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WHO'S DOING WORK FOR THE GOVERNMENT?: MONITORING, ACCOUNTABILITY AND COMPETITION IN THE FEDERAL AND SERVICE CONTRACT WORKFORCE

HEARING

BEFORE THE

COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

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WHO'S DOING WORK FOR THE GOVERNMENT?: MONITORING, ACCOUNTABILITY AND COMPETITION IN THE FEDERAL AND SERVICE CONTRACT WORKFORCE

WEDNESDAY, MARCH 6, 2002

U.S. SENATE,
COMMITTEE ON GOVERNMENTAL AFFAIRS,
Washington, DC.

The Committee met, pursuant to notice, at 9:35 a.m., in room SH–216, Hart Senate Office Building, Hon. Joseph I. Lieberman, Chairman of the Committee, presiding.

Present: Senators Lieberman, Akaka, Durbin, Carnahan, Thompson, Voinovich, and Bennett.

OPENING STATEMENT OF SENATOR LIEBERMAN

Chairman LIEBERMAN. The hearing will come to order.

Good morning and welcome to all who are here today. Today's hearing is entitled, "Who's Doing Work for the Government?: Monitoring, Accountability and Competition in the Federal and Service Contract Workforce."

I am pleased to open this hearing as Chairman of the full Committee. I am grateful that when Senator Durbin, who is Chair of the relevant Subcommittee, arrives that he will preside. He has a particular interest in the matter before the Committee today.

It is obvious that Americans all have a new sense of awareness today about how important it is that the Federal Government performs its job well and how important it is, therefore, that we not only have the best people working for the Federal Government, but that we treat them as the true professionals that they are.

This Committee has long focused on government performance as part of its general oversight responsibilities. But in this era of new security threats, post-September 11, performance issues have clearly taken on new and more important meaning.

Terms like outsourcing and service contracts generally glaze the eyes of those who hear them spoken. But in many cases how decisions are made surrounding questions like outsourcing and service contracts can truly determine the quality of Federal Government work, from the most routine of tasks to critical life and death responsibilities.

Again, post-September 11, Federal employees are playing an even more critical role in our homeland defense efforts than they have in the past. We are depending even more, for instance, on the Customs Service, the Immigration and Naturalization Service, and

the Coast Guard, to name just a few, to keep our country safe. So we must treat Federal employees well because we depend on them.

I do think that we have to give Federal employees the right to be engaged in discussions about how best we and they together can serve and protect the American people.

Outsourcing of services by Federal agencies and departments, in this regard, deserves close scrutiny. We need to know, for example, whether a given job is one that should be contracted out in the first place. Once that question is answered, we need to know if appropriate and fair competition for the job has occurred. And then we must ask does the decisionmaking process treat Federal workers fairly, making government work an attractive option and not less attractive than it might otherwise be.

I must say that I am troubled by the competitive sourcing requirements in the President's fiscal year 2003 budget. The arbitrary nature of the requirement that the agencies compete on 50 percent of the employees performing "inherently non-governmental work" as defined by the FAIR Act in order to earn a green light rating from OMB may, in effect, prevent the agencies from making the right and responsible decisions in carrying out their missions. That is a concern I have.

It is vital for every agency to consider how to achieve savings for the taxpayer while getting the best possible result. Decisions about what functions should be subjected to competitive sourcing must be made in a thoughtful and deliberative manner and on an independent basis, weighing many factors.

So I am concerned that imposing mandatory goals with an arbitrary timetable may well damage the quality of those decisions and cause agencies to subject programs to competitive sourcing that could and/or should be performed within the existing government agencies by existing Federal personnel at a best cost to the taxpayer.

Significantly, the Department of Defense has, in fact, in recent months voiced objection to the administration's approach to defined targets for competitive sourcing. More broadly, and this has been an ongoing concern of this Committee, particularly led by Senator Voinovich of Ohio and Senator Durbin has worked closely on this, we are facing a human capital crisis in government. A continuing need exists to recruit the highest quality employees into Federal service and to keep those high quality Federal employees that we already have.

Use of contracting out without proper balance and thoughtfulness can create unwarranted uncertainty in and disregard for the careers of Federal employees, at worst causing them to leave Federal service prematurely.

In recent years, this Committee and this Congress have worked hard to update and improve procurement law. Contracting out can help improve our lives by producing high quality work at a savings to taxpayers, or it can result in shoddy work, a lack of governmental supervision, and a greater cost to the taxpayers.

So we have got to weigh those possibilities and implement this idea thoughtfully. We have got to give Federal employees the opportunity to compete fairly for their jobs and ensure that the Fed-

eral Government determines the costs of work that have been contracted out versus work that is done within the government.

Because of the changing demands of the workplace, spurred by vast technological leaps forward, this Committee is committed to continuing to examine how best to approach this matter with the aim of achieving the fairest and most productive result for the American people, including those American people who work for the Federal Government.

I look forward to the hearing. I cannot stay much longer because I have a competing and conflicting schedule, but I am grateful that Senator Durbin will take the chair in a moment.

At this point, I would like to yield to Senator Thompson for an opening statement.

OPENING STATEMENT OF SENATOR THOMPSON

Senator THOMPSON. Thank you, Mr. Chairman.

I want to welcome everyone here.

I think for those who may be watching, it is interesting to point out, I think this is the largest hearing room in the Senate and it is jam packed here today. We had a hearing the other day in a subcommittee on a question of weapons of mass destruction threat to this country, and you could probably get all the people who attended that in one row here in this hearing room today. It is an interesting question of priorities.

But nonetheless, this is obviously interesting to a whole lot of people, so I appreciate your holding the hearing.

Not since this Committee considered and approved the Federal Activities Inventory Reform Act, the FAIR Act, in 1998, have we looked at the issues involved in whether commercial activities should be performed under contract with private sector sources or in-house using government facilities and personnel.

When this Committee considered the FAIR Act, we recognized that we were establishing only the beginning of a process. OMB Circular A–76, since 1966 has provided the administrative policy regarding the performance of activities that are not inherently governmental functions and it set forth procedures for determining whether such activities should be performed in-house by Federal employees, by another Federal agency's employees, or by contractors in the private sector.

The policy embodied in OMB Circular A–76—that the Federal Government will rely on the private sector for goods and services that are not inherently governmental—is more than 45 years old. This policy was first promulgated through Bureau of Budget bulletins in 1955, 1957 and 1960. OMB Circular A–76 was issued in 1966 and revised in 1967, 1979, 1983, and in response to the FAIR Act in 1999.

But conventional wisdom says that the Circular A–76 process is still broken and needs to be fixed. Clearly, this is a complicated issue which has caused much controversy and debate, and which prompted Congress to establish the GAO Commercial Activities Panel in 2000.

The panel, which is due to report to Congress on May 1, and frankly, I think, then would be a much more interesting time to have a hearing, is studying the policies and procedures governing

the transfer of commercial activities performed by the Federal Government from government personnel to Federal contractors.

All of us who struggle with these issues look forward to seeing what is in that report. I am pleased that we have with us today several members of that panel to share with us not the work of the panel itself, I suppose, but their positions on many of the issues that are involved in this debate.

This Committee has spent much time trying to focus attention on the Federal Government's management challenges. We published a report last June, "Government on the Brink," that laid out in detail many of the management problems that have persisted over the years. This administration has put an unprecedented emphasis on improving both the efficiency and the effectiveness of the Federal Government.

With the submission of the most recent budget documents, the President ought to be credited with keeping a focus on fixing what is wrong with government operations. The President's Management Agenda has an impressive array of solutions for addressing the government's major management challenges. We may not agree with all of them, but the President set concrete goals to solve problems that we have been dealing with here for years and years on how some of these programs operate.

One of the most important goals is the initiative on competitive sourcing, which has breathed needed life into the FAIR Act. When we passed the FAIR Act, there was hope that the lists of the many activities agencies perform would be married with the efficiencies that could be realized through outsourcing. Only with these inventories could we decide strategically what was conducive to outsourcing and what was not.

So I look forward to hearing from the administration witness on this initiative, as part of the management agenda.

I know there have been legislative solutions proposed to deal with some of the problems that we all agree are there with the Circular A–76 process. The effort by some in Congress to require that all activities be subject to a lengthy competition, not just the ones the government currently performs, does not move us in the right direction. In fact, I think the solution would be worse, agencies would be less efficient, and ultimately the taxpayer would be ill-served.

So I look forward to hearing from the witnesses today, Mr. Chairman.

Chairman LIEBERMAN. Thanks very much, Senator Thompson. I do want to indicate that Senator Craig Thomas will be submitting a statement for the record of the hearing.[1]

Chairman LIEBERMAN. Senator Richard Durbin of Illinois is the Chair of the Subcommittee on Oversight of Governmental Management, Restructuring and the District of Columbia, which is the Subcommittee that has jurisdiction over the matter before us. He is broadly experienced in these questions, and I am very grateful to him that he will Chair the hearing. I do not know if we symbolically should turn the gavel over, but I am happy to give it to you, and I wish you a good morning.

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[1] The prepared statement of Senator Thomas appears in the Appendix on page 147.

Senator DURBIN [presiding]. Thank you very much.

Senator THOMPSON. Mr. Chairman, I might point out, Senator Voinovich is the Ranking Member and will be serving that role here today, also.

OPENING STATEMENT OF SENATOR DURBIN

Senator DURBIN. Thank you very much. Thank you, Chairman Lieberman and Senator Thompson, my colleagues on the Committee.

This hearing about Who's Doing Work for the Government?: Monitoring, Accountability and Competition in the Federal and Service Contract Workforce, as Senator Thompson has noted, is a popular hearing. I came in the main door here and there is a long line standing outside trying to get into this room. I think it is a topic of great interest to not only those in attendance, but to everyone who has been following the events of the last year.

Six months ago, our Nation's collective consciousness was jolted when heinous acts of terrorism were committed on American soil. As a result of those horrific acts we are not, and never will be, the same. We are stronger in our response, more steeled in our resolve, more vigilant about identifying and eliminating our vulnerabilities.

Overnight, that experience forced us to seriously evaluate the workings of our government. For instance, I am not sure that before September 11 of last year any of us paid too close attention to who was monitoring security at our airports. But we started paying much closer attention. We started giving thought to the people who were being hired and trained and those who would oversee the front line in security when it came to our airlines and their services.

We are now looking at homeland security in a completely different way, protecting our borders and our ports, nuclear power plants, chemical plants, water supplies, and other critical infrastructure. The Department of Defense is reorganizing for homeland security and functions that may not have seemed essential to their mission now are very essential. Conversely, there may be functions that would be better done in the private sector, allowing the Department of Defense to focus on some other missions.

I would like to offer an example to illustrate this point. After last September 11, I asked my staff to secure a briefing on the security of a chemical munitions storage depot that sits 30 miles from the Illinois border. The United States is in the process of destroying deadly munitions which could kill hundreds of thousands of people pursuant to the Chemical Weapons Convention.

I learned the depot had only one uniformed military officer, the commander, to protect it because security had been provided by private contractors. About a week after that, National Guard troopers arrived and joined the private contractors in protecting the site.

I am very disappointed that the Department of Defense was not able to send a witness to this hearing. There are a lot of important questions that need to be asked of that Department about the reassessment that they are undertaking as a result of September 11. We notified the Department of Defense of this hearing about 10 days ago and asked them if they could spare someone in this particular area for 2 hours to come and tell us their side of the story

about what is going to happen. But they could not. If the Department of Defense cannot send a spokesman to Capitol Hill, perhaps they will consider contracting that responsibility out.

[Applause.]

Last year, the General Accounting Office elevated strategic human capital management to its list of high risk government-wide challenges. In testimony last February, before our Committee, Comptroller General David Walker stressed that Federal agencies have not consistently made essential principles of valuing and investing in employees a part of their strategic and programmatic approach to meeting their missions. There has been no stronger spokesman on this issue on Capitol Hill than my colleague, Senator Voinovich of Ohio.

Time and again, he has brought these issues of retention and recruitment before every single witness. He understands, as we all do, that if we are going to maintain and improve the morale of the people who serve this Nation through public service in the public sector, then we have to have an attitude when it comes to management that reflects it. And I am sure that Senator Voinovich will have his own statement and observations and questions along those lines as we proceed.

On the heels of this human capital crisis that faces the Federal workforce, the administration launched a major initiative requiring Federal agencies to compete or directly convert to private sector performance at least 5 percent of the full-time equivalent jobs listed on their Federal activities inventory under the FAIR Act. An additional 10 percent of the jobs are to be competed or converted by the end of fiscal year 2003—that is 85,000 jobs—for an aggregate of 15 percent of all Federal jobs considered commercial nature.

In the grand scheme, as evidenced by the budget scorecard standard, agencies must use either public/private or direct conversion competition of no less—no less—than 50 percent of the FTEs listed on the approved FAIR Act inventories in order to get a green light. That means 425,000 jobs over time.

It strikes me that it will be as formidable as the perils of Sisyphus to make any headway in reigning in this public sector human capital risk by trying to recruit and retain the best and brightest in the Federal workforce when in the same breath you are telling them that oh, by the way, over the next few years one out of every four jobs is potentially slated to disappear into the private sector.

You cannot have it both ways.

[Applause.]

I do not think that we can send key agencies who are now facing critical crises in terms of personnel to college campuses in cities across America and say it is time for you to make a career decision to go into the public sector and become a Federal employee when you cannot promise them that a year, 2, 3, or 4 years from now their job will even be there. We have to be very honest about this.

If a response to the Federal employee retirement wave is to simply replace the retiring workers with contractors, we may lose any benefit from trying to find the best management plan and most efficient mix of public and private workers.

It also strikes me we have a catch-22. In an effort to meet quotas, Federal agencies may not have the people in place to even

handle the competitions. So as they bump up against the deadlines this October, they may end up just directly converting work to the private sector.

We do not have a trove of solid agency-by-agency information about the cost and performance of work that is being performed by the government under contract.

I have been interested in this for a long time. I can remember the first time that I faced this about 8 years ago, as a member of the House Appropriations Committee, when someone raised the possibility of outsourcing, putting on the private sector, a specific responsibility of the Department of Agriculture. I asked them is there money to be saved by doing this. There was a pause and the person answered by saying that is not the point.

And I think that reflects a mentality that says if you can just keep turning out the lights, frankly that is the goal. And I do not buy that. What we have is a responsibility to the American people to perform essential services. We have men and women who have dedicated their lives to do that. If there is a cost savings to be gained by private sector competition, let us hear it. Let us have that competition. Let us make a determination as to whether or not it is in the best interest of the taxpayers.

But to start off with a goal of eliminating Federal jobs, I think, is to really sacrifice some of the very best people who have served this Nation and given their lives to public service.

[Applause.]

I have introduced legislation to try to get a handle on this. The TRAC Act would require Federal agencies to track the cost and savings from contracting out. It is simple. I just want to see the balance sheet. I am a lawyer and maybe I will need an accountant—I will have to be careful how I choose one—but perhaps I will need an accountant to help me understand this. But I think that is not unreasonable to ask whether there is money to be gained for the treasury and for the taxpayers over the long run—not momentarily, not in the first and second year. And I think that is a reasonable standard.

It calls for a comparative study of wages and benefits by OPM and the Department of Labor to get better information. The General Accounting Office has indicated since contractors have no obligation to furnish the necessary data, it is currently difficult to assess this.

I am particularly interested in this hearing today to bring out some points of view, and there will be differing points of view on this issue. We have to find out what is the history and experience here. How did OMB derive the targets? How are agencies implementing the administration's competitive sourcing plan? And what efforts are being taken to give in-house talent a fair opportunity to compete for the work?

I am looking forward to hearing from the witnesses and, as I said earlier, I am particularly happy that my colleague, Senator Voinovich is here. He is truly on the front line of this effort on Capitol Hill to maintain quality in our Federal workforce. At this point, I turn it over to my colleague.

OPENING STATEMENT OF SENATOR VOINOVICH

Senator VOINOVICH. Thank you, Senator Durbin. I want to thank you for your cooperation and help over the last 3 years as we have been addressing the Federal Government's human capital crisis.

I agree with your Committee and feel that arbitrary goals for public/private competitions simply do not make sense. Logic tells me that this policy does not equate given the fact that the Federal Government may lose up to 70 percent of the Senior Executive Service by 2005, through retirement or early retirement, and about 55 percent of the Federal workforce by 2004.

Arbitrary contacting goals send the wrong message to our Federal workforce especially since so many of them enjoy public service and are dedicated to their jobs. I remember Professor Patton, my law school contracts professor once said, "Look to your right, look to your left, next year that person may not be here."

I think that this is something that the administration should give very serious consideration to. It just does not make sense. I think the President should reevaluate the competitive sourcing goals outlined in his management agenda as soon as possible.

I would like to welcome the members of the American Federation of Government Employees and the National Treasury Employees that are in town for their annual legislative conferences. Senator Durbin, you coincidentally held this hearing just when they were in town.

[Applause.]

During the 1990's, the composition of the Federal workforce began to diminish, a transformation that continues to this day. As the Federal Government downsized, some agencies experienced an increase in the number of service contracts to make up for the loss of employees.

The trend created a shadow workforce of contractors that work side-by-side with our Federal employees. In his book, "The True Size of Government," Paul Light from The Brookings Institution estimated that the shadow workforce consisted of 12.6 million full-time equivalent jobs, including 5.6 million generated under Federal contracts, 2.4 million created under Federal grants, and 4.6 million encumbered under mandates to State and local government.

Every day, Federal employees solve complex policy and programmatic problems facing our Nation, often with inadequate recognition. I can sympathize with Federal employees who feel threatened that they may lose their job to a Federal contractor. Even though the public service competition process is safeguarded by OMB Circular A–76, the guidance on public/private competition in the FAIR Act, as Ms. Kelley and Mr. Harnage will discuss later in their testimony, there are reasonable questions regarding the current Federal contracting environment.

Furthermore, I am concerned about the negative effect that outsourcing may have on prospective government employees. In the 1990's, the Federal workforce experienced significant downsizing, and now the Bush Administration is proposing an equally significant outsourcing. A workforce in a seemingly constant state of uncertainty sends a negative message, which dissuades college graduates and mid-career professionals from pursuing jobs in the Federal Government.

Over the past several months, I have been participating in executive sessions sponsored by the JFK School on the government's human capital crisis. One of the things that Harvard graduate students are saying is that public/private competition may deter them from pursuing Federal employment. To me, the students seem somewhat reluctant to take a Federal job because they are worried that their jobs may be contracted out. This is not a healthy environment for making the Federal Government an employer of choice.

Unfortunately, the problems of performance-based management are not limited to the competitive civil service. We have seen an influx of contractors in the Federal workforce. Anecdotal evidence suggests we have not witnessed a significant improvement in Federal agencies' management of service contracts.

It is the goal of my proposed human capital legislation to increase the performance and accountability of Federal workforce, and I believe we should ask no less of our contract employees. In other words, do we know what we are getting from our contractors? Do we have the systems in place to measure their performance?

Mr. Chairman, I know there is often inadequate oversight of contractors. I know in my own experiences, and I speak from experiences as a county official, as mayor, and as governor of the State of Ohio. When I was county assessor, we had a horrible experience with a contractor because they could not fulfill their obligations.

[Applause.]

And I had to hire a cadre of professionals to guarantee that our next appraisal would meet predetermined performance standards. And there was a vast difference in the outcome of the appraisal.

But too often, when work is contracted out, agencies do not have the right people to manage the work. When I was first elected mayor of the city of Cleveland, our data processing function had been contracted to a firm in San Francisco. Unfortunately, I discovered that we were being overcharged, that our systems really were not up to where they should be because the cost was so prohibitive. Fortunately, I had a private sector management auditor examine the situation, and they suggested that we re-establish our own data processing within the city of Cleveland.

[Applause.]

And I think that similar problems can be found at the Federal level.

Fortunately, GAO has been working diligently to expose longstanding problems in the Federal service contracting, including poor planning, inadequately defined requirements, insufficient price evaluation, and lax oversight of contract performance.

In fact, as we speak, GAO is spearheading the Commercial Activities Panel to study the A–76 process. The panel's report is due on May 1 and I look forward to reviewing it, and I am sure you do, Mr. Chairman.

If I may, Mr. Chairman, I would like to make two suggestions for improving the Federal contracting environment. First, I suggest that this Committee carefully consider the Commercial Activities Panel's report. I am confident that this panel, which includes some of the most distinguished witnesses before us today, will provide

solid recommendations to improve the implementation and oversight of government contracts.

Second, I urge Congress to enact the human capital reform legislation that we have introduced this session. This Committee will be, in fact, considering several pieces of human capital legislation in the coming weeks which will improve the entire Federal workforce and therefore, by implication, improve the contract management workforce.

I look forward to continuing to work with my colleagues to resolve the Federal Government's human capital needs. However, even with human capital reform, it is probable, given the current retirement projections, that contractors are going to play a prominent role in the daily operations of the Federal Government in the future. Therefore, the importance of addressing outsourcing becomes even more crucial to the future of our government.

In addition to contracting, I would like to mention pay comparability and health benefits reform as two important issues that I pledge to look into.

[Applause.]

Thank you, Mr. Chairman.

Senator DURBIN. Thank you very much, Senator Voinovich.

I am sorry that Senator Akaka of Hawaii, who was here earlier, had to leave to chair a hearing in another Subcommittee. He is very interested in this topic and will be submitting a statement for the record.

[The prepared statement of Senator Akaka follows:]

OPENING PREPARED STATEMENT OF SENATOR AKAKA

Mr. AKAKA. Good morning. I want to thank Chairman Lieberman and Senator Durbin, who chairs the Subcommittee on the Oversight of Government Management, for calling today's hearing. I also wish to thank our witnesses for sharing their insights with us this morning. Lastly, I extend my appreciation to two of our witnesses, Colleen Kelley, President of the National Treasury Employees Union, and Bobby Harnage, President of the American Federation of Government Employees, for the work they do on behalf of their members.

September 11 has raised a new awareness of the importance of cost-effectiveness and accountability in government. Many agencies are now required to fulfill homeland security missions they had not considered just a year ago. To ensure that new and existing missions are met, we must make certain that agencies have the necessary people, skills and technologies to carry out their responsibilities.

Last week, I chaired an Armed Services Readiness Subcommittee hearing where we reviewed the achievements and challenges of Federal acquisition.

I want to welcome Angela Styles, who testified in last week's hearing. I enjoyed our discussion last week and look forward to working with you on these issues. While we have made progress in making our government acquisition system more responsive to the commercial environment, we continue to see significant shortcomings in DOD's management of its $53 billion in services contracts. Moreover, contract management and acquisitions have been identified as high-risk areas by GAO.

There are a number of actions we need to take to meet these challenges:

We need to achieve transparency of costs—both in government and among Federal contractors. To do this, we must work to improve the management of contracts and the collection of timely and accurate information about those who perform the work. We must stop erroneous and improper payments to contractors. For example, between FY94 and FY98 defense contractors returned $4.6 billion in erroneous payments to the Department of Defense.

We must ensure that the government has the people and tools they need to determine costs for both government and contracted out activities over the long-term.

Contracting out for goods and services raises fundamental questions of accountability at a time when we are demanding more from Federal employees whose jobs and responsibilities are expanding. One of our witnesses today, Mr. Dan Guttman,

points out that there are approximately two million Federal employees and 8 million employees who work for the government on grants and contracts. Who are these contracted workers, and who are they ultimately accountable to? What are the long-term costs of contracting out, both in terms of money spent and the effect of losing in-house expertise? What are the national security consequences of this?

Over the past decade, the Federal workforce has been dramatically cut at a time when agency homeland security missions were not as obvious as they are today. Do we know if the Federal Government has the people it needs to accomplish these new missions? How much institutional knowledge are we losing by cutting the Federal workforce through outsourcing? I hope our witnesses can address these questions.

We must learn from the past and avoid the same kind of procurement abuses that accompanied previous episodes of rapid budget growth, like the spare parts scandals that plagued the Department of Defense in the 1980's. In the face of broadened and more complex agency missions, resources are too scarce to allow this to happen again.

Because of limited resources, we need to make sure that Federal contractors achieve cost-effectiveness and are accountable to the agencies they serve.

I wish to express my appreciation to our witnesses again for their testimonies.

Senator DURBIN. At this point, I would like to recognize my colleague from Missouri, Senator Jean Carnahan.

OPENING STATEMENT OF SENATOR CARNAHAN

Senator CARNAHAN. Thank you, Mr. Chairman.

You do not have to spend much time in Washington to hear criticisms of the faceless Federal bureaucracy. They are a convenient punching bag. But Oklahoma City, the embassy bombings, and September 11 have put faces on our Federal workforce.

[Applause.]

Who are these Federal workers? They are the civilians of the Department of Defense who make it possible for our Armed Forces to execute their mission. And they are Federal law enforcement agents that put their lives on the line every day, to track down terrorists, criminals, and drug dealers. And they are our diplomats serving in dangerous posts. And they are our air traffic controllers. And they are our intelligence agents, seeking the whereabouts of Osama bin Laden. They are the ones who make sure that the seniors get their assistance that they need.

Today, more than ever, we need a highly skilled, effective Federal workforce to meet the challenges of the 21st Century.

[Applause.]

The Federal Government has been contracting out services for years. When it is appropriate for services to be handled outside of the government and with genuine cost-savings to the taxpayers, the services should be considered for contracting out.

The difficult issue is devising a fair, efficient process to identify which services can be shifted to the private sector and to calculate potential cost savings. Last year the Office of Management and Budget set out specific targets for contracting out that each Federal agency must meet. The setting of targets appears to be an arbitrary process. We should examine which specific services are amenable to contracting out and then see if these services can be performed less expensively in the private sector. Competition should be the touchstone of the process.

I approach the entire subject with some sensitivity due to an experience that occurred at the National Imagery Mapping Agency in St. Louis.

[Applause.]

Last year NIMA employees in St. Louis contacted me because their jobs were being contracted out to a corporation in Alaska. The 300 employees did not have the ability to compete to keep their jobs due to a loophole in the law that allowed for direct conversion. NIMA was not able to present any definite study that demonstrated that direct conversion would produce cost savings. There was no public/private competition, or even private/private competition for the contract.

So now the employees are performing the exact same tasks for the Alaska corporation that they were doing for NIMA. But we really do not know if we are saving money or spending money. So I am very concerned about proposals to allow even more direct conversion without competition.

[Applause.]

Workers should have a chance to compete for jobs.

[Applause.]

Adelai Stevenson once said that public service is a noble and worthy calling. Mr. Chairman, that is truer today than it has ever been before.

Thank you very much. [Applause.]

Chairman LIEBERMAN. Thank you, Senator Carnahan.

Our first panel consists of the Hon. Angela Styles, who is the Administrator of the Office of Federal Procurement Policy of the Office of Management and Budget, and Barry Holman, Director of Defense Capabilities and Management for the U.S. General Accounting Office.

We welcome you today, and Ms. Styles, if you would like to make your statement a part of the record and summarize it at this point, we welcome that testimony.

STATEMENT OF HON. ANGELA B. STYLES,[1] ADMINISTRATOR, OFFICE OF FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET

Ms. STYLES. Thank you, Senator Durbin and Members of the Committee.

I am pleased to be here today to discuss the administration's competitive sourcing initiative and the management of service contracts. I am particularly pleased to see so many dedicated Federal employees in the hearing room today. It is because of these people, and other Federal employees just like them, that the public trust in the government is at the highest point in 40 years and record numbers of young people are considering careers in public service. Without the dedication, commitment, and integrity of these people, our country would not be able to achieve great things.

I had the rare opportunity earlier this week to speak before the AFGE legislative conference. As I told this conference on Monday, and I will tell you now, free, open, and robust dialogue on these issues is essential. We may not always agree, but that does not mean that we should be afraid to discuss these issues.

I am often surprised by the fact that once the dialogue gets underway, people with opposing views often have much in common.

[1] The prepared statement of Ms. Styles appears in the Appendix on page 48.

For that reason, I am pleased to have the opportunity to discuss the administration's competitive sourcing initiative here today.

There are two points I want to clearly communicate. First, the administration's commitment to competition. Competition is fundamental to our economy and to our system of procurement. It is competition that drives better value, innovation, performance, and importantly, significant cost savings.

Second, is the President's commitment to results. He wants to see some fundamental improvements in the way we are managing the Federal Government. To use his own words, we are not here to mark time, but to make progress, to achieve results, and leave a record of excellence.

The competitive sourcing initiative fulfills both of these commitments. By exposing commercial jobs to the rigors of competition, we will reduce costs, improve performance, and infuse the Federal Government with the innovation of the private sector.

There has, however, been a tremendous amount of confusion surrounding this initiative. I usually clarify this confusion by explaining what competitive sourcing is not about. Competitive sourcing is not, and I repeat not, an outsourcing initiative. Similarly, competitive sourcing is not about reducing the Federal workforce. There is no goal here to reduce the Federal workforce.

Competitive sourcing is a commitment to better management and it is a commitment to competition. No one in this administration cares who wins a public/private competition. What we care about is competition and the provision of government service by those best able to do so, be that the private sector or the government itself. What we care about is cost, quality and availability of service, not who provides it.

Competitive sourcing is also a commitment, a commitment from this administration that Federal employees will have the opportunity to compete for their jobs.

There is one other point I want to clarify. Public/private competition through OMB Circular A–76 process or otherwise, is not an end in and of itself. It is simply a means to an end, the end being the better management of our government and better services for our citizens.

I often describe A–76 as one tool in the management toolbox for departments and agencies. The bottom line is that we need to do a better job of managing the Federal Government.

All this talk about competitive sourcing, however, does not mean we do not recognize the need to improve the process. Public/private competition is not easy and the A–76 process has its share of detractors. With some frequency I meet with members of Congress to discuss the very real impact of this process on their constituents. Real people with real concerns about their job security.

I have spent a tremendous amount of time since I came into office assessing the process and determining where and how we can make improvements. I recognize that there are faults and I am actively seeking input to improve that process.

Unfortunately, we have yet to find a silver bullet and achieving consensus on a strong set of reforms supported by all of the key stakeholders remains a challenge. However, I am confident that we

can work with industry and Federal employees to make significant changes and improvements to the current process.

An average duration between 24 to 32 months to complete a public/private competition is simply unacceptable. A 3-year competition to determine who should provide a commercial service hurts everyone. Employees are demoralized and private firms expend tremendous amounts of money to compete.

Finally, I would be remiss if I did not mention what I believe is a key element to effective management: Timely and accurate information about who helps departments and agencies perform their mission. Departments and agencies should be looking at more than just the Federal workforce that performs commercial tasks. Departments must look at the universe of how they meet their mission. The portion of the workforce performing inherently governmental tasks, the workforce performing commercial tasks, and importantly, private sector contractors.

Some recent incidents have highlighted for me the lack of information the departments and agencies have available to manage the work that contractors do for the Federal Government. This is not a criticism of the contractors. It is a recognition that we, in the Federal Government, need to do a better job of collecting information about our contracts with the private sector, and we need to do a better job of managing those contracts.

My office is working to create a web-based contract management information tool to be known as the Federal Acquisition Management Information System. Our goal is to take advantage of current technology to provide timely, relevant, and reliable information to support agency decisionmaking. We believe that FAMIS will significantly help OMB and agency managers understand and manage private sector contracts.

An agency cannot manage well unless they know how the private sector is helping overall to meet mission needs. Thank you again for having me here today. That concludes my statement, but I am pleased to answer any questions.

Senator DURBIN. Thank you for your testimony.

I would like to invite Director Holman to submit his statement for the record and summarize at this point. Thank you, sir.

STATEMENT OF BARRY W. HOLMAN,[1] DIRECTOR, DEFENSE CAPABILITIES AND MANAGEMENT, U.S. GENERAL ACCOUNTING OFFICE

Mr. HOLMAN. Mr. Chairman and Members of the Committee, I am pleased to be here today to participate in the Committee's hearing on competition and accountability in service contracting, and specifically use of OMB Circular A–76.

Although A–76 represents a relatively small portion of service contracting activity, it has been the subject of much controversy, as you have already alluded to, with concerns raised both by the public and private sectors.

DOD has been the primary user of A–76 in recent years; however again, as already alluded to, OMB is making a significant push to

[1] The prepared statement of Mr. Holman appears in the Appendix on page 60.

have all Federal agencies directly convert or compete a significant number of positions on their commercial activity inventories.

My comments today are based on our work in recent years in tracking DOD's progress in implementing its program. I want to make just a few comments about its progress and about its efforts to identify positions to be studied, challenges faced by DOD that I think other agencies will face as they embark on this challenging endeavor, and touch briefly on the work of the Commercial Activities Panel, which is chaired by Comptroller General David Walker.

Let me begin with just some brief comments about DOD and the number of positions that they are studying. The number of positions that DOD planned to study under A–76 and the timeframes for completing those studies have fluctuated greatly over time. They have varied as the department encountered difficulties in identifying positions to be studied and actually getting the studies underway.

At one point, DOD planned to study over 225,000 positions by the end of fiscal year 2002. The number now stands at about 183,000 positions that would be studied over a timeframe from fiscal year 1997 to 2007.

As some of the military services encountered delays and difficulties in launching their studies and meeting their study goals, DOD began permitting the service to augment A–76 with what it calls strategic sourcing. That is business process, reengineering, consolidations, and restructuring—that type of thing.

I want to cite what we have seen in DOD to make some observations about what other agencies may face as they follow the administration's guidance to engage in outsourcing. In tracking DOD's progress with its A–76 program, we identified a number of issues that other agencies may encounter.

They include again, as I have already indicated, difficulties identifying positions to be studied, expanded time and resource requirements to complete those studies, and difficulties developing precise estimates of savings. Let me give you a few examples.

In identifying functions and positions to be studied, the FAIR Act guidance recognizes that it may be appropriate to exclude certain commercial activities from competitions, such as patient care in government hospitals. Other factors, such as the inability to separate commercial activities from inherently governmental ones, can limit the number of positions to be studied once you start trying to undertake a specific study. It becomes important to consider such factors as these in determining what portion of the FAIR Act inventories are expected to be competed.

Additionally, we found it took much longer to complete A–76 studies and cost more than initially expected. The costs per position studied have varied with some ranging up to several thousand dollars per position. One factor increasing the cost of these studies was the use of contractors to help conduct the studies. Given differences in experience levels between DOD and other agencies in conducting A–76 studies, other agencies may devote greater resources to training their personnel to undertake these studies or otherwise obtain outside assistance in completing them.

Further, developing and maintaining reliable estimates of savings has been difficult. Considerable questions have been raised

about the extent to which DOD has realized savings from its A–76 studies. Our own work has shown that A–76 studies can produce significant savings. But assigning a precise number to those savings is a very challenging process.

Savings also may be limited in the short term because of the up front investment costs associated with conducting and implementing the studies, costs that must be absorbed before net long-term not recurring savings begin.

Finally, just a couple of comments about the Commercial Activities Panel. As has already been indicated today, both government and industry have expressed considerable frustration over A–76. Government workers have been concerned about the impact of competition on their jobs, their opportunity for input to the competitive process, and the lack of parity with industry offerers to protest Circular A–76 decisions.

Industry representatives have complained about the lack of a level playing field between the government and the private sector. Concerns have also been registered about the adequacy of the oversight of the competition winner's subsequent performance, whether won by the public or the private sector.

Such concerns gave rise to the legislation creating the Commercial Activities Panel. It required the Comptroller General to convene a panel of experts to study the policies and procedures governing the transfer of commercial activities. The panel includes senior officials from DOD, OMB, the Office of Personnel Management, private industry, Federal labor organizations, and academia.

The panel held its first meeting on May 8 of last year, at which time it adopted a mission statement calling for improving the current framework and processes so they reflect a balance among taxpayer interest, government needs, employee rights, and contractor concerns. The panel held three public hearings, the first in Washington, DC, the others in Indianapolis, Indiana and San Antonio, Texas.

Since completion of the field hearings the panel members have met several times, augmented between meetings by the work of the staff. Panel deliberations continue with the goal of meeting the May 1 date for a report to the Congress.

This concludes my summary statement and I would be pleased to answer any questions you might have.

Senator DURBIN. Thank you very much, Director Holman.

As I mentioned in my opening statement, I am disappointed that the Department of Defense would not send a spokesman here today, after we had invited them 10 days ago to do so. It is particularly, I think, noteworthy that the Department of Defense dwarfs all other agencies of government in the amount of contracting out that it does, $142 billion in fiscal year 2000 alone, $72 billion of that in services, research, and development, according to a GAO report.

I think one of the reasons, Ms. Styles, that they did not send someone over here was the fact that it could have been the confrontation within the administration. And let me point specifically to a letter that was sent to the OMB by the Department of Defense last December. In light of the September 11 attack, agencies across government were asked to reassess the security of America. And

we certainly look to the Department of Defense as the leader in that reassessment.

The letter that was sent by Mr. Aldrich, who is the Undersecretary at the Department of Defense, really called into question the OMB guidelines, standard, and schedule for privatizing in that Department. I think that he questioned directly whether the A–76 was appropriate in light of our new concerns about national security. He called for reassessment and he said, in his letter to OMB, such a reassessment may very well show we have already contracted out capabilities to the private sector that are essential to our mission, or that divestiture of some activities may be more appropriate than public/private competition or direct conversion.

That, as I see it, was a red flag to OMB to at least stop in place and assess whether or not holding to these goals of privatization and outsourcing made sense in light of our Nation's security. And yet, from the budget which has been sent to Capitol Hill, it appears that what Undersecretary Aldrich recommended has been totally ignored.

How would you respond?

Ms. STYLES. Thank you for asking that question, Senator Durbin. I think there has been a lot of confusion since that letter was released to the press.

I would first like to point out that letter was in the middle of a process that we are going through with many departments and agencies and how it is appropriate for them to meet their goals in some instances. It is not appropriate for some agencies to be considering for public/private competition 15 percent of their commercial workforce. So we are sitting down with each department and agency, working through a plan that is appropriate for each of those agencies.

What concerned us when we saw that letter from Pete Aldridge was the focus on divestiture. A significant protection in the A–76 process is the fact that public sector employees have the opportunity to compete for their jobs. If you have divestitures or direct outsourcing, there would be no opportunity to compete for their jobs.

As I said when I first started answering this question, that memo came out at the beginning of a discussion that we had been carrying on with the Department of Defense. Since then, we have sat down with the Department of Defense. We have had continued discussions with them.

They fully intend to meet the 2002 and 2003 goals of subjecting 15 percent of their commercial activities to public/private competition. As they move forward towards meeting the 50 percent goal, they are going to ensure that there is appropriate competition and appropriate protections in place for the Federal employees in that 50 percent.

Senator DURBIN. But then he wrote in the letter "rather than pursuing narrowly defined A–76 targets, we propose to step back and not confine our approach to only A–76."

Now as I understand what OMB is setting out to do, and you correct me if I am wrong here, is that they are saying by the end of fiscal year 2003 the Pentagon is supposed to have competed out 15 percent of all jobs designated as commercial, or directly convert

them to private sector contracts. And ultimately, the administration's goal is to compete or convert 50 percent, equivalent to 225,000 jobs, at the Pentagon alone.

I do not understand why Undersecretary Aldrich wrote the letter if it did not change your assessment of your goals in light of the needs of America's homeland security.

Ms. STYLES. I think he wrote the letter to explain what a lot of departments and agencies are doing, and which we are encouraging them to do, is to not just look at A–76 as the only way to manage their agency. That is not the point. It is a tool that they have available for them to manage their agency, and it is a tool that we have found is tremendously effective when it is used properly.

What he is describing is the process that many agencies are going through as they determine how to manage their agency. And once we sat down and talked about it and we exchanged ideas on this, they realized that taking a look at 15 percent for public/private competition was appropriate for the Department of Defense.

Senator DURBIN. Let me ask you this from the OMB point of view, because you are a valuable and important agency in our Federal Government, I am asking you to really step back and give me your candid answer here. Is your goal here numbers on a board, notches on a gun, or beans on a counter? Or are we really going to step back in light of September 11 and make an assessment of what is important for the security of our country? And it may not mean that we are going to compete out or outsource or put on the private side as many jobs as we had originally hoped we could, or at least the administration hoped it could.

Ms. STYLES. Certainly. As we sit down with each department and agency, we consider the needs of each department, their mission, and what is an appropriate level of competition. We put 15 percent up over 2 years as a goal that we thought was appropriate for almost every department and agency to meet because they had not subjected, as a general proposition—particularly at the civilian agencies—they had never subjected any of these jobs that are clearly commercial in nature to the pressures of competition.

So we sat down with each department and agency over the period of the past, I would say 6 to 9 months, to determine what was an appropriate plan for that agency. There are agencies where it is not appropriate right now for them to be competing 15 percent.

Senator DURBIN. Do you believe this so-called commercial application, the commercial category of jobs, has to be reassessed and reconsidered because of September 11?

Ms. STYLES. I am sorry, the commercial category?

Senator DURBIN. Yes, categorizing some jobs as not inherently governmental but commercial in nature? Would you step back after September 11 and look at that differently?

Ms. STYLES. I think we are perfectly willing to consider that in the normal process we go through with the FAIR Act inventory, where some might be more appropriately categorized as inherently governmental.

Senator DURBIN. I think that is critical. Let me ask you, is the goal here to save the taxpayers money?

Ms. STYLES. Absolutely.

Senator DURBIN. So whenever there is to be a competition, we are going to try to compare apples to apples, to find out what services can currently be provided by public employees at the ultimate cost to the government, as opposed to the services and quality of performance of those who are competing with them. Is that correct?

Ms. STYLES. We want to provide the best service to our citizens at the lowest price we can.

Senator DURBIN. So it is a matter of savings money?

Ms. STYLES. Well, I think public/private competition also brings innovation, it brings creativity, it brings performance improvements. I hate to focus on the cost alone.

Senator DURBIN. Let me just say in closing on this round of questioning, that is what bothers me.

[Applause.]

I am going to ask the audience, even though I love applause, to please refrain from responding at this point. We are going to try to complete this and to show respect to all the witnesses.

But your last statement, inviting private competition which encourages creativity. Do you realize what you have just said about public employees? I mean, it really reflects on Senator Voinovich's point earlier, that if we are going to try to attract and keep the best and brightest in government, we have to concede that sometimes they are creative, too, and that we do not have to look outside to private competition to have bright ideas.

The presumption that these are just dull bureaucrats marching back and forth to work every day is going to create an impression of government which cannot bring bright people like yourself to public service.

Ms. STYLES. Can I respond to that, Senator Durbin?

Senator DURBIN. Certainly.

Ms. STYLES. I think the best thing about this initiative is the fact that more than 60 percent of the time the public sector wins. They beat the private sector.

Senator DURBIN. That is good. And I think frankly, if it is a fair competition, the numbers might even be higher.

Ms. STYLES. That is exactly right.

Senator DURBIN. Thank you. Senator Voinovich.

Senator VOINOVICH. Thank you, Mr. Chairman.

Ms. Styles, at a May 2000 Subcommittee hearing I chaired which focused on the downsizing initiative of the Clinton Administration, Paul Light stated that downsizing ". . . has been haphazard, random and there is no question that in some agencies we have hollowed our institutional memory and we are on the cusp of a significant human capital crisis."

In other words, the downsizing goals adopted by the Clinton Administration were arbitrary and damaging. I believe that. They were more interested in downsizing instead of strategically reshaping the agencies in order to help them accomplish their mission. They did not provide Federal employees with the tools, the technology, the training, there was no money for training, and no quality management. It was a mindless kind of operation.

Now, in order for agencies to score a green on the President's competitive sourcing scorecard, they now must complete public/pri-

vate competitions or directly convert no less than 50 percent of the full time equivalent employees listed on the FAIR Act inventory.

Ms. Styles, I am concerned that the benchmarks the administration has adopted for its competitive sourcing are arbitrary and potentially damaging, as were the Clinton Administration's downsizing efforts. What measurement criteria did the administration use to come up with a 50 percent figure? What is the logic behind it?

Ms. STYLES. The President actually established the 50 percent criteria himself.

Senator VOINOVICH. Well, then I think the President may have received poor advice. I think the administration's plan puts too much emphasis on meeting an arbitrary quota.

