

# Panel on Contracting Integrity 2009 Report to Congress



Department of Defense  
Office of the Under Secretary of Defense  
Acquisition, Technology, and Logistics (AT&L)



## EXECUTIVE SUMMARY

### **Why We Submitted This Report**

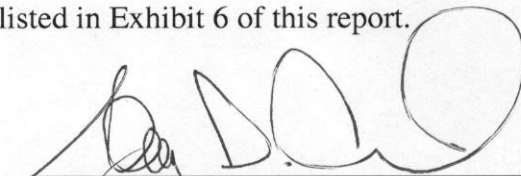
Section 813 of the John Warner National Defense Authorization Act for Fiscal Year 2007 directed the Department of Defense (DoD) to convene a panel of senior leaders representing a cross section of the Department to eliminate areas of vulnerability of the defense contracting system that allow fraud, waste, and abuse to occur. It directed the panel to prepare an annual report containing a summary of the panel's findings and recommendations for the year. This report covers the 28 actions identified for 2009, as well as one required by Section 207 of the Weapons Systems Acquisition Reform Act of 2009.

### **Panel on Contracting Integrity Accomplishments in 2009:**

- Issued a memorandum requiring senior contracting officials to designate an ombudsman for procurement integrity in their organizations
- Issued a memorandum to DoD senior leadership communicating expectations regarding ethics and integrity for the acquisition community
- Wrote three case studies and two articles highlighting ethics and integrity in contracting
- Developed initiatives addressing contracting workforce competency gaps such as recruiting, hiring, and retention and provided input into the President's Budget and the DoD Civilian Human Capital Plan
- Developed recommendations on approval levels for Time and Material contracts
- Developed training on enhancing competition for contracts
- Established standards for Contracting Officer's Representative (COR) training
- Drafted a DoD instruction with a COR certification process
- Identified source selection deficiencies and best practices
- Gathered examples of Performance Based Acquisition contract vehicles, templates, and best practices and provided them to the Defense Acquisition University
- Revised the Joint Contingency Contracting (JCCI) Handbook and led an interagency Contingency Contracting Conference
- Developed a webcast, led a procurement fraud conference, and wrote an article, "The Black and White of Fraud, Waste, and Abuse," to increase the awareness of procurement fraud
- Drafted a memorandum requiring defense contractor employees to include personal conflict of interest clause safeguards in their contracts
- Developed recommendations for the SECDEF regarding guidance and requirements for organizational conflicts of interest by defense contractors

### **What We Recommend: Actions in 2010**

In 2010, the Panel plans to implement the 25 actions listed in Exhibit 6 of this report.



Shay D. Assad

Chair

Panel on Contracting Integrity



## TABLE OF CONTENTS

### SECTION A. INTRODUCTION

1. PURPOSE	1
2. BACKGROUND	3
3. PANEL STRUCTURE	3
4. OVERVIEW OF 2009 METHODOLOGY AND SUCCESSES	8
5. ACTIONS IDENTIFIED FOR IMPLEMENTATION IN 2009	9
6. PANEL STRUCTURE FOR 2010	11
7. ACTIONS IDENTIFIED FOR IMPLEMENTATION IN 2010	11

### SECTION B. ACTIONS FOR IMPLEMENTATION IN 2009

#### 1. CURRENT STRUCTURE OF CONTRACTING INTEGRITY

- |  |    |
|--|----|
| a. Publish a DPAP memo directing CAEs/SPEs to designate and publicize an ombudsman for procurement integrity in their organizations.                                       | 13 |
| b. Incorporate in Section 5.3.12 of DoDI 5000.66, "CAEs/SPEs of organizations with contracting officers will self-certify compliance with this requirement every 2 years." | 14 |

#### 2. SUSTAINED SENIOR LEADERSHIP

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|---|----|
| a. Help new leaders communicate expectations for contracting integrity to leaders and employees.                    | 15 |
| b. Use case studies in contracting integrity to promote discussion and communicate standards in areas of ambiguity. | 16 |

#### 3. CAPABLE CONTRACTING WORKFORCE

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|---|----|
| a. Have senior contracting leaders in the components participate in component processes/efforts to submit workforce changes in the President's Budget Exhibit PBR-23 for both the Program and Budget Review Submission and the President's Budget processes. Consider Contracting Competency Assessment results and other data, as appropriate.   | 17 |
| b. Have DPAP and senior contracting leaders in the components update the contracting human capital-planning section of the AT&L Human Capital Strategic Plan.   | 18 |
| c. Have DPAP and senior contracting leaders in the components develop/implement gap closure strategies/initiatives to address competency gaps such as recruiting, hiring, and retention initiatives and document them in the Contracting Human Capital Strategic Plan. Submit strategies/initiatives for consideration by the Defense Acquisition Workforce Development Fund Steering Board established under Section 852 of NDAA 2008. | 19 |

#### 4. ADEQUATE PRICING

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| a. Establish a working group to assess the need for establishing thresholds for higher-level approval of commercial item determinations based on "of a type" and develop recommendations. This is an interim measure pending a legislative change proposal. | 20 |
| b. Establish a working group to assess the current regulations/PGI guidance (DoDIG Report D-2008-097, May 23, 2008) covering prime contract surveillance and pricing of its subcontracts and develop recommendations.                                       | 22 |
| c. Establish a working group to review approval levels for contracting officer's determination that a time-and-materials contract is the best type for a procurement and develop recommendations.   | 23 |
| d. Additional Adequate Pricing actions  | 25 |

<b>5. APPROPRIATE CONTRACTING APPROACHES AND TECHNIQUES</b>	
a. Establish a component cross-functional working group to identify and report on source selection deficiencies, best practices and lessons learned, and recommendations to increase accountability and oversight and to decrease complexity.	26
b. Assess effectiveness of Departmental guidance and training for executing Performance Based Acquisition and perform gap analysis in conjunction with DAU.	28
c. Provide updated guidance and training on competition initiatives and continue emphasis on enhancing competition for contracts and orders placed under multiple-award contracts.	29
<b>6. SUFFICIENT CONTRACT SURVEILLANCE</b>	
a. Have DAU, with support from the Defense components, evaluate current COR training (government and commercial).	30
b. Develop a COR certification process.	31
c. Develop an implementation plan for a COR certification process.	32
<b>7. CONTRACTING INTEGRITY IN A COMBAT/CONTINGENT ENVIRONMENT</b>	
a. Formally publish Contingency Contracting Policy in DFARS.	33
b. Lead An Interagency Contingency Contracting Conference In May 2009, Open To All Stakeholders In DoD And Other Government Agencies.	35
c. Update And Web-Enable The Joint Contingency Contracting Handbook; Build Upon Previous Efforts And Revise Contingency Contracting Training Curriculum As Required.	36
<b>8. PROCUREMENT FRAUD INDICATORS</b>	
a. Complete a POD webcast regarding procurement fraud indicators.	38
b. Draft an AT&L Journal article regarding procurement fraud indicators.	39
c. Communicate with contracting officers, auditors, and DCMA representatives regarding an advanced course on procurement fraud indicators and determine feasibility of development during 2009.	40
<b>9. CONTRACTOR EMPLOYEE CONFLICTS OF INTEREST</b>	
a. Issue a USD(AT&L) policy memorandum stating that advice from contractors' employees should be free from personal conflicts of interest.	41
b. Draft a DFARS clause prohibiting contractor employee conflicts of interest.	42
c. Recommend DoD implementation of actions in response to GAO-08-485 and GAO-08-360.	43
d. In accordance with the Weapons Systems Acquisition Reform Act (WSARA of 2009, revise the DFARS to provide 'uniform guidance and tighten existing requirements for organizational conflicts of interest by contractors in major defense acquisition programs.'	45
<b>10. RECOMMENDATIONS FOR CHANGE</b>	
a. Submit for DoD coordination a legislative proposal to permit federal agencies to retain fraud recovery funds.	47
b. Establish a Department of Defense-wide value-based ethics program.	48
c. Draft a legislative proposal to amend the Program Fraud Civil Remedies Act of 1986 or draft a stand-alone statute.	49

## SECTION C. APPENDICES

<b>APPENDIX 1: COMPLETED ACTIONS</b>	TAB
a. (Action 1a) DEPSECDEF Memo, Ombudsman for Procurement Integrity, October 1, 2009	A
b. (Action 2a) DEPSECDEF Memo, Ethics and Integrity in Acquisition, October 9, 2009	B
c. (Action 2b) Article, Creating a Culture of Procurement Integrity	C

d. (Action 2b) Article, Procurement Fraud: Ammunition Contract for the Afghan Army and Police	D
e. (Action 2b) Case Study, Good Friends	E
f. (Action 2b) Case Study, Mission First	F
g. (Action 2b) Case Study, The Plum Assignment	G
h. (Action 4a) Report, Commercial Item Determination	H
i. (Action 4b) USD(AT&L) Memo, Department of Defense Panel on Contracting Integrity - Prime Contract/Subcontract Surveillance Information Request, December 15, 2009	I
j. (Action 4c) DCAA Memo, Recommendations Approval Levels for Time & Material (T&M) Contracts and Additional T&M Training, December 8, 2009	J
k. (Action 5b) Guide, “Seven Steps to Performance Based Acquisition” (excerpt)	K
l. (Action 5c) USD(AT&L) Memo, Competition in Department of Defense Acquisition, September 14, 2009	L
m. (Action 8b) Article, “The Black and White of Fraud, Waste, and Abuse,” Defense AT&L Magazine, April/May 2009	M
n. (Action 9a) USD(AT&L) Memo, Personal Conflicts of Interests (PCIs) of Contractors’ Employees, November 24, 2009	N

**APPENDIX 2. NEW SUBCOMMITTEE INFORMATION**

a. Director, DPAP Memo, Establishment of New Subcommittees, August 27, 2009	O
b. Business System Reviews (BSR) Subcommittee Charter	P
c. Peer Review Subcommittee Charter	Q

**APPENDIX 3. LIST OF ABBREVIATIONS**

R

## **TABLE OF EXHIBITS**

EXHIBIT 1	John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364, section 813	2
EXHIBIT 2	Panel on Contracting Integrity Membership	4
EXHIBIT 3	Subcommittee Structure of Panel on Contracting Integrity	7
EXHIBIT 4	Schedule of Panel Meetings in 2009	8
EXHIBIT 5	Actions for Implementation in 2009	10
EXHIBIT 6	2010 Panel Structure and Actions	12





## **SECTION A. INTRODUCTION**

### **Purpose**

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Section 813 of the John Warner National Defense Authorization Act (NDAA) for Fiscal Year 2007, Public Law 109-364, directed the Department of Defense (DoD) to establish a Panel on Contracting Integrity consisting of senior leaders representing a cross-section of the Department. The Panel's purpose is twofold: review progress made by DoD to eliminate areas of vulnerability of the defense contracting system that allow fraud, waste, and abuse to occur, and recommend changes in law, regulations, and policy to eliminate the areas of vulnerability. Exhibit 1 provides the full text of Section 813.

In a February 16, 2007, memorandum, the Under Secretary of Defense (Acquisition, Technology and Logistics), USD(AT&L), complied with Section 813 by formally establishing the Panel on Contracting Integrity. USD(AT&L) designated the role of the Panel as a formal body to take a holistic view of all ongoing efforts and initiatives to improve performance in identified areas of weakness. To ensure actionable participation across DoD, the Panel was created with representatives from 19 military departments, agencies, and other DoD organizations. The Panel submitted its first two required reports to Congress in December 2007 and January 2009. By statute, the Panel's charter was initially set to expire December 31, 2009.

On May 22, 2009, President Obama signed the Weapon Systems Acquisition Reform Act of 2009 (WSARA) (Public Law 111-23) into law. Section 207 of the law includes two provisions directly affecting the Panel on Contracting Integrity:

- ◆ The law imposed a requirement for the Panel to present recommendations to the Secretary of Defense on eliminating or mitigating organizational conflicts of interest in major defense acquisition systems no later than 90 days after enactment (August 20, 2009).
- ◆ The law formalized DoD's intent to extend the Panel on Contracting Integrity. By statute, the Panel will exist until directed otherwise by the Secretary of Defense (SECDEF), and at a minimum through December 31, 2011.

This is the Panel's third annual report to Congress. It contains a summary of the panel's findings and recommendations for 2009. It also identifies the actions selected for implementation in 2010.

Exhibit 1. John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364, Section 813

**ESTABLISHMENT OF PANEL ON CONTRACTING INTEGRITY**

(a) Establishment-

(1) IN GENERAL- The Secretary of Defense shall establish a panel to be known as the Panel on Contracting Integrity.

(2) COMPOSITION- The panel shall be composed of the following:

(A) A representative of the Under Secretary of Defense for Acquisition, Technology, and Logistics, who shall be the chairman of the panel.

(B) A representative of the service acquisition executive of each military department.

(C) A representative of the Inspector General of the Department of Defense.

(D) A representative of the Inspector General of each military department.

(E) A representative of each Defense Agency involved with contracting, as determined appropriate by the Secretary of Defense.

(F) Such other representatives as may be determined appropriate by the Secretary of Defense.

(b) Duties- In addition to other matters assigned to it by the Secretary of Defense, the panel shall-

(1) conduct reviews of progress made by the Department of Defense to eliminate areas of vulnerability of the defense contracting system that allow fraud, waste, and abuse to occur;

(2) review the report by the Comptroller General required by section 841 of the National Defense Authorization Act for Fiscal Year 2006 (Public Law 109-163; 119 Stat. 3389), relating to areas of vulnerability of Department of Defense contracts to fraud, waste, and abuse; and

(3) recommended changes in law, regulations, and policy that it determines necessary to eliminate such areas of vulnerability.

(c) Meetings- The panel shall meet as determined necessary by the Secretary of Defense but not less often than once every six months.

(d) Report-

(1) REQUIREMENT- The panel shall prepare and submit to the Secretary of Defense and the congressional defense committees an annual report on its activities. The report shall be submitted not later than December 31 of each year and contain a summary of the panel's findings and recommendations for the year covered by the report.

(2) FIRST REPORT- The first report under this subsection shall be submitted not later than December 31, 2007, and shall contain an examination of the current structure in the Department of Defense for contracting integrity and recommendations for any changes needed to the system of administrative safeguards and disciplinary actions to ensure accountability at the appropriate level for any violations of appropriate standards of behavior in contracting.

(3) INTERIM REPORTS- The panel may submit such interim reports to the congressional defense committees as the Secretary of Defense considers appropriate.

(e) Termination- The panel shall terminate on December 31, 2009.

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## Background

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In recent years, DoD has increasingly relied on goods and services provided under contract by the private sector. Since FY00, DoD's contracting for goods and services has nearly tripled. In FY08 alone, DoD obligated over \$393 billion on contracts for goods and services. The sheer magnitude of the cost creates increasing opportunities for fraud, waste and abuse in contracting.

Early efforts to identify and address areas of vulnerability in DoD contracting were undertaken by the DoD Inspector General (DoDIG) and the Procurement Fraud Working Group (PFWG). In addition, the Defense Science Board (DSB) addressed this issue and published *Report of the Defense Science Board Task Force on Management Oversight in Acquisition Organizations* in March 2005. Subsequently, in the NDAA for FY06, Congress required the Government Accountability Office (GAO) to review the areas of vulnerability in the defense contracting system. GAO also reviewed initiatives undertaken by DoD to address its vulnerabilities, including actions in response to the DSB report.

GAO's July 2006 report, *Contract Management: DoD Vulnerabilities to Contracting Fraud, Waste and Abuse* (GAO-06-838R), identified five areas of vulnerability: sustained senior leadership, capable acquisition workforce, adequate pricing, appropriate contracting approaches and techniques, and sufficient contract surveillance. These vulnerabilities result in costly, less-than-optimal contracting scenarios involving excessive use of time and materials contracts, non-competitive awards, inadequate surveillance of sub-contract pricing, and insufficient numbers of contracting professionals. DoD must be diligent in improving its contracting discipline to combat these situations and ensure it buys the right things, the right way, at the right time. The Panel on Contracting Integrity facilitates this by evolving a series of reforms that allow DoD to minimize fraudulent activity, provide for a better-equipped contracting workforce, and increase its return on investments.

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## Panel Structure

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USD(AT&L) designated the Deputy Under Secretary of Defense (Acquisition and Technology), DUSD(A&T), as the Panel's Chairman, and the Director, Defense Procurement and Acquisition Policy (DPAP) as the Panel's Executive Director. The Chairman and Executive Director are supported by an Executive Secretary and support staff.

The Chairman and Executive Director implemented the Section 813 requirement for the broadest DoD-wide participation by identifying Panel members from organizations representing all key facets of the defense contracting system. Exhibit 2 identifies the Panel member positions and the DoD organizations they represent.

**Exhibit 2. The Panel on Contracting Integrity Membership**

Position		Organization
	Panel Chairman: Deputy Under Secretary of Defense (Acquisition and Technology)	Office of the Under Secretary of Defense (Acquisition, Technology and Logistics) (OUSD(AT&L))
	Executive Director: Director, Defense Procurement	OUSD(AT&L)
	Deputy Assistant Secretary of the Army (Procurement)	Department of the Army
	Director, Program Analysis & Business Transformation, Deputy Assistant Secretary of the Navy (Acquisition and Logistics Man- agement)	Department of the Navy
	Chief of Staff, Deputy Assistant Secretary of the Navy (Acquisition and Logistics Management)	Department of the Navy
	Deputy Assistant Secretary of the Air Force (Contracting)	Department of the Air Force
	Director	Defense Contract Audit Agency (DCAA)
	Director, Human Capital Initiatives/President, Defense Acquisition University (DAU)	OUSD(AT&L)
	Component Acquisition Executive	Defense Logistics Agency (DLA)
	Deputy General Counsel (Acquisition and Logistics)	DoD Office of the General Counsel
	Deputy Director, DPAP/Program Acquisition and Contingency Contracting (PACC)	OUSD(AT&L)
	Acquisition Executive	U.S. Special Operations Command (USSOCOM)
	Deputy General Counsel	Department of the Air Force

## Exhibit 2. The Panel on Contracting Integrity Membership

	Position	Organization
	Director of Contracting	Missile Defense Agency (MDA)
	Assistant General Counsel (Acquisition Integrity)	Department of the Navy Office of the General Counsel
	Director	Defense Contract Management Agency (DCMA)
	General Counsel	DCMA
	Assistant Inspector General (Acquisition and Contract Management)	DoD Office of the Inspector General and rep- representatives from Department of the Army Inspector General Department of the Navy Inspector General Department of Air Force Inspector General
	Chief of Staff	Defense Advanced Research Projects Agen- cy (DARPA)
	Deputy Director, Acquisitions and Contracts	National Geospatial-Intelligence Agency (NGA)
	Chief of Procurement	Department of Defense Education Activity (DoDEA)
	Deputy Director, Acquisition	U.S. Transportation Command (USTRANSCOM)
	Deputy Senior Acquisition Executive	National Security Agency (NSA)
	Director for Procurement	Defense Information Systems Agency (DISA)
	Chief, Health Planning Operations	Assistant Secretary of Defense (Health Affairs)/TRICARE Management Agency (TMA)

Considering the issues identified in Section 813, the research and recommendations of GAO (GAO-06-838R), and the work of the DSB Task Force, DoDIG, and Procurement Fraud Working Group (PFWG), the Panel identified seven core focus areas and three emerging contract integrity issues.<sup>1</sup> 10 subcommittees addressed the focus areas and emerging contract integrity issues.

◆ Core focus areas:

Current Structure of Contracting Integrity

Sustained Senior Leadership

Capable Contracting Workforce

Adequate Pricing

Appropriate Contracting Approaches and Techniques

Sufficient Contract Surveillance

Contracting Integrity in a Combat/Contingency Environment

◆ Emerging contract integrity issues:

Procurement Fraud Indicators

Contractor Employee Conflicts of Interest

Recommendations for Change.

The Panel's Executive Director selected 2009 subcommittee chairs based on their expertise with a particular focus area or issue. The chairs of the subcommittees are leaders in the organizations that represent the many facets of the defense contracting system, as are many of the subcommittee members. Exhibit 3 lists the subcommittees and identifies their chairs.

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vi

<sup>1</sup> Current and emerging contracting issues were identified in *Report of the Commission on Army Acquisition and Program Management in Expeditionary Operations*, October 2007, and in *Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DoD Contractor Employees*, GAO-08-169, and March 2008.

**Exhibit 3. 2009 Subcommittee Structure of Panel on Contracting Integrity**

	<b>Subcommittee</b>	<b>Chair</b>
	Current Structure of Contracting Integrity	Component Acquisition Executive, Defense Logistics Agency
	Sustained Senior Leadership	Deputy Assistant Secretary of the Army (Procurement)
	Capable Contracting Workforce	Director, Human Capital Initiatives, OUSD(AT&L)/President, DAU
	Adequate Pricing	Director, Defense Contract Audit Agency
	Appropriate Contracting Approaches and Techniques	Deputy Assistant Secretary of the Air Force (Contracting)
	Sufficient Contract Surveillance	Director, Program Analysis & Business Transformation, Deputy Assistant Secretary of the Navy (Acquisition and Logistics Management)
	Contracting Integrity in a Combat/Contingent Environment	Co-chairs: Panel Executive Director and Deputy Director, DPAP/ Program Acquisition and Contingency Contracting
	Procurement Fraud Indicators	Assistant Inspector General, Acquisition and Contract Management, DoD Inspector General
	Contractor Employee Conflicts of Interest	Co-chairs: Director, Defense Contract Management Agency and General Counsel, Defense Contract Management Agency
	Recommendations for Change	Deputy General Counsel (Acquisition and Logistics), DoD Office of the General Counsel

The subcommittees reach out across the military departments and defense agencies to additional DoD organizations for additional expertise.

## Overview of 2009 Methodology and Successes

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The Panel serves as a forum for leaders in the defense contracting system to align efforts and share successes, experiences, and lessons learned; manage implementation of the identified actions; address emerging issues; and maintain DoD leadership commitment and involvement. The leaders and subcommittees report upon the progress of their respective actions through a series of quarterly meetings each year. Exhibit 4 lists the 2009 meetings and the purpose of each.

**Exhibit 4. Schedule of Panel Meetings in 2009**

Date	Purpose
February 26, 2009	<ul style="list-style-type: none"><li>• Review the implementation progress on the actions</li></ul>
June 18, 2009	<ul style="list-style-type: none"><li>• Conduct quarterly rolling assessment and taskings</li></ul>
September 24, 2009	<ul style="list-style-type: none"><li>• Conduct quarterly rolling assessment and taskings</li><li>• Subcommittee chairs brief proposed 2010 actions</li></ul>
November 20, 2009	<ul style="list-style-type: none"><li>• Review draft annual report</li><li>• Review plan to continue progress in 2010</li></ul>

To complete each action and report on the Panel’s 2009 progress by December 31, 2009, the Panel initiated work in September 2008. Panel work groups spent considerable time and exercised great care in developing and refining the 2009 actions to ensure clarity and support implementation. The process focused on developing and coordinating a succinct, clearly worded action, defining an associated product, assigning “ownership” for each action, and naming the responsible staff advisors. The implementation plans were approved and the actions were formally adopted by the Panel in November 2008.

The focus of the subcommittees during 2009 was to develop and implement the policy directives, memoranda, legislative proposals, and training materials that constitute the set of 2009 actions. The subcommittees have supporting working groups of individuals with expertise in specific subject areas. The working groups meet regularly to exchange research, share best practices, and discuss options and potential solutions.

The Panel uses the subcommittees and their working groups, weekly working group conference calls, and quarterly Panel meetings to support discussion, coordination, and approval of all products that combine to effect the Panel’s actions.

The Panel employs a rolling assessment and tasking process, quarterly or upon completion of an action, to manage the efficient implementation of all subcommittee recommendations and identify new recommendations. The procedure is as follows:



- ◆ Subcommittees submit initial actions involving the recommended issuance of the Office of the Secretary of Defense (OSD) policy guidance to the Executive Secretary and support staff. The Executive Secretary reviews the documents and coordinates with DoD General Counsel and other OSD offices, if applicable. After initial internal coordination, the Executive Secretary's staff posts the documents to the password-protected Panel website and requests review and coordination.
- ◆ The Executive Secretary provides organizations the opportunity to review and comment on the work products of the other subcommittees. If an organization has substantive comments, the Executive Secretary refers them to the initiating subcommittee and work group to adjudicate and revise. The Executive Secretary allows ten days for the coordination process.
- ◆ After receipt of all coordination responses, the Executive Secretary completes the OSD coordination process by presenting the final package to, or through, the Panel's Executive Director, as applicable.
- ◆ Subcommittees actively conduct informal preliminary exchanges to achieve consensus prior to submission of a document for formal coordination.

### **Actions Identified for Implementation in 2009**

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In its 2008 report to Congress, the Panel identified 28 actions for implementation in 2009 and managed their implementation in meetings throughout the year. Early in 2009, Subcommittee 8 of the Panel (Procurement Fraud Indicators subcommittee) reached consensus across DoD that an advanced fraud detection course per action 8c, "*Communicate with contracting officers, auditors, and [Defense Contract Management Agency] DCMA representatives regarding an advanced course on procurement fraud indicators and determine feasibility of development during 2009,*" was not necessary. As an alternative, the subcommittee resolved to plan and host a Fraud Indicators Conference. From June 1 through June 3, 2009, over 350 contracting professionals attended subcommittee's DoD-wide "Fraud Prevention and Detection 2009 Conference – Improving Accountability for Government Professionals" conference at Fort Belvoir, Virginia.

An additional action was added in June: "revise [the Defense Federal Acquisition Regulation Supplement] (DFARS) in accordance with Section 207 of the Weapon Systems Acquisition Reform Act of 2009."

Exhibit 5 lists the 29 actions for implementation in 2009, including the discontinued and replacement actions from above.

