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West Government Contracts Year in Review Conference (Covering 2006)

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EMERGING POLICY AND PRACTICE ISSUES

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A NEW YEAR, A NEW RUBRIC. Last year, we fretted that former Office of Federal Procurement Policy (OFPP) Administrator David Safavian's arrest, indictment, and trial might cripple serious procurement reform for the remainder of the Bush administration. This year, the administration tapped Paul Denett, a credible, steady, experienced acquisition professional to restore confidence in federal acquisition. *OFPP Nominee Promises Strong Leadership*, 48 GC ¶ 225. Yet, with no clear mandate other than a dogged devotion to competitive sourcing (more on that below), less than two years before the 2008 elections, and a modest staff, Denett likely cannot expect to achieve dramatic reform.

But 2006 begins with acquisition professionals and policy wonks poring over the 400+ page "Draft Final" Report of the Acquisition Advisory Panel (AAP), a blue-ribbon commission launched in 2003 by Section 1423 of the Services Acquisition Reform Act (SARA). See www.acquisition.gov/comp/aap/draftfinalreport.html. Comments on the report were due by January 5, 2007 (yes, the two-week comment period spanned Christmas and New Year's), and we expect to see the final report soon after.

The AAP Report offers a thoughtful discussion of trends, a helpful executive summary, and seven substantive chapters: (1) Commercial Practices; (2) Improving Implementation Of Performance-Based Service Acquisition (PBSA) In The Federal Government; (3) Interagency Contracting; (4) Small Business; (5) The Federal Acquisition Workforce; (6) Appropriate Role Of Contractors Supporting Government; and (7) Federal Procurement Data. Given its timing and scope (and to the extent that we're numbed by the relentless focus on ethics, compliance, and procurement scandals, here and abroad), the AAP Report provides us with a fresh lens through which to view the year's emerging policy and practice issues.

We find this a much more aspirational, if not more optimistic, approach than, for example, the Project on Government Oversight's (POGO's) "*Baker's Dozen*" of *Suggested Congressional Oversight Priorities*. www.pogo.org/p/x/2007bakersdozen.html. Not surprisingly, POGO's agenda focuses disproportionately upon issues related, directly or indirectly, to public procurement. While we consider the list somewhat hyperbolic and a tad shrill, many of POGO's priorities remain instructive: (1) Addressing Federal Contractor Misconduct ("contracting will ... be plagued with waste, fraud, and corruption until bad actors have been genuinely held accountable"); (2) Hidden Costs of Privatizing Government ("anecdotal evidence suggests that contractors are now handling functions ... previously ... considered the exclusive domain of the government, raising questions about whether the government can adequately control its spending and fulfill its mission"); (3) Executive Branch Revolving Door and Conflicts-of-Interest ("rules were confusing and failed to rein in ... the most egregious abuses"); (5) The Black Hole that is Pentagon Spending ("Congress should demand more ... transparency and accountability"); (7) Defense Spending Priorities: Supporting the Troops or the Defense Contractors? ("the 109th Congress ... cut spending on equipment Marines were using in Iraq – including night vision goggles and upgrades to light-armored vehicles – and transferred those funds to breathe life

support into the troubled V-22 Osprey, which cannot even be used in high-risk environments”); (8) Government Watchdog and Accountability Organizations (“more oversight ... is needed to assess whether ... billions ... in government contracts are being adequately policed”); (9) Dragging the Government out of the Cold War (“[DoD] continues to maintain our deployed nuclear weapons on hair-trigger Cold War alert status”); (13) And of Course: Fixing the Broken Federal Contracting System (“problems ... are the result of ... procurement or acquisition ‘reforms,’ including cozy negotiations, inadequate competition, lack of accountability, little transparency, and risky contracting vehicles that are prone to waste, fraud, and abuse”).

I. A JOB WELL DONE. The Acquisition Advisory Panel did a commendable job, given the unique composition of the panel, the breadth of the mandate, the nature of collaborative endeavors of this scale, the (from our perspective) inadequate resources with which it had to work, and the mountain of data and anecdotal evidence available on the acquisition system’s current woes. (We’re biased: our colleague, Joshua Schwartz, served on the Panel, and two of our students served on the Panel’s professional staff.) The Panel’s analysis was insightful, and we applaud the Panel not only for recognizing the key trends in federal acquisition – the sagging acquisition workforce, the explosion in services contracting, the consolidation in federal contracting that favors larger firms, and the rapid rise of task- and delivery-order contracting – but also for aligning its recommendations with those trends. Ultimately, the Panel’s recommendations derive from a simple premise: The private sector does a better job with procurement by planning carefully and employing aggressive competition. The Panel identified the key constraints that keep the government from buying as a private firm would (Draft Report, at 8): special fiscal rules; urgent missions; inadequate staffing; social and economic objectives unrelated to achieving value for money; and unique accountability and oversight expectations and requirements. The Panel’s recommendations map out its reforms in light of those special constraints. With few notable exceptions, the proposed reforms were careful and incremental, which also means they were neither revolutionary nor terribly controversial. The Panel’s most aggressive recommendations address interagency contracting (addressed at length below). The Panel rightly appeared troubled by the rapid proliferation of interagency contracts, which all too often offer too little competition and transparency. Yet even here, the Panel compromised where a less compromising approach – based upon traditional principles of competition, transparency, and accountability – might prove more effective.

II. TRANSPARENCY, OPACITY, AND FEDERAL PROCUREMENT DATA

A. Information is Power. Last year, the jury remained out on whether the not-so-new, privatized, Federal Procurement Data System-Next Generation (FPDS-NG) would serve as a useful outsourcing success story. We sensed that it was premature for GSA to claim that the FPDS-NG has enhanced transparency, improved efficiency in government, and served the contractor community. GAO had expressed “concerns regarding whether the new system has achieved the intended improvements in the

areas of timeliness and accuracy of data, as well as ease of use and access to data ...[and] as to whether the FPDS-NG system has the flexibility to capture data on interagency contracting transactions.” See GAO-05-960R, *Improvements Needed to FPDS-NG* (Sept. 27, 2005), www.gao.gov/new.items/d05960r.pdf; 47 GC ¶ 421. Now it is clear that the situation is worse than expected. The FPDS-NG failed to win the AAP’s hearts and minds.

[T]he report documents a long history of inaccurate data input by agencies. For example, the Panel’s survey of PBA contracts and orders found that of the sample reviewed, 42% that were entered in FPDS-NG as performance based, clearly were not (with some agencies admitting to FPDS-NG coding errors).

The Panel expressed particular frustration in attempting to quantify interagency contracting activity. “From the outset of the Panel’s work, we have been frustrated by the lack of data available to conduct a thorough analysis of interagency contracts and the orders placed under them.” Nor was this an isolated example (however significant that example might be). “The Panel also is concerned with the amount of incorrect data entered into the system by agencies...” In the end, “[a]mong other recommendations for data improvement, the Panel has made several to focus attention on the importance of agencies inputting accurate data, including a statutory amendment assigning Agency Heads the accountability for accurate input.”

Nonetheless, the Panel began with an eye-catcher: “Each year Federal agencies spend nearly \$400 billion for a range of goods and services to meet their mission needs.” That’s a terrific reminder how rapidly procurement spending has increased after its late-1990’s plateau. “From fiscal year 2000 to fiscal year 2005, government purchasing increased nearly 75% from \$219 billion to more than \$380 billion.”

