STATEMENT BY

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BEFORE THE

SUBCOMMITTEE ON OVERSIGHT OF GOVERNMENT MANAGEMENT,
THE FEDERAL WORKFORCE, AND THE DISTRICT OF COLUMBIA

OF THE

SENATE COMMITTEE ON HOMELAND SECURITY
AND GOVERNMENTAL AFFAIRS

ON

BALANCING ACT: EFFORTS TO RIGHT-SIZE THE FEDERAL EMPLOYEE-TO-CONTRACTOR MIX

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Introduction

Chairman Akaka, Ranking Member Voinovich, and other distinguished members of the Senate Homeland Security and Governmental Affairs Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, my name is Mark Whetstone, and I am President of the American Federation of Government Employee's National Citizenship and Immigration Services Council. I greatly appreciate this opportunity to provide our union's input at today's hearing. The many issues within your subcommittee's jurisdiction may not generate the most attention, but there's no denying their vital importance to all Americans who depend on the federal government for efficient, effective, and reliable services. On a personal note, let me just say that it is a real thrill for me to discuss these issues with you this afternoon after following your work over the years with considerable interest.

As an employee of the Citizenship and Immigration Service, I served as an Immigration Services Officer at the Nebraska Service Center, where I adjudicated benefit applications and petitions. I hope that my own experiences will provide the subcommittee with an important perspective that might otherwise be missed—that of rank-and-file federal employees who work on the front-lines at the Department of Homeland Security (DHS) and are confronted every day with the consequences of wholesale privatization.

In fact, I used to work as an Immigration Information Officer (IIO). The members of this Subcommittee may recall that, beginning in 2003, the previous Administration reviewed for privatization the work of several hundred IIOs, DHS employees who are responsible for the investigation and adjudication of applications for immigration rights and benefits. IIOs must interpret and execute complex and frequently-changing immigration and naturalization laws and exercise discretion, often to promote public safety. There was no question that we performed functions that should have been unambiguously reserved for federal employee performance. Moreover, according to internal documents, program managers opposed the privatization effort because the study wouldn't have generated efficiencies. Nevertheless, the OMB Circular A-76 privatization study went forward. Why? Because the Office of Management and Budget (OMB) had imposed a numerical quota on all agencies, including DHS, that compelled them to study large numbers of federal employees for privatization within certain periods of time. In fact, according to internal DHS documents uncovered by this Committee, the A-76 quota was nakedly political: "Pressure exists by the Administration to conduct studies. Cabinet requests studies to be completed by elections in November". Thanks to successful floor amendments to the House and Senate versions of the FY05 Homeland Security Appropriations Bill, the privatization study of IIOs was scrapped. However, if not for the dogged leadership of Chairman Joe Lieberman (I-CT) and key support from Ranking Member Susan Collins (R-ME) for the Senate amendment to stop the IIO privatization study, I would not be here today because I and many other inherently governmental employees would likely have been privatized. I should also say that AFGE's ultimately successful effort to stop the privatization of IIOs inspired me to become a union leader.

DHS Overview

No department has a mission more important than that of DHS. Although the department depends on Coast Guard personnel, civilian personnel, and contractors, DHS has become one of the most heavily-outsourced in the federal government. An imprecise, but first of its kind, contractor inventory carried out in February 2010 by DHS found that the department employed 210,000 contractors and 188,000 federal employees.

Many DHS contractors have been assigned functions that should only be performed by federal employees—including making policy and managing acquisition, the consequences of which AFGE members understand all too well. A 2007 GAO study found that the Coast Guard had hired a contractor to manage the agency's OMB Circular A-76 activity. Because the contractor was being paid for each federal employee subjected to an A-76 study, you will not find it hard to believe that the number of my Coast Guard colleagues who were reviewed for privatization shot up dramatically.

A 2008 GAO report concluded that DHS did not assess the risks of hiring contractors to perform contract management and support services that had the potential to allow contractors to make decisions best left to government officials. Poor oversight at DHS has led to catastrophic failure in major contracts, such as the $2 billion "virtual border fence" along the US-Mexico border. In April 2010, a DHS official described the so-called SBInet border project as a "complete failure." The project was proceeding so slowly that, in March 2010, one House lawmaker estimated that it would take DHS 320 years – or until the year 2330 – to fully deploy SBInet along the Southwest border.

In other cases, DHS dispensed with the pretense of oversight , and contractors were assigned to manage their own work. A DHS Inspector General (IG) report in April 2010 found that contractors determined if their own invoices were "reasonable." And DHS is so heavily dependent on contractors that it has problems finding government employees to oversee contracts. This was the case with a $40 million information technology program contracted by the Federal Emergency Management Agency (FEMA). The DHS IG further reported that FEMA had chosen a former contractor employee to oversee that contractor's performance and had more than a dozen former contractor employees working in FEMA's Mitigation Directorate. "The misplaced allegiances of key directorate employees hampered the performance of (the contract)," the IG reported.

It is often said that DHS was forced to use contractors because it was set up in a hurry and it takes too long to hire federal employees. Unfortunately, that explanation doesn't jibe with reality. While TSA did have to be established after 9/11, the other agencies that Congress combined to create DHS were longstanding entities. And while contractor employees may have been initially necessary to perform some functions that should normally have been reserved for federal employees, more than sufficient time has elapsed to bring those functions back in-house. Indeed, as GAO points out, DHS officials regularly renewed contracts for functions that should have been reserved for federal employees without even considering in-house performance.

