# INTRODUCTION

# The Panel Project

## Background

The federal government is the single largest buyer in the world. Each year federal agencies spend nearly $400 billion a year for a range of goods and services to meet their mission needs.[1] Some acquisitions are highly specialized—advanced fighter jets, precision munitions, nuclear submarines—for which there is no non-governmental or commercial demand. Other goods and services are readily available and purchased from the commercial marketplace. From laptop computers and off-the-shelf software to information technology ("IT") consulting services, software development, and engineering services, federal agencies rely upon common commercial goods and services to conduct their business. In addition, commercial products may be modified to meet government needs. In all of these circumstances government acquisition process intersects with the private sector and the federal government can benefit from knowing how commercial buyers approach the acquisition process.

## Importance of the Commercial Market to Government Acquisition

Effective and efficient access to products and services available in the commercial market can help government agencies to achieve their various missions. The pace at which technology advances requires that government have access to commercial technology and technology-based services. Agencies have a significant interest in acquiring such products and services at a reasonable price and without undue administrative burden. Of course, in light of the involvement of public funds, acquisition must be conducted in a manner that is fair and furthers the public interests in transparency and accountability.

Over the last two decades, significant study and effort has been dedicated to the acquisition of goods and services available in the commercial market by the federal government. For example, in 1986, the Blue Ribbon Commission on Defense Management highlighted the need for DoD to expand its use of commercial products and processes and to eliminate barriers that discouraged application of innovative technology to DoD contracts.[2]

---

[1] See https://www.fpds.gov; *see also* http://www.whitehouse.gov/omb/procurement/index.html.

[2] The President's Blue Ribbon Commission on Defense Management (The Packard Commission), A Quest for Excellence: Final Report to the President and Appendix (Washington, D.C.: The Packard Commission, June 1986).

Congress later chartered the "Section 800 Panel" [3] to assess laws affecting defense procurement. In early 1993, the Section 800 Panel proposed a variety of reforms, including stronger policy language favoring the use of commercial and nondevelopmental items; a new statutory definition of commercial items; and an expanded exemption for "adequate price competition" in the Truth in Negotiations Act.

Following the efforts of the Section 800 Panel, Congress enacted a series of procurement reforms in the mid-1990s that were intended to enable the government to streamline the acquisition process and to obtain greater access to products and services available in the commercial market. These reforms primarily were introduced through the Federal Acquisition Streamlining Act of 1994 ("FASA")[4] and the Federal Acquisition Reform Act of 1996[5] ("FARA").

FASA and FARA required, and were followed by, various changes to the Federal Acquisition Regulation ("FAR"). For example, FASA introduced a strong preference for the acquisition of commercial items.[6] The statutory definition of commercial items refers to categories of products and services.[7] The same is true of the regulatory definition in the FAR.[8]

Since the FASA and FARA reforms, agencies have sought to purchase commercial items and otherwise rely on the techniques addressed in those statutes with varying degrees of success. Those efforts were the subject of considerable analysis, including by GAO in reports regarding use of the Multiple Award Schedule, task and delivery order contracts, and interagency contracting.

Congress enacted further reforms. For example, Congress passed the Services Acquisition Reform Act of 2003 ("SARA"), which introduced other reforms related to commercial items as well as to the acquisition workforce. SARA also chartered this Panel to study current laws, regulations, and government-wide acquisition policies with regard to commercial practices, and to recommend appropriate reforms.

## Trends in Acquisition

Since the FASA and FARA reforms were enacted a decade or more ago, a number of events have affected government contracting. For example, the events of September 11, 2001, and subsequent conflicts in Afghanistan and Iraq, as well as the Katrina aftermath, have influenced what the government buys and how much it spends. From fiscal year 2000 to fiscal year 2005, government purchasing increased nearly 75 percent from $219 billion to more than $380 billion.[9]

Over the last decade, a number of trends have affected government contracting. Services now comprise a greater percentage of the government's acquisition budget. Between

---

[3] The Section 800 Panel was chartered by Section 800 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 800, 104 Stat. 1485, 1587 (1990).

[4] Pub. L. No. 103-355, 108 Stat. 3243 (1994).

[5] Pub. L. No. 104-106, 110 Stat 186 (1996). FARA was later renamed the Clinger-Cohen Act.

[6] *See* 10 U.S.C. § 2577 (codifying preference).

[7] *See* 41 U.S.C. § 403(12).

[8] *See* FAR 2.101.

[9] Trending Analysis Report since Fiscal year 2000, http://www.fpdsng.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls.

1990 and 1995 the government began spending more on services than goods.[10] Currently, procurement spending on services accounts for more than 60 percent of total procurement dollars.[11] In FY 2005, DoD obligated more than $141 billion on service contracts, a 72 percent increase since FY 1999.[12]

While procurement spending has increased, products and services often are purchased through relatively large orders under contracts with broad scopes of work. Contracting agencies often rely on indefinite delivery contracts, such as interagency contracts, under which orders are issued for products or services. Orders under the types of contracts discussed above often can be larger in amount than individual contracts. Orders under such contract vehicles can be significant in terms of size, and may exceed $5 million. Purchases under the Multiple Award Schedules also have more than doubled in value over the last decade.[13]

There also are fewer acquisition professionals in the government to award and administer contracts as the government's contracting workforce was reduced in size in the 1990s. For instance, the DoD acquisition workforce declined by nearly 50 percent due to personnel reductions in the 1990s.[14] Despite recent efforts to hire acquisition personnel, there is an acute shortage of federal procurement professionals with between 5 and 15 years of experience. This shortage will become more pronounced in the near term because roughly half of the current workforce is eligible to retire in the next four years.[15]

Over the last decade or so, consolidation has occurred in certain parts of industry that contract with the government, including but not limited to aerospace and defense. As a result, certain contractors are now performing work that previously was performed by other companies.

In sum, a variety of trends and factors has influenced government contracting and continues to do so. Effective and efficient access to the commercial marketplace will continue to play a major role in helping to enable agencies to purchase the products and services they need.

## Current Commercial Practices: What are They?

Because Congress tasked the Panel[16] to assess current laws, regulations, and government-wide acquisition policies with a view toward "ensuring effective and appropriate use of commercial practices and performance-based contracting," the Panel considered it critical to identify current commercial practices.

Rather than make assumptions regarding current commercial practices, the Panel sought input. Specifically, over the course of its 18 months of study, the Panel broadly solicited and received substantial testimony and other input from government, industry,

---

[10] Calculations based on the Federal Procurement Report published by the Federal Procurement Data Center for fiscal years 1990-1995 (on file with OFPP).

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

[12] *See* Government Accountability Office, *Defense Acquisitions: Tailored Approach Needed to Improve Service Acquisition Outcomes*, GAO-07-20 (Nov. 2006), at 1.

[13] *See* General Accounting Office, *Federal Acquisition: Trends, Reforms, and Challenges*, GAO/T-OCG-00-7 (Mar. 7, 2000), at 6-7.

[14] U.S. DoD IG, DoD Acquisitiion Workforce Reduction Trends and Impacts, D-2000-088, 5-6 (Feb. 2000)

[15] Testimony before the Acquisition Advisory Panel of S. Assad, Director, Defense Procurement and Acquisition Policy, June 13, 2006, p. 57-58 (testimony on file with the Panel).

