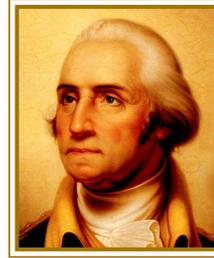


Statement of
Professor Steven L. Schooner
Co-Director of the Government Procurement Law Program
before the
United States Senate
Democratic Policy Committee



THE GEORGE
WASHINGTON
UNIVERSITY
LAW SCHOOL
WASHINGTON D C

Friday, September 10, 2004

IRAQ CONTRACTING: PREDICTABLE LESSONS LEARNED

*It is apparent that there was
no credible exercise of appropriate oversight of
contract performance at Abu Ghraib.¹*

Chairman Dorgan and members of the Committee, I appreciate the opportunity to appear before you today. This Committee's continued efforts to make sense of the procurement process in Iraq is an important and valuable public service. Staggering numbers of contractor personnel have supported, and continue to support, American troops and the government's reconstruction efforts in Iraq. In addition to the 1,000+ reported military casualties, many contractor employees have died or been injured in performing these services.² Yet recent experiences in Iraq, particularly allegations that contractor personnel were involved in inappropriate and potentially illegal activities at the Abu Ghraib prison, expose numerous areas of concern with regard to the current state of federal public procurement.

I would like to address two matters that cry out for Congressional attention and intervention. First, the federal government must devote more resources to contract administration, management, and oversight. This investment is an urgent priority given the combination of the 1990's Congressionally-mandated acquisition workforce reductions and the Bush administration's relentless pressure to accelerate the outsourcing trend. Second, the proliferation of interagency indefinite-delivery contract vehicles, and the perverse incentives that derive from these fee-based procurements, have prompted troubling pathologies that require correction and constraint.

¹ MG George R. Fay, Investigating Officer, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, at 52 (hereinafter "the Fay Report").

² One of the rare efforts to catalog contractor casualties suggests that at least 150 coalition contractor personnel have died in Iraq. See, e.g., <http://icasualties.org/oif/Civ.aspx>. Most experts believe the actual number is significantly higher.

The Rush to Outsource

No one should be surprised to find contractor personnel involved in almost every aspect of our efforts in Iraq. Outsourcing, or its more palatable pseudonym, “competitive sourcing,” is one of five government-wide initiatives in the Bush management agenda.³ The administration has done little to mask its preference for outsourcing, aggressively relying on contractor personnel in lieu of government employees or soldiers.⁴ NEW YORK TIMES columnist Paul Krugman aptly suggests that fear of a public backlash slowed the administration’s *domestic* outsourcing efforts, “[b]ut in Iraq, where there is little public or congressional oversight, the administration has privatized everything in sight, ... [particularly] purely military functions.... It’s one thing to have civilians drive trucks and serve food; it’s quite different to employ them as personal bodyguards to U.S. officials, as guards for U.S. government installations, and ... as

³ See, e.g., Executive Office of the President, Office of Management and Budget, *The President’s Management Agenda, Fiscal Year 2002*, www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf. “President Bush is a major advocate of ... hiring private firms to do the government’s work – and implemented this policy in Texas while he was governor....” Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83 (2003), citing, David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231, 232 (1998) (“Governor Bush’s effort to privatize most of Texas’ welfare system, in turn, seemed rooted in his attempt to make a name for himself with the kind of bold experimentation that could carry him to national office.” See also, Matthew Diller, *Form and Substance in the Privatization of Property Programs*, 49 UCLA L. REV. 1739, 1763, n. 94 (2002) (“Governor Bush sought to hand the administration of the state’s welfare system over to ... Lockheed Martin ... and Electronic Data Systems....”).