And the emphasis ought to be, in this administration, on giving the people that work in this government the tools, the technology, and the training that they need to get the job done. Take care of the internal customers.

I am really sincere about that. Too often in this business we go ahead and we establish arbitrary percentages without giving thoughts to what those percentages are translated into.

I want to know from you, and I am going to send a letter to the President, on this issue. One of my Ohio constituents brought the administration's contracting goals to my attention yesterday. I am very concerned about the effect the goals are having on the Federal workforce.

It sends the wrong message, and I think that you ought to reevaluate that. I am asking you, where did the 50 percent come from? Who gave him the idea? Did he just pick it out of the air? Was it based on any kind of information from the experts in the area? Where did it come from?

Ms. STYLES. I can explain to you the 5 and the 10 percent, and I can certainly understand the concerns about the metrics here. I think it is unfortunate that it uses an FTE metric, but public/private competition is a proven, effective tool that we want to continue to use.

That does not mean that the Federal agencies should not be appropriately managing their agencies when they look at commercial functions or their other functions as well. Or, for that matter, what is being done by the private sector.

Senator VOINOVICH. Have there been any studies that measure contractor performance? I have been a mayor for 10 years, I was a governor for 8 years, I was a county official for 7 years. And, as I mentioned in my opening statement, farming work out does not equate to getting the job done—you read Paul Light's books on this issue.

This idea that you would farm it out and it is just going to be wonderful, and I think Mr. Holman you may be coming back with looking at this whole process. But I think at this stage of the game we need to re-evaluate what we are doing in this area. There is no magic wand that says that you farm it out and it is the best way of doing it.

Ms. STYLES. If I can respond, we certainly can do a better job of understanding, from a higher level management perspective, what our contractors are doing to help us meet our mission needs. With

that said, though, there are contractors, the Lockheed-Martins, the Raytheons, the General Dynamics of the world, that have thousands of auditors onsite that review everything they do.

Senator VOINOVICH. Like on the Enron situation?

Ms. STYLES. No, sir. Actually, these are Defense Contract Audit Agency auditors that actually look at the costs that are charged, the amount of salaries, the reasonableness of their costs every day. That is their job.

Senator VOINOVICH. As Senator Thompson often mentions, at any given time the Defense Department cannot account for billions of dollars.

All I am saying is if you are starting out on a new game, you have been at it a year. I think that somebody ought to sit down and start to look at some of this. And I just want you to know that I really care about human capital, and I really want to make a difference for our Federal workforce. Furthermore, I am very concerned about what is happening here. And I am going to spend a lot of time on it.

Senator DURBIN. Thank you, Senator Voinovich. Senator Bennett.

OPENING STATEMENT OF SENATOR BENNETT

Senator BENNETT. Thank you, Mr. Chairman.

The old Yogi Berra line deja vu all over again, one of the most serious issues that I had to deal with during the previous administration was this whole question of privatizing versus government employees. I heard a lot of rhetoric similar to that which, frankly, is going around in this situation, but it was reversed.

That is, I was defending the government employees at Hill Air Force Base against spokesmen from the Defense Department that kept saying we could do things a whole lot better with private contractors that just happened to be at McClelland and Kelly, which were two bases that the BRAC Commission said ought to be closed. BRAC said they should be closed and the work transferred to Hill.

Now I do not mean to be overly cynical about it, but Kelly and McClelland were in Texas and California, which happened to have a fairly substantial number of electoral votes. And Hill happened to be in Utah, where the President finished third in the first election in 1992. So there was a suggestion that maybe the issue of privatization versus the public employees was driven by politics.

Indeed, there was an attempt made to make sure that contracting out to private corporations would occur to keep the base at McClelland open. Now they put a sign on the base that says this has been closed, but they kept all the work there in the name of privatization in place. And it took Congressional action to force the President to actually close McClelland and move the jobs to Hill. Again and again we heard the private people can do it better. And again and again, we knew the government employees at Hill knew what they were doing in this circumstance, dealing with specific Defense Department issues and that the government employees at Hill could do it better.

Hill Air Force Base is now up to 22,000 employees. They had only 12,000 at the time of the BRAC. But the Air Force, of all of the depots, rated Hill No. 1. It is amazing that we had to use polit-

ical muscle, if you will, in the Congress to get the previous President—and Senator Voinovich has made reference to what was done in the previous administration in this issue—to get the President to recognize that government employees in the proper process need to be recognized for their ability and their skill.

Now Ms. Styles, I do not hear anything in your presentation that suggests that you are opposed to giving government employees recognition of their expertise and their skill. There have been some that might want to posture you in that role, but I have not heard you say anything that says that this administration denigrates existing government employees, denigrates those who have put in significant careers and that are making significant contribution.

And I want to make that point because I think there may be a sense that you have tried to do that. I do not hear that you have tried to do that, and I do not think it would be fair to characterize you as trying to do that.

Ms. STYLES. No, sir. I think we recognize that we have Federal employees that are doing a terrific job. And this is an opportunity for them to be able to prove they can beat the private sector. We do not care about who provides the service. We want the person who can best provide the service to our citizens to be providing that service. And often times, that means a Federal employee is providing that service.

I have to tell you, Senator, that is a significant change from the previous administration. The OMB Circular A–76 right now presumes that the private sector is the better sector to provide services to the Federal Government. We have no such presumption. And that is a significant change.

Senator BENNETT. That is the point that I wanted to make, that there was, in the previous administration, a clear bias. Now from my point of view, frankly, it came out of the political dynamic of where the jobs would be, which could be translated into votes in an electoral rich State.

I am delighted to have you say that that bias has been changed. Now I would, with Senator Voinovich, ask you to take a look at the numbers. The numbers do have the appearance of being arbitrary. I hope you will take another look at them. But I think the record should be clear that we are moving in the right direction here. That this is not something that just sprung up. And it is a problem that has been with us for a long time, a problem that I and the other members of the Utah delegation faced. We fought long and hard for recognition of the competence and patriotism and sincerity of the government employees at our Federal installations, and we won that fight ultimately against an administration that wanted to go in the other direction.

So I have nothing further to add to this debate, simply to make the point that this is not a new issue. It has been around for a number of administrations, and I feel that the record of your administration, at least the direction that you are talking about, is an improvement over that which we had before. But I would, with Senator Voinovich, ask that you take another look at the possibly arbitrariness of the specific numbers that have been laid down.

Ms. STYLES. OK.

Senator BENNETT. Thank you, Mr. Chairman.

Senator DURBIN. Thank you, Senator Bennett.

Let me do this follow up question, because this is what I am troubled with. Ms. Styles, you have said this is about saving the taxpayers money. You have said that it should be a fair competition, let the best person win. But you have already established standards by which at least 85,000 Federal employees have to lose by the end of this year.

Ms. STYLES. They will not lose. You are assuming that they will lose the competition, that the Federal sector will lose the competition. They do not.

Senator DURBIN. Ten percent of the jobs would be competed or converted by the end of fiscal year 2003.

Ms. STYLES. Subject to public/private competition. And I can tell you, when a department or agency comes to me and says I want to meet these goals through directly converting these jobs, my answer is absolutely not.

Senator DURBIN. But what am I to expect at the end of this next fiscal year, in light of this budget? Are these agencies being given red lights, or green lights in terms of how many Federal employees FTEs are removed from their workforce?

Ms. STYLES. No, absolutely not.

Senator DURBIN. So at the end of this competition if, in fact, the Federal employees prevail and there are no jobs that are eliminated, then frankly why did the administration set the goals? Why did you put specific numbers in the budget?

Ms. STYLES. Because even when the public sector wins, we are getting cost savings exceeding 30 percent.

Senator DURBIN. You are not answering my question. Again, following Senator Voinovich's question, why does the administration have specific numbers of Federal jobs that they are saying have to be competed or converted at the end of the fiscal year—85,000—another 400,000 plus in the out years, if this is just about competition and the Federal employees have an equal chance of winning?

Ms. STYLES. Because we had to build an infrastructure at the civilian agencies in order to be able to have public/private competitions. There were no public/private competitions, generally speaking, going on in civilian agencies before this administration. We saw the benefits of public/private competition. We set up a goal that we thought was a minimum goal in order to build the infrastructure to have public/private competition.

And I think I should emphasize that that is the same infrastructure, if you want to look at work that is already been contracted out and you want to have Federal employees compete for that work, you also have to have that infrastructure in place to be able to do that.

Senator DURBIN. Let me ask you, if it is about competition and quality service, are you prepared to take jobs currently held by private contractors and allow them to be bid again with public employees?

Ms. STYLES. We have no problems with departments and agencies, where appropriate, looking at the jobs that are currently contracted out, and when they come up for recompetition, allowing the public sector, as appropriate because you have to make a commit-

ment of dollars here, to be able to compete for those jobs. And we are looking at this as a full competition initiative.

Senator DURBIN. Let me make sure I understand this, when you say 85,000 jobs, the head of an agency might comply by saying I will tell you what we will do, we have 10,000 people who are working for private contractors that took over jobs that once were in the Federal service. We are going to recompete those and let the Federal employees compete with those. So that would be adequate? That would be OK, from your point of view?

Ms. STYLES. No, we think the jobs—those jobs have already—no, I think I have the job to clarify this.

Senator DURBIN. I want you to.

Ms. STYLES. The jobs that are in the private sector right now have been subject to the pressures of competition. The jobs that are in the public sector right now, that are any variety of things that are available in the private sector to do, from hanging drywall to food service, etc., have never, ever been subject to the pressure of competition. Which is why our goal is focused on the commercial jobs being performed in the public sector right now.

That is not to say that we do not want the public sector to have the opportunity to compete.

Senator DURBIN. How often?

Ms. STYLES. We have a competition cycle for things in the private sector generally of every 3 to 5 years.

Senator DURBIN. So you would say on a 3 to 5 year basis the private contractor jobs should be up for competition again against Federal employees. Is that going to be the administration standards?

Ms. STYLES. Where appropriate. This is an agency-by-agency decision about how they want to manage their agencies.

Senator DURBIN. You would be willing to set goals of how many jobs in private contractors' hands? You have set goals here. 85,000 Federal jobs are going to be at stake in this competition in this year. Are you willing to state a goal of how many jobs currently in the private sector will be up for recompetition each year to see whether or not Federal employees would do a better job and save the taxpayers money?

Ms. STYLES. I am confused. If you think our goals are arbitrary, I am not sure why that would not also be an arbitrary goal?

Senator DURBIN. Why do you apply these goals to Federal employees but you will not apply them to those in the private sector who have taken over Federal jobs?

Ms. STYLES. Because the Federal employees' jobs have never been subject to the pressures of competition.

Senator DURBIN. And I might also add it starts with the assumption that once in the private sector that is where they are staying. And I think honestly, if the goal is to have quality service for the taxpayers, and to have real competition, we ought to recompete those jobs that have gone to private sector.

Ms. STYLES. We are not opposed. In fact, the Circular A–76 right now gives them that opportunity. There are some barriers there to actually bringing things back in in the Circular A–76. We are willing to remove those barriers. We are willing to encourage agencies, where appropriate, to take a look at what should be contracted.

And we have already done it with the Department of Housing and Urban Development, because quite frankly they took too many FTE cuts and sent too much to the private sector already. We have come up with a plan for them, that we are still working on right now, that says maybe a lower percentage of competition for your public sector employees is appropriate. And maybe you also need to be looking at what you can bring back in-house right now, because you cannot manage the contracts you have.

Senator DURBIN. I like this, and I will tell you that I am going to follow through on it. We are going to make sure that we have a clear understanding of what the administration's goal is going to be about recompeting these jobs that went to the private sector. Senator Voinovich's experience and your statement now about HUD, at least give us some pause as to whether or not once they are "out of the Federal Government" whether the taxpayers are still winning.

Director Holman, most of the questions have been directed to your fellow witness here, but I want to make sure I understand. Ms. Styles has said that the goal here is to save money. But you, through the GAO, have told us repeatedly, this is a pretty tough thing to do, quantify how much you are saving.

I think your statements and your respective testimonies probably referred to different periods of time, in terms of savings at the Department of Defense. At one point, I believe Ms. Styles has used the figure of $11 billion in Department of Defense savings of competing out, and you have used a much smaller figure of $396 million for 1 year. So I do not want to mischaracterize that comparison.

But speak to this issue about how we ultimately can feel that we are saving money in this whole process of A–76 and competing out.

Mr. HOLMAN. Senator Durbin, we have not established a precise figure overall for savings that have been realized. What we have done, on a case study basis selectively, is to go in and look at actual competitions that have been completed, to look at the costs that were incurred in doing the studies, the costs that were associated with implementing the studies, costs associated with saved pay where Federal employees may be RIFed, separation pay, and so forth.

Where we have done those case studies, in most instances, we have found that significant savings were being realized. Now the anomalies associated with each case, they were each different. Each had unique circumstances. In many cases, the agencies had not done as good a job as we would have liked to have seen establishing baseline costs before they went into the competition. That made it difficult for us then to go back and say OK, how much money was actually saved from that competition.

So that is why we have been very reluctant to put a precise figure on the amount of savings that have been realized. But having done these assessments, it is clear to us in many cases there are savings, significant savings. I might indicate so much so in some cases, you start to ask the question why did it take an A–76 competition to achieve these savings? Why weren't the efficiencies being achieved without the competitions?

Senator DURBIN. I do not quarrel with the possibility that there will be outsourcing and save taxpayers dollars. I do think we have to step back and decide whether or not that is actually happening, whether there is another overarching goal as Undersecretary Aldrich suggested such as national security and inherently governmental jobs.

But what troubled me was the presumption that outsourcing is, in and of itself, a valuable thing to happen. I think that is a sentiment which I think we have all raised and brought to question in this hearing this morning.

I want to thank you both for your attendance today. Ms. Styles, thank you for coming. Director Holman, thank you as well. I appreciate the testimony of the first panel and now we will call the second panel in for their testimony, and I will introduce them.

Dan Guttman is here. He is a Fellow of the Washington Center for the Study of American Government at Johns Hopkins University. Bobby L. Harnage, Sr. is National President of the American Federation of Government Employees. Colleen Kelley, National President of the National Treasury Employees Union. Mary Lou Patel, Chief Financial Officer of Advanced System Development. And Stan Soloway, President of the Professional Services Council.

Thank you all for joining us this morning, and we are going to invite your testimony in the order that you were seated. The first one to testify will be Bobby Harnage. Your full statement will be made part of the record and if you would be kind enough to summarize it at this moment, we would appreciate it. Mr. Harnage.

STATEMENT OF BOBBY L. HARNAGE, SR.,[1] NATIONAL PRESIDENT, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL–CIO

Mr. HARNAGE. Thank you, Chairman Durbin, and Ranking Member Voinovich and other distinguished Members of the Governmental Affairs Committee. On behalf of the 600,000 Federal employees that I represent across the Nation, I appreciate this opportunity to discuss the serious long-standing problems of Federal service contracting policy.

Let me also take this opportunity to thank you, Senator Durbin, for the leading efforts that you have made to correct those problems through the introduction of the TRAC Act. I also want to thank the 17 senators who have cosponsored this important piece of legislation, including Senators Lieberman, Torricelli and Dayton of this Committee.

Mr. Chairman, my written testimony is quite detailed and you have it for the record, and therefore I would like to just summarize sort of off the cuff.

There has been a lot of talk about the TRAC Act, a lot of opposition to it, but no one has been offering any attempt to address the most important issues of the TRAC Act. It has been simply an opportunity to try and kill the legislation rather than try and address the issues that are very important and identified in that TRAC Act.

Let me say up front, there is no intent for us to shut down government. How ridiculous that would be. That is us. We are the

[1] The prepared statement of Mr. Harnage appears in the Appendix on page 76.

government. There would be no reason for us wanting to shut the government down.

There has been comment that this is to stop privatization, and that is not true. This organization, for the last 6 years, has stood for competition, not stopping privatization but stopping competition. Most often referred to stopping privatization has to do with enforcement and accountability.

All too often we see the Senate and the House and Congress pass legislation with the best of intentions and DOD thumb its nose at it and not follow through with the requirements of that piece of legislation. And therefore, we see a need for some enforcement. If that enforcement is too strong, we are willing to work with you and others to address those concerns.

The Senate bill is much different than the House bill as a reflection of the work that you have done, Senator, in trying to address those concerns that was expressed in the House bill. I want to thank you for that, too.

We see this as a very demoralizing situation with the Federal employees. Right now I am particularly concerned with the acts of the administration while we are in this war on terrorism. It just seems odd to me that while we are calling our Federal workforce and our war fighters together, and many of them are working 7 days a week, 12 hours a day to keep this country safe, to make sure that our war fighters have the supplies and the ability to fight terrorism, we are saying by the way, all this dedication is appreciated but we are contracting out your job.

I would also like to point out that a lot of people that are now securing the airports and a lot of people that are overseas fighting terrorists are our members who were Federal employees but belong to the active Reserves, and they have been activated. And while they are over there fighting this war their jobs are being studied, as to whether or not there will be jobs when they get back home. And I think that is ridiculous.

I wrote a letter to the administration and to the DOD and said now that we are in this heightened security and this crisis situation, please withdraw those ridiculous quotas that you have, that affects the ability of us to fight our war. The response I got was this is a reason to step it up rather than slow it down. I just simply do not understand that.

We are seeing a lot of contracting being as a result of lowballing now, to where the contractors know they get their foot in the door there will be no competition later. We hear a lot of talk about competition, but when you look at the record once it goes private there is very little private/private competition. Sure it is put out for competition but no competition is there. So when they say it was competed, they are being truthful, but when you say was there competition, they are being misleading.

I heard a moment ago about the situation in HUD. We were here trying to express our concern back under the past administration, what was going on with HUD. Let us make it clear, HUD has never used A–76, regardless of what they tell you. It has never been used.

When you check into it, they will say oh yes, we used A–76, but we used the waivers in the A–76 process. There has never been

public/private competition in HUD. Not today, not yesterday, not ever. I challenge you to check that out.

This quota that we see, I keep asking myself why do we have these quotas? I understood what Senator Bennett said and I agreed with him. While he was fighting in the halls of Congress, I was fighting in the Pentagon, to try to change that privatization in place in Kelly and McClelland. Thank goodness we were both successful in getting some competition there.

But what this quota is all about is to make it happen regardless of cause. Senator Voinovich, I want to work with you. You are doing an outstanding job in trying to fight this human capital crisis, trying to identify what we need to do. I have met with you in your office. I have met with you at the Kennedy School of Business at Harvard. We are going to continue working with you.

But it just blows my mind as to how we think we can deal with the human capital crisis with the DOD now taking the position that their solution is simply privatizing. So when they start giving you numbers that appear to be decreasing, that does not include the vacancies that they now intend to turn over to a contractor without competition. And that is how they will address the human capital crisis, simply privatize it, contract it out. That will be the solution.

I look forward to your questions. I hope I get some of the same questions that was asked the previous panel. I do have some concerns with their answers.

That concludes my summary.

Senator DURBIN. Thank you very much, Mr. Harnage. Stan Soloway, President of the Professional Services Council.

STATEMENT OF STAN Z. SOLOWAY,[1] PRESIDENT, PROFESSIONAL SERVICES COUNCIL

Mr. SOLOWAY. Senator, thank you very much. My name is Stan Soloway, President of the Professional Services Council, the Nation's principle trade association of government, professional, and technical services providers. I appreciate the opportunity to testify before you this morning.

Even before the horrific events of September 11, we believe the need for a robust and growing partnership between the government and the competitive private sector was evident to many. In the aftermath of September 11, its priorities and missions have been altered forever. That need is greater than ever.

As the private sector speeds ahead with almost daily advances in information technology and security, biotech, business process reengineering, e-commerce and e-business solutions, integrated facilities management and more, the government has struggled to keep pace. And as the government faces its daunting human resource problems, ever growing competition for talent with the private sector and continuing financial constraints, the need for that vital partnership grows even more.

And to suggest that in such a partnership the private parties have a somehow diminished sense of commitment to their Nation or their mission, given that many of the members of that private

[1] The prepared statement of Mr. Soloway appears in the Appendix on page 105.

partnership are former government employees, is demonstrably false. As the events following September 11 should have made clear, and as I understand has been made clear to this Committee in recent correspondence from labor organizations opposed to the TRAC Act.

Unfortunately, the current debate on outsourcing and privatization not only fails to focus on the critical issues but is being conducted largely in an environment beset by false premises and perceptions. First we are told repeatedly that there is an enormous contractor workforce operating somewhere in the dark doing the bulk of the government's business. The so-called shadow workforce, the myth goes, is larger than the government itself, far less accountable for its actions, and over the last decade has dramatically increased at the expense of Federal employees. As Senator Voinovich indicated, Paul Light has estimated the size of this shadow workforce as 5.6 million.

But despite popular perception, Light's numbers have nothing to do with the contractor workforce. Rather, they were arrived at using the Commerce Department's Regional Input/Output Modeling System, or RIMS, which is designed to project not only the direct employment that would result from, for instance, the relocation of a plant, but also the overall economic impact including grocery store clerks, teachers, gas station attendants, and more. Thus, his figures offer little or no insight into the size or scope of the Federal contractor workforce.

That is why other analyses, including DOD's own studies, suggest the actual number of contractor employees supporting the government is only a fraction, maybe 20 percent of Light's numbers. In short, the shadow workforce casts a smaller shadow than many assert.

I would also suggest that arbitrary head counting of either Federal employees or contractor employees tells us little of value.

Second, the myth that the government has radically increased its outsourcing at the expense of incumbent Federal employees is factually incorrect. Some 60 percent of the growth in service contracting over the last 10 years has been in the civilian agencies, yet 90 percent of the workforce reductions have come at DOD. In the civilian agencies, service contracting has grown by some 33 percent over the last decade. During that same time, the civilian workforce has been reduced by 3 percent. If there were a correlation between increases in service contracting and workforce reductions, the data should at least suggest it, but it does not.

Moreover, where the government workforce reductions have been greatest, there have also been similar reductions in service contracting and vice versa. In other words, outsourcing and Federal workforce levels have actually tended to travel parallel, not conflicting, paths.

What about the accountability of contractors? Let me start by saying we have many challenges in contract management, but so too do we have challenges with management across the government, as Senator Thompson made clear in his opening statement and as this Committee reported last June. The problems of management cut across all aspects of government today. Thus, any suggestion that reducing contracting out or competition would de facto

result in an improvement in government performance and oversight and management is simply untrue.

In the case of contractors, they are subject to a range of checks and balances, including ongoing competitive pressures. In fact, 75 percent of all service contracting actions and more than 90 percent of all IT service actions are competitively awarded and routinely recompeted.

Contractor costs are subject to a range of government directed accounting standards and audit provisions. Contractors are continually rated on performance and previous performance, along with other critical non-cost factors, is typically a significant evaluation criterion in competitions for new work.

The GAO has reported that the government does not know in the aggregate precisely how much money is being saved through outsourcing but, as Mr. Holman made clear, the issue is not whether money is being saved, the only issue is how much.

And what of government activities? Let us stick simply to cost, and let us make clear this is not a criticism of government people, it is a criticism of government systems and government processes. To quote the GAO in a report on A–76 public/private competitions, "the government does not know the cost of the activities it competes."

In an independent study by the Center for Naval Analyses which sought to assess the relative long-term savings from outsourced and insourced work could not access in-house performance because the data, according to the study, does not exist.

Accountability cuts both ways, can be a challenge both ways, and needs attention both ways. Any suggestion that contract performance is somehow less transparent or accountable than internal government costs or performance just is not correct.

This leads me to the TRAC Act, which fundamentally disrupts the kind of strategic planning that Senator Voinovich and others concerned with human capital, I believe, think is absolutely necessary as the government faces the capital crisis of the future. The TRAC Act could force a moratorium on service contracting but would, without question, require that every service contract, recompetition, task order, option or other action be subjected to the widely discredited A–76 process. The bill does not, as many believe, deal only with work currently being performed by Federal employees, work for which those employees typically but not always do compete. Rather it deals with almost the entire universe of commercial activities being performed in support of the government.

If TRAC were to pass in whole or in part, procurements that today can be competed competitively in a matter of weeks or months would take years. Among other impacts, high performing commercial companies, many of whom have only recently entered the government market, would beat a hasty retreat rather than be subjected to the distorted, inaccurate, and low cost focus of the A–76 process.

The e-government, e-commerce, and other technology initiatives of both political parties would suffer potentially fatal blows, and in the end the government and the taxpayer will pay the bill.

Today, A–76 is utilized in less than 2 percent of all service contracting because only that small amount has involved work cur-

rently being employed by Federal employees. It is a process that industry, the Federal unions, and many others have testified does not work. So why dramatically expand its use? Why create false competition where real competition already exists?

For those reasons, PSC and the rest of the industrial base that supports the government oppose the TRAC Act. It is also opposed by labor unions, taxpayer organizations, national security organizations, and small business.

Some 50 years ago the House Committee on Government Operations observed that "a strange contradiction exists when the government gives lip service to small business and then enters into unfair competition with it." That observation remains as true today as it did then.

With all due respect, Mr. Chairman, the TRAC Act is ill-conceived, is based on faulty premises, driven in large part by a mythological environment, and could strangle the government. Moreover, passage of the bill or any parts of it could, in fact, destroy the delicate but very vital partnership between the public and private sectors. That is why opposition to the legislation is broad and deep and why support for an expanded partnership is so strong.

Thank you very much for the opportunity to testify this morning. I look forward to your questions.

Senator DURBIN. Thank you, Mr. Soloway. Ms. Kelley.

STATEMENT OF COLLEEN M. KELLEY,[1] NATIONAL PRESIDENT, NATIONAL TREASURY EMPLOYEES UNION (NTEU)

Ms. KELLEY. Thank you, Senator Durbin and Senator Lieberman. I want to thank you, on behalf of the NTEU members across the country, for the opportunity to testify today. And I want to thank you for holding this hearing.

I would also like to thank all of the Federal employees in the audience, who work so hard every day delivering the services to American taxpayers. Obviously, as evidenced by the large turnout, as we have all noted, this is a subject that is critically important to Federal employees.

The past 6 months, as we all know, have been very trying times for the American public. First came the tragic events of September 11, then the spread of anthrax, the security threats at our ports and our borders, the ongoing recession, and then the corporate accounting scandals. Never before has it been so clear how vulnerable our Nation is to such a wide variety of attacks. And never before has the need to maintain a highly trained, highly skilled, dedicated and valued Federal workforce to respond to and prevent these attacks been so clear.

The Customs inspectors who inspect foreign cargo, the FDA employees who ensure a safe food supply and who work to approve new vaccines. The FDIC and SEC employees who regulate our banking and securities industries. And the men and women at the IRS who ensure the revenues due to the treasury are paid. Our democracy depends on these patriots, and Americans recognize their work.

[1] The prepared statement of Ms. Kelley appears in the Appendix on page 112.

We can all agree that government services should be delivered to the American taxpayers in the most cost-effective manner possible and that agencies should continue to strive for higher performance in the delivery of these services. The taxpayers deserve accountability, reliability, and a transparent system that is fair and equitable.

Today NTEU would like to make suggestions for improving the delivery of government services. First, when it comes to accountability for the Federal workforce, there is little we do not know about the quality and the costs of government services as delivered by Federal employees. Unfortunately, we know virtually nothing about the quality and the real costs of the government functions being performed by private contractors. This is unfair to the taxpayers and to the Federal employees.

Because of very little governmental oversight of contractors, when a contractor is not performing or when contract costs escalate, it is often too late to fix the problem. Just last year, for example, we learned that Mellon Bank, a contractor hired by the IRS, had lost, shredded and removed over 40,000 tax returns worth over $1 billion revenues for the government. Fortunately, that contract was terminated.

But how could the government let this fraud go on for so long? Forty thousand tax returns and $1 billion in tax revenue. It took a very long time before we realized there was a problem. Why is that? The answer is because Congress and the administration have never put in place a reliable government-wide system or provided adequate tracking to track the work of contractors.

Before contracting out even more government work, we need to get a better handle on the current system. NTEU believes that the best way to do this would be for Congress to approve S. 1152, the TRAC Act. The TRAC Act would require agencies to implement systems to track whether contracting efforts are saving money, whether contractors are delivering services on time and efficiently, and that when contractors are not living up to their end of the deal, the government work is being brought back in-house.

In addition to passage of the TRAC Act, NTEU believes that the acquisition workforce, those responsible for not only awarding contracts but for overseeing them as well, should be increased and that training should be improved for them. We all know, we have talked all day today, about the OMB directives on the 5 percent and 10 percent outsourcing quotas leading up to ultimately 50 percent or 425,000 Federal jobs.

This mandated sourcing program is not truly competitive. Regardless of how well Federal employees are doing their jobs today, the directive provides absolutely no assurance that they will have an opportunity to compete to keep their jobs. Since agencies are not required to hold a competition, NTEU fears that in most cases they will be converting the jobs directly to the private sector without competition because it is the easiest thing to do.

And then they will do this not only because it is easy but because they do not have the staffing in place, the expertise or the training, to run a fair public/private competition.

The one-size-fits-all arbitrary competitive sourcing quotas, which give no consideration whatsoever to the uniqueness of each agency,

are already having a negative impact on the morale of the Federal workforce, and will continue to harm the ability of Federal agencies to effectively carry out their missions and to attract and retain quality Federal employees.

Before contracting out more jobs, the government needs to evaluate what the long-term risks are to our Nation. Congress and the administration need to make investments in increased agency staffing and better training so that government services can be delivered by Federal employees at even lower costs and increased efficiencies.

NTEU urges adoption of our recommendations and passage of S. 1152, which we believe are practical and sensible. Our recommendations will clean up the current system while better serving the needs and the interests of the American taxpayers.

Senator Durbin, I would just offer to you, I am an accountant and a CPA. I represent many Federal employees who are accountants, and we offer our services to you to help review those balance sheets when they arrive.

[Applause.]

Senator DURBIN. Thank you. I am sure it would be very objective, and I appreciate that very much. Ms. Patel.

STATEMENT OF MARY LOU PATEL,[1] CHIEF FINANCIAL OFFICER, ADVANCED SYSTEMS DEVELOPMENT, INC.

Ms. PATEL. Mr. Chairman and Members of the Committee, my name is Mary Lou Patel and I work for Advanced Systems Development. I am here to discuss my perspective on "Who's doing work for the government: Monitoring, accountability, and competition in the Federal and service contract workforce.

Advanced Systems Development is known as ASD. We are a small, disadvantaged business providing IT support services to the government in the areas of network administration, engineering, systems administration and engineering, web development, security, firewalls, information insurance, and help desks. The company was founded in 1978 by Richard L. Bennett, who is still a very active member of the company.

The Small Business Administration approved the company in the 8(a) program in 1982 and the company graduated in 1992 with the 8(a) business ending in 1995. During the 8(a) years, the company maintained a steady revenue base of $4.3 million to $5 million. After graduation, the first year of revenue was $5.7 million. Last year we completed the year at $14.9 million and this year we plan to project a revenue of $17.5 million.

ASD has earned a positive reputation with our customers, with the Office of Secretary of Defense and its components, with the Bureau of Labor Statistics under the Department of Labor, Joint Staff and Air Force work. Within the Office of Secretary of Defense, ASD started in 1982 with 3 technical staff and today we have 133.

ASD has a reputation of outstanding performance with our customers. This is possible due to ASD's commitment to our customers, their mission, providing employees with the skills that produce quality skills delivered.

[1] The prepared statement of Ms. Patel appears in the Appendix on page 116.

On September 11, ASD had 73 staff in the Pentagon. On September 12, we had 71. Although two members of our staff were unharmed physically, emotionally they could not return. Our employees are our most important resource. We had three crisis management sessions for counseling in response to this trauma, which helped our employees tremendously.

Many years ASD provided mostly help desk support to the Office of Secretary of Defense for Programs Analysis and Evaluation, Acquisition Technology, and Logistics, Directorate of Operational Test and Evaluation, Office of General Counsel, and the U.S. Court of Military Appeals. Four years ago, we competitively won the Directorate of Personnel and Security, 3 years ago the Office of Comptroller, 2 years ago the Secretary of Defense, and this year the Office of Legislative Affairs. The delivery order for the Secretary of Defense was awarded under our previous administration and we continue today to support Secretary of Defense Rumsfeld.

ASD enjoys a low attrition rate. As a result of this, not only does this make our employees very happy, but our customers receive the benefit of retaining a knowledge base. ASD implemented a career ladder that included in-house training, both with our professional staff helping our lower level staff, and also using professional organizations outside. This resulted in 76 employees receiving IT certifications last year, such as MCSCs, CNAs, and certifications like that.

Recently, a banker requested a list of our customers and asked me to provide references to assess our performance. After he called our various customers he called me and he said were all of those your relatives? I was taken aback and said no. He said that the satisfaction that our customers expressed was so extraordinary, he was unprepared for such glowing reports.

During the 15 years of mostly help desk support, as various training programs were implemented, the expansion to a wide range of IT desktop functions was achieved. Our customers have benefited from this professional development and growth of our employees. With the explosion of the information age, the development of new computer hardware and software and dependence on computers, ASD has worked hand-in-hand with our customers developing state-of-the-art capability to support their mission.

ASD works closely with our customers to ensure accurate quality services. We have oversight. We are assigned an installation representative, task monitors, contract officer, and technical representatives. We have monitoring on a monthly basis to measure performance measurements. There are service level agreements that are provided by Gardner Group as metrics to be followed. Examples of that are first resolution report, time to close work orders, team scorecards, knowledge based reporting, end of month status, and monthly invoice charging.

We also have oversight at a corporate level, Defense Contract Audit Agencies. Annually we have incurred cost audits, we have periodic accounting system audits. We have policy and procedure audits. We have billing rate audits. We have review of executive salary audits and limitation on amount of payment. We also have review of unallowable, making certain that is not included in our rates but are coming out of company profits.

We also have oversight by the Department of Labor with Title VII, the Uniform Guidelines on Employee Selection Procedures, training for sexual harassment, OFCCP for affirmative action plans and EEOC reporting, the Family Medical Leave Act, Americans with Disabilities Act, and safety training through the EPA.

ASD's dedication to our customers and our efforts to maintain a reputation of past performance extended to the most recent experience of providing staff to customers with no funding. The delay in the Defense appropriation and authorization bills placed ASD in a position that, with our monthly revenue of $1.5 million, we had $700,000 funded. So during October, November, December, and January, we were accumulating $800,000 of work that we would not receive payment for as we performed the work.

We continued to perform under this new contract with our existing customer, committed to providing uninterrupted service, but we could not be paid. Under continuing resolution funding was for ongoing, continuing efforts. The agency had awarded the company a new contract as of September 16, effective October 1, which represented what was unbilled.

During this time, when we needed to cover payroll, ASD sought the assistance of our bank instead of cutting employees and the service to our customers. Our bank refused. They would not permit borrowing because they said it was not funded.

In early December, with $1.6 million of work completed which we could not bill, we were in a critical need of cash. We had risked the net worth of the company to maintain our customer relationship. We appealed to the customer and we appealed to the Small Disadvantaged Business Utilization Office. We received partial funding under three of our eight delivery orders, which provided a partial and temporary solution to our problem.

After passage of the Defense Authorization Appropriation Bills, contracts released most of the funding during the last week of January. To meet our continuing need for operating capital, we resorted to calling on a relationship with a prime contractor for assistance. Twice we asked this prime contractor to make early payment of subcontractor invoices.

On March 1, 2002, last Friday, we received a payment from DFAS for $1.3 million which covered most of October and November performance expenses.

In conclusion, I believe these events have highlighted ASD's continued commitment to providing high quality services that meet the needs of our government customers and their missions. When they have problems, we work with them to remedy them as soon as possible. It is this commitment to quality, our reputation for past performance, and our employees that do the work for our customer in partnership with our customer that has allowed ASD to grow and succeed in the government marketplace.

I appreciate the opportunity to be here today.

Senator DURBIN. Thank you for your testimony, too.

Mr. Guttman, your testimony will be made part of the record. I note that you have been of service to Senator Pryor on some previous investigations of this issue. I welcome your testimony, if you would please summarize it and we will go to questions.

STATEMENT OF DAN GUTTMAN,[1] FELLOW, WASHINGTON CENTER FOR THE STUDY OF AMERICAN GOVERNMENT, JOHNS HOPKINS UNIVERSITY

Mr. GUTTMAN. Thank you. It is a privilege to appear before you, Mr. Chairman, and Senator Voinovich today. I appear as a citizen whose interest in performance of public purposes by private actors dates to law school research leading to The Shadow Government a quarter century ago. My experience since, as you have noted, has been immensely enriched by service as a staff member of this Committee, but also working as counsel to nuclear weapons workers who are, as Mr. Soloway would say, part of the contract workforce that has done an immense benefit during the cold war and today for our Nation.

Senator Voinovich started off by noting that Paul Light has told us several years ago that all of a sudden we have a shadow of government workforce of approximately 8 million. Mr. Soloway tells us that number is probably too large, perhaps by an order of magnitude. That is the good news. The bad news is the U.S. Government cannot tell us within an order of magnitude what the size of that workforce is.

Most of this shadow of government, as Mr. Soloway correctly pointed out, is obviously not doing the things that we, as citizens, would think of as the work of government. Most of it is doing services that are provided routinely by the commercial sector. But a large and substantial portion is doing what we would call the basic work of government, drafting rules, plans, policies and budgets, writing statutorily required reports to the Congress, interpreting and enforcing laws, dealing with citizens seeking government assistance and with foreign governments, managing nuclear weapons complex sites and serving in combat zones, providing the workforce for foreign aid nation building, and selecting and managing other contractors in the official workforce itself.

It is important to understand that this shadow of government is not a recent creation. It is not a Reagan or Clinton creation. It really reflects a basic, profound constitutional change in the structure of our government that dates to World War II and the beginning of the Cold War. It was not an accident. It was a product of design. It has lain, unexamined for decades. September 11 shows us that we are now at a period where due diligence is in order.

I think the take home message for this hearing is what Administrator Styles has told you. This is a time where we have to look at the government workforce as a whole.

At the dawn of the Cold War, reformers deployed contractors and grantees to harness private enterprise to public purpose. They knew the private sector would provide expertise and powerful political support for increased Federal commitment to national defense and public welfare tasks. They hoped the private sector would countervail against the dead hand of the official bureaucracy and allay concern that we all share as Americans of a centralized big government.

Those present at the creation—businessmen, officials and scholars—saw what they were doing as a profound constitutional

[1] The prepared statement of Mr. Guttman appears in the Appendix on page 119.

change. Kennedy School Dean Don Price called it a diffusion of sovereignty in 1965.

At the same time, the best and the brightest generation was aware that there were problems with this constitutional set of reforms. The highlight, the high water mark for the identification of these problems was a report to President Kennedy in 1962—the Bell Report. It said first, it is axiomatic that the government officials have to have the competence to be in control of the work of the government.

Second, however, it declared that, in fact, the increased reliance on contractors—this was 1962—was blurring the boundaries between public and private.

Most importantly, it warned we have a dynamic, not a static situation, because we have two sets of rules. We have the rules we apply to officials, ethics, pay caps, transparency, that we do not apply to contractors with good reason. We hire contractors because we expect they are autonomous. They come from the private sector, we assume there will be an official oversight of these people of the officials having these rules.

The problem the Bell Report identified was that over time with these two sets of rules, the brains of government would migrate into the private workforce. The Bell Report backed away from addressing these what it called philosophical issues, basically saying we are in a Cold War, we need to get on with it, let us address that set of basic questions later. September 11 shows that later is now.

One-half century of Federal reliance on contractors and grantees has produced remarkable successes. We all know about them. The Manhattan and Apollo projects, victory in the Cold War, advances in biomedical understanding, to name a few. At the same time, the Bell Report's concerns have borne out.

First, we have a declared governing principle, and now, in the FAIR Act, a Congressionally declared principle as well as an executive principle, that only officials can perform inherently governmental functions. That is a principle of law that is increasingly a fiction or a fig leaf. Since the Bell Report, third party government has grown as if on automatic pilot. Driven by the inexorable forces of bipartisan limits on the number of officials, personnel ceilings—I must confess, I share Senator Voinovich's view that the Clinton reduction was a Democrat pushing it downward, this is bipartisan—the creation of new programs or agencies has meant that work is necessarily contracted out without due regard for whether it is inherently governmental, or indeed often without regard for cost.

Second, we have a government premised on openness, the bulk of whose workforce is invisible to citizens, press, and too often even to Congress and the highest ranking political appointees. Notwithstanding the conflict of interest disclosure requirements, the few public reviews of the conflict disclosure process indicate that too often contractors are hired without due regard for potentially conflicting interests.

Even as they work side by side with officials, as Ms. Patel says and we all acknowledge and are very proud of the contractors who were in the Pentagon, at the same time the officials are on the or-

ganization charts and in the phone book. The contractors are not. Even as they do the basic memos and policy drafts for officials, they are transmitted anonymously so that Senator Pryor found, to the embarrassment of the Secretary of Energy, that his Congressional testimony was written lock, stock, and barrel by a contractor. The procurement office did not know about that.

Senator Pryor did one of the few reviews—I do not know of any other reviews of the conflict of interest disclosure process used by agencies—and found that contractors routinely failed to disclose relevant interests and officials ignored publicly available information that should have rung alarms. This is not to say it is a routine, but it occurs too often. Most importantly, he found it occurred in relation to very sensitive national security issues. Contractors were working for foreign interests while working for the U.S. Government without the government being aware of it.

Third, today we have two sets of rules to regulate. Those who perform the work of government. We can no longer presume that those who actually do the work of government are themselves governed by the laws enacted to define the limits of government and to protect ourselves against official abuse.

What are those laws? The Constitution of the United States. Law students do not appreciate—it only applies to people who work for the government—whether they are called State actors or instrumentality. If General Motors says you cannot talk in the lunchroom, that is General Motors. If the U.S. Government tells someone they cannot talk in a lunchroom, that is a First Amendment question.

The ethics provisions, the conflict of interest rules, the Freedom of Information Act, the political rule, and the Hatch Act apply to officials. The question of what is an inherently governmental function, this goes to Senator Durbin's opening statement, it is not a nit-picking scholastic tax code debate, as it so often seems to be today. It is a very practical question.

After September 11, does it make a difference to us if the people who are out on the front line of homeland defense are subject to the limits of our Constitution, subject to the statutory rules that govern officials? Maybe it does, maybe it does not, but that is what the inherently governmental question is. It is not an effort to get people to do some kind of homework.

Key rules governing officials do not govern private actors who perform the work of government, or in the case of conflict of interest rules, apply to them in a lesser extent. Again, if we assume government officials are in control, and that the contractors are doing commercial work, that is fine. If this changes, we have to rethink what is going on.

Fourth, we have an official workforce whose ability to account for the government and its private workforce is increasingly problematic. That is why Senator Voinovich, one of the reasons, he has been concerned. We have been seeing the hollowing out, the brain drain, in part because of personnel ceilings but in part because we have two sets of rules. Why should I work as an official if I can get paid twice as much and not be subject to ethics restrictions or political restrictions, doing the same or more interesting work as a contractor?

Fifth, in the absence of Congressional and executive oversight, the rules of law to govern third parties who perform government work are being made by accident and happenstance, often driven by third parties themselves. There has been executive and Congressional bipartisan fiction that the work of government is being done by officials so we can have our personnel reviews over here, our Volcker Commissions over here, and our procurement reviews over here and nobody has to look at the reality that Administrator Styles is talking about and we are all aware of, that the work of government is now done by a mixed workforce.

So instead of the rules of this new game being set by you all and President Bush, they are being set as Dan Guttman gets upset with a contractor or goes to court or goes to a particular Congressman and fixes it in some obscure provision of some bill.

Sixth—this is a very important one—in the absence of rules of law, which we do not have for the third party workforce, the tools of accountability that we are relying on are suboptimal. In a nutshell, it is very simple. There are two things that any of us here say you can do to hold the system to account. One is competition, whether we call it competition or stakeholders or interest groups, let us bring competitors in, keeping one another honest. Let us bring stakeholders in.

That is great. That is the premise of our Constitution. Madison, in the Federalist Papers, talks about the need for factions. Factions drive our political process. The problem is Madison said that does not do it alone. We still need a government. Competition and stakeholders are great, but the public interest may not be represented.