Fiscal Year	Transactions (in millions)	Dollars (in billions)	Percentage increase
2005	10.8 ¹	\$378	10.8
2004	10.5	\$346	13.51
2003	11.5	\$305	22.1
2002	8.65	\$250	6.5
2001	11.4	\$234	7.3
2000	9.8	\$218	-

See FPDS-NEXT GENERATION, <https://www.fpds.gov> (Trending Analysis Report for the Last 5 Years). Once again, we wonder whether *this* will be the year the spending binge ends. We continue to fret that, not only has government (procurement and non-procurement) spending increased, but the government continues to spend money far more quickly than it generates income. That seems unsustainable, and the early rhetoric of the Democratic Congress indicates some level of recognition. A dose of fiscal reality in 2007 could dramatically impact the federal government’s purchasing practices.

B. Harsh Reality. For casual readers, some the Report's statistics may not only surprise, but disturb. (We discuss many of these trends below.) In FY 2005, fully *one fourth* of federal contracts were awarded *without* competition. The Panel also chronicled the government's transition from a supply purchaser to a service consumer: "Services now comprise a greater percentage of the government's acquisition budget. Between 1990 and 1995 the government began spending more on services than goods. Currently, procurement spending on services accounts for more than 60% of total procurement dollars. In FY 2005, DOD obligated more than \$141 billion on service contracts, a 72% increase since FY 1999." Draft Report at 2-3 (footnotes omitted). The Panel described the lack of transparency and competition in interagency contracting as a "significant concern," noting that, in 2004, forty percent of all government obligations (\$142 billion) was spent through interagency contracts. Draft Report, at 3-7; 1-38 to 1-39 (growth in dollar GSA schedules sales). Similar observations surfaced during GAO's lively forum on acquisition reform. See generally, *GAO Hosts Forum on Acquisition Reform*, 48 GC ¶ 405, GAO-07-45SP, *Highlights of GAO Forum, Federal Acquisition Challenges and Opportunities in the 21st Century*, available at www.gao.gov:

[A]cquisition issues are heavily represented on GAO's list of government high-risk areas. ... [T]he government needs to reexamine and evaluate its strategic and tactical approaches to acquisition.... Forum participants [addressed] ... three broad challenges ... : (1) Determining who should perform the business of government in a constantly changing environment.... (2) Ensuring the federal workforce has the capacity and capability to manage contractor operations effectively.... [and] (3) Managing for results and accountability in a contractor-dependent environment....

III. LEGISLATIVE MANDATE, REFORM AGENDA, OR RESEARCH PROJECT? Now the White House is in an awkward position. Representative Tom Davis (R-VA) launched the Panel to fill a vacuum because acquisition reform was needed, no leadership emanated from the White House, and OFPP lacked the necessary bandwidth, in part because its resources were consumed by "competitive sourcing" (or outsourcing of government jobs). In return, Davis expected a comprehensive acquisition reform agenda for a Republican-controlled Congress. My, how things change! The final report will be delivered into a politically charged environment. Congressional Democrats, eager to hold hearings, are pointing to the report as evidence that the Bush administration failed to responsibly steward \$380 billion in procurement. (Might that prove precisely the kind of centrist message calculated to propel the Democrats to the White House in 2008?) Unlike Tom Davis' Republican-controlled Government Reform Committee, Chairman Henry Waxman's (D-CA) committee will feel no obligation to adopt any of the Panel's recommendations. (Contrast this with the Section 800 Panel's recommendations, which became the blueprint for Vice President Gore's National Performance Review (NPR) acquisition reform initiative. See Section 800 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 800, 104 Stat. 1485, 1587 (1990).) Instead, Chairman Waxman can pick and choose to bolster an agenda already outlined in his Clean Contracting Act (H.R. 6069 in the

109th Congress). Indeed, the Panel's dire warnings may convince members, such as incoming House Armed Services Committee Chairman Ike Skelton (D-MO), to support a revised version of the Clean Contracting Act. If the White House endorses the Panel report, many will ask why the administration dawdled rather than launch its own initiatives. If the White House opposes the Panel's recommendations, it plays into the hands of Democrats who assert that the White House studiously countenanced corruption in contracting.

We're guessing Tom Davis did not get what he expected. Since 2003, when Davis' House Government Reform Committee approved the Services Acquisition Reform Act (SARA) and the bill later became part of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136, the world has changed. In 2003, fighting in Iraq had just begun and most believed that it would soon end. Representative Davis expected the AAP to provide an acquisition reform agenda for the House Government Reform Committee, which he would chair until 2009. The Panel's report, originally expected no later than mid-2005, suffered from start-up impediments and a morphing mandate. (Davis's vision for the panel included neither small business nor acquisition workforce issues.) In retrospect, SARA's modest reforms, largely meant to fine-tune the "commercial item revolution" of the 1990s, seem almost quaint. The tidal wave of contracting dollars in Iraq and Afghanistan, the scandals in lobbying and federal procurement, and a stream of critical reports from inspectors general (IG's) and the Government Accountability Office (GAO), deflated any optimism surrounding federal contracting. Today, the acquisition system desperately needs reform.

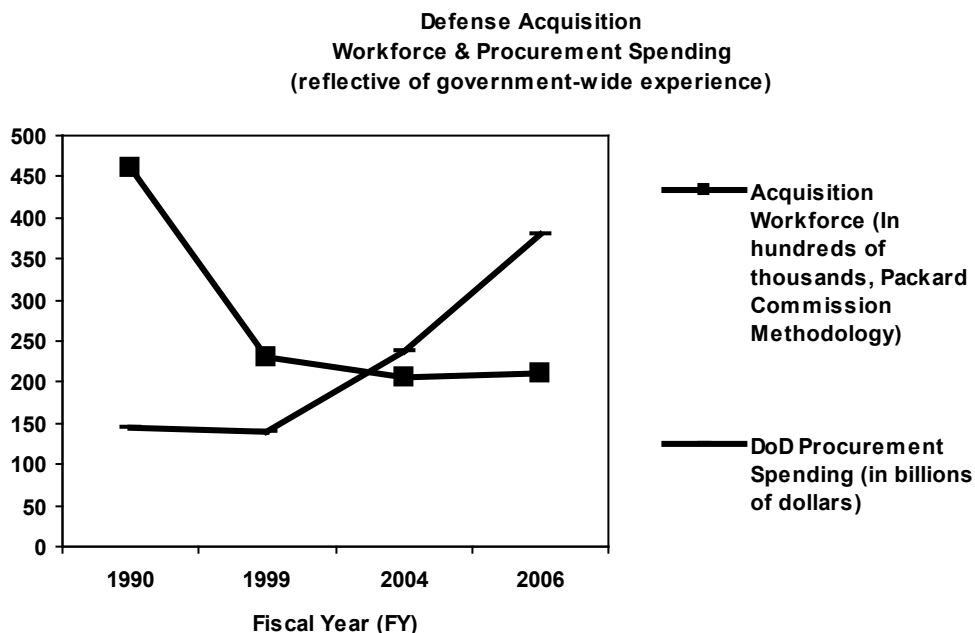
IV. THE FEDERAL ACQUISITION WORKFORCE (IS FINE; GLOBAL WARMING IS A MYTH; AND....) The Report performed a valuable public service by discussing the acquisition workforce and, in so doing, raising the profile of this critical issue. Although this issue fell outside of its legislative mandate, the Panel persuasively argued that acquisition workforce problems permeate most, if not all, of the issues before the Panel. *See* Draft Report, at pp. 5-1 to 5-3. That's spot-on!

