



---

[GW Law Faculty Publications & Other Works](#)

[Faculty Scholarship](#)

---

2005

## Emerging Policy and Practice Issues (2004)

Steven L. Schooner

*George Washington University Law School, [sschooner@law.gwu.edu](mailto:sschooner@law.gwu.edu)*

Christopher R. Yukins

*George Washington University Law School, [cyukins@law.gwu.edu](mailto:cyukins@law.gwu.edu)*

Follow this and additional works at: [https://scholarship.law.gwu.edu/faculty\\_publications](https://scholarship.law.gwu.edu/faculty_publications)

 Part of the [Government Contracts Commons](#)

---

### Recommended Citation

West Government Contracts Year in Review Conference (Covering 2004)

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact [spagel@law.gwu.edu](mailto:spagel@law.gwu.edu).

**EMERGING POLICY AND PRACTICE ISSUES**

by

**Steven L. Schooner**

**Associate Professor of Law**

**Co-Director of the Government Procurement Law Program**

**Christopher R. Yukins**

**Associate Professor of Government Contracts Law**

**The George Washington University Law School**

**Washington, D.C.**

The confirmation of David Safavian as Administrator of the Office of Federal Procurement Policy (OFPP), while potentially significant, fails to dominate the procurement policy scene as we enter 2005. 46 GC ¶ 462(g). Nonetheless, we hope he makes good on his commitment to the acquisition workforce, our highest priority for his tenure at OFPP. At the same time, we genuinely sympathize with him in his efforts to effectuate a rational procurement policy in light of distractions ranging from what can only be called scandals (more on this below) to what we see as “drags” on the system, such as the never-ending bundling-versus-consolidation debate or the evolving art of subdividing the procurement pie to include, most recently, service-disabled veteran-owned small businesses and the increasingly successful uber-8(a) firms, the Alaskan Native Corporations (ANC’s).

Despite the relentless attention focused upon competitive sourcing, in retrospect, it seems that the competitive sourcing regime experienced surprisingly little meaningful evolution over the last year. *See, e.g.*, 46 GC ¶¶ 430, 427, 416, 404, 364, 228, 226, 218, 206, 187, 175, 161, 150, 130, 97, 50, 48, 27. As a result, in attempting to identify the key trends and issues for 2005, we cannot avoid the reality that, as we recover from a particularly bitter and partisan election year, sadly, the procurement landscape remains dominated by bad news. On the one hand, two items, unquestionably unique, spawned a media frenzy: the Darleen Druyun saga and the flogging of contractors working in Iraq. At the same time, the media remains blissfully ignorant of what we perceive as the far more vexing issues that permeate federal procurement today – the excessive reliance upon, and corresponding misuse of, task-order contracting. For better or for worse, these plot-lines permeate our discussion of emerging policy and practice issues. Hopefully, this year, we’ll “Get it Right.” *See, e.g.*, 46 GC ¶ 277 (and discussion below).

**I. DARLEEN DRUYUN: (ROGUE) ANECDOTE OR HARBINGER?**

**A.** Darleen Druyun, the former civilian chief of Air Force acquisition, pleaded guilty in April to conspiracy to violate federal conflict-of-interest regulations, admitting that she engaged in job negotiations with Boeing while negotiating the high-profile \$20 billion tanker-lease deal. At the time, many took comfort in viewing her transgression as a technical violation of the Defense Department’s complex, burdensome, and seemingly arcane employment restrictions. What Druyun did appeared technically improper and, to the extent she must have known better, foolish. Subsequently, after a polygraph test, she further admitted to helping Boeing obtain inflated prices on several deals, describing one as a

“parting gift” intended to curry favor with her future employer. See George Cahlink, *Deal Breaker*, GOV’T EXECUTIVE, 19 (May 15, 2004); Renae Merle & Jerry Markon, *Ex-Pentagon Official Admits Job Deal; Civilian Got Boeing Offer While Overseeing Air-Tanker Contract*, WASH. POST A1 (Apr. 21, 2004) at; Renae Merle & Jerry Markon, *Ex-Air Force Official Gets Prison Time*, WASH. POST A1 (Oct. 2, 2004). Druyun implied that she did all this to secure, and later protect, her son-in-law’s and daughter’s employment at Boeing. Today, some of Druyun’s most ardent supporters feel that she got off lightly. Others find her admissions so dramatic that they fear she may have embellished her misdeeds under pressure from prosecutors or for personal reasons. Fallout from the Druyun scandal includes the Secretary of the Air Force James G. Roche. *Air Force Secretary and Top Acquisition Executive Resign*, 46 GC ¶ 458 (Nov. 24, 2004); *DOD IG Finds “Inappropriate Procurement Strategy” for CK-767A Tankers*, 46 GC ¶ 158 (Apr. 14, 2004).

One vignette merits repetition. Defense Secretary Donald H. Rumsfeld suggested that the Druyun debacle derived from lack of adult supervision at the Air Force. Thomas E. Ricks, *Rumsfeld: Druyun Had Little Supervision; Defense Secretary Cites High Turnover In Procurement Woes*, WASH. POST E01 (Nov. 24, 2004). The same week, Senator John McCain released a number of e-mails related to the Boeing tanker-lease deal, including this April 16, 2003 exchange, that fail to instill confidence in some of that “adult” leadership. 150 CONG. REC. S11776, S11780 (Nov. 20, 2004):

- Michael W. Wynne: They [Airbus] came in a couple of weeks ago and offered to build the majority [of the tankers] here in America. . . . I am not sure where this will lead, but the benefits of competition may be revealing.
- AF Secretary Roche: Mike, you must be out of your mind!!! ... We won’t be happy with your doing this!

**B.** The Druyun sentencing and any future actions stemming from the scandal could not have come at a worse moment for the U.S. procurement system. The public image of government contractors had a bad year. Uncle Sam’s massive outlay of money for Iraq’s reconstruction has failed to produce the (unrealistic and optimistic, but nonetheless) promised results. See, e.g., Robert S. Nichols, *GAO and CPA Continue to Find Numerous Setbacks Affecting Iraqi Reconstruction Work*, 46 GC ¶ 267 (July 14, 2004); *Emerging Issues in Iraq Reconstruction Contracting – Audits, Investigations, and the Transition of Sovereignty*, 46 GC ¶ 185 (May 5, 2004); *Iraq Reconstruction – Significant Contracting and Legal Issues*, 46 GC ¶ 39 (Jan. 28, 2004). The broad role of Halliburton subsidiary Kellogg Brown & Root (KBR) in Iraq – with Halliburton becoming one of DOD’s top ten contractors – and Halliburton’s ties to the Bush administration were heavily scrutinized. Bunnatine Greenhouse, the Army Corps of Engineers’ senior civilian acquisition official, apparently complained of the absence of competition and the level of KBR’s involvement during the contracting process (and, as a result, now finds herself in whistleblower status). The media repeatedly trumpets the billions of dollars of work that KBR has obtained without competition, and KBR’s accountability woes seem never-ending. A stream of audits suggest that the badly

understaffed Coalition Provisional Authority (CPA), subjected to unrealistic time pressure, lacked the resources or the will to utilize common oversight tools and, accordingly, failed to protect adequately against the waste of Iraqi and U.S. funds. Contractors working in Iraq today have every reason to believe that “no news is good news.” See, e.g., *Waxman Calls for New Hearings on Halliburton Contract*, 46 GC ¶ 451 (Nov. 17, 2004); *CPA IG Submits Third Quarterly Report to Congress*, 46 GC ¶ 436 (Nov. 10, 2004); *Halliburton Iraq Reconstruction Contracts to be Divvied Up*, 46 GC ¶ 354 (Sept. 15, 2004); see also 46 GC ¶¶ 318, 287, 249, 220, 219, 195, 170, 138, 127, 116, 115, 96, 69, 28, 17, 1.

**C.** Another Iraq contractor, Custer Battles, finds itself defending a qui tam action related to its work for the CPA. *Custer Battles Denies Allegations; Asserts that FCA Does Not Apply to its CPA Contracts*, 46 GC § 459 (Nov. 24, 2004). This litigation returns us to questions raised last year regarding the creation, standing, and authority of the CPA. The CPA’s contracts were supposed to be funded by foreign assistance funds, with most of the spending deriving from the Development Fund for Iraq (DFI). Recall the October 21, 2003 letter to the GAO regarding the protest of Turkcell Consortium, B-293048, in which the Army argued that: (1) the CPA was not a federal agency and (2) the CPA was not using appropriated funds for its contracts. But see L. Elaine Halchin, *CRS Report to Congress: The Coalition Provisional Authority (CPA): Origin, Characteristics, and Institutional Authorities* (Order Code RL32370, Apr. 29, 2004), available at <http://fpc.state.gov/documents/organization/32338.pdf>.

**D.** Allegations regarding contractor personnel that took part in the alleged prisoner abuse at Abu Ghraib relate to a statistically insignificant percentage of the contractor workforce in Iraq. But the investigation left no doubt that the federal government must devote more resources to contract management and oversight. See, generally, Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, STANFORD L. & POLICY REV., Vol. 16, No. 2 (forthcoming) 2005, available at <http://ssrn.com/abstract=605367>. In addition to raising the concerns/pathologies related to fee-based incentives, discussed at length below, this piece concludes that the government must devote more resources to contract administration, management, and oversight, particularly in light of the 1990s’ congressionally mandated acquisition workforce reductions and the Administration’s sustained pressure to accelerate the outsourcing trend.

**E.** A deluge of investigations, reports, and prosecutions continue to disclose government charge-card improprieties. A Defense Information Systems Agency contracting officer was indicted for using government purchase cards to steer business to a company in return for more than \$500,000 in cash and benefits. See *Purchase Card Data Mining Leads to CO Indictment*, 46 GC ¶ 330 (Aug. 25, 2004); Press Release, U.S. Dep’t of Justice, *Senior Government Official, Local Attorney and Others Charged in Defense Procurement Fraud Case* (Aug. 18, 2004), available at [www.dodig.osd.mil/IGInformation/IGInformationReleases/PR-Marlowe8\\_18\\_04.pdf](http://www.dodig.osd.mil/IGInformation/IGInformationReleases/PR-Marlowe8_18_04.pdf).

**F.** At one level, we’d like to agree with those eager to put the Druyun story, and these other anecdotes, to rest. Some prefer to paint

## **NOTES**

the whole episode as an isolated example, unlikely to be repeated soon. Others throw up their hands, believing that neither rules nor oversight regimes can deter sophisticated, powerful individuals intent upon transgression. But both perceptions are too convenient. As episodic transgressions become more routine, it is not enough to retort that, typically, the government receives good value for its money. Rather, Congress, the media, the contractor community, and the public must look into the process to determine whether the government's contracting practices remain appropriately effective, efficient, and fair. Without systemic credibility, consequentialist claims that the contracts awarded represent the best deals possible cannot sustain a public procurement regime.