Performance measures—we all think they are terrific. They are not new. As Senator Voinovich says, the problem in government is they are hard to come by and people have other things to do but stand around and measure them. They are suboptimal in the absence of rule of law.

Seventh, because we have failed to attend to our own house, we export and import systems of governance based on slogans whose practical meaning we ill understand. We are damaging our own national interest and those of nations and people throughout the world who say what are you doing? How do you manage government in the United States?

The examples are unfortunately too ready to come by: The failure of U.S. aid to Russia, turned over to a private entity, Harvard. The U.S. Department of Justice is now in court trying to get $120 million from Harvard. We were exporting corruption under the name of exporting good governance, because we ourselves did not understand what we were doing with our contract and we did not understand what we were doing when we were going over there.

In the 1980's, the Department of Energy, reading about Margaret Thatcher saying let us privatize, "privatized" all of our Department of Energy weapons complex cleanup. Nobody at the Department of Energy pointed out to themselves that we have been having this done by private contractors for years. Within a year you all were having hearings on $100 million cost overruns.

The failure of the U.S. Enrichment Corporation privatization, which Senator Voinovich is infinitely aware of, was not only predictable, it was predicted. That was treated as if this was a private

business deal, done in secret, when it was giving to a private entity of basic national security functions. We now have the Bush Administration picking up the pieces saying how are we going to put these pieces together? We did not have a clue. We thought we were selling a cement plant or a gas station, not putting into private sector public functions which had to remain under control.

Senator DURBIN. Mr. Guttman, as a former Senate committee staffer, you know how members get nervous when witnesses go over, so if you would summarize, we would appreciate it.

Mr. GUTTMAN. Yes. Truth in government, who is running the government, what rules of law will apply to those who do the work of government? Are we going to have two sets of rules, or are we going to do mixes and matches? Contractors who are doing vital work that is inherently government get to be governed by those kinds of rules.

Second, what kinds of mechanisms do we have now?

And third, and most importantly, and this goes to this whole TRAC question, if we are continuing to blur the lines, putting contractors and officials in competition, it sounds great. But the more we make contractors and officials look like one another, do we lose or risk losing the basic qualities of public service and private entrepreneurship that we have always valued in each? That is a very serious question because that is where the flow is going.

I apologize for taking more than 5 minutes.

Senator DURBIN. Thank you very much.

Your whole testimony will be made part of the record.

Mr. Soloway, let me ask you, in this whole debate over this issue, do you agree that we should make certain that Federal agencies really do track the costs and savings of contracting out?

Mr. SOLOWAY. I think that the Federal agencies should be tracking the cost savings and performance of all of their activities, be they contracted activities or internal activities.

I think one of the misconceptions that exists here, and it goes back again to the GAO reports of the past on financial management, is that if you have a contract in any locality of the government, at the buying activity level where the contract is actually let, they have complete and total visibility into what your costs are because they have to validate and approve, sometimes multiple times, every invoice that comes through the door.

Every time Ms. Patel's company submits an invoice there is somebody there who has complete visibility——

Senator DURBIN. I have several questions and I would like to get through them all and then we can have a general discussion.

Let me ask you, do you believe that there should be real competition when it comes to contracting out, between the public and private sector?

Mr. SOLOWAY. I believe that where there is an incumbent workforce involved, and where the skill sets, the resources, the capabilities in the government exist to be competitive, the Professional Services Council has said, in many of those cases public/private competition is valid.

However, I would point out again, the TRAC Act does not limit itself to where there are incumbent employees involved, and, competition exists across the board.

Senator DURBIN. We can address that.

Ms. Styles, in her testimony, said that she also believed there should be contracting in. So that once contracted out, some of these services should be recompeted to see if perhaps public employees could do a better job. Do you quarrel with that conclusion?

Mr. SOLOWAY. In essence, I do quarrel with that conclusion——

Senator DURBIN. Why would you quarrel with that?

Mr. SOLOWAY [continuing]. Because I think there would be very narrow circumstances in which it would be in the interest of the government, once a decision has been made that the function is commercial in nature, which is the supposition we are operating from here. Competition has been conducted, whether it was work performed in the government before or not. You have to realize that most of what we are talking about was never performed in the government. This is work that was new work and so forth.

Senator DURBIN. So this competition thing can be pretty uncomfortable, right?

Mr. SOLOWAY. No, in the private sector we are very comfortable with it.

Senator DURBIN. Then why would you be opposed to the contracting in? You would be subject to rebidding and recompetition. And if competition is OK for one side, why is it not all right for the private sector?

Mr. SOLOWAY. Let me be very clear here. Competition is what drives the private sector. We have absolutely no objection to competition and most of the work performed by the private sector on behalf of the government is routinely recompeted. The question you are asking is should there be a government bidder, a government entity bidding against contractors for already contracted work. And if we had a process that was a real competition that really looked at, on an equal playing field, quality, technical, performance, real cost, and so forth, then you might have an argument——

Senator DURBIN. You are making the same argument the public employees are making. You are saying that if you had to go to recompete as a private sector, you might not be treated fairly. They might not take into consideration a company's quality of service, the people who are there, and their dedication. You hear the same thing from these people, who have given their lives to public service. But they are facing a competition that you do not want to face.

[Applause.]

Mr. SOLOWAY. Senator, let me distinguish again, first, every government contractor lives in a world of competition where routinely they are under risk, the employees and the company at large, of completely losing the work they perform to other competitors. So there are constant competitive forces at work, which is the distinction Ms. Styles was trying to draw.

The second point I would make to you is that the A–76 competition process bears little resemblance to the kinds of competitive procurements that are done throughout the rest of government.

Senator DURBIN. I just do not follow this thinking. If you have work being done by government employees and there is a competition, public/private competition, and a private company wins that competition, Ms. Patel's or others, you are saying the fact that her

company and others have to compete in that private sector workplace is enough.

But the thought of coming back and competing with government employees at some future date to see if you could still win the competition is something you reject.

Mr. SOLOWAY. I would go back to the strategic question that you have to begin with before we even get to the question of who is competing for what. What is the mission of the agency? Is there a reason to believe that bringing the work back in-house for reasons other than perhaps some kind of cost comparison is beneficial to the government? Let me give you an example.

Senator DURBIN. Whoa, cost savings was the reason, do you not remember? It was about cost savings, according to Ms. Styles.

Mr. SOLOWAY. No, I believe she said it was cost, it was also innovation, it was creativity, all of which is driven by competition. It is driven in the public workforce when they face competition like any other workforce. The innovations and creativity emerge from the public workforce.

But I believe that you are comparing apples to oranges here, sir, to be very honest with you. The fact of the matter is that when you have a public/private competition for work going on and it goes into the private sector, the reason we have that competition as you, I believe, stated in your statement if I did not misinterpret, was to be, in your words, fair to the existing Federal employees involved.

When you have work that is already contracted out or new work and there is no existing Federal workforce, no incumbent workforce, performing that work, the question has to be asked what strategic benefit to the government do you get by creating a workforce to compete in an environment where there is already full competition?

Senator DURBIN. I will tell you what it is. It is called competition. And recalling Jack Nicholson's statement in a movie, "I do not think you can take competition." What you are saying is that when it comes to contracting in, you just do not want to see that competition.

Mr. SOLOWAY. It is a longer discussion, I suppose, but if it were a real competition I think you would have a different story. But remember again my point earlier, this work is competitive in the private sector.

Senator DURBIN. I do not understand why it is real competition when the public employees are competing with the private sector, but it is not real competition when the private sector has to put their contract on the line against the public employees reclaiming it.

Mr. SOLOWAY. Can I clarify one thing? I do not believe that the process that we now use in public/private competition is fully fair to either employees or contractors. And I do not believe it is truly a competitive environment because it does not allow for the consideration of the kinds of factors you are talking about.

Senator DURBIN. I can tell you that I have gone through these basic elements and I can understand why you oppose the TRAC Act. I can understand why, from your point of view, this idea of facing real recompetition with Federal employees is something you obviously do not want to face.

But you are asking them to face it with their jobs on a regular basis. I do not think it is fair.

Mr. SOLOWAY. Our company employees face it with their jobs every day of the week, as well, sir. Routinely.

Senator DURBIN. From what your testimony said, you do not want to face it when it comes to contracting in.

Mr. Harnage, you wanted to comment on some of the questions earlier. I only have a minute left, and I would give you 30 seconds and Ms. Kelley 30 seconds, as well.

Mr. HARNAGE. Well, first of all, Senator, I think to answer your question you have to come to the realization that I did several years ago. This is not about saving money. This is about moving money and jobs to the private sector. It is just that simple. If you think it is about saving money, you are missing the mark. Nothing that they are doing is about saving money.

And what we are trying to do is to get you focused on 3 percent of what is being contracted out. Only 3 percent comes under A–76. 97 percent of it is being done without public/private competition. So they have got you focusing on the little piece and not on the big piece.

I agree with you, there ought to be consideration of bringing it back in-house. A lot of the figures that you are being told about what is happening in the private sector and it being competed, better than 80 percent of the private sector competition is without competition. It is being put out there for competition but there is no competing forces there because they eat each other's young. They merge and they acquisition and all of that. So there is no competition there.

But everybody says competition is good because it is savings. You heard Ms. Styles say there is a 20 to 30 percent savings because it is competed. Well, if that is true, why does it not work the other way, in the other direction? And that is one of the reasons for the TRAC Act.

We try to get you focused on the 100 percent.

Senator DURBIN. I am trying my best to focus, too. Ms. Kelley, if you would like to comment for 30 seconds?

Ms. KELLEY. OMB's directive does not require competition. In fact, it makes it clear that the agencies can do competition, they can do direct conversion, or they can look for waivers to do the competition. So if there is going to be true competition, then what Federal employees need, want, and have the right to expect, is the support, the resources, the time and the expertise, the time to develop the expertise to be able to be involved in a true competition. And there is no doubt in my mind that if they were supported with the resources, the technical training and the true opportunity to compete, that there is no one who can do the work of the Federal Government better than Federal employees.

[Applause.]

Senator DURBIN. Thank you very much. Senator Voinovich.

Senator VOINOVICH. The testimony of Ms. Styles indicated that the administration did not have a bias against current Federal employees. Would not all of the witnesses agree that setting arbitrary percentages contradicts her testimony?

Mr. HARNAGE. Certainly.

Mr. SOLOWAY. I think what Ms. Styles was saying, and far be it from me to be a spokesman for the administration, what Ms. Styles I believe was saying was that, in terms of who delivers the services, the administration is taking no position. What they want to see is the force of competition brought to bear on government to help drive efficiency, innovation, and so forth.

Senator VOINOVICH. The fact is that when you use numbers and pick them out of the air, and then say there is not a bias against people that are working in the Federal Government, the fact that you picked these numbers indicates that you feel that they are not competent and capable of getting the job done.

The other thing that Ms. Kelley had to say is something that goes to your testimony, Ms. Patel. You were just telling us about how good you guys do with your people. That is wonderful. The question I have is what does the Federal Government do in terms of their people about training, about tools, about empowerment and the things that they need to get the job done?

I think part of the problem why Federal employees may not be able to be as competitive as they would like to be is because they really have not been valued the way they should be and given the environment where they could develop and grow and be competitive.

[Applause.]

So it seems to me that, in a logical sense, you would start with those and if that does not get the job done, then you look at some other options.

I am taken by this figure, Bobby. You say that 97 percent of this farming out is done without A–76?

Mr. HARNAGE. Yes, sir.

Mr. SOLOWAY. Senator, can I clarify that number just to be clear on what it is? The A–76 process is designed to deal with situations where you have an incumbent Federal workforce whose positions are being subjected to competition. What that number tells us, and I am not saying there have not been any muddy areas along the way, I am not saying it is a perfect number, is that well over 95 percent of the procurements the government engages in do not have an impact on existing Federal employees, do not involve work currently being performed by employees.

I will give you one example: 50 percent of the growth in contracting in the civilian agencies has been in information technology, an area the government has clearly not invested in. The government is clearly not keeping pace. The government is not a developer of technology capabilities any more. That responsibility, that investment, is coming now from the commercial sector.

So when we talk about the figure of 97 percent, we need to be absolutely clear that is because only a small portion of the outsourcing done by the government has involved competing Federal positions.

Senator VOINOVICH. I am interested in information from all of you at the table to get into more specifics about that, because that is a real concern to me.

I would also, before I say anything else, Senator Thompson, Mr. Chairman, has asked that I get your permission to allow him to ask questions for the record.

Senator DURBIN. Without objection.

Senator VOINOVICH. I would also like to have all of you submit to me information you have regarding authoritative studies that have evaluated the performance of private contractors. And also longitudinal studies to look at the long-term costs once the contracts have been farmed out.

Mr. Harnage, you have indicated that once you farm it out and there is cost savings there, that nobody looks down the road to what it is 4 or 5 years out. It is very easy, somebody low bids the job and gets it. Then before you know it you wake up and the cost savings that you thought you were getting have disappeared because they now have it.

I would be interested in looking at that.

Mr. HARNAGE. You need to be careful there, Senator, because a lot of what you are being told is about the accountability of the current cost. It is not an accountability of what it is supposed to be, but what it currently is. There is no match there. There is no comparison. That is what the TRAC Act does.

Senator VOINOVICH. I do not understand what you just said to me.

Mr. HARNAGE. The contractor submits its bill, so to speak, and you look at it and say yes, this is a reasonable bill for the amount of service being provided. We have accounted for everything that we have charged the government for. Maybe that is true, but that does not take into account that bill was supposed to be $10 million less, according to the competition in previous years. Nobody is looking back.

A while ago there was a question concerning the administration's budget and it automatically assumed that there was going to be fewer Federal employees. That is based on a projected savings, not a real savings but a projected savings. And nobody is looking back to see if those actual savings have occurred.

Senator VOINOVICH. But the point is we ought to have the ability to look back to evaluate. That is what I am interested in.

Mr. HARNAGE. That is exactly right.

Senator VOINOVICH. Again, as I say, if you could provide me with some of that information, I would be very grateful.

I would also be interested in the private sector's view on A–76. How can we improve it to make it a fairer process than it is today. Any comments on that?

Mr. SOLOWAY. Senator, I think there are a number of things we could do to improve it. Both Bobby, Colleen, and I, of course, are on the Commercial Activities Panel at the GAO that is looking at this very issue, and I think there will be a lot of information and recommendations coming out of that in just a couple of months. But I would be happy to submit some things to you in the meantime, highlighting some of the issues that you talk about.

Senator VOINOVICH. Mr. Chairman, I think that is one thing that we ought to look at. We have got a mixed group of people on that. It would be interesting to just see how we could move quickly to tighten that up and make it better than it now is.

Senator DURBIN. I want to thank the panel, as well as my colleague, Senator Voinovich who, I acknowledged at the outset, has been the real leader on Capitol Hill in this Federal human capital

debate. This has been a very interesting and spirited Committee hearing. I attend a lot and it is rare to have as many people in the audience following as closely. You would think your jobs were at stake here.

[Applause.]

Let me conclude by saying that this is not the end of the discussion. I had discussed having this hearing so that we could acquaint ourselves a little better with all of the sides of the issue. I thank all the witnesses for helping us reach that goal. And now we want to reach out to other members of Congress and engage them in this debate so that we might move forward with important legislation to really provide a clear and honest answer to this challenge.

This hearing stands adjourned.

[Whereupon, at 11:52 a.m., the Committee adjourned, subject to the call of the Chair.]

APPENDIX

PREPARED STATEMENT OF SENATOR BUNNING

Thank you, Mr. Chairman.

Today's hearing is an important one, and I appreciate the time our witnesses have set aside to be here today.

Outsourcing of government jobs is an issue that I hear about frequently, especially from constituents who work for the Federal Government and whose positions may be up for competition.

I think everyone would probably agree that certain standards must be met when the Federal Government considers public-private competitions and we should demand—and get—the same level of service from contractors as from Federal employees.

The Federal Government shouldn't tolerate shoddy or careless work from any contractor, and contractors should be accountable for their work. Contractors should meet the same standards as Federal employees, and they shouldn't be hired if they cannot meet these standards.

However, it seems to me that there are some jobs in the Federal Government that can be turned over to the private contractor.

Outsourcing some jobs should remain an option for Federal agencies, especially when the government can realize a significant savings in costs.

The testimony from some of our witnesses today raises several concerns about the current system, and Congress and Federal agencies can learn a lot from the Department of Defense's experiences with competitive sourcing.

I am looking forward to the findings of the Commercial Activities Study that is due out in May of this year, and from gaining the perspective of the witnesses testifying today.

We need a contracting system that is both fair to Federal workers and can reduce some government costs.

Thank you, Mr. Chairman.

STATEMENT OF ANGELA B. STYLES
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY
BEFORE THE
COMMITTEE ON GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
MARCH 6, 2002

Introduction

Mr. Chairman and Members of the Committee, I appreciate the opportunity to appear before you to discuss the Administration's Competitive Sourcing Initiative and related efforts involving the delivery of government services.

Last summer, the President unveiled five government-wide management reforms. The President's vision is guided by the principles that government should be results-oriented, not process-oriented; citizen-centered, not bureaucracy-centered; and, market-based, promoting competition rather than stifling innovation. Any doubts about the seriousness of this effort were erased in the President's 2003 Budget document, which devotes considerable attention to these reforms and rates agencies through the use of a scorecard. The Director of the Office of Management and Budget (OMB) is focused on the improved management of the Federal Government, and one of the issues he has identified is the thousands of commercial jobs that have never been exposed to the rigors of competition. That's what the competitive sourcing initiative sets out to address – one step at a time. Competitive sourcing is not about outsourcing or downsizing the Federal Government. The initiative is about competition and results.

The President has asked OMB to infuse the spirit of competition and performance throughout the Federal Government - without regard to whether the public or private sector wins a competition. When a commercial function performed by the public sector undergoes competition, performance is enhanced and costs are cut. Experience demonstrates that the use of public-private competition consistently reduces the cost of public performance by more than 30 percent.

The Benefits of Competitive Sourcing

Every study I have ever seen concludes that public-private competitions generate significant savings – not only here but also around the world. Competition also results in better value and improves performance by bringing viable, responsive, innovative and cost-effective competitors (public and private) to the table. The competitive sourcing initiative will continue to result in significant performance improvements. Regarding savings, DoD has estimated savings from competitive sourcing of over $11 billion. Without service or logistical support reductions, these funds will be available for redirection into other DoD priorities. Whether we are looking to reduce costs, improve performance, improve accountability, or increase efficiency, the dynamics of competitive sourcing provide the keys to success.

Data developed by DoD indicates that between 1995 and 2001 DoD conducted 781 public-private competitions. The results of these competitions are encouraging and support our government-wide program:

- 57 percent of decisions favor the in-house group and 43 percent the outside offeror (whether public or private)
- 67 percent of all contracts awarded by A-76 are small business awards
- Sensitive to the impact on federal employees who lose their jobs, DoD reports minimal "Reductions in Force" (RIFs) attributable to A-76. Only 8 percent of total DoD RIFs have undergone severance from federal service due to an adverse A-76 action.

Recognizing the Challenges with A-76

Public-private competition is not easy and the A-76 process has its share of detractors. Government employee unions, the private sector, and many Senators on this Committee have a long history with the competition of commercial functions performed by government employees.

With frequency, I meet with Members of Congress to discuss the very real impact that this process has on their constituents. I also hear from Members who want the Federal Government to limit competition with the private sector. In fact, even OMB, the "keeper" of A-76, finds fault with the process, and I am actively seeking input to improve the process.

Problems commonly cited include the potential for conflicts of interest, and the unique procedures established for comparing the public and private offers. The criticism that the public sector gets "two bites at the apple" reveals a frustration that the private sector believes causes

some to avoid the competition altogether. We acknowledge the frustration and agree that the process takes too long. There are also valid concerns about the fairness of the current appeals process. The private side can appeal decisions to GAO and the courts, but the public sector does not have this right. The Department of Defense estimates the average duration of a single function A-76 competition at 24 months, and 32 months for multi-function cost comparisons. A three-year competition to determine who should provide commercial services hurts everyone involved. Employees are demoralized, and it is expensive for private firms. Delay hurts the entire process: agencies are reluctant to perform additional studies, firms say they are less likely to go through the process again, and the department loses the chance to improve performance and achieve and redirect needed savings.

Significant portions of the military budget go not to "war-fighting" but to infrastructure and overhead. The logistics that keep our armed forces housed, trained and mobile are essential to our success on the battlefield. At the same time, there are numerous opportunities to (a) meet the President's competition goals, and (b) maintain and improve "non-war-fighting" capabilities. Through competition, goals such as the creation and maintenance of a mobile force can be met. A logistics operation that operates effectively and efficiently means our troops are more effective.

To a significant degree, the problems cited have at their root the difficulty in assessing the true cost of the government service. Pending long-term improvements in government cost

accounting, performance measurement and full cost budget integration, it is unlikely that we will be able to completely remedy the situation in the short-term.

The most significant hurdles cannot be fixed with legislation or regulatory action. The challenge we've seen from some former competitions has been a lack of commitment from particular managers to make A-76 work and to hold accountable those who implement this process. A senior Army official put it graphically: "asking a garrison to do an A-76 is like giving a pig a knife and asking it to make pork chops."

Laying the Groundwork for Future Success

In the short-term, OMB's A-76 competitive sourcing program is one tool in the Administration's efforts to improve performance, expand efficiency, improve accountability and generate savings. The Circular provides an established framework to determine if and when a commercial activity should be converted to or from in-house, contract or Inter-Service Support Agreements (ISSA) performance. The Circular also provides detailed guidance for the calculation of the in-house offer for comparison with the private sector, recognizing that federal accounting and budget procedures do not now enable a direct comparison of private sector costs with those of federal agencies.

Since I was confirmed last May, I have been studying alternatives and process improvements. Achieving agreement on a strong set of reforms supported by the key stakeholders remains a challenge. Nonetheless, the Administration has developed and strengthened its relationships with key players, such as the public employee unions and the private sector, and we will continue to work with these groups to make significant and lasting process improvements. In addition, OMB anticipates simplifying the current cost comparison process by replacing it with a budgeted measure of full agency costs.

Public-private competitions should not be one-time events nor should they be conducted only when the function is being performed in-house. To ensure that the taxpayer continues to receive the best deal and the best value, we need to periodically reexamine our decisions to outsource, to retain functions in-house or to use cross-servicing agreements. At the government's discretion, competition should be used on a recurring basis to review the particular function and to determine who can best provide required services.

This Administration is committed to achieving improved performance for the taxpayer through a focus on competition and accountability. There are several improvements that we are seriously considering that would improve the current process. Some of these include:

- Authorization of a public/private competition project that would be based on procedures found in the Federal Acquisition Regulation that would preserve the cost comparison methodology.
- Establish MOUs for in-house winners.
- Use of centralized management teams to conduct A-76 competitions.
- Use of DoD costing models for all agencies.
- Award of incentives to in-house winners.
- Clarification of conflict of interest guidance.
- Requiring in-house cost estimates to be audited by independent parties.
- Simplifying the current cost comparison process by replacing it with a budgeted measure of full agency costs.

Implementing Changes to Make the FAIR Act Inventories More Useful

The "Federal Activities Inventory Reform Act of 1998, otherwise known as the FAIR Act, requires federal agencies to prepare and submit to OMB, by June 30 of each year, inventories of the commercial activities performed by federal employees. OMB is required to review each agency's inventory and consult with the agency regarding content. Upon completion of this review and consultation, the agency head must transmit a copy of the inventory to the Congress and make the inventory publicly available.

The FAIR Act has been underutilized. Generally, the executive branch has not used this information as intended - to improve the management of government activities. The compilation of these numbers must be more than a "paper exercise." In past years, reams of paper, inventories in hard copy, were sent to OMB. FAIR Act information was not put into a database. This year, the inventories will be entered into an OMB database. This database will facilitate a more thorough and consistent review of functions by agency as well as government-wide.

Again this year, agencies will be requested to submit a separate report that lists the agency's civilian inherently governmental positions. OMB will analyze this data as part of its overall management responsibilities, but it will not be subject to the FAIR Act's administrative challenge and appeal process.

Management and Oversight of Service Contracts

An essential ingredient of the procurement process is a strong commitment to sound contract management. Good service contracting calls for an emphasis on contract administration skills, monitoring contractor performance, and ensuring that taxpayers receive the benefits of the contract bargain. Services, by their very nature, are more difficult to describe than goods, and require the exercise of a greater level of judgment in the contracting process.

Good service contracting begins with requirements personnel who have a sound understanding of the nature of the services to be acquired. Contracting professionals, no matter how well trained, cannot substitute for the program personnel who determine requirements, understand what constitutes quality performance, and monitor overall contractor progress. Agency program and requirements personnel stand at the "front line" of administering service contracts. In this regard, even the most capable program manager cannot succeed without a sound statement of work for the services to be acquired.

Unfortunately, statements of work are often process driven, telling a contractor "how to do the work" instead of telling a contractor what the desired outcome should be. However, progress is being made on this front. The Administration is committed to increasing its emphasis on performance-based service contracting; a contracting methodology that emphasizes outcomes over process, including how statements of work are to be written and contractor performance is to be monitored. Starting from a baseline of very few performance-based service contracts being awarded in FY 2000, we are planning an increase in the use of this contracting technique to achieve a total of 20 percent of all service contracts being performance-based by FY 2005. I am forming an inter-agency group to resolve disagreements among the agencies regarding the requirements to qualify a contract as performance-based. I anticipate, as one output of this effort, improved guidance regarding the scope and nature of Performance-Based Service Contracting (PBSC). There must be a common understanding of the definition upon which to build experience and track progress.

In addition to the critical role played by program personnel who establish service contracting requirements, government agencies, particularly DoD, have an extensive management system in place to oversee specific aspects of the service contracting process. Contracting officers, of course, are responsible for overall contract management, including enforcement of contract terms and conditions and approval of contractor payment. Assisting the contracting officer, depending on the complexity of the contracted work, are additional personnel such as contract auditors and quality assurance representatives. For example, at DoD, the Defense Contract Audit Agency and the Defense Contract Management Agency fill these critical roles, respectively. These agencies make various recommendations to the contracting officer concerning contract cost allowability, progress payment requests, and whether contractor progress toward meeting contract goals is within the terms and specifications of the contract.

Resources to Achieve Effective Contract Management

As is well known to this Committee, the Federal Government is facing a "human capital" challenge. Contracting is no exception to this challenge. Various studies have suggested that a substantial percentage of the overall government work force may be eligible for retirement by 2005.

Maintaining and developing our work force to oversee all contracts, and service contracts more specifically, will be a continuing challenge. However, I have reason to be optimistic on this front. First, both the Defense Acquisition Work Force Improvement Act and the Clinger-Cohen

Act substantially increased the professional training requirements for contracting and acquisition personnel. By every objective measure, our acquisition work force today is better qualified and trained than ever before. And, as new personnel are hired they must meet new stringent qualification requirements.

The challenge ahead is to ensure that both defense and civilian agencies maintain comparability in qualification and training requirements for acquisition personnel. We are working with the Defense Acquisition University and the Federal Acquisition Institute to ensure that contracting personnel at both defense and civilian agencies meet reciprocal training requirements. This will ensure that the government maintains a high quality acquisition training program that is accepted by all agencies.

Overall, the acquisition of services is a difficult issue that will not be easily resolved. The best course of action is to take a holistic approach to the acquisition system by involving, improving, and better integrating the roles played by requirements and contracting personnel. Requirements and contracting personnel make an enormous contribution to the acquisition of high quality services when they work together at an early stage of the acquisition process.

Conclusion

As a group, federal employees are some of the nation's most highly trained and dedicated employees. I was honored to speak at the annual conference of the largest union of federal government employees yesterday as they are spending this week discussing their top priorities with you and your colleagues in Congress. At the same time, I truly applaud the service of our citizens who work as employees in American companies that provide critical services to the Federal Government.

Working with Congress, we seek to have federal agencies reconsider how they accomplish their missions for the benefit of the American people. OMB Circular A-76 needs to be improved and there are improvements that can yield faster and more efficient competitions. Fundamental long-term changes need to be made to the A-76 process as well as the budget process to better reflect the true costs to taxpayers. For now, A-76 remains a key component of our effort to increase performance and realize savings. There is no question as to the very real benefits flowing from public/private competitions.

Competition has made the American economy the envy of the world. The President, through his Management Agenda, wishes to inject this spirit of competition in as many places in the Federal Government as possible. Mr. Chairman, that concludes my prepared statement. I would be pleased to respond to any questions that you might have.

United States General Accounting Office

GAO

Testimony

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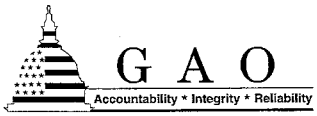
COMPETITIVE SOURCING

Challenges in Expanding A-76 Governmentwide

Statement of Barry W. Holman, Director
Defense Capabilities and Management



GAO-02-498T

Mr. Chairman and Members of the Committee:

I am pleased to be here today to participate in the committee's hearing on competition and accountability in the federal and service contract workforce with a particular focus on the use of Office of Management and Budget (OMB) Circular A-76. That circular established federal policy for the performance of recurring commercial activities. Issued in 1966, OMB supplemented it in 1979 with a handbook of procedures for conducting cost comparison studies to determine whether commercial activities should be performed by the government or by the private sector. OMB updated the handbook in 1983, 1996, and 1999. Cost comparisons completed under Circular A-76 are variously referred to as public-private competitions, outsourcing, or competitive sourcing.

Emphasis on use of the A-76 process has varied over the years. The Department of Defense (DOD), which began giving strong emphasis to the program in the mid- to late-1990s, has been the primary user of the process. Greater focus on the potential for expanded use of competitive sourcing governmentwide began with passage of the Federal Activities Inventory Reform (FAIR) Act legislation in 1998 requiring agencies to compile annual inventories of commercial activities. Then, in 2001, OMB began directing federal agencies to conduct public-private competitions or convert work involving specified percentages of commercial positions on their FAIR Act inventories directly to the private sector.

My comments today are largely based on our work in recent years tracking DOD's progress in implementing its A-76 program with the goal of saving billions of dollars to apply to other priority needs (see list of related products at the end of this statement). In response to questions you have asked me to address, my testimony will highlight (1) DOD's progress under the A-76 program, (2) challenges faced by DOD that may also be faced by other government agencies as they pursue A-76 studies, and (3) concerns that gave rise to the creation of the Commercial Activities Panel to study sourcing policies and procedures under section 832 of the National Defense Authorization Act for Fiscal Year 2001. Chaired by Comptroller General David M. Walker, the Commercial Activities Panel is required to report its findings and recommendations to the Congress by May 1, 2002. Given the ongoing nature of the panel's work, I hope you will appreciate limitations on my ability to discuss panel deliberations and their potential outcome.

Summary

DOD has been at the forefront of federal agencies in using the A-76 process in recent years. In 1995, DOD made the process a priority so as to reduce operating costs and free funds for other priorities. DOD has also augmented the A-76 program with what it terms strategic sourcing—a broader array of reinvention and reengineering options that may not necessarily involve A-76 competitions. Over the years, the number of positions—at one point 229,000—that DOD planned to study and the time frames for the studies have varied. Current plans are to study approximately 183,000 positions between fiscal years 1997 and 2007. Changes in the inventory of commercial activities and the current administration's sourcing initiatives could have the potential to change the number of positions studied in the future. However, we have not evaluated the extent to which these changes might occur.

DOD has faced a number of challenges with its A-76 program that may produce valuable lessons learned for other federal agencies that use the A-76 process. The challenges include the following: (1) studies took longer than initially projected, (2) costs and resources required for the studies were underestimated, (3) selecting and grouping functions to compete can be difficult, and (4) determining and maintaining reliable estimates of savings were difficult.

Federal managers, government workers, and private sector representatives have expressed concern about the A-76 study process. As required by legislation in 2001, the Commercial Activities Panel is studying and has held public hearings about the policies and procedures, including the A-76 process, that concern the transfer of commercial activities from government personnel to contractors. The panel, comprised of federal and private sector experts, is required to report its findings and recommendations to the Congress by May 1, 2002.

Background

Under A-76, commercial activities may be converted to or from contractor performance either by direct conversion or by cost comparison. Under direct conversion, specific conditions allow commercial activities to be moved from government or contract performance without a cost comparison study (for example, for activities involving 10 or fewer civilians).[1] Generally, however, commercial functions are to be converted

[1] For functions performed by DOD employees, a number of additional requirements, reports and certifications are addressed in chapter 146 of title 10 U.S. Code and in recurring provisions in DOD's annual appropriation acts.

to or from contract performance by cost comparison, whereby the estimated cost of government performance of a commercial activity is compared to the cost of contractor performance in accordance with the principles and procedures set forth in Circular A-76 and the revised supplemental handbook. As part of this process, the government identifies the work to be performed (described in the performance work statement), prepares an in-house cost estimate based on its most efficient organization, and compares it with the winning offer from the private sector.

According to A-76 guidance, an activity currently performed in-house is converted to performance by the private sector if the private sector offer is either 10 percent lower than the direct personnel costs of the in-house cost estimate or is $10 million less (over the performance period) than the in-house cost estimate. OMB established this minimum cost differential to ensure that the government would not convert performance for marginal savings.

The handbook also provides an administrative appeals process. An eligible appellant[2] must submit an appeal to the agency in writing within 20 days of the date that all supporting documentation is made publicly available. Appeals are supposed to be adjudicated within 30 days after they are received. Private sector offerors who believe that the agency has not complied with applicable procedures have additional avenues of appeal. They may file a bid protest with the General Accounting Office or file an action in a court of competent jurisdiction.[3]

Circular A-76 requires agencies to maintain annual inventories of commercial activities performed in-house. A similar requirement was included in the 1998 FAIR Act, which directs agencies to develop annual inventories of their positions that are not inherently governmental.[4] The

[2] An eligible appellant is defined as (a) federal employees (or their representatives) and existing federal contractors affected by a tentative decision to waive a cost comparison; (b) federal employees (or their representatives) and contractors who have submitted formal bids or offers who would be affected by a tentative decision; or (c) agencies that have submitted formal offers to compete for the right to provide services through an interservice support agreement.

[3] Federal employees do not have standing to file a protest with GAO and have generally been denied standing to sue in court.

[4] Section 5 of P.L. 105-270, codified at 31 U.S.C. 501 note (1998) defines an inherently governmental function as a "function that is so intimately related to the public interest as to require performance by Federal Government employees."

fiscal year 2000 inventory identified approximately 850,000 full-time equivalent commercial-type positions, of which approximately 450,000 were in DOD.[5] OMB has not yet released DOD's inventory for 2001.

DOD has been the leader among federal agencies in recent years in its use of OMB Circular A-76, with very limited use occurring in other agencies. However, in 2001, OMB signaled its intention to direct greater use of the circular on a government-wide basis. In a March 9, 2001, memorandum to the heads and acting heads of departments and agencies, the OMB Deputy Director directed agencies to take action in fiscal year 2002 to directly convert or complete public-private competitions of not less than 5 percent of the full-time equivalent positions listed in their FAIR Act inventories. Subsequent guidance expanded the requirement by 10 percent in 2003, with the ultimate goal of competing at least 50 percent.

In 1999, DOD began to augment its A-76 program with what it terms strategic sourcing.[6] Strategic sourcing may encompass consolidation, restructuring, or reengineering activities; privatization; joint ventures with the private sector; or the termination of obsolete services. Strategic sourcing can involve functions or activities regardless of whether they are considered inherently governmental, military essential, or commercial. I should add that these actions are recognized in the introduction to the A-76 handbook as being part of a larger body of options, in addition to A-76, that agencies must consider as they contemplate reinventing government operations.

Strategic sourcing initially does not involve A-76 competitions between the public and the private sector, and the Office of the Secretary of Defense and service officials have stressed that strategic sourcing may provide smarter decisions because it determines whether an activity should be performed before deciding who should perform it. However, these officials also emphasized that strategic sourcing is not intended to take the place of

[5] Guidance implementing the FAIR Act permitted agencies to exempt many commercial activities from competitive sourcing consideration on the basis of legislative restrictions, national security considerations, and other factors. Accordingly, DOD's fiscal year 2000 inventory of positions it considers to be potentially subject to competitions was reduced to approximately 260,000.

[6] While strategic sourcing includes A-76 studies, the Department has commonly used the term to refer to all reinvention efforts other than A-76. For purposes of this testimony, our reference to strategic sourcing will not include A-76 studies.

A-76 studies and that positions examined under the broader umbrella of strategic sourcing may be subsequently considered for study under A-76.

DOD's Ambitious Goals for Using A-76 Have Varied Over Time

After several years of limited use of Circular A-76, the deputy secretary of defense gave renewed emphasis to the A-76 program in August 1995 when he directed the services to make outsourcing of support activities a priority in an effort to reduce operating costs and free up funds to meet other priority needs. The effort was subsequently incorporated as a major initiative under the then secretary's Defense Reform Initiative, and the program became known as competitive sourcing—in recognition of the fact that either the public or the private sector could win competitions. A-76 goals for the number of positions to be studied have changed over time, and out-year study targets are fewer than in previous years. However, future study targets could be impacted by the current administration's emphasis on reliance on the private sector for commercial activities.

The number of positions planned for study and the timeframes for accomplishing those studies have changed over time in response to difficulties in identifying activities to be studied. In 1997, DOD's plans called for about 171,000 positions to be studied by the end of fiscal year 2003. In February 1999, we reported that DOD had increased this number to 229,000 but had reduced the number of positions to be studied in the initial years of the program. In August 2000, DOD decreased the number of positions to be studied under A-76 to about 203,000, added about 42,000 Navy positions for consideration under strategic sourcing, and extended the program to fiscal year 2005. Last year we noted that DOD had reduced the planned number to study to approximately 160,000 positions under an expanded time frame extending from 1997 to 2007. It also planned to study about 120,000 positions under strategic sourcing during that timeframe.

More recently, DOD officials told us that the A-76 study goal for fiscal years 1997-2007 is now approximately 183,000 positions—135,000 between fiscal years 1997-2001, and 48,000 between fiscal years 2002-2007.[7] It projects that it will study approximately 144,000 positions under strategic sourcing. To what extent the A-76 study goals are likely to change in the

[7] We did not verify these numbers, and they may be subject to change by DOD. Numbers reflect positions initially announced to be studied; historically, actual numbers of positions studied tend to be lower.

future could be a function of changes in inventories of commercial activities and continuing management emphasis on competitive sourcing.

Although DOD's fiscal year 2001 inventory of commercial activities has not been publicly released, we have noted some reductions between previous inventories as the department has gained experience in completing them. In reporting on our analysis of DOD's initial FAIR Act inventory, we cited the need for more consistency in identifying commercial activities.[8] We found that the military services and defense agencies did not always consistently categorize similar activities. We have not had an opportunity to analyze more recent inventories to determine to what extent improved guidance may have helped to increase consistency in categorizing activities. At the same time, we also previously reported that a number of factors could reduce the number of additional functions studied under A-76. For example, we noted that factors such as geographic dispersion of positions and the inability to separate commercial activities from inherently governmental activities could limit the number of inventory positions studied. Likewise, the inventory already makes provision for reducing the number of positions eligible for competition such as where performance by federal employees was needed because of national security or operational risk concerns.

On the other hand, *The President's Management Agenda*, Fiscal Year 2002, notes "Agencies are developing specific performance plans to meet the 2002 goal of completing public-private or direct conversion competition on not less than five percent of the full-time equivalent employees listed on the FAIR Act inventories. The performance target will increase by 10 percent in 2003." Additionally, DOD's *Quadrennial Defense Review Report*, September 30, 2001, states that the department should "*Focus DOD 'owned' resources on excellence in those areas that contribute directly to warfighting*. [Original emphasis.] Only those functions that must be performed by DOD should be kept by DOD. Any function that can be provided by the private sector is not a core government function. Traditionally, 'core' has been very loosely and imprecisely defined and too often used as a way of protecting existing arrangements." We have not assessed to what extent efforts in this area are likely to strengthen emphasis on A-76.

[8] U.S. General Accounting Office, *DOD Competitive Sourcing: More Consistency Needed in Identifying Commercial Activities*, GAO/NSIAD-00-198 (Washington D. C.: Aug. 11, 2000).

Challenges Faced by DOD That May Be Applicable to Other Federal Agencies

As we tracked DOD's progress in implementing its A-76 program since the mid-to late-1990s, we identified a number of challenges and concerns that have surrounded the program—issues that other agencies may encounter as they seek to respond to the administration's emphasis on competitive sourcing. They include (1) the time required to complete the studies, (2) cost and resources to conduct and implement the studies, (3) selecting and grouping positions to compete, and (4) developing and maintaining reliable estimates of projected savings expected from the competitions. These need not be reasons to avoid A-76 studies but are factors that need to be taken into consideration in planning for the studies.

Studies Took Longer to Complete Than Initially Expected

Individual A-76 studies in DOD have taken longer than initially projected. In launching its A-76 program, some DOD components made overly optimistic assumptions about the amount of time needed to complete the competitions. For example, the Army initially projected that it would take 13 to 21 months to complete studies, depending on their size. The Navy initially projected completing its studies in 12 months. The numbers were subsequently adjusted upward, and the most recent available data indicate that the studies take on average about 22 months for single-function and 31 months for multifunction studies. Agencies need to keep these timeframes in mind when projecting resources required to support the studies and timeframes for when savings are expected to be realized—and may need to revisit these projections as they gain experience under the program.

Costs and Resources to Conduct and Implement Studies Were Underestimated

Once DOD components found that the studies were taking longer than initially projected, they realized that a greater investment of resources would be needed than originally planned to conduct the studies. For example, the 2001 president's budget showed a wide range of projected study costs, from about $1,300 per position studied in the Army to about $3,700 in the Navy. Yet, various officials expressed concern that these figures underestimated the costs of performing the studies. While the costs they cited varied, some ranged up to several thousand dollars per position. One factor raising costs was the extent to which the services used contractors to facilitate completion of the studies. Given differences in experience levels between DOD and other agencies in conducting A-76 studies, these other agencies may need to devote greater resources to training or otherwise obtaining outside assistance in completing their studies.

In addition to study costs, significant costs can be incurred in implementing the results of the competitions. Transition costs include the separation costs for civilian employees who lose their jobs as a result of competitions won by the private sector or when in-house organizations require a smaller civilian workforce. Such separation costs include the costs of voluntary early retirement, voluntary separation incentives, and involuntary separations through reduction-in-force procedures. Initially, we found that DOD budget documents had not fully accounted for such costs in estimating savings that were likely to result from their A-76 studies. More recently, we found that the Department had improved its inclusion of study and transition costs in its budget documents.

Selecting and Grouping Functions to Compete Can Be Difficult

Selecting and grouping functions and positions to compete can be difficult. Because most services faced growing difficulties in or resistance to finding enough study candidates to meet their A-76 study goals, the goals and time frames for completing studies changed over time; and DOD ultimately approved strategic sourcing as a way to complement its A-76 program and help achieve its savings goals.

Guidelines implementing the FAIR Act permit agencies to exclude certain commercial activities from being deemed eligible for competition such as patient care in government hospitals. Additionally, as experienced by DOD, factors such as geographic dispersion of positions and the inability to separate commercial activities from inherently governmental activities could limit the number of inventory positions studied. It becomes important to consider such factors in determining what portions of the FAIR inventories are expected to be subject to competition.

Developing and Maintaining Reliable Estimates of Savings Were Difficult

Considerable questions have been raised concerning to what extent DOD has realized savings from its A-76 studies. In part, these concerns were exacerbated by the lack of a reliable system for capturing initial net savings estimates and updating them as needed and by other difficulties associated with the lack of precision often associated with savings estimates. Our work has shown that while significant savings are being achieved by DOD's A-76 program, it has been difficult to determine precisely the magnitude of those savings. Savings may be limited in the short-term because up-front investment costs associated with conducting and implementing the studies must be absorbed before long-term savings begin to accrue. Several of our reports in recent years have highlighted these issues.

For example, we reported in March 2001 that A-76 competitions had reduced estimated costs of Defense activities primarily by reducing the number of positions needed to perform those activities under study.[9] This is true regardless of whether the government's in-house organization or the private sector wins the competition. Both government and private sector officials with experience in such studies have stated that, in order to be successful in an A-76 competition, they must seek to reduce the number of positions required to perform the function being studied. Related actions may include restructuring and reclassifying positions and using multiskill and multirole employees to complete required tasks.