There ... are fewer acquisition professionals in the government to award and administer contracts as the government's contracting workforce has reduced in size over the last decade. The federal acquisition workforce has declined by nearly 50 percent since personnel reductions in the mid-1990s. Despite recent efforts to hire acquisition personnel, there is an acute shortage of federal procurement professionals with between five and 15 years of experience. This shortage will become more pronounced in the near term because roughly half of the current workforce is eligible to retire in the next four years.

Draft Report at 3. The Panel did more than any group to date in attempting to catalog the scope of the problem. The Panel engaged a contractor, Beacon Associates, to collect and analyze the voluminous available data. We agree with the Panel that: (1) agencies have failed to perform systematic human capital planning to assess their acquisition workforce, either in the present or with an eye towards the future; (2) despite the

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myriad methods in which the acquisition workforce has been defined and counted over time and among agencies, no one appears to be attempting to quantify *contractor personnel* that currently play an important role in assisting, supporting, and, yes, augmenting the acquisition workforce; and (3) “While the private sector invests substantially in a corps of highly sophisticated, credentialed and trained business managers to accomplish sourcing, procurement and management of functions, the government does not make comparable investments.” Consider this:



Steven L. Schooner, *Keeping Up With Procurement*, 38 Gov. EXEC. 74 (July 1, 2006) (“[I]t should be obvious that the federal government lacks a sufficient acquisition workforce to obtain the best value for the money it spends on goods and services.... In the years it will take to reach agreement on the optimal head count, agencies could be replenishing acquisition offices.”), www.govexec.com/features/0706-01/0706-01advp.htm. In the end, however, the Panel blinked and surrendered to the threshold issues of process. The Panel concluded that it lacked sufficient credible information on the size, composition, or strength of the acquisition workforce to make meaningful recommendations as to the target size of the acquisition workforce. Accordingly, the Report’s findings and recommendations primarily address planning and data-gathering. See Draft Report at pp. 5-14 to 5-57.

Meanwhile, the drums beat out a host of simple messages that our political leadership have ignored for more than fifteen years: The macro (government-wide) and micro (acquisition workforce) effects of the 1990’s downsizing frenzy left the federal government woefully unprepared to identify, recruit, manage, and incentivize the (hypothetically revolutionized) acquisition workforce envisioned by the 1990’s acquisition reforms. At the time, no empirical evidence supported the reductions, yet the sustained reductions and subsequent failure to replenish the workforce created a generational void and devastated procurement personnel mo-

rale. Meanwhile, despite clear mandates requiring agencies to contract out government functions (and explosive growth in the reliance upon service contracts), no emphasis was placed upon retaining or obtaining skilled professionals to plan for, compete, award, or manage sophisticated long-term service contracts. Accordingly, the failure to respond to a dramatic increase in procurement activity lead to a triage-type focus on buying, which severely limited the resources available for contract administration, management, and oversight. All of which could serve as an explanation for the meteoric rise in, and reliance upon, interagency contracting. See, also, the Professional Services Council (PSC) and Grant Thornton's *Troubling Trends* survey, *Acquisition Workforce Top Concern for Federal Managers, Survey Says*, 48 GC ¶ 398, www.pscouncil.org/pdfs/2006PSCProcurementPolicySurvey.pdf; *MSPB Releases Analysis of Contracting Officer Representatives Survey*, 48 GC ¶ 178; *DoD Not Publishing List of Critical Acquisition Workforce, DOD IG Says*, 48 GC ¶ 321 (internal records for acquisition personnel were inconsistent and inaccurate); *Over Half of Acquisition Workforce Eligible to Retire By 2015, FAI Report Says*, 48 GC ¶ 283; *Advisory Panel Calls for Comprehensive Database On Acquisition Workforce*, 48 GC ¶ 244; *IG Criticizes DOD Count of Acquisition Workforce*, 48 GC ¶ 149; *Katrina and Rita Response: Poor Planning, Lack of Communication and Insufficient Staffing Resulted in Poor Acquisition Practices*, 48 GC ¶ 138; *OMB Announces New Certification Program for Acquisition Personnel*, 48 GC ¶ 44.

V. INTERAGENCY CONTRACTING: THE ELEPHANT IN THE ROOM

A. Shine A Light. We were pleased that the Panel devoted so much attention to interagency contracting. The Panel's recommendations follow sustained calls for reform. See, e.g., Draft Report, at pp.3-1 to 3-7 (summary of reports, findings and recommendations on interagency contracting); Michael C. Wong, *Current Problems with Multiple Award Indefinite Delivery / Indefinite Contracts: A Primer*, ARMY LAWYER, Sept. 2006 (available at www.jagcnet.army.mil/TJAGLCS or www.pubklaw.com/papers.html); *GAO Finds DHS Interagency Contracting Controls Lacking*, 48 GC ¶ 339, GAO-06-996, *Interagency Contracting: Improved Guidance, Planning, and Oversight Would Enable the Department of Homeland Security to Address Risks*, www.gao.gov/new.items/d06996.pdf. As GAO explained:

[Although t]his contracting method is often chosen because it requires less planning than establishing a new contract, ... not all interagency contracts provide good value when considering timeliness and cost. [I]n all four cases for which an analysis of alternatives was required, it was not conducted. DHS officials said benefits of speed and convenience—not total value including cost—have often driven decisions to choose these types of contracts.... [Moreover,] DHS does not systematically monitor its total spending on interagency contacts and does not assess the outcomes of its use of this contracting method.

That sounds familiar. See, e.g., Robert O'Harrow Jr. and Scott Higham, *Interior, Pentagon Faulted In Audits: Effort to Speed Defense Contracts*

Wasted Millions, WASH. POST A1, (December 25, 2006). “More than half of the contracts examined were awarded without competition or without checks to determine that the prices were reasonable, according to the audits by the inspectors general for Defense (DOD) and Interior (DOI). Ninety-two percent of the work reviewed was awarded without verifying that the contractors’ cost estimates were accurate; 96 percent was inadequately monitored.” See also, *Problems Remain with DoD Purchases Made Through GSA*, 48 GC ¶ 406 (nearly all of the purchases reviewed were “either hastily planned or improperly executed or funded” and most of the purchases sampled lacked acquisition planning, did not have adequate interagency agreements with GSA, and did not develop adequate quality assurance plans), D-2007-007, FY 2005 DOD Purchases Made Through the General Services Administration, www.dodig.mil/Audit/reports/FY07/07-007.pdf; *Lack of Controls, Confusing Guidance Plague Marine Corps Intergovernmental Purchases, DOD IG Says*, 48 GC ¶ 293. See also, GAO-05-456, *Interagency Contracting: Franchise Funds Provide Convenience, But Value to DOD Is Not Demonstrated* (July 29, 2005); GAO-05-201, *Interagency Contracting: Problems with DOD’s and Interior’s Orders to Support Military Operations* (Apr. 29, 2005); GAO-05-350T, *GAO’s 2005 High-Risk Update*, GAO Rep. No. (Feb. 17, 2005); GAO-05-207, *GAO High-Risk Series: An Update*, (Jan. 1, 2005) (adding interagency contracting to “high-risk” list); GAO No. NSIAD-96-10, *Interagency Contracting: Controls Over Economy Act Orders Being Strengthened* (Oct. 20, 1995); Ralph C. Nash, *Federal Supply Schedule: Agencies Can Use It When They Want*, 20 N&CR ¶ 55 (November 2006).

