

1 INTERAGENCY CONTRACTS (PART I):
2 OVERVIEW AND RECOMMENDATIONS FOR REFORM

3 - - -

4 THURSDAY, FEBRUARY 25, 2010

5 United States Senate,
6 Committee on Homeland Security and Governmental Affairs,
7 Ad Hoc Subcommittee on Contracting Oversight
8 Washington, D.C.

9 The Subcommittee met, pursuant to notice, at 2:32 p.m.,
10 in Room 342, Dirksen Senate Office Building, Hon. Claire
11 McCaskill, Chairman of the Subcommittee, presiding.

12 Present: Senators McCaskill and Bennett.

13 OPENING STATEMENT OF SENATOR MCCASKILL

14 Senator McCaskill. I want to open this hearing and
15 begin by thanking the incredibly important witnesses we have
16 today. I do not know how many people there are in this town
17 that have great respect for all of you and the work you do,
18 but I am one of them because this is an area that I care
19 deeply about and have tried to really wade in, in this area,
20 since I arrived in the Senate. So I know all of you by
21 reputation, although I do not know you personally, and it is
22 great to be here with you today, and I look forward to being
23 informed by your testimony.

24 We are here today to examine the rapid growth in
25 interagency contracts. One of the principal functions of

1 this Subcommittee is to ensure that government contracting
2 is as efficient and effective as possible, and hopefully
3 this hearing will help us further that goal.

4 Interagency contracting refers to the practice where
5 agencies buy goods and services from, or on behalf of, other
6 Federal agencies. They do this through a variety of types
7 of contracts and other arrangements with a bewildering
8 number of acronyms. I am glad that I am on the Armed
9 Services Committee because that is where you go to Acronym
10 University, since the Department of Defense cannot speak
11 without at least three acronyms in every sentence. So I
12 have good training to deal with the area of interagency
13 contracting.

14 Some types of interagency contracting, like GSA's
15 Federal Schedules program, have existed for decades. Many
16 others were created or developed within the last 15 years.
17 When I first came to Washington, out of the auditor's office
18 in Missouri, I had no idea that most of these types of
19 contracts even existed. Frankly, most Americans have no
20 idea these contracts exist. And let me go a step further;
21 most members of Congress do not know that these contracts
22 exist.

23 I imagine that the overwhelming majority of people
24 outside of this room have never heard of a MAC or GWAC or a
25 franchise fund, and I imagine that many of them would be as

1 astonished as I was to learn that many agencies are now in
2 the business of making a profit from charging other agencies
3 to use their contracts.

4 Over the years, interagency contracting has been
5 promoted as a way to streamline contracting, increase
6 efficiency and leverage the massive spending power of the
7 Federal Government. This does have the potential to result
8 in lower prices for the government and savings on behalf of
9 the taxpayer. That is good news for everyone. But from
10 what I can see, the interagency contracting does not
11 necessarily seem to have gotten us there.

12 First, there has been a massive increase in interagency
13 contracting vehicles. I am somewhat troubled that all the
14 discussion and effort at Federal agencies have focused on
15 simply creating more vehicles, not whether the additional
16 vehicles are necessary or whether the existing vehicles on
17 getting us from Point A to Point B in an efficient and
18 effective manner.

19 I am also concerned that interagency contracts may not
20 be resulting in lower prices, both because there may not be
21 enough competition and because the negotiated prices are too
22 high.

23 And I am unaware of any analysis that has been done to
24 demonstrate that these types of contracts are actually
25 improving government contracting. One reason for this is

1 that there is almost no data available that would allow
2 anyone to draw those conclusions. As a result, the
3 government, Congress and the taxpayers are in the dark about
4 these types of contracts, and we remain in the dark despite
5 the recommendations of GAO, agency inspectors general and
6 the distinguished SARA Panel, that government agencies
7 collect and publish this kind of information. Why is this
8 taking so long?

9 At a conservative estimate, interagency contracts now
10 represent hundreds of billions in the government's budget,
11 and that is way too much money to lose sight of.

12 I intend to ask these questions and more at today's
13 hearing. We are joined, as I said before, by a panel of
14 very distinguished legal scholars and practitioners who have
15 studied interagency contracting for decades. I hope that
16 their testimony will help us get a clearer picture of how
17 and why Federal agencies use interagency contracting and
18 what steps we should be taking to make sure that it works
19 the way it should and works in a way that saves the taxpayer
20 dollars a dime.

21 Later this year, I intend to call officials from the
22 General Services Administration, the Office of Federal
23 Procurement Policy and other responsible agency officials to
24 a subsequent hearing to address what we learn here today.

25 I want to thank our witnesses, and I look forward to

1 your testimony and to our discussions.

2 And now I would like to turn it over to my colleague,
3 the Ranking Member of this Committee, Senator Bob Bennett.

4 OPENING STATEMENT OF SENATOR BENNETT

5 Senator Bennett. Thank you very much, Madam Chairman.

6 As I have mentioned before, when I graduated from
7 college, I began my business career as a purchasing agent.
8 I did not think when I left that particular assignment that
9 I would be here reliving those kinds of experiences as a
10 U.S. Senator, but interesting things happen to us in life.

11 Let me start out with the macro of what we are talking
12 about. In fiscal 2009, the Federal Government spent over
13 \$536 billion on goods and services. Now that number is
14 thrown around Washington almost to the point of abstraction.
15 That is a little over half a trillion.

16 Let's put it into perspective. That means that the
17 Federal Government purchasing comprises 3.7 percent of GDP,
18 and if we were an economy all by ourselves, just the
19 government, we would rank 18th in the world, bigger than all
20 the other countries below that number. And to compare our
21 spending to the private sector, to take the largest company
22 in the world, \$536 billion is nearly \$150 billion greater
23 than the total revenue of Wal-Mart. We are the largest
24 consumer in the world.

25 All right, now let's go from the macro to the micro.

1 We are all familiar with the basic buying and selling of
2 goods, and we know that if you are purchasing at a large
3 scale you usually expect a break in the price from the
4 seller. As the largest purchaser in the world, the Federal
5 Government expects to get these same kinds of wholesale
6 prices. In fact, it should be receiving some of the best
7 prices for goods and services available to anybody in the
8 marketplace, and that is at the core of the hearing today on
9 interagency contracts.

10 The question is: Is the purchasing power of the
11 Federal Government being used efficiently, and are the
12 systems that have been developed and expanded in recent
13 years the most efficient way for the Federal Government to
14 buy stuff?

15 And, of course, this goes to the fundamental question
16 that we as politicians have to answer: Are these contracts
17 yielding the best cost savings for the American taxpayers
18 who sent us here?

19 Well, encouraging business to sell to the Federal
20 Government is an essential part of these cost savings, and
21 it is my belief that the greater competition gained through
22 the participation of new companies in the marketplace, who
23 come in saying we can do better than your present supplier,
24 will have a greater effect on the price that the government
25 pays than its aggregated purchasing power. With a greater

1 number of companies competing for the government dollars,
2 the Federal Government should have access to the best goods
3 and services available, at the best price, and the
4 efficiencies of the market yielding significant cost breaks
5 and savings to the American taxpayer.

6 Unfortunately, having been a businessman who has looked
7 at the issue of selling to the government, I know from
8 firsthand experience and from that of my constituents that
9 many businesses, and small businesses in particular, find
10 the barriers to entering the Federal marketplace simply too
11 large to overcome. I have said it before--I will say it
12 again I am sure--the Federal Government's complicated
13 procurement system is simply too difficult to navigate. It
14 keeps potential vendors out. And, from the perspective of
15 small business, it is too costly, it is too slow, it is
16 confusing.

17 And I will confess as a business consultant, on
18 occasion when someone has come to me for advice as to where
19 they can seek new markets, I have told them stay away from
20 the Federal Government. It will cost you too much money and
21 too much brief. It troubles me that I think that was good
22 advice.

23 Now it also troubles me that when we seek a serious
24 cost-benefit analysis of the interagency contracting, we do
25 not really know quite where we are. Three years ago, the

1 SARA Panel, to use the acronym that the Chairwoman has used,
2 published a seminal report on interagency contracts, and
3 today we still find the government struggling to implement
4 that panel's most basic recommendations. For example, the
5 panel recommended a comprehensive database that would list
6 the interagency contracts in place and assist agencies in
7 making prudent businesslike decisions, and three years later
8 the database is not only not here; it is not even in
9 development.

10 Now I have said in previous hearings that the serious
11 analysis of acquisitions cannot take place until we replace
12 the anecdotal evidence of the status quo with serious
13 empirical analysis. I hope this panel--you are billed, I
14 think appropriately, as some of the best minds on this
15 topic--will be able to give us some ideas on how we do that.

16 Now interagency contracts, I have discovered, have
17 existed in various forms for nearly 80 years. The most
18 famous example, of course, is GSA schedules. Today, there
19 is a panoply of large-scale contracts that do a wide range
20 of purchasing, a wide variety of purchasing, and I am sure
21 some of these other large-scale contracts are necessary,
22 especially ones that are tailored to the unique needs of the
23 agencies that have a specific mission.

24 But I am suspicious that some of these contracting
25 vehicles have grown, both in number and in size, simply

1 because the agencies want to protect their turf--that using
2 them is easy, facile, and that the sponsoring agency
3 believes it can save money through creating their own
4 expertise even when the fees for other programs, like the
5 schedules, are in fact fairly modest.

6 So we have seen time and again in acquisitions that
7 agencies tend to focus on their own missions and interests,
8 but in doing so subordinate the interest of what is best for
9 the entire Federal Government. Once again, without a full
10 accounting of what interagencies are out there and what they
11 do and how much they cost, we are left with merely
12 speculating as to whether or not this wide array of
13 contracts is the most efficient way for the government to
14 make its purchases.

15 So I am eager to get the panel's perspectives on these
16 points, Madam Chairman. I thank them for being here. I
17 thank you for calling the hearing, and look forward to
18 sharing the panel's perspectives with the agency witnesses
19 at the next hearing that we will have.

