today, I want to address the issue of the federal acquisition workforce in its broadest context. Far from simplifying the life of the federal acquisition professional, many of the reforms included in the recently enacted legislation and recommended by the SARA Panel actually make the acquisition process more demanding for the people charged with its execution. One commentator summed up last year's legislative action as a series of "reports, restrictions and requirements." Furthermore, while "check the box" procedures are far easier to execute, they are also far less effective and frequently place procedural perfection over mission achievement.

Unfortunately, despite the near unanimous agreement that actions must be taken to address the challenges of the federal acquisition workforce, not enough has been done in the Executive Branch or by Congress to turn the tables.

To be sure, the mandatory competency survey separately conducted by DoD for a segment of its contracting workforce, and the voluntary competency survey for the civilian agencies' contracting staff conducted by OFPP, provide useful information to begin addressing the question of the current capabilities of the acquisition workforce. Yet there is little evidence that the military departments have substantially increased their investment in continuous learning and other developmental opportunities for the workforce. The situation is even worse across the civilian agencies where the availability of adequate funds to train and continuously improve the acquisition workforce has been woefully inadequate.

Five years ago, the Professional Services Council proposed the creation of the Acquisition Workforce Training Fund and we were pleased to see that recommendation included in the 2003 Services Acquisition Reform Act (P.L. 108-136); this year we recommended that the fund be made permanent and we are pleased that the fiscal year 2008 Defense Authorization Act took that action. That fund is a way to fence training funds for acquisition professionals; it is a start but it is not the whole solution.

Furthermore, the fiscal year 2008 National Defense Authorization Act includes an interesting provision creating an acquisition workforce development fund to help attract and retain the department's workforce. We will be closely watching the implementation of this provision. Other provisions in pending legislation, particularly S. 680, the "Accountability in Government Contracting Act of 2007" that passed the Senate last November, include important provisions we

support, such as creating a government-wide acquisition intern program, an acquisition fellowship, and a government-industry exchange program.

But more needs to be done. PSC believes that a smart, well-trained, and prepared customer makes the best customer. As PSC testified before the Senate last July[2], we need a kind of workforce "Marshall Plan" that aggressively addresses the hiring, retention, training, reward and development of the workforce we are asking to manage 40 percent of the discretionary budget of the federal government. We believe this initiative should include a special focus on emergency and contingency contracting. We also propose that Congress direct the creation of a government-wide Contingency Contracting Corps that is given special training in emergency and contingency contracting and would be immediately deployable when the mission need arises.

HR 3928: "Government Contractor Accountability Act of 2007"

One of the bills pending before the subcommittee that you asked for comment on is HR 3928, the "Government Contractor Accountability Act of 2007" introduced on October 23, 2007 by Congressman Chris Murphy and others. The bill directs federal government contracting officers to require "covered contractors" to submit for each contract entered into either (1) a certification that the contractor received 80 percent or less of its annual gross revenues from other federal contracts; or (2) a statement disclosing the names and salaries of the contractor's principal executive officer, principal financial officer, three most highly compensated other executives officers or individuals, and directors. Such certifications and any annual updates that are required to be submitted are to be made publicly available in searchable form through the Federal Procurement Data System. The term "covered contractor" means an entity that (1) received more than $5 million in annual gross revenue from federal contracts in the preceding fiscal year and (2) is not a publicly traded company required to file periodic reports under the Securities Exchange Act of 1934. The GSA administrator is required to issue regulations to implement these provisions.

Mr. Chairman, while PSC supports transparency and accountability in federal contracting and recognizes the importance of the government having access to all relevant information pertaining to contractor responsibility and awarded contracts, we oppose this bill in its entirety. The reason for this bill is clear and obvious – and focused on only one company under a unique set of circumstances. The bill requires the disclosure of irrelevant information for all covered contractors that neither current law nor the SEC requires of publicly held companies, and should not be so compelled. Government contractors, like any business, must be allowed to maintain the business model that works best for each individual company. A privately held company should not be punished for organizing itself in a manner that best suits its needs. Finally, the 80 percent threshold is purely arbitrary and is designed solely to get personal information from a selected company. It provides no information that the government can use to determine whether the contractor performs under the contract or even if it is profitable.

[2] See Stan Soloway's 7/17/07 testimony to the Senate Homeland Security and Governmental Affairs Committee, online at http://www.pscouncil.org/pdfs/solowaystatementhsgac07-17-07.pdf.

HR 4881: "Contracting and Tax Accountability Act of 2007" and related bills
Another bill pending before the subcommittee that you asked for comment on is HR 4881, the "Contracting and Tax Accountability Act of 2007," introduced on December 19, 2007 by Congressmen Ellsworth and Towns.

We strongly believe that private entities providing goods and services to the federal government should comply with federal, state and local tax requirements; companies that do not comply have an unfair competitive advantage over law-abiding contractors that pay their taxes.
Yet there is considerable rhetoric surrounding allegations that government contractors have reputedly violated tax laws but continue to receive contracts. If one carefully reads the Government Accountability Office (GAO) and other objective reports on the subject, very few government contractors are actually accused of, let alone been proven to have committed, tax fraud. In fact, the main point of the GAO report was that the system to link IRS tax collection procedures with agency payment processes were not working as planned. Since those reports were prepared, several regulatory and administrative actions have already been taken and more are in process.

In addition, businesses, governments and other taxpayers are already subject to numerous information reporting and withholding requirements. Federal agencies are specifically required to file information returns with the IRS with respect to awarded contracts, pursuant to Section 6050M of the Internal Revenue Code and Section 1.6050M-1 of the IRS regulations. This information return (IRS Forms 8596 and 8596-A) is due quarterly and is equivalent to the "Form 1099" so familiar to individual taxpayers who receive non-wage income.

HR 4881 provides that any person who has a "serious delinquent tax debt" shall be proposed for debarment from obtaining a government contract, pursuant to regulations to be issued by the Office of Federal Procurement Policy within 270 days after enactment. For grantees, the bill prohibits an award of such grant greater than the simplified acquisition threshold unless the certification required by the bill is made, pursuant to regulations to be issued by the Office of Management and Budget within 270 days after enactment. The bill requires federal agencies to require prospective contractors or grantees to (1) certify that they do not have such debt; and (2) authorizes the Treasury Secretary to disclose information describing whether such contractors or grantees have such a debt. The bill defines the term "seriously delinquent tax debt" as an outstanding tax debt for which a notice of lien has been filed in public records, but does not include a debt that is being paid pursuant to an agreement with the IRS or is being challenged by the taxpayer.

On April 20, 2007, Congressman Ellsworth introduced an earlier proposal, HR 1986, the "Federal Contractor Accountability Act of 2007," that provides an outright prohibition on the award of a contract in excess of the simplified acquisition threshold to any entity unless the entity certified that the contractor owed no federal tax debt.

On April 17, 2007, Congressman Towns and others introduced HR 1870, the "Contractor Tax Enforcement Act," to prohibit delinquent tax debtors from being eligible to be awarded federal contracts. In May 2007, this subcommittee favorably reported a revised version of HR 1870; under the substitute offered by Mr. Towns and adopted by the subcommittee, a contractor who

has a "serious delinquent tax debt," as defined in the substitute, shall be proposed for debarment pursuant to the requirements of the Federal Acquisition Regulations. The substitute covers procurements conducted by federal agencies under FAR Parts 14 and 15 and requires an entity that submits a bid or proposal to submit a certification that the offeror does not have a "serious delinquent tax debt" and a statement that the entity authorizes the Secretary of the Treasury to disclose to the procuring agency information limited to describing whether the entity has a serious delinquent tax debt. A serious delinquent tax debt is a debt greater than $2,500 and that has not been paid within 180 days after the assessment, but does not include a debt being paid in a timely manner pursuant to an agreement with the IRS.

PSC supported the Towns substitute, although we had other recommendations that were not included in the substitute. Nevertheless, the substitute properly relies on the debarment mechanism under current regulations to ensure that a contractor is provided with due process before being denied access to federal contracts, as already provided for under the responsibility requirements of federal law and the Federal Acquisition Regulations. We also supported the creation of a de minimus threshold for coverage and applauded the subcommittee's action to recognize the options available to a taxpayer to pay off any tax debt by excluding them from the definition of a tax delinquency.

As you know, there are two nearly identical provisions relating to contractor and grantee tax compliance included in the 2007 Consolidated Appropriations Act (P.L. 110-161; 12/26/07). Section 535 of Division B, the Commerce, Justice, Science Appropriations Act, provides that none of the funds appropriated or otherwise made available to the agencies covered by this act may be used to enter into a contract greater than $5 million or to award a grant in excess of $5 million unless the prospective contractor or grantee certifies in writing to the agency awarding the contract or grant that, to the best of its knowledge and belief, the contractor or grantee has filed all federal tax returns required during the three years preceding the certification, has not been convicted of a criminal offense under the Internal Revenue Code, and has not, more than 90 days prior to the certification, been notified of any unpaid federal tax assessment for which the liability remains unsatisfied, unless the assessment is subject to an installment agreement or an offer in compromise has been approved by the IRS and is not in default. Section 523 of Division G, the Departments of Labor, Health and Human Services and Related Agencies Appropriations Act, has almost identical language for agencies covered by that division.

Different formulations were included in six stand-alone, Senate-passed, fiscal year 2008 appropriations acts during calendar year 2007 and PSC opposed them because of their different requirements, scopes of coverage and treatment of thresholds, and other inconsistencies without apparent justification, among other reasons. Since the enactment of these two provisions, we are not aware of any guidance or interim procurement regulations that have been issued to implement these appropriations act restrictions, but we will be watching for them and intend to comment on them. While these appropriations act provisions do cover both contracts and grants, and unlike the Towns substitute adopted last year that we support, these provisions do not have any de minimus threshold for tax delinquency and do not differentiate between the types of contract awards covered by the provision.

Nevertheless, in light of the enactment of these two sets of provisions, we urge the subcommittee to hold off pursuing further legislation in this area at this time. While elements of Mr. Ellsworth's HR 4881 include useful provisions from the Towns substitute relating to the use of due process procedures for determining risk to the federal government and cover both contracts and grants, there are other provisions from the Towns substitute (such as the de minimus threshold and its proper focus on contract award types) that should be included in any legislation. We would prefer to see the limitation on appropriations from the Consolidated Appropriations Act replaced with stand-alone procurement legislation, although there are still too many details to be worked out before we could endorse any permanent legislation. We would welcome the opportunity to work with the subcommittee, and with Mr. Ellsworth and others, on the essential elements of any further legislation.

Furthermore, in a related matter, Section 511 of the Tax Increase Prevention and Reconciliation Act of 2005 requires all federal, state and local governments to automatically withhold three percent of all payments made to government contractors to address the so-called "tax gap;" this provision is scheduled to take effect for all payments made after December 31, 2010, regardless of when the contract is entered into. The sweeping requirements of Section 511 raise a number of serious concerns about fairness and implementation. Chief among them is that this withholding is based on revenues from government contract payments that bear no relationship to a company's taxable income. While we are awaiting Treasury tax and FAR contract regulations to implement the provision, PSC and dozens of other associations have joined together in a coalition, the Government Withholding Relief Coalition, to seek the repeal of this provision in conjunction with the enactment of increased information reporting that we believe offer a better solution. We are pleased that bi-partisan legislation has been introduced in the House, and a companion bill has been introduced in the Senate, to repeal this provision.

HR 3033: "Contractors and Federal Spending Accountability Act of 2007"

Another bill pending before the subcommittee that you requested comment on is HR 3033, the "Contractors and Federal Spending Accountability Act of 2007," introduced on July 12, 2007 by Congresswoman Maloney and Mr. Towns. We appreciate the subcommittee holding an additional hearing on this legislation beyond the July 18, 2007 hearing.

While PSC supports the objectives of transparency and accountability in federal contracting and recognizes the importance of the government having access to all relevant information pertaining to contractor responsibility and the source selection decision, we do not support HR 3033 in its present form. It is possible to provide substantial transparency while protecting other rights and the reasonable needs of the marketplace. But doing so requires balance and thought; unfortunately, as this proposal demonstrates, the trend could be headed in the wrong direction. We believe the bill (1) undercuts the fundamental principles of due process; (2) fails to establish fair and objective criteria for information to be collected to ensure such information is properly used; (3) presumes, without supporting evidence, that current suspension and debarment rules are inadequate or not fully used; and (4) demands, unrealistically, that government contracting officers make judgments on highly complex legal issues. Here again, we would welcome the opportunity to continue to work with the subcommittee and Mrs. Maloney on the development of a set of proposals that will provide federal agencies with accurate, actionable, information.

Section 3 of the bill requires the GSA administrator to establish and maintain a database regarding the integrity and performance of federal contractors for use by government contracting officers, officials having authority to suspend or debar contractors, and officials having authority over grant assistance. The database must include information regarding civil, criminal and administrative proceedings initiated or concluded by the federal government and by state governments against contractors or grant recipients. Specifically, for every person awarded a federal contract or assistance, the database must include the following information for the past five years: (1) information regarding all proceedings against that person; (2) each proceeding recorded must include a brief description of the proceeding, including any amount the person paid to the federal or state government; (3) all federal contracts and assistance awarded to the person that were terminated; (4) all federal suspensions and debarments; (5) all federal suspension and debarment show cause orders; and (6) all administrative agreements signed.

PSC does not conceptually oppose a government-wide database that includes objective information based on factual, government-provided input that includes sufficient descriptors to fully explain the nature of the reported data, the nature of the remedial action taken by the subject company, and the relative severity of the infractions cited. Unfortunately, the legislation does not address any of these elements. Furthermore, to the extent that the database includes information on fines paid or settlements, fundamental due process mandates that it only include those judicial or administrative actions that result in a finding or admission of guilt.

Section 4 of the bill requires that the Federal Acquisition Regulations (FAR) suspension and debarment regulations be amended six months after enactment to provide that a person be presumed ineligible for the award of a federal contract or for assistance if the person has received a judgment or conviction for the same offense twice within any three-year period, provided each offense independently constitutes a cause for debarment. The presumption may be rebutted only if the person demonstrates present responsibility and has corrected the conditions that gave rise to the violations. Finally, the section gives an agency suspension and debarment official the power to deem evidence of repeat violations as sufficient reason to find that immediate action is necessary to suspend the person under the regulations until the person can show present responsibility and has corrected the conditions that gave rise to the violations. PSC opposes this section.

The current suspension and debarment process works when used appropriately. Numerous companies have been suspended or debarred when their company behavior warrants it. Moreover, the legislation presumes that the method for “punishing” a contractor is suspension and debarment, a major change in the regulatory standards which currently apply to federal contracting; in so doing, the provision may impose a punishment that would exceed the nature of the offense. Finally, this provision improperly presumes that two occurrences equal a “pattern of abuse” that warrants suspension, without offering any context or perspective relative to the nature or severity of those occurrences or the remedial action the company may have taken. Yet even this approach raises a host of questions: when is a “pattern of abuse” sufficient to merit suspension? How do we ensure the due process protections granted by our laws and regulations are adhered to? What violations are significant enough to merit suspension or debarment? Do minor fines belong in the same category as major felonies? How do we treat administrative findings that are under review? These and other issues raise difficult, complex and often

troubling issues. While the discussion is wholly appropriate and we welcome the opportunity to participate in them, overly simplistic statutory or regulatory language that ignores the policy, implementation, due process and other dimensions of these issues is the wrong way to start.

Section 5 of the bill requires the FAR to be amended six months after enactment to require that any bid for a federal contract or request for assistance include the offeror's disclosure in writing, covering the five years preceding the bid or request, of (1) all federal or state suspension or debarments; (2) all suspension and debarment show cause orders; (3) all civil, criminal and administrative proceedings; (4) all administrative, civil, and criminal settlements, agreements, consent decrees, enforcement actions, corrective actions, compelling reason waivers and other similar judgment, orders, decisions, and final dispositions with respect to federal contracts or assistance that the person is implementing; and (5) all federal contracts and assistance awarded to the person that were terminated for default. PSC opposes this provision because it is overly broad and unfairly links any proceeding against a company to an implication of bad behavior rather than solely for those where a judgment against, or admission of guilt, resulted. The mere existence of an action does not equate to substantial wrongdoing by the company; for example, a show cause order is not the same as a decision to debar or suspend. Settlements with no finding of guilt do not, under our system of laws, equate to guilt. Finally, the five year period is too long; it should be limited to three years and focus only on the performance history that is relevant to the immediate request for proposal, as is the case with the current regulations relating to the use of past performance information.

Acquisition Advisory Panel Recommendations

In 2003, as part of the Services Acquisition Reform Act (P.L. 108-136), Congress created the Acquisition Advisory Panel, sometimes referred to as the "1423 Panel" after the section of the law creating it and sometimes referred to as the "SARA Panel." The panel, appointed by the Administrator of the Office of Federal Procurement Policy, began its work in February 2005 and issued its final report in July 2007, although the report is "dated" January 2007. The panel made 89 discrete recommendations regarding federal acquisition practices in seven broad functional areas.

