



STATEMENT OF

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BEFORE THE

**SUBCOMMITTEE ON MANAGEMENT, INVESTIGATIONS &
OVERSIGHT**

HOUSE COMMITTEE ON HOMELAND SECURITY

HEARING ON

**“PLAYING BY ITS OWN RULES: TSA’S EXEMPTION FROM THE
FEDERAL ACQUISITION REGULATION AND HOW IT IMPACTS
PARTNERSHIPS WITH THE PRIVATE SECTOR”**

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Introduction

Mr. Chairman, Ranking Member Rogers, members of the Subcommittee, I am Alan Chvotkin, Senior Vice President and Counsel of the Professional Services Council (PSC). PSC is the principal national trade association for companies providing services to virtually every agency of the Federal government. Many of our member companies now do business with the Transportation Security Administration (TSA) and other components of the Department of Homeland Security. On behalf of the more than 220 member companies, thank you for the invitation and the opportunity to provide our views on TSA's acquisition policies.

Growth in Federal Procurement

Since 9/11, federal procurement spending on goods and services has grown dramatically. This should not come as a surprise. Among other things, 9/11 significantly changed many of the government's missions and created requirements for new technologies and innovative solutions to improve our homeland security and fight the war on terror. Needless to say, the wars in Iraq and Afghanistan have also contributed significantly to this growth.

Today, federal spending on the purchase of goods and services exceeds \$400 billion, representing nearly 40% of the total discretionary budget of the federal government. Spending on services contracts represents nearly 60% of that federal spending. Thus, federal procurement must be a core competency of the federal government and prioritized as such.

But this growth has not occurred in a vacuum. During the same period, the discretionary budget has grown nearly 65%. Thus, while significant and clearly growing, spending on services has increased about 15% as a proportion of the government's operations.

Given the central role that acquisition plays in the proper functioning of our government, it is important that Congress, as part of its oversight role, continually assess federal acquisition policies and performance and explore changes to policy or practice that might be needed. We appreciate the thoughtful leadership of this Subcommittee and its continued vigilance in this complicated field that is too often dominated by myths and hyperbole. However, it is important to recognize that workforce challenges, honest mistakes, or other structural problems, while serious, do not equate to fraud or abuse. As such, we appreciate your seriousness of purpose and the openness of the discussion we are having today.

Acquisition Workforce Challenges

There is no doubt that the Federal government generally, and the Department of Homeland Security in particular, faces many difficult challenges in the acquisition arena. The human capital challenge is real and impacts the acquisition workforce as much as, if not more than, the rest of the federal workforce. PSC members believe strongly that an experienced, smart, and well-prepared customer makes the best customer. We see many examples in the private sector where companies take special effort to ensure that their procurement workforces are well prepared for the significant work they are assigned.

Yet across the board, workforce development in the federal government is a glaring weakness and has been for a long time. When federal agency budgets get tight, the first thing cut is training. That is why five years ago PSC recommended to Congress, and the Congress enacted, what is now known as the Federal Acquisition Workforce Training Fund.¹ While initially available only to the civilian agencies, Congress acted to bring the Defense Department fully into the Fund;² in addition, the House-passed version of the fiscal year 2008 National Defense Authorization Act recommends, and PSC strongly supports, making this training fund permanent.³ Although the fund is growing and the resources are being put to use to benefit the federal acquisition workforce, training funds for the acquisition workforce remain relatively flat and it is far from adequate.

To this Committee's credit, title IV of HR 1684, the FY 08 Department of Homeland Security Authorization Act, provides for important workforce development improvements for the Department of Homeland Security, including addressing homeland security procurement training and authority to appoint retired annuitants,⁴ and we support these initiatives. We were surprised that the Administration opposed those changes on the grounds that it would undermine efforts by the Office of Federal Procurement Policy to standardize government-wide competency and training requirements so that the government can recruit and retain the best talent.⁵

PSC Acquisition "Marshall Plan"

But more needs to be done. It is our belief that if we want to improve the quality of federal acquisition, we should not start by layering an already beleaguered workforce with more regulations and process demands. Rather, as PSC President Stan Soloway testified on July 17, 2007 before the Senate Homeland Security and Governmental Affairs Committee,⁶ we need an "Acquisition Marshall Plan" that aggressively addresses the hiring, retention, training, reward and development of the acquisition workforce on a government-wide basis. This would involve recognizing, as most high performing companies do, that those elements of the workforce that are most directly critical to the functioning and success of the institution must receive special and appropriate focus and support.