In December 2000, we reported on DOD's savings estimates from a number of completed A-76 studies.[10] We noted that DOD had reported cost reductions of about 39 percent, yielding an estimated $290 million savings in fiscal year 1999. We also agreed that individual A-76 studies were producing savings but stressed difficulty in quantifying the savings precisely for a number of reasons:

- Because of an initial lack of DOD guidance on calculating costs, baseline costs were sometimes calculated on the basis of average salaries and authorized personnel levels rather than on actual numbers.
- DOD's savings estimates did not take into consideration the costs of conducting the studies and implementing the results, which of course must be offset before net savings begin to accrue.
- There were significant limitations in the database DOD used to calculate savings.
- Savings become more difficult to assess over time as workload requirements or missions change, affecting program costs and the baseline from which savings were initially calculated.

Our August 2000 report assessed the extent to which there were cost savings from nine A-76 studies conducted by DOD activities.[11] The data

[9] U.S. General Accounting Office, *DOD Competitive Sourcing: Effects of A-76 Studies on Federal Employees' Employment, Pay, and Benefits Vary*, GAO-01-388 (Washington, D.C.: Mar. 16, 2001).

[10] U.S. General Accounting Office, *DOD Competitive Sourcing: Results of A-76 Studies Over the Past 5 Years*, GAO-01-20 (Washington, D.C.: Dec. 7, 2000).

[11] U.S. General Accounting Office, *DOD Competitive Sourcing: Savings Are Occurring, but Actions Are Needed to Improve Accuracy of Savings Estimates*, GAO/NSIAD-00-107 (Washington, D.C.: Aug. 8, 2000).

showed that DOD realized savings from seven of the cases, but overall less than Defense components had initially projected. Each of the cases presented unique circumstances that limited our ability to precisely calculate savings. Some suggested lower savings. Others suggested higher savings than initially identified. In two cases, DOD components had included cost reductions unrelated to the A-76 studies as part of their projected savings. Additionally, baseline cost estimates used to project savings were usually calculated using an average cost of salary and benefits for the number of authorized positions, rather than the actual costs of the positions. The latter calculation would have been more precise. In four of the nine cases, actual personnel levels were less than authorized. While most baseline costs estimates were based largely on personnel costs, up to 15 percent of the costs associated with the government's most efficient organizations' plans or the contractors' offers were not personnel costs. Because these types of costs were not included in the baseline, a comparison of the baseline with the government's most efficient organization or contractor costs may have resulted in understating cost savings. On the other hand, savings estimates did not reflect study and implementation costs, which reduced savings in the short term.

DOD has revised its information systems to better track the estimated and actual costs of activities studied but not to revise previous savings estimates. DOD is also emphasizing the development of standardized baseline cost data to determine initial savings estimates. In practice, however, many of the cost elements that are used in A-76 studies will continue to be estimated because DOD lacks a cost accounting system to measure actual costs. Further, reported savings from A-76 studies will continue to have some element of uncertainty and imprecision and will be difficult to track in the out-years because workload requirements and missions change, affecting program costs and the baseline from which savings are calculated.

Commercial Activities Panel Is Studying Sourcing Policies and Procedures

Although comprising a relatively small portion of the government's overall service contracting activity, competitive sourcing under Circular A-76 has been the subject of much controversy because of concerns about the process raised both by the public and private sectors. Federal managers and others have been concerned about organizational turbulence that typically follows the announcement of A-76 studies. Government workers have been concerned about the impact of competition on their jobs, their opportunity for input into the competitive process, and the lack of parity with industry offerors to protest A-76 decisions. Industry representatives

have complained about the fairness of the process and the lack of a "level playing field" between the government and the private sector in accounting for costs. Concerns also have been registered about the adequacy of oversight of the competition winners' subsequent performance, whether won by the public or private sector.

Amid these concerns over the A-76 process, the Congress enacted section 832 of the National Defense Authorization Act for Fiscal Year 2001. The legislation required the comptroller general to convene a panel of experts to study the policies and procedures governing the transfer of commercial activities for the federal government from government to contractor personnel. The panel, which Comptroller General David M. Walker chairs, includes senior officials from DOD, OMB, the Office of Personnel Management, private industry, federal labor organizations, and academia. The Commercial Activities Panel, as it is known, is required to report its findings and recommendations to the Congress by May 1, 2002.

The panel had its first meeting on May 8, 2001, at which time it adopted a mission statement calling for improving the current framework and processes so that they reflect a balance among taxpayer interests, government needs, employee rights, and contractor concerns. Subsequently, the panel held three public hearings. At the first hearing on June 11, in Washington, D.C., over 40 individuals representing a wide spectrum of perspectives presented their views. The panel subsequently held two additional hearings, on August 8 in Indianapolis, Indiana, and on August 15 in San Antonio, Texas. The hearing in San Antonio specifically addressed OMB Circular A-76, focusing on what works and what does not in the use of that process. The hearing in Indianapolis explored various alternatives to the use of A-76 in making sourcing decisions at the federal, and local levels.

Since completion of the field hearings, the panel members have met in executive session several times, augmented between meetings by work of staff to help them (1) gather background information on sourcing trends and challenges, (2) identify sourcing principles and criteria, (3) consider A-76 and other sourcing processes to assess what's working and what's not, and (4) assess alternatives to the current sourcing processes. Panel deliberations continue with the goal of meeting the May 1 date for a report to the Congress.

This concludes my statement. I would be pleased to answer any questions you or other members of the committee may have at this time.

Contacts and Acknowledgment	For further contacts regarding this statement, please contact Barry W. Holman at (202) 512-8412 or Marilyn Wasleski at (202) 512-8436. Other individuals making key contributions to this statement include Debra McKinney, Donald Bumgardner, Jane Hunt, Nancy Lively, Stephanie May, and Judith Williams.

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STATEMENT BY

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AFL-CIO

BEFORE THE

SENATE GOVERNMENTAL AFFAIRS COMMITTEE

ON

FEDERAL SERVICE CONTRACTING

MARCH 6, 2002

INTRODUCTION

Chairman Lieberman, Ranking Member Thompson, Chairman Durbin, Ranking Member Voinovich, and other distinguished members of the Senate Governmental Affairs Committee, on behalf of the 600,000 federal employees across the nation and around the world represented by the American Federation of Government Employees, AFL-CIO, I appreciate this opportunity to discuss the serious and longstanding problems in federal service contracting policy. Let me also take this opportunity to thank you, Senator Durbin, for leading the effort to correct those problems through the introduction of the Truthfulness, Responsibility, and Accountability in Contracting (TRAC) Act (S. 1152). I also want to thank the 17 Senators who have cosponsored this important legislation, including Senators Lieberman, Torricelli, and Dayton who sit on this committee.

We speak and act in the long and looming shadow of the Bush Administration's scheme to throw up for grabs the jobs of at least 425,000 federal employees over the next three years, either through direct conversions to contractor performance (i.e., giving work to contractors without public-private competitions) privatizations (again without competition) or public-private competitions. Not since the "spoils system" at its very worst have the American people seen an incoming Administration attempt on such a massive scale to gut the civil service, replacing the working and middle class Americans in the federal workforce with their political supporters in the business community.

As AFL-CIO President John Sweeney pointed out last year to the General Accounting Office's (GAO) Commercial Activities Panel:

> *"After abuses too infamous to ignore, the nation as a matter of law and policy rejected a `spoils system' that allowed new presidents to replace their predecessors' workforces with cronies and political supporters. We adopted, instead, a civil service system to ensure that the American people would always be served by women and men who chose to devote their lives to public good rather than private gain.*
>
> *"Rank-and-file federal employees provide the continuity, attention to details, and institutional memory necessary to ensure that the American people continue to be the best governed in the world. Because they are not political appointees, these civil servants can do their job of serving the public without fear or favor. And because civil servants are part of the enduring fabric of government, the American people can always count upon them for service, regardless of a President's political affiliation or ideological bent.*
>
> *"The idea that as much as one-fourth of the federal government's executive branch workforce could be outsourced over the next four*

years raises grave concerns that, under the banner of 'efficiency,' the nation could well return to a latter day 'spoils system.'"

GENERAL ACCOUNTING OFFICE'S COMMERCIAL ACTIVITIES PANEL

Over the last several months, we have heard a lot of talk about the GAO's Commercial Activities Panel. Specifically, contractors have insisted that AFGE members stop lobbying in support of the TRAC Act until the panel has submitted its recommendations to the Congress in May.

AFGE did not believe it was necessary to establish a panel to correct the serious and longstanding problems in federal service contracting policy. The two worst problems—the absence of mechanisms to track the cost of service contracting and the refusal to permit federal employees to compete in defense of their own jobs, for new work, and for contractor work—are obvious, and their solutions don't require the intervention of a panel.[1]

Rather, the time to establish a panel to look at outsourcing was when the controversial "acquisition reform" effort was first undertaken, not after the

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[1] Here's another serious and longstanding problem in federal service contracting policy: unlike contractors, federal employees and their unions have no legal standing to appeal agencies' arbitrary service contracting decisions to the Court of Federal Claims and the GAO. Providing federal employees and their union representatives with such standing would ensure both equity and accountability in the contracting process. Although they know their decisions can be appealed by contractors, acquisition officials understand that decisions adverse to the interests of federal employees will never be subject to review. That is, they can only be held accountable by one side. This inequity results in erroneous decisions against the interests of federal employees being left uncorrected. Indeed, it is likely that the accountability for contractors and the complete lack of accountability for federal employees also increases the likelihood that erroneous decisions against the interests of federal employees are made because of bias and political pressure. The competition process is obviously strengthened when contracting decisions are made on the merits. Moreover, stakeholders, both federal employees and contractors, need to have faith in the integrity of the competition process.

As Professor Charles Tiefer, the noted procurement law expert, concluded in a recent article in the Cornell Journal of Law and Public Policy, court "decisions have denied federal employee unions a forum to protest when the work of their members is contracted out in violation of laws and regulations. This disserves the public interest, the intent behind those laws and regulations, and the sense of fair play between the contractors and the federal unions that compete for that work. It is unsound as a matter of law. One way or another, the courts, the Executive, or the Members of Congress can and should let union protests of improper contracting out be heard."

So, one side has appellate rights, the other side does not. Do we need to establish a panel to right that wrong? One side's work is subject to public-private competition, while the other side's is not. Do we need a panel to right that wrong? We say we believe in public-private competition, but we systematically prevent federal employees from competing in defense of their own jobs and for new work, even when in-house performance would be cheaper, in order to reward politically well-connected businesses and falsely claim we're shrinking the size of government. Do we need a panel to right that wrong? We claim that outsourcing saves money, but we don't know how much we're spending on outsourcing, let alone whether that money is being spent wisely. Do we need a panel to correct that mistake?

damage had been done: the creation of the "human capital crisis," audits of service contracts so bad they left the Department of Defense Inspector General "startled," almost no public-private competition and levels of private-private competition so low that even Bush Administration officials are alarmed, the finding that more than one-tenth of the federal contractor workforce made poverty-level wages and that less than one-third of the federal contractor workforce was covered by prevailing wage laws, etc.

Moreover, the panel was clearly stacked to favor contractor interests. Seven of the twelve panelists are either contractors or officials in the Bush Administration. In fact, I would not have even joined the panel had Senate Armed Services Committee Chairman Carl Levin not assured me that his committee would not take up proposals from the panel that did not represent a consensus of views. At the same time, I must also emphasize that I have the utmost respect for all of my colleagues on the panel. I can't say that I agree with all of them as far as federal service contracting issues are concerned. However, I will readily agree that all panelists have conscientiously and capably advocated for their particular points of view.

It is expected that federal employees and their unions wait patiently for the panel's report. Have contractors and their friends in the Bush Administration waited on the panel's report? No, clearly not. Here are some examples of how the other side has failed to wait for the panel:

1. OMB officials have committed the Bush Administration to privatizing, converting to contractor performance without public-private competition or subjecting to public-private competition at least 425,000 federal employee jobs by the end of 2004.

2. As part of that scheme, agencies were required to convert or compete at least 5% of the jobs (42,500) listed on their Federal Activities Inventory Reform (FAIR) Act inventories during Fiscal Year 2002.

3. During Fiscal Year 2003, the quota is at least 10% of the jobs (85,000) on the FAIR Act inventories.

4. In FY03, agencies will be encouraged to use privatizations to hit their arbitrary quotas.

5. OMB has pressured agencies to contract out jobs that senior agency managers have always insisted be performed by reliable and experienced federal employees by requiring that agencies publish lists of their inherently governmental jobs. This would, of course, constitute a unilateral expansion of the FAIR Act beyond its carefully delineated boundaries—and one that would clearly require the enactment of additional legislation.

6. OMB sent out guidance on July 11, 2001, that instructed the Department of Defense (DoD) to consider contracting out work that have historically been performed by reliable and experienced civilian employees, including "Installation Services; Other Nonmanufacturing Operations, Real Property Management, Operations and Maintenance; Intermediate, direct or General Repair Work; and Education and Training."

7. OMB has proposed a dramatic change in OMB Circular A-76 with respect to interservice support agreements (ISSAs), contracts for services between agencies that may ultimately be performed by civilian employees or contractors. In a *Federal Register* notice, the Administration proposed that all ISSAs, old and new, be competed, usually at least every three to five years.

8. In its own package of recommendations for last year's defense authorization bill, DoD asked for authority to directly convert to contractor performance without public-private competition work performed by civilian employees, contract out depot maintenance work, and privatize the commissaries.

9. In last year's defense authorization bill, the Congress moved forward on a range of service contracting issues, ranging from a Base Realignment and Closure process last year that institutionalizes the controversial privatization-in-place mechanism to a recovery audit mandate with an inadequate public-private competition requirement to an extension of streamlined procedures for commercial items with values less than $5 million.

The Administration has not waited for the panel's report, the Pentagon hasn't waited for the panel's report, the contractors haven't waited for the panel's report, and the Congress hasn't waited for the panel's report. Only federal employees and their unions are supposed to wait for the panel's report—and wait not just for any panel's report: rather, we are told to wait for a report from a panel stacked in favor of contractor interests. While contractors and the Administration continue to attack federal employees, we are told to lay down our arms until *they* get some reinforcements. Even by inside-the-beltway standards, the bald assertion that federal employees and their unions must wait for the panel's report racks up a level of disingenuousness that takes one's breath away.

AFGE was urging the Congress to require agencies to carefully track the costs of contractors, uphold the use of costs as the ultimate criterion in any public-private competition process, ensure that federal employees have opportunities to compete for work they are doing as well as for new work, abolish the use of arbitrary in-house personnel ceilings that prevent federal employees from competing for work, ensure that agencies emphasize contracting in to the same extent as contracting out, and provide federal employees with the same appellate rights as contractors before the GAO Panel was established because those principles promote the interests of taxpayers and everyone who depends on the

federal government for service. Regardless of the recommendations offered by the panel, AFGE will still be fighting for those principles.

THE PROBLEMS IN FEDERAL SERVICE CONTRACTING POLICY AND THE SOLUTION: THE TRAC ACT

Federal service contracting policy is in desperate need of reform. As a result of wholesale downsizing of the in-house workforce and indiscriminate service contracting, the federal government, DoD in particular, is experiencing an entirely self-inflicted "human capital crisis." Despite the relative absence of competition between contractors for government work, contractors still acquire and retain almost all of their work without public-private competition. Agencies, even those with experience with service contracting, still lack reliable and comprehensive systems for tracking costs. Evidence mounts that to the extent savings are achieved through service contracting they come at the expense of workers. The entire competition process remains unaccountable because only contractors, not federal employees, have the appellate rights necessary to contest agencies' service contracting decisions.

And the situation is not getting any better. OMB has imposed arbitrary, one-size-fits-all conversion / competition / privatization quotas on all agencies, deliberately encouraging agencies to give federal employee jobs to contractors without any public-private competition.

(OMB insists that direct conversions that occur without a cost comparison must be justified by the contracting officer and must result in reasonable contract prices or a significant quality improvement or both. That's a pretty loose arrangement, however. It's one thing to allow agencies the discretion to undertake a direct conversion involving a few employees. It's another thing entirely to require agencies to hit large, arbitrary targets in very short time periods, using at least in part direct conversions. A federal employee would be very justified in believing that, in such an environment, direct conversions are vulnerable to abuse, either by contracting officers who want to contract out because of management prejudice and their power to do so is unchecked since there is no public-private competition process or by contracting officers who are trying desperately to hit their large and arbitrary targets in very short time periods.)

Moreover, DoD's high-level Business Initiatives Council is reportedly considering a wide variety of mechanisms to convert work to contractor performance without public-private competition that would take jobs away from tens of thousands of employees.

That's why today's hearing is so important. We will have an opportunity to review those problems and consider pending legislation—the TRAC Act—that would go a long way towards resolving those problems. No piece of legislation is perfect, especially one that attempts to solve the serious and longstanding problems in federal service contracting. Indeed, AFGE, at a 2001 hearing of the House Government Reform Subcommittee on Technology and Procurement Policy, has already indicated its willingness to work with all lawmakers, conservative and progressive, Republican and Democratic, to further refine the TRAC Act.

And we translated those good intentions into real action when we worked last year with Republican and Democratic lawmakers who care about readiness and efficiency on the House Armed Services Committee to attach a modified, DoD-specific version of the TRAC Act to the defense authorization bill. Contractors were only able to remove the service contracting reform provisions from the legislation after the House leadership threatened to prevent the defense authorization bill from ever going to the floor and committing to deal with the concerns raised by the pro-taxpayer provisions in conference. It came as no surprise to AFGE that those commitments were never kept.

1. Problem: Indiscriminate Downsizing and Service Contracting Have Created a "Human Capital Crisis"

No solution to the "human capital crisis"—the current and looming shortages of federal employees in critical occupational categories in agency after agency—is possible without a serious reform of federal service contracting policy. The "human capital crisis" did not happen by accident. It is the natural result, in large part, of arbitrary in-house personnel ceilings that force agencies to reduce their workforces and then prevent them from growing their workforces, irrespective of their workloads, in favor of an excessive reliance on service contractors. The TRAC Act would allow agencies to carefully recover from this self-inflicted crisis by preventing work from being contracted out without public-private competition and ending the use of arbitrary personnel ceilings.

a. Solution: The TRAC Act Would Ensure Public-Private Competition In Most Cases Before Work Could Be Given Contractors

The TRAC Act would neither prevent agencies from downsizing, whether the staff cuts were the result of BRAC or regular reductions-in-force, nor prevent agencies from contracting out work performed by federal employees. However, the TRAC Act would prevent agencies from replacing federal employees with contractors without first demonstrating the value of service contracting to taxpayers.

As I mentioned earlier, the federal workforce has not just been cut. In order to stay under arbitrary personnel ceilings, many agencies have essentially stopped

hiring federal employees and let attrition take its inexorable toll. Instead, agencies have contracted out the work, starving the workforce of new blood, new skills, and new ideas. The TRAC Act would ensure that agencies consider the appropriateness through a public-private competition process of performing some new work in-house. In other words, federal agencies would undertake the same "make-or-buy" decisions that are made by private sector firms, including contractors, on a daily basis.

The TRAC Act would make the federal government a more attractive employer. Although nobody is going to get rich from a career in the civil service, the work has traditionally been relatively immune from politics. Such is no longer the case. Why would a person join the civil service today when his or her job could be contracted out tomorrow, perhaps even without public-private competition?

As mentioned earlier, the TRAC Act would not end service contracting. However, it would ensure that federal employees have opportunities to compete in defense of their jobs before they were contracted out. That is, with respect to the competitive process, whether their jobs were kept in-house would depend on an objective cost comparison process, and not whether their work was coveted by politically well-connected contractors. Indeed, if their installations or offices were productive, federal employees would be allowed, under the TRAC Act, to compete with the private sector for additional federal government work. This more enlightened approach for the determination of work assignments obviously creates many recruitment and retention incentives for productive careers in the federal government.

The TRAC Act also provides the framework for appropriately growing the federal workforce. It is commonly acknowledged that agencies will have to hire additional staff if the federal government is to begin recovering from the "human capital crisis." The TRAC Act does not require that certain amounts or categories of work be brought back in-house. Rather, the legislation gives agencies the discretion to determine how many and which contractor jobs will be reviewed to determine the appropriateness of in-house performance through public-private competition; the measure also ensures that agencies will review new categories of work to determine whether it makes more sense to have the work performed by contractors or federal employees. The TRAC Act would allow agencies to recover from the "human capital crisis" by carefully considering, on a case-by-case basis, which categories of work are appropriate for in-house performance.

The TRAC Act would also give managers incentives to improve. Currently, when managers run into trouble, they all too frequently contract out the work. They outsource their problems, instead of working to solve them. Because it is so easy to contract out, and because they can often count on working for the contractor, managers sometime have little incentive to improve in-house service.

There will be no shortage of candidates to perform additional work in-house. Many federal employees will lose their jobs through direct conversions, public-private competitions, privatizations, downsizing, and BRAC over the next several years. The cost comparison requirements for new work and contractor work will give federal agencies an opportunity to retain that valuable human capital. Additional staff may well come from the private sector, particularly with respect to work acquired from contractors. Just as contractors sometimes "staff up" to perform work by hiring some of the federal employees who used to do the work, so would federal agencies "staff up" by hiring former contractor employees.

b. Solution: The TRAC Act Would Eliminate Arbitrary In-House Personnel Ceilings

The TRAC Act would eliminate the arbitrary in-house personnel ceilings that have been instrumental in bringing about the "human capital crisis." Arbitrary personnel ceilings keep agencies from hiring new staff or force the firing of existing staff, irrespective of budgets and workloads. When workload exceeds the in-house workforce, agencies simply contract out the work—often at higher costs. The TRAC Act would ensure that agencies manage their workforces by workloads and budgets, not by arbitrary numbers, empowering agencies to use federal employees or contractors, depending on which workforce is more efficient.

According to OMB, during the Clinton Administration, several agencies—including the Departments of Agriculture, Health & Human Services, Housing & Urban Development, State, Education, and Treasury, as well as the Environmental Protection Agency—said that they each could have saved millions of dollars by performing work with federal employees instead of contractors but did not do so because they were forced to work under arbitrary personnel ceilings. GAO has also reported that agencies sometimes manage their in-house workforces by personnel ceilings set by OMB that "frequently have the effect of encouraging agencies to contract out regardless of the results of cost, policy, or high-risk studies."

The problem is particularly bad at DoD. In 1995, the personnel directors of the four branches of the Armed Forces told the Congress that arbitrary personnel ceilings—not workload, cost, or readiness concerns—were forcing them to send work to contractors that could be performed more cheaply in-house. GAO reported in 1997 that a "senior command official in the Army stated that the need to reduce civilian positions is greater than the need to save money". An earlier report by the DoD Inspector General noted that the goal of downsizing the public workforce is widely perceived as placing the DoD in a position of having to contract for services regardless of what is more desirable or cost-effective.

And it's gotten worse. The Bush Administration's direct conversion and privatization quotas are nothing more than arbitrary reductions in the number of

federal employees so that they can be replaced by contractors without any public-private competition.

The TRAC Act would move us away from sterile debates about downsizing and upsizing so that we can finally talk about rightsizing. If agencies prove they can do work more efficiently through a public-private competition, they can hire the additional employees necessary to perform the work, notwithstanding any arbitrary personnel ceilings. If they can't perform the work more efficiently, then the agency couldn't hire any additional employees. The legislation would ensure that agencies always use the most efficient, most effective, and most reliable service provider, instead of having to always choose contractors.

For DoD, management by arbitrary personnel ceilings has been statutorily prohibited, both in Title 10 as well as in a perennial general provision in the defense appropriations bill. Nevertheless, DoD's high-level Business Initiatives Council recently repudiated the use of "civilian full-time equivalent targets...in order to make the most efficient use of civilian personnel," implicitly acknowledging that DoD continues to manage its workforce by personnel ceilings.

The TRAC Act's requirement for public-private competition would eliminate any incentive for the Pentagon to continue to defy the prohibitions against artificially constraining the civilian workforce: since the work has to be competed in most cases, there's no reason to unfairly discriminate against federal employees.

c. Solution: The TRAC Act would allow lawmakers to develop a better understanding of the human toll from service contracting as well as the impact of inferior private sector pay and benefits on contractor performance.

The Office of Personnel Management and the Department of Labor would be charged under the TRAC Act with comparing the pay and benefits of federal employees to their contractor counterparts and then reporting back to the Congress in order to determine the human toll from contracting out.

It is well-established that contracting out has been used in the private sector and in the non-federal public sector to shortchange workers on their pay and benefits and to avoid unions. It is likely that this pernicious practice exists at the federal level as well. In 1998, at the request of AFGE, Representatives Steve Horn (R-CA) and Dennis Kucinich (D-OH) asked the GAO to examine the pay and benefits of the federal service contractor workforce. Congressional auditors, however, came back empty-handed: agencies couldn't be helpful because they did not keep the relevant information and contractors did not respond to surveys. A survey conducted by GAO in 1985 of federal employees who were involuntarily separated after their jobs were contracted out revealed that over half "said that

they had received lower wages, and most reported that contractor benefits were not as good as their government benefits."

The Economic Policy Institute (EPI), in a ground-breaking 2000 study, has determined that more than one in ten federal contractor employees earn less than the "living wage" of $17,000 per annum, i.e., the amount of money necessary to keep a family of four out of poverty.

> *"The federal government saves money by contracting work to employers who pay less than a living wage ($8.20 per hour). Even the federal government jobs at the low end of the pay scale have historically paid better and have had more generous benefits than comparable private sector jobs. As a result, workers who work indirectly for the federal government through contracts with private industry are not likely to receive wages and benefits comparable to federal workers...*

Economic Policy Institute; "The Forgotten Workforce: More Than One in 10 Federal Contract Workers Earn Less Than a Living Wage"; November 27, 2000; page 2.

Contractors ritualistically invoke the Service Contract Act whenever the human toll from service contracting is raised. However, EPI's research reveals the very limited reach of prevailing wage laws.

> *"In 1999, only 32% of federal contract workers were covered by some sort of law requiring that they be paid at least a prevailing wage...But even this minority of covered workers is not guaranteed a living wage under current laws. For example, the Department of Labor has set its minimum pay rate at a level below $8.20 an hour for the workers covered by the Service Contract Act in 201 job classifications."*

Economic Policy Institute; "The Forgotten Workforce: More Than One in 10 Federal Contract Workers Earn Less Than a Living Wage"; November 27, 2000; page 2.

GAO has been unable to determine the extent to which contracting out undercuts workers on their wages and benefits. And despite its pioneering work in this area, EPI acknowledges that

> *"Further research, such as a survey of contracting firms, is needed in order to know more about these workers and their economic circumstances."*

The issue of contractor pay and benefits received considerable attention during the recent debate on aviation security. Virtually all participants in that debate, regardless of their political affiliation or position on the ideological spectrum, agreed that the failure of contractors to provide workers with decent pay and

benefits contributed significantly to the crisis in aviation security that ultimately led to broad and bipartisan support for the function's federalization.

While there is much talk about the "human capital crisis" in the federal workforce, the debate over aviation security focused much-needed attention on the "human capital crisis" in the contractor workforce, one that has been shrouded in secrecy because of poor contract administration and contractors' stubborn opposition to even the most basic efforts to determine what work contractors are performing and how much they cost.

(The TRAC Act, as discussed elsewhere in this testimony, would require agencies to track the cost and quality of all service contracting efforts, allowing managers to finally begin to understand the impact of inferior contractor pay and benefits on the delivery of services.)

In fact, the Aviation and Transportation Security Act (S. 1447) established a valuable precedent with respect to the pay and benefits of federal employees. Concerned about the impact of substandard compensation on the quality of work of airport screeners, the legislation requires future contractor screeners to provide their employees with no less compensation than that earned by federal employee screeners. This precedent should eventually pave the way for excluding pay and benefits from consideration during the competition process, so that awards can be based on systems and staffing levels, rather than what's worse for workers.

1. Problem: Federal employees are unfairly prevented from competing in defense of their own jobs, for new work, and for contractor work. Taxpayers are prevented from learning which sector is able to deliver government services in the most cost-effective manner.

a. Solution: The TRAC Act would ensure federal employees have opportunities to compete for their own work as well as for some new work.

Contrary to the interests of taxpayers and federal employees, almost all work is given to and retained by contractors without any public-private competition, even though federal employees win 60% of the competitions actually conducted.

DoD, the agency considered to be the champion of public-private competition, nevertheless, almost never uses public-private competition before giving work to contractors.

> *"(C)ontracts resulting from a cost comparison performed in accordance with OMB Circular A-76 represent an extremely small portion of the total number of service contracts awarded by the*

Department during fiscal year 1999 (less than 1 percent). Further, these contracts represent a very small portion of the total dollars awarded by DoD to private sector contractors during fiscal year 1999."

Jacques Gansler, Under Secretary for Acquisition & Technology, Department of Defense; Senate Report 106-53; December 26, 2000.

At the same time that DoD's civilian workforce has been significantly downsized, service contracting in DoD has increased dramatically.

"From FY 1992 through FY 1999, DoD procurement of services increased from $39.9 billion to $51.8 billion annually. The largest subcategory of contracts for services was for professional, administrative, and management support services, valued at $10 billion. Spending in this subcategory increased by 54 percent between 1992 and 1999."

Robert J. Lieberman, Assistant Inspector General, Department of Defense; "Federal Acquisition: Why Are Billions of Dollars Being Wasted?" (testimony before the House Subcommittee on Government Management, Information, and Technology); March 16, 2000.

That is, DoD has dramatically increased service contracting and, as discussed earlier, reduced its civilian employee workforce—while almost never using public-private competitions.

There is actually even less public-private competition outside of DoD. According to GAO, in the handbook for the Commercial Activities Panel's organizing meeting, "OMB reports that one-tenth of one percent of civilian agency commercial activities has been competed using OMB Circular A-76." It is important to keep in mind that non-DoD agencies contract out for more than $40 billion worth of services annually.

At the Department of Housing and Urban Development (HUD), for example, despite hundreds of millions of dollars worth of service contracting over the last several years involving work that has historically been performed by federal employees, the A-76 public-private competition process has never been used. HUD managers systematically invoke exceptions that allow contractors to acquire work without any public-private competition. And according to a Department of the Interior (DoI) internal memorandum, "it is DoI's policy to use exemptions to formal A-76 cost comparisons to the maximum extent possible."

Moreover, there is often little competition among contractors for work. The DoD Inspector General reported to the House Government Reform Subcommittee on Government Management that in excess of three-fifths of the contracts he and his staff surveyed suffered from "inadequate competition." Regardless of the level of private-private competition, 77% of the surveyed contracts had

"inadequate cost estimates" that "clearly left the government vulnerable—and sometimes at the mercy of the contractor to define the cost."

The relative absence of private-private competition holds true even with regard to markets considered more active.

> *"Most of the 22 large (information technology goods and services) orders we reviewed were awarded without competing proposals having been received. Agencies made frequent use of statutory exceptions to the fair opportunity requirement. Further, contractors frequently did not submit proposals when provided an opportunity to do so. Only one proposal was received in 16 of the 22 cases—the 16 cases all involved incumbent contractors and represented about $444 million of the total $553 million awarded."*

General Accounting Office, "Contract Management: Few Competing Proposals for Large DoD Information Technology Orders" (GAO/NSIAD-00-56), p. 4.

Bush Administration officials have noticed with alarm the inadequacy of competition between contractors.

> *"Because we are spending the public's money, there are some goals that cannot be compromised in the name of efficiency. Since the beginning of the (acquisition) reform movement, over a decade ago, I have not seen a serious examination of the effects of reform on competition, fairness, integrity, or transparency. As a result, I think we are seeing some serious competitive problems surface with the proliferation of government-wide contracting vehicles and service contracting."*

Angela Styles, then the Nominee to be Administrator of the Office of Federal Procurement Policy, Hearing of the Senate Governmental Affairs Committee; May 17, 2001; p. 2.

Federal agencies need not be at the mercy of sole-source contractors, however. If GAO reports that savings are possible from individual A-76 competitions, and if OMB insists that savings are generated through A-76 competitions generally, whether the work stays in-house or is contracted out, and if federal employees win 60% of the public-private competitions actually conducted, then federal employees should be competing for more work, both for their own as well as for new work and currently outsourced work.

If agencies were being run in the interests of taxpayers and the people who depend on the federal government for services, managers would be actively considering in-house performance of work. Would a firm in the private sector—a big defense contractor, let's say—automatically contract out almost all new work, as DoD does now? Of course not.

It is a homely metaphor, but today, in the federal services marketplace, there are two shops, a civilian employee shop and a contractor shop. However, agencies never use the civilian employee shop—no matter how much less costly, no matter how much more efficient we are, and no matter how much more reliable we are.

The TRAC Act would require that agencies subject work performed by federal employees as well as new work to public-private competition before it is given to contractors. The public-private competition requirement was carefully written to ensure that it would not apply to work performed by the private sector prior to the enactment of the legislation. The public-private competition requirement also does not apply to contracts with values less than $1 million for work not performed at the time by federal employees. The legislation also completely exempts contracts for design, construction, and engineering, as well as specialized scientific and technical contracts for work not performed at the time by federal employees that are undertaken for research and development.

The establishment of regular public-private competitions will reduce the time necessary to complete the competitions. Currently, agencies have no incentive to become quicker and more adept at performing public-private competition because managers are accustomed to simply giving work to contractors. The more competitions they conduct, the more expert managers will become. Once agencies understand that public-private competition is not optional, managers will have no choice but to develop the capacity to conduct the competitions expeditiously, equitably, and efficiently. With respect to new work that is subject to the public-private competition requirement, agencies can perform that work in the interim with federal employees—either existing or newly-hired temporary or permanent employees in that agency or in another agency—or even temporary contractors.

b. Solution: The TRAC Act would ensure that federal employees have fair opportunities to compete for some work that is currently outsourced.

Despite acquiring their work with virtually no public-private competition and little private-private competition, contractors are never subjected to much-needed public-private competition to see if their work could be performed more efficiently by reliable and experienced federal employees.

The prospect of contracting in would keep contractors from forcing taxpayers to swallow costly post-award mark-ups. Usually, there is very little competition among contractors for work, especially when the initial contract comes up for renewal. Columbia University Professor Elliot Sclar, who testified before the House Government Reform Subcommittee on Government Management in 1998 on contracting out, has described service contracting as a

"...dynamic political process that typically moves from a competitive market structure towards a monopolistic one. Even if the first round of bidding is genuinely competitive, the very act of bestowing a contract transforms the relative market power between the one buyer and the few sellers into a bilateral negotiation between the government and the winning bidder.

The simple textbook models of competition so prized by privatization advocates provide no guidance to what actually occurs when public services are contracted. Over time, the winning contractor moves to secure permanent control of the 'turf' by addressing threats of potential returns to (contracting in) or from other outside competitors. To counteract the former threat, they move to neutralize competition, most typically through mergers and market consolidation among contractors. This trend helps to explain why two-thirds of all public service contracts at any time are sole-source affairs...."

AFGE has long believed that if savings were possible from competing the jobs of federal employees, then they were possible from competing the jobs of contractors as well. As you know, OMB Circular A-76 provides for insourcing as well as outsourcing. The same rules and the same rationales apply.

The Clinton Administration agreed with us—or so we believed. A senior OMB official even committed to ensure that agencies undertook more contracting in. In a February 2, 1999, letter to me, Acting Deputy Director for Management G. Edward DeSeve wrote,

"I also agree with you that we should ask federal managers to 'take pause' and consider the potential benefits of converting work from contract to in-house performance. As I indicated at our October meeting, OMB will encourage agencies to identify opportunities for the conversion of work from contract to in-house performance..."

No such guidance was ever offered. We were not deterred, however. Working with lawmakers on the House and Senate defense appropriations subcommittees, principally Senator Durbin, we secured the enactment of this report requirement:

"The Secretary of Defense shall submit a report to...identify those instances in which work performed by a contractor has been converted to performance by civilian or military employees of the Department of Defense...In addition, the report shall include recommendations for maximizing the possibility of effective public-private competition for work that has been contracted out."

U.S. Congress, FY 2000 Defense Appropriations Act, Section 8109.

The resulting report on DoD's contracting in activities—or, more precisely, the lack of contracting in activities—was hardly a surprise. DoD's compliance—or, more precisely, DoD's complete failure to comply—with the second requirement to develop a contracting in policy did cause some surprise.

> *"Eight of the 286 (OMB Circular A-76 public-private competition) studies (completed during the previous five years) involved work which was being performed by the private sector." (Note: Federal employees were victorious in five out of the eight cases.) "In responding to the Section 8109 requirement to present recommendations for maximizing the possibility of effective public-private competition for work that has been contracted out, the Department reiterated existing policy guidance on the subject."*

General Accounting Office, DoD Competitive Sourcing (01-20), December 2000.

At a time when the Pentagon is supposedly championing public-private competition, less than 3% of all A-76 studies performed by DoD were directed at work performed by contractors. In other words, public-private competition is being used to replace federal employees with contractors, instead of to make DoD as a whole more efficient. Moreover, after being directed to come up with a plan for increasing its contracting in, the Pentagon thumbed its collective nose at the Congress. As usual, the situation is worse in non-DoD agencies where contractors' work is never subjected to the scrutiny of public-private competition.

With respect to contracting in, it's illustrative to look at local government, using survey data collected by the International City / County Management Association.

> *"Our data show significant incidence of reverse privatization or contracting back in previously privatized services...From 1992-1997, 88 percent of governments had contracted back in at least one service and 65 percent had contracted back in more than three services. On average across all places, 5 services were contracted back in from 1992 to 1997."*

Mildred Warner and Amir Hefetz, Privatization and the Market Structuring Role of Local Government, Cornell University Department of City and Regional Planning Working Paper #197, December 2000."

Why so much contracting in? The authors explain:

> *"Contracting back in reflects problems with the contracting process itself, concerns over limited efficiency gains and maintenance of service quality...Analysis of cases of contracting back in shows that*

> *it is motivated by desire to maintain service quality and local control and to ensure cost savings in the face of changing markets."*

What is the explanation as to why there is so much contracting in at the local level and so little at the federal level, especially given the strong likelihood that there is much less private-private competition for the federal government's work because of the much greater complexity of the work required and contract administration problems are so much more severe?

Here's the most likely explanation, according to the authors:

> *"Ideology does not dominate local service delivery decisions; rather, pragmatic local government demonstrate the continued importance of public investment, innovation and direct involvement in service delivery."*

In other words, local officials want to do what's right for their communities. Can the same good intentions be attributed to those who have run federal service contracting in recent years?

The TRAC Act would neither prohibit contracting out nor require contracting in. Rather, the legislation would simply require agencies to subject approximately the same numbers of federal employee and contractor jobs to public-private competition. That is, agencies would choose how many and which contractor jobs would be subject to public-private competition.

c. Solution: The TRAC Act would ensure that award decisions for public-private competitions would continue to be based on the objective criterion of costs and thus uphold the interests of taxpayers.

Contractors are not happy about losing almost three-fifths of the public-private competitions conducted under OMB Circular A-76. Rather than cut their costs and provide taxpayers with a better deal, contractors want to junk the circular and replace it with a pro-contractor system that emphasizes "best value."

Instead of making the best decision for taxpayers, i.e., what costs less, acquisition officers would be encouraged to use all manner of subjective criteria to determine the winner of a public-private competition process, including such whimsical notions as a contractor's ability to respond "flexibly" to changing circumstances or the contractor's use of "innovative" approaches. "Best value" would allow a contractor to exceed the requirements of the solicitation with the understanding that although she may charge more, her bid is more "responsive," and thus more closely follows the intent of the solicitation. In other words, what the contractors can't win on costs, maybe they can win with "fudge" factors.

Contractors try to justify the use of "best value" by falsely asserting that A-76 doesn't allow for consideration of qualitative factors. Wrong. Agencies can

already use a real "best value" system—one that is being used today to improve the quality of service while still ensuring that the ultimate decision on who should provide the service is based on costs—a bottom-line criterion that, even in the morally murky world of federal service contracting, is objective.

Even the strongly pro-contractor Clinton Administration strongly disagreed with contractors on "best value." In a July 21, 1998, letter, a senior OMB official, wrote that "The Administration fully supports the use of 'best value' procurement techniques and is currently using them in private-private competitions and public-private competition, conducted in accordance with the requirements of OMB Circular A-76. It must be clear, however, that the Federal Acquisition Regulations at Part 15 were not developed with public-private competitions in mind...We are opposed to any language that could be interpreted to permit DoD or any other agency to rely simply on Part 15 in a public-private competition."

By retaining important elements of the OMB Circular A-76 process—the formal cost comparison, the 10% minimum cost differential, and the most efficient organization—the TRAC Act ensures that the interests of taxpayers will be paramount.

Problem #3: Agencies don't track the costs, size, and quality of their contractor workforces, allowing waste, fraud, and abuse to run rampant through federal service contracting.

I shall speak a lot about the Department of Defense (DoD) in my testimony. That is because DoD has the most experience with service contracting, spending the majority of service contracting dollars. It is also one of the few agencies that has over the last several years been subjected to more than cursory Congressional oversight of its service contracting because of the bipartisan concern generated over how service contracting has undermined readiness and failed to come close to achieving the savings goals established by its proponents.

a. The TRAC Act would allow agencies to track their contractors' costs.
No one knows exactly how much DoD is spending on service contracting, let alone if those billions of taxpayer dollars are being spent wisely. We do know that the cost to taxpayers for service contracting has increased dramatically. Over the last six years, Pentagon officials have systematically replaced federal employees with contractors, often regardless of whether or not it makes any sense. According to the Office of Personnel Management, the DoD civilian workforce fell from 966,000 to 640,075 in 2001. Service contracting, on the other hand, increased from $39.9 billion in 1992 to $55.9 billion in 1999, according to the Federal Procurement Data System. (As discussed below, GAO estimates that the annual bill for taxpayers for DoD service contracts is almost $100 billion.)

It is clear that the emphasis in DoD's service contracting crusade has been giving the jobs of federal employees to contractors, not in making sure that work has been well done.

> *"...DoD managers and contracting personnel were not putting sufficient priority during the 1990's on (service contracting), which likewise was virtually ignored for the first few years of recent acquisition reform efforts. Consequently, we think the risk of waste in this area is higher than commonly realized...We reviewed 105 Army, Navy, and Air Force contracting actions, valued at $6.7 billion, for a wide range of professional, administrative, and management support services amounting to about 104 million labor hours, or 50,230 staff years. We were startled by the audit results, because we found problems with every one of the 105 actions. In nearly 10 years of managing the audit office of the IG, DoD, I do not ever recall finding problems on every item..."*

Robert J. Lieberman, Assistant Inspector General for Audits, Department of Defense; "Federal Acquisition: Why Are Billions of Dollars Being Wasted?" (testimony before the House Subcommittee on Government Management, Information, and Technology); March 16, 2000.

One of the principal architects of DoD's massive transfer of work from federal employees to the private sector, Dr. Jacques Gansler, was sheepish when asked during a Senate Readiness Subcommittee hearing later that year about the IG's damning report:

> *"...I agree with (the IG about) needing significant improvements in service contracting...(T)his has become a major challenge for us...(W)e have to really significantly improve our service buying...(I)t's probably going to take us a few years...to shift towards really professional service buying."*

It is time to stop blaming the hard-working men and women in DoD's acquisition workforce for service contracting waste, fraud, and abuse. AFGE has strongly opposed the ruinous cuts in DoD's acquisition workforce that have been jointly imposed by the Pentagon and the Congress over the last several years. AFGE has warned lawmakers that DoD would lack sufficient in-house staff to keep contractors from perpetrating waste, fraud, and abuse. AFGE has also insisted that the Pentagon is replacing—at higher cost—federal employees in the acquisition workforce with contractors. And according to a 2000 Inspector General report, AFGE's suspicions were completely correct.

