



THE EXECUTIVE BRIEF SERIES

**Executive Brief on Federal Contracting and Procurement:
The Impact of Laws, Regulations and Initiatives on the Homeland Security & Defense Industry**

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For the Homeland Security & Defense Business Council by:

Marcia G. Madsen
Partner

David F. Dowd
Partner

Roger D. Waldron
Counsel

MAYER • BROWN

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EXECUTIVE SUMMARY

The issue of fair and open contracting has always been of concern to both government and industry. With the creation of the U.S. Department of Homeland Security, the largest agency in the history of the U.S. government was created with numerous urgent missions that required substantial outsourcing. Working toward an environment that provides successful outcomes and achieves mission objectives is the ideal of both the government and contracting community. Recently, with the President's Memorandum and several already existing initiatives, the climate has shifted toward enforcement and oversight rather than management and operational considerations. Assuring a competitive contracting process, selecting the proper contracting vehicle, and achieving effective oversight are critical goals; however, the move toward enforcement burdens both the contractor and procurement communities with an atmosphere of "blame" rather than one that facilitates mission execution.

On March 4, 2009, President Obama issued a Memorandum regarding government contracts that drew considerable attention in the media, throughout government, and in industry.¹ The Memorandum emphasizes five areas of focus in government contracting that need particular attention: (i) competition; (ii) contract type; (iii) oversight; (iv) inherently governmental activities; and (v) the acquisition workforce. All five areas have been the focus of considerable attention in recent years, including enacted and pending legislative initiatives.

This paper explores the President's Memorandum, mandatory disclosure rules, the Federal Acquisition Streamlining Act, revisions to the Federal Acquisition Regulation, the False Claims Act, among numerous other legislative and administrative initiatives that seek to improve the federal contracting process. The cumulative and unintended consequences of these changes are discussed and explored with suggestions on how to assure the Department can achieve its programmatic goals through an open and fair procurement and acquisition process.

This Executive Brief also summarizes the context and challenges of some of the recently enacted and pending reforms, including:

- **Competition**: Enhanced competition for task and delivery orders.
- **Contract Type**: Additional guidance on the use of cost-reimbursement vs. fixed-price contracts, and more emphasis on the use of fixed-price contracts.
- **Oversight**: New means to monitor contractor performance, including possible violations of law, through self-disclosure requirements and a greater role for investigative personnel in contract administration.
- **Conflicts of Interest**: Statutory and regulatory measures to further specify how conflicts should be addressed, which may limit contracting flexibility.

OVERVIEW

The Homeland Security & Defense Business Council (“Council”), a non-partisan, non-profit organization of the leading small, medium and large companies that provide the products, services and technologies for every program that encompasses our nation’s homeland security mission, has prepared this paper to address the topics identified in the President’s Memorandum and to identify (i) the status and key changes in these areas of the law; (ii) congressional initiatives that are reviewing further changes; and (iii) how industry in general and the Council members in particular might approach and assist the Government in addressing these areas of focus.

In each of the areas highlighted in the President’s Memorandum, statutory, regulatory, and other initiatives directed at the same objectives already are underway (See table in appendix A). In other instances, existing law and regulations adequately address the concerns. As government debates what gaps preclude our nation from achieving an even more effective, efficient and successful process, it is incumbent upon industry to be an active participant in that discussion. The concern is that the focus and increased spotlight may create an atmosphere of blame rather than one that facilitates achieving “programmatically goals.”

The federal contracting market is substantial and growing, reaching roughly \$500 billion in fiscal year 2008. Government contracting is subject to an intricate web of statutes, regulations, and policies. Public interest is significant. Oversight is persistent. Competition for contracts can be fierce.

As one would expect, managing the contracting process on behalf of the U.S. Government requires expertise, skill, and business judgment. Yet, as acquisition spending has increased substantially over the last decade, the Government has experienced a decline in the size of its acquisition workforce, as has been addressed in reports such as the January 2007 report of the Acquisition Advisory Panel. As a result of contracting reforms initiated in the 1990s, the federal acquisition workforce began to shrink as reforms were implemented that were thought to require fewer resources. Agencies such as DHS, in turn, increasingly have relied on contractors to perform functions for which the agency did not have sufficient personnel. This practice, in turn, has led to questions whether inherently governmental functions related to acquisition are being properly outsourced. Congress also has expressed concern about organizational conflicts of interest and personal conflicts of interest on the part of contractors as their roles have evolved.

Concerns also have arisen whether the acquisition reforms of the 1990s, such as increased use of task and delivery order contracts, have yielded the intended benefits. In particular, the Government Accountability Office, agency Inspectors General, and Congress have questioned the adequacy of competition for orders. Congress also has expressed concern that agencies are becoming overly reliant on cost-reimbursement contracts. These and other concerns have led to a series of legislative, regulatory, and management initiatives discussed below, that provide the framework for the President’s March 4 Memorandum.

The Memorandum calls for the Office of Management and Budget (“OMB”), in collaboration with other agencies, to develop and issue by July 1, 2009 “Government-wide guidance to assist agencies in reviewing, and creating processes for ongoing review of, existing contracts in order to identify contracts that are wasteful, inefficient, or not otherwise likely to meet the agency’s needs, and to formulate appropriate corrective action in a timely manner.” This corrective action may include “modifying or canceling such contracts” in accordance with law. The Memorandum notes that the amounts spent on federal contracts had more than doubled since 2001, with significant increases in the dollars awarded without “full and open competition” and in cost-reimbursement contracts. It states that reversing these trends “could result in savings of billions of dollars each year for the American taxpayer.”

The Memorandum further calls for OMB to develop and issue by September 30, 2009, Government-wide guidance to:

(1) govern the appropriate use and oversight of sole-source and other types of noncompetitive contracts and to maximize the use of full and open competition and other competitive procurement processes;

(2) govern the appropriate use and oversight of all contract types, in full consideration of the agency's needs, and to minimize risk and maximize the value of Government contracts generally, consistent with the regulations to be promulgated pursuant to section 864 of Public Law 110-417;

(3) assist agencies in assessing the capacity and ability of the Federal acquisition workforce to develop, manage, and oversee acquisitions appropriately; and

(4) clarify when governmental outsourcing for services is and is not appropriate, consistent with section 321 of Public Law 110-417.

The consultation process directed by the Memorandum will include the Federal Acquisition Regulatory Council and other agencies, including DHS.

I. AREAS OF REFORM

In many respects, the President's Memorandum reinforces existing law and policy. In others, it appears to embrace initiatives that are underway through recent or pending legislation and amendments to the Federal Acquisition Regulation ("FAR").

A. The Contract Review

The Memorandum calls for development and issuance of guidance to "assist agencies in reviewing, and creating processes for ongoing review of existing contracts in order to identify contracts that are wasteful, inefficient, or not otherwise likely to meet the agency's needs, and to formulate appropriate corrective action in a timely manner."

Depending on the guidance issued, this review may require contractors to assist agencies in supporting the need for, and efficacy of, their contracts. In some instances, due to their workload, contracting officials within agencies may benefit from the additional support that a contractor can provide. The assurance that the contract (if performed to specification) will meet the agency's needs must come from the agency.

