CHAPTER 6

Appropriate Role of Contractors Supporting Government

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I. Introduction

Fifteen years ago, the Government Accountability Office ("GAO") found, "Service contracts are essential for carrying out functions of the government because the government does not have employees in sufficient numbers with all the skills to meet every requirement."[1] This observation is even more accurate today, as the disparity between the number and complexity of federal government programs and the number and skill-sets of federal employees available to implement those programs continues to grow. In the years since the GAO report, the Office of Personnel Management ("OPM") estimates that the federal civilian workforce dropped 13 percent, from 3.1 million in 1990 to 2.7 million in 2004, though the actual decline occurred during the 1990s.[2] In fact, OPM employment statistics show that the year 2000 marked the lowest federal civilian employment for the Executive Branch since 1960.[3] Meanwhile, there was a significant increase in the dollar amount and number of contracts with private sector firms. Between 1990 and 1995 the government began spending more on services than goods.[4] Currently, procurement spending on services accounts for more than 60 percent of total procurement dollars.[5] Contributing to this trend, Congress has adopted legislation, and several Administrations have implemented policies, that encourage the use of contractors to perform certain functions and activities that have in the past been performed by government employees.[6]

As a result of these developments and others, federal agencies are increasingly relying on private sector contractors. As the Comptroller General recently stated: "The Government has and is going to increasingly rely on the private sector in general and contractors in particular to be able to deliver a whole range of products and services."[7] Some of the reasons for this trend are "to acquire hard to find skills, to save money, to have the private sector do work that is not inherently governmental, to augment capacity on an emergency basis, and to reduce the size of government."[8]

Currently, acquisition of goods and services from contractors consumes over one-fourth of the federal government's discretionary spending, and many federal agencies rely

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[1] U.S. GAO, *Government Contractors: Are Service Contractors Performing Inherently Governmental Functions? Report to the Chairman, Federal Service, Post Office and Civil Service Subcommittee, Committee on Governmental Affairs, U.S. Senate*, GAO/GGD-92-11, 6 (Nov. 1991).

[2] Comparison of Office of Personal Management, The Fact Book, 2005 edition, Trend of Federal Civilian Employment 1994-2004 at 7 and the 2004 edition, Trend of Federal Civilian Employment 1990-2003 at 8 (available at http://www.opm.gov/feddata/factbook/index.asp).

[3] OPM, Trend of Federal Civilian On-Board Employment For Executive Branch (U.S. Postal Service excluded) Agencies (available at http://www.opm.gov/feddata/html/ExecBranch.asp). The year 1960, the first year the data is available shows employment at 1,807,958. Between 1966 and 1995, employment remained over 2,000,000. Then in 1996, employment dropped to 1,933,979 and continued to decline until it reaches 1,704,832 in 2000, the lowest employment since 1960. Between 2000 and 2005, federal civilian employment in the Executive Branch has risen to 1,871,920.

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

[5] Total Actions by PSC standard report from FPDS-NG run Dec. 2006.

[6] *See, e.g.*, Federal Workforce Restructuring Act, Pub. L. No. 103-226 (Mar. 30, 1994); Federal Activities Inventory Reform Act of 1998 (FAIR Act), Pub. L. No. 105-270 (Oct. 18, 1998).

[7] Test. of David Walker, GAO, AAP Pub. Meeting (Mar. 29, 2006) Tr. at 245.

[8] Nat'l Academy of Pub. Admin., *Managing Federal Missions with a Multisector Workforce: Leadership for the 21st Century* 2 (Nov. 16, 2005) [hereinafter "NAPA Report"].

extensively on contractors in the performance of their basic missions.[9] In some cases, contractors are solely or predominantly responsible for the performance of mission-critical functions that were traditionally performed by civil servants, such as acquisition program management and procurement, policy analysis, and quality assurance. In many cases contractor personnel work alongside federal employees in the federal workspace; often performing identical functions. This type of workplace arrangement has become known as a "blended" or "multisector" workforce.[10]

These developments have created issues with respect to the proper roles of, and relationships between, federal employees and contractor employees in the multisector workforce.[11] In particular, although federal law prohibits contracting for activities and functions that are inherently governmental, uncertainty about the proper scope and application of this term has led to confusion, particularly with respect to service contracting outside the ambit of OMB Circular A-76. Moreover, as the federal workforce shrinks, there is a need to assure that agencies have sufficient in-house expertise and experience to perform critical functions, make critical decisions, and manage the performance of their contractors.[12] In addition, concerns have been raised regarding the appropriateness of the current prohibition of "personal services contracts."[13]

Concurrently, the increase in service contracting has raised two separate conflict-of-interest ("COI") issues. First, questions have been raised as to whether contractor employees working to support federal agencies should be required to comply with some or all of the ethics rules that apply to federal employees, particularly in the multisector workforce where contractor employees are working alongside federal employees and are performing identical functions. Second, the increased participation of contractors in developing projects that are subsequently open to market competition and the increased use of contractors to evaluate contract proposals and to evaluate the performance of other contractors raise important questions about how to address potential organizational conflicts of interest ("OCI") and how to preserve the confidentiality of proprietary information.

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[9] Examples include the Department of Energy, the Centers for Medicare and Medicaid, and the National Aeronautics and Space Administration. *See* U.S. GAO, *Comptroller General's Forum: Federal Acquisition Challenges and Opportunities in the 21st Century*, 4 GAO-07-45SP, 1 (Oct. 2006).

[10] "Multisector workforce" is a term adopted by the National Academy of Public Administration to describe the current mix of personnel working in the government:

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

NAPA Report at 2.

[11] GAO-07-45SP at 8.

[12] *Id.*; U.S. GAO, *Suggested Areas for Oversight for the 110th Congress*, GAO-07-235R, 8 (Nov. 2006).

[13] FAR 37.101 - 37.104.

Chapter 6 – Appropriate Role of Contractors Supporting Government Findings and Recommendations

Findings	Recommendations
Finding 1: Several developments have led federal agencies to increase the use of contractors as service providers: • Limitations on the number of authorized FTE positions • Unavailability of certain capabilities and expertise among federal employees • Desire for operational flexibility • Need for "surge capacity" **Finding 2:** The existence of a multisector workforce, where contractor employees are co-located and work side-by-side with federal employees has blurred the lines between: (1) functions that are considered governmental and functions that are considered commercial; and (2) personal and non-personal services. **Finding 5:** The degree to which contractors are used and the functions that they perform vary widely both within agencies and across agencies.	**Recommendation 1:** OFPP should update the principles for agencies to apply in determining which functions must be performed by government employees.
Finding 3: Agencies must retain core functional capabilities that allow them to properly perform their missions and provide adequate oversight of agency functions performed by contractors. **Finding 4a:** Some agencies have had difficulty in determining strategically which functions need to stay within government and those that may be performed by contractors. **Finding 4b:** The term "Inherently Governmental" is inconsistently applied across government agencies.	**Recommendation 2:** Agencies must ensure that the functions identified as those which must be performed by government employees are adequately staffed with federal employees.

Findings	Recommendations
Finding 2: The existence of a multisector workforce, where contractor employees are co-located and work side-by-side with federal employees has blurred the lines between: (1) functions that are considered governmental and functions that are considered commercial; and (2) personal and non-personal services. **Finding 5:** The degree to which contractors are used and the functions that they perform vary widely both within agencies and across agencies. **Finding 11:** The current prohibition on personal services contracts has forced agencies to create unwieldy procedural safeguards and guidelines to avoid entering into personal service contracts, some of which may cause the administration of the resulting "non-personal" contracts to be inefficient.	**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, performance ratings, etc.) should be retained. **Recommendation 4:** Consistent with action to remove the prohibition on PSCs, OFPP 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, GAO should study the results of this change.

Findings	Recommendations
Finding 6: The use of contractor employees to perform functions previously performed by government employees combined with consolidation in many sectors of the contractor community has increased the potential for organizational conflicts of interest. **Finding 7:** There is a need to assure that the increase in contractor involvement in agency activities does not undermine the integrity of the government's decision-making processes. **Finding 8:** There are numerous statutory and regulatory provisions that control the activities of government employees. These measures are designed to protect the integrity of the government's decision-making process. Recent, highly publicized violations of these laws and regulations by government employees were adequately dealt with through existing legal remedies and administrative processes. Additional laws or regulations controlling government employee conduct are not needed at this time. **Finding 9:** Most of the statutory and regulatory provisions that apply to federal employees do not apply to contractor employees, even where contractor employees are co-located and work side-by-side with federal employees and are performing similar functions. **Finding 10:** A blanket application of the government's ethics provisions to contractor personnel would create issues related to cost, enforcement, and management.	**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.

Findings	Recommendations
Finding 6: The use of contractor employees to perform functions previously performed by government employees combined with consolidation in many sectors of the contractor community has increased the potential for organizational conflicts of interest.	**Recommendation 5-1:** Organizational 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 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.
Finding 7: There is a need to assure that the increase in contractor involvement in agency activities does not undermine the integrity of the government's decision-making processes. **Finding 10:** A blanket application of the government's ethics provisions to contractor personnel would create issues related to cost, enforcement, and management. **Finding 9:** Most of the statutory and regulatory provisions that apply to federal employees do not apply to contractor employees, even where contractor employees are co-located and work side-by-side with federal employees and are performing similar functions.	**Recommendation 5-2: Contractor Employees' Personal Conflicts of Interest ("PCI").** The FAR Council should determine when contractor employee PCIs 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 Defense Industry Initiative ("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.

Findings	Recommendations
Finding 7: There is a need to assure that the increase in contractor involvement in agency activities does not undermine the integrity of the government's decision-making processes.	**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.
Finding 7: There is a need to assure that the increase in contractor involvement in agency activities does not undermine the integrity of the government's decision-making processes.	**Recommendation 5-4:** Training of Acquisition Personnel. The FAR Council, in collaboration with DAU and 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.
Finding 7: There is a need to assure that the increase in contractor involvement in agency activities does not undermine the integrity of the government's decision-making processes. **Finding 10:** A blanket application of the government's ethics provisions to contractor personnel would create issues related to cost, enforcement, and management.	**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.
	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 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.