Focus On TSA

Since its creation by the Aviation and Transportation Security Act (ATSA), TSA has been transformed from an agency quickly established to address grave public concerns in the wake of the deadly attacks of September 11, 2001, to one of many federal agencies with the important mission of protecting the country from threats and attacks. Because the urgency of events required a rapid establishment of TSA, ATSA allowed the agency exceptions to standard federal sourcing as well as personnel laws and regulations. Yet almost a decade later, the agency continues to use these exceptions. With little analysis of efficiency, security, fairness to federal employees or prudent use of taxpayer money, TSA has outsourced federal worker duties at the agency. GAO and IG reports have chronicled wasteful spending. News reports and Congressional investigations have documented compromises of security by contract employees who edited the Transportation Security Officer (TSO) checkpoint procedures in such a way that redacted portions were posted online and circulated around the world by bloggers, necessitating changes in screening procedures. Last week a Massachusetts couple was arrested on charges of using information they received from a contract employee in TSA's human resources office to steal the identities of dozens of TSOs at Boston Logan International Airport. These outcomes could have easily been avoided by applying the same contracting rules to TSA as other federal agencies. AFGE strongly urges TSA to conform its contract procedures to those of the federal government, and for Congress to make those requirements law, in addition to granting TSOs the same collective bargaining rights and workplace protections of other federal employees.

The most egregious of TSA's outsourcing effort is the Screening Partnership Program (SPP), a system that converts the inherently governmental federal screening duties performed by TSOs to private contractors without evidence that they provide the same level of security as federal employees at lower costs. The SPP is contrary to Congressional intent to federalize airport security and violates statutory prohibitions against the outsourcing of federal jobs without allowing federal employees to compete for those jobs. Before privatizing work performed by federal employees, agencies are generally required to demonstrate through a cost comparison study (under the rules of OMB Circular A-76) that a contractor is more efficient. The SPP includes none of the safeguards such as a cost comparison of federal employee performance to that of the contractor, risk analysis determination or any demonstration of savings. If the A-76 rules that govern outsourcing in the rest of the federal government were applied to the SPP, TSA screening jobs would be kept in-house if for no other reason than the costs of extra oversight needed for contractor employees would make contracting too expensive. Although the SPP gives laid-off TSOs a qualified and unenforceable right to a job with the contractor, the SPP does not remove federal screener managers. Instead, it adds contractor managers, creating another layer of overhead and expense. AFGE firmly believes the duties of screening passengers and baggage at U.S. airports is best performed by cost-effective, highly-trained federal employees.

On March 30, 2010, OMB issued a proposed Policy Letter on the Work Reserved for Performance by Federal Government Employees providing guidance regarding three categories of federal work that are generally reserved for federal employees: inherently governmental functions, critical functions, and functions that are closely associated with the performance of inherently governmental work. The proposed policy letter includes an Appendix with an illustrative list of functions closely associated with

the performance of inherently governmental work. That list includes the function described as "Provision of special non-law enforcement security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details". The work of TSOs clearly falls into this category, making the SPP contrary to OMB's own concept of work that must be performed by federal employees.

AFGE is particularly concerned about the advancement of the SPP in the border state of Montana. TSA recently awarded private security contracts under the SPP for seven airports and is considering the applications of seven additional airports to use private contractors. AFGE TSO members in Montana report they have faced retaliation and intimidation from TSA management and airport authority officials for actively opposing the program. These actions by TSA management directly contradict the agency's policy prohibiting TSA managers and supervisors from making "remarks that directly or indirectly threaten an employee with the loss of any benefit such as promotion or leave approval, or threaten to take action against an employee engaging in protected activities". The allegations are serious and should be investigated by TSA management and the TSO workforce assured they will be treated fairly. TSA should be required to follow the same rules for outsourcing as the rest of federal government and Congress should close the loopholes in ATSA that allow the agency to circumvent standard federal sourcing rules.

How We Got Here

I am proud to be a DHS employee. And I am proud of the work performed by the department's Coast Guard personnel, civilian employees, and contractors. But DHS has swung dangerously out of balance in its overreliance on contractors—to the detriment of both our mission and the nation's taxpayers. DHS employees are grateful that the Senate Homeland Security and Governmental Affairs Committee, in bipartisan fashion, has historically taken the lead in drawing attention to the consequences of the department's out-of-balance workforce. The department's new management shows a commendable determination to restore DHS' accountability, but there's no question this committee's continued bipartisan leadership is necessary to ensure that good intentions are translated into actual results.

I know that there are some who would prefer to keep history out of our discussion, perhaps because they don't want others to be reminded of the roles they played in the wholesale privatization that made insourcing and expansion of the definition of inherently governmental so imperative, but we will never be able to create lasting and meaningful reforms until we have learned from history. This wholesale privatization occurred during the two previous Administrations, one Democratic and one Republican. Thus, it would be a mistake to assign responsibility for wholesale privatization to one political party. However, there is no reason why the effort underway to rebalance the federal government's civil service and contractor workforces in DHS specifically, and the federal government generally, should not be more bipartisan than the ignoble effort that created such a terrible imbalance.

We didn't get here by accident. We got here because of politics and the resulting policy choices.