## Exhibit 5. Actions for Implementation in 2009

<b>1. Current Structure of Contracting Integrity</b>	
A.	Publish a DPAP memo directing CAEs/SPEs to designate and publicize an ombudsman for procurement integrity in their organizations.
B.	Incorporate in Section 5.3.12 of DoDI 5000.66, "CAEs/SPEs of organizations with contracting officers will self-certify compliance with this requirement every 2 years."
<b>2. Sustained Senior Leadership</b>	
A.	Help new leaders communicate expectations for contracting integrity to leaders and employees.
B.	Use case studies in contracting integrity to promote discussion and communicate standards in areas of ambiguity.
<b>3. Capable Contracting Workforce</b>	
A.	Have senior contracting leaders in the components participate in component processes/efforts to submit workforce changes in the President's Budget Exhibit PBR-23 for both the Program and Budget Review Submission and the President's Budget processes. Consider Contracting Competency Assessment results and other data, as appropriate.
B.	Have DPAP and senior contracting leaders in the components update the contracting human capital-planning section of the AT&L Human Capital Strategic Plan.
C.	Have DPAP and senior contracting leaders in the components develop/implement gap closure strategies/initiatives to address competency gaps such as recruiting, hiring, and retention initiatives and document them in the Contracting Human Capital Strategic Plan. Submit strategies/initiatives for consideration by the Defense Acquisition Workforce Development Fund Steering Board established under Section 852 of NDAA 2008.
<b>4. Adequate Pricing</b>	
A.	Establish a working group to assess the need for establishing thresholds for higher-level approval of commercial item determinations based on "of a type" and develop recommendations. This is an interim measure pending a legislative change proposal.
B.	Establish a working group to assess the current regulations/PGI guidance (DoDIG Report D-2008-097, May 23, 2008) covering prime contract surveillance and pricing of its subcontracts and develop recommendations.
C.	Establish a working group to review approval levels for contracting officer's determination that a time-and-materials contract is the best type for a procurement and develop recommendations.
<b>5. Appropriate Contracting Approaches and Techniques</b>	
A.	Establish a component cross-functional working group to identify and report on source selection deficiencies, best practices and lessons learned, and recommendations to increase accountability and oversight and to decrease complexity.
B.	Assess effectiveness of Departmental guidance and training for executing Performance Based Acquisition and perform gap analysis in conjunction with DAU.
C.	Provide updated guidance and training on competition initiatives and continue emphasis on enhancing competition for contracts and orders placed under multiple-award contracts.
<b>6. Sufficient Contract Surveillance</b>	
A.	Have DAU, with support from the Defense components, evaluate current COR training (government and commercial).
B.	Develop a COR certification process.
C.	Develop an implementation plan for a COR certification process.
<b>7. Contracting Integrity in a Combat/Contingent Environment</b>	
A.	Formally publish Expeditionary Contracting Policy in DFARS as a consolidated effort of the Emergency Procurement Committee.
B.	Lead a multi-service and agency Emergency Procurement Conference in spring 2009 open to stakeholders in DoD and other government agencies (DHS, FEMA, DOS, USAID, USACE, USNORTHCOM, etc).
C.	Revise the Joint Contingency Contracting Handbook and Contingency Contracting training curriculum to build upon current efforts.
<b>8. Procurement Fraud Indicators</b>	
A.	Complete a POD webcast regarding procurement fraud indicators.
B.	Draft an AT&L Journal article regarding procurement fraud indicators.
C.	Communicate with contracting officers, auditors, and DCMA representatives regarding an advanced course on procurement fraud indicators and determine feasibility of development during 2009. (Discontinued.) –Host a fraud indicators conference. (Alternative unplanned action.)
<b>9. Contractor Employee Conflicts of Interest</b>	
A.	Issue a USD(AT&L) policy memorandum stating that advice from contractors' employees should be free from personal conflicts of interest.
B.	Draft a DFARS clause prohibiting contractor employee conflicts of interest.
C.	Recommend DoD implementation of actions in response to GAO-08-485 and GAO-08-360.
D.	Revise DFARS in accordance with Section 207 of Weapons Systems Acquisition Reform Act of 2009.
<b>10. Recommendations for Change</b>	
A.	Submit for DoD coordination a legislative proposal to permit federal agencies to retain fraud recovery funds.
B.	Establish a Department of Defense-wide value-based ethics program.
C.	Draft a legislative proposal to amend the Program Fraud Civil Remedies Act of 1986 or draft a stand-alone statute

## **Panel Structure for 2010**

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The structure of the Panel will change for 2010 with the addition of two new subcommittees. These new subcommittees, added in August 2009, are responsible for actions regarding ‘Evaluation of Contractor Business Systems’ and ‘Peer Reviews.’ The letter establishing these subcommittees and their charters can be found in appendix 2.

The ‘Evaluation of Contractor Business Systems’ subcommittee is chaired by the DPAP Director of Cost, Pricing, and Finance. The subcommittee’s duties include performing a comprehensive review of current policy, processes, and practices within the DoD regarding the audit and evaluation of all contractor business systems.

The second new subcommittee, ‘Peer Reviews,’ is chaired by the Deputy Assistant Secretary of the Navy, Acquisition and Logistics Management. It is chartered to perform an overall assessment of the peer review process. This will include an assessment of peer review implementation plans developed by the military departments and DoD agencies, and the extent to which those plans are being carried out effectively.

## **Actions Identified for Implementation in 2010**

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The Panel identified 25 actions for implementation in 2010. While many of them are a natural follow-on from those completed in 2009, others address the requirements of WSARA and NDAA 2010. Still others build upon well-received Panel efforts. For example, in May 2009 the Contracting Integrity in a Combat/Contingent Environment subcommittee led an emergency procurement conference open to stakeholders in DoD and other federal agencies such as the Department of Homeland Security (DHS), Federal Emergency Management Agency (FEMA), Department of State (DoS), and U.S. Agency for International Development (USAID). The subcommittee plans to reprise the conference in 2010 with expanded scope and target audience.

Exhibit 6 details the new Panel structure, with the actions assigned to each subcommittee.

**Exhibit 6. 2010 Panel Structure and Actions**

<b>1. Current Structure of Contracting Integrity</b>
A. Develop recommendations for OMB regarding inherently governmental functions B. Develop training to professionalize requirements development
<b>2. Sustained Senior Leadership</b>
A. Consider additional initiatives that senior leadership can undertake to demonstrate the importance of integrity and ethics in the workplace
<b>3. Capable Contracting Workforce</b>
A. Analyze feasibility of standardized DoD warranting program that includes panel interviews, scenario questions, etc B. Develop and implement 'back to basics' on-the-job training for new, inexperienced contracting workforce
<b>4. Adequate Pricing</b>
A. Assess prime contract surveillance and pricing of its subcontracts B. Assess current DoD policy regarding the definition of adequate price competition C. Explore expansion of cost estimating and contract cost/pricing training and guidance
<b>5. Appropriate Contracting Approaches and Techniques</b>
A. Study UCAs throughout DoD for possible abuse – implement DoD policy and instill greater oversight B. Review use of level of effort contracts, including firm fixed price and cost plus C. Consider developing doctrine for selection of contract type in R&D environment, aimed at better mgt of risk and cost growth
<b>6. Sufficient Contract Surveillance</b>
A. Develop a DoDI for the COR standard/certification B. Develop a COR handbook
<b>7. Contracting Integrity in a Combat/Contingent Environment</b>
A. Provide Contingency Contracting Officers with standardized systems, tools, and resources for success B. Provide Contingency Contracting Officers with effective contingency contracting policy to support their mission C. Lead a Worldwide Contingency Contracting Conference in May 2010 in Orlando, Florida
<b>8. Procurement Fraud Indicators</b>
A. Review the DoD's "analysis of the Interim Report of the Commission on Wartime Contracting in Iraq and Afghanistan," dated November 4, 2009, to determine if additional actions need to be taken to address fraud, waste, and abuse
<b>9. Contractor Employee Conflicts of Interest</b>
A. Review use of senior mentors/advisors/highly qualified experts and potential conflicts of interest and prepare report to Congress IAW Section 833 of FY2010 NDAA B. Develop guidance for use of personal services contracts in the PGI
<b>10. Recommendations for Change</b>
A. Establish a DoD-wide value-based ethics program B. Draft a legislative proposal to amend the Program Fraud Civil Remedies Act of 1986
<b>11. Evaluation of Contractor Business Systems</b>
A. Review current DoD policy covering contractor business systems (such as purchasing, estimating, etc) to include reviews, approvals, and surveillance B. Publish a DPAP memorandum on a policy to resolve differences between contract audit recommendations and contracting officer determinations. C. Evaluate requirements placed on DCAA for reports and reviews to determine if all are necessary or can be performed by others
<b>12. Peer Reviews</b>
A. Assess peer review process, including implementation plans

◆ SECTION B. ACTIONS FOR IMPLEMENTATION  
IN 2009

**Current Structure of Contracting Integrity**

**Chair: Component Acquisition Executive, Defense Logistics Agency**

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**Action 1a: Publish a DPAP memo directing CAEs/SPEs to designate and publicize an ombudsman for procurement integrity in their organizations.**

**Discussion**

Currently, FAR 16.505(b)(6) requires the head of an agency to designate a task order and delivery order ombudsman. The duty of this ombudsman is to review complaints from contractors and ensure they are afforded a fair opportunity to be considered, consistent with the procedures in the contract.

Since current ombudsman designation policy is for the purpose of: (1) the contractor, and (2) past and recent malfeasance of contracting and supervisory personnel, the subcommittee working group agreed that it is in the best interest of all DoD agencies to designate an ombudsman specifically for acquisition personnel. This will provide the acquisition workforce an anonymous avenue to discuss any ethical issues or procurement weaknesses regarding any acquisition. The Ombudsman for Procurement Integrity's primary function is to support acquisition personnel by acting as an independent sounding board to hear concerns about specific procurement integrity issues and to assist in the resolution of the concerns.

It should be noted that the Ombudsman shall not interfere with or usurp the authority of procurement and related officials (e.g., contracting officer/source selection authority, program manager, or Suspension and Debarment Official); render a decision that purports to bind the Organization, Agency, or agency personnel; take any action or make a recommendation inconsistent with a law, policy, or applicable administrative decision; directly compel or attempt to compel an entity or any person to implement the Ombudsman's recommendations; or participate in proposal evaluation, source selection, or adjudication of protests or formal contract disputes.

The Director, Defense Procurement and Acquisition Policy issued a memo, Ombudsman for Procurement Integrity, dated October 1, 2009, requiring all DoD organizations to designate and publicize an Ombudsman to their respective workforces by January 1, 2010.

**Status**

This action is complete.

## **Current Structure of Contracting Integrity**

**Chair: Component Acquisition Executive, Defense Logistics Agency**

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**Action 1b: Incorporate in Section 5.3.12 of DoDI 5000.66, “CAEs/SPEs of organizations with contracting officers will self-certify compliance with this requirement every 2 years.”**

### **Discussion**

The Panel recommended reinforcing the evaluation requirements for contracting officers by clarifying requisite procedures. DoD Instruction (DoDI) 5000.66, “Operation of the Defense Acquisition, Technology, and Logistics Workforce Education, Training, and Career Development Program,” articulates the policy governing review and evaluation of contracting officers. DoDI 5000.66 requires all DoD organizations to biennially self-certify through the Component Acquisition Executives/Senior Procurement Executives (CAEs/SPEs) that they are in compliance with this instruction to the Director, DPAP. In 2008, the subcommittee drafted a memorandum, ‘Reinforcing the Evaluation Requirements of Contracting Officers under DoDI 5000.66,’ to strengthen and clarify the instruction. The Deputy Secretary of Defense (DEPSECDEF) signed and issued the memorandum on August 27, 2008.

The subcommittee working group members determined that DoDI 5000.66 requires revision to incorporate the CAE/SPE self-certification requirement and resolved to provide it to Defense Acquisition University (DAU). The proposed language for the revision was submitted to DAU on November 6, 2008, and was subsequently accepted.

### **Status**

This action is on-going. Upon review of the proposed language, DAU determined that DoDI 5000.66 and DoD Directive (DODD) 5000.52, “Defense Acquisition, Technology, and Logistics Workforce Education, Training, and Career Development Program,” overlap and should therefore be combined into a new Instruction (DoDI 5000.55). Individual review for DoDI 5000.66 and 5000.52 was completed June 2009, and the process to combine the two into DoDI 5000.55 began July 2009. DAU’s completed document is anticipated by February 2010.

## **Sustained Senior Leadership**

**Chair: Deputy Assistant Secretary of the Army (Procurement)**

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### **Action 2a: Help new leaders communicate expectations for contracting integrity to leaders and employees**

#### **Discussion**

The Panel noted a need to reinforce the importance of ethics and integrity in the acquisition community with the anticipated addition of thousands of acquisition professionals over the next few years.

The subcommittee on Sustained Senior Leadership drafted a memorandum for the DEPSECDEF to senior leadership communicating expectations regarding ethics and integrity for the acquisition community. The memorandum encourages senior leaders to set the ethical tone in their organizations by embedding core ethical values like honesty, transparency, fairness, and respect into the day-to-day business practices and processes within the acquisition community.

The DEPSECDEF signed the memorandum on October 9, 2009.

#### **Status**

The action is complete.

## **Sustained Senior Leadership**

**Chair: Deputy Assistant Secretary of the Army (Procurement)**

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**Action 2b: Use case studies in contracting integrity to promote discussion and communicate standards in areas of ambiguity.**

### **Discussion**

The Panel noted the need to reinforce ethical standards within the Acquisition Community by promoting discussion and communicating standards. The subcommittee to the Panel worked with Army and Air Force Investigative Agencies to identify cases that could be used to illustrate ethical and unethical behavior within the acquisition community. Though numerous cases involving contracting improprieties exist, many of the best examples proved to be ongoing and therefore excluded from consideration. The subcommittee used hypothetical and actual cases to illustrate the types of incidents occurring in today's acquisition environment.

The working group developed three case studies loosely based on closed Fraud Investigation Cases and hypothetical situations. These case studies allow the reader to review scenarios and determine what they would do if faced with the same or similar situation. The DAU will use these cases in their acquisition training to promote discussion on ethics and integrity.

Working group members also wrote two articles, both based on fact, to provide insight into fraud within the acquisition community. These articles outline fraudulent activity between government employees and contractors and provide results of the investigations. The articles will be published in Defense AT&L magazine.

### **Status**

The action is complete.



## **Capable Contracting Workforce**

**Chair: Director, Human Capital Initiatives, OUSD(AT&L)HCI**

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**Action 3a: Have DPAP and SPEs ensure Component Senior Contracting Leaders participate in President’s budget process, including Exhibit PB-23. Consider Contracting Competency Assessment results and other data, as appropriate to shape inputs.**

### **Discussion**

The Panel identified the need to address competency gaps in the contracting workforce through recruiting, hiring, and retention initiatives. Senior contracting leaders worked with respective Components to submit manpower requirements for approval and inclusion in the President’s Budget and via PB-23 submissions.

The DoD continues to work hard towards the development and sustainment of a highly capable contracting workforce, motivated to deliver warfighting capabilities with the highest standards of trust, integrity, and ethics. Workforce shaping and workforce capability are functions of size, competency, training, processes, tools, policy, and structure. Two primary elements in workforce shaping for the contracting community are: (1) the competency assessment to document and forecast skill gaps, and (2) the PB-23 process to ensure that the Components have programmed adequate workforce needs to support DoD contracting mission requirements.

The contracting workforce competency assessment is a major effort to identify current and future gaps in skills and experience to provide a roadmap to shape the workforce. It provides the means to document and forecast workforce needs and to compete successfully with other communities when programming for funding.

The PB-23 process helps DoD attain equilibrium between contracting workforce requirements and the resources programmed to adequately fund personnel. To this end, the Senior Procurement Executives (SPEs) and senior contracting leaders use this process to work with Components to determine workload and capability requirements.

### **Status**

This action is complete.

## **Capable Contracting Workforce**

**Chair: Director, Human Capital Initiatives, OUSD(AT&L)HCI**

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**Action 3b: DPAP and senior contracting leaders in the components update the contracting section of the AT&L Human Capital Strategic Plan (HCSP) and develop gap-closure strategies for recruiting, hiring, development and retention initiatives.**

### **Discussion**

The intent of this action was to ensure that DPAP and senior contracting leaders in the components update the contracting human capital-planning Annex to the Defense Acquisition Workforce Section to the DoD Civilian Human Capital Plan and ensure that funding is requested under the section 852 Defense Acquisition Workforce Fund (DAWF).

The September 2007 AT&L Human Capital Strategic Plan “Source Document” provided the acquisition community with the initial framework and guiding principles to collaborate and develop people to strengthen the community. It stressed that DoD must equip everyone with the necessary skills they need to be successful and work together to ensure successful outcomes. In 2009, the subcommittee provided input to support an update to the contracting section of the HCSP.

This overarching theme continues as a major strategic thrust and facilitates a common approach towards the execution of workforce initiatives that supports the DoD acquisition enterprise as a whole. This includes continued collaboration and engagement practices with Components growth strategies.

### **Status**

This action is complete.

## **Capable Contracting Workforce**

**Chair: Director, Human Capital Initiatives, OUSD(AT&L)HCI**

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**Action 3c: Have DPAP and senior contracting leaders develop short term gap closure strategies for recruiting, hiring, development and retention initiatives for consideration of Section 852, NDAA, “Defense Acquisition Workforce Development Fund.”**

### **Discussion**

The Panel determined that DPAP and senior contracting leaders in the components should develop and implement gap closure strategies and initiatives to address workforce gaps such as recruiting, hiring, development and retention initiatives and document them in the Contracting Appendix to the Human Capital Strategic Plan. Additionally, they should submit short term strategies and initiatives for consideration by the Defense Acquisition Workforce Development Fund Steering Board established under Section 852 of NDAA 2008.

The subcommittee noted that the contracting community needs additional resources to recruit, hire, and retain a capable contracting workforce to maintain integrity in the Defense contracting system. Effective recruiting, hiring, and retention initiatives are essential to meeting the growing demands of the acquisition and contracting mission.

The contracting leadership continuously analyzes their workforce challenges via PB-23 projections and workforce demographics such as workforce gains and losses. DPAP, the SPEs, and other Component senior leaders continue to evaluate emerging competency results and workforce assessments in preparation for deliberation in senior executive forums and review.

DPAP, SPEs, and Contracting Senior Leaders incorporated competency assessment results into overall workforce strategies and recruiting, hiring, development, and retention. Components submitted initiatives to Defense Acquisition Workforce Development Fund Steering Board.

### **Status**

This action is complete.

## **Adequate Pricing**

### **Chair: Director, Defense Contract Audit Agency**

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**Action 4a: Establish a working group to assess the need for establishing thresholds for higher-level approval of commercial item determinations based on "of a type" and develop recommendations. This is an interim measure pending a legislative change proposal.**

#### **Discussion**

As part of its FY08 actions, the subcommittee pursued a recommendation to submit a legislative proposal to change the commercial item definition to eliminate the phrase “of a type” and “offered for sale.” The subcommittee concluded that this language is a contract pricing vulnerability where fair and reasonable prices may not be established due to the lack of competition and the lack of a requirement for cost or pricing data. As a result of a meeting with Deputy Under Secretary of Defense (Industrial Policy) (DUSD(IP)), the subcommittee agreed to perform additional work to assess the current vulnerability with the definition of a commercial item based on the language contained in the FY08 NDAA.

The subcommittee reviewed a sample of FY08 sole source commercial item procurements awarded on the basis of “of a type” or “offered for sale” to assess the sufficiency of supporting documentation regarding the determination of a commercial item and the determination of a fair and reasonable price. It used the analysis to determine the need to proceed with the legislative proposal or establish thresholds for higher-level approval of commercial item determinations based on “of a type.”

The subcommittee established a working group with representatives from DPAP, DoDIG, DCAA, and the Services to identify existing approval requirements and associated requirements for determining fair and reasonable prices. It also reviewed a sample of commercial contract awards awarded based on the “of a type” criterion. The working group selected pricing actions from the Army, Navy, Air Force, Defense Logistics Agency (DLA), and Defense Information Systems Agency (DISA) and analyzed the selected “of a type” commercial procurements to:

- ◆ Assess compliance with the DFARS documentation requirements on commercial item determination; and
- ◆ Assess sufficiency of the supporting documentation for fair and reasonable pricing.

The working group completed its analysis and determined that “of a type” and “offered for sale” language in the commercial item definition continues to be a contracting vulnerability.

In summary, the review results and recommendations are as follows:

- ◆ Commercial item determinations are not always sufficiently documented in accordance with DFARS 212.102. The subcommittee recommends a standard format be developed for documenting commerciality determinations that would include the minimum documentation requirements.
- ◆ Market research efforts supporting commerciality determinations are not always adequately documented. The subcommittee recommends that there be more emphasis on conducting market research from reliable sources in support of commerciality determinations and to record the results in an acceptable format. The format of the market research should be tied to the content requirements of the commerciality determination to streamline the process.
- ◆ Price reasonableness determinations are not always sufficiently supported for non-competitive actions.

In addition to the recommendations cited above, the subcommittee continues to recommend a legislative proposal be submitted for the FY 2012 Defense Authorization Bill to eliminate “of a type” and “offered for sale” from the definition of commercial item to eliminate this contracting vulnerability. In the interim, the subcommittee recommends that the DFARS be revised to require a higher-level approval (above the contracting officer) for commercial contracting actions that are based on “of a type” commercial procurements or “offered for sale” yet not currently sold to the general public.

**Status**

This action is complete.

## **Adequate Pricing**

### **Chair: Director, Defense Contract Audit Agency**

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**Action 4b: Establish a working group to assess the current regulations/PGI guidance (DoDIG Report D-2008-097, May 23, 2008) covering prime contract surveillance and pricing of its subcontracts and develop recommendations.**

#### **Discussion**

As a result of recent DoDIG reviews, a potential contracting pricing vulnerability was identified relating to the methods and procedures used by contracting officers to ensure the Government pays fair and reasonable contract prices relating to subcontract effort. DoDIG reports disclosed cases where contracting officers and prime contractors failed to perform the necessary cost or pricing analysis of subcontract efforts and prime/subcontract cost monitoring to ensure the Government pays a fair and reasonable price. The subcommittee assessed the risks and vulnerabilities documented in the DoDIG reports.

The subcommittee established a working group with representatives from DPAP, DoDIG, DCMA, DCAA, and the Services which reviewed and assessed existing regulations and Procedures, Guidance and Information (PGI) covering prime contract surveillance and pricing of subcontracts. The working group finalized its analysis of identified gaps/risks/vulnerabilities related to current regulations and PGI guidance covering prime contract surveillance and pricing of its subcontracts, and determined that adequate coverage exists within the Federal Acquisition Regulation (FAR), DFARS, and PGI.

#### **Status**

This action is on-going. In an effort to accomplish a more comprehensive assessment, the working group drafted a memorandum to the Services and Defense Agencies soliciting input on specific policies, procedures and best practices that ensure prime contractors are properly monitoring their subcontractors. The input will support Phase II of this action for the 2010 actions to assess the execution of existing DoD policies and procedures.

## **Adequate Pricing**

### **Chair: Director, Defense Contract Audit Agency**

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**Action 4c: Establish a working group to review approval levels for contracting officer's determination that a time-and-materials contract is the best type for a procurement and develop recommendations.**

#### **Discussion**

Time-and-materials (T&M) contracts comprise the highest contract type risk to the Government. Because of the risks involved, the FAR directs that T&M contracts should be used only when it is not possible at the time of award to accurately estimate the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. FAR 16.601(d) and FAR 12.207(b)(2) states that this type of contract may only be used after the contracting officer executes a written justification, known as a determination and findings (D&F), that no other contract type is suitable.

The GAO recommended that DoD require more diligence in justifying the use of certain types of T&M contracts and analyze the use of T&M on indefinite-quantity contracts to ensure that it does not become the default contract type. The GAO also recommended DoD require monitoring plans to reflect the risks inherent in this contract type. DoD concurred with the GAO recommendations.

In response to the GAO recommendation, DPAP issued a memorandum, 'Proper Use of Time-and-Material Contract Types,' dated March 20, 2008, directing the Services and Defense Agencies to establish procedures for analyzing whether T&M contracts and orders under indefinite-delivery contracts are being used when other contract types are suitable. The memo directed the head of contracting activities to assess the use of T&M contracts and provide their assessment to DPAP by June 4, 2008. The memo also required the Services and Defense Agencies to reduce the use of T&M contracts, whenever possible.

The subcommittee established a working group with representatives from DPAP, DoDIG, DCAA, and the Services and identified existing regulations and PGI requirements related to awards of T&M contracts. The working group also reviewed the input received from the Services and Defense Agencies in response to DPAP's March 20, 2008, memorandum. It assessed the specific procedures established by the Services and Defense Agencies for ensuring the appropriate use of T&M contracts and also reviewed the actions taken to reduce the use of T&M contracts.

The working group's review disclosed T&M contracts required limited approval beyond the contracting officer. Under current regulations, (FAR 16.601(d) and FAR 12.207(b)(3)) approval of the contracting officer's D&F is required by the head of the

contracting activity only for contracts exceeding three years (base and option periods included).

The working group sent a memorandum to the Panel recommending that the D&F supporting the awards of both FAR Part 12 and 16 contracting actions including contracts, delivery orders, task orders, and contract line items that are T&M or Labor Hour (LH) type actions require approvals which coincide with the approval levels required for other than full and open competition provided in FAR 6.304, Approval of the Justification.

The memo also recommended that DAU incorporate DCMA's T&M training material into DAU's T&M course. The DCMA training focuses on surveillance of T&M/LH contracts; T&M/LH Withholds and Payments, and the Closeout Process of T&M/LH Contracts. In addition, the DAU course should include the DoD policy from DPAP memorandum, 'Approving Payments under Cost-reimbursement, time and material (T&M) and labor hours (LH) contracts,' dated April 14, 2008, that clearly outlines the authority for approval of interim and final vouchers for T&M contracts. This memorandum reiterates the responsibilities provided for in DFARS 242.803. Further, the requirement to develop Quality Assurance Surveillance Plans for T&M contracts to facilitate assessment of contractor performance, as stated in a subsequent DPAP memorandum dated July 14, 2009, should be incorporated into the enhanced training.

