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Steven L. Schooner

George Washington University Law School, sschooner@law.gwu.edu

Daniel S. Greenspahn

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Too Dependent on Contractors? Minimum Standards for Responsible Governance

In the outsourcing debate, there are many benefits, challenges, and risks involved in privatization, but it is failed implementation, rather than outsourcing policy, that explains the government's (mis)management of its contractors. This article addresses the issue of outsourcing and explores the minimum standards for responsible governance.

BY STEVEN L. SCHOONER AND DANIEL S. GREENSPAHN

Irresponsible Delegation and the Downward Spiral

Early in the twenty-first century, a longstanding, subtle trend toward outsourcing accelerated into a fundamental change in the nature of federal government. Federal procurement spending nearly doubled within six years,¹ and with no reason to expect the hollow-government² trend to reverse, the future seems bright for contractors. The public is slowly gaining awareness of this reality, albeit primarily through anecdotal and typically scandal-based information, but few appreciate that today the government likely employs more contractors than soldiers in Iraq;³ that high-profile mishaps are directly attributed to an unprecedented, poorly orchestrated reliance on private security;⁴ and that during 2006, more than one in four allied fatalities consisted of contractor or civilian personnel.⁵

Closer to home, five years after the largest government reorganization in half a century, the heavily outsourced Department of Homeland Security (DHS) remains the target of criticism due to its disproportionate reliance upon the private sector. DHS's experience confirms the obvious proposition that outsourcing as a matter of necessity, rather than as a matter of policy, leads to suboptimal results, and it appears no relief is in sight. Tasked to protect against terrorist attacks and respond to natural disasters, the cobbled-together and heavily outsourced DHS instead often finds itself

defending, well, itself, particularly against allegations of inadequate management and oversight of its contractors.⁶ And while confronting these procurement challenges is important and indeed necessary, Congress routinely fails to recognize that throwing stones, while easier, is far less effective than developing solutions for solving difficult problems or building solid foundations.

Recommendations for meaningful, long-term procurement reform—whether for DHS or across the federal government—must recognize the practical ramifications of

About the Authors

STEVEN L. SCHOONER, CPCU, FELLOW, is the senior associate dean for academic affairs and codirector of the Government Procurement Law Program at the George Washington University Law School. He is also a member of the NCMA Board of Advisors. Mr. Schooner would like to gratefully acknowledge Seymour Herman for his continued support of government procurement law research at the George Washington University Law School.

DANIEL S. GREENSPAHN is a third-year law student at the George Washington University Law School. Following graduation, he will clerk for Judge Francis Allegra on the U.S. Court of Federal Claims. He previously worked in the U.S. Senate and the U.S. House of Representatives.

The views, findings, and opinions expressed in this article are those of the authors alone and do not necessarily reflect the views of their employers or any entity with which they are affiliated.

sustained, unplanned, and unchecked privatization in an era of downsized government. Despite a generation of bipartisan efforts to portray a “small government” to the public,⁷ government mandates continue to increase, leaving agencies no choice but to increasingly rely upon contractors to provide mission-critical services. Simultaneously, however, Congress embarked upon an ill-conceived gutting of the acquisition workforce. This effort not only left the government woefully understaffed to manage its omnipresent cadre of service contractors, but also—through an absence of succession planning manifested by more than a decade of cuts and hiring freezes—ensured that fixing the damage could not feasibly be achieved in the foreseeable future.

Too Dependent on Contractors?

Focusing on DHS as a proxy for the larger trend, it oversimplifies the outsourcing management problem to suggest that the agency is currently too dependent upon contractors. As a matter of policy, it is possible that, under different circumstances, an outsourced and privatized DHS may better serve the government’s interests.⁸ This potentially fascinating debate—over how much we should outsource—quickly polarizes participants into two basic camps. One camp staunchly advocates the rapidly changing status quo: that work historically or currently being performed by government employees should remain in-house.⁹ This position idolizes, or at the very least respects, both the ethos of public service and, more generally, public servants.¹⁰ The opposite camp advocates outsourcing or reliance upon the private sector, asserting that for-profit firms are capable of performing much of the government’s work and, if properly motivated and managed, should outperform government employees in terms of quality of service, price of service, or both.¹¹

However, at an abstract level, neither position is uniquely compelling.¹² Empirical evidence is scant to demonstrate that government employees are more talented, committed, motivated, or honest than their private-sector counterparts (and vice-versa). But the two groups differ dramatically in their incentive structures. The private sector’s exposure to market forces, and the related corporate purpose of pursuing profit, permits (and arguably requires) a more diverse and potent arsenal of employee incentives and disincentives. These tools include compensation (e.g., attractive salaries, salary increases, bonuses, stock incentives, etc.), opportunity for advancement, and of course, the risk of termination.¹³ While the government can employ similar tools, their effect—or the degree to which these tools can influence behavior—is at least perceived as far less dramatic, given a heavily constrained promotion and bonus regime and an impenetrable *de facto*

tenure system.¹⁴ Ultimately, the private sector enjoys the flexibility to offer far greater economic rewards for success and threaten more credible sanctions for less than desirable performance.¹⁵ While we continue to witness efforts to reform the civil service system and inject more potent performance incentives, doing so remains a daunting task.¹⁶

No Relief in Sight?

Ultimately, however, this debate is increasingly academic. Outsourcing is currently the inevitable reality.¹⁷ Today, the government relies on the private sector because it has restricted the size of government—more specifically, the number of government employees.¹⁸

Overseas, the government currently has no short-term option but to rely on contractors for every conceivable task that it lacks appropriate staff to fulfill. In Iraq, the military relies on contractor personnel not only for transportation, shelter, and food, but for unprecedented levels of battlefield and weaponry operation, support, and maintenance.¹⁹ Accordingly, defense experts now recognize that without contractors, our military simply cannot project its technical superiority abroad.²⁰ But highly publicized incidents—whether of prisoner abuse at Abu Ghraib or allegations of the shooting of civilians by the private military company Blackwater—raise fundamental questions regarding both the tasking of contractor personnel and the oversight of their performance.²¹

At home, DHS also has no meaningful short-term alternatives for escaping its current predicament. It would take many years to build DHS into a significantly larger, cohesive organization,²² and it is unlikely that there is enough political will on either side of the aisle to grow the federal workforce.²³ Further, it is distinctly possible, given the constraints of the federal service (particularly in terms of compensation), that even if Congress mandated a dramatic expansion, DHS simply could not assemble a sufficiently talented organization.²⁴ For example, the market for talent is now global, and the global shortage of engineers is well documented.²⁵ Thus, it is not an option for DHS to consolidate its missions, jettison a number of its tasks, terminate contracts, or to take on only those missions it is appropriately staffed to perform.²⁶ Nor is it feasible for DHS to wait while it embarks upon an aggressive program to identify, recruit, hire, and retain an extraordinary number of civil servants. Accordingly, DHS must continue to employ its best efforts to achieve its mission with the resources available, acknowledge that it is a rather “hollow” agency,²⁷ and invest significant energy and resources in improving its use of contractors to help it achieve its mission.²⁸

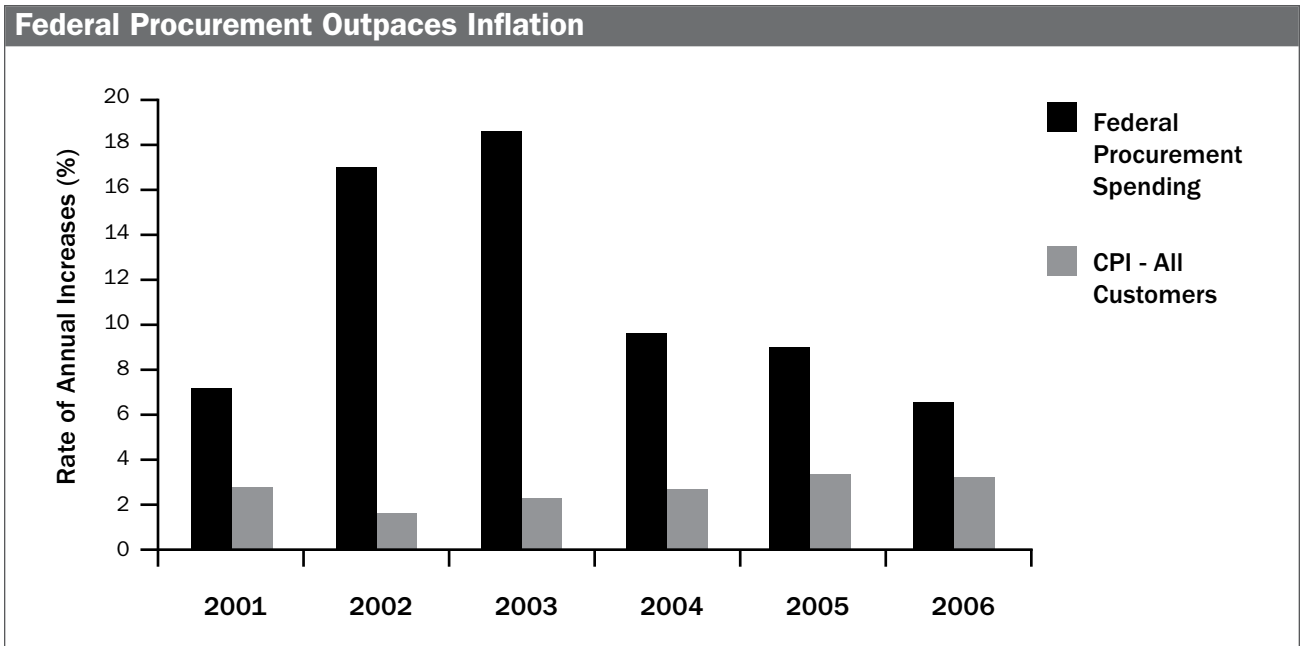


FIGURE 1.

An Ounce of Prevention...

Accordingly, today the government needs to invest significant resources—time, money, and energy—to recruit, train, incentivize, and retain a dramatically expanded acquisition workforce.²⁹ Not only must the government promptly and aggressively recruit a huge number of business-minded professionals, but also must train the new personnel and provide supplemental training to the existing workforce to enhance their competence and expertise. Further, the government needs to provide meaningful incentives for, and employ creative solutions to retain (or of course, to continually recruit and train) over time, the best, most experienced professionals.

