STATEMENT OF

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SUBCOMMITTEE ON CONTRACTING OVERSIGHT
COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

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Chairman McCaskill, Ranking Member Bennett, and members of the Subcommittee. My name is Marshall Doke, and I am a lawyer in private practice in Dallas, Texas, with the firm of Gardere Wynne Sewell. I have practiced government contract law almost exclusively for over forty years, beginning as a young Army Judge Advocate General officer in the Procurement Law Division in the Pentagon with a special assignment as Counsel to the Army Contract Adjustment Board. My practice has included virtually all types of government contracting (including interagency contracting) involving preparation of solicitations, bid protests, disputes, and litigation representing federal, state, and local government agencies, as well as contractors and grantees.

I have served as Chairman of the American Bar Association's Section of Public Contract Law and was that Section's spokesman in the ABA's policy-making House of Delegates for over thirty years. I also have served as President of the United States Court of Federal Claims Bar Association and (I am currently on its Advisory Council), as President of the Boards of Contract Appeals Bar Association and as a member of the Board of Governors of the Federal Circuit Bar Association.

ACQUISITION ADVISORY PANEL

The federal Acquisition Advisory Panel (the "Panel") was authorized by Section 1423 of the Services Acquisition Reform Act of 2003, which was enacted as part of the 2004 DOD Authorization Act. I served as one of the two lawyers in private practice appointed to the fourteen-member Panel. The law directed the Panel to review all federal acquisition laws and policies, and it specifically mentioned the performance of acquisition functions across agency lines of responsibility and the use of government-wide contracts (*i.e.*, interagency contracts).

The Panel had 31 public meetings and received testimony from over 100 witnesses from both public agencies and private organizations. Our work reviewing interagency contracting included consideration of multiple reports of the Government Accountability Office ("GAO") and various Inspector Generals ("IG"). The Panel's final report was published in 2007 and is available on the Panel's website.

The Panel found that the significant increase in the use of interagency contracting methods raised a number of complex policy issues and has created an environment in which accountability often was lacking. When managed properly, interagency contracting can simplify the acquisition process and leverage the Government's buying power.

Our review of interagency contracting methods involved four basic questions: (1) what are they, (2) why do agencies use them, (3) how do agencies use them, and (4) how should agencies use them?

Here is an overly-simplified explanation of the basic types of interagency contracting methods.

a. *The Federal Supply Schedule Program* (also called the Multiple Award Schedule Program) operates by the General Services Administration negotiating many thousands of contracts (without competition) based upon the vendors' best price for their preferred customer and having provisions for a price reduction if the vendor lowers its price for those "most favored customers" ("MFG"). Other agencies can place orders under those schedule contracts. The various "schedules" describe different types of products and services. The GSA e-Buy program facilitates the submission of on-line quotations and proposals for schedule items.

b. *GSA's Government-wide Acquisition Contracts* ("GWACs") are single or multiple award indefinite delivery-indefinite quantity ("IDIQ") contracts for information technology products or services. Other agencies can place delivery orders or task orders to vendors under these contracts.

c. *Enterprise-wide Contracts* are intended to serve as an alternative to interagency contracts and share the same IDIQ ordering features as GWAC contracts but whose use generally is confined within a single agency. An example of this type of contract is the Navy's SeaPort-e program.

d. *Interagency Assisting Entities* are not contracts but have a significant interagency contracting impact. These entities generally are described as some type of "fund," such as franchise fund, revolving fund, acquisition services fund, or working capital fund. Well known examples include the Department of Interior's GovWorks, Health and Human Services' Program Support Center, and Department of the Treasury's FedSource (dissolved in 2009). Most of these have separate statutory authorizations permitting one agency to transfer funds to another for purchasing, and some allow agency funds to remain obligated after the end of the fiscal year.

There are a number of factors that have prompted federal agencies to utilize interagency contracts to satisfy the demands for their contracting services. The reductions in the acquisition workforce (with increased workloads and resulting increased lead-times) have caused agencies to seek alternate means of contract services delivery. Funding constraints have caused agencies to find ways to "park" one-year money with other agencies in order to extend the use of the funds into a subsequent fiscal year.

Agencies have used interagency contracts to avoid and waive competition requirements in favor of incumbent contractors and to reduce the basis of oversight through the protest

process. Moreover, interagency contracts allow the sponsors to collect fees for assisted and unassisted buying (this creates an incentive to increase sales volume to support other agency programs).

