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EMERGING POLICY & PRACTICE ISSUES

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I. A NEW YEAR AND AN ELECTION CYCLE. Last year began with the Acquisition Advisory Panel (AAP), a blue-ribbon commission launched in 2003 by Section 1423 of the Services Acquisition Reform Act (SARA), transitioning its report from “Draft Final” to Final. History will reflect that, while the report can be conveniently accessed on the Internet, at www.acquisition.gov/comp/aap/finalaapreport.html, the superb cover photo of the Capitol at night sets a new standard for the presentation of an acquisition study effort and also permits dual use of the report as an attractive coffee table book. This year begins with Congress rushing headlong towards the establishment of a Wartime Contracting Commission with a broad mandate and the potential to wreak havoc in the critical fight for the resources needed to stabilize, let alone improve, the federal acquisition system. But more on that below.

A. Sobering News. The most unexpected development during 2007 was also the most disconcerting and tragic. Deborah Howell, in *A Story Punctuated by Death*, WASH. POST (November 5, 2007), explained:

The Post ran a Page 1 story about a temporary Pentagon assignment given a retired Air Force officer by a defense contractor. [Two weeks later], the officer, Lt. Col. Charles Riechers, was found dead, apparently a suicide.... O’Harrow wrote that Riechers went to work for Commonwealth Research Institute, a nonprofit defense contractor.... Riechers was awaiting appointment ... to the No. 2 job in Air Force procurement, a political position. O’Harrow quoted Riechers: “I really didn’t do anything for CRI.” Instead, he worked for Sue C. Payton, assistant Air Force secretary for acquisition, on projects with no connection to CRI.... The Air Force asked CRI to take on Riechers for two months under an existing SETA—science, engineering and technical assistance—contract....

See also, Zachary A. Goldfarb, *Procurement Official Questioned About No-Work Deal Found Dead*, WASH. POST (October 16, 2007); Robert O’Harrow Jr., *Senators Ask for Explanation on Contracting Deal*, WASH. POST (October 5, 2007); Robert O’Harrow Jr., *Air Force Helped Civilian Nominee Get Paycheck From Nonprofit Defense Firm for No Work*, WASH. POST (September 30, 2007). Once again, we are reminded that the procurement community operates under intense scrutiny, public procurement is more that “business as usual,” and – as we discuss at length below – whether in success or failure, it’s all about people.

B. Procurement in an Election Year. With the Presidential election looming, candidates increasingly will jockey to score points by excoriating high-profile procurement failures, both macro and micro. But don’t expect to hear the candidates engaged in a serious national conversation demanding: (1) an unprecedented effort to hire, train, and integrate the huge cadre of highly skilled business professionals necessary to manage the government’s burgeoning contractor workforce (upon which the nation’s functioning depends); (2) the massive government hiring binge – civilian and military – required to staff the government’s current mandates (if, as a nation, we truly desire to depend less upon contractors); or (3) a significant reduction in the services that the government provides to the public (ranging from defense –

at home and abroad – to air traffic control and food safety). The problems facing the acquisition system – particularly those involving the workforce – identify a unique need for leadership, and the upcoming election highlights the challenge. The acquisition community, the nuances of the procurement regime, and the demands inherent in purchasing \$400 billion annually of services, supplies, and construction are invisible to the public. Similarly, the public has no grasp on the direct relationship between increased outsourcing and the need to invest heavily in the acquisition workforce. In a competitive race, the candidates have to speak to the issues the public cares about; there's no time to try to focus the public on the issues they *should* care about. Given the stakes, it's important to get a sense of what the candidates are saying.

Hillary Clinton's "comprehensive, 10-point plan to restore Americans' confidence in their government by increasing transparency and cutting waste and corruption ... includes: ... Ending abuse of no-bid government contracts and posting all contracts online[, and c]utting 500,000 government contractors." www.hillaryclinton.com/issues/reform/

John Edwards asserts, at www.johnedwards.com/issues/, that he would:

Root Out Cronyism and Waste and Increase Efficiency in the Pentagon: ... [He would] launch a comprehensive, tough review of fraud, waste, and abuse, such as missile defense and offensive space-based weapons, that are costly and unlikely to work ... [and] overhaul the rules governing privatization and punish mismanagement.

...

[He would m]odernize our forces, so we do not keep spending money on systems that only meet the needs of today, not tomorrow. "Greening the military" to increase innovation, save millions of dollars, reduce reliance on vulnerable supply lines.

Rudy Giuliani, www.joinrudy2008.com/issues/view/1, asserts that he would "impose fiscal discipline and accountability through a combination of executive action and legislative reform." More specifically, he would:

Require Agencies to Identify at Least 5% to 20% in Spending Reductions: Requiring agency heads to identify savings and increased efficiencies in each annual budget ... is a management tool that will lead to constant streamlining and more cost-effective government spending without compromising national security in the search for savings....

[He also would] Reduce the Federal Civilian Workforce by 20% through Attrition and Retirement ... [and] Replace only half, making the Federal government smaller and smarter through increased use of technology and privatization.

Mike Huckabee has not yet addressed procurement-related topics, but his macro-level approach to government is articulated at www.mikehuckabee.com/?FuseAction=Issues.Home. He is:

running to completely eliminate all federal income and payroll taxes... [including] personal federal, corporate federal, gift, estate, capital gains, alternative minimum, Social Security,

Medicare, self-employment. ... Instead we will have the FairTax, a simple tax based on wealth. When the FairTax becomes law, it will be like waving a magic wand releasing us from pain and unfairness.

...

[O]ur massive deficit is not due to Americans' being under-taxed, but due to the federal government's over-spending. ... To achieve a balanced federal budget, ... the President should have the line-item veto.

...

Our current armed forces aren't large enough.... [He] will increase the defense budget. ... without raising taxes. [He] will limit increases in other discretionary spending and rely on the normal increase in federal tax revenue that is generated annually as Americans' incomes rise.

John McCain "believes we must enlarge the size of our armed forces to meet new challenges to our security," www.johnmccain.com/Informing/Issues/, and further asserts:

"Earmarked dollars have doubled just since 2000, and more than tripled in the last 10 years. ... The time for us to fix this broken process is long overdue." ... [He] would shine the disinfecting light of public scrutiny on those who abuse the public purse, use the power of the presidency to restore fiscal responsibility, and exercise the veto pen to enforce it.

...

Modernizing American armed forces involves procuring advanced weapons systems that will help rapidly and decisively defeat any adversary and protect American lives... and [ensuring] that America's combat personnel have the best safety and survivability equipment available.

...

McCain has worked aggressively to reform the defense budgeting process.... Includ[ing] reforming defense procurement to ensure the faithful and efficient expenditure of taxpayer dollars that are made available for defense acquisition. ... [He] supports significant reform in our defense acquisition process to ensure that dollars spent actually contribute to U.S. security.

Barack Obama would "Shine the Light on Federal Contracts, Tax Breaks and Earmarks," by among other things, creating a "contracts and influence' database that will disclose how much federal contractors spend on lobbying, and what contracts they are getting and how well they complete them." <http://origin.barackobama.com/issues/ethics/> He also asserts, at www.barackobama.com/pdf/TakingBackOurGovernmentBackFinalFactSheet.pdf at 2, that:

The current Administration has abused its power by handing out contracts without competition to its politically connected friends and supporters. These abuses cost taxpayers billions of dollars each year. According to a report by the Center for American Progress, during just the last three years more than five federal officials have been convicted of crimes involving

federal contracting, three others were placed under indictment, and more are under investigation. Barack Obama will end abuse of no-bid contracts. He will require that all contract orders over \$25,000 be competitively awarded unless the contracting officer provides written justification that the order falls within a specified exception and that the requirements and evaluation criteria are clear for every contract.

Mitt Romney, *www.mittromney.com / Issues / curbing-federal-spending*, explains:

Politicians ... in Washington, D.C. have spent too much money on too many programs for far too long. ... The competition for pork barrel spending and the prevailing practice of out of control earmarking has contributed greatly to a culture of corruption in Washington that has tarnished both parties and led to a lack of faith and trust in America's elected representatives.