B. Competition

In part because of the cost savings and transparency it offers, competition is a particular area of emphasis in the President's March 4 Memorandum. The Memorandum states that "[e]xcessive reliance by executive agencies on sole-source contracts (or contracts with a limited number of sources) creates a risk that taxpayer funds will be "spent on contracts that are wasteful, inefficient, subject to misuse, or otherwise not well designed to serve" the needs of the U.S. Government or the taxpayer. The Memorandum states that it is Government policy that agencies "shall not engage in noncompetitive contracts except in those circumstances where their use can be fully justified and where appropriate safeguards have been put in place to protect the taxpayer." It calls for guidance to "govern the appropriate use and oversight of sole-source and other types of noncompetitive contracts and to maximize the use of full and open competition and other competitive procurement processes."

1. Context

For more than two decades, the Competition in Contracting Act of 1984 (“CICA”) has required agencies to engage in “full and open competition” when awarding contracts, subject to specified exceptions. Under existing statutes and regulations, agencies generally must publicize their efforts to award contracts, define their requirements in a manner that is the least restrictive to foster competition, identify to potential competitors the factors to be used to evaluate the proposals, and apply those factors in evaluating proposals and making an award. One of the current statutory exceptions to competition is that only one source can perform the work. When an agency relies on that exception, it must prepare a Justification and Approval to document the basis for its determination that a single source can perform the required work or provide the required product.

2. The Struggle Over Orders

Partly due to acquisition reforms over the last decade, the emphasis on competition has been diminished in practice, including through relatively large orders placed under multiple award contracts. Congress, the U.S. Government Accountability Office (“GAO”), and agency Inspectors General (“IGs”), among others, have noticed the lack of competition and expressed concern. For example, DHS has been the focus of a targeted competition mandate from Congress. The Department of Homeland Security Appropriations Act, 2009, requires¹ all DHS contracts above the Simplified Acquisition Threshold (\$100,000) to be awarded using competitive procedures unless awarded under the Small Business Act, through an interagency contract funded by an agency other than DHS, or in other limited circumstances. The Secretary of DHS may waive this provision. The Act also calls for a study by the DHS IG of departmental contracts awarded other than through full and open competition “to assess departmental compliance with applicable laws and regulations.”²

To a significant degree, orders rather than contracts *per se* are the critical area of concern. Task and delivery orders under multiple award contracts and the Federal Supply Schedule – which together have comprised a significant portion of acquisition spending over the last decade – have been a particular area of concern for Congress, GAO, and the IGs. In the Federal Acquisition Streamlining Act of 1994 (“FASA”)³, Congress required that the award of multiple award task or delivery order contracts be subject to full and open competition and included specific requirements for competitions for subsequent orders. The FASA standard was a “fair opportunity to be considered” for each task or delivery order, subject to limited exceptions.⁴

3. Seeking A Fair Opportunity

Despite the statutory mandate for a “fair opportunity to be considered,” agencies did not consistently promote competition or justify exceptions to competition in the years after FASA was enacted.⁵ A number of acquisition reforms have been introduced over time to bolster competition for orders under multiple award contracts. For example, Section 803 of the National Defense Authorization Act (“NDAA”) for Fiscal Year (“FY”) 2002⁶ sought to enhance the competition requirements for DoD orders under multiple award contracts. Regulatory efforts also have tried to encourage greater competition for orders.

Continuing this trend, Section 843 of the NDAA for FY2008 attempts to strengthen the competitive procedures for task orders over \$5 million awarded by DoD and civilian agencies such as DHS by requiring that the agency provide all contractors a fair opportunity to be considered, which is not met unless all such contractors are provided: (1) a notice of the order that includes a clear statement of the agency’s requirements; (2) a reasonable period of time to provide a proposal in response; and (3) disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating such proposals and the factors’ importance, as well as certain information regarding an award when one is made.⁷ Following Section 843, orders over \$5 million thus are subject to enhanced competition that approximate the safeguards to be applied when contracts are awarded. This approach for orders makes sense as a fair number of contracts do not exceed \$5 million in value.

Section 863 of the NDAA for FY2009 requires a change to the FAR to require greater competition under all multiple award contracts, including the Federal Supply Schedule, for all orders over the Simplified Acquisition Threshold.

All such orders are to be made on a “competitive basis,” unless one of four CICA exceptions to competition is met or a law expressly authorizes or requires a purchase to be made from a specified source. The enhanced competition procedures must require fair notice of the intent to make a purchase to be given to all offerors and must afford all offerors “a fair opportunity to make an offer and have that offer fairly considered by the official making the purchase.” Agencies also will be required to publicize sole-source orders over the Simplified Acquisition Threshold.

It remains to be seen if the new competition regulations will produce the desired result. Ensuring a fair opportunity to compete for task orders has been a challenging endeavor, and will require continued focus as the new round of reforms is implemented and tested.

4. Oversight For Competition

Audits and investigations, such as GAO reports, are one (but not the only) means to ascertain if agencies are following the laws and regulations that seek to increase competition. When Congress initially encouraged the use of multiple award contracts in FASA, it limited protest jurisdiction to the contention that the order increases the scope, period, or maximum value of the contract under which the order was issued. This meant that regardless of the magnitude of the order at issue, contractors could not protest the terms of any solicitation for task or delivery order proposals or the methodology employed by the agency in making an award of an order. In addition to concerns regarding the fairness of the competitions for orders that GAO and IG reports identified, it was discovered that many orders were relatively large. Following the recommendation of the Acquisition Advisory Panel that protest jurisdiction be extended over relatively large orders, Section 843(e) of the NDAA for FY2008⁸ permits the filing at GAO of protests regarding orders valued in excess of \$10 million. This approach permits timely oversight of concerns regarding the fairness of order competitions that are brought to light by interested parties during the competition or just after it has been completed. At that juncture, the agency still has time to correct any prejudicial deficiencies in a meaningful way for the benefit of the agency and the competitive process. Section 843(e) limits the statutory authority for these protests to three years after enactment of the bill.

Although multiple award contracts offer the prospect of an initial competition followed by further competitions for discrete orders, the President’s Memorandum recognizes that the Government has not yet achieved the full competitive promise (and benefits) of these contract vehicles. This may be due, in part, because acquisition officials occasionally have placed a greater emphasis on efficiency or expediency than on the desired competition.⁹ The demands on a limited acquisition workforce may be a contributing factor.

5. Competition – A Continuing Focus

The recent emphasis on competition is not limited to orders under multiple award contracts. For example, the American Recovery and Reinvestment Act of 2009¹⁰ (“Recovery Act”) requires that contracts funded under the Act should be awarded as fixed-price contracts through competitive procedures to the “maximum extent possible.” Although it applies only to major defense acquisition programs, Section 203 of the pending S. 454 places a strong emphasis on competition through the life cycle of a program.

Competition thus is, and likely will remain, a focus of acquisition reform in coming years. Even when the rules have been clear, it often has proven challenging in practice to ensure that interested parties have an open and fair chance to compete to provide the best value to the Government.

C. Contract Type

According to the President’s Memorandum, dollars obligated under cost-reimbursement contracts nearly doubled from FY2000 to 2008, rising from \$71 billion to \$135 billion. The Memorandum also notes that overall spending roughly doubled from 2001 to 2008, when it reached \$500 billion. Over this period, therefore, the amount spent on cost-reimbursement contracts has been roughly comparable in regard to the percentage of spending.