### **Status**

The memorandum to the Panel is in coordination.



## **Adequate Pricing**

### **Chair: Director, Defense Contract Audit Agency**

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#### **Additional Adequate Pricing Actions**

##### **Discussion**

To support the Adequate Pricing subcommittee's efforts to address vulnerabilities in contract pricing, DPAP Cost, Pricing, and Finance (CPF) hosted a DoD Pricing Conference attended by three hundred government personnel representing all the military services, major Defense agencies, and several civilian agencies.

The conference agenda included speakers and panelists addressing DoD's progress in re-invigorating the pricing function, updates on recent legal and regulatory developments, and discussion of selected pricing issues, techniques and methods. In addition to presentations, conference attendee's had numerous opportunities to ask questions and exchange information with the gathered pricing community.

In addition, DPAP/CPF began publishing a periodic newsletter to communicate DoD's progress in re-invigorating the pricing function, provide updates on recent legal and regulatory developments, and discuss selected pricing issues, techniques and methods.

The first two editions of the Cost, Pricing and Finance Newsletter were published in July and October of 2009 respectively. The newsletters were sent to more than three hundred government personnel in the pricing community. Topics covered included recent changes in regulations, statutes, and case law and summaries of current congressional and oversight activities related to pricing.

**Appropriate Contracting Approaches and Techniques**  
**Chair: Deputy Assistant Secretary (Contracting),**  
**Assistant Secretary (Acquisition), Secretary of the Air Force**

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**Action 5a: Establish a component cross-functional working group to identify and report on source selection deficiencies, best practices and lessons learned, and recommendations to increase accountability and oversight and decrease complexity.**

**Discussion**

The subcommittee drafted a DPAP memorandum in November 2008 establishing a component cross-functional working group and was subsequently notified that OSD had established the Source Selection Joint Analysis Team (JAT). The JAT took the place of the working group and representatives from the subcommittee are members of the JAT subcommittees: ‘Understanding the Problem,’ led by the Navy; ‘Best Practices,’ led by the Army; and ‘Guidance,’ led by the Air Force. The mission of the Source Selection JAT was to thoroughly examine the current source selection process, identify the key elements of successful source selections, and produce guidance to improve the effectiveness, efficiency, and certainty of the joint source selection process and selection decisions.

The subcommittee submitted its initial reports and recommendations to USD(AT&L) at the end of April 2009. Highlights from these initial reports include the following:

Understanding the Problem:

- ◆ A comprehensive analysis of GAO protest information and DoD statistics does not indicate any alarming trends over the last 20 years (validated by GAO and Congressional Research Service Reports issued)
- ◆ From FY01 to FY08, DoD represented on average approximately 60% of GAO cases closed.
  - The overall number of DoD protests filed with GAO has increased steadily during this period, but there has not been a commensurate increase in the number of sustained protests.
  - GAO sustain rates for protests filed against DoD are lower than rates for protests against all federal agencies.
- ◆ From FY01 to FY08, the effectiveness rate for all protests filed with GAO has steadily increased, from 33% in FY01 to 42% in FY08.

- ◆ DoD protest sustain rates are not increasing. However, DoD is being proactive in combating the above issues to avoid a degradation of DoD's bid protest trends, and more importantly falling short in satisfying the needs and expectations of the warfighter and the taxpayer.

Best Practices--the following recommendations were made to USD(AT&L):

- ◆ Develop an automated, online guide for use by all, updated by DoD. (Guide as opposed to Manual to allow easy updating without going to Federal Register).
- ◆ Conduct acquisition planning with robust risk assessment and linkage from understanding the requirement to development of evaluation criteria.
- ◆ Establish a source selection organization with experienced multi-functional experts. The assignment of experts with graduated responsibilities should be based on previous source selection experience. For example, the chairperson would have been a deputy chairperson or factor team lead, etc.
- ◆ Develop source selection plan and ensure consistency between the criteria and evaluation of the criteria with sections L and M of the solicitation.

Guidance:

- ◆ The joint framework consists of four activities (pre-solicitation, evaluation, decision, and documentation) each with source selection sub-activities. Review of the joint framework yielded more common approaches than differences in the source selection process. Upon further review, the notable variations seem to occur in the Service/Agency procedural approach to executing the source selection regulatory requirements.

In July 2009, the Source Selection JAT's 'Guidance' subcommittee produced draft joint source selection procedures that standardize the methodology and approach for source selections. The draft procedures should improve the effectiveness, efficiency, and certainty of the source selection process and selection decisions. They are being reviewed by DPAP prior to coordination by the Military Departments and other Defense Agencies.

### **Status**

This action is complete.

**Appropriate Contracting Approaches and Techniques**  
**Chair: Deputy Assistant Secretary (Contracting),**  
**Assistant Secretary (Acquisition), Secretary of the Air Force**

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**Action 5b: Assess effectiveness of Departmental guidance and training for executing Performance Based Acquisition and perform gap analysis in conjunction with DAU.**

**Discussion**

The Defense-Industrial Initiatives Group at the Center for Strategic and International Studies (CSIS) reports that 2007 marked the fourth year in a row that the government market for professional services was larger than that for hardware. In 2007, DoD spent \$143 billion on professional services. At the same time, the current DAU curriculum is focused on weapon systems and equipment acquisition versus an emphasis on service acquisition. The subcommittee opened a dialog with DAU to determine how to better align training and provide useful resources, tools, and best practices to take advantage of performance based acquisition principles focused on driving efficiency and decreasing costs.

The subcommittee tasked all Service Components and specific Other Defense Agencies (ODAs) asking for their best examples of more complex and higher dollar acquisitions to include Advisory & Assistant Services, Base Operating Support, Equipment Related, Medical and other viable examples. These areas were targeted based on the FY07 DoD-Wide Comprehensive Spend Plan Analysis of Services, because they represent some of the largest spend portfolios or unique commodity portfolios. Documents collected from the Services and ODAs were posted to the subcommittee website established on the Acquisition Community Connection. DAU is analyzing the data collected and are vetting the best examples to use in the roll out of the Service Acquisition Mall in the January 2010 time frame.

The subcommittee also solicited information from Service Components and ODAs about upcoming conferences that would provide DAU the opportunity target program managers, requirements developers and contracting professionals, and to promote the benefits of performance based acquisition. Information collected was provided to DAU.

**Status**

This action is complete.

**Appropriate Contracting Approaches and Techniques**  
**Chair: Deputy Assistant Secretary (Contracting),**  
**Assistant Secretary (Acquisition), Secretary of the Air Force**

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**Action 5c: Provide updated guidance and training on competition initiatives and continue emphasis on enhancing competition for contracts and orders placed under multiple-award contracts.**

**Discussion**

The President's Memorandum on Government Contracting, dated March 4, 2009, reinforced the importance of striving for an open and competitive process as an overriding obligation to American taxpayers. In FY08, DoD competitive obligations totaled \$252 billion or a record 64% of DoD obligations. This is above DoD's ten year average of 61%. Although the trend is moving in the right direction, the subcommittee recognized the need to continue to emphasize the importance of competition and take appropriate action to overcome barriers and reach our competition goal of 66% for FY09.

The subcommittee developed a robust, aggressive DoD competition training program for acquisition professionals, in addition to others that are involved in requirements development and source selection. This program standardizes competition training across DoD and compliments training offered by the DAU which highlights, focuses and educates those involved in Defense contracting on the importance of competition and its potential to maximize industry effort and value.

The subcommittee completed and posted the standardized DoD competition training program on DPAP's website at <http://www.acq.osd.mil/dpap/cpic/cp/docs/training.ppt>. DPAP issued a corresponding memorandum on September 14, 2009, emphasizing the importance of competition and asking Defense components to reinvigorate and expand the role of competition advocates to target training to everyone involved in the acquisition process, including the requirements community. The subcommittee, in conjunction with DAU, converted this training program into an online Continuous Learning Center (CLC 055, Competition Requirements for DoD Acquisition) to make this training more accessible and enable accountability for course completion.

This training is now an active part of DAU's curriculum and has been highly recommended by both the faculty and acquisition workforce. To date, over 682 acquisition professionals have taken the training and majority of the feedback has been in the "excellent" category.

**Status**

This action is complete.

## **Sufficient Contract Surveillance**

**Chair: Director, Program Analysis & Business Transformation, Deputy  
Assistant Secretary of the Navy  
(Acquisition and Logistics Management)**

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**Action 6a: Have DAU, with support from the Defense components, evaluate current COR training (government and commercial).**

### **Discussion**

The contracting officers' representative (COR) standard identifies three types of work/requirements for CORs:

Type A – Fixed price, no incentives, low performance risk

Type B – Other than fixed price, no incentives, low performance risk

Type C – Requiring other specialized education/training beyond Type B

The subcommittee, together with the DAU, identified learning objectives and competencies for Type B and C training, which were incorporated into DAU course COR 222.

- ◆ DAU COR 222 and the Army Logistics Management College course (ALMC-CL) are equivalent courses.
- ◆ DAU is working with other DoD training providers to ensure Government training sources are equivalent to COR 222.
- ◆ Commercial providers must use a third party, American Council on Education, to determine “equivalent provider” status.

COR 222 was designed as a 5 day in-residence customer support course. DAU requested and received Section 852 funding to convert COR 222 to an online offering. Conversion will allow development of a separate course for Contingency CORs. It is estimated that the on-line versions of COR 222 and the Contingency COR course will be available fourth quarter FY 2010.

### **Status**

The subcommittee submitted a draft DEPSECDEF memorandum to publicize COR standards across the DoD and advise commercial offerors of course equivalency requirements.

## **Sufficient Contract Surveillance**

**Chair: Director, Program Analysis & Business Transformation, Deputy  
Assistant Secretary of the Navy  
(Acquisition and Logistics Management)**

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### **Action 6b: Develop a COR certification process.**

#### **Discussion**

Concurrent with development of a COR's certification process, the subcommittee assessed the COR standard submitted in 2008 and identified a significant issue with the number of slots available for the DAU COR training course (COR 222) as well as the need to provide training for CORs in contingent environments.

- ◆ The subcommittee estimated that DoD has more than 25,000 CORs and that 2/3 of the CORs would require COR 222
  - DAU COR 222 and the ALMC equivalent (ALMC-CL) are 5 day in-residence courses for 24 - 30 students.
  - COR 222 is offered as a customer support course where individual activities contract for course presentation. DAU, which does not have dedicated COR faculty, pulls from the Contracting faculty. Thus, DAU can only schedule 30 -35 COR 222 courses annually, leaving the number of available training slots short of the requirement.
- ◆ The COR standard was based on the assumption that CORs in contingency areas would require COR 222.
  - The Army Contracting Command indicated that more that 30% of CORs in-theater are surveilling Type A work/requirements. The subcommittee recognized that requiring these CORs to complete COR 222 was excessive.

DAU requested and received funding to convert COR 222 to on-line learning.

- ◆ The contingency learning objectives from COR 222 will be incorporated into a separate DAU online course for CORs in a contingent environment.

#### **Status**

This action is on-going. The subcommittee developed a draft DoDI for COR certification which addresses roles and responsibilities of the Contracting Officer, the COR, and COR management. The draft DoDI was submitted to the subcommittee working groups for review and comment in December 2009.

## **Sufficient Contract Surveillance**

**Chair: Director, Program Analysis & Business Transformation, Deputy  
Assistant Secretary of the Navy  
(Acquisition and Logistics Management)**

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### **Action 6c: Develop an implementation plan for a COR certification process**

#### **Discussion**

Development of the implementation plan was completed concurrent with development of the COR certification process.

Key issues addressed in the COR standard implementation plan include:

- ◆ The DoDI will require Defense Components to plan and budget for COR requirements.
- ◆ COR Governance: the subcommittee recommends that a COR governance body be identified to establish, oversee and maintain the education, training, and experience requirements including competencies and certification standards; and ensure that content of the COR courses are current, technically accurate, and consistent with DoD acquisition policies.
  - CORs are employees of the requiring activity and do not “belong” to the Contracting Officer.
  - CORs are not a specifically identified community.
  - Significant number of CORs are not members of the Defense Acquisition Community.
- ◆ Transitioning: current training and experience requirements for CORs are activity-specific and vary widely. The COR standard establishes a minimum standard across DoD. The transition strategy addresses training resources, on-going efforts supported by CORs, and mission requirements.

#### **Status**

This action is on-going. The proposed implementation plan was submitted to the subcommittee working groups for review and comment in December 2009.



**Contracting Integrity in a Combat/Contingent Environment**  
**Co-chairs: Panel Executive Director and Deputy Director,**  
**OUSD(AT&L)DPAP/PACC**

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**Action 7a: Formally publish Contingency Contracting Policy in DFARS.**

**Discussion**

The proposed DFARS Contingency Contracting Policy establishes uniform policies and procedures for DoD Contingency Contracting Officers (CCOs) deploying to a contingent environment, both overseas and domestic. This policy is intended to supplement the DFARS and other DoD and agency-specific publications concerning contingency contracting.

The DFARS policy (hereafter named the Joint Contingency Contracting Handbook, or Handbook) is intended to provide practical advice and helpful procedures to help facilitate rapid procurement in contingency operations. It goes well beyond the actual writing and administering of a contract, to include practical advice, training, and critical checklists. Principles of contingency contracting apply to contingency missions over the entire range of a given operation, at any time and any place.

These principals also apply to short-term and long-term declared contingency operations and non-declared emergency contingency operations such as humanitarian and peace-keeping operations. United States public laws, the FAR and DFARS are not revoked or suspended by contingencies unless specifically exempted. Acquisition personnel must therefore comply with applicable federal laws and regulations.

The following are significant highlights of this action:

- ◆ The Handbook consolidates, in a single source, the set of joint policies and procedures used by contingency contracting personnel to execute their mission in a combat and contingent environment.
- ◆ The policy takes a Joint approach to contingency contracting, and can be updated via the web-based version real-time as circumstances arise where specific training deficiencies exist and need to be highlighted.
- ◆ The Handbooks are currently in the hands of the contingency contracting workforce today and working well. The Department is currently updating the Handbook which will be updated based on inputs from recently deployed CCOs in June 2010.
- ◆ The Contingency Contracting Policy applies to both Overseas and Domestic declared contingency support requirements.

- ◆ The policy is not intended be a compendium of existing DFARS policy, but rather a single source, tailored and specific to the contingency mission, taking into consideration the best elements of existing Service Level Contingency Contracting supplements and existing theater specific contingency contracting policy.

The requirement to use the Handbook will be captured in the DFARS to ensure compliance and will also be encapsulated into PGI. The Handbook has been distributed and we are currently working on the third edition.

**Status**

This action is complete.

**Contracting Integrity in a Combat/Contingent Environment**  
**Co-chairs: Panel Executive Director and Deputy Director,**  
**OUSD(AT&L)DPAP/PACC**

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**Action 7b: Lead an interagency Contingency Contracting conference in May 2009, open to all stakeholders in DoD and other government agencies.**

**Discussion**

The subject conference was one in a combined effort of three separate conferences sponsored by the Director, DPAP. It took place May 4-6, 2009, in Orlando, Florida. The following are significant highlights of the conference:

- ◆ Contingency Contracting Conference theme: Interagency Contracting Efforts in Response to Catastrophic Disasters.
- ◆ Conference objective: Listen to presentations by key interagency participants; engage in lively discussions on key and relevant topics; and share lessons learned. Identify key areas to improve communication, synchronize support between interagency organizations, and leverage existing processes and contract instruments to support a unified effort.
- ◆ Take away: Participants have a better understanding of each interagency organization's missions and roles in supporting catastrophic domestic disasters. Participants and agencies retained a list of points of contact and presentation material for future reference.
- ◆ Target audience: Executive Directors and Senior Action Officers/Program Managers, in the contracting career field, planning, logistics, and those active in disaster support operations.
- ◆ Attendees included: OSD, Joint Chiefs of Staff (JCS), US Army (USA), US Navy (USN), US Marine Corps (USMC), US Air Force (USAF), General Services Administration (GSA), DHS/FEMA, National Guard Bureau (NGB), US Northern Command (USNORTHCOM), Department of Commerce (DoC), Department of Health and Human Services (DHHS), US Army Corps of Engineers (USACE), DCMA, DCAA, and GAO.
- ◆ Conference length: 2 Days.
- ◆ Actual attendance: 70.

**Status**

This action is complete.

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**Contracting Integrity in a Combat/Contingent Environment**  
**Co-chairs: Panel Executive Director and Deputy Director,**  
**OUSD(AT&L)DPAP/PACC**

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**Action 7c: Update and Web-enable the Joint Contingency Contracting Handbook; build upon previous efforts and revise contingency contracting training curriculum as required.**

**Discussion**

The goal in producing the Joint Contingency Contracting Handbook was to provide a pocket-sized guide to help the CCO meet the needs of those being supported. Contracting support is a crucial element in the success of the Geographic Combatant Commander's mission. No one individual CCO can remember verbatim all the training and tools needed to successfully accomplish the mission.

One of the greatest advantages of the handbook has been filling these known gaps with relevant and useful policy, information, and guidance. It is by no means a stand-alone document, but intended to be a supplement to the DFARS and Operational Contract Support in Joint Operations (Joint Publication 4-10). 'Contingency Contracting: A Joint Handbook' provides a consolidated source of information for CCOs conducting contingency contracting operations in a Joint environment.

The Handbook is available in multiple versions: a Web version found on the OSD-AT&L-DPAP website at <http://www.acq.osd.mil/dpap/> (under the contingency contracting tab); and a hard-copy book with attached DVD. The Web version and hardcopy of the Handbook and DVD can be used to train at home station and referenced while deployed. All versions of the Handbook and attached DVD look and feel the same and contain useful tools, templates and training which enable the CCO to be effective in any contracting environment.

The Director, DPAP authorized the Air Force Logistics Management Agency (AFLMA) to take the lead and produce 'Contingency Contracting: A Joint Handbook.' AFLMA recently completed the second update to the Joint Contingency Contracting Handbook and over 9,000 copies distributed.

The following are the significant highlights of this action.

- ◆ Built upon CY 2008 efforts to publish a revised version of the Joint Contingency Contracting Handbook and integrate it into core CCO training. Web version made available April 2009. Revised Handbook and disk available July 2009.

- ◆ Provided the user with more relevant and useful tools in an easy-to-use format. Incorporated new document templates and training and revise existing text as needed.
- ◆ Incorporated new policy and lessons learned.
- ◆ Maintained a Web-enabled version of the handbook to look and perform similar to hard-copy text and accompanying disk.
- ◆ Published, distributed, and maintained the second edition of the hardcopy and disk version of the Joint Contingency Contracting Handbook for all DoD stakeholders.
- ◆ Integrated second edition of the handbook into revised contingency contracting training at the Service level and at DAU.

**Status**

This action is complete.

Revisions of the Handbook will continue as an on-going action.

## **Procurement Fraud Indicators**

**Chair: Assistant Inspector General, Acquisition and Contract Management, DoD Inspector General**

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**Action 8a: Complete a POD webcast regarding procurement fraud indicators.**

### **Discussion**

As a follow up to last year's fraud awareness initiatives, the subcommittee developed a POD webcast (a video distributed over the Internet) to increase overall awareness of procurement fraud and indicators of such fraud.

The subcommittee worked with DAU officials to develop the script and filmed the video in April. The podcast included a series of snippets on various fraud scenarios and provided awareness of the new training module developed by the subcommittee on procurement fraud. The podcast was introduced at a DoD Procurement Fraud Conference in early June and DAU also included it in the completed Procurement Fraud continuous learning module developed by the subcommittee as one of the actions for 2008.

### **Status**

This action is complete.

## **Procurement Fraud Indicators**

**Chair: Assistant Inspector General, Acquisition and Contract Management, DoD Inspector General**

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**Action 8b: Draft an AT&L Journal article regarding procurement fraud indicators.**

### **Discussion**

This was the second of the initiatives designed to follow up on last year's Panel actions and further increase overall awareness of the procurement fraud environment.

The article, entitled "The Black and White of Fraud, Waste and Abuse," was published in the March/April issue of Defense AT&L Magazine. It provided basic definitions of fraud, why people commit fraud and various fraud indicators. The article also included a number of other resources available for those interested in finding out more about fraud detection and prevention.

### **Status:**

This action is complete.

## **Procurement Fraud Indicators**

**Chair: Assistant Inspector General, Acquisition and Contract Management, DoD Inspector General**

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### **Action 8c: Communicate with contracting officers, auditors, and DCMA representatives regarding an advanced course on procurement fraud indicators and determine feasibility of development during 2009**

#### **Discussion**

Two objectives were pursued as part of this action: (1) determine if a need existed for an advanced course on procurement fraud indicators and (2) if a need existed, determine whether the necessary resources existed within the Panel to develop such a course. A meeting was held in December with contracting officers and investigators to discuss the feasibility of an advanced procurement fraud class for the contracting community. The subcommittee evaluated a survey of over 300 contracting officer responses on training needs for fraud training.

The results of the survey indicated that the required training was included in the continuous learning module developed as part of the Panel's 2008 actions. The subcommittee evaluated the content of various fraud conferences as well as the content of various fraud courses, including available advanced fraud training. It met with officials at the DCMA, including the head of the contracting integrity office, to discuss their thoughts on the need for an advanced class. The subcommittee also reached out to individual Services to gauge interest.

Based on the review of training needs, the subcommittee determined an advanced course was not needed for the overall contracting core. Additionally, for contracting officials seeking more information on procurement fraud and fraud indicators, advanced courses and conferences already exist that could meet this need.

As an alternative to developing an advanced fraud training course, the subcommittee, in coordination with the Inspector General (IG) Policy Group and in partnership with the Panel and DAU, developed and sponsored a Procurement Fraud Conference in June to further increase the knowledge base of the contracting community. The conference was held in early June with participation from at least 46 Defense components, 12 other Federal agencies and 4 contractor organizations.

#### **Status**

This action is complete.



## **Contractor Employee Conflicts of Interest**

**Co-Chairs: Director, Defense Contract Management Agency and General Counsel, Defense Contract Management Agency**

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**Action 9a: Issue a USD(AT&L) policy memorandum stating that advice from contractors' employees should be free from personal conflicts of interest.**

### **Discussion**

GAO Report-08-169: Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DOD Contractor Employees ["PCOIs Report"]

GAO's Recommendation:

"We recommend that the Secretary of Defense direct the Under Secretary of Defense (Acquisitions, Technology, and Logistics), to develop and implement policy that requires personal conflict of interest contract clause safeguards for defense contractor employees that are similar to those required of DoD's federal employees. In developing its policy, DoD should include requirements for contractor companies to identify and prevent personal conflicts of interest for certain of their contractor employees who are performing contracted services that provide inputs to DoD's decision-making in such mission-critical areas as the development, award, and administration of government contracts and other advisory and assistance functions."

The subcommittee drafted a policy memorandum for USD(AT&L) directing DoD Components to follow policies and procedures relating to avoiding or reducing contractor employee conflicts of interest while performing under Government contracts. One attachment to the memo is a graph showing risks to that Government as they relate to the type of contract employed. A second attachment provides scenarios of contractor employee personal conflicts of interest and the level of risk associated with these scenarios.

### **Status**

This action is complete.

## **Contractor Employee Conflicts of Interest**

**Co-Chairs: Director, Defense Contract Management Agency and General Counsel, Defense Contract Management Agency**

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### **Action 9b: Draft a DFARS clause prohibiting contractor employee conflicts of interest.**

#### **Discussion**

The Panel determined a DFARS clause should be developed that:

- (1) requires contractors to have a written code of business ethics addressing personal conflicts of interest for their employees working on certain DoD advisory and assistance type services,
- (2) requires contractors to have internal controls to identify and prevent personal conflicts of interest for their employees working on certain DoD service contracts,
- (3) requires contractors to report to the applicable contracting officer, as soon as identified, any violation by their employees of the requirement that advice must be given free of personal conflicts of interest, and
- (4) gives remedies to the Government for contractor's knowing or negligent violation.

#### **Status**

This action is on hold pending the outcome of FAR Case 2008-25, *Preventing Personal Conflicts of Interest by Contractor Employees Performing Acquisition Functions*. Per Case synopsis, the case Implements section 841(a) of the FY09 NDAA (Pub. L. 110-417). Section 841 requires the Office of Federal Procurement Policy, within 270 days after enactment, to develop and issue a policy to prevent personal conflicts of interest by contractor employees. The FAR Case 2008-25 proposed rule was published on November 13, 2009, with comments due January 12, 2010.

## **Contractor Employee Conflicts of Interest**

**Co-Chairs: Director, Defense Contract Management Agency and General Counsel, Defense Contract Management Agency**

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### **Action 9c(1): Review and make recommendations on GAO Report 08-485 Post-Government Employment of Former DOD Officials Needs Greater Transparency [The “contractor disclosure” Report]**

#### **Discussion**

The GAO found that ex-DOD officials often work on defense contracts related to their prior agencies or their prior direct responsibilities. There is a risk of conflicts of interest and the appearance of conflicts of interest. There is a need to maintain public trust in the integrity of defense contracting

GAO's Recommendation:

USD(AT&L) determines if changes in procurement policy are needed to impose additional reporting requirements or other requirements to guard against violations of the government's post-employment rules. Determine feasibility of offerors disclosing names of their current employees/consultants working on a matter and having the contractor and/or employees/consultants certify to compliance with post-employment restrictions.

This area is now closely aligned with the new DFARS 252.203-7000, *Requirements Relating To Compensation of Former DoD Officials*. In addition, DFARS Case 2008-D007 is closely associated with this issue.

The subcommittee proposed a new clause requiring certification by a contractor when submitting proposals, stating that all people working on the contract meet post-retirement ethics rules.

#### **Status**

This action is on-going. The draft clause is under review by the Panel working groups, however the final disposition of the clause must await the outcome of DFARS Case 2008-D007.

## **Contractor Employee Conflicts of Interest**

**Co-Chairs: Director, Defense Contract Management Agency and General Counsel, Defense Contract Management Agency**

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### **Action 9c(2): Review and make recommendations on GAO Report 08-360 Army Case Study Delineates Concerns with Use of Contractors as Contract Specialists [The “personal services” Report]**

#### **Discussion**

GAO found that the government currently relies on individual contractor employees to identify potential organizational and personal conflicts of interest, and this risk is pervasive. Use of on-site individual contractor employees frequently results in de facto personal services contracts. The FAR generally prohibits personal services.