In the Clinton Administration, the mantra was "steer, don't row"—that federal employees should do nothing more than supervise contractors, even if outsourcing cost more or resulted in inferior service. As it turned out, federal employees were often prevented from steering as well as rowing, so contractors began to supervise other contractors or even to supervise themselves. During the Bush Administration, the philosophy could best be summed up by the now infamous "Yellow Pages" test: if there's a function a contractor wants to perform, then we should contract it out.

- It was not an accident that inflexible personnel ceilings were imposed on the federal civil service which forced agencies to contract out work which either should have been performed in-house because of its sensitive nature or could have been performed more efficiently by federal employees. If only I had a dollar for every time I have heard a manager say that for policy reasons work should be performed by civil servants but they had to outsource because while there is always money to hire a contractor there is rarely authority to hire a federal employee.

- It was not an accident that the Bush Administration implemented a "competitive (sic) sourcing" initiative that required all agencies to conduct privatization studies of hundreds of thousands of federal employees or risk having their budgets cut, using an OMB Circular A-76 process that, according to the GAO and the DoD IG, overstated savings and understated costs. In fairness to the Bush Administration, it must be pointed out that the Clinton Administration had earlier launched its own quota-driven "competitive (sic) sourcing" effort in DoD, which also ended in failure.

- It was not an accident that, despite all of the doubletalk about the value of public-private competition, the vast majority of work that was contracted out during the previous two Administrations occurred through direct conversions (i.e., without any public-private competition—indeed, usually without even consideration of in-house performance).

- It is not an accident that agencies keep meticulous records about federal employees—where they work, how many there are, how much they cost—but that contractor inventories are still under construction. It is not an accident that controls are still imposed on the numbers of federal employees on agencies' payrolls—but that we don't even know how many contractor employees there actually are. It is not an accident that agencies must justify in the budget process any increase in their in-house workforce, but that new and sometimes even unrelated functions can be added to existing contracts with mere keystrokes.

- It is not an accident that acquisition personnel were instructed to consider contractors to be their partners, rather than profit-seeking firms that should be held at arm's length. It is not an accident that, as a result, conflicts of interest occurred more frequently, rather than exceptionally, with senior acquisition personnel taking lucrative positions with the contractors that they had ostensibly been regulating and former senior officials cashing in on inside knowledge by helping their new private sector employers to take over their old programs.

- It is not an accident that until the end of the Bush Administration sourcing went one way—out—despite the seemingly endless number of contracts that are poorly performed, were awarded without competition, or include functions too important or sensitive to be privatized.

- And it is not an accident that agencies, as reported by GAO, are either defiant or ignorant of requirements that they give careful consideration before contracting out important or sensitive work that arguably should be reserved for federal employee performance or subject that work to more searching scrutiny after it has been outsourced.

While costing taxpayers and undermining services, the excesses of wholesale privatization have inspired promising reforms. There are some who believe that contractor inventories and insourcing are creations of the Obama Administration. Not true. Those reforms were established for the Department of Defense through the FY08 National Defense Authorization Act—which was signed into law by President Bush—thanks to Representative Ike Skelton (D-MO) and Senator Carl Levin (D-MI), the Chairs of the House and Senate Armed Services Committees, as well as Representative Jim Langevin (D-RI), Senator Barbara Mikulski (D-MD), and Senator Edward Kennedy (D-MA).

With respect to the non-DoD agencies, Senator Dick Durbin (D-IL) and Representative Jose Serrano (D-NY), as Chairs of the Senate and House Financial Services Appropriations Subcommittees, have taken the lead, working with Senator Mikulski, including provisions in recent bills to prohibit direct conversions, to require the development of an insourcing policy for commercial work as well as work that should be reserved for federal employee performance, and to establish inventories of service contractors. No discussion of right-sizing the federal employee and contractor workforces would be complete without extensive reference to the landmark laws enacted because of courageous Congressional leadership.

Summary

Here is AFGE's checklist for rightsizing the federal workforce:

1. Expand, clarify, and—above all—enforce the definition of inherently governmental.

2. Compile and review service contractor inventories, consistent with the law, and then integrate the results into the budget process.

3. Correct, through insourcing or modification, contracts that include functions that should not be outsourced, were inappropriately outsourced, or are inefficiently performed, consistent with the law.

4. Eliminate abuse of personal services and advisory and assistance contracts.

5. Enforce prohibitions against direct conversions.

6. Free agencies from in-house personnel ceilings.

7. Fund existing human resources flexibilities.

1. EXPAND, CLARIFY, AND ENFORCE THE DEFINITION OF INHERENTLY GOVERNMENTAL.

Significant amounts of work that should be reserved for federal employee performance are now performed by contractors because the current definition of inherently governmental is narrow, unclear, and unenforced. Desperately striving to retain in their agencies important and sensitive functions, some managers have tried to compensate for the narrowness of the existing definition by employing weaker designations—closely associated with inherently governmental, critical, core, etc.—to protect from outsourcing pressures functions that may not meet the statutory definition but should still be performed in-house. However, these efforts have left the definition even more unclear. And, of course, even a robust and crystal-clear definition is meaningless if it is not enforced. AFGE is submitting detailed comments to OMB later this month in response to the draft proposal for a new definition of inherently governmental. However, although the effort to redefine the term is important, it is only one part of the overall effort to rebalance the federal workforce.

a. OMB's proposed definition of work that should be reserved for performance by federal government employees should abandon the implication that contractors should necessarily perform "commercial" functions.