[16] *See* Pub. L. No. 108-136, sec. 1423(c)(1).

and other members of the public regarding acquisition practices. As part of its study, the Panel also issued questionnaires to private sector buyers and government buying agencies to assess current practices and to identify potential areas for improvement in the way the government buys.

The Panel thus was able to conduct its assessment of current laws, regulations, and government-wide acquisition policies with the benefit of an understanding of current commercial practices, as described by industry. Industry input included private sector buyers with experience in large, complex acquisitions of services, such as information technology services. Such buyers described the competitions that they conducted, and their efforts to ensure that prices were fair and reasonable. It is clear from the many private sector buyers who testified before the Panel that the bedrock principle of current commercial practice is competition.

The Panel also benefited from the experience and insights provided by government acquisition personnel regarding the various practices that were introduced or encouraged by procurement reforms in the last decade. The Panel inquired about what agencies were doing, what worked, and what did not. The inputs described above provided critical information for the Panel's work.

## Commercial Purchases and Practices: The Special Challenge of Government

Our Supreme Court has observed that when the government enters the commercial market, it generally subjects itself to the same contract rules as private parties.[17] Although there are exceptions set forth in federal statutes regulations and the Constitution, this suggests that the federal government take advantage of commercial practices where possible.

Due to its special status as the sovereign, and in light of the statutes and regulations that apply to government contracting, government agencies are not in a position to take full advantage of the practices of the private sector. For example, agencies generally may not award contracts based solely on consideration of a company's prior performance or enter into long-term strategic agreements. Agencies are subject to appropriations laws, and may be limited to use of annual appropriations. As discussed above, agencies also are required to abide by competition statutes and regulations.

On the other hand, government can take advantage of many approaches used in the commercial market. Doing so can foster effective and efficient access to products and services.

The Panel has made an effort to achieve balance, recognizing the time pressures on the acquisition system, but also has tried to recommend current commercial practices regarding competition, and to provide transparency and accountability necessary for the responsible expenditure of taxpayer funds.

[17] *Lynch v. United States*, 292 U.S. 571, 579 (1934). *See also Mobil Oil Exploration and Producing Southeast, Inc. v. United States*, 530 U.S. 604, 607 (2000).

## Report Structure

This Report is divided into seven chapters. Each chapter sets forth the background of the issues, followed by the Panel's findings and recommendations. We have provided a relatively detailed Executive Summary that explains the Panels findings and recommendations – as well as the Panel process. However, the Executive Summary is not the Report. The chapters are as follows:

Chapter 1—Commercial Practices
Chapter 2—Improving Implementation Of Performance-Based Acquisition (PBA) In The Federal Government
Chapter 3—Interagency Contracting
Chapter 4—Small Business
Chapter 5—The Federal Acquisition Workforce
Chapter 6—Appropriate Role Of Contractors Supporting Government
Chapter 7—Report On Federal Procurement Data

# Executive Summary

As the Panel's Findings and Recommendations took root in its working groups and were presented to and debated and adopted by the full Panel during public meetings, certain themes began to emerge and intersect across the working groups. This executive summary does not list all of the findings and recommendations. Instead, it is intended to share those key themes that became apparent over the course of the Panel's deliberations. For clarity and consistency, this material is presented in accordance with the Panel's statutory charter.

# I. Statutory Charter: Ensure Effective And Appropriate Use of Commercial Practices

While nobody expects the government to ever be a truly commercial buyer given Constitutional constraints on funding, the need to be accountable for the expenditure of public funds, the statutory constraints aimed at providing full and open competition, and achievement of certain social and economic objectives, the Panel's many commercial sector witnesses echoed recurring themes that could be adopted by the government.

## A. Enhance Competition

### 1.Findings

*Requirements Definition is Key to Achieving Benefits of Competition.* Commercial firms testifying before the Panel described a vigorous acquisition planning phase when buying service solutions. Acquisition process governance is considered of equal importance to selecting the right contractor. They obtain "buy in" of the business case from all organizational stakeholders. These organizations invest the time and resources necessary to clearly define requirements first. They do this in order to achieve the benefits of competition in an efficient market, namely, high quality, innovative solutions at the best prices. They use multifunctional teams and perform ongoing rigorous market research and are thus able to provide well-defined performance-based requirements conducive to a best value solution at fixed prices.

*Government Frequently Fails to Invest in Requirements Definition.* Public sector officials and representatives of government contractors testified that the government frequently is unable to define its requirements sufficiently to allow for fixed-price solutions. Ill-defined requirements also fail to produce meaningful competition for services solutions, relying instead on time-and-materials ("T&M") contracts based on fixed hourly rates. The causes for this failure to define requirements were described by many witnesses, including the Government Accountability Office ("GAO") and agency inspectors general ("IGs"). Major contributors to this problem are a culture focused on "getting to award" and budgetary time pressures combined with a strained workforce and lack of internal expertise in the market. Additional problems associated with unclear roles and responsibilities in the use of interagency or government-wide contracts, another area under this Panel's statutory purview, also contribute. The government's difficulties in defining requirements are well documented. Recently, the GAO and IGs have found that orders under interagency contracts frequently contain ill-defined requirements.

### 2. Recommendations

The Panel's recommendations seek to improve the environment for healthy competition using a 360-degree approach, providing tools to enhance transparency, requirements analysis and definition, requirements for greater use of competition, and positive pressures, in the form of protest authority and transparency that will result in agencies applying an appropriate level of discipline to the structure of their acquisitions.

The Panel could not make recommendations regarding competition without an aim toward nurturing a healthy environment conducive to achieving the benefits of competition. Therefore, the Panel recommends that agencies establish centers of expertise in requirements analysis and definition, and obtain express advance approval of the requirements from the key stakeholders (*e.g.*, program manager and contracting officer) to closely resemble the buy-in obtained in commercial practice. Additionally, the Panel recognizes a need for a centralized source of market research information to facilitate more robust but efficient acquisition planning. Therefore, the Panel recommends that the General Services Administration ("GSA") establish a market research capability to monitor services acquisitions by government and commercial buyers, collect publicly available information, and maintain a database of information regarding transactions. In addressing the GAO and IGs concerns about ill-defined requirements in orders under interagency contracts, the Panel recommends criteria for upfront requirements planning before access to interagency contracts is granted.

Requirements definition is particularly important with respect to the Panel's recommendations for the efficient and appropriate use of performance-based acquisition ("PBA"). The Panel made several recommendations to the Office of Federal Procurement Policy ("OFPP") to provide more guidance on the use of this technique in order to assist agencies with defining their requirements and establishing measurable performance standards and appropriate contract incentives. A recommendation for a formal PBA educational certification program for technical representatives and other acquisition team members is intended to enhance the efficiency and effectiveness of analyzing and describing requirements.