The Panel’s recommendations, however, imply that taxpayers do not deserve (or are not entitled to) a fully transparent procurement system. Sure, we routinely make economic decisions that stop short of full transparency. Procurements for more than a relatively low amount, \$25,000, require a certain amount of publicity, competition, and post-award public notice, and are subject to protest, while more stringent demands are imposed at the \$100,000 level. See generally Draft Report, at pp.1-29 to 1-31. Since the mid-1990’s, interagency contracting constituted a radical departure. These flexible vehicles have shielded billions of dollars in orders from basic requirements of transparency and competition (while, all too often avoiding common sense expectations for pre-award requirement descriptions and post-award management and surveillance). Thus, at one level, the Panel’s most radical decision was to *countenance* that suboptimal procurement system by tolerating the existing interagency contracting regime. See Draft Report, at pp. 3-38 to 3-44.

B. Fixing the Problem? The Report focused on the problems *internal* to interagency contracting that ultimately reflect a breakdown in the competitive process. The storyline is familiar: There is insufficient definition of requirements at the time interagency contracts are first let. (The phrase “open-ended statement of work” springs to mind.) Once orders are to be issued against those standing contracts, there is far too little competition for those orders. (That’s consistent with the perception that contractors treat these vehicles as “hunting licenses.”) The Panel found only spotty *publication* of proposed interagency purchases or awards, that there is seldom robust *competition* for orders, and *accountability* and *transparency*

fail because there are no debriefings (nor, generally, protests) of task- or delivery-order awards under the standing agreements. *See* Draft Report, at 9.

Debriefing and Protest Rights for Orders over \$5 Million: We applaud the Panel for recommending that disappointed offerors for orders over \$5 million be entitled to at least some debriefing and protest rights. Conversely, the threshold seems arbitrary. (It also ignores the fact that GAO already entertains protests on *all* levels of GSA Multiple Award Schedule (MAS) orders.) The \$5 million figure seems to have been chosen because it marks the median value of orders. *See* Draft Report, at pp. 1-76 to 1-77. We wonder whether: (a) there is any evidence that there is less likelihood of government error or corruption in orders below \$5 million and thus less need for transparency, or (b) whether purchasing officials act less irrationally on smaller orders (which would suggest *less* need for oversight and accountability). With regard to debriefings, FAR Subpart 16.5 and the GAO already afford contracting officers broad discretion in shaping debriefings (such that, at a minimum, only a written description of the basis of award needs to be given). This minimal requirement would not cripple the interagency procurement system. Rather, we assume that the Panel engaged in a cost-benefit analysis (and, while we might disagree, some progress is better than none). The recommendation on protests also is laudable (if not courageous, given the public disdain for protests), yet the compromise is difficult to reconcile. Around the globe, procurement officials recognize that protests (an extremely efficient form of third-party oversight) ensure transparency, competition, and accountability. Immunizing any aspect of a procurement system from protest is dangerous, because it shelters arbitrary or corrupt action from review.

Expanding the Defense Department's 803 Mandates Government-wide. The Panel recommended government-wide applicability of two rules previously made applicable to DoD pursuant to Section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107-107), per DFARS 216.505-70. First, all *eligible contractors* would be entitled to notice of impending orders on a standing interagency contract. Draft Report, at pp. 1-34 to 37 ("fair opportunity" requirements for order competition discussed). Of course, this limited notice will *not* reach the public or potential vendors that do not hold standing contracts. The Panel also would require that agencies receive at least three offers for orders under interagency contracts. Practical experience, however, cautions that this requirement (charade?) is easily overcome by soliciting empty offers from vendors that are certain to lose.

Going Further? We were disappointed that the Panel failed to mandate pre-award notice when orders are awarded on a sole-source basis. It also appeared overly cautious in its recommendations regarding structured competitions. Only for orders *over \$5 million* where a statement of work is *already* required would the Panel require (1) a clear statement of requirements, (2) disclosure of significant evaluation factors and subfactors, and their relative importance, (3) a reasonable response time for those submitting proposals, and (4) documentation of the source selection decision (including the trade-off of price and quality). Finally, the Report's argument

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for requiring post-award notice – to provide “transparency and the positive pressures that transparency imparts” (Draft Report, at 9) – seems to prove the need for *pre*-award notice. Unless competitors know of a prospective opportunity, they will have little incentive to compete for (or scrutinize) the business opportunity. More broadly, the Panel’s recommendation for *post*-award notice was already overtaken by the law with the Federal Funding Accountability and Transparency Act, Pub. L. No. 109-329 (September 26, 2006), www.whitehouse.gov/news/releases/2006/09/20060926.html, which requires that all “federal awards” (including task and delivery orders) be published on the web by January 1, 2008.

We would have preferred the Panel to demand full transparency, competition and accountability for task-order contracting. Ironically, that might prove more simple and *less* expensive and disruptive than the Panel’s complicated compromises. We recommend:

- *Publicizing All Prospective Purchases Over \$25,000 (or, in the alternative, \$100,000)*: Every business opportunity over \$25,000 (or, again, in the alternative, \$100,000) intended to be awarded through interagency orders should be publicized on FedBizOpps, www.fedbizopps.gov. Many such opportunities are already publicized through GSA’s “e-Buy” system, see www.gsaadvantage.gov. Unfortunately, the “e-Buy” system is closed to prospective contractors without a good or service on the appropriate GSA schedule, just as it is closed to journalists, taxpayers, and members of Congress. See, e.g., www.ebuy.gsa.gov; Draft Report, at p.1-43 (“the system is set up so that all vendors within the selected product/service categories or SINS can view the RFQ ... and submit quotations”).
- *Structuring All Competitions To Optimize Best Value*: The goals that the Panel set for orders over \$5 million – a sound statement of requirements, with clear evaluation criteria, reasonable time for response, and a documented award – should logically be applied to all orders, of whatever size. DoD already applies many of these requirements to all interagency services orders over \$100,000, see, e.g., DFARS 216.505-70. The alternative seems untenable: Have we really reached the point where multi-million dollar orders with open-ended statements of work can be awarded without even the most fundamental predicates?
- *Affording Debriefings for All Awards*: The core purpose of debriefings is to assure disappointed offerors that they should not abandon the federal marketplace; that they have not lost for irrational or corrupt reasons. That purpose is just as important in small procurements (e.g., under \$5 million) as in large ones.
- *Allowing Protests of All Orders*: While making orders over \$5 million subject to protest was laudable, the threshold is simply too high.

This type of reform will *not* come from the agencies, the FAR Council, OFPP, or the administration. Now it’s up to Congress, and so the reform agendas of key Democratic leaders will prove critically important.