In the "Purpose" section, the policy letter extols the virtues of contractors and makes it executive policy that reliance on contractors is "not a cause for concern" as long as the work is commercial and not critical and is appropriately managed by federal officials. There is no requirement that use of contractors in such situations be cost effective. Moreover, there is no mention that federal employees should also be considered for commercial functions. The guidance should extol the virtues of federal employees and their indispensable contributions to federal agencies, including expertise, flexibility, innovation, cost-effectiveness, and dedication to mission.

The guidance should also explicitly state that the use of federal employees for commercial functions is not a cause for concern, and thus those commercial functions performed by federal employees should not be targeted for outsourcing, as they were in the two previous Administrations. Internal reengineering of commercial functions currently performed by federal employees is far more likely to generate real efficiencies because such an approach avoids the costs and controversies of outsourcing.

Moreover, there are many reasons, other than cost effectiveness, why agency managers might need to use federal employees to perform commercial functions. Agencies may want to avoid conflicts of interest that would allow contractors to substitute private interests for the public interest. Agencies may want to avoid the risk of a contractor monopoly on the expertise to perform a particular function. Agencies may want to ensure that the public is confident that government officials are performing certain government actions instead of contractors. Certain functions may be so intertwined with other functions that it is more effective to have multi-tasking federal employees performing those functions than separate them for contracting. Some functions require detailed knowledge of complicated rules and are best performed by long-term federal employees rather than temporary contractors. And, of course, agencies often want to retain institutional knowledge of certain functions.

b. OMB's proposed definition should establish a rebuttable presumption that federal employees should perform functions that are critical or closely associated with inherently governmental functions.

It is imperative that there be a rebuttable presumption in favor of federal employee performance of "closely associated" and critical functions. The reservation of functions for performance by federal employees is to protect the public interest. An agency should be required to determine whether that public interest would be harmed before such functions can be outsourced. Presumptions could be rebutted when agencies examine individual functions in depth during reviews of the contractor and in-house inventories.

During the two previous Administrations, there was a prejudice in favor of contractor performance of not just "closely associated" and critical functions, but of inherently governmental functions as well because of a toxic combination of politics, conflicts of interest, and human capital issues (both real and imagined). There must be a rebuttable presumption in favor of federal employee performance of "closely associated" and critical functions – if only to counteract the real-world prejudices that conspire to drive such functions into the private sector.

c. OMB's proposed definition of inherently governmental should adequately protect the public from contractor influence on agency decision-making.

The definition of inherently governmental should better insulate agency decision-making from private interests. The guidance notes that contractor performance should not preempt federal officials' decision-making processes, discretion or authority. However, the draft guidance is not clear regarding the situations in which contractor performance could lead to such preemption.

Final decisions must be made by agency officials, and those decisions must be based on informed, independent judgments made by knowledgeable agency officials. Agency decisions can be preempted by contractors not only when contractors make the final decisions in lieu of agency officials but also when contractors make recommendations that contribute significantly to agencies' final decisions, and agency officials do not have the time and resources to independently review and evaluate contractor recommendations. Thus, it is vital that the redefinition of inherently governmental specifies that agencies must retain sufficient in-house staff and expertise to thoroughly vet contractor recommendations and make independent judgments.

It is also inappropriate for contractors to contribute significantly to a determination about government benefits where there is little or no oversight by agency officials. For example, the draft guidance states, in (5-1(a)(2)(i)), that a function may be performed by a contractor if the decision making is limited by guidance that identifies specified ranges of acceptable decisions and subjects the discretionary authority to final approval or regular oversight by agency officials.

However, many government functions, e.g., benefits determinations, are subject to oversight by agency officials in only a small fraction of cases, which, effectively, renders the initial determination final in all other cases. Because each benefits determination results in the granting or denial of a benefit, only those determinations that are substantively reviewed by federal employees should be made available for contractor performance.

Finally, the proposed redefinition oversimplifies the concept of discretion by stating that a function may be performed by a contractor if the decision-making is limited by guidance that identifies specified ranges of acceptable decisions. Many subject areas are quite sophisticated and require years of experience and the knowledge and use of numerous statutes, regulations, procedures, policies, and other federal guidelines, some of which are broad, unspecific and/or poorly written. The fact patterns presented can be unique and may not lend themselves to easy resolution. While in some cases a decision can be appealed, approvals are rarely appealed and thus rarely reviewed.

The redefinition of inherently governmental should be clarified so that only those individual exercises of discretion that are actually substantively reviewed by federal employees and based upon simple, straightforward guidance can be determined to not be inherently governmental.

When I review OMB's draft guidance, I can't help but think about my experience as an IIO, and I ask myself this question: would the functions performed by an IIO be reserved for federal employee performance under this new definition of inherently governmental? Unfortunately, the answer is almost surely no. DHS management, if so inclined, could simply insist, as it did under the previous Administration, that an IIO is making decisions "in accordance with pre-established guidelines or in accordance with the proper oversight of higher ranking officers. As a result, these actions are not discretionary decisions...", even though IIOs, according to their job descriptions, must "use on-the-spot judgment" in conducting background investigations; must interpret and execute "a dynamic body of law that is constantly being changed and updated"; and must exercise discretion, usually without management review, that significantly affect(s) the life (and) liberty of private persons.

d. OMB's proposed guidance should provide meaningful criteria to identify critical functions.