The IG told the Senate Armed Services Subcommittee on Readiness last year that DoD has

> *"reduced its acquisition workforce from 460,516 people in September 1991 to 230,556 in September 1999, a reduction of 50 percent. Further cuts are likely and, in fact, one of defense acquisition goals*

(for FY01) is to achieve another 15 percent reduction in the DoD acquisition related workforce."

These staffing cuts have come at the same time the acquisition workload has increased significantly. According to the IG, from FY 1990 through FY 1999,

> *"the number of procurement actions increased (emphasis original) about 12 percent, from 13.2 million to 14.8 million. The greatest amount of work for acquisition personnel occurs on contracting actions over $100,000, and the annual number of those actions increased about 28 percent from FY 1990 to FY 1999, from 97,948 to 125,692."*

Among the adverse consequences reported by multiple acquisition organizations:

> insufficient staff to manage requirements efficiently, reduced scrutiny and timeliness in reviewing acquisition actions, increased backlog in closing out completed contracts, and lost opportunities to develop cost savings initiatives.

Ominously, the IG warned that the appalling litany of problems caused by the indiscriminate reductions of the acquisition workforce

> *"appears to be a conservative summary of the overall impact of the problem and, if further downsizing occurs, these staffing management problems and performance shortfalls can only get worse."*

AFGE has warned that precipitous reductions in in-house acquisition personnel were forcing DoD to contract out acquisition work at higher costs. The IG reports that seven different acquisition organizations report "increased program costs resulting from contracting for technical support versus using in-house technical support." As an example, the IG reported that the

> *"lack of in-house engineering staff at an Army acquisition organization caused an increase in customer costs of $20,000 to $50,000 per each work year of support services for weapons programs because of the need to hire contractors to perform the work."*

Considering that DoD essentially stopped hiring acquisition personnel several years ago and that the IG reports 42 percent of the remaining acquisition workforce being lost through attrition by FY 2005, it is imperative that the Congress take steps to actually increase the size of the acquisition workforce. As the IG sagely concluded,

> *"a reasonably sized, well-trained and highly motivated workforce is by far our best safeguard against inefficiency, waste, and fraud."*

Jacques Gansler, Under Secretary for Acquisition & Technology, Department of Defense; "A Hearing on Acquisition Reform" (testimony before the Senate Subcommittee on Readiness); April 26, 2000.

GAO has weighed in as well, both with respect to service contracting undertaken pursuant to OMB Circular A-76 and service contracting generally.

> *"Efforts to improve the accuracy of data on savings from A-76 (public-private competition) studies at the time the studies are completed are warranted, as are efforts to assess savings over time. Both are key to establishing more reliable savings estimates and improving the credibility of the A-76 program amidst continuing questions in Congress and elsewhere."*

General Accounting Office, DoD Competitive Sourcing (NSIAD 01-20), December 2000.

In an earlier report on A-76, GAO had noted that entries in the Commercial Activities Management Information System (CAMIS), the system that is supposed to be used to monitor contracts undertaken pursuant to the circular,

> *"are not modified and are being used continuously without updating the data to reflect changes in or even termination of contracts. DoD officials have noted that they could not determine from the CAMIS data if savings were actually being realized from A-76 competitions. Our work continues to show important limitations in CAMIS data...During our review, we found that CAMIS did not always record completed competitions and sometimes incorrectly indicated that competitions were completed where they had not yet begun or were still underway. We also identified where savings data recorded for completed competitions were incorrect based on other data provided by the applicable service."*

General Accounting Office, DoD Competitive Sourcing: Results of Recent Competitions (NSIAD-99-44), March 2000.

According to GAO, DoD has chosen not to keep its commitment to the Congress to improve its system for reporting the costs of contract services.

> *"The Department of Defense (DoD) spends tens of billions annually on contract services—ranging from services for repairing and maintaining equipment; to services for medical care; to advisory and assistance services such as providing management and technical support, performing studies, and providing technical assistance. In fiscal year 1999, DoD reportedly spent $96.5 billion for contract services—more than it spent on supplies and*

equipment. Nevertheless there have been longstanding concerns regarding the accuracy and reliability of DoD's reporting on the costs related to contract services—particularly that expenditures were being improperly justified and classified and accounting systems used to track expenditures were inadequate...

"...DoD has not developed a proposal to revise and improve the accuracy of the reporting of contract service costs. DoD officials told us that various internal options were under consideration; however, these officials did not provide any details on these options. DoD officials stated that the momentum to develop a proposal to improve the reporting of contract services costs had subsided. Without improving this situation, DoD's report on the costs of contract services will still be inaccurate and likely understate what DoD is paying for certain types of services."

General Accounting Office, CONTRACT MANAGEMENT: No DoD Proposal to Improve Contract Service Costs Reporting (01-295), February 2001.

As bad as the Pentagon is at tracking the costs of service contracting, DoD at least has some experience in this regard (although most of it could hardly be called instructive or worthy of emulation). Nevertheless, the Administration is directing non-DoD agencies to undertake massive increases in their service contracting without first establishing systems to reliably and accurately track their outsourcing costs.

To her credit, the new OFPP Administrator has acknowledged that "agencies do not have a recurring system to adequately track A-76 savings over the long term." That is a stunning admission, given that the Bush Administration intends to use A-76 to convert / compete / privatize at least 425,000 jobs over the next three years. Surely it is not too much to expect that agencies be required to track the billions and billions of dollars spent on service contracting. Clearly, effective contract administration is one of the many additional costs of service contracting. Otherwise, service contracting becomes all about replacing federal employees with contractors, regardless of the expense.

The TRAC Act would require agencies to keep track of the costs and savings of its service contracting. For each service contract, the following cost information would be tracked and made public: the cost of federal employee performance at the time the work was contracted out, the cost of federal employee performance under a most efficient organization plan, the anticipated cost of contractor performance, the current cost of contractor performance, and the actual savings achieved by the contract.

If imitation is the sincerest form of flattery, then TRAC Act supporters should feel very flattered, indeed. The FY01 defense authorization bill included a provision (Section 354) that required DoD to establish a TRAC-like inventory of all work

involving 50 or more employees that has been subject to performance review (OMB Circular A-76, strategic sourcing, privatization, or any other analysis to determine whether the performance of work should be changed). For each such activity reviewed, the inventory is 1) tracking the cost of conducting the review; 2) comparing the cost of performance before and after the review; and 3) comparing the anticipated savings with actual savings, if any. Reviewed activities will be tracked for this information for at least five years. Reports from this inventory will be submitted to the Congress annually. The TRAC Act would establish a similar system for all contracts in all agencies, offering real hope that federal service contractors will finally be held accountable to the taxpayers.

Of course, the cost-tracking requirement of the TRAC Act has already won outright flattery from the leader of a major service contracting group. According to the April 2, 2001, *Federal Times*, "(Contract Services Association Gary) Engebretson said he agrees with part of the TRAC Act that calls for more reliable accounting systems to track the cost and savings from outsourcing."

Moreover, the establishment of a public-private competition requirement will give agencies real choices in the delivery of services and ensure that careful consideration is given before the taxpayers are billed for additional service contracting. By ensuring that they are allowed to compete, federal employees will be able to keep contractors honest—and vice-versa, of course.

b. The TRAC Act would allow agencies to track their contractors' effectiveness.

The TRAC Act does not focus only on efficiency. The legislation would also ensure that agencies track contractors' effectiveness. The TRAC Act would require agencies to describe for each contract the quality control process used by the agency in connection with monitoring the contracting effort; identify the applicable quality control standards and the frequency of the preparation of quality control reports; and then determine whether the contractor met, exceeded, or failed to achieve quality control standards.

c. The TRAC Act would allow agencies to track their contractors' workforces.

A former senior OMB official once said when asked about the size of the contractor workforce, *"You can use any number you want. . . But whatever it is...it is a lot of people."* Indeed, it is. Research by Paul Light of the Brookings Institution who is the author the ground-breaking book, The True Size of Government, indicates that the service contractor workforce is approximately 4 million employees. In contrast, there are just over 1.8 million executive branch federal employees. This means the service contractor workforce may well have grown to at least twice the size of the federal government's in-house staff.

The shadow workforce of contractors has been built up over many years. As Light observed, the shadow workforce reflects in large part

> *"decades of personnel ceilings, hiring limits and unrelenting pressure to do more with less. Under pressure to create a government that looks smaller and delivers at least as much of everything the public wants, federal departments and agencies did what comes naturally. They pushed jobs outward and downward into a vast shadow that is mostly outside the public's consciousness."*

OMB officials and contractors have long dismissed the need to document the size of the contractor workforce, both at the micro (i.e., number of workers employed under specific contracts) and macro (i.e., number of contractor workers employed agency-wide and government-wide) levels. "Numbers are not important," they blithely insist. "What really matters is how well the job is done." (Of course, because of the problems discussed above, we can't say how well contractors are actually performing.)

In documents ranging from the federal budget to the Federal Activities Inventory Reform Act, detailed information is kept on the number of federal employees, at both the micro and macro levels. Clearly, Bush Administration officials, like those who came before them, believe it is very important to maintain meticulous records about the size of the federal government's in-house workforce. However, they have historically professed no interest whatsoever in keeping the same statistics about the contractor workforce.

Light reminds us that we cannot talk intelligently about what government does and what it needs to do without an accurate head count of the contractor workforce:

> *"It is impossible to have an honest debate about the role of government in society if the measurements only include part of the government. The government also is increasingly reliant on non-federal workers to produce goods and services that used to be delivered in-house. Not only does the shadow workforce create an illusion about the true size of government, it may create an illusion of merit as jobs inside the government are held to strict merit standards while jobs under contract are not. It may also create illusions of capacity and accountability as agencies pretend they know enough to oversee their shadow workforce when, in fact, they no longer have the ability to distinguish good product from bad...*
>
> *"Expanding the headcount (to include, among others, contractor employees) would force Congress and the President to confront a series of difficult questions. Instead of engaging in an endless effort to keep the civil service looking small, they would have to ask*

just how many (employees working directly and indirectly for the government) should be kept in-house and at what cost. One can easily argue that the answers would lead to a larger, not smaller, civil service, or at least a civil service very differently configured."

The Department of the Army is to be commended for its development of a reliable, comprehensive and unobtrusive methodology for tracking the costs and size of its contractor workforce. It is unfortunate that some contractors and some of their allies in the "acquisition reform" establishment have worked so hard to kill this important initiative. In addition to tracking costs and size, the information collected would be used by the Army to determine the extent to which inherently governmental work had been given to contractors and whether readiness is undermined if commercial activities are contracted out to an excessive extent. It is this methodology—endorsed by organizations ranging from the AFL-CIO to the Reserve Officers Association to the National Association of Public Administration—which agencies could use in fulfilling the TRAC Act's requirement for tracking the contractor workforce.

The TRAC Act's Enforcement Mechanism

The TRAC Act includes an enforcement mechanism to ensure agencies' prompt compliance with the TRAC Act's requirements to track contractor costs, ensure public-private competition for our work and new work before it is given to contractors, abolish the use of arbitrary in-house personnel ceilings that prevent federal employees from competing for work, and emphasize contracting in to the same extent as contracting out.

AFGE worked seriously and constructively with the Clinton Administration to deal with the concerns of federal employees about the service contracting process. Despite commitments—to develop a contractor inventory, start contracting in work, stop managing federal employees by arbitrary in-house personnel ceilings, and establish a system to track contractor costs—and laws—to end the practice of managing the DoD civilian workforce by personnel ceilings, develop a plan for contracting in work, regularly consider contracting in DoD work, stop replacing downsized employees with contractors without public-private competition—the situation has not improved. And the Bush Administration, with its aggressively pro-contractor agenda, is making this situation far, far worse.

The TRAC Act requires agencies to have made "substantial progress" during the 180 days after enactment towards meeting the legislation's requirements. OMB is responsible for certifying "substantial progress" towards compliance on an agency-by-agency basis. If OMB, which is commonly acknowledged to be run and staffed by those who are predisposed towards downsizing and service contracting, is unable to certify that a particular agency is in compliance, that agency may not undertake any new service contracts. That agency, however, may ask OMB at any time—the next week, the next day, or later that afternoon—for another chance to be certified,

presumably as a result of making "substantial progress" towards reforming its service contracting processes.

During any agency's temporary suspension of service contracting, OMB may waive it, on an agency-by-agency basis, for service contracts necessary for national security, patient care, and extraordinary economic harm. There are no administrative, legislative, or judicial reviews or appeals to the use of the exceptions. AFGE can't tie up agencies in courts or Congress over the use of those three very broadly-worded exceptions.

This enforcement mechanism was based on a bipartisan, non-controversial provision in the Senate FY01 defense authorization bill that imposed a moratorium on further downsizing of the DoD acquisition workforce unless the Secretary could certify that certain criteria had been met.

Responding to OMB Criticism of the TRAC Act

A representative of the Bush Administration harshly criticized the House TRAC Act (H.R. 721) at a June 28, 2001, hearing of the House Government Reform Subcommittee on Technology and Procurement Policy. While we do not concede the accuracy of the OMB criticism, I am sure, Senator Durbin, you are pleased to know that your legislation satisfactorily addresses that criticism.

"...TRAC would freeze all currently contracted activities to see if they could be performed more cost effectively by the public sector..."

This is false. Under no circumstances would any temporary suspension in the House or Senate TRAC Acts affect "currently contracted activities." Besides, as discussed above, there is no immediate temporary suspension in the Senate bill. Under the Senate TRAC Act, agencies have 180 days to start making progress towards complying with the requirements of the legislation to track contractor costs, giving federal employees opportunities to compete in defense of their jobs and for new work, abolishing arbitrary in-house personnel ceilings, and emphasizing contracting in to the same extent as contracting out.

If the Office of Management and Budget (OMB) certifies six months after enactment that an agency is making "substantial progress", then there are no consequences. If not, then there would be a temporary suspension on new service contracting-with broad exceptions for national security, patient care, and extraordinary economic harm-until such time as that agency was certified as being in compliance—the next week, the next day, or later that afternoon.

"...and would require an entirely new set of financial and other reporting systems that would not contribute to the government's ability to administer contracts, improve performance, or enhance accountability."

This is half-right. Yes, the TRAC Act would require new contractor tracking systems. However, these tracking systems would actually be helpful in ensuring better contract administration, as the witness from GAO pointed out during the question and answer session at the June 28th hearing on the House side and as the leader of a major contractor group (the Contract Services Association of America) has already admitted.

"By suspending all facilities and operations contracts including, for example, all federal scientific and criminal lab contracts, many of the primary functions of government would be seriously affected-constituting a serious threat to our national defense."

As noted above, the Senate TRAC Act does not have an immediate temporary suspension. Rather, agencies have six months to make "substantial progress" towards implementing the reforms required by the TRAC Act until OMB is charged with determining whether they are in compliance. Unlike the House bill, the Senate TRAC Act exempts from the legislation "specialized scientific and technical contracts for work not performed at the time by federal employees that are undertaken for research and development..." Moreover, the TRAC Act's enforcement mechanism poses no threat to "national defense" because there is an exemption for all future contracts necessary for "national security."

"Even Medicare would not be able to issue payments since this is performed by contract."

This is really grasping at straws. If it is not already clear that the legislation is not intended to address Medicare contracts, an exemption can easily be written in the bill at its mark up.

"TRAC also would require public-private competitions for all future contracts, including the exercise of all options, extensions, and renewals by any contracting officer. We estimate that TRAC would affect over 230,000 contract actions involving contracts over $25,000 totaling $100.3 billion in 2000-an untenable outcome."

That the TRAC Act is serious about ensuring that federal employees have opportunities to compete is true. However, the Senate TRAC Act does not require public-private competitions for "all options, extensions, and renewals." Moreover, the legislation also includes a threshold exempting contracts for new work below $1,000,000 in value from the public-private competition requirement.

Conclusion

Giving work performed by federal employees to contractors without public-private competition is pork-barrel politics at its worst. AFGE's opposition to direct conversions, whether through share-in-savings contracts, Native American direct

conversions, or the myriad of exceptions loopholes, and waivers in the A-76 process is non-negotiable, whether five jobs or five hundred jobs are at stake.

At the same time, public-private competition must be used to make the federal government more efficient, not as a "spoils system" by the new Administration to replace federal employees with the businesses of politically well-connected contractors. Contractors and their allies can no longer have it both ways, the federal sector always under scrutiny, the contractor sector immune from review; competitions and conversions mandatory for the jobs of federal employees but strictly off-limits for contractors; showering new work on contractors while putting federal employees on a starvation diet.

The establishment of a process that subjects work to public-private competition before it is given to contractors and holds contractors to the same scrutiny as that experienced by federal employees, like that in the TRAC Act, will benefit taxpayers and all Americans who depend on agencies for important services.

First, taxpayers will save money because contractors will finally have real competition. Second, the quality of work will be improved because managers will finally have real choices in the delivery of services. Third, a real public-private competition process will bolster contract administration and thus reduce waste, fraud, and abuse. Fourth, ensuring that agencies at least consider the appropriateness of in-house performance will help to end the "human capital crisis."

It's time for the Congress to face a fundamental and inescapable truth: if public-private competition works, then it works for new work and contractor work—not just federal employee work. If public-private competition isn't right for contractor work or new work, then it's not right for federal employee work either—and the entire outsourcing process must be shut down.

That concludes my testimony. I would be happy to entertain any questions.

TESTIMONY

of Stan Z. Soloway
President
Professional Services Council

Before the

Senate Committee on Governmental Affairs

March 6, 2002

Mr. Chairman, members of the committee. My name is Stan Soloway, president of the Professional Services Council, and I am honored to appear before you today. PSC is the nation's principal trade association of government professional and technical services providers and represents the full range of information technology, research and development, engineering, high-end consulting, operations and maintenance and other companies supporting the government's many missions in virtually every agency.

This hearing comes at a most important time in our history. Even before the horrific events of September 11, the need for a robust and growing partnership between the government and the competitive private sector was evident to all. In the aftermath of September 11, as priorities and missions have been altered forever, that need is greater than ever. As the private sector speeds ahead with almost daily advances in information technology and security, bio-technologies, business process re-engineering, e-commerce and e-business solutions, integrated facilities management solutions, and more, the government has struggled to keep pace. As the government faces its daunting human resource problems, ever-growing competition for talent with the private sector and continuing financial constraints, the need for that vital partnership grows. It should be embraced enthusiastically with the full recognition of the benefit such a partnership can have for the taxpayers and for the government's many customers.

That is why, Mr. Chairman, PSC so strongly opposes the TRAC Act. And that is why we are joined in opposition to the legislation by a cross-section of business organizations, including those representing small, minority owned and women owned businesses; labor unions; national security organizations; taxpayer groups; and more. We are convinced that the TRAC Act would, if passed in whole or in part, lay waste to that partnership and result in diminished government services to the public.

Everyone testifying today has his own views on the TRAC Act. Each has vested, parochial interests. But sound policy must be focused on meeting the public's interests and enabling federal agencies to achieve their missions in a manner that optimizes both performance and costs. That also means that sound public policy must be underpinned by sound facts and a clear picture of the environment in which it will be executed.

Today, the bulk of technology development is performed in the private sector....an almost complete reversal of the balance that existed just 25 years ago, when the government was still the principal developer, and owner, of most technology. Indeed, by most estimates, in this calendar year, the private sector will spend more than $250 billion in research and development, compared with the government's investment of roughly one fifth that amount. In the information technology arena alone, studies suggest that a relatively small number of companies—perhaps 80 or 90 of the top information technology firms—will spend more on research and development this year than the entire Department of Defense research and development budget. And it remains a fact that in the high technology arena especially, far too many firms remain inaccessible to the government during the critical research and development phases of product and capability development.

Thus, while the government's renewed focus on and commitment to research and development is important and welcome, the gap is so wide that it likely never will be closed. Thus, the government must continue to reach out to, tap, and adapt to the proven best practices of the commercial sector if it hopes to access the range of solutions, for everything from business processes to weapons systems that are today available. Moreover, it must recognize that the term "low technology" is rapidly becoming obsolete and that the solutions emerging today from the competitive private sector cover the entire spectrum of operations, including many of those functions previously considered "low tech".

Unfortunately, the current debate on outsourcing and privatization not only fails to focus on the critical issues, but is being conducted largely in an environment beset by false premises and perceptions. As so often happens when issues such as this arise, fear and mythology take hold and tend to overwhelm fact. Today, I would like to spend a few minutes dispelling some of the mythology and talking about the real world of government contracting for services.

First, many in this room - indeed, many in industry itself - accept at face value the suggestion, made popular by Paul Light of the Brookings Institution, that there is an enormous contractor workforce, operating somewhere in the dark, doing the bulk of the government's business. The so-called "shadow workforce," we are told repeatedly, is much larger than the government workforce and far less accountable for its actions. Moreover, the mythology holds that over the last decade the government has dramatically increased its outsourcing, or services contracting, at the expense of federal employees, whose numbers have been significantly cut as outsourcing has grown.

Let's start with the issue of the "shadow workforce" itself. This term must be differentiated from the term "shadow government," as defined and written about in Dan Gutman's book of the same title. It also is the term used in recent news stories about the administration's precautionary rotation of senior government officials to secure facilities. In Mr. Gutman's congressional staff reviews in the 1980s and in his book of a number of years ago, the focus was on the business of governance; that is, the occasional involvement of contractors in the policymaking of government. Since then, the rules dictating which functions are inherently government - and thus not appropriate or available for outsourcing – have been refined. On the other hand, the topic of today's hearing is the processes and policies surrounding functions that are defined to be commercial in nature and thus could be performed by the private sector.

In the final analysis, the actual number of contractor employees performing work for the government is not terribly important or meaningful - arbitrary head counting of direct or indirect employees rarely is. In fact, the true and most important measures of government's size lie in its overall mission, performance and budget, regardless of who is performing the work.

Nonetheless, we are routinely treated to varying estimates as to the size of the shadow workforce, with the most prominent and widely accepted being Paul Light's estimate of 5.6 million, roughly three times the size of the federal workforce. But despite popular perception, Light's numbers have little to do with the contractor workforce. Rather, they were arrived at using the Commerce Department's Regional Input/Output Modeling System, or RIMS, which

measures the total economic impact of things like plant relocations. Under RIMS, the government and others are able to determine not only the direct employment that would result from the relocation of the plant, but also the overall impact, including grocery store clerks, teachers, gas station attendants and more. Thus, Light's figures offer little or no insight into the size or scope of the federal contractor workforce or the work they are or should be doing.

Moreover, it is for this same reason that other analyses, including the work the Army did last year on the subject, and DoD's own studies, suggest that the actual number of contractor employees supporting the government is only a fraction, maybe 20 percent, of Light's numbers.

As I noted earlier, I do not believe that the time and effort necessary to count the number of contractor and subcontractor employees supporting the government would be worth the result, since the real issue for work contracted out or performed in house is overall performance and cost. But the key point here is that the so-called "shadow workforce" casts a far smaller shadow than is often believed.

Second, the perception that the government, over the last decade or so, has radically increased its outsourcing or service contracting at the expense of incumbent federal employees is also belied by the data. Some 60 percent of the growth in service contracting over the last 10 years has been in the civilian agencies, yet 90 percent of the workforce reductions have come at DoD. In the civilian agencies, service contracting has grown by some 33 percent over the last 10 years. During that same time, the civilian workforce has been reduced by only 3 percent, according to the latest Congressional Budget Office and Office of Personnel Management data. At DoD, service contracting has actually increased, in dollars and percentages, at a slower rate...only 14 percent over 10 years, while the workforce reductions, many of them driven by base closures, have been close to 32 percent. In short, if there were a correlation between increases in service contracting and workforce reductions, the data would at least suggest it...but it doesn't.

Moreover, where the government workforce reductions have been greatest—particularly in blue collar and administrative work—there have been similar reductions in service contracting. Likewise, in those areas where the government is most aggressively hiring, or trying to hire, especially in the professional fields, service contracting has also grown. In other words, federal workforce levels and service contracting trends have tended to follow similar paths based on the changing missions and needs of government. And as the data suggest, the relationship between outsourcing and workforce levels have actually tended to be complementary, not mutually exclusive.

As the GAO and others have reported, it would be entirely wrong to suggest that government employees face vastly diminished pay and benefits when work they are performing is outsourced. If that is the case, why has there been such a debate over "pay parity", a debate in which the focus has been on raising federal wage levels to equal those of equivalent private sector positions? The assertion also fails to acknowledge that for many positions included in government service contracts, the government, not the contractor, sets the acceptable wage and benefits requirements through the Service Contract Act.

And what of the accountability of contractors? How does it match up against internal government management and controls? Quite well, actually.

No one doubts that the government has challenges in the contract management arena, that training of the acquisition workforce has lagged or that shifting the government's thinking into the contemporary era of value- and performance-based business relationships is difficult. That is why the Professional Services Council has been a strong and consistent advocate of more training and developmental opportunities for the acquisition workforce. At the same time, however, it would be disingenuous to suggest that similar - or worse - problems do not exist internally.

Contractors, for instance, are subject to a range of checks and balances, including continual competitive pressures. In fact, some 75 percent of all services contracting actions, and more than 90 percent of all information technology services contracting actions, are competitively awarded and most are routinely recompeted. Contractor costs are subject to a range of government-directed accounting standards and audit provisions—too many such provisions in fact. Contractors are continually rated on their performance and previous performance is now typically a significant evaluation criterion when they compete for new work. Since virtually every contractor invoice must be validated before being approved—often more than once—the costs of contractor activity are immediately and fully visible, at least at the buying level.

The GAO has reported several times that the government does not know, in the aggregate, how much money is being saved or how much cost is being avoided through outsourcing. But that is an internal systems issue; it does not diminish the reality when the bills are paid, there is total cost visibility. Nor does it change the opinion of GAO or others that contracting out saves money. The only issue is how much.

And what of government activities? To quote the GAO in a report on A-76 public-private competitions, "the government does not know the cost of the activities it competes." An independent study by the Center for Naval Analyses, which sought to assess the relative long-term savings of outsourced work and work retained in house after an A-76 competition, reached a similar conclusion. While they concluded that outsourced work achieved, over the long term, the savings originally projected, they could reach no such conclusions with regard to internal performance. CNA reported that they had originally intended to do such an assessment, but could not because "the data does not exist". Moreover, government activities are not continually rated on performance, or for that matter, incentivized adequately for high performance, in any meaningful way. Competition remains all too scarce. And real commitments to workforce development and training, now considered among the highest priorities in the high performing private sector, remain afterthoughts that rarely survive the agency battles over resources.

My point is simple. Accountability cuts both ways, can be a challenge both ways and needs attention both ways. Any suggestion that contracted work is somehow less accountable than internal government costs or performance is simply incorrect.

This leads me back to S1152, the Truthfulness, Responsibility, Accountability in Contracting Act, or TRAC. The TRAC Act almost certainly would result in a moratorium on service contracting and would, in the long run, require that every service contract, recompetition, task order, option or other action be subjected to the widely discredited, time consuming, expensive A-76 process. The bill does not, as many believe, deal only with work currently being performed by federal employees, work for which employees already can and do compete; rather, it deals with almost the entire universe of work being performed in support of the government. It is a thinly veiled attempt to stop all outsourcing and mandate the in-sourcing of all work, regardless of whether an incumbent federal workforce is currently performing that work.

Procurements that today can be completed in a fully competitive environment, in a matter of weeks or months, would take years. High performing commercial companies, many of whom have only entered the government market in recent years, would beat a hasty retreat rather than subject themselves to the distorted, inaccurate and suspect A-76 process. Nor would high performing, competitive companies be inclined to engage in so-called "competitions" which favor those who bid lowest and tend to discount the key discriminators that drive true performance, such as quality, technical sophistication, long term performance, and more. The e-government, e-commerce, and other technology initiatives of both political parties would suffer potentially fatal blows. The new post-September 11 missions of many agencies would suffer as well. And in the end, the government, and the taxpayer, will pay the bill.

Today, A-76 is utilized in less than 2 percent of all service contracting because only that small amount of service contracting involves work currently being performed by more than 10 federal employees. It is a process that industry, the federal unions and many others have testified does not work, is not fair, and does not deliver the results the government needs and deserves.

For those reasons, PSC and the rest of the industrial base that supports the government oppose the TRAC Act. It is also opposed by labor unions, taxpayer organizations, national security organizations, and small businesses—many of which would literally be driven out of business were it to pass. In fact, as devastating as the TRAC Act would be for larger businesses in the government marketplace, it would be even worse for small businesses, which already face enormous challenges and obstacles as they seek to grow. Some 50 years ago, the House Committee on Government Operations observed that "a strange contradiction exists when the government gives lip service to small business and then enters into unfair competition with it." That observation remains as true today as it was then.

Similarly, the Department of Defense, in letters from both Secretary Rumsfeld and Undersecretary Aldridge, has made known to Congress its strong opposition to the TRAC Act. A group of 12 retired, senior military officers, including former Joint Chiefs Chairmen Adm. William Crowe and Gen. John Shalikashvili and several former service chiefs, wrote Congress last year to warn of the bill's potentially "devastating impact on national security."

Last year, the Congress directed the comptroller general to establish a diverse panel of experts to review the overall issue of outsourcing, including A-76, and report back to Congress this May with recommendations for policy changes. The comptroller general chose to chair the panel and

ensured that it was indeed diverse. The membership includes Mr. Harnage and Ms. Kelley, me, and another private sector representative, senior DoD, OMB and OPM officials, and other experts. Given Congress's mandate to the comptroller general and the panel, it would seem precipitous to take any action now, before the panel has completed its work and submitted its recommendations to Congress.

With all due respect, Mr. Chairman, the TRAC Act is ill-conceived, is based on faulty premises driven in large part by a mythological environment, and would strangle the agencies and small business. Moreover, the passage of the bill or any parts of it could well destroy the delicate but vital partnership between the public and private sectors. The opposition to the legislation is broad and deep, crossing all economic and political lines.

Mr. Chairman, I want to thank you and the committee again for the honor of appearing here today. I would be happy to answer any questions you have.

Testimony
Of
Colleen M. Kelley
National President
National Treasury Employees Union

"NTEU Views on Improving the Delivery of Government Services"

March 6, 2002

Committee on Governmental Affairs
216 Hart Senate Office Building

Chairman Lieberman, Ranking Member Thompson, Senator Durbin, and other distinguished Senators of this committee, my name is Colleen Kelley and I am the National President of the National Treasury Employees Union. As you know, NTEU represents more than 150,000 employees in 25 federal agencies and departments, including employees who work at the Department of Treasury, Department of Health and Human Services, and the Department of Energy. I want to thank you for giving me the opportunity to present testimony on behalf of these dedicated men and women.

The past six months have been a very trying time for the American public. First came the tragic events of September 11th, then the spread of anthrax, the security threats on our ports and borders, the ongoing recession, and then the corporate accounting scandals. Never before has it been so clear how vulnerable our nation is to such a wide variety of attacks. And never before has the need to maintain a highly trained, highly skilled, dedicated federal workforce to respond to and prevent these attacks been so clear. The Customs officers who inspect foreign cargo, the FDA employees who ensure a safe food supply and who work to bring new vaccines to the public, the FDIC and SEC employees who regulate our banking and securities industries, and the men and women at the IRS who ensure the revenues due to the Treasury are paid: our democracy depends on these patriots. If any American didn't appreciate the national value of our federal employees before the tragic events of September 11th, then they sure recognize their work now.

We can all agree that government services should be delivered to the American taxpayers in the most reliable, most efficient, and most cost-effective manner, and that agencies should continue to strive for higher performance in the delivery of these services. Regardless of whether federal employees or private contractors provide the services, the taxpayers deserve accountability for how their tax dollars are being spent, they deserve reliability to ensure those services will be delivered when they need them and where they need them, and they deserve a transparent system that is fair and equitable. Today, NTEU would like to make suggestions for meeting these criteria.

First, when it comes to accountability and oversight of the federal workforce, thanks to the checks and balances within the federal civil service system, and oversight and scrutiny of federal agencies by Congress, there is crystal clear transparency of the work being done by federal employees. And through the budget and appropriations process, the Government Performance and Results Act, and the FAIR Act, there is little we don't know about the quality and costs of government services delivered by federal employees.

Unfortunately, we know virtually nothing about the quality and "real" costs of the government functions being performed by private contractors. And because of very little government oversight of contractors, when a contractor is not performing or when the contract costs escalate, it is often too late to fix the problem. For example, last year, we learned that Mellon Bank, a contractor hired by the IRS, lost, shredded, and removed 40,000 tax returns worth close to $1 billion in revenues for the government. Fortunately, the IRS eventually terminated the contract and is conducting an investigation to determine the level of criminal wrongdoing.

I am not raising this issue to suggest that based on Mellon's poor performance we should not contract out any more work. Rather, I am bringing this issue to your attention to highlight the need for better oversight of contractors. How could we let this fraud go on for so long – 40,000 lost tax returns – before we realized there was a problem? The answer is quite simply that Congress and the Administration have never put in place reliable government-wide systems or provided adequate staffing to track the work of contractors. The American taxpayers want the same level of transparency and accountability of the work performed by contractors as there is of the work performed by federal employees.

Before contracting out even more government work, the taxpayers deserve to know exactly how their tax dollars are being spent on contracts. We need to get a better handle on the current system, and NTEU believes the best way to do this would be for Congress to approve, and President Bush to sign into law, S. 1152, the TRAC Act. The TRAC Act would require agencies to implement systems to track whether contracting efforts are saving money, whether contractors are delivering services on-time and efficiently, and that when contractors are not living up to their end of the deal, the government work is being brought back in-house.

In addition to passage of the TRAC Act, NTEU believes the acquisition workforce – those responsible for not only awarding contracts, but overseeing them as well – should be increased and training for them should be improved. We are very concerned that as the amount of government work being contracted out continues to increase – and with it the workload for contract officers – there has been a steady decline in staffing levels for agency contracting offices. The increased workload and decrease in staffing has led to rarely utilized and inadequate public-private competitions and practically non-existent contractor oversight. And according to the General Accounting Office, the problem is only going to get worse, as 27 percent of agencies' current contracting officers will be eligible to retire through the year 2005.

Unfortunately, even though no new accountability procedures have been adopted and the acquisition workforce continues to decline, the Administration has taken extreme actions that will undoubtedly only exacerbate current problems with contracting out. In particular, NTEU is strongly opposed to the Administration's use of arbitrary quotas to open up thousands of federal jobs to the private sector.

The Office of Management and Budget has directed every department and agency to open up to the private sector in fiscal year 2002 the work of five percent of the federal jobs on their FAIR Act inventories and an additional ten percent in FY 2003. The Administration will be directing agencies and departments to ultimately open up to the private sector fifty percent – more than 425,000 – of these federal jobs considered commercial in nature. Agencies and departments are not even required to hold public-private competitions before privatizing these jobs to reach the arbitrary quotas.

The arbitrary privatization quotas will significantly disrupt operations at agencies like the IRS, which is in the middle of a sweeping reorganization plan, and agencies on the front lines of our homeland defense. For example, at the Customs Service, personnel are working under heightened Level 1 border security as a result of the tragedy of September 11th 2001, and many have been sent on temporary duty assignments thousands of miles from their families. Yet,

OMB is still insisting that the Customs Service and every other agency meet the arbitrary quotas, and in fact they have begun grading agencies on their compliance.

Furthermore, while the Administration refers to these arbitrary contracting out quotas as "competitive sourcing," nothing could be further from the truth. Regardless of how well federal employees are doing their jobs today, the directive provides no assurance that they will have an opportunity to "compete" to keep their jobs. Agencies are allowed to hold a competition, but in most cases they will be converting the jobs directly to the private sector without competition. The civilian agencies simply do not have the staffing, the expertise, or the training to run a fair public-private competition. And with the OMB pressure on these agencies to open these jobs to the private sector – let's remember agencies are being publicly graded on this – of course they are going to take the easier road and outsource the jobs without competition. If this policy truly is about "competitive" sourcing, then federal employees should have an opportunity to compete in defense of their jobs before they are contracted out.

The one-size-fits all arbitrary outsourcing quotas, which give no consideration whatsoever to the uniqueness of each agency, will harm the ability of the IRS and other federal agencies to effectively carry out their missions. We believe these actions are only going to lead to more waste, more broken promises, and more cost overruns in government contracting. And we know this directive is already having a negative impact on the morale of the federal workforce. While the Administration clearly did not feel it was necessary to seek congressional approval for such a broad arbitrary change in policy, Congress can certainly pass legislation to block this policy and NTEU urges you to take such action.

Before contracting out more government work, the government needs to take a step back and evaluate the costs, the quality and the risks involved. Sure, a private contractor may be able to submit a bid to perform a certain government function for less cost than federal employees, but what happens when that private contractor files for bankruptcy in the 2nd year of a five-year contract? Is it worth the long-term risks to our nation to shut the government out of the government service business and become dependent on profit-driven private sector companies? It is incumbent upon Congress and the Administration to make investments in increased agency staffing and better training so that government services can be delivered by federal employees at even lower costs, increased efficiency, and lower risk than they are today.

Mr. Chairman, the issues before you are very complex. As you know, I am a member of the Commercial Activities Panel, which was established last year by Congress to look at the subject matter we are discussing today. The Panel, chaired by Comptroller General David Walker, is working to develop a set of recommendations for Congress on how to improve our government's service delivery decision-making procedures, and is required to report to Congress by this May. Regardless of what recommendations the Panel sends to Congress, NTEU believes that Congress should move forward with the suggestions we have proposed today. We believe our recommendations will clean up the current system while serving the needs and interests of the American taxpayers.

Thank you for holding this important hearing today and for giving me the opportunity to testify.

ADVANCED SYSTEMS DEVELOPMENT, INC.

STATEMENT OF

Mary Lou Patel
Chief Financial Officer

BEFORE
The Senate Government Affairs Committee

HEARING On:
The Monitoring, Accountability and Competition in the Federal and Service Contract Workforce

Mr. Chairman, and the members of the committee, my name is Mary Lou Patel of Advanced Systems Development. I am here today to discuss my perspective on "Who's Doing Work for the Government?: Monitoring, Accountability, and Competition in the Federal and Service Contract Workforce."

ASD Background

Advanced Systems Development, Inc. (known as ASD) is a small, disadvantaged company providing desktop IT support services to the government. These services include network administration and engineering, systems administration and engineering, web development, security, firewalls, and information assurance. Richard L. Bennett founded ASD in 1978. The company was approved by the Small Business Administration for the 8(a) program in 1982, graduated in 1992, with the 8(a) business ending in 1995. During most of the ten years in the 8(a) program, ASD maintained a stable revenue base in the range of $4.3M to $5M. In fiscal year 1995, the company recorded revenue in the amount of $5.7M and completed fiscal year 2001 with revenue of $14.9M. Currently, ASD has 193 employees with revenue projected for fiscal year 2002 at $17.5M.

ASD Employees

ASD has earned a positive reputation with our customers including the Office of the Secretary of Defense and its components and the Department of Labor, Bureau of Labor Statistics. By having a reputation of outstanding past performance, ASD has grown over a period of twenty years at OSD from three (3) employees directly supporting the Office of Secretary of Defense to 133 employees today. This would not have been possible without the skills and commitment to quality of our employees. ASD had 73 staff members in the Pentagon on September 11th with all except 2 reporting back to work on September 12th. As our employees are our most important resource, ASD invited our

staff to three crisis management counseling sessions in response to the trauma of September 11th.

For many years ASD provided mostly help desk support to Directorate of Programs Analysis and Evaluation, Acquisition Technology and Logistics, Directorate of Operational Test and Evaluation, Office of General Counsel, and the Unites States Court of Military Appeals. Four years ago, ASD added the Office of Personnel and Security, three years ago, the Office of Comptroller, two years ago, the Secretary of Defense, and this year Office of Legislative Affairs. The delivery order to support the Secretary of Defense was awarded under the previous administration and our support to Secretary of Defense Rumsfeld continues today. With a low attrition rate, the ASD employees enjoy their job and our customers receive the benefit of retaining the knowledge base. ASD has implemented a career ladder for our employees and developed an in-house technical training program augmented by professional organization training.

Recently, a banker asked to call several of our customers to assess ASD's performance. We provided him the names of four of our customers. Later, he called me and asked if they were all relatives. He indicated that their satisfaction rating with ASD was extraordinary, and he was unprepared to hear such a glowing report.

For more than 15 years, ASD provided almost exclusively help desk support and as the various training programs were implemented, the employees acquired more skills, and ASD expanded into network administration and engineering, systems administration and engineering, web development, security, firewalls, and information assurance. Now ASD has a wide range of expertise in the area of information technology. Our customers have benefited from the professional growth of our employees. With the explosion of the information age, the development of new computer equipment and software tools, ASD has worked hand-in-hand with the new developments to maintain a state-of-the-art capability for our government customers.

Government Customer Oversight

ASD works closely with our government customer to ensure accurate and quality service. Typically, our customers assign a Task Monitor or Installation Representative (IR) and require us to report monthly performance measurements. The performance is measured by "service level agreements" determined by agreement between the government customer and ASD regarding performance metrics based on Gardner Group guidelines. As an example, the performance measurements could include the following reports: first resolution report, time to close report, team scorecard, knowledge base reporting, narrative of end-of-month statue, and monthly invoice charges. Additionally, a small business has the same requirements as a large business for administrative oversight with audits by DCAA for incurred costs, billing rates, provisional rates, accounting system audit. The Department of Labor has oversight under Title 7: Uniform Guidelines on Employee Selection Procedures, Training – Sexual Harassment, OFCCP – Affirmative Action Plan and EEOC Reporting, FMLA, ADA, and the Environmental Protection Agency with safety training.

2001 Challenges

ASD's dedication to our customers and the efforts to maintain our reputation for past performance has extended to the most recent experience of providing staff to the customer with no funding. The most recent delay in the passing of the Defense Authorization and Appropriation Bills caused a major dilemma for ASD. Of our $1.5M of monthly revenue, the amount of monthly contract effort funded was $700K leaving ASD $800K short of payment for work we performed. We continued to perform work under a new contract with an existing customer because we were committed to providing uninterrupted service, but we could not be paid because the "continuing resolution" only covered payments to on-going, continuing, efforts. The agency had awarded the company a new contract vehicle on September 16, 2001 effective October 1, 2001.

In order to cover payroll costs, ASD sought assistance from our bank instead of cutting employees and service to our customers. ASD's bank took the position that this work was being performed by ASD "at risk" and, therefore, would not permit ASD to borrow against this work. By early December with $1.6M of work completed with a continued reputation of outstanding support services provided to our customer, ASD was in critical need of cash for payroll. In short we risked the company in order to maintain the customer relationship.

With an appeal to our customer and a visit to the Office of the Small and Disadvantaged Utilization Office, partial funding was provided for three (3) of the eight (8) delivery orders we service and providing a partial and temporary solution. After the passage of the Defense Authorization and Appropriation Bills, the contracts office released most of the funding dollars the last week of January. To meet the continuing need for operating capital limited by contract payments that had still not been received for work performed in October and November, ASD turned to a prime contract relationship for assistance. Twice ASD requested and received early payment to meet payroll from this prime contractor for which ASD was a long-time subcontractor. On March 1, 2002, we received payment from DFAS in the amount of $1.3M for services performed in October and November.

Conclusion

In conclusion, I believe these events have highlighted ASD's continued commitment to providing high quality services that meet the needs of our government customers. Should a problem arise with one of our contracts, we work with our government management to remedy the problem as soon as possible. It is this commitment to quality and 'partnership' approach to contract management that has allowed ASD to not only graduate from the 8(a) program, but to succeed in the government marketplace and continue to grow.

I will be happy to answer any questions you may have for me. Thank you.

United States Senate

Committee on Governmental Affairs

Who's Doing Work for Government? Monitoring, Accountability and Competition in the Federal and Service Contract Workforce

Testimony of Dan Guttman

March 6, 2002

My name is Dan Guttman. My work address is 1155 15th Street, N.W., Suite 410; telephone no. 202-638-6050; email: dan@dguttman.com. Thank you for the opportunity to appear before you today.

I am an attorney in private practice, a Fellow of the National Academy of Public Administration and a Fellow at the Johns Hopkins' Washington Center for the Study of American Government, where I teach courses including "government by third party."