PSC was pleased to co-chair a multi-association working group comprised of six associations that was formed by industry to track the panel's work, ensure industry views were presented, and to provide the panel members and policymakers with industry's views on the panel's interim and final recommendations. Our industry working group presented over 1,000 pages of testimony and supporting information to the panel and we actively participated in the panel's public meetings and working group sessions, to the extent permitted by the panel, and at almost every stage of the panel's deliberations. PSC testified twice before the panel's public meetings.

We compliment Ms. Madsen, the chairman of the panel, and all of the members who served on the panel. The assignment given the panel was huge and its resources small. But its output was generally well documented and insightful. Panel members served with personal and professional dedication and with an honest commitment to address important federal procurement policy issues. Even though our working group did not agree with all of the panel's final recommendations, the panel's recommendations addressed many of the then current federal procurement policy issues.

We also compliment the Government Accountability Office for their extensive work in this area and their detailed December 2007 report (GAO 08-160; 12/20/07) on the panel's final recommendations.

GAO reported that the Office of Federal Procurement Policy (OFPP) opposed only two of the panel's final recommendations: one proposing to change the name of the current Contracting Officer Technical Representative (COTR) to Contracting Officer Performance Representative (COPR) and one allowing for protests of task and delivery order contracts over $5 million awarded under multiple award contracts. There are other panel recommendations that are still under OFPP review.

Our industry working group supports many of the panel's recommendations and we have been working with the Office of Federal Procurement Policy and others on the implementation of them. Attached for your information is the March 12, 2007 final package of detailed industry comments on all of the panel recommendations that had an effect on industry. In several instances, our recommendations provide alternatives for the Congress and others to consider when evaluating these specific recommendations. In addition, the associations in this working group and other associations submitted in early 2007, as we have for many years previously, a separate set of industry's legislative recommendations for improvements to the acquisition process.

However, many of the SARA Panel's final recommendations regarding commercial practices would, in our view, impede the federal government's use of an effective and appropriate commercial-like acquisition process. Several of the panel's recommendations relating to commercial practices also take a step backwards from the reforms of the Clinger-Cohen Act and subsequent congressional reform measures.

In your letter of invitation, you asked us to focus on that subset of the panel's final recommendations that require legislation. Based on the GAO's December 2007 analysis, 23 of the panel's 89 recommendations either "require legislative action" or "might be addressed by legislative action."

Even before the panel's report was finalized, legislation was introduced and considered acting on the topics addressed by the panel. For example, S. 680, introduced by Senators Collins and Lieberman on February 17, 2007 and that passed the Senate on November 7, 2007, addressed several of the panel's recommendations on the federal acquisition workforce and on protests of task and delivery orders under multiple-award contracts, among other provisions. The Defense Department submitted a legislative proposal in March 2007 to make changes to certain commercial item procurement provisions; these were incorporated into the original version of the fiscal year 2008 National Defense Authorization Act that was introduced on request and some were subsequently enacted.

Since the panel's final report was issued, the enacted version of the fiscal year 2008 National Defense Authorization Act (P.L. 110-181; 1/28/08) included several of the panel's recommendations for legislation, although not in identical form.

Section 805 requires DoD only, within six months after enactment, to amend its regulations concerning the procurement of commercial services for or on behalf of the department. Such services that are not sold competitively in substantial quantities in the commercial marketplace, but are "of a type" offered for sale and sold competitively in the commercial marketplace, may be treated as commercial items for purpose of the Truth in Negotiations Act only if the contracting officer determines that the offeror has submitted sufficient information to evaluate the reasonableness of price.

Section 815 amends provisions applicable to the Department of Defense to add the requirement that the offeror has submitted sufficient information to evaluate the reasonableness of the price for a major system.

Section 843 prohibits, on a government-wide basis, the award of a task or delivery order awarded more than four months after enactment that exceeds $5 million, unless the "fair opportunity to compete" includes five specifically provided statutory elements, including an opportunity for a post-award debriefing. In addition, for three years, the provision authorizes an offeror to protest exclusively at GAO the award of any task or delivery order valued over $10 million.

Finally, Section 855 mandates that OFPP create an Associate Administrator for Acquisition Workforce Programs in order to administer the acquisition workforce training fund, develop a strategic human capital plan for the acquisition workforce, review and provide input to individual agency acquisition workforce succession plans, and make recommendations regarding appropriate programs, policies and practices to increase the quality and number of acquisition officials.

Task Order Protests

Mr. Chairman, PSC and our multi-association working group strongly opposed provisions in the panel's report, in S. 680, and in the National Defense Authorization Act that would allow protests to be filed on task order awards under multiple award contracts. Before the enactment of the FY 08 NDAA, the law prohibited such protests except in limited circumstances, although protests were and are fully allowed when the initial master contract is competed and awarded. We recognize that task order buying now accounts for nearly half of all acquisitions in the services marketplace but this is one area in which the views of the industry are probably the most relevant! After all, if there is growing concern about the government's adherence to the rules of fair play contained in the FAR and administered by the agencies during the acquisition process, it is the companies that would be the first to call for more opportunity for redress. Yet across industry there is a resounding consensus that adding protests to task order awards is unnecessary and would be costly and time consuming. We did and do support that portion of the panel's recommendation, and Section 843 of the 2008 Defense Authorization Act, that, among other steps, requires post-award debriefings for task orders. We are pleased that the Congress provided for a subset of this protest authority to provide an opportunity to evaluate the true impact of this provision on the acquisition system.

Commercial Practices

One recommendation in the Commercial Practices section of the panel's final report recommends authorizing GSA to establish a new Information Technology Schedule for professional services under which prices for each order are established by competition and not based on posted rates. While the panel's description of this recommendation is confusing and it was the subject of numerous exchanges, we support a competitive environment for the schedules; many agency purchases are already being made through competition and, of course, GSA Schedule holders have broad authority to reduce prices to meet specific competitive opportunities. We did not believe that legislation is necessary for GSA to implement this recommendation.

Small Business

Several of the panel's recommendations in the Small Business chapter require legislation.

With respect to the recommendation to adopt legislation that would provide for parity between the 8(a), HUBZone, and Service-Disabled Veteran Owned small business programs, we believe the current mixture of statutory and administrative priorities adds significant policy obstacles to further orienting individual agency actions, but our working group took no position on what the specific hierarchy among the various small business programs should be.

We support the panel's recommendation to enact government-wide legislation to prohibit the use of the contracting technique for tiered evaluations commonly called "cascading." The panel's recommendation goes further than the current provision applicable only to the Defense Department that generally limits cascading. This cascading technique is inappropriate and a poor proxy for proper market research; it is also patently unfair to firms that submit offers that will never be considered, including particularly small business.

The panel recommended amending the Competition in Contracting Act to provide agencies with the discretion to reserve contracts for certain categories of small business, except for 8(a) awards. Our working group does not oppose providing guidance on the practice of agencies "reserving" prime contracts for small business in full and open competitions; we believe agencies are already familiar with the practice and are taking advantage of appropriate opportunities. However, over the past year, congressional actions have implicitly rejected this recommendation through legislative provisions to foster greater competition in federal procurement, to require full and open competition in certain circumstances, and to restrict agency flexibility on awards of certain task and delivery orders under multiple award contracts.

Appropriate Role of Contractors

We oppose completely the panel's recommendation to remove the current prohibition on awarding personal services contracts. In our view, only a limited, more targeted approach to the use of personal services contracts is called for. We do not support that portion of the panel's recommendation that would impinge on the business relationship between the government and the contractor and between the contractor and its employees.

Notwithstanding our objection to removing the prohibition on awarding personal services contracts, we support that portion of another recommendation that requests OFPP to develop

guidance on the circumstances that agencies should address in determining whether, and to what extent, targeted exceptions to the prohibition on personal services contracts might be appropriate. However, since this recommendation goes beyond procurement policy, others must be involved in the review, discussion and decision.

Conclusion

Mr. Chairman, the federal procurement system is a complete ecosystem; from requirements development to solicitation, award, performance and contract closeout, each phase of the process is interdependent on each other and on multiple parallel processes. The federal procurement rules are complex – often unnecessarily so – and provide many opportunities for honest mistakes. Intentional misconduct is rare and should be fully prosecuted, but even the allegations diminish the trust and confidence in the performance of the acquisition process. There must be urgent attention to the federal acquisition workforce and to the relationships between agency mission needs and acquisition outcomes. Problems must be thoroughly and factually analyzed to ensure that root causes are properly identified and its effect on the federal procurement ecosystem understood. Finally, to be beneficial, any legislative and regulatory changes must be narrowly targeted and address both the policy and the implementation issues.

On behalf of the Professional Services Council, I appreciate the opportunity to provide our comments on the important issues before the subcommittee. We look forward to working with the subcommittee as you continue your deliberations. I look forward to any questions you may have.

STATEMENT REQUIRED BY HOUSE RULES

In compliance with House Rules and the request of the Committee, in the current fiscal year or in the two previous fiscal years, neither I nor the Professional Services Council, a non-profit 501(c)(6) corporation, has received any federal grant, sub-grant, contract or subcontract from any federal agency.

BIOGRAPHY

Alan Chvotkin is Executive Vice President and Counsel of the Professional Services Council, the principal national trade association representing the professional and technical services industry. PSC is known for its leadership in the full range of acquisition, procurement, outsourcing and privatization issues.

Mr. Chvotkin joined PSC in November 2001. He draws on his years of government and private sector procurement and business experience to facilitate congressional and executive branch knowledge of and interest in issues facing PSC's membership. Previously, he was the AT&T vice president, large procurements and state and local government markets, responsible for managing key AT&T programs and opportunities. Earlier at AT&T, he was vice president, business management, responsible for the government contracts, pricing, compliance and proposal development organizations. From 1986 to 1995, he was corporate director of government relations and senior counsel at Sundstrand Corporation. Mr. Chvotkin also was a founding member of industry's Acquisition Reform Working Group.

Before joining Sundstrand, Mr. Chvotkin spent more than a dozen years working for the U.S. Senate. He first served as professional staff to the Senate Budget Committee and to the Senate Governmental Affairs Committee. He became counsel and staff director to the Senate Small Business Committee, and then counsel to the Senate Armed Services Committee.

He is a member of the Supreme Court, American and District of Columbia Bar Associations. He is also a member of the National Contract Management Association and serves on its national board of advisors and as a "Fellow" of the organization. Alan is also a two time "Fed 100" winner. He has a law degree from The American University's Washington College of Law, a master's in public administration and a bachelor's in political science.

Myth: There is insufficient oversight of federal contracting which leads to rampant waste, fraud and abuse.

The Facts:
According to the Government Accountability Office (GAO), various Inspectors General, and others, fraud and abuse is not nearly as prevalent in government contracting as some might believe.[3] The real challenges facing government acquisition are tied to the government's ability to plan, coordinate, and manage its programs from the outset, regardless of whether the work is performed by contractors or government personnel.

The Oversight System Works
The government has an effective interlocking system of oversight in place to weed out waste, fraud and abuse that includes agency contracting officials, auditors, Inspectors General, the Government Accountability Office, and Congress. In fact, in proportion to the size of government contracting—which comprises millions of transactions annually with a total value of more than $400 billion—the oversight system works well. This is demonstrated by the fact that almost all problem contracts that have emerged have been uncovered through existing management and oversight processes. But overall, there is little evidence of widespread fraud by government contractors. In fact, the Comptroller General told a Congressional hearing in 2007 that, "a vast majority of federal contractors do a good job."[4] And according to the Special Inspector General for Iraq Reconstruction (SIGIR), "fraud has not been a significant component of the U.S. contracting experience in Iraq."[5] In other words, a lack of after-the-fact oversight is not the real problem facing federal contracting.

The Real Challenges Lie in Sound Management, Planning and Resources
Clearly, problems do exist. Reports from the GAO, SIGIR, and almost every other objective source have all concluded that problems in contracting stem primarily from inadequate planning and communications, poor definitions of the government's needs, and a shortfall in acquisition personnel with the skills and training required to meet the government's increasingly complex missions.[6] These problems are likely to grow as the federal workforce ages and the government struggles to recruit, train, and retain its next generation of employees. These are important issues that merit significant attention, since sound management and upfront planning is the best form of contract "oversight."

[3] Special Inspector General for Iraq Reconstruction Lessons Learned reports on Human Capital Management; Contracting and Procurement, and Program and Project Management, and the Nov 1, 2007 Gansler Commission Report, titled "The Commission on Army Acquisition and Program Management in Expeditionary Operations, and David Walker's testimony to the Committee on Homeland Security and Governmental Affairs hearing "Federal Acquisition: Ways to Strengthen Competition and Accountability" on July 17, 2007
[4] David Walker's testimony to the Committee on Homeland Security and Governmental Affairs hearing "Federal Acquisition: Ways to Strengthen Competition and Accountability" on July 17, 2007.
[5] Special Inspector General for Iraq Reconstruction speech, October 1, 2007
[6] Special Inspector General for Iraq Reconstruction Lessons Learned reports on Human Capital Management; Contracting and Procurement, and Program and Project Management, and the Nov 1, 2007 Gansler Commission Report, titled "The Commission on Army Acquisition and Program Management in Expeditionary Operations.

Myth: The government's reliance on contractors has exploded in the last five years, creating a "shadow workforce" consisting of nearly 8 million contractors.

The Facts:
According to the latest data available from the Federal Procurement Data System and the Office of Management and Budget, the government's reliance on contractors has grown roughly 15 percent since 9/11—a significant increase, but far from the explosion some suggest.[7] And claims about the size of the "shadow workforce" are both wildly exaggerated and based on faulty analysis.

Contract Growth in Context
While the total dollars spent on contracting have nearly doubled since 2001—mostly as a result of the government's need for new and increasingly complex capabilities in the post-9/11 world—that growth has come at a time when the overall budget and mission of the government has also grown substantially. Thus, when looked at proportionally, as a percentage of government operations, the role of contractors has grown about 15 percent—a significant amount but not quite the unconstrained growth some assume.

The Myth of the "Shadow Workforce"
The growth in contracting is often accompanied by the claim that government contractors make up a "shadow workforce" that is now nearly four times the size of the federal workforce. This claim is simply wrong because:

- The econometric model used in the analysis measures total economic impact, including direct and indirect employment.[8] While this model is useful for measuring the total regional impact of a new manufacturing plant, for instance, it is simply not an effective tool to measure the number of contractors actually doing work in support of the government.
- The analysis fails to distinguish between federal contract dollars spent on acquiring equipment, hardware and goods which the government has never produced, and those spent on acquiring services which might have been or could be performed by government employees.
- It requires acceptance of a mathematical impossibility—namely that for less total dollars expended on personnel, the private sector is providing the government with four times as many people.

When examined in the context of the growth of the government's mission and budget, and its growing human capital and technology challenges, it is not surprising to find an increase in the amount of work being done by the private sector. Addressing the challenges inherent in that growth requires a focus on people, resources, and organizational structure, and should be based on a factual and accurate baseline.

[7] Federal Procurement Data System NG XML Files FY 1997-2006 Categories A-Z and Office of Management and Budget
[8] Regional Input/Output Modeling System, Department of Commerce

**Myth: As federal contracting has grown,
competition for federal contracts has diminished greatly.**

The Facts:
Approximately 65 percent of federal contracts are awarded using competitive procedures—a percentage that has held steady since the late 1990s.[9] Claims that the system is rife with "no bid" contracts, or that the use of "full and open" competition has dropped dramatically, are based on inaccurate information or misperceptions.

Competition levels have remained steady
Federal contracting, along with the broader federal mission and budget, has grown significantly since 9/11, largely due to the increase in new, critical, national and homeland security challenges. Yet, while in absolute dollar terms the money spent using other than competitive procedures has grown in the past few years, proportionally the levels of competition today are just about the same as they were in the late 1990s.

Just as in the private sector, competition for government contracts is the best and preferred way to obtain the goods and services the government needs. Understanding the differing kinds of competition in federal contracting is essential to understanding how or where competition rules and policies warrant attention or change.

Defining "competition"
The terms "full and open competition," "competition" and "competitive procedures" are not synonymous.

In government contracting, "full and open competition" refers to contracts that are open to bidding by all qualified companies. However, there are significant portions of federal contracting that are usually very competitive but not available to all aspiring bidders and thus not awarded under "full and open competition."

Set Asides for Woman, Minority and Service-Disabled Owned Firms
For example, some contracts are specifically "set-aside" as part of the government's socioeconomic initiatives to help small and disadvantaged businesses compete for federal procurement dollars. Businesses qualified to compete for these contracts are limited to those in certain categories, such as small, disadvantaged, woman-owned, minority-owned, service-disabled veteran owned, and others. As such, while they are competing for work, work set-aside under these programs is not considered "full and open."

Multiple Award Contracts
Similarly, Multiple Award Contracts (MAC), under which a significant portion of government work is acquired, are overarching contracts awarded, usually under full and open competition, to a select number of winning firms. The actual work on a MAC is then competed again at the task-order level. Those competitions are not "full and open" because the competition is limited to only the companies who won the right to perform work under the MAC. For example, in July, GSA selected 29 firms who are now eligible to compete for task orders under the Alliant contract—a contract that provides federal government agencies a centralized source to acquire integrated information technology products and services worldwide.