GAO’s Recommendation: “We recommend that the Secretary of Defense issue guidance to clarify the circumstances under which contracts risk becoming improper personal services contracts and to provide direction on how the risk should be mitigated.”

Sec. 831 of FY09 NDAA makes DoD responsible for development of guidance on personal services contracts. It also requires the development and issuance of a standard policy within 270 days of Act by the Secretary of Defense with guidance related to personal services contracts to:

- (1) require a clear distinction between employees of the Department of Defense and employees of Department of Defense contractors;
- (2) provide appropriate safeguards with respect to when, where, and to what extent the Secretary may enter into a contract for the procurement of personal services; and
- (3) assess and take steps to mitigate the risk that, as implemented and administered, non-personal services contracts may become personal services contracts.

#### **Status**

An ad hoc DFARS team is looking at personal services. This team’s working group is focused on a DFARS case, DAU courseware updates, and a DoDI 1100.22 update. The Panel on Contracting Integrity subcommittee for Contractor Employee Conflicts of Interest is part of the ad hoc team.

## **Contractor Employee Conflicts of Interest**

**Co-Chairs: Director, Defense Contract Management Agency and General Counsel, Defense Contract Management Agency**

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**Action 9d: Per Weapons Systems Acquisition Reform Act [WSARA] make recommendation to Secretary of Defense [SECDEF] to revise the DFARS by February 16, 2010, in order to provide “uniform guidance and tighten existing requirements for organizational conflicts of interest by contractors in major defense acquisition programs.**

### **Discussion**

The WSARA requires the SECDEF to revise the DFARS by February 16, 2010, in order to provide “uniform guidance and tighten existing requirements for organizational conflicts of interest by contractors in major defense acquisition programs.”

In preparing the revisions, the SECDEF is to consider recommendations from two sources, the DoD Panel on Contract Integrity (Panel) and a similar study, already underway, by the Office of Procurement Policy and Office of Government Ethics.

The Panel completed its report to the SECDEF with the following recommendations:

For Program Executive Officers (PEOs) and Program Managers (PMs), require:

- (1) An organizational conflict of interest (OCI) configuration control strategy and policy for each major defense acquisition program,
- (2) widest dissemination of functional and technical information well prior to release of Request for Proposals/Request for Qualifications,
- (3) the establishment of OCI boards, and
- (4) annual training on OCIs.

For Contracting Officers, require:

- (1) Offerors be required to fully disclose all contracts and subcontracts they perform in support of an agency or organization (whose requirements are being solicited for proposals),
- (2) OCI determination must be made prior to awarding each task order, and
- (3) annual training on OCIs.

For contractors, require:

- (1) Complete OCI disclosure and continual updating,
- (2) corporate ethics programs, to include OCI mitigation and training,
- (3) prevention of inappropriate distribution of key information, and
- (4) a continuing duty to report OCI and nondisclosure violations.

Additional recommendations:

- (1) DAU ensure OCI training is properly embedded within all of its acquisition community training.
- (2) USD(AT&L) ensure OCIs are appropriately addressed within program guidance and policy.
- (3) DFARS needs expanded guidance on OCI documentation and waivers.
- (4) Press for increased funding for Federally Funded Research & Development Centers (FFRDCs).

**Status**

The final report with the above recommendations is in formal coordination.

**Recommendations for Change**  
**Chair: Deputy General Counsel (Acquisition and Logistics),**  
**DoD Office of the General Counsel**

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**Action 10a: Submit for DoD coordination a legislative proposal to permit federal agencies to retain fraud recovery funds.**

**Discussion**

The Recommendations for Change subcommittee recommended this action to the Panel, and the Panel approved this action on May 22, 2008.

Currently, DoD must “pay” twice for the value of goods or services lost through fraud. Though it has no appropriated funds for paying liabilities properly chargeable to cancelled accounts, DoD is required to pay such liabilities from current appropriations. Accounts for lost funds recovered by the government under the False Claims Act have usually expired, thus the funds generally go to the Treasury Department rather than the defrauded agency.

The law currently requires funds for expired accounts to be deposited as miscellaneous receipts under the control of the Treasury Department. This opportunity cost is a considerable disincentive for agency personnel to expend time and effort assisting with fraud investigations. The subcommittee believes individuals would be more willing to participate in fraud investigations if their organizations retained some of the recovered funds.

The subcommittee drafted a legislative proposal to allow funds recovered under the False Claims Act to be credited to current appropriations for the limited purpose of paying “current for cancelled” obligations. This legislative proposal would remedy the two problems described above. Panel member coordination of the draft legislative proposal was completed on June 13, 2008.

By policy, DoD delayed until February 2009 all legislative proposals other than those critical to the operation of the Department. The ban was lifted on February 6, 2009. The legislative proposal was approved by DUSD(A&T) and submitted by DPAP to the Office of the USD(AT&L)’s Acquisition and Resource Analysis (ARA) directorate on February 10, 2009. On March 10, 2009, OSD’s Office of the Deputy General Counsel (Legislative Counsel) deferred submission of the proposal until the NDAA 2011 submission cycle. On June 22, 2009, the Panel resubmitted the legislative proposal to ARA for NDAA 2011. The proposal was included to address DoD legislative priorities in September 2009.

**Status**

This action is complete.

**Recommendations for Change**  
**Chair: Deputy General Counsel (Acquisition and Logistics),**  
**DoD Office of the General Counsel**

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**Action 10b: Establish a Department of Defense-wide value-based ethics program.**

**Discussion**

The requirement for a value-based ethics program was identified to complement the robust and active rule-based compliance program currently in effect within the Department. The Standards of Conduct office has been very effective in demanding compliance for set rules, but may provide the false impression that ethics are principally the concern of the Office of the General Counsel. Integrity is a leadership issue and everyone's concern. The Defense Science Board recommended that the Department institutionalize an orientation program for incoming senior leaders that addresses values, the importance of leadership to sustain an ethical culture, and performance expectations. Funding for the program was identified in FY09.

The subcommittee drafted a PWS describing survey requirements. The scope encompassed services to design a web-based survey, administer the survey, provide analysis of the results, conduct focus groups, and report the results.

Contracting support was provided by Washington Headquarter Services (WHS). A solicitation issued on November 20, 2008 was cancelled after initial oral briefings were received. A subsequent revised PWS was submitted to survey a sample of the entire military and civilian population to include 100% of the acquisition workforce of the Defense Department. This solicitation was issued on February 18, 2009 to GSA Federal Supply Schedule Holders. The technical team evaluated the oral presentations and written technical proposals.

**Status**

This action is on-going. On May 14, 2009, a competitive, fixed-price contract was awarded to Human Resources Research Organization. The period of performance is May 18, 2009, through January 17, 2010, and includes a two-month wait for Defense Manpower Data Center (DMDC) approval of the survey. A Pilot Test was conducted in August. The final survey was submitted to the contracting office for DMDC approval. The subcommittee will recommend a way ahead for the development of a values-based ethics program based upon the contractor's recommendations.



**Recommendations for Change**  
**Chair: Deputy General Counsel (Acquisition and Logistics),**  
**DoD Office of the General Counsel**

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**Action 10c: Draft a legislative proposal to amend the Program Fraud Civil Remedies Act of 1986 or draft a stand-alone statute.**

**Discussion**

The Program Fraud Civil Remedies Act authorizes federal agencies to assess civil penalties up to \$5,000 for any claim or statement made to an agency that a person knows or has reason to know is false, fictitious, or fraudulent. However, as currently structured, the statute is too complex and cumbersome, requiring inordinate numbers of reviews by very senior officials. The act also requires hearings to be conducted by administrative law judges, which DoD does not employ. To the subcommittee's knowledge, DoD has rarely invoked this act because it is so laborious, yet the Department has a 39-page directive implementing it.

The legislative proposal would create a pilot program for DoD which would (1) authorize the DoD suspension and debarment officials to investigate, make determinations on, and assess penalties for violations of the act, and (2) increase the dollar limitations from \$150,000 to \$500,000.

**Status**

This action is on-going. A proposal is being drafted for submission as a non-budget legislative proposal for FY11.



## SECTION C. APPENDICES

### APPENDIX 1: COMPLETED ACTIONS

During 2009, the Panel developed policy directives, memorandums, articles, case studies, and training guides. This section contains the actions that can be reproduced. The actions appear in the following order:

	TAB
• (Action 1a) DEPSECDEF Memo, Ombudsman for Procurement Integrity, October 1, 2009	A
• (Action 2a) DEPSECDEF Memo, Ethics and Integrity in Acquisition, October 9, 2009	B
• (Action 2b) Article, Creating a Culture of Procurement Integrity	C
• (Action 2b) Article, Procurement Fraud: Ammunition Contract for the Afghan Army and Police	D
• (Action 2b) Case Study, Good Friends	E
• (Action 2b) Case Study, Mission First	F
• (Action 2b) Case Study, The Plum Assignment	G
• (Action 4a) Report, Commercial Item Determination	H
• (Action 4b) USD(AT&L) Memo, Department of Defense Panel on Contracting Integrity - Prime Contract/Subcontract Surveillance Information Request, December 15, 2009	I
• (Action 4c) DCAA Memo, Recommendations Approval Levels for Time & Material (T&M) Contracts and Additional T&M Training, December 8, 2009	J
• (Action 5b) Guide, "Seven Steps to Performance Based Acquisition" (excerpt)	K
• (Action 5c) USD(AT&L) Memo, Competition in Department of Defense Acquisition, September 14, 2009	L
• (Action 8b) Article, "The Black and White of Fraud, Waste, and Abuse," Defense AT&L Magazine, April/May 2009	M
• (Action 9a) USD(AT&L) Memo, Personal Conflicts of Interests (PCIs) of Contractors' Employees, November 24, 2009	N



# TAB A





ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

OCT -1 2009

MEMORANDUM FOR CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
UNDER SECRETARIES OF DEFENSE  
COMMANDER, UNITED STATES SPECIAL OPERATIONS  
COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION  
COMMAND (ATTN: ACQUISITION EXECUTIVE)  
GENERAL COUNSEL OF THE DEPARTMENT OF  
DEFENSE  
INSPECTOR GENERAL OF THE DEPARTMENT OF  
DEFENSE  
DIRECTOR, COST ASSESSMENT AND PROGRAM  
EVALUATION  
DIRECTOR, NET ASSESSMENT  
DEPUTY ASSISTANT SECRETARY OF THE ARMY  
(PROCUREMENT), ASA (ALT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY  
(ACQUISITION & LOGISTICS MANAGEMENT),  
ASN (RDA)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE  
(CONTRACTING), SAF/ACQ  
DIRECTORS OF THE DEFENSE AGENCIES  
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Ombudsman for Procurement Integrity

Section 813 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Pub. L. 109-364) directed the Secretary to establish a "Panel on Contracting Integrity." The purpose of the Panel is to conduct a Department-wide review of vulnerabilities to contracting fraud, waste, and abuse and provide Congress with recommendations for improvement. One of the Panel recommendations is to designate an Ombudsman for Procurement Integrity (Ombudsman) in each DoD Component with Component Acquisition Executives/Senior Procurement Executives (CAEs/SPEs).

Recognizing the Contracting Officer (CO) has the primary responsibility for Procurement Integrity, the Ombudsman will provide a neutral, informal, confidential and independent alternative for employees, managers and customers to seek assistance in resolving procurement integrity issues (see 41 U.S.C. § 423). The primary function of the Ombudsman is to support acquisition personnel by acting as an independent sounding

board to hear concerns about specific procurement integrity issues and to assist in the resolution of the concerns.

DoD Components with CAEs/SPEs shall designate an Ombudsman for Procurement Integrity. The Ombudsman will be an experienced senior official, independent of the contracting officer and program manager functions, who will foster communication between concerned individuals regarding procurement integrity issues.

All DoD Organizations will establish and designate this collateral duty to a senior official as the Ombudsman for Procurement Integrity or build on their existing procurement integrity advisory function or Ombudsman Program. Each component shall publicize its designation to its respective workforce by January 1, 2010.

The attached Ombudsman tenets are to be used as guidelines in implementing this advisory role or expounding on an existing Ombudsman Program.

A handwritten signature in black ink, appearing to read 'Shay D. Assad', with a large, stylized flourish extending to the right.

Shay D. Assad  
Director, Defense Procurement  
and Acquisition Policy

Attachment:  
As stated



# **Tenet Guidelines for the Ombudsman for Procurement Integrity**

## **Ombudsman Purpose**

Recognizing that the contracting officer (CO) has the primary responsibility for Procurement Integrity, the Ombudsman for Procurement Integrity (Ombudsman) provides a neutral, informal, confidential, and independent alternative for employees, managers, and customers to seek assistance in resolving procurement integrity issues (See 41 U.S.C. Sec 423). The primary function of the Ombudsman is to assist acquisition personnel by acting as an independent sounding board to hear concerns about specific procurement integrity issues and to aid in the resolution of the concerns.

## **Ombudsman Responsibilities**

### **The Ombudsman shall:**

- a. Act upon complaints and questions about alleged acts, omissions, improprieties, and systemic problems regarding procurement integrity issues within the Ombudsman's purview;
- b. Act on the Ombudsman's own initiative to address issues within his/her purview;
- c. Function by such means as:
  - o conducting inquiries;
  - o developing, evaluating, and discussing options available to affected individuals;
  - o facilitating, negotiating, and mediating;
- d. Call upon other resources of his/her organization as needed to assist in resolving procurement integrity issues or concerns (e.g. DoD ethics specialists, administrative support, independent review teams such as the Inspector General, General Counsel/JAG);
- e. Refer allegations of potential criminal misconduct discovered during the course of an Ombudsman inquiry to the appropriate investigative organization, and take no further action with regard to the potential misconduct;
- f. Assist acquisition personnel in the resolution of procurement integrity issues;
- g. Act in a manner that does not jeopardize the reporting individual(s) and, if requested, maintain their anonymity to the extent allowed by applicable laws and regulations;

- h. Ensure all affected offices and appropriate officials are consulted as part of any resolution process;
- i. Inform senior management personnel responsible for oversight, to include the Senior Procurement Executive, as appropriate, of issues raised, actions taken, and proposed or implemented resolutions.
- j. Document the review, key findings and recommendations;
- k. Recuse him/herself from the matter, when appropriate, in the event of a conflict of interest or the appearance of a conflict of interest (using the standards in 5 C.F.R. Part 2635, Subparts D and E).

**The Ombudsman shall not:**

- a. Interfere with or usurp normal procurement and related authorities [e.g., CO/source selection authority, program manager (PM), Suspension and Debarment Official, or Designated Agency Ethics Official (DAEO)];
- b. Render a decision that purports to bind the Organization, Agency, or agency personnel.
- c. Take any action or make a recommendation inconsistent with a law, policy, or applicable administrative decision;
- d. Directly compel or attempt to compel an entity or any person to implement the Ombudsman's recommendations; or
- e. Participate in the evaluation of proposals, the source selection process, or the adjudication of protests or formal contract disputes.

**DoD Components with CAEs/SPEs Responsibilities**

Organizations shall:

- a. Designate an Ombudsman for Procurement Integrity. The Ombudsman will be an experienced senior official, independent of the CO and PM functions, who will foster communication between concerned individuals regarding procurement integrity issues;
- b. As deemed warranted and appropriate for mission enhancement (e.g. multiple Contracting Activities), designate additional Ombudsmen, aligned to organizational structure;
- c. Identify and publicize the Ombudsman on their public and internal websites;

d. Provide the Ombudsman with access to the appropriate offices to collect all facts and data relevant to the resolution of the issue(s), consistent with security requirements. This may include information subject to protection under FAR 3.104;

e. Ensure the Ombudsman does not replace or interfere with agency level protests, Inspector General reviews/audits, Government Accountability Office (GAO) bid protests, contract dispute procedures (to include Alternative Disputes Resolution), requests for debriefing, employee-employer actions, contests of OMB Circular A-76 competition performance decision, post-Government employment ethics advice or any other administrative or investigative processes. It is, however, appropriate for the contracting activity to consult with the Ombudsman in the course of these actions. Consulting an Ombudsman does not alter or postpone the timelines for any of these processes, nor provide a forum to review a GAO decision. Upon transfer of issue/concern to formal resolution process, the Ombudsman shall cease further review of the issue.



# **TAB B**





**DEPUTY SECRETARY OF DEFENSE**  
1010 DEFENSE PENTAGON  
WASHINGTON, DC 20301-1010

MEMORANDUM FOR: SEE DISTRIBUTION

OCT 09 2009

SUBJECT: Ethics and Integrity in Acquisition

Operating within high ethical standards and with integrity is absolutely key to the success of the Department. Therefore, I want to communicate clearly my expectations regarding ethics and integrity in DoD acquisition and procurement. Core ethical values and corresponding conduct must permeate the Acquisition Community, both in the Government and throughout the defense industry. As DoD senior leaders, you are to reinforce this imperative by properly setting the ethical tone in your organization.

With the anticipated addition of thousands of acquisition professionals over the next few years, we must ensure ethics and integrity are woven into the fabric of everything we do. Every member of the Defense acquisition workforce – whether program managers, logisticians, contracting officers, auditors, or quality assurance personnel – must understand ethical behavior and integrity are not optional qualifications, but absolute requirements for these positions. We can achieve this goal by embedding core ethical values like honesty, transparency, fairness, and respect into our day-to-day business practices and processes. This will build a sustainable ethical culture in the Acquisition Community and will promote public trust and confidence in the integrity of DoD programs and operations. We must also understand and comply with ethics laws and rules, particularly in the area of conflicts of interest and the revolving door between Government service and employment in the private sector. As you proceed, remember to ensure industry demonstrates ethics and integrity in all dealings with the Department.

As you know, acquisition reform is a strategic objective of the Secretary of Defense. The Department is working with Congress to develop an improved, better-trained acquisition work force. We must embed ethics and integrity throughout both formal and informal curricula and ensure our government acquisition professionals complete annual ethics training.

With your help, the Department will develop and promote a professional acquisition environment based on ethical decision making that flows from the basic ethical values of integrity, transparency and mutual respect. Thank you in advance for making this important undertaking a success.

2009 OCT 14 AM 11:24

NEW YORK, NY

OSD 11116-09



**DISTRIBUTION:**

**SECRETARIES OF THE MILITARY DEPARTMENTS**

**CHAIRMAN OF THE JOINT CHIEFS OF STAFF**

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**GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE**

**DIRECTOR, OPERATIONAL TEST AND EVALUATION**

**DIRECTOR, COST ASSESSMENT AND PROGRAM EVALUATION**

**INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE**

**ASSISTANTS TO THE SECRETARY OF DEFENSE**

**DIRECTOR, ADMINISTRATION AND MANAGEMENT**

**DIRECTOR, NET ASSESSMENT**

**DIRECTORS OF THE DEFENSE AGENCIES**

**DIRECTORS OF THE DOD FIELD ACTIVITIES**



# TAB C



## Creating a Culture of Procurement Integrity

The obligations of public service to place loyalty to the Constitution, the law, and ethical principles above private gain, are well established principles that are reiterated in Government standards of conduct training programs. Such training tends to consist of reviewing the various laws, policies, and processes that have been established to maintain public trust and confidence in Government and the federal acquisition system. Some procurement integrity training programs include fictional scenarios. Such scenario-based training, when combined with reviews of regulatory requirements and agency processes, can be very effective in providing an awareness of the underlying statutes and the consequences for any violations. But is such awareness training sufficient to ensure that those entrusted with acquisition and contracting authority refrain from improper and illegal acts? How do we prevent our public servants from starting down a path of behavior that may spin out of control to include unethical or illegal activities? Sadly, given recent reports on incidents of abusive practices and fraudulent conduct in federal acquisition, it is clear that more than standard training programs are needed. We must move beyond viewing integrity as a training subject to be cyclically emphasized, to ensuring that integrity and ethical core values are engrained in our day-to-day actions. We must respect and enforce established processes which protect the fairness of the acquisition system, and be ever vigilant to detect and deter abuses of the system and positions of trust.

The following is a real example of the integrity lapses that take place more often than we realize.

A high level procurement official was recently accused of conspiring to influence contract awards and inflate prices on several high visibility contracts; splitting the difference with the contractor, thus defrauding the government of millions of dollars. He apparently made this deal with not just one, but approximately fifteen contractors and subcontractors providing services and furnishings for a resort hotel built for our military personnel and their families.

The procurement official was charged with receiving thousands of dollars in bribes and gifts in the form of home renovations, automobile maintenance, airline tickets, hotel rooms, and furniture. In addition, he was charged with filing false income tax returns. When he was finally caught by the local investigative authorities, he decided to cooperate with them in return for leniency. This resulted in jail time for his co-conspirators, which included U.S. and foreign contractors. He has now pled guilty to bribery and tax evasion charges. As of this writing he has not been sentenced, but faces up to 15 years in prison and a \$250,000 fine for the bribery charge, and three years in prison and a \$100,000 fine for each count of filing false tax returns.

This high level procurement official was a Director of Contracting, a very influential position. He used his influence to manipulate contract awards and payments under his control. What would entice him to risk his career by defrauding the government? Was he in debt, struggling to make ends meet? Was he overwhelmed by a delusion of power and invincibility? Was this a case of just plain greed? Regardless of the underlying motivation for his criminal acts, this individual's life and reputation are ruined.

In our daily activities, we must be mindful to uphold the trust that is given to us as public servants. We must be aware of the ruinous consequences of violating that trust. Just as petty larceny often leads to grand theft, little violations of the public trust can lead to larger ones. Accepting gratuities in violation of standards of conduct is a step toward bribery and contract fraud. Fraud is like a drug. One may think trying a little is harmless and will not be addictive. However, just like drugs, fraudulent schemes often start on a small scale, followed with the perpetrators taking on greater risks, believing their plans are flawless—that is, until they are caught.

To detect and deter fraud, we need to be aware of behaviors that indicate something is not right and promptly report any apparent ethical violations. Is there someone who has authority over a contract, such as a program manager, contracting officer (procuring or administrative), quality assurance specialist, or engineer that appears to always favor a contractor's position rather than the Government's? Does this person participate in meetings concerning specific contractors and does he/she tend to irrationally defend or dismiss the contractor's actions/inactions? Does this person's opinion vary depending on the contractor involved? Does this person suddenly appear to have more money to spend? Is this person traveling more frequently? Is the person frequently meeting away from the office? Is someone of influence trying to steer an award a particular way or working exclusively with a particular contractor (not treating others equitably)?

Although appearances can be deceiving and we need to be respectful of employee rights to privacy, we should be alert to indications of fraudulent behaviors and report any concerns of possible ethical violations to competent authority (e.g., Agency Ethics Official, Agency Inspector General, Fraud Hotlines.) As public servants in positions of trust, we must accept our civic duty to report any apparent fraud or other illegal activity.

The Government has recently stepped up measures to prevent fraud, particularly procurement fraud, and increase public awareness. Yet, recent reports of contract fraud abound in the media. Several high profile fraud cases involve personnel working in Iraq or Afghanistan, where the perception of lesser oversight may have led the perpetrators to believe they were less likely to get caught. In October 2006, the National Procurement Fraud Initiative was announced by then Deputy Attorney General Paul J. McNulty. The initiative is designed to promote the early detection, identification, prevention and prosecution of procurement fraud associated with the increase in contracting activity for national security and other government programs. As a result of this initiative, the National Procurement Fraud Task Force was created, which encompasses U.S. Attorneys' Offices, the Federal Bureau of Investigation, the U.S. Inspectors General community, and other federal law enforcement agencies. Furthermore, the Department of Defense Inspector General has created a Procurement Fraud Handbook, an excellent guidebook for the detection and prevention of procurement fraud. The Defense Acquisition University recently added a training module to their venue on procurement fraud; an excellent learning tool for acquisition personnel.

Procurement integrity is everyone's responsibility, including our industry partners. It must be woven into our day-to-day activities, reinforced through education, and be regarded as the cornerstone of our profession, our culture, and personal ethos.

**TAB D**



## **Procurement Fraud Case Study: Ammunition Contract for the Afghan Army and Police**

### Introduction

Since 2001, the United States has been engaged in a comprehensive program to train and equip Afghan National Army (ANA) and Afghan National Police (ANP) for the purpose of promoting stability and the rule of law in Afghanistan. As part of this process, the U.S. Army has overseen the purchase of weapons and ammunition suitable for use by the ANA and the ANP. Based on the legacy of the former Soviet Union's involvement in Afghanistan, the Army decided in April 2006 to procure weapons and ammunition manufactured in former Warsaw Pact nations instead of U.S. manufactured equipment. Contracting officers had to consider other alternatives to traditional suppliers of weapons and ammunition to the Department of Defense (DoD) and looked to brokers of non-standard ammunition on the international arms market. The result was one of the most visible procurement fraud cases out of Afghanistan and multiple lessons-learned on contractor performance evaluations and quality controls used in the procurement of non-standard goods by the DoD.

### Background

After an evaluation of the ANA's and ANP's munitions needs, the U.S. Army Sustainment Command (ASC) issued a request for proposals (RFP) on July 28, 2006. This RFP required the delivery of various types of non-standard ammunition to ANP and ANA ammunition stocks in Kabul, Afghanistan, within three to six months of ASC issued task orders. Included in the contract was a requirement to deliver 7.62x39mm ammunition for AK-47 assault rifles for delivery to the ANP and ANA via transport arranged by the contractor according to international standards. The ammunition was to be packaged according to commercial "best practices." The evaluation criteria in reviewing responses to the RFP were price, utilization of small businesses and past performance, to include ability to deliver ammunition on time to international locations, and quality of performance. Ten proposals were received, of which eight were deemed complete and eligible for consideration. Following pre-award surveys of the bidders and evaluation of the award criteria, contract number W52P1J-07-D-0004, valued at approximately \$298 million, was awarded to AEY, Incorporated on January 26, 2007.

