

ACQUISITION ADVISORY PANEL

Meeting Minutes

November 18, 2005

The Auditorium, Federal Deposit Insurance Corporation (FDIC)
Washington, D.C.

The Acquisition Advisory Panel (AAP) convened its thirteenth meeting on November 18, 2005 in the auditorium at the Federal Deposit Insurance Corporation (FDIC), Washington D.C. Ms. Marcia Madsen, Chair of the AAP, opened the meeting at 09:11 AM.

The Chair welcomed everyone to the meeting and stated that the day's agenda included presentations by two speakers and updates from three Working Groups on their preliminary findings. Ms. Madsen announced that the new name of the "Inherently Governmental" Working Group is "*The Appropriate Role of Contractors Supporting the Government.*" She also announced that the next AAP public meeting would be November 29th at the auditorium of the General Services Administration (GSA), and added that two Working Groups would brief their preliminary recommendations during that meeting.

The speakers and their affiliations were as follows:

| <u>Presenter</u> | <u>Affiliation</u> | <u>Attachment</u> |
|------------------------|--|-------------------|
| Mr. Stan Z. Soloway | Professional Services Council (PSC) | Attachment 1 |
| Mr. Daniel Gordon | Government Accountability Office (GAO) | |
| Mr. Joshua I. Schwartz | Acquisition Workforce Working Group | |
| Mr. James "Ty" Hughes | Commercial Practices Working Group | Attachment 2 |
| Mr. David A. Javdan | Small Business Working Group | Attachment 3 |

The Chair turned the meeting over to Ms. Laura Auletta, the Panel's Designated Federal Officer (DFO), to call the roll. The following Panel Members were present:

Dr. Allan V. Burman
Mr. Carl DeMaio
Mr. Marshall J. Doke, Jr.
Mr. James A. (Ty) Hughes, Jr.
Mr. David A. Javdan
Mr. Thomas Luedtke
Ms. Marcia G. Madsen
Mr. Joshua I. Schwartz

The following Panel Members were not in attendance:

Mr. Louis Addeo
Mr. Frank J. Anderson, Jr.
Mr. David A. Drabkin
Mr. Jonathan L. Etherton
Ms. Deidre A. Lee
Mr. Roger D. Waldron

The Chair introduced the first presenter, Mr. Stan Soloway (Attachment 1). Ms. Madsen stated that Mr. Soloway has had a long and successful career in Government and is currently President of the PSC. Mr. Soloway thanked the Chair for the opportunity to speak to the Panel. He began his remarks by raising several concerns about the current procurement environment, one characterized by significant increases in the level of services being procured, some of which are not unlike major weapons systems in their complexity. He explained that in the past ten to twelve years, new acquisition processes were created which provided the workforce with new flexibilities. The presumption was that the reforms would make acquisition easier and more streamlined, but, in fact, he said, reforms have made it more difficult. He believes this increased complexity calls for a more sophisticated workforce, and that providing the resources and appropriate tools remains a fundamental challenge. Mr. Soloway expressed his belief that there are serious issues relating to the acquisition and management of services. Mr. Soloway recommended that in order to achieve collective goals in acquisition, commitment to workforce development must exist, a commitment that goes beyond the traditional certification requirements. He said problems associated with recent high visibility procurements can be traced to lack of training and pressures in some Government agencies operating under a profit and loss situation.

Mr. Soloway next addressed a changing acquisition environment characterized by the need for technology ownership which has had a large impact on the type of workforce needed. Another aspect of the changing acquisition environment Mr. Soloway discussed was the Government's increasing procurement of professional services across the full spectrum of capabilities, calling this "an industrial base unto itself." He suggested that more thought be given to how to address policy issues such as transparency, accountability and maintaining a competitive environment associated with this market.

In response to a question from Panel Member Carl DeMaio on whether there is a correlation between the rise in ethical concerns and regulatory acquisition streamlining occurring in recent years, Mr. Soloway replied that in his view, serious ethics issues have been minimal. He stated that he does not believe today's ethics concerns are very different from those of the nineteen seventies or eighties. He noted that with the creation of Government organizations that focus on profit and loss, there may not have been enough focus on incentives to ensure that profit is sought responsibly.

Panel Member Joshua Schwartz said he was pleased to hear Mr. Soloway point out that there have been unintended consequences of procurement reform which have resulted in a more complex procurement system as a whole. Mr. Soloway explained that a best value procurement can be very complicated and much more difficult than the process associated with a procurement awarded following a rigid, rule-based system. Professor Schwartz asked Mr. Soloway to elaborate on an earlier comment on the Government's inability to ascertain whether the acquisition workforce is the right size given that the extent to which it is effectively using available tools is as yet undetermined. Mr. Soloway stated that while his frame of reference is only from a Department of Defense perspective, he does not believe a good formula has been developed to measure the impact of education and training on the workforce. Mr. Soloway offered to provide the Panel with recent U.S. Army data which presents the number of contract actions per contracting officer and its growth over the last four years, but advised that this data does not quantify the impact of additional capabilities resulting from increasing use of technology. Noting the exodus of civil servants from the Federal workplace, Mr. Soloway

expressed his concern regarding the time it will take for replacements in the acquisition career fields to gain the training and experience necessary to handle the complex workload. He commented that in the meantime, the mission must still be accomplished. Following additional dialogue among Panel Members and Mr. Soloway on the size and capabilities of the acquisition workforce and the impact of acquisition reform on the workforce, Mr. Soloway said that he believes creating and imposing broad new regulatory acquisition restrictions that may not be understood by the workforce would not be wise.

Panel Member Ty Hughes thanked Mr. Soloway for both his comments and written submission. Mr. Hughes asked what tools and capabilities would improve the acquisition process. Mr. Soloway replied that the next step should be termed less of a tool or capability definition than what he referred to as “aligning the communities.” He believes there is a misalignment between requirements definition and contract execution and administration that needs to be addressed. He believes also that many in the oversight audit community do not agree with much of the acquisition reform that has occurred, and would like to return to post-award audits. Others, he said, are overly focused on profit the Government might be paying on their commercial procurements.

Panel Member Marshall Doke thanked Mr. Soloway for his comments and expressed his position that with more and better competition, there is less need for contract oversight. Referring to Mr. Soloway’s earlier comment on bridging a disconnect between the acquisition and oversight communities, Mr. Doke asked if there are areas being reviewed by auditors where they should disengage, and conversely, were there areas which warrant more audit attention? Mr. Soloway elaborated on the differences of opinion that members of the various communities have regarding the management of services contracts. He alluded to recent high visibility procurements where the contracting officer’s determination of whether requirements were within scope had been second-guessed. Mr. Soloway emphasized that the contracting officer is authorized to make procurement decisions, to include those associated with scope. He said the acquisition community must determine the extent to which it is going to allow them to make these decisions, and that, in his estimation, the auditor function is to provide advice and assistance. Mr. Doke asked PSC members to provide specific examples and/or recommended solutions to oversight issues. Mr. Soloway made the request an action item.

Following a brief discussion on the occupational and acquisition organizational model established by Panel Member Allan Burman in the nineteen nineties, Mr. Soloway spoke of the reluctance by some to be considered part of the acquisition workforce because there was a sense at the time that the acquisition community was under assault. Mr. Soloway said that that sense has only grown over time and has led to morale problems within the Federal acquisition workforce. Dr. Burman expressed his belief that Government senior leadership should view the acquisition function as strategic and critical to accomplishing the organizational mission. Mr. Soloway agreed, noting that at Defense, within the weapons systems community, acquisition is approached strategically, but he has not seen this view for procurement of services even though it represents over 50% of procurement dollars. Mr. Soloway suggested that the most significant outcome of the AAP’s report would be its discussion of the challenges facing the acquisition workforce.