**G.** To the extent that procurement involves taxpayer funds, public trust, and the related principles of transparency and integrity, are tremendously important. Previously, we've noted that fewer nations today view our procurement system (or our government) as a model of fair dealing. One example of this comes from the global watchdog organization, Transparency International, which tracks accountability in government spending. Public procurement is among dozens of metrics used to compile its annual Corruptions Perceptions Index (CPI), ranking 146 countries in terms of the degree to which corruption is perceived (by business people, academics and risk analysts) to exist among public officials and politicians. Our government fares relatively well in this poll, but plenty of room for improvement remains. Unfortunately, we seem to be losing, rather than gaining, ground. See Transparency International, *Corruption Perceptions Index 2004*, available at [www.transparency.org/cpi/2004/cpi2004.en.html](http://www.transparency.org/cpi/2004/cpi2004.en.html). This is a potent reminder that significant challenges lie ahead in convincing the public that its money is well spent.

<b>Year</b>	<b>U.S. Ranking</b>
2004	17-19 (tie)
2003	18-19 (tie)
2002	16
2001	16-17 (tie)
2000	14
1999	9-10 (tie)
1998	17-18 (tie)
1997	16
1996	15
1995	15

## **II. CONTRACTORS SERVE, AND PAY THE ULTIMATE PRICE**

Major media outlets meticulously record and honor those who served and gave their lives in uniform in Iraq. See, e.g., CNN's *War in Iraq, US & Coalition Casualties*, at [www.cnn.com/SPECIALS/2003/iraq/forces/](http://www.cnn.com/SPECIALS/2003/iraq/forces/)

*casualties* /, or the Washington Post's *Faces of the Fallen: U.S. Fatalities in Iraq*, at [www.washingtonpost.com/wp-srv/world/iraq/casualties/facesofthefallen.htm](http://www.washingtonpost.com/wp-srv/world/iraq/casualties/facesofthefallen.htm), or Military City's (the Military Times Media Group) *Honor the Fallen*, at [www.militarycity.com/valor/honor.html](http://www.militarycity.com/valor/honor.html). These sites offer photos, service-members' names, their ages, their home towns, and details of their deaths. Strangely, however, contractor fatalities rarely receive similar coverage. One of the rare efforts to catalog contractor fatalities suggests that at least 200 coalition contractor personnel have died in Iraq. See, e.g., Iraq Coalition Casualty Count, *Iraq Coalition Casualties: Contractors - A Partial List*, at <http://icasualties.org/oif/Civ.aspx>. Most experts believe the actual number is significantly higher. Renae Merle, *Contract Workers Are War's Forgotten; Iraq Deaths Create Subculture of Loss*, WASH. POST A1 (July 31, 2004) ("The Pentagon does not keep an official count, and many companies do not announce when their employees in Iraq are killed."). While the government, contractors, and the media may have valid reasons to avoid focusing the public's attention upon contractor fatalities, failure to include these lives artificially suppresses the human cost of the government's efforts in Iraq. (Is this somehow different from the prohibition on casket photographs? See, e.g., Blaine Harden and Dana Milbank, *Photos of Soldiers' Coffins Revive Controversy*, WASH. POST A10 (Apr. 23, 2004).) Similarly, the public rarely hears how effectively KBR (and other contractors) and Blackwater have cared for U.S. troops in Iraq, providing essential services such as security, food, shelter, showers, and laundry.

### **III. BETTER DATA, SOONER?**

By now, the Federal Procurement Data System-Next Generation (FPDS-NG) should be available. If the FPDS-NG delivers on its promises, the General Services Administration (GSA) will deserve kudos for enhancing transparency, improving efficiency in government, and serving the contractor community. See generally [www.fpdnsng.com/](http://www.fpdnsng.com/). You can track the implementation status at [www.fpdnsng.com/status.html](http://www.fpdnsng.com/status.html); see also 69 FED. REG. 77661 (Dec. 28, 2004) (interim rule regarding prices for access to FPDS database) (GSA "expect[s] that nearly all of the public users will use the free data and report generation tools.... The public will use the same report generation tools as Federal employees...."). The FPDS Reengineering Project seeks to lower the government-wide cost of operations, be more responsive to customer needs, and enable direct data collection from agency electronic commerce systems. GSA aspires to accomplish five things: (1) Reduce the time (from 3-9 months to a week or less) to collect data about contracts; (2) Collect more and better information; (3) Provide on-line, web-based management information; (4) Save money, primarily by enabling agencies to use automated tools to reduce the data entry requirement; and (5) Be interoperable, specifically offering the an inherent capability to share data. If customer satisfaction rises with current expectations, GSA's efforts will no doubt serve as a useful outsourcing success story.

### **IV. THE SPENDING SPREE AND THE PENDING, INEVITABLE BELT-TIGHTENING**

**A.** In terms of opportunities, contractors benefited from the series of events begun on September 11, 2001, and subsequently fueled by a

## NOTES

spending spree born of bipartisan lack of fiscal responsibility. After years of stagnation, or minimal increases, Fiscal Year 2003 saw federal procurement spending break the \$300 billion threshold. See, e.g., [www.fpdc.gov/fpdc/fpr\\_2003/FPR2003.pdf](http://www.fpdc.gov/fpdc/fpr_2003/FPR2003.pdf), reflecting, for FY 2003, 11.5 million transactions exceeding \$305.4 billion. Not surprisingly, information technology spending continues to soar. *Government IT Spending Continues to Grow, Report Finds*, 46 GC ¶ 478 (Dec. 8, 2004) (suggesting a 60 percent increase over 2003, from \$95 to \$155 billion); *2003 IT-Related Contract Awards Total \$115 Billion, Study Finds*, 46 GC ¶ 159 (Apr. 14, 2004). Some suggest that, with the enhancements expected for FPDS-NG, a more accurate current number for total federal procurement could reach \$350 billion.

Fiscal Year	Transactions (in millions)	Dollars (in billions)	Percentage increase
2003	11.5	\$305	22
2002	8.65	\$250	6.8
2001	11.4	\$234	7.3
2000	9.8	\$218	-

**B.** Not only has government (procurement and non-procurement) spending increased, but the government is spending money far more quickly than it is generating income. Neither the short- nor the long-term prospects suggest this approach can be sustained. Looking ahead, it seems likely that the spending binge must come to an unfortunate end. How quickly, and how dramatically, fiscal reality sets in no doubt will dramatically impact the federal government’s purchasing practices. See, e.g., Renae Merle, *Defense Holds Key To Boeing’s 2005, Division Chief Says*, WASH. POST E1 (Dec. 24, 2004) (“Spending on the war in Iraq and a growing budget deficit will soon begin to squeeze funds for large weapons programs....”).

One of the few remaining voices of reason on the topic, David M. Walker, the Comptroller General, warns of “large and growing structural deficits” resulting from “known demographic trends and rising health care costs.” The GAO’s research suggests that, to balance the budget over the next 35 years, the government would either need to cut total federal spending by about 60 percent or raise taxes to about 2.5 times today’s levels. While economic growth can help, annual economic growth would have to exceed 10 percent every year for the next 75 years (as compared to an average 3.2 percent per year during the 1990s) to bring the budget in balance. David M. Walker, *America’s Financial Condition and Fiscal Imbalance*, [www.gao.gov/cghome/worldcongress20040802/index.html](http://www.gao.gov/cghome/worldcongress20040802/index.html); see also *Comp. Gen. Criticizes Financial Reporting Process; Sees Greater Role for “Contracting Out,”* 46 GC ¶ 495 (Dec. 15, 2004) (“GAO will include . . . unprecedented language emphasizing the seriousness of the problems encountered in 2004 – namely, the \$568 billion deficit. . . . GAO will emphasize its concern with the deterioration of the U.S. financial outlook . . .”).

For additional reading, see the Concord Coalition, at [www.concordcoalition.org/](http://www.concordcoalition.org/). “Conspicuously absent in the presidential campaign and debates [was] any sense of urgency about the federal budget deficit. Neither candidate promise[d] to do more than halve it within four years. And in all likelihood, neither’s budget plan would do even that.” Specifically, consider a recent issue of the *Concord Coalition’s Report on Fiscal Responsibility*, available at [www.concordcoalition.org/federal\\_budget/040730fiscresponrpt.pdf](http://www.concordcoalition.org/federal_budget/040730fiscresponrpt.pdf), bemoaning that: “A sensible proposal to reinstate “pay-as-you-go” rules (PAYGO) for both tax cuts and entitlement expansions was rejected.”

## **V. TIME AND MATERIALS CONTRACTS: CAMEL’S NOSE UNDER THE TENT**

Only time will tell whether 2004 set the stage for the government to embrace a new world of time and materials (T&M) contracts. The regulatory drafting team faces a significant challenge balancing, on the one hand, the need for flexibility and discretion with, on the other hand, clarity and sufficient constraints to instill confidence in largely unfettered reliance upon a rapidly growing, but easily misused, tool. The success of the endeavor will depend upon extracting salient characteristics from lessons learned from commonly used T&M contracts in the commercial marketplace. See the proposed Federal Acquisition Regulation (FAR) rules at 69 FED. REG. 56316 (Sept. 20, 2004); Pub. L. No. 108-136 § 1432; *Special Interests Grapple Over Allowing T&M and LH for Commercial Services*, 46 GC ¶ 485 (Dec. 8, 2004); *Industry Groups Support Proposed FAR Rule Change for Withholding Under Time-And-Materials/Labor-Hour Contracts*, 46 GC ¶ 300 (Aug. 4, 2004).

## **VI. THE LITIGATION UPTICK: ANOMALY OR EMERGING TREND?**

The dramatic, sustained reduction in government contract-related litigation that spanned the 1990s and carried over into this decade appears to have bottomed out. Contrary to conventional wisdom, we view this as a positive development. Contractor-litigants provide a valuable oversight function when they, typically unintentionally, serve as private attorneys generals while pursuing their own private interests. As recent events demonstrate, a public good results when the government’s all too often episodic oversight regime is buttressed by this type of third-party oversight.

On the protest front, the re-named Government Accountability Office (GAO) saw its bid protest docket grow during FY 2004. GAO received 1485 new protests, the highest number received for more than five years, but nowhere near the more than 3,000 protests it received in a single year just over a decade ago. *GAO Bid Protests Continue to Rise*, 46 GC ¶ 466 (Dec. 1, 2004); *Bid Protest Filings Continue to Rise*, 46 GC ¶ 169 (Apr. 21, 2004); *Bid Protest Filings Highest in Five Years*, 46 GC ¶ 16 (Jan. 14, 2004). Over the last three years, GAO claims a 30 percent increase in protest activity, and predicts further increases in anticipation of protests of public-private competitions by most efficient organizations (MEO’s). *Comp. Gen. Criticizes Financial Reporting Process; Sees Greater Role for “Contracting Out,”* 46 GC ¶ 495 (Dec. 15, 2004).