AEY, Inc., (AEY) was a small Miami Beach, Florida based company. In its best year of business, AEY received contracts valued at \$7,238,329, divided among 59 separate Government contracts. Operating from a single location with eight employees, AEY's management consisted of Efraim Diveroli, the company's 22 year old President and primary point of contact for Government contracts, David Packouz, the company's Vice-President and former licensed masseuse, Alexander Podrizki, AEY's representative in Tirana, Albania, and Ralph Merrill, a business associate of Mr. Diveroli and financial backer of AEY. The majority of the company's revenue came from providing miscellaneous weapons, ammunition, clothing and tactical equipment to organizations and individuals. As a result of the award of the ASC ammunition contract, AEY went from a moderately successful small business to a major supplier of munitions to a key U.S. ally. Even before the first task order was placed, however, questions

were surfacing in the law enforcement community and at the Department of State (DoS) about AEY's management and its contacts in the global arms marketplace.

Since April 2006, AEY and Mr. Diveroli had been under investigation by the U.S. Immigration and Customs Enforcement Service (ICE) for Arms Export Control Act violations, contract fraud and illegal firearms transactions. The DoS placed both AEY and Mr. Diveroli on its watch list of international arms dealers due to the suspicious nature of AEY's arms transactions and parties that it did business with. Because all information surrounding that investigation was restricted to law enforcement personnel, the contracting community was unaware of the evidence compiled by ICE investigators. Furthermore, as AEY had provided AMC with data that indicated a good record of past performance and compliance with applicable regulations, no inquiries were made by the source selection team with the ICE or other criminal investigative agencies that may have been privy to the details of the investigation. This omission continued even after Defense Criminal Investigative Service (DCIS) joined ICE in the AEY investigation. On the surface, AEY appeared to be a qualified supplier of non-standard ammunition that had the additional benefit of meeting the solicitation's requirement for award to a small business.

Unbeknownst to AMC, however, AEY's basic qualifications were also in question due to a series of terminations for default for failure to perform several DoD and DoS contracts. Between April 2005 and the end of 2006, AEY failed to adequately perform at least nine contracts for the supply of weapons, tactical equipment, and non-standard ammunition. On five occasions in 2005 and 2006, AEY either failed to deliver or delivered substandard rifle mounts and scopes ordered by the Army as part of foreign military sales contracts, despite multiple opportunities from contracting officers to cure defects in the company's performance. One of these contracts was terminated on March 1, 2007, a little more than a month after AMC's award of the ANA and ANP ammunition contract. On other occasions in 2005, AEY provided 10,000 helmets that failed to provide ballistic protection for use by the Iraqi army, failed to deliver 10,000 9mm pistols for use by the Iraqi police and delivered defective ammunition to the Army Special Operations Command.

AEY responded to repeated requests for improved quality control and delivery standards by suggesting that there was bias present on the part of inspectors against the company, that as a small business it should be given additional opportunities to perform, or it should be allowed to offer non-conforming, substitute equipment to meet contract requirements. In extreme cases, Mr. Diveroli blamed failures to perform on plane crashes, Government interference and a fictitious hurricane that devastated AEY's offices in Miami.

None of this information regarding AEY's past performance was made available or discovered by the source selection team for the ANA and ANP ammunition contract. The only past performance evaluated related to three contracts identified by AEY despite the fact that over 90 contracts had previously been awarded to the company. All three of these contracts indicated that the company had satisfactorily performed in all respects. Based on what appeared to be a history of good contract performance, AEY received an "excellent" rating by the source selection team for on-time delivery and performance and by the contracting officer as "good" for international delivery history and experience as a systems integrator.



With contract in hand, AEY soon began receiving task orders for the delivery of ammunition to Afghanistan. With each task order received, the company procured the ammunition and shipped it via air transport to Bagram Airbase, Afghanistan using a civilian subcontractor airline, Silkway Airways. A contracting officer's representative accepted shipments that were then driven via truck to the ANA and ANP ammunition storage facility called the "22 Bunkers Complex." From that facility, the ammunition was issued directly to ANA and ANP units. AEY obtained surplus ammunition from a variety of sources in Eastern Europe, including Albania, in its efforts to procure ammunition that met contract requirements.

This ammunition, in most cases, had been manufactured during the Cold War and stored in sealed metal boxes that provided data on the origin and manufacture dates, as well as protection from corrosion. As their investigation continued, it became clear to ICE and DCIS investigators that AEY was repackaging ammunition originating in Albania by removing it from metal storage containers and placing it into paper and cardboard boxes. This repackaging allowed AEY to conceal the fact that the ammunition supplied to the ANA and ANP had been manufactured in the People's Republic of China. This repackaging also prevented the casual observer from determining the date of manufacture and allowed AEY to save the costs associated with shipping the metal storage containers via air to Afghanistan.

AEY apparently began this practice in April 2007, after Mr. Diveroli received notice from the DoS that AEY would not be issued an export license from the U.S. Government for the brokering of ammunition stored in Albania for a twenty-year period. In addition, Mr. Diveroli provided certificates of conformance to the contracting officer stating that the manufacturer of the ammunition was MEICO (Military Export and Import Company), a company operated by the Albanian Ministry of Defense. Between June 26 and October 31, 2007, Mr. Diveroli provided 35 certificates of conformance that falsely certified MEICO as the manufacturer of ammunition provided under contract W52P1J-07-D-0004. These fraudulent certificates of conformance resulted in payments totaling \$10,331,736.44 to AEY from the Government.

Prior to the award of the ANA and ANP ammunition contract, numerous questions were received from potential offerors regarding contract requirements and performance. Amendment 3 to the solicitation for this contract included a question from one offeror asking if "ammunition from China [is] acceptable for this contract – assuming that it meets the technical specifications." In response, the source selection team stated that "statutory or regulatory restrictions . . . that may effectively prohibit supplies from any source are the responsibility of each offeror to both identify and resolve." This response was clarified by Amendment 6 to the solicitation, through the express incorporation of DFARS 252.225-7007 into the solicitation, entitled "Prohibition on Acquisition of United States Munitions List Items from Communist Chinese Military Companies." DFARS 252.225-7007 specifically states in subparagraph b that:

"Any supplies or services covered by the United States Munitions List that are delivered under this contract may not be acquired, directly or indirectly, from a Communist Chinese military company."

Subparagraph (a) of this section defines "Communist Chinese Military Company" as "any entity that is part of the commercial or defense industrial base of the People's Republic of China" or

any company that is owned, controlled or affiliated with the Government of the People's Republic of China. The incorporation of the prohibition found in DFARS 252.225-7007 into Section A of the contract resulted in a prohibition against the use of ammunition from the People's Republic of China by AEY to meet contract requirements.

Contract language problems also existed which allowed AEY to ship substandard ammunition to Afghanistan. The contract only specified that the ammunition be "serviceable" but did not specify the age of the ammunition. The allowance for using surplus ammunition to meet contract requirements also added to the questions about what, if any, age limit on the ammunition would be imposed by the Government on AEY as surplus ammunition tends to be of older manufacture than ammunition recently purchased. Furthermore, the ammunition was not inspected by the Defense Contract Management Agency (DCMA) at any point during shipment to Bagram Airbase or after its arrival, preventing adequate quality control. Had DCMA or the contracting officer attempted to inspect the ammunition after its arrival at the 22 Bunkers Complex, they would have found that it was impossible to match the ammunition with a specific task order or certificate of conformance due to AEY's use of identical lot numbers and conflicting transportation control numbers. Because the ammunition was procured as Commercial Off The Shelf (COTS) ammunition, the normal DCMA inspection process tracked acceptance for other COTS items. This primarily consists of kind, count and condition acceptance of sample lots at the delivery point. DCMA delegated this inspection to Army personnel considered experts in non-standard small arms ammunition. The contract contained no specific acceptance instructions or QALI for these items.

In addition to the other issues with the contract, AEY, on par with their history of non-performance in other contracts, was four months behind in ammunition deliveries by early January 2008. The company's lack of managerial ability, deceptive practices and, by its own admission to the contracting officer, unreliable sources of supply from the international arms market, resulted in a contract that was behind schedule and a contractor that was failing to supply the required ammunition.

During early 2008, the Army Procurement Fraud Branch (PFB) requested the Army Criminal Investigative Command (CID) to visually inspect AEY-provided ammunition. On January 25, 2008, CID agents took 335 digital photographs of ammunition, ammunition pallets and shipping documents in 15 storage containers containing ammunition supplied by AEY. Of those 15 containers, 14 contained various types of ammunition packaged in brown paper and cardboard boxes, wrapped in plastic, with AEY shipping documents attached to them. The only identification markings regarding the origin of the ammunition consisted of headstamps showing the numbers 31, 61, 71, 81 and 661 and dates of manufacture ranging from 1962 to 1974. Based on unclassified information available from the Defense Intelligence Agency, the headstamp numbers indicated that the 7.62x39mm ammunition in these 14 containers was manufactured at factories in the People's Republic of China. Based on the discovery that the ammunition was manufactured in China, the Army suspended AEY from contracting with the Government on March 25, 2008. Further deliveries of ammunition and payments on previously issued task orders were suspended on March 31, 2008. AMC terminated the contract with AEY for default on May 23, 2008, following its own investigation into the circumstances surrounding the award of the contract and the company's performance to date.

On June 19, 2008, AEY, Mr. Diveroli, Mr. Packouz, Mr. Podrizki and Mr. Merrill were indicted in the U.S. District Court for the Southern District of Florida, on one count of conspiracy, 35 counts of false statement, and 35 counts of Major Fraud Against the United States. These indictments were based on the repackaging of Chinese ammunition to hide its origin, the fraudulent certificates of conformance that accompanied the deliveries of this ammunition, and the subsequent payments by the Government based on the delivery of non-conforming ammunition. In August 2009, Mr. Diveroli pled guilty to one count of conspiracy. He is scheduled to be sentenced in November 2009.

### Discussion

A review of the award of the ANA and ANP ammunition contract shows two distinct points where the contracting system failed. First, the initial source selection team did not venture beyond the information presented to it. The team took into consideration only information presented by AEY. The Defense Contract Audit Agency (DCAA) was not requested to perform a financial capability audit until after the contract was awarded, and was unable to complete the audit because AEY could not provide sufficient financial data and support. Had the source selection committee taken steps to seek out other instances of AEY's performance or delve into the company's background, it would have found a history of non-performance and a company that had been tied to illegal activity.

Had the source selection team taken steps to actively contact organizations outside of the contracting community, it would have found that there is no single repository for contractor information within the Government. While the DoD maintains a database of prime contractors and their contracts that shares data regarding contractor performance, subcontracts and contracts with organizations outside the Department of Defense are not included. This is true even for contracts and subcontracts that are in direct support of ongoing DoD activities. While suspicion of illegality will not support a defacto debarment, had all the negative information been readily available to the Source Selection Evaluation Board, they most assuredly would have made a different award decision. The formulation of a single database that consolidates past performance information and lowering of the dollar threshold requiring the reporting of such information would prevent a repeat of the issues arising here.

The second point where the contracting system failed relates to the lack of quality control and documentation of shipments after AEY began deliveries of ammunition to Bagram Airbase. The first indications that the ammunition did not meet contract requirements and was of Chinese origin came several months after AEY began performing and was not confirmed until January 2008, a year after contract award. This is due to the skill required to differentiate COTS ammunition of one country from another. In addition, the ammunition could not be tracked upon delivery due to a lack of specific identifying shipment documentation, as AEY used the same lot numbers for all deliveries. Specific quality control instructions relating to the provenance of the ammunition may have led to the early detection of non-conforming ammunition. As it happened, the initial halt to AEY's continued performance was based on a suspension action initiated by PFB due to the use of Chinese ammunition in violation of the DFARS to meet contract requirements, not the quality control issues or the criminal investigation by ICE and DCIS.

The lack of coordination between law enforcement and the contracting community also played a factor in the failures to detect problems with AEY's history of performance. Since at least April 2006, ICE had been investigating AEY's sources of weapons and ammunition, a fact not shared outside the law enforcement community, thus preventing full disclosure of the risks involved with selecting AEY to the source selection team. Lacking this information, the source selection team erroneously reached the conclusion that there were no criminal allegations pending against the company or its management.

### Conclusion

In conclusion, the ANA and ANP ammunition contract awarded to AEY was flawed from the beginning due to a faulty review of AEY's contracting background and a lack of quality control at the point of delivery. Source selection teams should be required to actively seek out information regarding the past performance of companies in conjunction with DCAA and other agencies responsible for providing data on companies seeking Government contracts. Reliance on information provided by contractors, readily available to a single agency, may not provide a complete history in some cases to make proper source selection determinations. In the case of AEY, had the source selection team inquired with the DoS, the agency charged with monitoring the international traffic in arms, it would have found that AEY, its management, and several of its affiliates were on a watch list due to suspicion of illegal activity. In addition, companies should have an affirmative duty to provide complete contracting histories as part of their contract bids. This would shift the requirement to provide complete performance histories onto the contractor, not the contracting officer, and would include performance on subcontracts and contracts outside the DoD that are presently not readily available via existing databases.

The final lesson is that when contracting for non-standard items, greater care must be taken to ensure that quality control is maintained as those items are not regularly purchased by the Government, or manufactured based on specifications established by third parties or for the commercial market. Quality control should be flexible enough to accommodate the type of non-standard goods yet provide for adequate inventory tracking and ensure that the needs of the end user are met. The goal of quality control in these contracts should be to handle a non-standard item using standardized and meaningful management controls at all times.

This case serves as a useful tool in reviewing the issues involved with how to evaluate contractor performance and use quality controls in the procurement of non-standard goods by the DoD. It also serves as an excellent example of how a contractor can manipulate the contacting system by failing to disclose its performance history and substituting prohibited goods for those required under the contract. Fortunately, for the Government, AEY's deception was discovered and the company was prevented from doing any further damage to the procurement system through its suspension from contracting with the Government and subsequent criminal prosecution.

# **TAB E**



## Good Friends: A Case Study in Contracting Ethics and Integrity

You are a contracting officer at Warren Manor Air Force Base currently on temporary duty (TDY) travel to attend an acquisition community professional development seminar. While at the seminar you are approached during a break by Paul Johnson, the Chief Operating Officer of Water Conservation, Inc., a federal government contractor with whom Warren Manor has had several contracts. You first met Mr. Johnson years ago when he was a Lieutenant Colonel in the Air Force, and the two of you were assigned to the same base. Although you did not work in the same acquisition career field, your paths crossed often because he was the lead engineer on several contracts for which you were the contracting officer. Both of you always had a very cordial but professional relationship. Occasionally, you would also see each other at the officers' club and at various Air Force social functions.

Mr. Johnson greets you warmly, hands you his business card, and begins to reminisce about your old working relationship. He asks about some former colleagues who still work with you and makes other small talk. As the seminar is about to reconvene and you excuse yourself to return to your seat, he asks if he could speak with you after the meeting regarding one of his company's current contracts. You agree to do so, thinking that whatever the issues, a face-to-face meeting with a company senior executive might obviate the need for a week of emails later.

After the seminar ends, you and Mr. Johnson remain behind to discuss the issues on his contracts. You listen, take notes, and promise to investigate further upon returning to work. You advise him that you will get the right people together to fact-find and resolve the issues. Pleased with your quick-handling of the matter, you gather your belongings to leave the conference room, when Mr. Johnson stops you, saying, "There is something else I want to talk to you about." He proceeds to tell you how impressed he is with you and how you would "fit right in" with the senior management team at Water Conservation, Inc. "You know, you could make a lot more money than you are making now. A lifestyle change, actually. Plus, you've already got enough years to qualify for a Government retirement." You are flattered and say, "Someday, perhaps." Mr. Johnson suggests you talk more at the hotel bar during "happy hour" and you agree to meet him there. Over drinks, Mr. Johnson tells you that there is definitely a place at Water Conservation for you—he would only have to say the word to his personnel department and you could pretty much "name your salary." You tell him a job change is not something you are seeking just yet. "Maybe down the road," you say.

By now, you have had several drinks and as you glance at your watch, Mr. Johnson grabs your arm and says quietly, "A job change is not the only way we can help each other out." He alludes to your past association and confides that his company is trying to increase its business with the government. They are targeting some upcoming acquisitions that he "heard through the grapevine" are coming up for competition. He tells you that this is a fiercely competitive business and asks if there is anything you can do to "help a fellow officer." Then, out of the blue, he offers to give you a percentage of

all contracts that you can direct to his company. He tells you that no one will ever know because he will be discreet.

**Questions:**

**What would you do?**

**For each of the following three scenarios, discuss the integrity and ethics issues.**

**What laws, if any, have been broken?**

**What should the contracting officer report and to whom? Why?**

Scenario 1

You are totally appalled that someone would approach you with a bribe. You ask yourself what is it about you that would make him think that he could approach you in such a manner. Since you are caught off-guard, you make a small joke about it and quickly retire to your hotel room. There you sit at your desk and collect your thoughts as you allow your breathing and heartbeat to return to near-normal levels. You ask yourself, why would he possibly think I would ever agree to such a thing? Is this sort of business conduct now becoming commonplace? You think back to what you had been told in your last ethics brief—that you are supposed to report such incidents to the Air Force Office of Special Investigations immediately, but you wonder if you will be implicated because you did not directly refuse the bribe. You did not even directly refuse the job offer. You remember that your friend is a Special Agent for the Air Force Office of Special Investigations, so you call her and invite her to lunch the following day when you will have returned to your office. She agrees and over lunch you relay the story to her. After lunch she takes you to her office where you brief the Commander on what has transpired. They ask you to play along with the contractor, and you agree.

Scenario 2

You cannot believe your luck. You are trying to close on the purchase of a new house and, having just bought a new car, you do not have enough cash for the house down payment. If you do this just once, you should make enough money to make a substantial down payment on the house. If things work out, you can probably take a vacation also. That would make things a lot easier with your spouse who has been after you to spend more time at home instead of all the overtime you have been putting in at work. A voice in the back of your head tells you what you are about to do is wrong, but you convince yourself that it is no different than many other practices that you believe are



commonplace in federal procurement—noncompetitive awards; skewed source selections that favor incumbent contractors; organizational conflicts of interest that are “papered over;” senior officials taking high positions in industry. Besides, Water Conservation is not a sham company—they do good work. What is wrong with doing this just once, and who would know? You tell Mr. Johnson that you accept his offer.

### Scenario 3

You replay in your mind what just happened. You convince yourself that this was just a “what if” conversation between two guys away from the office. Since you are very near to retiring, you do not want to get involved in anything controversial. You decide that you will not accept Mr. Johnson’s offer, but you also decide to say nothing further about it—to anyone. You will pretend that the conversation never happened.

\* \* \* \* \*

Case Study continues:

You decide to inform Mr. Johnson that you will accept his marvelous offer. Within two months, you have an opportunity to direct a sole source award to Mr. Johnson’s company. You inform the requiring activity that you know of a small business, capable of meeting the requirement. You advise them that the company they are currently considering, another small business, is not qualified and does not have the experience that Water Conservation has, and you strongly recommend Mr. Johnson’s company. The requiring activity agrees, and the Department makes the award to Mr. Johnson’s company. After performance begins, you and Mr. Johnson meet for lunch at a quiet restaurant away from the air base, where he gives you your first installment of fifty thousand dollars toward your total payment of two hundred thousand dollars. Over the next few months, you receive the remainder of the “referral fee.”

### Questions:

**Discuss the integrity and ethics issues.**

**Have any laws been broken?**

**Discuss how one’s moral compass can be affected by such factors as one’s relationships with others, financial difficulties, or perceptions that misconduct and improper business practices are tolerated in one’s profession.**

\* \* \* \* \*

## Case Study conclusion:

Your second payment is \$100,000. WOW! You never expected anything like this. Mr. Johnson says that he added a little extra because he appreciates what you did for him. He tells you just how easy it is to continue to direct work his way and encourages you to continue to do so. You tell him that you will think about it. Your life is much better now that you have the extra money. You are able to do so much more than you ever could before. You think to yourself, I'll do this just one more time then I WILL QUIT! You continue to direct contracts to Mr. Johnson's company, and he continues to pay. A few people notice that you are a lot less stressed, but they have no idea. Your relationship with Mr. Johnson is very comfortable. The two of you regularly meet for lunch to discuss the next contract, or communicate by e-mail to designate locations for meeting and for payment.

Life is great until the Office of Special Investigations (OSI) calls you in for questioning regarding contracts awarded to Mr. Johnson. It turns out that you were not the only one that Mr. Johnson had approached, but you were the only one that accepted his offer. Your friend, Chester Brazier was offered the same deal as you; however, he contacted the OSI immediately. Two years after the fiasco begins, it ends with you being arrested for accepting a bribe, and conspiracy, and Mr. Johnson being arrested on charges of bribery, fraud, and conspiracy. Both of you are eventually convicted and are serving prison time.

# TAB F



**Mission First:  
A Case Study in Contracting Ethics and Integrity**

You are an experienced contracting officer, newly assigned at a Defense agency whose contracting organization has experienced a lot of turnover. Your branch consists of you, two contract specialists who have been with the agency for several years, a college intern, and “TJ,” a support contractor who recently retired from federal service. There are also several vacant positions. Your branch manager, John Smiley, is one year away from retiring from federal service. His office is adorned with a large sign that reads, “Mission First.” John is normally a pleasant fellow but seems to become easily irritated whenever a customer calls to complain about the support provided by the contracting organization. You have been on the job less than a month and have already overheard John snap at your colleagues on several occasions, saying, “I don’t care. Just get it done. Mission first.”

You’ve just set aside the afternoon to process a new award document using the agency’s automated contract writing system. While you focus on the onerous data entry requirements of the new system, your concentration is broken by the intern’s voice: “John wants us all in his office in five minutes for a meeting.”

At the meeting, John explains that the agency’s annual Operations and Maintenance budget has received a sizable supplemental appropriation to support ongoing contingency operations in Iraq and Afghanistan. The agency’s senior leadership wants this funding obligated as soon as possible. The branch has just been inundated with quickly-prepared purchase requests, and customers are demanding prompt action. John hands everyone a pile of purchase requests, and announces, “I want these awarded by the end of next month. Failure is not an option.”

Returning to your desk, you start to review the purchase request folders and become alarmed at what you see. All are for various service contract requirements but are lacking well-written Performance Work Statements (PWS). Many seem to have been specifically written for an incumbent contractor and even have the contractor’s name included in the PWS. Several folders contain documents labeled “Independent Government Cost Estimate (IGCE)” and other documents that appear to be contractor quotes in the exact same amount as the IGCEs. Other purchase request folders have a contractor’s time-and-materials/labor hour quote and a note from the requesting office’s coordinator (the agency does not have a dedicated Price Analysis department) saying, “Looks okay.” Almost all the folders include draft memoranda “Justifications and Approval for Other Than Full and Open Competition,” but almost all are poorly supported and legally insufficient.

As you walk to John Smiley’s office to discuss your concerns, you note that TJ, your support contractor, has already begun processing his assigned workload and is preparing award documents for John’s execution. You glance down and notice that the first one is made out to the same company that employs TJ. As if reading your mind, TJ shouts, “No worries. It’s all good. I don’t have execution authority.” As you continue past the contract specialists, you are amazed at the progress they have already made in preparing award documents. You are concerned that your colleagues appear not only to be disregarding requirements for publicizing contract actions but also to be carelessly using the agency’s contract writing system in selecting

clauses and preparing the prospective solicitation and contract documents. You also suspect they are not bothering to read the associated pricing memoranda and supporting draft justifications and approvals.

In John Smiley's office, you express your concerns that these purchase requests cannot be processed in a timely fashion as received. John listens and then says, "Look, we do not have the luxury of time to cross all the t's and dot all the i's here. Our mission is too important. Do the best you can. Just remember, we have never failed to meet our obligation targets."

- 1. Identify the contracting ethics and integrity issues that are presented in this case.**
- 2. Describe WHAT you would do and WHY you would do it.**
- 3. Describe WHY it is important for members of the acquisition community to have a shared sense of professional integrity.**

**[DISCUSSION]**

## Instructor Guide

### **Question 1: Identify the contracting ethics and integrity issues that are presented in this case.**

It is important for readers of this case study to first determine whether any ethics and integrity issues have been breached before deciding what to do. How they frame the problem will determine what actions they might take. Is this a case where an over-worked contracts staff is merely professionally “sloppy”—cutting corners with procedures and process, oblivious to the impact on procurement system integrity and fairness? If that is so, are there not still integrity and ethical concerns? Are there any indicators of possible fraud in the pre-solicitation phase or award of contracts by this agency? Are the issues confined to the contracting office?

### **Question 2: Describe WHAT you would do and WHY you would do it.**

Answers will vary to the question, “What would you do in this situation?” Some will say they would do something while others might do nothing for fear of making someone angry or “rocking the boat.” Discussion should address reasoning behind the decision to act or not act, from a moral, ethical, and legal perspective.

### **Question 3: Describe WHY it is important for members of the acquisition community to have a shared sense of professional integrity.**

Acquisition professionals must fully embrace principles of ethical conduct and integrity in performing their duties. An important teaching point in this case is that ethical transgressions in the acquisition field—even those that do not involve the transgressor receiving an improper financial benefit or engaging in conduct that places a financial interest above public duty—impact public trust and confidence in a fair and open system. Consider the statement of guiding principles for the Federal Acquisition System at FAR 1.102, and also the Basic Obligations of Public Service under 5 CFR 2635:

#### FAR 1.102 Statement of guiding principles for the Federal Acquisition System:

“(a) The vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer, *while maintaining the public’s trust* and fulfilling public policy objectives...

(b) The Federal Acquisition System will....

(3) *Conduct business with integrity, fairness, and openness*”

#### 5 CFR 2635 STANDARDS OF ETHICAL CONDUCT FOR EMPLOYEES OF THE EXECUTIVE BRANCH:

(a) ***Public service is a public trust.*** Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations.

(b) General principles. The following general principles apply to every employee and may form the basis for the standards contained in this part. Where a situation is not covered by the standards set forth in this part, employees shall apply the principles set forth in this section in determining whether their conduct is proper.

(1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.