I appear as a citizen whose interest in the performance of public purposes by private actors dates to law school research leading to *The Shadow Government* (Pantheon: 1976). My understanding has been enriched by service as counsel to Senator David Pryor in his inquiries, as Chair of the Federal Services Subcommittee, into "government by contract," service as Executive Director of the President's Advisory Committee on Human Radiation Experiments in its examination of biomedical contract and grant research, service as counsel to nuclear weapons workers, themselves longstanding contractor employees, and exchanges with Johns Hopkins students and an emerging global network of researchers on new forms of governance.

SUMMARY

The Past and the Present: Where We Are and How We Got Here

In 1999 the Brookings Institution reported that the Federal government's "official" workforce of approximately 2 million employees is a fraction of the "shadow of government" -- an estimated 8 million employees who work for the Federal government on grant and contract.[1]

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[1] See, Light, *The True Size of Government* (Brookings: 1999), at 1. ("As of 1996, this 'shadow of government,"...consisted of 12.7 million full-time equivalent jobs, including 5.6 million generated under federal contracts, 2.4 million created under federal grants, and 4.6 million under mandates to state and local governments.")

Today's Federal reliance on grant and contractor employees to perform the basic work of government is neither an accident nor a recent development. [2] It is the product of mid-20th century reform that produced profound successes, but left a legacy of fundamental questions that have lain unexamined by Congress and the Executive. September 11 shows us that due diligence on the legacy of past reform is now in order.

Most of this "shadow of government," of course, produces products (computers, food) or provide services (maintenance, electricity) that are commercial staples. However a significant fraction play a daily role in the basic work of government -- drafting rules, plans, policies, and budgets, writing statutorily required reports to Congress, interpreting and enforcing laws, dealing with citizens seeking government assistance and with foreign governments, managing nuclear weapons complex sites and serving in combat zones, providing the workforce for foreign aid "nation building," and selecting and managing other contractors and the official workforce itself.

At the Dawn of the Cold War, reformers deployed contracts and grants to harness private enterprise to public purpose. They knew the private sector would provide expertise and powerful political support for increased federal commitment to national defense and public welfare tasks. They hoped that the private sector would countervail against the dead hand of the official bureaucracy and allay concern that a growing government meant a centralized Big Government. The officials, businessmen, and scholars who forwarded reform saw themselves as engaged in change of Constitutional dimensions (the "diffusion of sovereignty, as Harvard's first Kennedy School Dean Don Price wrote in 1965).

The reformers were aware that the "blurring of the boundaries between public and private" raised troubling questions about the Constitutional premises of our government. The concerns were identified in a 1962 Cabinet report to President Kennedy. The"Bell Report":

* declared that reliance on contractors and grantees has "blurred the traditional dividing line between the private and the public sectors of the our Nation;"

* deemed it "axiomatic" that government officials (i.e., civil service and appointees) must do the work and have the competence required to account for all work of government;

* warned that, unless corrective action were taken, there would be a brain drain of officials – why shouldn't they prefer working as contract and grant employees, who are not constrained by official pay caps or ethics rules, and are increasingly assigned the interesting work?

The Bell Report backed away from answering the basic questions it raised. The new

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[2] For a fuller story, see Guttman and Willner, *The Shadow Government* (Pantheon: 1976); Guttman, "Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty," *Administrative Law Review*, Summer 2000.

public/private mix, it found, was essential to Cold War programs, and "philosophical issues" need be deferred to a later date. Now, September 11 suggests, is that later date.

Unresolved Constitutional Questions for Today and Tomorrow

One-half century of federal reliance on contractors and grantees produced remarkable successes -- the Manhattan and Apollo projects, victory in the Cold War, advances in biomedical understanding, to name a few. At the same time, the Bell Report's concerns have borne out:

(1) *We have a declared governing principle -- only officials can perform "inherently governmental" work -- that is increasingly a fiction or figleaf.*

Since the Bell Report, third party government has grown on automatic pilot. Driven by the inexorable force of bipartisan limits on the number of officials ("personnel ceilings"), the creation of new programs or agencies has meant that work is necessarily contracted out without due regard to its "inherently governmental" nature (or, indeed, the relative costs involved).

(2) *We have a Government the bulk of whose workforce is invisible to citizens, press, and too often even to Congress and the highest ranking political appointees. Notwithstanding conflict of interest disclosure requirements, the few public reviews of the process indicate that too often contractors are hired without due regard for potentially conflicting interests.*

-- Even as they work side by side with officials in government offices and respond to citizen queries on government hotlines, contractors are not found on government organization charts or in official phone books.

-- Contractor work is often transmitted within agencies as if it were official workproduct. Thus, Senator Pryor found, the Secretary of Energy (and his procurement staff) was unaware that contractors wrote his Congressional testimony.

-- Senator Pryor's review of the conflict of interest clearance process employed by the Department of Energy (a rare agency where such review is statutorily required) found contractors routinely failed to disclose relevant interests and officials ignored publicly available information that should have rang alarms. [3] Most disturbingly, DOE assigned sensitive national security tasks to contractors with no awareness of their work on

[3] See "Contractors Lied on Conflict of Interest, says DOE, " Energy Daily, March 27, 1990, at 3.

the same issues for potentially adverse foreign interests. [4]

-- Contractors may work for multiple boxes on an agency organization chart, and for multiple agencies. Officials who call on contractors may be unaware that contractors are reviewing their own work. [5]

-- The dimensions of the contractor workforce remain unclear. Brookings' 1999 report estimated the Army's contract workforce at about 1 million; recent Army estimates put the number in the range of 200,000. [6]

(3) We have two sets of rules to regulate those who perform the work of government. We can no longer presume that those who actually do the work of government are themselves governed by the laws enacted to define the limits of government and to protect ourselves against "official" abuse – the Constitution of the United States, and statutory ethics, openness, and political conduct provisions

The question " what is an inherently governmental function?" is practical, not, as it often now appears, an invitation to scholastic debate. Over the course of two centuries we have crafted laws to empower our government and to protect ourselves against government misconduct -- to whom should these laws and rules be applied?

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[4] In 1980 the Subcommittee found that the contractor DOE deployed to plan for the next OPEC oil embargo was simultaneously boasting to another agency of its role in oil planning for Libya and other OPEC members. In 1989 the Subcommittee found that the contractor DOE deployed to shepherd a controversial nuclear nonproliferation agreement through Congress was simultaneously reporting to the foreign beneficiaries of the treaty – keeping them abreast on, among other things, the "hardheaded" views of this Committee's staff director.

[5] For example, from 1996-2000 the Nuclear Regulatory Commission relied on a contractor to draft rules for the recycling of nuclear waste, unaware that the same contractor was simultaneously a "teaming partner" on a controversial quarter billion dollar DOE contract to do just this. NRC terminated the contractor for conflict of interest in 2001 – after stakeholders pointed out the conflict. DOE then hired the same contractor to do perform environmental review of the recycling issue – only to terminate the contract when stakeholders again pointed out the conflict. See, Bess, "Nuclear Waste Recyclers Target Consumer Products," Reuters, Sept.3, 2001.

[6] The contract workforce may be smaller –but more expensive. See,Peckenpaugh,"Army has fewer contractors but they cost more, study shows,", *GovExec.com*, July 17, 2001.

Key rules governing officials do not govern private actors who perform the work of government, or, as in the case of conflict of interest rules, apply to them in a lesser form. Where third parties are relied upon solely for "commercial" assistance, and accountable to officials, it makes sense to have one set of rules to govern the civil service and another to govern third parties. Where third parties do the work of government, this logic requires review.

(4) We have an official workforce whose ability to account for the government and its private workforce is increasingly problematic.

With the added impetus of personnel ceilings, the dual sets of rules have stimulated, as the Bell Report predicted, a migration of talent from the official workforce into the contractor/grantee workforce.

(5) *In the absence of Congressional and Executive oversight, Rules of Law to govern third parties who perform the work of government are being made by accident and happenstance, often driven by third parties themselves.*

Bipartisan fiction that only officials can and do perform the work of government, has brought stovepiped reviews of "procurement" and "civil service" systems – with no overview of where the two meet. In the vacuum of oversight, the rules to govern third parties are, by default, being made on an case by case basis in which third parties are often the driving force, and in which courts have an increasing role. The result is often rules that may protect the interest of third parties themselves, but not necessarily the interests of the public at large.

(6) In the absence of consistent Rules of Law to govern all who do the work of government, the tools of accountability we deploy are suboptimal.

In lieu of consistent rule(s) of law to govern the new mix of official employees and contractors we employ accountability mechanisms that, it often appears, presume that it does not matter who does the work of government.

Thus, we invoke "performance standards, "performance contracting," "performance based organizations" in hope that if we define and measure performance, accountability will be assured. Similarly, we empanel stakeholders and urge competition in contracting in hopes that these traditional contests of interests will, in the end, keep the system honest.

These modern and traditional accountability mechanisms are of undeniable value. However, the cure-all value of these mechanisms in a world of diminished official oversight capacity is problematic. The Founding Fathers recognized that competition (whether among businesses or stakeholders or other "factions") does not negate the need for government. Similarly, history shows that performance measures are useful, but not a panacea when applied to government -- where performance is difficult to define, results are not always measured, and alternative performers are not always available, or only available at further cost.

(7) *Because we have failed to attend to our own house, we export and import systems of governance based on slogans whose practical meaning we ill understand. We are damaging our own national interest and those of peoples who rely on us in their search for governance models.*

- Thus, the Agency for International Development (AID) turned over to a Harvard institute the administration of funds to "restructure" post Cold War Russia; we know now that we exported corruption, not governance. The Department of Justice has filed a False Claims Act lawsuit to recover $120 million from Harvard.[7]

- Thus, in the mid 1990's DOE, following Margaret Thatcher, declared it would "privatize" nuclear weapons complex cleanup -- with little recognition that DOE cleanup work was always performed by private contractors, and that DOE's problem is controlling contractors, not employing them. The resulting cost overruns were soon the subject of Congressional inquiry.[8]

- Thus, in 1998 we "privatized" the U.S. Enrichment Corporation, again without recognition that work at issue had always been performed by the private sector under contract, and without appreciation that we were not selling a cement plant or hotel, but entrusting a private corporation with key national and energy security missions. In March, 2001 a Federal District Court Judge found the "privatization," the most significant of the Clinton era, a "model" of what not to do.[9]

What Should be Done? Due Diligence on the Legacy of 20th Century Reform is in Order

As we proceed with the post September 11 reexamination of government, it is time to address the difficult questions raised, but not answered, by mid-20th century reform. Components of due diligence include:

Truth in Government: Who's Doing the Work of Government?

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[7] *U.S. v. Harvard* (D. Mass; Sept. 2000).

[8] *See e.g., DOE's Fixed Price Cleanup Contracts: Why are Costs Still Out of Control?;* Hearings Before the Subcommittee on Oversight and Investigations of the House Committee on Commerce, 106th Cong.

[9] *See, Oil, Chemical & Atomic Workers vs. Department of Energy*, District Court of District of Columbia, March 16, 2001 (appeal of attorneys fee award pending).

- In reviewing and authorizing programs, who is the workforce, and how will we make sure it is visible to citizens and officials?

What Rule(s) of Law Will Apply to Those Who Do the Work of Government?

- Will we continue to have two sets of rules – one applicable to officials and the other to nongovernmental actors who perform the work of government?

- Will nongovernmental actors be subject to some or all Constitutional and statutory provisions we apply to officials?

- Are new principles of law needed to govern nongovernmental actors who perform governmental functions?

What Are Our Accountability Mechanisms and How Well Do They Work?

- Do we still presume that officials must and do have the skills and resources to control government? If so, how do we now this is the case?

- Or, do we believe that alternative accountability mechanisms -- such performance measures and competitor and stakeholder/interest group vigilance are enough to do the job in the absence of capable official oversight? If so, how do we know this is the case?

- What is our fallback if third party government does not work?

If We Continue to Blur Boundaries Between Officials and Private Workforces, Is There Danger We May Lose The Very Qualities We Most Value in Both?

- Can we constrain nongovernmental actors (be they corporations, universities, or other nonprofits) without diluting the qualities of autonomy and independence for which we relied on them in the first instance?

- By the same token, as we seek to reinvigorate the civil service by making it more entrepreneurial and incentive driven, will we lose the qualities that rendered the civil service of value in the first place?

I. The 20th Century Reconstitution of The Federal Government

A. The Mid-Century Foundations of Reform

The mid-20th century development of government by third party was not an accident, but reflected a bipartisan design by reformers to grow the Federal government while avoiding the perceived perils of enlarging the official bureaucracy.

Today's network of federal grant and contract relationships is based on a template established in the early 20th century, when private philanthropists (such as Robert Brookings and the Rockefeller Foundation) created private research institutions (such as the Institute for Government Research, Brookings' progenitor) to serve as levers for the reform of the Federal government (such as the 1921 passage of the Budgeting and Accounting Act, which created the modern budget bureau and Congressional accounting offices).

The informal network of early 20th century relationships -- among private money and private expertise and public agency -- was mobilized for the World War II effort. The research and development required for the War was, of course, immensely expensive, and private philanthropy could not foot the whole bill. Thus, what had begun as an informal set of relationships in which money flowed from the private sector to private experts, was transformed into a set of relationships defined, in primary part, by the government contract and grant. The success of the wartime grant and contract based relationships among government, industry, and university led to the determination to make them a permanent fixture of post war America. When demobilized government researchers returned to the private sector, they continued to work on the taxpayer dollar, under contract and grant.[10] The post-war network in turn spawned new

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[10] Under (on leave MIT official) Vannevar Bush's direction, the wartime Office of Scientific Research and Development:

> would contract out most of its programs to universities, de-emphasizing federal laboratories...The contractor was responsible for results and deadlines, but retained a measure of independence from public supervision. Banking on the patriotism of private citizens...and the hunger of universities for long denied federal subsidy, Bush established the practice of state funded but privately executed R&D. In a matter of months, patterns that had characterized American research throughout history were undone.

Walter A. McDougall, *The Heavens and the Earth: A Political History of the Space Age* (1985), at 67.

Vannevar Bush's memoirs capture the transformation of wartime expedient into post-war governing structure. FDR called on Bush to advice on post war science. Bush recalled:

> It was soon possible to gather together committees on various aspects of the problem, for the men who could contribute were

institutions: "independent nonprofits " (with Rand and Aerospace the prototypes) created to manage Cold War military research and development.

The military's post-war contracting out of weapons R&D and production was not mandated by law; indeed, the seminal text on post war weapons contracting explained that "[t]he preference for private enterprise conduct of U.S. weapons development and production work...is essentially an unwritten law, and, indeed, statutory references seem to contradict it." [11]

The Manhattan Engineer District, precursor to today's Department of Energy (as well as the Nuclear Regulatory Commission and the nuclear weapons component of the Defense Department), established the template for government by third party as the essential means of government, and not a mere adjunct to render services on a "temporary and intermittent basis." Following the core of the Manhattan Project's 1947 reconstitution as the Atomic Energy Commission, the weapons complex continued to perform its work in fundamental reliance on contractors.

The mid-1950's Bureau of the Budget Circular A-49 was the first effort to address the problems of official control posed by the sweeping delegation to "management and operating ("M&O") contractors" of the management of the "government-owned contractor operated" ("GOCO") nuclear weapons facilities -- such as Oak Ridge, Los Alamos, and Hanford.

In 1980, Senator David Pryor's subcommittee of the Government Affairs Committee (Federal Services) sought to take the measure of decades of contracting out, and found that the Department of Energy's 20,000 Federal employees were a small fraction of the 100-200,000 employed on contract. The subcommittee found that; "the reliance on contractors is so extreme that if the terms of its contracts, the resumes of its contractors and their employees, and the contractor work the department adopts as its own are to be believed, it is hard to understand

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> already working together. It did not take five years to come to conclusions, as it sometimes does on such matters; it took only a few months, for there was an extraordinary consensus of opinion. The result was [a report] called *Science the Endless Frontier*. It called for heavy federal support of the scientific effort in the post war scene.

"I was as anxious," Bush recalled, " to get out of government as were nearly all of those who manned the laboratories." See, Vannevar *Bush, Pieces of the Action* (1970), at 56-64.

[11] See, Merton J.Peck and Frederick Scherer's classic study of weapons contracting; *The Weapons Acquisition Process: An Economic Analysis* (1962), at 97.

what, if anything, is left for officials to do." [12]

In 1989-90 Senator Pryor revisited the Department of Energy (as well as many other agencies) and found, among other things, that: (1) DOE knew that, as a rule of thumb, taxpayers were paying $25,000 per person year more for support service contractors to do the work of government than officials cost -- but, because of personnel ceilings, had no other choice; (2) DOE's rules for checking contractors' conflicts of interest were systematically violated; (3) contractor use was so invisible within DOE that the procurement office and the Secretary of Energy did not know that contractors were being employed to write the Secretary's Congressional testimony; (4) DOE was unaware that the contractor it was employing to forward a highly controversial modification to the nuclear nonproliferation treaty before Congress was simultaneously reporting back to the foreign beneficiaries of the modification.[13]

In 1997 S. S. Hecker, Director of the Los Alamos National Laboratory, put the actuality of the weapons complex's fidelity to the "inherently governmental" principle in a nutshell:

> The development, construction, and life-cycle support of the nuclear weapons required during the Cold War were inherently governmental functions. However, the government realized that it could not enlist the necessary talent to do the job with its own civil-service employees. Instead, it enlisted contractors to perform the government's work on government land, in government facilities, using the specialized procurement vehicle of the management and operating (M&O) contract. [14]

If there is a public imprimatur for the new governing principle, it was the creation of NASA. NASA marked the halfway house; the transfer of the military model to a "quasi-civilian"

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[12] See, Staff of Senate Committee on Governmental Affairs, 96th Cong., *Oversight of the Structure and Management of the Department of Energy* (Comm Print, 1980), at 303.

[13] See, "Report to the Chairman of the Federal Services Subcommittee by the Majority Staff," in *Use of Consultants and Contractors by the Environmental Protection Agency and the Department of Energy*; Hearing Before the Subcommittee on Federal Services, Post Office, and Civil Service of the Senate Committee on Governmental Affairs, 101st Cong. 63 (1989).

[14] S. S. Hecker, "Nuclear Weapons Stewardship in the Post-Cold War Era: Governance and Contractual Relationships," April 15, 1997. Historical scholarship suggests that every likely suspect for a platonic "inherently governmental function" --- law enforcement, war fighting, tax collection -- has been performed by a "private" entity at one time or place. The exception may be nuclear weapons management, the "stewardship" of which has always been an "exclusive" government function (performed in heavy official reliance on contractors, to be sure).

agency. NASA, created overnight through the transformation of a small in-house research agency ("NACA"), was designed to depend on contractors for the bulk of its workforce. A court decision stemming from a reduction in force (RIF) of Federal employees at the Marshall space center captures the transition in amber.[15] The federal workers complained that "NASA was employing many technical service workers at Marshall supposedly as independent contractors, but actually with a degree of control by NASA and with other characteristics that made them functionally employees of the United States." The use of contractors, instead of federal employees, they complained, violated civil service laws, the NASA enabling act, and the union collective bargaining agreement.

Indeed, there was apparent conflict within the NASA Enabling Act, which provided that federal employees would perform NASA's basic work, but capped their number, and then broadly provided for the deployment of contractors. The Court of Appeals explained:

> At the same time that Congress enacted the enabling act which compelled NASA to produce a mammoth research effort, 'the number of civil service personnel that could be hired was limited due to personnel ceilings imposed within the Federal Civil Service.' Thus, it is not surprising that support service contracts [were] a way of life at Marshall ...

NASA, the court observed, "resorted to support service contracts as the alternative means of overcoming the civil service personnel ceilings." The court concluded that the enabling act's provision for contractors provided a "separate means, independent of the [the federal employee provision] for performing NASA's functions."

B. The Reformers' Design: Change of Constitutional Dimensions

The writings of the public servants, businessmen, and scholars present at the creation show that the post World War II growth of the contract bureaucracy was the product of design, not bureaucratic happenstance. At the Dawn of the Cold War, reformers believed that the harnessing of private enterprise to public purpose would serve two complementary purposes. First, the private sector would provide both technical expertise and powerful political support for increased federal commitment to national defense and public welfare tasks. Second, the private bureaucracy would countervail against the dead hand of the official bureaucracy and alleviate concern that a growing government meant a centralized Big Government. The officials, consultants, and scholars, saw themselves as engaged in reforms of profound, even Constitutional dimensions.

In his 1965 *The Scientific Estate*, public policy scholar Don Price, first dean of the Kennedy school, described the transformational import of the "fusion of economic and social

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[15] See, *Lodge 1858 American Federation of Government Employees v. Webb*, 580 F. 2d 496 (D.C. Cir.1978).

power" and the "diffusion of sovereignty":

> ...the general effect of this new system is clear; the fusion of economic and political power has been accompanied by the diffusion of sovereignty. This has destroyed the notion that the future growth of the functions and expenditures of governments ... would necessarily take the form of a vast bureaucracy.[16]

This basic and benign reconstitution of government, marveled John Corson, a New Deal civil servant who, at mid-century, opened the management consulting firm McKinsey's Washington office, took place with "little awareness." Corson began his 1971 book *Business in the Humane Society:*

> There is little awareness of the extent to which traditional institutions, business, government, and universities and others, have been adapted and knit together in a politico-economic system which differs conspicuously from the conventional pattern of our past.[17]

Post-war contracting, Corson proclaimed, was a "new form of federalism" under which the federal government gets its work done by private enterprise.[18]

It was left to President Eisenhower, in his farewell address, to provide another portrait of the implications of developments:

> The conjunction of an immense military establishment and a large arms industry is new in the American experience. The total influence, economic, political, and even spiritual, is felt in every city, every state house, every office of the Federal government. We recognize the imperative of this development. Yet we must not fail to comprehend its implications....In the councils of government, we must guard against the acquisition of

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[16] *The Scientific Estate*, at 75.

[17] *Business in the Humane Society*, at iv. Corson noted that, "[e]ven those readers...familiar with the Washington scene, will be impressed with the magnitude and scope of the subsidy, grant, and regulatory processes as they have evolved." *Id.* Corson explained that his understanding of "the nature of this evolution in the American politico-economic system [was aided] by a stimulating group of approximately fifty business and governmental leaders that has met monthly for five years to examine and discuss the adaptations as they become apparent." *Id.*

[18] *Id.*, at 74.

unwarranted influence ... by the military-industrial complex.[19]

C. The 1962 Bell Report: The Highwater Mark of High Level Understanding and Concern

The highwater mark of the dialogue between those who viewed the basic changes in the structure of government with alarm and those who applauded them lies in the 1962 report of a Cabinet level panel convened by President Kennedy, directed by Budget Bureau Director David Bell. The panel was to consider the contracting out of military research and development.[20]

The "Bell Report" addressed the "highly complex partnership among various kinds of public and private agencies related in large part by contractual arrangements." The panel found that, "the developments of recent years have inevitably blurred the traditional dividing lines between the public and private sectors of our Nation."

The panel put its finger on the two characteristics of the new developments that were most troubling then -- and are even more so today. First, the rules enacted to protect citizens against abuse by public servants did not, in important respects, apply to contractors or their employees. In particular, the Bell report noted that pay caps on Federal employees did not apply to contractors and that conflict of interest rules which governed federal employees did not apply to contractors or their employees.[21] The conflict of interest rules applicable to federal employees

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[19] "Farewell Radio and Television Address to the American People", Pub. Papers Par. 421 (Jan. 17, 1961).

[20] "Report to the President on Government Contracting for Research and Development," April 30, 1962, Executive Office of the President, Bureau of the Budget. The report was accompanied by Congressional hearings on "systems development and management" (i.e., the role of Rand, Aerospace and other new nonprofit organizations in the management of Defense activities).

[21] The panel delicately observed the interlocking relationships within the contract bureaucracy:

> [T]here is a significant tendency to have on the boards of trustees and directors of the major universities, not-for-profit and profit establishments engaged in federal research and development work, representatives of other institutions involved in such work..Certainly it is in the public interest that organizations on whom so much reliance is placed for accomplishing public purposes, should be controlled by the most responsible, mature, and knowledgeable men available in the Nation. However, we see the clear possibility of conflict-of-interest situations

did not apply to contractors and their employees on the presumption that they will be overseen by competent officials, who themselves are conflict free.[22]

Second, the panel neatly laid out the seductive psychology which undergirded the new system --- short term rationality, but possibly, long term irrationality. From the vantage of politicians and officials, the choice of contractors to perform new missions made sense; they could be deployed quickly and brought new political support to programs and, in theory, they could be disposed of when no longer needed. In the short run, the employment of contractors to serve vital Cold War needs seemed undeniably reasonable.

However, the panel perceived that the cumulative effects of contracting could be debilitating. The salaries of contractor employees was not capped, and their work was increasingly more interesting than that performed in-house. Because differing rules applied to federal employees and contractors, there would be, over time, a tendency for the intelligence of government to migrate from the official workforce into the third party workforce — thus further eroding the capability of the official workforce to control the third party workforce. Over the long run, the intelligence of government needed to control contractors might only be found within the contractors themselves. The danger was compounded because of the qualitative difference in the interests of contractors, as well as the rules governing those interests.

The report portentously declared the emergence of "profound questions affecting the structure of our society [due to] our inability to apply the classical distinctions between what is public and what is private." Most pointedly, the panel expressed concern that officials would lose control to contractors, particularly where contractors were performing "the type of management functions which the government itself should perform."

The Bell panel deemed it "axiomatic" that certain "functions" can only be performed by officials:

> There are certain [research and development] functions which should under no circumstances be contracted out. The management and control of the Federal research and development effort must be firmly in the hands of full-time government officials clearly responsible to the President and the

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developing...that might be harmful to the public interest.

On this account, as Don Price observed, during the 1950's "no Congressmen chose to make political capital out of an investigation of the interlocking structure of corporate and government interests in the field of research and development." *Scientific Estate*, at 51.

[22] The rules applicable to employees were under wholly distinct review by another blue ribbon panel. See, *Conflict of Interest and the Federal Service; The Association of the Bar of the City of New York Special Committee on the Federal Conflict of Interest Laws*" (1960).

> Congress. We regard it as axiomatic that policy decisions . . . must be made by full-time Government officials clearly responsible to the President and the Congress. Furthermore, such officials must be in a position to supervise the execution of work undertaken, and to evaluate the results. These are basic functions of management which cannot be transferred to any contractor if we are to have proper accountability for performance of public functions and for the use of public funds.

The panel emphasized that the test for government control is one of substance, not form. "There must be sufficient technical competence in the Government so that outside technical advice does not become defacto technical decisionmaking."

In the end, however, even as the report described the problematic nature of the "blurring of public and private" with acuity, it begged the "philosophical" questions thereby raised. Having laid out the problems and their import, the Bell Report backed away from the abyss. The Cold War was no time to address such fundamental issues of governance. The panel explained:

> We have not, however, in the course of the present review attempted to treat the fundamental philosophical issues [discussed earlier in the report]. We accept as desirable the present high degree of interdependence and collaboration between Government and private institutions. We believe the present intermingling of the public and private sectors is in the national interest because it affords the largest opportunity for initiative and the competition of ideas from all elements of the technical community. Consequently, it is our judgment that the present complex partnership between Government and private institutions should continue.

Instead, the task was to learn the best uses of the panoply of new institutional tools - profits, independent nonprofits, universities, and in-house research groups - at hand.

D. The 1960's and 1970's: Government By Third Party on Automatic Pilot

Following the Bell Report's go ahead, third party government grew as if on automatic pilot.The contracting out of military, atomic energy, and space programs was, of course, hardly a secret. The growth of third party bureaucracies as appendages to new "civilian agencies" (such as the Departments of Transportation, Housing and Urban Development and the Office of Economic Opportunity, and the U.S. Environmental Protection Agency) was less visible, but no less exorable. Driven by the force of bipartisan limits on the number of Federal employees ("personnel ceilings"), those directing new agencies and programs had no recourse but to call on third parties to do the work of government. [23] As in the case of the Cold War agencies, the

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[23] The history of personnel ceilings is cataloged by Paul Light in *The True Size of Government* (Brookings 1999).

promoters of third party government viewed third parties as purveyors of new management techniques, but also as tools in the politics of bureaucratic reform. The reformers claimed that social problems could be solved if "institutional obstacles" to change were overcome. [24]

From another perspective, however, government by third party was not a benign reform effort to control Big Government bureaucracies, but a veneer for politics as usual. The "Nixon Personnel Manual," unearthed by Congress during the Watergate hearings, mused:

> In 1966, Johnson offered legislation, which Congress passed, [that] required the Executive Branch...to reduce itself in size to the level of employment in fact existing in 1964. The cosmetic public theory...was that...a personnel ceiling for the Executive Branch would first cut, and then stabilize, Federal expenditures connected with personnel costs...What the Johnson Administration did after passage...was to see to it that "friendly" consulting firms began to spring up, founded and staffed by many former Johnson and Kennedy Administration employees. They then received fat contracts to perform functions previously performed within the Government by the federal employees. The commercial costs, naturally, exceeded the personnel costs they replaced.[25]

E. 1980's and 1990's: Privatizers, Downsizers and Reinventors; Blurring the Boundaries with Abandon

In the 1980's and 90's, smaller government gained popular support around the globe. Citizens, however, generally wanted no diminution in governmental functions. To address this inconsistency, strategies for the reform of governance took hold: reinventing government, public-private partnerships, devolution, privatization, deregulation, the third way, to name a few. These strategies sought to make government more responsive and efficient by engaging nongovernmental actors in its functions.

At the level of the Federal government of the United States, they were forwarded with passing, if any, regard for the fact that the reforms proposed had, in fact, long since taken place. Thus, after identifying the "new" mechanisms for delivery of social services that form the core of

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[24] *See* Guttman and Willner, *The Shadow Government*, for a description of the third party predicated social reform efforts that ran from Kennedy to Nixon Administrations.

[25] "Federal Political Personnel Manual," in *Presidential Campaign Activities of 1972, Senate Resolution 60: Executive Session Hearings Before the Senate Select Committee on Presidential Campaign Activities*, 93d Congress, 8903, 8976 (1974).

"Reinventing Government," Osborne and Gaebler note that "surprisingly" many of these innovations had already been deployed by the Federal government.[26]

Advocates of new governance strategies, acknowledged, even boasted, that application of their regiment would "blur" conventional boundaries. Counseling that officials "steer" and non-governmental actors "row", the authors of *Reinventing Government* (1992) further counseled that innovation not be held back by "outdated mindsets." "We could do well,"they quote public administration scholar Harlan Cleveland approvingly, " to glory in the blurring of public and private and not keep trying to draw a disappearing line in the water."[27]

Upon taking office, the Clinton Administration brought "REGO" front and center, declaring that the initial commitment of the reinvention effort would be the reduction of the federal workforce by 300,000 employees.

The new Bush Administration's Faith-Based- Initiative, for its part, may be seen as heir to the reform tradition; the use of nongovernmental actors to perform publicly funded social services. [28]

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[26] David Osborne and Ted Gaebler, *Reinventing Government: How the Entrepreneurial Spirit is Transforming the Public Sector*, at 30 (1992).

[27] Id., at 39-40.

[28] Significantly, in forwarding the faith-based initiative, the Administration does not suggest that reliance on private parties to perform government service is new; rather, recognizing that we have long done this, it questions the effectiveness of this reliance to date. Thus, an August 2001 White House white paper ("Barriers: A Federal System Inhospitable to Faith-Based and Community Organizations") explains:

> The Federal grants system is intended to put taxpayer dollars to the most effective use by enlisting the best nongovernmental groups to provide various social services....
>
> The Federal Government, however, has little idea of the actual effect of the billions of social service dollars it spends directly or sends to State and local governments....
>
> Billions of Federal Dollars Spent, Little Evidence of Results
>
> ...Although Federal program officials monitor nonprofit organizations, State and local governments, and other groups that receive the funds to ensure that they spend Federal money for designated purposes and without fraud, Federal officials have

At the millennium's start, globalization provides another New Frontier for third party governance -- foreign policy. In 1998, the United States contracted out the administration of the nuclear nonproliferation agreement under which the U.S. purchases Russia's nuclear weapons grade uranium -- placing national security in the hands of a private entity whose legitimate profitmaking interests are in obvious potential conflict with those declared by the Congress of the United States in providing for the privatization.[29] The Clinton Administration also called on a non-governmental entity (Harvard's Institute for International Development) to manage U.S. funds for the restructuring of the Russian state and economy.[30] The now well-publicized failings of these efforts showcased the discrepancy between American readiness to deploy third parties as agents of foreign policy and American ability to deploy the means of accounting for them.

II Today's Federal Government: Actual Principles of Governance

A. Inherently Governmental Function: Fiction and Figleaf

The principle of "inherently governmental" functions was codified by the Executive Branch just as its practical import was being negated by the force of personnel ceilings.

In the 1950s, the Bureau of the Budget included this principle in Circular A-49, which governed Defense/NASA/AEC use of "management" contractors, and Circular A-76, which provided that "commercial" functions should, by contrast, be contracted out.

The policy that only officials can perform "inherently governmental" functions was reasserted in OMB Policy in 1992 (OFPP Policy Letter 92-1) and, for the first time, given express Congressional imprimatur in the FAIR Act.

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accumulated little evidence that the grants make a significant difference on the ground.

The paper is at: http://www.whitehouse.gov/news/releases/2001/08/unlevelfield3.html

[29] The failure of the privatized U.S. Enrichment Corporation (USEC) to abide by statutory purposes that were a condition of its creation has been well chronicled. See, *e.g.*, Matthew Weinstock, "Meltdown," *Government Executive*, February, 2001. In March, 2001, as noted previously, Federal District Court Judge Gladys Kessler found the USEC privatization to be a "model" of what not to do when privatizing.

[30] The story of this failure of public administration is told by Janine Wedel in, "Tainted Transactions: Harvard, the Chubais Clan and Russia's Ruin," *The National Interest*, Spring 2000. In 2000, the United States Department of Justice brought suit against Harvard to recover monies under the False Claims Act.

It is now well appreciated that the principle is not subject to formulaic definition. In 1992, the Comptroller General, prodded by Senator Pryor's inquiries, reported that "GAO's review of historical documents, relevant books and articles, prior GAO work, applicable laws, government policy, and federal court cases showed that the concept of 'governmental functions' is difficult to define." The Supreme Court, as discussed below, has found few examples of "exclusive" public functions.

Moreover, is the test for decisional responsibility one of form or substance? If a Cabinet Secretary signs a document he has not read, does it make a difference whether the document was drafted by officials or third parties?

In 1989, Senator Pryor put the question to the Comptroller General. The Senator asked whether the inherently governmental principle was violated where: 1) the Department of Energy (DOE) relied on contract hearing examiners to review security clearance determinations; 2) DOE relied on a contractor to prepare congressional testimony (including that given by the Secretary of Energy); and 3) EPA contracted out of its "Superfund Hotline."

The GAO declared the test is one of substance, not form. DOE's argument that the Secretary could review the decisions of the (contracted) hearing examiner were not persuasive, nor was the fact that the Secretary of Energy, and not the contractor, appeared before Congress to read the Secretary's testimony. "Our decisions and the policy established by OMB Circulars," the Comptroller General stated, "are based on the degree of discretion and value judgment exercised in the process of making a decision for the government." [31]

If the inherently governmental principle is to have bite in current circumstances, the test for the line between "assistance" and de facto decisional responsibility must be one of substance and not form. But, by the same token, where sovereignty is intentionally diffused, the likelihood that such test will be more than a figleaf is not overwhelming.

B. Employees and Contractors: Dual Regulatory Systems for the Basic Work of Government

American governmental bodies, at all levels of government, possess a long and growing tradition of rules enacted to prevent abuse of power by government "officials." These rules include those that address conflict of interest, assure that government activities are (with limits) "open" to the public, limit the pay for official service, and limit the participation of officials in political activities.

The rules governing federal employees are generally stated in Title 5 of the United States

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[31] See Letter from Charles A. Bowsher, Comptroller General, to the Hon. David Pryor, Chairman, Federal Services Post Office and Civil Service Subcommittee (Dec. 29, 1989).

Code (and corresponding regulations). In addition, Title 18 of the Code contains criminal prohibitions against conflict of interest and other ethics violations. The third party workforce is generally governed by distinct laws and rules (e.g., Title 41 and corresponding regulations).

1. Truth in Government Organization

Employees, but not contractors, are covered by routine practices - such as the publication of agency phone books and organization charts - that inform the public of the name, title, and location of those who serve it. These practices do not, with small exception, cover contractors (or their employees) - even where contractors may work side by side with officials and even outnumber them. Similarly, agency budget presentations to Congress typically identify the number of civil servants in each box of the organization chart by number(s) and pay grade. By contrast, there is rarely disclosure of the number, job titles, and pay grades of contractor employees attached to these organizational chart boxes.

2. Freedom of Information

The work of the official workforce is, with important limitations, subject to the Freedom of Information Act (FOIA). FOIA, by its terms, applies to "agency" records -- contractors, the courts have found, are not agencies – even where it has been found and admitted that they perform decisional roles. [32]

3. Ethics

Title 18, section 208 of the United States Code provides for criminal sanctions for federal employees who work on matters in which they have substantial financial interests. Federal employees are also bound by "Standards of Ethical Conduct for Employees of the Executive Branch." (5 CFR Part 2635). In short, the work of the official workforce is subject to a body of stringent conflict of interest and further ethical provisions. These provisions do not govern the third party workforce.

4. Further Rules

There are further respects in which the rules enacted to constrain official conduct differ qualitatively from those which govern private actors, even where those actors come to work

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[32] *See, e.g., Public Citizen Health Research Group v. Dept of Health, Education, & Welfare*, 449 F. Supp. 937 (D.D.C. 1978) where the court found that the nongovernmental agency had decisional authority over medicaid/medicare reimbursements, and "exercises it daily" – but, nonetheless was not subject to FOIA. In finding that FOIA should not apply, the majority explained that its application to the private actors would constrain the unique qualities of expertise and independence the private actors bring to government decisionmaking.

alongside officials in the daily performance of the work of government. Thus, federal (and local) officials, but not third party workers, are subject to pay caps, restrictions on political activity, and prohibitions on the right to strike.

C. The Tools of Third Party Accountability: Competitors/ Stakeholders. New Tools of Government, and Third Party Law Enforcement

In the Western tradition, the rule of law is presumed to be the core means of holding government to account. In the absence of coherent rules for the governance of third parties who perform the work of government, we have deployed alternative means of accountability. Prominent among them are:

1. Reliance on Competitors/Stakeholders To Keep the System Honest

The use of competitors and stakeholders (sometimes called interest groups or special interests) to keep the system honest has been a core tool of American government,[33] and remains a key tool of accountability today -- as government is increasingly performed by third parties. Thus, agencies routinely convene "stakeholders" to draft rules and set agendas (with contractors employed to "facilitate" the stakeholder discussions.)[34] Thus, the Bush Management Agenda is premised on competition (between officials and contractors, as well as between contractors) as a key means of making the new system work.

These tools are fundamental, but have limits that have long been recognized; competitors and stakeholders do not have equal access to information and the resources needed to act on it -- and, even if where they do, they may not represent the public interest at large.[35] Thus, as the Founding Fathers provided, a structure of government is an essential complement to the interplay of competitors and competing interests.

2. New "Tools of Government" to Manage the New Public/Private Mixes

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[33] The Madisonian concept of "factions," of course, is at the core of our Constitutional system.

[34] Advances in information technology - which permit public access to governmental activities on an immediate and widespread basis - have provided for quantum leaps in stakeholder oversight capability.

[35] Thus political economist Charles Lindblom's classic "The Science of Muddling Through" (1959) extolled the virtues of interest groups as essential watchdogs for good government, but watchdogs who, by virtue of their own interests, may crucially fail to representation the public interest.

There is active effort by scholars and practitioners to understand and deploy "new tools" of government to govern public-private mixes -- grants, contracts, public/private partnerships, privatization.[36] These tools are, in turn, undergirded by modern management wisdom concerning – e.g. the role and structuring of performance contracting, performance-based organizations, performance budgeting.

In the best of times (where official oversight capability is strong) these management techniques have not been panaceas. The promise of "performance" or "incentive" contracting, for example, may be of least value where it is most needed- i.e., when, as with better weapons or better education, the products or services are not easy to define or attain, and the definition of performance may itself change in mid-contract with shifts in political or bureaucratic winds. Similarly, the promise of accountability through the required evaluation of past performance has proved illusory where past performance - even in relatively cut and dried circumstances - is either not readily measurable or is just not measured.

3. Third Party Law Enforcement

The growth of third party government has been accompanied by a sea change in the law of standing (the rights of citizens to take court action where the government, or its contractors, have broken the law), including the standing of contractors to challenge the government contract process, and the standing of other third party beneficiaries of government entitlements or largesse to challenge the integrity of the process by which these dispensations are awarded. The grant of litigation rights to third parties underscores another tension in the process of third party government - the balance between the flexibility ostensibly inherent in the use of third parties and the rights of third parties to due process.

Whether or not the frontiers of third party standing will be pushed back remains to be seen. Questions include the ability of contract beneficiaries other than contractors to challenge procurement decisions, particularly those that allegedly violate the basic policies stated in OMB/OFPP circulars - which the Executive Branch strives mightily to render nonreviewable.

In addition, the False Claims Act (which permits citizens to bring suit in the name of the government to recover for fraud against the government) is playing an increasing role in holding third party government to account.[37]

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[36] See, Lester M. Salamon ed. *The Tools of Government: A Guide to the New Governance* (Oxford 2002).

[37] The False Claims Act appears at 31 U.S. Code Section 3729. The Constitutionality of the False Claims Act was recently confirmed in a decision that has interesting implications for the law of third party government more generally. In *Vermont Agency of Natural Resources v. United States* (2000), the Court indicated that while only government has the right, under our Constitution, to enforce the public interest, this right may be "assigned," as in the False Claims

D. The Default Rulemaking Process for the Law of Third Party Government: Third Party Driven Rulemaking

In the absence of considered Congressional and Executive Branch oversight, the rules governing third party performance of government work are, by default, being made on an case by case basis in which third parties themselves are often the driving force. The resulting rules are essential, but, because of the limited interests of the third parties who drive them, may not completely protect the public interest. The rulemaking process is illustrated in the application of conflict of interest and freedom of information rules to nongovernmental actors who perform the work of government.

1. Organizational Conflict of Interest: Rulemaking and Enforcement By Contractors

The concept of "organizational conflict of interest" (the term for the conflict of interest rules applied to contractors) emerged at mid-century when aerospace manufacturers complained that the location of the initial Project Rand contract within a competitor (Douglas Aircraft) was unfair (because Rand might recommend hardware projects that Douglas would bid on). To resolve the conflict of interest concerns, the Rand contract was spun out of Douglas into a new nonprofit organization.[38] Following a similar episode in the management of the ICBM missile program (which resulted in the creation of Aerospace, another nonprofit, to manage the program) the organizational conflict of interest concept crystallized in the notion of the "hardware ban" – "think" contractors could not be affiliated with entities in the running for the lucrative hardware contracts that flowed from their thoughts.[39]

The essential problem with the organizational conflict of interest concept was that it protected the interests of competing contractors, but did little to protect the interest of the public at large. As the Bell Report noted, the governing boards of the new nonprofits made them intellectual holding companies for the contractor establishment at large. The notion that an independent "public interest" required protection - e.g., an interest above and beyond that of individual contractors or agencies - was a latecomer to organizational conflict of interest policy. It was not until the late 1970's that the notion of a "public interest" – an interest independent of that of the contractor establishment at large – came into being. [40]

Act, to nongovernmental actors.

[38] See Bruce L.R. Smith, *The Rand Corporation: Case Study of a Nonprofit Advisory Corporation* (1966).

[39] The "hardware ban" story is told in H. L.Neiburg, *In the Name of Science* (1966).

[40] See Guttman, *Organizational Conflict of Interest and the Growth of Big Government*; Harvard Journal of Legislation (1978).

The enforcement of organizational conflict of interest prohibitions is an insiders game. There is reason to doubt that - in the absence of vigilance by competing contractors - the rules are enforced with consistent rigor.