Unfortunately, few satisfactory short-term solutions exist to solve the current acquisition workforce crisis.³⁰ A personnel crisis methodically orchestrated over more than a 15-year period cannot be ameliorated overnight. Even if for the foreseeable future the government hired every qualified acquisition professional willing to work for the government, it would still likely prove insufficient to meet the government's needs. (And that is without taking into account the well-chronicled upcoming exodus of retirement-eligible acquisition personnel.)³¹ Moreover, there is every reason to be pessimistic about the government's ability to promptly and effectively train such an influx of professionals. Similarly, current demographic information suggests that younger, entry-level workers are far more mobile than their predecessors, which may make retention of this new talent difficult.

However, the specifics—such as how many thousands more acquisition professionals (5,000; 10,000; or more) must be hired,³² how the procurement community should receive meaningful hands-on training, and how these professionals should be incentivized—are far less important than the threshold issue or predicate. Congress must invest heavily and aggressively in rebuilding the acquisition workforce. Significant improvement depends upon a clear message from Congress accompanied by sustained, dramatic increases in appropriations specifically for acquisition personnel.³³ Flexible recruitment and hiring authority, as well as increased flexibility with regard to compensation and incentives, may prove necessary. Absent such a commitment, which would be as welcome as it would be unexpected, any attempted solution will serve as little more than a finger in the dike.

The Expanding Scope of Outsourcing: Contract Proliferation and Increased Reliance on Service Contractors

Government use of, and reliance upon, private contractors is not a new phenomenon,³⁴ nor are debates over the relative benefits and risks of outsourcing government work. In the 1960s, President Eisenhower warned against the unwarranted influence of military contractors,³⁵ and a report to President Kennedy expressed similar concerns about the blurring lines between public and private decision-making.³⁶

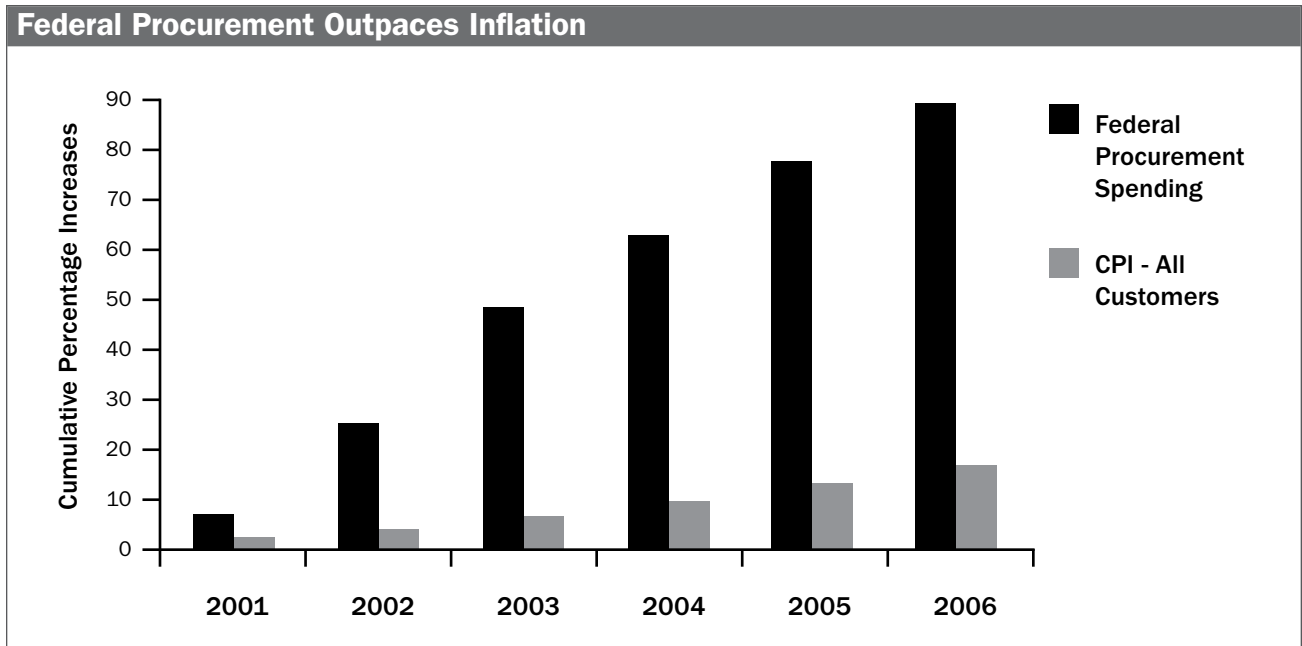


FIGURE 2.

Yet, in recent years, Democratic and Republican administrations and congressional leaders alike have all embraced a downsized federal government supported by private contractors.³⁷ This has led to unprecedented privatization in both breadth and scope.

Today, for the first time in modern U.S. history, the federal government spends nearly 50 cents of every discretionary dollar of the federal budget on contracts with private firms.³⁸ Procurement spending has nearly doubled from \$219 billion in 2000 to more than \$415 billion in 2006,³⁹ and continues to rise, while the rest of the discretionary budget has increased only 6.7 percent per year.⁴⁰ At the Department of Defense (DOD), federal contract spending more than doubled from \$133 billion in 2000 to over \$297 billion in 2006, accounting for 72 percent of the federal procurement budget.⁴¹ Also, DHS spending on contracts soared 337 percent in four years and rose from \$5 billion in 2003 to \$15 billion in 2006.⁴²

The rapid post-millennium growth in federal government contracting⁴³—the lion's share of which is services contracting—has dramatically outpaced (indeed, each year, more than doubled) the rate of inflation. As FIGURE 1 demonstrates, the rate of growth in federal procurement spending has exceeded the increases in the consumer price index (CPI) every year this decade. But even that understates the enormity of the growth. Overall, as indicated in FIGURE 2, from 2000 through the end of 2006, the CPI rose only 17.1 percent,

while federal procurement spending rose by 89.2 percent. In other words, in this decade, federal procurement spending increased at a rate five times the rate of inflation. During that time frame, the federal workforce remained largely stable, but significantly smaller than in earlier years.⁴⁴

In addition to hiring more contractor personnel, the government today relies upon contractors for increasingly critical and sensitive defense-related tasks, and turns more and more to contractors for healthcare, education, welfare, and prison management.⁴⁵ In the wakes of the September 11, 2001 tragedy and Hurricane Katrina in 2005, the government contracted out public service obligations such as disaster relief, border security, port security, and policing,⁴⁶ but no outsourcing undertaking has proven more controversial than the use of contractors in military and foreign operations.⁴⁷

In Iraq and Afghanistan, contractors provide support services such as food, housing, and sanitation for U.S. troops, but also gather intelligence, maintain weapons, train troops, and handle interrogations.⁴⁸ The private military industry has mushroomed⁴⁹ with a disconcerting number of private contractors on the ground in Iraq, many of whom bear arms.⁵⁰ In describing the modern era “soldiers for hire” phenomenon, Peter Singer, author of *Corporate Warriors: The Rise of the Privatized Military Industry*, explained that “the wholesale outsourcing of U.S. military services since the 1990s is unprecedented.”⁵¹

Why Outsourcing Makes Sense

While these facts and statistics may suggest otherwise, none of this should be read as a conceptual or ideological opposition to outsourcing. Outsourcing permits organizations to focus on what they do best (which hopefully coincides with the organizations' missions or mandates), while relying upon other more efficient entities to provide the goods, services, and support necessary to do so. Moreover, the government has historically sought experience, innovation, and capacity from the private sector. That makes sense. Experience suggests that privatization offers many potential benefits, including surge capacity, flexibility, innovation, and quite often, the ability to meet agency missions using limited government personnel, abilities, and resources. Despite a relentless deluge of negative publicity and, unfortunately, a number of contractor missteps, many of these benefits—particularly in terms of speed, quality of service, and customer satisfaction—have been demonstrated by the U.S. Army's global use of the Logistics Civil Augmentation Program (LOGCAP).⁵² Another instructive, but oft-criticized, anecdote can be found in the government's increased use of large-scale "seat management" contracts to outsource agencies' information technology functions to the private sector.⁵³

Using outside contractors for surge capacity offers the government the ability to supplement limited governmental resources far more quickly, efficiently, and effectively than the existing federal personnel or acquisition regimes permit.⁵⁴ The federal government can tap contractor personnel when war, storms, or earthquakes occur, without keeping excess (and thus idle) personnel on the payroll during times of calm or, much later, funding their retirement and subsidizing their healthcare.⁵⁵ Contractors also enjoy more flexibility in setting compensation and benefits and in hiring and firing, making them better situated than the government to react to fluctuating markets to meet short-term demands for workers.⁵⁶ Whether in Baghdad or New Orleans, private contractors have the potential to offer superior speed and geographic flexibility in terms of deploying expertise.⁵⁷

Privatization also offers flexibility in employing superior technology, better talent, and different approaches than the government's existing workforce and capital resources would permit.⁵⁸ In an era of downsized government,⁵⁹ private contractors provide specifically what the government lacks, such as the skill, expertise, and innovation necessary to carry out government functions.⁶⁰ Thus, contractors are a critical resource for agencies struggling to fulfill their missions, particularly where the federal government has limited staffing, resources, or skills. For agencies operating under tight personnel ceilings that restrict staffing, contractors have significantly helped to execute government functions.⁶¹ By

taking over ancillary responsibilities, contractors also enable agency staff to focus on core responsibilities,⁶² which in the defense context, is typically described as increasing the military services' "tooth to tail" ratio.⁶³

Although cost savings are sometimes deemed a benefit of privatization, some critics question whether contractors are more cost-effective.⁶⁴ In any event, the potential for cost savings alone should not be deemed a primary benefit for reliance upon contractors, and slavish focus upon the relative cost of contractor support is misguided. Moreover, it is not productive to criticize agencies for paying contractors "too much" without:

- Permitting, as an alternative, an agency to hire additional personnel;
- Confirming that sufficient personnel are available in the marketplace and willing to work for the government;
- Comparing "apples to apples," such as taking into account all of the long-term or legacy costs of civil servants or members of the armed services; and
- Considering critical issues such as flexibility and surge capacity.⁶⁵

For example, higher contractor salaries may be offset, at least in part, by long-run costs avoided. Indeed, a strong case could be made that for short-term demands for additional resources it makes sense to pay higher, and potentially significantly higher, amounts for contractor support rather than incurring the legacy cost of additional government employees.