On the disputes front, appeals to the Armed Services Board of Contract Appeals (ASBCA) increased – from 429 in FY 2003 to 461 in FY 2004 – for the first time since FY 2000. *ASBCA Docket Bucks Downward Trend*, 46 GC ¶ 465 (Dec. 1, 2004). Although minor, the increase is significant because it is the first true increase in over a decade. The only anomaly – the FY 2000 increase – can be attributed, in large part to the ASBCA's incorporation that year of the judges and docket of the Corps of Engineers BCA. Nonetheless, activity at many of the smaller boards appears sporadic, and pressure persists for the OFPP to fulfill its statutory mandate to manage and, in so doing, likely consolidate, the boards of contract appeals. See, e.g., Frederick J. Lees, *Consolidation of the Boards of Contract Appeals: An Old Idea Whose Time Has Come?*, 33 PUB. CONT. L.J. 505 (2004). OFPP's recent data collection efforts lay the groundwork for David Safavian to take action, and we hope he does not squander this opportunity to increase the efficiency of the BCAs.

Previously, one of us ruffled some feathers by suggesting that – despite our respect for many of the court's fine jurists – we should consider what the litigation landscape might look like without the U.S. Court of Federal Claims. Steven L. Schooner, *The Future: Scrutinizing The Empirical Case For the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714 (2003), available at <http://ssrn.com/abstract=355360>. Although bills were introduced in both Houses of Congress last year that would have shuttered the Court of Federal Claims, it does not appear that sufficient legislative interest or momentum will effectuate the dramatic reform proposed. See S.2293 (Apr. 7, 2004), H.R. 4946 (July 22, 2004).

### **VII. RECOGNIZING EXCELLENCE**

The success of the procurement system depends upon people. Unfortunately, the public procurement profession more often attracts attention to its missteps rather than its successes. Accordingly, we are heartened by the increased efforts to recognize individual excellence in acquisition. In addition to various agency-specific (and less lucrative) incentive programs, there are now at least four government-wide prizes – of \$5,000 each – that reward individual excellence in public procurement.

- The *Ida Ustad Award for Excellence in Acquisition* recognizes a Government employee in the 1102 series working for an agency subject to the Federal Acquisition Regulation with high ethical standards. See [www.fai.gov/prodev/idaustad.htm](http://www.fai.gov/prodev/idaustad.htm).

- The *Procurement Round Table Elmer Staats Award* recognizes younger, but experienced procurement professionals; applicants must have at least 5 years of experience but be under the age of 38. See <http://www.fai.gov/prodev/roundtable.htm>.

- *New!* The *ESI Contracting Award* will recognize a contracts professional who has contributed significantly to acquisition operations or acquisition policy. See [www.esi-intl.com/public/contracting/contestrules.asp](http://www.esi-intl.com/public/contracting/contestrules.asp).

- *New!* The *Procurement Round Table John Magnotti Acquisition Mentorship Award* will recognize a Federal acquisition professional who, by mentoring civilian or military personnel, has contributed significantly to the quality of the Federal acquisition workforce. See [www.law.gwu.edu/facweb/sschooner/MagnottiAward-05.pdf](http://www.law.gwu.edu/facweb/sschooner/MagnottiAward-05.pdf).

We hope this trend will continue, and we look forward to learning of your significant achievements through these, and other, award programs.

## **VIII. GSA AND THE CRISIS IN TASK-ORDER CONTRACTING**

While the Air Force was being buffeted by the Druyun scandal, a series of small scandals hit the GSA. The concerns raised – concerns rooted in competition, transparency, and integrity – affect all agencies that sponsor indefinite-delivery/indefinite quantity task- and delivery-order contracts. (For simplicity’s sake, we’ll refer to these as “task-order” contracts.) Though other agencies also use and sponsor task-order contracts, GSA, for better or worse, has become most closely identified with these contracting vehicles.

In task-order contracting, master contracts are awarded, some of which may extend over many years, if not decades. Once those contracts are in place, customer agencies issue orders against the master contract. Usually those orders are subject to closed competitions among the holders of the master contracts. Those “fraternal” competitions are almost never disclosed to other potential bidders. Awards under those closed competitions seldom, if ever, are announced outside the circle of master-contract holders.

### **A. Gathering Criticism of Task-Order Contracting**

In January 2004, GSA’s Inspector General (IG) sharply criticized the contracting practices of GSA’s Federal Technology Service (FTS). The GSA IG report specifically critiqued task-order contracting done by three key FTS regional “client support centers.” See GSA, Office of Inspector General, *Audit of Federal Technology Service’s Client Support Centers* (Rep. No. A020144/T/5/Z04002, Jan. 8, 2004), available at [www.gsa.gov/gsa/cm\\_attachments/GSA\\_DOCUMENT/A020144\\_R2QA4-j\\_0Z5RDZ-i34K-pR.pdf](http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/A020144_R2QA4-j_0Z5RDZ-i34K-pR.pdf).

The GSA IG report unearthed widespread misuse of task-order contracting, including abuse of small business contracts, out-of-scope contracting, and inappropriate use of the Information Technology Fund (described below). As a result of these failures in procedures and competition, the FTS regional centers’ “contracting practices did not provide reasonable assurance that the Government received supplies and services at a fair and reasonable price.” *Id.* at 1, 3. The report blamed three key factors for the abuses:

- An ineffective system of management controls,
- GSA personnel accommodating agency customer preferences, and
- A culture at the GSA regional centers that emphasized revenue growth.

*Id.* at 3; see John G. Stafford, Jr. & Pang Khou Yang, *The Federal Supply Schedules Program*, 04-05 BRIEFING PAPERS 1, 15 (Apr. 2004). Senator Charles Grassley (D-Iowa) responded angrily to the IG’s report and demanded that GSA undertake a “a thorough housecleaning of FTS . . . from top to bottom,” with a further investigation into the remaining FTS client support centers. *Developments: Senator Grassley Wants FTS “Housecleaning” After GSA IG Audit*, 46 GC ¶ 32 (Jan. 21, 2004).

## NOTES

The GSA IG's office duly broadened its investigation to cover all FTS regional centers. (That report is discussed below.) See *Developments – Better Oversight and Stronger Internal Controls Needed at GSA's FTS Office*, 46 GC ¶ 146 (April 28, 2004). In the interim, GSA's National Capital Region (NCR) concluded an independent review of its contracting practices, done through a private firm, Acquisition Solutions, Inc. See GSA, Federal Technology Service, *National Capital Region Acquisition Assessment: "Adding Value to the Client"* (Acquisition Solutions, Inc., Oakton, VA, Mar. 22, 2004) ["GSA-NCR Report"], available at <http://federaltimes.com/ftscapitalregion.pdf>; See also Karen Robb & David Phinney, *Contracting Shortcuts, Violations Rampant at GSA*, FED. TIMES (Apr. 26, 2004). The Acquisition Solutions review concluded:

- An alarming portion – roughly half – of the NCR contract files reviewed **did not contain an Independent Government Estimate (IGE)**, which would normally ensure that the contracting office had fairly assessed quality and price reasonableness. Among those files that *did* contain IGEs, a substantial portion were unsatisfactory because, for example, the IGE was identical to the contractor's proposed price, the IGE was changed to conform to the contractor's proposed price, the IGE was included in the statement of work provided to the contractor, or the contractor prepared the IGE. *Id.* at 21-22.

- The report also **examined FTS's use of the Information Technology (IT) Fund**, a revolving fund which supports FTS's reimbursable agreements with client agencies to provide information technology products and services. See Statement of Stephen A. Perry, GSA Administrator, Before the Committee on Government Reform, U.S. House of Representatives, at 7-8 (Oct. 2, 2003) (background requirements on use of IT Fund), in *Entrepreneurial Government Run Amok? A Review of FSS/FTS Organizational and Management Challenges: Hearing Before the House Committee on Government Reform*, 108<sup>th</sup> Cong, 1<sup>st</sup> Sess. 23-24 (Ser. No. 108-80) (Oct. 2, 2003); 40 USCA § 322(c). The review found that the "inherent flexibility" of the IT Fund permits agencies to transfer monies into the IT Fund for procurements that are not IT-related. See GSA-NCR Report, *supra*, at 22. Agencies also may "park" appropriations by transferring those funds for requirements that are not, in truth, "bona fide [agency] needs."

- Customer agencies and GSA consistently **failed to establish formal selection criteria** when choosing contracts and routinely **ignored their obligation to use performance-based contracting**. The agencies' failure to use performance-based contracting regularly may derive from overuse of T&M contracting, which does not lend itself to performance-based measures. *Id.* at 22-26.

- **Procedural failures eroded competitive processes**. Many of the files lacked justifications needed for sole-source actions or T&M task orders. The vast majority of the files lacked any meaningful market research or acquisition plans. *Id.* at 27. Most procurements were rushed. Agencies rarely pressed for discounts or concessions, and instead had simply accepted contractors' list prices, without negotiations. *Id.* at 33-35.

As was noted above, the crisis in task-order contracting gained momentum when it emerged that the Army misused GSA schedules IT con-

tracts to buy interrogation services at the Abu Ghraib prison in Iraq. See MG George R. Fay, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205<sup>th</sup> Military Intelligence Brigade*, 47-52, 116-17, available at <http://news.findlaw.com/nytimes/docs/dod/fay82504rpt.pdf>. The Interior Department's IG (it was an Interior unit that coordinated the interrogator task orders) also articulated, step by step, how the customer agencies abused the flexible task-order contracts to obtain these services. See Earl Devaney, IG, U.S. Department of the Interior, *Review of 12 Procurements Placed Under General Services Administration Federal Supply Schedules 70 and 871 by the National Business Center (Assignment No. W-EV-OSS-0075-2004)* (July 16, 2004), available at [www.oig.doi.gov/upload/CACI%20LETTER3.pdf](http://www.oig.doi.gov/upload/CACI%20LETTER3.pdf). See generally James J. McCullough & Courtney J. Edmonds, *Contractors on the Battlefield Revisited: The War in Iraq and Its Aftermath*, 04-06 BRIEFING PAPERS 1, 11-12 (May 2004).

Across these reports and commentaries, we see a recurring series of concerns in task-order contracting. The core problem seems to be GSA's need to generate revenue. Since the mid-1990s, GSA's FTS and Federal Supply Service (FSS) have been supported primarily by contract fees rather than appropriations. As a result, FTS and FSS survive on their "user fees." In the FTS regional centers, for example, those fees typically range from 1 to 4 percent of sales. See GSA IG Report, *supra*, at 5. Thus, GSA can ill afford to offend the customer agencies that order through GSA's contract vehicles.