In response to a question from Panel Member David Javdan on allocation of the acquisition workforce, Mr. Soloway discussed the imbalance between contracting personnel and auditors

supporting Hurricane Katrina and Iraq missions, and suggested that because the unique challenges in those environments are relatively predictable, the oversight and contracting communities should develop processes and expectations for dealing with these types of events.

Panel Chair Marcia Madsen asked Mr. Soloway to comment on statements he has made on the subject of organizational conflict of interest (OCI), and if he had recommendations that might be of particular interest to the Panel's Appropriate Role of Contractors Supporting the Government Working Group. Mr. Soloway added that it is becoming more difficult to identify conflicts in advance for large and broadly integrated companies, especially with increasing consolidation in industry. He said that because the model of Government is becoming more complex as it procures capability to meet agency missions, careful thought must go into any changes in regulations and legislation. He agreed to submit written comments and recommendations. Ms. Madsen thanked Mr. Soloway for his insightful comments.

Upon reconvening the meeting following a short break, the Panel Chair introduced the day's second speaker, Mr. Daniel Gordon, currently Managing Associate General Counsel at the GAO and an adjunct professor at George Washington University. Ms. Madsen noted that Mr. Gordon's professional experience made him uniquely qualified to speak to the Panel in the areas of Contract Disputes and OCI. Mr. Gordon thanked the Chair for the opportunity to speak to the Panel. He informed the Panel that while he had not prepared a written statement, his soon-to-be published law review article on OCI is available at the Social Science and Research Network (SSRN) website. He explained that there are three types of OCI: 1) unequal access to information (affiliate receives an unfair competitive advantage); 2) biased ground rules (affiliate competes on a proposal where the contractor or affiliate authored the statement of work or specification); and 3) impaired objectivity (company advice to the Government is influenced by corporate interests).

Mr. Gordon said instances of OCI are increasing because of increased industry consolidation and because industry is providing more advice to the Government. He described several Multiple Award Contracts (MACs) scenarios where a Government agency could find itself in an OCI-like situation: 1) where an agency collects fees from an outside agency to manage procurements, and 2) A-76 public/private competitions where Federal employees conduct the Most Efficient Organization evaluation. Noting that OCI is not covered extensively in statute, he explained that the acquisition workforce can find detailed guidance in Part 9.5 of the Federal Acquisition Regulation (FAR), and from GAO and Court of Federal Claims bid protest decisions. Following discussion of examples of these decisions, Mr. Gordon invited questions from the Panel Members.

Panel Member Marshall Doke thanked Mr. Gordon for his insight, and asked Mr. Gordon whether Federal agency officials view protests as beneficial or to be avoided at all costs. Mr. Gordon replied that he believes bid protests are helpful to agencies. He explained that bid protests provide a self-policing mechanism that may be more efficient than an audit because they allow the aggrieved party to raise concerns. He believes that agency personnel would agree that, ultimately, protests are positive.

Panel Member Ty Hughes asked Mr. Gordon if the Federal Government allows different standards for support contractors in the Federal workplace than for its Government personnel. Mr. Gordon replied that he believes OCI rules are stricter for companies than for individual

Federal employees. Mr. Hughes said that while this may capture the organizational perspective, it does not address conflicts at the individual contractor employee level, and that a contractor employee is not subject to the same disclosure and recusal requirements to which a Federal employee is subject.

In response to a question from Mr. Hughes on consolidation within the defense industry, Mr. Gordon responded that he is concerned that people addressing the Panel may be leaving the impression that the Federal procurement system is not functioning well. He said that while there are many challenges, the system is very successful. He has studied foreign procurement systems where, he says, the biggest problem is corruption. Mr. Gordon said that corruption does occur within the Federal Government, but it is unusual and handled well.

In response to a question from Panel Member Carl DeMaio, Mr. Gordon replied that additional legislation to address OCI is not necessary, and suggested a review of the FAR might result in need for some regulatory changes, but that he is unaware of major gaps.

Panel Chair Marcia Madsen asked Mr. Gordon for his views on Lead System Integrator (LSI) type contracts as they relate to OCI. He replied that LSI contractors are in a challenging role because the likelihood is high that the company will make decisions impacting affiliates and/or competitors. However, he stated, he is unaware of any bid protests in this area. Ms. Madsen said that on LSI-type contracts where the Government has “effectively outsourced an entire program,” much of the effort occurs at the subcontract level where OCI violations would not be transparent or subject to protest.

Panel Members Thomas Luedtke and Dr. Allan Burman asked Mr. Gordon questions on the consequences of outsourcing agency functions and mission to professional services support contractors, and the ability of the Federal Government to effectively oversee contractor performance. Mr. Gordon emphasized the need for the Government to retain internal core capabilities in order to provide meaningful contractor oversight and contract administration.

In response to a question from Panel Member Joshua Schwartz on personal versus organizational conflicts of interest, Mr. Gordon reiterated that OCIs are very different from personal conflicts of interest, where the corporation is not relevant. He agreed with Dr. Burman’s point that when non-public information obtained by an individual based on his Government employment is used to provide an advantage to win award of a contract of a new contractor employer, this is not only a personal conflict of interest, but also a procurement integrity violation. Mr. Gordon said that labeling an unfair competitive advantage situation as an OCI violation is not helpful. Panel Chair Marcia Madsen thanked Mr. Gordon for his presentation and invited him to submit any additional thoughts of interest to the Panel.

Following a fifteen-minute break, the Panel reconvened at 11:45 AM. Panel Chair Marcia Madsen explained that the remainder of the day’s meeting would be devoted to presentation of findings (Part III of the report) from Workforce, Small Business and Commercial Practices Working Groups. She emphasized the transparency of Panel deliberations noting that Working Group findings and recommendations would be posted to the Panel’s website to solicit public feedback. Ms. Madsen reminded Panel Members that the AAP’s standard report format is also posted on the website, and that as each section of Working Group reports reaches suitable draft stage it will be posted to the website as well. Ms. Madsen suggested that the November 29th

AAP public meeting would include a briefing of preliminary findings by the newest Working Group, The Appropriate Role of Contractors Supporting the Government.

Ms. Madsen turned the meeting over to Professor Schwartz, co-chair of the Acquisition Workforce Working Group. Professor Schwartz thanked Working Group members and their staffs for their efforts to date. He provided a status of the Group's draft Parts I and II (Background and Issue Statements), and made a "last call" for comments from Panel Members prior to posting to the Panel's website. Professor Schwartz explained that the Working Group has secured a support contractor to assist with obtaining data and trends on the acquisition workforce. He then orally introduced the following Working Group key points that he explained would become the basis of written findings:

- Serious data problems are evident with existing available data on the workforce. Definitions of acquisition workforce are different at varied collection points.
- Few, if any, efforts to seriously appraise the existing workforce in qualitative terms have occurred.
- Assuring that every procuring agency has an effective procurement workforce of adequate size, training, capability, within an appropriate organization, is essential to making any existing procurement regimes operate effectively.
- The Federal acquisition workforce has not received sufficient attention, resources, and qualitative and quantitative reinforcement to achieve success throughout the operation of the procurement system. Demands have increased in most respects, but diminished in a few respects (to include use of the Government Purchase Card). The net effect, in the last fifteen years, has been an increased workload for the Federal acquisition workforce.
- Procurement dollar values and the volume of actions have increased dramatically.
- The nature of the goods and services being procured has become more sophisticated.
- Implementation of a series of procurement reforms in the last decade has resulted in placing greater burdens on the acquisition workforce. Although many of these reforms have, in many instances, made procurement quicker and more efficient, from the perspective of Federal acquisition personnel, the reforms have also increased the complexity of the Federal procurement system as a whole.
- The AAP has heard compelling testimony from sophisticated private sector organizations, both corporations and consulting firms, who regularly employ a core of sophisticated, highly credentialed, and highly trained business managers and analysts to carry out organizational sourcing, procurement and contract management. These are considered high priority functions within the organization and are well resourced. The Federal Government does not now have comparable personnel available to enable it to carry out these increasingly complex and sophisticated functions.