Challenges of Outsourced Government

There are, of course, competing challenges associated with any organization relying extensively on contractors or other external resources. In addition to maintaining a cohesive culture and instilling shared values, the central difficulties lie in planning, negotiating, managing, and overseeing effective contracts and most importantly, maintaining a sufficiently educated, experienced, and motivated government (or augmented) workforce to take on these challenges.

Adequate government planning is necessary to both understand and describe the outcomes and tasks that will be sought from the private sector. As today's procurement officials are often overworked and undersupported, planning is extremely limited or simply delegated to contractors.⁶⁶ Accordingly, critics lament that statements of work routinely lack measurable outcomes, and that contractors prepare budgets, manage employee relations in a blended workforce,

and develop regulations.⁶⁷ Privatization also requires selecting appropriate, qualified contractors in a timely fashion, negotiating cost-effective agreements, and drafting clear contracts that contain effective incentives or profit mechanisms to maximize contractor performance. The inability to satisfactorily perform any of these functions alters the nature of the government's delegation. For example, like other agencies, DHS risks becoming "so dependent on contractors that it simply has no in-house ability to evaluate the solutions its contractors propose or to develop options on its own accord."⁶⁸ Lastly, privatization requires that the government manage its contractual relationships and provide appropriate oversight to ensure it receives value for its money and avoids corruption. At best, poorly managed outsourcing reduces the likelihood that the government will get value for the taxpayers' money; at worst, it renders the public's expenditures susceptible to inefficiency and waste.⁶⁹

DHS continues to experience the challenges of privatization and is persistently criticized for its ineffective contract management and oversight.⁷⁰ The DHS inspector general (IG), for example, has identified plentiful examples of poorly defined contractual requirements, inadequate oversight, unsatisfactory results, and unnecessary costs.⁷¹ In part, the problem stems from DHS never having conducted a comprehensive assessment of the proper balance between its employees and contractors.⁷² Instead, DHS, like other federal agencies, simply hired contractors to supervise other contractors. For example, DHS estimates that 60 percent of the 270 personnel it will use to oversee the massive SBI net border security contract will be contractors.⁷³ Also, DHS has vested a great deal of decision-making authority in its contractors, such as in the U.S. Coast Guard's "Deepwater" initiative, in ways that critics perceive as impeding agency authority over the design and production of its own assets.⁷⁴

Of course, DHS is not alone in drawing criticism for ineffective oversight,⁷⁵ lacking the resources and authority to ensure adequate contract oversight,⁷⁶ or relying on outside help to prepare budgets, develop policy, and coordinate intelligence (which puts the agency at risk of being unduly influenced by contractors).⁷⁷ Even a former DHS chief procurement officer (CPO) recognized the fact that the blurred lines between government and contractor employees in a blended workforce raises concerns about organizational conflicts of interest (OCIs) and contractor ethics.⁷⁸ In short, according to the CPO, there are "too many contractors performing too many functions with too little supervision."⁷⁹

Risks of Poorly Orchestrated Outsourcing

Against this backdrop, the risks of relying so heavily upon contractors are constrained only by one's imagination. These risks include, but are by no means limited to:

- Interference with an agency's ability to accomplish its mission;
- Harm being inflicted upon the public, the government, and others;
- Loss of public confidence in the government; and, of course,
- Excessive expenditure of public funds.⁸⁰

To exacerbate these risks, in an uncertain legal regime, there is a heightened risk that contractors cannot be held accountable and thus will escape liability for corruption or criminal acts.⁸¹

There is no shortage of examples to demonstrate the risks of privatization. Isolated examples, such as scandals at Abu Ghraib or improper accounting and billing practices by KBR/Halliburton, gave way to a host of evolving foibles in Iraq.⁸² At home, in March 2008, privacy abuses involving all three of the major 2008 presidential candidates⁸³ and in antiterrorist data mining illustrates the problems of employing private contractors in response to the 9/11 attacks.⁸⁴ The poorly orchestrated and seemingly uncoordinated response to Hurricane Katrina and plans to give contractors virtual autonomy in handling captured illegal immigrants at the United States/Mexico border demonstrate that significant outsourcing risks will continue to haunt DHS for some time.⁸⁵

Although there is always room for minimizing these risks, the current laws and regulations governing today's acquisition environment are, for the most part, adequate.⁸⁶ Rather, the lion's share of DHS' and the government's contracting difficulties can be traced to the implementation of those laws, regulations, and policies. And implementation is more about people than policy. The root cause of the problems is derived from resource deficiencies and more specifically, an inadequate acquisition workforce.

Inadequate Investment in Acquisition Resources is Irresponsible Given the Government's Unavoidable Reliance upon Contractors

Unfortunately, acknowledgment of the acquisition workforce crisis has been slow in coming and at times impeded by

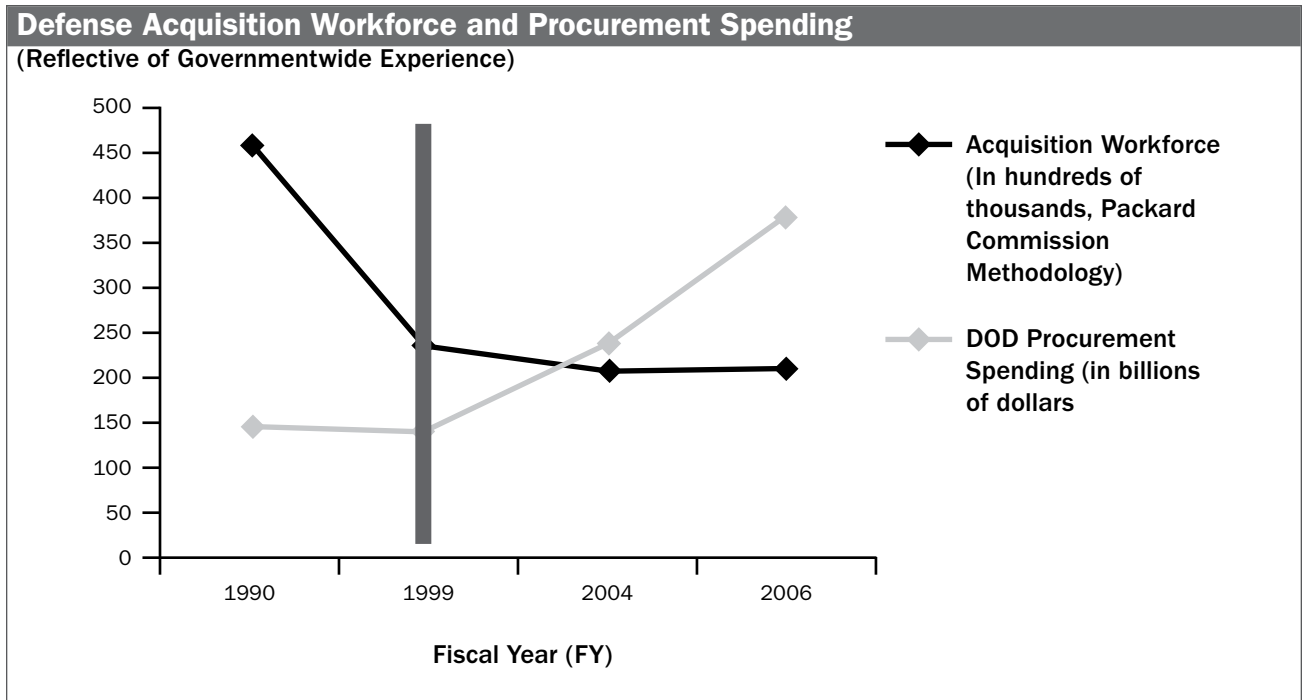


FIGURE 3.

denial.⁸⁷ Today, as the topic gains traction, it is easy to agree with Government Accountability Office (GAO) recommendations for reform at DHS.⁸⁸ It is difficult to conceive of a higher priority for a heavily outsourced agency, such as DHS, than to “assess program office staff and expertise necessary to provide sufficient oversight” of its most important service contracts.⁸⁹ GAO is correct to prod DHS to assess the risks of relying so heavily upon contractors as part of the acquisition process. While DHS may have no choice but to rely upon contractors despite those risks, the discipline may result in contracts that more carefully attempt to control those risks. Further, DHS should “define contract requirements to clearly describe roles, responsibilities, and limitations” as part of the acquisition planning process.⁹⁰ Additional effort devoted to acquisition planning will pay dividends during contract performance.⁹¹

The Need for Acquisition Workforce Investments

Again, DHS is not alone. The federal government must devote more resources to the acquisition function. This investment is urgent following the bipartisan congressionally mandated acquisition workforce reductions that spanned the 1990s.⁹² Although no empirical evidence supported the policy, the sustained reductions and subsequent failure to replenish

the workforce created a generational void and devastated procurement personnel morale.⁹³ By some measures, as FIGURE 3 illustrates, DOD’s acquisition workforce of over 500,000 in 1990 was slashed to 300,000 in 1996 and to 200,000 in 2004, at the very same time that its procurement budget doubled from \$145 billion in 1990 to over \$380 billion in 2006.⁹⁴ Simultaneously, the government skimmed on training, as contracting officers faced increasing workloads and confronted dramatically changing and increasingly complex contractual challenges.⁹⁵ Despite the explosive growth in the reliance upon service contracts,⁹⁶ no emphasis was placed upon obtaining or retaining skilled professionals to plan for, compete, award, or manage sophisticated long-term service contracts.⁹⁷ As a result, “the shift from the acquisition of goods to...services, combined with the heavy reliance on interagency contracting, has resulted in ‘markedly greater demands on the Acquisition Workforce for capability, training, time, and sophistication.’”⁹⁸

The macro (governmentwide) and micro (acquisition workforce) effects of the 1990s downsizing frenzy left the federal government woefully unprepared to identify, recruit, manage, and incentivize the (hypothetically revolutionized) acquisition workforce envisioned by the 1990s reforms.⁹⁹ The dramatic increase in procurement spending since the 9/11 attacks exacerbated the simmering workforce crisis.¹⁰⁰ Congressional investment in the people who are responsible

for that procurement has not kept pace, even as Congress began to recognize that agencies “currently lack the means to provide proper oversight of...service contracts, in part because of an insufficient number of contract oversight personnel.”¹⁰¹ Quite simply, today the government lacks sufficient qualified acquisition, contract management, and quality control personnel to handle the growth in service contracts,¹⁰² and the existing personnel lack the qualifications and experience necessary for them to perform a complicated, highly discretionary task over extended periods of time.¹⁰³