(2) Employees shall not hold financial interests that conflict with the conscientious performance of duty.

(3) Employees shall not engage in financial transactions using nonpublic Government information or allow the improper use of such information to further any private interest.

(4) An employee shall not, except as permitted by subpart B of this part, solicit or accept any gift or other item of monetary value from any person or entity seeking official action from, doing business with, or conducting activities regulated by the employee's agency, or whose interests may be substantially affected by the performance or nonperformance of the employee's duties.

(5) ***Employees shall put forth honest effort in the performance of their duties.***

(6) Employees shall not knowingly make unauthorized commitments or promises of any kind purporting to bind the Government.

(7) Employees shall not use public office for private gain.

(8) ***Employees shall act impartially and not give preferential treatment to any private organization or individual.***



# TAB G



**The Plum Assignment:  
A Case Study in Contracting Ethics and Integrity**

You have just been assigned as the Contracting Officer for a large, follow-on requirement of great importance to your organization. You can hardly contain your excitement. You are happy to think that the Director of Contracting (DOC) believes that you are prepared to take on this assignment. You have worked hard to hone your skills, and, having personally worked on the original contract four years ago, you are very familiar with the history of this program. Most of the original people are still on the program. The person most likely to be designated as Contracting Officer's Representative (COR) is the best in the organization. Also, you have previously worked with most of the others assigned to the pre-award team, including the designated Budget Analyst, Cost and Pricing Analyst, and Legal Advisor. As you wait to meet with the DOC to discuss the acquisition timeline for the follow-on acquisition, you reflect on how this important assignment has been handed to you. You know that successful execution of this assignment will put you in contention for a promotion.

Over the next six weeks, you work with the requiring activity to prepare and issue the solicitation. Just as you thought, Ruby was designated as COR. You are really happy to have her work with you from the beginning of the process.

Two weeks after the solicitation is released, you hear chatter regarding the incumbent contractor. It appears that the program manager from the incumbent contractor; a former employee of the requiring activity, has been visiting the Government's premises more frequently than usual and spending quite a bit of time with Ruby, who is also the COR on the current contract. You trust Ruby, so you avoid jumping to conclusions that such meetings are anything but proper.

You happen to go to Ruby's office one day when the contractor's program manager is there. Their conversation stops abruptly as you enter the office, and the program manager's greeting seems a bit awkward. You notice that the Independent Government Cost Estimate (IGCE) for the follow-on requirement, along with other government internal documents, is lying on Ruby's desk. While only the cover pages of the documents are visible, not the contents, you still find this strange because Ruby is a very organized person, who keeps everything in its place. Her desk very seldom has any documents on it that are not being used. You decide not to say anything for now. But as you leave the office you realize you are beginning to have concerns about Ruby. There is nothing that you can prove, but you do not have a good feeling.

The solicitation closes and a total of five proposals are received, including one from the incumbent. The Source Selection Evaluation Board (SSEB) begins its evaluation. The second day of evaluations, you are asked a question regarding information provided in the incumbent contractor's proposal. It appears the incumbent has made some assumptions in its proposal that the other offerors have not. The first thing that crosses your mind is... Ruby!

The following day, you receive a note from the SSEB. They would like to see you. At the scheduled meeting, you are informed that there is information that is available to the incumbent that would make a big difference if known by the other offerors. Specifically, the incumbent has had access to planning information that is not available to the other offerors.

Your problems do not end there. The Technical Team has discovered a mistake in the Performance Work Statement (PWS). You cannot believe this. Prior to issuing the solicitation, you had several meetings with the program office to discuss the PWS, and they said they reviewed it with a fine-tooth comb. How could they have overlooked this matter? No one identified a problem until all the responses to the proposal failed to address one critical area.

As a result of your determining that there was a PWS deficiency, you decide to issue an amendment to the solicitation to give offerors an opportunity to revise their proposals. Ruby informs you that her supervisor (a senior official with a lot of organizational clout) is not at all happy with this turn of events. She reminds you that her supervisor had told you from the beginning that the contract needed to be awarded within four months and considers that you have now just wasted two months. Both Ruby and her supervisor are upset that you chose to issue a Request for Proposal (RFP) amendment over a technical detail, instead of making the award and issuing a simple PWS clarification as a contract modification afterwards. Ruby states that her supervisor has even threatened to have you removed as contracting officer if you do not get the contract awarded soon.

Late one evening several days later, you are sitting at your desk when Ruby's supervisor comes to your office. He is concerned that the current contract will expire soon and the successor contractor has not yet been decided. Responses to the amended RFP have not even been received yet. He explains that if a contractor other than the incumbent were to win, there must be a sufficiently long transition period to address important Status of Forces Agreement requirements. He tells you that he has no time to waste, and characterizes you as a "toad in the road." What are you going to do?

Prior to the receipt of revised proposals, an anonymous note informs you that the writer believes the "extra" information known only to the incumbent was not information it properly acquired in the course of performing the existing contract. Instead, the note alleges that the information was of a planning nature about the requirements for the ongoing solicitation and was provided to the incumbent by a government employee who incorrectly thought it to be non-critical. Could Ruby be the culprit? Could this planning information be of such a nature that if it were provided to all offerors, it could make a significant difference in the proposals? You ask yourself, why did someone tell you this anonymously? Why now? Ruby's supervisor is not going to be happy if this acquisition is delayed again.

By now, you are a wreck. What happened to the smooth running requirement that you were assigned a few months ago? What can you do? What should you do? What do you

do? You close your eyes and decide not to take any action. You will just move on to the next step.

Meanwhile, you are presented with a draft Justification and Approval (J&A) for Other Than Full and Open Competition for the current contract. The requiring activity wants to extend the life of the contract by six months and increase the ceiling on the contract. However, upon review, you see that the draft J&A is very poorly written. You make numerous suggested revisions and comments and return the draft for revision. Ruby returns the document to you two days later. It is still not satisfactory. The document has been extensively revised, but most of your requested changes have been ignored. You tell Ruby that you cannot sign the document as written. You elevate this to your supervisor who tells you that he has had a long conversation with requiring activity personnel and you need to expedite the award. Apparently, you are “taking too much time.”

You decide this situation is one that you cannot brush to the side and advise your supervisor that you will not sign the J&A until it is corrected. You go back and forth with the requiring activity for over a week. The Legal Advisor has reviewed the document and supports you 100 percent. The requiring activity finally makes your requested changes and the J&A is approved.

Prior to receipt of proposal revisions, the requiring activity (the organization that provided most of the members of the SSEB), makes it known that the SSEB has one week to review all proposals and report the results to the Source Selection Authority. You explain to your supervisor why it is critical to allow the two week time frame as planned. Your reasoning falls on deaf ears. By now, the various team members are tired of being in the hurry-up-and-wait mode. There are scheduled vacations, a wedding, and other work to be completed. Everyone, including you, wants this done now, but you also want it done right. You know that if the SSEB takes its time, it may be able to determine whether the incumbent benefited from the “extra” information it possessed. If it rushes the evaluation, this may not be possible. From the beginning, you have had a gut feeling that the right thing to do is to provide the same information to all competing offerors. You decide to discuss the matter with the Legal Advisor who questions why you did not bring this matter to his attention earlier. He advises you immediately either to amend the RFP and provide the information to all offerors, or to cancel the RFP and re-solicit. Now you have gone and done it... another delay.

You decide to amend the solicitation. After a total of seven amendments to the solicitation, you finally receive good proposals, narrow the competitive range to three, and award the contract. There are no protests.

Your “plum assignment” was not what you thought it would be, but the lessons learned are invaluable.



**TAB H**





**Original Report on Action Item 4a  
DoD Panel on Contracting Integrity  
Commercial Item Determination**

**Submitted to:**

**Chair  
Subcommittee on Adequate Pricing  
DoD Panel on Contracting Integrity**

**Prepared by:**

**Working Group  
Subcommittee on Adequate Pricing**

**December 15, 2009**

## Table of Contents

	Page
Section I: Executive Summary	1
Section II: Introduction	2
A. Action	2
B. Background	2
C. Members	3
D. Objectives	3
Section III: Working Group Analysis	3
A. Survey Methodology	3
B. Contract Review	4
Section IV: Summary Results	4
Section V: Recent Regulatory Changes	7
Section VI: Recommendations	7
Appendix:	9
FAR 2.101; Definition of Commercial Item	

## **Section I: Executive Summary**

This report represents the final deliverable of the Adequate Pricing Subcommittee of the Panel on Contracting Integrity for 2009 Action 4a

Section 813 of the National Defense Authorization Act (NDAA) for FY 2007, required the Secretary of Defense to establish a panel to be known as the “Panel on Contracting Integrity” (hereafter, “the Panel”) to conduct reviews of progress made by the Department of Defense (DoD) to eliminate areas of vulnerability of the defense contracting system that may allow fraud, waste and abuse to occur and to recommend changes in law, regulations, and policy that it determines necessary to eliminate such areas of vulnerability. One area of vulnerability identified by the Panel addressed risks associated with ensuring adequate contract pricing.

In 2009, the Panel tasked the Subcommittee on Adequate Pricing to establish a working group to assess the need for establishing thresholds for higher-level approval of commercial item determinations based on "of a type" and develop any additional recommendations that would address contract pricing vulnerabilities relating to the procurement of commercial items. In addition, the subcommittee would continue to assess the need for a legislative change proposal to delete the terms “of a type” and “offered for sale” from the definition of a commercial item.

The subcommittee established a working group with representatives from Defense Procurement and Acquisition Policy (DPAP), DoD Inspector General (DoDIG), the Defense Contract Audit Agency (DCAA), and the Services to identify existing commercial item determination approval requirements and associated requirements for determining fair and reasonable prices. The working group also reviewed a sample of commercial contract awards from the Federal Procurement Data System – Next Generation (FPDS-NG) database that appeared to be awarded based on the “of a type” criterion. The working group selected pricing actions from the Army, Navy, Air Force, the Defense Logistics Agency (DLA), and the Defense Information Systems Agency (DISA). The working group analyzed the selected “of a type” commercial procurements to:

- Assess compliance with the Defense Federal Acquisition Regulation Supplement (DFARS) 212.102 documentation requirements for commercial item determinations; and
- Assess sufficiency of the supporting documentation for fair and reasonable pricing.

The working group has completed its analysis and determined that “of a type” and “offered for sale” language in the commercial item definition continues to be a

contracting vulnerability. In summary, the review results and recommendations are as follows:

- Commercial item determinations are not always sufficiently documented in accordance with DFARS 212.102. The subcommittee recommends a standard format be developed for documenting commerciality determinations that would include the minimum documentation requirements. The documentation requirements and content in Federal Acquisition Regulation (FAR) 6.303 for justifications of other than full and open competition may be used as a baseline to develop the standard format.
- Market research efforts supporting commerciality determinations are not always adequately documented. The subcommittee recommends that there be more emphasis on conducting market research from reliable sources in support of commerciality determinations and to record results in an acceptable format. The format of the market research should be tied to the content requirements of the commerciality determination to streamline the process.
- Price reasonableness determinations are not always sufficiently supported for non-competitive actions. The subcommittee recommends that DPAP reinforce the current policies/procedures on determining price reasonableness under commercial acquisitions and the documentation requirements necessary.

In addition to the recommendations cited above by the working group, the subcommittee continues to recommend a legislative proposal be submitted for the FY 2012 Defense Authorization Bill to eliminate “of a type” and “offered for sale” from the definition of commercial item to eliminate this contracting vulnerability. In the interim, the subcommittee recommends that the DFARS be revised to require a higher-level approval (above the contracting officer) for commercial contracting actions that are based on “of a type” commercial procurements or “offered for sale” yet not currently sold to the general public.

## **Section II: Introduction**

**A. Action.** Establish a working group to assess the need for establishing thresholds for higher-level approval of commercial item determinations based on "of a type" as provided in FAR 2.101, definition of commercial item, and develop recommendations. In addition, based on its review, the subcommittee would continue to assess the need for a legislative change proposal to delete the terms “of a type” and “offered for sale” for the definition of a commercial item.

**B. Background.** As part of its FY 2008 actions, the subcommittee pursued a recommendation to submit a legislative proposal to change the commercial item

definition to eliminate the phrase “of a type” and “offered for sale.” The subcommittee concluded that this language is a contract pricing vulnerability where fair and reasonable prices may not be established due to the lack of competition and the lack of a requirement for cost or pricing data. As a result of a meeting with Deputy Under Secretary of Defense (Industrial Policy) (DUSD(IP)), the subcommittee agreed to perform additional work to assess the current vulnerability. The subcommittee agreed to review a sample of sole source commercial item procurements awarded on the basis of “of a type” or “offered for sale” to assess the sufficiency of supporting documentation regarding the determination of a commercial item and the determination of a fair and reasonable price. Based on the results of this review, the subcommittee would determine if there is a need to proceed with the legislative proposal or, at a minimum, assess the need for establishing thresholds for higher-level approval of commercial item determinations based on “of a type.” The subcommittee planned to report the results of this review to the Panel by December 2009.

**C. Working Group Members.** The DoD working group consisted of representatives of DPAP, DoD IG, DCAA, Army, Navy and Air Force.

**D. Objectives.**

The primary objectives of this task were to:

- identify the policies/procedures addressing commercial item contracts used by contracting personnel;
- assess the sufficiency of documentation supporting contracting officers commercial item determinations in accordance with prescribed regulations; and
- assess the sufficiency of supporting documentation for the determination of fair and reasonable prices.

**Section III: Working Group Analysis.**

**A. Survey Methodology**

The commercial contract awards selected for analysis by the working group originates, in part, from FPDS-NG ad hoc reports. The ad hoc reports included basic contract awards executed in fiscal years 2008 and 2009 (as of March 31, 2009), valued over \$10M (option years inclusive), and coded as having been awarded using FAR Part 12 procedures.

For the sampled contracts, the contracting activities were asked to validate that the contract actions were Part 12 acquisitions; and, if so, to complete a survey with relevant data on commerciality determinations and price reasonableness decisions. The initial

sample places greater emphasis on non-competitive actions and includes randomly selected contracts from the contracting activities.

FPDS-NG did not provide a wide enough universe for selection of commercial contracts awarded based on the “of a type” portion of the definition of a commercial item. In addition, the working group members encountered other challenges while analyzing the data in FPDS-NG. Some of these challenges included miscoded information and FPDS-NG is not designed to identify “of a type” contracts within commercial contracts. Therefore, it was necessary for several working group members to issue a manual data call to identify a sample of contracts that would be considered “of a type.” In total, 17 high dollar contract awards were selected for analysis.

**B. Contract Review**

1. The next step was to determine if the validated contracts were for commercial items “of a type” (e.g. not sold, leased, or licensed to the general public in substantial quantities) as provided in FAR 2.101. This step proved challenging because commerciality determinations varied in format and did not always document which of the eight elements within the FAR definition had been met (see Appendix).

2. After reviewing all relevant information, several contracts were deleted from the sample; for example, one was clearly a service customarily used by the general public or by nongovernmental agencies. After reviewing relevant information, the working group isolated contracts that covered a range of products and services that appeared to fit the “of a type” category of commercial items.

3. A summary of the sample contracts from the FPDS-NG commercial item database and supplemental data calls are as follows:

<b>Services/Components</b>	<b># of Contracts</b>	<b>Contract Amount</b>
Air Force	3	\$ 170,033,189
Army	4	71,164,550
Navy	7	799,095,077
Other Defense Agencies	<u>3</u>	<u>305,356,718</u>
Total	<u>17</u>	<u>\$1,345,649,534</u>

**Section IV. Summary Results.**

**A. Policies and procedures used for commercial item contracts:** Contracting activities rely on the FAR/DFARS and acquisition supplements to execute commercial item contracts. The Office of the Secretary of Defense, Acquisition, Technology, and Logistics (OSD AT&L) handbook on commercial item contracts is also used. Some

activities have augmented these regulations with their own guidance. In addition to FAR/DFARS, for example, Air Force contracting professionals rely on the Air Force Federal Acquisition Regulation Supplement (AFFARS) to execute commercial item contracts. The Air Force Materiel Command (AFMC) has also developed a handbook that is used by their commands. This handbook provides examples to assist contracting professionals in understanding and applying the commercial item definition.

It should be noted that the OSD AT&L handbook on commercial item contracts is currently being revised. DoD IG representatives met with DPAP to provide a number of revisions that should to be made prior to the revised handbook being released.

**B. Commerciality Determinations.** Contracting officers are generally documenting their commercial item determinations (i.e., document in writing that the acquisition meets the commercial item definition). However, the working group concluded, that in several cases, market research efforts are not documented adequately in the file to support commerciality determinations. DFARS 212.102 requires contracting officers to follow the procedures in Procedures, Guidance, and Information (PGI) 212.102 (a) regarding the file documentation. PGI 212.102 states that contracting officers shall ensure that contract files fully and adequately document the market research and rationale supporting a conclusion that a commercial item definition has been satisfied. The PGI further states that particular care should be taken to document determinations for “modifications of a type” and items “offered for sale.”

Commerciality determination formats vary across Departments/Components. The majority use separate memoranda signed by the contracting officer. At least one activity uses a checklist that identifies the FAR 2.101 commercial item definition elements. In two instances, the commerciality determination consisted of a statement made within the Business Clearance Memorandum (BCM) and an approved Justification and Authorization (J&A) that the requirement met the FAR 2.101 commercial item definition. Many times, the complexity of the acquisition dictated the detail of the commerciality determinations and the formats ranged from a memorandum for the record to a checklist.

Several commerciality determinations did not adequately substantiate/validate the facts of how the instant requirement met the factors in the FAR definition. In few instances, statements in J&As (and in one case, in market research documents) about the commercial nature of the requirement actually conflicted with statements made in the signed commerciality determinations. Of particular concern is the fact there were instances that commerciality determinations were made after release of the Request for Proposal/Request for Qualifications (RFP/RFQ).

In several cases, market research efforts were not documented adequately in the file to support commerciality determinations as the specific details on market research efforts to support the decision was lacking. There is no consistent approach or format

followed to initiate/conduct market research or to document results. There were some instances where the extent of market research efforts had been briefly mentioned in the J&A and/or commerciality determination; but, specific details regarding market research efforts were lacking. There was at least one case where a summary Excel matrix depicting market research results was attached to a commerciality determination; but it lacked details clearly depicting the outcome of the analysis. In at least one case, Wikipedia was used as a means to support market research efforts for a commerciality determination. Information in Wikipedia may be unreliable as it can be easily changed by anyone with access to the internet.

Contracting officers are signing commerciality determinations. There is no level above the contracting officer review or other approval requirements on commerciality determinations.

**C. Price Reasonableness Determinations.** The working group concluded that, in several cases, price reasonableness determinations were not sufficiently documented in the contract files. Contracting officers document their price reasonableness determination of a fair and reasonable price using various methods. In addition, in several cases the extent and supporting information related to the market research efforts was minimally documented in BCMs. The extent of supporting documentation within the BCMs varied as follows:

- Several contained statements indicating that prior prices had been determined reasonable under other contracts. Several files lacked specific details validating proposal analysis techniques used in the prior contracts and the rationale explaining how such techniques support reasonableness of the prices under those contracts.
- For the most part, when contracting officers used price analysis techniques to determine price reasonableness they relied on information available within the government (from previous or current contracts within DoD for same or similar products or services with the contractor).
- In some cases, the contracting officers relied on vendor catalog prices, published commercial price lists (including General Services Administration (GSA) Federal Supply Schedules), commercial sales data from contractor clients and other information (other than cost or pricing data). However, in at least two non-competitive actions, the contractors did not provide the additional information on commercial sales citing non-disclosure agreements with its commercial or foreign government clients.
- In at least one case the contractor's proposed price was accepted "as is" without attempts at negotiating adjustments for volume discounts.



- In a few cases, field pricing or technical expert (DCAA, Defense Contract Management Agency (DCMA), or Agency pricers) support was requested in the formulation of pre-negotiation objectives. However, the extent of the support was not always clearly explained in the documents.
- Many of the BCMs lacked reference to or discussion of an independent government estimate for the cost of the requirement.

## **Section V: Recent Regulatory Changes**

**DFARS Case 2008-D011, July 15, 2009 Interim Rule.** National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181). Section 815 limits the conditions under which major weapon systems may be treated as commercial items and acquired under procedures established for the acquisition of commercial items. In addition, Section 815 requires DoD to modify its regulations on the acquisition of commercial items to clarify that the terms “general public” and “nongovernmental entities” do not include the Federal Government or a state, local, or foreign government.

The subcommittee reviewed the interim rule and continues to believe that vulnerability still exists as many of the department’s acquisitions are not directly related to major weapon systems.

## **Section VI: Recommendations:**

There is definite need for improvement in documentation efforts of commercial items acquisitions. In summary, the review results and recommendations are as follows:

- Commercial item determinations are not always sufficiently documented in accordance with DFARS 212.102. The subcommittee recommends a standard format be developed for documenting commerciality determinations that would include the minimum documentation requirements. The documentation requirements and content in FAR 6.303 for justifications of other than full and open competition may be used as a baseline to develop the standard format.
- Market research efforts supporting commerciality determinations are not always adequately documented. The subcommittee recommends that there be more emphasis on conducting market research from reliable sources in support of commerciality determinations and to record results in an acceptable format. The format of the market research should be tied to the content requirements of the commerciality determination to streamline the process.
- Price reasonableness determinations are not always sufficiently supported for non-competitive actions. The subcommittee recommends that DPAP reinforce the

current policies/procedures on determining price reasonableness under commercial acquisitions and the documentation requirements necessary.

In addition to the recommendations cited above, the subcommittee continues to recommend a legislative proposal be submitted for the FY 2012 Defense Authorization Bill to eliminate “of a type” and “offered for sale” from the definition of commercial item to eliminate this contracting vulnerability. In the interim, the subcommittee recommends that the DFARS be revised to require a higher-level approval (above the contracting officer) for commercial contracting actions that are based on “of a type” commercial procurements or “offered for sale” yet not currently sold to the general public.

## Appendix

Commercial item definition provided at FAR 2.101:

- (1) Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and--
  - (i) Has been sold, leased, or licensed to the general public; or,
  - (ii) Has been offered for sale, lease, or license to the general public;
- (2) Any item that evolved from an item described in paragraph (1) of this definition through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Government solicitation;
- (3) Any item that would satisfy a criterion expressed in paragraphs (1) or (2) of this definition, but for --
  - (i) Modifications of a type customarily available in the commercial marketplace; or
  - (ii) Minor modifications of a type not customarily available in the commercial marketplace made to meet Federal Government requirements. “Minor modifications” means modifications that do not significantly alter the nongovernmental function or essential physical characteristics of an item or component, or change the purpose of a process. Factors to be considered in determining whether a modification is minor include the value and size of the modification and the comparative value and size of the final product. Dollar values and percentages may be used as guideposts, but are not conclusive evidence that a modification is minor;
- (4) Any combination of items meeting the requirements of paragraphs (1), (2), (3), or (5) of this definition that are of a type customarily combined and sold in combination to the general public;
- (5) Installation services, maintenance services, repair services, training services, and other services if--
  - (i) Such services are procured for support of an item referred to in paragraph (1), (2), (3), or (4) of this definition, regardless of whether such services are provided by the same source or at the same time as the item; and
  - (ii) The source of such services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government;
- (6) Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed or specific outcomes to be achieved and under standard commercial terms and conditions. For purposes of these services—
  - (i) “Catalog price” means a price included in a catalog, price list, schedule, or other form that is regularly maintained by the manufacturer or vendor, is

either published or otherwise available for inspection by customers, and states prices at which sales are currently, or were last, made to a significant number of buyers constituting the general public; and

(ii) "Market prices" means current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated through competition or from sources independent of the offerors.

(7) Any item, combination of items, or service referred to in paragraphs (1) through (6) of this definition, notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor; or

(8) A nondevelopmental item, if the procuring agency determines the item was developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple State and local governments.

# TAB I





ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

DEC 15 2009

MEMORANDUM FOR CHAIRMAN OF THE JOINT CHIEFS OF STAFF  
COMMANDER, UNITED STATES SPECIAL OPERATIONS  
COMMAND (ATTN: ACQUISITION EXECUTIVE)  
COMMANDER, UNITED STATES TRANSPORTATION  
COMMAND (ATTN: ACQUISITION EXECUTIVE)  
DEPUTY ASSISTANT SECRETARY OF THE ARMY  
(PROCUREMENT), ASA (ALT)  
DEPUTY ASSISTANT SECRETARY OF THE NAVY  
(ACQUISITION & LOGISTICS MANAGEMENT), ASN  
(RDA)  
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE  
(CONTRACTING), SAF/AQC  
DIRECTORS OF THE DEFENSE AGENCIES  
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Department of Defense Panel on Contracting Integrity –  
Prime Contract/Subcontract Surveillance Information Request

Section 813 of the John Warner National Defense Authorization Act for Fiscal Year 2007, Public Law 109-364, directed the Department of Defense (DoD) to establish a Panel on Contracting Integrity. The purpose of the Panel is to conduct a Department-wide review of vulnerabilities that might lead to contracting fraud, waste, and abuse and, where appropriate, provide Congress with recommendations for improvement.

In its 2008 report to Congress, the Panel identified 28 actions for implementation in 2009 in ten core focus areas. One of the 2009 action items required the Panel's Adequate Pricing subcommittee to review and assess the current regulations, including Procedures, Guidance and Information (PGI), related to contracting officer surveillance over prime contractor's pricing of its subcontracts. This recommendation stemmed from the DoDIG's Report, D-2008-097, dated May 23, 2008, which identified cases where the Government or industry failed to perform the necessary subcontract cost or price analysis for emergent hurricane relief efforts to ensure the Government paid a fair and reasonable price.

Since contracting officers are responsible for determining price reasonableness of prime contracts, which often include subcontract costs, the subcommittee was tasked with assessing existing regulations/PGI to determine if they provide sufficient coverage with

regard to the contracting officer's oversight responsibility to ensure that prime contractor's are fulfilling their obligation to perform adequate subcontract pricing and monitoring. The subcommittee's initial assessment of subcontract pricing coverage of the Federal Acquisition Regulation (FAR), Defense Federal Acquisition Regulation Supplement (DFARS), and PGI indicates that the regulatory requirements and guidance appear adequate. However, in light of the DoDIG findings, there are concerns that the coverage may not be implemented effectively, especially for emergent requirements.