OMB's draft guidance includes two apparently contradictory definitions for critical function:

1. a function that is necessary to effectively perform and maintain control of agency mission and operations, and

2. a function that would expose the agency to risk of mission failure if performed entirely by contractors.

The first definition would allow agency managers to define critical function based on their agency's particular circumstances, while the second definition requires a much higher threshold of mission failure. The second definition should be eliminated. Agency managers should not be hamstrung in reserving functions for federal employee performance by requirements for finding threats of mission failure. Public service is not a pass/fail system where the only goal is providing some level of service to taxpayers. The mission of government is to provide effective service to taxpayers, and failure to do so is mission failure. Taxpayers expect agency managers to step in long before the government fails to defend the country, provide medical care to veterans, or contain oil spills in the ocean.

In addition, agency managers must be able to classify fundamental functions as critical in order to maintain control of their organizations, such as communications (information technology), capital assets (finance, accounting, building maintenance) and human capital (personnel, security). Without the ability to freely make decisions about the extent to which these functions should be reserved for federal employees, agency officials will not be able to run their organizations, no matter what the mission.

e. OMB's proposed guidance should provide clear criteria for identifying positions necessary to develop and maintain sufficient organic expertise and technical capability.

The statute requires OMB to provide criteria to identify positions necessary to develop and maintain sufficient organic expertise and technical capability separate and apart from the determination of critical functions. OMB failed to do this by reserving the analysis of organic expertise/technical capability only for positions performing functions already deemed to be critical. Under OMB's proposed framework, a function isn't critical unless contractor performance would lead to mission failure, and an agency can't reserve performance for federal employees unless a function is critical.

OMB should add a fourth category to the guidance that provides criteria for identifying positions that are necessary for developing and maintaining sufficient organic expertise and technical capability in any function now and in the future. Those criteria should include the expertise and capability needed to oversee contractors and reconstitute a function in-house in the event of contractor failure. In addition, positions should be reserved that provide unique experience that can only be acquired by performing the function or is necessary for other federal employee positions.

2. COMPILE AND REVIEW SERVICE CONTRACTOR INVENTORIES, AND THEN INTEGRATE THE RESULTS INTO THE BUDGET PROCESS

Although the definition of "inherently governmental" is important, the processes by which agencies identify contracts that include functions that are inappropriate for contractor performance and then correct those contracts through insourcing or modification are even more important.

a. COMPILE INVENTORIES OF SERVICE CONTRACTS

No effort to ensure federal employee performance of functions that are critical, closely associated with inherently governmental functions, and inherently governmental can be taken seriously without comprehensive and expeditious compliance with laws enacted that require all agencies to establish and then review inventories of their service contracts.

Per Section 743 of the FY10 Financial Services Appropriations Bill, non-DoD agencies are required to identify for each service contract a description of the services purchased, the overseeing and requiring components, the total dollar amount obligated and funding source, the total dollar amount invoiced, the contract type and date of award, the name of the contractor and place of performance, the number and work location of contractor and subcontractor employees, whether it is a personal services contract, and whether it was awarded non-competitively. A very similar contractor inventory requirement was established for DoD in the FY08 Defense Authorization Act.

If we are serious about ensuring in-house performance of functions that should be reserved for federal employee performance, then we must block attempts to gut the requirement that non-DoD agencies establish contractor inventories. I will now address four OMB proposals that would dramatically reduce the scope of the inventories for non-DoD agencies and explain why these proposals are bad policy, inequitable, and unnecessary.

1. *limit the non-DoD inventories to only new contracts*

Bad policy: As most contracts are not new, but simply rolled over again and again, this would exclude a huge number of contracts, because most service "contract actions" are awarded through the execution of task orders under previously awarded contracts. The reporting of service contracts awarded as task orders would not occur for many years into to the future. Indeed, because some indefinite delivery, indefinite quantity contracts contain "evergreen" clauses that allow contracts to extend for 20 years, the reporting on these contracts will not occur for almost two decades. This limitation means that agencies would be deprived of the ability to identify all of the current contracts that include functions that should be reserved for performance by federal employees.

OMB's position is contrary to its aggressive effort to implement a Federal Awardee Performance and Integrity Information System (FAPIIS). In October 2008, pursuant to Section 872 of the FY2009 National Defense Authorization Act, Congress enacted a statutory requirement for the Office of Management and Budget to create and "maintain a database of information regarding the integrity and performance of certain persons awarded Federal agency contracts and grants..." OMB has moved aggressively to implement this law, requiring current federal contractors to enter extensive information on legal and administrative proceedings as well as settlements into an on-line government maintained database. Federal contractors are required to provide extensive information on legal proceedings and settlements related to all federal and state contracts (including current contracts) over the preceding five years. Information must be provided before a contractor can receive an additional federal contract or grant. Current federal contractors have spent considerable sums to accurately input this data in order to be eligible to receive future contract awards. The time and money spent by contractors collecting, inputting, and updating data is not reimbursed by the federal government. The mechanism through which OMB has chosen to implement this legislation subjects contractors to significant monetary liability under the False Claims and False Statements Acts if the legal proceedings and settlements are improperly or not fully disclosed. It is unclear why OMB can require this level of detail to comply with the FAPIIS inventory but not the even more important Section 743 inventory.

Not necessary: The DoD contractor inventory includes no such exclusion. Indeed, experts point out that it is just as easy to include an existing contract in the inventory when it is renewed as it is a wholly new contract.