Professor Schwartz opened up the floor to the other Panel Members for discussion, comments and questions. Panel Member Marshall Doke recommended that Professor Schwartz obtain information from Mr. Daniel Gordon regarding international contracting to enable a comparison of issues on corruption between the U.S acquisition system and that of international countries. Mr. Doke stated that, "compared to the rest of the world, it would give us a pat on the back to a lot of very good professionals that are doing a very difficult job." Professor Schwartz agreed that soliciting information from Mr. Gordon was an excellent suggestion.

Panel Member Carl DeMaio commented that acquisition workforce issues had arisen in nearly all of the Public testimony received by the Panel, and thanked Professor Schwartz for tackling this difficult subject. Mr. DeMaio suggested that the Panel consider a finding that explicitly states that the acquisition workforce is in “crisis.” He said that a similar Office of Personnel Management declaration of an impending Government human capital crisis had a positive impact on focusing Government’s attention on the issues. Panel Member Allan Burman agreed with Mr. DeMaio’s comments regarding the need to ensure the right people with the right skills and capabilities are in place to do the job. He explained, however, it is important that findings be presented carefully. Mr. DeMaio replied that he had not meant to suggest that ethics issues exist or that the Federal Government does not currently have a capable workforce, but rather, he wanted to emphasize critical future needs. He also touched upon the increase, both in the number and complexity of transactions that have resulted in stress on members of the acquisition community.

Panel Member Marshall Doke commented that he believes the testimony to the Panel indicates there is currently a crisis in the acquisition workforce. He discussed the limited size of the acquisition workforce, the increasing numbers of its members retiring and associated loss of institutional knowledge, the increasingly complex workloads, and the failure to fill vacancies and train new acquisition professionals in a timely manner.

Panel Member Ty Hughes observed that the Government sometimes loses its ability to generate savings and achieve cost efficiencies because of the pressure and challenges of balancing finite resources with the need to outsource to meet critical agency missions. He added that, if faced with a choice between meeting mission and saving a little bit of money, mission would always be chosen.

The Chair suggested that one of the key acquisition workforce issues may be less about the number of the acquisition workforce, but instead about the best use of these limited resources. Ms. Madsen stated that another comment heard from the private sector is how heavily industry relies on competition, fixed-priced contracts and standard terms and conditions. Professor Schwartz agreed that these are important issues that should be considered by the Working Group. Professor Schwartz said he also wanted to respond to comments made regarding the “crisis in the acquisition workforce” by Panel Members Carl DeMaio and Dr. Allan Burman. He stated that not enough information to support that premise exists at this time. But, he said, that there may be a human capital *planning* crisis and agencies may not be paying enough attention to what resources they currently have and what they will need in the future. Panel Member Carl DeMaio echoed Professor Schwartz’s comments and emphasized the need for better human capital planning, workforce assessments and mission alignment of the workforce.

Panel Member Tom Luedtke observed that because Federal agencies have very diverse needs and missions, the workforce should not be viewed or treated as a unified whole. He stressed the importance of providing the acquisition workforce the flexibility and opportunity to be creative rather than demanding adherence to a rigid set of prescribed rules. He said that expecting more of our workforce increases the importance of selection, training and retention of the appropriate workforce. He noted the importance of focusing on the broader acquisition workforce and the entire acquisition process, not just on contracting professionals and the contracting piece of the process. Referring to earlier comments, Mr. Luedtke explained that from his perspective, acquisition reform made procurement rules themselves less complex, but more demanding on

acquisition professionals. He suggested that every agency may not have a need for its own procurement authority, and that those without might rely on the capability of larger agencies to support their mission. Professor Schwartz agreed with Mr. Luedtke's comments that new procurement mechanisms are not complex in and of themselves, but that the increased discretion they allow demands difficult, sophisticated, mature judgments by members of the workforce.

Panel Member Allan Burman commented on private sector testimony highlighting the involvement of senior leadership in training and human capital planning as an important strategic function for organizations. Dr. Burman added that legislatively establishing Chief Acquisition Officers (CAOs) within agencies had been a way to ensure proper training and development was being emphasized within Federal agencies.

In response to the Chair's question on whether the Acquisition Workforce Working Group plans to address the role of program managers as it relates to requirement development within the acquisition process, Professor Schwartz responded that the Working Group will address it specifically in Part III (Findings) of its report.

Panel Member Ty Hughes asked if the workforce data being developed by the Working Group's support contractor will be segregated by product, such as major weapons system, repair and maintenance, sustainment, and other acquisitions, noting that this segregation might allow the Panel to determine if there is an acquisition workforce crisis in one, or more, or all areas. Professor Schwartz responded that his Working Group will analyze the data with that question in mind. Mr. Hughes commented that another dynamic associated with the data is the determination of which functional areas are included in the acquisition workforce count. He emphasized that the count should include not just contracting personnel, but also engineers, program managers and functional personnel. He explained that each agency has a different team composition dependent upon the types of acquisition being executed. Dr. Burman observed that it may be difficult to obtain agency data by various services categories, such as post, camp and station support, or weapon systems.

The Chair solicited additional comments for Professor Schwartz. Because none were forthcoming, she recessed the meeting at 12:55 P.M. for lunch.

The Chair reconvened the AAP meeting at 1:55 PM. Ms. Madsen introduced Mr. Ty Hughes, Co-Chair of the Commercial Practices Working Group (Attachment 2). Mr. Hughes thanked the Chair and other Working Group members for their support to date. He stated that the Commercial Practices Working Group's findings were primarily in these five areas: acquisition planning, fostering competition, commercial pricing, time & material (T&M) contracts, and current practices under FAR Part 12. Mr. Hughes emphasized the significance of effective competition in the private sector, noting that his advocacy for competition had grown stronger based on the industry testimony to the Panel. He explained that the private sector relies upon a robust requirements building process, adding that requirements building includes use of a dedicated internal team to define deliverable and performance measures, firm internal agreements by all stakeholders on business requirements and service levels, and "baked in" standard terms and conditions. He remarked that the commercial requirements development process is typically completed in four to six months, but that industry utilizes an experienced and multi-functional staff, sometimes comprised of consultants, particularly when developing a new requirement. Mr. Hughes explained that while the Government is restrained to a degree because

of the need for transparency, letting vendors develop dissimilar approaches to satisfying requirements should be encouraged.

In terms of fostering competition, Mr. Hughes observed the following industry preferences: 1) head-to-head competition; 2) use of fixed-price contracts; 3) avoidance of dealing with a single vendor; 4) retention of the right to walk away from a contract and re-compete the requirement or bring it in-house (similar to a termination for convenience); and 5) re-competition of “*technology heavy*” contracts every 3-5 years to maintain currency with evolving technology. He contrasted the ability of the private sector to interact one-on-one with individual vendors with that of the Government’s, noting that the Government is constrained by its mandate to deal with vendors on an even footing. Mr. Hughes suggested that a best practice for industry has been to standardize price sensitive contract terms such as remedies for non-performance, acceptance rights, and warranty provisions.