II. Inherently Governmental Functions

The recognition of a clear-cut dividing line between public and private activity has been problematic since the earliest days of our republic.[14] One commentator noted "[t]he boundary of the public sector in American life has never been distinct. Our history has not produced any clear tradition allocating some functions to the government and others to the private sphere."[15] With the growth of the multisector workforce, it has become even more important to specify which functions *can and cannot* legally be performed by the private sector, as well as what functions *ought* to be performed by federal employees.

In 1966, the Office of Management and Budget ("OMB") issued Circular A-76, "Performance of Commercial Activities," recognizing that "[c]ertain functions are inherently governmental in nature, being so intimately related to the public interest as to mandate performance only by federal employees." However, as the GAO found in its 1991 Report, that formulation was too general to provide adequate guidance to federal agencies. In response to that report, on September 23, 1992, the Office of Federal Procurement Policy ("OFPP"), issued Policy Letter 92-1, entitled "Inherently Governmental Functions" ("IGF"). While retaining the original A-76 definition, the OFPP Policy Letter provided explanations and examples to help agencies decide whether particular functions could be contracted out. It listed examples of specific functions that are inherently governmental and those that generally are not, but require "closer scrutiny." OFPP Policy Letter 92-1 was superseded by OMB's May 29, 2003 revision of Circular A-76. However, the revised A-76 Circular incorporates the provisions of the Policy Letter, without any significant changes.

The Federal Acquisition Regulation ("FAR") also addresses IGFs. The term is defined at FAR Section 2.101. FAR Subpart 7.5 implements the policies of OFPP Policy Letter 92-1 and the current version of OMB Circular A-76. FAR Section 7.503(a) prohibits contracting for IGF;[16] Section 7.503(c) lists examples of IGF (derived from Appendix A of Policy Letter 92-1); and Section 7.503(d) lists examples of functions that "approach" being IGF (derived from Appendix B of Policy Letter 92-1).

The Federal Activities Inventory Reform Act of 1998 ("FAIR Act") was enacted "to provide a process for identifying the functions of the Federal government that are not inherently governmental functions." The FAIR Act requires federal executive agencies to prepare annual inventories to identify IGFs and those activities that are not inherently governmental, and to conduct managed competitions to determine who can best perform certain

[14] *See* GAO/GGD-92-11, *supra*, at 2 n.1 ("Concern about which federal agency activities are inherently governmental is not new. It goes back as far as the early days of the nation, as evidenced, for example, by the discussions in the *Federalist Papers* among the framers of the Constitution over what functions are appropriate for the federal government to exercise.").

[15] Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 Tex. L. Rev. 441, 458 (1989).

[16] Such contracts are also prohibited by FAR 37.102(c).

commercial functions.[17] The FAIR Act retains essentially the same definition of IGF as OFPP Policy Letter 92-1.

Although there has been some degree of inconsistency among agencies in the categorization of various functions under Circular A-76 and the FAIR Act, in part due to the lack of specificity in the appendices, for the most part agencies have been able to identify discrete commercial functions that can and should be competed under the framework specified in A-76. However, there has been little, if any, attention paid to the obverse issue: whether agencies are inappropriately contracting out functions that, while not necessarily inherently governmental in a strict sense, have traditionally been performed by federal workers and are critical to the performance of the agency's mission.[18]

In addition to contracting out significant portions of the acquisition function—as discussed elsewhere in this Report[19]—most, if not all, agencies have contracted out major portions of their information technology and communications functions. Moreover, some agencies have contracted out substantive, mission-critical functions, often without considering the potential adverse implications of such a step for the future. One example of this trend is the growing use of Lead System Integrators ("LSI"). The GAO has described LSIs as "prime contractors with increased program management responsibilities [and] greater involvement in requirements development, design, and source selection of major system and subsystem subcontractors."[20] Historically, the designs of complex, multiyear programs and projects have been created by federal employees, but with LSIs that is often not the case. Even more troubling, in some cases the government no longer has federal employees with the requisite skills to oversee and manage LSIs.

While in the short run such contracts may appear to be the best—or at least the simplest—way for an agency to implement a particular project or program, they can have serious adverse consequences in the long run. Such consequences include the loss of institutional memory, the inability to be certain whether the contractor is properly performing the specified work at a proper price,[21] and the inability to be sure that decisions are being made in the public interest rather than in the interest of the contractors performing the work. If, for example, National Aeronautics and Space Administration ("NASA") were to

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[17] The OMB guidelines for preparing FAIR Act inventories recognize a non-statutory category of functions, referred to as "commercial A," which are "commercial activities deemed unsuitable for competition" by an agency. Agencies designating function in this category must provide written justifications. *See,* in general, OFPP Memorandum M-05-12, from David H Safavian to Heads of Executive Departments and Agencies, regarding 2005 FAIR Act inventories (May 23, 2005), http://www.whitehouse.gov/omb/memoranda/fy2005/m05-12.pdf.

[18] This may be due, in part, to the fact that since the early 1980s, OMB has pushed agencies to privatize commercial functions, at times utilizing goals and targets, which were sometimes perceived as informal quotas. Agencies that are reluctant to privatize functions performed by their existing workforce—which could require downsizing and/or reductions in force—are generally more willing to contract out new or expanded functions (since such contracts could give them credit toward meeting OMB's targets), without necessarily considering the long-term implications of such a step.

[19] *See* Panel Report, Chapter 5, The Federal Acquisition Workforce, Finding 7 and Discussion.

[20] Paul L. Francis, Director, Acquisition and Sourcing Management, testimony before the Subcommittee on Airland, Committee on Armed Services, U.S. Senate, 10 (March 2005).

[21] For example, the Army's investigation of the Abu Ghraib interrogator scandal in Iraq found that "it is very difficult, if not impossible, to effectively administer a contract when the [Contracting Officer's Representative] is not on site," particularly where contractor employees greatly outnumbered the government employees responsible for oversight of the contract. *See* MG George R. Fay, AR 15-6 *Investigation of the Abu Ghraib Detention Facility and the 205th Military Intelligence Brigade* 50, 52 (2004).

contract out the function of designing and constructing the next generation of satellites, without retaining a core group of federal workers with knowledge of—and responsibility for—the details of the project, it could permanently lose the capacity to perform one of its critical, core functions.

III. Personal Services Contracts

> [W]e have now a definition and a rule based on a ban . . . on personal service contracts that's been with us for years and years and doesn't take proper recognition of where we are as a work force today.[22]

Under the FAR, the federal government is prohibited from awarding "personal services contracts" ("PSC") unless specifically authorized by statute to do so.[23] A PSC is defined in the FAR as a contract that, by its express terms or as administered, makes the contractor personnel appear to be government employees.[24] The United States Office of Personnel Management ("OPM") defines PSCs as contracts "that establish an employer-employee relationship between the Government and contractor employees involving close and continual supervision of contractor employees by Government employees rather than general oversight of contractor operations."[25] The key indicator of a PSC, according to the FAR and OPM, is whether the Government exercises relatively continuous supervision and control over the contractor personnel performing the contract.[26] The FAR also provides a list of other elements that may indicate whether a PSC exists.[27]

A. History of the Prohibition of PSCs

As set forth in a cogent review by Robert Erwin Korroch in his LLM thesis,[28] the rationale for prohibiting PSCs has shifted several times since it first arose in the late nineteenth century. Prior to that time, executive branch personal services contracts were commonplace,[29] and they were exempt from competition under an 1861 statute.[30]

The initial rationale for the ban was based on the theory that an 1882 appropriations statute[31] precluded the use of federal funds to pay contractors unless the funds were explicitly appropriated for that purpose. *See, e.g.*, *Plummer v. United States*, 24 Ct. Cl. 517, 520 (1889). Under a 1926 Comptroller General decision interpreting that statute, if a civil

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[22] Test. of William Woods, GAO, AAP Pub. Meeting (Mar. 29, 2006) Tr. at 274.

[23] FAR 37.104(b).

[24] *Id.*

[25] Contracting Branch, OPM, *Competitive Sourcing, Procurement Policy and Procedure* (Jun. 30, 2003), http://www.opm.gov/procure/pdf/USOPMCompetitiveSourcingPolicy.pdf.

[26] FAR 37.104(c)(2).

[27] FAR 37.104(d).

[28] Robert E. Korroch, *Rethinking Government Contracts for Personal Services* (Sep. 30, 1997) (unpublished LLM thesis, The George Washington University Law School) (available at The George Washington University Law Library).

[29] *Id.* at 41-43.

[30] Act of Mar. 2, 1861, ch.84, sec. 10, 12 Stat. 220.

[31] Currently codified at 5 U.S.C. § 3103.

service government employee could be utilized or hired to do the work required, then the work could not be obtained by contract.[32]

In 1943, the Comptroller General identified a different rationale for prohibiting contracts for personal services, concluding that allowing a contractor to select persons to render services for the government would be inconsistent with the federal civil service laws, which require that all appointments of officers and employees be made by federal officials.[33]

PSCs have also been criticized in the theory that they allow federal agencies to circumvent limits on the number of authorized employees, particularly in circumstances where the duties of the prospective contractor personnel were the sorts of duties usually performed by federal employees, and would have been performed by such employees but for the personnel ceiling.[34] The Comptroller General relied on two factors in defining what constituted personal services: (1) the government furnished everything necessary for the performance of the services except the employees, who could have been hired by the government; and (2) the services were of a type usually performed by classified employees and were of a continuing or indefinite duration.[35]

B. The Pellerzi-Mondello Opinions

The prohibition of PSCs in the current FAR, and the criteria for identifying such contracts, were derived from opinion letters issued in the late-1960s by two General Counsels of the United States Civil Service Commission ("CSC"), Leo Pellerzi and Anthony L. Mondello. Those opinion letters were prepared in response to a referral from the U.S. District Court in a case brought by a labor union representing federal employees, who alleged that several technical support service contracts being utilized by NASA at the Goddard Space Center were in violation of applicable personnel statutes.[36] The principles identified in the opinions were subsequently incorporated into FAR Part 37.