C. Interagency Contracting: Competition, Consolidation, Combustion. One key problem with managing, let alone reforming, interagency contracting is their astronomical growth. In the weeks before the Panel's draft report, OFPP acknowledged that *several hundred* interagency contracts have grown up across the government, largely unchecked. See Matthew Weigelt, *Interagency Contracts Need Parameters, Officials Say*, FEDERAL COMP. WEEK, Dec. 6, 2006, www.fcw.com/article97023-12-06-06-Web). Although he acknowledged concerns with proliferating interagency contracts, OFPP's Denett argued gamely that the multiple contracts enhance competition among contracting vehicles, see Daniel Pulliam, *OMB Looks to Boost Use of Interagency Contracts*, GOV. EXEC. (Dec. 5, 2006) www.govexec.com/dailyfed/1206/120506p1.htm. Those who oppose consolidation ignore the efficiencies of uniformity. Should the government really manage hundreds of interagency contracts? GSA Administrator Lurita Doan argued that proliferating contracts should be consolidated at GSA. See, e.g., Rob Thormeyer, *Doan Takes GSA Back to Basics*, WASH. TECH. Oct. 16, 2006, www.washingtontechnology.com/news/21_20/news/29524-1.html. This has a certain logical appeal, even though it follows a sharp drop in GSA revenues and must be contemplated in light of GSA's strong self-interest (specifically, its reliance upon fees to survive and thrive). GSA's struggle stems, in large part, from a serious decline in DoD usage, prompted by a series of sharply critical reports about abuses in interagency contracting. See, e.g., DOD IG, D-2007-007 *FY 2005 DoD Purchases Made Through the General Services Administration*, (Oct. 30, 2006), www.dodig.mil/Audit/reports/FY07/07-007.pdf; DOD IG, D-2007-023, *Acquisition: FY2005 DoD Purchases Made Through the National Aeronautics and Space Administration* (Nov. 13, 2006) (available at www.dodig.osd.mil/Audit/reports/FY07/07-023.pdf (of 111 DOD orders reviewed through the NASA Scientific and Engineering Workstation Procurement (SEWP) contracts, 98 were "either improperly executed, improperly funded, or both"); Draft Report, at pp.1-60 to 1-61 (recounting review "by GAO and the DoD IG over several years [which] have repeatedly called into question the competitiveness of the ordering process under task and delivery order contracts").

GSA responded that DoD's standards for interagency contracting were "evolving" in a proliferating set of DoD guidance. *Id.* at iii & 6. To solve this problem – to stabilize the standards for interagency contracting – in December 2006, DoD and GSA entered into a memorandum of understanding, establishing standards for GSA performance in handling interagency orders for the Defense Departments. See *Memorandum of Agreement Between General Services Administration and Department of Defense* (Dec. 4, 2006) available at www.gcn.com/newspics/Dod-GSA_MOU_12.06.06.pdf. Notably, this was *precisely* the solution urged by Representative Waxman's bill, H.R. 6069: a "written agreement between the requesting agency and the servicing agency assigning responsibility for the administration and management of the contract." *Id.* § 303. While the DoD–GSA agreement has been roundly criticized as overly restrictive, the *existence* of the agreement suggests the way forward for interagency contracting. The December 2006 DoD–GSA agreement highlights one key point on which interagency contracts will compete: the most successful interagency

vehicles will accommodate customer agencies' unique requirements, and, given increasing outside scrutiny, those requirements will likely entail ever broader regulatory burdens. The race among scores of interagency vehicles, in other words, may well be a *race to the top* (reversing the decade-long race to the bottom) – a competition in which the winner will be the “most righteous” interagency vehicle, *i.e.*, the interagency contracting vehicle that best ensures that customer agencies can comply with a myriad of procurement rules and fiscal laws.

If this happens, it will turn traditional concerns about interagency contracting on their head. GAO placed interagency contracts on its “high-risk” list in 2005 precisely because of the “downward” forces inherent in interagency contracting: the incentives for sponsoring agencies to cut corners to attract orders from customer agencies. GAO’s concern – that customer agencies and centralized purchasing agencies might collude to reduce their burdens by avoiding competition, transparency, and accountability – may now be reversed. With pressure from Congress, from IG’s, and from other outside critics, centralized purchasing agencies (such as GSA) and their customer agencies (such as DoD) may be forced onto a higher plane – and, thus, regulatory compliance ultimately may lend GSA and other centralized purchasing agencies a competitive *advantage* in the fight for interagency orders. If the procurement market continues to evolve in this direction, ultimately those centralized purchasing agencies that are best able to accommodate regulatory compliance – likely those agencies with the resources and experience to accommodate a rapidly escalating set of compliance demands – will be the most likely to prevail. That leads to the next logical question: whether the *ad hoc* (and sometimes bitter) competition between interagency vehicles will, in time, devolve into a more structured process for selecting centralized purchasing agencies, perhaps under the Office of Management and Budget’s (OMB’s) ongoing “Line of Business” initiative, with specific agencies providing services to other agencies as “centers of excellence.” See www.whitehouse.gov/OMB/egov/c-6-lob.html, discussing consolidating “lines of business” (such as financial, human resources, grants, health, and case management systems) and guidance at www.fsio.gov/fsio/download/fmlob/mpgv1/2.2_-_Competition_Framework.doc. OMB’s guidance suggests that these centers of excellence will compete, in limited fashion, with incumbent agency capabilities.

VI. OUTSOURCING AND THE APPROPRIATE ROLE OF CONTRACTORS SUPPORTING THE GOVERNMENT. For the last couple of years, we’ve suggested that, despite the relentless attention focused upon competitive sourcing (the kind, genteel moniker for outsourcing or privatization), it seemed that the regime experienced little meaningful evolution. But that has not deterred the White House from continuing to tout that: “competitions completed in FY 2005 are expected to generate net savings or cost avoidances totaling \$3.1 billion over the next 5-10 years[.]” *OMB Issues Annual Report on Competitive Sourcing*, 48 GC ¶ 158, www.whitehouse.gov/omb/procurement/comp_src/cs_annual_report_fy2005_results.pdf. We’re stumped as to whether that represents an increase, a decrease, or a skillful obfuscation when compared to last year’s “achievement” of annual gross savings of approximately \$500 million. But hope spring eternal, such that when the Government “fully implement[s] competitive

sourcing, it will save at least \$6 billion each year[.]” *PMC Reports \$50 Billion Annual Savings Through Improved Performance*, 48 GC ¶ 381, PRESIDENT’S MANAGEMENT COUNCIL, GIVING THE AMERICAN PEOPLE MORE FOR THEIR MONEY, www.whitehouse.gov/results/agenda/06_Results_Report.pdf. Don’t spend your \$6 billion just yet. The referenced Attachment F to the report indicates that, for all agencies combined, the *projected* annual savings from *completed* competitions is \$897 million, and the *potential* annual savings from *future* competitions is \$4.16 billion (and, no, we don’t see how that becomes “at least \$6 billion each year”). See also footnote 2: “For those agencies that have not completed **any** competitions involving a most efficient organization [MEO], the government-wide estimated savings average (i.e., \$22,000 per FTE) was used. Future savings may vary....” (Emphasis added.) In any event, the outsourcing debate continues. *GSA Proposes Privatizing Pre-Award Audits; House Democrats Object*, 48 GC ¶ 426 (including discussion of GSA Administrator Lurita Doan’s reference to GSA Inspector General (IG) and his staff as “terrorists”); *GAO Questions Planning for IRS Private Debt Collection Program*, 48 GC ¶ 387; *Plan for Outsourcing Tax Collection Draws Opposition From Advocacy Panel*, 48 GC ¶ 302; *House Approves Amendment to Upgrade Employee Rights to Protest A-76 Competitions*, 48 GC ¶ 233; *Private Sector Airport Screener Contracts Lack Cost Efficiencies*, 48 GC ¶ 176; *DOD Can Improve Oversight and Evaluation Methods Related to Privatized Housing*, 48 GC ¶ 167.