In his discussion of commercial pricing, Mr. Hughes stressed the private sector’s reliance on competition to achieve reasonable contract pricing, and specifically noted that the private sector rarely utilizes cost-based contracts. He noted that T&M contracts are also seldom used by commercial buyers because they are very resource intensive to manage. However, he said, T&M contracts can be beneficial in limited situations of specialized expertise when requirements cannot be clearly defined. Mr. Hughes discussed Government commercial practices under FAR Part 12, noting that there is less reliance on competition for pricing than in the private sector, and that orders placed under indefinite delivery/indefinite quantity (IDIQ) and GSA schedule contracts do not always achieve price competition. In those situations being awarded under FAR Part 12 where competition is not present, where there is not an efficient market, and where no cost insight is available, Mr. Hughes asked rhetorically, how is price reasonableness determined? He questioned also the appropriateness of characterizing items and services sold only to the Government as commercial in nature.

Mr. Hughes remarked also that vendors often consciously segment their Government business from their commercial business, effectively de-linking Government pricing from their commercial counterpart. He said a related observation is that most favored customer clauses are not effective and not generally enforceable because of the terms and conditions associated with individual procurements. Another pending Commercial Practices Working Group activity, he advised, involves review of the adequacy of the definition of commercial items/services, and whether the acquisition of commercial services under FAR Part 12 without competition is a practice that should continue. Mr. Hughes opened up the floor to other Panel Members for discussion, comments and questions.

Panel Member Thomas Luedtke asked Mr. Hughes if the Government’s commercial practices match those of the private sector. Mr. Hughes responded that it is difficult to provide a single answer because some Government agencies’ practices mirror their industry counterparts’ practices very closely. But, he added, at the margins, the Government approaches commercial practices very differently from industry and has not adopted some of its best practices.

Panel Member Joshua Schwartz asked Mr. Hughes to expand more on the commercial item definition discussion. Mr. Hughes explained that the current definition encompasses items that are sold in an efficient commercial marketplace. He explained that the definition is subject to interpretation, and that he believes that some services being procured by the Government are not

commercial in nature, and therefore, should not be procured under FAR Part 12. In response to a follow-up question from Professor Schwartz, Mr. Hughes said that the issue of how similar to the original item must a modified item being procured by the Government be to remain characterized as commercial may have been settled by recent legislation associated with the Air Force's tanker lease procurement. The legislation requires that modifications must be done under Part 15 when exceeding 5% of the original value, or \$500,000, whichever is the lesser.

Panel Chair Marcia Madsen suggested that some of the acquisition workforce issues that are emerging within the Commercial Practices Working Group may be better addressed by the Acquisition Workforce Working Group. Professor Schwartz agreed, and stated that he would coordinate with Mr. Hughes and Ms. Auletta, the Panel's DFO, on the crosscutting workforce issues.

There was discussion among Panel Members regarding situations where some vendors whose primary market is commercial will not respond to FAR Part 15 solicitations because of their reluctance to open their books to Government scrutiny. Professor Schwartz observed that a possible unintended consequence of revisions to the commercial item definition that limits sole source procurements to Part 15 might be unwillingness by some vendors to sell to the Government. Mr. Hughes remarked that the Working Group would look at this situation and consider if waiver provisions might be adopted when the Government must have unique products. The Chair thanked Mr. Hughes for his presentation, and noted that the Working Group has some interesting challenges to address.

Panel Chair Marcia Madsen introduced Mr. David Javdan, Chair of the Panel's Small Business Working Group (Attachment 3). Mr. Javdan thanked the Working Group members and their support staffs for their efforts to date. He reminded everyone of the importance of small business to the U.S. economy and provided supporting statistics including the small business data relating to total Federal prime contracting dollars for fiscal years 2002 through 2004. He said that the Working Group had identified two primary issues. The first was adequacy of guidance in structuring procurements to afford small business participation, while at the same time, balancing efficiency and transparency in the process. The second issue centered on whether guidance under MACs is adequate to allow reservation of prime contracts. Mr. Javdan explained that his Working Group had organized its findings around acquisition planning and competition phases in the acquisition process. Based on the Working Group's analysis, the following twelve (12) findings were identified (Attachment 3):

- "The current statutory requirement for establishing specific agency small business contracting goals is an effective means for agencies to monitor and develop strategies to increase small business participation.
- There is insufficient guidance about "the order of precedence" for selecting among numerous socio-economic contracting mechanisms to fulfill procurement requirements and achieve small business goals.
- Agencies are not effectively considering and assessing their small business goal achievements in developing acquisition strategies and utilizing small business mechanisms.

- Agencies need accurate, real-time Federal Procurement Data System – Next Generation (FPDS-NG) contracting data to help effectively monitor small business goal achievements.
- There is limited data on the impact of contract bundling on small businesses.
- Procurement officials often do not correctly apply and follow the governing contract bundling definition and requirements when planning acquisition strategies.
- Agencies do not have clear guidelines or best practices of structuring acquisitions to mitigate the effects of contract bundling.
- Agencies with strong leadership commitment to SB contracts are the most successful in achieving small business procurement goals.
- The growing practice, of reserving prime contracts for SB in full and open MACs, has resulted in inconsistent applications of SB contracting requirements, because there is no specific legal guidance for such reservations.
- Reserving prime contract awards for small businesses in full and open multiple award procurements can be an effective tool to mitigate against the effects of contract bundling and facilitate small business goal achievements.
- There is no explicit guidance for utilizing small business preference programs when placing orders against multiple award contracting vehicles.
- Agency flexibility in targeting small businesses on GSA Federal Supply Schedule has afforded small businesses greater access to task order awards, but agencies are not clear on the extent to which they can limit competition to specific SB categories.”

Working Group Chair David Javdan opened up the floor to Panel Members for comments and/or questions. Panel Member Joshua Schwartz asked if the order of preference issue had been left intentionally vague because of Congress’ inability to reach consensus, and if Congress should be left to establish priorities. Mr. Javdan replied that statute can be interpreted in different ways, and the Working Group’s findings are meant to clarify. He suggested that the Panel discuss whether the scheme associated with preference priorities should be left to Congress. Mr. Javdan stated that depending on the situation, some of the Working Group’s recommendations may require statutory change, while others could be clarified administratively.

Panel Member Allan Burman suggested that the Panel explore recommending a joint Administration-Hill group that would assemble stakeholders of the preference programs to explore approaches to dealing with order of precedence and/or goal setting percentages for the various programs.

Several of the Panel Members and the DFO discussed the need for accurate and real-time data associated with socio-economic preference programs, contract bundling and contracting vehicles. Panel Chair Marcia Madsen suggested that the Panel’s report should make the distinctions in its recommendations between the types of data that should be collected and the issues associated with the collection of the data.

Professor Schwartz asked if the Small Business Working Group planned to address the apparent tension between mandates to engage in strategic sourcing and those to limit contract bundling. Suggesting better guidance on balancing these mandates, Mr. Javdan said that the Working Group had discussed the issue and would likely provide the Panel with more insight.