⁴ Until the political pressure became unbearable, the administration repeatedly offered eye-catching quotas for the number of government employees to be cut. See, e.g., BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 2004 (Feb. 2003) (Defense Department and Department of Veterans Affairs plan to outsource 55,000 civilian positions in 2003), www.whitehouse.gov/omb/budget/fy2004/budget.html; Christopher Lee, *Army Outsourcing Plan Decried*, WASH. POST A4 (Dec. 21, 2002) (suggesting that the plan could affect more than one of every six Army jobs). Today, these quotas are unofficial and internal. See, e.g., Christopher Lee, *OMB to Drop Quotas for Outsourcing of Jobs*, WASH. POST. A23 (July 25, 2003) (noting that skeptics “said OMB officials could still impose de facto quotas by refusing to bless agency plans that do not meet the old goals.”). Nonetheless, they remain the policy’s primary purpose. See, e.g., Office of Management and Budget, *Competitive Sourcing: Reasoned and Responsible Public-Private Competition: Agency Activities: A Supplement to the July 2003 Report* (September 2003), www.whitehouse.gov/omb/procurement/comp_sourc_addendum.pdf. Attachment A, Table 1, details the “OMB Estimates of Commercial Activities at Agencies Tracked under the PMA” indicating each agency’s total workforce, the number of full-time-equivalents (FTEs) performing commercial activities, the total number of those FTEs available for competition, and the percentage of the total workforce that this number represents.

interrogators in Iraqi prisons....”

In Iraq, our military relied upon contractor personnel not only for transportation, shelter, and food, but for unprecedented levels of battlefield and weaponry operation, support, and maintenance. Accordingly, defense experts now recognize that, without contractors, our military simply cannot project its awesome technical superiority abroad. But these highly publicized incidents raise fundamental questions, particularly with regard to the tasking of contractor personnel and the oversight of their performance.⁵

Anecdotes from Abu Ghraib

The disturbing allegations of prisoner abuse at the Abu Ghraib prison unfortunately include contractor personnel. The widely circulated Fay Report, which concludes that “[c]ontracting-related issues contributed to the problems at Abu Ghraib prison[,]” and the less well-known Interior Department Inspector General report are instructive in regard to the role of contractor personnel on and around the battle area.⁶

As a threshold issue, many observers, with good reason, object to the use of contractors to perform interrogation duties, assuming that interrogation is an inherently governmental function. Although the Fay report does not seek to resolve this issue (instead suggesting that use of contractor personnel may be unavoidable in “urgent or emergency situations”), this policy question offers a window into a long-running ad hoc battle over how our government serves the public. On a less philosophical level, the Fay report leaves no doubt that some of the specific problems experienced in Abu Ghraib can be traced to insufficient contractor oversight.⁷

⁵ By no means have all of the legal issues associated with contractors on the battlefield been resolved. See, e.g., Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders With Emergency Change Authority*, AIR FORCE L. REV. (forthcoming 2004); Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L. J. 369 (2004); Todd S. Millard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 176 MIL. L. REV. 1 (2003); Keith Hartley, *The Economics of Military Outsourcing*, 11 PUB. PROCUREMENT L. REV. 287 (2002); Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L. J. 233 (2000); Brian H. Brady, *Notice Provisions for United States Citizen Contractor Employees Serving with the Armed Forces of the United States in the Field: Time to Reflect Their Assimilated Status in Government Contracts?*, 147 MIL. L. REV. 1 (1995).

⁶ Fay Report, particularly at 47-52, and Memorandum from Earl Devaney, Inspector General, Department of the Interior, *Review of 12 Procurements....* (July 16, 2004) (hereinafter “Interior IG Report”).

⁷ Fay Report at 49. Several other findings, with regard to the CACI contract, merit attention: (1) A CACI employee participated with the contracting officer’s representative in
(continued...)

Inadequate Contract Administration

As learned in the current situation, it is very difficult, if not impossible, to effectively administer a contract when the COR [contracting officer's representative] is not on site.⁸

No one should be surprised by the finding that: “An important step in precluding the recurrence of [these types] of situations ... is to insure that a properly trained COR is on site.” But the larger point cannot be avoided. If the government plans to rely heavily upon contractors, the government must maintain, invest in, and apply appropriate acquisition professional resources. Unfortunately, insufficient contract management resources have been applied in Iraq.

Meaningful contract administration and monitoring will not be possible if a small number of CORs are asked to monitor the performance of one or more contractors who may have 100 or more employees in theater, and in some cases, perhaps in several locations.... [T]he CORs do well to keep up with the paper work, and simply have no time to actively monitor contractor performance. *It is apparent that there was no credible exercise of appropriate oversight of contract performance at Abu Ghraib.⁹*

Long before the prison scandal led to increased scrutiny, the government's failure to properly staff its contracts in Iraq was pervasive and well-known. As I suggested to this committee last year, there was every reason to fear that the government lacked adequate resources on the ground in Iraq to properly manage and administer its contractual undertaking. Few doubted that the government lacked sufficient personnel and mechanisms to ensure appropriate oversight of this massive contracting enterprise.