The Memorandum states that cost-reimbursement contracts “shall be used only when circumstances do not allow the agency to define its requirements sufficiently to allow for a fixed-price type contract.” It calls for guidance to “govern the appropriate use and oversight of all contract types, in full consideration of the agency’s needs, and to minimize risk and maximize the value of Government contracts generally, consistent with the regulations to be promulgated pursuant to section 864 of Public Law 110-417,” which is the NDAA for FY2009. The Memorandum thus embraces the approach required by Section 864.

1. Section 864

Section 864 requires the FAR to be amended to include guidance regarding (i) when and under what circumstances cost-reimbursement contracts are appropriate, (ii) the findings necessary to support a decision to use a cost-reimbursement contract, and (iii) the resources necessary to award and manage cost reimbursement contracts. Section 864 further provides that within one year of the promulgation of the new regulations, each IG for agencies that award contracts or orders that total over \$1 billion in the prior fiscal year are to review agency compliance with the regulations.

The Recovery Act emphasizes the use of fixed-price contracts for contracts awarded under the Act. As noted above, Section 1554 provides that contracts under the Act are to be awarded as fixed-price contracts through competitive procedures to the “maximum extent possible.” Agencies must post a notice on recovery.gov regarding any contract awarded with Recovery Act funds that is not fixed-price and not awarded using competitive procedures.

2. Fixed Prices vs. Cost-Reimbursement Contracts: The Current FAR View

The President’s directive for new guidance, and the acquisition reforms discussed above, should be viewed in context. Part 16 of the FAR currently provides guidance regarding when to use fixed-price and cost-reimbursement contracts. It is unclear to what extent the new guidance will deviate from the approach in the current FAR. The FAR states, for example, that selection of a contract type “is generally a matter for negotiation and requires the exercise of sound judgment.”¹¹ It lists eleven specific factors for the contracting officer to consider in selecting and negotiating the contract type, including such matters as price competition, type and complexity of the requirement, and urgency of the requirement.¹²

Under fixed-price contracts, the contractor assumes “maximum risk and full responsibility for all costs and resulting profit or loss.”¹³ According to the current FAR, a firm-fixed-price contract is suitable for commercial items or “for acquiring other supplies or services on the basis of reasonably definite functional or detailed specifications.”¹⁴ The FAR cautions that complex requirements “particularly those unique to the Government, usually result in greater risk assumption by the Government,”¹⁵ referring to cost-based contracts. This is “especially true for complex research and development efforts, when performance uncertainties or the likelihood of changes makes it difficult to estimate performance costs in advance.”¹⁶

As the FAR notes, fixed-price contracts are not appropriate in certain circumstances. For example, the FAR states that cost-reimbursement contracts “are suitable for use only when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.”¹⁷ The FAR cautions about the use of fixed-price contracts for research and development.¹⁸

3. Contract Type: The Challenge Going Forward

Fixed-price contracts thus require well-defined requirements to optimize the balance of risks. The adequacy of requirements definition was a particular focus and concern of the Acquisition Advisory Panel.¹⁹ As the Panel found, it can be a significant challenge for agencies to assemble the resources and devote the time needed to prepare a clear and accurate statement of their requirements, as is necessary for a full and fair competition for a fixed-price contract.

The President’s Memorandum, and other reforms, are pressing agencies to use fixed-price contracts to a greater extent. Based on the contract type, the FAR recognizes that doing so will shift a greater risk of performance to contractors. To make this transition fair, and to better enable the Government to receive a fair price that accurately reflects the allocation of risk, agencies will need to exert additional efforts to define and refine their requirements. Pursuant to Section 864, the contemplated FAR amendments are to address the resources needed to award and manage cost-reimbursement contracts. Although not addressed by Section 864, the resources needed to facilitate award of fixed-prices are also a significant concern.

The emphasis on fixed-price contracts will require better requirements definition to ensure a fair allocation of risk. Ill-defined requirements increase the risk that the Government may not acquire what it truly needs or wants. In addition, although cost-reimbursement contracts may require more resources to administer, formation of fixed-price contracts (which are more dependent on accurate and precise specifications and requirements definitions) may require more work by agency personnel in the formation process.

D. Oversight

The Memorandum states that it is “essential” that the Government “have the capacity to carry out robust and thorough management and oversight of its contracts in order to achieve programmatic goals, avoid significant overcharges, and curb wasteful spending.” It further states that “[i]mproved contract oversight” could “significantly” reduce the amounts spent on contracts.

There are many reasons short of “waste” that cost overruns occur on contracts. Requirements may not be clearly defined or may evolve over time. Work may prove to be more difficult than anticipated. As discussed above, the FAR recognizes that cost-type contracts are to be used precisely when it is difficult to estimate what the work will cost.

Effective oversight of government contracts unquestionably is necessary and beneficial to the public. As with the emphasis on contract type, however, the emphasis on oversight in the President’s Memorandum should be placed into context. Oversight in government contracting has been the focus of transformative change over the last year. Some facets of this oversight, at least initially, do not require Government resources because they rely on contractor disclosures. These changes may fundamentally alter how government contracts are managed and substantially increase the risks of performance. That, in turn, may have significant (and adverse) ramifications on contract pricing.

1. Mandatory Disclosure – Crossing Boundaries In Oversight And Ceding Contract Management

As the result of a final rule issued²⁰ in November 2008, FAR 52.203-13(c)(2) now requires disclosure “whenever, in connection with the award, performance, or closeout of [the] contract or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor” has committed a “violation of Federal criminal law involving fraud, conflict of interest, bribery or gratuity violations” in Title 18 of the U.S. Code or a “violation of the civil False Claims Act (31 U.S.C. 3729-3733).” This disclosure obligation for a contract continues until “until at least 3 years after final payment.” Certain key terms in FAR 52.203-13, such as what constitutes “credible evidence” of a violation, are not defined.

The disclosures required by FAR 52.203-13 must be made to the agency IG, with a copy to the contracting officer. If the violation at issue pertains to an order against a Government-wide contract, a multiple award schedule contract such as the Federal Supply Schedule, or other procurement instrument intended for use by multiple agencies, the disclosure must be made to the IG of the ordering agency and the IG of the agency responsible for the basic contract.

The mandatory disclosure rule in current FAR 52.203-13 was the product of a request by the Department of Justice for a disclosure requirement for contractors as well as to the Close the Contractor Fraud Loophole Act.²¹ The regulatory history for the mandatory disclosure rule reflects considerable support from agency IGs for the final rule. The Act was in reaction to a proposed mandatory disclosure rule that exempted commercial item contracts and contracts

performed entirely overseas. The Act (and now the FAR) covers both classes of contracts. Contractors should pay special attention to ascertain if their contracts and subcontracts incorporate the current version of FAR 52.203-13.