20 Senator McCaskill. Thank you, Senator Bennett.

21 Let me introduce the witnesses. The first witness is
22 Ralph C. Nash, who taught at George Washington University
23 Law School from 1960 to 1993, when he retired to become
24 Professor Emeritus. In 1960, he co-founded the university's
25 government contracts program. Professor Nash now serves as

1 a consultant for government agencies, private corporations
2 and law firms, and is the author and co-author of numerous
3 foundational case books and articles on government
4 contracting. In the 1990s, he was a member of the DoD
5 advisory panel on streamlining and codifying acquisition
6 laws, also known as the Section 800 Panel. Professor Nash
7 is a renowned expert on government contracting, and I am
8 pleased to welcome him here today.

9 Marshall Doke, Jr. Is a partner specializing in
10 government contracts in the Dallas office of Gardere Wynne
11 Sewell LLP. Mr. Doke previously served on the Acquisition
12 Advisory Panel created by the Services Acquisition Reform
13 Act, known as SARA, and also is President of the U.S. Court
14 of Federal Claims Bar Association. Mr. Doke has been
15 described by leading legal publications as the Nation's top
16 government contract lawyer.

17 Steven Schooner is an Associate Professor of Law and
18 Co-Director of the Government Procurement Law Program.
19 Before joining the faculty, Professor Schooner was the
20 Associate Administrator for Procurement Law and Legislation,
21 as a senior executive service position at the Office of
22 Federal Procurement Policy. He is a member of the Board of
23 Advisors of Certified Professional Contracts Managers, and
24 serves on the Board of Directors of the Procurement
25 Roundtable.

1 Joshua Schwartz is the E.K. Gubin Professor of
2 Government Contracts Law at the George Washington University
3 Law School. Professor Schwartz has been at the law school
4 since 1985 and has been Co-Director of the LL.M. Program in
5 Government Procurement Law since 1992. Professor Schwartz
6 also served as a member of the Acquisition Advisory Panel.
7 He is the author of many articles and book chapters on the
8 subject of procurement law.

9 It is the custom of the Subcommittee to swear in all
10 witnesses that appear before us. So, if you do not mind, I
11 would ask you to stand and swear that the testimony you give
12 before this Subcommittee will be the truth, the whole truth
13 and nothing but the truth, so help you God.

14 Mr. Nash. I do.

15 Mr. Doke. I do.

16 Mr. Schooner. I do.

17 Mr. Schwartz. I do.

18 Senator McCaskill. Thank you all very much.

19 We will be using a timing system today, although I am
20 so grateful to have you all here. I am not going to do what
21 a court reporter did to me one time in the courtroom when,
22 as I kept talking and the time had gone over, she shouted to
23 me, have you looked at your watch? I will not do that to
24 you.

25 We would ask you to try to keep your testimony to no

1 more than five minutes, and your written testimony obviously
2 will be printed in the record in its entirety.

3 And, Professor Nash, we will begin with you.

1 TESTIMONY OF RALPH C. NASH, PROFESSOR EMERITUS,
2 FREDERICK J. LEES, E.K. GUBIN PROFESSOR EMERITUS
3 OF GOVERNMENT CONTRACTS LAW, THE GEORGE WASHINGTON
4 UNIVERSITY LAW SCHOOL

5 Mr. Nash. Thank you very much.

6 I agree with what I have been hearing so far, almost
7 completely. I am not sure that--you may know more about
8 this than I do.

9 Let me just point out, one, what I think is a factual
10 thing that is very important, and that is that you talk
11 about going back to 80 years, the Federal Supply Schedule,
12 but that was a Federal Supply Schedule. And if you are
13 going to buy paper or pens or that kind of stuff, presumably
14 you can induce people to give you a pretty darn good price
15 if it is for the whole Federal Government, in theory.

16 And remember we used to have mandatory schedules. We
17 used to have schedules where you had to buy, rule
18 requirements contract. They are all gone now.

19 The big thing that has happened that is really
20 important is that what we are buying on these interagency
21 contracts now is primarily services, and the Federal
22 Government does not know how to buy services. I think you
23 could say almost unequivocally that we do not. There is no
24 guidance on services. If you look at Part 37 of the FAR, it
25 is almost totally useless; that is the part on services. It

1 says virtually nothing that is any use to anybody.

2 So what we have done is to transpose, I think, supply
3 buying ideas to service buying ideas. For example, we say
4 that the prices on the Federal Supply Schedule have been
5 determined by GAO to be fair and reasonable. Well, what
6 price is on a Federal Supply Schedule for services? It is a
7 fixed labor rate, which has virtually nothing to do with
8 whether what the government ultimately is going to pay.

9 I mean I can pay a \$50 fixed labor rate to somebody who
10 is not very competent, who will spend 10 hours to get a job
11 done, where I could pay \$100 fixed labor rate to somebody
12 who is really competent and could do the same job in 2
13 hours. So we have transposed our logic from supplies to
14 services, I think, without really thinking through what this
15 is all about.

16 Now having said that, which just sort of underpins I
17 think thinking about this, it seems to me that what we need
18 to do is identify what the goals are for our interagency
19 contracting.

20 Senator McCaskill, you mentioned one of them which is
21 trying to accumulate government needs, so we get better
22 prices, and I think that perhaps is one of the goals. I
23 have about as much skepticism as you do, I believe, as to
24 whether we have actually gotten any better prices by
25 accumulating those needs, if we have accumulated needs. I

1 am not even sure we have in some cases.

2 We have had some line of business initiatives which are
3 a little bit outside interagency, where we have tried to do
4 some of that, and people are making efforts in that regard,
5 but I would guess that most interagency contracts do not
6 really accomplish that purpose very well.

7 Another possible goal would be to set up some agency
8 that is so good at buying a certain class of things,
9 whatever. IT would be the GWACs-IT. It seems to be
10 probably one of the goals of the GWACs in the Clinger-Cohen
11 Act was to somehow get somebody who is competent to buy IT.
12 I am still searching for that somebody.

13 But if we--what we have in lieu of that, we seem to
14 have gotten a lot of people who set up GWACs and various
15 other forms of interagency contracting including Schedule 70
16 on the Federal Supply Schedule, but I am not sure anybody
17 know show is competent.

18 So, again, if that is a goal, then we need to pin that
19 down and say, all right, fine, who is it?

20 And it probably should not be 10 different agencies.
21 If somebody is really good at buying IT, remember the old
22 Brooks Act, that was the theory of Jack Brooks. How many
23 years ago was that? Forty, fifty years ago. It did not
24 work because GSA delegated the procurement right back to all
25 the agencies. They could have picked up the ball and run

1 with it. It would have been fabulous, but they did not do
2 it.

3 So that is another goal.

4 The one goal that I think was underlying some of the
5 things that happened in the nineties was this idea that if
6 we could get contracting officers to compete with each
7 other, that we would make the contracting officers better.
8 And I can guarantee you if that was anybody's idea, that was
9 wrong. It did not make anybody any better. What it created
10 was a lot of requirements people running around their own
11 contracting office, which they should not have been doing.
12 DoD has seen that and remedied that problem, I think.

13 I do not know about the other agencies. I am not sure
14 about the agencies you are looking at.

15 But issue number one, what are we trying to accomplish?
16 If we do not figure that out, I do not think we will ever
17 make sense of interagency contracting. So that is where I
18 would start.

19 Then once I had figured that out, then I try to figure
20 out, all right, who can do that? Who can actually do that?
21 Who can get me better prices? Who can create the expertise?
22 Who can build that kind of expert?

23 One of the franchise funds, if you go back and look at
24 the website--and I am probably beyond my time. One of the
25 franchise funds, when their web site first came out, they

1 basically said, we can buy everything better than anybody
2 else.

3 Now the government buys a lot of everything, right--
4 construction, services, supplies, weapon systems. Nobody
5 can buy everything better than anybody else, and that is
6 preposterous to even have put that on the web site.

7 Somebody should have read that web site and said, you are
8 out of business, you know, because that cannot be.

9 I agree with you. We need what the panel recommended.
10 Look from the point of view of companies. We have created a
11 hunting license world, right, and the companies have to have
12 a lot of hunting licenses. It is crazy. It does not make
13 any sense.

14 [The prepared statement of Mr. Nash follows:]

1 Senator McCaskill. Thank you very much, Professor.
2 Mr. Doke.

1 TESTIMONY OF MARSHALL DOKE, JR., PARTNER, GARDERE
2 WYNNE SEWELL, LLP

3 Mr. Doke. Good afternoon, Chair McCaskill, Ranking
4 Member Bennett.

5 I first want to say that I am a past president of the
6 Court of Federal Claims Bar Association. The current
7 president might give me a bad time if I do not correct that
8 on the record.

9 My written statement discusses the Acquisition Advisory
10 Panel's work on interagency contracts. This afternoon,
11 however, I want to limit my remarks to a brief summary of my
12 supplemental in improving competition, which you asked me to
13 address and which are included in the advisory panel's
14 report that is on the internet.

15 What is competition? All real or fair competition,
16 whether it is sports, gambling, contracts, must have rules,
17 and those rules must be disclosed, and then the rules must
18 be enforced. The rules tell you what is required and what
19 you must do to win, how you will be scored.

20 My views is that we do not have real competition today
21 in the competitive proposal or best value method of
22 government contracting. The fact that we call it
23 competition does not make it competition. As Abraham
24 Lincoln said, you can call a dog's tail a leg, but it is
25 still a tail.

1 We have had requirements for competition for and
2 government contracts for over 200 years, in order to prevent
3 fraud and favoritism and collusion. I believe we have had
4 more reported fraud in government contracts in the last 10
5 years than we have had in the previous 40 years, combined.

6 And I believe that some of this increase is
7 attributable to the use of and the deficiencies in the best
8 value, or competitive, method of procurement. By the way,
9 competition is a subset of interagency contracts. Many of
10 them are required to use the same rules of competition as
11 any other agency is for any contracting.

12 In the sealed bidding method, price and price-related
13 factors are the sole basis for award of the contract. Bids
14 are publically open, and there is not much chance for fraud
15 unless it is the bidders who are colluding.

16 In competitive proposals, price is only one factor, and
17 the procurement regulations place no limitation specifying
18 the percentage or weight that must be given to price. It
19 could be 90 percent or it could be 5 percent, 95 percent.
20 The number of other non-price evaluation factors can be 10,
21 20, 30, sometimes even more, and each can be highly
22 subjective. These factors often are related to financial
23 strength and years of experience, management capability.