⁷(...continued)

writing the statement of work (SOW) prior to the award of the contract. As the Fay report notes, such a practice – what appears to be an organizational conflict of interest (OCI) – appears to violate the Federal Acquisition Regulation (FAR), see, e.g., 48 C.F.R. § 9.502-2; (2) It was unclear whether anyone in the Army’s contracting or legal organizations approved the use of the blanked purchase agreement (BPA). (3) The Army general counsel’s office concluded, in May of 2004, that these and other delivery orders for interrogator services were outside the scope of the GSA Schedule contract and should be cancelled. Fay Report at 48-49.

⁸ Fay Report at 47.

⁹ Fay Report at 52 (emphasis added). The report states what common sense dictates: “Failure to assign an adequate number of CORs to the area of contract performance puts the Army at risk of being unable to control poor performance or become aware of possible misconduct by contractor personnel.”

Unfortunately, this problem is not unique to the Iraq contracting process. The federal government currently lacks sufficient qualified acquisition professionals to conduct appropriate market research, properly plan acquisitions, maximize competition, comply with a plethora of Congressionally-imposed social policies, administer contracts to assure quality control and guarantee contract compliance, resolve pending protests and disputes, and close out contracts.¹⁰

This point bears emphasis for two reasons. First, GAO's "prior work has shown that when workforce reductions do not consider future needs – such as the staff reduction at DOD during the 1990's – the result is a workforce that is not balanced with regard to experience and skill sets."¹¹ Frankly, the government did not have enough qualified contracts professionals to meet its needs before the events of 9/11. Since that time, despite a dramatic spike in procurement spending for homeland security and military operations in Iraq and Afghanistan, the federal government has failed to engage in a meaningful effort to recruit the staff necessary to manage the government's increased contracting burdens.

Second, given the administration's competitive sourcing initiative, the most rapidly growing area of procurement activity lies in service contracting. Successful service contracts are difficult to draft and, more importantly, require significant resources to administer or manage. Currently, there are inadequate personnel resources, and insufficient investment has been made to train existing personnel in required skills (such as drafting performance-based statements of work). In other words, the critical acquisition workforce problems will get worse before they get better.

Demands upon overtaxed acquisition corps lead to a triage-type focus on buying, which has severely limited the resources available for post-award contract administration. Agencies must apply their limited resources to meet their most pressing needs. In other words, buyers face enormous pressure to fill vacant seats with bodies. When faced with applying limited resources, agencies focus first upon *awarding* contracts and less upon *administering* those contracts once awarded. To be clear – the government lacks the procurement professionals needed to manage the contractors that continue to replace outsourced government personnel. Steve Kelman, one of

¹⁰ See, generally, Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627 (2001) (discussing reduced oversight in government procurement throughout the 1990's). Last year, GAO conceded that the acquisition workforce has declined dramatically, while "all agencies face the prospect of losing many of their skilled acquisition personnel over the next 5 years – with a significant portion of the government's acquisition workforce becoming eligible to retire by fiscal year 2008." See, generally, *Federal Procurement: Spending and Workforce Trends*, GAO-03-443 (April 2003); Office of the Inspector General, Department of Defense, *DoD Acquisition Workforce Reduction Trends and Impacts*, Report D-2000-088 (February 29, 2000).

¹¹ GAO-03-443, citing, *inter alia*, *Contract Management: Trends and Challenges in Acquiring Services*, GAO-01-753T (May 22, 2001).

the chief architects of the 1990's acquisition reforms, now concedes that: "the administration of contracts[,] once they have been signed[,] has been the neglected stepchild of [procurement system reform] effort."¹² More broadly, the cuts diminished internal (or government) oversight of the contracting process,¹³ limiting the government's insight into how its contractors perform.

This scenario thus hides significant downstream costs and potential performance failures. In Iraq (and, ultimately, throughout the government), it's time to make meaningful investments in restoring, expanding, training, and incentivizing the acquisition workforce. A related concern arises with regard to the proliferation of personal services contracts.