In order to ensure a steady stream of contract fees, GSA's FTS and FSS have an incentive to accommodate the needs of their customer agencies. As discussed below, however, experience suggests that GSA's customer agencies have little or no incentive to force competition and transparency into the contracting process, and GSA's contracting officials, in what is, in essence, an open market for contracting support, have every incentive to accommodate their customers' distaste for full-and-open competition. See, e.g., Ralph C. Nash & John Cibinic, *Acquisition Planning: Competition for Task Orders: The Exception or the Rule?*, 18 N&CR ¶ 42 (Oct. 2004) ("[T]here are requirements for competition in issuing such task orders and there are numerous indications that [COs] are diligent in finding ways to avoid such competition. In the traditional tug-of-war between 'customer satisfaction' (honoring the desire of program and technical personnel to obtain services from knowledgeable and high performance incumbents) and obtaining competition, customer satisfaction appears to be winning by a large margin."). In the marketplace, GSA contracting vehicles unfortunately are too often viewed as a simple end-run around the Competition in Contracting Act (CICA).

As noted, GSA repeatedly has been criticized for allowing customer agencies to use IT-related contracting vehicles for tasks that seem only remotely related, if at all, to information technology. See, e.g., *Developments: GSA Extends Military Counseling Services Contract to Titan Partner*, 46 GC ¶ 334 (Aug. 25, 2004) (psychological counseling contract was let as IT contract). That problem of out-of-scope contracting – normally a problem of contract formation or administration – also triggers fiscal law concerns. GSA appears to have misused its IT Fund, established as a revolving fund "available for expenses . . . to efficiently provide information technology resources federal agencies." 40 USCA § 322(c)(1). By

using the IT Fund for purposes other than information technology, agencies are bypassing normal fiscal constraints, and in effect are cutting themselves loose from Congress' control.

## **B. Task-Order Contracting: Reform Initiatives**

Two separate reform initiatives, one by GSA itself and one by DOD, suggest how the government may deal with these recurring problems in GSA task-order contracting. More broadly, these initiatives suggest how the government may resolve – or at least attempt to resolve – problems with task-order contracting in general.

### **1. GSA's "Get It Right" Campaign**

The first initiative is GSA's "Get It Right" campaign, intended to:

- Ensure **compliance** with federal contracting regulations,
- Make contracting policies and procedures **clear and explicit**,
- Ensure the **integrity** of GSA's contract vehicles and services,
- **Improve competition** in the marketplace when GSA's contract vehicles and services are used,
- Improve **transparency** relating to how GSA's contract vehicles and services are used, and
- Ensure that taxpayers get the **best value** for their tax dollar whenever GSA's contract vehicles or services are used.

*Id.* (emphasis added). The "Get It Right" campaign – which stresses, among other things, competition, transparency, integrity and best value – squares fully with the "desiderata" suggested as cornerstone principles to our procurement system. See, e.g., Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 2002 PUB. PROC. L. REV. 103 (available on Westlaw); R.B. Watermeyer, *A Generic and Systemic Approach to Procurement: The Case for an International Standard*, 2005 PUB. PROC. L. REV. 39 (discussing common principles). In practice, however, the campaign faces significant challenges.

### **2. DOD Reform Initiative**

The Defense Department also tried to curb its agencies' misuse of non-DOD contracts, including the GSA schedules. Under the October 29, 2004 DOD memorandum regarding use of non-DOD contracting vehicles, before DOD agencies may use non-DOD contracts, they must: (1) evaluate whether the non-DOD contract is in the DOD's best interest, (2) determine that the goods and services to be ordered are within the scope of the contract vehicle, (3) ensure that the proposed use of funds complies with appropriations limits, (4) ensure that DOD-unique terms, conditions and requirements are provided to the non-DOD contracting agency, and (5) collect data on contracts and task orders awarded on DOD's behalf. See Robert J. Henke, Principal Deputy Under Secretary of Defense (Comptroller) & Michael W. Wynne, Acting Under Secretary of Defense (Acquisition, Technology & Logistics), Memorandum re: Proper Use of Non-DOD Contracts (Oct. 29, 2004), available at <http://akss.dau.mil/jsp/default.jsp> (go

to “Policy Documents” > “Organizations” > “DOD Policy Letters and Memos”); *IG Review Prompts New Policies on DOD Use of Non-DOD Contracts*, 46 GC ¶ 438 (Nov. 10, 2004).

### C. Congress Steps In

The DOD policy memorandum, which assured Congress that DOD would undertake its own reforms, reportedly helped defer legislative action against GSA. Before the October 2004 memorandum, the Senate had included language in the pending fiscal year 2005 defense authorization bill that would have *stopped* all DOD contracting over \$100,000 at FTS customer support centers until the DOD IG had certified that the centers were in compliance with U.S. procurement laws. See S. 2400, National Defense Authorization Act for Fiscal year 2005, § 803, CONG. REC. S7592, S7621 (July 6, 2004) (defense authorization bill as passed by Senate), available at <http://thomas.loc.gov>; *GSA To Face New Audit Requirement for FTS Contracts*, 46 CG ¶ 405 (Oct. 20, 2004). Barring DOD purchases from the FTS regional centers would have been devastating, as DOD purchases typically represent over 85 percent of the centers’ sales. See GSA IG Report, *supra*, at 6. The ultimate version of the legislation (the conference report passed by both houses of Congress) included much more limited reforms for GSA.

Even as softened, however, the fiscal year 2005 defense authorization act demanded immediate reforms at GSA. Section 802 of the final legislation, Public Law No. 108-375, see *Congress Approves FY 2005 Defense Authorization Act*, 46 GC ¶ 393 (Oct. 13, 2004), calls for the DOD and GSA IGs to conduct a joint review by March 2005 to determine whether the FTS Client Support Centers are, in fact, compliant with DOD procurement regulations. If not, and if the Client Support Centers have not made “significant progress” towards compliance in 2004, the centers will be banned from entering into contracts over \$100,000 with DOD activities, absent special permission. Pub. L. No. 108-375, § 802, available at [www.house.gov/rules/1084200confrept.pdf](http://www.house.gov/rules/1084200confrept.pdf) (conference report); see *GSA To Face New Audit Requirement for FTS Contracts*, *supra*.

It is not clear how the FTS Client Support Centers will fare in the statutorily mandated March 2005 IG reviews. In mid-December 2004, the GSA IG released a compendium of audits, collectively over 400 pages long, on procurement practices at various regional centers. GSA IG, *Compendium of Audits of the Federal Technology Service Regional Client Support Centers* (Dec. 14, 2004) [“GSA IG December 2004 Report”], [www.gsa.gov/gsa/cm\\_attachments/GSA\\_DOCUMENT/COMPENDIUM\\_R2-sM2T\\_0Z5RDZ-i34K-pR.pdf](http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/COMPENDIUM_R2-sM2T_0Z5RDZ-i34K-pR.pdf); see Michael Hardy, *FTS Pledges Improvement*, FED. COMPUTER WEEK, available at [www.fcw.com/fcw/articles/2004/1213/web-fts-12-17-04.asp](http://www.fcw.com/fcw/articles/2004/1213/web-fts-12-17-04.asp). These audits present a sweeping critique of task-order contracting practices across all of the FTS regional centers and identify failures in competition and contracting practices in literally hundreds of GSA task orders.

GSA Assistant IG Eugene Waszily reported that “significant deficiencies and departures from procurement regulations occurred frequently at many of the CSCs [Client Support Centers].” See *GSA IG December 2004 Report*, *supra*, introduction; Michael Hardy, *IG: “Signifi-*

*cant Deficiencies” at FTS, FED. COMPUTER WEEK (Dec. 16, 2004), available at [www.fcw.com/fcw/articles/2004/1213/web-fts-12-16-04.asp](http://www.fcw.com/fcw/articles/2004/1213/web-fts-12-16-04.asp). The compendium report did not bode well for the March 2005 reviews. Although the GSA IG’s office reported that “the significance . . . and the nature of the problems found varied widely . . . making it impossible to develop an overall characterization,” the audits concluded that, as of four months before the March 2005 deadline, FTS’s “existing procurement program controls were not working and were in need of a substantial overhaul.”*

#### **D. Task-Order Contracting: A Way Forward**

Will the proposed reforms cure GSA’s contracting vehicles – or will the cures kill GSA contracting? On balance, neither is likely. According to GSA’s *Schedules Sales Query* database, GSA schedules sales rose from \$13.8 billion in fiscal year 2000 to \$31.8 billion in fiscal year 2004. At current sales levels, GSA is reaping over \$100 million in Industrial Funding Fee revenues from the schedules *alone*. Although there was some industry concerns that the recent DOD reforms may impair GSA revenues, *see, e.g., Michael Hardy, DOD Works to Get Contracting Right, FED. COMPUTER WEEK* at 10 (Nov. 15, 2004), there is no obvious sign that GSA schedule sales are slacking: sales on the schedules rose from \$8.0 billion to \$8.8 billion from the first to the last quarters in fiscal year 2004 (a 10% rise). *Id.* (DOD’s Deidre Lee does “not expect the [new DOD] policy to impact the frequency that DOD uses non-DOD contracts.”). While the previous fiscal year’s increase in schedules sales from \$6.4 billion to \$7.3 billion (14%) was stronger in relative terms, the sheer gross size of the schedules is proof enough of the schedules’ growth and strength – and the resilience of other task-order vehicles. So long as agencies continue to cut their own acquisition workforces, *see, e.g., General Accounting Office, Federal Procurement: Spending and Workforce Trends* (Report No. GAO-03-443, Apr. 2003), and the GSA contracting vehicles offer streamlined, simpler alternatives to traditional competitive contracting, the GSA contracting vehicles are likely to grow. *See Eric Aaserud, GSA Schedule Contracts: Opportunities and Obligations, PROCUREMENT LAWYER* at 4 (Summer 2004).

The question, then, is how to reform the GSA contracting vehicles. Ironically, the vehicles’ root problems emerged in GSA’s slogans, found on the backs of D.C.-area buses:

*Get It Right. Get It Here. Excellence in Acquisition.*

These three slogans highlight the narrow line GSA must walk. “Getting It Right” means GSA must tighten its procurement procedures. That goal, however, runs headlong into GSA’s business goal, to encourage customer agencies to “Get It Here,” for GSA’s comparative advantage rests squarely with its willingness to accommodate its customer agencies’ desire for faster, simpler and cheaper procurements, even at the expense of competition and transparency. And until GSA can ensure competition and transparency, GSA will not be able to deliver “Excellence in Acquisition,” which means, in our system, delivering the best value in goods and services to the government customers within the constraints imposed by Congress.

These recent reports suggest that inadequate competition and transparency in task-order contracting mean that customer agencies are *not*

receiving best value. Worse still, the IG reports hint that integrity erodes as the system grows less open and less competitive. We can only hope that as the Administration continues to review task-order contracting, policymakers will return to the core principles in our procurement system – indeed, many of the core values that GSA itself embraced when it announced the “Get It Right” campaign:

- **Competition:** The Competition in Contracting Act sets a simple goal for federal procurement: that every procurement will be subject to full and open competition. 41 USCA § 253. While purchases under the GSA schedules are “considered” to be conducted using full-and-open competition, FAR 8.404, and orders under multiple-award indefinite delivery/indefinite quantity contracts are exempt from the normal CICA competition requirements, FAR 16.505(b), in fact too often there is far too little competition for work under those task- and deliver order contracts. *See generally* Michael James Lohnes, *Note: Attempting to Spur Competition for Orders Placed Under Multiple Award Task Order and MAS Contracts: The Journey to the Unworkable Section 803*, 33 PUB. CONT. L.J. 599 (2004). One way to bolster competition would be to take the European Union (EU) approach, and to treat each task or delivery order as a separate “contract,” requiring at least some of the competition normally afforded any contract award. *See, e.g.,* Rhodri Williams, *The New Procurement Directives of the European Union*, 2004 PUB. PROC. L. REV. 153, 157. (Some of the shortcomings in the EU’s approach are discussed below.) While true full-and-open competition in task-order contracting might be unworkable – forcing each task order through full competition would likely erase the efficiencies of task-order contracting – it is clearly time to ensure *some* higher level of competition, coupled with more transparency.