Public audits of the conflict of interest review process are few and far between. In 1980, and again in 1989, Senator Pryor's Subcommittee reviewed enforcement in the DOE. The subcommittee's work found systematic failure of implementation. First, the subcommittee found, and the DOE confirmed, [41] that contractors did not comply with disclosure requirements. Often, the failure to disclose was readily apparent when the conflict of interest disclosure was compared to the portion of the proposal in which the contractor touted its experience. Second, the subcommittee found procurement officials, delegated legal responsibility for procurement rules, know procurement rules, but not necessarily the subject matter of the contracts they oversee. The procurement officials relied on program officials to alert them to the significance of the information that is disclosed. Meanwhile, the subcommittee reported, "program officials, who depend on contractors to get their work done, assume that procurement officials will adequately apply DOE conflict rules." Third, program officials may see the indicia of conflict as evidence that the contractor should be hired, and not avoided. From the program officer's perspective, valued expertise may be the flip side of what, to the outsider, is a conflict of interest. [42]

2. Freedom of Information: Third Party Autonomy vs. Third Party Accountability

In the case of public access to contractor-maintained data, courts have repeatedly held that the Freedom of Information Act does not apply to (taxpayer funded) records maintained by contractors, because they are not "agencies" (as required by the act). In doing so, the courts acknowledge that nongovernmental entities are, in fact, making governmental decisions.[43] It was not until 1998, following protest by powerful components of American industry that they lacked access to data underlying proposed EPA rules, that FOIA was amended to provide for access to grantee produced

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[41] See "Contractors Lied on Conflict of Interest, says DOE", Energy Daily, March 27, 1990.

[42] See, "Report to the Chairman of the Federal Services Subcommittee by the Majority Staff," in *Use of Consultants and Contractors by the Environmental Protection Agency and the Department of Energy*; Hearing Before the Subcommittee on Federal Services, Post Office, and Civil Service of the Senate Committee on Governmental Affairs, 101st Cong. 63 (1989).

[43] *See, e.g.*, Court rejection of requests by Public Citizen for access to privately created expert ("PSRO") data even where the data was admittedly "conclusive" to government medicare/medicaid reimbursements. *Public Citizen Health Research Group v. Dept of HEW*, 668 F. 2d 537 (D.C. Cir. 1981).

data underlying proposed regulations.[44] Even so, the rule applies to some kinds of third parties, but not others.

E. The Supreme Court As Default Interlocutor of the New Rules of Public Service

In the absence of coherent Executive and congressional oversight the Court, necessarily on a case by case basis, plays a default role in determining the rules by which third party government will operate and the extent to which non- federal entities vested with public purposes will be constrained by the rules that constrain officials. However, given the obscurity of third party government, the Supreme Court's (and lower court) decisionmaking has not benefited from the context needed to test the logic of the judiciary's necessarily case and fact-specific analyses.

1. The Supreme Court Has Found Few Exclusively Governmental Functions

While the Executive, as discussed above, views the concept of "inherently governmental functions" as "axiomatic," the Supreme Court has not provided the concept with abundant content. In *Flagg Brothers, Inc. v. Brook* (1978), the Court surveyed tradition and precedent to determine whether "binding conflict resolution" was an "exclusive public function." The case involved a claim that a warehouseman's sale of goods entrusted for storage, pursuant to New York State's adoption of the Uniform Commercial Code, constituted state action. The majority reported back that only two activities - elections and the activities of company towns - could be termed "exclusive public functions." The majority noted that "the Court has never considered the private exercise of police functions."

2. The Supreme Court has Declared Readiness to Look Beyond Form to Substance to Determine if Constitutional Protections Apply

Lebron v. National Railroad Passenger Corporation (1995), is a bookend to *Flagg Brothers*. *Flagg Brothers* shows that the Supreme Court is ill inclined to find many "exclusively public" functions. *Lebron* shows that the Court is willing to override even express congressional declaration that an entity is not a governmental actor.

Lebron dealt with Amtrak's refusal to permit an artist to post his work in a station. Amtrak is a "government corporation" pursuant to the Government Corporation Control Act. In creating Amtrak, Congress took pains to free it from constraints otherwise applicable to agencies (e.g., federal procurement rules). Most directly, Congress declared that Amtrak "will not be an agency or

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[44] The Shelby Amendment, enacted as part of the Fiscal Year 1999 Omnibus Appropriations Bill, directed OMB to "require Federal awarding agencies to ensure that all data produced under an award will be made available to the public...under the Freedom of Information Act." Pub. L. No. 105-277, 112 Stat. 2681 (1998).

establishment of the United States Government."

Justice Scalia, for the majority in *Lebron*, explained that the Amtrak statute "is assuredly dispositive of Amtrak's status as a Government entity for purposes of matters that are within Congress's control," for example, the applicability of the Administrative Procedure Act, the Federal Advisory Committee Act, and federal procurement laws. But, he explained, "it is not for Congress to make the final determination of Amtrak's status as a Government entity for purposes of determining the constitutional rights of citizens affected by its actions."

On review of the circumstances surrounding Amtrak's creation and operations, including the public purposes mandated for Amtrak in the statute and the appointment of a majority of the Board members by the President, the majority held that Amtrak "is an agency or instrumentality of the United States for the purpose of individual rights guaranteed against the Government by the Constitution."

Lebron evinces the readiness of the Court to serve as active arbiter of "public" status (for purposes of the Constitution). Congress cannot immunize an entity from public status by sheer declaration. Private entities assigned public purposes cannot "evade the most solemn obligations imposed by the Constitution by simply resorting to the corporate form."

At the same time, *Lebron* shows that the tension between the autonomy and accountability of third parties is constitutionally rooted. It may be desirable to render entities like Amtrak free from the constraints applied to officials, because such freedom will permit them to more efficiently pursue the public purpose. But to the extent that the purpose remains a public purpose, the Constitution may require that the entity be constrained as if still in official hands.

III. The Legacy of 20th Century Reform: What Should Be Done?

A. The Default Option: Muddling Through

In the absence of Congressional and Executive Branch attention, new rules have, in fact, been evolving to govern the diffusion of sovereignty.[45] The default system has virtues – it works sporadically, and the new rules can be discerned through diligent inquiry. But it is suboptimal – it favors "accident and force" over "reflection and choice."[46]

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[45] For a fuller treatment of these developments, see Guttman, *supra*, *Administrative Law Review*.

[46] See *Federalist Paper No. One* (the country must decide "the important question, whether societies of men are really capable or not of establishing good government from reflection and choice, or whether they are forever destined to depend for their constitutions on accident and force."

The salient characteristics of the new rulemaking process are:

(1) third party governance rules are not developed on a systematic, coherent, and considered basis; rather, they develop as third parties with the clout to point out the need for rules do so, with courts playing an important default role in attending to the concerns;

(2) the rules do not preclude private actors from performing governmental functions, but oblige those who do so to follow selected rules of the kind that impose constraints on officials in similar settings;

(3) the new rules reflect the interests of the third parties that call for them, but not necessarily the interest of the public at large. There is no assurance that the larger public interest will be served;

(4) There is a tension inherent in the reliance on third parties; the design to call on private actors, runs the risk of governmentalizing them, and thereby negating the initial logic behind their deployment. Third parties are employed because they are said to qualitatively differ from civil servants (*e.g.*, they are entrepreneurial and flexible while civil servants are risk averse and hidebound). Rules that render private parties accountable to public purposes may alter the qualities that made them desirable . (By the same token, the drive to make the civil service more "entrepreneurial," "customer-responsive," and "businesslike" may dilute or negate the qualities valued in the civil service at the start.

Thus, in denying citizens Freedom of Information Act access to admittedly decisional data maintained by universities and other nonprofits, courts repeatedly cited the Congressional determination that the imposition of such constraints on such institutions would dilute the autonomous qualities which made them desirable sources of expertise.[47] Following the enactment of the Shelby amendment, hundreds, perhaps thousands, of nonprofits complained to OMB that this would be the effect of the law. The current debate on federal funding of faith based organizations has raised similar concerns about the "governmentalization" of these organizations.

B. The Preferred Option: Truth in Government: Executive and Congressional Review of the Public Workforce as a Whole

The alternative to the current "default" rulemaking process is self-evident; the Executive and Congress should view the federal workforce as a whole. This would require abandonment of the fiction that government equates to the official workforce. While the outcome of this effort cannot, and should not, be predicted, the initial steps seem clear:

(1) Periodic reviews of Federal personnel and procurement policy can no longer be "stovepiped," as if there were no relationship between the integrity of the federal workforce and the

[47] See, e.g., *Forsham v. Harris*, 445 U.S. 169.

utility of the contractor workforce.

(2) The third party workforce must be rendered visible -- to Congress, officials, and the public. Federal budgets, organization charts, and agency directories provide details on the Federal workforce; there is no such detail on the third party workforce, even where it works in Federal buildings and even where it outnumbers officials. Inside agencies, as well as in transmissions to Congress and the public, third party prepared materials are presented as if they were the handiwork of officials.

(3) There must be public review and comparison of the differing rules that apply to Federal employees and to non-governmental actors in the performance of the government's work. The rules to be reviewed would include those governing ethics, pay, political activity, and transparency.

C. An Option in Either Case: A Revived Public Law Tradition

Whether the country continues to muddle through or steps back to look at the Big Picture, the legal fiction of "government regularity" has inhibited the deployment of traditional legal principles to order the performance of public purposes by private actors. If it is assumed that third parties do not exist and/or do not have *de facto* responsibility for public purposes, there is little reason to invoke the tradition.

Our legal tradition has long recognized that private actors may perform public purposes. This, for example, is the common law premise of modern public utility regulation.[48] This tradition includes concepts such as the (non)delegation doctrine, the "government instrumentality", and the "public utility." It also includes experience in translating publically derived obligations to private actors. This tradition remains to be mined. [49]

This concludes my testimony.

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[48] *See, Munn v. Illinois* (1876).

[49] See, Guttman, *Public Purpose and Private Service*, at 920-923, for further discussion of this tradition.

Testimony of

U.S. Senator Craig Thomas

Hearing before the Senate Committee on Government Affairs

"Who's Doing Work for the Government?: Monitoring, Accountability, and Competition in the Federal and Service Contract Workforce."

Wednesday, March 6, 2002, 9:30am

Room 216 of the Hart Senate Office Building

Mr. Chairman, members of the subcommittee, it is my pleasure to appear before you to discuss the federal government's outsourcing program.

This is an issue in which I have been active since my days in the Wyoming legislature, when I discovered that a State-owned and operated laboratory was duplicating and competing with the private sector. I have long found it troubling to learn of instances where the government is conducting functions and activities that are commercial in nature and I believe it is inappropriate for the government to be involved in work that you and I can obtain from companies on Main Street in Casper, Wyoming or Peoria, Illinois.

Since 1955, it has been the Federal Government's policy that it "will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels".

That policy, originally set forth in the Bureau of the Budget Bulletin (55-4), has remained on the books for almost 50 years and has been endorsed by Republican and Democratic Administrations.

Congress made historic progress in the effort to remove the Federal government from competition with the private sector with the enactment of legislation I introduced in 1998 called the Federal Activities Inventory Reform or FAIR Act (Public Law 105-270).

Enactment of the FAIR Act was a major step toward remedying a problem that has existed for almost the entirety of the 20th Century. As far back as 1932, a Special Committee of the House of Representatives expressed concern over the extent to which the government engaged in activities which might be more appropriately performed by the private sector. The first and second Hoover Commissions expressed similar concern in the 1940's and recommended legislation to prohibit government duplication of private enterprise. However, there was no formal policy until 1955, when Congress pressured the Executive Branch to take action. The Executive Branch implemented the policy administratively and the Bureau of the Budget Bulletin thus prohibited agencies from carrying on any commercial activities which could be provided by the private sector.

However, during those 50 years, Congress and the American people never knew whether agencies were complying with the policy. The FAIR Act was enacted to ensure that the government was not engaged in commercial activities that could be performed by the private sector.

Since its implementation in 1999, the FAIR Act has shown that nearly 1 million Federal employees are engaged in commercial activities -- services you can find in the Yellow Pages from small business and other firms in cities and towns across America. These government activities duplicate capabilities in the private sector, compete with the private sector, and divert Federal funds from more pressing needs that only the government can provide.

However, even the FAIR Act does ***not*** directly address activities in which the Federal government is competing with the free enterprise system that can be performed by private enterprise in the free market economy. While the FAIR Act addresses government activities that ***duplicate*** the private sector, the law does not specifically address those functions of the government that ***compete*** with the private sector.

Mr. Chairman, I am here today to express my strong opposition to S. 1152, the so-called TRAC bill and to reiterate the need for additional, not fewer, actions to reduce government competition with the private sector. My opposition is based on three general points:

1) I view this bill as an effort to repeal or at least cripple, the FAIR Act. My bill was enacted as a result of long negotiations among the House and Senate, Republicans and Democrats, Congress and the Clinton Administration, industry and the government employee unions;

2) S. 1152 requires time-consuming, costly and burdensome cost comparisons on activities that are currently contracted-out, in an effort to bring them back in-house. I oppose this as (1) that idea was suggested in this committee's mark-up of the FAIR Act, and it was rejected, (2) that idea is inconsistent with more than 45 years of Federal policy, and (3) there is not a single study that shows this would save time or money, or provide efficiency or innovation to government operations;

3) S. 1152 does nothing to expedite or in any way facilitate the process of reviewing or evaluating for potential private sector performance, the nearly 1 million Federal positions that the agencies identified under the Clinton Administration pursuant to the FAIR Act inventory requirement which highlights federal positions that are commercial in nature.

I fear that S. 1152 would actually result in a government shutdown by severely limiting the ability of Federal agencies to continue to contract with the private sector for the commercially-provided activities.

There are many benefits when the government contracts with the private sector.

- Government competition stifles economic growth in the private sector, particularly among small businesses;

- Utilizing the private sector generates more taxable revenue by private, for-profit firms, since government entities pay no income, property or sales taxes. Significant revenue can be claimed not only by the Federal government but by State and local government as well, thus expanding the Federal, State and local tax base;

- When the federal government contracts with the private sector it not only creates more jobs but it allows federal agencies to refocus their core missions such as inherently governmental activities;

- When the federal government performs commercial activities it manipulates the market price. Since there are a limited number of users, the consequence is that all taxpayers subsidize the sale of products and services that only a small portion of the citizenry actually utilizes or consumes;

- The record is clear that using the private sector is ***not*** a back-door effort to eliminate federal jobs. The record shows that fewer than 10% of employees are involuntarily separated due to outsourcing. Employees are reassigned to

higher priority, inherently governmental functions within their agency, are transferred to positions in other agencies, take jobs with the private contractor, or accept a buy-out or early retirement offer. Thus, we can allay the fears of Federal employees about downsizing due to the fact that a "soft landing" clearly exists for those affected by the transition of activities from the government to the private sector;

- Studies by the Center for Naval Analysis and other organizations show that on average, the government saves 30% when an activity is outsourced;
- Agencies using the private sector report that this strategy provides access to personnel and skills that cannot be efficiently recruited or retained in the civil service system;
- Contracting for services provides the government agencies access to innovation and technology that cannot be as easily accessed within the government and cannot as efficiently be created or maintained within the government;

In other words, the outsourcing option allows the government to get commercially available activities performed better, faster and cheaper than it can in-house.

Congress should enact legislation that would prohibit government agencies and tax exempt and anti-trust exempt organizations from engaging in commercial activities in direct competition with small businesses.

I appreciate the opportunity to testify today and I offer my assistance in working with the Committee, as we did when we passed the FAIR Act, to further advance the implementation of a fair, equitable, cost effective and efficient outsourcing program.

AMERICAN COUNCIL OF ENGINEERING COMPANIES

STATEMENT OF THE AMERICAN COUNCIL OF ENGINEERING COMPANIES *BEFORE THE* SENATE GOVERNMENTAL AFFAIRS COMMITTEE'S *HEARING ON* FEDERAL AND SERVICE CONTRACT WORKFORCE

MARCH 6, 2002
9:00 A.M.

The American Council of Engineering Companies is pleased to provide this statement to the Senate Committee on Governmental Affairs for it's hearing on the Federal and Service contract workforce.

The American Council of Engineering Companies (ACEC) is the business association of the engineering industry, representing over 6,000 private engineering companies in the United States totaling over 500,000 employees. These firms range from large, multi-disciplined, architectural and engineering firms to small business and minority owned firms. Regardless of size, ACEC members deliver vital infrastructure services to the American people including the design and construction of roads, airports, power plants, and waste water treatment facilities, the safe disposal of unexploded ordnance (UXO), the cleanup of superfund sites and most recently, cleanup of anthrax from the Hart Senate Office Building. The quality and innovation that ACEC's member firms bring to our built environment ensures the safety of those who ultimately pay for these services – the US taxpayer.

The federal government has long benefited from the expertise of private engineering firms. ACEC member firms would choose to offer more of their talents to the government if more of its commercial activities were open to the private sector. Federal Civilian Workforce Statistics, a document released by the Office of Personnel Management in September of 2000, suggests that there is much room for improvement. The report identifies over 123,000 engineering and architectural positions within the federal government. Many of these individuals are performing work that is not inherently governmental and thus, directly competing with private industry.

Outsourcing as a Management Tool

The debate that is currently taking place regarding the outsourcing of government commercial activities occurs at a critical time for the US government. As federal agencies face tight budgets and a looming human capital crisis, the need to efficiently allocate scarce resources has become increasingly important. In order for federal agencies to provide the best service to US taxpayers, they must concentrate on strengthening their core (inherently governmental) mission and outsource other activities to private industry. Outsourcing is a proven management tool that directly contributes to enhanced performance

through improved quality, reduced standby costs, increased innovation, and access to technical expertise not available in-house.

- ***Improved Quality:*** Outsourcing provides a direct source of accountability and responsibility by tying contractor compensation to the successful implementation of contracts. The increased trend towards performance based contracting at the federal level means that contractors are even more accountable for delivering quality services within budget. As past performance is also a key determinant in securing new work, most contractors are vigilant in ensuring that their work meets or surpasses a client's expectations. Contractors who deliver low quality services fare poorly when bidding on future contracts. Our free market system delivers the ultimate accountability by quickly weeding out underperforming contractors.

- ***Reduced Standby Costs:*** Most public agencies have found that it is not cost efficient to retain highly specialized individuals for work that is infrequent and use outsourcing as a means to easily draw upon a reliable pool of expertise. One of the key benefits of outsourcing is that it allows agencies to better accommodate fluctuating demand for labor, thereby reducing standby costs. Following the Loma Prieta and Northridge earthquakes, Caltrans, the state transportation agency, began an intensive seismic retrofit project of all California highways. In fiscal years 1996-97, Caltrans purchased 1,250 man-years of highly specialized seismic design work from private engineering firms. Once the work was completed, the firms redeployed the engineers to other assignments around the globe. Had Caltrans decided to perform the work in-house, it would have had to lay off these engineers or maintain a staff that far exceeded its need for this expertise.

- ***Increased Innovation:*** When private firms are required to compete for government contracts, a climate is created that spurs new ideas and innovative thinking. This is especially true when government specifies desired results and requires a contractor to develop innovative methods of achieving those results.

- ***Access to Expertise:*** As private engineers are exposed to a wide variety of clients with challenging projects, they often bring unparalleled experience to their assignments. To again use California as an example, many engineers who participated in the Caltrans seismic retrofit program took their experience to other seismically active areas of the world such as Turkey, a country whose government did not possess strong capabilities in this area. By tapping the expertise of the American engineering community, the Turkish government helped to dramatically improve the safety of its infrastructure, and as a result, thousands of lives will be saved should another devastating earthquake hit that nation.

Major Challenges Facing Government Outsourcing and Suggested Initiatives

While it is clear that outsourcing is a valuable management tool, it is also recognized that it may not be appropriate for all situations. Ensuring that outsourcing makes good business sense is one of the major challenges facing public agencies when determining what and how much to outsource to private industry. In the past, many public sector agencies approached the concept of outsourcing in an ad hoc manner that focused more on cost cutting than improving overall performance and efficiency. Unfortunately, this has sometimes led to less than perfect results.

ACEC proposes that Federal agencies approach the question of what to outsource by applying basic business principles that stress the importance of focusing on core competency. The 1993 Government Performance and Results Act (GPRA) and the strategic planning process that it engenders may be an excellent vehicle by which to identify functions that are not within an agency's core competency and thus, able to be outsourced. GPRA mandates that agencies create strategic plans, set performance goals and report on progress in achieving them. As agencies go through this process, they should consider

outsourcing initiatives that make sense from the standpoint of improving efficiency and focusing on core competency.

Another challenge facing the federal government as it continues to outsource is how to confront the human capital crisis that is increasingly evident. Contract managers within these agencies are, for the most part, well trained, highly motivated, and competent. They are technically knowledgeable and capable of prudently negotiating scope and budget to accomplish the work at hand. They care about their work and perform in the best interest of the taxpayers. However, many are approaching retirement age and we are concerned as to who will replace them.

On the other hand, some ACEC member companies are engaged in building design work for the Navy, the Post Office, the Corps of Engineers and the Air Force report that in professional architects and engineers employed by the government lack the ability to write performance work statements. Members report that many professionals in government are too involved with design details and don't understand how to write a work statement for architectural and engineering design of building projects. Additional training for government architects and engineers should include mentoring of junior staff as well as formal education on project management, contract administration, scoping, budgeting and scheduling.

Low Price as a Deciding Factor in Competitions and the Role of Best Value

While the discussion of whether or not to outsource government commercial functions has often been portrayed as a battle between government employees and private contractors, the real issue is ensuring that the government achieves the best value for the taxpayer.

While many competitive contracts are awarded on low cost, Federal law (40 U.S.C. 541 et. seq.) requires that architectural, engineering and design related services be procured on a two-step, best value basis: first, selecting the best-qualified team and second, negotiating the most favorable scope and fee. This law is often referred to as the Brooks Act or Qualifications Based Selection (QBS). Using this procurement method, competition is significant and heated. However, rather than price, qualifications is the determining factor in awarding a contract. The winning contractor must demonstrate best qualifications for the specific project and services. This includes not only successful firm experience with the specific project type, but also availability and commitment of specific senior professionals to manage and accomplish the assignment. In the event that the government is unsuccessful in reaching an agreement on project scope and fee with the most qualified contractor, the second most qualified contractor is engaged in a negotiation. Through QBS, taxpayers are guaranteed to receive best value as the most qualified firm is selected at a fair price. ACEC believes the public would be well served if more projects were procured using a process similar to QBS.

Impact of S. 1152 on the Contracting Community and Federal Government

ACEC is particularly interested in commenting on S 1152, legislation that Senator Richard Durbin introduced last June. Many ACEC members are veterans of a similar battle that occurred in the State of California. In 1998, the Professional Engineers in California Government (PECG) introduced Proposition 224 which aimed at severely limiting outsourcing. The reasons were similar to the reasons articulated by the representatives of federal employee unions -- chief among them was the supposed high cost of contractors. The PECG union argued that a cost comparison is the only fair way to choose the design team. What they didn't say is that their proposed method of comparing costs was anything but fair as it would only take into account the marginal costs of state work and compare them with the total cost for private work. In other words, state costs were only the incremental costs of doing another assignment and did not include a pro-rata share of the cost of the agency. If a fair process for cost comparison were found, it would involve rewriting the accounting program for state government. And each competition would require a long process of solicitation within various government agencies and locations throughout the state-- an untenable situation.

Another issue that was raised during the Proposition 224 campaign was accountability. PECG advanced the notion that an additional 25% of the consultant fee amount would be required to fund quality control over a contractor's work. Our industry has successfully argued that regardless of whether the work is done by private consultants or internal staff, the same process of quality control and accountability is appropriate. Caltrans has come to our industry's point of view and is currently installing just such a process with our input.

Despite the attempt by the PECG union, 62% of California voters rejected the idea that the use of private design consultants by state and local public agencies should be severely limited. A huge coalition, including private sector unions, local governments, broad based business groups, taxpayer groups, contractors, transportation groups, and architecture and engineering organizations vocally opposed Proposition 224.

Following defeat of Proposition 224, the engineering industry led a coalition that sponsored a ballot measure to change the California State Constitution to specifically allow state and local governments to outsource architectural, engineering and other design related services. In approving the measure 55% to 45%, voters established public policy in California that state and local government should take advantage of commercially available services in delivering government to the people of the state.

Along with other federal contractors, the engineering industry was disappointed that the TRAC bill was reintroduced this year. The bill alleges to be about bring truthfulness, responsibility, and accountability to federal contracting, but instead is an attempt to halt government outsourcing, and increase the federal workforce regardless of cost or quality. The legislation is not only out of step with current trends in federal procurement, but it's also out of step with the advice that multilateral development banks give to former Soviet bloc countries as it would dramatically increase the size and scope of government.

As with the PECG initiative in California, this legislation is based on a flawed assumption – that government contractors are not held accountable for cost or performance. Performance of outsourced functions is routinely measured and monitored in the federal system. On federal projects that my firm has worked on, the government held us accountable for cost, schedule, quality, safety and innovation. As stated earlier, the private sector bears the ultimate accountability – if work is continually performed poorly, the contractor will eventually go out of business.

If passed, S.1152 would have a devastating impact on the private engineering industry as it would slow down While the bill does not impose the moratorium on contracting that the companion bill in the House does (H.R. 721) the requirement that OMB certify that Federal agencies are complying with the unattainable provisions of S. 1152 within 180 days would lead to a suspension of service contracting. S. 1152 would bring millions of dollars in infrastructure projects to a grinding halt and would jeopardize public safety.

The legislation would require extensive public-private competitions, which typically take three or four years to conduct, before any existing contract could be renewed or recompeted, whether or not the functions performed under the contract ever were, could be, or should be performed by the government. Furthermore, this provision would reverse the 30 year old law requiring that engineering services be procured on a QBS basis. In short, the call for increased public-private competitions which are selected on lowest price is not a good model for the future. Again, the focus should be on achieving best value.

Commercial Activities Panel

The engineering industry is concerned about the reintroduction of S. 1152 in that it comes at a time when the General Accounting Office (GAO) convened a national panel to review the performance of

commercial activities, public-private competitions, and other related issues. This panel is due to report its findings to Congress in May of 2002. Any attempt to advance legislation (either pro- or anti-outsourcing) that would interfere with the panel's deliberations would be precipitous.

The engineering industry is fully engaged in the work of the Commercial Activities Panel and is hopeful that significant reforms to the outsourcing of government commercial activities will be included in the panel's report to Congress. We remain hopeful that during their deliberations, panel members are mindful of the spirit of OMB Circular A-76 which reads:

> ***"In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs."***

ACEC truly hopes that the wisdom that prevailed over 45 years ago continues to be recognized today.

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March 19, 2002

Senator Joseph Lieberman, Chairman
Senator Fred Thompson, Ranking Member
Senate Governmental Affairs Committee
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Senators:

The Committee held hearings on March 6, 2002, titled "Who's Doing Work for the Government? Monitoring, Accountability, and Competition in the Federal and Service Contract Workforce." During the course of testimony, questions were raised about the accuracy of the estimated contractor workforce in my book, *The True Size of Government*. In an effort to make sure the record presents a fully rounded discussion as the Committee considers legislation to track the contractor workforce, I would like to submit the following information.

You may recall that most of the criticism came from Stan Soloway, president of the Professional Services Council, which represents contractors. Mr. Soloway's primary complaint is that my estimates over-state the true size of government because they count indirect jobs created through contracts.

1. It is important to note that the estimates in *The True Size of Government* are just that, estimates. The federal government has never had the resources or interest to track contract-created jobs through a census of some kind, leaving scholars like myself with the only option available, meaning estimates. As I noted in *The True Size of Government*, the estimates are a conservative illustration of just how big the federal government's workforce might be if we counted all contract-, grant-, and mandate-created jobs.

2. On that point, Mr. Soloway ignored the substantial number of estimated jobs created through federal grants and mandates, which together account for more federally-created jobs than contract-created jobs. Nor did Mr. Soloway address the stunning increase in jobs created through service contracts. The vast majority of contract-created jobs are currently in the service industry, a category that covers everything from janitorial and security services to computer program and management analysis.
3. Mr. Soloway reserved his harshest criticism for the use of the Bureau of Economic Analysis' input-output model of the U.S. economy. It is important to note that this model is the gold

standard for estimating labor impacts, and has been tested, validated, and affirmed in study after study. If one is to estimate the impact of a dollar spent on contracts, this is the methodology to use. Economists long ago decided that it is not enough to merely estimate the primary job created by a dollar of spending, be it a dollar of private or public spending.

4. The methodology used in *The True Size of Government* is extraordinarily inexpensive, and imposes absolutely no burden on contractors. Short of ordering contractors to submit detailed estimates of their own, I would argue that this is the way to proceed. I suspect Mr. Soloway's members would be concerned at the implication that Mr. Soloway might prefer a hard headcount to the kind of arms-length estimating methodology I have used. If not my methodology, Mr. Soloway, then what?

5. The estimating methodology used in *The True Size of Government* gives us the opportunity to track changes over time dating back to 1984. This gives us the chance to monitor trends in employment patterns such as the dramatic decline in defense-related contracting, the rise in grant-created jobs in agencies such as the National Highway Administration, and the overall shift in share of contract-created jobs from defense toward domestic.

6. My basic argument is not that government positions are being replaced on a job-for-job basis, but that the true size of the federal government's workforce can only be understood by counting jobs in all sectors. Contractors, grantees, and state and local employees who work under federal mandates are federal employees of a kind and should be counted as such. Their work is no less the work of government today than it was sixty years ago.

It is not entirely clear why Mr. Soloway would belittle my data. His organization has made no effort whatsoever to supply its own estimates of the contractor workforce and has steadfastly resisted all legislative and executive efforts to require a hard headcount of his constituents. Ironically, his case against my methodology actually strengthens the case for legislation to track contract headcount more deliberately.

This is not to say my model could not be improved and refined. After all, the analysis had never been attempted until I teamed with Paul Murphy and Eagle Eye Publishers, Inc. But until Mr. Soloway or others actually make the effort to do a hard headcount, I submit that methodology used in *The True Size of Government* is still the best, most cost effective, and least burdensome, available.

Sincerely,

Paul C. Light
Vice President and Director of Governmental Studies

Testimony Submitted for the Record
By the Contract Services Association and National Defense Industrial Association
To the Senate Governmental Affairs Committee
Federal and Service Contract Workforce
March 6, 2002

This statement is being submitted for the subcommittee hearing record on behalf of the members of the Contract Services Association of America (CSA) and the National Defense Industrial Association (NDIA).

CSA is the premier industry representative for private sector companies that provide a wide array of services to Federal, state, and local governments. CSA members are involved in everything from maintenance contracts at military bases and within civilian agencies to high technology services, such as scientific research and engineering studies. Many of our members are small businesses, including 8(a)-certified companies, small disadvantaged businesses, and Native American owned firms. The goal of CSA is to put the private sector to work for the public good.

NDIA is the largest defense-related association, representing approximately 24,000 individuals and nearly 900 companies, which employ the preponderance of the nearly two million men and women in the defense industry. Our corporate members range from mega-defense companies to small businesses. NDIA's individual members are drawn from the ranks of government, academia and industry. NDIA is a non-partisan, educational organization committed to advocating the interests and views of the defense industrial and technology base.

Introduction

The role of Government contracting has entered an era of rapidly changing, commercially driven technological advances. A healthy, competitive and innovative industry meeting the Government's needs, specifically those of our defense industrial base (particularly in this time of national crisis), should be closely integrated with the commercial marketplace.

The Road to Acquisition Reform

During the height of the Cold War, the Department of Defense (DOD) had substantial budgets and its weapons systems were essentially defense-unique. Not much attention was even paid to civilian agencies. All that has changed in the last ten years. Tremendous advances have been made in the commercial sector in technology – no longer is the Government on the leading edge, but rather it is the private sector, with the Government lagging far behind. Recognizing this, Congress enacted a series of important acquisition reform initiatives. These all contributed to a more functional, effective acquisition process aimed at allowing the Government to purchase goods and services in the commercial marketplace, as well as strengthening the national industrial base. As President William J. Clinton noted, when signing into law the Federal Acquisition Streamlining Act (FASA), acquisition reform is intended *"to build the confidence of the American people in Government and to empower those people who work for the Government to make the most of their jobs and make the most of taxpayers' dollars."*

Indeed, reforms like best value procurement and performance based acquisition have changed both the practical and, just as importantly, the philosophical foundation of Federal contracting. For instance, the use of past performance as a selection criteria should help contracting professionals feel more comfortable with the awardees selected for given contracts – knowing that the contractor has an established track record of providing quality services, and for being responsive and responsible. And that can only result in better business relationships all around. The same is true with the broader application of performance-based acquisition initiatives and, of course, the still too little utilized concept known as partnering.

These initiatives can improve the credibility of the processes involved, and of the contractors themselves. That, in turn, should eventually help reduce some of the psychological barriers to increased outsourcing and privatization that we see today.

Acquisition Reform and Outsourcing

The issues of outsourcing and privatization are among the most prominent and important issues facing the Federal

government. Indeed, much of what has been accomplished in the area of acquisition reform can and must now be applied to a more aggressive and comprehensive policy of competing commercial activities currently performed by Government agencies.

Since the founding of our country (and up through World War II), private sector support was standard. It was only during the Cold War when we experienced a huge buildup of Government operations that we came to think of Government support as the norm. In a sense, we're now going "back to the future." Over the past decade, we've begun to look for new opportunities to contract out and privatize. There are many examples of successful transitions, including aircraft maintenance, environmental remediation, food establishments, grounds maintenance, and water treatment plants at our defense facilities. And, we've privatized the security police and civil engineering functions at many civilian facilities. We've gradually extended private support to cover the entire range of service and support functions.

A. Rewards are well worth the effort

There are many advantages we can realize as a result of privatization and outsourcing. In many cases, the Government can become entangled in its own power, stifling creativity and productivity. Government agencies responsible for supplying goods and services, therefore, often miss out on the drive stimulated by the private sector within the global market.

We should look at outsourcing and privatization as an opportunity, not a crisis, and keep an open mind to constructive alternatives and new possibilities. As an old Chinese proverb says, "man who says it cannot be done should not interrupt man doing it."

Outsourcing is a response to practical considerations such as budget cuts and fewer people. But more fundamental, it's the right thing to do. We're responding to American taxpayers who demand and deserve fair value for the government's expenditures. It's yet another way of exercising an increased level of stewardship over the public purse.

B. What it's all about

Outsourcing and privatization are not about cutting services. Neither is it a question of doing "more with less." And we are certainly not talking about a loss of capability. It is about changing the source of a service. It's about becoming more efficient, saving money and, in the case of the United States military, maintaining combat capability and improving performance and readiness.

Competitive sourcing offers several advantages. By competing in-house staff commercial activities against the private sector, Federal agencies are forced to look at how they perform their missions and incorporate new and innovative methods to reduce time and cost. The end result, whether a service stays in-house or converts to contract, is improved performance, more efficient use of resources, and savings that can be used for modernization.

The U.S. private sector's restructuring experiences of the last decade yield an important lesson that is worthy of mention. Concentrating on core expertise and spinning off the rest contributes to the bottom line. In the Pentagon's case, the "bottom line" is measured in terms of readiness and modernization. Outsourcing and privatization can do for defense what it did for America's leading edge businesses – free up resources to concentrate on core competencies. In the end, the Federal government must accept this undeniable fact – when it comes to running commercial-type operations and services, the private sector has "built a much better mousetrap."

The Demand for Competition and a Fair Process

Outsourcing offers a chance to become more efficient in an increasingly demanding environment. Economically, there are obvious reasons for the switch. It all comes down to capitalizing on the advantages of the market. Competition pushes costs down, keeps output attractive, and gives the consumer a choice, increasing the options. Finally, a Government agency does not always have the impetus or the funds to keep abreast of the latest technology, to find the newest cost-saving developments, or to innovate – but the private sector does.

We are not advocating that all Government services be contracted to the private sector. But as we continue to

reinvent Government we must focus on competition. And that focus requires a balanced, responsible and unyielding commitment to exploring new ideas, challenging old prejudices and looking carefully at what services the Government must provide. It also requires a careful examination of who, inside or outside of Government, is in the best position to provide each service in the most efficient and effective way. This means, too, that the Government should adopt from the best of private enterprise those tools that foster the necessary incentives and rewards for high performance. And it must follow a fair process designed to protect the interests of the taxpayer and address the legitimate concerns of the current Government workforce while, at the same time, ensuring that the Government operates in a maximally efficient manner. Above all, we must foster a process that is reliant on competition – and the private sector.

The Need to Address Acquisition Workforce Issues

The role of retraining and job placement is a vital one – and it is an area in which the services industry is ready and willing to assist. The ability of the acquisition workforce to implement and embrace changes hinges on the training and assistance that accompanies it. And it hinges on the degree to which that training is based on, and communicates, a real-world understanding of the competitive commercial marketplace. Because of the importance of outsourcing issues to the Government procurement process, we recommend that procurement officials be provided with special training in the requirements of the A-76 process

For the most part, problems that have been identified in connection with the management of service contracts can be traced to inadequate guidance and training for the acquisition workforce. The acquisition workforce dedicated to services contracting is often times far-flung and located in remote areas since local activities contract for their own support services. This is different from the large hardware procurement activities, which tend to be administered from higher level commands. Therefore, training of the acquisition workforce in the services area needs to be focused on "filtering" down to the lowest level buying activities in all locations. Only by providing proper training on the options available under acquisition reform, will true reform be fully adopted into the services industry contracts. Indeed, CSA has developed its own series of courses for a program manager certification for services contracting for CSA members – we believe that these courses could also be provided to the Federal acquisition workforce. Such training partnerships would benefit both the public and private sector.

Ironically, at the same time extensive cultural and process changes are being mandated through acquisition reform, the acquisition workforce is being reduced without a corresponding reduction in workload required by the "old system." This issue was highlighted in testimony by the General Accounting office before the Blue Ribbon Commercial Activities Panel in June 2001. Moreover, fiscal support for education and training is coming under extreme budget pressure. We also may reach a crisis as talented acquisition individuals begin to retire; if not addressed, there is expected to be a gap within five years of trained and experienced high-level acquisition personnel. This is particularly critical because there are certain functions that are inherently governmental, which Government personnel must perform.

When the private sector wins a contract, it does not have a "warehouse" of people just waiting to take over the job. A study done by the National Commission of Employment Policy (NCEP), a branch of the Department of Labor, indicates that over half of the workers on outsourced Government functions went to work for the private sector firm, while twenty-four percent of the workers were transferred to other jobs and seven percent retired. The study concluded that less than seven percent of the workers needed to find new employment.

Taking care of Government workers who are impacted by outsourcing decisions is an issue the private sector takes very seriously. Former Government workers affected by a conversion of their jobs to contract are typically offered a "right of first refusal," under which the workers are given first priority for employment for those jobs for which they are qualified. In many instances, persons previously stymied in their desire for promotion find that working for a contractor provides upward mobility they did not previously enjoy. Contractors are not typically bound by seniority in making employment decisions. As a result, contractors can often make dramatic improvements in a workforce just by selecting less senior persons (often those with high career motivation and energy) for supervisory and key technical positions. This infusion of fresh enthusiasm can invigorate a workforce even when the workforce as a whole remains relatively unchanged due to "right of first refusal" protections. Another positive aspect of conversion to contract that is almost always overlooked is that former Government employees become far more employable in a variety of private industry jobs after working in a "transition" environment on a Government services contract, thus helping with future career advancement.

Finally, in many instances, the contractors' benefit programs are equivalent or even superior to those enjoyed by Government employees. The one area where contractors cannot "compete" pertains to paid time off. But, responsible contractors understand that satisfied customers depend, to a considerable degree, upon satisfied employees. All responsible contractors treat benefits management as an important element of good labor relations.

Misperceptions

Government service contractors have played an important role in supporting our Government agencies in a cost effective and responsive manner. However, there are many false beliefs or misperceptions that have been raised regarding private sector Government contractors. Briefly, they include:

- *The first assertion is that Government service contractors have few rules and achieve savings by paying their employees less.* The Federal procurement process has evolved into a complicated web of laws and regulations requiring companies doing business the Government way to implement unique systems for accounting, quality assurance, production and management. The service contract industry is governed by a host of wage laws, among them the Service Contract Act (SCA). Under the SCA, the Government provides wage rates for a variety of employees in addition to requiring money to be spent on fringe benefits. Violations of the Service Contact Act can result in fines and debarment. CSA conducts a successful program with the Department of Labor to promote understanding of and compliance with the Service Contract Act. Additionally, the Government does not face, either qualitatively or quantitatively, the same risks as a commercial contractor (*e.g.*, on issues relating to termination for default, absorption of cost overruns or potential Civil False Claims penalties). Nor does the Government need to comply with cost accounting standards or the Truth in Negotiation Act, which require Government contractors to comply with detailed standards and provide certified cost and pricing data.

- *The second assertion is that lowest cost always assures long-term performance and best value.* Best Value is generally represented by the most advantageous offer, its affordability, and a long-term commitment to performance and innovation, which in the end provides a customer the flexibility to buy precisely what it needs. Unfortunately, most public-private competitions conducted under OMB Circular A-76 do not achieve these objectives since competitions are conducted under a Two-Step selection process, which ultimately focuses solely on the lowest proposed overall price/cost. Many Government agencies now realize that lowest cost does not assure superior performance and innovation or long-term partnerships and commitment.

- *Another assertion is that once a private sector company wins a public-private competition, their performance is never reviewed and there is no more competition on that contract.* Past performance is an increasingly important evaluation factor in selecting the best private sector competitor -- ensuring that the Government selects a firm with a proven track record for providing quality service in a timely manner. Additionally, contract performance including, but not limited to cost, schedule and quality are reviewed quarterly and contract incentives are based on established performance metrics. If the contract is a multi-year contract (e.g., 3 or 5 years), the incumbent contractor is subject to annual reviews and audits before an option year can be exercised. Finally, the recompetition factor not only helps drive down subsequent contract costs, but helps spur process innovation and efficiency. In most cases, these recompeted workloads have been refined in scope and there is an established cost and performance baseline on which offerors bids can be evaluated. Finally, Government contractors are subject to pre-award audits, and quarterly/annual post-award audits as specified by the contract. Violations of the contract can lead to financial plenty or termination for default.

- *Finally, there is also a commonly held – and incorrect view – that contractors don't deploy.* This is not accurate. During the Gulf War, as well as in Vietnam and now in Afghanistan, contractors remained with their customer units and helped achieve the success of the mission. Contractors maintain war reserve materiel and, in each instance, these contractor employees are already "deployed" to the AOR. Similarly, contractors have been in Somalia, Bosnia, and virtually all other recent contingency operations. During the Vietnam War, contractors were a major source of support in the country. During WWII, contractor pilots flew mission critical supplies into North Africa and over the Burma Hump. By taking care of many logistics functions, contractors free up military personnel for those duties that cannot, or should not, be

performed by civilians. And following the events of September 11, 2001, private sector contractors performed exceptional services to help Federal agencies, particularly the Department of Defense, respond to the crisis. Types of contractor support included: providing 24 hour staffing in critical positions; augmenting military personnel to enhance security and help with evacuations; increasing support at military medical facilities; ensuring uninterrupted power production and engineering support at key facilities; providing equipment quickly to provide a work environment and sense of normalcy for displaced Pentagon workers; providing 24-hour support at fueling facilities as well as vehicle operations and maintenance (e.g., helicopters and trucks, etc.); and ensuring timely delivery of mail via ground transportation.

The Problems Inherent in Public-Private Competitions

There are built-in inequities which must be adjusted if we are 1) to get cost comparisons that are truly fair and 2) engender the kind of confidence in the process that is critical to meeting agency budgetary targets and mission requirements. And, it goes without saying that the A76 process itself, which is far too time consuming and disruptive must be modified and streamlined if we are to achieve the goals of the reform initiative. There are improvements that could be made today, real improvements that do not have to wait for that day sometime later in the millennium when the Government accounting system is rationalized.