Inclusion of this FAR clause is not the only concern for contractors. When FAR 52.203-13 was revised to implement the disclosure requirement, the FAR also was revised to add to the potential causes for suspension and debarment a “knowing failure” to disclose matters within the scope of the mandatory disclosure rule, regardless of whether FAR 52.203-13 applies. Contractors that are not subject to FAR 52.203-13 thus nonetheless may have disclosure obligations. The potential causes for debarment or suspension in the FAR now include the knowing failure by a principal, until 3 years after final payment on any government contract, to timely disclose to the Government, in connection with the award, performance or closeout of the contract or subcontract thereunder, credible evidence of (1) a violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of U.S. Code; (2) a violation of the civil False Claims Act, or (3) a “[s]ignificant overpayment(s)” on the contract.²² This new “cause” applies to the knowing failure to report under all contracts, including current contracts entered into prior to the effective date of the mandatory disclosure rule until 3 years after final payment, and thus is retroactive in effect. The FAR now provides that a contractor’s “record of integrity and business ethics” may be considered in assessing past performance.²³

The mandatory disclosure rule and the related changes in the suspension and debarment and past performance contexts herald a new and potentially troubling dynamic in government contracting. As this rule and other recent and pending reforms reflect, the acquisition system is increasingly being run based upon enforcement and oversight concerns rather than upon management and operational considerations. That may be in tension with one of the goals expressed in the President’s Memorandum, which is to rely on oversight to “achieve programmatic goals.”

From a contractor’s perspective, compliance programs are more important than ever. Contractors must protect themselves through robust internal control systems, ethics awareness, and effective ethics training. What in the past were “voluntary” disclosures now may be viewed as obligatory. What once were routine acquisition management and contract administration issues may require increased contractor scrutiny to mitigate the risks inherent in the new mandatory disclosure requirements. Particularly in light of the type of matters that previously have resulted in False Claims Act investigations and proceedings, which some contractors considered matters of contract interpretation or other performance disputes, some contractors may opt to employ a conservative approach, and disclose matters even while disclaiming any belief that there is “credible evidence” of any violation of law.

The contracting officer also has a different role. IGs will assume a greater importance in contract administration. This formal new role for the IG may make contracting officers more reluctant to address and resolve concerns that arise during performance for fear of being second-guessed. At a minimum, contracting officers must strike a delicate balance in managing and overseeing contract performance.

2. Other Reporting And Disclosure Requirements

Other reforms emphasize oversight concerns through making adverse information about contractors more available to the public. Section 872 of the NDAA for FY2009 mandates the establishment of a database of negative information regarding contractors for use by DoD acquisition officials. The database covers the most recent 5-year period for contractors with contracts valued at \$500,000 or more. The database will encompass such matters as civil or administrative judgments resulting in a finding of fault and requiring payments for \$5,000 or more, settlements for more than \$5,000 or more that include a finding of fault on the part of the contractor, and default terminations of federal contracts. Section 872 calls for the FAR to be amended to require contractors with more than \$10 million in federal contracts to submit information to OFPP for inclusion in the database. Section 2313 of H.R. 1107 would expand this database to cover civilian agencies.

H.R. 1360 (the “Contractor Accountability Act”) would require each agency to report to Congress and publish a list of contractors that are not fulfilling their contractual obligations. The Act would require an agency to certify that it has “exercised oversight over each contract or order sufficient to ensure that each contractor is fulfilling the obligations

specified in the contract or order” but does not specify how an agency is to determine whether a contractor is fulfilling its obligations or whether an agency view that a contractor is not fulfilling its obligations must be adjudicated or otherwise determined to be accurate through some process before it is published. The Act would not require the publication of information that is exempt from release under the Freedom of Information Act (“FOIA”).²⁴

The Recovery Act further emphasizes oversight for covered acquisitions and activities. Sections 1521-1528 of the Act establish the Recovery Accountability and Transparency Board to review whether competition and reporting requirements have been met or whether other abuses are occurring with recovery funds.

Sections 1152(c)–(d) of the Recovery Act require recipients of recovery funds from federal agencies to submit a report to the agency, including a list of all projects for which fund were spent or obligated and information about any subcontracts or subgrants awarded by the recipients. The information in these reports is to be made available on the Internet.

3. Spotlight On Government And Potential Consequences

Changes in reporting and oversight in this new era of contracting are not limited to contractors. On March 13, 2009, the Defense Contract Audit Agency (“DCAA”) issued new guidance regarding the reporting of “significant/sensitive unsatisfactory conditions related to actions of government officials.”²⁵ The actions at issue are not those which fall within the category of “suspected irregular conduct,” such as violations of “criminal and penal statutory provisions,” which previously were reportable and are to be handled in accordance with current practice.

Rather than elevate the “unsatisfactory conditions” through the official’s management chair for resolution, the new guidance provides that DCAA may report them directly to the DoD IG following DCAA’s internal review. The “unsatisfactory conditions” include “actions by Government officials that appear to reflect mismanagement, a failure to comply with specific regulatory requirements or gross negligence in fulfilling his or her responsibility that result in substantial harm to the Government or taxpayers, or that frustrate public policy.” One example listed in the DCAA memorandum of a reportable action is “where a contracting officer ignores a DCAA audit report and takes an action that is grossly inconsistent with procurement law and regulation, (e.g., awards a contractor unreasonable or excessive costs and/or profit).” The DCAA guidance states that a simple disagreement between an audit position and a contracting officer’s decision is not reportable as an unsatisfactory condition. It is unclear at this early juncture how contracting officials will respond to the letter and spirit of the new DCAA guidance.

4. Looking Ahead

As stated in the March 4 Memorandum, the President’s goal is to be able to use the oversight to “achieve programmatic goals,” among other objectives. As the current and pending acquisition reforms show, contract oversight (and, to some extent, management) increasingly is being formalized and directed through investigative and enforcement channels. These changes may provide greater visibility into certain contract matters, but it is less clear that this information will foster a greater capability (or willingness) on the part of contracting officials to act on the information. Routing information to investigators – particularly of matters that have not yet been fully investigated or proven to be a problem – may make contracting officials less willing to act. Publication of lists of contractors that are purportedly not fulfilling their obligations – which itself may be a matter of dispute – could cause significant competitive harm to contractors that might not be remediable if, it turns out, the Government’s view of the contractor’s actions (or its interpretation of what the contract or order required) was incorrect. Although bills such as H.R. 1360 caution that they would not require the release of information that is exempt from release under the FOIA, the competitive harm from identification of a company as purportedly failing to fulfill its contract obligation may be difficult to assess.

As the new DCAA guidance reflects, contracting officials also may find themselves under considerable scrutiny. Even where contracting officials’ conduct does not rise to the level of a reportable incident – as undoubtedly will be true

in the vast majority of cases – the relationship between contracting officials and their audit advisors may shift in ways that might not have been fully contemplated.

E. Inherently Governmental Activities And Acquisition Workforce

The President’s March 4 Memorandum identifies the acquisition workforce and the outsourcing of services as key areas for the Government to address. As shown above, workforce issues (including who can or will perform necessary tasks) permeate many aspects of acquisition.

With regard to the acquisition workforce, the Memorandum states that “it is essential that the Federal Government have the capacity to carry out robust and thorough management and oversight of its contracts in order to achieve programmatic goals, avoid significant overcharges, and curb wasteful spending.” With regard to government outsourcing of services, the Memorandum observes that “the line between inherently governmental that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. As a result contractors may be performing inherently governmental functions.” The Memorandum further directs OMB to issue guidelines to assist agencies in assessing the acquisition workforce and to clarify when governmental outsourcing of services is and is not appropriate, consistent with law.