Inequitable: The analogous Federal Activities Inventory Review (FAIR) Act inventory includes functions currently performed by federal employees, not just work assigned to in-house personnel after the law's enactment.

2. *allow OMB to determine which contracts and categories of contracts should be covered*:

Bad policy: Even if OMB really does eventually include acquisition and information technology contracts in the non-DoD contractor inventories, as has been suggested, this exclusion by itself guts the inventory. The same problems found in acquisition and information technology contracts can be identified across the government—from safety inspections to eligibility determinations. Allowing OMB to exclude the rest of the government from the non-DoD inventories means those problems will become even worse because of continued ignorance and inattention.

Indeed, this exclusion would undermine the ostensible rationale of identifying only acquisition and information technology contracts. As borne out by the experience of the Department of the Army, the label given to a contract can be very misleading. Until the contents of an inventory are actually reviewed, an agency does not know which functions are actually being performed—whether they are or are not, say, acquisition—and whether the functions include some that should be performed by federal employees.

Not necessary: The DoD contractor inventory includes no such exclusion. If DoD, which will have the largest and most complicated inventory, can cover all functions, it is not unreasonable to expect non-DoD agencies to do the same.

Inequitable: The analogous FAIR Act inventory includes all functions performed by federal employees, not just acquisition and information technology.

3. *exclude from coverage significant numbers of contracts through excessive minimum thresholds*

Not necessary: DoD has no minimum threshold for its inventory.

Bad policy: This particular exclusion means that large numbers of contracts for specialized management services, e.g., policy and planning, which often include functions that should be reserved for federal employee performance, will not be part of the inventory. The numbers of contracts and contract dollars that would be excluded are significant.

Inequitable: The analogous FAIR Act inventory covers all functions performed by federal employees, regardless of size.

4. *exclude from coverage entirely all agencies which don't have Chief Financial Officers (CFO's)*

Bad policy: That agencies are small doesn't mean they don't have the same needs as large agencies to identify inherently governmental functions inappropriately outsourced and then to insource or modify those contracts. Indeed, given that smaller agencies receive less oversight and surveillance, their need for inventories may actually be greater.

Not necessary: DoD includes several smaller agencies, but they will still be compiling contractor inventories.

Inequitable: The analogous FAIR Act requirement covers many agencies that don't have CFO's. The absence of inventories means that these agencies will be unable to identify functions contracted out that should be reserved for federal employee performance and make more difficult any insourcing. In order to promote equity, agencies that don't have CFO's should also be prohibited from complying with the FAIR Act and conducting A-76 studies, if OMB insists on this change.

b. REVIEW THOSE INVENTORIES TO DETERMINE WHICH CONTRACTS NEED TO BE MODIFIED OR INSOURCED

Compilation of the contractor inventories is only the first step. The contractor inventory laws require agencies to review those contracts to, among other things, determine if personal services contracts have been authorized; ensure that contractors are not performing inherently governmental contracts; and determine whether contracts that include closely associated with inherently governmental functions should be corrected or insourced, consistent with the law.

If an agency does not know what functions are being performed under a contract and how they are being performed by that contractor, then it does not know whether that contract includes functions that should be reserved for performance by federal employees. The contracts in the inventory must be reviewed individually because an examination of the written terms of a contract at the time it is awarded is insufficient. Contracting officers are unlikely to acknowledge that the contracts they write include inappropriate functions. Moreover, contracts change over time, and informal adaptations are often not reflected in writing.

The Department of the Army has already developed a process that allows for accurate determinations of whether contracts include functions that should actually be performed by federal employees—the Panel for Documenting Contractors (PDC). According to the Army, the PDC reviews descriptions of how a function is performed by a contractor, taking into account oversight staffing levels and other relevant facts. The panel includes programmatic experts as well as procurement personnel and is advised by the General Counsel. While most familiar with how a function is being performed, the requiring activity may not understand how to apply the law to ensure that the function is not being inappropriately performed by contractors. The PDC corrects or corroborates the requiring activity's determination. The results of the PDC process are linked into the Army's insourcing plan or for projections of contractor requirements by function for proposed programming and budgeting.

According to the Army, of the 95,000 contractor employees accounted for in its inventory, 2,000 perform inherently governmental functions, 41,000 perform closely associated with governmental functions, 1,500 are performing unauthorized personal services contracts, while another 50,000 are deemed appropriately contracted.

c. INTEGRATE THE RESULTS OF THOSE REVIEWS INTO THE BUDGET PROCESS

The contractor inventory will not be taken seriously if reviews are not used to inform budget decisions, as Congress has required for the Department of Defense through Section 803 of the FY2010 National Defense Authorization Act, which requires the department to display annual budget requirements for procurement of contract services.

As report language noted: "(I)ncluding in the annual budget submission the total amounts for the procurement of services and the number of full-time equivalents requested by each (DoD) component, installation, or activity should provide greater clarity on amounts proposed to be spent annually on contract services. In addition, specific break-outs of how the money is obligated for each type of service should be reflected in annual contract inventories compiled by the military departments and defense agencies. The information in the budget submission, together with the detail provided in the annual inventories, should provide the information needed for improved oversight by (DoD) of the procurement of contract services."