- **Transparency:** Even if it would be too expensive and unwieldy to force task orders through full competition, it would *not* be prohibitively expensive to open those competitive processes, to allow more transparency into agencies’ purchases on task-order contracts. GSA’s e-Buy program, for example, is a cornerstone to GSA’s “Get It Right” campaign, and to hopes for greater competition in schedules contracting. *E.g., Developments: GSA Introduces New e-Tools to Streamline Online Purchases*, 46 GC ¶ 368 (Sept. 22, 2004). Through the e-Buy program, and electronic notice of pending competitions for schedule requirements, GSA promises to aggressively compete its customer agencies’ requirements. The e-Buy program, however, remains closed to outsiders: only customer agencies, and contractors already on the appropriate schedules, can “see” the posted opportunities. Opening e-Buy’s electronic “box” to outside review would allow other prospective vendors to review agency’s requirements, and would allow other stakeholders – taxpayers and public-interest groups – to see how the thousands of procurements in e-Buy are unfolding.

- **Uniformity/Simplicity:** The GSA schedules and indefinite delivery/indefinite quantity task-order contracts under FAR Part 16 are subject to a confusing, and sometimes contradictory, welter of competition requirements. There are at least four different sets of requirements, which apply variously to GSA schedules contracts, FAR Part 16 task-order contracts, civilian agencies and defense agencies. *See* Ralph C. Nash & John Cibinic, *Competition for Task Orders: The Exception or the Rule?*, 18 N&CR ¶ 42 (2004). This hodge-podge of requirements is not



generating open task-order competition; at the same time, the proliferating requirements add costs to the contracting process, and discourage those who might otherwise enter a simpler, more uniform market. There is no reason for this chaos: competition requirements should be harmonized across task-order contract vehicles, to ensure best value, boost accountability, enhance transparency, and ease market access.

GSA's efforts to "Get It Right" and to meet Congress' March 2005 deadline for compliance in its regional centers should not obscure the need for long-term reform. We hope that the "Section 1423" panel on acquisition reform will focus at least some attention to this ongoing crisis in task-order contracting. See Services Acquisition Reform Act (SARA), Section 1423, at Public Law No. 108-136, § 1423; Marshall J. Doke, Jr. & Miki Shaker, 2003 *Procurement Review*, 04-02 BRIEFING PAPERS 1, 2 (Jan. 2004); Jason Peckinpugh, *Focus of New Acquisition Panel Debated*, GOV. EXEC. (Feb. 17, 2004).

### **IX. COMPLIANCE: A PERFECT STORM OF SCANDAL**

The recent procurement scandals discussed above ran headlong into a tidal wave of Sarbanes-Oxley concerns with corporate governance. At the same time, as the DOD's Dee Lee has repeatedly stressed, "with revenue comes responsibility," see, e.g., [www.acq.osd.mil/dpap/Docs/GetItRight\\_final.ppt#10](http://www.acq.osd.mil/dpap/Docs/GetItRight_final.ppt#10), and federal officials are likely to put more pressure on contractors to bear responsibility for ensuring integrity. On a third front, and to finish this "perfect storm," recent changes to the U.S. Sentencing Guidelines have raised the bar for *all* corporate compliance programs, across the private sector, and federal procurement regulations are likely to follow in the Guidelines' path. Whether to strengthen compliance programs in federal procurement will be a relatively easy decision. The harder question will be whether, for the first time, federal contractors should be *required* to implement compliance programs.

A good deal of guidance already exists on how federal contractors can erect compliance systems to ensure that their personnel follow the law. Current federal procurement regulations and the U.S. Sentencing Commission's Organizational Sentencing Guidelines, discussed below, sketch out the basic elements of a compliance system. The Defense Industry Initiative on Business Ethics and Conduct (DII), a consortium of many of the largest companies in the defense industry, provides basic training materials and provides links to a variety of resources for firms intent upon establishing sound compliance systems. See, [www.dii.org](http://www.dii.org).

The Druyun scandal, discussed further below, offers a textbook case of a flawed compliance system. Even with a formidable compliance system in place, a contractor can stumble as problems work their way through the cracks and fissures in any compliance system. What's frightening, however, is that many contractors – particular newcomers, with only a hazy understanding of federal contracting rules – have *no* compliance systems whatsoever.

#### **A. Sentencing Guidelines Reforms Raise the Bar**

Most well-established contractors, as publicly traded companies, are required to set up internal compliance systems under the Sarbanes-Oxley

Act of 2002. Those compliance systems, however, generally go to *financial* compliance and do not reach contractors' special obligations under the federal procurement laws, including, most importantly, contractors' procurement integrity requirements. See generally Elizabeth W. Fleming, *Sarbanes-Oxley: New Considerations for Corporate Counsel*, 38 *PROCUREMENT LAW*. 7 (Winter 2003).

The Defense Federal Acquisition Regulation Supplement (DFARS) and several other FAR supplements call for *nonmandatory* compliance systems, see, e.g., DFARS 203.7001. See generally Christopher R. Yukins, *Ethics in Procurement: New Challenges After a Decade of Reform*, *PROCUREMENT LAW*., 3 (Spring 2003). These rules instruct contractors to establish compliance systems with the following elements: a code of ethics, training, audit and reporting systems, discipline for employee misconduct, reporting of failures, and cooperation with any government investigation.

Traditionally, most major contractors follow the compliance recommendations for organizations published by the Sentencing Commission, through the Federal Sentencing Guidelines. In the past, the compliance system contemplated by these Sentencing Guidelines largely mirrored the compliance system suggested by the DFARS. This was by design, so that contractors could simultaneously comply with both regulatory regimes. See generally Richard Bednar, *Emerging Issues in Suspension and Debarment: Some Observations from an Experienced Head*, 2004 *PUB. PROC. L. REV.* 223, 225-26.

The Sentencing Guidelines were recently strengthened, however, to impose much stricter requirements for organizational (e.g., corporate) compliance system. The following chart compares the newly revised Sentencing Guidelines to the traditional DFARS recommendations:

<b>Revised Sentencing Guidelines</b>	<b>DFARS 203.7001</b>
1. Standards and procedures	Code of Ethics
2. Knowledgeable leadership	
3. Exclude risky personnel	
4. Training	Training
5. Monitor, evaluate, reporting hotline	Periodic review; audits; hotline
6. Incentives and discipline	Discipline
Adjust program to risk	
Self-reporting	Timely reporting to government; cooperation

As the chart reflects, the revised Sentencing Guidelines trigger at least three potential areas of new compliance obligations, not specifically addressed under the existing DFARS guidance, *see* U.S. Sentencing Commission, Federal Sentencing Guidelines §8B2.1, *Effective Compliance and Ethics Program* (effective Nov. 1, 2004) [hereinafter “Federal Sentencing Guidelines”], available at [www.ussc.gov/2004guid/8b2\\_1.htm](http://www.ussc.gov/2004guid/8b2_1.htm):

- **Knowledgeable Leadership:** Corporate leadership must, under the revised Sentencing Guidelines, be fully briefed on how the corporation’s compliance effort is addressing a specific compliance threat. Corporate leaders are responsible for ensuring that their firms have effective compliance programs in place. Lower-level personnel may be tasked with implementing those programs, but senior corporate leaders should be briefed regularly. Because the effectiveness of a contractor’s compliance program will turn, in part, on the contractor’s ability to remold its compliance strategy to accommodate lessons from the recent scandals (see below), corporate leaders will likely be looking to operational personnel for answers on whether, and how, their corporations’ compliance programs are accommodating the new challenges.

- **Excluding Personnel Who Raise Compliance Risks:** As part of an effective compliance program, a corporation is now expected to exclude from its senior ranks those who might pose a risk of criminal activity. This new obligation to exclude “risky” senior personnel may have special ramifications. The Druyun scandal grew out of Druyun’s gradually expanding reliance on Boeing for favorable treatment and employment: for her future son-in-law, her daughter, and then, finally, for herself. The lesson here seems to be that a contractor should, if possible, track these types of personal links between key government personnel and the company, so that the company can, on a recurring basis, assess and reassess the potential integrity risks that the government personnel pose.

- **Adjusting Program to Risk:** Under the revised Sentencing Guidelines, a corporation’s leaders must ensure that the firm’s compliance program accommodates new risks, both internally and in the marketplace. The Guidelines’ implementing commentary calls for corporations to readjust their compliance policies through periodic reassessments of risk, based upon (1) the types of criminal conduct that may occur, including an assessment of the severity of potential criminal conduct, and (2) the likelihood of criminal conduct, based upon the company’s own history, its industry, and the nature of the company’s work in that industry. Logically this means that companies in a similar line of business – other major defense contractors, in other words – should consider adjusting their compliance programs to accommodate the risks made apparent by the Druyun scandal. To make sense of this review, we can look to the remedial steps that outside counsel, former senator Warren Rudman, recommended to Boeing, discussed below.

### **B. The Rudman Report: Compliance Lessons from the Top**

In a February 26, 2004 report to Boeing’s board of directors – issued before Druyun’s and Michael Sears’ guilty pleas – Warren Rudman’s team recounted a review of Boeing’s compliance system. Warren Rudman *et al.*, A

*Report to the Chairman and Board of Directors of The Boeing Company Concerning the Company's Policies and Practices for the Hiring of Government and Former Government Employees* (Feb. 26, 2004), available at [www.boeing.com/news/releases/2004/q1/rudman\\_030904.pdf](http://www.boeing.com/news/releases/2004/q1/rudman_030904.pdf); see *Developments: Boeing Reviews Company Hiring Ethics, Finds No Widespread Problems*, 46 GC ¶ 121 (Mar. 17, 2004); see also Warren Rudman et al., *A Report to the Chairman and Board of Directors of The Boeing Company Concerning the Company's Ethics Program and Its Rules and Procedures for the Treatment of Competitors' Proprietary Information* (Nov. 3, 2003) (report on Boeing's ethics program), available at [www.boeing.com/news/releases/2003/q4/rudman.pdf](http://www.boeing.com/news/releases/2003/q4/rudman.pdf). The February 2004 report focused on Boeing's greatest area of risk in light of the Druyun scandal: legal requirements and procedures for hiring senior-level government executives. See *id.* at 28.