With few exceptions, we fear that 2008 could be another year in which things get worse before they get better. Nor, at this point, should we expect a leadership epiphany after the 2008 elections.

II. A GOOD YEAR FOR TRANSPARENCY AND FEDERAL PROCUREMENT DATA. Last year, we discussed the Federal Procurement Data System-Next Generation (FPDS-NG), and we hoped that this year we would be able to determine whether that platform would serve as a useful outsourcing success story. There's little question that, for many public users, FPDS-NG provides data more quickly than its in-house predecessor. To the extent that it failed to provide answers to commonly asked questions and permit users to access the wealth of data it contained, however, FPDS seems to have lost its stranglehold on delivery of federal procurement data. Ironically, *competition* has increased *transparency* into the federal procurement data marketplace.

OMB Watch, "a nonprofit government watchdog organization," which "exists to increase government transparency and accountability; to ensure sound, equitable regulatory and budgetary processes and policies; and to protect and promote active citizen participation in our democracy" was first to market with *FedSpending.org*. Its purpose was clear: "OMB Watch started development of this website after years of frustration over not being able to obtain information about federal contracts and grants." In the spirit of transparency, OMB Watch conceded, at the time, that: "We hope this site serves as a prototype for the recently passed Federal Accountability and Transparency Act passed in Congress that requires [OMB] to provide a free online database of all federal spending." Its hope was fulfilled.

USASpending.gov is now the government's single searchable website intended to satisfy the mandate of the Federal Funding Accountability and Transparency Act of 2006. The website concedes that: "The underlying technology for *USASpending.gov* was developed by OMB Watch ... and is used on OMB Watch's website.... The [contract] data available on *USASpending.gov* is provided by the Federal Procurement Data System (FPDS)." It seems reasonable to ask why the FPDS and *USASpending.gov* have not been combined or whether they will be in the future. New users to *USASpending.gov* will be impressed with the ease with which they can generate, among other things, summary data quantifying, for example:

- Federal Contract Awards by Contractor State [note: Virginia, California, and Texas lead the pack for 2006];
- Federal Contract Awards by Contractor Congressional District [note: Virginia 8th District (James P. Moran), Texas 12th (Kay Granger), and Virginia 10th (Frank R. Wolf) top the 2006 list];
- Federal Contract Awards by Major Contracting Agency [Defense, Energy, HHS, NASA, DHS, and GSA are the top six for 2006]; or
- Federal Contract Awards by Extent (or Type) of Competition [for 2006, Full and open competition, 36 percent; Not competed, 26 percent; Full and open competition, but only one bid, 11 percent, etc.].

Moreover, contractor-specific searches are convenient and informative. Simply type in a contractor’s name and you can extract summary information including:

- Contract dollars and number of transactions, per year;
- Agencies purchasing from the contractor;
- Products or services sold;
- Trend data (comparing annual contracting totals over time); or
- A list of the contracts awarded.

You can even filter the amount of information you want on individual contactors, choosing “levels of detail” between low, medium, high, extensive, and complete (although the latter categories may take additional time, depending upon the contractor activity). Moreover, as agencies struggle to make information available in real time, *USASpending.gov* explains that it: “will report transparently on three categories of data quality: completeness, timeliness, and accuracy. In Spring 2008, the quality of agency data will be assessed and their status for each of these categories will be reported candidly and transparently.” For example, at a recent viewing, most agencies were reported between 60 and 71 in terms of “percentage (%) completeness/availability of the data.”

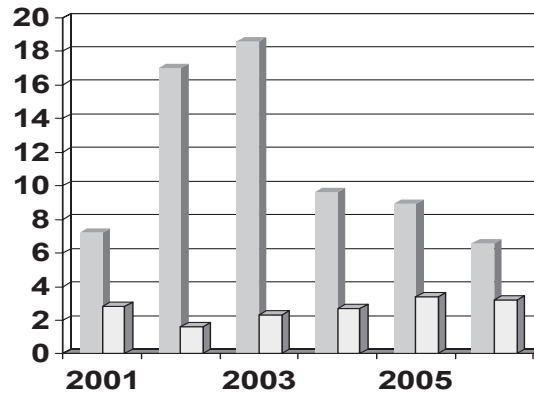
III. Procurement Matters: The Upward Spending Trend Continues. Each year in this decade, we’ve marveled at the increased volume and rate of federal procurement spending. We assumed that the growth would taper, and, to some extent, the growth *rate* has slowed. But annual warnings that the spending increase was a blip, and a contraction was imminent, never transitioned into fact. Further, suggestions remain that that the growth cycle has not yet run its course. *Immigration Control Contracts: The Next Government Spending Binge?*, 49 GC ¶ 272. Looking back, what is particularly striking is how dramatically the rapid growth in federal government contracting has outpaced the rate of inflation.

Federal Procurement Spending Trends 2000-2006			
Fiscal Year	Procurement Spending (in Billions)	% Increase From Previous Year	% Increase in Consumer Price Index (CPI)
2006	\$415.4	6.6	3.2
2005	\$389.6	8.9	3.4
2004	\$357.7	9.6	2.7
2003	\$326.4	18.6	2.3
2002	\$275.2	17.0	1.6
2001	\$235.2	7.2	2.8
2000	\$219.3		

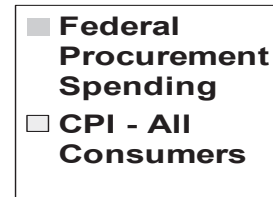
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See Federal Procurement Data System, *Trending Analysis Report Since Fiscal Year 2000* (2006), available at www.fpdsng.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls. Annual increases in the Consumer Price Index for All Urban Consumers (CPI-U) were extracted from the annual Consumer Price Index Detailed Report Tables, U.S. Department of Labor, Bureau of Labor Statistics available at www.bls.gov/cpi/cpi_dr.htm#2007.

**Figure 1:
Federal Procurement
Outpaces Inflation**

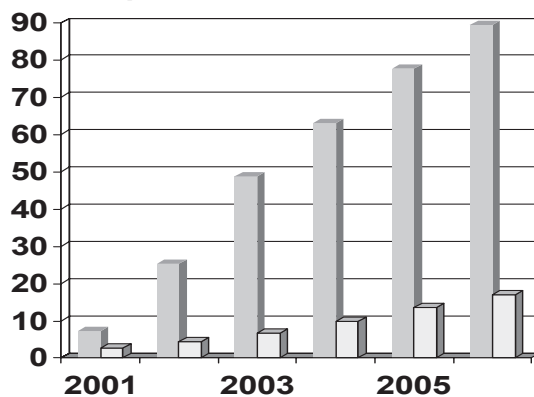


Rate (%) of Annual Increases

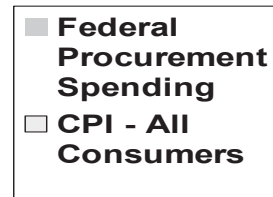


As Figure 1 demonstrates, the rate of growth in federal procurement spending has exceeded the rate of increases in the consumer price index (CPI) every year in this decade. But even that understates the enormity of the growth. During that period, the pace of procurement spending *more than doubled* the rate of inflation each year. (And, yes, procurement spending growth *more than tripled* the rate of inflation in 2002, 2003, and 2004.) Overall, as indicated in Figure 2, from 2000 through the end of 2006, the consumer price index rose only 17.1 percent, while federal procurement spending rose by 89.2 percent. In other words, in this decade, federal procurement spending rose at a rate *five times the rate of inflation*. We have to assume that that can't be a sustainable trend.

**Figure 2:
Federal Procurement
Outpaces Inflation**



Cumulative Percentage Increases



The elephant in the room is that, increasingly, the lion's share of procurement is for services. The growth in service contracting is nicely documented by the Commercial Activities Panel April 2002 Final Report, *Improving the Sourcing Decisions of the Government*, available at <http://share76.fedworx>.

org. “In 1986, supplies and equipment accounted for the bulk of contracting dollars – about . . . 55 percent of total spending. By fiscal year 2001, however, the largest acquisition category was services at . . . 51 percent of total spending.” *Id.* at 25-27. Figure 5, on page 17 of that report, offers a stark visual representation of this trend. The combination of three trends – the relentless shift towards services contracting, the growth in federal procurement spending, and the underinvestment in the acquisition workforce (discussed below) – makes it difficult to predict that the golden age of federal procurement is on the horizon.