According to Mr. Pellerzi:

> . . . contracts which, when realistically viewed, contain all the following elements, each to any substantial degree either in the terms of the contract, or in its performance, constitute the procurement of personal services proscribed by the personnel laws.
>
> - Performance on-site.
>
> - Principal tools and equipment furnished by the Government.

[32] A-16312, 6 Comp. Gen. 364, 365 (Nov. 27, 1926), *recon. denied*, 6 Comp. Gen. 463 (Jan. 11, 1927).

[33] B-31670, 22 Comp. Gen. 700, 701-702 (Jan. 25, 1943).

[34] *See, e.g.*, B-113739, 32 Comp. Gen. 427, 430-431 (Apr. 3, 1953). In that decision, the Comptroller General also stated that the contract violated the "long-standing rule that persons performing purely personal services for the Government be placed on Government pay rolls and made subject to its supervision." *Id.*

[35] *Id.*

[36] *Lodge 1858 Am. Fed. of Gov't Emp. v. Adm'r NASA*, 424 F. Supp. 186 (D.D.C. 1976), *aff'd in part, vacated in part*, 580 F.2d 496 (D.C. Cir.), *cert. denied*, 439 U.S. 927 (1978).

- Services are applied directly to integral effort of agencies or an organizational subpart in furtherance of assigned function or mission.
- Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.
- The need for the type of service provided can reasonably be expected to last beyond one year.
- The inherent nature of the service or the manner in which it is provided reasonably requires directly or indirectly, Government direction or supervision of contractor employees in order:
  - To adequately protect the Government's interest or
  - To retain control of the function involved, or
  - To retain full personal responsibility for the function supported in a duly authorized Federal officer or employee.

Mr. Pellerzi concluded that contracts with these features are proscribed unless an agency possesses a specific exception from the personnel laws to procure personal services by contract.

In August 1968, Mr. Mondello issued a supplemental opinion in which he emphasized that the "touchstone of legality under the personnel laws is whether the contract creates what is tantamount to an employer-employee relationship between the government and the employee of the contractor."[37] The opinion focused upon the third element in the definition of federal "employee" in 5 U.S.C. § 2105(a): *i.e.*, whether an individual is subject to the supervision of another federal employee. Thus, under the Pellerzi-Mondello opinions, a contract that involves or permits supervision of contract employees by government employees would be contrary to the civil service laws.

C. The Existing FAR Prohibition

Following the rationale of the Pellerzi-Mondello opinions, the current FAR prohibition of PSCs focuses on the concern that government supervision of contractor personnel would act to create an employer-employee relationship between the government and the contractor's personnel. However, this concern is based upon a misguided premise, since a contract cannot confer employee status upon contractor personnel in the absence of an appointment to the federal service.[38]

For example, in *Costner v. United States*,[39] the plaintiff had submitted a claim for annuity credit for his years of work under a federal contract, claiming that he was a federal employee

[37] *See Lodge 1858*, *supra*, 580 F.2d at 507.

[38] Pursuant to Article II, Section 2, Clause 2 of the U.S. Constitution, "The President shall appoint all officers of the United States unless Congress vests such authority in the department heads or courts." Over 100 years ago, the Supreme Court confirmed that an individual had to be appointed to a government position before he or she could become an officer of the government. *United States v. Smith*, 124 U.S. 525, 531-32 (1888); *United States v. Mouat*, 124 U.S. 303, 307 (1888). And although the Constitutional provision refers only to "officers," and not "employees," the courts have treated the two terms as synonyms for this purpose. *See, e.g.*, *Baker v. United States*, 614 F.2d 263, 267 (Ct. Cl. 1980).

[39] 665 F.2d 1016 (Ct. Cl. 1981).

during that period. However, the Court of Claims concluded that the plaintiff could not satisfy the statutory definition of a federal employee, 5 U.S.C. § 2105(a), noting, "It is obvious from the statutory language that there are three elements to the definition—appointment by an authorized federal employee or officer, performance of a federal function, and supervision by a federal employee of officer—and that they are cumulative. . . . An abundance of federal function and supervision will not make up for the lack of an appointment."[40]

See also *United States v. Testan*, in which the Supreme Court stated, "The established rule is that one is not entitled to the benefit of a [Government] position until he has been duly appointed to it."[41] And in *Goutos v. United States*, the Court held "[i]t is settled law that a Government employee is entitled only to the rights and salary of the position to which he was *appointed* by one having the proper authority to do so."[42]

Moreover, as the D.C. Circuit held in *Horner v. Acosta*, appointment as a federal employee requires "a significant degree of formality" and "evidence that definite, unconditional action by an authorized federal official designating an individual to a specific civil service position is necessary to fulfill the appointment requirement of 5 U.S.C. § 2105(a)."[43] Indicia of appointment include whether the person's compensation and benefits are paid and funded by the civil service system, whether a SF-50 or other appointive document was executed, and whether the oath of office was administered.[44]

These cases confirm that the FAR prohibition on PSCs, which was derived from CSC opinions seeking to assure that the supervision of contract personnel by federal employees does not confer federal employment status upon such personnel, is unnecessary to achieve its intended purpose.

D. Exception for Temporary Expert and Consultant Services Contracts

The FAR prohibition explicitly does not apply where a statute authorizes PSCs. One such statute is 5 U.S.C. § 3109, which authorizes agencies to acquire temporary consultants or experts. This authority originated in section 15 of the Administrative Expenses Act of 1946, which authorized executive departments to procure temporary services of experts or consultants by contract.[45] The statute was designed as an exception to the prohibition against PSCs for contracts that do not exceed one year in duration, and its use is conditioned upon the existence of explicit language in an appropriation act or other statute. However, the list of statutes authorizing such use has become so voluminous that this restriction has little effect.[46]

Under the statute, agencies may "contract" for both individual consultants and for organizations of consultants.[47] However, different rules apply to the different types of

[40] *Id.* at 1020.

[41] 424 U.S. 392, 402 (1976) (internal citations omitted).

[42] 552 F.2d 922, 924 (1976) (internal citations omitted) (emphasis in original).

[43] 803 F.2d 687, 692-93 (D.C. Cir. 1986).

[44] *Id.* at 694.

[45] 60 Stat. 810 (codified as 41 U.S.C. § 5).

[46] See Korroch Thesis at 45. The list of cross references at 5 U.S.C. § 3109 contains 161 statutory provisions authorizing temporary hires under this section.

[47] Letter from Comptroller General Warren to the Comm'r, United States Section, Int'l Boundary and Water Comm., United States & Mexico, 27 Comp. Gen. 695, 695-98 (May 17, 1948).

contractors. When "procuring by contract" the services of an *individual* under the authority of this statute, the agency actually temporarily appoints the person into the civil service, notwithstanding the provisions of civil service appointment procedures.[48] This temporary appointment makes the individual a government employee who thereby has many, but not all, of the same protections and rights, and is subject to the same duties, as any other federal government employee who is hired into the excepted service.[49] In contrast, when an agency hires a *contractor* (organization) under the authority of this section, the contractor's employees do not become government employees. The organization's employees remain employees of the contractor.[50]

On January 25, 1989, the OPM promulgated regulations allowing agencies to utilize private sector temporaries.[51] OPM acknowledged the new regulation was not consistent with prior pronouncements:

> There is no statutory prohibition. The guidance and opinions of the past (best known as the Pellerzi-Mondello opinions after the two General Counsels of the former Civil Service Commission who prepared them), which placed the use of temporary help services under the general ban against contracting for personal services, must give way to a new interpretation based on court decisions, the statutory definition of a Federal Supervisor, evolving experience, and the now established role which temporary help services perform. This rule reflects that new interpretation and it amends the Pellerzi-Mondello opinions with respect to the use of temporary help service firms.[52]

E. Conclusion

For the reasons stated above, the existing FAR prohibition on PSCs, which focuses upon the type of supervision provided to contractor personnel in an effort to preclude the creation of an employer-employee relationship, is not compelled by applicable statutes and case law. Given the statutory definitions of a federal employee, as that definition has been interpreted by the courts, the activities that are currently barred as PSCs by the FAR would not create such an employer-employee relationship. And the PSC prohibition, to the extent it is observed in practice, often creates inefficiencies and adds to costs for both agencies and contractors.

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[48] "Procuring by contract" is an inapt term here, because the contractor actually becomes a temporary federal government employee. *See* 27 Comp. Gen. 66, 48 (July 31, 1947).

[49] Letter from Comptroller General Warren at 697.

[50] For a more in-depth discussion of this topic, *see* Jeffrey Lovitky, *The Problems of Government Contracting for Consulting Services*, 14 Pub. Cont. L.J. 332 (1984).

[51] 5 CFR 300.501-300.507, adopted at 54 Fed. Reg. 3762 (Jan. 25, 1989); *see also* FAR 37.112.

[52] 54 Fed. Reg. at 3762. OMB recognized that such temporaries, would, in at least some respects, arguably be supervised by federal employees. However, it concluded they would not formally be "supervised" by federal employees, relying upon the broad span of control over government employees included in the statutory definition of "supervisor;" i.e., "an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment." 5 U.S.C. § 7103(a)(10).

IV. Organizational Conflicts of Interest ("OCI")

Over the last two decades, a number of factors have led to an increasing probability of—and a increasing need to protect against—OCIs.[53] Three industry trends appear to be responsible for the increase in OCIs.[54] First, the government is buying more services that involve the exercise of judgment, such as evaluating technical platforms or assessing the goods or services provided by contractors. Second, industry consolidation has resulted in fewer and larger firms, which results in more opportunities for conflicts. Third, use of contract vehicles such as indefinite-delivery, indefinite-quantity ("IDIQ") umbrella contracts result in awards of tasks to a limited pool of contractors.