Personal Services Contracts

*Another indication of the apparent inadequacy of on-site contract management and lack of contract training is the apparent lack of understanding of the appropriate relationship between contractor personnel, government civilian employees, and military personnel.*¹⁴

As the administration pursued its outsourcing agenda, it ignored the long-standing Congressional prohibitions against personal services contracting. Government procurement law, policy, and practice distinguish contracts for *services* (ranging from custodial or clerical to medical) from those for *supplies* (end items or widgets, ranging from furniture to fighter aircraft) and *construction* (designing, building, or repairing structures or, generally, improving real estate).¹⁵ Service contracts are further distinguished as *personal* and *nonpersonal* service

¹² "The most fundamental problem with the current system is that it insufficiently recognizes contract administration as in the first instance a management function." Steven Kelman, *Strategic Contracting Management*, in JOHN D. DONAHUE & JOSEPH S. NYE, JR. MARKET BASED GOVERNANCE 88, 89-90, 93 (2002); citing, *inter alia*, DONALD F. KETTL, GOVERNMENT BY PROXY: (MIS?)MANAGING FEDERAL PROGRAMS (1988) (with a reference to the "hollow state").

¹³ Schooner, *Fear of Oversight*, *supra* at 671-72 (including the graphic on 672). Between 1990 and 1999, the number of accounting and budget personnel within the acquisition workforce fell from 17,504 to 6,432, a decrease of 63 percent. The cumulative reduction in these specialties is more dramatic, because these figures *exclude* the Defense Contract Audit Agency, whose staffing decreased from 7,030 work years in FY 1990 to 3,958 in FY 1999, a reduction of about 44 percent. Further, during the same period, the number of quality assurance, inspection, and grading personnel fell from 12,117 to 5,191, a decrease of 57 percent.

¹⁴ Fay Report at 51.

¹⁵ A service contract "directly engages the time and effort of a contractor whose primary
(continued...)

contracts. In a nonpersonal services contract, the government delegates a function to a contractor. Conversely, in personal services contracts, the government retains the function, but contractor employees staff the effort.¹⁶

The government operates under longstanding legal and policy objections to the use of personal services contracts.¹⁷ Yet an increasingly common form of personal services contract is the *body shop* or *employee augmentation arrangement*. As the name implies, the government uses this type of contract to hire contractor personnel to replace, supplement, or work alongside civil servants or members of the armed forces. As a matter of *practice and necessity*, the federal government today relies heavily upon this type of employee augmentation contract.¹⁸ The experience in Iraq is no different from that in government offices and organizations across the United States. Civil servants work alongside, with, and at times, for, contractor employees who sit in seats previously occupied by government employees. But no one stopped to train the government workforce on how to operate in such an environment. For example, the Fay Report notes that the use of contractor personnel, “hired in an attempt to address shortfalls[,]” contributed to the lack of unit integrity in the Joint Interrogation and Detention Center (JIDC), which the report described as a “fatal flaw.”¹⁹

One of the most troubling aspects of using contractor personnel to augment government personnel shortfalls is that, all too often, the contractor personnel lack appropriate training to replace government personnel and government personnel lack appropriate training to supervise the contractor personnel. Among other things, the Fay Report found that: “No training is

¹⁵(...continued)

purpose is to perform an identifiable task *rather than to furnish an end item of supply.*” 48 C.F.R. § 37.101 (emphasis added).

¹⁶ “‘Nonpersonal services contract’ means a contract under which the personnel rendering the services are not subject, either by the contract’s terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.” 48 C.F.R. § 37.101. “A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor’s personnel.” 48 C.F.R. § 37.104(a).

¹⁷ The basic procurement regulation explains that: “Agencies shall not award personal services contracts unless specifically authorized by statute . . . to do so.” 48 C.F.R. § 37.104(b).

¹⁸ This reliance is driven by the juxtaposition of two trends: (1) increased government downsizing and (2) the targeted acquisition workforce reductions discussed above.