IV. REFORM AND THE AFTERMATH OF THE ACQUISITION ADVISORY PANEL. As noted above, 2007 began with the 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*. Although not clearly related to the report’s findings, many familiar topics – commercial item purchasing; competition; incomplete contracts; interagency contracting; uniformity of the FAR system; even the explosive, unmanaged growth of time-and-materials contracting – continue to bubble on the surface as potential areas of reform. See, e.g., *DOD Seeks to Extend TINA to Some Commercial-Item Procurements*, 49 GC ¶ 157; *OFPP Administrator Calls for Competition Enhancement Through Competition Advocate*, 49 GC ¶ 230; *DOD Should Enhance Oversight of Unfinalized Contract Actions*, GAO Says, 49 GC ¶ 252; Ralph C. Nash, *Interagency Contracting: It’s Not A Way To Avoid Legal Requirements*, 21 N&CR ¶ 51 (“One benefit of the spree of interagency contracting that has occurred in recent years is that we have learned a lot of important legal rules applying to such contracts.”); *House Committee Questions TSA’s FAR Exemption*, 49 GC ¶ 299 (it’s about time, eh?); *DOD T&M Contract Controls Need Improvement*, GAO Says, 49 GC ¶ 270; Vernon J. Edwards, *The New Clause for Payments Under Noncommercial Time-and-Materials and Labor-Hours Contracts: An End To The Confusion?*, 21 N&CR ¶ 15; Vernon J. Edwards, *Time-and-Materials and Labor-Hour Contracts for Commercial Items: A Significant Departure From Tradition*, 21 N&CR ¶ 5; *Poor Contracting Procedures Waste Funds*, HUD IG Says, 49 GC ¶ 254; *GAO Updates High-Risk List*, 49 GC ¶ 59.

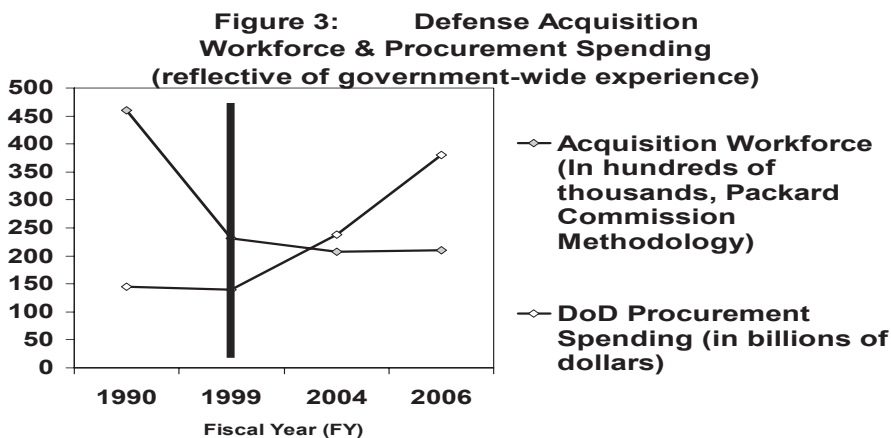
A. Aggressive Legislative Agenda: Stay Tuned. The number and scale of suggestions and legislative remedies for the procurement system rival those seen during the peak of the 1990’s reform movement that produced the Federal Acquisition Streamlining Act and the Clinger-Cohen Act. Despite all of the congressional activity, however, 2007 concluded before we saw whether the lion’s share of the major procurement initiatives would become law. See, generally, *FY 2008 Defense Authorization Act Includes Significant Acquisition Reforms*, 49 GC ¶ 476; *Congress Sends Defense Bill With Additional Funding For Contract Oversight*, 49 GC ¶ 434; *Senate Approves Legislation Targeting Federal Contracting Shortcomings*, 49 GC ¶ 433; *Senate Committee Approves Accountability in Government Contracting Act*, 49 GC ¶ 303; *Committee Hears Testimony On Accountability in Government Contracting Act*, 49 GC ¶ 280; *Senate Hears IG Community’s Views on Improving Government Accountability Act*, 49 GC ¶ 253; *SARA Panel Recommendations Stymie Procurement Reform Progress*, Services Group Says, 49 GC ¶ 122; *House Passes Contracting Reform Bill*, 49 GC ¶ 117; *House Committees Approve Acquisition Reform Bill*, 49 GC ¶ 105; *Acquisition Advisory Panel Calls For More Competition, Transparency in Government Procurements*, 49 GC ¶ 2. Our practical fear is that, even if

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Congress were to adopt all of the pending legislative solutions, it might take a professional lifetime to train the existing acquisition workforce to implement the changes.

B. Good Tidings on Prototyping. We were particularly intrigued, nay, pleased, to learn that DOD appears to have rediscovered competitive prototyping. See, e.g., *Navy Endorses Competitive Prototype Policy*, 49 GC ¶ 466. See Under Secretary of Defense Memorandum, *Subject: Prototyping and Competition*, September 19, 2007 (“Lessons of the past, and the recommendations of multiple reviews, including the Packard Commission report, emphasize the need for, and benefits of, quality prototyping.”); David Architzel, *Subject: Prototyping and Competition* (P07-005), “All pending and future ACAT I programs will be planned, funded and executed based on technology development and acquisition strategies that provide for two or more competing teams producing key system or sub system prototypes.”, available at www.acquisition.navy.mil/content/view/full/5492. See also, Ralph C. Nash, *Postscript: Weapon System Procurement Planning*, 21 N&CR ¶ 54 (“[C]ompetitive prototyping is the most effective strategy... It’s good to see that it has not been forgotten.”); Ralph C. Nash & Vernon J. Edwards, *Weapon System Procurement Planning: A Memory Loss*, 21 N&CR ¶ 14 (“It appears that there is little institutional memory in today’s Government procurement process. ... [T]he long-awaited Request for Proposals for the new Air Force tanker ... adopts the acquisition strategy of a total package procurement, implicitly rejecting the competitive prototyping strategy. Twenty years ago, competitive prototyping was in vogue and total package procurement was banned.”)

V. WHERE THE RUBBER MEETS THE ROAD: THE ACQUISITION WORKFORCE. Last year, we bemoaned that, unfortunately, despite all of the credit it deserves for adding the acquisition workforce to its mandate, the Acquisition Advisory Panel came up short on its ultimate recommendations and surrendered to the threshold issues of process rather than demand action. The longstanding information vacuum provided an easy excuse. 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. That’s disappointing. It seems to us that all of the empirical—macro and micro—and anecdotal evidence leads to the inescapable conclusion that there are too few qualified acquisition professionals to meet the government’s needs today and for the foreseeable future.



A. Not a Pretty Picture. Again, just to review, look at Figure 3 (from last year's materials) and consider that: the federal acquisition workforce declined dramatically due to congressionally mandated personnel reductions in the mid-1990's; arguably, the government has not hired an appropriate number of new acquisition professionals in any year since the 1980's; the existing workforce is aging and, in large part, is retirement eligible; the lion's share of that workforce was neither hired nor trained to primarily purchase services using flexible contractual vehicles; and, as discussed above, the volume of purchasing has increased (or, as some might, say, exploded) in this decade. That's a recipe for disaster.