Contractor Ethics: On a related note, the Acquisition Advisory Panel steered delicately around the issue of contractors’ ethical obligations as they assume ever more central roles in government. See Draft Report, Ch. 6. We found this surprising given the extent to which scandals have dominated the procurement policy discussion to an extent not seen since the 1980’s. See, e.g., *Boeing Settles “Druyun Affair”: Tax Implications Concern Top Senators*, 48 GC ¶ 234. Despite the Democrats’ stunningly successful campaign claims that Washington is immersed in a “culture of corruption,” and the Democrats’ clear legislative agenda of ethics reform, the Panel did *not* call for new legislation to govern contractors’ ethics in government. (Ironically, a statute nearly two decades old, 41 U.S.C. § 405b, already authorizes regulations to curb conflicts of interest in those who closely advise the government.) Instead, the Panel recommended that OFPP more clearly define the dividing line between contractors and “inherently governmental” functions in government. Draft Report, at pp. 6-29 to 6-30. Instead of statutory or regulatory constraints on contractors’ potential conflicts of interest, the Panel called for resolving the problem contractually, through clauses – and not necessarily prohibitive clauses, but rather clauses that would set out “general ethical guidelines and principles,” perhaps by “requiring appropriate disclosures.” Draft Report, at 25. The Panel passed this political “hot potato” back to the FAR Council. See Draft Report, at pp. 6-31 to 6-35. But the problem won’t go away.

[W]e have gone so far in allowing the Federal Government to lose competence that it is understandable that many ... seem to have concluded that it is impossible to create competent Government agencies staffed with competent civil servants. That seems to be the hidden premise of the Acquisition Advisory Panel and may well be the view of Congress and the Executive

Branch. If that is so, it would be helpful for our politicians to openly admit that this is their view and stop pretending that it is good policy to contract out segments of a critical program or contracting office.

Ralph C. Nash, *Postscript: Mixed Workforce Questions*, 20 N&CR ¶ 54, *A Mixed Workforce: Questioning the Result*, 20 N&CR ¶ 45; see also *SARA Panel Wary of Expanding Ethics Rules for Blended Workforce*, 48 GC ¶ 186.

Personal Services: At the same time, however, the Panel recommended that the government drop its bar against “personal services” contracting (under which a contractor employee reports to a government manager). See Draft Report, at pp. 6-5 to 6-13 (history of personal services bar); 6-30 to 6-31; *SARA Panel Seeks to Ease Ban on Personal Services Contracts*, 48 GC ¶ 282. If this last recommendation is adopted, and contractor employees can take shelter under claims of federal direction, the Panel’s *laissez-faire* approach to regulating contractor ethics may embolden rogue contractors who, already feeling few real legal constraints, will point to their federal “managers” to argue that they enjoy the government’s uncton. Of course, that’s only if the train hasn’t already left the station.

VII. COMMERCIAL CONTRACTING

“If there is any lesson that needs to be taught to companies considering dealing with the Government, it is that Government procurement is nothing like commercial contracting.” Ralph C. Nash, *Dateline*, 21 N&CR (January 2007).

A. Commercial Services Contracting. Given its original mandate, the Panel toiled mightily to bring order to commercial service contracting. As noted above, the growth in service contracting has been accompanied by inadequate resources to properly manage the services and persistent woes that derive from the government’s sustained push to implement performance based service contracting before the Government understood the initiative or how to implement it. See, also, *DoD Management of Services Acquisition Falls Short, GAO Says*, 48 GC ¶ 405; GAO-07-20, *Defense Acquisitions: Tailored Approach Needed to Improve Service Acquisition Outcomes*, www.gao.gov/new.items/d0720.pdf; *HASC Subcommittee Questions Army and Air Force on Services Contracting*, 48 GC ¶ 140.

We expect the Panel’s service contracting recommendations to prove controversial. Yes, the Panel endorsed the use of commercial practices in federal contracting. But, after closely reviewing the history of commercial-item contracting, see Draft Report, at p.1-11, the Panel recommended that streamlined commercial-item contracting be limited to “services ... offered and sold in the commercial marketplace.” That’s more restrictive than the current regulatory definition, which includes as a “commercial item” any service “of a type” of those sold commonly in the commercial marketplace. FAR 2.101; see, e.g., Draft Report, at 1-19; *Information Ventures, Inc.*, Comp. Gen. No. B-294,267, 2004 CPD ¶ 205, n.4 (noting need for market research to qualify services as “commercial”); *SHABA Contracting*, Comp. Gen. B-287,430, 2001 CPD ¶ 105. We agree. Limiting commercial-

item contracting through streamlined procedures to services that are, in fact, broadly sold in the commercial marketplace should ensure that the government will receive fair prices and good quality. Draft Report at 1-67 to 1-68; *cf.* World Trade Organization, *Revision of the Agreement on Government Procurement as at 8 December 2006*, www.ustr.gov/assets/WTO/asset_upload_file771_10226.pdf (revised Government Procurement Agreement uses “of a type” definition for both goods and services). For similar reasons, the Panel recommended that time & materials (T&M) contracts be used to purchase such services only on a limited basis, and only when the government has fully planned the proposed work, to ensure adequate oversight. Although the Panel’s recommendations triggered protests from industry, it is not clear how revolutionary the Panel’s recommendations were. The relevant statute, 41 U.S.C. § 403, already defines “commercial item” services more narrowly, as services “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,” *see* Draft Report, at p. 1-7. Similarly, FAR 16.601 already cautions against overusing T&M contracting, *see id.* at p.1-23; *see also* 71 Fed. Reg. 74667, 74676-77 (Dec. 12, 2006); *FAR Councils Publish Final Rule For Payments Under T&M and LH Contracts*, 48 GC ¶ 431. Perhaps that’s just the point: we don’t really need new rules; we just need to reform (or conform) our practices.

We also were intrigued to see how the discussion of commercial services appears to have reinvigorated policy analysis of the Truth in Negotiations Act. *See, generally, Narrow TINA’s Commercial-Item Exception, DOD IG Says*, 48 GC ¶ 370 (IG expressing concern that “contracting officials relied upon the commercial item exception ... to justify dispensing with cost or pricing data and other protections without achieving the benefits of buying truly commercial products”), DoD IG Report No. D-2006-115. This begs the question as to whether TINA has fulfilled its intended purpose and whether history might provide us with a more effective and/or fair vehicle for achieving a similar outcome. William E. Kovacic & Steven L. Schooner, *A Modest Proposal to Enhance Civil/Military Integration: Rethinking the Renegotiation Regime as a Regulatory Mechanism to Decriminalize Cost, Pricing, and Profit Policy*, available at <http://ssrn.com/abstract=869982>; *see also, Air Force Commercial Acquisition Practices May Lead to High Costs, GAO Says*, 48 GC ¶ 351, GAO-06-995, DOD Contracting: Efforts Needed to Address Air Force Commercial Acquisition Risk, www.gao.gov/new.items/d06995.pdf, discussing the risks without the benefits:

OSD expected that the increased use of commercial acquisition would provide DOD with greater access to commercial markets ... with increased competition, better prices, and new market entrants and/or technologies.... [For] at least one of the expected benefits, attracting new market entrants, the expected benefit has not materialized.... [I]mproperly classifying an acquisition as a commercial acquisition leaves the Air Force vulnerable to accepting prices that may not be the best value for the department.... The Air Force’s use of commercial acquisition has also been accompanied by an increased amount of dollars being awarded sole-source... [and GAO found increasing sole-

source spending on Air Force commercial contracts over the last 6 years].