¹⁹ Fay Report at 9. The government’s failure to train its workforce to operate in such a fluid, highly integrated environment concerns the nation’s public policy schools and scholars who study the “new public management.” See, e.g., John Forrer and James Edwin Kee, *Public Servants as Contract Managers?*, 33 PUB. CONT. L.J. 361 (2004).

conducted at any level ... on the employment of contract interrogators in military operations.... [Moreover, the government's] interrogators, analysts, and leaders were unprepared for the arrival of contract interrogators and had no training to fall back on in the management, control, and discipline of these personnel."²⁰ Moreover, within Abu Ghraib, it appears that the parties involved lacked a sense "of the appropriate relationship between contractor personnel, government civilian employees, and military personnel. Several people indicated ... that contractor personnel were 'supervising' government personnel or *vice versa*."²¹

The worst-case scenario arises where the a contractor performs work under an open-ended contract (e.g., with a vague or ambiguous statement of work) without guidance or management from a responsible government official (e.g., in the absence of an administrative contracting officer or a contracting officer's representative).²² The Fay investigation did well to draw attention to the oversight vacuum. It is troubling to learn that the officer in charge of interrogations received no parameters or guidance for use of contractor personnel, was unfamiliar with the contract's terms and procedures, made no mention of a government contracting officer's representative, and understood her primary point of contact to be the contractor's on-site

²⁰ Fay Report at 19. Nor was there an established curriculum from which the government could have drawn for its training. The Fay Report found that: "No doctrine exists to guide interrogators and their intelligence leaders ... in the contract management or command and control of contractors in a wartime environment. These interrogators and leaders faced numerous issues involving contract management: roles and responsibilities of [government] personnel with respect to contractors; roles, relationships, and responsibilities of contract[or personnel] ... with military personnel; and the methods of disciplining contractor personnel...." Moreover, there was no standardization of the contractor interrogator training. To the extent that the contract required that contractor personnel have training equivalent to government interrogators, "no one was monitoring the contractor's decision as to what was considered 'equivalent.'" Fay Report at 51.

²¹ Fay Report at 51. For example, the report identifies two organization charts that listed contractor employee supervisors with military subordinates. Fay Report at 52.

²² A simple example illustrating this principle can be found in the BTG/Titan contract for linguists. Because the purpose of the contract was to provide linguists, the contract does not contemplate that contractor personnel might conduct interrogations. Accordingly, nothing in the contract required BTG/Titan personnel to review or sign the interrogation rules of engagement. Fay Report at 48. The report continues, at 52:

Proper oversight did not occur at Abu Ghraib due to a lack of training and inadequate contract management and monitoring. Failure to assign an adequate number of CORs to the area of contract performance puts the Army at risk of being unable to control poor performance or become aware of possible misconduct by contractor personnel.... The Army needs to take a much more aggressive approach to contract administration and management....

manager.²³ Sadly, this scenario is all too common today.

Flexible Fee-Based Acquisition Instruments

These problems are exacerbated by the proliferation of fee-based arrangements that permit government agencies to avoid longstanding contracting constraints by off-loading their procurement function to other agencies. No doubt, most Americans are surprised to learn that the military relied upon the Department of the Interior's National Business Center to procure contractor personnel to conduct interrogations in Iraq and Guantanamo Bay.²⁴

Yet it is no surprise that problems continue to arise under these immensely popular, highly-flexible, contractual vehicles – the indefinite-delivery/indefinite-quantity (ID/IQ) contract. While these vehicles undoubtedly streamline the procurement process, concerns regarding their misuse are neither new nor novel.²⁵ Numerous GAO and IG reports disclose agency practices in awarding task and delivery order contracts which, almost uniformly, include insufficient competition and poorly justified sole-source awards.²⁶ In principle, contractors were supposed to compete to become part of an umbrella contract, which offered them little more than the

²³ Fay Report at 50.

²⁴ It is difficult to get a sense of the mission, purpose, or mandate of the National Business Center. For example, a visit to the NBC's website indicates that its new or expanded customers include: (1) the Public Defender Service of the District of Columbia (PDS), a federally funded, independent agency of the District of Columbia; (2) the Millennium Challenge Corporation (MCC), a new government corporation, which provides U.S. foreign development assistance to countries that adopt pro-growth strategies for meeting political, social and economic challenges; and (3) the African Development Foundation (ADF), a government corporation, which provides small grants directly to private organizations in Africa to carry out sustainable self-help development activities in an environmentally sound manner. See, e.g., *www.nbc.gov*. Like a commercial firm, to the extent that "[t]he NBC operates on a full cost-recovery business basis[.]" it must generate fees. Unlike a commercial firm, one might expect its ultimate purpose to derive from a Congressional authorization in some way related to the Interior.