Unfortunately, as our procurement system has struggled throughout this decade, more energy has been devoted to punishment rather than cure. Specifically, Congress has been quick to call for more auditors and IGs to scrutinize contracting and increase accountability.¹⁰⁴ While this is a responsible gesture, the corresponding call for more contracting experts and staff to perform the many functions that are necessary for the procurement system to work well has been both delayed and, sadly, muted.¹⁰⁵ In order to serve the taxpaying public and to meet the needs of agency customers, acquisition professionals must:

- Promptly and accurately describe what the government needs to buy,
- Assess the marketplace to identify and select quality suppliers,
- Strike deals that ensure fair prices,
- Structure contracts with proper monetary incentives for good performance, and
- Effectively manage and evaluate contractor performance.¹⁰⁶

Accordingly, the contracting workforce—understaffed, under-resourced, and underappreciated—desperately requires a dramatic recapitalization.¹⁰⁷ But acquiring the necessary talent to do so will not be easy. Senior government officials increasingly bemoan that no young person in his or her right mind would enter government contracting as a career.¹⁰⁸ And it is possible that even an extremely aggressive recruiting campaign may do no more than keep pace with the pending exodus of retirement-eligible acquisition professionals that constitute the current workforce’s critical mass.¹⁰⁹

Personal Services Contracting as a Symptom of the Acquisition Crisis

Turning from the macro to the micro, one of the most intriguing aspects of necessity-driven outsourcing has been the erosion of the government’s longstanding prohibitions against personal services contracting. This little-understood

nuance is critical to understanding the significance of the outsourcing trends and the scope of the delegation of government duties and responsibilities implicated by that outsourcing. Use of personal service contracts—“characterized by the employer–employee relationship [they] create between the government and the contractor’s personnel”—empowers contractor personnel to make discretionary decisions historically (and, arguably, legally) required to be made by government officials.¹¹⁰

In a classic (nonpersonal) services contract, the government delegates a function to a contractor. Conversely, in personal services contracts, the government retains the function, but contractor personnel staff the effort. Despite longstanding legal and policy objections to the use of personal services contracts,¹¹¹ we have witnessed an explosive growth in what are referred to as “body shop” or “employee augmentation” arrangements, through which the government, as a matter of practice and necessity, hires contractor personnel to replace, supplement, or work alongside civil servants or members of the armed forces.¹¹² This is the antithesis of the government’s preferred approach, known as “performance-based service contracting.”¹¹³ Civil servants work alongside, with, and at times, for contractor employees who sit in seats previously occupied by government employees.¹¹⁴ Unfortunately, no one stopped to train the government workforce on how to operate in such an environment, referred to as a “blended workforce.”¹¹⁵ The worst-case scenarios have arisen where contractors perform work under open-ended contracts without guidance or management from a responsible government official, and typically facilitated by the reliance on interagency contracting vehicles. Increasing attention to this oversight vacuum has begun to reign in this practice,¹¹⁶ but the practice, with its attendant delegation of authority from government officials to contractor personnel, persists.

Across the government, the longstanding prohibitions against personal services contracting have become dead letter.¹¹⁷ With the prohibition’s erosion, the scope of the government’s delegation to its contractors expands. In less than a decade, services contracts grew 72 percent at DOD from \$82 billion in 1996 to \$141 billion in 2005.¹¹⁸ DHS already enjoys greater authority to employ personal services contracting authority through the Homeland Security Act.¹¹⁹ In addition to potential OCIs,¹²⁰ this trend raises a number of issues regarding the management of human capital.¹²¹ In attempting to attract and retain a qualified workforce, DHS may find it increasingly difficult to articulate why individuals should come to work for or stay employed by DHS rather than its contractors.¹²² This problem is particularly acute where contractors employ incentives such as compensation, training, and travel to reward and retain their top talent.

Conclusion: A Call to Action

In the end, the federal government's inadequate and often failed implementation of its outsourcing efforts renders it difficult, if not impossible, to draw broad conclusions on the validity of outsourcing as a matter of public policy. The primary lessons learned from the past 20 years merely reflect the fundamental assumptions commonly accepted by competent procurement professionals. First, if a procuring entity fails to invest time and energy in understanding its requirements and, equally important, articulating its desired outcomes (or frankly, what value it expects to receive in return for its money) to its private-sector business partner, it is unlikely that the government's end user will be satisfied with the result. More specifically, failure to plan typically guarantees a suboptimal result. Finally, outsourcing—particularly of mission-critical, complex tasks—requires a large, experienced, and properly incentivized cadre of skilled professionals to:

- Plan;
- Identify requirements;
- Conduct market research;
- Draft specifications and solicitations;
- Manage competitions;
- Draft, negotiate, and award contracts; and
- Manage contractor performance by providing:
 - Advice and guidance,
 - Quality assurance,
 - Compliance through appropriate oversight,
 - Facilitation of invoicing and payment,
 - The proper handling of contingencies (and related modifications and terminations),
 - The closing out of contractual relationships, and
 - Generally ensuring appropriate stewardship of the public's scarce resources.

Unfortunately, more than 15 years of ill-conceived and inadequate investment in the federal government's acquisition workforce, followed by a governmentwide failure to respond to a dramatic increase in procurement activity, has led to a buying and contract management regime animated by triage, with insufficient resources available for contract administration, management, and oversight.¹²³ The old adage “an ounce of prevention is worth a pound of cure” rings true. More auditors and IGs, in performing their critical functions, will guarantee a steady stream of scandals. But they will neither help avoid the scandals nor improve the procurement system. Conversely, a prospective investment in upgrading the number, skills, incentives, and morale of government purchasing officials would reap huge long-term dividends for the taxpayers.

Despite all of the credit it deserves for adding the acquisition workforce to its mandate, in the end, the Acquisition Advisory Panel (AAP) failed to demand sufficiently forceful action on this critical issue. The AAP concluded that it lacked sufficient, credible information on the size, composition, or strength of the current acquisition workforce to make meaningful recommendations as to the target size of the acquisition workforce. Fortunately, the Gansler Commission did not similarly shy away from the core problem, instead sounding a clarion call for restoration and reinvigoration of the acquisition workforce: “The Commission believes that the Army contracting community has reached a ‘tipping point’ that requires extraordinary action.”¹²⁴ Moreover, the report presciently articulates: “Too often it takes a crisis to bring about major change—the Iraq/Kuwait/Afghanistan contracting problems have created a crisis!”¹²⁵

While DHS's experience may be unique due to its lightning-rod, magnetic attraction of criticism, and the army's courage in its self-assessment is commendable, neither the army nor DHS is alone in facing this crisis. Rather, this problem—pervasive reliance upon contractors without sufficient qualified personnel to properly manage contractual relationships—bedevils the entire federal government.

At the same time, this problem requires strong leadership and the upcoming presidential election poses another daunting challenge. The public neither comprehends nor favors outsourcing as a matter of policy. Moreover, the acquisition community, the nuances of the procurement regime, and the demands inherent in purchasing more than \$400 billion annually of services, supplies, and construction, are invisible to the public. Similarly, the public has no grasp on the direct relationship between outsourcing and the need to invest heavily in the acquisition workforce. Accordingly, none of the presidential candidates—Democrat, Republican, or (when still in the race) Independent—believed their campaigns would benefit from suggesting that good government (or for that matter, competent government) demands a massive infusion of resources to restore and reinvigorate the acquisition workforce,¹²⁶ nor should we expect a leadership epiphany after the 2008 election.

Although a small number of influential members of Congress—Senators Susan Collins (R-ME) and Joseph Lieberman (I-CT), and Representative Henry Waxman (D-CA), to name a few—have begun to recognize the need, they lack the power to generate the sufficient investment required to recapitalize the acquisition workforce. But at least the process has begun, however tentatively. Accordingly, the acquisition community and those directly affected by it must engage in an unprecedented effort to educate our elected representatives not only of the need for resources, but also in

the dividends to be reaped by investment in the acquisition community. The Office of Federal Procurement Policy (OFPP) must aggressively take up the leadership role assigned by S. 680.¹²⁷ At a minimum, OFPP must become the acquisition workforce's primary advocate and cheerleader; a role from which it too often has shied away. Similarly, NCMA is well positioned to lead such an initiative, but it cannot succeed alone. Unlimited potential allies exist; they need only be harnessed.

Together, the combined voices of those that favor good government, fiscal responsibility, and good business can articulate the government's need for a well-staffed, experienced, and well-trained acquisition workforce. The case is clear and the need is great. The time for action is now. *JCM*