3. **CORRECT, THROUGH INSOURING OR MODIFICATION, CONTRACTS THAT INCLUDE FUNCTIONS THAT SHOULD NOT BE OUTSOURCED, WERE INAPPROPRIATELY OUTSOURCED, OR ARE INEFFICIENTLY PERFORMED, CONSISTENT WITH THE LAW.**

We've all heard the DoD term "target-rich environment". Given the documented large numbers of contracts that were awarded during the previous two Administrations without competition that include functions that are inappropriate for contractor performance, and that are being poorly performed, it is safe to say that we are in a "target-obscenely wealthy environment". Everywhere one turns, almost literally, there are opportunities to insource, consistent with both law and the public interest. OMB's December 2009 report on pilot projects appears to include few if any instances of agencies even considering insourcing work that has been poorly performed or was contracted out without competition, raising questions about whether the Administration is in compliance with the legal requirement to give such functions "special consideration" in the insourcing context.

We understand the interest in focusing on insourcing inherently governmental, "closely associated", and critical functions. However, even that effort is proceeding slowly, given the myriad of possibilities. With respect to insourcing "closely associated" functions, there are so many targets that even our contractor friends lament they are performing work they shouldn't.

Here are case studies for insourcing that aren't being widely discussed but that ought to be placed "at the top of the pile". The diversity—of agencies, of functions, and of rationales for insourcing—is impressive.

Case Study #1
Agency: Department of Housing and Urban Development (HUD).

Function: Administration and oversight of the Section 8 Housing Program.

Rationales: Save money and restore public control of functions that are both inherently governmental and "closely associated".

HUD should insource the day-to-day administration and oversight of the Section 8 housing program that subsidizes the rent of low-income Americans living in privately-owned housing developments. This oversight work was outsourced in 1999 to state housing agencies, some of which subcontracted the work to private companies. The contractors are known as Performance-based Section 8 Contract Administrators (PBCA).

In 2009, HUD's Office of Inspector General (OIG) issued a critical report on the contracts for PBCAs. The OIG reported that HUD "did not always ensure accountability" for results and said that HUD "did not obtain the best value for the $291 million spent in 2008" on PBCA services. As a first option for HUD, the OIG suggested that the agency should increase its staffing levels and "bring all of the contract administration functions back in-house" – i.e., insource. That option, the OIG said, "eliminates layers of management and profit that are inherent" in obtaining the services under contract.

Case Study #2
Agency: Department of Veterans Affairs (DVA).

Functions: Cemetery Caretaking and Medical Facility Maintenance.

Rationale: Restore public control of critical functions that historically have been poorly performed by contractors, ensure performance by a particularly qualified workforce, and fulfill a sacred obligation to our nation's veterans.

The National Cemetery Administration's cemetery caretaking—mowing, trimming, headstone setting and interment—becomes a critical function because of its importance to the department's mission to care for and honor veterans. DVA's in-house cemetery caretakers, most of whom are veterans themselves, are particularly qualified to conscientiously carry out their responsibilities and to comfort and support grieving families. Although DVA boasts publicly that its cemeteries are unique because caretakers bring a "personal commitment" to the job, these functions are being increasingly transferred to private contractors in violation of the law and with no regard for the impact on agency operations and mission.

The Veterans Health Administration's (VHA) medical facility support services—including grounds keeping, housekeeping and environmental engineering—have traditionally been performed largely by disabled veterans recovering from post-traumatic stress disorder, substance abuse, and homelessness. In-house personnel have traditionally performed better than their contractor counterparts because, as veterans, they take more pride in maintaining the facilities (which they also use as patients). Moreover, contractors, who juggle multiple contracts, are frequently not on-site to take care of emergency situations such as snowstorms. Despite the department's obligations to its employees and veterans, VHA is also directly converting these functions to contractor performance in violation of the law.

Case Study #3
Agency: Citizenship and Immigration Services (CIS), DHS.

Function: Background investigations of immigrants in order to determine eligibility for legal immigrant status and eventual citizenship.

Rationale: Restore public control of a critical function.

CIS should insource the function, currently outsourced, in which contractors search the documentation and records of immigrants for names and aliases for input into government databases for further analysis. It is vital that the search for names and aliases be thorough and complete, because those intelligence and law enforcement databases provide information that allows federal adjudication officers to ensure that legal immigrants are who they say they are, have proper documentation, and have not been convicted of any crime that would prevent them from earning legal immigrant status and / or eventually becoming full citizens. Moreover, once an individual obtains a legal immigration document as a result of this process (including a work permit or a green card), that document can be used to obtain other benefits such as a driver's license.

This function is currently performed by 750 employees of a foreign-owned contractor. DHS also uses 400 federal adjudication officers who are ultimately responsible for the alias computer checks but have no control over how they are performed. The selection of names and aliases, and alternative spellings, to be inputted into the databases is critical to the federal adjudication officers' decisions, and thus the agency's mission, but it is performed by contractors; that function should be insourced.

Case Study #4
Agency: Federal Protective Service (FPS), DHS.

Function: Security.

Rationale: Restore public control of a critical function that historically has been poorly performed by contractors.

The excessive use of contractor rent-a-cops to protect federal facilities and personnel across the nation has left the American public and federal employees at risk, as documented in a recent GAO report. Contractors have historically lacked sufficient training and authority, which is determined by relevant states and municipalities rather than the federal government, to accomplish this important work.