Interagency contracts have caused management problems by the lack of transparency and internal controls. The GAO and IG findings reflect misuse of interagency contracts, particularly service contracts. Many of the problems are the result of unclear guidance, an inexperienced workforce, and inadequate training. The Panel found, in many instances, that there were inadequate and inaccurate data that made review and evaluation extremely difficult.

One significant conclusion of the Panel was that there is no consistent, government-wide policy for interagency contracts. Addressing the misuse of interagency contracts caused by inadequate controls and oversight calls for a government-wide policy covering the broad scope of creation, utilization, and continuation of these contract vehicles rather than unorganized attempts to "fix" individual issues. Such a policy should recognize that these contracts require special business ability and flexibility to operate and manage.

The problem of the uncoordinated proliferation of interagency contracts has been compounded by the lack of coordination among the agencies regarding the various types of products and services offered under various types of contracts. There is agency competition to obtain "business" from other agencies in order to earn the fees for providing the services. There are thinly disguised "turf" issues that make solutions difficult.

The Panel concluded that most of the interagency contracting problems have resulted from an uncoordinated, bottoms-up, statutory and regulatory approach focusing on short-term benefits of reduced procurement lead times instead of as a tool for government-wide strategic sourcing with reduced administrative costs. The Panel recommended the development of a government-wide policy that requires agencies to address all relevant issues at the point of creation and continuation of these contract vehicles rather than trying to fix them at their point of use. Specific recommendations for such policy coverage were included in the Panel's report.

IMPROVING COMPETITION

Many interagency contracts require full and open competition using the competition provisions in the Federal Acquisition Regulation (FAR) and, thus, competition is a subset of interagency contracting. I was particularly pleased that your invitation asked me to address my Supplemental Views on "Improving Competition" included in the Acquisition Advisory Panel's final report (beginning at page 141). Inasmuch as my Supplemental Views are conveniently available on the Internet (with 91 footnotes referencing legal decisions and other information), I will only briefly summarize those comments.

Competition requirements in government contracts in this country go back over 200 years and now exist in all 50 states. Competition is required not only to obtain lower prices but also to prevent unjust favoritism, collusion, or fraud. I emphasize this last purpose because of what one

federal judge called a growing culture of corruption in Washington. I personally believe we have had more reported fraud in government contracting in the last 10 years (including fraud by high level government officials) than the combined amount in the previous 40 years. I believe the deficiencies in our competition process have given such enormous discretion to contracting officials that, together with a lack of transparency, they have created an environment and circumstances that have contributed significantly to this increase in fraud.

Let us look at "competition" in the abstract. All "real" competition (whether in sports, gambling, or contracting) requires "rules" for the competition, disclosure of the rules to the competitors, and enforcement of the rules. The fact that you "call" something competition does not make it real competition. Who thinks professional wrestling is real competition? What if, in football, the players are not told how many points they will get for kicking a field goal?

One big difference between government and commercial contracting is that the Government only can buy what it *needs*, not what it *wants* (in the absence of specific statutory authority). This is because the authority for government agencies to enter into contracts is *implied* from an appropriation of money by Congress, and one cannot reasonably believe Congress intended for agencies to buy more than they reasonably need (this is called the "minimum needs" doctrine). Our competition process, however, allows the agencies to purchase more than they need all the time (as I will explain).

We have two primary types of full and open competition. The first is sealed bidding in which the award is based solely on price and price-related factors (such as transportation costs). The second type, competitive proposals, results in the largest dollar volume in federal contract awards. In this type of competition, price is only *one* factor in the source selection decision. Agencies may use multiple other evaluation factors and subfactors (twenty or more are not uncommon). The Federal Acquisition Regulation gives four or five "examples" of such factors (*e.g.*, management capability, technical excellence, etc.) that "may" be used, but FAR provides absolutely no guidance about even those factors, what evaluation factors should encompass, when and in what contracts they should be used, or how much importance or "weight" they should be given in the evaluation process.

There are only two evaluation factors that must be used -- price and (usually) past performance. There is *no* requirement or even guidance in FAR regarding what percentage must, or even should, be given to price in evaluating proposals – it can be ten percent or ninety percent. Moreover, many non-price evaluation factors are entirely subjective, such as employee appearance, intrinsic value, reputation, and vision. Although there is a statutory requirement for agencies to disclose (in the Request for Proposals) all significant evaluation factors and subfactors, the GAO holds that a subfactor does not need to be disclosed if it is reasonably related to or encompassed by a disclosed factor. That view evades the statutory requirement, because any *subfactor* is, by definition, logically related to or encompassed by the primary factor – if not, it is a separate factor altogether.