The memorandum’s directives to OMB regarding the assessment of the acquisition workforce and reassessment of “government outsourcing” mark an affirmation of recent Congressional and Executive branch initiatives rather than a new beginning. Over the last four years, there has been growing consensus – crossing political lines – that the acquisition workforce is in need of repair. Similarly, there has been an increasing recognition that the growth of services and the resulting blended workforce (government and contractor personnel working side-by-side or cubicle-by-cubicle) have created new challenges for the Government in managing its operations. Although there is less consensus regarding the role of outsourcing in the Government, there is a recognition that at a minimum, additional conflict of interest safeguards and improved oversight of services are needed. Future debate will center on the definition of “inherently governmental functions” and the role contractors may play in supporting such functions. In order to effectively participate in shaping future policy addressing the acquisition workforce and government outsourcing of services, it is critical to understand how the Government got to this point and the initiatives already underway addressing these issues.

II. HOW DID THE U.S. GOVERNMENT (AND DHS) GET TO THIS POINT?

Fundamental shifts in the federal procurement system since the mid-1990s have profoundly altered the procurement landscape with significant implications for contractors today. In coupling acquisition reforms with the reductions in acquisition workforce, the general view was that streamlined procurement processes would allow the Government to buy more while using fewer administrative resources to do so.

A. Structural Shifts In The Procurement System

The 1990s saw a major shift in the acquisition system, with a focus on streamlined awards, commercial items, interagency contracts, and a less resource-intensive process. The changes were intended to reduce regulatory burdens, making the procurement system more efficient and “commercial-like.” These acquisition reforms had their intended effect – the acquisition system was streamlined, and more commercial products and services entered the federal marketplace.

The acquisition of services also expanded rapidly. Services now account for more than 60 percent of Federal Government purchases. The growth reflects the new services-based economy, as well as the Government’s overall downsizing and corresponding reliance on the private sector for support services. For example, in the early to mid-1990s, products accounted for the vast majority of purchases under the Federal Supply Schedule (“FSS”) program. By FY 2006, services accounted for 64 percent of total sales (\$22.6 billion of \$35.1 billion) under the program. The significant growth areas for services under the FSS program were, and remain, professional, management, technical and engineering, and

information technology services. Similarly, at DHS, services accounted for \$7.9 billion or 67 percent of total procurement dollars in FY2005 with \$1.2 billion obligated for four types of professional and management support services: program management and support, engineering and technical, other professional and other management support.²⁶

During this period, the downsizing of the acquisition workforce became a management mandate. For example, the NDAA for FY1996 required DoD to reduce its acquisition workforce by 25% by the end of FY2000. Furthering the trend, DoD's workforce in 2004 was less than half its acquisition workforce in 1990.²⁷ Unfortunately, the cutbacks of the 1990s were followed by a lack of investment and strategic human capital planning for the acquisition workforce over the course of this decade. The reduction in the acquisition workforce reflects a "brain drain" that has shifted procurement expertise from the public sector to the private sector. In particular, over the last 15 years, the Government saw a significant reduction in its requirements development capabilities. That shortfall, as discussed above, may have adverse ramifications in light of the new emphasis on the use of fixed-price contracts.

In retrospect, the timing of the workforce cuts and the lack of investment in the workforce could not have been worse. As the Acquisition Advisory Panel noted in expressing its concern regarding the state of the acquisition workforce, "[a] qualitatively and quantitatively adequate and adapted workforce is essential to successful realization of the potential for the procurement reforms of the last decade."²⁸ The reductions in the acquisition workforce did not anticipate or account for fundamental shifts in the purchasing profile or the purchasing volume of the Federal Government. Procurement spending has exploded; since 9/11, the dollar volume of procurement has increased 63 percent as of January 2007.²⁹

The rapid growth of services acquisitions has taxed a depleted workforce. Generally, services acquisitions are more difficult to specify, assess, and measure than product acquisitions. As a result, additional analysis and enhanced judgment are typically needed to assess the technical approach and skills necessary to perform a task. Fundamental to this analysis is sound requirements development. The lack of acquisition resources has made the evaluation, award, and administration of services contracts increasingly difficult.

In response, agencies increasingly have relied on contractors to provide acquisition support and requirements development. As the Acquisition Advisory Panel stated:

In some cases, contractors are solely or predominantly responsible for the performance of mission-critical functions that were traditionally performed by civil servants, such as acquisition program management and procurement, policy analysis, and quality assurance. In many cases contractor personnel work alongside federal employees in the federal workspace; often performing identical functions. This type of workplace arrangement has become known as a "blended" or "multisector" workforce.³⁰

The blended workforce not only raises questions regarding the potential performance of "inherently governmental functions" by contractors, it also raises organizational conflict of interest ("OCI") and personal conflict of interest ("PCI") questions. As the Panel noted, "the growth in the use of contractors to perform acquisition functions that in the past were performed by federal employees, coupled with the increased consolidation in many sectors of the contractor community, has increased the potential for organizational conflicts of interest."³¹

There are three basic types of conflicts of interest: 1) biased ground rules; 2) unequal access to information; and 3) impaired objectivity. FAR Part 9.5 provides basic information regarding OCIs; it provides little guidance to contracting officers on how to identify, evaluate, and avoid or mitigate OCIs. As the Panel noted, GAO is sustaining an increasing number of OCI-related protests. The use of contractor personnel also raises concerns regarding the protection of contractor confidential, proprietary information and the potential for improper disclosure.

B. DHS's Outsourcing And Acquisition Workforce Challenges

The creation of DHS highlighted the challenges facing the entire acquisition system. Managing new mission requirements and the corresponding explosion of procurement spending with a downsized acquisition workforce has proved daunting for DHS. The challenges facing the entire procurement system were made all the more difficult given the management and organizational hurdles in creating DHS out of a myriad of pre-existing and disparate Federal entities.

With regard to outsourcing of services, DHS relied heavily on management and professional services contractors in rapidly standing up its new organization. As GAO noted in a September 2007 Report regarding DHS, "a lack of staff and expertise to get programs and operations up and running drove decisions to contract for professional and management support services."³² Often these contracts involved broad statements of work that were difficult to effectively manage or to use for measuring contractor performance.

Further, according to GAO, DHS officials generally did not assess the risk associated with contracting for services that closely support the performance of inherently governmental functions.³³ The risk identified by GAO was the possible loss of Government control over discretionary decision making. GAO made the following recommendations to improve DHS's risk management of services that closely support inherently governmental functions:

- Establish strategic-level guidance for determining the appropriate mix of government and contractor employees to meet mission needs;
- Assess risk of selected contractor services as part of the acquisition planning process, and modify existing guidance and training to address when to use and how to oversee those services in accordance with federal acquisition policy
- Define contract requirements to clearly describe roles, responsibilities of selected contractor services as part of the acquisition planning process;
- Assess program office staff and expertise necessary to provide sufficient oversight of selected contractor services; and
- Review contracts for selected services as part of the acquisition oversight program.³⁴

DHS generally concurred with GAO's recommendations.

With regard to its acquisition workforce, a timely November 2008 GAO Report³⁵ highlights the challenges facing DHS. According to the report, DHS has made progress in filling contract specialist positions but much work remains to be done. For example, DHS increased its government contract specialist population from 577 to 1041 from 2003 to the end of FY 2007. At the same time, GAO reported that contract specialist vacancy rates still ranged from 12 percent to 35 percent across DHS's procurement offices. GAO noted that DHS had hired contractors to perform some acquisition support functions.