A. Existing Regulations

Under the FAR, an OCI occurs when

> because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the government, or the person's objectivity in performing the contract work is or might otherwise be impaired, or a person has an unfair competitive advantage.[55]

The term "person" in this definition includes companies and other contracting entities.[56]

FAR 9.5 addresses OCIs. The regulation states that the government is concerned with both actual conflicts as well as potential conflicts, both in current and future acquisitions.[57] The principles guiding the government's efforts to avoid such conflicts are: (1) preventing the existence of conflicting roles that might bias a contractor's judgment; and (2) preventing unfair competitive advantage.[58] As such, the FAR directs contracting agencies to take measures to detect and mitigate actual and potential OCIs.[59] Contracting officers must "identify and evaluate potential OCIs as early in the acquisition process as possible" and "avoid, neutralize, or mitigate significant potential conflicts before contract award."[60] However, the FAR provides no detailed guidance to contracting officers regarding how they should accomplish these tasks.[61] In practice, it appears that contracting officers and agencies have occasionally encountered difficulties implementing appropriate OCI avoidance and mitigation measures.

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[53] *See generally,* Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 Pub. Con. L.J. 25 (Fall 2005); Michael R. Golden, *Organizational Conflicts of Interest*, PowerPoint presentation to 4th Annual U.S. Missile Defense Conference, at 5.

[54] For a description of the industry trends driving the increase in OCIs, *see* Gordon at 27-29. *See also* Golden at 5.

[55] FAR 2.101. For a detailed description of the elements of an OCI, *see* Gordon, *supra* note 53, at 30-32.

[56] *Id.* at 31.

[57] FAR 9.502(c).

[58] FAR 9.505(a), (b).

[59] FAR 9.504.

[60] FAR 9.504(a)(1), (a)(2).

[61] *Id.* (guidance is limited to the "general rules, procedures, and examples" in FAR 9.5).

B. Types of OCIs

In order to ascertain whether the existing FAR guidance provided sufficient direction for the contracting community, the Panel reviewed the various types of OCIs and how contracting agencies, GAO, and the Court of Federal Claims view contracting officers' efforts to detect and mitigate OCIs. There are three general types of OCIs:

- Unequal Access to Information – A firm has access to nonpublic information as part of its performance of government contract responsibilities, and that information might provide the firm a competitive advantage in a future competition (these are also known as "unfair competitive advantage" OCIs).[62]
- Biased Ground Rules – A firm, as part of its performance of government contract responsibilities, has set the ground rules for another government contract by, for example, writing the statement of work or defining the specifications. The firm that drafted the ground rules might have a competitive advantage in a future competition governed by those rules.[63]
- Impaired Objectivity – A firm's work under one government contract could entail evaluating its own work or that of a competitor, either through an assessment of performance under another government contract or through an evaluation of proposals.[64]

Although the case law has discussed a number of conflicts that arise with increasing frequency in each of these categories, the examples provided in the FAR do not appear to address adequately the range of possible conflicts that can arise in modern government contracting.

C. Case Law

The GAO discussed the various categories of OCIs in *Aetna Gov't Health Plans, Inc.; Foundation Health Fed. Servs., Inc.*, B-254397, *et al.*, Jul. 27, 1995, 95-2 CPD ¶ 129 at 8-10. The Court of Federal Claims began citing the *Aetna* decision and description of OCIs in *Vantage Assocs., Inc. v. United States*, 59 Fed. Cl. 1, 10 (2003). These decisions, along with others, address methods of identification and mitigation of OCIs. The GAO and the Court of Federal Claims have denied protests where an agency both recognized actual or potential OCIs and either avoided, neutralized, or mitigated the OCI in a reasonable manner.[65]

[62] FAR 9.505-4.

[63] FAR 9.505-1 and 9.505-2.

[64] FAR 9.505-3.

[65] *See, e.g., Deutsche Bank*, B-289111, Dec. 12, 2001, 2001 CPD ¶ 210 (proposed use of subcontractor to perform tasks where prime contractor had potential conflict due to prior work for the agency was deemed acceptable mitigation); *LEADS Corp.*, B-292465, Sep. 26, 2003, 2003 CPD ¶ 197 (protest denied because mitigation plan—agency consideration of potential OCI and decision to assign work carefully to avoid the appearance of impropriety—was sufficient). Compare *Sci. Applications Int'l Corp.*, B-293601, *et al.*, May 3, 2004, 2004 CPD ¶ 96 (protest sustained for lack of consideration to potential OCI) with *Sci. Applications Int'l Corp.*, B-293601.5, Sept. 21, 2004, 2004 CPD ¶ 201 (corrective actions remedied prior OCI, making award possible).

However, protests were upheld where it was concluded that the contracting officers and/or agencies did not go far enough in recognizing or mitigating OCIs.[66]

D. Consequences and Possible Improvements

The public expects there to be no preferential treatment for particular contractors, no self-interest in the decision-making process, and no hidden agenda impacting contractor selections. Moreover, the cost and delay associated with resolving potential OCIs after-the-fact adversely affects agency programs and the public interest. Yet, "the more we integrate non-Federal employees, contractors or call them blended workforce, into the actual governing and administration of our agencies, the larger the gap we have and the more difficult it is for us to insure the integrity of Government decision making."[67] Much of the difficulty arises when contractor personnel have substantial responsibilities in selecting systems or contractors for award, sometimes effectively making evaluation and/or award decisions for agencies, even if they do not themselves actually make the formal award.

Although FAR 9.5 provides considerable leeway to contracting officers and agencies for considering avenues to address actual or potential OCIs, lack of guidance regarding identification and mitigation of conflicts—particularly for the increasingly common unfair competitive advantage or impaired objectivity conflicts—leads to variable results and inconsistent application of the regulations. Uniform regulations providing guidance to contracting officers and contracting agencies could help to reduce the frequency of failures to identify and mitigate OCIs.

V. Personal Conflicts of Interest

With the growth of the multisector workforce, in which contractor employees are working alongside federal employees and are performing identical functions, questions have been raised as to whether contractor employees working to support federal agencies should be required to comply with some or all of the ethics rules that apply to federal employees.[68]

There are numerous statutory and regulatory provisions applicable to federal employees that seek to protect against conflicts of interest ("COI") and promote the integrity of the government's decision-making process. These provisions are intended to avoid preferential treatment, self-dealing, and hidden agendas, and to ensure that persons entrusted to act for

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[66] *See, e.g., Alion Sci. & Tech. Corp.*, B-297022.3, Jan. 9, 2006, 2006 CPD ¶ 2 (protest sustained where agency assessment that a "maximum potential" for OCI of 15 percent of tasks was sufficiently low to permit award was fundamentally flawed; further, the agency's assessment of possible impacts of OCI was inadequate and understated the potential for conflicts); *Greenleaf Constr. Co., Inc.*, B-293105.18, .19, Jan. 17, 2006, 2006 CPD ¶ 19 (protest sustained where agency failed to reasonably consider or evaluate potential OCI due to financial arrangement between contractor and evaluator); *Celadon Labs., Inc.*, B-298533, Nov. 1, 2006, CPD ¶ __ (protest sustained where agency failed to evaluate impact of contractors performing technical evaluation being employed by firms that promote competing technologies); *PURVIS Sys., Inc.*, B-293807.3, .4, Aug. 16, 2004, 2004 CPD ¶ 177 (protest sustained where agency failed to reasonably consider or evaluate potential OCI created by awardee's participation in evaluation of its own work—and the work of its direct competitors—on undersea warfare systems).

[67] Test. of Steve Epstein, Director of Standards of Conduct, Department of Defense, AAP Pub. Meeting (May 18, 2006) Tr. at 90.

[68] *Id. See also* Test. of Marilyn Glynn, U.S. Office of Gov't Ethics, AAP Pub. Meeting (May 17, 2005) Tr. at 78, 107.

the government are acting in the best interest of the government. In short, the rules address the basic obligation of public service. This obligation is described as:

> [The] responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in [5 CFR Part 2635].[69]

A. Criminal Statutes in Title 18 of the U.S. Code

Several criminal conflict of interest statutes in Title 18 of the U.S. Code address federal employees' (1) representational activities before the federal government; (2) post-employment activities; (3) participation in matters in which they have financial interests; and (4) receipt of supplementation of salary as compensation for their official services.

18 U.S.C. § 205 is intended to prohibit current federal employees from misusing their offices and influence by prohibiting them from participating in claims against the government on behalf of private interests, whether or not for pay. Section 205 applies to all employees, regardless of their level of responsibility or the scope of their duties, and to all particular matters regardless of whether those matters are related to the employee's position or duties. 18 U.S.C. § 203 addresses similar considerations, but it only applies to compensated representational activities. It prohibits an individual from sharing in compensation for representational services performed by someone else, such as a business partner, if those services were provided at a time when the individual was still a government employee.

18 U.S.C. § 207 prohibits former employees from engaging in certain activities on behalf of persons or entities other than the United States. Some restrictions apply to all employees, regardless of level of position or subject matter.[70] Other restrictions apply only to employees holding positions at certain levels of authority or pay.[71] Some restrictions are subject matter-specific or client-specific,[72] while others apply only to persons that held positions in certain agencies or employees in certain programs.[73] The applicable durations of the various restrictions also vary.[74] Most of the restrictions, including those that affect the most employees, are limited to representational communications and appearances, but three narrowly applicable provisions also cover behind-the-scenes activities, thus adding an additional layer of complexity.[75]

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[69] 5 CFR 2635.101(a).

[70] 18 U.S.C. § 207(a)(1).

[71] Subsections 207(a)(2) (supervisory employees), 207(c) (senior employees), 207(d) (very senior employees), and 207(f) (senior and very senior employees).

[72] Subsections 207(b) (trade agreement and treaty matters), and 207(f) (foreign entity clients).

[73] Subsections 207(f)(2) (special lifetime restrictions for the U.S. Trade Representative and Deputy), and 207(l) (special restriction applicable to Information Technology Exchange Program assignees).