The Working Group Chair, Mr. Javdan, and Mr. Hughes discussed the Small Business Working Group's ninth finding on lack of guidance on using small business preference programs for orders placed against multiple award contracts. Mr. Javdan said that the Working Group intended to address this area in their report and noted that there is confusion on what is allowable under MACs at the task order level and Federal Supply Schedules. Mr. Hughes said that the conflict extends beyond the order level. He advised that setting aside several multiple small business ID/IQ contracts out of a larger number of contracts is not allowable; the entire requirement must be set aside. Ms Madsen thanked Mr. Javdan for his presentation.

Below is a list of additional materials or information requested by the Panel during the guest speakers' presentations:

- Mr. Stan Soloway, PSC:
 - Army statistics and trends (last 10 years) reflecting the number of contract actions executed per contracting officer
 - Examples of disconnects between the acquisition and oversight communities (identification of problems and ways to bridge the gap between transparency and accountability)
 - General Counsel comments and/or suggestions on OCI in the current environment
- Mr. Daniel Gordon, GAO:
 - Comments/recommendations on OCI relating to issues/impacts on the workforce

The Panel Chair solicited additional questions or comments on the day's three Working Group presentations; none were forthcoming. Ms. Madsen reminded the public that the next AAP public meeting was scheduled for November 29, 2005 at GSA, Washington D.C.

ADJOURNMENT

The DFO adjourned the thirteenth Acquisition Advisory Panel meeting at 3:08 PM.

I hereby certify that, to the best of my knowledge, the foregoing minutes are accurate and complete.



Ms. Marcia Madsen
Chair
Acquisition Advisory Panel

FEB 16 2006



**Statement to the
Acquisition Advisory Panel
November 18, 2005**

**Stan Soloway, President
Professional Services Council**

Madame Chair and members of the panel, thank you for the opportunity to appear here today to share the views and perspectives of the members of the Professional Services Council as they relate to the important work of this panel. PSC is the principal national trade association of companies of all sizes providing services of virtually every type to every agency of government. PSC has a long history of leadership on the full array of procurement policy and process issues. My appearance here today represents an extension of our commitment to helping improve the marketplace for services and to foster business processes that result in best value for the government customer.

As this panel is now well into its deliberations, I will focus my remarks on issues and challenges that fall within the purview of one or more of your existing working groups. In so doing, I will simply try to offer a few basic perspectives and a limited number of specific recommendations in each area.

The Current Procurement Environment

First, PSC members are deeply concerned about the procurement environment in which we find ourselves today. I think we can all agree that this is as difficult an environment as we have seen in many, many years. The credibility of the process is at low ebb, procurement has increasingly become a surrogate for other political agendas, and the disconnects between the front end requirements and acquisition communities, and the post-award, post-performance oversight communities, are greater than ever. As a result, we have an environment in which government contracting officers are increasingly afraid to make decisions, let alone mistakes.

This situation is both unhealthy and unwarranted. Despite numerous news articles to the contrary, and the often harsh rhetoric from a few in Congress, the sky is not falling. The truth is that in the majority of the cases that have made it into the media or congressional speeches, there has been far more smoke than fire. Unfortunately, allegations are being

thrown about loosely, and all too often inappropriately, and are even finding their way into proposed legislation, let alone the public consciousness.

In fact, the federal acquisition process works well, despite the numerous problems we face. When one considers the more than \$160 billion spent each year on services, the growing complexity and nuance of the work involved, and the rapid pace of change in the technology world, the basic effectiveness of the procurement system becomes a bit clearer.

Also, contrary to what some have alleged, competition is actually strong. For example, price and performance pressures are greater today than they were a decade ago. Since the mid 90s, the number of companies selling services to the government has nearly doubled and the advent of best value, past performance and other basic reforms has changed the way companies in the marketplace bid for and manage their government work. The rise of the GSA schedules, GWACs and other multiple award vehicles have also played an important role, creating a competitive marketplace for contracts that gives customers options that simply did not exist before, and creating even more competitive pressure on the companies and works to the government's benefit.

Thus, I hope that one of this panel's initial and most prominent messages will be one of caution to those who believe the sky is falling, because it is not. I believe that the bulk of the problems that led to the formation of this panel, as well as the bulk of the concerns expressed by the leadership, can be traced to two basic factors: a lack of context and perspective on the realities of government procurement and a lack of meaningful commitment to, and support of, the acquisition workforce.

There is no doubt that we face serious challenges in the acquisition and management of services. There is no doubt that there has sometimes been inadequate discipline in the process, nor is there any doubt that the flexibilities now available to the federal acquisition community require far more aggressive and robust training and professional development than has been the case to date. And there is no doubt that the changing nature of government itself has created an environment in which partnership and collaboration is both more important and more evident than ever before.

Focus on the Workforce

In short, while it would be irresponsible to be sanguine about where things stand, the answer to the challenges we face does not lie in wholesale changes to the acquisition process or structure. The answer does not lie in swinging the pendulum back to the bad old days. It lies in focusing on the real crux of the issue, the people, and in giving them the tools and time needed to do their jobs better.

Trite as it may sound, the issues we face always seem to come back to the workforce and the widely accepted fact that we have too few acquisition professionals in the right places with the right skills. I cannot tell you, nor can anyone, how many acquisition professionals we need today; nor can I assess whether those we have in place are fully

capitalizing on the many tools that can help them do their jobs better and faster. It is clear, however, that we are placing the workforce in an impossible position.

While some acquisition reform was about streamlining processes, other elements were about incorporating significant contemporary business judgments in a procurement process that previously relied on rigid rules and formulas. In other words, acquisition reform was not, as some think, about making acquisition “easier”. On many levels, it is actually harder and more complex than was the case before.

That is why I believe solving the workforce problems go well beyond traditional certification requirements like those DoD currently has and which are now being put in place in the civilian agencies. And it goes beyond the recently created partnership between the Defense Acquisition University and the Federal Acquisition Institute. Both are positive steps forward but alone they will barely dent the problem.

If you look at any successful corporate enterprise you will see extensive investments in continuing professional development and learning. Yet in the government, particularly in acquisition, that is but an afterthought. The DAU has a budget of nearly \$100 million, which may sound like a lot. But when one deducts from that the amount DAU must pay for student travel and per diem, and then deduct further the costs of delivering basic certification training to a DoD acquisition workforce of over 180,000 people, the bottom line becomes clear: little money remains for continuous learning. Of course, in the civilian agencies not even that initial funding stream is available.

In other words, achieving our collective goals in acquisition, first and foremost requires a commitment to workforce development that is orders of magnitude greater than ever before. Given the central role acquisition plays in the proper functioning of our government, that investment will be well worth it. Unfortunately, we continue to give it short shrift. No matter what policy or rule changes we impose, no matter how we tinker with structures or process, we will continue to experience almost all of the difficulties we experience today unless that paradigm changes.

The use of past performance in acquisition decisions is a good example. It makes eminent sense. Yet the systems required to give contracting professionals the information they need to properly utilize past performance reports are woefully inadequate, and necessary upgrades remain underfunded, thus creating an environment in which the information is either too limited or simply not available.

Likewise, we all agree that in many cases the low bid is not always the right bid for the government. Yet it seems that every time an award is made to other than the low bidder, the entity making the award is vilified for wasting taxpayer money.