GAO commented that DHS "faces staffing shortages in other acquisition-related positions, including certified program managers, business and financial management staff and technical support staff."³⁶ GAO found that DHS had undertaken several initiatives focused on the acquisition workforce, much of it designed to address the shortage in contract specialists, but concluded that DHS needed a more strategic focus. In conclusion, GAO recommended that DHS:

- Establish an interim working definition of acquisition workforce that more accurately reflects the employees performing acquisition-related functions to guide current efforts, while continuing to formally add career field to the definition;

- Determine whether the department’s current initiatives related to recruiting and hiring are appropriate for acquisition-related career fields other than contract specialists and, if so develop plans to implement the initiatives within the broader acquisition workforce;
- Develop a comprehensive implementation plan to execute the existing DHS acquisition workforce initiatives. The implementation plan should include elements such as performance goals, time frames, implementation actions and related milestones, and resource requirements;
- Direct the Chief Human Capital Officer and the Chief Procurement Officer to establish a joint process for coordinating future acquisition workforce planning efforts with the components for the purpose of informing department wide planning efforts; and
- Improve the collection and maintenance of data on the acquisition workforce.³⁷

DHS generally concurred with GAO’s recommendations and provided additional information where it had taken supplemental actions to address acquisition workforce challenges. For example, DHS provided an updated definition for personnel considered part of the acquisition workforce.

C. Congressional And Executive Branch Responses To Outsourcing And Acquisition Workforce Challenges Inherently Governmental

In directing OMB to clarify when government outsourcing for services is appropriate, the President’s Memorandum cites section 321 of the NDAA for FY2009, Pub. L. 110-417. Section 321 directs OMB to review the current definitions of “inherently governmental function” in law and regulation to determine whether the definitions are sufficiently focused to ensure that only officers or employees of the Government or members of the Armed Forces perform inherently governmental functions or other critical functions necessary for the mission of the Federal department of agency. The definitions of inherently governmental subject to review are the following:

- The Federal Activities Inventory Reform Act of 1998 (Public Law 105-270; 31 U.S.C. 501 note);
- Section 2383 of title 10, United States Code;
- Office of Management and Budget Circular A-76;
- The Federal Acquisition Regulation; and
- Any other relevant Federal law or regulation, as determined by the Director of the Office of Management and Budget in consultation with the Chief Acquisition Officers Council and the Chief Human Capital Officers Council.

OMB also is charged with developing a single consistent definition for inherently governmental function. OMB must develop criteria to be used by the head of each department or agency to identify critical agency functions and any positions that although not inherently governmental, nevertheless should be performed by departmental or agency personnel to ensure the department or agency maintains control of its mission and operations. OMB also must develop criteria that would identify positions that are to be performed by employees of the Government or members of the Armed Forces to ensure maintenance of sufficient organic expertise and technical capability. OMB is also responsible for establishing criteria to ensure agencies develop guidance implementing the definition of inherently governmental and the

criteria for identifying critical functions. Finally, OMB must provide criteria to ensure that agencies develop guidance for the management of decisions regarding staffing. OMB must seek the views of the public regarding these matters.

D. OCIs And PCIs

The issues relating to contractor OCIs and PCIs have received heightened attention from Congress, federal agencies, and the acquisition community.³⁸ On March 26, 2008, the FAR Council took a first step towards addressing PCIs when an Advanced Notice of Proposed Rulemaking (“ANPR”) was issued for FAR Case 2007-017. The purpose of the notice was to seek public comments regarding “if, when, and how service contractor employees’ personal conflicts of interest need to be addressed and whether greater disclosure of contractor practices, specific prohibitions, or reliance on specified principles would be most effective and efficient in promoting ethical behavior.” The comment period closed on July 17, 2008. To date, the FAR Council has taken no further steps regarding the ANPR.

The FAR Council’s inaction is likely due to the ANPR being overtaken by Congressional action. Section 841 of the NDAA for FY 2009 directs OMB to develop and implement new policies addressing PCIs and OCIs. Section 841(a) requires that OFPP develop and issue standard policies, within 270 days of enactment of the provision, regarding contractor employee PCIs. The policy must define the term PCI as it relates to contractor employees performing acquisition functions closely associated with inherently governmental functions. It also requires contractors whose employees perform such functions to: (1) identify and prevent PCIs; (2) prohibit employees who have access to non-public government information obtained while performing such functions from using the information for personal gain; (3) report any PCI violation by an employee to the CO; (4) maintain effective oversight; (5) have procedures in place to screen for PCIs; and (6) take appropriate disciplinary action against any employee who fails to comply with the PCI policy.

The FAR also shall be revised to include a contract clause or set of clauses for use in solicitations and contracts that incorporates the PCI policies developed under Section 841 pertaining to contractor employees performing acquisition functions closely associated with inherently governmental functions and that sets out the contractor’s responsibilities in monitoring its employees. The new FAR clauses will likely operate both as performance requirements and *implied certifications* regarding a contractor’s PCI compliance.

Section 841(b) requires that OFPP and the Office of Government Ethics (“OGE”) review the FAR to: (1) identify contracting methods, types, and services that raise heightened concerns for potential PCIs and OCIs; (2) determine whether revisions to the FAR are necessary to address PCIs with respect to functions other than acquisition functions associated with inherently governmental functions; and (3) determine whether revisions to the FAR are necessary to achieve sufficiently rigorous comprehensive and uniform policies to prevent and mitigate OCIs. OFPP and OGE must complete their review of the FAR and make their determinations within 12 months. Finally, Section 841(c) requires that OFPP and OGE develop a Best Practices Repository for the prevention and mitigation of OCIs and PCIs.

The Weapons System Acquisition Reform Act of 2009,³⁹ which became law on May 22, 2009, includes provisions that will alter the approach to OCIs for DoD and may lead to a new approach Government-wide. Section 207 of the Act calls for substantial restrictions on the use of systems engineering and technical assistance (“SETA”) contractors that are affiliated with competitors for major defense acquisition programs, as well as other restrictions related to the role of contractors (and their affiliates) in such programs. The Act calls for consideration of recommendations by (i) the Panel on Contracting Integrity established by the NDAA for FY2007⁴⁰ regarding measures to eliminate or mitigate OCIs in the acquisition of major defense acquisition programs as well as (ii) the Administrator for Federal Procurement Policy and the Director of Government Ethics pursuant to Section 841(b) of the NDAA for FY2009.

E. Acquisition Workforce

Congress has also addressed acquisition workforce management. Section 855 of the NDAA for FY2008 establishes a position of Associate Administrator for Acquisition Workforce Programs within OFPP responsible for

supervision of the acquisition workforce training funds, development of a cross cutting human capital strategic plan for the government as well as development of programs and policies to increase the quality and quantity of the acquisition workforce. Section 855 further mandates that each agency's Chief Acquisition Officer establish an acquisition workforce human capital plan that addresses the agency's acquisition workforce recruitment, development, and training needs. Finally, Section 855 mandates each agency to operate acquisition training programs and requires OFPP to issues policies to promote performance standards for acquisition training.