[74] Subsections 207(a)(1) (life of the matter), 207(a)(2) (two years), 207(b) (one year), 207(c) (one year), 207(d) (one year), 207(f) (one year, except lifetime for the United States Trade Representative and Deputy), and 207(l) (one year).

[75] Subsections 207(b), 207(f), and 207(i).

18 U.S.C. § 208 has been called the cornerstone of the executive branch ethics program.[76] The section prohibits an employee from participating personally and substantially in any particular matter in which he has a financial interest, or in which certain others with whom he is associated, such as family members, have a financial interest. The policy behind the law is promotion of public confidence in governmental processes by barring employees from participating in government matters that would have beneficial or adverse financial effects on them.

18 U.S.C. § 209 prohibits federal employees from receiving any salary or supplementation of their salary from private sources as compensation for their services to the government. This ban on outside compensation for government work is designed to prohibit an executive branch employee from serving two masters in the performance of his or her official duties.[77]

18 U.S.C. § 201(b) prohibits a public official from seeking, accepting, or agreeing to receive or accept anything of value in return for being influenced in the performance of an official act or for being induced to take or omit to take any action in violation of his or her official duty. This section is commonly referred to as the prohibition on bribery, and it is one of the few statutes in this area that apply to contractor personnel as well as to government employees.[78]

B. Non-Criminal Ethics Statutes

Congress has also enacted non-criminal statutes that impose limitations on outside earned income and employment;[79] impose limitations on the acceptance of travel and related expenses from non-federal sources;[80] impose limitations on the acceptance of gifts and travel generally;[81] and impose restrictions on partisan political activities.[82]

Other statutes authorize and direct agencies to collect financial information from certain officials and employees in order to monitor for and prevent financial conflicts of interest.[83] The extent of the information required from a particular employee and whether that information will be made public or not depends upon the seniority of the employee.

C. The Procurement Integrity Act

Under the Procurement Integrity Act, additional ethics provisions apply to employees who participate in the award or administration of federal contracts, 41 U.S.C. § 423. Such employees are prohibited from accepting compensation from the awardee of a contract on

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[76] U.S. Office of Gov't Ethics, *Report to the President and to Congressional Committees on the Conflict of Interest Laws Relating to Executive Branch Employment* (Jan. 2006) at 28, http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/reports_plans/rpt_title18.pdf .

[77] *Id.* at 34.

[78] Epstein Test. at 92-93. A separate statute, 31 U.S.C. § 1352, prohibits recipients of federal funds, including contractors, from using any of those funds to attempt to influence federal officials.

[79] 5 U.S.C. App. 4 §§ 501-505.

[80] 31 U.S.C. § 1353.

[81] 5 U.S.C. § 7301.

[82] 5 U.S.C. §§ 7321-7326, known as the Hatch Act.

[83] 5 U.S.C. App. 4 §§ 101-111, 401-408, 501-505; *see also* 5 CFR Part 2634.

which they had participated for a period of one year after the employee's involvement.[84] The statute also prohibits the disclosure of non-public, privileged or sensitive information,[85] and it requires procurement officers to take certain actions when contacted regarding potential non-federal employment.[86] Violations are punishable by both civil and criminal penalties.[87]

D. Office of Government Ethics

Under the authority of the Ethics in Government Act, 5 U.S.C. App. §§ 401-407, the United States Office of Government Ethics ("OGE") has promulgated "Standards of Ethical Conduct for Employees of the Executive Branch," 5 CFR Part 2635. These detailed standards implement, and in some cases expand upon, the ethics statutes contained in various titles of the United States Code. For example, 5 CFR 2635.502, sometimes known as the "impartiality regulation," expands upon 18 U.S.C. § 208 by requiring federal employees to disqualify themselves from particular matters in which a reasonable person with knowledge of the relevant facts would question the employee's impartiality. In addition, many federal agencies have supplemented the OGE regulations with regulations of their own.[88]

OGE exercises leadership in the Executive Branch to prevent conflicts of interest on the part of government employees, and to resolve those conflicts of interest that do occur. It has provided extensive written guidance to federal employees in its Standards of Conduct, in memoranda addressing particular questions (sometimes referred to as "DAEOGrams"), and in pamphlets handed out at orientation sessions for new federal employees. These resources provide detailed guidance, with examples, on subjects including gifts from outside sources, gifts between employees, conflicting financial interests, impartiality in performing official duties, seeking other employment, misuse of position, and outside activities. The OGE also trains agency ethics officers regarding the standards of conduct requirements.[89]

E. Applicability to Contractor Personnel

With the growth of federal contracting for services, contractors are, and will increasingly continue to be, performing some of the government's most sensitive and important work, including, but not limited to, acquisition functions. However, contractor personnel are not subject to the foregoing comprehensive set of statutory and regulatory ethics rules, even though in some cases they are working alongside government employees in the federal workplace and may appear to the public to be government employees.[90] Some observ-

[84] 41 U.S.C. § 423(d).

[85] Subsections 423(a) and (b).

[86] Subsection 423(c).

[87] Subsection 423(e). Concerns about conflicts of interest in the area of government contracting have been a particular focus in the enforcement of federal ethics laws. In the 2005 OGE survey of prosecutions involving the conflict of interest criminal statutes, nine of the twelve reported prosecutions involved contract-related misconduct. *See* Memorandum from Robert I. Cusick, OGE Director (Aug. 9, 2006), http://www.usoge.gov/pages/daeograms/dgr_files/2006/do06023.pdf.

[88] For example, the Department of Transportation has adopted 49 CFR Part 98, "Enforcement of Restrictions on Post-Employment Activities," and 49 CFR Part 99, "Employee Responsibilities and Conduct."

[89] A full description of OGE's responsibilities and activities can be found on its website: http://www.usoge.gov.

[90] Walker Test. at 276.

ers, including the Acting Director of OGE, have suggested that current laws, regulations, and policies may be inadequate to prevent certain kinds of ethical violations on the part of contractors and their personnel.[91]

In testimony to the Panel, Ms. Marilyn Glynn, who at the time was the Acting Director of OGE, expressed her concern regarding personal conflicts of interest in the following contractual circumstances: (1) advisory and assistance services contracts, especially those where contractor personnel regularly perform in the government workplace and participate in deliberative and decision-making processes along with government employees; (2) management and operations ("M&O") contracts involving large research facilities and laboratories, military bases, and other major programs; (3) contracts resulting from the competitive sourcing process (under OMB Circular A-76), particularly where the services had been performed previously by government employees and are now being performed by former government employees who have exercised rights of first refusal; and (4) large indefinite delivery or umbrella contracts that involve the decentralized ordering and delivery of services at multiple agencies or offices.[92] Ms. Glynn stated that several situations involving the conduct of individual contractor employees in these contexts have been identified by public sector ethics officials. Such problems primarily relate to financial conflicts of interest, impaired impartiality, misuse of information, misuse of authority, and misuse of government property.[93] If the conduct that Ms. Glynn described had been performed by a federal employee, it would be a violation of statute and/or regulation punishable by criminal or civil penalties or both.

Ms. Glynn testified that although OGE has received expressions of concern in this area from agency ethics officials, it has not recommended that any of the criminal COI statutes be amended to apply to contractor personnel. Instead, it has deferred answering such a question to "others with more knowledge of procurement policies and practices."[94] An alternative approach was identified by Steve Epstein of DoD, who suggested that the FAR Council should consider "some model language, or instruction [to] Government agencies to include these provisions within contracts."[95]

F. Contractor Ethics Programs

The Defense Federal Acquisition Regulation Supplement (DFARS) imposes certain ethics requirements upon contractors doing business with DoD.[96] In general, such contractors must "conduct themselves with the highest degree of integrity and honesty." More specifically, the regulations require contractors to maintain specific standards of conduct and internal control systems, including: (1) a written code of ethics and a training program; (2) periodic reviews of company practices and internal controls; (3) a reporting hotline; (4) audits; (5) disciplinary actions for improper conduct; (6) timely reporting to the government of any suspected or

[91] *See* Letter from Marilyn L. Glynn, Acting Director, U.S. Office of Gov't Ethics, to the AAP (Feb. 8, 2005) (on file with the Panel)

[92] Glynn Test. at 80-81.

[93] *Id.* at 82.

[94] *Id.* at 88-89.

[95] Epstein Test. at 129.

[96] DFARS 203.7000.

possible violation of law in connection with a government contract; and (7) full cooperation with any government investigation or corrective action.[97]

In the mid-1980s, a group of major defense contractors voluntarily committed themselves to a program of self-governance in the ethics arena. The program, named the Defense Industry Initiative ("DII"), requires participants to: (1) adopt a written code of ethical conduct; (2) train employees on the performance expected under the code; (3) encourage employees to report violations of the code without fear of retribution; (4) implement systems to monitor compliance procedures and to disclose violations to the government; and (5) share best practices with other firms in the program.[98] To a great extent, the DII was a response to the findings and recommendations of the President's Blue Ribbon Commission on Defense Management ("the Packard Commission").[99] The Packard Commission found that "[p]ublic confidence had been eroded by reported instances of waste, fraud and abuse within both the industry and the Defense Department. The Commission concluded that the defense acquisition process, the defense business environment, and confidence in the defense industry could be improved by placing greater emphasis on corporate self-governance."[100]

The DII conducts an annual Best Practices Forum that provides an opportunity for industry and government to discuss best practices and emerging issues relating to ethics programs and how contractors can meet those challenges.[101] Another significant element of the DII program is that member companies have committed to make themselves accountable to the public through disclosures and reports on business ethics and conduct.[102] The DII also issues an Annual Report, which covers a wide variety of subjects, including, *inter alia*, conflicts of interest, procurement integrity, kickbacks, inside information, and voluntary disclosure to the government.[103]

The Sarbanes-Oxley Act of 2002[104] ("SOX") also impacts the ethics programs of publicly traded government contractors.[105] SOX requires the establishment of an "audit committee" to establish procedures for receiving, examining, and resolving complaints relating to financial controls and ethics concerns.[106] SOX also places significant responsibility on attorneys representing public companies.[107] Among other things, attorneys must report directly to the chief legal counsel or chief executive officer evidence of breach of fiduciary

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[97] DFARS 203.7001(a).