Government Management Challenges

Further, our procurement challenges cannot be separated from the government's broader management challenges, in the financial, technology, human resources, and other fields. As the Senate Government Affairs Committee reported just a few years ago, we have a general management crisis in government that is the result of decades of inadequately resourcing professional development and a continual exiting of peak career civil servants. As the data show, this critical demographic in the federal workforce is actually dropping steadily at a time it should be growing. That is probably the biggest challenge we face across government and nowhere is it more evident than in acquisition. While it is often convenient to talk of contract management as if its problems are unique, the truth is that it is but one of many government disciplines in which management is a significant challenge. Additionally, in high performing companies, strategic human capital management is just that—strategic. It requires careful thought and planning around the entity's mission, the kinds of organic workforce it absolutely needs, and providing the tools, resources and workforce management flexibilities required to achieve those goals. This remains anathema to the government's personnel management philosophies and budgeting and staffing processes.

For these reasons, we applaud the panel's focus on the acquisition workforce. I know you are all too well aware of the critical need to rethink overall personnel practices and policies so that we can ensure the government's access to the people it needs. That is not to say the government does not have a lot of highly talented professionals. It is to say, however, that we clearly do not have enough, are not developing enough, and are losing too many of those very people.

But please do not ignore the workforce's morale and the range of steps that can be taken to better support them in both the short and long term. It's time for credible leaders to call for a halt to the witch-hunt environment and, at the same time, to provide the context and perspective I mentioned before. Today, that kind of overt support for the acquisition workforce is all too often missing.

If that dynamic doesn't change, the government will find it ever more difficult to recruit and retain the quality people it needs and will be powerless to prevent the continued and disturbing exodus from government of the very people it so badly needs.

Think Broadly About Acquisition

It is also important to think about acquisition more broadly than we generally do. Too often, when people think about acquisition, they typically are only thinking about the 1102s or contracting officers, rather than the broad panoply of skills that are essential for effective and efficient management and mission execution, prominently including program management---a critical acquisition skill but one that is too often understated or underemphasized in government. When I was at the Defense Department, the education, training, and career development of the more than 180,000 professionals in the acquisition workforce fell under my office's purview. And of those 180,000, just over 10

percent were warranted contracting officers. In recognition of this integrated nature of effective acquisition, DoD focused a lot of energy on the creation of Integrated Process Teams to manage its major weapons systems programs. That same philosophy is not nearly as evident in DoD's acquisition of services and is almost totally absent in the civilian agencies.

For example, while I will talk later about some of challenges in executing performance based projects, one of the clearest challenges is directly related to this need for a multi-functional management approach. After all, performance based acquisition is not, fundamentally, a contracting exercise. Successful PBSAs require the active involvement of and investment by the customer, financial, legal, contracting, and other functional stakeholders. Yet such management strategies are clearly the exception rather than the norm.

Inherently Governmental Functions and the Blended Workforce

The workforce issues are also inextricably linked to the Panel's deliberations over the definition of inherently governmental functions. When I served on the Commercial Activities Panel, we spent a fair amount of time reviewing and discussing the current definition of inherently governmental as contained in OMB Policy Letter 92-1. We came to the conclusion that we could not improve on that policy letter; that the existing guidance was about as prescriptive as one could or should get.

Nonetheless, while changing the regulatory definitions may not be necessary, the current environment clearly demands that we give more consideration to the larger question of roles, responsibilities and accountability.

It requires us to think in terms of the three tiered nature of government work: first, what we might call governance---setting policy, committing government funds, awarding contracts or otherwise legally binding the government—all of which is clearly inherently governmental; second, areas like contract management and administration, technology assessment, program management, and the like--less clearly inherently governmental functions but clearly areas in which the government must maintain a robust residual capability to ensure that it meets its responsibilities for cost, schedule, performance, and more; and finally, those activities that can be performed either internally or externally.

Of course, this tiering is nothing new. What is different is the degree to which that middle category of government work is tilting increasingly toward contracting. As the government shifts, inexorably and likely irreversibly, to being the manager of service delivery rather than the actual deliverer of those services, this trend will continue.

This is not an innately negative change, although some seem to perceive it as such or characterize it as such for their own purposes. Instead, it simply creates a reality to which we must adjust. It requires us to manage our acquisition and other organic government assets differently than we did in the past and to strategically focus those limited assets where they are most needed. It requires us to recognize the changing nature not only of

the supplier base but also of the way in which needed support is delivered to the government and how government can and must optimize its delivery of services to its citizens. We cannot isolate the government from the dynamics of the marketplace. Rather, the government has to adjust to those dynamics. Managing those new realities is a matter of training, guidance and resources, not rules and regulations.

In simple terms, then, the real issues are not about redefining inherently governmental or about drawing rigid bright line tests. Rather, they about thinking realistically, communicating those realities clearly to decision makers and policy leaders, and making sure that, where necessary, we have the proper controls in place to protect the government's equities.

They are clearly unique challenges associated with managing blended workforces, which are becoming more and more common throughout government. This is an area in which PSC has just begun to do some of its own work, since our member companies are well aware of the challenges presented. It is also an area that agencies, such as HHS have begun to think about. As our internal discussions on this fundamental issue progress, we would be happy to provide the panel with additional thoughts and even specific recommendations.

Aligning Acquisition and Oversight

It is also our hope that the Panel will find a way to help bridge the disconnects between the acquisition and oversight communities that I referenced earlier. Today, any number of the procurement issues that have found their way into the media or before the Congress, are directly related to this unfortunate and troubling misalignment. Some oversight entities, the GAO for example, are genuinely focused on critical management challenges and have become valued partners in the many important efforts to improve government performance. Others, however, remain rooted in what we believe are old ways of thinking about business relationships, profit, and priorities. This is particularly true of elements of the audit community which seem to fundamentally disagree with many of the procurement reforms of the last decade. Regrettably, that disconnect has served to unfairly and inappropriately feed the fires of skepticism surrounding federal procurement.

Oversight is, of course, a critical government responsibility. But it is not always going to look precisely the same in every circumstance. In Iraq, we learned that some of our traditional perceptions about oversight simply were not executable in a wartime environment or one in which one of our other policy objectives was to engage and build the local economy. Frankly, some of those same challenges are emerging in the aftermath of Hurricane Katrina.

But this disconnect plays out as well in more routine procurements. They are manifested in excessive audit demands or demands for access to records--sometimes exceeding what the law would seem to allow; challenging prices even under competitive fixed price awards; the handling of subcontractor billings, even when those billings reflect the exact

pricing that was contained in the initial bid, and more. In addition, in recent testimony before a Senate subcommittee, the counsel to the GSA Inspector General called for a return of post-award, incurred cost audits for task orders awarded under the GSA Schedules. Indeed, in that testimony, she said “defective pricing is alive and well at GSA”. Unfortunately she offered no good evidence to back up such a dramatic claim and, based on other ongoing policy debates, I suggest that the very definition of defective pricing would be a matter of significant debate.

In other cases the disconnects have arisen when government acquisition professionals make a business judgment only to have that judgment later challenged somewhere in the oversight community. This is particularly true when someone doesn’t like the answer or the outcome, or simply doesn’t agree with the rules as they are written.

I am often amazed at the increasing number of cases in which PSC member companies are caught up in a fundamental conflict between a contracting officer and an auditor or IG investigator. This kind of second guessing can get ridiculous. In one case the agency auditors were unsure whether a company had properly categorized and billed for its workforce. The contracting officer believed the company had made appropriate judgments and was satisfied. However, the auditors were less sure. So five auditors took a vote. The vote was 3 to 2 against the company’s judgment and they thus challenged the company billing! That case is indicative of the kinds of untenable positions the government acquisition community often finds itself facing. And, of course, the headline the next day would be that the company involved was gouging or overcharging—whatever that means—the government.