Accordingly, we remain disappointed, but are no longer surprised that the debate over the need to restore the acquisition workforce continues. See, generally, *OFPP Releases 2007 Acquisition Workforce Survey Results*, 49 GC ¶ 414 (anonymous self-assessment); *Davis Bill Calls for Rehiring Retirees to Alleviate Workforce Shortages*, 49 GC ¶ 365; *DHS Acquisition Management Needs Improvement, GAO Says*, 49 GC ¶ 352 ("DHS acquisition management lacks clear and transparent policies and processes and a capable acquisition workforce"); *Panel to Congress: More Contracting Personnel, Not More Laws*, 49 GC ¶ 260; *FAI Report Stems Debate Over Acquisition Workforce Numbers*, 49 GC ¶ 229; Federal Acquisition Institute, *Annual Report on the Federal Acquisition Workforce Fiscal Year 2006* (May 2007) (describing the stagnant acquisition workforce that employed 57,835 in 2000 and 58,723 in 2006), available at www.fai.gov/pdfs/FAI%20annual%20workforce%20report%202007.pdf; *Senate Committee Criticizes DHS Acquisition Management Structure*, 49 GC ¶ 231; *Doomsday Reports About Acquisition Workforce Not Accurate, But Strategic Management Needed, DAU Chief Says*, 49 GC ¶ 176. *But see* Ralph C. Nash, *Dateline, February 2007*, 21 N&CR (discussing the AAP Report and concluding: "while we don't expect miracles, it would be helpful to see uniform acceptance of the finding that the Government has a real problem and that the first step in improving the acquisition process must be improving the workforce."); *DOD Acts on Audit Recommendations, Discusses Future Workforce Movement*, 49 GC ¶ 100; *Acquisition Transformation: DOD Issues First Report to Congress*, 49 GC ¶ 99; *SASC Grapples with Acquisition Workforce, Competition Concerns*, 49 GC ¶ 44; *DHS Acquisition Management Challenges Remain, IG Says*, 49 GC ¶ 6. *See also*, Ralph C. Nash, *The Acquisition Workforce: Technical Competence Is Required*, 21 N&CR ¶ 59 ("For quite a while we have been wondering how contracting agencies would cope with the steady drain of personnel with the technical competence to carry out their mission.... It's somewhat shocking that an agency procuring helicopter services had no technical person with the expertise to deal with this issue – at either the original evaluation level or at the agency protest level.... It is also a clear indication of the need to prevent such loss of essential capabilities.")

B. Three Cheers For the Gansler Commission! We fully recognize the absence of political will to solve the problem. But we were heartened by, and pause to applaud, the uniquely honest and insightful appraisal delivered by the so-called Gansler Commission. We hope that it serves as an example for others to follow. The recent Army study recommended, among other things, increasing the Army's contracting workforce by 1,400 professionals, which would involve about a 25 percent increase. While the Army is typically one of the largest procuring agencies, it accounts (in any given year) for 15-25 percent of the federal acquisition budget and, historically, has better staffed the procurement function

than many civilian agencies (such as, for example, the Department of Homeland Security). See Commission on Army Acquisition and Program Management in Expeditionary Operations, *Urgent Reform Required: Army Expeditionary Contracting* (Oct. 31, 2007) [hereinafter “Gansler Commission”], available at www.army.mil/docs/Gansler_Commission_Report_Final_071031.pdf; see also, *Army Creates Contracting Brigade: Plans to Bolster Acquisition Workforce*, 49 GC ¶ 464; *Contracting Should Be Core Competency, Army Commission Says*, 49 GC ¶ 422. Among other things, the report explains: “[S]ince the Cold War terminated, the Department of Defense . . . made significant changes to adapt to meet the expected challenges. . . . Over this same period the Army has transitioned many jobs that were previously performed by individuals in uniform . . . to performance by contractors.” Unfortunately, altering the ratio is not without costs. The “Commission [found it apparent] . . . that the Institutional Army has not made the necessary adaptations to the operational policy to extensively outsource support services (in the case of Iraq and Afghanistan, over 160,000 contractors—over 50 percent of the total force). Since these services are needed, and now are being provided by commercial vendors instead of organically, they can now only be fulfilled through the acquisition process; more specifically, by personnel who are specialists in contracting. If the military commander has gained riflemen, but not added contract professionals who can acquire the support services his unit needs, then he has lost capability.”

Fortunately, the Gansler Commission did not similarly avoid the critical issue demanding attention; instead it sounded a clarion call for restoration and reinvigoration of the acquisition workforce: “The . . . Army contracting community has reached a ‘tipping point’ that requires extraordinary action.” One of the most prescient points in the Gansler report is that: “Too often it takes a crisis to bring about major change—the Iraq/Kuwait/Afghanistan contracting problems have created a crisis!” Neither the Army, or for that matter the DHS (discussed at some length below), is alone in facing this crisis. Indeed, this problem—pervasive reliance upon contractors without sufficient qualified personnel to properly manage these contractual relationships—bedevils the entire federal government. Maybe the Army will lead the way with an aggressive response to the Gansler report. Change must begin somewhere.

C. Hiring the Future: Daunting Challenges. Even if Congress came to its collective senses, however, and promptly invested in rebuilding the workforce, the recruiting impediments appear severe. “Harshly critical oversight and bad press have also had an undesirable effect [on recruiting]. One [participant] asked why a young person would go into contracting, given how the government’s contracting function is portrayed in the press. The participant said that publicity, created in part by the ‘gotcha’ approach of some in the auditing community, turns off potential new hires and hurts the existing workforce, causing federal employee attrition.” U.S. Gov’t Accountability Office, GAO-07-45SP, *Highlights of a GAO Forum: Federal Acquisition Challenges and Opportunities in the 21st Century* (Oct. 2006), available at www.gao.gov/new.items/d0745sp.pdf. Moreover, anecdotal evidence continues to demonstrate the difficulty of retaining government expertise in the face of rising private sector compensation. See, e.g., Testimony of Secretary of Defense Robert M. Gates, Hearing of the Senate Committee on Appropriations: The President’s FY 2008 Supplement Request for the Wars in Iraq and Afghanistan (Sept. 26, 2007) (“My personal concern about some of these security contracts is that I worry that sometimes the salaries that they are

able to pay in fact lure some of our soldiers out of the service to go work for them.”). As the Professional Services Council has suggested, “the answer lies principally in aggressively addressing the government’s human capital challenges. These include reversing personnel procedures and policies that inhibit and discourage talented individuals from pursuing a federal career and the development of skills and resources necessary to meet immediate and emerging needs.” *PSC Response to the Center on American Progress*, at www.pscouncil.org/pdfs/centerwhitepaper.pdf.

D. Don’t Fight Oversight; But Don’t Expect it to Fix Things Either.

We continue to advocate that an ounce of prevention is a better investment than a pound of cure. But, criticizing the auditors and those engaged in oversight is not productive. See e.g., Ralph C. Nash, *Dateline, May 2007*, 21 N&CR, discussing the “constant drumbeat claiming that federal agency Inspectors General are discouraging the acquisition workforce from performing their work in an optimum fashion.” We, like Nash, “just don’t get it.” In fact, “[s]implifying the [procurement] process to more effectively serve the agency has little or nothing to do with compliance.” We agree that:

[A] new crop of acquisition personnel ... need to understand that Government procurement requires transparency and documentation. ... If they have obtained competition and made a sound decision, there is no reason to feel threatened. ... [T]he procurement system is governed by a set of rules and ... compliance with these rules is essential. ... Teaching our new hires that compliance ... leads to ineffective procurement is absolutely the wrong message. Let’s get rid of agency management that believes this message and give the bright new folks being hired the freedom to do effective procurement—within the rules.

We return to our mantra: the government needs people, lots more people to (1) plan, which includes understanding what outcome will be sought from the private sector; (2) understand and accurately describe that outcome (or task) to the private sector; (3) select appropriate, qualified contractors in a timely fashion; (4) negotiate cost-effective agreements and draft clear contracts that contain effective incentives (or profit mechanisms) to maximize contractor performance; (5) manage the contractual relationship to ensure that the government receives value for its money; and (6) provide appropriate oversight throughout the process to, among other things, avoid corruption. See also Ralph C. Nash & Vernon J. Edwards, *Dateline, March 2007, Acquisition Planning: The Missing Link*, 21 N&CR: “The lack of timely and sound planning is a constant theme in reports of [IGs] and the [GAO]. It appears that many agencies just do not devote the necessary attention to this vital aspect of the process. It is not much of a stretch to say that the lack of good acquisition planning is at the root of many, if not most, of the poor acquisition procedures that are being reported almost continuously at present.”