B. Improving Implementation Of Performance-Based Service Acquisition (PBSA) In The Federal Government. Compared to its effort on interagency contracting, the Panel's PBSA's treatment seems like an afterthought. As politely as possible, the Panel conceded that performance-based acquisition has failed to catch fire. As was typically found when discussing the FPDS, data on performance-based acquisition appeared "insufficient" and "perhaps misleading" regarding the success of performance-based acquisition. *See* Draft Report, Ch. 7 (highlighting serious problems in federal procurement data gathering). Yet, hope springs eternal. Like the stubborn parent convinced that his or her child can succeed if only given a chance – and armed with faith (rather than data) to support that conviction – the Panel called for *broader* use of performance-based acquisition. *See* Draft Report, at 15 ("Ultimately, the Panel determined that in view of a lack of data supporting *either* that the technique is unworkable in the federal government sector *or* that PBA's [performance-based acquisition's] costs outweigh its benefits, the Panel's statutory mandate was clear: improve the effectiveness and appropriate use of PBA."). But that ignored the obvious inference logically drawn from performance-based acquisition's sorry history to date. Given the current acquisition workforce's experience, training, and skills, and the demands placed upon the workforce, performance-based acquisition simply does not, and cannot be expected to, work. Thus, we are flummoxed by the Panel's presumption that, absent hard data to the contrary, performance-based acquisition simply *must* work. We admire the Panel's faith (even if we do not, nay, cannot, share it). But we think Ralph Nash said it best:

we have encountered scores ... of dedicated acquisition personnel who have attempted to follow the current guidance in acquiring these types of services. We can report their reaction in one word – frustration. A recommendation that the Government ... press on with the 15-year effort to impose performance-based contracting on all varieties of services must be based on the proposition that all of these folks are incompetent, untrained, or both. We don't believe this is so. ... [T]he fundamental policy that is flawed. Thus, the first step in addressing improvements to performance-based contracting should be to define the many types of routine services for which it is appropriate. The second step should be to recommend a sound technique for those services for which it is inappropriate.

Ralph C. Nash, *Postscript: Performance-Based Contracting*, 20 N&CR ¶ 53 (November 2006); see also, Vernon J. Edwards, *The Acquisition Advisory Panel And Performance-Based Contracting: A Wasted Year*, 20 N&CR ¶ 32 (July 2006) ("In the more than 15 years since [OFPP] issued its policy making performance-based contracting the preferred way to buy services, the policy has not caught on. Working-level resistance to performance-based contracting has withstood pilot programs, best practices guides, samples, templates, a variety of handbooks, new regulations, new statutes, annual goals, countless conferences and seminars, unsubstantiated claims of cost savings and quality improvements, and all manner of hype.").

VIII. SMALL BUSINESS, SOCIAL AND ECONOMIC POLICIES, AND WEALTH DISTRIBUTION. The Panel's recommendations regarding small-business contracting appear modest. See Draft Report, Ch. 4. (Recall that these issues were an (arguably unwelcome) eleventh hour compromise addition to its mandate.) Given the broad sweep of its investigation, however, we remain slightly disappointed that the Panel steered so carefully around the "third rail" in public procurement. The Panel scrupulously avoided addressing whether our omnipresent battery of social and economic preferences serve our procurement system well or, as most experts around the globe conclude, do extreme violence to our procurement regime's ability to provide value for money, optimize competitive outcomes, ensure customer satisfaction, maximize transparency, or enhance administrative efficiency. To the extent that this issue is being played out on a global scale, particularly among the European Union (EU) states, we sense that a valuable window of opportunity has been squandered. Yes, we understand (and may even sympathize with) the Panel's implicit tactical decision to conserve its political capital for its assault on interagency contracting. (But that doesn't mean we aren't disappointed.) And, yes, the Panel acknowledged problems with small business initiatives, including confusion over the priority to be given socioeconomic programs and failures in "cascading" procurements (which "pour over" contracting opportunities to large businesses only if those opportunities are not seized by small and disadvantaged contractors). In the end, however, the Panel recommended only incremental improvements and left the difficult issues for the next major cycle of reforms. Draft Report, at pp. 22 to 23; 4-18 to 4-24; 4-33 to 4-41.

Thus, it's particularly amusing to look back on the most disruptive social policy of 2006: ill-conceived domestic preferences, here in the form of the Berry Amendment's coverage of specialty metals. The domestic source requirements related to specialty metals offered a textbook example of how social policies can restrict competition and inject inefficiency into the procurement process by forcing participants to focus on matters unrelated to value for money. See, generally, David M. Nadler, Harvey G. Sherzer & Michael C. Mateer, *New Department of Defense Berry Amendment Guidance—Some Answers and More Questions*, 48 GC ¶ 435; John W. Chierichella & David S. Gallacher, *Berry Amendment 'Reform'—The Sound And the Fury*, 48 GC ¶ 370 ("Berry Amendment is a relic of a former age, ill-suited to the realities of our global marketplace and current procurement demands"); John W. Chierichella & David S. Gallacher, *Specialty Metals and the Berry Amendment—Frankenstein's Monster and Bad Domestic Policy*, 46 GC ¶ 168; *DOD Requests Berry Amendment Changes*, 48 GC ¶ 143; *DCMA Issues New Guidance on Berry Amendment Oversight*, 48 GC ¶ 94. See also, John J. Pavlick & Rebecca E. Pearson, *New DoD Guidance on the Berry Amendment: Still Berry After All These Years*, PROCUREMENT LAWYER (forthcoming 2007) (Recent statutory changes [to "one of the most vexing of the domestic preference statutes affecting government contracts"] have tantalized ... with the possibility of meaningful reforms. ... [M]any held out hope that implementing regulations and guidance would aggressively exploit openings in the legislative language to provide the sought-after relief. However, guidance ... once again adopts a wait and see attitude.")

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But this single domestic preference-based disruption is by no means the sole example of how social policy impedes efficient procurement outcomes. A favorite bastardization of the procurement regime remains the ill-suited and, apparently, unconsummated, marriage of Alaska Native Firms to the Small Business Administration's 8(a) program. *See, e.g., GAO Criticizes SBA Oversight of Contracts With Alaska Native Firms*, 48 GC ¶ 157, GAO-06-399, Contract Management: Increased Use of Alaska Native Corporations' Special 8(a) Provisions Calls for Tailored Oversight, www.gao.gov/new.items/d06399.pdf. GAO found, for example, that "SBA has not tailored its policies and practices to account for ANCs' unique status in the 8(a) program and their growth in federal contracting, even though SBA officials recognize that ANC firms enter into more complex business relationships than other 8(a) participants." While stopping short of accusing SBA of imitating an ostrich with its head in the sand, GAO concluded that SBA provided inadequate oversight by not:

- determining whether more than one subsidiary of the same ANC is generating the majority of revenue under the same primary industry [Note: "From fiscal year 1988 to 2005, ANC 8(a) subsidiaries increased from one subsidiary owned by one ANC to 154 subsidiaries owned by 49 ANCs."];
- consistently determining whether other small businesses are losing contracting opportunities when large, sole-source 8(a) contracts are awarded to ANC firms;
- adhering to a legislative and regulatory requirement to ascertain whether 8(a) ANC firms have, or are likely to obtain, a substantial unfair competitive advantage within an industry;
- ensuring that the partnerships between ANC firms and large firms are functioning in the way they were intended under the 8(a) program; and
- maintaining information on ANCs' 8(a) activity.