One particularly troublesome problem is that agencies are permitted to give extra points or credit in evaluating proposals for *exceeding* the requirements in the specifications or statement of work, and without even telling the competitors they are doing so or how much weight will be given. This has two problems. First, the failure to disclose how proposals will be evaluated violates the fundamental rule "disclosure" principle of competition. Second, if the specifications or statement of work describe what the agency *needs*, then giving extra credit (possibly resulting in a higher price paid) violates the minimum needs doctrine.

The law is clear that agencies have very broad discretion in selecting evaluation factors and in evaluating proposals. If agencies follow the law and their own "rules" set forth in the solicitation and document their reasons, the agency's contract award decision is virtually "bullet proof" in bid protests to the GAO or the United States Court of Federal Claims.

The significance of this "competition" process is that agencies can, pretty much, award a contract to whichever competitor it wants. Not just "*agencies*," but also contracting officers or other source selection officials, can make such decisions. It is this broad *discretion*, lack of transparency, and bullet proof award decisions that, I submit, create circumstances and an environment that can result in fraudulent activity. There is, I believe, a direct correlation between discretion and fraud. That is the reason the Government has competition requirements in government contracts in the first place. That is why sealed bidding actually is the favored method of contracting if the Government can describe its requirements adequately.

Let me add that agency personnel will fight tooth and nail against any changes to this system that, basically, allows them to award to any competitor they want. It is human nature, and my clients that are public agencies also want this discretion and chaff when restrictions are imposed. It is not because they want to cheat – they just want the freedom of choice.

What about cost to the Government? When a contract is awarded to a competitor whose price is higher than the price offered in an otherwise acceptable proposal, the difference between the lowest price and the contract award price is the *price premium* being paid for the other, non-price, evaluation factors. In other words, the price premium reflects how much *more* the Government is paying for evaluation factors such as additional years of experience, better reputation, more intrinsic value, etc. That price premium must be documented in the contract file, but there is no requirement, anywhere, that these price premiums be reported above the contracting officer level.

I respectfully submit to this Subcommittee that no more important service to government contracting could be provided, right now, than merely imposing a statutory requirement that price premiums paid for every contract be reported "up-the-chain" to the Department level and aggregated at each level.

The President stated in a Memorandum of March 4, 2009, 74 Fed. Reg. 9755, that spending on government contracts has more than doubled since 2001, reaching over $500 billion in 2008. Merely adding "sunlight" and transparency to the price premiums being paid would, I

believe, have a significant impact in slowing additional growth. I also want to call your attention to Section 845 of the 2010 DOD Authorization Act, which directed the Comptroller General to conduct a study of non-price evaluations factors such as those I have been discussing. You might want to hear GAO witnesses with respect to this study.

Finally, I want to mention briefly the concept of "responsibility" in government contracting. This is a term used to describe a competitor's ability to perform its contract obligations. There are various factors involved, but no government contract can be awarded unless the contracting officer finds the proposed awardee is "responsible," meaning it can perform the contract *satisfactorily*. However, many of the non-price evaluation factors used in awarding contracts are directly related to "responsibility," such as financial capability, corporate experience, key personnel, etc. I ask you this question. If the agency cannot award a contract to anyone that cannot perform it "satisfactorily," why should the Government pay a price premium for a contractor to perform *more* than satisfactorily? If the Government *needs* performance that is more than satisfactory, that must be because the Government has not properly defined what "satisfactory" means in the specifications or statement of work. One government program manager had a sign on his wall saying, "Better Is Worse Than Good Enough." This meant that, if you are paying for more than you need, you are using money that could be used for something else for which money is not available.

This "responsibility" issue has a serious adverse impact on small business concerns. If a government purchasing agency finds a small business competitor to be "non-responsible," it must refer the matter to the Small Business Administration, which has conclusive authority to determine the responsibility of a small business concern. However, if the agency uses responsibility-type evaluation factors (such as years of experience, financial capability, etc.), it can award a contract to a large business with *more* experience, *more* money, *more* people, etc., because the small business loses in a *comparative* evaluation (and, the agency is not required to refer the question to the SBA). Even if responsibility is not an issue, a larger, more experienced company with more money, people, and successful past performance usually will win in a competition with a small business concern that could perform the contract "satisfactorily" and, possibly, at a lower price.

My Supplemental Views in the Panel's report has recommendations, and I will be happy to take questions.