[98] Test. of Patricia Ellis, Raytheon Corp., AAP Pub. Meeting (May 17, 2005) Tr. at 247; *see also The Defense Industry Initiative on Business Ethics and Conduct, 2005 Annual Report to the Public* (Feb. 22, 2006) [hereinafter DII 2005 Report] *at* 9, http://www.dii.org/annual/2005/DII-2005_AnnualReport.pdf.

[99] Test. of Richard Bednar, National Coordinator for DII, AAP Pub. Meeting (May 17, 2005) Tr. at 260-61.

[100] DII 2005 Report at 7 citing to the President's Blue Ribbon Comm'n on Defense, Interim Report to the President, at 19-21 (Feb. 28, 1986) http://www.ndu.edu/library/pbrc/pbrc.html..

[101] Ellis Test. at 247; Bednar Test. at 284.

[102] *Id.* at 262.

[103] *Id.* at 294. The report also includes the compiled responses to a detailed annual survey of member company CEOs.

[104] Pub. L. No. 107-204, 116 Stat. 745 (2002).

[105] Non-public companies may choose to comply with the SOX standards, though compliance is not required by law.

[106] *See* SOX § 204. Audit committee members are "independent" members of the board, meaning they have no other financial relationship with the company other than their service on the board. The audit committee members' independence encourages unbiased analysis of auditor reports and information, and prompt recognition of conflicts of interest or other improper activity.

[107] SOX § 307.

duty by any employee, officer, or agent of the company.[108] SOX also enhances protections for whistleblowers who report items of concern such as, but not limited to, perceived fraud and conflicts of interest.[109]

The Federal Sentencing Guidelines[110] also provide incentives for companies to create, maintain, and staff appropriate ethics programs. Convicted companies that have met these criteria are eligible for a variety of downward departures from the general Sentencing Guidelines.[111] The Guidelines include criteria for determining whether companies have instituted "effective compliance and ethics program[s]" that not only prevent and detect criminal conduct, but also promote ethical corporate cultures.[112] Corporate directors must be knowledgeable about and receive training on their companies' programs,[113] while high-level personnel are tasked with ensuring the effectiveness of the program.[114] Companies are asked to institute a system for reporting potential ethical violations, communicate this system and the underlying ethical rules to employees, employ compliance personnel with adequate resources and direct reporting access to the Board, institute incentive and disciplinary procedures to ensure compliance, and periodically evaluate the program's effectiveness.[115] In addition, establishing effective compliance programs can also help companies escape indictment in the first instance, since federal prosecutors consider similar criteria when determining whether to indict companies for the crimes of their employees.[116]

G. Next Steps

The Panel heard testimony that emphasized the importance of culture in a successful ethics program. For example, DII considers a values-based code of ethics a best practice, stating that culture is at least as important as, and perhaps even more important than, rules.[117] The OGE is concerned with leadership commitment to ethics programs and referenced academic research that shows the tone at the top is the most important thing in an ethics program.[118] DII's National Coordinator asserted that values-based self-governance should be the preferred model for all companies that deal with the federal government, and suggested that the DFARS regulatory scheme be elevated to the FAR.[119]

In view of the wide variety of circumstances that can implicate PCIs on the part of contractor personnel, the wide variety of federal contracts for services, and the differences in size and sophistication among federal contractors, the Panel has concluded there is no single set

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[108] *Id.*

[109] SOX § 806.

[110] United States Sentencing Commission, *Guidelines Manual* (Nov. 2006).

[111] *Id.* §§ 8C2.5(b), (f) & 8C4.11.

[112] *Id.* § 8B2.1(a).

[113] *Id.* § 8B2.1(b)(2)(A), (b)(4).

[114] *Id.* § 8B2.1(b)(2)(B).

[115] *Id.* § 8B2.1(b)(4)-(6).

[116] *See Principles of Federal Prosecution of Business Organizations*, Memorandum from Larry D. Thompson, Deputy Atty. Gen., to Heads of Dep't Components 6-7 (Jan. 20, 2003), http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

[117] Ellis Test. at 252-54, 257.

[118] Glynn Test. at 104.

[119] Bednar Test. at 263-64.

of ethics requirements that would be appropriate in all contexts. The regime of ethics regulation applicable to federal employees is quite complex, and the Panel is not aware of anyone with experience in this field who has contended that the full range of federal statutory and regulatory provisions ought to be applied to all contractors and their personnel.

VI. Findings

Finding 1:

Several developments have led federal agencies to increase the use of contractors as service providers, including: (1) limitations on the number of authorized civil service positions, (2) unavailability of certain capabilities and expertise among federal employees, (3) desire for operational flexibility, and (4) the need for "surge" capacity.

There are many reasons for the increase in the use of contractors by the federal government, including those listed in this finding. However, aside from the importance of recognizing what forces brought about the current circumstances involving the pervasive use of contractors to support the work of government, the reality is that in many cases the federal government could not accomplish its mission today but for the contractor workforce. Private sector actors have become an essential partner in delivering government services. In its 2003 study recommending reorganization of the federal government, the National Commission on the Public Service found that additional contracting for services "may be needed, for example, to acquire additional skills, to augment capacity on an emergency or temporary basis, and to save money on goods and services that are not inherently governmental."[120]

The past fifty years has seen a global transformation in public administration from government to governance, whereby our federal government has increasingly come to rely on non-governmental actors to perform core "governmental" activities, and the achievement of public goals has been accomplished by a mix of "state, market and civil society actors."[121] This development has presented a challenge to the ability of federal government officials to retain the capacity to supervise and evaluate the work of the government, whether such work is performed by contractors or federal employees. During the same period, civil service personnel ceilings have been imposed, which has ensured that as the government has grown, reliance on contractors has also increased.[122] To compound the challenge, many agencies have been unable to recruit and retain an adequate number of skilled professionals to be able to do the complex types of work that are now part of their missions.[123] This problem has also affected the acquisition workforce, which has faced new challenges as the quantity and complexity of federal contracting has grown.[124]

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[120] Report of the Nat'l Comm'n on the Pub. Serv. *Urgent Business for America: Revitalizing the Federal Government for the 21st Century*, 31 (Jun. 2003).

[121] Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 Pub. Con. L.J. 321, 322-23 (2004).

[122] *Id.* at 323.

[123] *See, e.g.*, Testimony of Barney Klehman, Missile Defense Agency, AAP Pub. Meeting (Mar. 29, 2006) Tr. at 144-47, 153-54.

[124] *Id. See also*, David M. Walker, *The Future of Competitive Sourcing*, 33 Pub. Con. L.J. 299, 301 (2004).

Finding 2:

The existence of a multisector workforce, where contractor employees are co-located and work side-by-side with federal employees, has blurred the lines between: (1) functions that are considered governmental and functions that are considered commercial; and (2) personal and non-personal services.

As early as 1962, a Cabinet-level report to President Kennedy on government contracting practices (known as the "Bell Report") concluded that reliance on third parties to perform the work of government "blurred the traditional dividing line between the public and private sectors."[125] As one commentator has pointed out, such blurring was not an accident in that the architects of this change acknowledged that it would challenge traditional notions of official accountability for work performed by non-government actors.[126]

Finding 3:

Agencies must retain core functional capabilities that allow them to properly perform their missions and provide adequate oversight of agency functions performed by contractors.

It is axiomatic that federal government officials need to maintain the skills and competencies required to manage and implement all of the government's work—including that performed by the growing contractor workforce.[127] However, as discussed above, there is reason to question whether the government has retained adequate personnel with such skills and competencies.[128]

Finding 4a:

Some agencies have had difficulty in determining strategically which functions need to stay within government and those that may be performed by contractors.

Finding 4b:

The term "Inherently Governmental" is inconsistently applied across government agencies.

The impossibility of drawing a bright line between governmental and non-governmental functions has inevitably led to inconsistent application of the competitive sourcing policy across the government. As David Walker, Comptroller General of the United States, stated in 2003, "[t]he Commercial Activities Panel heard complaints from all sides with regard to the lack of clarity, transparency, and consistent application in the current A-76 process."[129]

There are acknowledged difficulties in determining exactly what functions are inherently governmental.[130] Such difficulties are not new. GAO stated in 1991 that it was unable to definitively conclude whether service contractors were performing inherently governmental

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[125] *Report to the President on Government Contracting for Research and Development in Systems Development and Management: Hearings before a Subcommittee of the Committee on Government Operations, House of Representatives*, 87th Cong. 191-263 app. I [hereinafter Bell Report (1966)].

[126] Guttman at 330.

[127] Bell Report at 144.

[128] *See, e.g.*, U.S. GAO, *High Risk Series*: *An Update,* GAO-05-207 (Jan. 2005).

[129] Walker, *The Future of Competitive Sourcing* at 305.

[130] Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder?*, 33 Pub. Con. L.J. 263, 272 (2004).

activities "[b]ecause of the difficulty in defining governmental functions."[131] Faced with the FAIR Act mandate to classify all of its positions, agencies may turn to other factors—such as whether there are federal employee authorizations or sufficient skill sets in the government workforce—to determine whether a function is classified as commercial or inherently governmental.[132] Functions that are considered appropriate for commercial competition by one agency may not be considered so by another.

Finding 5:

The degree to which contractors are used and the functions that they perform vary widely both within agencies and across agencies.

As discussed above, there has been a marked shift in the willingness of agencies to allow contractors to perform mission critical functions. One example of this has been the growth of LSI contracts.[133] Moreover, in recent years, the military has become dependent upon contractor support for transportation, shelter, food, and "unprecedented levels of battlefield and weaponry operation, support, and maintenance."[134] Additionally, the DoD has "encouraged the procurement of complex defense systems under contracts requiring ongoing contractor support throughout the systems' life cycles."[135]

The degree to which contractors are performing functions that were previously performed by government employees, and the specific functions that are being performed by those contractors varies both agency to agency and within agencies. Some agencies use contractors sparingly, while some rely on contractors for the vast majority of the work the agency accomplishes. Furthermore, the functions that are considered core or inherently governmental at some agencies have been performed by contractors for decades at other agencies.