VI. OUTSOURCING AND THE BLENDED WORKFORCE.

A. The Future of Outsourcing? A casual reader might conclude that the U.S. government currently is engaged in a broad-based, thoughtful examination of its outsourcing policy, although some, including a hand-

ful of academics, are skeptical of the approach. For example, consider the new book, PAUL VERKUIL, *OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT* (Cambridge Univ. Press 2007) (as the title suggests, the author senses a government abdication of responsibility for governance, generally, and, more specifically, inherently governmental functions); see also, Richard J. Pierce, Jr., *Book Review: Outsourcing Sovereignty by Paul Verkuil*, *Geo. Wash. L. Rev.* __ (forthcoming, 2008). The debate seems to span agencies – both civilian and military – and functions of every conceivable type. See, generally, *Panel Urges Better Management of Government Outsourcing*, 49 GC ¶ 423 (“Better management of Government outsourcing will require heightened contract oversight instead of exhaustive legal calisthenics aimed at parsing the subtleties of what constitutes an inherently governmental function...”); *House Approves Measure to Kill Outsourced Tax Collection And Delay Vendor Withholding Tax*, 49 GC ¶ 394; *House Bill Repeals IRS Authority to Outsource Collection Activities*, 49 GC ¶ 285; *Grassley Defends IRS’ Private Debt Collection Program as House Committee Explores Its Value*, 49 GC ¶ 222; *Conference Highlights A-76 Successes and Missteps*, 49 GC ¶ 188; *IRS Private Debt Collection Program Receives Positive IG Report*, 49 GC ¶ 148; *Army Officials Testify That A-76 Process Caused Walter Reed Decay*, 49 GC ¶ 101; *National Taxpayer Advocate Calls for IRS Private Debt Collection Repeal*, 49 GC ¶ 23. But it’s often “sound and fury, signifying nothing.”

GAO is not alone in painting a sobering picture of the outsourcing decisional process at, for example, DHS. “Decisions to contract for . . . services were driven by the need for staff and expertise to get programs up and operations up and running . . . [Yet, even where] the original justification for contracting, such as immediate need, had changed, . . . components continued to use contractors without reassessing who . . . should perform a given function.” *DHS Needs Better Oversight for Contractors Supporting Inherently Government Functions*, 49 GC ¶ 402; GAO-08-142T, *Department of Homeland Security: Risk Assessment and Enhanced Oversight Needed to Manage Reliance on Contractors* (Oct. 17, 2007), available at www.gao.gov/new.items/d08142t.pdf; U.S. Senate Committee on Homeland Security and Government Affairs, Hearing, *Is DHS Too Dependent on Contractors to Do the Government’s Work?* (Oct. 17, 2007); GAO-07-990, *Department of Homeland Security: Improved Assessment and Oversight Needed to Manage Risk of Contracting for Selected Services* (Sept. 17, 2007), available at www.gao.gov/new.items/d07990.pdf; Testimony of Scott Amey, General Counsel, Project on Government Oversight (POGO) Before the House Committee on Homeland Security “Responsibility in Federal Homeland Security Contracting,” (Apr. 20, 2007), available at www.pogo.org/p/contracts/ct-070420-contracting.html; Accountability in Government Contracting Act of 2007 (S. 680).

B. The Blended Workforce: Still Practicing, Little Policy. It may be too late to call it a trend, but the blended workforce – the reality that government functions, both military and civilian, are accomplished by ill-defined government-and-contractor teams – is here to stay, despite the government’s continued lack of preparation to operate in such an environment. “Federal workers frequently are co-located with contractor personnel in the same government offices, virtually indistinguishable, and often doing the same or similar work. . . . The blended workforce is woven into the government’s fabric for the foreseeable future. The challenge for the acquisition community is to

recognize this extraordinary transfer of responsibilities and make it work in the public interest.” Richard J. Bednar & Gary P. Quigley, *Viewpoint: The Blended Workforce*, GOV'T EXEC. (May 1, 2007). Numerous issues are raised by, yet rarely resolved in advance with regard to, these relationships. See, generally, Vernon J. Edwards, *The Blended Workforce: Another Concern*, 21 N&CR ¶ 9:

under a blended workforce contract, agencies and their contractors must make a special effort to manage not only the relationships between themselves, but the relationships among their respective employees.... The parties must ... discuss the boundaries of legitimate conduct and interaction and how they will identify and resolve workforce issues. They must exchange information about their human resource policies To mitigate the risks, ... agencies and contractors ... must ensure that their employees are informed about the professional and personal risks to which they are exposed, the professional and personal boundaries that must be erected and maintained, and the possible professional and personal consequences of failing to do so.... [I]t is especially important that [government] employees have a clear understanding of what constitutes the scope of their office and employment.

See also, Ralph C. Nash, *Postscript II: Mixed Workforce Questions*, 21 N&CR ¶ 3 (highlighting concerns related to proprietary information).

C. Misguided focus on comparative “cost” of outsourcing. Seriously, it’s not about the money. Although cost savings are sometimes deemed a benefit of privatization, some critics continue to question whether contractors are more cost-effective. See, e.g., U.S. House Committee on Government Reform, *Additional Information About Blackwater USA* (Oct. 1, 2007) (noting that taxpayers spend 600 percent more to use a \$1,222-per-day Blackwater security specialist than an Army Sergeant who receives \$140 to \$190 per day). In any event, we remain convinced that the potential for cost savings *alone* should not be deemed a *primary* benefit of reliance upon contractors, and slavish focus upon the relative cost of contractor support is misguided. Specifically, it is not productive to criticize agencies for paying contractors “too much” without: (1) permitting, as an alternative, an agency to hire additional personnel; (2) confirming that sufficient personnel are available in the marketplace and willing to work for the government; (3) comparing “apples to apples,” such as taking into account all of the long-term or legacy costs of civil servants or members of the armed services; and (4) considering critical issues such as flexibility and surge capacity. For example, higher contractor salaries may be offset, at least in part, by long-run costs avoided. Indeed, a strong case could be made that, for *short-term* demands for additional resources, it makes sense to pay higher, and potentially significantly higher, amounts for contractor support (rather than incurring the cost of additional government employees).

This complex topic is well beyond the scope of these briefing materials, but for an interesting attempt to make some apples-to-apples comparisons, see Congressional Budget Office, *Logistics Support* (comparing the costs of using government employees and private contractors to support the U.S. military), available at www/cbo.gov/ftpdoc.cfm?index=6749. See also GAO-07-998T,

Peacekeeping: Observations on Costs, Strengths, and Limitations of U.S. and UN Operations (June 13, 2007) (noting that to deploy 872 civilian officers, the U.N. budgeted \$25 million whereas it would cost the U.S. an estimated \$217 million; and for pay and support of military troops, the U.N. budgeted \$131 million whereas it would cost the U.S. an estimated \$260 million), available at www.gao.gov/new.items/d07998t.pdf). But see Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 *YALE J. INT'L L.* 383, 395-96 (2006) (noting that the cost savings of not providing benefits to employees of private contractors who can be hired on a short-term basis and are typically not unionized may be offset by the lack of competition in the military contracting process).

VII. IRAQ PROCUREMENT, CONTRACTORS ON THE BATTLEFIELD, AND THE MODERN ERA OF PRIVATE SECURITY

A. Iraq Procurement Dominates The Headlines. It's a lot of money. It's all over the newspapers, Internet, television. And it's not going away anytime soon. Accordingly, procurement in Iraq will continue to dominate congressional and public perception of the state of federal public procurement. *DPAP Gives More Guidance on Contracting Procedures in Iraq and Afghanistan*, 49 GC ¶ 428; *Inadequate Documentation Stymies SIGIR Review of Iraq Reconstruction Management*, 49 GC ¶ 426; *House Committee Presses for Details On Iraq Embassy Contracts*, 49 GC ¶ 390; *HASC Holds Hearing on Alleged Fraud and Corruption Surrounding Defense Support Contracts in Iraq*, 49 GC ¶ 363; *DOD Contracting in Iraq Still Poorly Managed, Comp. Gen. Says*, 49 GC ¶ 189; *LOGCAP Pitfalls Follow Familiar Themes, SASC Finds*, 49 GC ¶ 177; *Deconstruction Reconstruction: Senate Tackles Management of Post-Conflict Rebuilding Efforts*, 49 GC ¶ 124; *DCAA Finds Unsupported Iraq Contract Costs; Top Government Auditors Define 'Waste'*, 49 GC ¶ 65; *Deteriorating Security in Iraq Hampers Reconstruction, SIGIR Reports*, 49 GC ¶ 46; *Watchdog Report Compiles Evidence of Contractors' Failure to Rebuild Iraqi Healthcare*, 49 GC ¶ 35; *Lack of Access to Iraq Data Frustrates Top Investigators*, 49 GC ¶ 32; *GAO Urges Congress to Ask Tough Questions About Iraq*, 49 GC ¶ 13.