In addition, in keeping with other models for emergency relief, PSC called for the creation of a government-wide "Contingency Contracting Corps" drawn from across the government contracting workforce, with special training in emergency and contingency contracting, to be

¹ Enacted as Section 4307(a) of the Services Acquisition Reform Act of 2003 (P.L. 104-106) and codified in Section 37(h)(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 433(h)(3))

² Section 821 of the FY 06 National Defense Authorization Act P.L. 109-163 (1/6/06), available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ163.109.pdf

³ Section 802(a) of the FY 08 National Defense Authorization Act (HR 1585), as passed by the House of Representatives on May 17, 2007, available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1585eh.txt.pdf

⁴ Sections 401 and 402 of the FY 08 Homeland Security Authority Act (HR 1684), as passed by the House of Representatives on May 9, 2007, available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1684eh.txt.pdf

⁵ See OMB Statement of Administration Policy on HR 1684, available at <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr1684sap-h.pdf>

⁶ Available on the PSC website at: <http://www.pscouncil.org/pdfs/solowaystatementhsgac07-17-07.pdf>

deployable when the need arises. When not deployed, the individuals populating this vital cadre would continue to perform their regular functions at their home agencies. To make these important reforms a reality will require Congress to be the catalyst.

TSA's Current Procurement Authority

As you know, in 2001, before the Department of Homeland Security was created, the Aviation and Transportation Security Act⁷ established the TSA as a new agency within the Department of Transportation with security responsibility for all modes of transportation then overseen by the Department of Transportation and other related activities. Pursuant to Section 101(o) of that 2001 Act,⁸ TSA procurements were to be governed by the Federal Aviation Administration's Acquisition Management System (AMS) and were specifically exempt from most of the Federal procurement laws and the Federal Acquisition Regulations (FAR), in the same manner as the FAA was and remains exempt from the FAR. I was privileged to play a small role representing industry in meetings with the FAA's Blue Ribbon panel that provided recommendations to the FAA on the AMS.

Section 101(o) provides:

Acquisition Management System.-The acquisition management system established by the Administrator of the Federal Aviation Administration under section 40110 shall apply to acquisitions of equipment, supplies, and materials by the Transportation Security Administration, or, subject to the requirements of such section, the Under Secretary (for the TSA) may make such modifications to the acquisition management system with respect to such acquisitions of equipment, supplies, and materials as the Under Secretary considers appropriate, such as adopting aspects of other acquisition management systems of the Department of Transportation.

Instructively, the 2001 Act did not explicitly cover the acquisition of services. Subsequently, TSA adopted the FAA's AMS as its procurement regulations (TSAAMS) with modifications to address TSA unique requirements.

Although the 2002 Homeland Security Act transferred TSA to the Department of Homeland Security (DHS), the 2002 Act did not alter or amend the exemption from either the procurement laws or the FAR.

In 2005, Congress enacted the fiscal year 2006 Department of Homeland Security Appropriations Act⁹ and reaffirmed that the TSA acquisition management system, and the exemptions from the procurement laws and regulations of the FAR, is the appropriate acquisition

⁷ See P.L. 107-71, enacted 11/19/01, available at: http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.183&filename=publ071.pdf&directory=/diska/wais/data/107_cong_public_la_ws

⁸ Codified at 49 U.S.C. 114(o)

⁹ HR 2360, enacted as Public Law 109-90, and available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h2360enr.txt.pdf

model. The statute also closed the gap in the coverage of the 2001 statute relating to services.¹⁰ Section 515 of that 2005 Act provides:

For fiscal year 2006 and thereafter, the acquisition management system of the [TSA] shall apply to the acquisition of services as well as equipment, supplies and materials (emphasis added).

GAO subsequently affirmed that the 2005 Act now exempts TSA's services procurements from its bid protest jurisdiction.¹¹

While in 2006 the Senate adopted an amendment to the fiscal year 2007 Department of Homeland Security Appropriations Act offered by Senators Kerry, Snowe and Lautenberg to repeal the TSA procurement exemption,¹² the conference report failed to adopt that provision.¹³ Again last week, the Senate adopted an amendment by Senators Kerry and Snowe to repeal the TSA exemption 180 days after enactment.¹⁴ In a July 24, 2007 letter to Senators Kerry and Snowe, PSC was pleased to support that amendment.¹⁵

By any measure, TSA is a major procurement organization. According to statistics from DHS,¹⁶ in the last fiscal year TSA issued almost two thousand actions with a value in excess of \$1.55 billion dollars. In PSC's analysis, over 80% of TSA's spending has been for the purchase of services; TSA has identified information technology, administrative support services, guard services and program management support services as among the top five categories of services purchased; the top five services categories accounted for over \$610 million in agency purchases in the last fiscal year. Overall, in fiscal year 2006, DHS obligated over \$15.7 billion, of which 83 percent was for services,¹⁷ making it the third largest government agency in terms of annual procurement spending, behind the Defense Department and the Department of Energy.