24 The relative weights of evaluation factors are
25 disclosed to the competitors, but there is no requirement to

1 disclose the specific percentages the government evaluators
2 will use. The use of non-price factors in evaluation allows
3 agencies to award a contract, pay more money to an offeror
4 more highly rated on non-price factors than other
5 competitors offering lower prices. That difference between
6 the lowest price offered by a technically acceptable
7 proposal and the contract award price for the higher rated
8 proposal is called a price premium. That is the premium or
9 higher price paid by the government resulting from
10 consideration of these non-price factors and subfactors.

11 Now the Federal Acquisition Regulation provides
12 absolutely no guidance on what, which or how many evaluation
13 factors can be used, their relative importance that should
14 be given to the various factors, even any limitation on the
15 maximum percentage that can be paid for a price premium in
16 selecting the awardee. Price premiums must be justified in
17 the contract file, but there is no requirement, financial or
18 management report to anyone above the contracting officer
19 level regarding the amounts of these price premiums that
20 agencies are paying for these non-price evaluation factors.

21 Supreme Court Justice Brandeis said that sunshine is
22 the best disinfectant. I believe there is something this
23 Subcommittee can do that will save our government more
24 money, sooner, than anything else you possibly could do, and
25 that is recommend legislation requiring that contracting

1 officers report for all contracts, including interagency
2 contracts, the amount of all price premiums paid to the next
3 higher level and go up the agency chain to the department
4 level and be made subject to public inspection. I predict
5 that such a requirement would have a dramatic impact on
6 reducing the amounts of these price premiums.

7 Now I do not mean to imply that paying price premiums
8 is sometimes not appropriate and needed, but there should be
9 some regulatory guidance or limitations on those payments.

10 I hope you will also consider the discussion in my
11 written statement about how the deficiencies and competition
12 process are adversely affecting our small business concerns.

13 Senator Bennett, this is one of the biggest obstacles
14 that small business concerns have to overcome in
15 competition, and that is overcoming the inherent advantage
16 that large, giant businesses have because of putting these
17 responsibility type evaluation factors, and this is
18 discussed in my written material.

19 And I thank you for asking me to be here today.

20 [The prepared statement of Mr. Doke follows:]

- 1 Senator McCaskill. Thank you very much.
- 2 Professor Schooner.

1 TESTIMONY OF STEVEN SCHOONER, ASSOCIATE PROFESSOR
2 OF LAW AND CO-DIRECTOR OF THE GOVERNMENT
3 PROCUREMENT LAW PROGRAM, THE GEORGE WASHINGTON
4 UNIVERSITY LAW SCHOOL

5 Mr. Schooner. I appreciate the opportunity to discuss
6 the government's ongoing need to effectively manage
7 interagency contracts. But as I sit here with Ralph to my
8 right, I have to take just a moment to mention that last
9 Thursday evening nearly 500 people joined in the historic
10 Mellon Auditorium while we recognized Ralph and celebrated
11 50 years of government contract law at the George Washington
12 University. It was a great event.

13 Most of what I am going to do in starting will actually
14 echo some of the things Ralph said anyway. Centralized
15 purchasing, particularly of commodities and certain types of
16 nonpersonal services, is a globally accepted practice,
17 particularly when governments can achieve economies of
18 scale. Governments also routinely employ centralized
19 purchasing where one agency's unique experience can benefit
20 other agency. But as we sit here today, there is no
21 experience that suggests that competition between agencies
22 to provide these services, particularly for a fee, is going
23 to help anything, and in fact we know that it introduces
24 externalities--unanticipated incentives and disincentives--
25 into the procurement process.

1 Fee-based purchasing offices need revenue to survive.
2 The pursuit of fees, rather than any congressionally
3 mandated mission of serving the public, therefore drives
4 these purchasing organizations. As a result, these vehicles
5 routinely produce insufficient competition and poorly
6 justified sole-source awards.

7 In theory, there was supposed to be competition to get
8 into the umbrella contract. Unfortunately, that never
9 materialized. In effect, firms are granted a hunting
10 license, as Ralph pointed out, and similarly no competition,
11 or real competition is also absent at the task order stage.
12 Because all of the contract holders can market their
13 services directly to individual agencies, those agencies
14 frequently will obtain those services on a sole-source of
15 noncompetitive basis because it gives them greater speed,
16 more convenience, personal preference or, simply, human
17 nature basically says why deal with the bureaucracy if I can
18 bypass it.

19 This has created a race to the bottom. The fee-based
20 purchasing instrumentalities lack a sufficient stake in the
21 outcome of the contracts they award. A program manager at
22 the purchasing agency will willingly pay a franchise fee to
23 a servicing agency to avoid bureaucratic constraints, like
24 competition, that might slow down the process.

25 In turn, the servicing agency has no vested interest in

1 the purpose of the procurement, will gladly streamline the
2 process and are often more than willing to permit personal
3 services contracts for employee augmentation.

4 Once the contract is awarded, the servicing agency has
5 no interest in administering, nor does it have sufficient
6 resources to manage those contracts. The post-award
7 contract management vacuum that we have seen created may be
8 the most pernicious effect of the proliferation of these
9 vehicles.

10 Finally on this, the vehicles simply lack or fail to
11 meet the high standards for transparency that we aspire to
12 in our procurement system.

13 Now we have got Marshall and Josh here. Since 2005,
14 GAO added the interagency contracts to the high-risk list--
15 step in the right direction. The AAP, the 1423 panel, their
16 recommendations moved the ball in the right direction as
17 well, but there is plenty of room left for improvement.

18 In my written statement, I summarized a couple of
19 anecdotes. In the interest of time, I will skip them, but I
20 do want to just mention that the anecdote from the Abu
21 Ghraib prison, where the military ended up relying on one of
22 these vehicles that was managed by the Department of
23 Interior's National Business Center. They used contractor
24 personnel to assist in interrogations in Iraq and Guantanamo
25 Bay.

1 The inspector general basically just hit the nail on
2 the head, indicating that the pursuit of fees distorted the
3 moral compass that we would otherwise hope would animate our
4 procurement officials, and here is what he said: "The
5 inherent conflict in a fee-for-service operation, where
6 government procurement personnel, in the eagerness to
7 enhance organization revenues, have found shortcuts to
8 Federal procurement procedures and procured services for
9 clients whose own agencies might not do so."

10 I mean it seems to me this is a fundamental problem.

11 Before I close, however, I do want to indicate that, as
12 has been suggested and I think you will hear more of this
13 from Josh, much of the problem that underlies why we have
14 relied on these vehicles so much is that we have huge
15 problems in the acquisition workforce. And on that regard,
16 I want to applaud both of you for S. 2901, the Acquisition
17 Workforce Improvement Act of 2009. Obviously, that will not
18 fix any of these problems today, but if we can have
19 legislation like that, forward-looking legislation where we
20 can invest in the acquisition workforce and do better, maybe
21 we will not be having the same discussion a generation from
22 now.

23 Thanks for the opportunity to be here.

24 [The prepared statement of Mr. Schooner follows:]

- 1 Senator McCaskill. Thank you, Professor.
- 2 Mr. Schwartz.

1 TESTIMONY OF JOSHUA SCHWARTZ, E.K. GUBIN PROFESSOR
2 OF GOVERNMENT CONTRACTS LAW; CO-DIRECTOR OF THE
3 GOVERNMENT PROCUREMENT LAW PROGRAM; FACULTY CHAIR
4 OF THE PRESIDENTIAL MERIT SCHOLARS PROGRAM; THE
5 GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

6 Mr. Schwartz. Thank you, Chairman McCaskill and
7 Senator Bennett, for this opportunity to share my thoughts
8 about the challenges and opportunities associated with
9 interagency contracting by the United States Government.

10 I have had the opportunity to think about the potential
11 for interagency contracting and its problems, both in my
12 research and writing, as Co-Director of the Government
13 Procurement Law Program at George Washington University and
14 for two years, along with my friend Marshall Doke, as a
15 member of the government's Acquisition Advisory Panel.
16 There are several key points I would like to make, and like
17 my friend, Steve Schooner, I have chosen to--I agree with
18 the things you have said, so I am focusing my attention
19 elsewhere.

20 First, interagency contracting is simply a tool. It is
21 neither inherently abusive as critics have sometimes
22 suggested, nor is it a panacea for all the ills of
23 government procurement as its fans have sometimes suggested.

24 I would rather think of it as like the proverbial
25 miner's canary. The mushrooming growth of interagency

1 procurement shines a sharp spotlight on underlying
2 weaknesses and problems in our procurement system. So the
3 challenge for the Congress and for the executive branch is
4 to guide the use of this procurement device so as to reduce
5 abuse, increase competition, enhance accountability, all in
6 the use and management of interagency contracts.

7 The rapid growth that we have already acknowledged, of
8 interagency contracting in the last 15 years certainly
9 justifies the attention that these hearings are giving to
10 this sector of Federal procurement activity.

11 That said, it is my view that the most important things
12 to be done about interagency contracting, from where we now
13 stand, are not actually measures uniquely addressed to
14 interagency contracts. The key problem areas in my judgment
15 relate to the inadequacy of the Federal acquisition
16 workforce and the need for competition in contracting and to
17 the need for sustained attention to effective contract
18 management. You have heard something about each of these
19 points from the other panel members.

20 Although I strongly believe that we can significantly
21 improve the performance of the Federal acquisition system, I
22 think we can do so most effectively by investing in the
23 Federal acquisition workforce. It is a cliché, but I think
24 an apt one in this situation, to remember that an ounce of
25 prevention is worth a pound of cure. If we were as zealous

1 going forward about properly staffing the Federal
2 acquisition function as we have been in recent years in
3 investigating what has gone wrong with the government's
4 contracting response to Hurricane Katrina, to procuring the
5 needs for our military in Afghanistan and in Iraq, I think
6 we would see better outcomes.

7 It may seem to you that I am trying to change the
8 subject here, from a focus on a particular acquisition
9 technique to a focus on the human infrastructure of Federal
10 acquisition. But, candidly, that is exactly where I think
11 the focus needs to be.