To accomplish a more comprehensive assessment and provide recommendations, the subcommittee is soliciting your input on specific policies, procedures and best practices that are in place at the Component level to ensure that prime contractors are properly monitoring their subcontractors. In addition, the subcommittee welcomes your comments and recommendations on how to improve subcontract pricing analysis within the Department.

Components are reminded that they should continue to assess compliance with the existing regulations and guidance during execution and procurement management reviews.

Please submit your response, if any, by December 31, 2009. Your responses and questions may be addressed to Mr. David Mabee at David.Mabee@osd.mil or 703-602-0288.



Shay D. Assad  
Director, Defense Procurement  
and Acquisition Policy



**TAB J**





DEFENSE CONTRACT AUDIT AGENCY  
DEPARTMENT OF DEFENSE  
8725 JOHN J. KINGMAN ROAD, SUITE 2135  
FORT BELVOIR, VA 22060-6219

OFFICE OF THE DIRECTOR

December 8, 2009

MEMORANDUM FOR PANEL ON CONTRACTING INTEGRITY

SUBJECT: Recommendations Approval Levels for Time & Material (T&M) Contracts and Additional T&M Training

As part of the Panel's 2009 actions, the Adequate Pricing Subcommittee was tasked with establishing a working group to review approval levels for Time and Material (T&M) contracts relating to the contracting officer's determinations that the T&M contract type is the best contracting method for the procurement. The Subcommittee established a working group consisting of representatives from Defense Procurement and Acquisition Policy (DPAP), Defense Contract Audit Agency (DCAA), DoD Inspector General (DoDIG), and the Military Departments. As a result of the working group's review, the subcommittee recommends establishing a structured T&M contract approval requirement, enhancements to the Defense Acquisition University (DAU) T&M training materials, and requiring all contracting officers to complete the DAU training on T&M contracts after it has been revised (see below recommendation).

The Department considers T&M contracts as one of the least preferred contracting methods since they provide no positive profit incentive to the contractor for cost control or labor efficiency. As such, the working group reviewed the existing regulations and DoD Procedures, Guidance and Information (PGI) associated with awards of T&M contracts. The working group's review disclosed T&M contracts required limited approval beyond the contracting officer. FAR 12.207(b)(1)(ii) and FAR 16.601(d)(1) require that the contracting officer prepare a determination and findings (D&F) which supports that no other contract type is suitable. For the acquisition of commercial T&M services under competitive procedures, FAR 12.207(b)(2) provides detailed expectations as to the required content of the D&F, such as a description of the market research conducted. Under current regulations, the contracting officer's D&F must be approved by the head of the contracting activity only for contracts exceeding three years (base and option periods included).


The Government Accountability Office (GAO) has raised concerns over the use of T&M contracts. In June 2007, the GAO issued its report, *Improved Insight and Control's Needed over DoD's Time-and-Materials Contracts*, reference GAO-07-273. In this report, the GAO recommended that the Department exercise more diligence in justifying the use of T&M contracts. In response, DPAP issued a memorandum to the Military Departments and defense agencies on March 20, 2008, which required procedures to be developed to ensure compliance with the FAR requirements. In the GAO's most recent report on the use of T&M contracts, *Contract Management-Minimal Compliance with New Safeguards for Time-and- Materials Contracts for Commercial Services and Safeguards Have Not Been Applied to GSA Schedules Program*, reference GAO-09-579, the GAO found that DoD contracting officers rarely complied with the detailed FAR 12.207(b)(2) D&F content requirements for commercial T&M procurements. The GAO found that in many cases a D&F was not prepared at all. The GAO identified a general lack of awareness of the detailed FAR Part 12 D&F requirements at the agencies it reviewed. In addition, the GAO found that Agency internal management and legal reviews generally did not detect the contracting officers' failure to prepare a sufficient D&F.

The working group believes the limited approval requirements along with the contracting officers' failure to appropriately prepare the required D&F significantly increase the risk and vulnerability of inappropriate T&M contract awards within the Department. As a result, we have developed recommendations that include higher-level approval requirements for T&M contracts as a means to reduce the associated risk and vulnerability to the Department.

**T&M Approval Levels** – We recommend that the D&F supporting the awards of both FAR Part 12 and 16 contracting actions including contracts, delivery orders, task orders, and contract line items that are T&M or Labor Hour (LH) type actions require approvals which coincide with the approval levels required for other than full and open competition provided in FAR 6.304, Approval of the Justification. Further, approval authority for the highest threshold level should be no lower than the Agency's senior contracting official.

**Training** – We recommend that DAU incorporate Defense Contract Management Agency's (DCMA) T&M training materials into DAU's T&M course (CLC060). DCMA developed the internal training to reinforce FAR requirements on T&M contracting to its employees responsible for contracting, requirements definition, and contract administration. The DCMA training, accessible through DCMA's guidebook, focuses on surveillance of T&M/LH contracts; T&M/LH Withholds and Payments and the Closeout Process of T&M/LH Contracts. In addition, the DAU course should include the DoD policy from the DPAP memorandum, Subject: Approving Payments under Cost-reimbursement, time and material and labor hours contracts, dated April 14, 2008, that clearly outlines the authority for approval of interim and final vouchers for T&M contracts. This memorandum reiterates the responsibilities provided for in DFARS 242.803. Further, the requirement to develop Quality Assurance Surveillance Plans for T&M contracts to facilitate an assessment of contractor performance, as stated in a subsequent DPAP memorandum dated July 14, 2009, should be incorporated into the enhanced training.

To ensure consistency across the department, once the course is revised all contracting officers and other personnel supporting the requirements definition and contract administration for the acquisition process should be required to retake the DAU T&M course (CLC060) within six months.

  
Patrick J. Fitzgerald  
Director

# TAB K



# Seven Steps to Performance-Based Services Acquisition

## Seven Steps

to Performance-Based Services Acquisition

Introduction

Executive  
Summary

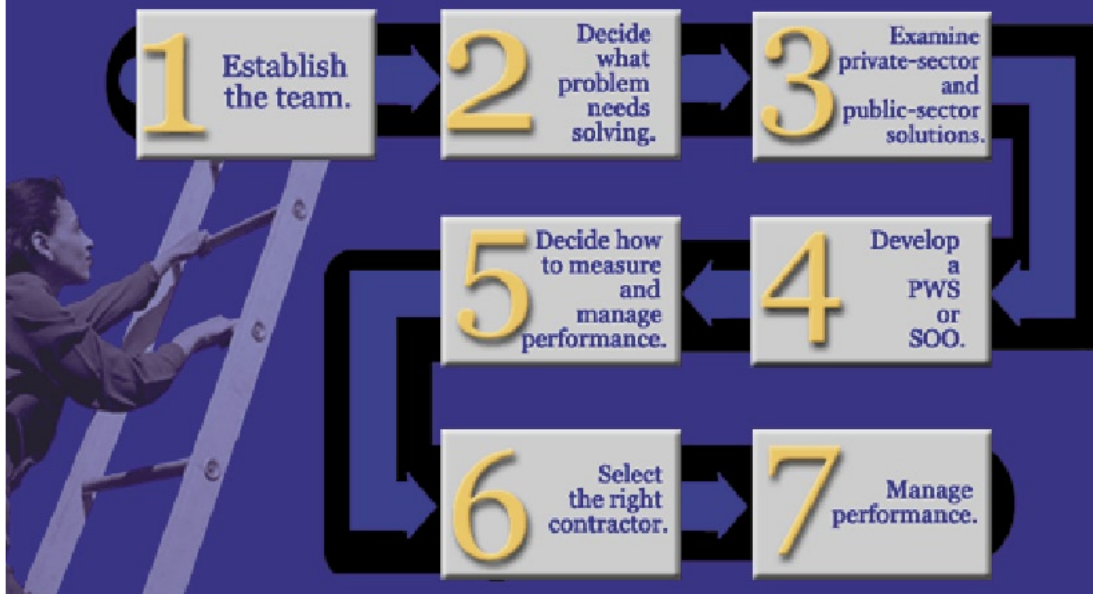
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FAQs

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This Project

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**For full version go to:**

[http://acquisition.gov/comp/seven\\_steps/index.html](http://acquisition.gov/comp/seven_steps/index.html)

**An Interagency-Industry Partnership in Performance**



# Introduction

## A Performance-Based Preference

Over the last decade and a half, innovators in Congress and the executive branch have reformed the laws and policies that govern Federal acquisition. Among the most important of these reforms are the Government Performance and Results Act of 1993, the Federal Acquisition Streamlining Act of 1994 (FASA), and the Clinger-Cohen Act of 1996. All of these laws send an important message about performance in federal programs and acquisitions.

As is evident from the dates above, performance-based service acquisition is not new. Office of Federal Procurement Policy Pamphlet #4, “A Guide for Writing and Administering Performance Statements of Work for Service Contracts,” (now rescinded) described “how to write performance into statements of work” and addressed job analysis, surveillance plans, and quality control in 1980. Eleven years later, OFPP Policy Letter 91-2, Service Contracting,” (also now rescinded) established that:

*It is the policy of the Federal Government that (1) agencies use performance-based contracting methods to the maximum extent practicable when acquiring services, and (2) agencies carefully select acquisition and contract administration strategies, methods, and techniques that best accommodate the requirements.*

The intent is for agencies to describe their needs in terms of what is to be achieved, not how it is to be done. These policies have been incorporated in the Federal Acquisition Regulation Subpart 37.6 (Performance-Based Contracting).

Law and regulation establish a preference for performance-based service acquisition. This Administration continues a long line of support for this acquisition approach. As cited in the Procurement Executives Council’s Strategic Plan:

*...over the next five years, a majority of the service contracts offered throughout the federal government will be performance-based. In other words, rather than micromanaging the details of how contractors operate, the government must set the standards, set the results and give the contractor the freedom to achieve it in the best way.*

—Presidential Candidate George W. Bush on June 9, 2000

## Benefits of Performance-Based Acquisition

Performance-based service acquisition has many benefits. They include:

- Increased likelihood of meeting mission needs
- Focus on intended results, not process
- Better value and enhanced performance
- Less performance risk
- No detailed specification or process description needed
- Contractor flexibility in proposing solution
- Better competition: not just contractors, but solutions
- Contractor buy-in and shared interests
- Shared incentives permit innovation and cost effectiveness
- Less likelihood of a successful protest
- Surveillance: less frequent, more meaningful
- Results documented for Government Performance and Results Act reporting, as by-product of acquisition
- Variety of solutions from which to choose

## Moving toward Performance-Based Competency

The federal acquisition workforce has not, to date, fully embraced performance-based acquisition. There are many reasons, such as workload demands, but more fundamentally, traditional “acquisition think” is entrenched in a workforce of dwindling numbers. The situation is complicated by lack of “push” from the program offices who have the mission needs and who fund the acquisitions... because there is where the true key to performance-based acquisition lies. It is not the procurement analyst, the contracting officer, or even the contracting office itself. Performance-based acquisition is a collective responsibility that involves representatives from budget, technical, contracting, logistics, legal, and program offices.

While there are leaders among us who understand the concept and its potential, it is difficult for an agency to assemble a team of people who together have the knowledge to drive such an acquisition through to successful



contract performance. This is especially true today because many more types of people play a role in acquisition teams. These people add fresh perspective, insight, energy, and innovation to the process -- but they may lack some of the rich contractual background and experience that acquisition often requires.

Performance-based service acquisition can be daunting, with its discussion of work breakdown structures, quality assurance plans, and contractor surveillance. Guides on the subject can easily run to and over 50, 75, or even 100 pages. This makes learning something new appear more complicated than it really is. The foundation for a successful acquisition involves a clear answer to three questions: *what do I need, when do I need it, and how do I know it's good when I get it?*

This virtual guide breaks down performance-based service acquisition into seven easy steps, complete with “stories” (case studies). It is intended to make the subject of PBSC accessible for all and shift the paradigm from traditional “acquisition think” into one of collaborative performance-oriented teamwork with a focus on program performance and improvement, not simply contract compliance. Once the shift is made, the library and links sections interwoven in this guide will lead you into the rich web of federal performance-based guidance.

*Have a good journey!*

## Executive Summary

One of the most important challenges facing agencies today is the need for widespread adoption of performance-based acquisition to meet mission and program needs. By memorandum, this Administration has set a goal for civilian agencies to apply performance-based acquisition methods on 40 percent (as measured in dollars) of eligible service actions (including contracts, task orders, modifications, and options) over \$25,000 in Fiscal Year 2006. The Department of Defense has a goal of 50 percent.

Although policies supporting performance-based contracting have been in place for more than 25 years, progress has been slow. The single most important reason for this is that the acquisition community is not the sole owner of the problem, nor can the acquisition community implement performance-based contracting on its own. The changes made to FAR 37.6 in February 2006 put more of the onus on the program office community - they're the ones with the performance-based budgeting requirement in the President's Management Agenda.

Laws, policies, and regulations have dramatically changed the acquisition process into one that must operate with a mission-based and program-based focus. Because of this, many more types of people must play a role in acquisition teams today. In addition to technical and contracting staff, for example, there is “value added” by including those from program and financial offices. These people add fresh perspective, insight, energy, and innovation to the process -- but they may lack some of the rich contractual background and experience that acquisition often requires.

This guide, geared to the greater acquisition community (especially program offices), breaks down performance-based service acquisition into seven simple steps.

- 1.** Establish an integrated solutions team
- 2.** Describe the problem that needs solving
- 3.** Examine private-sector and public-sector solutions
- 4.** Develop a performance work statement (PWS) or statement of objectives (SOO)
- 5.** Decide how to measure and manage performance
- 6.** Select the right contractor
- 7.** Manage performance

The intent is to make the subject of performance-based acquisition accessible and logical for all and shift the paradigm from traditional “acquisition think” into one of collaborative, performance-oriented teamwork with a focus on program performance, improvement, and innovation, not simply contract compliance. Performance-based acquisition offers the potential to dramatically transform the nature of service delivery, and permit the federal government to tap the enormous creative energy and innovative nature of private industry.

*Let the acquisitions begin!*



# TAB L





OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

SEP 14 2009

MEMORANDUM FOR SEE DISTRIBUTION

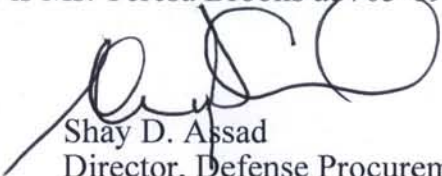
SUBJECT: Competition in Department of Defense Acquisition

Competition is the cornerstone of our acquisition process and the benefits are well established. The President's Memorandum on Government Contracting dated March 4, 2009, reinforces the importance of striving for an open and competitive process as an overriding obligation to American taxpayers and the need to place greater emphasis on achieving competition in our procurements. In Fiscal Year 2008, Department of Defense (DoD) competitive obligations totaled \$252 billion, a record 64 percent of DoD obligations. While this is better than DoD's ten year average of 61 percent, we must continue to emphasize the importance of competition and take appropriate action to overcome barriers and reach our competitive obligations goals in the years to come.

Meeting this goal requires a commitment to competition from personnel throughout the acquisition process, from identifying and developing requirements to putting them on contract. To facilitate this effort, a working group of representatives from various DoD components developed a standardized competition training tool to educate and focus all DoD agencies on current competition policy and guidance, reiterate the importance and benefits of competition, and highlight opportunities to increase competition in government acquisitions. The training tool is structured to emphasize key concepts with links to in-depth material for those desiring a more thorough understanding of policy and procedures. Additionally, it will both educate and motivate acquisition professionals and their technical experts to do their part in ensuring the competitive process is maintained, sustained, and nurtured. I am confident that the Department will benefit from this training and enable us to continue to fulfill our commitment to the American taxpayers. The training is available at: <http://www.acq.osd.mil/dpap/cpic/cp/docs/training.ppt>.

I ask Defense components to reinvigorate and expand the role of the competition advocate(s) and reinforce the importance of competition to everyone involved in the acquisition process, including the requirements community. To the maximum extent practicable, competition advocates are encouraged to take the lead to ensure this training is delivered in an environment that provides the greatest opportunity for real-time dialogue and discussion. An additional resource to gain access to this training material can be found on the Defense Acquisition University (DAU) Distance Learning Center as Continuous Learning Module (CLM) 055.

My point of contact for this initiative is Ms. Teresa Brooks at 703-697-6710 or [Teresa.brooks@osd.mil](mailto:Teresa.brooks@osd.mil).

  
Shay D. Assad  
Director, Defense Procurement  
and Acquisition Policy

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DEPUTY UNDER SECRETARY OF DEFENSE (LOGISTICS  
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**TAB M**








# The Black and White of Fraud, Waste, and Abuse

Bruce Burton ■ Lauren McLean



Defense budgets and procurement activity have risen dramatically over the years, increasing from \$304 billion in fiscal year 2000 to almost \$700 billion in fiscal year 2008.

Contracting for goods and services also saw substantial increases, with more than \$315 billion awarded on contracts in 2007. The volume alone created a strain on DoD procurement resources, but when it is considered that resource levels remained flat during this time, the environment was ripe for increased opportunities for fraud. Throw in increased urgency in DoD's support for the warfighter and you create the perfect storm for fraud, waste, and abuse; and that is exactly what we see in the news headlines on almost a daily basis.

---

**Burton** is the deputy assistant inspector general for the acquisition and contract management directorate in the DoD Office of the Inspector General. **McLean**, currently in the Audit Policy and Oversight branch in the DoD Office of the Inspector General, has numerous years of experience as an auditor, both in DoD and industry.

Some examples of eye-catching headlines:

“Feds Charge 22-year-old Pentagon Contractor with Procurement Fraud”—This case involved a defense contractor who defrauded the government by delivering faulty, decades-old munitions to Afghan security forces. The 22-year-old company president and three colleagues were indicted on 71 counts related to the sale of \$298 million of Chinese ammunition through a DoD contract. (As reported in *Government Executive*, June 23, 2008.)

“Army Officer Pleads Guilty to Conspiracy, Bribery and Money Laundering Scheme Involving DoD Contracts at U.S. Army Base in Kuwait”—While deployed in Kuwait, an Army officer admitted to participating in a bribery and money laundering scheme. The officer was responsible for awarding contracts for services worth millions of dollars to be delivered to troops in Iraq. In return for awarding the contracts, he admitted to receiving or being promised more than \$9 million in bribes. (As reported in *Earthtimes*, June 24, 2008.)

“Former DoD Contractor Pleads Guilty in Scheme to Steal \$39.6 Million Worth of Fuel from U.S. Army In Iraq”—A DoD contractor and his co-conspirators used fraudulently obtained documents to enter Camp Liberty in Iraq. The conspirators presented false fuel authorization forms to steal aviation and diesel fuel for subsequent resale on the black market. The fraud resulted in the theft of 10 million gallons of fuel worth approximately \$39.6 million. One of the conspirators received at least \$450,000 in personal profits from the illegal sale. (As reported in *Marketwatch*, Oct. 7, 2008.)

### Fraud, Waste, and Abuse Definitions

Although most people have a general understanding of the term fraud, one of the most widely quoted definitions is found in Black’s Law Dictionary:

*A false representation of a material fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which should have been disclosed, which deceives another so that he acts, or fails to act, to his detriment.*

The Government Accountability Office’s definitions for waste and abuse are:

*Waste involves the taxpayers not receiving reasonable value for money in connection with any government funded activities due to an inappropriate act or omission by players with control over or access to government resources (e.g. executive, judicial or legislative branch employees, grantees or other recipients). Most waste does not involve a violation of law. Rather, waste relates primarily to mismanagement, inappropriate actions and inadequate oversight.*

*Abuse involves behavior that is deficient or improper when compared with behavior that a prudent person*

*would consider reasonable and necessary business practice given the facts and circumstances. Abuse also includes misuse of authority or position for personal financial interests or those of an immediate or close family member or business associate. Abuse does not necessarily involve fraud, violation of laws, regulations or provisions of a contract or grant agreement. ... Payment of incentive and award fees in circumstances where the contractor’s performance in terms of cost, schedule and quality outcomes does not justify the fees is an example of contracting waste. In comparison, an example of contracting abuse would include making procurement or vendor selections that are contrary to existing policies or unnecessarily extravagant or expensive. It is important for contracting professionals to be alert to the presence of fraud, waste, and abuse when conducting their work.*

### Why Do People Commit Fraud?

In the 1950’s, famed criminologist Donald R. Cressey developed a hypothesis to explain why people commit fraud. Over the years, his hypothesis has become known as the fraud triangle. The triangle is usually pictured with three common fraud elements: opportunity, motivation, and rationalization. The opportunity to commit fraud occurs when employees have access to organizational assets or information that allows them to commit and conceal fraudulent activity. In general, the opportunities to commit fraud increase when an organization has a poorly designed system of internal controls, or there are persons in positions of authority who are able to override existing controls.

Motivation is also referred to as incentive or pressure. People are motivated to commit fraud for a variety of reasons, and the quest for power is often a common motivator. Pressure to commit fraud can be caused by either internal physical stresses or stresses from outside parties such as collection agencies. Rationalization occurs when the fraudsters convince themselves that their behavior is okay for a variety of reasons. Common rationalizations a person may have include: “I am just borrowing the money and will pay it back when my situation changes”; “The organization does not really need all the money it makes”; or “The organization has not treated me well, and I am going to get back at them.”

### What Does Fraud Mean in DoD?

In addition to becoming familiar with the commonly used definitions of fraud, waste, and abuse, it is important that contracting professionals understand DoD’s definition of fraud. DoD Instruction 5505.2, “Criminal Investigations of Fraud Offenses,” Feb. 6, 2003, defines fraud as follows:

*Any intentional deception designed to deprive the United States of something of value or secure from the United States a benefit, privilege, allowance, or consideration to which he or she is not entitled. Such practices include:*

**"Things in law tend to be black and white. But we all know that some people are a little bit guilty, while other people are guilty as hell."**

**Donald R. Cressey, Criminologist, 1919-1987**



- *Offering payment or accepting bribes or gratuities.*
- *Making false statements.*
- *Submitting false claims.*
- *Using false weights or measures.*
- *Evading or corrupting inspectors or other officials.*
- *Deceiving either by suppressing the truth or misrepresenting a material fact.*
- *Adulterating or substituting materials.*
- *Falsifying records and books of accounts.*
- *Arranging for secret profits, kickbacks, or commissions.*
- *Conspiring to use any of these devices.*
- *Conflict of interest cases, criminal irregularities, and the unauthorized disclosure of official information relating to procurement and disposal matters.*

curred. It is important for contracting professionals to be aware of indicators of fraud and fraud schemes when conducting their work.

Procurement fraud indicators are numerous and sometimes may not be obvious, depending on the knowledge and experience of the fraudster. Although this list is not all inclusive, the following are examples of procurement fraud indicators:

- Unusually high volume of purchases from the same vendor.
- Close socialization between government officials and vendors.
- Industry or country has a reputation for corruption.
- Losing bidder cannot be located in business directories.
- Vendor address is a mail drop or a P.O. box with no telephone number or street address.
- Vendor address or phone number matches a government employee's.
- Losing bids do not comply with bid specification, or only one bid is competitive and others are poorly prepared.
- Bidder participated in drafting contract specifications.
- Vague contract specifications followed by change orders.
- Purchase orders of contracts extended by change order rather than rebidding.
- Multiple awards for similar work are given to the same contractor.
- Significant transfers to scrap accounts or inventory write-off accounts.
- Cost is charged to original job order, but no physical inventory is left on the job.
- Apparent high prices compared to similar contracts, price lists, or industry averages.

A May 2008 Defense Criminal Investigative Service case contained several examples of fraudulent practices prohibited by the department. Specifically, five defendants were involved with a multimillion dollar bribery scheme involving Army Medical Department contracts at Fort Sam Houston, Texas. According to court records, from April 2002 to August 2005, the defendants committed acts of bribery and fraud, accepted kickbacks, and disclosed privileged information to ensure that a defendant-owned company received government contracts.

### **Fraud Indicators**

Fraud indicators are best described as symptoms or characteristics of possible fraud, the result of a fraudulent act, or an attempt to hide a fraudulent scheme. However, a fraud indicator may have nothing to do with a fraud scheme and might simply be a symptom of an internal control weakness within the organization. Similarly, the presence of more than one indicator does not necessarily mean that fraud has oc-

# GREAT MOMENTS IN ACQUISITION HISTORY



**1802:** Napoleonic Army designers roll out the first camouflage headgear.

help them level the playing field. Section 813 of the John Warner National Defense Authorization Act for fiscal year 2007, Public Law 109-364, directed DoD to establish a panel on contracting integrity. The panel consists of senior leaders throughout DoD tasked with conducting a department-wide review of progress made by DoD to eliminate areas of vulnerability in the contracting system that allow fraud, waste, and abuse to occur. The panel established 10 subcommittees to address a variety of issues such as contracting integrity in a combat/contingency environment, sufficient contract surveillance, and the identification of procurement fraud

- Failure to adequately publicize requests for bids.

The Navy Acquisition Integrity Office (AIO) has developed a comprehensive list of fraud schemes that all DoD contracting professionals should be aware of when conducting their work. Common acquisition fraud schemes identified by AIO include:

- Bribery and Kickbacks—giving or receiving something of value to influence an official act.
- Collusive Bidding—Suppliers and contractors agree to prohibit or limit competition and rig prices to increase the amount of business available to each participant.
- Defective Pricing—Failure to submit current, complete, and accurate cost or pricing data in a price proposal to the government on a negotiated contract.
- Product Substitution—Intentional submission of goods and/or services that do not conform to the contract specifications or requirements.
- False Statements and Claims—Knowingly and willfully submitting false statements or claims with the intent to mislead.
- Unjustified Sole Source—Improper award of a contract without competition or prior review.