Congress addressed the status of the Acquisition Workforce Training Fund (41 U.S.C. § 433(h)(3)). Section 854 of the NDAA for FY2008 repealed the sunset provision of the Acquisition Workforce Training Fund making it permanent. The Acquisition Workforce Training Fund is used pay for the development of government-wide acquisition training developed and implemented by the Federal Acquisition Institute. Congress authorized agencies to designate acquisition positions as shortage category positions and to re-employ retired acquisition personnel without the re-employed employee losing his or her annuity. This authority expires on December 31, 2011.

Finally, Congress has recognized (at least for now) that it will take a sustained, long-term management focus to rebuild the acquisition workforce. Last year, Congress mandated the first step in that process. Section 869 of the NDAA for FY 2009, authorizes and directs OFPP to develop the Acquisition Workforce Development Strategic Plan for Federal agencies other than the Department of Defense to develop a specific and actionable 5-year plan to increase the size of the acquisition workforce, and to operate a government-wide acquisition intern program, for such Federal agencies. This plan is the responsibility of the new Associate Administrator for Acquisition Workforce Programs and will be funded by the Acquisition Workforce Training Fund. The plan must be developed by October, 2009. The Acquisition Workforce Development Strategic Plan must, at a minimum examine the following matters:

- The variety and complexity of acquisitions conducted by each Federal agency covered by the plan, and the workforce needed to effectively carry out such acquisitions;
- The development of a sustainable funding model to support efforts to hire, retain, and train an acquisition workforce of appropriate size and skill to effectively carry out the acquisition programs of the Federal agencies covered by the plan, including an examination of interagency funding methods and a discussion of how the model of the Defense Acquisition Workforce Development Fund could be applied to civilian agencies;
- Any strategic human capital planning necessary to hire, retain, and train an acquisition workforce of appropriate size and skill at each Federal agency covered by the plan;
- Methodologies that Federal agencies covered by the plan can use to project future acquisition workforce personnel hiring requirements, including an appropriate distribution of such personnel across each category of positions designated as acquisition workforce personnel under section 37(j) of the Office of Federal Procurement Policy Act (41 U.S.C. § 433(j));
- Government-wide training standards and certification requirements necessary to enhance the mobility and career opportunities of the Federal acquisition workforce within the Federal agencies covered by the plan;
- If the Associate Administrator recommends as part of the plan a growth in the acquisition workforce of the Federal agencies covered by the plan below 25 percent over the next 5 years, an examination of each of the matters specified in paragraphs (1) through (5) in the context of a 5-year plan that increases the size of such acquisition workforce by not less than 25 percent, or an explanation why such a level of growth would not be in the best interest of the Federal Government.

It took the better part of two decades for the acquisition workforce to reach its current state. It will likely take a similar amount of time to rebuild the numbers, skills, and capabilities of the acquisition workforce. The development of a

governmentwide Acquisition Workforce Development Plan will lay the foundation for the sustained effort necessary to rebuild the acquisition workforce.

F. Legislative Initiatives Going Forward

Other legislative initiatives are underway that bear on the areas discussed above. For example, False Claims Act reform is underway. S. 386 (the “Fraud Enforcement and Recovery Act of 2009”) which was signed into law on May 20)⁴¹, introduces a series of changes to the civil False Claims Act that expand liability for contractors. For example, the bill redefines “claim” to cover false claims submitted to a “contractor,” “grantee,” or “other recipient” if the Government provides or has provided any portion of the amount claimed or will reimburse the contractor, grantee, or other recipient. It also imposes liability for “knowingly and improperly” retaining government funds, such as overpayments that the contractor is obligated to return.

On February 24, 2009, Sen. Grassley introduced S. 458, the False Claims Act Clarification Act of 2009. A similar bill (H.R. 1788, The False Claims Act Correction Act of 2009) was introduced in the House. This pending legislation includes the following provisions, among others:

- S. 458 permits Government employees (or family members) to be relators using information obtained in their Federal employment if: (1) the relator disclosed the allegations to the IG and advised his/her supervisor and the Attorney General of such disclosure; and (2) the Government does not file suit on those allegations within 18 months. S. 458 provides that DOJ “may” move to dismiss claims brought by Government employees whose duties include uncovering and reporting the type of fraud alleged and the employee, as part of his/her duties, is participating in or knows of an investigation or audit of the alleged fraud, or if the material allegations were derived from a filed indictment, information, or open investigation or audit.
- S. 458 and H.R. 1788 would repeal the public disclosure bar as a jurisdictional defense that may be raised by defendants; only DOJ could file a motion to dismiss based upon public disclosure. In addition, the House bill requires even DOJ to meet a higher standard of public disclosure by changing what constitutes “public disclosure” to require that “all essential elements of liability” of the claim “are based exclusively on the public disclosure.” Further, a public disclosure includes “only disclosures that are made on the public record or have otherwise been disseminated broadly to the general public.” A claim is “based on” a public disclosure “only if the person bringing the action derived . . . knowledge of all essential elements of liability . . . from the public disclosure.”
- Both bills extend the statute of limitations (Senate bill – 10 years, House bill – 8 years), and allow the Government to intervene at any time adding new claims or information and the complaint would “relate back” to the date of the relator’s original filing to the extent that the Government’s claim arises out of the conduct, transactions, or occurrences addressed in the original filing.

It remains to be seen which of these provisions are enacted. This much appears clear: reform is on the way and the risks to contractors are increasing.

III. PRIVATE SECTOR VIEW AND ROLE

The issues addressed in the President’s Memorandum of March 4, 2009 were raised throughout his campaign and by members of the House and Senate from both sides of the aisle. At times, the rhetoric regarding federal contracting has merely created good sound bites rather than creating an atmosphere in which real solutions can be crafted. No doubt all signs point to increased oversight by both the Administration and Congress -- the final hearing of the House Homeland Security Committee in 2008 was entitled: “Waste, Abuse and Mismanagement: Calculating the Cost of DHS Failed

Contracts.” In addition to the President’s Memorandum, a new Senate ad hoc subcommittee was established for the 111th Congress on Contracting Oversight.

Partly in response to these initiatives, but mostly because industry’s voice and perspective was seemingly lost in the cacophony of the debate, the Council embarked on this review of existing law, as well as the proposed and pending changes and challenges in Federal contracting, particularly as it impacts the U.S. Department of Homeland Security. Underlying this study is the Council’s viewpoint, in line with the May 2008 statement of a bipartisan group of House and Senate Homeland Security leaders, that industry supports wholeheartedly more explicit requirements and performance standards in major contracts to ensure successful outcomes.

The Council and its members – the leading providers of homeland security solutions – support processes that provide for:

1. Quality contracting;
2. Quality acquisition management; and
3. Quality people.

It is crucial that public sector leaders recognize that the initial process of quickly creating the Department of Homeland Security and protecting our nation required, at its initial outset, a higher reliance on outside contractors. It resulted in a contracting and procurement environment that was, in many ways, uniquely complex and challenging. The private sector recognizes and supports efforts to wean certain government contractors off of inherently government employee positions. The private sector also recognizes that a proper blending of public sector requirements and private sector expertise will provide the American people the best value, the greatest efficiency and the best outcomes. Going forward, a key issue is whether the lessons that have been learned from any prior mistakes, burdensome procedures and unintended consequences will be incorporated into future projects. We must learn from our past mistakes and not be defined by them.