Of course, domestic preferences and ANC set-asides are but two anecdotes in the unruly and oh-so-unattractive feeding frenzy of social interests brutally jockeying for their piece of the federal procurement pie. *See, e.g., Snowe Wants GSA to Set-Aside Large IT Acquisition for HUBZone Firms*, 48 GC ¶ 388; *Federal Government Earns D- On Small Business Contracting*, 48 GC ¶ 275; *Senate Panel and SBA IG Call Small Business Contracting Numbers Misleading*, 48 GC ¶ 255; *SBA Issues Long-Awaited Notice On Set-Asides for Women Owned Firms*, 48 GC ¶ 222; *DOD More Likely to Pay Small Business Contractors Late, GAO Finds*, 48 GC ¶ 195; *Inadequate Management Contributes to DOE's Failure to Meet Small Business Goals, GAO Says*, 48 GC ¶ 139.

IX. PRESUMED GOOD FAITH: A MATTER OF PERSPECTIVE.

The Panel found that contractors do not enjoy a level playing field in their relationship with their customer when it comes to good faith. "Although the presumption of good faith applies equally to both parties to a commercial contract in the event of a performance dispute with the government, contractors do not enjoy the same legal presumptions regarding good faith of the parties. Current precedent provides that the government enjoys

an enhanced presumption of good faith and regularity in such a dispute.” Draft Report at 7. Accordingly, “with a view toward ensuring fairness[, t]he Panel recommends legislation to ensure that contractors, as well as the government, enjoy the same legal presumptions, regarding good faith and regularity, in discharging their duties and in exercising their rights in connection the performance of any government procurement contract, and either party’s attempt to rebut any such presumption that applies to the other party’s conduct shall be subject to a uniform evidentiary standard that applies equally to both parties.” *Id.* We think that makes sense. To the extent that we are former Justice Department litigators, we remain baffled by the controversy that this recommendation generates. See, generally, *Presumption of Good Faith Should Apply to Contractors As Well As Government*, SARA Panel Says, 48 GC ¶ 232; W. Stanfield Johnson, *Still Needed: Augmentation of Government Ethics Standards To Embrace “Square Dealing” With Contractors – And A Possible Resolution*, 20 N&R ¶ 60 (December 2006) (suggesting, *inter alia*, that a code of ethics based on § 205 of the Restatement be adopted for both parties to the Government contract); Linda P. Armstrong, Walter H. Pupko, and Donald M. Yenovkian II, *Federal Procurement Ethical Requirements and the Good Faith Presumption*, 20 N&CR ¶ 29 (June 2006) (“The presumption that Government officials perform their duties in good faith is well established throughout the United States. Current law, as described above, balances the need for adequate remedies for contractors that have been damaged by inappropriate Government conduct against the need of the Government to exercise discretion in the administration of its contracts.”). We find this a convenient segue into a trend we’d like to see come to an end.

X. CONTRACTING IN IRAQ. Not surprisingly, the (now Phoenix-like) Special Inspector General for Iraq Reconstruction (SIGIR) and the GAO found plentiful ammunition to criticize the Iraq procurement effort. *Documents Evidence Prohibited Subcontracts for Security in Iraq*, 48 GC ¶ 438 (Representatives Waxman (D-Calif.) and Van Hollen (D-Md.) fret that security services were obtained through a KBR LOGCAP subcontract); *SIGIR Criticizes KBR Practice of Declaring Information Proprietary*, 48 GC ¶ 389; *Army Did Not Adequately Monitor Reconstruction Contract Overhead*, SIGIR Says, 48 GC ¶ 379; *Panelists Blame Inadequate Government Oversight for Reconstruction Failings*, 48 GC ¶ 362 (George Washington University Law School Forum); *GAO Reports on \$3.5 Billion in Unsupported or Questioned Iraq Contract Costs*, 48 GC ¶ 343; *SIGIR Reports Severe Waste-Water Leaks in New Barracks at Baghdad Police College*, 48 GC ¶ 341, *SIGIR Reports on Lessons Learned and Status of Iraq Contracting*, 48 GC ¶ 273; *Democrats Call for Hearings on Iraq Reconstruction Contracting*, 48 GC ¶ 226; *Private Security Provider Costs Unknown; Lack of Coordination Remains*, 48 GC ¶ 215; *Corps of Engineers Reimburses KBR’s Controversial Iraq Fuel-Supply Costs*, 48 GC ¶ 81; *SIGIR Reports More CPA Mismanagement*, 48 GC ¶ 34. For every contractor misdeed, and we concede that there have been many, we continue to find that the root cause of most of the Government’s contracting ills in Iraq derived (and continue to suffer) from well-known and predictable procurement pathologies: unrealistic expectations and demands from political officials; insufficient numbers of qualified acquisition personnel and high turnover

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amongst existing personnel (and the attendant lack of institutional knowledge); lack of advance acquisition planning; poor requirements definition; inadequate competition; limited transparency; poorly drafted contractual vehicles; and, of course, inadequate post award administration, quality assurance, and oversight. See, generally, Griff Witte, *The Builder Who Bombed in Iraq: Battered Over Failed Projects, Parsons's CEO Fires Back at Government Critics*, WASH. POST D01 (December 22, 2006):

[Parsons Corp. CEO James F.] McNulty said the government handed Parsons an impossible task by setting unrealistically high expectations for how much could be built while underfunding its efforts.... [T]he company repeatedly pleaded with the government to either provide enough money to get the job done or scale back its goals, but said its entreaties were ignored.

On a related note, see Ralph C. Nash, *Relying on the Government: Seller Beware!*, 20 N&CR ¶ 50 (October 2006) (“We have repeatedly warned contractors that they should not rely on actions of the Government but should know the rules of Government contracting.... Government contractors have to be experts on the statutes and regulations that govern the procurement process and cannot rely on Government officials. If the Government folks make a mistake, it is the unknowing contractor that pays the price.”)

On a positive note, the Government has taken great strides to address the rapidly evolving role of (and the Government's reliance upon) contractors on the battlefield, particularly arms-bearing contractors. Richard L. Dunn, *Interim Rule On Contractor Personnel Accompanying U.S. Armed Forces*, 48 GC ¶ 221; *DOD Issues Interim Rule For Contractors Authorized to Accompany U.S. Troops*, 48 GC ¶ 217. On a less cheery note, we fear that the Abu Ghraib debacle may have been a harbinger for Guantanamo Bay. See, e.g., Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STANFORD LAW & POLICY REVIEW 549 (2005) (was this the straw that broke the camel's back on unregulated interagency contracting?); Griff Witte and Renae Merle, *Contractors Are Cited in Abuses at Guantanamo: Reports Indicate Interrogation Role*, WASH. POST D01 (January 4, 2007) (documents released through an ACLU lawsuit “suggest a greater role for contractors than was previously known”).

1 The Federal Procurement Report for 2005 charts, “Federal Contract Actions and Dollars by Executive Department and Agency,” report the number of actions for FY2005 as 5.94 million.