¹⁰ See the decision of the Comptroller General of the United States in the bid protest filed by Resource Consultants, Inc. (B-290163; B-290163.2 (6/7/02) 2007 CPD 94 at 5), holding that the ATSA limited the bid protest exemption at GAO to acquisitions involving "equipment, supplies, and materials."

¹¹ See the decision of the Comptroller General of the United States in the bid protest Knowledge Connections, Inc., B-298172 (4/12/06), holding that the solicitation for services by TSA is expressly exempt from GAO's bid protest jurisdiction.

¹² See Senate Amendment 4552 to H.R.5441, the fiscal year 2007 Homeland Security Appropriations Act, available at: http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2006_record&page=S7387&position=all However, it is not clear that simple repeal of the underlying authority would, by operation of law, bring TSA under the FAR.

¹³ While the TSA exemption was deleted, Section 542 of the Act provides that the TSA acquisition management system is subject to the provisions of the Small Business Act; the conference report is available at: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ163.109.pdf

¹⁴ See Senate Amendment 2463 to HR 2368, the fiscal year 2008 Homeland Security Appropriations Act, adopted 7/26/07, available at: http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?position=all&page=S10109&dbname=2007_record

¹⁵ The PSC letter was printed in the Congressional Record and is available at: http://frwebgate.access.gpo.gov/cgi-bin/getpage.cgi?dbname=2007_record&page=S9909&position=all

¹⁶ As reported by DHS and recorded in the Federal Procurement Data System, current as of 2/2007, available at: http://www.dhs.gov/xlibrary/assets/opnbiz/cpo_acquisitionreportfy2006.pdf. Data does not include grants and purchase card transactions.

¹⁷ Id. See also testimony of DHS Inspector General Richard Skinner before the House Oversight and Government Reform Committee's Subcommittee on Government Management, Organization, and Procurement, July 18, 2007, available at: <http://governmentmanagement.oversight.house.gov/documents/20070718162847.pdf>

Mr. Chairman, there were valid reasons for exempting TSA from the acquisition laws and regulations when it was created in late 2001, even while good arguments also existed to treat TSA as most other agencies – particularly with respect to federal acquisition policy. There was a second opportunity to review that decision in 2002 when Congress created the Department of Homeland Security and transferred TSA from the Department of Transportation into the Department of Homeland Security, but the provision was not changed. There was yet a third reaffirmation of the procurement authority applicable to TSA provided for in the 2005 Appropriations Act.

To be sure, the FAA's acquisition system works for TSA, as has been demonstrated over the past five years. It is built on the principles of the federal acquisition system, even though there are some obvious differences in implementation. Further, the flexibilities TSA has used to meet past threats, and may need to respond fully and promptly to emerging and future threats, need to be carefully considered, although the current acquisition statutes, the FAR and the DHS authorities also provide broad flexibility for agencies to address emergency situations.

This committee and others have reviewed many of the procurements entered into by TSA. Many of them have achieved exactly the goals the TSA had and have been implemented as intended; others have raised issues regarding performance by both federal officials and contractors, with examples of problems at all phases of the acquisition system.

I cannot say that TSA's exemptions from the key federal acquisition statutes and government-wide Federal Acquisition Regulations was the cause for any of these problems; nor can I say with certainty that bringing them under those laws and regulations will ensure that there will not be problems in the future. But I can say with confidence that bringing TSA at least under the common rules applicable to the Department of Homeland Security will increase competition, expand opportunities for greater small business participation, provide greater accountability and transparency in their procurement processes, and provide greater options for addressing the challenges of the department's acquisition workforce. Indeed, there are clear advantages for all parties when agencies operate under common, government-wide rules and procedures. Moreover, as TSA seeks to train its current workforce and expand its acquisition workforce, the degree of commonality between its acquisition procedures and other federal agency practices will have a real effect on the cost and efficiencies of bringing in skilled professionals from other agencies.

What Acquisition System Should the TSA Be Under?

If TSA were not authorized to retain the current explicit authority to maintain its own acquisition systems, what system should it be under?