12 If you look back at the last 30 or 40 years of the
13 evolution of the Federal Government's procurement process, I
14 think what you will see is that we have swung back and forth
15 like a pendulum between an emphasis on abuses that called
16 for additional regulation and an emphasis, particularly in
17 the 1990s, on the excessive rigidities that called for more
18 flexibility in the operation of our system. And I think
19 there was in fact a time and a role for each of these policy
20 responses. But I think we have reached a point at which we
21 would be better served, and the taxpayers would be better
22 served, if we could damp down this oscillation and that the
23 challenges that face us today primarily require better
24 implementation of existing procurement mechanisms and do not
25 call for radical new solutions.

1 Let me offer three illustrations of how problems that
2 appear to be about the use of interagency contracts can be
3 ameliorated by solutions that appear to be about the
4 acquisition workforce.

5 First, agencies with adequate acquisition personnel
6 will not find themselves driven to use interagency contracts
7 simply because they lack the resources to do the procurement
8 themselves.

9 Second, if agencies receive adequate funding for their
10 procurement operations, they will not see the incentives
11 that Professor Schooner has referred to, that are far too
12 common today, to host interagency contracts simply as a
13 means of sustaining their own procurement operations and in
14 effect supporting other activities at their own agencies.

15 Third, agencies with adequate acquisition personnel
16 should be able to devote the resources necessary to the
17 sustained and careful management of the contracts that they
18 enter.

19 I do not believe that contractors, as a class, are
20 either better or worse, more competent or more honest, or
21 less competent or less honest than the rest of the human
22 race, but I think it is completely unreasonable to expect
23 that government contractors will deliver sustained excellent
24 performance unless they know that the government is
25 seriously committed to monitoring their performance.

1 Last point, improvement to our federal acquisition
2 operations really should not be a subject for partisan
3 debate or ideological division. This is not about whether
4 markets or government action are better means of fulfilling
5 important public needs.

6 Public procurement, by definition, is about the
7 interface of markets and public management. To an
8 impressive degree, I think, we have actually reached a
9 consensus in the last generation that important public needs
10 can be well served by securing goods and services from
11 private enterprise and from the market. But to make
12 effective use of the productive capacity and the problem-
13 solving abilities of the private sector, we need to invest
14 in consistently effective public management of our
15 government contracts, and I do not think we have done that
16 adequately.

17 Thank you.

18 [The prepared statement of Mr. Schwartz follows:]

1 Senator McCaskill. Well, thank you all.

2 There is a lot here that I would like to get into, but
3 let me start with kind of a broad question. As I sit here
4 thinking about how to fix some of these things, the typical
5 response in government is, well, who is in charge of it?
6 Where do I go to get this fixed? What agency head do I call
7 to talk to them about this?

8 Now I know we have the Federal procuring policy office.
9 But should there be someone in charge of all this overseeing
10 that has not been done?

11 First of all, let's be honest. I mean you all are very
12 knowledgeable and interested in this. We are pretty
13 interested in it. I did not worry about every seat being
14 full today in the hearing.

15 [Laughter.]

16 Senator McCaskill. I did not worry about TV cameras
17 knocking me over as I walked in the door. This is a place
18 that has the attention span of a kindergartener. This is
19 not some place that people spend a lot of time trying to
20 really get their teeth into something that is this complex,
21 this stovepiped, this disparate. It is really hard for us
22 to fix this thing.

23 So you all have years of experience in studying this
24 and understanding it. Where? Who? Other than us just
25 doing legislation, which sometimes is a little bit like

1 spitting in the wind, how do we find the right overseers, or
2 do we have to do this agency by agency and bust up the
3 current system in terms of some of these schedules and fee-
4 for-service operations?

5 Mr. Schooner. If we distinguish, beginning with just
6 the GSA schedule, I mean the obvious starting place here is
7 at the Office of Management and Budget. Now you mentioned
8 the Office of Federal Procurement Policy, but keep in mind
9 if we take the step forward after the economy act, a lot of
10 this proliferation comes from the Clinger-Cohen Act. And
11 the bottom line is if we again take it apart and go back to
12 ITMRA, this is authority that was vested at the Office of
13 Management and Budget. They were supposed to manage it.

14 And frankly, what happened was the OMB thought it was a
15 great idea. They expected this to be a hyper-competitive
16 environment, with competition to get onto the vehicles and
17 then competition at the task and delivery order level. It
18 did not materialize in the 1990s. And when Steven Kelman
19 was still the OFPP administrator he came forward and asked
20 the people who were managing these vehicles to enter into
21 what he called at the time a Mayflower Compact in which they
22 would commit to at least having fundamental competition, and
23 it failed miserably.

24 But at the end of the day, the short answer to your
25 question is OMB can be tasked with managing this, and

1 frankly there is no reason why OMB should not be put in a
2 position where they ought to be shutting these vehicles
3 down.

4 Senator McCaskill. And do you believe they can shut
5 these vehicles down without any kind of action on our part?

6 Mr. Schooner. Oh, yes.

7 Senator McCaskill. Okay, that is good to know.

8 Mr. Nash. Well, are you saying they will?

9 Mr. Schooner. No, no, of course not.

10 Mr. Nash. I mean they will if somebody forces them.

11 I think we have tried chaos for 20 years, and I would
12 say that chaos has not worked all that well. We can
13 probably all agree on that. So the answer to your question
14 is, yes, we need leadership, absolutely.

15 In my written remarks, one thing that I recommended was
16 that if we establish an interagency, if we let somebody set
17 up an interagency contract to buy and they become a
18 specialist, let's say, that we ought to, somebody ought to
19 certify them as being a specialist.

20 One of the problems--I teach a lot of contracting
21 officers. I just came back last night, or this morning--I
22 should have come back last night--from teaching 30
23 contracting people, Navy people. If you look at it from
24 their point of view, and they asked me to talk about task
25 orders, it is bewildering for them to know which vehicle to

1 use. There is no catalogue out there.

2 I looked. I found an IG report, just stumbled on it a
3 year or so ago. I write a monthly newsletter, and I wrote
4 it up because at one interagency vehicle, the labor rates,
5 the fixed labor rates are nationwide. Right next door is
6 another interagency vehicle where the labor rates are
7 regional.

8 Well, that makes a big difference if you, you know, if
9 you are buying. In New York City, you ought to buy off the
10 nationwide.

11 Senator McCaskill. Right.

12 Mr. Nash. If you are buying out where Senator Bennett
13 is, I assume his rates are lower. You are probably better
14 off buying from the regional.

15 Senator Bennett. More efficient too.

16 Mr. Nash. But the normal contracting officer does not
17 have a clue that that is the way it operates. So we have
18 created--I mean we really do have chaos. I do not know how
19 you make somebody manage something, but we need leadership,
20 absolutely.

21 Senator McCaskill. It is fascinating to me that
22 government does not have to make it work at the bottom line.
23 You cannot add employees in a business until you have the
24 revenue to add employees, but we can add employees around
25 here if somebody thinks they have a good idea. And what a

1 lot of these things were, were someone's good ideas that
2 have not, as they have been executed, turned out to deliver
3 what people thought they could deliver.

4 Now what is fascinating to me is you have got these
5 agencies that see getting more money for their agency as the
6 end goal. They completely lost sight that it has anything
7 to do about value of the contract.

8 Is there any place that you all think that we can go to
9 get a handle on which agencies have done the best job at (A)
10 marketing themselves to get more money for their agency, or-
11 -well, let's just take that at this point.

12 Mr. Doke. Let me preface that to your previous
13 question, and Ralph said leadership is the problem, and I
14 think that is largely it. I think there is power that can
15 be used in the Office of Federal Procurement Policy.

16 The problem you have is that when the administrator
17 tries to exert that power, the reaction coming back from the
18 other agencies overwhelms him. He does not have the
19 political stroke to make it work. He issues a memorandum to
20 the agencies, and then the bigger agencies--you know there
21 is an old saying, that no person with a straight flush ever
22 asks for a new deal. Well, that is what happens. The
23 agencies are happy with what they have got, so they
24 overwhelm.

25 Now you can go to the OMB that can do that, but then

1 politics all over enters in. So it is largely exercising
2 leadership that is there and is necessary to straighten it
3 out. OMB or the administrator has the power to call for the
4 information necessary to get, to make a judgment on those
5 issues, but it has to be exercised.

6 Mr. Schwartz. And what you need is sustained attention
7 to these things. The reason I singled out the response to
8 Hurricane Katrina or Iraq/Afghanistan addresses the point
9 you raised about lack of attention span around here.

10 One of the great things of the last decade was that for
11 a brief time people outside the Beltway could understand
12 that it really made a big difference in the quality of their
13 lives and sometimes as to whether people lived or died,
14 whether the government was competently spending the money it
15 had to spend. We have seen some very disappointing results.

16 The problem is that you can engage people's attention
17 for a short time, but management, or legislation for that
18 matter, in reaction to the last scandal, is not going to do
19 it.

20 So it seems to me I agree with the leadership argument.
21 I agree that the OMB and the Office of Federal Procurement
22 Policy need to focus attention, and they need to have
23 backing at the highest levels in the executive branch and
24 from the Congress to understand that this is attention that
25 will continue to be paid. It will not be shifted away when

1 that headline is off the front page.

2 But you also have to build from the bottom-up, and this
3 is where my acquisition workforce focuses in. You need
4 leadership on the top to insist on a higher level of
5 performance and sustained attention, and you need to hire
6 and promote and pay people who can master the very
7 complicated procurement systems that we have now built in
8 this Country. Essentially, what we have done is keep
9 adding, and we never subtract, so that to master the
10 procurement system today is just a very demanding task, as
11 Ralph Nash has insisted.

12 Mr. Schooner. Your question fundamentally begins with
13 a success metric, and the problem is we have totally
14 polarized metrics here. For the servicing agency, the only
15 metric is the generation of fees. For the purchasing
16 agency, the attraction of these vehicles is the ability to
17 bypass bureaucracy and the entire world of congressional and
18 regulatory mandates.

19 Senator McCaskill. Right.

20 Mr. Schooner. And I think that the best example that
21 your Committee has familiarity with is what happened at
22 Homeland Security. They did not have an acquisition
23 workforce. They had a tremendous reliance on these
24 vehicles, and this Committee eventually reined them in.

25 But if we were to look at the other side, and again I

1 go back to the point that Ralph made about how we get into
2 this in the first place, economies of scale is a wonderful
3 reason to buy product in bulk or in volume. But there is no
4 empirical research that suggests that purchasing services
5 generates economies of scale, which begs the question, how
6 did GSA grow so dramatically in the last generation?