## B. Encourage Competition

### 1. Findings

*Commercial Buyers of Services Rely Extensively on Competition.* The numerous commercial organizations invited to address the Panel expressed their strong preference for head-to-head competition. They use rigorous market research and requests for information ("RFIs") to identify capabilities and suppliers. They provide significant opportunities for information exchange with potential suppliers and typically ensure that they retain at least two or three suppliers throughout negotiations. Sole source engagements are rare. Even after the contract is signed, competition remains a distinct possibility. These commercial buyers reserve the right to recompete or bring the service in-house before the contract has run full term. Six Sigma-style continuous monitoring and evaluation is used to measure performance and suppliers face the prospect of losing business if performance doesn't meet targets or if technology or strategic direction changes. Finally, these buyers use relatively short-term contracts, especially for services that involve complex technology requirements.

*Competition for Government Contracts as well as its Approaches to Acquiring Commercial Services Differs Significantly from Commercial Practice. The Extent to which Each of these Approaches Achieves Competition Varies.* Even where the government attempts to adopt commercial approaches, competition for government contracts differs in significant respects from commercial practice. Contributing factors include fiscal constraints imposed by the annual appropriations process, the need to accomplish urgent missions with limited time and personnel, policies and statutes requiring transparency and fairness in expenditure of public funds, use of the procurement system to accomplish a host of government social and economic objectives, and the audit and oversight process designed to protect taxpayers from fraud, waste, and abuse. But there is an unequivocal mandate for competition that runs through the statutes and regulations governing federal procurement. Yet, the Panel found government implementation of competition varies from quite structured processes on the one hand, to ill-defined requirements and minimal, if any, head-to-head competition on the other.

Comparing the emphasis on competition in commercial practice with actual government-wide competition statistics, the Panel found that nearly one-third of the government's dollars obligated in fiscal year 2004 was awarded without competition accounting for $108 billion. About one-fourth, or $98 billion was awarded noncompetitively in fiscal year 2005. Even when competed, the percent of dollars awarded when only one offer was received has doubled from 2000 to 2005. Spending on services was $216 billion in fiscal year 2004 and $220 billion in fiscal year 2005, accounting for more than 60 percent of total obligations for each year. At least 20 percent to 24 percent of these services were awarded noncompetitively in fiscal years 2004 and 2005. However, the Panel believes that the amount of noncompetitive awards is underreported for orders under multiple award contracts available for interagency use. This lack of transparency is significant given that 40 percent or $142 billion of all government obligations were spent under interagency contracts in 2004. But even without visibility into the level of competition on orders, there is significant evidence to give cause for concern. Both the GAO and the DoD IG have found that agencies continue to award a large proportion of orders for services noncompetitively. The GAO placed interagency contracts on their High Risk Series for 2005, finding, in part, that the orders under these contracts frequently fail to comply with competition requirements.

In addition to the concerns regarding the level of competition for orders under interagency contracts, the Panel also has significant concern regarding the level of meaningful competition achieved. Interagency contracts are generally indefinite-delivery, indefinite-quantity and, based on a statutory preference, generally result in multiple awards. Where services are sought, the initial competition for these contracts typically includes a loosely defined statement of the functional requirements in the solicitation, focusing on hourly rates for various labor categories, with the expectation that more clearly defined requirements will be provided at the order level where more meaningful competition will occur. However, the Panel heard testimony and reviewed GAO and IG reports describing ill-defined requirements at the order level. Costly and complex services are procured using orders under these contracts. Of the $142 billion obligated under interagency contracts in fiscal year 2004, $66.7 billion was awarded in single transactions exceeding $5 million, with services accounting for 64 percent or $42.6 billion. For fiscal year 2005, interagency contract obligations totaled $132 billion

with $63.7 billion in single transactions over $5 million, and services accounting for 66 percent or $42 billion.

So what has happened to dampen the expectation for this more rigorous competitive process at the order level? There appear to be several key checks and balances missing that would otherwise contribute to a healthier competitive environment. For instance, except recently for DoD, it is not required that all eligible contractors be informed of an order requirement. Also, there is little transparency, even into sole source orders, as there is no public notification or synopsis requirement. Even where competition is used at the order level, there is no protest option for contractors under multiple award contracts, reducing transparency and accountability, including, for instance, the need for clearly stated requirements, evaluation criteria and the incentive to evaluate using reasonable trade-offs based on these criteria. And, finally, there is no requirement for a detailed debriefing at the task order level, denying contractors the opportunity to become more competitive on future orders.

But the Panel does recognize that these multiple award contracts provide significant benefits to the government, not the least of which is a reduced administrative cost accruing to those agencies that would otherwise have to conduct full and open competitions for their recurring service needs. Multiple award contracts are an effective tool allowing a strained acquisition workforce to meet mission needs in a streamlined fashion. However, there was never an expectation that these streamlined vehicles would not produce meaningful competition. Therefore, the Panel sought to achieve a balance – one that would introduce more pressure to encourage competition but not unduly burden these contracts as tools for streamlining. While nearly half of the dollars spent under these contracts are awarded in single transactions over $5M, the majority of the transactions fall under this threshold. Therefore, in addition to its other recommendations, the Panel recommends applying additional requirements at this threshold, thereby impacting a significant dollar volume but not the majority of transactions.

## 2. Recommendations

To emphasize the importance of competition to achieving the best outcomes, the Panel recommends expanding government-wide the current DoD requirements to notify all eligible contractors under multiple award contracts of order opportunities or to ensure the receipt of three offers. The Panel also felt that while a pre-award notification of sole source orders might unduly burden the streamlined purpose of these multiple award contracts, post-award notification would suffice in providing transparency and the positive pressures that transparency imparts while bolstering public confidence. And for single orders with an expected value in excess of $5 million where a statement of work is required, the Panel recommends that agencies 1) provide a clear statement of the requirements; 2) disclose the significant evaluation factors and subfactors and their relative importance; 3) provide a reasonable response time for proposal submissions, and; 4) document the selection decision to include the trade-off of price/cost to quality in best value awards. Additionally, the Panel recommends post-award debriefings for disappointed offerors for orders in excess of $5 million where statements of work and evaluation criteria are used in the selection. The Panel found that contractors expend significant bid and proposal costs in competing for individual orders under multiple award contracts and that debriefings encourage meaningful competition by providing disappointed offerors information

that assists them in becoming more competitive on future orders. Concerned that the government is purchasing costly and complex services without a commensurate level of deliberation, transparency and review to ensure an appropriate level of discipline, the Panel recommends limiting the statutory restriction on protests of orders under multiple award contracts to orders valued at $5 million or less.

With respect to the GSA Federal Supply Schedules Program, the Panel recommends a new services schedule for information technology that would reduce the burden on contractors normally resulting from a lengthy process of negotiating labor rates with GSA that produce little meaningful price competition because services of this type are requirement specific. The meaningful competition results from an offeror responding to a specific order requirement with an appropriate and well-priced labor mix resulting in a quality solution. This new services schedule would require competition at the order level.

## C. Adopt More Commercial Practices

### 1. Findings

*Commercial Buyers Rely on Competition for the pricing of goods and services, using well-defined requirements that facilitate competitive, fixed-price offers.* Commercial practice strongly favors fixed-price contracts in the context of head-to-head competition in an efficient market. In the absence of competition, which is relatively rare, commercial buyers rely on their own market research, and benchmarking, and often seek data on similar commercial sales. In some cases, they may obtain certain cost-related data, such as wages or subcontract costs, from the seller to determine a price range.