[9] Federal Procurement Data System NG XML Files FY 1997-2006 Categories A-Z and Office of Management and Budget

GOVERNMENT SERVICES Insider

Policy & Regs: Moving Farther Away from the FAR

Alan Chvotkin, Executive Vice President and Counsel, Professional Services Council

On April 1, 2004, I joined with many in government and industry in unveiling and saluting the new, unified, Federal Acquisition Regulation (FAR). The FAR assembled in a single, comprehensive body the disparate procurement regulations that governed purchases by DoD, NASA, and other federal agencies. Its goal was to enhance consistency, uniformity and predictability across all federal procurements and minimize differences when doing business within agencies.

Even while agencies were authorized then (and still) to supplement the FAR with agency-unique requirements, the expectation was that they would narrowly address organizational reporting requirements or specialized contracting methods, not serve as a loophole for separate contracting regimes. Many agencies have issued their own substantive procurement regulations to overcome adverse publicity, bid protests or court decisions or to respond to critical reports from the oversight communities. With all these exceptions to the uniform FAR, the promise of consistency, uniformity and predictability has not been kept. Today, with federal procurement spending more than $400 billion, and despite continued efforts to maintain a unified FAR, we are coming full circle—back to the robust, agency-unique, procurement rules that characterized the federal procurement system more than two decades ago.

From its earliest days, some questioned whether the Defense Department fully appreciated the value of FAR integration. Its Defense Federal Acquisition Regulations Supplement (DFARS) has remained the most comprehensive of the agency supplements. And DoD has maintained its own acquisition regulations council to ensure that its perspectives are fully protected. USAID's longstanding unique procurement regulations were largely obscured from public attention and FAR integration until the agency assumed responsibility for early Iraq contracting.

GSA has also contributed to the problem. The Schedules program operates under only a few paragraphs of FAR regulations, while the preponderance of policy and acquisition regulations are in the GSA acquisition supplement.

Congress has also contributed significantly to undercutting the uniform FAR. For more than 20 years, the annual National Defense Authorization Act has included numerous acquisition policy provisions applicable just to the Defense Department — and requiring a plethora of DoD-specific acquisition regulations. In 1995, Congress granted the FAA an exemption from most procurement statutes and the FAR, letting the agency create its own regulations.

In 2002, Congress directed the new Transportation Security Administration to follow the FAA's alternative procurement system, although the fiscal year 2008 consolidated appropriations act repeals this exemption effective next fiscal year. More recently, Congress has imposed a raft of unique purchasing requirements on the Department of Homeland Security.

Impacts. These measures further fracture federal procurement policy into agency-size bites and create barriers across much of the government. This makes it harder to attract, retain and train a government-wide acquisition workforce, and it also limits the replicability of business practices and experiences. In addition, FAR fragmentation inhibits reducing barriers to competition, particularly for smaller businesses that can offer quality goods and services across agency boundaries.

For many firms, regardless of size, that specialize in work with only one agency, these agency-specific traits may not be of much significance. But more agencies are relying on other agencies' contracts, through a variety of inter-agency arrangements, to meet their requirements.

While larger firms may have sufficient staff or customer base to justify (and recover) the investment required to understand and comply with these specialized provisions, the cost likely outweighs the benefits to them. But it also reduces potential competition from firms that are new to the market, new to an agency, or just interested in expanding their business.

What's a contractor to do?

First, until there is a change, you will have to master the governmentwide rules as well as the ones unique to the agency where you

are seeking or doing business. This requires constant vigilance and study to keep up with the changes.

Second, climb on the advocacy train for minimizing agency-unique requirements—whether initiated by Congress or the Executive Branch. Make sure that senior agency acquisition officials and your trade associations join in the effort on your behalf.

Finally, critically review agency solicitations and raise questions about the need for agency-unique requirements and contract clauses. Issues raised during your market research and the pre-solicitation phase can be particularly valuable.

The 1984 vision of a single governmentwide, uniform, acquisition regulation remains within reach with the support of the acquisition community and a targeted effort. The entire federal procurement system can then benefit from a return to the original purpose of the FAR.

GOVERNMENT SERVICES Insider

Final Response and Comment of the

Aerospace Industries Association
Contract Services Association
Electronic Industries Alliance
Information Technology Association of America
National Defense Industrial Association
Professional Services Council

To the recommendations of the

Acquisition Advisory Panel

March 12, 2007

MULTI-ASSOCIATION COMMENTS ON
THE SECTION 1423 ACQUISITION ADVISORY PANEL'S
FINAL PANEL RECOMMENDATIONS
CHAPTER 1 - COMMERCIAL PRACTICE

Recommendation 1: The definition of stand-alone commercial services in FAR 2.101 should be amended to delete the phrase "of a type" in the first sentence of the definition. Only those services that are actually sold in substantial quantities in the commercial marketplace should be deemed "commercial." The government should acquire all other services under traditional contracting methods, e.g., FAR Part 15.

SUMMARY OF PANEL'S RATIONALE

The Panel observed that the regulatory definition of commercial services is broader than the statute and asserted that the regulatory definition can be read to include services not sold in substantial quantities in the marketplace. In fact, it asserted that, "Virtually all types of services are now deemed commercial (Final Draft Report Chapter 1, Pg. 1-1). The statute defining commercial services does not include the phrase "of a type." The regulatory drafters added the phrase "of a type" to the statutory definition of commercial services. The Panel stated that its research and basic statutory construction makes clear that when Congress used the phrase of a type for items, but not for services, it did not intend "of a type" to apply to services. The Panel further asserted that the "of a type" language allows the government to acquire under FAR Part 12 services that are not sold in substantial quantities in the market place, although the Panel provided no supporting examples. The Panel proposes that the FAR be revised to drop "of a type". See also Recommendation 6 [Time-and-Materials Contracts].

The Panel concluded that the current statutory definition of "commercial services" was adequate and does not need to be changed because it correctly focuses on the key concept - whether the services are sold in substantial quantities in the marketplace. Also, the Panel concluded that the current statutory definition of "commercial items" was adequate and does not need to be changed.

MULTI-ASSOCIATION RESPONSE

We begin by noting that the Panel's recommendations do not enumerate the benefits commercial type contracting has brought to the federal procurement process. Instead its recommendations on commercial procurement focus on restricting the use of commercial practices, particularly when procuring services.

A key recommendation with which we must disagree is the Panel's recommendation to delete the phrase "of a type" in the first sentence of the definition of "stand alone" commercial services at FAR 2.101. The Panel mistakenly concludes that services sold in substantial quantities to the general public are no longer sold in substantial quantities to the public when they have been modified slightly to meet government needs, that is, they are "of a type" of service and thus should not be procured as commercial services.

The Panel's recommendation could require that the service provided to the government must be *exactly* the same as that provided in the commercial market.

MULTI-ASSOCIATION DISCUSSION

The Panel makes no case for removing the "of a type" provision from FAR 2.101. This provision was adopted when FASA was initially implemented in the FAR in 1995. At that time, the government reasoned that stand-alone services existed that were ***not*** based on catalog (or market) prices but still were "clearly commercial in nature and should be eligible for streamlined acquisition" (FAR Case 94-970). Now, without any reported justification, the Panel challenges this reasoning by observing that, at that time, the Commercial Item Drafting Team referred only to "grass cutting and janitorial" services. The Panel is mistaken about the context of those examples, as used by the Commercial Item Drafting Team. The Commercial Item Drafting Team, the FAR Council, and the FAR Secretariat understood that "grass cutting and janitorial" services were only examples of a variety of stand-alone services that were clearly commercial in nature and that otherwise fall under the "of a type" provision. If the services the government procures are generally of the same types sold commercially, the government should use the FAR's commercial procurement techniques as the most cost effective and efficient process available to it. Indeed, the Panel's recommendation would cause the government to impose FAR Part 15 government-unique requirements (including certified cost or pricing data, Cost Accounting Standards compliance, unilateral change order provisions, etc.) whenever the services being procured are not exactly the same as those provided in the commercial marketplace, often because the government has somewhat different needs. Many commercial service providers, including most small businesses, do not have the infrastructure in place to comply with the government-unique requirements applicable to non-commercial acquisitions. The Panel's recommendation will dampen competition and opportunities for small business service providers.

Congress understood, as well, that the "of a type" phrase used in the regulations accomplishes Congress' purpose of promoting reliance on the commercial marketplace, including, in particular, the Report of the House Committee on National Security, National Defense Authorization Act for Fiscal Year 1996, House of Representatives Report No. 104-131 (June 1, 1995). The Committee was commenting on the Administration's proposed regulations for implementing FASA, which included the "of a type" provision for stand-alone services, and noted:

> In the first category - ***accomplishing what was intended*** - the draft commercial contracting regulations clearly were drawn on a clean slate, rather than just making patchwork changes to existing regulations. Rather than being risk adverse, this approach relies on the forces of the commercial marketplace for quality, terms, prices, and other critical factors … (emphasis added)

Section 1432 of the Services Acquisition Reform Act further demonstrates that Congress accepted the use of "of a type" in defining commercial services. Specifically,

section 1432 authorized the government to procure commercial services using time-and-materials or labor-hour contracts for those categories of services determined by the Office of Federal Procurement Policy to be **of a type** of commercial services that are commonly sold to the general public through use of time-and-materials or labor hour contracts." Accordingly, the current FAR language matches Congressional intent and adopting the Panel's recommendation would depart from that intent.

The "of a type" language does not allow the government to acquire under FAR Part 12 services that are not sold in substantial quantities in the market place. The Panel's report provides no evidence that for services, the "of a type" language is leading to abuses. The Panel's analysis also rests on the weak foundation of Finding #8, "Statutory and Regulatory Definitions of Commercial Services," which inaccurately traces the history of FAR 2.101 and omits information material to these issues in the process[1]. The importance of the "of a type" language for services is no more apparent than in the Aalco Forwarding decision (B-277241)(October 9, 1997). In this case, the GAO notes that the MTMC was encouraged by Congress to reengineer the processes for military household goods moving. MTMC completed extensive market research and established a reengineered process based on commercial business "best practices." MTMC released a solicitation based on these best practices and utilizing the flexibilities provided by Part 12 and the "of a type" language in the commercial item definition. A protest was filed on the basis that the movement of household goods of military personnel is not like the movement of household goods of civilian personnel. The GAO denied the protest and noted that while there are unique military requirements, the moving services provided to military personnel "...are **essentially** the same moving services provided in the commercial market." This point is important because without the "of a type" language in the services portion of the commercial item definition, MTMC would have been prohibited from using Part 12 because the services were not exactly the same as those in the commercial market, but only "essentially the same…"

The rationale for using the "of a type" provision within the definition of stand-alone commercial services at FAR 2.101 is as sound today as it was in 1995 and is supported by the Panel's own observation that the government tends to not buy what is exactly sold in the commercial marketplace. Without the "of a type" phrase, the commercial services definition could be read as requiring that a stand-alone service be exactly the same as that sold in substantial quantities in the commercial market, notwithstanding the fact that government-unique requirements and needs require slight changes in how the service is provided. It is a virtual certainty that the Panel's recommendation for a more restrictive definition of commercial item as it applies to stand-alone services will impair federal agencies' ability to procure professional and technical services from the commercial marketplace to meet their mission requirements.

The clearest and most appropriate definition of commercial items services is to remove the distinctions between commercial supplies and commercial services within the

[1] These errors were noted in our comments to the Panel on July 19, 2006, Multi-Association Comments on Working Draft of Parts I & II from the Commercial Practices Working Group, (particularly pp.33, 35, 36), available on the Panel's website at http://www.acquisition.gov/comp/aap/psr.html. Errors continue to be reflected in the draft Final Report.

definition of commercial items. Industry made such a recommendation at the request of DoD and previously provided it to the Panel. We specifically recommended striking references to services at 41 U.S.C. § 403(12)(E) and (F) and revising 41 U.S.C. § 403(12)(A) to read as follows:

> Commercial item means - (1) Any item, ***including any supply or service***, other than real property, that is of a type customarily used by the general public or by non-*Governmental* entities for the purposes other than *Governmental* purposes and—
>
> > (i) Has been sold, leased, or licensed to the general public; or
> >
> > (ii) Has been offered for sale, lease, or license to the general public; . . .

This definition would simplify the FAR definition and rightly focuses on whether the type of service is customarily sold to the general public or non-governmental entities. Moreover, the requirement that the contracting officer determine that the government's awarded price is reasonable and in the government's best interest – and the analysis to support that determination – are already provided for in the price reasonableness provisions of the FAR.

Recommendation #2: Current policies mandating acquisition planning should be better enforced. Agencies must place greater emphasis on defining requirements, structuring solicitations to facilitate competition and fixed-price offers, and monitoring contract performance. Agencies should support requirements development by establishing centers of expertise in requirements analysis and development. Agencies should then ensure that no acquisition of complex services (e.g., information technology or management) occurs without express advance approval of requirements by the program manager or user and the contracting officer, regardless of which type of acquisition vehicle is used.

SUMMARY OF PANEL'S RATIONALE

The Panel's recommendations are based on its findings that the government's requirements process for services acquisition is deficient in several respects. This recommendation is intended to put "teeth" into the process of defining requirements for services contracts. Without review and sign off from the senior program executive and the contracting officer (CO), no acquisition may be conducted. This approach is consistent with commercial practice that requires "buy-in" by those portions of the company with an interest in the transaction. The sign-off may occur at the time of the initial business clearance memorandum, or an equivalent point - but must be accomplished without regard to the type of procurement process or vehicle used.

MULTI-ASSOCIATION RESPONSE

While we support aspects of this recommendation, such as enforcing existing policies for acquisition planning, emphasizing using better requirements definitions and better structuring of solicitations, we do not believe that passing another law or inserting another approval layer is necessary to achieve these goals.

MULTI-ASSOCIATION DISCUSSION

Agencies need to better manage the process of defining requirements to meet existing policies and goals, which will result in better contracts awarded after more robust competition. Adequate procedures are already in place, but better acquisition workforce training is needed to ensure that these procedures are followed. Simply adding procedures to those that already exist but that will not be followed will not result in better requirements documents. The Panel's recommendation is also unduly vague in failing to define key terms including "complex services" and "statement of requirements." It also sets no limits on how this new approval process is to apply to acquisition of supplies, i.e., all supplies, complex supplies or commercial supplies. With respect to complex services, we suggest that the term be tied to an appropriate dollar threshold, such as $50 million, which is the threshold for full EVMS implementation in the FAR.

Recommendation #3(a): The requirements of Section 803 of the FY 2002 Defense Authorization Act regarding orders for services over $100,000 placed against multiple award contracts, including Federal Supply Service schedules, should apply uniformly government-wide to all orders valued over the Simplified Acquisition Threshold. Further, the requirements of Section 803 should apply to all orders, not just orders for services.

SUMMARY OF PANEL'S RATIONALE

The Panel believes that there is no logical basis for having two sets of "fair opportunity" regimes - one subject to Section 803 and one not, especially given that DoD orders account for approximately 55 to 60 percent of all orders under the Schedules as well a majority of the orders under multiple award multi-agency contracts. Further the Panel believes there is no logical basis for limiting the requirements of Section 803 to services.

MULTI-ASSOCIATION RESPONSE

We support this recommendation with the additional step of requiring civilian agencies to implement procedures that parallel those developed by the DoD in response to the requirements of Section 803.

MULTI-ASSOCIATION DISCUSSION

The DoD has developed procedures that meet the intent of Section 803 while providing the acquisition activities some operational flexibility in meeting the competition requirements. These procedures have been found to be operationally sound and effective. The Panel's call for uniform application can best be implemented if the established DoD processes apply to individual agencies and bureaus.

The Panel's call that the Section 803 requirements apply to all orders might be better understood by field personnel if the recommendation stated more explicitly that orders for both products and services were subject to the competition requirements.

In addition, we support competition. We urge, however, that as the government relies more and more on competition to establish price reasonableness and best pricing, there is no longer the need for those clauses that have caused allegations of "defective pricing" and Price Reductions Clause noncompliance. These clauses are incredibly difficult to administer and often require vendors to invest tens of millions of dollars in compliance systems that still cannot possibly catch every deviation for commercial sales practices or often every sale. The government would experience even more competitive pricing if it eliminated these government-unique requirements from the Multiple Award Schedule Program.

Recommendation #3(b): Competitive procedures should be strengthened in policy, procedures, training, and application. For services orders over $5 million requiring a statement of work under any multiple award contract, in addition to "fair opportunity," the following competition requirements as a minimum should be used: (1) a clear statement of the agency's requirements; (2) a reasonable response period; (3) disclosure of the significant factors and subfactors that the agency expects to consider in evaluating proposals, including cost or price, and their relative importance; (4) where award is made on a best value basis, a written statement documenting the basis for award and the trade-off of quality versus cost or price. The requirements of FAR 15.3 shall not apply. There is no requirement to synopsize the requirement or solicit or accept proposals from vendors other than those holding contracts.