In assessing Boeing's efforts to ensure compliance with the key "revolving door" statutes, including the Procurement Integrity Act and 18 USCA § 208 (the conflict-of-interest statute), the Rudman report noted, at pages 18-19 and 26, that:

- The Boeing procedures did not address the possibility of pre-interview employment discussions, which could, for example, trigger recusal requirements under the Procurement Integrity Act.
- The Boeing procedures did not make it clear that separate conflict-of-interest reviews are required *pre-interview* and *pre-hire*. Because additional information may emerge during the period between interview and hire, and because the prospective job responsibilities of the applicant may shift during this period, successive reviews would be appropriate.
- The Boeing procedures did not distinguish between (a) the conflict-of-interest issues that should be considered before employment discussions begin (*e.g.*, disqualification of federal officials), and (b) those that should be considered *after* an offer letter is issued (*e.g.*, limitations on the types of representations that the employee may make before his or her previous agency, and other post-employment restrictions).
- There has historically been almost no formal process for conflict-of-interest reviews when foreign nationals are hired by Boeing, including those who may be hired from foreign government service.

The Rudman report cited other serious gaps in Boeing's internal compliance program, including: Boeing's heavy reliance on government employees, past and present, to comply with the law, *id.* at 29; Boeing's failure to treat "revolving door" hiring as a high-risk activity, *id.* at 30; "erratic" human resources records management at Boeing, *id.* at 33; a lack of internal training and data on the topic; and, an undisciplined process for conflict-of-interest reviews. *Id.* at 29-34. The Rudman report recommended a number of reforms, *id.* at 36-41; Boeing, and other large contractors with similar gaps in their compliance systems, are likely to take up those recommendations in the coming months.

### **C. Compliance for Everyone Else**

Implementing the Rudman report's recommendations is relatively simple; it is largely a matter, for Boeing and other major contractors, of

repairing gaps in already well-established compliance systems. The harder question is how to deal with those contractors that have no compliance systems to repair.

Under the current legal structure, it is entirely possible for contractors to have no compliance systems in place. Multitudinous privately held small and medium-sized contractors fall outside the Sarbanes-Oxley Act's requirements for financial compliance systems. Although the Sentencing Guidelines' mandatory requirements for compliance systems cover all companies, large and small, the Guidelines come into play only when a corporation is caught in a criminal violation. Only then will a compliance system, if in place, soften the corporation's criminal penalty. Thus, if a contractor can avoid criminal prosecution, no outsider may ever know that the contractor had no compliance system in place. Nor does the FAR require a compliance system, and, as noted, the DFARS and the other supplements speak only in terms of the compliance systems that contractors "should" have in place.

Should regulators *require* contractors to erect compliance systems? The arguments against mandating compliance are obvious: compliance systems are expensive. Mandatory compliance systems would pose a significant barrier against potential entrants to the federal market. This, in turn, could raise prices, hurt quality, and have other anti-competitive effects. Worse yet, if a contractor's inadequate compliance system could trigger bid protests or enforcement actions, mandating compliance systems could launch new waves of litigation or entire new sub-bureaucracies.

There are, however, compelling arguments *for* requiring compliance systems. Compliance systems reduce risks for going concerns, *see* John S. Pachter, *The New Era of Corporate Governance and Ethics: The Extreme Sport of Government Contracting*, 2004 PUB. PROC. L. REV. 247, and, per the Sentencing Guidelines, reduce compliant firms' sentencing exposure in the event of a criminal breach. Savvy companies also recognize that moving ahead of their competitors in embracing compliance reforms, if done properly, can yield strategic advantages. *See* Simon Zadek, *The Path to Corporate Responsibility*, HARV. BUS. REV., Dec. 2004, at 125. Furthermore, mandating compliance systems would track a growing trend in U.S. business: to demand internal controls to ensure that those running a firm are accountable to stakeholders *outside* the firm. *Cf.* Marcia Madsen, *The Government's Debarment Process: Out of Step With Current Ethical Standards*, 2004 PUB. PROC. L. REV. 252 (discussing growing emphasis on corporate governance and internal controls).

Requiring contractor compliance systems would be a logical extension of the Sentencing Guidelines. When a company finds itself ensnared in sentencing under the Guidelines, the severity of that sentencing will turn, in part, on the company's efforts to establish an effective compliance system – and the compliance system is mandatory. So too, one could argue, when a company finds itself enmeshed in the highly regulated procurement system, there is nothing unreasonable about requiring the firm to establish a compliance system to ensure procurement integrity. Indeed, federal law already demands compliance systems to ensure contractors' compliance with many federal laws that govern contractors' hiring practices. *See, e.g.,* [www.dol.gov/elaws/ofccp.htm](http://www.dol.gov/elaws/ofccp.htm) (checklist of fed-

eral laws enforced by the Department of Labor's Office of Federal Contractor Compliance).

If federal regulators *do* bring the FAR into line with the Sentencing Guidelines by mandating compliance systems, the question will be how to enforce that requirement. Tossing enforcement of mandatory compliance systems to a federal bureaucracy would be unwieldy and inefficient: given the huge cultural and organizational differences between contractors, it would be almost impossible for any enforcement agency to define and enforce standards for compliance systems in procurement integrity.

There may be an alternative approach to enforcement already buried in the FAR. Much as the Sentencing Guidelines take a more lenient approach a corporation's *criminal* sentence if the corporation has a sound compliance program in place, so too does the FAR take a more lenient approach to debarment – in effect, the corporation's "contractual" sentence – if the contractor has an effective compliance system. FAR 9.406-1(a)(1); *see* Richard Bednar, *supra*, 2004 PUB. PROC. L. REV. at 225-26. Since debarment is only an expanded finding of non-responsibility, *see* FAR 9.402(a), it would not take much to incorporate compliance systems into the general responsibility determinations. Indeed, FAR 9.104-1 already says that, when a contracting officer is assessing a prospective contractor's responsibility, the CO should assess whether the contract has a "satisfactory record of integrity and business ethics" (paragraph (d)), and the "necessary organization . . . and operational controls" (paragraph (e)). Adding an element to the responsibility determination – instructing the CO to assess whether the prospective contractor's compliance system accords with the Sentencing Guidelines' standards – would not be a radical step.

## **X. PROCUREMENT REFORM: OLD EUROPE LEADS THE WAY**

While the U.S. procurement community has been distracted by war in Iraq, scandals in contracting, and the never-ending debates over outsourcing, our European counterparts have quietly launched a sweeping rewrite of their procurement laws. In early 2004, the European Union (EU) published two directives on procurement, and the EU member states have two years to conform their laws to these ambitious directives. What's startling about the EU directives is that they repeatedly address gaps we have yet to fill in our own tapestry of procurement law.

### **A. Reverse Auctions: Europe Strides Ahead**

While the U.S. policymaking process stalled over the issue of reverse auctions, the Europeans have proposed a solution – even if an imperfect one – to the longstanding conundrum of reverse auctions.

In "reverse auctions" (typically held online), prospective vendors "bid" against one another, generally by offering successively lower prices to win a contract. What's perhaps most interesting about international progress in reverse auctions is how the same issues have emerged in different industrialized nations. In December 2003, for example, the U.K.'s Office of Government Commerce announced that it was offering reverse-auction services to other government agencies, *see* U.K. Office of Government Commerce, Press Release: "Government Launches New 'Elec-

## **NOTES**

tronic Reverse Auction' Framework" (Dec. 2, 2003), *available at www.ogc.gov.uk/*, in an announcement remarkably similar to the GSA's July 2002 announcement that it was offering parallel electronic auction services to U.S. agencies, *see* General Services Administration, "Reverse Auction Services" (Dec. 2002), *available at www.gsa.gov*. The U.K. agency's forecast that reverse auctions would save, on average, 25 percent for customer agencies echoed U.S. proponents' claims that reverse auctions would save 20 percent. *See* Mohanbir Sawhney, *Forward Thinking About Reverse Auctions*, CIO MAGAZINE, June 1, 2003.

But while reverse auctions have advanced in parallel in many industrialized nations, regulations to govern these auctions have been uneven. The U.S. regulatory initiative regarding reverse auctions seems to have stalled, in part, because of industry opposition, *see, e.g.*, Susan L. Turley, *Wielding the Virtual Gavel – DOD Moves Forward with Reverse Auctions*, 173 MIL. L. REV. 1, 25-31 (Sept. 2002), and, more substantively, because of a lack of consensus on when reverse auctions should be used. Reverse auctions, with their anonymous, grinding pressure to force down prices, are suboptimal tools for agencies seeking to forge lasting supply-chain relationships built on quality, much as the industrial *keiretsu* of Japan would shun reverse auctions in their carefully built supply chains. *See* Jeffrey K. Liker & Thomas Y. Choi, *Building Deep Supplier Relationships*, HARVARD BUS. REV., Dec. 2004, at 104, 106. What is less clear is where reverse auctions *would* be appropriate.

In 2000, the FAR Councils sought comments on proposed rules to govern reverse auctions, 65 FED. REG. 65,232 (Oct. 31, 2000), which engendered vigorous debate and helped form the issues, *see, e.g.*, ABA PCL Section Weighs in on E-Commerce-Related FAR Changes, 43 GC ¶ 20 (Jan. 17, 2001), but led to no resolution, *see* U.S. Army Materiel Command, *Reverse Auction Contracting Technique*, at 2, *available at www.amc.army.mil/amc/command\_counsel/resources/documents/newsletter02-4/encl06.pdf*.

One significant obstacle to reverse auctions is the lack of clear legal authority. *See, e.g.*, Thomas F. Burke, *Online Reverse Auctions*, 00-11 BRIEFING PAPERS 1 (Oct. 2000). Until the FAR Part 15 rewrite in 1997, "the FAR prohibited the use of auction techniques in negotiated procurements." When FAR Part 15, "which governs the conduct of negotiated procurements, was rewritten, it encouraged a more open dialogue between the Government and offerors, and no longer included the prohibition against the use of auction techniques." U.S. Army Materiel Command, *Reverse Auction Contracting Technique*, *supra*, at 1; ABA Public Contract Law Section, *Comments on Reverse Auction Notice* (Jan. 5, 2001), *available at www.abanet.org/contract/federal/regscmm/ecommm\_003.html* ("Until the FAR Part 15 re-write..., the FAR generally prohibited auctioning... [U]se of "auction techniques" such as "[i]ndicating to an offeror a cost or price that it must meet to obtain further consideration; . . . [a]dvising an offeror of its price standing relative to another offeror; . . . [and o]therwise furnishing information about another offeror's price," was forbidden. *See, e.g.*, FAR 15.610(e)(2) (1996) . The removal of these prohibitions suggests that the specified techniques are no longer prohibited.