There is currently no way to accurately quantify this trend. OMB Circular A-76 and the FAIR Act focus on traditional commercial activities and therefore do not account for the tremendous increase in the "shadow" workforce of contractors who are stepping into positions that were traditionally held by government employees.

While the FAIR Act requires agencies to produce inventories of the functions they consider commercial and those that are considered inherently governmental, along with the numbers of positions in the agency that fall under those designated functions, these inventories do not reveal the number of contractor personnel performing various functions, particularly those functions that were generally performed by government employees in the past. Moreover, because the categories of functions are broadly stated in the FAIR Act inventories, those inventories do not provide the level of detail required to do the type of agency-by-agency analysis that will render meaningful results in determining how the government is applying the inherently governmental standard. Neither would the available information provide sufficient data to determine how many contractors are performing work that probably would have been performed by government employees in the past.

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[131] GAO/GGD-92-11 at 2.

[132] *Id*. at 4.

[133] *See* note 19 and accompanying text.

[134] Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 Stanford L. & Policy Rev. 549, 554 (2005).

[135] Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 Pub. Con. L.J. 369, 374 (2004).

Finding 6:

The use of contractor employees to perform functions previously performed by government employees combined with consolidation in many sectors of the contractor community has increased the potential for organizational conflicts of interest.

As explained above, the potential for OCIs has increased significantly in recent years. The contracting community needs more expansive and detailed guidance for identifying, evaluating, and mitigating OCIs. The current FAR language provides significant leeway to contracting officers to address OCIs, but recent decisions by the GAO and the courts indicate that, in many instances, appropriate investigation and/or analysis is not performed. This has created a substantial, negative impact on agency performance and on the public's impression of the procurement process.

Finding 7:

There is a need to assure that the increase in contractor involvement in agency activities does not undermine the integrity of the government's decision-making processes.

Just as the trend toward more reliance on contractors poses a threat to the government's long-term ability to perform its mission, the trend raises the possibility that the government's decision-making processes can be undermined.

For example, it is now commonplace for agencies to utilize contractors to perform activities historically performed by federal contract specialists. Although these contractors are not authorized to obligate the United States,[136] they provide, among other things, analysis, market research, and other acquisition support to the federal decision makers. Unless the contractor employees performing these tasks are focused upon the interests of the United States, as opposed to their personal interests or those of the contractor who employs them, there is a risk that inappropriate decisions will be made. Commenting on this topic, David Walker, Comptroller General of the United States, recently offered the following advice:

> We have to keep in mind that there are certain things that you can privatize, but there is one thing you can never privatize. You can never privatize the duty of loyalty to the greater good. The duty of loyalty to the collective best interest of all, rather than the narrow interest of a few: that is what public service is all about; that is what public servants are all about.[137]

Finding 8:

There are numerous statutory and regulatory provisions that control the activities of government employees. These measures are designed to protect the integrity of the government's decision-making process. Recent, highly publicized violations of these laws and regulations by government employees were adequately dealt with through existing legal remedies and

[136] Such authority has always been considered an inherently governmental function reserved to federal employees.

[137] Walker, *The Future of Competitive Sourcing* at 303-04.

administrative processes. Additional laws or regulations controlling government employee conduct are not needed at this time.

The Panel finds that the existing system of statutes and regulations governing the conduct of federal government employees is adequate to effectively deal with ethical violations. Adding new prohibitions or increasing the already severe penalties available to punish violators would be unlikely to provide additional deterrence.

Finding 9:

Most of the statutory and regulatory provisions that apply to federal employees do not apply to contractor employees, even where contractor employees are co-located and work side-by-side with federal employees and are performing similar functions.

As described above, contractor personnel are not subject to the comprehensive set of statutory and regulatory ethics rules applicable to federal employees, even though in some cases they are working alongside federal employees in federal offices, are performing work that in the past was performed by federal employees, and may appear to the public to be federal employees.

Finding 10:

A blanket application of the government's ethics provisions to contractor personnel would create issues related to cost, enforcement, and management.

Federal agencies cannot directly impose ethics requirements upon contractor employees or discipline those employees for the violation of federal ethical standards and requirements. However, they do have the authority to impose ethics requirements upon the entities with which they contract through contract provisions that hold contractors accountable for their employees' behavior. And Congress has the authority to enact new statutes, or amend the existing statutes that apply to federal employees, to criminalize violations of ethical requirements by contractor personnel. However, the Panel is not aware of any evidence suggesting that the imposition of criminal liability upon contractor personnel would yield significant benefits, and it could have serious adverse consequences.

Government contractors, particularly large contractors, generally have internal ethics programs. Application of the specific federal employee ethics requirements to contractor personnel would require additional training, monitoring, and enforcement, and the cost of these efforts would be passed on to the government. If the imposition of such requirements would significantly improve the ethical behavior of contractors and their employees, such costs would be justified. However, if it merely replaced one set of effective rules with another set of rules, without a significant effect upon contractor behavior, the costs would not be justified. Further analysis of the costs and benefits of applying the various specific ethics provisions to contractor personnel is needed before taking such steps.

Finding 11:

The current prohibition on personal services contracts has forced agencies to create unwieldy procedural safeguards and guidelines to avoid entering into personal service contracts, some of which may cause the administration of the resulting "non-personal" contracts to be inefficient.

The Panel did not identify specific instances of agency violations of the prohibition on PSCs. However, anecdotal evidence suggests the lines have been blurred to such a degree that the prohibition may have become a mere formality observed during contract formation. In other words, contracts for professional services that are formed as "non-personal," are often performed with close contact between federal government and contractor employees that approaches, and perhaps crosses, the line between personal and non-personal services under the broad FAR definition.

Some agencies have expended significant resources prescribing policies and guidance designed to help avoid the sorts of "employer-employee relationships" identified in the FAR. For example, the U.S. Air Force has issued a *Guide for the Government-Contractor Relationship* to address "the distinctions between government employees and contractor personnel."[138] This guide addresses a wide range of topics that arise in the multisector workforce, including among others, personal services vs. non-personal services contracts, proper identification of contractor personnel, use of government resources, and time management. The Missile Defense Agency, which is staffed in large part by contractor employees, has also identified procedures to avoid the creation of an employer-employee relationship with contractor personnel.[139]

Such policies generally prohibit federal employees working side-by-side with contractor employees from reviewing and directing the work of those contractor employees and require the involvement of the contractor supervisor in day-to-day operations. Agencies would obviously prefer to avoid such inefficiencies, which cost them time and money. Removing the FAR prohibition would simplify the process and ease pressure on an overburdened federal workforce. It is likely that it would also enable contractors to realize cost savings because they would be able to remove a layer of on-site management. Such cost savings should then flow to the government and the taxpayer.

VII. Recommendations

Recommendation 1:

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

In view of the fact that fifteen years have passed since OFPP's last comprehensive analysis of what constitutes an inherently government function ("IGF"), and the fact that there have been numerous changes in the way the government operates and the way that contractors are utilized since that time, the Panel concluded that it would be appropriate

[138] Air Force Materiel Command, *Guide for the Government-Contractor Relationship* (May 2005).

[139] Test. of Barney Klehman at 180.

for OFPP to consider the current governmental and contractor landscape and adopt a set of general principles and best practices for identifying those functions that should be performed by civil servants.

Those principles would then be applied on an individualized, agency-by-agency basis, consistent with each agency's mission and the need to retain the capability to perform that mission. In those instances where an agency is relying on contractors for assistance, the Panel believes that it is critical for the agency to have adequate and knowledgeable staff to establish appropriate requirements for its contracts and to manage contractor performance.

The Panel did not believe that there was any need for OFPP to adopt a new formal definition of what constitutes an IGF. In the Panel's view, it does not matter whether a particular function is considered to be "Inherently Governmental" or whether—to use the terminology utilized in FAIR Act inventories—it is considered "Commercial Category A." What is important in this context is whether a given function ought to be performed by federal employees. Unfortunately, agencies do not always analyze their personnel needs or their acquisition of services with the objective of maintaining agency capability to perform core functions. There is no reason to be less attentive to these issues in a reduction in force situation, or in deciding whether to perform new projects or programs with federal employees or through a contract.

The Panel expressly stated it is not recommending that OMB revise A-76, but it recognized that OMB might conclude it would be appropriate to do so to better assure the agencies' ability to perform their core functions.

Recommendation 2:

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

Once an agency determines that certain of its functions should be performed by government employees, it must ensure that it has sufficient qualified employees to actually perform those functions. Agencies must focus on these issues when they are reducing their personnel levels, whether through a formal reduction in force or otherwise. The same is true when contracting for services. Agencies must not simply take the easy way out by contracting for critical functions because they have had difficulty recruiting and retaining qualified employees in certain areas. The Panel emphasized that this recommendation would not require any revision in agency practices in complying with A-76 or in preparing their FAIR Act inventories.

The Panel decided not to make any recommendation with respect to the issue of whether OMB should make agency compliance with these principles mandatory, or whether OMB should impose reporting requirements upon the agencies. OMB should analyze the services for which agencies are contracting (other than through A-76) in determining how to structure these principles and whether to make them mandatory.

Recommendation 3:

In order to reduce artificial restrictions and maximize effective and efficient service contracts, the current prohibition on personal service contracts should be removed. Government employees should be permitted to direct a service contractor's workforce on the substance of the work performed, so long as the direction provided does not exceed the scope of the underly-

ing contract. Limitations on the extent of government employee supervision of contractor employees (*e.g.*, hiring, approval of leave, promotion, performance ratings, etc.) should be retained.