A. Resistance

The resistance of Government managers stems from several basic concerns. First, they fear that contracting out will, to some degree, erode their managerial control, causing performance to suffer and diminishing their effectiveness. And, of course, managers justifiably want to protect their employees from adverse actions. Government employees and their unions often consider cost competition a direct threat, either from a diminution of benefits and seniority, or, in the worst case, from loss of jobs. People who choose Government careers for security, stability, and patriotic reasons tend to see their commitment as devalued by a forced move to the private sector. One important fact that goes unrecognized is that, although the results of an outsourcing study could potentially lead to the loss of Federal employment, it usually leads to the transfer to another Federal job or becoming a part of the contractor workforce, whose pay and promotion opportunities are often better.

Unfortunately, opponents of privatization and outsourcing contend that such efforts threaten the American way, fail to provide good quality service, and save less money than proponents claim. Resistance also comes from members of Congress whose constituents are directly affected by privatization and outsourcing. Public employees' unions and the Congress often place obstacles in the path of outsourcing and privatization. Unfortunately, national security considerations have been used to rule privatization or outsourcing as out-of-bounds in many programs. For example, the Congress has blocked cost-saving contracting out of much supply, maintenance, and repair work despite requests from the Pentagon.

Public employees' unions have led the resistance to the Government's outsourcing efforts. However, this should not be considered strictly a union versus nonunion issues. The majority of service contractors, especially large corporations, are unionized, with private sector unions playing a key role in ensuring employee wages and benefits.

B. Cost Comparison Process

Industry has significant philosophical reservations regarding public -private competition, especially when it is based solely on lowest cost. Indeed, we feel that it is not in the best interest of the taxpayer for the Federal government to compete directly with its citizens; this is partly reinforced by the lack of comparability between Government and industry cost accounting systems.

As OMB Director Mitch Daniels stated in an April 18, 2001 speech at a General Services Administration Federal Acquisition Conference, "*the general idea that the business of Government is not to provide services, but to see that services are provided seems self-evident to me.*"

While industry recognizes that public-private competitions will continue to be the rule, we are concerned that such competitions ultimately disadvantage all parties. For the private sector, the playing field is not, and likely never will be, entirely level. This is primarily due to the fact that, despite several recent laws, the Government does not have

cost accounting systems in place to provide accurate or reliable financial data on workloads, does not have to pay taxes, and the methods by which it computes its overhead rates are not comparable with those of industry, nor does the Government "pay" for infrastructure (*e.g.,* buildings and land). In addition, the Government does not face, either qualitatively or quantitatively, the same risks as a commercial contractor (*e.g.,* on issues relating to termination for default, absorption of cost overruns or potential Civil False Claims penalties).

The factors listed above make it extremely difficult and, in some cases impossible, for industry to win a competition. For the Government, such competitions often result in decisions to retain work in-house because it does not appear that outsourcing represents the lowest cost to the taxpayer. However, in many such cases, the appearance is drastically different than the reality. The Government's "cost" is typically based on accounting systems that simply cannot capture the real, total cost and almost always fail to provide an adequate framework for determining whether the Government's "cost" is, in fact, the most efficient organization for the taxpayer (including meaningful assessments of past performance, such as those rightfully applied to the private sector). Indeed, awarding a contract to the Government is not even made on the basis of "best value" – a fundamental premise of acquisition reform – but rather low cost. If Government agencies are to continue to compete against private offerors to provide goods or services, it is vital that such competitions be conducted on the basis of truly comparable levels of performance, cost accounting practices, past performance and best value.

To reiterate, reliable cost and past performance information is crucial to the effective management of Government operations and to the conduct of competitions between public or private sector offerors. Unfortunately, this information has not been generally available and/or has often been found to be unreliable. The Chief Financial Officers Act of 1990 (CFO Act) included among the functions of chief financial officers "the development and reporting of cost information" and "the systematic measurement of performance." This includes performance by in-house, contract or ISSA resources. In July 1993, Congress passed the Government Performance Results Act (GPRA), which mandated performance measurements by Federal agencies. The Statement of Federal Financial Accounting Concepts No. 1, "Objectives of Federal Financial Reporting (1993)" stated that one of the objectives of Federal financial reporting is to provide useful information to assist in assessing the budget integrity, operating performance, stewardship, and control of the Federal government. In 1995, the Federal Accounting Standards Advisory Board (FASB) recommended standards for managerial cost accounting, which were approved by the Director of the Office of Management and Budget, the Secretary of the Treasury and the Comptroller General. These standards were issued as the Statement of Federal Accounting Standards No. 4, "Managerial Cost Accounting Standards for the Federal Government." *Despite these initiatives, the current process perpetuates an aspect of the public-private competition policy that has been severely discredited in recent years – the Department of Defense, and the other Federal agencies, still do <u>not</u> possess the cost systems or cost accounting procedures to accurately tally its costs for in-house activities.*

The need for comparable accounting data is implied in the *Federal Activities Inventory Reform Act* (FAIR Act) that is supported by industry. The statute requires an inventory of all commercial activities within the Federal government and allows contracting for the performance of those activities to pursue the "best value" for the taxpayer. It requires realistic and fair cost comparisons and establishes a definition for inherently governmental functions. The FAIR Act embraces several key principles: to achieve the best deal for the taxpayer; to be fair and equitable to all interested parties; and, to be instrumental in the government's overall reinvention effort. It is a rational and appropriate approach towards achieving the proper balance of utilizing public and private resources.

<u>Stop TRAC</u>

The Truthfulness, Responsibility and Accountability in Contracting Act appears to be a simple and logical attempt to ensure Government contracting results in meaningful cost savings and efficiency enhancements; however, the impact of the bill bears little relation to its title or purported intent. The bill essentially would delay new service contracting. In addition to suspending all new Government service contracting, it would throw into chaos all existing contracting for Government services, regardless of its nature – by requiring all new contracts, options and renewals to be subjected to public-private competition. This could cost additional taxpayer dollars – in order to compete to bring work back in-house, equipment may have to be moved, new facilities built or modified and additional workforce hired and trained. The bill would, by any measure, disrupt scores of Government operations, severely impact national security, slow down or entirely stop vital environmental clean-up operations, and much more. In short, CSA/NDIA believe this bill represents a serious and unprecedented threat to the ability of Government agencies to meet their ongoing missions and improve efficiencies. It should be noted that just last year

the Congress directed the General Accounting Office to convene a national panel to review the performance of commercial activities, public-private competitions and related issues. That panel, which convened last Spring (2001) and is composed of both industry and union representatives, as well as, Government and academic experts, is due to report back to Congress in May 2002 with its recommendations. Thus, to support or move forward any legislation, such as this "Government shutdown" bill, now would be precipitous.

Recommendations

We have an extraordinary opportunity to put momentum behind a policy first initiated by President Eisenhower, but which today remains largely ignored. The ability of Federal agencies to meet the tough budgetary and mission targets that Congress has set for them hinges, in large part, on the ability of Congress and the American public to know how agencies are using their resources to meet their core missions, and ensuring that scarce resources are used most efficiently. The nation is best served by implementing a new "Government-wide Commercial Activities Policy" suited to emerging 21st century requirements and based on commercial practices as defined in recent acquisition reform initiatives which will replace the A-76 process. Specific recommendations include:

- **Congress Should Establish a Bi-Partisan, Bi-Cameral Commercial Activities Caucus.** Such an approach is needed to address the findings and recommendations of the national-level Commercial Activities Panel. The panel recommendations are expected to include both policy and statutory initiatives, which will cross jurisdictional lines of several Committees including, but not limited to the Senate and House Armed Services and Appropriations Committees, Senate Governmental Affairs and House Government Reform Committees, and the Rules Committees of each body.

- **Adopt Specific Findings and Recommendation of the Commercial Activities Panel.** This panel is reviewing the nature and character of public-private competitions and is looking at new ways to streamline the process while still preserving its integrity. When the Panel's report is submitted in May, 2002, CSA and NDIA intend to push for those recommendations which are consistent with our own stated principles.

LABORERS' INTERNATIONAL UNION OF NORTH AMERICA

March 4, 2002

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General President

ARMAND E. SABITONI
General Secretary-Treasurer

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The Honorable Joseph I. Lieberman
Chairman
Senate Governmental Affairs Committee
340 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Lieberman:

Laborers' International Union of North America (LIUNA) is contacting you to express our strong opposition to S. 1152. The Truthfulness, Responsibility and Accountability in Contracting Act. LIUNA represents 800,000 members in more than 650 locals, including thousands of members working for private sector firms performing federal government service contracts. Our members perform the full spectrum of functions on these contracts.

As a result of collective bargaining, LIUNA members working on these contracts receive fair wages, good benefits and professional growth opportunities. Our members have unsurpassed experience, capability and training as well as a strong commitment to the success of the missions of the agencies they support.

S. 1152 would subject every existing federal service contract to the OMB Circular A-76 process before a new contract can be awarded, renewed, or have an option awarded or exercised. Testimony by affected employees, federal managers, industry and government officials have all said that the A-76 costs too much, takes too long and is disruptive for the agency and incumbent employees. It makes little sense to extend the A-76 or similar process to work already being performed in the private sector.

S. 1152 is a direct and immediate threat to our members' jobs, wages, benefits, safety and opportunities for professional development, without providing any benefit to federal agencies. Please join LIUNA in opposing S. 1152, or any similar legislation. Thank you for your consideration.

We request that this letter be made part of the record of the hearing.

Sincerely,

Terence M. O'Sullivan

TERENCE M. O'SULLIVAN
General President

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cc Democratic Members of the Committee

Statement of the U.S. Chamber of Commerce
Submitted for the Record of the
Hearing on Federal And Service Contract Workforce
Before the Senate Governmental Affairs Committee
March 6, 2002

The U.S Chamber of Commerce is the world's largest federation of business organizations, representing more than three million businesses and professional organizations of every size, sector and region of the country. The Chamber serves as the principal voice of the American business community. The Chamber appreciates the opportunity to submit these comments for the record of the Senate Governmental Affairs hearing on the monitoring, accountability and competition in the Federal and service contract workforce.

These comments are offered on behalf of the entire business community, but especially for the Chamber members involved in government contracting and those vying for increased opportunities in the federal market. These businesses, small and large, rely on an efficient, fair competitive process in providing the federal government with goods and services to maintain and grow their businesses.

Introduction

The Chamber has a long-standing policy that the government should not perform the production of goods and services for itself or others if acceptable privately owned and operated services are or can be made available for such purposes. Functions of the federal government should be limited to those that are (1) inherently governmental, (2) related to national security, or (3) functions that the private sector cannot perform. The government should not be providing goods and services, outside these limitations, that could be performed by the private sector at a higher quality and better value to the taxpayer.

Government should rely upon the private sector to provide goods and services necessary for the operation and management of federal agencies and departments. When the government engages in commercial activities beyond its core functions, its focus is diverted from executing its primary mission and is in direct competition with the private sector. Outsourcing reduces the size of government and increases efficiency by limiting government to performing its core mission functions.

Since the Eisenhower Administration, and through successive Democrat and Republican Administrations, the Federal Government has supported this concept. In 1955 President Eisenhower issued the following policy directive:

"the Federal Government will not start or carry on any commercial activity to provide a service or product for its own use if such product or service can be procured from private enterprise through ordinary business channels."

This policy is embodied in the Office of Management and Budget (OMB) Circular A-76, "Performance of Commercial Activities," which established the formal process by which Federal commercial activities could be opened for private/public sector competitions or direct conversion to private sector performance.

Private Sector Services and 9-11

These are unique and challenging times for our nation and American businesses. The importance of private sector participation in federal service contracting is even more apparent since the 9-11 terrorist attacks. Businesses across the country responded instantly to the extraordinary challenges brought on by these attacks. The Environmental Protection Agency has publicly stated that without the expertise of private sector service contractors, anthrax cleanup in the Senate Hart Office Building and elsewhere would have been next to impossible. Many private sector defense contractors responded to the needs of the civilian agencies as well as the Pentagon and defense facilities around the world. Their efforts included, but are certainly not limited to:

- Delivering, installing and testing more than 800 feet of conduit, 4,000 feet of wire, two power distribution units and approximately 24 branch circuits within 24 hours at the Pentagon.
- Providing equipment quickly to provide a work environment and sense of normalcy for displaced Pentagon workers. In particular, this meant getting into operation the IT systems necessary to allow 1,000 relocated Pentagon personnel to be fully functional within one week of the attack - an extraordinary effort that earned a special commendation from the Administrator of the General Services Administration.
- Providing emergency, temporary office facilities, within four hours of the Pentagon attack, to 125 Air Force personnel in the company's Northern Virginia offices.
- Providing aircraft to transport the largest Centers for Disease Control emergency mobilization team ever assembled from Atlanta to ground zero in New York City.
- Providing 24/7 technical support - with most personnel working 12-hour shifts seven days a week - to the Office of the Secretary of Defense Public Affairs team and other critical organizations.
- Providing 24/7 operations support to DOD's Information Assurance Technology Analysis Center, a key center in ensuring information assurance and security.
- Establishing a 24/7 special teleconferencing connection linking officials of the City of New York and Port Authorities of New York and New Jersey to allow for more efficient responses to emergency communications requirements.
- Increasing support at military medical facilities as well as providing high-speed communications to the naval hospital ship, the USNS Comfort, docked in New York Harbor.
- Providing transportable satellite communications facilities and technicians to the New York Police Department to quickly provide voice and data services.

- Augmenting military personnel to enhance security and help with evacuations.
- Ensuring uninterrupted power production and engineering support at key facilities.
- Providing 24/7 support at fueling facilities as well as providing 24/7 support in vehicle operations and maintenance (e.g., helicopters and trucks, etc.).
- Ensuring timely delivery of mail via ground transportation.

Benefits of Competition and Outsourcing

American business accounts for over 80 percent of the output, inventions and innovations of our $9 trillion economy. American businesses have also added $2.4 trillion to the gross domestic product over the past ten years. The private sector fuels the economy, yet federal agencies and departments continue to perform countless services and functions that could be performed more efficiently by competitive private sector enterprises, saving billions of dollars annually.

Studies by the Center for Naval Analysis, OMB, and others show that, on average, 30% is saved when a Federal activity contracted to the private sector performance. The taxpayer benefits when there is competition among competing private sector firms because of the cost savings that result -- a true testament to the value of competition in the free market economy.

By outsourcing functions that are commercial in nature significant revenue can be claimed by Federal, State and local government as well, thus expanding the tax base, since government entities pay no income, property or sales taxes while private firms performing government contracts are subject to such taxes. Outsourcing provides a stimulus to economic growth, while in-house performance and unfair government competition with the private sector retards such growth in the private sector, particularly among small businesses. Performance of commercial activities by government agencies also manipulates the marketplace since government services are often priced below market price.

Outsourcing also helps focus Federal agencies on core missions and those inherently governmental activities that citizens expect from the government and which only government can perform. Agencies using the private sector report that outsourcing provides access to personnel and skills that cannot be efficiently recruited or retained through the Federal personnel system, and outsourcing provides the government agencies access to innovation and technology that cannot as easily be accessed, be created or maintained within the government.

TRAC Act

For decades, businesses have worked in cooperation with the federal government to provide efficient and cost effective services for America's taxpayers. Through federal service contracts, thousands of businesses help our nation's government run more efficiently. All parties involved in these relationships benefit, including the government, business, and the American taxpayer. The government saves taxpayers billions of dollars

by partnering with business, and government investment in these companies helps sustain our nation's competitive edge in industries such as defense, information technology and management.

This mutually beneficial relationship is being threatened by the Truthfulness, Responsibility and Accountability in Contracting (TRAC) Act (H.R. 721/S. 1152). The TRAC Act would force a virtual shutdown of critical government activities by imposing a moratorium on all federal service contracts, including those involving environmental protection, air traffic control systems, school and highway construction, homeland defense and national security.

The proposed added steps in the already massive bureaucracy will impose substantial delays in performance of government services as all existing and new government services contracts would be subject to lengthy, expensive and unfair public-private A-76 competitions, which take a minimum of 18 months and often as long as 3 years to complete, as compared to most new competitive procurements that can be completed in weeks or months. The government would lose its flexibility to purchase innovative solutions needed to improve government performance, safety, security and efficiency. All this will occur at the expense of U.S. businesses and taxpayers, despite the fact that the private sector has repeatedly demonstrated it can perform these functions for the government faster, better and cheaper.

There are many monitoring and accountability mechanisms already in place. Virtually all contract work is subject to intense competition and re-competition between companies in the private sector. This competition is closely monitored by contracting officials and is subject to pricing, conflict of interest, and past performance evaluation factors under stringent audit rules and guidelines. Government contractors are one the most regulated and audited industries in the country. Contractors must abide by a host of rules that include, but are not limited to:

- Federal Acquisition Regulations
- Contract Accounting Standards & Defense Contract Audit Agency Audits
- Competition in Contracting Act
- Procurement Integrity Act and Conflict of Interest rules
- Pre-Award Surveys
- Post-Award Audits
- Service Contract Act, Davis Bacon Act and DOL Wage Rates
- Fair Labor Standards Act and State Labor Regulations

Congress has already spoken on this issue. Attempts to insert TRAC-like amendments to the House Treasury Postal Appropriations and the National Defense Authorization Act were defeated last year. The time is now to create more efficient and effective partnerships between the pubic and private sector, especially as we face the complex challenges of homeland security and national defense, and keeping our borders, economy and society both safe and free. The TRAC Act will lead our government in the opposite direction.

Conclusion

The philosophical argument for outsourcing is based on the premise that the free market offers benefits not found in the public sector, such as relative ease of innovation, quicker decision-making, and general efficiency resulting from market discipline and the need to compete for business. In fact, these free-market tendencies are considered beneficial because they actually threaten the destruction of businesses that do not provide the best value for their customers and thereby encourage creativity and economical customer service. Driven by profits and regulated by market forces, the private sector has proven to perform more efficiently, effectively and at a lower cost than government.

Thank you for allowing our comments to be submitted for the record of the hearing on the monitoring, accountability and competition in the Federal and service contract workforce. Please feel free to contact us should you have any questions or require additional information.

Aerospace Industries Association Airport Consultants Council* American Council of Independent Laboratories* American Council of Engineering Companies * American Electronics Association* American Institute of Architects* Associated General Contractors of America* Business Executives for National Security* Contract Services Association of America* Design Professionals Coalition* Electronic Industries Alliance* Information Technology Association of America* Management Association for Private Photogrammetric Surveyors* National Association of RV Parks and Campgrounds* National Defense Industrial Association* Professional Services Council* Small Business Legislative Council* Textile Rental Services Association of America* The National Auctioneers Association* United States Chamber of Commerce*

Testimony Submitted for the Record
Senate Governmental Affairs Committee
Federal and Service Contract Workforce
March 6, 2002

The associations listed above appreciate this opportunity to submit testimony for the record on the *"monitoring of accountability and competition in the Federal and service contract workforce."* The associations represent over one million companies, including businesses already engaged in providing goods and services to the Federal government, and that would be able to compete for commercial functions currently performed by Federal employees. The associations' membership also includes thousands of firms that are not presently in the Federal market, but would seize the opportunity if more of the Government's commercial activities were open to competition by private firms through increased outsourcing. The company members are firms of all sizes, including small business and minority owned firms.

Introduction

> *"In the process of governing, the Government should not compete with its citizens. The competitive enterprise system, characterized by individual freedom and initiative, is the primary source of national economic strength. In recognition of this principle, it has been and continues to be the general policy of the Government to rely on commercial sources to supply the products and services the Government needs."* [Office of Management and Budget, 1955-Present]

Since the Eisenhower Administration, and through successive Democratic and Republican Administrations, it has been the policy of the United States Government to rely on the private sector for the provision of goods and services. The Government has many options for doing business directly with the private sector, much of which is embodied in the Office of Management and Budget (OMB) Circular A-76, *"Performance of Commercial Activities."* This circular sets up a formal process by which Federal commercial activities could be through directly converted to private sector performance or opened for private/public sector competitions. The debate surrounding outsourcing, however, has been unnecessarily divisive and controversial.

The rapid advancements in technology, wide-ranging Federal government downsizing, increased services contracting and constrained budgets have combined to bring new urgency to the question of outsourcing – creating both opportunities and roadblocks. By outsourcing functions that are commercial in nature, a Federal agency can address the following:

- Deep and growing shortages of skilled workers;
- Need to stabilize costs via multiyear service level agreements; and
- Improving agencies effectiveness and responsiveness by relying on companies to implement processes to continually refresh methods and technologies, rather than being held captive by methods and assets that are quickly outdated, thus allowing agencies to focus on core, inherently governmental missions.

Examples of Private Sector Services

> *"DOD should aim for excellence in functions that are either directly related to warfighting or must be performed by the Department. But in all other cases, we should seek suppliers who can provide these non-core activities efficiently and effectively...we must take advantage of the private sector's expertise"* [Donald Rumsfeld, Secretary of Defense]

We are in this war against terrorism together and Government contractors are committed to providing the necessary services to win. For example, the anthrax cleanup and Pentagon rebuild would not be possible without private sector involvement. The Environmental Protection Agency has publicly stated that without the expertise of private sector service contractors, anthrax cleanup in the Senate Hart Office Building and elsewhere would have been next to impossible. Furthermore, private contractor, specifically those in the construction and engineering industry, worked alongside police and firefighters, solving a myriad of engineering and construction challenges posed by the massive, twisted rubble at Ground Zero. To this very day, many contractors continue the cleanup efforts though they are unable to obtain insurance that would protect their companies and their employees.

Contractors also play an important role everyday in securing the Federal government's buildings and other infrastructure assets. Construction contractors have been on the job twenty hours a day six days a week trying to stabilize and rebuild the Pentagon. Over one thousand workers have been mobilized to keep the project on schedule. Contractors have been working on the overall renovation of the Pentagon, due to be completed by 2013. The renovation includes steel reinforced, blast-resistant windows credited with saving lives on September 11. Safety on the jobsite is of utmost concern as the project attempts to maintain its current pace. For the area destroyed in the September 11attacks, the goal is to have those Pentagon workers back in their offices by September 11, 2002.

Other examples of how private sector contractors responded to the needs of the Federal agencies as well as the Pentagon and defense facilities around the world are detailed in attachment #1.

Benefits of Outsourcing

> *"Only those functions that must be performed by DoD should be kept by DoD. Any function that can be provided by the private sector is not a core government function"* [2001 Quadrennial Defense Review]

Outsourcing is an integral element of the business strategies of successful organizations in today's global economy – and it is equally important to the public and private sectors. Strategic outsourcing substantially lowers costs, risks, and fixed investments while greatly improving flexibility, innovation and products and services. Organizations with successful outsourcing strategies:

- Concentrate more power on a few capabilities that customers genuinely care about;
- Innovate constantly to ensure that their performance and value exceeds competitors;
- Develop flexible business models to deal with changing competitive pressures and opportunities; and
- Leverage their resources significantly by using the capabilities and investments of others.

Outsourcing strategies must be tailored to the unique mission requirements of an organization. Numerous studies have documented the reasons an organization might outsource some of its functions, and the elements of success in approaching that outsourcing. Attachment #2 summarizes the findings of one of those studies. In addition, the Federal Activities Inventory Reform (FAIR) Act was an attempt to put a process in place Government-wide for strategically assessing Federal agency workforce needs and identifying those "commercial activities" functions currently being performed by Federal workers that could be outsourced to the private sector. Unfortunately, the approach to outsourcing by many public sector organizations remains ad-hoc, which contributes to confusion and misunderstanding and leads to counterproductive results. This area also is replete with its own mythology. Attachment #3 lists some of these outsourcing myths and provides the factual realities for them.

Among the keys to an effective outsourcing strategy are creating a comprehensive framework, coordinating organizational policies and goals, and defining outsourcing objectives in a cooperative fashion.

First, organizations must understand their core competencies. Core competencies are not products or "those things we do relatively well." They are usually intellectually based service activities or systems that an organization performs better than any other enterprise. They are the sets of skills and capabilities that an organization delivers at "best in the world" levels to create unique value for its customers. Understanding these factors allows the organization to:

- Focus and flatten their organization by concentrating their limited resources on a relatively few knowledge-based core competencies;
- Leverage innovation through effective links to outside knowledge sources; and
- Eliminate inflexibilities of fixed overhead, bureaucracy, and physical plant by leveraging the resources of both their customer chain downstream and their technology and supply chain upstream.

The majority of corporations in the United States have outsourced some services. Outsourcing has migrated from a tactical, primarily manufacturing, perspective to the more strategic philosophy of contracting out any functions, especially services, not identified as a core competency. We believe this approach is equally applicable to the Federal sector, particularly the Department of Defense (DOD). The current redefinition of our national military strategy provides an excellent opportunity for the Federal government to re-assess its core competencies and leverage the commercial market's proven capabilities through outsourcing. This would enable it to achieve excellence more quickly, with less expenditure of resources.

Once an organization's core competencies are understood, it can fully exploit three high-leverage areas for outsourcing:

- Traditional functional or service activities performed in-house (e.g., accounting, IT, payroll, or employee benefits functions).
- Complementary, integrative, or duplicative activities that need to be coordinated across the enterprise but are lodged within many different organizations.
- Those disciplines, subsystems, or systems where outsiders have much greater expertise or capabilities for innovation because of access to wider or different sets of customer needs or more specialized knowledge and/or technology.

Competition

> *"Nearly half of all federal employees perform tasks that are readily available in the commercial marketplace...By rarely subjecting commercial tasks performed by the government to competition, agencies have insulated themselves from the pressures that produce quality service at reasonable cost."*
> [The President's Management Agenda, Fiscal Year 2002]

Federal agencies are being challenged by Congress and the Administration to meet tough budgetary and mission targets. To meet these goals, Federal agencies must assure Congress and the American public that they are using their resources to meet their core missions, and ensuring that scarce resources are used most efficiently. Study after study, from sources as diverse as the General Accounting Office (GAO), Office of Management and Budget (OMB), Center for Naval Analyses (CNA) and innumerable think tanks, have shown that competitively outsourcing the Government's commercial activities saves money, with savings ranging from 20% to 40% or more on a specific opportunity. Even reports that are critical of the *amount* of savings achievable through outsourcing conclude that competition , including competition between the public and private sector – regardless of who wins – results in real cost savings.

Those opposing outsourcing in the Federal arena frequently contend that contractors achieve savings by paying their employees less wages and benefits than Federal employees. This is misleading and wrong. For example, the services industry is governed by a host of wage laws, among them the Service Contract Act (SCA). Under the SCA, the Government determines the wage rates for a variety of employees in addition to setting fringe benefit rate. According to the implementing regulations in the Federal Acquisition Regulations (FAR), all solicitations for service contracts that are subject to the SCA must include the requirement that employees of service contractors be paid the same Federal Grade Equivalence (FGE) in wage rates, and be given the same in fringe benefits, as if that contractor employee was employed by the Federal contracting agency. In addition, all private sector Government contractors must abide by the Fair Labor Standards Act, the Occupational Safety and Health Act and numerous other

statutes. Private firms also pay Federal, State and local taxes – a financial requirement not imposed on in-house Government activities.

Faced with the need to downsize Federal staff and budgets, Congress initiated a series of actions aimed at improving the efficiency and effectiveness of the Federal government. These include the 1993 Government Performance and Results Act, the 1994 Government Management Reform Act, the 1994 Federal Acquisition Streamlining Act, and the 1996 Clinger-Cohen Act. Linked with these Congressional initiatives was the National Performance Review (NPR), with its goal of reinventing and improving the Federal Government. Central to NPR was a review of every Government program and function to determine whether its continued performance by federal employees was critical to the agency's mission. If not, then that program should be terminated or privatized. If yes, then consideration should be given to whether it can be performed as well or better by competing the activity with the private sector.

The successor to NPR is the August 2000 "President's Management Agenda," which is aimed at changing and modernizing management practices and Government performance. The President's overall management goal is to ensure that the Federal government is well run and is results-oriented.

Public-Private Competitions

> *"Sixty-seven percent of the competitions we initially selected for review were eliminated from analysis because of inadequate cost and performance documentation...Inadequate documentation was particularly prevalent when the function was retained in-house."* [The Center for Naval Analyses]

In general, we have serious reservations about public-private competitions. Indeed, it is not in the best interest of the taxpayer, or Government employee, for the Federal government to compete directly with its citizens; this is partly reinforced by the lack of comparability between Government and industry in their cost accounting systems and in performance obligations. Unfortunately, the current public-private competition process fosters hostility between the public and the private sector and undermines the partnerships necessary to improve Government service.

We recognize that there is support for public-private competition. Yet, even among supporters of public-private competition, there is widespread dissatisfaction with the current OMB Circular A-76 cost-comparison methodologies used to prepare for, conduct, evaluate and execute those competitions. We join with others in working to improve the overall process. Key issues that must be addressed to improve the process include:

- The process used to account for costs requires total "visibility." It is absolutely critical that a Government-wide activity-based cost accounting system or generally accepted accounting practice be established to assure that Federal cost proposals truly reflect all relevant direct and indirect costs. Only after such an accounting practice is adopted, in conjunction with other steps, will public-private competitions have the potential to be conducted fairly.

- The evaluation system should incorporate "all costs (including the costs of quality assurance, technical monitoring of the performance of such functions, liability insurance, employee retirement and disability benefits, and all other overhead costs)." This would also include the "time value of money", including depreciation and amortization, as well as otherwise unaccounted for labor costs, such as the use of military personnel. The foregoing examples do not represent an exhaustive listing of direct and indirect cost deficiencies.

- Comparisons of public and private bidders must be "normalized", or adjusted, to reflect unique elements on both sides, such as indemnification premiums and state and local taxes for private sector contractors. Areas where there are clear differences between industry and Government operating structures and accounting practices should be identified and factored into the evaluation. In addition, differences between the treatment of "binding obligations" for industry and Government should be identified and resolved. .

- A major shortcoming of the current process is that it focuses solely on a low cost comparison between the Government and private sector bidder, while ignoring the most important factor in Government procurement: best value. Maintaining an environment where Government organizations are competing with the private sector on a cost basis rather than a quality-dominated basis is in sharp contrast with the quality/best value principals that were strongly enunciated by Congress. Ironically, as Government acquisition policy has significantly moved away from price as the primary factor towards best value, the current A-76 process for public-private competitions continues to require simplistic evaluations based on flawed cost comparisons.

  The current A-76 cost comparison process only applies best value comparisons to private sector bidders. Once a contractor has been selected on the basis of best value, it must then compete with the Federal employees' "bid" on a cost only basis. This potentially allows the evaluators of the competition to select the highest priced industry offeror to compare to the Federal employees' proposal which was prepared solely to meet the minimum performance work statement at the lowest possible price. This is unfair to industry and not in the best interest of the taxpayer; nor does not it ensure that the cost savings intended will be achieved or that the taxpayer will receive the best performance. Public-private competitions must be based upon best value principles, subjecting both the Federal employees and the contractors to a similar evaluation of past performance, quality, innovation, workforce flexibility, organizational capabilities, problem-solving approaches, management and key personnel, special scientific and technical capabilities, and other applicable non-cost/price factors.

- Meaningful performance and service levels must be incorporated into the overall performance requirements. This is in addition to the utilization of performance-based work statements in all cases, as well as the incorporation of performance penalties, which have equivalent impact on both public and private sector performers. Currently the Government is not being held to the same procurement disciplines and risks as industry offerors.

- Past performance is not evaluated for Federal employees' proposals under the current process. It is not true that they have no valid past performance record. Individuals by position are being proposed in the MEO. For example, the personnel that will be performing the work have performance records. Therefore, just as contractor key personnel are evaluated, so should be the Government's personnel. Further, there are often records to document program cost overruns and schedule slippages in past Government performance. There are also records demonstrating the accomplishments of training or other services against specific goals. These records should be reviewed and evaluated as part of a "best value" evaluation in a public-private competition.

- It is of critical importance that there be an independent source selection board. The current A-76 process for public-private competitions has not addressed sufficiently the inherent conflict of interest found in some Government source selection evaluations. The process has allowed the very same activity that is being studied for possible outsourcing to conduct the procurement and act as the source selection authority for the award. Government personnel involved in evaluating the procurement should be required to declare any personal interest in the competing offers and if an employee is or will be affected by the procurement personally, that employee should not be in a position to influence the award decision.

- Next to a good specification (including reliable workload data), there is nothing more critical to the evaluation of offers (public or private) than a competent, thorough, and responsible independent Government estimate (IGE) of the manpower and non-labor resources needed to successfully perform the specified work with minimum risk of unsatisfactory performance. Unfortunately, an IGE is seldom done. If one is prepared, it is typically seriously flawed because it was based on factoring from the staffing and other resources of the existing contract. Clearly, if the existing contract is not optimized, any IGE produced by such factoring will also be sub optimal. Ideally, a responsible IGE should be derived from a thorough work breakdown structure estimate that is zero-based and which reflects an appreciation of modern commercial practices. This IGE also becomes a baseline for justifying future scope growth driven by changing requirements and/or evaluating cost adjustments. It is recommended that an independent Government estimate be prepared for every solicitation.

We stress that, in those circumstances where agencies elect to conduct public-private competitions, the process used should be kept as high-level and streamlined as possible, avoiding the excessively detailed, overly mechanistic, aspects of the current A-76 procedure.

Areas where there are clear differences between industry and Government operating structures should be identified and addressed in such a manner that results in true cost comparability. Further, the fundamental difference in contract type should be addressed. While a private offeror may be competing for a fixed-price contract, the public offeror in effect always competes for a cost-plus contract. The public sector offeror does not have to bear a financial consequence for an underestimate of the amount of work involved.

Finally, because it is impossible, especially in services, to predict every situation, yesterday's traditional, specific, narrow, ironclad contracts may no longer meet today's needs. The real challenge lies in writing a commercial-like contract that is specific enough to protect an organization yet flexible enough to accommodate unplanned events. As managers are called to manage outsourced services, they must learn to "manage the contract, not the contractor."

Stop the "Government Shutdown" bill

> *"This bill [TRAC Act], is not a pretty picture. It could literally grind government to a halt...The bill would create a paperwork nightmare of agency reports to OMB on costs and performance on every agency contract. As currently written, the bill would cover more than 20 million contract actions a year."* [Steve Kelman, Administrator, Office of Federal Procurement Policy, Clinton Administration]

While the title of the bill (*Truthfulness, Responsibility and Accountability in Contracting Act)* implies a simple and logical attempt to ensure that Government contracting results in meaningful cost savings and efficiency enhancements, the impact of the bill bears little relation to its title or its purported intent. Indeed, the legislation would suspend new contracting activities (above $1,000,000) within the Government. It would throw into disarray all other contracting for Government services, regardless of its nature – including contract renewals and contract recompetitions. The legislation would require extensive public-private competitions, which typically take three or four years to conduct, before any existing contract could be renewed or recompeted, *whether or not the functions performed under the contract ever were, could be, or should be performed by the Government.* As such, the bill would, by any measure, disrupt scores of Government operations, severely impact national security, slow down or entirely stop vital environmental clean up operations, and much more. In short, this bill represents a serious and unprecedented threat to the ability of Government agencies to meet their ongoing missions and improve efficiencies *(attachment #4 lists concerns over the TRAC bill)*.

In the Fiscal Year 2001 National Defense Authorization Act (section 817), Congress directed the General Accounting Office to convene a national panel to review the performance of commercial activities, public-private competitions and related issues. That panel, which is composed of both industry and union representatives, as well as, Government and academic experts, is due to report back to Congress in May 2002 with its recommendations. For that reason, we believe that support for, or any legislative action on, legislation such as the "*Truthfulness, Responsibility and Accountability in Contracting Act*" would be precipitous.

Conclusion

Ongoing strategic sourcing initiatives are aimed at helping agency management identify those programs that did not support its strategic plan under the Government Performance and Results Act (GPRA) – and to help agency management identify those programs that did not support core missions. Once identified, agency management would then determine what to do with the function. The Federal government would shed non-core functions and Federal employees would be redirected to core agency programs. The end result is a more efficient and effective Government that is better able to serve the American public. No legislation to short-circuit that process should be adopted.

ATTACHMENT #1

ATTACK ON AMERICA – CONTRACTORS RESPOND

In light of the September 11 tragedy, many private sector defense contractors responded to the needs of the civilian agencies as well as the Pentagon and defense facilities around the world. Their efforts included:

- Delivering, installing and testing more than 800 feet of conduit, 4,000 feet of wire, two power distribution units and approximately 24 branch circuits within 24 hours at the Pentagon.
- Providing equipment quickly to create a temporary work environment and sense of normalcy for displaced Pentagon workers. In particular, this meant completing complex IT systems rewiring and development to facilitate full IT functionality to more than 1,000 relocated Pentagon personnel within one week of the attack – an extraordinary effort that earned a special commendation from the Administrator of the General Services Administration.
- Establishing within 72 hours, at the request of Mayor Guiliani, the New York Family Assistance Center (on Pier 94) to assist families with missing relatives. Contractor employees volunteered and worked round-the-clock to turn the pier into a facility that could help thousands of families receive assistance from the Red Cross, Federal, state, and local agencies and non-profit organizations.
- Providing emergency, temporary office facilities, within four hours of the Pentagon attack, to 125 Air Force personnel within the private sector contractor's Northern VA offices.
- Providing aircraft to transport the largest Centers for Disease Control emergency mobilization team ever assembled from Atlanta to ground zero in New York City.
- Providing 24/7 technical support – with most personnel working 12-hour shifts seven days a week – to the Office of the Secretary of Defense Public Affairs team and other critical organizations.
- Providing 24/7 operations support to DOD's Information Assurance Technology Analysis Center, a key center in ensuring information assurance and security.
- Establishing a 24/7 special teleconferencing connection linking officials of the City of New York and Port Authorities of New York and New Jersey to allow for more efficient responses to emergency communications requirements.
- Increasing support at military medical facilities as well as providing high-speed communications to the naval hospital ship, the USNS Comfort, docked in New York Harbor.
- Providing transportable satellite communications facilities and technicians to the New York Police Department to quickly provide voice and data services.
- Augmenting military personnel to enhance security and help with evacuations.
- Ensuring uninterrupted power production and engineering support at key facilities.
- Providing 24/7 support at fueling facilities as well as providing 24/7 support in vehicle operations and maintenance (*e.g.*, helicopters and trucks, etc.).
- Ensuring timely delivery of mail via ground transportation

ATTACHMENT #2

Top 10 Reasons Companies Outsource

1. Reduce and control operating costs
2. Improve company focus
3. Gain access to world-class capabilities
4. Free internal resources for other purposes
5. Resources are not available internally
6. Accelerate reengineering benefits
7. Function difficult to manage/out of control
8. Make capital funds available
9. Share risks
10. Cash infusion

Top 10 Factors for Successful Outsourcing

1. Understanding company goals and objectives
2. A strategic vision and plan
3. Selecting the right vendor
4. Ongoing management of the relationships
5. A properly structured contract
6. Open communications with affected individual/groups
7. Senior executive support and involvement
8. Careful attention to personnel issues
9. Near term financial justification
10. Use of outside experts

Top 10 Factors in Vendor Selection

1. Commitment to quality
2. Price
3. References/reputation
4. Flexible contract terms
5. Scope of resources
6. Additional value-added capability
7. Cultural match
8. Existing relationship
9. Location
10. Other

Source: Survey of Current and Potential Outsourcing End-Users
The Outsourcing Institute, 1998

ATTACHMENT #3

OUTSOURCING MYTHS AND REALITIES

Opponents of outsourcing have perpetrated a series of myths to prevent implementation of this important management tool. Each of these myths, and others, have been debunked through the use of sound, concise, outsourcing arrangements that provide for such elements as an exit strategy, approvals of technology direction, soft landings for existing employees, and creative use of performance incentives.

1. *Myth: "The Government will be tied to the contractor forever or held captive to its processes and technologies."* In truth, the Government never forfeits its right to terminate a contract or to recompete the work. And most contracts are competed on an annual basis.
2. *Myth: "The Government will have less visibility to what is actually going on within its organizations."* In truth, a decade of acquisition reform has created a teaming environment where competent Government managers are an integral component of the contractor partnership.
3. *Myth: "The Government will lose its valuable people and will not be able to take the effort over again if there is ever a problem."* In truth, through outsourcing, the Government is gaining access to the state-of-the-art technologies and processes that it cannot replicate efficiently in-house.
4. *Myth: "The Government has different incentives that drives it and whereas the outsourcing firm is driven by profit, the Government is driven by customer service."* In truth, the Federal government has made significant progress in moving toward performance based acquisition that holds contractors more responsible than ever for quality and where past performance is one of, if not the most significant competitive discriminator, and customer service is a prime motivator for Government contractors.
5. *Myth: "The Government will not be able to document savings."* In truth, the commercial sector, which was already performing much more efficiently than the Federal government, has been able to realize monumental savings through outsourcing. As the Government reforms its accounting practices and methods, these same savings will become evident. In the meantime, the Government will be able to realize improved program results and expanded capabilities by aggressively outsourcing its commercial functions.
6. *Myth: "A shadow Government will be created. Government will not really be made smaller."* In truth, in the new performance based acquisition environment, the private sector is much better equipped to scale its workforce to the Federal government's requirements – expanding to fill a need and shrinking to maintain optimum efficiency. The Federal government expands slowly and cannot tighten its belt at anything other than a glacial pace. Outsourcing is an important tool for the Government to redirect its resources and personnel toward more essential core missions.
7. *Myth: "Contractors will abandon the most difficult programs at the most inopportune times."* In truth, contractors have successfully completed the most demanding requirements imaginable, including working side-by-side with U.S. armed forces in battlefield situations (i.e. Viet Nam, Desert Storm, Bosnia and Afghanistan).
8. *Myth: "Employees are severely disadvantaged by outsourcing policies."* In truth firms that are awarded outsourcing contracts attach a high priority to the placement of many, if not most, employees responsible for performing the function prior to the new outsourcing arrangement beginning. These firms typically consider their greatest asset to be their people. A highly skilled existing workforce, possessing considerable corporate memory and technical depth, has great value as a foundation for the new work group assuming responsibilities under the outsourcing arrangement. This value translates into a number of additional benefits to the employees including: dramatic opportunities for upward mobility, continuous learning/training environments to maintain competitiveness, portability of skills, and high rates of retention.

ATTACHMENT #4

STOP THE TRAC ACT (H.R. 721, S. 1152)

TRAC WOULD CRIPPLE THE FEDERAL GOVERNMENT'S PERFORMANCE

- There will be substantial delays in performance of government services as all existing and new government services contracts would be subject to lengthy, expensive and unfair public-private A-76 competitions, which take a minimum of 18 months and often as long as 3 years to complete, as compared to most new competitive procurements that can be completed in weeks or months
- The government would lose its flexibility to purchase innovative solutions needed to improve government performance, safety, security and efficiency
- Agencies' efforts to rapidly introduce new capabilities to meet ever-changing needs for critical services such as healthcare, transportation, environmental protection, social security, and homeland defense would effectively grind to a halt
- New service contracting activities would stop, subject to the lifting of a moratorium

TRAC IS ANTI-MODERNIZATION, ANTI-TECHNOLOGY AND ANTI-PERFORMANCE

- Many firms will not engage in laborious public-private competitions where best value is not considered, timelines are long, and costs are high, thus limiting the number of available solutions
- The government would not have the ability to buy commercial technologies to help modernize and transform its services in a performance based, results oriented environment
- Initiatives such as e-government would come to a halt

TRAC WOULD EXACERBATE THE FEDERAL HUMAN CAPITAL CRISIS

- Over half of the civilian workforce and 60 percent of the Senior Executive Service will be eligible for retirement by 2004
- As the government seeks to strategically assess its human capital needs and realities, TRAC will eliminate critical flexibility that government managers will need to ensure continued, and continuously improving, government performance, particularly in technology, engineering, and other fields in which the government is not a competitive employer

TRAC WOULD DEVESTATE SMALL BUSINESS

- The survival of small businesses, and most particularly woman, minority and veteran owned companies, supporting government customers would be threatened as they face the added costs associated with the A76 process and unfair competition for their work

TRAC IS A FLAWED SOLUTION IN SEARCH OF A PROBLEM

- 50 years of bipartisan policy mandates that the government should not compete with the private sector for non-inherently governmental functions
- There already is robust competition for federal business, driving cost-savings and innovation
- The federal procurement system already provides an extensive framework to monitor a contractor's performance and costs
- The Center for Naval Analysis and the General Accounting Office have concluded that the government lacks a system of cost accountability and performance measures for in-house activities

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