Although the Army Materiel Command (AMC), among others, has pointed out that now "there is not any direct prohibition against the use

of on-line auctions,” “neither the FAR nor the GAO have specifically approved of [the] use” of reverse auctions. See AMC, *Reverse Auction Contracting Technique*, *supra*, at 1. Others argued that prohibitions which might otherwise bar reverse auctions – specifically, prohibitions on disclosing competitors’ pricing and technical information – may be waived with the consent of the participating vendors. Timothy D. Palmer, Agnes P. Dover & Thomas L. McGovern, *Can the Government Go Fast Forward on Reverse Auctions?*, 42 GC ¶ 263 (July 12, 2000); see also David A. Whiteford, *Negotiated Procurements: Squandering the Benefit of the Bargain*, 32 PUB. CONT. L.J. 509, 543-44 (2003). *But cf.* Robert Antonio, *Do Reverse Auctions Violate FAR 15.307 (b)?* (July 24, 2000), available at [www.wifcon.com/anallegal.htm](http://www.wifcon.com/anallegal.htm).

The debate has thus centered, in important part, on the disclosure of competitive information as the reverse auction proceeds. The U.S. procurement system generally strictly prohibits the disclosure of an offeror’s sensitive information to other competitors. Although the ABA Public Contract Law Section has sounded cautious notes about the disclosure of prices, many other commentators respond that the current regulatory structure, as liberalized through the 1990s, seems to have opened the door to reverse auctions, for now contracting officials may reveal bidders’ prices when the bidders have acquiesced. See Steven Kelman, *Remaking Federal Procurement*, 31 PUB. CONT. L.J. 581, 606 (2002); Ralph C. Nash & John Cibinic, *Acquisition Reform: A Progress Report*, 16 N&CR ¶ 48 (Oct. 2002), see Steven W. Feldman, *Government Contract Awards: Negotiation and Sealed Bidding* § 16:18.10, “Revealing Prices Without Permission” (Mar. 2004).

A May 2004 OFPP memorandum raised new questions, though. OFPP indicated that that electronic techniques, including reverse auctions, are extremely useful procurement tools when “used correctly.” Robert A. Burton, Associate Administrator, Office of Federal Procurement Policy, U.S. Office of Management & Budget, *Memorandum for Federal Acquisition Council & Senior Procurement Executives, “Utilization of Commercially Available Online Procurement Services”* (May 12, 2004), available at [www.acqnet.gov/Notes/commercialtechniques.pdf](http://www.acqnet.gov/Notes/commercialtechniques.pdf). The one-page memorandum failed, however, to explain when reverse auctions are “used correctly.” See Ralph C. Nash & John Cibinic, *Online Procurement Services: Reverse Auctions Too*, 18 N&CR ¶ 29 (July 2004).

The United Nations Commission on International Trade Law (UNCITRAL) is currently considering whether, and how, to address reverse auctions in UNCITRAL’s Model Procurement Law on Procurement of Goods, Construction and Services, available at [www.uncitral.org/english/texts/procurem/procurementindex.htm](http://www.uncitral.org/english/texts/procurem/procurementindex.htm); see Sue Arrowsmith, *New Developments in UNCITRAL: Future Work on Public Procurement and New Model Provisions on Privately Financed Infrastructure Projects*, 2003 PUB. PROC. L. REV. NA131. Both France and Brazil use electronic reverse auctions, the United Kingdom has endorsed the use of reverse auctions, and draft proposed revisions to the World Trade Organization’s Government Procurement Agreement (GPA) contemplate the use of reverse auctions. See United Nations Commission on International Trade Law, Working Group I (Procurement), Sixth Session, Vienna (30 Aug.-3 Sept. 2004), *Recent Developments in the Area of Public Procurement – Issues Arising from the Increased Use of Electronic Communications in Public Procure-*



## NOTES

ment: Note by the Secretariat ¶ 85 (June 7, 2004) (A/CN.9/WG.I/WP.31), available at [www.uncitral.org/english/workinggroups/wg\\_1/wg1-procurement-index-e.htm](http://www.uncitral.org/english/workinggroups/wg_1/wg1-procurement-index-e.htm); Ricardo Pagliari Levy & Marcelo S. Barradas Correia, *Electronic Procurement of Goods and Services in Brazil Under the Procurement Auction Procedure*, 2003 PUB. PROC. L. REV. 21.

But the most important international endorsement of reverse auctions came from the EU 2004 directives. See Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, 2004 O.J. (L 134) 1, Art. 56 (Apr. 30, 2004); Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, 2004 O.J. (L 134) 114, Art. 54 (Apr. 30, 2004), both available at [europa.eu.int/comm/internal\\_market/publicprocurement/legislation\\_en.htm](http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm); see also Sue Arrowsmith, *Electronic Reverse Auctions Under the EC Public Procurement Rules: Current Possibilities and Future Prospects*, 2003 PUB. PROC. L. REV. 299 (arguing that electronic reverse auctions were allowable under prior European directives, and reviewing early history of reform eventually manifested in the 2004 directives).

While the new EU directives do not provide all the answers on reverse auctions, they do frame some of the basic procedures needed to make reverse auctions both flexible and successful. Article 54 of the new directive on public works contracts provides, for example, that:

- Member states *may* – but **need not** – allow their contracting activities to use electronic auctions.
- Where **evaluation criteria** can be established with **objective precision**, parts of the procurement (even a negotiated procurement) may be resolved using electronic auctions.
- The solicitation documents must **clearly explain the criteria for award**, and the **process** the auction will follow.
- An electronic auction should afford all bidders equal opportunities **to offer new prices in new rounds** of bidding.
- On an ongoing basis through the auction, officials should announce the bidders' **rankings but not the bidders' identities**.

Although the new EU directives ultimately leave unanswered the question *when* reverse auctions should be used, the directives *do* steer the EU member states towards vigorous use of reverse auctions. Because procurement reform is often a matter of trial and error in the laboratory of public works, the Europeans deserve credit for taking a giant step forward; whether the experiment in electronic auctions succeeds will have to await further experience in Europe.

### **B. Task-Order Contracting: Europeans Rush In . . .**

As discussed above, U.S. task-order contracting is popular, yet mired in controversy due to intense concerns about flagging transparency, com-

petition and integrity. In the EU, in contrast, where these agreements have been used for some time, procurement reformers are pressing forward with task-order contracting, through what are known there as “framework agreements.” See United Kingdom Office of Government Commerce, “Framework Agreements and EC Developments” (updated 2004) [hereinafter “OGC Guidance”], available at [www.ogc.gov.uk/embedded\\_object.asp?docid=1000330](http://www.ogc.gov.uk/embedded_object.asp?docid=1000330).

One of the recent directives endorses the use of “framework” contracts in numerous ways. Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, 2004 O.J. (L 134) 114, Art. 54 (Apr. 30, 2004) [hereinafter “Public Works Directive”], available at [europa.eu.int/comm/internal\\_market/publicprocurement/legislation\\_en.htm](http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm):

- **Flexibility in Use:** Member states in the EU decide whether to use framework agreements. See Public Works Directive ¶ 16.

- **Contract Period:** The directive limits framework contracts to 4 years. See, e.g., Public Works Directive Art. 32. In the DOD, in contrast, the longest allowable ordering period for task-order contracts was recently “re-extended” to 10 years. See 69 FED. REG. 74992 (2004) (interim rule) (recounting history of changes in term limitations under successive defense authorization acts).

- **Framework Agreements/Contracts/Orders:** Unlike the U.S. system, the European system contemplates an initial “framework agreement” and then a series of “contracts,” to be issued under the framework agreement. See Public Works Directive, Art. 15. In the U.S., initial award is for a competitive “contract,” but then task and delivery orders – not contracts – are issued against that master contract. FAR Subpart 16.5. There is a subtle difference in terminology: U.S. agencies issue “task orders” under a master contract, while European agencies will issue “contracts” under a master framework agreement. In practice, however, there may be little difference:

- **No Greater European Transparency?** In the U.S., task orders under a master contract need not be publicized for competition or award. In other words, there is limited transparency at the task-order phase. Similarly, under the EU directive, once a framework agreement is in place, the “mini-competitions” amongst multiple awardees for the follow-on contracts need not be publicized. See, e.g., Public Works Directive, *supra*, Art. 12. Agency guidance published by the U.K.’s Office of Government Commerce indicates that, if the original agreement is publicized in the *Official Journal of the European Communities*, subsequent contracts competed (“called off,” in the British vernacular) under that agreement need not be advertised. See OGC Guidance, *supra*, ¶ 9 (“It is far better, therefore, to advertise the framework itself, so that there is no need to consider the need for advertising as each call-off comes up.”); Public Works Directive, *supra*, Art. 35, ¶ 4; FAR 16.505(b)(4) (record required only in contract file).

- **No Better European Competition?** Nor will the EU’s procurements necessarily prove more competitive. As in the U.S., see

FAR 16.505(b), requirements need only be competed among the standing awardees under the EU framework agreements, *see* Public Works Directive, Art. 12, ¶ 4. Indeed, under the EU system there may be even *less* competition. While U.S. rules competition contemplate affording all the master contract holders a “fair opportunity to compete” for individual orders, *see* FAR 16.505(b)(1), the EU directive countenances contract award *without* further competition among the standing framework contractors, if it is possible to make an award per the terms already “laid down in the [original] framework agreement,” *see* Public Works Directive, Art. 32, ¶ 4; *see also* OGC Guidance, *supra*, ¶ 18.

- **Centralized Purchasing:** As in the U.S., where GSA plays a central role in establishing and administering task order contracts used by other agencies, in Europe the new Directive contemplates framework agreements set up by centralized purchasing agencies. *See, e.g.*, Public Works Directive, *supra*, Art. 11. What is not clear, however, is whether the European centralized purchasing agencies will charge fees. If so, and the centralized purchasing agencies come to depend on those fees, European policymakers should take care. The U.S. experience suggests that fee-driven centralized purchasing officials too often bend procurement rules to accommodate their agency customers. *See, e.g.*, GSA IG, *Compendium of Audits of the Federal Technology Service Regional Client Support Centers, supra*, at 9 (based on review of approximately \$4.6 billion in orders, found that improper task order contracting practices were due to “an ineffective system of internal management controls; [purchasing agency] personnel sacrificing adherence to proper procurement procedures in order to accommodate customer preferences; and an excessive focus on customer satisfaction and [fee] revenue growth”).

On balance, therefore, if the EU states use framework agreements aggressively under the new directives, they may suffer the same problems that have plagued U.S. task-order contracting. If centralized purchasing agencies learn to manipulate these extremely flexible rules to accommodate government customers – who may find transparency and competition unwelcome and disruptive – Europeans may find themselves in precisely the same quagmire that has engulfed U.S. agencies.

In the EU there may, moreover, be another wrinkle to these potential abuses. If member states use framework agreements with limited transparency or competition, this may permit “discriminatory” treatment between states. A central tenet in the European procurement directives is to discourage discrimination against other states in procurement, *see, e.g.*, Public Works Directive, *supra*, ¶ 4, nationalistic discrimination (what we in the U.S. know as “Buy American” or domestic preference) which may otherwise disrupt the free flow of goods and services across Europe. Without robust competition and transparency, however, EU agencies may gain subtle opportunities to favor domestic firms.