ENDNOTES

1. See "Federal Procurement Spending: Trending Analysis Report Since Fiscal Year 2000," Federal Procurement Data System, *Trending Analysis Report Since Fiscal Year 2000*, 2006, available at www.fpdnsng.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls. Annual increases in the Consumer Price Index for All Urban Consumers (CPI-U) were extracted from the annual "CPI Detailed Report Tables," Department of Labor, Bureau of Labor Statistics, available at www.bls.gov/cpi/cpi_dr.htm#2007.
2. See Mark L. Goldstein, *America's Hollow Government: How Washington Has Failed the People*, Ch. 6 (Irwin Pub. 1992).
3. See T. Christian Miller, "Private Contractors Outnumber U.S. Troops in Iraq," *Los Angeles Times*, July 4, 2007.
4. See *infra* section titled "Risks of Poorly Orchestrated Outsourcing."
5. See David Ivanovich, "Contractor Deaths Up 17 Percent Across Iraq in 2007," *Houston Chronicle*, at A1, February 10, 2008; and Bernd Debusmann, "In Outsourced U.S. Wars, Contractor Deaths Top 1,000," *Reuters*, July 3, 2007. These figures are derived from quarterly reports generated, but not widely distributed, by the Department of Labor based upon claims made under the Defense Base Act Insurance Program. See, generally, www.dol.gov/esa/owcp/dlhwc/lstdba.htm.
6. See, e.g., GAO, GAO-08-142T, "Department of Homeland Security: Risk Assessment and Enhanced Oversight Needed to Manage Reliance on Contractors" October 17, 2007, available at www.gao.gov/new.items/d08142t.pdf; U.S. Senate Committee on Homeland Security and Government Affairs, Hearing, "Is DHS Too Dependent on Contractors to Do the Government's Work?" October 17, 2007; GAO-07-990, "Department of Homeland Security: Improved Assessment and Oversight Needed to Manage Risk of Contracting for Selected Services" September 17, 2007, available at www.gao.gov/new.items/d07990.pdf; testimony of Scott Amey, general counsel, Project on Government Oversight before the House Committee on Homeland Security, "Responsibility in Federal Homeland Security Contracting," April 20, 2007, available at www.pogo.org/p/contracts/ct-070420-contracting.html; and Accountability in Government Contracting Act of 2007 (S. 680). We support many of the initiatives in the current version of S. 680, particularly the Acquisition Workforce Human Capital Succession Plan.
7. See, generally, Paul C. Light, "Outsourcing and the True Size of Government," 33, *Public Contract Law Journal* 311, 311-20 2004 (examining the growth of a "shadow government" and the incentives behind it).
8. See, e.g., Paul Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It*, 57-77 (Cambridge Univ. Press, 2007) (suggesting that use of carefully supervised private contractors for airport security could be preferable to relying on government employees).
9. See, generally, Martha Minow, "Outsourcing Power: How Privatizing Military Efforts Challenges Accountability, Professionalism, and Democracy," 46, *Boston College Law Review*, 989, 2005 (describing the risks of outsourcing including contractor profiteering, jeopardized public confidence in government, illegitimate lobbying, reduced transparency, limited checks and balances, and an impaired international reputation).
10. *Ibid.* at 1022-26.
11. See Congressional Budget Office (CBO), *Logistics Support for Deployed Military Forces*, 23-25, October 2005 [hereinafter "CBO, *Logistics Support*"], available at www.cbo.gov/ftpdocs/cfm?index=6749; Albert A. Robbert, Susan M. Gates, and Marc N. Elliott, *Outsourcing of DOD Commercial Activities: Impacts on Civil Service Employees*, 83-87, RAND, 1997; *Privatization: The Provision of Public Services by the Private Sector* (Roger L. Kemp ed., 2007) (analyzing the breadth, reality, and promises of privatization); Martha Minow, *Partners, Not Rivals: Privatization and the Public Good* (Beacon Press, 2003) (explaining ways privatization can help improve public services if properly structured); and E.S. Savas, *Privatization and Public-Private Partnerships* (CQ Press, 1999) (discussing ways privatization can help governments deliver services).
12. For more middle ground proposals, see Laura A. Dickinson, "Public Law Values in a Privatized World," 31, *Yale Journal of International Law*, 383, 401-22, 2006 (identifying nine proposals that use government contracts as a mechanism for ensuring accountability, transparency, and human rights norms in privatization); and Jody Freeman, "Extending Public Law Norms Through Privatization," 116 *Harvard Law Review*, 1285, 1300, 2003 (urging the use of contracts as a tool to make privatization public).
13. See CBO, *Logistics Support*, *supra* note 11, at 23-25; and Dickinson, "Public Law Values," *supra* note 12, at 395-96.
14. *Ibid.*
15. *Ibid.*
16. For example, in a 2006 survey, DHS ranked near last in every category regarding job satisfaction and management due to concerns about promotions, merit pay, and related policies (see Tim Kauffman, "Survey's Message to Leaders," *Federal Times*, February 8, 2007, available at www.federaltimes.com/index.php?S=2532429). In 2006, the D.C. Circuit upheld an injunction that blocked many aspects of DHS' new personnel system related to pay and discipline (see *Nat'l Treasury Employees Union v. Michael Chertoff*, 452 F.3d 839, 856-67

- [D.C. Cir. 2006]). Moreover, many perceive the end of David M. Walker's tenure as comptroller general was precipitated by his efforts to introduce incentive pay among the GAO career workforce. See, e.g., Emily Yehle, "Walker Takes His Work to Private Sector," *Roll Call*, February 19, 2008 ("Walker changed the agency over to a market-based, performance-driven system...drawing the ire of GAO analysts....The controversy was enough to spur the creation of a union.... [S]ome analysts celebrated Walker's resignation...."); and Elizabeth Brotherton, "Farewell," *Roll Call*, March 12, 2008:
- It is Walker's ongoing call for economic responsibility that he likely will be best remembered for in his time as Comptroller General....But GAO employees probably will remember Walker most for his restructuring of the agency's pay structure into a market-based, performance-driven system. While Walker has said the new system is needed to ensure taxpayer dollars are spent wisely, it has drawn the ire of GAO analysts, who called it unfair and formed the agency's first-ever union as a result.
17. See Dickinson, "Public Law Values," *supra* note 12, at 387 (noting that those who resist privatization are misguided as the outsourcing trend is probably irreversible).
 18. GAO aptly noted: "Decisions to contract for...services were driven by the need for staff and expertise to get programs up and operations up and running....[Yet, even where] the original justification for contracting, such as immediate need, had changed...components continued to use contractors without reassessing who...should perform a given function." GAO, "DHS: Improved Assessment and Oversight Needed," *supra* note 6, at 3-4, 14-15.
 19. See, generally, CBO, *Logistics Support*, *supra* note 11 (reviewing \$15 billion of logistics support used in Iraq, Afghanistan, and southwest Asia under contract by the U.S. Army).
 20. *Ibid.*
 21. See Verkuil, *supra* note 8, at 25-30; and U.S. House Committee on Government Reform, *Additional Information About Blackwater USA*, 14, October 1, 2007. The Blackwater scandals clearly illustrate the human and financial costs of failed contract oversight. In only five years, Blackwater contracts jumped 80,000 percent, going from \$736,000 in 2001 to \$593 million in 2006. (*Ibid.* at 3-4.) Of Blackwater's \$1 billion in contracts from 2001-2006, 51 percent were awarded without full and open competition. (*Ibid.*) Since then, 16 Iraqis have allegedly been killed as a result of Blackwater's excessive use of force, and 162 of 195 incidents where its personnel have fired weapons have resulted in property damage. (*Ibid.* at 7.) Oversight of Blackwater by the State Department has been sharply criticized, though 122 Blackwater employees have been terminated for misconduct. (*Ibid.* at 9-13.) See also Steven L. Schooner, "Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government," 16, *Stanford Law & Policy Review*, 549s 2005.
 22. See Richard J. Pierce Jr., "Book Review: *Outsourcing Sovereignty* by Paul Verkuil," in *Outsourcing the Federal Government*, 10, October 25, 2007 (noting that the creation of DHS placed 22 agencies with unique and complicated cultures and mix of missions under several added layers of bureaucracy).
 23. Minow, note 9, at 1001.
 24. See testimony of Secretary of Defense Robert M. Gates, U.S. Senate Committee on Appropriations Hearing, *The President's FY 2008 Supplement Request for the Wars in Iraq and Afghanistan*, September 26, 2007 (noting that private-sector salaries lure talented personnel away from government service). Only serious, long-term, and far-reaching personnel reforms can begin to reverse the current trend in any meaningful manner; and Commission on Army Acquisition and Program Management in Expeditionary Operations, "Urgent Reform Required: Army Expeditionary Contracting," 44-45, October 31, 2007 (describing the need for extensive personnel, training, restructuring, and additional legislative, regulatory, and policy reforms), available at www.army.mil/docs/Gansler_Commission_Report_Final_071031.pdf.
 25. See Margaret McGurk, "Projecting a Shortage, Engineers Step Up Recruiting Efforts," *Gannett News Service*, October 29, 2007, available at www.armytimes.com/careers/second_careers/military_engineers_071029/; and Ann Grimes, "Even Tech Execs Can't Get Kids to Be Engineers," *Wall Street Journal Online*, March 31, 2005, available at www.careerjournal.com/salaryhiring/industries/engineers/20050331-grimes.html.
 26. Testimony of Elaine Duke, DHS CPO, U.S. Senate Committee on Homeland Security and Governmental Affairs Hearing, "Is DHS Too Dependent on Contractors to Do the Government's Work?" October 17, 2007 ("It is not a question of whether we continue to utilize contractor services, but...about reaching the optimum balance between requirements being performed by Federal employees and contractors").
 27. This includes conceding that contractors will continue to perform what historically have been perceived as inherently governmental functions. GAO accurately describes the conceptual framework under which government employees, rather than contractors, should perform inherently governmental functions, those functions that "require discretion in applying government authority or value judgments in making decisions for the government." (GAO, "DHS: Improved Assessment and Oversight Needed," *supra* note 6, at 6-7.) But this discussion, and, in practice, the entire legal regime (encompassing "competitive sourcing" and OMB Circular A-76), is increasingly quaint, outmoded, anachronistic, or simply irrelevant. Experience suggests that, throughout the government, the private sector is intimately involved in functions perceived as inherently governmental, including those where the risk level is deemed highest, such as acquisition support, engineering or technical services, intelligence services, policy development, and reorganization and planning. (*Ibid.* at 19.) See also GAO-07-45SP, "Highlights of a GAO Forum: Federal Acquisition Challenges and Opportunities in the 21st Century," October 6, 2006 ("...increasing reliance on contractors to perform services for core government activities challenges the capacity of federal officials to supervise and evaluate the performance of these activities"), available at www.gao.gov/new.items/d0745sp.pdf; and GAO-08-572T, "DOD Needs to Reexamine Its Extensive Reliance on Contractors and Continue to Improve Management and Oversight," testimony before the Subcommittee on Readiness, Committee on Armed Services, House of Representatives, March 11, 2008 (notes excluded) at 8-9:

[W]e reported that an increasing reliance on contractors to perform services for core government activities challenges the capacity of federal officials to supervise and evaluate the performance of these activities....[T]he Director of National Intelligence reported in 2006 that the intelligence community finds itself in competition with its contractors for employees and is left with no choice but to use contractors for work that may be 'borderline inherently governmental'....Unless the federal government pays the needed attention to the types of functions and activities performed by contractors, agencies run the risk of losing accountability and control over mission-related decisions.