SUMMARY OF PANEL'S RATIONALE

The Panel believes that a clear unambiguous statement addressing the specific standards to be applied should be included in the revised regulations implementing Section 803 across the government. Where acquisitions under multiple award contracts become significant procurement actions in their own right, essential attributes of source selection requirements should be applied at the order level. The Panel believes that these recommendations are not inconsistent with their Small Business recommendations regarding award of contracts and task or delivery orders.

MULTI-ASSOCIATION RESPONSE

We generally agree with the identification of the specific activities that should be strengthened to support competitive procedures. However, the Panel's recommendation that FAR Subpart 15.3 requirements not apply is itself ambiguous and requires clarification.

MULTI-ASSOCIATION DISCUSSION

FAR Subpart 15.3 makes reference to other FAR Parts, most particularly those associated with debriefings. While the Panel's recommendation speaks to these matters, it would provide clarity if a more specific reference to the embedded requirements of FAR Subpart 15.3 were made. It would also be beneficial if the exceptions for synopsis in FAR Part 5 were noted as well.

Recommendation #3(c): Regulatory guidance should be provided in FAR to assist in establishing the weights to be given to different types of evaluation factors, including a minimum weight to be given to cost/price, in the acquisition of various types of products or services.

SUMMARY OF PANEL'S RATIONALE

No specific Panel rationale was provided.

MULTI-ASSOCIATION RESPONSE

We oppose this recommendation.

MULTI-ASSOCIATION DISCUSSION

The Panel has presented no findings that bear on this recommendation or pointed to any studies that demonstrate agencies have been giving "too much weight" to non-price evaluation factors or not enough weight to cost/price. The Commercial Practices Working Group Preliminary Draft stated cost/price should almost always be more important than all other factors. While we commend the Panel for its revisions to the Working Group draft, the proposal remains seriously flawed. The Panel recommendation would limit the discretion an agency has to establish the basis on which it will evaluate offers to meet the requirements the agency defines. It is the procuring agency and the customer who are responsible for ensuring their needs are met economically. Selecting and ranking evaluation factors comes within the agency's discretion (see, e.g., *Encompass Group, LLC,* B-299092, 2006 WL 3872864 (December 22, 2006) ("It is the agency's role to define both its underlying needs and the best method of accommodating those needs."); *Hydra Research Sci., Inc.*, B-230208, 88-1 CPD ¶ 517 (May 31, 1988) ("It is well settled that a determination of an agency's minimum needs and the selection and weights of evaluation criteria used to measure how well offerors meet those needs are within the broad discretion entrusted to agency procurement officials."). Indeed, recognizing competition based on non-price factors as a legitimate, approved form of competition, on par with "formal advertising," was one of the principle achievements of the Competition in Contracting Act of 1984.[2] It is impossible to establish a one-sizes-fits-all, minimum weight for cost/price that could be applicable to all or even a category of purchases.

To the extent this is an effort to promote acquisition through minimally acceptable, lowest cost, awards, we strongly oppose making such a fundamental change in procurement philosophy. Neither the Panel nor the FAR Councils should consider substituting their judgment of the proper evaluation methodology for the award evaluation decision for the judgment of those making the procurement.

[2] *See* Response and Comments of Aerospace Industries Association, Contract Services Association, Government Electronics and Information Technology Association, Information Technology Association of America, National Defense Association, and the Professional Services Council to the Preliminary Working Draft of the Commercial Practices Working Group of the Acquisition Advisory Panel, page 40 (July 13, 2006) ("Multi-Association Comments on Working Draft from Commercial Practices Working Group").

Recommendation #4: GSA be authorized to establish a new information technology (IT) schedule for professional services under which prices for each order are established by competition and not based on posted rates.

SUMMARY OF PANEL'S RATIONALE

The recommended new IT schedule would be limited to terms and conditions other than price. Instead, prices would be determined at the order level based on competition for the specific requirement to be performed. This recommendation recognizes that pricing for services is requirement specific and depends on the level of effort and mix of skills necessary to meet the agency's specific needs at the order level. Presently, schedule labor rates play a role but in practice are more often determined based on the specifics of the requirement and current market conditions.

According to the Panel, the recommended new IT schedule would work in the following manner:

- Negotiation of labor rates the schedule level based on GSA's Most Favored Customer (MFC) pricing methodology would be eliminated.
- The "Price Reductions" clause would be eliminated.
- To obtain the new IT schedule offerors would be required to meet the following terms: (1) offer a commercial service that meets the FAR definition, as recommended by the Panel (i.e., sold in substantial quantities); (2) have a suitable record of past performance; and (3) agree to the terms and conditions imposed by GSA for the MAS program.
- Successful contractors would be contractually required to post their labor rates on GSA Advantage!, which the contractor could change at any time. Proposed prices in response to a task order solicitation would be binding on the contractor in the manner agreed upon in the task order.
- Contracting officers would use the posted labor rates, along with key terms and conditions, to perform market research and comparing proposals at the order level.

The Panel believes that the posting of rates at each contractor's discretion will create a more dynamic market for services. The inherent competition created by the transparency of the "electronic marketplace" will benefit buyers who will be better able to compare and contrast the associated labor rates and services offered under the recommended new IT schedule.

MULTI-ASSOCIATION RESPONSE

We opposed an earlier version of this recommendation on the basis that we believed that GSA already possessed the necessary authority to establish new schedules. GSA also has the authority to adopt this new approach. However, the idea of a competitive

services schedule as broadly outlined by the Panel in its revised discussion supporting the recommendation has merit and we would like to work with GSA and other interested parties to mature this concept.

MULTI-ASSOCIATION DISCUSSION

GSA already has the necessary authority to establish new schedules so that no new authorization is required. Moreover, the current FAR rules for ordering require the use of competition. See FAR 8.405-1 and 8.405-2. We agree that as the focus is more on competition as a result of Section 803 and related regulatory initiatives, there is no longer the need for onerous administrative requirements such as the Commercial Sales Practices Format and the Price Reductions clause. The key to successful schedule contracting is focusing on the buying agency's processes, as FAR Part 8.4 does, not necessarily by eliminating stated hourly rates in the base contract.

Recommendation #5(a): Adopt the following synopsis requirement.

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

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

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

SUMMARY OF PANEL'S RATIONALE

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

Currently, once an indefinite delivery indefinite quantity (IDIQ) or a MAS contract is awarded, there is no provision for pre-award publishing of information concerning the task order or delivery order placed against such contracts. The growth of IDIQ contracts since FASA and the growth of the MAS program over the last decade have reduced the visibility that the public has into more than 10% of the non-defense system procurements made annually and that percentage continues to grow. This lack of transparency into the placement of orders has led some, according to the testimony received by the Panel, to question whether the government complied with its own procedures, whether competition was obtained in placing the order and whether the taxpayer received best value.

The Panel believes that sole source orders under these vehicles should not be subject to a lesser standard of transparency. The synopsis proposed here would be post-award only, providing the positive pressure that transparency offers and bolstering public confidence, while not delaying the award or imposing any further restrictions, on urgent requirements for instance, than the current fair opportunity regime.

MULTI-ASSOCIATION RESPONSE

We agree with the Panel's recommendation; however, the Panel has not provided any flexibility from the mandatory publication to allow for specialized circumstances such as for classified orders or when publishing such awards would affect an agency's mission (such as in contingency contracting) or when timing of the notice is impracticable (such as during the initial response in a Presidentially-declared emergency).

MULTI-ASSOCIATION DISCUSSION

Therefore, we recommend that the Panel's recommendations be modified to permit exceptions to the mandatory posting to align with the exceptions for posting already provided for in FAR 5.202. We also recommend that agencies be provided authority for reasonable delay in the publication of such notices based on unusual circumstances.

Recommendation #5(b): For any order under a multiple award contract over $5 million where a statement of work and evaluation criteria were used in making the selection, the agency whose requirement is being filled should provide the opportunity for a post-award debriefing consistent with the requirements of FAR 15.506.

SUMMARY OF PANEL'S RATIONALE

Where agencies are making acquisitions of goods or services under a negotiated process involving a statement of work and evaluation criteria, the Panel sees no basis for not providing a debriefing to the unsuccessful offeror(s), regardless of the contract type involved. Companies expend significant bid and proposal costs in response to order solicitations, just as they do in response to other solicitations. The Panel believes that debriefings are a good business practice. It is important that the government share its rationale regarding a task order award with losing offerors in order to create a climate of continuous improvement. Offerors need to understand where they can improve their approaches to meeting the government's needs. While FAR 8.405-2(d) requires an agency to offer "a brief explanation of the basis for the award decision" for Schedule orders when requested, there is no requirement for debriefings for orders under multiple award contracts. The Panel believes providing debriefings will increase confidence in the integrity of the procurement process.

MULTI-ASSOCIATION RESPONSE

We support providing meaningful debriefing opportunities for bidders, even for significant orders against multiple award contracts. We further believe that the threshold for providing the opportunity for a post-award briefing should be tied to the applicable threshold found in FAR Part 15.

MULTI-ASSOCIATION DISCUSSION

We are concerned, however, that debriefings would be provided in a purely mechanical manner by agencies to avoid conveying any information that could be used against the agency in a subsequent protest, if protests are allowed under the Panel's recommendation R-7. If this is the case, the primary benefit of debriefings - improved future competition - may be lost.

Recommendations #6: The Panel makes the following recommendations with respect to time & materials contracts.

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

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

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

SUMMARY OF PANEL'S RATIONALE

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

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

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

MULTI-ASSOCIATION RESPONSE

We do not agree with the Panel's recommendation, nor do we believe that additional regulations would increase contract management efficiency. However, we generally support the final rule issued by the FAR Council on December 12, 2006 concerning T&M contracts for commercial items (FAR Case 2003-027). It is not clear if the Panel took the final rule into account in their deliberations. We had previously made our concerns known to the Panel through the public comment process, such as with certain access to records and audit right matters.

MULTI-ASSOCIATION DISCUSSION

The FAR's existing guidance at FAR 16.601 is quite stringent and would serve the government well as paragraph (a) of Recommendation 6 seems to recognize. FAR 16.601 provides that a T&M contract may be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. To the extent there are enforcement concerns, we would agree with improvements in this area. However, it is important to note that the statistics provided to the Panel by the DoD IG contradict the Panel's findings concerning overuse of T&M contracts for services. Representatives from the DoD IG testified on May 17, 2005 that, roughly, only 6% of contracts for services awarded in FY 2004 were T&M contracts

The new FAR regulations published on December 12, 2006 (71 Fed Reg. 74667) resolve many of the Panel's concerns.

The "Findings" section of the Panel's report fails to accurately reflect testimony and other evidence demonstrating that T&M contracts are commonly used in the commercial market. For example, according to the *Federal Register* notice published on December 12, 2006, 71 Fed. Reg. 74,668, the GAO conducted a survey that represented the buying practices from a relatively wide range of industries, "including airline, automotive and truck manufacturers, automotive and truck parts, business services, communications equipment, computer hardware, computer services, electric utilities, insurance, major drugs (pharmaceutical), money center bank, non-profit financial services, oil and gas, regional bank, retail (grocery and technology), scientific and technical instruments, and semiconductor." Based on this survey and testimony offered to the Panel, the OFPP concluded that commercial services "are commonly sold on a T&M and LH basis in the marketplace when requirements are not sufficiently well understood to complete a well-defined scope of work and when risk can be managed by maintaining surveillance of costs and contractor performance." The Panel's point with regard to competitive awards is unclear yet the issue of competition has been addressed in the commercial T&M rule. While we support competition in contracting, we do not support changes to the competition rules as they are presently being applied to T&M contracts. That is, the circumstances for making competition decisions for T&M should be no different than that for other contract types. Competition brings benefits no matter what type of contract is awarded. It is unclear how competition is more beneficial or more necessary for T&M contracts than any other type of contract.

We conceptually support converting work currently being done on a T&M basis to a performance-based effort. In our view, performance-based effort does not necessarily require a fixed priced contract. If the use of performance-based contracts assumes the use of a fixed price contract, it must also assume that the offerors understand the associated risks and are willing to accept those risks. It is often the case that where a T&M contract is used, neither the government nor the offerors fully understand the scope of the work that will be required. In such cases, conversion from T&M to fixed price, performance-based contracts may increase prices to value the risks, or create

performance problems because of a mutual lack of understanding of the scope of the requirement.

Finally, Recommendation 6(c) is confusing. The Panel's intention in encouraging "efficient use" of time and materials resources is not explained. Moreover, the Panel's recommendation for a sufficient scope and objective definition to be in place before the award of any T&M contract is even more unclear, especially considering that the Panel makes no attempt to reconcile this recommendation with the existing FAR 16.601 language that mandates that a T&M contract may be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. This recommendation in practice will eliminate or severely curtail the ability of the contracting officer to contemplate the use of T&M contracts, even in instances when it is appropriate as identified above. When the scope of work progresses to a point where it is sufficiently defined to permit a reasonable estimate of the cost of performance, it is at that point that a firm-fixed price contract may be suitable. The Panel seems to be recommending a different approach, although one that is not adequately explained. This point has not been addressed by the Panel, notwithstanding industry's comments to the Panel calling this issue to its attention. This also leaves hanging the question of what contract type to use when a definitive scope cannot be defined.

We do not agree with the notion that the government should account for its use of T&M contracts through the budget execution process, reporting annually at the conclusion of the fiscal year the dollars spent and personnel purchased through the use of T&M contracts as discussed by the Panel. We do not envision any value in imposing such a reporting burden on the government.

Recommendation #7: Permit protests of task and delivery orders over $5 million under multiple award contracts. The current statutory limitation on protests of task and delivery orders under multiple award contracts should be limited to acquisitions in which the total value of the anticipated award is less than or equal to $5 million.

SUMMARY OF PANEL'S RATIONALE

The Panel has serious concerns about the use of task orders to conduct major acquisitions of complex services without review. The Panel has obtained and analyzed data from FPDS-NG that show that nearly half of the dollars spent under interagency contracts are expended on single transactions valued over $5 million. Agencies are using competitive negotiation techniques to make best value type selections under these multi-agency, multiple award contracts. The panel believes that these procurements are of sufficient significance that they should be subject to greater transparency and review.

MULTI-ASSOCIATION RESPONSE

We oppose this recommendation.

MULTI-ASSOCIATION DISCUSSION

Under current law and regulations (FAR 16.505(a)(9)), no protest may be filed against any order placed against a multiple-award/IDIQ contract except for a protest that asserts that the order increased the scope, period or maximum value of the contract. In addition, under limited circumstances, the Government Accountability Office has considered protests based on the narrow additional ground where an agency fails to follow its own procedures in the placement of an order.

This long-standing congressional decision to strictly limit the grounds for protest of task orders was an intentional act to carefully balance the desire for timely ordering with an appropriate check on arbitrary agency action that violates the formation of the underlying core contract. In our view, opening up protests for any additional reason at the task order level (even for seemingly large orders) significantly changes that balanced equation and creates a different market dynamic at both the contract formation and order placement phases. Unilateral action cannot be taken on only one side of the business/risk equation. We are not aware of any significant concerns raised by industry, contracting officials or procuring activities seeking to expand the protest right or about the limited circumstances now permitted for protests.

Furthermore, the expansion of protest rights would ultimately cost the taxpayer and it hurts the government's ability to get the contracted work accomplished on schedule. Protests cost the government because of the additional expense related to the preparation of protest responses, soliciting revised bids, and the reevaluation of offers. The Armed Services Board of Contract Appeals has held recently on two separate occasions that an offeror may sue the government for breach of contract under multiple-award ID/IQ contracts when a "fair opportunity to be considered" has not been provided.

See L-3 Commc'ns Corp., ASBCA No. 54920; 2006 WL 2349233 (July 27, 2006); *Community Consulting Int'l*, 02-2 BCA ¶ 31940, ASBCA No. 53489. Under the Panel's recommendations, a disappointed offeror under a multiple-award ID/IQ contract will be able to protest the government's action at the GAO or sue at the Court of Federal Claims. Such litigiousness in the procurement system is not helpful to either the government or those wishing to provide the best solutions to the government on a timely basis.

Recommendation #8: For commercial items, provide for a more commercial-like approach to determine price reasonableness when no or limited competition exists. Revise the current FAR provisions that permit the government to require "other than cost or pricing data" to conform to commercial practices by emphasizing that price reasonableness should be determined by competition, market research, and analysis of prices for similar commercial sales. Move the provisions for determining price reasonableness for commercial items to FAR Part 12 and de-link it from FAR Part 15.

Establish in FAR Part 12 a clear preference for market-based price analysis but, where the contracting officer cannot make a determination on that basis (e.g., when no offers are solicited, or the items or services are not sold in substantial quantities in the commercial marketplace), allow the contracting officer to request additional limited information in the following order; (i) prices paid for the same or similar commercial items by government and commercial customers during a relevant period; or, if necessary (ii) available information regarding price or limited cost related information to support the price offered such as wages, subcontracts or material costs. The contracting officer shall not require detailed cost breakdowns or profit, and shall rely on price analysis. The contracting officer may not require certification of this information, nor may it be the subject of a post-award audit.