While commercial buyers avoid T&M contracts, viewing them as too resource intensive to monitor, they do use them for specific types of work, for instance, repair, building capital equipment designed in-house, and engineering/development work. When T&M contracts are used, commercial buyers plan for and apply the necessary in-house resources to effectively monitor these contracts.

### 2. Recommendations

The Panel's statutory charge requires it to make recommendations with a view toward protecting the best interests of the federal government. These recommendations seek to improve the government's ability to establish fair prices. The Panel recommends restoring the statutory definition of commercial services found in the Federal Acquisition Streamlining Act ("FASA"). FASA intended for services that were offered and sold in substantial quantities in the commercial marketplace to be defined as commercial, thereby allowing more streamlined purchasing per FAR Part 12. This would mirror how commercial buyers purchase in an efficient market using competition. However, the regulatory implementation of the definition of commercial services allowed services not sold in substantial quantities in the commercial marketplace, or those "of a type," to nonetheless be classified as commercial and acquired using the streamlined purchasing policies of FAR Part 12. This can leave the government at a significant disadvantage by restricting the available tools for determining fair and reasonable prices when limited or no competition exists. Restoring the statutory definition would not preclude purchasing services not sold in substantial quantities in the commercial marketplace, but would require that such services be purchased using FAR Part 15 procedures.

The Panel also recommends specific regulatory revisions that would provide a more commercial-like approach to determining price reasonableness when no or limited competition exists. The recommendation revises what "other cost or pricing data" the contracting officer can request when no or limited competition exists for a commercial item or service. To protect contractors from contracting officers who might be tempted to default immediately to seeking cost data from the contractor before attempting other means to establish price reasonableness, the Panel has provided an order of precedence, favoring market research first and limited information from the contractor last. In no event may the contracting officer require detailed cost breakdowns or profit, and shall rely instead on price analysis. The contracting officer may not require contractor certification of "other cost or pricing data," nor may it be the subject of a post-award audit or price redetermination.

The Panel's concerns regarding the use of T&M contracts are based largely on price and contract management. However, in considering a recommendation in this area, we balanced our concerns for the risk these contracts place on the government, especially given GAO findings that the government does not provide sufficient surveillance, with our concern to protect the government's ability to perform its mission uninterrupted. The Panel, therefore, recommends enforcing the current policies limiting the use of T&M contracts. This includes the recently enacted Section 1432 of SARA that allows the use of these contracts using FAR Part 12 procedures if they are competed. The Panel also recommends, whenever practicable, establishing procedures to convert work being done on a T&M basis to a performance-based effort. Finally, to limit the government's risk under these contracts, the government should not award a contract or task order unless the overall scope of the effort, including the objectives, has been sufficiently described to allow efficient use of the T&M resources and to provide effective government oversight of the effort. While a written public statement from an association representing contractors advised the Panel to recommend repealing the competition requirement under Section 1432 of SARA for commercial item T&M contracts, the Panel could not ultimately support this given its findings regarding competition.

## D. Equality Under Legal Presumptions

### 1. Findings

*Government Contractors Not on a Level Playing Field.* Although the presumption of good faith applies equally to both parties to a commercial contract in the event of a performance dispute with the government, contractors do not enjoy the same legal presumptions regarding good faith of the parties. Current precedent provides that the government enjoys an enhanced presumption of good faith and regularity in such a dispute.

### 2. Recommendation

In addition to protecting the best interests of the government, the Panel's statutory charter also called on it to make recommendations with a view toward ensuring fairness. The Panel recommends legislation to ensure that contractors, as well as the government, enjoy the same legal presumptions, regarding good faith and regularity, in discharging their duties and in exercising their rights in connection the performance of any government procurement contract, and either party's attempt to rebut any such presumption that applies to the other party's conduct shall be subject to a uniform evidentiary standard that applies equally to both parties. In enacting new statutory and regulatory provisions, the same rules

for contract interpretation, performance, and liabilities should be applied equally to contractors and the government unless otherwise required by the United States Constitution or the public interest.

# II. Statutory Charter: Review Laws and Regulations Regarding the Performance of Acquisition Functions Across Agency Lines of Responsibility, and the Use of Government-Wide Contracts

## A. Enhance Accountability and Transparency

### 1. Findings

*Accountability and Transparency Lacking.* Government-wide contracts are referred to in this Report as interagency contracts and multi-agency contracts interchangeably. The performance of acquisition functions across agency lines is almost exclusively accomplished through the use of interagency contracts. The Panel finds that interagency contracts play a critical streamlining role, allowing agencies to achieve their missions with fewer resources devoted to procurement while affording the government the opportunity to leverage its buying power. But in 2005, GAO placed interagency contracts on its High Risk series due, in part, to ordering under these contracts that failed to adhere to laws, regulations, and sound contracting practices, and for a lack of oversight and accountability. GAO found that the causes of such deficiencies stem from the increasing demands on the acquisition workforce, insufficient training, and in some cases inadequate guidance. GAO also noted that the fee-for-service arrangement used for interagency contracts may create incentives for the contracting agency to increase sales volume and results in too great a focus on meeting customer demands and not enough on complying with fiscal rules and ordering procedures. GAO raised concerns that the lines of responsibility for key functions such as describing requirements, negotiating terms, and conducting oversight are not clear among: (i) the agency that manages the interagency contract, (ii) the ordering agency, and (iii) the end user.

The Comptroller General of the United States told the Panel that while it is known that these contracts are proliferating, outside of the GSA Schedules program and the Governmentwide Acquisition Contracts ("GWACs"), there is no reliable data on how many such contracts exist, how much money is involved and the nature of the services acquired under them. Through its research, the Panel has obtained some general information regarding these contracts. As evidence of their popularity, interagency contract obligations in fiscal year 2004 totaled $142 billion or 40 percent of the government's obligations in that year.

With the proliferation has come extensive oversight of various federal agencies by Congress, GAO, the IGs, outside organizations and the media. Among the GAO and IG findings on ordering deficiencies is a significant failure to comply with competition requirements, use of ill-defined requirements and T&M pricing without sufficient government surveillance. Some GAO and IG findings identify "interagency assisting entities" that use interagency contracts. These interagency assisting entities provide fee-for-service acquisition support to other agencies. The Panel recommendations address these entities. The Panel

also found a trend of agencies establishing enterprise-wide contract vehicles that operate much like an interagency contract, except their use is restricted to a single agency. While the Panel recognizes that some competition among agencies is desirable, inefficient duplication threatens to dilute the overall value of interagency contracts to the government.

With the rapid growth in public funds spent under these interagency contracts and with the assisting entities that use them, the Panel believes it is critical to confront the lack of accountability and transparency to improve public confidence in these vehicles and ensure they fulfill their promise for reducing overall administrative costs to the government. It is notable that despite the significant dollars spent under these contracts, there is no consistent, government-wide policy regarding their creation and reauthorization.