7 GSA has been marketing what they call commercial
8 services. So, in effect, rather than having people make
9 good business-based, value type assessments as to how to
10 purchase services. They go through the GSA filter, they pay
11 the fee and they do not have to do any thinking. They get
12 whatever employee augmentation they need, so they can have
13 their personal services contractor. That cannot be the way
14 that we need to do business in the long run.

15 Senator McCaskill. Senator Bennett?

16 Senator Bennett. Well, thank you, Madam Chairman.

17 This has been a fascinating discussion, and I have been
18 making notes and would like to get into virtually all of it.
19 Let me just share off the top of my head a few comments and
20 reactions, again out of my own experience. That is always
21 dangerous because it gets you into anecdotal stuff.

22 But one of the things I learned, you talked about
23 buying primarily services. I ran businesses that were
24 entirely services and learned very quickly and told my
25 potential customers a very fundamental truth: You want to go

1 where your account is important.

2 Now if you are Ford Motor Company, and you are looking
3 for an ad agency, you want to hire J. Walter Thompson, one
4 of the biggest in the world. I am using ancient
5 circumstances here rather than getting to where we are
6 because Ford Motor and J. Walter Thompson were an item for a
7 long period of time.

8 If you are a relatively small operation in Salt lake
9 City, you do not want to hire J. Walter Thompson.

10 Mr. Nash. That is right.

11 Senator Bennett. The criteria you were talking about,
12 Mr. Doke, you might say, well, you have to take into
13 consideration the management, the experience and so on, and
14 J. Walter Thompson would always appear as the first choice.
15 But you would be far better off in a much smaller ad agency
16 that could not possibly handle Ford but where your account
17 was very important, and you would get the attention of the
18 head of that agency, who would probably be better than the
19 very junior person J. Walter Thompson might apply.

20 Of course, that is presumably the philosophy behind
21 best value, that you do not want to say, okay, we are going
22 to create a sufficient regulatory strait jacket that says
23 you can only buy this.

24 You are depending on--to your point, Mr. Schwartz--that
25 the person doing the purchasing has a little bit of ability,

1 has a little bit of capacity to make a judgment that says
2 this is the best one. Even though it may not be the best
3 price, I am going to an agency where my account is
4 important. And how you do that in the personnel pool that
5 makes up the Federal purchasing group becomes an enormous--
6 enormous--training problem.

7 I also felt when I was CEO of the company, my biggest
8 challenge was training my own people to do the right thing
9 rather than directing them to do the right thing because it
10 was a whole lot more efficient if they were trained and they
11 made the decision closer to the problem than if every
12 decision had to come up to me, and I would clearly, my
13 obvious brilliance to the contrary notwithstanding, make a
14 whole lot more dumb decisions than they would if they were
15 properly trained.

16 All right, the conversation about OMB. I am one of the
17 few Senators who has worked in the executive branch, and I
18 have dealt with OMB, and I have learned that the law of
19 inertia is not just a law of physics--and not only the
20 inertia at rest, but far more pernicious is the inertia of
21 motion. A body in motion tends to stay in motion and in the
22 same direction, and this is the way we have always done it,
23 and so this is the way we are going to do it.

24 My own hobby horse is that in spite of the fact that M
25 was put in OMB during the Nixon Administration, or during

1 the time I was in the Nixon Administration, it has never
2 really showed up.

3 Mr. Nash. That is right.

4 Senator Bennett. OMB is still Harry Truman's Bureau of
5 the Budget, and just putting another name in it and another
6 initial to its acronym does not mean that they spend very
7 much time on management.

8 The solution I have tried to peddle within the
9 Congress, Madam Chairman, has been to switch us to a two-
10 year budget instead of a one-year budget, so that they can
11 spend one year developing the budget and the other year on
12 the M of OMB.

13 I give you the anecdote of the commandant of the Coast
14 Guard who was a good friend of mine. I was in the
15 Department of Transportation. The Coast Guard used to be
16 there. The Coast Guard gets kicked around more than any
17 other agency. It starts out in Treasury, goes to
18 Transportation and ends up at Homeland Security. Where are
19 they going next?

20 When he became the commandant of the Coast Guard, he
21 said, now I can finally do the kinds of things the Coast
22 Guard needs to have done. And when I retired as the
23 commandant of the Coast Guard, I had accomplished none of
24 them because I spent my entire time preparing budgets.

25 Every year, there had to be a new budget. It had to be

1 prepared, and then it had to be defended. Then the year was
2 over, and a new budget had to be prepared and had to be
3 defended. I never got around to all of this.

4 Those are my reactions to the conversation that you
5 have had.

6 Now let me get to a specific question. I think this is
7 probably aimed at you, Professor Schooner. Let's talk about
8 another regulation that will go in, that in my opinion will
9 interfere with management, intelligent management. I am
10 letting my prejudice here advance the question. But are you
11 familiar with the high road labor preference?

12 Mr. Schooner. Alas, yes.

13 Senator Bennett. Alas, yes. All right. I think maybe
14 we are on the same page. Would you give us your
15 understanding of it and how you think that would impact this
16 quality I have been talking about of having intelligent
17 people properly trained to make the right kind of decision,
18 or does it put a strait jacket on circumstances that will
19 make the procurement process worse?

20 Mr. Schooner. So, in a nutshell, the underlying theory
21 behind high road contracting as it has been articulated, is
22 that the Federal Government would give an evaluation
23 preference, would give a leg up to firms that paid their
24 employees higher than the minimally required wages under the
25 relevant labor minimum standard for that type of contract.

1 So, in effect, the theory is that the firms that paid their
2 employees the most would be competitively advantaged when
3 they competed for government contracts.

4 Again, I may have signaled this, but I find this
5 terribly frustrated. The Administration has been in office
6 now for a year. They have spent a disproportionate amount
7 of their energy in the public procurement space, focused on
8 using the public procurement process to benefit union
9 members and other special interests, and it simply does not
10 make any sense.

11 On the one hand, it is simply inconceivable that the
12 government would incentivize a contractor to pay its workers
13 more, particularly in this economy. I mean the bottom line
14 is the government should be getting bargains because we have
15 excess capacity out in the workplace.

16 But I think that the real issue here that is the most
17 frustrating is if you were to ask what the government should
18 be focused on, the government should be focusing on getting
19 the greatest value for its money in everything that it
20 purchases. And the secondary consideration for that, which
21 is actually the same, is the government should be trying to
22 maximize the customer satisfaction of the agencies that are
23 spending that money. The bottom line is the redistribution
24 of wealth, rather the generation of value, is simply the
25 wrong path to take in public procurement.

1 Senator Bennett. Mr. Doke?

2 Mr. Doke. Let me comment on what I will call the
3 elephant in the room in best value procurement. What people
4 do not think about is that no government can be awarded
5 anywhere, by anybody, unless the contracting officer makes
6 an affirmative finding of responsibility. Now the
7 regulations cover. There are a number of factors in
8 responsibility, but what it boils down to is the contracting
9 officer must decide that this person can perform the
10 contract satisfactorily.

11 Now if that is true, if they do that, then if you are
12 paying more money to someone who has a higher rating on
13 management capability, on financial strength, on experience,
14 more years of experience, what you are doing is saying this
15 person can perform the contract more than satisfactorily.

16 Now if you do that, you are paying for more than you
17 need. It means that the government has not described what
18 satisfactory is, if it is higher than you need, and the
19 minimum needs doctrine has almost been forgotten in
20 government procurement. That doctrine says that the
21 government says that the government cannot buy what it
22 wants; it has to buy what it needs.

23 It is limited to what it needs. Why? Because in 99
24 percent of the cases the only authority to contract comes
25 from Congress, and it is from your appropriation of money.

1 It is implied authority, and you cannot imply that Congress
2 intended for the government to buy more than it needs.

3 But we forget it when you pay the price premiums, when
4 you pay the very large businesses more because they have got
5 more experience than the small business concern, and so
6 forth. Even in the best value procurement, you can give
7 added points for exceeding the specification. Now if you
8 give more money to somebody that is exceeding the
9 specification, and you do not even have to disclose it in
10 RFP. If you can do that, then you are paying money for
11 things you do not need, and that is just part of this
12 problem that is causing some of the dilemma we see today.

13 Senator Bennett. Anyone want to comment on that?

14 Mr. Schwartz. I guess I have a somewhat different
15 view. I have learned to disagree with my friend, with
16 diffidence, but I guess I think I am coming out in the
17 middle on the spectrum here. That is, as I tell my
18 introductory classes, if it is your brother or sister
19 jumping out of the airplane, you do not want the government
20 to buy the cheapest parachute it can get.

21 And yes, there is a role for specifications, and there
22 is a role for responsibility, but I just do not accept the
23 view that there is nothing to be measured and that in the
24 private sector we would not take into account things that
25 are not always wholly tangible, that enter into quality and

1 value for the taxpayer.

2 The high road program takes this a step further, and it
3 does not say you can exercise some judgment. It mandates
4 the way you are going to exercise that judgment, and that is
5 what I take to be controversial. So I do think there is a
6 role for contracting officers, and I am not looking to write
7 a lot more regulations to constrain that judgment.

8 The other thing that I think is important to say is if
9 you give people judgment, it is not true that they will
10 never make mistakes. But if you do not give them any
11 discretion, they will always make mistakes.

12 Mr. Nash. Let me comment on Marshall's thought. I do
13 not agree with the way Marshall said it, but he started--he
14 did a look at GAO decisions in 1996, I think it was, and he
15 could not figure out what the government was getting for the
16 additional dollars that they paid on these individual
17 procurement decisions. And it is hard to figure out from a
18 GAO decision because they do not give you an absolutely full
19 description of the procurement.

20 I did the same thing in 1997 because I wanted to see
21 what he saw, and I looked at 44 decisions where the
22 government had paid more in that particular year, and I
23 agreed with him. I could not figure it out either.

24 His recommendation that people--I have no problem with
25 paying more for something, but my perception is that an

1 awful lot of contracting officers think that best value
2 means we should pay more, and in a lot of cases it is wrong.

3 If you read the GAO decisions, it is fascinating. For
4 example, I took in the newsletter, I took the last nine
5 decisions where the tradeoff was between past performance
6 and price. Past performance is a way to evaluate the risk
7 of nonperformance, right. If somebody has not done well in
8 the past, there is a risk that they might not do your job
9 well.