28. One oft-criticized practice, the use of Lead Systems Integrator (LSI) strategies—with the most relevant example here being the Deepwater initiative—are a direct result of the human capital gap. The potential conflicts that arise from these relationships are now well documented. See, generally, GAO-07-874, "Coast Guard: Challenges Affecting Deepwater Asset Deployment and Management and Efforts to Address Them," June 18, 2007 ("Over the past several years, GAO has expressed concerns about the Coast Guard's ability to manage and oversee the Deepwater program. Specifically, the program has faced challenges in terms of management, contractor accountability, and cost control."), available at www.gao.gov/new.items/d07874.pdf. It may make sense for the Coast Guard to bring the integration function back in-house. But this ignores the reality that the Coast Guard originally turned to the private sector because it lacked the capacity to perform the task with internal resources. The Coast Guard will require additional program management and engineering support from contractors to replace the contractors that had been performing those roles. Accordingly, even as DHS increases its capacity, it still has no choice but to strategically supplement its workforce from outside.
29. For the purposes of this paper, we take an expansive view of the acquisition workforce. The specific definition of that workforce, long a topic of confusion and debate, is beyond the scope of this paper. See generally Steven L. Schooner, "Feature Comment—Empty Promise for the Acquisition Workforce," 47, *Government Contractor*, May 4, 2005.
30. The only legitimate short-term alternative to the status quo is to selectively outsource the procurement function. While there are a number of reasons why this approach is suboptimal, it is a commonly accepted approach in developing countries. Arguably, the federal government has already embarked upon this path (by necessity rather than design). The success of Acquisition Solutions, Inc. offers an instructive anecdote: "Our only business is identifying, developing, and implementing innovative techniques and leading practices to help the federal government achieve better acquisition outcomes." See, generally, www.acquisitionsolutions.com. In 2006, Acquisition Solutions received over \$35 million in contracts, up from only \$10 million in 2003 and under \$3 million in 2000. (Ibid.) Eleven of its 12 largest contracts (five of which exceeded \$1 million) were categorized as "professional, admin[istrative], and management support services." (Ibid.) See also www.fedspending.org for annualized contract activity.
31. See *infra* note 109.
32. The recent U.S. Army study by the so-called Gansler Commission recommended increasing the army's contracting workforce by 1,400 professionals, which would involve about a 25 percent increase. While the army is typically one of the largest procuring agencies, it accounts (in any given year) for 15-25 percent of the federal acquisition budget and, historically, has better staffed the procurement function than many civilian agencies (such as, for example, DHS). See Gansler Commission, *supra* note 24.
33. A number of the provisions in S. 680 are a good start. See S. 680, Title 1, Acquisition Workforce. Section 101 would create a new Senior Executive Service (SES) position at OFPP—Associate Administrator for Acquisition Workforce Programs. Section 852 would establish a DOD Acquisition Workforce Fund "for the recruitment, training, and retention of acquisition personnel of the Department of Defense." (Ibid.) The fund would ensure that DOD's "acquisition workforce has the capacity, in both personnel and skills needed to properly perform its mission, to provide appropriate oversight of contractor performance, and ensure that the Department receives the best value for the expenditure of public resources." (Ibid.)
34. See Verkuil, note 8, at 23.
35. Dwight D. Eisenhower, Military-Industrial Complex Speech, 1961, available at, *inter alia*, www.yale.edu/lawweb/avalon/presiden/speeches/eisenhower001.htm:
 In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military industrial complex. The potential for the disastrous rise of misplaced power exists and will persist....Today, the solitary inventor, tinkering in his shop, has been overshadowed by task forces of scientists in laboratories and testing fields. In the same fashion, the free university, historically the fountainhead of free ideas and scientific discovery, has experienced a revolution in the conduct of research. Partly because of the huge costs involved, a government contract becomes virtually a substitute for intellectual curiosity.
36. See Verkuil, note 8, at 23, 45.
37. See Minow, note 9, at 1001.
38. U.S. House Committee on Government Reform, "More Dollars, Less Sense: Worsening Contracting Trends Under the Bush Administration," i (June 2007). See, generally, OFPP, *Summary Tables, Table S-2, Discretionary Funding by Category*, available at www.whitehouse.gov/omb/budget/fy2008/summarytables.html, reporting \$843.4 billion in total discretionary function for FY2006, as compared to \$415 billion (see note 1).
39. See "Federal Procurement Spending: Trending Analysis Report Since Fiscal Year 2000," Federal Procurement Data System, *Trending Analysis Report Since Fiscal Year 2000*, 2006, available at www.fpdsg.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls.
40. U.S. House Government Reform Committee, *op.cit.*
41. *Ibid.* at 3-4.
42. *Ibid.*
43. This change is nicely documented by the Commercial Activities Panel's April 2002 Final Report, *Improving the Sourcing Decisions of the Government*, available at <http://share76.fedworx.org>: "In 1986, supplies and

- equipment accounted for the bulk of contracting dollars—about...55 percent of total spending. By fiscal year 2001, however, the largest acquisition category was services at...51 percent of total spending.” (Ibid. at 25-27.)
44. The federal workforce has seen no growth since 1998. Its present size is smaller than the highs of the late 1980s and early 1990s, and, in total, is at its lowest point since 1965. See U.S. Office of Personnel Management, *Trend of Federal Civilian Employment By Year*, available at www.opm.gov/feddata/html/ExecBranch.asp.
 45. See Dickinson, “Public Law Values,” note 12, at 383-84.
 46. See Verkuil, note 8, at 23-24.
 47. See Dickinson, “Public Law Values,” *supra* note 12, at 390-97.
 48. Ibid. at 390.
 49. See Verkuil, note 8, at 25-30.
 50. See Miller, “*supra*” note 3. Prior estimates demonstrate the escalating use of contractors in Iraq. See, e.g., GAO-06-865T, “Rebuilding Iraq: Actions Still Needed to Improve the Use of Private Security Providers” (June 13, 2006) (20,000 contractors in 2005 and 48,000 as of March 2006), available at www.gao.gov/new.items/d06865t.pdf; testimony of Secretary of Defense Robert Gates, U.S. House Appropriations Defense Subcommittee Hearing, *Defense Department Budget for Fiscal Year 2008*, March 29, 2007 (126,000 contractors); and Kris Osborn, “McCaffrey: 600 U.S. Contractors Have Been Killed in Iraq,” *Defense News*, April 16, 2007 (130,000 contractors), available at www.defensenews.com/story.php?F=2688598&C=mideast.
 51. Singer, Peter W., *Corporate Warriors: The Rise of the Privatized Military Industry*, 16 (Cornell Univ. Press, 2003). See also Debora D. Avant, *The Market for Force: The Consequences of Privatizing Security* (Cambridge Univ. Press, 2005).
 52. See Army Material Command (AMC), Logistics Civil Augmentation Program (LOGCAP), available at www.amc.army.mil/LOGCAP; GAO-05-328, “Defense Logistics: High-Level DOD Coordination Is Needed to Further Improve the Management of the Army’s LOGCAP Contract,” March 21, 2005, available at www.gao.gov/new.items/d05328.pdf; and GAO-04-854, “Military Operations: DOD’s Extensive Use of Logistics Support Contracts Requires Strengthened Oversight,” July 19, 2004, available at www.gao.gov/new.items/d04854.pdf.
 53. Of course, even this anecdote provides a cautionary reminder that a reasonable idea can be thwarted by poor, hasty, or overly ambitious implementation. See, generally, the Navy-Marine Corps Intranet (NMCI) program at www.nmciinfo.usmc.mil; GAO-03-33, “Information Technology: Issues Affecting Cost Impact of Navy Marine Corps Intranet Need to Be Resolved,” October 2002, available at www.gao.gov/new.items/d0333.pdf; GAO-02-329, “Desktop Outsourcing: Positive Results Reported, but Analyses Could Be Strengthened,” March 29, 2002, available at www.gao.gov/new.items/d02329.pdf; and GAO/T-NSIAD/AIMD-00-116, “Defense Acquisitions: Observations on the Procurement of the Navy/Marine Corps Intranet,” March 8, 2000.
 54. See Verkuil, note 8, at 26-27.
 55. Ibid. at 33.
 56. See CBO, *Logistics Support*, *supra* note 11, at 23-25; and Dickinson, “Public Law Values,” *supra* note 12, at 395-96.
 57. See Minow, *supra* note 9, at 998; and CBO, *Logistics Support*, *supra* note 11, at 23-25.
 58. It has been more than a generation since the government abdicated its leadership role in spending on research, development, and innovation. For example, for too long the federal government has engaged in the shortsighted practice of requiring contractor “investment” in defense research and development. During that time, the private sector dramatically outpaced the government in the creation of new technology, both in terms of hardware solutions and business systems and processes. As a result, not surprisingly, the most talented workforce follows the technology, a trend that increasingly makes government work less attractive. Moreover, the combination of government recruiting policies, salaries, benefits, opportunities, and quality of work lag behind much of the private sector, particularly in high-demand career fields. Thus, the market reflects that the government undervalues critical skills. See GAO-07-45SP, “Highlights of a GAO Forum: Federal Acquisition Challenges and Opportunities in the 21st Century,” 13-15, October 2006, available at www.gao.gov/new.items/d0745sp.pdf; and GAO-08-93SP, “A Call for Stewardship: Enhancing the Federal Government’s Ability to Address Key Fiscal and Other 21st Century Challenges,” 19-21, October 2007, available at www.gao.gov/new.items/d0893sp.pdf.
 59. See Verkuil, note 8, at 149-50, 159-62, and 173-74.
 60. See CBO, *Logistics Support*, *supra* note 11, at 23-25; and Duke Testimony, *supra* note 26, at 7.
 61. See, generally, Verkuil, Paul R., “Public Law Limitations on Privatization of Government Functions,” 84, *National Contract Law Review*, 397, 399-402 (2006).
 62. Statement of Senator Susan M. Collins (R-ME), U.S. Senate Committee on Homeland Security and Governmental Affairs Hearing, “Is DHS Too Dependent on Contractors to Do the Government’s Work?” (October 17, 2007). See also CBO, *Logistics Support*, *supra* note 11, at ix-xi, 23-25 (describing the use of private contractors for logistics support in construction, food, fuel, housing, and supplies to ensure the military can focus on its mission of combat operations).
 63. See Gansler Commission, *supra* note 24: “In the decade and a half since the Cold War terminated, the Department of Defense...made significant changes to adapt to meet the expected challenges....The Army has transitioned many jobs that were previously performed by individuals in uniform during the Cold War to performance by contractors.” (Ibid. at 13.) Unfortunately, altering the ratio is not without costs. The Gansler Commission found “that the Institutional Army has not made the necessary adaptations to the operational policy to extensively outsource support services (in the case of Iraq and Afghanistan, over 160,000 contractors—over 50 percent of the total force). Since these services are needed, and are now being provided by commercial vendors instead of organically, they can only be fulfilled through the acquisition process; more specifically, by personnel who are specialists in contracting. If the military commander has gained riflemen, but not added contract professionals who can acquire the support services his unit needs, then he has lost capability.” (Ibid. at 13.)