On July 18, 2007, the DHS Inspector General testified before the House Oversight and Government Reform Committee¹⁸ and spelled out five elements of an efficient, effective and accountable acquisition process, relying on the September 2005 Government Accountability

¹⁸ IG testimony, note 17 supra

Office “Framework for Assessing the Acquisition Function at Federal Agencies”¹⁹ and the July 2005 DHS Acquisition Oversight Program Guidebook²⁰ as a baseline. The DHS IG identified five interrelated elements essential to an efficient, effective and accountable acquisition process:

1. Organizational alignment and leadership
2. Policies and processes
3. Financial accountability
4. Acquisition workforce
5. Knowledge management and information systems

He concluded that, within DHS: (1) an integrated acquisition system does not exist; (2) full partnership of acquisition offices with other department functions has not been realized; (3) comprehensive program management policies and processes are needed; (4) staffing levels and trained personnel are not sufficient; (5) financial and information systems are not reliable or integrated; and (6) timely, corrective actions have not been taken in response to the IG’s and GAO’s recommendations.²¹ While we take issue with some elements of the IG’s testimony, we concur in the overarching conclusions he reached.

We believe that several of these conclusions result from the fact that TSA has its own procurement system, its own policies and processes, its own workforce with separate needs for training, and its own financial and information systems based on its unique acquisition system.²² Furthermore, these unique processes make it difficult to share acquisition resources across the department, let alone on a government-wide basis as we suggested in our proposed Contingency Contracting Corps; it puts an added burden on the responsibility of the Department’s Chief Procurement Officer to provide the training for them and makes rotational assignments across the department to meet higher priority needs of the department more difficult. It also calls into question whether their performance statistics match with the rest of the government.

From an industry perspective, this separate but unequal system creates other challenges. Since TSA uses a unique acquisition process, doing business with the TSA requires a thorough understanding of a different procurement system, built upon, but separate from, the standard civilian agency procurement system for the rest of the Department and even most of the Federal government, which acts as a market limiting factor for those firms who do not have the resources to master and navigate through multiple systems. There are also other significant procedural differences between TSA and other departmental procurements, such as access to the GAO protest process for stand alone contracts, even though TSA relies on the FAA’s agency-based Office of Dispute Resolution for Acquisition (ODRA) as an independent review forum.²³

¹⁹ GAO 2005 Report 05-218G (September 1, 2005), available at: <http://www.gao.gov/new.items/d05218g.pdf>

²⁰ DHS, *Acquisition Oversight Program Guide*, available at: http://www.dhs.gov/xlibrary/assets/DHS_ACQ_Planning_Guide_Notice_05-02.pdf

²¹ IG testimony note 17 supra at page 5.

²² The Coast Guard, also now part of the Department of Homeland Security, is governed by the “standard” federal procurement system except when called into service as part of the Department of Navy, when it will be governed by the “standard” Defense Department procurement system. Of course, the FAA retains its separate procurement system while remaining part of the Department of Transportation.

²³ Information on the ODRA process is available at:

http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc70/index.cfm?print=go

What Acquisition System is the Department of Homeland Security Now Under?

It is also fair to carefully inspect the current procurement system for DHS. As you know, Section 101 of the Homeland Security Act²⁴ established the Department as an “executive department.” Subtitle D of title VIII of that Act also provides the Department with specific exemptions to government-wide procurement rules: one for “personal services,” one providing “other transaction authority,” coupled with other flexibilities related to the regular acquisition process²⁵ plus additional flexibilities for emergency procurements.²⁶ These exemptions help the Department meet its specialized mission and have proven to add valuable flexibilities to meet the department’s needs. There is transparency in the department’s procurement rules and both internal and external accountability and oversight for procurement actions. At a minimum, TSA should be held to the same procurement rules as applicable to the Department of Homeland Security.

Conclusion

Mr. Chairman, we are coming up on six years since 9/11 and almost six years since TSA was established. TSA has accomplished an enormous mission under some of the most trying circumstances. But it is appropriate to again ask what the best acquisition policy for TSA should be going forward. For PSC, we believe that bringing TSA at least under the common rules applicable to the Department of Homeland Security will increase competition, expand opportunities for greater small business participation in the Department’s procurements, provide greater accountability and transparency to all stakeholders in their procurement processes, and provide greater options for Congress and for the Secretary and the Under Secretary for Management of the Department to address the challenges of TSA’s and the department’s acquisition system and workforce.

Thank you again for the invitation to provide the Professional Services Council’s views on this important procurement policy issue. I look forward to responding to any questions you may have.

²⁴ Section 101(a) of P.L. 107-296 (Nov. 25, 2002), codified in 6 U.S.C. 111

²⁵ See Subtitle D of title VIII of the Homeland Security Act of 2002, codified in 6 U.S.C. 391, et. seq.

²⁶ See Subtitle F of title VIII of the Homeland Security Act of 2002, codified in 6 U.S.C. 431, et. seq.

STATEMENT REQUIRED BY HOUSE RULES

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