10 In eight of the nine decisions, the agency had paid
11 more for better past performance. In a few of the cases,
12 they had paid 15, 20 percent more for very small differences
13 in past performance--the difference between very good and
14 excellent, for example. It makes you wonder.

15 I agree that we ought to have a bunch of wonderfully
16 competent contracting people out there, but it is going to
17 take a long time to get there.

18 I think Marshall's suggestion is an excellent one, that
19 if we just use transparency and put that data out there in
20 the open--how much more did you pay and what did you get for
21 it--I think that would do a great deal to cast light on this
22 system of how we are buying things, just what kind of
23 decisions. It is great to have a lot of discretion, but we
24 ought to take a look every once in a while and see how that
25 discretion is being exercised.

1 Senator Bennett. Right.

2 Mr. Doke. Let me mention that I am certainly not
3 against best value procurement. That term was sort of
4 introduced into our world as a marketing tool by a former
5 administrator. We have had that type of procurement 50
6 years. I started as cost technical tradeoffs, but we have
7 had for a long time.

8 And the theory, not the theory, but you had to have it
9 in some cases because sometimes the government cannot
10 describe its needs adequately. Research and development
11 contracts, many other things, they just cannot describe it
12 adequately. So the technical aspect of it was extremely
13 important.

14 Certainly, when you have that, sometimes the government
15 needs to buy more than what is satisfactory. You need the
16 best, the very best, and a technical evaluation is
17 necessary. And price premium certainly was appropriate in
18 those cases, where you need the best--health, safety,
19 security and so forth.

20 But it is in these other areas to where these factors
21 are placed in there that really exclude small businesses,
22 put them out of the game totally because they really relate
23 to responsibility. The government can set its own standard
24 for what is required to perform satisfactorily, and that is
25 responsibility. And if it does that, you do not need those

1 factors to do it comparatively.

2 Senator Bennett. Anyone on this one?

3 I have more, but we will go back to you, Madam Chair.

4 Senator McCaskill. Okay. I will take one. We will go
5 every other one, how is that, until we get worn out.

6 Parking of funds, that is one of the unintended
7 consequences of what we have, the chaos that we are living
8 through as it relates to interagency contracting, that and
9 the notion that they are supposed to be giving back to the
10 Treasury whatever they are collecting that is over and above
11 what they are due, based on direct and indirect costs of
12 what they are executing. Any comments on this phenomenon?

13 One of the things that is scary about this is we have a
14 couple of GAO reports where they found this, but we do not
15 have anything that is overarching as to how common this is.
16 Do you all have a sense that we are having anti-deficiency
17 violations on an annual basis as the end of the fiscal year
18 rolls around and everybody looks for some place to park
19 money?

20 Mr. Schooner. Yes, but they are not really Anti-
21 Deficiency Act violations because the way the system has
22 been set up, it is a tolerated practice. It was never
23 intended. I mean I think that my written testimony has all
24 the cites in there. But the bottom line is there is
25 supposed to be a bona fide need in the fiscal year.

1 But because of the nature of the revolving funds, one
2 of the things that the servicing agencies are offering to
3 the other agencies is do not let your money expire. Just
4 tell me what you think you want next year. Park it with me,
5 and we will figure out what you want to spend it on next
6 year.

7 I mean there is plenty of GAO reports on this. And
8 again, once again, if you decided that you wanted OMB to
9 actually manage this, they could manage it.

10 Another way to deal with it is to simply have, and
11 again there is plenty of audits going on, on a million
12 different things, but you could simply shut down the
13 agencies that do it. Just shut down. Shut them down.
14 There is no reason for it whatsoever. It is just one more
15 pernicious effect of a vehicle. It is a race to the bottom.

16 Senator McCaskill. Well, I think it would be kind of
17 hard to shut down. For example, when they did that on the
18 Border Patrol, I do not think we could.

19 Mr. Schooner. No, no, no. I am not telling you to
20 shut down the agency, but you can really shut their
21 procuring off.

22 Senator McCaskill. Oh, shut down their services and
23 their fee-for-service. Oh, I see, yes, their franchisement.

24 Mr. Schooner. Right. Again, look, there are many,
25 many revolving funds that the government uses that make a

1 lot of sense. I mean, for example, I gave you the anecdote
2 of the government printing office, and I believe that when I
3 talked about that, there is a difference between saying, for
4 example, that members of the public should not be able to
5 mail their holiday cards if they are not going to buy stamps
6 from the Postal Service, and we know that the Postal Service
7 is constantly generating income to deal with their future
8 requirements and that we adjust the price of stamps
9 periodically because we expect them to basically be playing
10 at a zero-sum game.

11 This is a completely different animal. This is all
12 Federal appropriated money that is being passed around. It
13 is a shell game.

14 Senator McCaskill. Right.

15 Mr. Schooner. And if anybody tells you that the fees
16 are not a shell game, they are simply coming up with a
17 highfalutin theory for what is going on. There is no need
18 for this to happen whatsoever.

19 Mr. Nash. I went back and looked at the franchise fund
20 legislation, and it looked to me like the theory was quite
21 sound. As I understood the way it came out, the theory was
22 that this is six people, six different agencies--

23 Senator McCaskill. Right.

24 Mr. Nash. --that could buy things, could in effect be
25 providers of some category of thought, okay. In effect,

1 they were sellers, not buyers, and that to the extent that
2 they could have been sellers. And I guess that gets us back
3 to the special expertise, but to the extent that they could
4 have been sellers accumulating, sort of like warehousemen in
5 a way. You know. We can provide this kind of service,
6 economies of scale and all the rest. Parking funds probably
7 makes sense, right, because then they are selling you
8 something.

9 But it turned out all they were selling was buying
10 services. They were not actually--they were not
11 accumulating anything. They were not becoming great at
12 something, and of course that eventually said that is sort
13 of scandalous because it is all phony.

14 But I sort of think the original idea was probably an
15 okay idea. It was the implementation that got it. This 4
16 percent fee became the goal.

17 Senator McCaskill. Right.

18 Mr. Schooner. Just very briefly on this, if you go
19 back to this original vision that Ralph describes, the
20 theory was that OMB would manage it, and they did not.

21 Senator McCaskill. Right.

22 Mr. Schooner. And they could

23 Mr. Nash. One of the curious things in the franchise
24 funds is when the Treasury Department decided they did not
25 want theirs anymore, they tried to peddle it, and nobody

1 would buy it. I guess it is gone. Is that right?

2 Mr. Doke. It is. It dissolved in October of this
3 year.

4 Mr. Nash. They went around to the whole Federal
5 Government and said, would anybody like to have this thing?
6 We do not want it anymore.

7 Nobody would buy it, which I think tells you what its
8 value was.

9 Senator McCaskill. Yes.

10 Mr. Doke. Which brings up another part. I think Josh
11 may agree with me on this. In observing the witnesses, and
12 we had a lot of witnesses at the advisory panel, two things
13 that stuck with me: One, we have talked about, the problems
14 associated with the charging fees and how much and setting
15 the fees and the problems, but another problem is the turf
16 battles that you saw, that came out of the testimony. Once
17 you have an agency, it is their turf, and they are very
18 protective of it. That almost precludes any cooperation in
19 trying to solve some of these problems.

20 Senator McCaskill. Bob?

21 Senator Bennett. All right, let's go back to a
22 specific proposal that is before us, and we are back to high
23 road for just a minute.

24 I would anticipate that this would have a very chilling
25 effect on small business trying to compete for Federal

1 purchases. I said in my opening statement I have had the
2 experience of small businesses running into far too much
3 difficulty in trying to penetrate the Byzantine labyrinth of
4 Federal procurement procedures, and one of the additional
5 problems now is a requirement that you not only go through
6 all of the procedures, but you change your competitive
7 position in your nongovernmental marketplace by increasing
8 your labor costs or other activities.

9 I do not think it is specifically tied to labor. The
10 Federal Government could say, well, if you are going to
11 compete for Federal money, you have to have this kind of
12 carbon footprint. You have to have fill in the blank,
13 whatever the flavor of the month for either a Republican or
14 a Democratic administration, of the kinds of things they
15 would like to see happen. And if you will not do this, you
16 cannot compete.

17 Maybe I am overreacting from my own background as a
18 small businessman, but I see this as a pretty bad slope to
19 start to slip down in terms of the way you use the
20 contracting, the opportunity to sell to the government, as a
21 club to beat people up to get them to do other things that
22 they would not otherwise do. And if they do decide to take
23 that, it puts them at a competitive disadvantage in a free
24 marketplace.

25 Mr. Nash. Well, a normal company, the big company, one

1 thing they have learned is that you do not sell to the
2 Federal Government out of the same unit that you do
3 commercial work with because the additional costs. They are
4 mostly overhead costs, mostly indirect costs, but they are
5 huge. We do not know exactly how much.

6 The only study we have ever had of that was the one
7 that was done by the Analytical Sciences, TASC, the
8 Analytical Sciences Company, when Jacques Gansler was
9 running it, and they did. It is not a precise study, but
10 they did do a fairly detailed studied, and they came up with
11 an 18 percent premium that it costs to do business with the
12 Department of Defense, mostly in indirect costs.

13 Senator Bennett. So Boeing has two divisions: one
14 that produces airliners for American airlines and one that
15 produces--

16 Mr. Nash. Sure, sure.

17 Senator Bennett. I was not aware.

18 Mr. Nash. There is a wonderful example in Scottsdale.
19 Motorola had a commercial division and a government division
20 about a mile apart in Scottsdale, and the commercial people
21 were so scared of the government virus they would not deal
22 with the government division. Finally, the Motorola company
23 decided to sell the government division to General Dynamics
24 because they already had the virus, and it could not hurt
25 them any.

1 Mr. Doke. But before they decided to sell it, the
2 government contract division, who could not afford to take
3 their own division's electronics from a competitor because
4 that would not look good, they took, they bought from their
5 Fed source--I mean from their electronics microchip company--
6 -and they gave it to the government. They put it on their
7 proposal as zero cost, so the government could not come in
8 and audit it. They had to do that because they just would
9 not let the Federalies in the door.