64. See, e.g., U.S. House Committee on Government Reform, "Additional Information About Blackwater USA," October 1, 2007 (noting that taxpayers spend 600 percent more to use a \$1,222 per day Blackwater security specialist than an army sergeant who receives \$140 to \$190 per day); U.S. House Government Reform Committee, "More Dollars, Less Sense," note 38, at 8-11 (referencing 187 contracts totaling \$1.1 trillion involving waste, fraud, abuse, or mismanagement as a result of inadequate oversight, a stagnant acquisition workforce, and procurement inefficiencies); and Minow, note 9, at 1010-11 (describing cost-overruns and inefficiencies resulting from the legacy of downsizing where the government has lost control over its contractors).
65. This complex topic is well beyond the scope of this article, but an interesting attempt is made in CBO, *Logistics Support*, note 11 (comparing the costs of using government employees and private contractors to support the U.S. military). See also GAO-07-998T, "Peacekeeping: Observations on Costs, Strengths, and Limitations of U.S. and UN Operations," June 13, 2007 (noting that to deploy 872 civilian officers, the U.N. budgeted \$25 million, whereas it would cost the U.S. an estimated \$217 million; for pay and support of military troops the U.N. budgeted \$131 million, whereas it would cost the U.S. an estimated \$260 million), available at www.gao.gov/new.items/d07998t.pdf; and Dickinson, note 12, at 395-96 (noting that the cost savings of not providing benefits to employees of private contractors who can be hired on a short-term basis and are typically not unionized may be offset by the lack of competition in the military contracting process).
66. See, e.g., Dan Guttman, "Inherently Governmental Functions and the New Millennium," *Making Government Manageable: Executive Organization and Management in the Twenty-First Century*, 40, 55 (Thomas H. Stanton and Benjamin Ginsberg eds., 2004) (describing how contractors prepare agency analyses, leaving officials to rubberstamp contractor work products).
67. Sen. Collins Statement, note 62.
68. *Ibid.* at 2.
69. Minow, note 9, at 1010-11. Some critics suggest that the cost of this procurement oversight gap may be as high as \$1.1 trillion. See also U.S. House Government Reform Committee, "More Dollars, Less Sense," *supra* note 38, at 8-11. Critics often complain about high subcontracting, suggesting that tiers of subcontractors, with their attendant overhead and profit rates, unnecessarily increase contract costs. This, however, fails to recognize an obvious tradeoff. Either the government can award more, smaller contracts (and manage them) or the government can delegate its management to prime contractors, who, in turn, subcontract a similar number of subsidiary tasks. All too often, the government enters into larger, more complex contracts because it lacks sufficient personnel to manage large numbers of smaller contracts.
70. See, e.g., Department of Homeland Security Office of Inspector General, *Department of Homeland Security's Procurement and Program Management Operations*, OIG-0-53, September 2005, available at www.dhs.gov/woig/assets/mgmtrpts/OIG_05-53_Sep05.pdf; and Eric Lipton, "Homeland Security Department is Accused of Credit Card Misuse," *New York Times*, July 19, 2006.
71. See Sen. Collins Statement, *supra* note 62, at 5 (referencing reports of the DHS inspector general).
72. See Statement of Senator Joseph I. Lieberman (D-CT), U.S. Senate Committee on Homeland Security and Governmental Affairs Hearing, "Is DHS Too Dependent on Contractors to Do the Government's Work?" (October 17, 2007).
73. See House Government Reform Committee, "More Dollars, Less Sense," note 38, at 11.
74. See Testimony of Richard L. Skinner, DHS inspector general, U.S. House Committee on Oversight and Government Reform Hearing, "Management of Large Homeland Security Contracts: Deepwater and SBI.net," February 8, 2007.
75. DOD's system for reviewing, tracking, and monitoring contracts has also been sharply criticized. See, e.g., "Special Inspector General for Iraq Reconstruction," *Iraq Reconstruction: Lessons Learned in Human Capital Management*, January 2006 (concluding that "large-scale reconstruction and stability operations in Iraq could not be solved by contracting out these duties"), available at www.sigir.mil/reports/pdf/Lessons_Learned?Feb16.pdf; Minow, note 9, at 1000-16 (criticizing massive outsourcing of military work without meaningful methods for ensuring contractual compliance); Coalition Provisional Authority Office of Inspector General, *Coalition Provisional Authority's Contracting Processes Leading Up to and Including Contract Award*, OIG-CPA-04-013, July 27, 2004; and GAO-04-854, "Military Operations: DOD's Extensive Use of Logistics Support Contracts Requires Strengthened Oversight," July 19, 2004 (concluding that there is a lack of appropriately trained military staff to provide effective oversight and that many military units lack clarity of their role in directing and monitoring contractors' work), available at www.gao.gov/new.items/d04854.pdf.
76. GAO-07-900, "Department of Homeland Security: Progress and Challenges in Implementing the Department's Acquisition Oversight Plan," June 13, 2007, available at www.gao.gov/new.items/d07900.pdf.
77. See Lipowicz, Alice, "GAO: DHS Relies Too Much on Contractors," *Federal Computer Week*, October 18, 2007, available at www.fcw.com/online.news/150552-1.html.
78. Duke Testimony, note 26, at 8.
79. Pierce, see note 22, at 4-5.
80. GAO artfully states that increasing reliance upon contractor services runs the risk that the "government [loses] control over and accountability for mission-related policy and program decisions." GAO, "DHS: Improved Assessment and Oversight Needed," note 6, at 2.
81. See, e.g., Dickinson, "Public Law Values," *supra* note 12, at 384, 397-400 (explaining the gaps in holding private contractors liable and noting that courts applying the state action doctrine have been largely unwilling to view constitutional norms as applicable to contractors); Heather Carney, Note, "Prosecuting the Lawless: Human Rights Abuses and Private Military Firms," 74, *George Washington Law Review* 317, 330-36, 2006 (suggesting that the modern private military operates virtually outside the law); and Minow, note 9, at 1018-20 (explaining the lack of clarity in the liability regime regarding civilian contractors). For more background on the jurisdictional patchwork under the Military Extraterritorial Jurisdiction Act (MEJA), the Uniform Code of Military Justice (UCMJ),

- Coalition Provisional Authority Order #17, and other sources, see Verkuil, *supra* note 8, at 38 and Workshop Summary, “Princeton Problem-Solving Workshop Series in Law and Security: A New Legal Framework for Military Contractors?” (June 8, 2007), available at http://lapa.princeton.edu/conferences/military07/MilCon_Workshop_Summary.pdf.
82. The Special Inspector General for Iraq Reconstruction (SIGIR) concedes that “the incidence of corruption within the U.S. reconstruction program...appears to constitute a relatively small component of the overall American financial contribution to Iraq’s reconstruction...[L]osses to American taxpayers from fraud within reconstruction programs will likely amount to a relatively small component of the overall investment in Iraq, totaling in the tens of millions (rather than hundreds of millions or billions, as is sometimes imagined). However...[the SIGIR has] found egregious incidents of fraud.” Statement of Stuart W. Bowen Jr., *War Profiteering and Other Contractor Crimes Committed Overseas*, SIGIR 07-012T at 2-3 (June 19, 2007), available at www.sigir.mil/reports/pdf/testimony/SIGIR_Testimony_07-012T.pdf.
83. See, generally, Paul Richter, “Passport Files on All 3 Candidates Breached,” *Los Angeles Times*, March 22, 2008: “An investigation...revealed that since last summer...three contract workers in the department’s passport office had poked through passport application files containing the Social Security numbers and other personal information of the presidential hopefuls.”
84. Minow, note 9, at 989-94.
85. Verkuil, note 8, at 30-37.
86. One clear exception lies in the government’s increasing and, frankly, disturbingly chaotic reliance upon private security. As recent events make clear, the risks in this area are particularly grave, the existing legal and regulatory regimes are inadequate to address them, and the government waited far too long to address them in a thoughtful and responsible manner. The events involving Blackwater on September 16, 2007, appear to have become the proverbial straw that broke the camel’s back. Peter Singer’s popular book, *Corporate Warriors: The Rise of the Privatized Military Industry*, was published in 2003; the popular frontline documentary “Private Warriors,” aired in 2005, (viewable at www.pbs.org/wgbh/pages/frontline/shows/warriors); and the National Defense University’s Industrial College of the Armed Forces (ICAF) has conducted two lengthy studies on privatized military operations in 2006, www.ndu.edu/ICAF/Industry/reports/2006/pdf/2006_PMOIS.pdf, and 2007, www.ndu.edu/ICAF/Industry/reports/2007/pdf/2007_PMOIS.pdf. Yet numerous issues remain unresolved, as suggested by a recent Princeton University workshop with senior military and government officials, contractors, academic experts, and policymakers. See Press Release, “Princeton’s Law and Public Affairs Program Releases Consensus Findings on Legal Framework Governing U.S. Military Contractors” (October 1, 2007), available at <http://lapa.princeton.edu/newsdetail.php?ID=17>; and Workshop Summary, *supra* note 81.
87. David Safavian, while still serving as the OFPP administrator, unhesitatingly proclaimed: “OMB does not support an increase in billets merely to establish an arbitrary level for the acquisition corps. This ‘shoot first and ask questions later’ solution has been replaced with a disciplined, outcome-oriented approach that challenges agencies to do more with less....Both OFPP and OMB have challenged agencies to meet their human resources and program needs in a more strategic manner, and agencies continue to rise to the challenge.” Honorable David H. Safavian, “Delivering Results for the Acquisition Workforce,” 47, *Government Contractor*, June 15, 2005. Safavian was responding to one of the author’s assertions that “the [OFPP] policy letter ignores the proverbial elephant in the room: the [g]overnment lacks the number of strong, talented, and well trained procurement horses needed to pull the wagon.... [And] despite a clear need for additional resources, Safavian, like many of his predecessors at OFPP, steadfastly refuses to call for increasing the size of the acquisition workforce.” Steven L. Schooner, “Empty Promise,” note 29.
88. See GAO, *DHS: Improved Assessment and Oversight Needed*, note 6, at 25.
89. *Ibid.*
90. *Ibid.*
91. *Ibid.* Unfortunately, haste and lack of resources frequently continue to lead to inadequate acquisition planning. Absent strong leadership, calling for “strategic-level guidance for determining the appropriate mix of government and contractor employees” may result in empty rhetoric. Ultimately, it is unlikely that DHS will be able to meaningfully implement these actions.
92. See, e.g., Gansler Commission, *supra* note 24, at 90-104 (noting an overworked, understaffed, undertrained, undersupported, and undervalued acquisition workforce).
93. See, e.g., Professional Services Council (PSC) and Grant Thornton, *PSC Procurement Policy Survey: Troubling Trends In Federal Procurement*, 2006 (noting that the acquisition workforce is the top concern for federal managers), available at www.pscouncil.org/pdfs/2006PSCProcurementPolicySurvey.pdf.
94. See, e.g., Gansler Commission, *supra* note 24, at 91.
95. See, generally, Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, January 2007, available at www.acqnet.gov/comp/aap/finalaapreport.html. AAP performed a valuable public service by discussing the acquisition workforce in its report and raised the profile of this critical issue. Although this issue originally fell outside of its legislative mandate, AAP persuasively argued that acquisition workforce problems permeate most, if not all, of the issues before AAP. AAP did more than any group to date in attempting to catalog the scope of the problem. Among other important observations, AAP aptly chronicled that: (1) agencies have failed to perform systematic human capital planning to assess their acquisition workforce, either in the present or with an eye toward the future; (2) despite the myriad methods in which the acquisition workforce has been defined and counted over time and among agencies, no one appears to be attempting to quantify contractor personnel that currently play an important role in assisting, supporting, and, yes, augmenting the acquisition workforce; and (3) “While the private sector invests substantially in a corps of highly sophisticated, credentialed, and trained business managers to accomplish sourcing, procurement, and management of functions, the government does not make comparable investments.” (*Ibid.* at 19.)