Our list of disconnects could go on for some time. Suffice it to say that we believe this is one of the most fundamental and difficult issues we face today and the Panel’s leadership in addressing it, on some meaningful level, will be of great value. Here too, while you might not be able to solve the problem, identifying it, and making at least some recommendations toward its resolution will be very important.

Risk and Risk Management

I would also like to recommend that you address another major issue in services contracting: risk and risk management.

Take for example the Panel’s focus on Performance Based Services Acquisitions. In addition to the need for an IPT-approach to PBSAs, our view is that the problems with PBSA can often be whittled down to three simple elements:

1. the government often cannot adequately define its existing processes and systems so as to enable the creation of an appropriate baseline against which to measure actual performance by the contractor;
2. the government has not invested adequately in the workforce responsible for executing the PBSA mandate, so they often do not have the tools and resources necessary to evaluate divergent solutions; and

3. because innovation by definition involves significant risk-taking, and the government has not shown much tolerance for mistakes or failure, the workforce is too often actually incentivized to avoid real innovation.

Nonetheless, there are mandates for using PBSA across government—many of which we in industry applauded when they were adopted and which we continue to support. But because of the implementation challenges, we often see square pegs being pushed into round holes and, perhaps most disconcertingly, inordinate risks being placed on the contractor, whether through an inappropriate focus on fixed price contracts or reliance on performance metrics that all too often hinge on the government’s ability to provide data or insight it simply doesn’t have.

This risk-shifting and/or poor risk recognition and management is evident elsewhere as well, including share in savings contracts. In some cases, the biggest challenges come down to ineffective base lining. That problem could be addressed through the use of initial contract periods focused on a collaborative diagnostic exercise, to be followed by an execution phase. But such strategies are rare. In others cases, the government’s continued and often unhealthy focus on profit rather than on performance and real value virtually guarantees that the risks notwithstanding, reward will not follow. That is not a healthy balance and is actually turning industry off to the very kinds of innovative contracting that companies enter into everyday in the commercial sector.

The advent of Sarbanes Oxley, under which companies must clearly and publicly identify much broader categories of business risk affecting them, hasn’t helped matters. Likewise, even seemingly small matters like the growing use of cascading set asides amount to a risk and cost-shift, since it requires companies to risk their precious bid and proposal resources even in cases where proposals might never be evaluated. In the end, it really amounts to industry conducting the very market research the government should be conducting.

We thus hope this Panel will focus some of its report on the important area of risk identification and management. There is often very little understanding of the ways those important factors affect companies, their bidding strategies and their ability to optimize performance. Moreover, this is an area that cries out for greater communication among decision makers and policy leaders who, regrettably, are often less familiar with these issues yet are responsible for generating the policies that govern procurement and general government management.

Small Business

Finally, I would like to offer a few comments with regard to small business issues. First, let me be clear: nothing I am about to say should be misconstrued to in any way suggest a lack of support for robust small business policies and practices. Indeed, over two thirds of PSC’s member companies have less than \$100 million in revenue and many of them are small businesses. Moreover, our most recent research suggests that over 90% of federal services contractors have gross annual revenues of under \$100 million. Clearly,

small business, and “smaller businesses” play an essential role in our economy and our industry.

That said, this Panel could help open the door to what would certainly be a difficult, but nonetheless important, national discussion about the purpose and effectiveness of our small business policies and programs. Our federal procurement system looks at the marketplace in a binary manner: companies are small or other than small. Yet the reality is that the marketplace is diverse and multi-layered---and that diversity and layering is clearly in the government’s best interest since it helps ensure a robustly competitive marketplace.

With no specific policy prescription or answer in mind, we believe the time has come to ask some fundamental questions:

- Is our goal to create small businesses or to foster the development of sustainable enterprises?
- The governmentwide goal for small business primecontracting is 23%. Is it good for the government or the marketplace that most agencies have set goals substantially higher, sometimes twice or more as high? As but one example, the Department of Housing and Urban Development claims that fully 72% of its prime contract dollars went to small business in FY 2004. On one level HUD deserves great credit for its small business success, but one must ask whether the department is being shortsighted and creating an unhealthy market dynamic
- Is it time to return to the old system of a government-unique size standards? After all, the objective evidence suggests that in most key areas, the gap between commercial and government market realities has actually grown, not narrowed. And as a result PSC has specifically recommended this approach in its comments on SBA’s proposed size standards revisions.

We believe this is an essential time for this particular dialogue. Industry consolidation is an unavoidable reality and all indications are that over the next few years we will see a fundamental restructuring within the government services sector. It thus behooves the government to get out a little ahead of that curve and carefully assess how ITS supplier base is likely to change and what those changes mean.

Conclusion

Again, let me extend my personal thanks and that of the association to the Panel both for the hard work you are doing and the opportunity to be with you today. We look forward to a continued dialogue with you and to your final report. We need leadership. We need context. We need objective observations. You are ideally suited to provide all three.

Commercial Practices Working Group Acquisition Advisory Panel

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1

Preliminary Findings

- ➔ ■ Acquisition Planning Process
- Fostering Competition
- Commercial Pricing
- Time & Materials Contracts
- Current Practices Under FAR Part 12

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2

Defining Requirements

- Effective services competition in the private sector rests upon a robust requirements building process
- Requirements building tools include:
 - Requests for Information (RFIs)
 - Dedicated internal teams to define deliverables and performance measures
 - Firm internal agreement by all stakeholders on business requirements & service levels
 - Terms and Conditions “baked in”

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3

Planning Process

- Commercial requirements building process usually completed in 4-6 months or less
 - (Commercial buyers use multidisciplinary staff to monitor performance and manage contract)
- Buyers use dedicated and experienced staff
- Consultants with deep credentials and experience frequently used by commercial firms in building requirements
- Consultants prohibited from bidding or participating in any way in the acquisition

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4

Defining Contract Requirements

- Commercial buyers define content of requirements by the outcome of the work
- Define work by the output
- “If you don’t know your requirements, maybe you should slow down and think about whether you should be buying anything”
- Leave to vendors “how to do it”
 - Allows vendors to bring forth expertise, experience and proprietary approaches

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Preliminary Findings

- Planning Process
- ■ Fostering Competition
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Observed Preferences

- Head-to-head competition preferred
- Use of fixed price contracts
- Always have 2-3 vendors competing
- Never deal only with one vendor
- Retain right in contract terms to compete new requirements or take them in house
- Re compete “technology heavy” contracts every 3-5 years
 - Necessary to keep up with changing technology

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7

Commercial Practices (1)

- Provide extensive opportunities for buyer/supplier interchange of information about the buyer’s needs and operations before submission of proposals
 - Extensive site access
 - Meetings with buyer staff
 - Workshops
 - Two-way interchange

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Commercial Practices (2)

- Detailed market research performed regarding vendor capabilities
- Commercial practice involves extensive negotiations with vendors in the competition regarding vendor specific solutions
 - Does not require vendors to propose the same solution
 - Allows vendors to bring their expertise to address the buyer's specific issues
- Early narrowing of competitive range

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9

Commercial Contract Terms

- Extensive use of fixed price contracts
- Balanced contract terms developed through interaction with vendors
- No variance in contract terms except in extraordinary cases for limited reasons
- If vendor perceives risk, vendor must "price it"

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Preliminary Findings

- Planning Process
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Commercial Pricing

- Primary reliance on competition to achieve reasonable prices
- In limited competition, pricing measured against cost of performing service in house
- Cost-based contracts not used for commercial services, too expensive to administer
- Bedrock principle in pricing commercial contracts is competition within an efficient market