## The Fight Against Fraud

Although the fight against fraud may seem like an uphill battle, DoD is making tools available to its personnel to

indicators. Subcommittee membership includes representatives from all the military departments; defense agencies; and other DoD organizations, including the Defense Contract Audit Agency, the Office of General Counsel, and the Office of the DoD Inspector General.

The panel took a strong stand against fraudulent activity with the establishment of the Procurement Fraud Indicators Subcommittee, which is chaired by the DoD assistant inspector general for acquisition and contract management in the Office of the DoD Inspector General. Subcommittee members represent a variety of disciplines and DoD organizations, including the Army Audit Agency, Naval Audit Service, Navy Acquisition Integrity Office, and the Air Force Office of Special Investigations.

## Where to Find Information on Fraud

A subcommittee accomplishment is a partnering with the Defense Acquisition University to develop an online fraud training module for contracting professionals, available on the DAU Website (<[www.dau.mil](http://www.dau.mil)>) in April 2009. The DAU training will consist of one or two training modules that will take about two hours to complete. The modules will be available to anyone who would like to learn more about acquisition fraud, but are particularly targeted to individuals working in the acquisition field—such as contracting officers and specialists, program managers, and

**Although the fight against fraud may seem like an uphill battle, DoD is making tools available to its personnel to help them level the playing field.**

contracting officer's representatives—as well as to auditors, investigators, and attorneys. Persons completing the training will qualify for continuing professional education credits depending on the requirements of their field and/or professional license.

The online training has information on more than 15 acquisition fraud scenarios such as purchases for personal use, phantom vendors, and bid information leaks. The first part of the training will define and explain contracting fraud schemes and corresponding indicators. The second phase will provide an opportunity for participants to test their knowledge of fraud schemes and indicators.

A second subcommittee accomplishment is the October 2008 launching of the Fraud Indicators in Procurement and Other Defense Activities Web site (<[www.dodig.osd.mil/inspections/apo/fraud/index.htm](http://www.dodig.osd.mil/inspections/apo/fraud/index.htm)>), developed by the Office of the DoD Inspector General's Audit Policy and Oversight group. The Fraud Indicators Web site has a variety of resources for procurement professionals, auditors, investigators, and individuals interested in learning more about methods to detect and prevent fraud, waste, and abuse. More than 35 DoD agencies and components, as well as the American Institute of Certified Public Accountants, contributed to the development of the tool.

The Web site includes 40 scenarios and fraud indicators on a variety of topics such as contracting, in-theater operations, healthcare, and base allowance for housing. Contracting scenarios cover a variety of interesting topics such as suspect invoice charges, inherently governmental functions, contract progress reports, and fraudulent invoices. Additional fraud resources located on the Web page include fraud guidance for auditors, fraud handbooks developed by DoD and other federal agencies, information on upcoming fraud training and conferences, a fraud dictionary, an interactive fraud IQ tests, and useful links. Web site visitors are encouraged to submit comments, provide feedback, or submit a fraud scenario.

## Reporting Fraud, Waste, or Abuse

Army Criminal Investigative Division  
[crimetips@conus.army.mil](mailto:crimetips@conus.army.mil)

Naval Criminal Investigative Service  
1-800-264-6485 or [ncistipline@ncis.navy.mil](mailto:ncistipline@ncis.navy.mil)

Air Force Office of Special Investigations  
1-877-246-1453 or [hqafosi.watch@ogn.af.mil](mailto:hqafosi.watch@ogn.af.mil)

Defense Criminal Investigative Service  
1-800-424-9098 or [hotline@dodig.mil](mailto:hotline@dodig.mil)

### **Additional information and reading material on contracting fraud issues:**

Defense Contract Management Agency,  
Contract Integrity Center  
<http://home.dcm.mil/cntr-dcmac-y/fof/index.htm>

Department of Defense, Office of Inspector General  
[www.dodig.mil/inspections/apo/fraud/index.htm](http://www.dodig.mil/inspections/apo/fraud/index.htm)

Navy Acquisition Integrity Office  
<http://ogc.navy.mil/aio.asp>

Army Fraud Fighters  
<https://www.jagcnet.army.mil>

Defense Acquisition University  
[www.dau.mil](http://www.dau.mil)

National Procurement Fraud Task Force  
[www.usdoj.gov/criminal/npftf/](http://www.usdoj.gov/criminal/npftf/)

### **If It Looks Like Fraud...**

Contracting professionals at all levels are the eyes and ears of DoD. When a contracting professional suspects that something is wrong, he or she should make a referral to a DoD attorney or investigator. It is better to request the assistance of attorneys and investigators when you see smoke instead of waiting for a three-alarm fire. Contracting professionals should not try to assume the role of detective; that is the responsibility of trained professionals. The investigators and attorneys will work together to answer the questions, "Is it fraud or stupidity?" and "Are they guilty as hell?"

*Mark S. Boyll, associate general counsel, DoD Office of the Inspector General; Nancy Reuter, supervisory editor, Naval Audit Service; and Joseph P. Bentz, program director, Contract Audits, U.S. Army Audit Agency contributed to this article.*

Comments and questions can be provided at <[www.dodig.osd.mil/inspections/apo/fraud/commentform.php](http://www.dodig.osd.mil/inspections/apo/fraud/commentform.php)>.

**TAB N**







ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

THE UNDER SECRETARY OF DEFENSE  
3010 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3010

NOV 24 2009

MEMORANDUM FOR: SEE DISTRIBUTION

SUBJECT: Personal Conflicts of Interest (PCIs) of Contractors' Employees

Section 813 of the John Warner National Defense Authorization Act for FY 2007 directed the Secretary of Defense to convene a panel of senior leaders to conduct a DoD-wide review of progress made by the Department to eliminate areas of vulnerability of the defense contracting system that allow fraud, waste, and abuse to occur and to recommend changes. The Panel identified personal conflicts of interest of contractor employees as an area of vulnerability.

The Government's increased reliance on contracted technical, business and procurement expertise has increased the potential for PCIs. Unlike Government employees, contractor employees are not required to disclose financial or other personal interests to the Government that may conflict with the responsibilities they are performing on behalf of the Government.

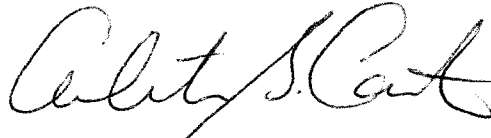
The risk associated with PCIs is directly related to the supply or service being acquired and the type of contract used to secure the supply or service. Attachment 1 depicts levels of risk created as a function of the relationship between potential impacts of PCIs and the likelihood that contractors will influence Government decisions. PCIs present lesser risk to the Government on fixed-price, supply contracts; however, risk increases as the supply or services become more sophisticated or the relationships between Government and contractor blur into inherently governmental functions. Attachment 2 provides scenarios of contractor employee PCIs and the level of risk associated with each scenario.

Section 841 of the Duncan Hunter National Defense Authorization Act for FY 2009 directed the Administrator of the Office of Federal Procurement Policy (OFPP) to issue policy to prevent PCIs by contractor employees performing acquisition functions closely associated with inherently governmental functions.

Pending issuance of the OFPP guidance on contractor employees' conflicts of interest, the Department should follow the policies and procedures of FAR 9.5, Organizational and Consultants Conflicts of Interest.

The acquisition community must consider the risks of a contractors' employee having PCIs when performing acquisition functions closely associated with inherently governmental functions on behalf of the Department. The risk increases when contractor

employees are involved with substantially subjective judgmental work. We must remain vigilant in identifying and avoiding or mitigating impacts of PCIs by using appropriate contract types and establishing effective controls.

A handwritten signature in black ink, appearing to read "Ashton B. Carter". The signature is fluid and cursive, with the first name being the most prominent.

Ashton B. Carter

Attachments:

As stated

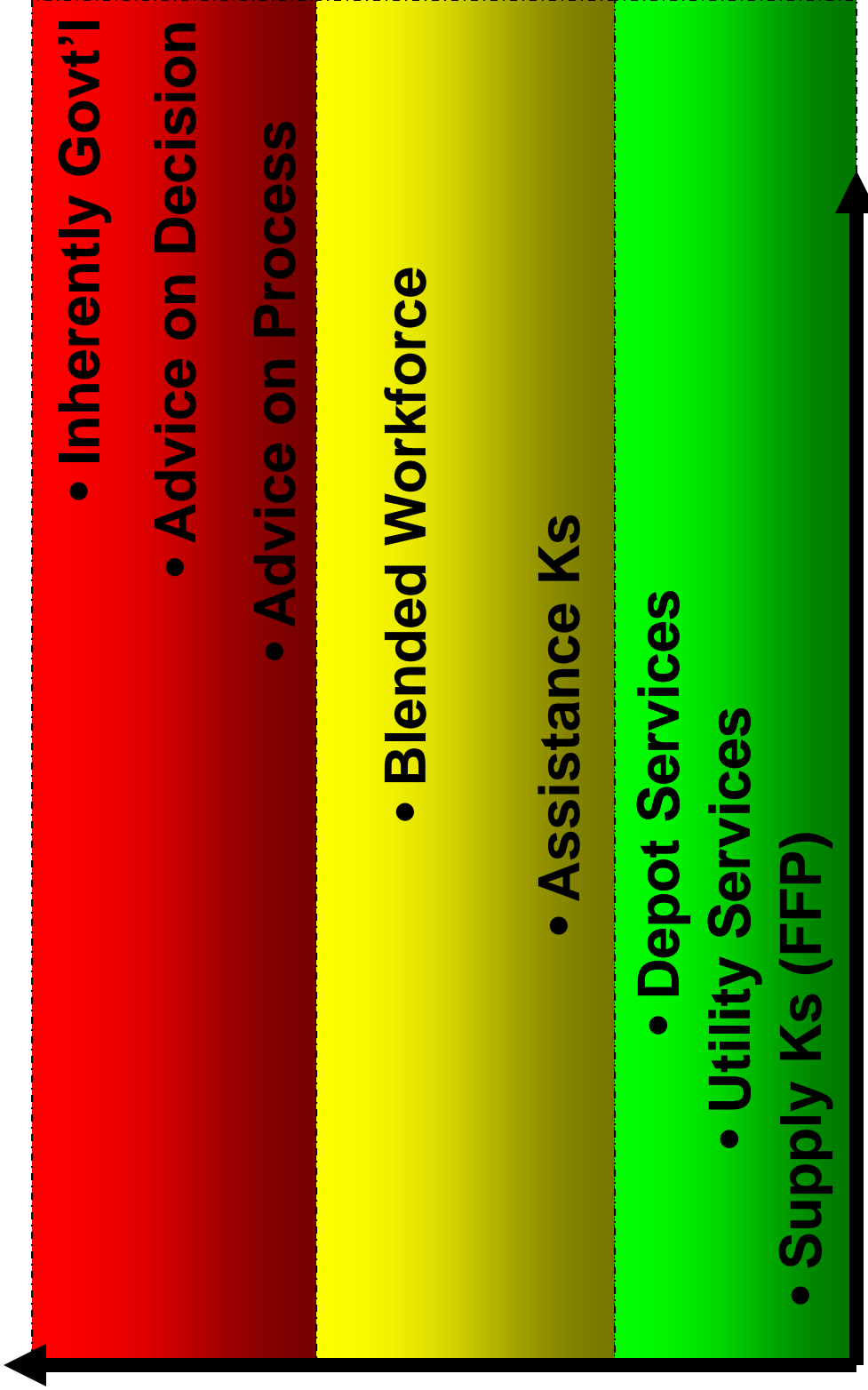
**DISTRIBUTION:**

Secretaries of the Military Departments  
Chairman of the Joint Chiefs of Staff  
Under Secretaries of Defense  
Deputy Chief Management Officer  
Commanders of the Combatant Commands  
Assistant Secretaries of Defense  
General Counsel of the Department of Defense  
Director, Operational Test and Evaluation  
Inspector General of the Department of Defense  
Assistants to the Secretary of Defense  
Director, Administration and Management  
Director, Cost Assessment and Program Evaluation  
Director, Net Assessment  
Directors of the Defense Agencies  
Directors of the DoD Field Activities



# Contractor Employee PCI Risk

Potential Impact of PCIs



Potential Influence Over Gov't Decisions

## **Scenarios of Contractor Employee Personal Conflicts of Interest (PCIs) and Associated Levels of Risk**

### **SCENARIO 1**

Jane is an employee of government contractor Company A. Company A assigned Jane to work supporting a Government Agency. As part of her duties she is signing DD Forms 250, Material Inspection and Receiving Reports. Company A is a subsidiary of Company B, a large defense contractor. In performing her job for Company A, Jane signs DD Forms 250 submitted to the government by both Company A and Company B.

**Risk: High.** Jane has a personal conflict of interest in this scenario. She has a financial interest in both Company A and Company B. Whether Jane is signing the DD Form 250 as evidence that Quality Assurance has been performed or to accept the goods, her association with both A and B causes a conflict. The acceptance of the goods as to the quantity and the condition is an inherently governmental function. Jane's performance of either of these functions as an employee of Company A puts the Government at high risks of paying for goods that were not received or were not in good condition when received.

### **SCENARIO 2**

John is an employee of government contractor Company C. Company C assigned John to work supporting a Government Agency as an advisor on a source selection panel. The acquisition is valued at \$300 million. John's wife, Mary, works for Company D as the director of engineering. Company D is one of three offerors on the procurement where John is serving as an advisor on the source selection panel.

**Risk: High.** John has a personal conflict of interest in this scenario. His household finances are likely to be directly affected by the outcome of the award decision which could impair his ability to be totally objective with his advice. Therefore, the actual or perceived risk is high that the Government may not receive impartial advice. This endangers the public trust.

### **SCENARIO 3**

Paul is an employee of government contractor Company E. Company E assigned Paul to work supporting a Government Agency as an advisor on a source selection panel. Paul has \$10,000.00 worth of stock in Company F. Company F is one of three offerors on the procurement where Paul is serving as an advisor on the source selection panel.

Risk: Low. Paul has a personal conflict of interest in this scenario due to his financial interest in Company F. Those overseeing source selection panels must ensure that all participants providing advice to the panel are free from conflicts of interest. Once all conflicts are brought to light, steps can be taken to determine if the stock is of de minimis value or the financial interests are far too remote or inconsequential to warrant disqualification.

#### **SCENARIO 4**

Mr. Jones is an employee of government contractor Company G. After full and open competition, Company G has been awarded a firm fixed-price contract to manage a Defense Agency's depot. Company G has appointed Mr. Jones as their project manager for this contract. Mr. Jones' wife owns a moving franchise. In his role as project manager for Company G, Mr. Jones orders boxes, pallets, tape, and other like items from his wife's moving company.

Risk: Low to None. Although Mr. Jones' behavior may not appear ethical, this personal conflict of interest has no inappropriate financial effect on the Government. Company G's award was based on a firm fix price that was determined fair and reasonable as the result of full and open competition. Any loss to Company G due to Mr. Jones' actions has no effect on the Government.

#### **SCENARIO 5**

David is an employee of government contractor Company T. Company T was awarded a contract to assist in developing the requirements for a new, high-tech procurement. David has been assigned by his employer, Company T, to work on this project to develop the requirements. David's wife works for H, a high-tech company likely to offer on this new procurement.

Risk: Medium to High. David does have a personal conflict of interest because he will be giving advice to the Government that may impact the company for which his wife works. The degree of risk depends on how much information David knows about the technologies of Company H and what position David's wife has in Company H. For instance, is she a mail clerk or a technical engineer and does she have or could she have access to Company H's employees who would offer on this procurement?

#### **SCENARIO 6**

Shirley is an employee of government contractor Company X. Company X has assigned Shirley to work supporting a Government office. That office has contract responsibility

to ensure the swift and effective performance of specific aspects of a contract. The contract to which Shirley is assigned was awarded to Company X. The award is a cost-plus-award-fee contract. Shirley's yearly bonus will be based on the award-fee Company X receives on the contract. Shirley finds that the performance of the contract is impeded by an operational conflict over which she has influence.

Risk: High. Shirley has two personal conflicts of interest. First she has a conflict because she has oversight responsibilities on a contract between the government and her employer. Second, she has another conflict because her bonus is not based on how well she carries out her contract oversight responsibilities in support of the Government Office, but rather on the overall quality of the performance of her employer's contract -- the same contract on which she has oversight responsibilities. There is an actual or perceived risk that her decisions, rather than being based only on the best interests of the Government, might be influenced on what is best for Company X and her own financial interest.





## **APPENDIX 2: NEW SUBCOMMITTEE INFORMATION**

	TAB
• Director, DPAP Memo, Establishment of New Subcommittees, August 27, 2009	O
• Business Systems Review (BSR) Subcommittee Charter	P
• Peer Review Subcommittee Charter	Q



**TAB O**





OFFICE OF THE UNDER SECRETARY OF DEFENSE  
3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

ACQUISITION,  
TECHNOLOGY  
AND LOGISTICS

AUG 27 2009

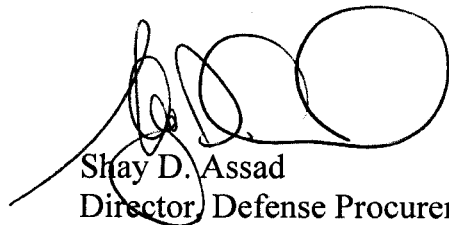
MEMORADUM FOR THE PANEL ON CONTRACTING INTEGRITY

SUBJECT: Establishment of New Subcommittees

The purpose of this memorandum is to inform you that I have established two new subcommittees to assist us in our mission to eliminate areas of vulnerability in the DoD contracting system. The first subcommittee will be chartered to perform a comprehensive review of current policy, processes, and practices within the DoD regarding the audit and evaluation of all contractor business systems. Mr. Brian George will chair that subcommittee.

I am also establishing a new subcommittee to perform an overall assessment of the Peer Review Process including the implementations plans of the Military Departments and the Other Defense Agencies. Mr. Elliott Branch, Executive Director, Deputy Assistant Secretary of the Navy, Acquisition & Logistics Management, will chair that subcommittee.

I want to thank you for your continued support to the Panel on Contracting Integrity. The Panel has made great progress in its mission and some of our subcommittees have completed their original assignments and initiatives. As we look to the future, I would like to solicit your thoughts and recommendations for new focus areas for those subcommittees and/or new subcommittees as appropriate. Please be prepared to address these issues at the September 24, 2009, Panel meeting.



Shay D. Assad  
Director, Defense Procurement  
and Acquisition Policy





**TAB P**





## **BUSINESS SYSTEM REVIEWS (BSR) SUBCOMMITTEE CHARTER**

**Purpose:** To establish an interdepartmental subcommittee to review current policy and procedures within DoD regarding the Department's audit and administration of contractors' business systems.

**Background:** The Under Secretary of Defense (AT&L) established a Panel on Contracting Integrity as directed by Section 813 of the John Warner National Defense Authorization Act for Fiscal Year 2007. The Panel conducts annual Department-wide reviews of the defense contracting system to determine the Department's progress in eliminating areas of vulnerabilities in contracting that allow fraud, waste, and abuse to occur. The Panel's efforts are summarized in a series of annual progress reports to Congress.

According to the Commission on Wartime Contracting June 2009 Interim Report, "[t]oo many contractor business systems are inadequate and must be fixed" and "[c]ontracting officials make ineffective use of contract withholds provisions recommended by their auditors..." In August 2009 hearings, the Commission on Wartime Contracting heard testimony that regulations and contract clauses need to be improved to allow contracting officers to withhold amounts from contractor payments relating to inadequate contractor systems. The overarching concern expressed by the Commission is that inadequate contractor business systems may be an area of vulnerability that may permit waste and abuse to occur.

**Authority, Objectives, and Scope:** The efforts of this subcommittee are authorized and chartered by the DoD Panel on Contract Integrity. The subcommittee will review current policy, processes, and practices within the DoD regarding the audit, evaluation, and administration of contractor's business systems to include contractor internal control systems or other contractor systems the subcommittee may identify. The following discussion points will guide the subcommittee's efforts:

- ◆ Is there a need for one "common list" of contractor business systems?
- ◆ Is there a need for additional contract clauses or regulations for each system, to include remedies such as withholds and guidelines for audit frequency?
- ◆ Is there a need for defined expectations or criteria for each system to determine adequacy?

**Membership:** Army, Navy, Air Force, Defense Contract Management Agency, and Defense Contract Audit Agency will each provide subject matter experts as members to this working group. The Subcommittee will be chaired by the DPAP Director of Cost, Pricing, and Finance.

**Roles and Responsibilities:** This task is a high priority for the DoD and requires the commitment of all participating organizations and personnel. Assigned members will leverage internal component resources and will coordinate with and report on information exchanges within their respective organization. The goal is to achieve timely consensus on issues and recommendations for corrective action throughout the Department. The Subcommittee Chair will appoint a working group lead(s) who will be responsible for assigning priorities, scheduling meetings, and reporting the findings and recommendations of the working group(s) to the Subcommittee Chair.

**Milestones:** Introduce charter and preface of the Subcommittee to the Panel on September 24, 2009, and quarterly thereafter, brief the Panel on progress/status/recommendations.



# TAB Q



## PEER REVIEW SUBCOMMITTEE CHARTER

**Purpose:** To establish an interdepartmental subcommittee to assess the effectiveness of Peer Reviews.

**Background:** The Under Secretary of Defense (AT&L) established a Panel on Contracting Integrity as directed by Section 813 of the John Warner National Defense Authorization Act for Fiscal Year 2007. The Panel conducts annual Department-wide reviews of the defense contracting system to determine the Department's progress in eliminating areas of vulnerabilities in contracting that allow fraud, waste, and abuse to occur. The Panel's efforts are summarized in a series of annual progress reports to Congress.

**Authority, Objectives, and Scope:** The efforts of this subcommittee are authorized and chartered by the DoD Panel on Contract Integrity. The subcommittee will review Peer Review policies and processes to include an assessment of the soundness of Peer Review implementation plans developed by the military departments, defense agencies and field activities, and the extent to which those plans are being carried out effectively. In addition, the subcommittee will offer recommendations regarding the following:

- Appropriateness of the various phases currently employed to conduct OSD Peer Reviews
- Strategies to ensure all senior contracting leaders participate as Peer Review team members
- Methods by which to disseminate trends, lessons learned and best practices learned as a result of OSD Peer Reviews

**Membership:** Army, Navy, Air Force, and will each provide subject matter experts as members to this working group. The Subcommittee will be chaired by the Navy.

**Roles and Responsibilities:** This task is a high priority for the DoD and requires the commitment of all participating organizations and personnel. Assigned members will leverage internal component resources and will coordinate with and report on information exchanges within their respective organization. The goal is to achieve timely consensus on issues and recommendations for corrective action throughout the Department. The working group lead will be responsible for assigning priorities, scheduling meetings, and reporting the findings and recommendations of the working group to the Subcommittee Chair.

**Milestones:** Introduce preface of the subcommittee to the Panel by November 15, 2009. By January 31, 2010, and quarterly thereafter, brief the Panel on progress/status/recommendations.



**TAB R**





### **APPENDIX 3: LIST OF ABBREVIATIONS**

This report contains the following abbreviations:

AFLMA	Air Force Logistics Management Agency
ALMC	Army Logistics Management College
ARA	Acquisition and Resource Analysis
AT&L	Acquisition, Technology, and Logistics
CAE	Component Acquisition Executive
CCO	Contingency Contracting Officer
COR	Contracting Officer's Representative
CPF	Cost, Pricing, and Finance
CSIS	Center for Strategic and International Studies
D&F	Determination and Findings
DARPA	Defense Advanced Research Projects Agency
DAU CLC	Defense Acquisition University Continuous Learning Center
DAU	Defense Acquisition University
DAWF	Defense Acquisition Workforce Fund
DCAA	Defense Contract Audit Agency
DCMA	Defense Contract Management Agency
DEPSECDEF	Deputy Secretary of Defense
DFARS	Defense Federal Acquisition Regulation Supplement
DHHS	Department of Health and Human Services
DHS	Department of Homeland Security
DISA	Defense Information Systems Agency
DLA	Defense Logistics Agency
DMDC	Defense Manpower Data Center
DoC	Department of Commerce
DoD	Department of Defense
DoDD	Department of Defense Directive
DoDEA	Department of Defense Education Activity
DoDI	Department of Defense Instruction
DoDIG	DoD Inspector General

DoS	Department of State
DPAP	Director, Defense Procurement and Acquisition Policy
DSB	Defense Science Board
DUSD(A&T)	Deputy Under Secretary of Defense (Acquisition and Technology)
DUSD(IP)	Deputy Under Secretary of Defense (Industrial Policy)
FAR	Federal Acquisition Regulation
FEMA	Federal Emergency Management Agency
FFRDC	Federally Funded Research and Development Center
GAO	Government Accountability Office
GSA	General Services Administration
HCSP	Human Capital Strategic Plan
IAW	In Accordance With
IG	Inspector General
JAT	Joint Assessment Team
JCS	Joint Chiefs of Staff
LH	Labor Hours
MDA	Missile Defense Agency
NDAA	National Defense Authorization Act
NGA	National Geospatial-Intelligence Agency
NGB	National Guard Bureau
NSA	National Security Agency
OCI	Organizational Conflicts of Interest
ODA	Other Defense Agency
OMB	Office of Management and Budget
OSD	Office of the Secretary of Defense
PB	President's Budget
PBR	President's Budget Request
PEO	Program Executive Officer
PFWG	Procurement Fraud Working Group
PGI	Procedures, Guidance, and Information
PM	Program Manager
PWS	Performance Work Statement

R&D	Research and Development
SECDEF	Secretary of Defense
SPE	Senior Procurement Executive
T&M	Time and Materials
TMA	TRICARE Management Agency
UCA	Undefinitized Contract Action
USA	US Army
USACE	US Army Corps of Engineers
USAF	US Air Force
USAID	U.S. Agency for International Development
USD(AT&L)	Under Secretary of Defense (Acquisition, Technology and Logistics)
USMC	US Marine Corps
USN	US Navy
USNORTHCOM	US Northern Command
USSOCOM	US Special Operations Command
USTRANSCOM	US Transportation Command
WHS	Washington Headquarters Services
WSARA	Weapon Systems Acquisition Reform Act of 2009