SUMMARY OF PANEL'S RATIONALE

Competition, market research, and comparisons to prior prices that have been determined to be reasonable typically should enable the contracting officer to determine that an offered price for a commercial item is fair and reasonable without further information from the offeror. However, if the contracting officer is unable to make such a determination on that basis (e.g., no offers are solicited, or the items or services are not sold in substantial quantities in the commercial marketplace), the contracting officer should be able to request the following information: (i) Prices paid for the same or similar commercial items or services by its commercial and government customers under comparable terms and conditions for a relevant time period, and (ii) available information regarding price or cost that may support the price offered, such as wages, subcontracts, or material costs.

In requesting this information, the contracting officer should limit the scope of the request to information that is in the form regularly maintained by the offeror as part of its commercial operations. The contracting officer should not require the offeror to provide information regarding all cost elements, detailed cost breakdowns, or profit, but instead shall rely on price analysis. The contracting officer should not request that this information be certified as accurate, complete, or current, nor shall such information be the subject of any postaward audit or price redetermination with regard to price reasonableness. This information would be exempt from release under the Freedom of Information Act (5 U.S.C. 552(b)).

MULTI-ASSOCIATION RESPONSE

We do not agree with the Panel's recommendation, taken as a whole.

MULTI-ASSOCIATION DISCUSSION

We disagree with the Panel's recommendation to move the provisions for determining price reasonableness for commercial items to FAR Part 12 and de-link it from FAR Part 15. As the Commercial Item Drafting Team indicated when issuing the final rule on FAR Part 12 on September 18, 1995:

> Commercial Item Pricing - Commentors suggested that Part 12 should discuss the techniques for pricing commercial items. The policies and procedures for determining the price reasonableness of commercial items are contained in Subpart 15.8 and the Team did not want to conflict with those policies. However, a brief summary of pricing considerations used when contracting by negotiation under Part 15 has been included in Part 12.

The Panel makes no case for moving the pricing rules for commercial items from Part 15 to Part 12 nor is it apparent that the Panel has considered the possible unintended consequences from a bifurcated commercial pricing policy. When the FAR was first published in 1984, one of its key improvements was the consolidation of related policy into a single FAR Subpart. Subsequent government regulatory initiatives have been in the interests of further consolidation and simplification. Moving the pricing policy, as it applies to commercial items, from Part 15 to Part 12 would be contrary to such goals.

The Panel's analysis with respect to commercial pricing matters is weak (Finding No. 5, "Pricing of Commercial Contracts by Commercial Buyers"). It is important to note that the Panel did not find that prices presently paid by the government for commercial items are not fair and reasonable. Commercial buyers do rely on competition, market research, benchmarking, and in some cases, cost related data. The FAR and DoD's Contract Pricing Reference Guide (ref. FAR 15.404-1(7)) likewise provide for the use of these tools. However, with regard to the use of cost data, there is a vital difference between submission to another commercial customer and the government. When an offeror submits cost data its exposure to fraud charges goes far beyond commercial practices. This includes the Truth in Negotiations Act, Cost Accounting Standards, contract cost principles, etc. The architects of FASA and the related regulations understood this and developed the commercial pricing rules accordingly.

For the most part, what the Panel recommends as a basis for determining price reasonableness is presently provided for under existing guidelines in FAR Subpart 15.4 and the DoD's Contract Pricing Reference Guide. The contracting officer should obtain information that is in the form regularly maintained by the offeror as part of its commercial operations - ***before contract award***. However, we are concerned that the Panel may be encouraging government contracting officers to obtain any form of cost information, that is, available information regarding price or limited cost related

information to support the price offered such as wages, subcontracts or material costs. This is not required in FAR Subpart 15.4 and we would not support such a change to the FAR.

We strongly agree with the Panel on the prohibition on certifying information provided by the offeror and subjecting such information to post-award audit with regard to price reasonableness on contracts for commercial items or release under FOIA. We recommend that post-award pricing audits should not be conducted at all, including such audits currently being conducted by the GSA and VA. GSA's defective pricing clause at GSAM 552.215-72 "Price Adjustment - Failure to Provide Accurate Information," should be rescinded.

Recommendation #9: GSA should establish a market research capability to monitor services acquisitions by government and commercial buyers, collect publicly available information, and maintain a database of information regarding transactions. This information should be available across the government to assist with acquisitions.

SUMMARY OF PANEL'S RATIONALE

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

MULTI-ASSOCIATION RESPONSE

The Coalition supports this recommendation but makes suggestions for clarification.

MULTI-ASSOCIATION DISCUSSION

The recommendation essentially frames GSA as a "center of excellence" for the establishment of a market research capability. It must be pointed out that a funding source for this activity would need to be established as this capability is above and beyond what GSA is staffed for today. The data should be prospectively collected and reporting requirements must not be imposed on the already overburdened government contractor community. Finally, every effort should be made to develop this capability internally so as to build consistency and knowledge from prior experiences.

Recommendation #10: (a) Legislation should be enacted providing that contractors and the government shall enjoy the same legal presumptions, regarding good faith and regularity, in discharging their duties and In exercising their rights in connection with the performance of any government procurement contract, and either party's attempt to rebut any such presumption that applies to the other party's conduct shall be subject to a uniform evidentiary standard that applies equally to both parties.

(b) In enacting new statutory and regulatory provisions, the same rules for contract interpretation, performance, and liabilities should be applied equally to contractors and the government unless otherwise required by the United States Constitution or the public interest.

SUMMARY OF PANEL'S RATIONALE

When the government acts in a sovereign or regulatory capacity, either under its Constitutional authority or pursuant to an Act of Congress, the courts have held that those actions are entitled to a strong presumption of regularity when they are challenged in court. Indeed, this approach is specified in the statutory provisions that Congress has enacted authorizing judicial review of government action in most contexts, and it is meant as a safeguard against what we today might call inappropriate "judicial activism." On the other hand, when the government enters into contractual relations, it is frequently engaged in the kinds of actions that might be taken by any party to a contract. In the latter situation, we do not believe there is any sufficient policy or legal justification for extending to the government an extraordinary presumption of good faith or of regularity that is well-nigh impossible to overcome. Yet some judicial decisions have done just that. Our recommendation would not mean that the rights of the government and of the contractor under government contracts are identical in all respects, however. Congress and its authorized delegates have concluded that public policy requires the inclusion in most government contracts of provisions giving the government certain special prerogatives deemed necessary for the protection of the public interest. Nonetheless, to the extent permitted by the terms of the government contract, we see no reason not to make any presumptions of regularity and good faith even-handed in their application to the government and the contractor.

This recommendation would not place the burden on government contract officials of showing that they have acted in good faith. Nor would it make the good faith of either party an issue to be litigated in every case. Rather, our recommendation simply requires that any presumption of good faith and regularity be applied equally to the government and to contractors in disputes arising from the performance of a government contract. Thus, where good faith is relevant to any issue in a government contract dispute, the party claiming that the other failed to act in good faith would bear the ordinary civil litigation burden of proof by a preponderance of the evidence and would also bear the burden of going forward with evidence to prove the allegation of failure to act in good faith.

The parties to any contract should expect and receive fair dealing from others. It is sometimes said that, in order for there to be fair dealing, “the door must swing both ways.” In order for this to occur, the same rules must apply to both the government and contractors unless there is a compelling public interest requiring a different rule. This principle should be applied in enacting new statutory and regulatory provisions.

MULTI-ASSOCIATION RESPONSE

We take no position on this recommendation at this time.

MULTI-ASSOCIATION DISCUSSION

The discussion supporting the recommendation is lacking in details to explain how the Panel proposes implementing this broadly stated recommendation. Therefore, we would want to consider specific proposals before taking a position on the recommendation.

MULTI-ASSOCIATION COMMENTS ON
THE SECTION 1423 ACQUISITION ADVISORY PANEL'S
FINAL PANEL RECOMMENDATIONS
CHAPTER 2 - PERFORMANCE-BASED ACQUISITION

Industry has reviewed Chapter 2 of the Acquisition Advisory Panel report on Performance-Based Acquisition and is in agreement with the findings. The Acquisition Advisory Panel has captured points and issues raised by the Multi-Association Working Group in our comments as well as our testimony. The Panel has also captured in the Findings significant failures, challenges, cultural barriers and organizational constructs that inhibit Performance-based Services Acquisition (PBSA) success. Industry supports these findings.

The Panel's recommendations are a start but require much investment and OFPP intervention in order for PBSA to succeed; however, the recommendations address some, but not all, of the findings.

Finding 1: Despite OMB Target, Agencies remain unsure when to use PBSA.

Recommendation 1: OMB's government-wide quota of requiring 40% of acquisitions be Performance-based should be adjusted to reflect individual agency assessments and plans for using PBSA.

MULTI-ASSOCIATION RESPONSE

Industry supports this recommendation, agreeing that a one-size-fits-all quota should be abandoned. It is not clear, however, how OMB plans to review each agency's analysis of its unique acquisition portfolio based on clearer OFPP PBSA guidance as reflected in the agency's Acquisition Performance Plan. It is also unclear to what extent plans are tied to transformational versus transactional engagements.

Recommendation 2: FAR Part 7 and 37 should be modified to include two levels of Performance-based Acquisitions: Transformational and Transactional. OFPP should issue more explicit implementation guidance and create a PBSA "Opportunity Assessment" tool to help agencies identify when they should consider using performance-based acquisition vehicles.

MULTI-ASSOCIATION RESPONSE

Industry supports the recommendation to create two categories of PBSAs to distinguish transformational from transactional acquisitions. We also support the development of an "Opportunity Assessment" tool for determining when PBSA is appropriate, but are concerned about how the tool will be developed and would caution against the development of a simple check box-type tool. There are too many variables that can determine the appropriateness of a PBSA. For example, while an agency might have a "transformational" requirement, it may not be possible for the agency to baseline their

particular measurement and whether the measurement is even realistic and important to the end goals.

Industry is also concerned that the transactional acquisition as described too closely resembles the current PBSA practice of calling an acquisition performance-based and then directing what work is to be done by the contractor. The cost is already constrained by the contract price and quality and timeliness are reflected in the hoped for past performance evaluation. These are not true performance-based acquisitions. The Panel report states that under this type of PBSA, the government would be "willing to assume the risk that the work being done may not solve the baseline need/ problem." But this assumption is contrary to the purpose for PBSA, where the goal is to identify a problem or need and have the contractors determine the best means for finding a solution.

Finding 2: PBSA solicitations and contracts continue to focus on activities and processes, rather than performance and results.

Finding 3: PBSA's potential for generating transformational solutions to agency challenges remains largely untapped.

Finding 4: Within federal acquisition functions, there still exists a cultural emphasis on "Getting to Award."

Finding 5: Post-award contract performance monitoring and management needs to be improved.

MULTI-ASSOCIATION RESPONSE

Industry believes that Transformational PBSA and OFPP guidance must focus on the Panel's comment to Finding 3: "The Panel concedes that defining a strategic vision and compelling an institution to coalesce around it are extremely difficult endeavors. Stove-piped organizations and institutional and cultural conservatism greatly inhibit the ability to define and execute against strategic objectives. The right people must be involved, including senior leadership and vital stakeholders, to bring a broad perspective on what to buy, as well as which vehicle to use. If the critical parties are not at the table, it is extremely difficult to break through cultural barriers that inhibit success."

We also note the Panel's concern for the tendency of contractors to "not to be open to a broader set of responses outside the government's original SOW." The reason for this "tendency" is because contractors are fearful of losing a bid if they do not closely mimic the government's statement of work in their responses. As a result, many competitions are reduced to careful alignment of proposals with the government's specific approach and/or price shoot-outs, and the potential for innovation is largely forfeited. Industry does not see any recommendation or required direction to OFPP to insure that these concerns are addressed.

<u>Recommendation 3:</u> Publish a best practices guide on development of measurable performance standards for contracts.

<u>MULTI-ASSOCIATION RESPONSE</u>

Industry generally supports the recommendation for OFPP to issue a Best Practices Measurements Guide but such a recommendation requires more clarification.

The references to a "Measurement Chain" and "Logic Model" frameworks are unclear. The discussion in the last paragraph on Baseline & Outcome Measurement is also unclear. Baselines are essential for any successful PBSA and must always be a measurement that can be well articulated in a final contract. Further, the Panel recommends under Limiting Measures setting a limitation on the scope of performance measures in PBSA's, which seems to be reasonable. However, the recommendation never defines what measures are acceptable and which ones are not necessary. It simply says that measures should be limited to a "sampling."

Finally, the evolution of measures is a topic emphasized in the recommendations as "WILL and MUST" changes over time. This is a significant topic that requires focused understanding and sophistication. Expectations must be realistic and not set to arbitrary hurdles.

<u>Recommendation 4:</u> Modify FAR Part 7 and 37 to include an identification of the government's need/requirements by defining a "baseline performance case" in the PWS or SOO. OFPP should issue guidance as to the content of Baseline Performance Cases.

<u>MULTI-ASSOCIATION RESPONSE</u>

Industry supports the creation of a Baseline Performance Case. However, establishing the baseline performance state and state-of-practice assessments will require in-depth training as well as overcoming a cultural hurdle in that understaffed contracting activities will seek the "easiest" way to answer the Baseline Performance Case requirements. Unless done diligently, the resulting Baseline Performance Case will not solve the underlying problem of clearly defining needs and requirements upfront.

<u>Recommendation 5:</u> Improve post-award contract performance monitoring and management, including methods for continuous improvement through the creation and communication of a "Performance Improvement Plan" that would be appropriately tailored to the specific acquisition.

<u>MULTI-ASSOCIATION RESPONSE</u>

Performance Improvement Plans as described are found in industry practices and industry would support the development of these plans in the course of post-award management of PBSA contracts. Such plans allow the contractor to provide evolving

input as to how they should be assessed for performance, while allowing the objectives of the contract to evolve with changing needs. However, OFPP needs to provide crisp guidance as to when and how performance improvement plans are used and advise how such plans provide a diminishing return in multi-year contracts. This recommendation requires focused understanding and sophistication that may not be present in current usage of PBSAs.

Recommendation 6: OFPP should provide improved guidance on types of incentives appropriate for various contract vehicles.

MULTI-ASSOCIATION RESPONSE

Industry supports this recommendation for OFPP to take the lead by using the PBSA interagency working group to catalogue the various types of incentives appropriate for use in PBSA efforts, critique how the incentives are being applied, assess the applicability of award fee and award term approaches to PBSA and discuss the challenges posed in managing PBSA's under existing budget and appropriation rules that limit multi-year financial commitments and incentive-based budget projections. In addition, in order to maximize the use of PBSA's to their fullest, industry recommends a legislative solution to these budgeting problems.

Recommendation 7: OFPP should revise the seven-step process to reflect the Panel's new PBSA recommendations.

MULTI-ASSOCIATION RESPONSE

Industry agrees with this recommendation to revise the 7 Step process subject to these comments.

Recommendation 8: Contracting Officer Technical Representatives (COTR's) in PBSA's should receive additional training and be re-designated as Contracting Officer Performance Representatives (COPR's).

MULTI-ASSOCIATION RESPONSE

Industry strongly agrees with Recommendation 8, but questions how OFPP plans to address the comment in Finding 3 regarding cultural change to enable transformational PBSAs. While training and designating a COPR will facilitate better transactional PBSAs, additional training and oversight does not address fundamental organizational and cultural barriers of a transformational PBSA.

Finding 6: Available data suggests that contract incentives are still not aligned to maximize performance and continuous improvement.

MULTI-ASSOCIATION RESPONSE

This finding is more closely related to Recommendations 5 and 6 regarding continuous improvement and guidance on incentives.

Finding 7: The FPDS Data are insufficient and perhaps misleading regarding use and success of PBSA.

Recommendation 9: Improved data on PBSA usage and enhanced oversight by OFPP on proper PBSA implementation using an "Acquisition Performance Assessment Rating Tool" or A-PART.

MULTI-ASSOCIATION RESPONSE

Requiring agencies to use the A-PART tool with an enhanced checklist will not be a panacea of successes. Transactional/Transformational PBSA contracts requires understanding and sophistication and a checklist will only provide OFPP with data that shows agencies in fact followed a process.

Industry supports the recommendation that FPDS be amended to better capture data regarding PBSAs and to adequately differentiate between transformational and transactional performance-based acquisitions and their task and delivery orders.

Recommendation 10: OFPP should undertake a systematic study on the challenges, costs and benefits of using performance-based acquisition techniques five years from the Panel's delivery of its final report.

MULTI-ASSOCIATION RESPONSE

Industry supports the recommendation for a study on PBSA but analyses must be more regularly done to provide value to policymakers.

MULTI-ASSOCIATION COMMENTS ON
THE SECTION 1423 ACQUISITION ADVISORY PANEL'S

FINAL PANEL RECOMMENDATIONS
CHAPTER 3 - INTERAGENCY CONTRACTING

ISSUE: GUIDANCE IN USING INTERAGENCY CONTRACT VEHICLES

The Acquisition Advisory Panel provided recommendations on the performance of acquisition functions across agency lines of responsibility and the use of government-wide contracts. The Panel recommended changes to laws and regulations to include improving competition, establishing data collection tools for improved vehicle management and oversight, and addressed systemic issues identified in Government Accountability Office (GAO) and Inspector General (IG) reports.