B. A Busy SIGIR. Some of the news is encouraging, but it's easily drowned out by relentless media coverage focused upon the seemingly inexhaustible anecdotes of sub-optimal acquisition outcomes. The Special Inspector General for Iraq Reconstruction (SIGIR) concedes that: "the incidence of corruption within the U.S. reconstruction program . . . appears to constitute a relatively small component of the overall American financial contribution to Iraq's reconstruction. . . . [L]osses to American taxpayers from fraud within reconstruction programs will likely amount to a relatively small component of the overall investment in Iraq, totaling in the tens of millions (rather than hundreds of millions or billions, as is sometimes imagined). However, . . . [the SIGIR has] found egregious incidents of fraud." Statement of Stuart W. Bowen, Jr., *War Profiteering and Other Contractor Crimes Committed Overseas*, SIGIR 07-012T at 2-3 (June 19, 2007), available at www.sigir.mil/reports/pdf/testimony/SIGIR_Testimony_07-012T.pdf. See, generally, www.sigir.mil, and specifically, www.sigir.mil/reports/Default.aspx (for Quarterly Reports to Congress, Testimony, Lessons Learned Reports, Audit Reports (with more than 100 issued), Project Assessments, and other reports). If only the media, public, and Congress understood the basics. As Bowen explained:

[O]ur lessons learned report on contracting and procurement [explains that...] the goals of contingency contracting differ

... from other government contracting: the work is done in a dangerous and ever-evolving environment. Contracting under these circumstances requires an agency's most experienced contracting and program management personnel and top level oversight to address conditions in a fast paced environment that is particularly vulnerable to waste, fraud and abuse. ... [C]ontractors bear a high degree of risk, and thus are more likely to perform work under cost reimbursable contracts which have to be carefully managed to ensure results.

C. Increased, Yet Limited Transparency. Congress and the public only recently came to grips with the reality that, in Iraq, the number of contractors rivals that of our military presence. See, e.g., T. Christian Miller, *Private Contractors Outnumber US Troops in Iraq*, L.A. TIMES (July 4, 2007). Prior estimates seem to demonstrate the escalating use of contractors in Iraq. See, e.g., GAO-06-865T, *Rebuilding Iraq: Actions Still Needed to Improve the Use of Private Security Providers* (June 13, 2006) (20,000 contractors in 2005 and 48,000 as of March 2006), available at www.gao.gov/new.items/d06865t.pdf; Testimony of Secretary of Defense Robert Gates, U.S. House Appropriations Defense Subcommittee Hearing, *Defense Department Budget for Fiscal Year 2008* (Mar. 29, 2007) (126,000 contractors); Kris Osborn, *McCaffrey: 600 US Contractors Have Been Killed in Iraq*, DEFENSE NEWS (Apr. 16, 2007) (130,000 contractors), available at <http://www.defensenews.com/story.php?F=2688598&C=mideast>. Moreover, although far from easily accessible and, arguably, generated for unrelated purposes, Labor Department data suggests that contractors are increasingly paying the ultimate price for their service in Iraq. See, generally, *Report: 14 Percent of Iraqis Now Displaced*, KNIGHT RIDDER (November 6, 2007):

The deaths of 72 civilian contractors working on U.S.-funded projects in Iraq were reported to the U.S. Department of Labor during the third quarter of the year, a 22 percent increase over the average of previous quarters.... The deaths brought to 1,073 the number of civilians working on U.S.-funded projects who've died in Iraq since the war there began....

David Ivanovich, *Information Incomplete on Iraq Contractors*, HOUSTON CHRON. (August 9, 2007):

While acknowledging the death toll of contractors working in Iraq has crossed the milestone of 1,000, the government Wednesday provided incomplete information about the companies the victims worked for or their nationalities.... [A]s of June 30, 1,001 civilian contractors working for U.S. firms had died ... including 231 in the first six months of 2007.... While military casualties are updated daily and posted on the Pentagon's Web site, civilian contractor deaths are updated only quarterly.... The [Labor] department broke down 776 contractor deaths by company, leaving out almost a fourth..., and did not include all companies whose employees or contractors have died.... The list ... doesn't include ... KBR, the Pentagon's largest contractor operating in Iraq, Kuwait and Afghanistan, which has acknowledged [more than 100] fatalities in the Middle East.

D. Private Security. A single incident on September 16 involving Blackwater, a high-profile private security firm, graphically demonstrated that the risks in the government's increasing and, at times, disturbingly chaotic reliance upon private security are particularly grave; the existing legal and regulatory regimes are inadequate to address them; and the government waited far too long to address these issues in a thoughtful and responsible manner. The September 16 engagement appears to have become the proverbial straw that broke the camel's back, forcing private security into the mainstream media and leaving Congress little choice but to do "something." *DOD and State Sign Private Security Contractor Agreement*, 49 GC ¶ 463; *Proposed Legislation Would Phase Out U.S. Private Security Contractors Overseas*, 49 GC ¶ 458; *State Department Panel Recommends Enhanced Oversight of Security Contractors*, 49 GC ¶ 413; *DOD Wants Single Entity to Oversee Private Security Contractors*, 49 GC ¶ 403; *Private Security Contracting Comes Under Fire From House Oversight Committee*, 49 GC ¶ 372; *COFC to Consider Issues Posed by Private Security Contracting as Senate Considers FY 2008 NDAA*, 49 GC ¶ 262. It's surprising it took so long. Peter Singer's popular book, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY*, was published in 2003; the popular FRONTLINE documentary *Private Warriors*, aired in 2005, www.pbs.org/wgbh/pages/frontline/shows/warriors; and the National Defense University's Industrial College of the Armed Forces (ICAF) conducted two lengthy studies on privatized military operations in 2006, www.ndu.edu/ICAF/Industry/reports/2006/pdf/2006_PMOIS.pdf, and in 2007, www.ndu.edu/ICAF/Industry/reports/2007/pdf/2007_PMOIS.pdf. Yet numerous issues remain unresolved, as suggested by a recent Princeton University workshop with senior military and government officials, contractors, academic experts, and policymakers. See Press Release, *Princeton's Law and Public Affairs Program Releases Consensus Findings on Legal Framework Governing U.S. Military Contractors* (Oct. 1, 2007), available at <http://lapa.princeton.edu/newsdetail.php?ID=17>; Workshop Summary, *Princeton Problem-Solving Workshop Series in Law and Security: A New Legal Framework for Military Contractors?* (June 8, 2007), available at http://lapa.princeton.edu/conferences/military07/MilCon_Workshop_Summary.pdf. See also, Patrick Cullen & Peter Ezra Weinberger, *Reframing the Defense Outsourcing Debate: Merging Government Oversight with Industry Partnership*, Peace Operations Institute (2007) ("[POI] is a nonprofit research organization established ... by staff from the International Peace Operations Association (IPOA) ... dedicated to improving education about peace and stability operations and to promoting practical solutions to peacekeeping operations.") The authors explain that: "This report shifts the discussion of the government's role in defense contract oversight away from an exclusive focus on guarding against contractor malpractice—an important issue that has nevertheless been exaggerated in the media—towards an understanding of contract oversight as a process of government-industry partnership."