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Preliminary Findings

- Planning Process
- Fostering Competition
- Commercial Pricing
- Time & Materials Contracts
- Current Practices Under FAR Part 12

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Time & Materials Contracts

- Seldom used by commercial buyers
- No perceived benefit
- Too resource intensive to manage
- Use limited to situations involving
 - Requirements development
 - Requirements cannot be clearly defined
 - Special expertise required
- Monitored closely when used

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Preliminary Findings

- Planning Process
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- ➔ ■ Current Practices Under FAR Part 12

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Gov't Practices under FAR Part 12

- Less reliance on competition for pricing than in the private sector
 - Orders placed under IDIQ and GSA schedule contracts do not always achieve price competition
- FAR requires incorporation of vendor terms and conditions based on erroneous assumption that standard industry terms exist
 - This is impediment to normalizing proposals
 - Allows different risk allocation among different proposals

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Gov't Practices under FAR Part 12

- FAR Part 12 is used in sole source contracts
- Items or services are often acquired as “commercial” even when the government is the predominant or only buyer
- Definitions for commercial items and services are broad enough to encompass items and services for which there is no efficient market establishing a fair and reasonable price
 - Agencies use Part 12 to acquire items and services that are not truly commercial

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Competition under GSA Schedule

- Two opportunities to set competitive prices
 - Award or modification of schedule contract
 - Competition at task order level
- Enabling statute deems GSA schedule to be competitive, not always so
- In practice, use of GSA schedule does not ensure that government benefits from pricing established by an efficient commercial market

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Vendor Practices under FAR Part 12

- Vendors often segment their government business from their commercial markets, delinking government pricing from their commercial pricing
- Vendors, even under schedule contracts, not required to disclose their actual commercial prices to the government
 - "Basis of award" allows gaming of pricing
 - MFC clauses are largely unenforceable and have little practical utility

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Pending Findings

- Adequacy of the definition of commercial items and services
- Should commercial services ever be acquired under Part 12 in the absence of competition

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Acquisition Advisory Panel

Cross-Cutting Issues: Small Business Working Group Findings

November 18, 2005

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Small Business Working Group Panel Members

- David Javdan, Chair
 - General Counsel, U.S. Small Business Administration
- Louis Addeo
 - President, AT&T Government Solutions
- Deidre Lee
 - Assistant Commissioner for Integrated Technology Services, Federal Acquisition Service, GSA
- Roger Waldron
 - Acting Senior Procurement Executive, GSA

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Importance of Small Business to the U.S. Economy

- Represent 99.7% of all employers
- Employ about half of all private sector employees
- Pay 44.3% of the total U.S. private payroll
- Generated 60 to 80% of net new jobs annually
- Employ 39% of high tech workers (such as scientists, engineers, and computer workers)
- Produce 13 to 14 times more patents per employee than large firms

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3

Congressional Mandate Governing Small Business Contracting

- Section 8(d) of the Small Business Act requires that small businesses have the “maximum practicable opportunity” to participate in Federal prime and subcontract awards

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4

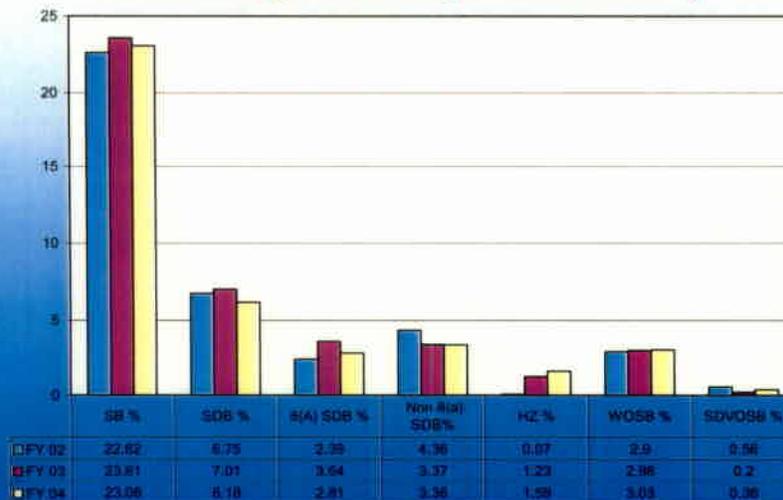
Small Business Contracting Goals

- 23% - Small Business (SB)
- 5% - Small Disadvantaged Business (SDB)
- 5% - Women-Owned SB (WOSB)
- 3% - HUBZone Small Business Concern (HZ)
- 3% - Service-Disabled Veteran-Owned SB (SDVOSB)

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Small Business Percent of Total Federal Prime Contracting Dollars (FY 2002-2004)



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6

Issues: Structuring Procurements to Afford Small Business Participation

- Adequacy of guidance in selecting among the myriad of small business contracting mechanisms
- Adequacy of guidance in defining requirements to facilitate small business contracting opportunities

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Issues: Small Business Competition Under Multiple Award Contracts

- Adequacy of guidance in reserving prime contracts for small businesses in full and open multiple award procurements
- Adequacy of guidance in utilizing small business contracting methods when placing orders against multiple award contracts

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Finding # 1: Structuring Acquisitions

- The current statutory requirement for establishing specific agency small business contracting goals is an effective means for agencies to monitor small business contracting and develop strategies to increase small business participation, provided that the goals are based on a realistic assessment of the agency's mission and procurement needs

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Finding # 2: Structuring Acquisitions

- There is insufficient guidance on the order of precedence for selecting among the numerous socio-economic contracting mechanisms to fulfill procurement requirements and achieve small business goals

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Finding # 3: Structuring Acquisitions

- Agencies are not effectively considering and assessing their small business goal achievements in developing acquisition strategies and utilizing small business contracting mechanisms

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Finding # 4: Structuring Acquisitions

- Agencies need accurate, real-time FPDS-NG contracting data to effectively monitor and utilize small business goal achievements in developing acquisition strategies

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Finding # 5: Structuring Acquisitions

- There is limited data on the impact of contracting bundling on small businesses

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Finding # 6: Structuring Acquisitions

- Procurement officials often do not correctly apply and follow the governing contract bundling definition and requirements when planning acquisition strategies

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Finding # 7: Structuring Acquisitions

- Agencies do not have clear guidelines or best practices for structuring acquisitions to mitigate the effects of contract bundling

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Finding # 8: Structuring Acquisitions

- Agencies with strong leadership commitment to small business contracting are the most successful in achieving small business procurement goals

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Finding # 9:

Competition Under Multiple Award Contracts

- The growing practice of reserving prime contracts for small businesses in full and open multiple award procurements has resulted in inconsistent applications of small business contracting requirements because there is no specific legal guidance for such reservations

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Finding # 10:

Competition Under Multiple Award Contracts

- Reserving prime contract awards for small businesses in full and open multiple award procurements can be an effective tool to mitigate against the effects of contract bundling and facilitate small business goal achievements

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Finding # 11:

Competition Under Multiple Award Contracts

- There is no explicit guidance for utilizing small business preference programs when placing orders against multiple award contracting vehicles

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Finding # 12:

Competition for Multiple Award Contracts

- Agency flexibility in targeting small businesses on GSA's Federal Supply Schedule has afforded small businesses greater access to task order awards

These slides contain preliminary working group findings for discussion purposes only. They have not approved by the Acquisition Advisory Panel 20

Next Steps

- Complete draft of findings for Panel review
- Prepare specific recommendations for Panel consideration
- Post draft findings and recommendations on Panel's web site for public comment

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