DISCUSSION

Interagency contract vehicles play a key role in allowing agencies to accomplish their missions. This is especially critical with the increased workload and the aging workforce challenges being faced by the federal acquisition community. Over 40 percent of all government obligations were spent under interagency contracts in 2004, and a significant amount of these obligations were non-competitive actions. In 2005, the GAO placed interagency contracts on its "High Risk" series due, in part, to the ordering under these contracts that in many cases failed to adhere to laws, regulations, and sound contracting practices, as well as lack of oversight and accountability. The causes vary, but most are attributed to the increasing demands on the acquisition workforce, insufficient training and, in some cases, inadequate guidance. Additionally, the rapid growth in the amount of contracts and the public funds spent under these interagency contracts is an emerging problem.

The Panel made 9 recommendations primarily focused on improvements in the following areas:

a. Proliferation of interagency contracts
b. Improving the oversight of and insight into the creation and continuation of these vehicles.
c. Aligning the vehicles to better leverage the government's buying power
d. Diversity of the vehicles
e. New guidance for improvements on the development and use of interagency contracts

MULTI-ASSOCIATION RESPONSE

Overall, we agree with the Panel's recommendations and support the Panel's intent to improve the creation, use and oversight of government wide, multi-agency and interagency contract vehicles. The emphasis on increased competition in a transparent environment will improve the use of these vehicles. Additionally, improved

management oversight with enhanced data collection will increase the quality of future contracts, providing value for both the vendor and the requiring agency.

However, there are several items that should be further clarified. Since many of the Panel's recommendations were given to OMB to implement using administrative or regulatory procedures, industry anticipates having an opportunity to provide input during a public comment phase prior to issuing final regulatory guidance. In addition to comments on the nine recommendations listed below, we offer the following comments on the Interagency-related portions of the Executive Summary.

a. Page 4, item 2 "Recommendations" - While we support the panel's concerns about improving competition at the task order level of multi-agency award contracts, we are very strongly opposed to the Panel's recommendation to address this concern by allowing protests on task and delivery orders exceeding $5M under multi-agency contracts. This option would create an additional layer of protests; add to the workload for the contracting workforce and their industry counterparts; and reduce the efficiency of these vehicles and impact agency mission by delaying the delivery of goods and services to the government. It would also increase the risk for both the agencies and the vendors, driving up the costs for these goods and services for the government and the taxpayer.

b. Page 5, "Recommendations" - The panel recommended a new Information Technology Services Schedule that would reduce the burden on contractors from negotiating labor rates with GSA that produce little price competition. The meaningful competition results from an offeror responding to a specific order requirement with an appropriate and well-priced labor mix resulting in a quality solution.

The Panel's recommendations, if implemented, are a significant step in the right direction to improve the creation, use and management of interagency vehicles. We concur that increased competition and improved use of contract data to analyze and determine the government needs earlier should eliminate redundant vehicles, as well as reduce needless bid and proposal costs from unnecessary vehicles. Finally, increased oversight and management of existing vehicles will improve efficiency and allow agencies to maximize the effectiveness of their acquisition workforce. As we noted in our comments in Chapter 1, the recommendation has merit and we would like to work with GSA and other interested parties to mature this concept.

<u>Recommendation 1:</u> Increased transparency through identification of vehicles and Assisting Entities. Office of Management and Budget (OMB) conduct a survey of existing vehicles and Assisting Entities to establish a baseline. The draft OFPP survey, developed during the working group's deliberations should include the appropriate vehicles and data elements.

MULTI-ASSOCIATION RESPONSE

We applaud the Office of Federal Procurement Policy's (OFPP) data collection effort initiated in the memo dated February 24, 2006 to Agencies Senior Procurement Executives and Chief Acquisition Officers. This is a necessary first step to identify and categorize existing Interagency contract vehicles. We look forward to examining the survey results and discussing the initial implementation steps OFPP will undertake to improve oversight for Interagency contracts and processes.

Recommendation 2: Make available the vehicle and assisting entity data for three distinct purposes.

a. **Identification of vehicles and the features they offer to agencies in meeting their acquisition requirements (yellow pages).**
b. **Use by public and oversight organizations to monitor trends in use.**
a. **Improved granularity in fee calculations.**
b. **Standard FPDS-NG reports.**
c. **Use by agencies in business case justification analysis for creation and continuation/reauthorization of vehicles.**

MULTI-ASSOCIATION RESPONSE

The market survey of existing vehicles, scope and price structure is critical to effective acquisition planning for both industry and government use. We share the panel's view that a consolidated, accurate, database for all vehicles may eliminate redundancy and reduces industry bid and proposal costs associated with responding to duplicative government offerings.

Recommendation 3: OMB institutionalize collection and public accessibility of the information, for example through a stand-alone database or transaction module within the Federal Procurement Data System – Next Generation (FPDS-NG).

MULTI-ASSOCIATION RESPONSE

This recommendation aligns with the Panel's recommendation #9 in Chapter 1, "Commercial Practices," which states:

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

In addition to our comments in Chapter 1, this capability would be an effective tool to improving the market research and acquisition planning of both industry and government. The personnel and technology investment cost of establishing and

maintaining this database will be offset by efficiencies found in improved acquisition strategies, clearer requirements definition and improved industry responses to government needs.

Recommendation 4: OMB direct a review and revision, as appropriate, of the current procedures for the creation and continuation/reauthorization of GWACS and franchise funds to require greater emphasis on meeting specific agency needs and furthering the overall effectiveness of government-wide contracting. GSA should conduct a similar review of the Federal Supply Schedules. Any such revised procedures should include a requirement to consider the entire landscape of existing vehicles and entities to avoid unproductive duplication.

MULTI-ASSOCIATION RESPONSE

We agree with this recommendation that regular reviews of existing vehicles' use and effectiveness will improve the management and oversight of contract vehicles. The OMB review criteria and procedures developed for this review are critical to its success. Although this requirement could potentially be manpower resource intensive, an annual review of all vehicles within its first 3 years would add value to evaluating contract effectiveness.

Recommendation 5: For other than the vehicles and entities described in #4 above, institute a requirement that each agency, under guidance issued by OMB, formally authorize the creation or expansion of the following vehicles under its jurisdiction:

a. **Multi-agency contracts.**
b. **Enterprise-wide vehicles**
c. **Assisting entities**

MULTI-ASSOCIATION RESPONSE

Industry concurs with the recommendation to develop uniform procedures to guide the continuation/re-authorization of contract vehicles. We further recommend industry participation in the development of these uniform procedures and an opportunity for public comment on the final approved recommendations. We also concur with the Panel's recommendation in #4, which provides: "OMB reconsider the current requirement for annual review and re-authorization of these vehicles." We feel a review after a minimum of 3 years is reasonable to offset the investment costs related to this effort.

The term "expansion" should have more clarification, since the recommendation suggests "a significant increase in scope or size of contracts under an interagency or enterprise-wide vehicle". It is assumed that any expansion of an existing vehicle is considered a scope change and thus subject to regulatory guidance on public notification or synopsis requirement, competition, etc.

Recommendation 6: Institute a requirement that the cognizant agency, under guidance issued by OMB, formally authorize the continuation/reauthorization of the vehicles and entities addressed in #5 on an appropriate recurring basis consistent with the nature and type of the vehicle or entity. The criteria and timeframes included in the OMB guidance should be distinct from those used in making individual contract renewal or option decisions.

MULTI-ASSOCIATION RESPONSE

We support a disciplined, coordinated, periodic, review of all interagency contracts to assess their effectiveness in meeting government requirements. Industry, as a major stakeholder, would welcome the opportunity to contribute to the development of clear, concise criteria and an implementation approach to support this recommendation.

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

MULTI-ASSOCIATION RESPONSE

We noted in our comments to Recommendation #1 that OMB has already undertaken the effort to identify all existing vehicles and we look forward to the opportunity to analyze the results of that survey with an eye toward developing an effective implementation strategy.

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

d. **Business case justification analysis (GWACs as model)**
e. **Projected scope of use (products and services, customers, and dollar value)**
f. **Explicit coordination with other vehicles/entities**
g. **Ability of agency to apply resources to manage the vehicle**
h. **Projected life of vehicle, including the establishment of a sunset, if appropriate**
i. **Structuring the contract to accommodate market changes associated with the offered supplies and services (e.g. market research, technology refreshment and other innovations).**
j. **Ground rules for use of support contractors in the creation and administration of the vehicle**
k. **Criteria for upfront requirements planning by ordering agencies before access to vehicles is granted**
l. **Defining post-award responsibilities of the vehicle holders and ordering activities before use of the vehicles is granted. These criteria should distinguish between the different sets of issues for direct order type**

vehicles versus vehicles used for assisted buys, including data input responsibilities.

m. Guidelines for calculating reasonable fees including the type and nature of agency expenses that the fees are expected to recover. Also, establish a requirement for visibility into the calculation.

n. Procedures to preserve the integrity of the appropriation process, including guidelines for establishing bona fide need and obligating funds within the authorized period.

o. Require training for ordering agencies personnel before access to vehicle is granted.

p. Use of interagency vehicles for contracting during emergency response situations (e.g., natural disasters).

q. Competition process and requirements.

r. Agency performance standards and metrics.

s. Performance monitoring system.

t. Process for ensuring transparency of vehicle features.

i. Ombudsman as Point of Contact for the public.

u. Guidance on the relationship between agency mission requirements/core functions and the establishment of interagency vehicles (e.g., distinction between agency expansion of internal mission-related vehicles to other agencies vs. creation of vehicles from the ground up as interagency vehicles).

MULTI-ASSOCIATION RESPONSE

Consistent government-wide standards for the creation and continued use of vehicles, with clear performance standards, will improve the business and acquisition processes. We urge OMB to quickly initiate an effort to develop guidance, with industry input, to agencies.

Recommendation 9: OMB conduct a comprehensive, detailed analysis of the effectiveness of the Panel recommendations and agency action in addressing the findings and deficiencies identified in the Acquisition Advisory Panel report. This analysis should occur no later than three years after initial implementation with a continuing requirement to conduct a new analysis every three years.

MULTI-ASSOCIATION RESPONSE

We concur that a subsequent review of the Panel's recommendations would be in order, but would suggest a clarification that such a follow-up would occur three years, "after OMB's receipt of the Panel's Final Report."

Summary

We concur that enhanced oversight and management of existing contract vehicles will improve efficiency and allow agencies to maximize the effectiveness of their acquisition.

MULTI-ASSOCIATION COMMENTS ON
THE SECTION 1423 ACQUISITION ADVISORY PANEL'S
FINAL PANEL RECOMMENDATIONS
CHAPTER 4 - SMALL BUSINESS

In Chapter 4, the Acquisition Advisory Panel highlighted recognition given by the congressional and executive branches to the fundamental role played by small businesses in government contracting. That recognition has led to the development of policies and guidance, and the passage of numerous laws governing preference programs. The Panel made several distinct recommendations related to small business contracting.

While not a formal recommendation, in its "Statement of Issues," the panel also highlighted the need to reform the system for defining and applying size standards in government contracting – and indicated its support for efforts of the Small Business Administration (SBA) to simplify small business size standards. Industry recognizes SBA's efforts to address significant reform of the size standards. However, we remain opposed to SBA's actions in its 2004 proposed rule and follow-on 2005 Advance Notice of Public Rulemaking.

DISCUSSION

After conducting its own review of the policies and laws related to small business programs, the Panel determined that there is inadequate guidance and even inconsistency in the application of the governing guidance. To address the inadequacy of the guidance and the confusion surrounding implementation of the various laws and policy, the panel made the following recommendations:

- **Amend the Small Business Act to ensure there is no hierarchy among various small business contracting programs. Specifically, the statute should provide for parity between the 8(a), HUBZone, and Service-Disabled Veteran Owned small business programs. The panel noted that a change to the HUBZone statute would be required. Also, the SBA and FAR regulations would need to be amended to fully implement this recommendation.**
- **Provide greater discretion to the contracting officer to meet agency specific small business goals as appropriate.**

MULTI-ASSOCIATION RESPONSE

Industry generally supports the goal of clarifying the regulatory guidance regarding the contracting officers' discretion to achieve agency small business goals. However, we believe the current mixture of statutory and administrative priorities adds significant policy obstacles to further orienting individual agency actions.

- **Direct the Government Accountability Office (GAO) to perform a review of the FPDS-NG to examine the data being collected; how agencies use the data; and whether agencies have real-time access to goaling data.**

MULTI-ASSOCIATION RESPONSE

Industry supports a comprehensive review of the FPDS-NG capabilities and of department and agency ability to input data on a real-time basis, including an analysis of agencies' ability to identify and report on contract bundling. We recommend, however, that this analysis should occur before any policy changes are made.

- **Stop the use of cascading procurements. To accomplish this, the panel recommends replacing Section 816 of the FY06 National Defense Authorization Act (P.L. 109-163) that required the Department of Defense to develop guidance on cascading procurements in limited circumstances with language that would create an outright prohibition on the use of cascading on a government-wide basis.**

MULTI-ASSOCIATION RESPONSE

We support the Panel's recommendations to prohibit the use of the contracting technique for tiered evaluations commonly called "cascading". Industry has opposed the use of cascading and supported the provision in the FY06 National Defense Authorization Act that required guidance to be developed on the use of tiered evaluations as a means to control its use. We agree that the use of this contracting technique is inappropriate and is a poor proxy for proper market research. Additionally, this technique is patently unfair to firms that submit offers that will never be considered for award, be they large businesses or small businesses with lower set-aside priority.

However, to implement the panel's recommendations, many agencies need to be involved and coordinate their efforts.

ISSUE: GUIDANCE WITH CONTRACT CONSOLIDATION

The Acquisition Advisory Panel noted that the use of contract bundling and consolidation is not new. Many agencies have consolidated or bundled contracts in order to streamline the procurement process, reduce administrative efforts and costs and leverage buying power. More recently, it is being used by agencies pursuing strategic sourcing opportunities.

DISCUSSION

The Panel noted that while both the president and Congress have expressed concern about contract consolidation, and several statutes address contract bundling, there is inconsistency in implementation of the applicable laws and regulations by contracting

officials. To address this concern, the panel recommended that the Office of Federal Procurement Policy (OFPP):

- **Create an interagency taskforce to develop best practices and strategies to unbundle contracts and mitigate the effects of contract bundling;**
- **Coordinate the development of a government-wide training module for all Federal agencies on the legislative and regulatory requirements related to minimizing contract bundling.**

In adopting and implementing the recommendations of the Panel, it is expected that all Federal agencies would be impacted by any policies developed by OFPP.

MULTI-ASSOCIATION RESPONSE:

No civilian agency (nor OFPP for that matter) has issued guidance to civilian agency contracting and program offices on best practices to implement statutes addressing the practice of contract bundling. Therefore, we strongly support creating a government-wide database of best practices for understanding the statutory and regulatory requirements relating to "contract bundling" (as defined in the statute) and for mitigating its effects. We also support the development of training courses specifically aimed at helping contracting officials understand, and minimize, contract bundling and consolidation.

Several associations have been meeting regularly with the Department of Defense's (DoD) Office of Small Business to further identify appropriate, updated guidance that can be issued to contracting officers, small business advocates and industry, to better understand the statutory and regulatory requirements. We recommend that those efforts be continued on a government-wide basis, possibly under the auspices of OFPP.

In addition, Congress has imposed on DOD an additional set of procedures when the Department proposes to use "contract consolidation." DOD has issued limited guidance in the DFARS to implement this statutory requirement.

ISSUE: COMPETITION FOR MULTIPLE AWARD CONTRACTS

The Acquisition Advisory Panel noted that statutory changes, as well as internal changes within the General Services Administration Multiple Award Schedules, has led to an increase in the use of multiple award indefinite delivery/indefinite quantity contracting vehicles. Small businesses have been able to compete on these contracts because of the innovative procurement methods used by contracting officials.

DISCUSSION

According to the Panel's findings, reserving multiple award contracts for small businesses may help agencies achieve their goals. However, such actions may be contrary to the requirements of the Competition in Contracting Act (CICA). Furthermore, there has been inconsistent and confusing use of these vehicles.

Therefore, the Panel recommended that CICA be amended to provide agencies with the discretion for reserving contracts for HUBZones, small disadvantaged businesses, service-disabled small businesses and women-owned small businesses. The amendment would not cover the 8(a) program, however.

MULTI-ASSOCIATION RESPONSE

While we do not oppose providing guidance on the practice of agencies "reserving" prime contracts for small business in full and open competitions, we believe agencies are already familiar with the practice and are taking advantage of appropriate opportunities. A current example is the Department of Homeland Security's information technology systems procurement (EAGLE) where a number of awards in each of the major categories of work solicited on a full and open basis were "reserved" for and awarded to small business.

ISSUE: COMPETITION FOR TASK ORDERS

The findings and recommendations by the Acquisition Advisory Panel related to competition for task orders is similar to those related to multiple-award contracts.