10 Mr. Nash. That is very common. I mean that is across
11 the board, and you have to.

12 I mean my advice to small companies has always been you
13 can sell to the government if you have a product that they
14 will not touch. They will not make you change it any. They
15 will just buy your product, firm fixed price, and that is
16 it. But if you begin to get into modifying your product--

17 Senator Bennett. Or services.

18 Mr. Nash. --all that kind of stuff, government specs,
19 you are in trouble. It is going to cost a lot more money.
20 It is going to raise your whole cost of doing business.

21 Mr. Schooner. Just going back to the original
22 question, though, the issue is far broader than high road.
23 Keep in mind that right after the inauguration the
24 Administration immediately pumped out three executive orders
25 that fundamentally gave union contractors a competitive

1 advantage in the marketplace.

2 Now you may, or any individual member of Congress or
3 the President may, conclude that the single best purpose of
4 your public procurement regime is to redistribute wealth,
5 and you may be in favor of unions, you may be opposed to
6 them. But as we sit here today, I believe that most of us
7 speak for the public procurement process, which is focused
8 on value for money for the government and customer
9 satisfaction, so that government agencies can actually
10 achieve their missions.

11 All of these social policies, whether it is pro-union
12 or anything else, at the end of the day, what they do is
13 they increase barriers to entry. They increase the
14 complexity of the process. They add to the work that the
15 acquisition workforce actually needs to do. Therefore, they
16 reduce competition. So, in the long run, they are not
17 intended to maximize the ability of the public procurement
18 system to be efficient and to serve its ultimate purpose.

19 Now again, countries all over the planet use the public
20 procurement system to redistribute wealth, but at some point
21 it seems to be me we ought to start with value and customer
22 satisfaction, and then worry about redistributing the
23 spoils.

24 Mr. Nash. Incidentally, it is the 30th anniversary of
25 GAO's recommendation that you repeal the Davis-Bacon Act.

1 They made that recommendation in 1980, and that was a sound
2 recommendation then, and it is still a sound recommendation.

3 Mr. Schooner. Could we at least raise the threshold?

4 I am sorry.

5 Mr. Schwartz. Dual regulation, I think this is
6 something you will get an unusual degree of agreement on, is
7 a bad idea. I mean I think that we ought to restrict carbon
8 output, but those obligations should not be different for
9 government contractors. Whatever they should be, they
10 should be. So the idea that you have a backdoor channel of
11 regulating your economy, or any subsector of it, because you
12 want to be a government contractor is inherently a bad idea.
13 That we agree on.

14 But as the Davis-Bacon example suggests, it is
15 relatively hard to get people to agree across the board that
16 we are going to focus on singlemindedly on value, that we
17 are not only not going to introduce new distractions from
18 value, but that we are going to go back and reconsider all
19 the old ones.

20 Again, I will start with an introductory class, and I
21 say, I bet you I can find some collateral social and
22 economic policy where you are willing to say, I do not want
23 my government spending my taxpayer dollars that way even if
24 it is not best value. So we all have our soft underbellies
25 on this.

1 And if somehow you could get an agreement to
2 comprehensively devote yourself to value in the procurement
3 system and not to do other things, but that would, among
4 other things, involve some things that maybe some folks in
5 the room will not be happy with, including the things that
6 we do to prefer small businesses. So, if we took the gloves
7 off entirely and said, we are going back to value and
8 nothing but, I think people on both sides of the aisle would
9 find the places where they are unhappy, and there has not
10 been a willingness to do that across the board.

11 Mr. Nash. Yes, I agree with that.

12 The big breakthrough we made on the 800 Panel back in
13 1991 and 1992 and came into FAS in 1994 was we said we
14 cannot get rid of all these policies. Most of them, people
15 agree with.

16 Let's try to simplify. Let's raise what used to be the
17 Small Purchase Threshold; it is now called the Simplified
18 Acquisition Threshold. We raised that to \$100,000, and we
19 also put rules in that said let's write a commercial buying
20 set of rules that does not have to comply with all these
21 policies, and we did that. That is in Part 12 of the FAR.

22 So, in buying commercial products and services, and in
23 procurements under the Simplified Acquisition Threshold, we
24 do have--I think we made great strides in cutting a lot of
25 that web out. SO your small business can probably do okay

1 selling a commercial product or selling under \$100,000.

2 Senator Bennett. All right. Yes, sir.

3 Mr. Doke. When I get a new client, the first thing I
4 ask when they want to get their first government contract or
5 their first big government contract, I request the
6 opportunity to talk to their top management, board of
7 directors if possible. I sometimes get it, sometimes I do
8 not.

9 The whole point of it is to ask to discuss with them
10 the difference between commercial contracting and government
11 contracting, and the point I try to make is that the
12 government is not just another customer. It is a different
13 business. And if you are not willing to understand that it
14 is a different business, and either have the experience and
15 expertise or be willing to invest in it to get it, you
16 should not take that government contract.

17 After I spend about an hour and a half to two hours
18 with them in answering questions, most of them go forward,
19 but I say I have done my job. You know.

20 I am not trying to say it is a bad business. I make my
21 living in this business, so I am not trying to talk you out
22 of it, although you think I am. What I am trying to tell
23 you is as a matter of ethical obligation, is that if you are
24 not willing to do these things you better stay away from it.
25 Some of them stop right there and do not go forward.

1 Senator Bennett. Okay. Well, I think I am hearing
2 implementation of high road would make many companies less
3 competitive for government contracts, that most small
4 businesses could not absorb the additional costs, and it
5 would, for those that try, would push them into unionization
6 where they otherwise would not go. Is that a fair summary?

7 Mr. Schooner. I think the only quibble I would have
8 with that is the absorption of the costs. I mean it is a
9 pass-through.

10 Senator Bennett. Oh, I see.

11 Mr. Schooner. So the bottom line is it is not going to
12 have any impact to the corporate bottom line, but the
13 government arguably would pay more for labor than it
14 otherwise would.

15 Senator Bennett. The pass-through would be government.

16 Mr. Schooner. Right.

17 Senator Bennett. Yes, which is not necessarily
18 something we want.

19 Mr. Schooner. It does seem somewhat inconsistent with
20 many of the goals for our public procurement system--paying
21 more for the same service.

22 Senator Bennett. Yes. Okay. Thank you.

23 Senator McCaskill. Let me talk about some of the other
24 issues here, and I want to wrap this up with transparency,
25 all of them, because it appears to me that what we did not

1 have 20 or 30 years ago was the ability to put these things
2 out for everyone to see real-time in a fast and efficient
3 way. Have you any of you given any thought or can you
4 direct us to any written works that you are aware of?

5 I get your point that you made, Mr. Doke, about just
6 making them reveal price premium. Just that alone would
7 have an amazing impact. Really, what is really going on
8 here is all of this stuff, you all know about it, but this
9 is really a little like the Wild West in that nobody really
10 is watching. Nobody is paying attention. Nobody knows.

11 Now Katrina and Iraq and Afghanistan, I mean we figured
12 out. I was reminded of that when you talked about better
13 past performance. I would like to meet the contracting
14 officials that are evaluating that better past performance
15 since I have watched award fees being handed out for
16 contractors who have been miserable at the execution of
17 their contracts.

18 But this transparency issue is fascinating because it
19 seems like to me if we could do something as simple as after
20 the fact you got to show all the laundry. You got to show
21 exactly what the price premium was. You got to show exactly
22 what the differentials were. Maybe we could even figure out
23 how many Alaska Native corporations are fronting for major
24 corporations in major, major contracting all over this
25 government. It seems to me that that transparency piece,

1 with what we have now with the internet, could really be a
2 game-changer.

3 Mr. Doke. There is just one line item on a report that
4 has to be made now, that could be added, that would solve
5 that problem on price premiums. There are wonderful reports
6 that go up, that are required all the time through the
7 budgeting allocation and so forth, and every contract is
8 recorded. But that information is not it, and it would be
9 very simple to require it.

10 Mr. Schooner. But we can do much better. I mean we
11 can take these steps. If we just take a simple example,
12 look how far we have come just in the last few years with
13 regard to the Federal Procurement Data System. It used to
14 be you could only get these reports in print. Finally, we
15 got the FPDS online, then the FPDS next generation, but we
16 did not get the leapfrog forward until we went to
17 USASpending.gov-

18 Senator McCaskill. Right.

19 Mr. Schooner. --which frankly was piggybacked on a
20 private sector initiative, but again big step forward.

21 Take the next step. It was not so long ago where the
22 Commerce Business Daily came out in print. We moved to
23 FedBizOpps. Now you can get the solicitations online. So
24 we are making progress.

25 But just two other quick ones, or at least one other

1 quick one to look at, you know it has frustrated me for
2 years that the public and the media seem to have no interest
3 whatsoever in the number of contractor personnel that are
4 dying in Iraq and Afghanistan instead of our military
5 personnel every year. You read in the newspapers about the
6 military personnel that die. You do not read anything about
7 the contractors who are driving the truck drying all the
8 time. We are talking one out of every four bodies that came
9 home in a bag or a box since 2007, and the public will not
10 even talk about it.

11 But we just saw serious improvements on that because
12 the Department of Labor recently started publishing the
13 contractor fatality data from the Defense Base Act insurance
14 claims on the web. They just did this recently. It is very
15 easy.

16 But I want to go to Marshall's point and take it the
17 next step forward. We have consistently collected and
18 published data on the awards of government contracts. What
19 we have no insight into whatsoever is what value the
20 government actually gets for their money. Let's focus on
21 outcomes of contracts, not just the beginning, because it is
22 a night and day difference. We could do that.

23 Senator McCaskill. Okay. Talk about what that would
24 look like.

25 Mr. Schooner. Well, the bottom line is one thing that

1 we could do is correlate, at a minimum. We already have the
2 entry when the contract is awarded. Why do we not have an
3 entry for what the final delivered price of it was?

4 And again, Marshall talked about talking about
5 premiums. We have PPIRS. We have this past performance
6 database.

7 Senator McCaskill. Right.

8 Mr. Schooner. There are many, many ways that we can--

9 Senator McCaskill. Which has its flaws.

10 Mr. Schooner. Oh, just a few, but at least, but again
11 they are working on that, and it shows you how far we have
12 come and how much progress we can make.

13 But we can literally demand anything we want in terms
14 of information on outcomes, and it seems to me that that
15 information is easily available, but at some point we need
16 to take the step forward, saying this is valuable to us as
17 consumers.