²⁵ See, e.g., Karen DaPonte Thornton, *Fine Tuning Acquisition Reform's Favorite Procurement Vehicle, the Indefinite Delivery Contract*, 31 PUB. CONT. L. J. 383 (2002); Michael J. Benjamin, *Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies*, 31 PUB. CONT. L. J. 429 (2002).

²⁶ Section 803 of the 2002 Defense Authorization Act was intended to rein in some of these practices. See also 67 Fed. Reg. 15351, 65505 (April 1, 2002; October 25, 2002). "It remains to be seen, however, whether these new regulations will enhance competition because agencies often have disregarded the existing FAR provisions...." Steven N. Tomanelli, *Feature Comment: New Law Aims to Increase Competition and Oversight of DoD's Purchases of Services on Multiple Award Contracts*, 44 GOV'T CONTRACTOR ¶ 107 (March 20, 2002).

opportunity to compete for individual task or delivery orders. Unfortunately, the anticipated competition rarely materializes – agencies tend to include all comers on the contract vehicle. This makes sense, to the extent that inclusion on the contract is no more than an opportunity to compete, akin to a “hunting license.” Yet real competition also proved absent during the task order stage. Because all “contract holders” may market their services directly to individual agencies, those agencies – affected by considerations including speed, convenience, personal preference, and human nature – frequently obtain those services on a sole source or non-competitive basis from those possessing these hunting licenses. As a result, legitimate competition infrequently materializes.²⁷

Moreover, as the Interior Department Inspector General concluded in this case, the pursuit of fees distorts the moral compass that we would otherwise hope to animate federal government procurement officials. The Interior IG correctly perceived “[t]he inherent conflict in a fee-for-service operation, where procurement personnel in the eagerness to enhance organization revenues have found shortcuts to Federal procurement procedures and procured services for clients whose own agencies might not do so.”²⁸

This point merits elaboration. The federal procurement statutes and regulations assume a model in which agencies rely upon warranted purchasing professionals to procure their needed supplies and services.²⁹ This longstanding arrangement bifurcates programmatic authority from procurement authority – in other words, program or project managers (PM’s) must rely upon contracting officers (CO’s) to fulfill their requirements. Our procurement regime assumes that CO’s will be familiar with, understand, and follow Congressional mandates and effectuate the government’s procurement policies in making these purchases. Contracting officers are expected to meet the PM’s needs, but only within the established constraints of the procurement system.

Unfortunately, perverse incentives associated with flexible, interagency, fee-based acquisition vehicles turn this system on its head. Various statutory schemes permit interagency transfers,³⁰ such as permitting one agency to conduct a purchase for another.³¹ While the

²⁷ See generally, GAO/NSIAD-00-56 at 4, *Contract Management: Few Competing Proposals for Large DOD Information Technology Orders* (March 20, 2000).

²⁸ Interior IG Report at 3.

²⁹ See, e.g., 48 C.F.R. § 1.6.

³⁰ See, e.g., the Economy Act, 31 U.S.C. §§ 1535, 1536; the Federal Property and Administrative Services Act (FPASA), 40 U.S.C. § 481(a)(3); and the Clinger-Cohen Act of 1996, Pub. L. No. 104-106. In addition, as GSA explains: Governmentwide Acquisition Contracts (GWACs) are defined in Part 2 of the Federal Acquisition Regulation (FAR) as task order or delivery order contracts for information technology (IT) established by one agency for governmentwide use. Each GWAC is operated by an executive agent designated by ... OMB

(continued...)

Economy Act authorizes interagency transfers, the statute “permit[s] an agency to take advantage of another agency’s expertise, not merely to offload work, funds, or both to avoid legislative restrictions.”³²

The problem arises because fee-based purchasing offices (or, in other words, the servicing agency) need revenue to survive.³³ In other words, revolving funds permit agencies or governmental organizational units to operate like an ongoing business. Like a business, however, the survival of revolving fund instrumentalities depend upon the generation of fees. Thus, all too often the pursuit of fees, rather than any Congressionally-mandated mission, drives these purchasing organizations.