## 2. Recommendations

Many of the issues identified by the GAO, IGs and Panel witnesses on the misuse of these vehicles are related to the internal controls, management and oversight, and division of roles and responsibilities between the vehicle holder and ordering agency. These issues can best be addressed with a government-wide policy that requires agencies to specifically and deliberately address these matters at the point of creation rather than attempting to remedy these problems at the point of use. The current lack of procedural requirements and transparency allows for the proliferation of these vehicles in a largely uncoordinated, bottom-up fashion, based on short-term, transaction-related benefits instead of on their ultimate value as a tool for effective government-wide strategic sourcing. The Panel recommends that under guidance issued by OMB, agencies formally authorize the creation or expansion of multi-agency contracts, enterprise-wide contracts, and assisting entities. The Panel's recommendations maintain approval for the creation and expansion at the agency level (except for GWACs). The Panel provides a list of considerations to be included in this OMB guidance to address responsible management of these contracts and assisting entities.

The Panel also made recommendations to improve transparency regarding these contracts. First, the Panel recommends OMB conduct a survey of existing vehicles and Assisting Entities to establish a baseline. The draft OFPP survey, developed during the Working Group's deliberations includes the appropriate vehicles and data elements. The Panel believes that establishing a database identifying existing contracts and assisting entities as well as their characteristics is the most important near-term task. It is the view of the Panel that the most expeditious means of assembling such information is in the form of a survey as currently drafted by OFPP in support of the OMB task force examining Interagency and Agency-Wide Contracting. The information gathered should be available for agency and public use. This survey is already underway.

From the outset of the Panel's work, we have been frustrated by the lack of data available to conduct a thorough analysis of interagency contracts and the orders placed under them. The Federal Procurement Data System ("FPDS") has traditionally been a transactions-based database, collecting information only on transactions that obligate funds. Therefore, while agencies input their order information, there was no efficient way to identify it as an order under an interagency contract, except for the GSA Schedules program.

In 2004, FPDS-Next Generation ("FPDS-NG"), a new technology solution, replaced FPDS. Twenty-seven years of collected contract data was migrated into the new system. But at the same time as the system migration, new reporting elements were added. For instance,

FPDS-NG now collects information on interagency contracts. However, adding a new collection requirement on any ongoing contract or order creates a myriad of unavoidable migration issues. Moreover, information on the extent of competition at the order level is not reliable due to a number of issues including: (i) automatic DoD coding of all GSA schedule orders as full and open competition, (ii) coding of other orders as full and open based on the master contract, and (iii) system migration rule failure.

The Panel also is concerned with the amount of incorrect data entered into the system by agencies, such as the ultimate value (base plus options) requiring the Panel to rely solely on the transaction value of an order, significantly less than the ultimate value.

The data section of the Report documents a long history of inaccurate data input by agencies. For example, the Panel's survey of PBA contracts and orders found that of the sample reviewed, 42 percent that were entered in FPDS-NG as performance based, clearly were not (with some agencies admitting to FPDS-NG coding errors). Among other recommendations for data improvement, the Panel has made several to focus attention on the importance of agencies inputting accurate data, including a statutory amendment assigning Agency Heads the accountability for accurate input. In those limited circumstances where the Panel and FPDS-NG staff were able to obtain data on interagency contracts, the Panel recommends providing public access to that data online.

## III. Statutory Charter: Ensuring Effective and Appropriate Use of Performance-Based Contracting

Performance-based Contracting, now called Performance-based Acquisition ("PBA"), is an approach to obtaining innovative solutions by focusing on mission outcomes rather than dictating the manner in which the contractor's work is to be done. Those outcomes are then measured and the contractor compensated on the basis of whether or not the outcomes are achieved.

During the Panel's public deliberations, there was some debate as to the value of this technique. Witness testimony, as well as written public statements, was mixed on PBA merits. One member and some public comments questioned the validity of PBA for government uses after more than a decade of attempts to implement have failed to produce expected results. Others, however, noted significant successes using PBA. And though a 1998 OFPP study found generally positive results, the Panel found no systematic government-wide effort to assess fully the merits of the process. Many spoke to the challenges in implementing the technique, most of which focused on the acquisition workforce, including those who define requirements. Even commercial organizations told the Panel that implementing the technique can be difficult, especially identifying the appropriate performance standards to measure. Despite the difficulty, it remains the preferred commercial technique seen as critical to obtaining transformational and innovative solutions. Ultimately, the Panel determined that in view of a lack of data supporting either that the technique is unworkable in the federal government sector or that PBA's costs outweigh its benefits, the Panel's statutory mandate was clear: improve the effectiveness and appropriate use of PBA. As such the Panel recommendations should not be interpreted as offering a long-term endorsement of PBA. Rather the Panel aims are directed at improving current

implementation and at providing a solid basis for a more thorough assessment of its value. Thus, the Panel agreed that the overall statement of the issue is "Why has PBA not been fully implemented in the federal government?"

## A. Improve PBA Implementation

### 1. Findings

*Uncertainty Remains on How and When to Apply PBA.* Government officials testifying before the Panel related the challenges they face in applying PBA that included when and how to apply it and the time and resources required for the technique. They also spoke to the cultural emphasis of "getting to award" that shortchanges both the requirements definition process and effective post-award contract management. A 2002 GAO survey of 25 contracts reported as PBA found that while most contained at least one PBA attribute, only 9 contained all of the required elements. GAO concluded that the study raised concern about whether agencies have an understanding of PBA and how to maximize its benefits. A Rand Corporation study of the U.S. Air Force Air Logistics and Product Centers in 2002 found uncertainty over which services were suitable for PBA, confusion with the terms "Statement of Work" and "Statement of Objectives," and over what constitutes a measurable performance standard. The Panel's own survey of randomly selected PBAs from the top ten contracting agencies reflect similar problems, including an inability to identify and align performance measures and contract incentives to ensure desired outcomes are achieved. A multi-association group representing government contractors told the Panel that many of the solicitations they receive that would be appropriate for PBA are still not described in terms of outcomes and those that are frequently do not identify measures to achieve those outcomes. This multi-association group provided the Panel with a sampling of such solicitations. As a result of these findings, the Panel concluded that the potential for PBA to generate transformational solutions to agency challenges remains largely untapped.

*FPDS-NG data are insufficient and perhaps misleading regarding use and success of PBA.* At the suggestion of a written public statement, the Panel conducted its own survey of contracts and orders that were coded in FPDS-NG as performance-based. Of the 76 contracts and orders randomly selected from the top ten contracting agencies, the Panel received 55 that contained sufficient documentation to support the review. While 36 percent were determined to have the elements of a PBA, another 22 percent required significant improvement. And of the sample reviewed, 42 percent were clearly not PBA with some agencies admitting that the contracts were mistakenly coded as performance-based in FPDS-NG. Finally, it is important to note that FPDS-NG data is collected at the time of contract or order award and is not designed to collect information to assess cost savings or other similar measures of success.

### 2. Recommendations

Based on these findings, the Panel recommended more guidance to assist agencies in the efficient and appropriate application of PBA, including

- An Opportunity Assessment Tool that acknowledges the resource investment required by PBA and helps agencies identify those acquisitions likely to derive the most immediate benefit from such an investment;

- A Best Practices Guide on developing measurable performance standards; and
- Improved guidance on types of incentives appropriate for various contract vehicles

Other Panel recommendations seek to provide a framework for a discipline in defining outcomes and appropriate measures during acquisition planning, and with post-award monitoring. The recommendation for a Baseline Performance Case, prepared by the government, would assist agencies in developing and communicating appropriate outcomes, measures and expectations to prospective offerors. The Panel recommends a Performance Improvement Plan, prepared by the contractor, to serve as a tool to ensure that the contractor and agency are regularly assessing performance, expectations, and the need for continuous improvement to respond to shifting priorities

As a signal of the cultural change PBA requires throughout the contract life cycle, the Panel recommends redesignating the traditional Contracting Officers Technical Representative ("COTR") as a Contracting Officers Performance Representative ("COPR"). The COPR should receive training in PBA and be involved in the development of the Baseline Performance Case and key measures. The Panel recommends that the Federal Acquisition Institute ("FAI") and the Defense Acquisition University ("DAU") jointly develop a formal educational certification program for COPRs.