The Panel recognized that, despite the existing prohibition of PSCs in the FAR, many (if not all) agencies have contractors performing activities that fit within the prohibition as it is currently defined, in part because it would be very inefficient to structure the workplace to preclude direct instructions to contractor personnel. When service contractor personnel and federal employees are working together on a program or project, there is no good reason to prohibit the federal employee in charge from giving directions or assignments directly to contractor personnel so they can work as a true team. For example, contractors and agency personnel routinely work in integrated project teams in technical areas. It is unrealistic to expect that in such situations, government employees will not provide technical direction, and it would be inefficient to impose such a prohibition.

Even apart from efficiency concerns, it is antithetical to good government practices to have regulations in place that cannot realistically be complied with and thus are routinely violated and not enforced.

Under the Panel's recommendation, federal employees would still be precluded from involvement in personnel decisions regarding contractor employees, such as hiring, promotions, bonuses, and performance ratings.

Although there is no express statutory prohibition, the prohibition has been in place for so long, and there have been so many rationales for it, the Panel concluded that Congress should clearly and unambiguously resolve the issue through statute, rather than await a regulatory revision.

Recommendation 4:

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

The Panel recognized that it was possible that some types of service contracts should still be prohibited; therefore, it recommended that OFPP provide specific guidance to agencies, consistent of course with whatever limitations Congress might impose.

For example, an agency Inspector General ("IG") or Chief Financial Officer ("CFO") should not be able to direct the performance of a contractor hired to audit the agency's records and practices. In a performance-based contract, the contractor should have full authority to determine how best to achieve the required performance. And there are circumstances in which it would not be appropriate for government managers to micro-manage contractor activities.

The Panel also recognized that not every federal employee should be authorized to provide direction to contractor personnel.

Since the recommended changes in this area would reverse prohibitions that had been in place for decades, the Panel concluded that GAO should conduct a study within five years

after the adoption of the recommended OFPP guidance in which it would identify the benefits of the changes and any unintended adverse consequences or abuses by agencies.

Recommendation 5:

The FAR Council should review existing rules and regulations, and to the extent necessary, create new, uniform, government-wide 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.

With respect to all the sub-recommendations in this category, the Panel recognized that numerous agencies have considered these issues, and in many cases agencies have identified and implemented effective measures to address them. However, there has been no standardization, and there is no central repository or list of best practices available. The Panel concluded that the identification and adoption of government-wide policies and standardized contract clauses in these areas would be beneficial and that the FAR Council was the appropriate organization to perform this task. The Panel anticipated that the FAR Council would not have to start from scratch on most, if not all, of these issues, but would be able to select from among existing strategies.

Recommendation 5-1:

Organizational 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 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.

The Panel recognized that a single OCI clause would probably not fit all circumstances, so it suggested that the FAR Council consider whether it would be better to set forth a set of such clauses from which procurement officials could select.

The Panel noted that OCIs could arise in various time frames (before, during, and after the award of a contract), and that they could arise in a variety of contexts. Among other possibilities, the Panel identified potential financial conflicts (*e.g.*, attempting to steer business to an affiliate); unfair competitive advantage (*e.g.*, using information learned as a contractor to enhance the contractor's ability to receive a future contract); and impaired objectivity (*e.g.*, reviewing the performance of an affiliate or of a potential competitor for a future contract).

The Panel emphasized that whatever clauses were adopted should "flow down" to the employees, affiliates, and subcontractors of the contractor.

Recommendation 5-2:
Contractor Employees' Personal Conflicts of Interest ("PCI").

The FAR Council should determine when contractor employee PCIs 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 Defense Industry Initiative ("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.

The Panel concluded that, in view of the tremendous amount of federal contracting for services, and particularly in the context of the multisector workforce, additional measures to protect against PCIs by contractor personnel were needed. However, the Panel believes that PCI issues are more critical for certain types of contracts than for others, primarily for service contracts. It concluded that the FAR Council should initially identify those types of contracts where the potential for PCIs raises a concern.

The Panel believes that achieving greater government-wide consistency in protecting against PCIs would be beneficial, in that it would allow agencies to implement best practices, and it would also help to assure that all bidders on federal contracts—whether successful or not—are aware of their responsibilities and that they structure their operations knowing what was expected of them. On the other hand, given the wide variation in the types of federal contracts and in the types of entities that perform those contracts, the Panel believes that it would not be appropriate to impose a single set of requirements on all contracts and all contractors.

The Panel concluded that it was not necessary to adopt any new federal statutes to impose additional requirements upon contractors or their personnel. Rather, the obligations should be imposed—where appropriate—through contract clauses. Such clauses would not necessarily impose specific prohibitions upon contactors and/or their personnel; rather, it might be possible to achieve an appropriate level of integrity and ethical conduct on the part of contractors and their employees by developing general ethical guidelines and principles and/or by requiring disclosure of potential PCIs.

The Panel does not believe the requirements imposed on contractors and their personnel—through the contract and solicitation clauses or otherwise—should incorporate the extensive and complex requirements imposed on federal employees by existing statutes and by the regulatory standards and advisory opinions promulgated by the Office of Government Ethics ("OGE").

The Panel was concerned about the possibility of over-regulation and its attendant costs, particularly as it applies to small businesses, noting that the imposition of burdensome requirements could discourage such businesses from contracting with the government. In part for that reason, it struck from the recommendation draft language that would have required all PCI-related obligations on prime contractors to necessarily "flow down" to all subcontractors.

The Panel recognized the benefits that have been achieved through voluntary agreements, as epitomized by the DII, noting it as a model that should be considered by the FAR Council. In addition, the FAR Council should consider the DII suggestions that (1) values-based self-governance should be the preferred model for all federal contractors, and (2) the DFARS regulatory scheme should be incorporated into the FAR. To the extent that the FAR Council adopts these suggestions, it should also decide the appropriate scope and applicability of such provisions.

The Panel recognized that many companies already have extensive and effective ethics policies and programs, and in many cases such companies also do business with non-government entities. It would be inefficient and confusing to their workforce to make them create a separate program applicable to their work with the federal government. Therefore, where existing standards of conduct, codes of ethics, etc. satisfy the principles of the federal government's ethics system, those internal rules would not need to be revised. However, the contractors would have to be held accountable, through appropriate clauses in the contract, for enforcing them.

The Panel had initially proposed a sub-recommendation under which the FAR Council would have been directed to analyze existing statutes and regulations to determine if they provide sufficient tools to deter—and to appropriately hold contractors accountable for—violations of PCI and OCI requirements, or whether additional tools are needed. However, the Panel determined that this sub-recommendation was unnecessary, since it concluded that if the FAR Council identified a regulatory or statutory gap, it would make appropriate recommendations through the appropriate channels.

Recommendation 5-3:
Protection of Contractor Confidential and Proprietary Data.

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

The Panel is aware that many agencies have addressed the issue of how best to protect confidential and/or proprietary information from release or from improper use by competitors. However, others have not. The Panel concluded that substantial benefits could be achieved through the development of standardized, government-wide guidance and contract clauses that could be implemented by agencies, rather than having to develop such clauses individually. Uniformity would also be helpful in those ever more common situations where a given contractor doing work for one agency obtains access to information that had been provided to another agency.

The Panel urges the FAR Council to identify and, if possible, standardize the ways in which contractors and/or agencies would be able to enforce violations of non-disclosure agreements.

The Panel contemplated that the clauses and principles identified by the FAR Council would be included in the FAR.

The Panel emphasized that it was not seeking to address long-standing issues related to appropriate use of the intellectual property of the government or of another contractor. Rather, the issue is what can be done to prevent the improper disclosure of proprietary

information, particularly since in many cases contractors are required under the contract to share such information with the government and with other contractors.

Recommendation 5-4:
Training of Acquisition Personnel.

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

The Panel noted that in many instances a salutary policy is promulgated, but it is not effectively implemented because the individuals who have the responsibility are not trained on how to implement it.

There would be two aspects to the recommended training: first, to educate procurement personnel so that they are sensitized to the issues and are aware that something ought to be done to address potential OCIs, PCIs, and disclosure issues; and second, to provide uniform guidance on how to respond to such issues so these officials do not have to reinvent the wheel.

Recommendation 5-5:
Ethics Training for Contractor Employees.

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

Although the Panel recognized that contractor personnel who work alongside civil servants would generally not be subject to all of the same ethics rules, it thought that it would be helpful if they understood the rules applicable to the federal workers with whom they work. For example, it would be a good idea if contractor personnel understood why a coworker could not accept an expensive lunch or gift.

However, the Panel only recommended that agencies *consider* implementing such a training program for their contractor personnel, as opposed to recommending that all agencies be *required* to do so. In addition, the scope and content of whatever training was offered would be decided on an agency-by-agency basis.

The Panel found that the costs associated with such training would be minimal, since the contractor personnel could simply attend training already being provided to government employees, or—in some agencies—would receive the training at their convenience over the Internet.

An agency could enforce a requirement that contractor personnel attend the federal training the same way it enforces other training requirements, such as safety training.

The Panel considered recommending the converse to this recommendation (*i.e.*, to require federal employees in a blended workforce environment to attend ethics training sessions given to contractor personnel), but it decided not to adopt such a recommendation, in

part because it would be unwieldy in circumstances where a federal employee worked alongside personnel from several different contractors.

Recommendation 6:
Enforcement.

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

The Panel emphasized that contractors need to be held accountable for complying with ethical standards and principles identified in Recommendation 5, so there need to be consequences attached to any such violations.

The Panel concluded that the enforcement tools that currently exist (*e.g.*, suspension and debarment) are sufficient—if they are properly utilized—and that there is no need for Congress to adopt additional statutory remedies. However, the Panel also concluded that additional training in when and how to use these remedies is important.

The Panel emphasized that in addition to protecting the government's interests directly, it was also important to assure that unethical entities do not have an unfair competitive advantage over ethical companies.

The Panel considered whether to recommend an amendment to existing law that would expressly authorize the imposition of a lifetime ban upon repeated violators, but it decided not to do so.