DISCUSSION

The panel noted that limiting competition to small businesses helps agencies achieve their goals – but may be contrary to requirements for competition for the Department of Defense as required by Section 803 of the FY2002 National Defense Authorization Act. Therefore, the panel recommends that contracting agencies, including DOD, be given the statutory discretion to limit competition for task orders to small businesses.

MULTI-ASSOCIATION RESPONSE:

Industry has consistently supported the application of Section 803 on a government-wide basis. However, we believe that public comment should be sought to ensure proper implementation beyond current use at DoD.

ISSUE: SUBCONTRACTING WITH SMALL BUSINESS (APPENDIX)

In the appendices to Chapter 4, the Panel did a cursory review of small business subcontracting issues.

DISCUSSION

The Panel recommended improving the new electronic subcontracting reporting system (eSRS) that might provide the necessary information to contracting officials to ensure proper compliance with subcontracting requirements.

MULTI-ASSOCIATION RESPONSE

Industry supports a thorough review of subcontracting issues. Since the eSRS program is not yet in effect (as of March 1, 2007), it is too early to address improvements.

MULTI-ASSOCIATION COMMENTS ON
THE SECTION 1423 ACQUISITION ADVISORY PANEL'S
FINAL PANEL RECOMMENDATIONS
CHAPTER 5 - THE WORKFORCE

The Acquisition Advisory Panel's recommendations regarding the status of the federal contracting workforce are welcome and much needed. Many of the events of the last several years that have brought about increased criticism and enhanced oversight of federal contracting are in many ways the direct and indirect result of shortcomings in the federal contracting workforce.

Recommendation#1-1: Data Collection and Workforce Definition

MULTI-ASSOCIATION RESPONSE

Industry concurs that there is a need to create and apply workforce definitions that can be sensibly and consistently applied to contracting/procurement staffs as well as the broader acquisition community in both the civilian and DOD workforce. We also believe such efforts and this recommendation need to be more directly linked and keyed to the Human Capital Planning recommendations of the Panel's report. Otherwise, there is a possibility that collecting and aggregating the workforce data will become a circular and unproductive activity.

Policymakers should consider a companion activity related to the collection of meaningful transaction data. Such transactional data, when considered in conjunction with the workforce data, will provide a more holistic and dimensional perspective to staff and workload relationships. Building upon the report's discussion of this matter, policymakers should make it clear that the objective in writing definitions is to fashion an effective tool of measurement and assessment, not an exacting and all encompassing description of duties and responsibilities. .

Recommendation #1-2: Data Collection and Workforce Definition

MULTI-ASSOCIATION RESPONSE

Industry agrees with the need for a standard definition and suggests that policymakers consolidate Recommendation #1-1 and #1-2.

Recommendation#1-3: Acquisition Workforce Database

MULTI-ASSOCIATION RESPONSE

This database builds on Recommendation #1-1 such that, once identified as being part of the Acquisition Workforce, additional information concerning each individual will be collected. This appears to establish a system of records duplicative of existing systems and may need to be authenticated in terms of Privacy Act provisions.

In order for such a database to maintain currency and relevancy for its intended use, it will require extraordinary effort. Most of the identified elements of the database have a short shelf life requiring frequent updating, in all likelihood by the individual, in order for the information to have any bearing on its use in making decisions. Given the Panel's concerns with extraneous demands on Acquisition Workforce time and effort, there appears to be minimal immediate return on the investment of time to maintain such a centralized database. Policymakers should consider the use and possible expansion of records systems currently maintained at the agency level for warranted Contracting Officers.

The expressed purpose of the database, as identified in the Discussion, would be to "offer a valuable tool to try to attract our most talented and capable acquisition personnel to the most demanding positions within the federal acquisition mission". How this might be accomplished or achieved is not detailed in the Discussion or in the material posted on the Panel's web site. It does, however, suggest centralized management of the Acquisition Workforce. While we do not believe the case has been made for a single, government-wide Acquisition Corps, there may be a benefit to establishing select teams of contracting/procurement and acquisition professionals to handle more complex contract requirements at a Departmental level.

Recommendation #2-1: Human Capital Planning for the Acquisition Workforce

MULTI-ASSOCIATION RESPONSE

The use of the existing Human Capital Planning process as a foundational activity for more particularly assessing the capacity, capability, professional maturity and competency of the existing workforce is a good recommendation. It minimizes process duplication while specifically furthering the assessment of critical metrics related to the acquisition workforce. What is not clear is how the Chief Acquisition Officers will be afforded the opportunity to leverage these assessments for purposes of assuring training, recruitment and retention of acquisition workforce personnel. The Panel's recommendation would be furthered if policymakers establish objectives for a process similar to that followed for Capital Programming activities on major IT and facilities. The Panel has correctly recognized the importance of investing in the acquisition workforce and the suggested process would allow the CAOs to present the investment case as part of the budget and appropriations process as opposed to an administrative pleadings process during operational budget allotments and allocations.

Recommendations #2-2 and #2-3: Human Capital Planning for the Acquisition Workforce

MULTI-ASSOCIATION RESPONSE

The discussion associated with these recommendations suggests they are more statements of expectations and outcomes associated with Recommendation #2-1 than

they are stand-alone recommendations. Predicting the need for acquisition staff and forthrightly stating the gap in human resources and capability between what is available and what is expected to be required are integral components of a meaningful Human Capital Planning activity. These recommendations should be incorporated into Recommendation #2-1 to further strengthen the Acquisition Workforce Human Capital Strategic Plan.

Recommendation #2-4: Human Capital Planning for the Acquisition Workforce

MULTI-ASSOCIATION RESPONSE

The Panel has correctly identified the need to assess the extent to which contractor personnel are performing acquisition roles and responsibilities and whether such involvement is efficient and beneficial. Incorporating these findings into the Acquisition Workforce Human Capital Strategic Plan will facilitate creating a single and encompassing analysis of all resources dedicated to the acquisition process.

Of concern, however, as evidenced in the Discussion, is the Panel's inclination to presume such resource dependency may not be beneficial to the government based on anecdotal information and predispositions to the same. Recommending the study of a matter need not be predicated on a presumption that something isn't working correctly when in fact it might really be working very well when considered from another perspective.

As the Panel's Discussion pointed out, contractors should not perform inherently governmental functions. But care is needed to address the practical difference between the exercise of authority from related activities that may be undertaken to facilitate the exercise of such authority. Decision-making is distinctly separate from gathering information and making recommendations to the decision-maker. The issue appears to be who does them, not whether they need to be done. A review the Federal Activities Inventory Reports [FAIR] indicates that not all agencies view the support of acquisition and procurement decisions makers as inherently governmental.

Concerns about possible organizational conflicts of interest [OCI], clearly a legitimate concern that needs to be addressed, are themselves not a reason for precluding support. OCI can be dealt with through a number of mitigating actions, all of which can be focused on protecting the government's and taxpayer's interests.

One particular opportunity that surprisingly did not receive greater consideration is the re-employment of qualified retired acquisition and procurement professionals. Individuals who qualify for retirement frequently transition to alternative careers in private industry for financial considerations. Such individuals frequently are not retiring; they are changing jobs because it makes financial sense. Policymakers are encouraged to consider recommending or endorsing legislation that would permit individuals who have "retired" but are willing to return to Federal services without a loss of pension. Industry is just as aware of the very uncertain future the government faces in regard to its capability and capacity to service and support its contracting and purchasing requirements. Stabilizing the situation by returning qualified individuals to Federal service would be a very positive, productive and effective solution.

The Panel's observation that time and materials contracts are disfavored is irrelevant to the specific issue of contracting for acquisition and procurement support. The use of T&M contracts speaks to a broader issue. The contract type used for acquisition support

services needs to be considered on the merits of the instant case, not as a matter of policy. As the Panel recognizes, the complexity and volume of workload is creating extraordinary demands. To the extent agencies choose to address the demand by seeking contractor assistance, it is the circumstances of the demand that should be considered in selecting contract type.

Recommendation#2-5: Qualitative Assessment

MULTI-ASSOCIATION RESPONSE

The Panel's recommendation focuses on a critical element of consideration when assessing the adequacy and demand for acquisition personnel. The full lifecycle of the Federal contracting process needs to be accounted for when the current and future staffing assessments are done. Lack of staffing or reduced staffing competency in any phase of the acquisition lifecycle will jeopardize the government's interests and will have its own distinctive impact on phases preceding or following the area in which the shortfall is experienced.

The Panel's stated specific intent to optimize the contribution that private sector capabilities can make to the successful accomplishment of Federal Agency missions seems misplaced by inclusion in this recommendation. This objective would appear to be more consistent with an assessment related to performance based contracting than lifecycle staffing issues.

Recommendation #3: Workforce Improvements Need Prompt Attention

MULTI-ASSOCIATION RESPONSE

The Panel's stated intent is to communicate clearly the urgent attention that should be given to strong measures to improve the acquisition workforce. We concur with the intent but believe this statement fails to constitute a recommendation. While Findings #5 through #5-5 detail the factual basis for the urgent call to immediate action, the discussion supports the Human Capital Planning activities called for by the Panel in Recommendations #2-1 through #2-5 or in the subsequent #3 recommendations.

Recommendation #3-1: Need to Recruit Talented Entry Level Personnel

MULTI-ASSOCIATION RESPONSE

The Panel's recommendation to establish a government-wide internship has our strong endorsement. The absence of such programs in many government agencies is a contributing factor to the government's failure to attract personnel to acquisition careers. Additionally, the absence of such programs has undoubtedly contributed to the lack of needed skill sets in today's acquisition environment.

While the creation of a government-wide internship program is fully merited, the focus on entry level personnel overlooks the possibility that experienced industry personnel might seek a government career. In establishing the intern program, consideration should be given to including experienced non-Federal personnel who have needed skills but lack the experience of representing the government.

Policymakers are encouraged to consider the recruitment of *qualified* as opposed to "first rate" personnel. The existing standards for the 1102 series establish a reasonable minimum set of qualifications. Suggesting a higher standard seems counterproductive to the intent of the recommendation.

Recommendation #3-2: Hiring Streamlining Necessary

MULTI-ASSOCIATION RESPONSE

The Panel's recommendation to accelerate the hiring process by removing obstacles is well founded. The government must be able to identify, select and offer employment to qualified candidates in a much more timely manner. The administrative and budgetary considerations that impact the process must be minimized.

Recommendation #3-3: Need to Retain Senior Workforce

MULTI-ASSOCIATION RESPONSE

Given the Panel's supporting narrative for Finding #5-2 and Discussion of this recommendation, it is disappointing that the Panel chose not to directly confront the sources of some of the staffing issues now being faced in the acquisition workforce. The Panel would have served its concern for the workforce more forcefully if it had chosen to identify impacts of the past and recommended some guiding principles for legislative and political consideration when addressing issues impacting or affecting the acquisition workforce.

Nonetheless, as recommended, there exists a demanding need to retain the experienced and senior acquisition personnel and leadership. While the need to retain personnel is not exclusive to acquisition, the incentives created must address the reasons that prompt personnel to leave or retire from Federal service.

Recommendation #3-4: Training

MULTI-ASSOCIATION RESPONSE

The Panel's recommendation to institute a vigorous workforce training program is clearly merited. Assured funding is critical to successfully implementing this recommendation. Establishing a protective environment for these funds would be beneficial by outlining budgetary reprogramming provisions that would govern funds. Having OFPP assess the adequacy of the training funds using the Acquisition

Workforce Human Capital Strategic Plan should work to assure OMB sensitivity to the demands for funds and their effective use.

Recommendation #3-5: Acquisition Workforce Education and Training Requirements

MULTI-ASSOCIATION RESPONSE

The Panel's recommendation essentially calls for a more disciplined environment within which education and training waivers would be granted. The framework already exists and the process apparently is being followed. The Panel's recommendation appears to be based on perception and anecdotal information, bringing into some doubt the concerns expressed and the actions proposed. The Panel states it is concerned with assuring the waiver program is used to achieve compliance with education and training requirements and not a means of having to avoid complying. Disagreeing with the decisions thought to have been made does not justify a recommendation to change the existing process.

Recommendation #3-6: Acquisition Workforce University

MULTI-ASSOCIATION RESPONSE

The Panel's recommendation to establish an OFPP study panel to evaluate the need for a government-wide Federal Acquisition University is, as stated, a compromise. The inability of the Panel to come to consensus on the matter suggests this recommendation may be unnecessary. Recent efforts to facilitate the coordination of training between the Defense Acquisition University and the Federal Acquisition Institute need to be given the opportunity to succeed before concluding that the effort is failing or without merit.

Recommendation #4: An Acquisition Workforce Focus is Needed in OFPP

MULTI-ASSOCIATION RESPONSE

The Panel's call for OFPP oversight of the Acquisition Workforce Human Capital Strategic Plan properly places the responsibility with the office that should be most cognizant of the acquisition workforce and workload issues. Whether this responsibility justifies a senior executive position is better determined by other parties. Using this recommendation to aggregate OFPP responsibilities identified in this Chapter may be convenient but not necessary.

Recommendation #5: Reporting Waiver Requirements

MULTI-ASSOCIATION RESPONSE

The recommendation is justified as a means of controlling the workload for the workforce and the administrative burden for agencies that are already experiencing difficulties that have been described in Recommendations #1-4.

MULTI-ASSOCIATION COMMENTS ON
THE SECTION 1423 ACQUISITION ADVISORY PANEL'S
FINAL PANEL RECOMMENDATIONS
CHAPTER 6 - APPROPRIATE ROLE OF CONTRACTORS
SUPPORTING GOVERNMENT

Chapter 6 of the Acquisition Advisory Panel's final report addressed the appropriate role of contractors supporting government. This is a new area of attention in the federal acquisition landscape and the Panel's work adds to the body of knowledge about the issue and the challenges that both government and contractors face.

On January 31, 2006, our Multi-Association Group provided the Panel with our initial observations about the ethical matters being discussed by the Panel, including internal controls, standards of conduct, and the emerging policy issues relating to the "blended workforce." Since that industry initiative, the Panel addressed these matters in their final meetings.

The Panel's final recommendations and our multi-association comments are provided.

Recommendation 1: The Office of Federal Procurement Policy should update the principles for agencies to apply in determining which functions must be performed by government employees.

MULTI-ASSOCIATION RESPONSE

We generally support this recommendation although the Office of Federal Procurement Policy has already taken these actions. In May 2003, OFPP issued a revised OMB Circular A-76 relating to competitive sourcing that incorporated essentially unchanged the definition of the phrase "inherently governmental" from its 1992 OFPP Policy Letter 92-1. Little has changed that would call for a further update. In addition, since the 1998 passage of the Federal Activities Inventory Reform ("FAIR") Act, agencies have, under OMB guidance, prepared and publicly published annually their FAIR Act inventories identifying in detail the specific functions within each agency that are "inherently governmental" that should still be performed by federal employees and those functions that are "commercial activities" that could be performed by the private sector. Any future OFPP guidance must provide the flexibility for each agency to determine which functions "must" be performed by government employees. An advantage to using the FAIR Act inventory process for making these important determines is the ability of the public to review the agency decisions and contest inappropriate determinations.

Regrettably, while the Panel approached this matter objectively, Congress has enacted legislation to restrain agency decision-making by imposing procedural hurdles or by specifically categorizing certain functions as "inherently governmental" that are required to be performed by government employees. This politicization of the review and decision-making process subverts the ability of agencies to address these important

workforce issues substantively and with due regard for agency-unique human capital needs and plans.

These additional categories add to the already problematic interpretations put on the phrase "inherently governmental." In acting on the Panel's recommendation, we suggest that OFPP determine whether or not the phrase "inherently governmental" is the best terminology to be used. Amending or replacing the phrase to better connote the services that are appropriately performed by employees in the private, public or both may better achieve the Panel's objective. The application may differ from agency to agency depending on the mission of each and the expertise already in the agency.

Recommendation 2: Agencies must ensure that the functions identified as those which must be performed by government employees are adequately staffed with Federal employees.

MULTI-ASSOCIATION RESPONSE

We fully support this recommendation. In addition to having adequate numbers of staff, the workforce – whether performing these designated functions or not – must be well trained, well compensated and well equipped to fully perform their work.

Recommendation 3: In order to reduce artificial restrictions and maximize effective and efficient service contracts, the current prohibition on personal service contracts should be removed. Government employees should be permitted to direct a service contractor's workforce on the substance of the work performed, so long as the direction provided does not exceed the scope of the underlying contract. Limitations on the extent of government employee supervision of contractor employees (e.g. hiring, approval of leave, promotion or performance ratings, etc.) should be retained.

MULTI-ASSOCIATION RESPONSE

We do not support a complete repeal of the existing statutory prohibition on the use of personal services contracts. While the Panel has made a case that the blended workforce has created a new workplace that combines the resources of both government and industry that calls for special attention and it has provided an exhaustive recitation of concerns raised by the legislative and regulatory history of the prohibition, the Panel has not made a compelling case for complete repeal of this long-standing statutory restriction on the use of personal services contracts. It also appears that this issue reflects shortfalls in the government workforce that are not primarily a procurement issue, but could reflect gaps in human resources that personal services contracts are filling for lack of alternatives.