It must also be recognized that the private sector plays a critical role in the special coordinated and collaborative homeland security mission. Members of the Council and other private sector companies will not win future contracts if they do not deliver and implement product and service solutions, and provide world-class experts and practitioners to the projects as needed. It is imperative that the foundation upon which a successful federal procurement system is built be underpinned by credibility, trust, and competence.

The challenge is to find a balance between the need to strengthen oversight – including applying aggressive controls and having experience and well-trained acquisition management – and the need to maintain flexibility to adjust to rapidly changing conditions on the ground and ensure a successful mission.

Contracts that contain overly burdensome procedural requirements, a prolonged budget process, multiple decision-making layers, long reporting chains, overlapping management and operations, narrow work restrictions, and insufficiently trained managers present challenges and impede success at a time when today’s homeland security needs demand flexibility and adaptability. Emphasis must be placed on the desired result, not merely the process.

IV. CONCLUSION

In sum, existing law already embraces many of the procurement, enforcement, and compliance issues that the President’s Memorandum targets. In many instances, relevant reforms have been recently enacted and are in the process of implementation. The private sector recognizes that some gaps in the process remain and that a number of these areas continue to present considerable challenges that will require a persistent, and possibly protracted, effort to address them. Only when industry and government can work together cooperatively – rather than as adversaries – will the nation achieve its highest level of security.

APPENDIX A: Summary of Key Acquisition Provisions

Provision	Topic	Key Aspects
Section 843(a) of NDAA for FY2008	Competition	For orders over \$5 million, agencies must provide all contractors a fair opportunity to be considered, which is not met unless all such contractors are provided: (1) a notice of the order that includes a clear statement of the agency's requirements; (2) a reasonable period of time to provide a proposal in response; (3) disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating such proposals, and their importance. Agencies also must provide certain information to unsuccessful offerors regarding an award.
Section 843(e) of NDAA for FY2008	Competition/Oversight	Permits the filing at GAO of protests regarding orders valued in excess of \$10 million.
Section 863 of the NDAA for FY2009	Competition	Requires a change to the FAR to require greater competition under all multiple award contracts, including the Federal Supply Schedule, for all orders over the Simplified Acquisition Threshold. All such orders are to be made on a "competitive basis," subject to certain exceptions. The enhanced competition procedures must require fair notice of the intent to make a purchase to be given to all offerors and must afford all offerors "a fair opportunity to make an offer and have that offer fairly considered by the official making the purchase."
Section 864 of NDAA for FY2009	Contract Type	Requires the FAR to be amended to include guidance regarding (i) when and under what circumstances cost-reimbursement contracts are appropriate, (ii) the findings necessary to support a decision to use a cost-reimbursement contract, and (iii) the resources necessary to award and manage cost reimbursement contracts
Section 1554 of the American Recovery and Reinvestment Act of 2009	Competition/Contract Type	Requires that contracts funded under the Act should be awarded as fixed-price contracts through competitive procedures to the "maximum extent possible."
Section 321 of NDAA for FY2009	Inherently Governmental	Directs OMB to review the current, various definitions of "inherently Governmental function" in statute and regulation to determine whether the definitions ensure that only government employees perform such functions or other critical functions necessary for the corresponding agency or department mission

Section 855(a) of NDAA for FY2008	Acquisition Workforce	Creates the position of Assistant Administrator, charged with the supervision of the acquisition workforce training fund administration and development of a human capital strategic plan and programs and policies to increase the quality and quantity of the acquisition workforce
Section 855(b) of NDAA for FY2008	Acquisition Workforce	Mandates each agency to operate acquisition training programs and requires the OFPP to issue policies to promote performance standards for acquisition training
Section 855(e) of NDAA for FY2008	Acquisition Workforce	Requires an agency's CAO to establish an acquisition human workforce capital plan that addresses the agency's acquisitions workforce recruitment, development, and training needs within one year of the Act's enactment
Section 869 of NDAA for FY2009	Acquisition Workforce	Directs OMB to develop a Acquisition Workforce Development Strategic Plan

This Chart will be available and updated on the Council's website: www.homelandcouncil.org in addition to a comprehensive table of legislative initiatives.

¹ Pub. L. 110-329, Division D, secs. 525(a), (b).

² *Id.*, sec. 525(d).

³ Pub. L. 103-355.

⁴ 41 U.S.C. § 253j; 10 U.S.C. § 2304c(b).

⁵ See, e.g., U.S. General Accounting Office, *Contract Management: Civilian Agency Compliance with Revised Task and Delivery Order Regulations*, GAO-03-983 (Washington, DC: August 2003), at page 7.

⁶ Pub. L. 107-107.

⁷ See Pub. L. 110-181, sec. 843(b)(2).

⁸ See Pub. L. 110-181, sec. 843(e).

⁹ See U.S. General Accounting Office, *Contract Management: Civilian Agency Compliance with Revised Task and Delivery Order Regulations*, GAO-03-983 (Washington, DC: August 2003), at 10-11; U.S. Government Accountability Office, *Contract Management: Guidance Needed to Promote Competition for Defense Task Orders*, GAO-04-874 (Washington, DC: July 2004), at 6.

¹⁰ Pub. L. 111-5.

¹¹ FAR 16.103(a).

¹² See FAR 16.104.

¹³ See FAR 16.202-1.

¹⁴ FAR 16.202-2.

15 FAR 16.104(d).

16 FAR 16.104(d).

17 FAR 16.301-2.

18 *See* FAR 36.006(b), (c).

19 *See Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress, January 2007* at 100.

20 73 Fed. Reg. 67064.

21 Pub. L. 110-252, Title VI, Chapter 1.

22 *See* FAR 9.406-2 and 9.407-2.

23 *See* FAR 42.1501.

24 5 U.S.C. § 552.

25 DCAA Memorandum for Regional Directors, Mar. 13, 2009, available at <http://image.exct.net/lib/fefd167774640c/d/1/DCAA%20Report%20.pdf>.

26 U.S. Government Accountability Office, *Department of Homeland Security: Improved Assessment and Oversight Needed to Manage Risk of Contracting for Selected Services* GAO-07-990 (Washington, DC: September 17, 2007).

27 *Commission on Army Acquisition and Program Management in Expeditionary Operations, "Urgent Reform Required: Army Expeditionary Contracting"* October 31, 2007 at 91.

28 *See Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress, January 2007, at 18.*

29 *Id.*

30 *Id.*

31 *Id. at 24.*

32 U.S. Government Accountability Office, *Department of Homeland Security: Improved Assessment and Oversight Needed to Manage Risk of Contracting for Selected Services* GAO-07-990 (Washington, DC: September 17, 2007) at 13.

33 *Id. at 19.*

34 *Id. at 25.*

35 U.S. Government Accountability Office, *Department of Homeland Security: A Strategic Approach Is Needed to Better Ensure the Acquisition Workforce Can Meet Mission Needs* GAO-09-30 (Washington, DC: November 19, 2008).

36 *Id. at 10-12.*

37 *Id. at 28-29.*

38 *See, e.g.,* U.S. Government Accountability Office, *Defense Contracting: Additional Personal Conflict of Interest Safeguards Needed for Certain DoD Contractor Employees*, GAO-08-169 (Washington, DC: March 7, 2008) (recommending a written code of business ethics applicable to contractor employees).

39 Pub. L. 111-23.

40 Pub. L. 109-364, sec. 813.

41 Pub. L. 111-21, sec. 4.