96. See, e.g., GAO, "DHS: Improved Assessment and Oversight Needed," *supra* note 6, at 5 (noting that services accounted for 67 percent of DHS contracting in FY2005, which follows the governmentwide trend).
97. See, e.g., Laura Peterson, Center for Public Integrity, "Outsourcing Government: Service Contracting Has Risen Dramatically in the Last Decade," October 30, 2003, available at www.publicintegrity.org/wow/report.aspx?aid=68.
98. U.S. House Government Reform Committee, "More Dollars, Less Sense," note 38 (quoting the Report of the AAP).
99. See Acquisition Advisory Panel, *supra* note 95.
100. For example, as of 2006, each member of the acquisition workforce is responsible for \$7 million of procurement spending (double the \$3.5 million each oversaw in 2000). U.S. House Government Reform Committee, "More Dollars, Less Sense," note 38, at 10. See, generally, Steven L. Schooner, "Empty Promise," *supra* note 29. Moreover, a nice anecdote can be found in the Gansler report (Gansler Commission, note 24, at 29):
- Army 'culture' is focused on warfighting and thus neither recognizes the critical and complex nature of contracting nor rewards people in the contracting community. Contracting personnel incorrectly have been characterized as 'shoppers,' by some both inside and outside of the Army (and, consequently, reduced in both quantity and stature) as opposed to being viewed as true professionals....In an effort to recognize the postulated effects of [the end of the Cold War, new management processes, improved training, and improved technology], accompanied by unrelenting pressure from Congress, the DOD and the Army took significant cuts in the acquisition force and also deliberately choose not to shore up identified shortfalls in program management and contracting workforce. However, because of other efficiency decisions such as outsourcing which were being concurrently implemented, the actual workload of contracting personnel (the people charged with writing, negotiating, monitoring, and enforcing performance of the contracts) was substantially increasing in complexity and volume. The shortage of acquisition people is an overall DOD problem resulting from the drawdown in the first half of 1990s, with minimal-to-no build-up, as the DOD wartime operations and budget have soared.
101. See, e.g., Gansler Commission, *supra* note 24, at 96 (citing the U.S. House Appropriations Committee for FY2008).
102. See Federal Acquisition Institute, *Annual Report on the Federal Acquisition Workforce Fiscal Year 2006* (May 2007) (describing the stagnant acquisition workforce that employed 57,835 in 2000 and 58,723 in 2006), available at www.fai.gov/pdfs/FAI%20annual%20workforce%20report%202007.pdf.
103. For example, at DHS, "common themes and risks emerged...primarily the dominant influence of expediency, poorly defined requirements, and inadequate oversight that contributed to ineffective or inefficient results and increased costs." GAO, "DHS: Improved Assessment and Oversight Needed," see note 6, at 24.
104. See, e.g., Gansler Commission, *supra* note 24, at 98.
105. *Ibid.*
106. The involvement of contractors in the Abu Ghraib prison scandal provided a simple "lesson learned." If the government relies heavily upon contractors, there are unfortunate consequences when government fails to maintain, invest in, and apply appropriate acquisition professional resources to select, direct, and manage those contractors. See, generally, Steven L. Schooner, "Contractor Atrocities at Abu Ghraib," *supra* note 21. For example, General Fay poignantly articulated: "[T]here was no credible exercise of appropriate oversight of contract performance at Abu Ghraib." Maj. Gen. George R. Fay, Investigating Officer, *Article 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, 52, 2004, available at www.army.mil/ocpa/reports/ar15-6/AR15-6.pdf. This problem exists governmentwide: "[T]he administration of contracts, once they have been signed, has been the neglected stepchild of [procurement system reform] effort." Steven Kelman, "Strategic Contracting Management," *Market Based Governance: Supply Side, Demand Side, Upside, and Downside* at 89-90, 93 (John D. Donahue and Joseph S. Nye Jr. Eds., 2002).
107. AAP found that "the federal government does not have the capacity in its current acquisition workforce necessary to meet the demands that have been placed on it." Acquisition Advisory Panel, note 95, at 361.
108. "Harshly critical oversight and bad press have also had an undesirable effect [on recruiting]. One [participant] asked why a young person would go into contracting, given how the government's contracting function is portrayed in the press. The participant said that publicity, created in part by the 'gotcha' approach of some in the auditing community, turns off potential new hires and hurts the existing workforce, causing federal employee attrition." GAO-07-45SP, "Highlights of a GAO Forum: Federal Acquisition Challenges and Opportunities in the 21st Century," October 2006, available at www.gao.gov/new.items/d0745sp.pdf. Moreover, anecdotal evidence continues to demonstrate the difficulty of retaining government expertise in the face of rising private-sector compensation. See, e.g., testimony of Secretary of Defense Robert M. Gates, *Hearing of the Senate Committee on Appropriations: The President's FY 2008 Supplement Request for the Wars in Iraq and Afghanistan*, September 26, 2007 ("My personal concern about some of these security contracts is that I worry that sometimes the salaries that they are able to pay in fact lure some of our soldiers out of the service to go work for them.").
109. See Acquisition Advisory Panel, *supra* note 95, at chapter 5: "Although a much more adequate workforce exists at more senior levels of experience...retirements among this cohort are a major threat to the continuing adequacy of the workforce. [As Shay Assad] noted, it is essential that retention of this senior cadre be improved because, 'we don't have anybody to replace them.'" Referencing testimony of Shay Assad, director, defense procurement, acquisition policy, strategic sourcing, at the Acquisition Advisory Panel Public Meeting, June 14, 2006.
110. See, generally, *Federal Acquisition Regulation (FAR)* 37.104(a); 48 C.F.R. 37.104(a): "The government

- is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract." See also FAR 37.104(b); 48 C.F.R. 37.104(b).
111. "Agencies shall not award personal services contracts unless specifically authorized by statute...to do so." FAR 37.104(b); 48 C.F.R. 37.104(b).
112. See, e.g., Duke Testimony, *supra* note 26, at 8.
113. "Performance-based acquisition (see Subpart 37.6) is the preferred method for acquiring services (*Public Law 106-398*, section 821)." FAR 37.102(a), 48 C.F.R. 37.102. See also, "Seven Steps to Performance-Based Acquisition," available at www.acqnet.gov/comp/seven_steps/introduction.html; and OFPP, *Guide to Best Practices for Performance-Based Service Contracting*, October 1998 (rescinded), available at www.whitehouse.gov/omb/procurement/pbsa/guide_pbsc.html.
114. "Federal workers frequently are co-located with contractor personnel in the same government offices, virtually indistinguishable, and often doing the same or similar work....The blended workforce is woven into the government's fabric for the foreseeable future. The challenge for the acquisition community is to recognize this extraordinary transfer of responsibilities and make it work in the public interest." Richard J. Bednar and Gary P. Quigley, "Viewpoint: The Blended Workforce," *Government Executive*, May 1, 2007.
115. See Minow, *Outsourcing Power*, *supra* note 9, at 1006; and Duke Testimony, *supra* note 26, at 7-8.
116. Schooner, Steven L., "Feature Comment—Risky Business: Managing Interagency Acquisition," 47, *Government Contractor*, April 6, 2005 (applauding GAO for adding interagency acquisition to its high risk list).
117. The Acquisition Advisory Panel Report began from the premise that "the ban...on personal service contracts... doesn't take proper recognition of where we are as a workforce today" and concludes that "the existing FAR prohibition on [personal services contracts] is not compelled by applicable statutes and case law." Acquisition Advisory Panel, note 95, at 400-04.
118. See Gansler Commission, *supra* note 24, at 26.
119. See, generally, Section 832 of the Homeland Security Act, 6 U.S.C. 392, including authority to contract without regard to the pay limitation of 5 U.S.C. 3109. Also, the Transportation Security Administration retained separate authority to engage in personal services contracts that derives from the Federal Aviation Administration's procurement flexibilities. Moreover, the U.S. Coast Guard is specifically authorized to award medical personal services contracts. 10 USC 1091.
120. See Daniel I. Gordon, "Organizational Conflicts of Interest: A Growing Integrity Challenge," 35, *Public Contract Law Journal*, 25, 26-28, 2005 (attributing the increasing frequency of organizational COIs to the consolidation of contractors, increasing reliance on them for discretionary judgments, and the growth of umbrella contracts requiring contractors to market to government buying officials to generate profit).
121. See Duke Testimony, *supra* note 26, at 7-12.
122. Minow, note 9, at 1020-22 (noting that military are lured to work for private contractors who pay more, thus sapping the military's talent, resources, and control).
123. It is not surprising that GAO "found cases in which the [DHS] components lacked the capacity to oversee contractor performance due to limited expertise and workload demands." GAO, "DHS: Improved Assessment and Oversight Needed," note 6, at 22-23 (acknowledging that "at DOD, we have found cases of insufficient numbers of trained contracting oversight personnel, and cases in which personnel were not provided enough time to complete surveillance tasks, in part due to limited staffing.").
124. Gansler Commission, note 24, at 9.
125. *Ibid.* at 106.
126. Reality makes for bad policy. "No rational contemporary legislator would risk campaigning based upon promises to hire more government employees." Steven L. Schooner, "Competitive Sourcing Policy: More Sail Than Rudder," 33, *Public Contract Law Journal*, 263, 277, 2004.
127. See S. 680, *supra* note 33, at Section 101.