E. The Wartime Contracting Commission. All signs point to a Congressional mandate of a wartime contracting commission during 2008. The commission's extremely ambitious mandate could include, among other things: (1) a study of reconstruction, logistical support, and security contracting in Iraq and Afghanistan; (2) a review of the extent of governmental reliance upon contractors and the impact of that reliance; (3) an assessment of the quality of contractor performance and the mechanisms by which performance is measured; (4) an effort to gauge the extent of contractor fraud, waste, and abuse

and the extent to which responsible parties are held accountable; (5) a review of both the DOD's and the State Department's "organizational structure, policies, practices, and resources" relating to program management and contracting; and (6) an assessment of contractor use and mis-use of force, the law of war, and related issues. See, generally, *Wartime Contracting Commission Survives Defense Authorization Bill Negotiations*, 49 GC ¶ 469; *House Approves Proposal to Criminalize Wartime Profiteering From Fraudulent Contracting*, 49 GC ¶ 407; *Congress to Focus on Accountability of Battlefield Contractors*, 49 GC ¶ 387 (House passes the Military Extraterritorial Jurisdiction Act (MEJA) Expansion and Enforcement Act of 2007); *Bill Would Establish Commission to Investigate Wartime Contracting*, 49 GC ¶ 296; *War Profiteering Bill Approved By Senate Judiciary Committee*, 49 GC ¶ 194; *Officials and Lawmakers Agree That Stiffer Criminal Penalties May Better Deter War Profiteering*, 49 GC ¶ 123; *Leahy Targets War Profiteering and Corruption*, 49 GC ¶ 14.

VIII. CONTRACTOR COMPLAINT AND INTEGRITY. As discussed elsewhere (particularly in the Chapter in these materials by Joseph D. West & Diana G. Richard on *Corporate Compliance and Ethics*), Congress is prodding the contractor community to make investments in compliance on a scale not experienced since the late 1980's. The proposed compliance regimes are as controversial as they are broad-reaching. David M. Nadler & Justin A. Chiaodo, *Feature Comment: The Proposed Rule on Contractor Compliance Program and Integrity Reporting—An Ill-Conceived Over-reaction to Recent Procurement Scandals*, 49 GC ¶ 474 (December 19, 2007); *FAR Councils Propose Expanding Ethics and Business Conduct Rule*, 49 GC ¶ 446; *Grassley Proposes Significant Changes to FCA*, 49 GC ¶ 359; *DOD Directive and Congressional Bill Afford Stronger Protections to Whistleblowers*, 49 GC ¶ 301; *House Panel Considers Central Repository to Weed Out Unsatisfactory Contractors*, 49 GC ¶ 281; *Millions in Improper Payments Recovered, DOD IG Says*, 49 GC ¶ 272; *SASC Approves Whistleblower Protections for Defense Contractor Employees*, 49 GC ¶ 225; *Thinktank Says Congress Needs to Clean Up Procurement Process Mess; Industry Group Responds*, 49 GC ¶ 212, see also Scott Lilly, *A Return to Competitive Contracting Congress Needs to Clean Up the Procurement Process Mess* (May 2007), www.americanprogress.org/issues/2007/05/pdf/procurement_paper.pdf; see also PSC Response at www.pscouncil.org/pdfs/centerwhitepaper.pdf ("the report's conclusions are almost entirely underpinned by misstatements and misinterpretations of fact. Rather than serving as a thoughtful, analytical report, the report is little more than a collection of rhetoric and anecdotes."); *Better Contractor Tax Enforcement Needed, GAO Administrator Testifies*, 49 GC ¶ 182; Christopher R. Yukins, *Feature Comment: Enhancing Integrity—Aligning Proposed Contractor Compliance Requirements With Broader Advances In Corporate Compliance*, 49 GC ¶ 165; David Nadler, *Feature Comment: The Proposed Rule on Contractor Code of Ethics and Business Conduct—A Sign of the Times and Useful Guidance for All Contractors*, 49 GC ¶ 144; *Whistleblower Protection Legislation Faces Veto Threat*, 49 GC ¶ 127; *FAR Councils Propose Contractor Code of Ethics and Business Conduct*, 49 GC ¶ 82; *Collins Targets Wasteful Contracting Practices at Home and Abroad*, 49 GC ¶ 81; *Prevention is the Key to Minimizing Fraud, Waste and Abuse in Recovery Efforts, GAO Says*, 49 GC ¶ 47; *Senate Reintroduces Whistleblower Protection Legislation*, 49 GC ¶ 27; Paul R. Hurst & Andrew D. Irwin, *Feature Comment: Past Is Prologue—The Clean Contracting Act as the Paradigm for Procurement Reform in the 100th Congress*, 49 GC ¶ 21.

IX. SMALL BUSINESS, SOCIAL AND ECONOMIC POLICIES. Even as it grows, everyone wants a piece of the federal procurement pie. If anything, the growing pie seems to attract more attention. *See, generally, Advocacy Group Critical of SBA 'Top 100' List of Small Business Contractors*, 49 GC ¶ 452; *Senate Committee Approves Proposal to Shore Up SBA Contracting Set-Asides*, 49 GC ¶ 435; *Delay of WOSB Set-Aside Program Draws House Small Business Committee Ire*, 49 GC ¶ 382; *House Subcommittee Hears Testimony On Federal Contracting Barriers for Minority-Owned Small Business*, 49 GC ¶ 370; *Lawmakers Respond to SBA FY 2006 Small Business Report*, 49 GC ¶ 330; *House Subcommittee Explores Negative Effects of Contract Bundling*, 49 GC ¶ 292; *SBA Proposes Changes to Small Business Size-Status Calculation*, 49 GC ¶ 297; *Senate Small Business Committee Spotlights Small Business Contracting*, 49 GC ¶ 282; *Anti-Bundling Bill Aims to Improve Small Business Access to Federal Contracts*, 49 GC ¶ 183; David M. Nadler & Joseph R. Berger, *Feature Comment: New Small Business Re-Certification Rules Strike the Right Balance*, 49 GC ¶ 1. *See also*, Ralph C. Nash, *Small Business Subcontracting Plans: An Evaluation Factor?*, 21 N&CR ¶ 39 (“wonder[ing] why an agency would make small business subcontracting plans an evaluation factor requiring comparative evaluation of the plans as part of the source selection process”).

A. New Legislation. The House of Representatives overwhelmingly passed the Small Business Fairness in Contracting Act (H.R. 1873), amending the Small Business Act (P.L. 85-536) to enhance small business participation in federal contracting. The measure would expand the definition of prohibited contract bundling to include **construction contracts** for the first time. Moreover, it would raise the small business goal from 23 to 30 percent (after only a decade at 23 percent, up from the prior 20 percent standard), while increasing the goal for small disadvantaged businesses (SDB) and women-owned businesses from five to eight percent. (We leave for another day what impact, if any, this would have on the consistently ineffective post-*Adarand* SDB preference program.) The bill also attempts to limit large business participation in small business contracts and to craft meaningful limits to the exceptions to the 8(a) program enjoyed by Alaska Native Corporations (ANC's). The White House opposes the measure. *See House Overwhelmingly Passes Controversial Small Business Fairness in Contracting Act*, 49 GC ¶ 202.

B. Thirty Percent Small Business Goal? The goal increase is particularly intriguing. The White House called the 30-percent goal “unrealistic.” Although SBA announced that the Government reached the 23-percent small business contracting goal for fiscal years 2005 and 2006, critics are skeptical. SBA reported that for FY 2006, the Government came close, reaching 22.8 percent. House Democrats disputed SBA's announcement for FY 2005, *see* 48 GC ¶ 275, and Eagle Eye Publishing reported in 2005 and 2006 that the Government did not meet the 23-percent goal. *See* 49 GC ¶ 104(a). Of the various other socioeconomic small business contracting goals – including five percent to small disadvantaged businesses, five percent to women-owned small businesses, three percent to Historically Underutilized Business Zone participants, and three percent to service-disabled veteran-owned small businesses – SBA reported that only the small disadvantaged business goal was reached.

C. Large Business Participation in Small-Business Contracts. The bill would limit participation in small business contracts by firms

that are not small. Businesses “close to exceeding” the small business standard on which the contract was given small business status would be required to recertify annually to the agency awarding the contract that the business has not exceeded the relevant small business standard. Annual small business recertification remains controversial, and, currently, no congressional mandate requires firms performing ongoing contracts to certify annually that they still meet the relevant small business standard. While small business advocates hoped for a broad annual recertification provision, Emily Murphy, former GSA chief acquisition officer believes the new SBA rule, 13 CFR § 121.404(g), adequately addresses the issue. See 49 GC ¶ 1.