Finally, in recognition of the concerns raised by some regarding the appropriate use of and cost-benefits of this technique, the Panel makes two recommendations. First, the Panel recommends improved data on PBA usage and enhanced oversight by OFPP on proper implementation using an "Acquisition Performance Assessment Rating Tool" or "A-PART." Currently, OMB uses a "Program Assessment Rating Tool" or "PART" as a systematic method for measuring program performance across the federal government. It essentially includes a series of questions that help the evaluator determine whether a program is meeting the mission requirements it was designed to support. The use of the PART has helped improve the clarity of OMB guidance on the Government Performance and Results Act ("GPRA") as well as engaged OMB more aggressively in reviewing its implementation. The Panel recommends that OFPP develop a checklist that reflects how well a particular acquisition comports with the basic elements of a PBA to provide a more methodological and accountable approach to PBA implementation. While the Panel anticipates the need for such rigor until agencies are comfortable and competent in using the tool, we believe the requirement should sunset after three years unless its continued use is deemed useful by OMB and the agencies. Second, the Panel recommends that OFPP undertake a systematic study on the challenges, costs and benefits of using PBA techniques five years from the date of the Panel's final Report.

# IV. Statutory Charter: Review all Federal Acquisition Laws and Regulations, and . . . Policies . . . make Recommendations . . . Considered Necessary . . . to Protect the Best Interests of the Federal Government [and] to Ensure the Continuing Financial and Ethical Integrity of Acquisition . . . .

Because the state of the federal acquisition workforce was not one of the topics specifically identified by Congress in the legislation establishing the Panel, some might wonder why the Panel addressed this topic. From the beginning, the Panel clearly understood that providing the insight and assistance that Congress sought could not be accomplished without addressing the federal acquisition workforce. Through the Panel's review of numerous GAO and IG reports and extensive witness testimony, it is clear that the knowledge and skill base necessary to successfully operate the acquisition system and to secure good value for the government and taxpayers has outstripped the resources available to operate the system.

Without an analysis and recommendations on the state of this workforce, there is a risk that problems stemming from the shortcomings of the acquisition workforce would be misunderstood. And certainly, addressing the specifics of the Panel's statutory charter, PBA, commercial practices, and interagency contracting, inevitably have an impact on the acquisition workforce, both in terms of identifying problems with these techniques and the recommendations to improve them. Finally, those readers who are familiar with the 1972 Commission on Government Procurement, and more recently, the National Performance Review, will recall that these initiatives recognized the importance of an effective workforce to the acquisition system.

## A. Focus on the Acquisition Workforce

### 1. Findings

*Even though there are now available a variety of simplified acquisition techniques, the demands on the workforce, both in terms of the complexity of the federal acquisition system as a whole as well as the volume and nature of what is bought, have markedly increased since the 1980s.* A qualitatively and quantitatively adequate and adapted workforce is essential to the successful realization of the potential of the procurement reforms of the last decade. Without such a workforce, successful federal procurement is unachievable. But demands on the workforce have grown. Just since 9/11, the dollar volume of procurement has increased by 63 percent. And while acquisition reform made low dollar purchases less complex, high dollar purchasing became more complex with the emphasis on best value, commercial practices, past performance evaluations and PBA, placing greater demands on the workforce including requiring more sophisticated market expertise. The streamlined purchasing vehicles, such as purchase cards and interagency contracts, we now know are subject to management challenges associated with appropriate and effective use. Accompanying these trends is a structural change in what

the government is purchasing, with an emphasis on high dollar complex services. In general, the demands placed on the acquisition workforce have outstripped its capacity. And while the current workforce has remained stable in the new millennium, there were substantial reductions in the 1990s accompanied with a lack of attention to providing the training necessary to those remaining to effectively operate the more complex buying climate. There are currently too few people in the pipeline with between 5 and 15 years of experience to mitigate the eventual retirements of the most experienced acquisition workforce.

*Lack of a Consistent Definition for and Accounting of the Workforce.* Assessing workforce needs and proposing solutions for these challenges has been made difficult by the continued inconsistent definitions and accounting of the workforce. An accurate understanding of the key *trends* about the size and composition of the federal acquisition workforce cannot be had without using a consistent benchmark and none is currently available. The definitions for the DoD workforce and the civilian workforce are not consistent and have changed or been reported differently over time. The reports on the workforce, therefore, do not facilitate trend analysis.

The Panel recognized that these issues about the acquisition workforce have long roots. To assist the Panel in analyzing the available information about the size, composition, competencies and effectiveness of the acquisition workforce, and to help identify gaps and inconsistencies in the data, the Panel engaged a contractor, Beacon Associates, Inc. to collect and analyze the voluminous available data. Beacon created a report that has been used extensively by the Panel in developing its recommendations.

*Agencies have not Engaged in Systematic Human Capital Planning to Assess their Acquisition Workforce in the Present or for the Future.* While the GAO has recognized improved progress in this area, there is a wide variance between agencies in terms of their progress. And while some agencies have undertaken an analysis of the competencies necessary for the workforce, they do not attempt to address the demands these competencies place on the workforce of the future nor the degree to which their existing workforce possess these competencies. In fact, GAO found that the civilian agencies generally lacked reliable, consistent and complete data on the composition of the current workforce, including data on the knowledge, skills and abilities of the existing workforce.

*Despite the variations in the way the acquisition workforce has been defined and counted over time and among agencies, no one is counting contractor personnel that are used to assist, support and augment the Acquisition Workforce.* Witness testimony before the Panel, a 2006 DoD IG Report, and the experience of members of the Panel make clear that many agencies make substantial use of contractor resources to carry out their acquisition functions. But because there is no count of such contractor support, much of which is accomplished outside of the bounds of OMB Circular A-76, the government lacks information on which to make a determination of whether this reliance is cost effective.

*While the private sector invests substantially in a corps of highly sophisticated, credentialed and trained business managers to accomplish sourcing, procurement and management of functions, the government does not make comparable investments.* Testimony before the Panel points to two reasons for this disparity. First, the most successful commercial organizations have built a procurement workforce on the understanding that smart buying is important to

profitability. Second, the private sector pays better, has superior approaches to recruitment and retention, and considers procurement integral to business success.

## 2. Recommendations

Remedying what the Panel found as the structural barriers to assessing the acquisition workforce is an important first step to assessing how the acquisition workforce can better fulfill its mission. Therefore, the Panel provides a specific recommendation to OFPP to prescribe a single, consistent government-wide definition of the acquisition workforce using a combined methodology designed to address the broader understanding of the functions outside of procurement that must be addressed while preserving a count that does not overstate the resources available to conduct and manage procurement. The Panel's belief in the urgency of accurately assessing the acquisition workforce on a government-wide basis is reflected in its recommendation that using this combined methodology, OFPP should collect this data within a year of the issuance of Panel's final report. Consistent with this recommendation, OFPP should also be responsible for the creation, implementation and maintenance of a mandatory government-wide database for members of this acquisition workforce. The Panel notes that the Commission on Government Procurement recommended a similar system in 1971.