### **C. Share-in-Savings: Lessons from Across the Pond**

The Europeans have much to teach us about public-private partnerships, which can be accomplished, for example, through contractor-financed infrastructure contracts that are repaid through a steady stream of revenue or fees from the government. *See, e.g.*, Rhodri Williams, *The*

In the U.S., we are in the first stages of the debate over public-private partnerships; that debate is likely to accelerate, as the federal government, increasingly pressed for resources, looks to the private sector for capital to finance public works. Most recently, that debate has unfolded around the concept of “share-in-savings” contracts. See, e.g., Kenneth J. Buck, *Share-in-Savings as a Performance-Based Contracting Tool*, PROCUREMENT LAWYER at 3 (Spring 2004); Michael Hardy, “Ready To Test the Waters,” FED. COMP. WEEK (Aug. 9, 2004), available at [www.fcw.com/fcw/articles/2004/0809/feat-procure-08-09-04.asp](http://www.fcw.com/fcw/articles/2004/0809/feat-procure-08-09-04.asp); see also General Accounting Office, *Contract Management: Commercial Use of Share-in-Savings Contracting*, GAO-03-327 (Jan. 31, 2003); *Developments: GAO Encourages OFPP To Fine Tune SIS Contracting*, 45 GC ¶ 143 (Apr. 2, 2003); *Developments: GAO Reports on Lessons Learned from Commercial Share-in-Savings Contracts*, 45 GC ¶ 108 (Mar. 12, 2003).

In the U.S., share-in-savings contracting remains a flashpoint for controversy. Professor Steve Kelman argues that share-in-savings contracts are an almost unalloyed good, “one of the most attractive innovations in procurement right now,” because “vendors get paid in proportion to the value of savings their efforts generate.” In his view, share-in-savings contracting “provides the strongest possible incentive for good vendor performance.” Steve Kelman, *Show Off Share-in-Savings*, FED. COMPUTER WEEK (Dec. 13, 2004), available at [www.fcw.com/fcw/articles/2004/1213/oped-kelman-12-13-04.asp](http://www.fcw.com/fcw/articles/2004/1213/oped-kelman-12-13-04.asp). Another former OFPP Administrator, Angela Styles, in contrast, branded the core arguments for share-in-savings contracts the “Big Lie.” She frets that share-in-savings contracts are dangerous and will allow agencies to enter into risky ventures with little true fiscal control by Congress. See Angela B. Styles, *Share-in-Savings Contracting: The Big Lie*, PROCUREMENT LAWYER 1 (Fall 2004).

To make sense of the debate, it’s important to understand what share-in-savings contracts are. Share-in-savings contracts are *not* limited to those where the government actually experiences savings. Under section 210 of the E-Government Act of 2002, which authorized share-in-savings contracts until 2005, share-in-savings contracts include any contract under which a contractor provides solutions for improving an agency’s processes or “accelerating the achievement of agency missions,” so long as the agency pays the contractor a portion of the agency’s resulting savings from (i) improvement in the agency’s processes or (ii) “acceleration of achievement of agency missions.” E-GOVERNMENT ACT OF 2002, Pub. L. No. 107-347, § 210(c)(3) (codified at 41 USCA § 266a; 10 USCA § 2332). The proposed FAR provision on share-in-savings contracting would adopt the E-Government Act’s broad definition of share-in-savings contracts. 69 Fed. Reg. 40514, 40515 (July 2, 2004); see Ralph C. Nash & John Cibinic, *Share-in-Savings Contracts: An Update*, 18 NC&R ¶ 43 (Oct. 2004). Although the E-Government Act allows these broad classes of share-in-savings contracts only for information technology procurements, legislation introduced in April 2004 by Congressman Tom Davis (R-Va.), H.R. 4228, would extend this sweeping authority to share-in-savings contracts for *all* types of supplies and services. See generally *Developments: Davis Introduces ASIA; Adds to SARA*, 46 GC ¶ 186 (May 5, 2004).

## NOTES

These share-in-savings contracts thus can sprawl pretty broadly. They may include contracts for which contractors' payments are *not* strictly limited to clear agency dollar savings, so long as the agency and the contractor can point to other quantifiable gains from the contract.

But how are we to ensure that share-in-savings contracts are adequately competed? See Ralph Nash & John C. Cibinic, *Postscript: Share-in-Savings Contracts*, 17 N&CR ¶ 12 (Feb. 2003). The Blanket Purchase Agreements (BPAs) issued by GSA to implement share-in-savings contracting, see *Developments: GSA Awards Six SIS Contracts*, 46 GC ¶ 289 (July 28, 2004), give only very vague direction as to competition, see *Share-in-Savings: Operational Efficiency Blanket Purchase Agreement (BPA): Terms and Conditions*, available at [www.gsa.gov/shareinsavings](http://www.gsa.gov/shareinsavings) (under "SiS BPAs"). The BPAs that GSA has entered into with six of the leading systems integrators (Accenture, CGI-AMS, CSC, IBM, SAIC and SRA International) are under the integrators' existing GSA schedule contracts, and the GSA instructions allow customer agencies to award share-in-savings task orders based on very loose "best value" criteria. See *id.* at 11 ("Award of a task order shall be made on a best value basis upon consideration of technical (qualitative) and price (quantitative) related factors such as highest net present value return to the Government. Secondary consideration should be given to factors such as return on investment to the Government if the contractor requires any investment on the part of Government, as well as payback period."). Ultimately, outside observers – the Government Accountability Office, for example, on a protest – will have difficulty assessing whether, under this terribly amorphous standard, share-in-savings contracts are indeed awarded impartially and competitively.

Share-in-savings proponents might argue that share-in-savings contracts are inherently complex, with huge structural differences between offers because the contractors must shoulder so much risk. Proponents could argue that trying to wedge these incredibly complex arrangements into traditional, structured competitions would be forcing share-in-savings into a Procrustean bed.

Even if true, this highlights the price we're paying in share-in-savings – and it brings us full circle to the European experience in public-private partnerships. In April 2004, the Commission of the European Communities issued its *Green Paper: On Public-Private Partnerships and Community Law on Public Contracts and Concessions*, COM(2004) 327 final (Brussels Apr. 30, 2004), available at [europa.eu.int/eurlex/en/com/gpr/2004/com2004\\_0327en01.pdf](http://europa.eu.int/eurlex/en/com/gpr/2004/com2004_0327en01.pdf), which the Europeans are using to drive a public discussion of public-private partnerships in their procurement systems. See [http://forum.europa.eu.int/Public/irc/markt/markt\\_consultations/library?l=/public\\_procurement/partenariat\\_public-priv&vm=detailed&sb=Title](http://forum.europa.eu.int/Public/irc/markt/markt_consultations/library?l=/public_procurement/partenariat_public-priv&vm=detailed&sb=Title) (comments on *Green Paper*). The *Green Paper* forces us to remember that share-in-savings contracts really are simply the first step towards broader use of private-sector financing for government contracts. As we progress down that road, we must recognize that, by using private financing, we may have to abandon some of the basic values of our procurement system:

- **Competition:** It is difficult to conduct a traditional, structured competition for a complex procurement that will be supported by pri-

vate financing. Only as the market matures, and contract forms and financing instruments grow more uniform, will it be possible to conduct apples-to-apples comparisons between prospective offers. The Europeans are trying to do exactly that by bringing more “homogeneity” to competitions and awards of public-private partnership contracts. *Id.* at 7, 9-10. Until our own privately financed public procurement can be more “homogenized” into true, structured competitions, we must recognize that embracing share-in-savings contracting means surrendering at least some of the price and quality protections that structured competition affords the government.

- **Transparency:** The Europeans recognize that transparency, the complement to competition, erodes as well when public-private partnerships are used. *See Green Paper, supra*, at 9-12. Ensuring adequate transparency – ensuring that prospective offerors are made aware of a contracting opportunity, and that the award can be reviewed for impartiality, *see Green Paper*, at 11 – is difficult because of unique aspects of the market for public-private partnerships. Existing contractors may, for example, be encouraged to prepare, or even compensated for preparing, proposals for a public-private partnership, *see Green Paper*, at 13-14. As public-private partnerships (such as share-in-savings arrangements) force the government and its contractors into closer, intertwined relationships, transparency to “outsiders” can only decline.

- **Socioeconomic Goals:** Although the *Green Paper* does not discuss social policies, we cannot ignore those aspects of our own system. The first contractors to win “contracts” (BPAs under existing contracts, really) for share-in-savings arrangements were some of the largest and most successful systems integrators in the U.S. Procurements that rely on private financing almost invariably favor larger companies with ready access to capital sources. Small firms typically lack that same access, and will struggle to compete for share-in-savings contracts. Over the long term, a massive shift by the federal government to share-in-savings contracting (and, more broadly, to all types of public-private partnerships) could hurt small and disadvantaged businesses – and thus would undercut longstanding socioeconomic goals.

- **Inherently Governmental Functions:** The *Green Paper*, at 3, asserts that by putting government functions into the hands of private contractors, there is a “benefit . . . in public life from the know-how and working methods of the private sector.” The shift to public-private partnerships, the *Green Paper* notes, “is also part of the more general change in the role of the State in the economy, moving from a role of direct operator to one of organiser, regulator and controller.” *Id.* It is not clear, however, that all stakeholders would be ready for this shift in the U.S. government’s role, were it to come with the shift to public-private partnerships (such as share-in-savings arrangements). At the very least, as Angela Styles points out, this shift in the government’s role would almost certainly reduce the ranks of government employees.

- **Fiscal and Managerial Accountability:** Shifting functions into the private sector will make it much more difficult for Congress (and others in government) to exercise oversight over those functions. Accountability will suffer. As private financing bypasses Congress’s con-

## **NOTES**

trol over procurements through annual appropriations, Congress's power to exercise *fiscal* control will also decline. The Europeans' experience confirms this: Eurostat, the Statistical Office of the European Communities, has recommended that, under certain conditions where the private contractor bears financial and performance risks, assets involved in public-private partnerships should be moved off government balance sheets. See *Green Paper, supra*, at 4 n.3 (citing Eurostat Press Release STAT/04/18). Angela Styles refers to this off-balance-sheet contracting as the "Enronization" of procurement. See Angela B. Styles, *supra*, at 14.

The European experience in public-private partnerships should inform our efforts in share-in-savings contracting. We should be mindful – and we hope the Europeans share this view – that the procurement systems in developed nations are far more similar than they are different, and that those similarities easily transcend differences in legal traditions. As the developed nations' procurement systems move forward in parallel, we hope that we can continue to share lessons around the world.

In closing, we thank West/Thomson for an important recent contribution in this area. The *Public Procurement Law Review* (published by Sweet & Maxwell's, a Thomson affiliate) is now available on WESTLAW. With a few keystrokes, U.S. procurement lawyers now can easily access much of the best thinking in European procurement law and policy.