D. Fixing Bad Data? The bill also would require each agency IG to annually report to Congress on the number and dollar value of contract awards that were coded as small business awards but were not made to small businesses. Murphy likes this provision because: “It puts responsibility back on the agencies to confirm that businesses performing their small business contracts are actually small – instead of simply relying on the [Central Contractor Registration (CCR) database and Online Representations and Certifications Application] system.” Small business advocates argue that until there is greater transparency in how small business awards are counted, legislated small business goals are meaningless. Lloyd Chapman of the American Small Business League says that simply taking SBA’s word on small business goals is “like playing poker over the telephone.”

E. Alaska Native Corporations: Slowing the Gravy Train? A particularly controversial section of the bill provides that unless Congress enacts a law by Dec. 31, 2007, revising limits on the value of sole source contracting under the SBA’s 8(a) program exception for ANC’s, the OFPP administrator, in consultation with the SBA administrator, “shall establish appropriate limits.” Last year the GAO said the program, described by Rep. Betty McCollum (D-Minn.) as “the only non-gaming economic development program that has worked” for native Alaskans, has been misused by agencies “as a quick, easy and legal method of awarding contracts for any value.” Rep. Henry Waxman said the provision assured continued dialogue on the issue. Murphy called the provision a fascinating approach sure to result in a long and interesting political process. 49 GC ¶ 202.

F. Goaling Report and Scorecard. SBA released its annual “goaling report” on federal small business contracting data, and the first of what will be an annual scorecard of agencies’ achievement of small business contracting goals and progress toward improving small business contracting in the future. SBA Administrator Steven Preston explained that “data scrubbing” from FY 2005 revealed more than \$4 billion in contracts miscoded as small business actions. Preston said the goaling reports and scorecard will “drive greater transparency, greater integrity and greater accountability in small business contracting that should improve small businesses’ ability to get Federal Government contracts.” See *SBA Releases GY 2006 Small Business Contracting Data, Scorecard*, 49 GC ¶ 323.

The scorecard—a green, yellow, red system—reflects each agency’s performance in two categories: current small business contracting status, and progress toward improving future small business contracting. Agencies earn

a green score on current small business contracting by meeting their small business goal and at least two of the four socioeconomic contracting targets. For the progress category, agencies earn a green score for demonstrating top-level commitment to improving small business contracting through the implementation of a small business contracting plan or strategy, accountability for not meeting goals, staff training and outreach to small businesses. In scoring the agencies, Preston said SBA was committed to making an honest assessment. Only seven agencies earned a green score for current small business contracting. Five agencies received yellow and 12 scored red, including DOD and GSA. The progress category was more positive, with 12 agencies earning green, eight yellow and just four red. Reports for agency scoring are available at www.sba.gov/aboutsba/sbaprograms/goals.

SBA also released the raw data for FY 2006 small business contracting in the form of a goaling report. The report indicates each agency's eligible small business actions, eligible dollars, actual small business actions, actual small business dollars and the resulting small business contracting percentage. The report contains additional raw data on each agency's performance within the socioeconomic contracting programs. The report reveals that DOD's small business contracting percentage for FY 2006 was 21.8 percent, below the Government-wide goal and below its agency small business goal established by SBA. GSA's total small business contracting in FY 2006 was 32.2 percent, above the Government-wide goal but below the goal it established with SBA, which resulted in its red score. Major agencies with strong small business contracting results include SBA (67 percent), HUD (66 percent) and Interior (55 percent). 49 GC ¶ 323.

G. GSA's GWAC Efforts to Funnel IT Contracts to Small Businesses. GSA is adding to its stable of Government-wide Acquisition Contracts (GWACs) by launching the Alliant Small Business (ASB) GWAC, a competitive multiple award, indefinite-delivery, indefinite quantity set-aside small business contract. The ASB GWAC is designed to provide worldwide IT solutions to federal agencies while strengthening opportunities in federal contracting for small businesses. GSA selected 62 small businesses to receive awards in a set-aside worth up to \$15 billion to acquire IT. The ASB contract runs for five years, with a five-year option. Calling ASB "a key component of the Federal Acquisition Service (FAS) portfolio of technology solutions," FAS Commissioner James A. Williams said it "allows our customers to acquire IT solutions in a streamlined, flexible manner." ASB was developed within the framework prescribed by OMB's new IT investment budget guidance to comply with federal policies governing IT investments. 50 GC ¶ 5.

H. Free Trade Agreements and Small Business Limitations. Small business advocates are increasingly aware that Free Trade Agreements may present challenges to U.S. small business growth and sustainability. While the FAR expressly excludes small business set-asides from trade agreements, FAR 25.401(a), popular modern contract vehicles with increased work and dollar values may attract the attention of existing or future trading partners. Prior to 1980, foreign contractors met significant obstacles in accessing the lucrative U.S. procurement markets because of the restrictions imposed by the Buy American Act (BAA), 41 U.S.C. §§10a-10d, which restricts the purchase of supplies, services, and construction materials that are not domestic end products. The BAA provides a preference for domes-

tic suppliers and domestic end products by augmenting the price of nondomestic bids or offers by a stated percentage (six or twelve percent, the latter if the lowest domestic offer is from a small business concern) to determine the reasonableness of the cost of domestic suppliers' prices. FAR 25.105(b). The Trade Agreements Act of 1979, 19 U.S.C. § 2501 et seq., creates waivers of the BAA for eligible products from countries that have signed international trade agreements, such that, above certain dollar thresholds, end products and construction materials from eligible countries receive nondiscriminatory treatment in evaluation alongside domestic offers. To the extent that bilateral and multilateral agreements do not confer national treatment to offerors with respect to acquisitions under certain monetary thresholds, domestic small businesses often are insulated from foreign competition.

What is provocative is how far this protectionism will go in a procurement system that increasingly relies on GWAC's and other ID/IQ contracts. Those vehicles, also known as "framework" agreements in Europe, tend to obscure protectionism, because the orders made under GWAC's and ID/IQ contracts are so hard to track. Moreover, because a marketplace dominated by GWAC's and ID/IQ contracts is a marketplace that favors *relationships* over best value, foreign competitors in that marketplace confront a competitive disadvantage against domestic firms with existing relationships with agency personnel.

Free trade agreements increasingly focus on facilitating access to foreign procurement markets. The World Trade Organization (WTO) Government Procurement Agreement (GPA) and the several bilateral Free Trade Agreements (FTAs) have been instrumental in opening United States procurement markets to foreign contractors and vice versa. The objectives of trade negotiation with respect to government procurement are generally to (1) establish rules requiring government procurement procedures and practices in the trading partner to be fair, transparent, and predictable for suppliers of U.S. goods and services that seek to do business with the trading partner and (2) expand access for U.S. goods and services to the government procurement market of the trading partner. See, e.g., Jean Heilman Grier, *Recent Developments in International Trade Agreements Covering Government Procurement*, 35 PUB. CONT. L.J. 385, 398 (Spring 2006). Those negotiating goals – to expand foreign export markets – tend to obscure the procurement system's more parochial goals of gaining access to foreign goods and services to achieve best value. As the U.S. opens its procurement market to more and more nations, the procurement community must increasingly understand that the domestic procurement system is part of a global supply chain.

For example, probably the most extensive free trade agreements relating to procurement—in terms of establishing specific procurement methods, notice requirements, and solicitation response times—is the United States-Australia Free Trade Agreement Implementation Act or AUSFTA. Through the agreement, Australia became a "designated" country and, as such, its contractors are eligible for nondiscriminatory treatment and, in certain circumstances, are placed on the same competitive footing as U.S. contractors (and, of course, those contractors from other designated countries). Nonetheless, the AUSFTA includes the normal exclusion of U.S. acquisitions set-aside for small businesses. FAR 25.401(a); Australia-United States Free Trade Agreement, Ch. 15, Sec. 7 (General Notes), available at www.dfat.gov.au/trade/negotiations/us_fta/final-text/chapter_15.html. As an emerging issue, therefore, while

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small business are currently insulated from foreign competition when procurements are set-aside for small business, existing or future trading partners may seek to eliminate FAR 25.401(a) (exclusions of small business set-asides from trade agreements) in light of the United States' use of new contract vehicles such as GWACs.