Human capital planning requires prompt attention. Chief Acquisition Officers ("CAOs") should be responsible for assessing the current and future needs of their agencies, including forthrightly identifying and acknowledging gaps, and taking immediate steps to address these gaps through hiring, allocation of resources, and training. The CAO should be responsible for developing a separate Acquisition Workforce Human Capital Strategic Plan as part of the overall Human Capital Management Plan. This plan should assess the effectiveness of contractor personnel supplementing the acquisition workforce. OFPP should be delegated the responsibility for reviewing and approving agency Human Capital Plans regarding the acquisition workforce and for identifying trends, good practices, and shortcomings.

The Panel recommends identifying and eliminating obstacles to the speedy hiring of new talent and a government-wide acquisition intern program to attract first-rate entry-level personnel into the acquisition career fields. Concurrently, incentives to retain qualified, experienced personnel need to be created. To address the training needs of the acquisition workforce, the Panel recommends the statutory reauthorization of the SARA Training Fund and provision of direct funding/appropriations for it. Additionally, OMB should issue guidance directing agencies to assure that funds in agency budgets identified for acquisition workforce training are actually expended for that purpose and require Agency Head approval before such funds are diverted for other uses. OFPP should also conduct an annual review of whether agency acquisition workforce training funds are sufficient to meet agency needs per the agency's human capital plan.

Because both DoD and the civilian agencies provide for waivers to the congressionally established training and education standards, such waivers should be guided by sufficient oversight. The Panel recommends that permanent waivers be granted by agencies only after an objective demonstration that the grantee possesses the competencies and skills necessary to perform the duties and that temporary waivers should only be granted to allow sufficient time to acquire any lacking education or training. And CAOs (or equivalent) should

report annually to OFPP on the agency's usage of waivers, justifying their usage and reporting on plans to overcome the need to rely excessively on waivers. Upon review of these reports, OFPP should provide an annual summary report on the use of waivers of congressionally established training and education standards. In order to promote consistent quality, efficiency and effectiveness in the use of government training funds, OFPP should convene a 12-month study panel to consider whether to establish a government-wide Federal Acquisition University and/or alternative recommendations to improve training. And finally, in light of OFPP's unique government-wide focus, the Panel recommends establishing in OFPP a senior executive with responsibility for Acquisition Workforce Policy throughout the federal government.

# V. Statutory Charter: Protect the Best Interests of the Government . . . Amend or Eliminate any Provisions that are Unnecessary for the Effective, Efficient, and Fair Award and Administration of Contracts

The Panel recognized early in its deliberations that the Panel's statutory charter would necessarily impact small business. In terms of ensuring the fair award of contracts, certainly with respect to government-wide contracts, the interests of small business must be represented. The statutory requirement that agencies afford the maximum practicable small business participation in federal acquisition reflects the critical role of small businesses in stimulating the Nation's economy, creating employment, and spurring technological innovation. The Panel identified findings and recommendations that impact efficient and effective acquisition planning and fairness in the competition of multiple award contracts.

## A. Improve Small Business Participation

### 1. Findings

*Inconsistent Statutory and Regulatory Framework Governing the Use of Various Small Business Preference Programs Hinders Efficient and Effective Use of the Programs.* The Panel found potentially conflicting guidance between the statutory and regulatory provisions governing the priority of the various small business contracting programs. For example, the Small Business Act appears to mandate a priority for the HUBZone program by providing that contracting officers "shall" use the HUBZone contracting mechanism in certain circumstances "notwithstanding any other provision of law." At the same time, other provisions of law appear to suggest parity between the HUBZone and 8(a) programs. The potential inconsistency between the statutory framework and the regulatory guidance has created confusion among contracting officials and has hindered the proper application of these programs to ensure small business goal achievements.

But the Panel also found that there are no express guidelines governing a contracting officer's decision in selecting the appropriate small business contracting techniques. This lack of guidance not only deprives a contracting official of published standards against which to exercise discretion, but also obfuscates that decision-making process.

*The contracting community does not properly apply and follow the governing contract bundling definition and requirements in planning acquisitions.* Continuing its focus on ensuring small businesses are afforded sufficient opportunities to participate in government contracting and that acquisition planning is efficient and effective, the Panel found that there continues to be confusion about what constitutes contract bundling and the procedures that apply for addressing it. Furthermore, the reporting and review provisions contain little in the way of clear procedures, instructions, or techniques for mitigating the effects of bundling once such acquisitions are identified and justified during the acquisition planning phase. This lack of guidance contributes to the workload pressures facing our acquisition workforce, undermining its ability to plan and award acquisitions efficiently.

*Agency officials need targeted training to better acquaint them with the requirements and benefits of contracting with small businesses.* The Panel found that because senior program managers play such an important role in shaping an acquisition during the planning stages, it is imperative that they understand the governing small business contracting requirements as well as the benefits of contracting with small business. Such an understanding would also serve to lessen the pressure on contracting officials to explain such requirements, thereby improving efficiency and the overall effectiveness of agencies in meeting small business goals.

Cascading procurements fail to balance the government's interest in quick and efficient contracting with governing requirements for the maximum practicable small business contracting opportunities. Cascading procurements (sometimes called tiered procurements) are a costly substitute for government market research. Essentially, these procurements tier the evaluation of offers based on the socioeconomic status of the offeror. For example, an agency may establish a four-tiered evaluation, beginning with 8(a), then HUBZone, small business, and finally large business offerors. The contracting officer's evaluation of offers will then cascade to each succeeding tier until a winning offeror is identified. If the winner is found in tier one, then the proposals of all other tiered offerors will never be considered for award. This controversial contracting technique, fails to balance the interests of the government and contractors. Proposal preparation is costly for government contractors, large and small alike. As a result, recent legislation limits their use in the Department of Defense. The new legislation requires the contracting officers to first conduct the required market research, and to document the contract file before engaging in cascading procurements. But the Panel has determined that the recent enhancements to the Central Contractor Registration database have improved the contracting officer's capability to conduct this type of market research, thereby obviating the need for such procurements. Cascading procurements place an undue financial burden on small and large contractors that is not outweighed by the administrative convenience of this technique.

*There is No Explicit Statutory Authority For Small Business Reservations in Otherwise Full and Open Competitions for Multiple Award Contracts.* While the Panel recognizes the great efficiencies offered by these contracts, especially those available for multi-agency use, the desire for efficiency must be balanced against the sometimes negative impact these contracts can have on small business opportunities. The Panel found that, often, these contracts have such broad coverage, either geographically, functionally, or both, that they effectively preclude small businesses from competing with large businesses under full and open competitions for the multiple awards. And if there are small businesses that receive awards under these

contracts, there is no specific statutory or regulatory authority for agencies to reserve orders under these contracts for small business competition in order to achieve agency goals.