In our view, only a limited, more targeted approach to the use of personal services contracts is called for. Indeed, Congress has been willing to provide specific agencies with specific limited authority to use personal services contracts to address agency-

identified needs. Industry is concerned that the outright repeal of the prohibition will give rise to more problems than benefits to the acquisition system. The Panel properly noted its concerns about issues relating to the government's supervision of contractor employees, including directing work outside the scope of the contract under which those contractor employees are working, and the government's intervention into employer responsibilities such as performance evaluations and working conditions – issues which go to the very heart of the business relationship between government and industry and industry and its employees. These sorts of interventions could impinge on the responsibility of contractors to perform the contract and manage its workforce. Thus, we do not support this recommendation but would support efforts by OFPP and the HR offices of individual agencies to identify agency needs for personnel and how to resolve them in both the short term and long term.

Recommendation 4: Consistent with action to remove the prohibition on personal services contracts, the Office of Federal Procurement Policy should provide specific policy guidance which defines where, to what extent, under which circumstances, and how agencies may procure personal services by contract. Within five years of adoption of this policy, the Government Accountability Office should study the results of this change.

MULTI-ASSOCIATION RESPONSE

Notwithstanding our objection to Recommendation 3 that would completely repeal the statutory prohibition on personal services contracts, we support the portion of this recommendation that requests the Office of Federal Procurement Policy to develop guidance on the circumstances that agencies should address in determining whether, and to what extent, targeted exceptions to the statutory prohibition might be necessary or appropriate. We believe, however, this recommendation goes beyond procurement policy and would, therefore, require the involvement of both the Office of Personnel Management and agency human capital planners. At this time, we do not see the need for any GAO study on this matter.

Recommendation 5: The FAR Council should review existing rules and regulations, and to the extent necessary, create new, uniform, government-wide policy and clauses dealing with Organizational Conflicts of Interest, Personal Conflicts of Interest, and Protection of Contractor Confidential and Proprietary Data, as described in more detail in the following sub-recommendations.

MULTI-ASSOCIATION RESPONSE

Our specific comments are addressed in each of the sub-recommendations. As a general matter, we do not believe that more laws or regulations are necessary. We do support greater government and private sector leadership and greater attentiveness to the high-risk areas particular to these emerging business relationships. In addition, industry would welcome a meaningful, robust public dialogue about the current regulations, any gaps that might exist in the existing coverage, and the appropriate

regulatory solution that provides meaningful approaches that address the needs of both government and industry.

Recommendation 5-1: Organization Conflicts of Interest (OCI).
The FAR Council should consider development of a standard OCI clause, or a set of standard OCI clauses, if appropriate, for inclusion in solicitations and contracts that set forth the contractor's responsibility to assure that its employees and those of its subcontractors, partners and any other affiliated organization or individual), as well as policies prescribing their use. The clauses and policies should address conflicts that can arise in the context of developing requirements and statements of work, the selection process, and contract administration. Potential conflicts of interest to be addressed may arise from such factors as financial interests, unfair competitive advantage, and impaired objectivity (on the instant or any other action), among others.

MULTI-ASSOCIATION RESPONSE

The existing FAR provisions require the government to be alert to issues of potential organizational conflict and to take action to prohibit or mitigate its effects. Numerous GAO bid protest decisions over the past three years have reinforced the importance of contracting officer attention to and action regarding this important matter, from the acquisition strategy phase through contract administration. However, there is little evidence that a "standard" clause is necessary or that the absence of such a clause has led to any greater risk to the government. Indeed, the specific areas of concern the Panel recommended be addressed are already the core elements in the current FAR OCI provision. Nevertheless, industry would welcome a meaningful, robust public dialogue about the current regulations, any gaps that might exist in the existing coverage, and the appropriate regulatory solution that provides meaningful approaches that address the needs of both government and industry. We are, however, skeptical that a standard clause is appropriate since OCIs and potential OCIs are completely fact specific.

Recommendation 5-2: Contractor Employees' Personal Conflicts of Interest (PCI). The FAR Council should determine when contractor employee PCI need to be addressed, and whether greater disclosure, specific prohibitions, or reliance on specified principles will accomplish the end objective of ethical behavior. The FAR Council should consider whether development of a standard ethics clause or a set of standard clauses that set forth the contractor's responsibility to perform the contract with a high level of integrity would be appropriate for inclusion in solicitations and contracts. The FAR Council should examine the DII and determine whether an approach along those lines is sufficient. As the goal is ethical conduct, not technical compliance with a multitude of specific and complex rules and regulations, the rules and regulations applicable to Federal employees should not be imposed on contractor employees in their entirety.

MULTI-ASSOCIATION RESPONSE

The Panel has identified an emerging and appropriate area of attention in the government/ contractor relationship: any personal conflict of interests (PCI) of a contractor employee that might impinge on that employee's performance of a government contract, particularly in a "blended workforce" environment or where the employee is providing material judgmental information to governmental decision makers. Needless to say, we support measures that will materially enhance the likelihood of ethical behavior. We also support efficient and economical procurement processes that reflect the differences between public and private employment. As a new area of attention, we also appreciate the flexibility the Panel demonstrated in its recommendation that the FAR Council evaluate this issue to determine when PCI should be taken into account and how best to address this important matter. Industry would welcome a meaningful, robust public dialogue about the current regulations, any gaps that might exist in the existing coverage, and the appropriate regulatory solution that provides meaningful approaches that address the needs of both government and industry.

Recommendation 5-3: Protection of Contractor Confidential and Proprietary Data. The FAR Council should provide additional regulatory guidance for contractor access and for protection of contractor and third party proprietary information, including clauses for use in solicitations and contracts regarding the use of non-disclosure agreements, sharing of information among contractors, and remedies for improper disclosure.

MULTI-ASSOCIATION RESPONSE

The Panel has identified another emerging and appropriate area of attention in the government/contractor relationship: the protection of contractor and third party proprietary information. As a new area of attention, we also appreciate the flexibility the Panel demonstrated in its recommendation that the FAR Council evaluate this issue to determine the additional guidance necessary to protect such proprietary information. Several agencies have already taken regulatory action that could undercut these important contractor rights. Industry would welcome a meaningful, robust public dialogue about the current regulations, any gaps that might exist in the existing coverage, and the appropriate regulatory solution that provides meaningful approaches that address the needs of both government and industry.

Recommendation 5-4: Training of Acquisition Personnel.
The FAR Council, in collaboration with the Defense Acquisition University (DAU) and the Federal Acquisition Institute (FAI), should develop and provide (1) training on methods for acquisition personnel to identify potential conflicts of interest (both OCI and PCI), (2) techniques for addressing the conflicts, (3) remedies to apply when conflicts occur, and (4) training for acquisition personnel in methods to appropriately apply tools for the protection of confidential data.

MULTI-ASSOCIATION RESPONSE

We support this recommendation. We strongly recommend that industry be included in the development of the training material and, to the extent appropriate, participate in the delivery of the training. We also encourage the government to periodically re-evaluate the key skills and attributes it uses to assess and train the contracting workforce to assure they reflect current needs.

Recommendation 5-5: Ethics Training for Contractor Employees.
Since contractor employees are working side-by-side with government employees on a daily basis and because government employee ethics rules are not all self-evident, consideration should be given to a requirement that would make receipt of the agency's annual ethics training (same as given to government employees) mandatory for all service contractors operating in the multisector workforce environment.

MULTI-ASSOCIATION RESPONSE

As we noted in our January 31, 2006 comments, most companies that serve as government contractors already have extensive systems in place that address ethical standards and behaviors for their employees. Companies working with government agencies in a multi-sector workforce environment have developed an increased level of sensitivity to appropriate standards of business conduct. We recognize that the government's standards of conduct and training are different from contractor standard of conduct and training; both government and industry would benefit from a greater understanding of each other's obligations and implementing actions, although we do not believe that such benefit can only be obtained by making the government's annual ethics training mandatory for contractor employees.

Recommendation 6: Enforcement.
In order to reinforce the standards of ethical conduct applicable to contractors, including those addressed to contractor employees in the multisector workforce, and to ensure that ethical contractors are not forced to compete with unethical organizations, agencies shall ensure that existing remedies, procedures and sanctions are fully utilized against violators of these ethical standards.

MULTI-ASSOCIATION RESPONSE

We support this recommendation for enforcement where the violations and appropriate remedial or punitive actions are determined after appropriate due process procedures.

MULTI-ASSOCIATION COMMENTS ON
THE SECTION 1423 ACQUISITION ADVISORY PANEL'S
FINAL PANEL RECOMMENDATIONS
CHAPTER 7 - FEDERAL PROCUREMENT DATA

Panel Recommendation

The Panel makes several specific recommendations to improve and expand upon the current Federal Procurement Data System–Next Generation (FPDS-NG), including:

Office of Federal Procurement Policy (OFPP) shall ensure that reporting of task and delivery order information reflects the level of competition.

- OFPP shall make sure that data reporting and validation procedures are the same across agencies.
- An Independent Verification and Validation should be undertaken to review validation rules.
- Congress should amend the OFPP Act to assign Head of Executive Agency responsibility for timely and accurate data reporting.
- Agencies should focus on training employees on accurate data reporting.
- Office of Management and Budget (OMB) should establish a standard operating procedure to designate procedures and allocate resources to test changes to FPDS-NG.
- Agencies should conduct internal reviews to compare FPDS-NG data to the contract file or order file.
- OFPP Interagency Contracting Working Group should address data entry responsibility for agency-wide contracts.
- Government Accountability Office (GAO) should audit the quality of FPDS-NG data as well as agency compliance with accurate and timely reporting.
- OFPP should require data reporting for orders under interagency and enterprise-wide contracts.
- FPDS-NG report provided to the Panel should be provided to the public.
- OFPP should study ways to enhance the information available on FPDS-NG.
- OMB shall ensure that agencies provide sufficient funds to finance data reporting systems.

MULTI-ASSOCIATION RESPONSE

We agree generally with the Panel's draft recommendations for improving the Federal Procurement Data System – Next Generation. We also agree with the Panel's findings that the FPDS-NG is beset by inaccurate and incomplete data and that efforts to improve the FPDS-NG should focus on timely, accurate, and complete data reporting. The specific steps laid out by the Panel appear to provide a reasonable approach to addressing many of the current problems with FPDS-NG.

As the Panel recognized, the Federal Funding Accountability and Transparency Act of 2006 (the Act) supersedes some of the Panel's recommendations concerning FPDS-NG. The problems with FPDS-NG and the need to improve the system will only be magnified in light of the passage of the Act, which was signed into law on September 26, 2006. The Act directs OMB to establish a publicly-available online database containing information about the award of federal contracts, grants, and loans. The online database prescribed by the Act will include the following information for each Federal award over $25,000, with certain exceptions for classified information and federal assistance payments made to individuals:

(1) the name of the entity receiving the award;

(2) the amount of the award;

(3) information on the award, including transaction type, funding agency, the North American Industry Classification System (NAICS) code or Catalog of Federal Domestic Assistance number (where applicable), program, source, and an award title descriptive of the purpose of each funding action;

(4) the location of the entity receiving the award and the primary location of performance under the award, including the city, State, congressional district, and country;

(5) unique identifier of the entity receiving the award and of the parent entity of the recipient, should the entity be owned by another entity; and

(6) any other relevant information specified by OMB.

This online database will consolidate data from various sources, including the FPDS-NG. Much of the information that must be in the online database required by the Act overlaps with information that is captured (or is supposed to be captured, as the case may be) by FPDS-NG. A complete and accurate FPDS-NG, therefore, is crucial to implementing the database envisioned by the Act, which must be up and running by January 1, 2008. Some have already suggested that the weaknesses of FPDS-NG, such as the incomplete and inaccurate information detailed in the Panel's report, could hinder OMB's efforts to implement the Act. Deficiencies in FPDS-NG, therefore, will only gain more attention going forward if not remedied, and any recommendations to improve FPDS-NG should focus on how FPDS-NG will be used to implement the online database required by the Act.

Notably, the Act also directs OMB to include information on subcontractors and subgrantees in the database by January 1, 2009. Data on subcontracts currently is not contained in FPDS-NG, but instead is reported in a different database, the Electronic Subcontracting Reporting System (eSRS), maintained by the Small Business Administration. The eSRS does not appear to capture all of the information on subcontractors required by the Act.

Finally, and most importantly, we believe it is imperative when considering changes to the FPDS-NG and any federal procurement data system that the proprietary and commercial information of offerors and contractors be protected from unauthorized and unlawful disclosure. It is of utmost importance that the current laws governing the protection of such information remain in effect and that the government continues to vigorously enforce those laws in order to protect the information. All bid and proposal information must be protected in accordance with 41 U.S.C. § 423, FAR 3.104-4, *Disclosure, protection, and marking of contractor bid or proposal information and source selection information*, FAR 14.401, *Receipt and safeguarding of bids*, and FAR 15.207, *Handling proposals and information*. Likewise, contractor commercial and proprietary information – which is exempt from disclosure under the Freedom of Information Act, including unit price information under the exemption in 5 U.S.C. § 552(b)(4) – should be protected from disclosure. Just as the interests of transparency and accountability are furthered by disclosure of award information through an effective procurement data system (the purpose of the FPDS-NG and the Act), the interests of robust competition in the government space will only be accomplished through protecting the proprietary information of competitors and contractors.

About AIA
The Aerospace Industries Association represents the nation's leading manufacturers and suppliers of civil, military, and business aircraft, helicopters, unmanned aerial vehicles, space systems, aircraft engines, missiles, materiel, and related components, equipment, services, and information technology. The association, originally known as the Aeronautical Chamber of Commerce, was founded in 1919 with a charter membership of 100 "to foster, advance, promulgate and promote: aeronautics, and "generally, to do every act and thing which may be necessary and proper for the advancement" of American aviation. Early members included such aviation pioneers as Orville Wright and Glen H. Curtiss, as well as representatives of major aircraft manufacturing units in the United States.

About CSA
By way of background, CSA is the nation's oldest and largest association of service contractors representing over 200 companies that provide a wide array of services to Federal, state, and local governments. CSA members perform over $40 billion in Government contracts and employ nearly 500,000 workers, with nearly two-thirds of CSA companies using private sector union labor. CSA members represent the diversity of the Government services industry and include small businesses, 8(a)-certified companies, small disadvantaged businesses, women-owned, HubZone, Native American owned firms and global multi-billion dollar corporations. CSA promotes Excellence in Contracting by offering significant professional development opportunities for Government contractors and Government employees, including the only program manager certification program for service contractors. For more information on CSA, go to: www.csa-dc.org.

About EIA
EIA, headquartered in Arlington, Va., comprises nearly 1,300 member companies whose products and services range from the smallest electronic components to the most complex systems used by defense, space and industry, including the full range of consumer electronic products. The Alliance is composed of four sector organizations: the Electronic Components, Assemblies and Materials Association; the Government Electronics and Information Technology Association; the JEDEC Solid State Technology Association; and the Telecommunications Industry Association.

About GEIA
The Government Electronics & Information Technology Association (GEIA) promotes the interests of the U.S. electronics, communications and information technology industries with regard to government markets, requirements, and technical standards. GEIA represents companies that create and apply innovative products, services, practices, technologies and integrated solutions to meet government needs. Our activities encompass most business disciplines of the government electronics, communications and information technology industries, including market planning, forecasting, manufacturing, procurement, support services, standards, and government specifications. GEIA programs include ongoing interaction with Congress and civil and military agencies of the Executive Branch.

About ITAA

Founded in 1961 as the Association of Data Processing Services Organizations (ADAPSO), the Information Technology Association of America (ITAA) provides global public policy, business networking, and national leadership to promote the continued rapid growth of the IT industry. ITAA consists of over 325 corporate members throughout the U.S., and is secretariat of the World Information Technology and Services Alliance, a global network of 67 countries' IT associations. The Association plays the leading role in issues of IT industry concern including information security, taxes and finance policy, digital intellectual property protection, telecommunications competition, workforce and education, immigration, online privacy and consumer protection, government IT procurement, human resources and e-commerce policy. ITAA members range from the smallest IT start-ups to industry leaders in the Internet, software, IT services, digital content, systems integration, telecommunications, and enterprise solution fields. For more information visit www.itaa.org.

About NDIA

NDIA is a non-partisan, non-profit organization with a membership that includes 1,285 companies and nearly 39,000 individuals. NDIA has a specific interest in government policies and practices concerning the government's acquisition of goods and services, including research and development, procurement, and logistics support. Our members, who provide a wide variety of goods and services to the government, include some of the nation's largest defense contractors. For further information, visit our web site at http://www.ndia.org.

About PSC

The Professional Services Council (PSC) is the principal national trade association of the federal government’s professional and technical services industry. PSC is widely regarded as the most respected and effective advocate and resource on the full scope of legislative, regulatory, and business policy issues affecting the federal services industry—both on Capitol Hill and throughout the federal agencies. PSC’s more than 200 member companies are among the leading small, mid-tier, and large companies providing the full range of professional services to every federal agency. These services include, but are not limited to, information technology, engineering, logistics, operations and maintenance, consulting, international development, scientific, and environmental services.