In practice, this creates an unfortunate “race to the bottom.” Fee-based purchasing instrumentalities have no stake in the outcome of contracts that they award. The program manager at the purchasing (or receiving) agency willingly pays a franchise fee to the servicing

³⁰(...continued)
pursuant to section 5112(e) of the Clinger-Cohen Act.

³¹ The Fay Report suggests another unanticipated pathology the derives from the use of an interagency purchasing scheme. Keeping in mind that the Army used Interior Department and GSA contracting vehicles to obtain contractor support, the Fay Report expresses concern that, because “[s]ome of the employees at Abu Ghraib were not DoD contractor employees[,]” they may not be subject to the Military Extraterritorial Jurisdiction Act, 18 U.S.C. §§ 3261-3267, which might permit them to avoid criminal prosecution.

³² STEVEN N. TOMANELLI, APPROPRIATIONS LAW: PRINCIPLES AND PRACTICE at 371 (2003). One of the most common violations of this prohibition is “parking” funds. For example, fearing that some of its appropriated funds might expire before the end of the fiscal year (and thus be lost to it forever), a hypothetical agency (A) might “spend” its remaining appropriation by transferring it into another agency’s revolving fund. The receiving agency (B) then holds or parks the funds in its revolving fund, where the funds do not expire with the fiscal year’s conclusion. Subsequently, consistent with A’s wishes, B retains and reimburses a contractor (out of the revolving fund, using what otherwise would be expired funds) to perform services for A. A is pleased to receive services that, pursuant to conventional fiscal law, it could not afford to purchase. B willingly obliges A because B skims an administrative or franchise fee off the top of the transaction which, in turn, funds (or potentially grows) B’s operations.

³³ Most federal government agencies and operations depend upon annual appropriations. To the extent that they generate income or receive funds from the public, those funds - typically termed miscellaneous receipts – return to the general fisc. (In other words, the agency cannot use them to fund other activities.) By contrast, the revolving fund concept permits certain agencies to create funds, credit receipts to the fund, and use the funds without further Congressional appropriation. See, e.g., JOHN E. JENSEN, QUICK REFERENCE TO FEDERAL APPROPRIATIONS LAW, 172 (2002).

agency to avoid the bureaucratic constraints (such as competition mandates) that slow down the PM's in-house contracting officer. In turn, the servicing agency gladly streamlines the purchase. Moreover, once the contract is awarded, the serving agency has no interest in administering, nor does it have sufficient resources to manage, the contract. Thus, in exchange for a fee, the program manager can choose a favored contractor without competition and enjoy the contractor's performance unfettered by typical contract administration. The Abu Ghraib experience offers a startling illustration of this relationship.

On July 13, the GSA unveiled its "Get It Right" plan to ensure proper use of its schedule contracts. This initiative is as well intentioned as it is overdue. The plan will assess regulatory compliance and "calls for GSA to proactively supervise the proper use of its contract vehicles..."³⁴ More must be done. Without aggressive Congressional intervention, it is unlikely that confidence and credibility can be restored to the existing interagency services procurement regime.

The Abu Ghraib experience, while atypical in terms of its brutality and the public outcry it spawned, is sadly typical of a much broader problem that pervades public procurement. The task order regime resembles a self-replicating virus, without checks or controls. Program personnel favor these fast and all-too-often invisible contracts, which sponsoring agencies gladly provide for a fee, and so the virus spreads. To stop this virus, Congress must insist that these contracting actions take place in the open, subject to competition, oversight, and review. Congress also must make clear that, if sponsoring agencies earn fees for facilitating these contracts, those sponsoring agencies will be held strictly accountable for the contractual outcomes. The alternative is chaos. As the Abu Ghraib experience demonstrates, when public trust is at stake, that result is untenable.

Conclusion

That concludes my statement. Thank you for the opportunity to share these thoughts with you. I would be pleased to answer any questions.

³⁴ *GSA "Get It Right" Plan Will Ensure Proper Use of GSA Contract Vehicles*, GSA News Release #10097 (July 13, 2004); GSA Policy, Acquisition, Get it Right at www.gsa.gov.