### 2. Recommendations

The Panel recommends a simple and specific amendment to the Small Business Act that would provide consistent statutory language enforcing the intended parity among the various small business programs and affording contracting officers the discretion and flexibility to develop acquisition strategies appropriate to agency small business goal achievements. The Panel also recommends specific statutory and regulatory revisions clarifying that contracting officers should exercise their discretion to select the appropriate small business contracting methods based on agency small business goal achievements and market research on the availability of small business vendors. With respect to the concerns over the implementation of contract bundling requirements, the Panel recommends additional training and the creation of an interagency group to develop best practices and strategies to unbundle contracts and mitigate the effects of contract bundling.

Finding that acquisition planning and compliance with requirements would be better served if all stakeholders in the acquisition planning phase were better trained, the Panel recommends that OFPP coordinate the development of a government-wide small business contracting training module targeting program managers and acquisition team members. The training module should not only educate these officials on the requirements, but also the value and benefits of contracting with small businesses, including acquainting them with the substantial capabilities, sophistication and innovation of the Nation's small business concerns. The Panel also recommends a statutory prohibition on the use of the cascading procurement technique, finding that they place an undue financial burden on contractors, thereby limiting their participation in government procurement.

Finally, with respect to multiple award contracts, the Panel recommends specific statutory amendments that would allow contracting officers to reserve, for small business competition only, a portion of the multiple awards in a competition not suitable for a total small business set-aside. The Panel further recommends express authority to reserve certain orders under these multiple award contracts for competition by the small business multiple awardees only. These authorities will afford contracting officers who wish to take advantage of these streamlined acquisition vehicles greater opportunities in meeting agency small business goals as well.

## VI. Statutory Charter: Ensure the Continuing Financial and Ethical Integrity of Acquisitions

The government has realized for some time that it cannot achieve its mission without the support of contractors. A 1991 GAO report stated that contractors were "essential for carrying out functions of the government." Since this report, the government's spending on services has exceeded that spent on goods. Spending on services in 2006 accounts for 61 percent of total procurement dollars.

Given the growth of services, the expanded role of contractors and the government's reliance on them in the workplace, the Panel believes that addressing the "blended" workforce was essential though not specifically called out in its authorizing statute.

## A. Focus on Effective, Efficient and Responsible Use of Contractor Support

### 1. Findings

*Several developments have led federal agencies to rely increasingly on the use of contractors as service providers.* During the 1990s, the federal acquisition workforce was significantly reduced and hiring virtually ceased, creating what has been termed the "bathtub effect," a severe shortage of procurement professionals with between 5 and 15 years of experience. The impact of this shortage is likely to be felt more acutely soon, as half of the current workforce is eligible to retire in the next four years. The impact of these events has left its mark on government operations, creating a shortage of certain capabilities and expertise in government ranks. In order to meet mission requirements and stay within hiring ceilings, some agencies have contracted for this capability and contractors are increasingly performing the functions previously done by civil servants. This has largely occurred outside of the discipline of OMB Circular A-76 procedures, meaning there is no clear and consistent government-wide information on the numbers of and functions performed by this growing cadre of service providers.

*The "blended" or "multisector" workforce, where contractors are co-located and work side-by-side with federal managers and staff, has blurred some boundaries.* While the A-76 outsourcing process provides a certain rigor and discipline to distinguishing between "inherently governmental" and commercial functions, the application of these terms is less clear outside of this context. The challenge is determining when the government's reliance on contractor support impacts the decision-making process such that the integrity of that process may be questioned.

The growth in the use of contactors to perform acquisition functions that in the past were performed by federal employees, coupled with the increased consolidation in many sectors of the contractor community, has increased the potential for organizational conflicts of interest ("OCI"). Based on the language in FAR 9.5, the case law has divided OCIs into three groups: (i) biased ground rules; (ii) unequal access to information; and (iii) impaired objectivity.[18] And while the FAR instructs it provides little guidance to already strained contracting officers on how to identify, evaluate, and avoid or mitigate such conflicts. The GAO is sustaining more protests for the government's failure to do so. With respect to protection of contractor confidential or proprietary data, the Panel recognizes the increased threat of improper disclosure as more and more contractor employees engage in support of the government's acquisition function.

Government employees face civil and criminal penalties for not acting impartially in their official duties in exchange for personal gain, and some have suggested that similar civil and criminal statutes be applied to contractor employees performing acquisition functions. But the Panel found that many contractors have established extensive ethics and compliance programs. Further, the Sarbanes-Oxley Act of 2002 requires specific accountability and controls relating to fiduciary duties.

*As the extent of service contracting has grown, the current ban on personal services contacts has created two unfortunate responses.* Except as authorized by statute, the government is prohibited

[18] *See* Daniel I. Gordon, *Organization Conflicts of Interest: A Growing Integrity Challenge*, 35 Pub. Con. L.J. 25, 2005.

from entering into personal services contracts ("PSCs"). The FAR cautions that such relationships not only result from inappropriate contract terms, but also from the manner in which the contract is administered. In order to comply with the PSC prohibition, government managers may find themselves crafting cumbersome and inefficient processes to manage the work of contractor personnel to avoid an appearance that they are exercising continuous supervisory control. Some testimony before the Panel indicates that others simply ignore the ban.

## 2. Recommendations

The Panel recommends that OFPP update the principles for agencies to apply in determining which functions must be performed by civil servants. These principles are needed so that those *not* specifically engaging in A-76 studies understand their applicability to the blended workforce.

With respect to conflicts of interest, the Panel concluded that it is not necessary to adopt any new federal statutes to impose additional requirements upon contractors or their personnel. Rather, where appropriate, the obligations should be imposed through contract clauses, the goal of which should be ethical conduct, not technical compliance. 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 with general ethical guidelines and principles and/or by requiring appropriate disclosures. The Panel does not believe that the requirements imposed on contractors and their personnel—through the contract and solicitation clauses—should incorporate the extensive and complex requirements imposed on federal employees. The Panel is 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.

Thus, the Panel recommends that the FAR Council, in its unique role as the developer of government-wide acquisition regulations, take the following action: review existing rules and regulations, and to the extent necessary, create new, uniform, government-wide policy and clauses dealing with OCIs, and personal conflicts of interest ("PCIs"), as well as the protection of contractor confidential and proprietary data. The Panel recognized that numerous agencies have considered these issues, and in many cases 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, as the developers of government-wide acquisition regulations, was the appropriate organization to perform this task. The FAR Council should work with DAU and FAI to develop and provide training and techniques to help procurement personnel identify and mitigate potential OCIs and PCIs, remedy conflicts when they occur, and appropriately apply tools for the protection of confidential and proprietary data.

Finally, the Panel recommends replacing the ban on PSCs with guidance on the appropriate and effective use of such contracts. In implementing this recommendation, the government should be allowed to direct or supervise the contractor employee's workforce concerning the substance of work or tasks performed. This new flexibility, however, should be accompanied by retention of the current prohibitions on government involvement in

purely supervisory activities (*e.g.*, hiring, leave approval, promotion, performance ratings, etc.). Because this recommendation represents a significant departure from the decades of prohibition on personal services, the Panel recommends that GAO review the new policy five years after implementation to identify the benefits of the changes and any unintended adverse consequences or abuses by agencies.