18 Last point on this, on the defense side of things, we
19 constantly talk about major systems acquisitions and all of
20 the terrible things about major systems acquisitions, but we
21 only track three metrics. We track the original price of
22 the contract, we track the original schedule for deliveries,
23 and we track the original performance criteria. But those
24 are irrelevant by the time the system gets delivered 5, 10,
25 15 years later. It has evolved.

1 What we need to be thinking about are meaningful
2 metrics that track the value the government gets for the
3 money they spend, and we are talking about the kinds of
4 things that private businesses do every single day. They
5 teach it in the business schools. Successful executives
6 know how to do it. The government can do it too.

7 Mr. Nash. Let me give you an example that I just wrote
8 up. GAO has put cost-type contracts on the high-risk list.
9 Cost-type contracts are a big thing up here on the Hill.
10 They are bad contracts, terrible contracts, everybody is
11 saying.

12 GAO, in the last GAO report, they went through all the
13 stuff about they do not motivate anybody and all this
14 theory. But the one question they never asked was: How
15 many of the cost-type contracts that are awarded get fully
16 performed at the original cost?

17 When I ask industry people that, they say most of our
18 cost-type contracts, we perform at the cost. We do not come
19 in and ask for more money.

20 But we do not, and that is the outcome issue. We do
21 not know that. So we say, theoretically, cost-type
22 contracts are a bad form of contract.

23 Senator McCaskill. I think you are right. I think we
24 have not analyzed. But I would tell you in some of the
25 contracts I have really waded around in significantly, they

1 did not deliver at the price. The original LOGCAP contract
2 was estimated to be \$700 million a year, and the first year
3 it came in at \$20 billion.

4 Mr. Schooner. With all due respect, keep in mind the
5 value of the contract is that it is all about surge
6 capacity.

7 Mr. Nash. Yes.

8 Mr. Schooner. The contract is an unlimited vehicle
9 that permits the United States Military to send an unlimited
10 number of troops anywhere on the planet and sustain them
11 indefinitely, regardless of the requirement.

12 Senator McCaskill. No, no, no, no. I am telling you
13 the original estimate in theater by the contingency
14 operation was \$700 million.

15 Mr. Schooner. I will not dispute that there are warts
16 in the LOGCAP contract. But I believe a generation from now
17 at the National Defense University, at the War College, at
18 the military academies, we will look back and say despite
19 the problems at the margin, that it may be that the LOGCAP
20 contract is the single most significant advance in military
21 history. Never before has a military been able to project
22 such potency, modality and sustainability anywhere on the
23 planet. We can send our military anywhere in any numbers
24 and keep them there indefinitely, and we can fight and have
25 our troops well rested, well fed, clean and effective.

1 I am not saying that there cannot be better cost
2 control, but the vehicle itself is a remarkable achievement
3 that military historians will be talking about for
4 generations.

5 Senator McCaskill. I absolutely could not agree with
6 you more, that logistical support on a contractual basis is
7 a breakthrough, but we could spend four hours debating how
8 they did LOGCAP and the way it was executed.

9 You talk about and some of you had some really good
10 testimony about oversight of the management of the contract.
11 When I have somebody look at me in the eye, in theater, and
12 I ask them, why did that contract go from \$20 billion to \$15
13 billion in one year, and the person in charge of the
14 contract looked at me and said, it was a fluke. This is not
15 a contract management that we need to be putting down in the
16 history books as well management.

17 Mr. Schooner. And we come back to personnel once again
18 which is the one thing you have heard from all of us.

19 Senator McCaskill. Exactly, exactly. So, hopefully,
20 by the time we have refined our logistical support contracts
21 that began with LOGCAP I and now we have the evolution of
22 LOGCAP IV, we will have something that we can be very proud
23 of. But I would say LOGCAP I and II is not something that
24 any of you would want to teach.

25 Mr. Nash. Let me suggest that if it had been a fixed-

1 price contract, it would have been equally badly mismanaged.

2 Senator McCaskill. I am sure it would have.

3 Mr. Nash. The type of contract would not have impacted
4 how it was managed.

5 Senator McCaskill. I am sure it would.

6 Mr. Nash. But I will tell you one thing it would have
7 done. It would have made Marshall Doke rich.

8 [Laughter.]

9 Mr. Nash. Because if it had been fixed-price, there
10 would have been change orders--

11 Senator McCaskill. Right.

12 Mr. Nash. --process, you know, probably 20 a day in
13 the history of the contract.

14 Senator McCaskill. You are exactly right. You could
15 not be more right about that. There would have been a new
16 history-making change order operation.

17 Mr. Doke. Let me disagree with that. I was
18 fortunately broken into this business as counsel to the Army
19 Contract Adjustment Board. And you remember when the
20 missile crisis came, and we were building those silos.
21 There were claims before that board where they were having
22 2,000 change orders a day on that effort.

23 Mr. Nash. That is right. And we converted. I was
24 working for one of the companies, and we converted our
25 contract to a cost reimbursement contract because it did not

1 make any sense.

2 Senator McCaskill. Right.

3 Mr. Doke. I want to toss Josh the softball because the
4 data, having the system for the data is one thing. But as
5 we found on the advisory panel there is a great reporting
6 requirement, but we could not rely on the data because the
7 people who were entering the data did not know what they
8 were doing. So it was totally unreliable.

9 Senator McCaskill. So we get back to acquisition
10 personnel again.

11 Mr. Doke. Acquisition workforce.

12 Mr. Nash. I have got to comment on that. Regarding
13 increasing the acquisition workforce, a group of these
14 contracting people asked me yesterday asked me this: Who
15 would you hire?

16 What I said to them, if you are going to increase your
17 staff in the contracting office, do not hire any more 1102s.
18 You have got plenty of 1102s. Hire clerical people because
19 the contracting people are doing clerical work 30 percent,
20 40 percent of their time.

21 Senator McCaskill. Right.

22 Mr. Nash. And I say to them, not only are they
23 underutilizing your skills, but you are all lousy clerks.
24 You are overskilled, and that is why the data is no good,
25 because they are not good clerks. If you just hired a good

1 high school graduate who wanted to be a clerk and had the
2 competence to be a clerk, you would get a lot better data.

3 Mr. Schwartz. I think there are other reasons, and one
4 of them is that what we heard on the panel was that it is
5 easy to issue mandates to collect this data or that data.
6 But a contracting officer faced with a choice of getting the
7 contract out and acquiring the goods and services you need,
8 the last thing at the end of the day is to fill in some data
9 report. And so if you want good data, you have to pay for
10 it. It is not free.

11 It is certainly true that we found that the
12 government's data were unreliable, and because we had a
13 variety of expertise within the panel sometimes you would
14 put in--you could do a special query, and you would come
15 back with numbers that we all knew could not be right.

16 Senator McCaskill. Right.

17 Mr. Schwartz. So we have come a long way, but if you--
18 there is a long way to go to getting reliable data.

19 And take Marshall's example. I happen to think the
20 middle ground between us disclosure of data on things like
21 price premiums. That is a good idea. But if you tell a
22 contracting officer, do everything you are doing this and do
23 this too, something is going to break.

24 Mr. Nash. Yes, yes.

25 Senator McCaskill. Bob?

1 Senator Bennett. I think we have plowed most of the
2 ground we need to plow. I want to thank the panel for your
3 expertise and your willingness to mix it up between
4 yourselves, and thank you, Madam Chairman, for calling the
5 hearing.

6 Senator McCaskill. Let me see if I cannot, for the
7 record, summarize some of the high points, so that we can
8 tee off on these areas as we go forward and as we begin to
9 prepare for the hearing with the OMB personnel and with
10 procurement policy folks.

11 Transparency is important, particularly as it relates
12 to price premium.

13 We need to look at whether or not we are developing
14 competency in an area that is providing these services to
15 other agencies instead of it being a free-for-all with every
16 agency thinking they can provide every type of service with
17 competency.

18 More guidance in the FAR about what competition really
19 is, since we have not really defined what. We all use the
20 word, but it does not mean that it is. I will remember
21 Abraham Lincoln and his tail.

22 Contract management by agencies is lacking because many
23 times the people who are entering into the contracts are not
24 the people using the services, and therefore you have a
25 disconnect in the system in terms of overseeing the

1 contracts and managing them appropriately in terms of
2 getting value because the folks who are using the services
3 have nothing to do with executing the contracts.

4 And overall, we have the acquisition workforce. Susan
5 Collins, who normally sits in your chair, Bob Bennett, would
6 be glad that we are ending with that because obviously she
7 has worked on this for a while, and I have joined her in
8 that effort. And I know Senator Bennett agrees that you do
9 get what you pay for, and we will not fix most of these
10 problems until we get to the point that we have an
11 acquisition workforce that is the right size and the right
12 competence, to administer these contracts in a way that
13 taxpayers will get value.

14 There is an awful lot of work to do in this area.
15 Frankly, there are some questions that I had that we did not
16 get to. But we may prevail upon you, a couple of you or
17 maybe all of you, and will not give all of you all of the
18 questions but divide them up, because I think all four of
19 you could speak with authority on any of the questions we
20 would have in this area, in a way that is very reliable and
21 that frankly I would take to the bank.

22 Senator Bennett. I agree with your summary, Madam
23 Chairman, but let the record show the Ranking Member also
24 summarizes that he does not like high road.

25 [Laughter.]

1 Senator McCaskill. I think we figured out that. I
2 think we figured out the high road part.

3 Once again, you all generously gave a significant part
4 of your time this afternoon. This is something I actually
5 enjoy, this area of government policy. I actually read IG
6 and GAO reports as recreational reading. I know I am weird,
7 but I do, and I am going to continue down this path with
8 hopefully some tenacity and see if we cannot prevail upon
9 OMB.

10 As I tell the White House how you feel about high road,
11 Senator Bennett, I am going to also prevail upon them to see
12 if we cannot get OMB and maybe Jeff Zients, who is supposed
13 to be performing a government-wide performance function.
14 This would be a perfect area for this performance officer to
15 dive into because it is government-wide and there could be
16 real impact with a little bit of effort from OMB.

17 So, thank you all very much.

18 [Whereupon, at 4:12 p.m., the Subcommittee was
19 adjourned.]