Instead, FPS should insource the functions performed by private security guards, using the model developed by the U.S. Capitol Police and the U.S. Secret Service Uniformed Division. The officers that provide security at the Capitol and Congressional office buildings are federal employees. They are

trained at the Federal Law Enforcement Training Center and possess the authority of arrest on federal property. FPS should also hire civilian security specialists to provide oversight of any remaining contracts, thereby allowing federal police officers to focus on law enforcement response and physical security duties.

Case Study #5

Agency: Social Security Administration (SSA).

Function: Adjudication of disability claims.

Rationales: Reduce costs and restore public control of a critical function that historically has not been uniformly performed.

SSA should insource disability claims adjudication functions that are currently performed by state Disability Determination Services (DDS) because the disability approval rate shows unacceptable variance among states. For instance, a 2009 study revealed that a claimant who applies for social security disability payments in New Hampshire has a 53% chance of being approved at the initial level. However, a claimant applying in Mississippi has only a 26% chance of being approved at the initial level.

The disparate treatment is not difficult to explain. Each state has different criteria for hiring disability examiners, and each state provides them with different pay and benefits packages. Training is different and inconsistent across state lines as well. In effect, because of outsourcing there are 50 different disability programs instead of one.

By insourcing the DDS functions, SSA could address the inconsistent decisions at the initial claims level, diminish the number of appeals, and decrease the SSA's appeals hearing backlog. Addressing these problems would dramatically help SSA perform its mission to serve the elderly and disabled.

Case Study #6

Agency: US Marshals Service, Department of Justice.

Function: Security at federal courthouses; protection of federal judges; transportation of federal prisoners and detainees.

Rationale: Restore public control of critical and inherently governmental functions.

Excessive use of contractors as deputy U.S. Marshals at the United States Marshals Service (USMS), guarding federal courthouse and transporting federal prisoners, has undermined the agency's mission to ensure public and judicial safety. The USMS workforce includes approximately 5,000 federal employees and 8,000 contractors.

In 2005, the DoJ's Office of Inspector General reported that USMS contractors were performing inherently government work and found that some contractors were unqualified for their positions. USMS should insource a significant portion of the work currently performed by contractors so that the agency can regain control of its mission.

4. ELIMINATE ABUSE OF PERSONAL SERVICES AND ADVISORY AND ASSISTANCE CONTRACTS

Personal services and advisory and assistance contracts in agencies' inventories should be rigorously reviewed for modification or insourcing, consistent with the law.

Unauthorized personal service contracting is widespread. Such contracts are regularly undertaken with limited if any competition, public-private or private-private. Personal services contracts are often entered into in order for cronies to be hired without going through the regular civil service process. Moreover, personal services contractors often perform functions that should be reserved for federal employee performance.

The laws that established the inventories for DoD and the non-DoD agencies both require that personal services contracts be reviewed to determine if they have been entered into and are being performed in accordance with applicable laws and regulations. OMB's guidance on work reserved for federal employee performance should require agencies to review contracts to determine if personal services contracts are authorized. When such contracts are not authorized, the guidance should require agencies to either insource the functions wrongly outsourced or modify the contracts.

Advisory and assistance service contracts are easily abused and often include functions that are inappropriate for contractor performance, e.g., planning and budgeting. Contracts for advisory and assistance services should only be undertaken if the agency does not possess the necessary in-house expertise. In the event this expertise is needed for more than one year, then the capability should be established in-house. Advisory and assistance contracts should receive special attention in the inventory review and correction process.

When it is necessary to undertake advisory and assistance contracts, DoD Instruction 1100.22, Policies and Procedures for Determining Workforce Mix, includes helpful caveats and guidance:

> "Discretionary decisions made by government officials must be based on informed, independent judgments, and must not be unduly influenced or controlled by private contractors who are beyond management controls applicable to public employees and who might not have objectives in concert with the public's best interests. Although a DoD official may consider a contractor's advice when making a decision, the official may not rely solely or so extensively on a contractor's recommendations that, by so doing, the decision no longer reflects an independent judgment...
>
> "(DoD should) (e)nsure contract advisory assistance is not used to support a government decision without thorough knowledge and understanding of the work submitted by the contractor and recognition of the need to apply independent judgment in the use of the work products; take

steps to ensure that a contractor's involvement on a project is not so extensive or so far advanced that the government does not have the ability (sufficient time, information, or resources) to develop and consider options other than those provided by the contractor (such as during staff coordination of products developed by contractors) and ensure that contractors do not have undue influence in the final decision to include determining which, and how, options or recommendations are provided to Defense officials for a final decision; or why an option is recommended to the deciding official as the government's preferred alternative."

5. ENFORCE PROHIBITIONS AGAINST DIRECT CONVERSIONS

The Congress, on a bipartisan basis, has, repeatedly, attempted to prohibit agencies from perpetrating "direct conversions"—the term used to describe instances in which agencies give work performed by federal employees to contractors without first conducting full cost comparisons.

Although laws were enacted—more than one year ago in non-DoD agencies and more than six months ago in DoD—to prohibit any direct conversions, no guidance has ever been issued to ensure that agencies are in compliance.[i] From human resources in DHS to cemetery caretaking in DVA, functions last performed by federal employees continue to be contracted out in defiance of the law, the circular, common sense, and basic notions of fairness.

In fact, some agencies believe that there is a "no harm, no foul" exception to the prohibition against direct conversions, i.e., if no actual federal employee is adversely affected, then a direct conversion is not covered by the prohibition. That is why agencies routinely replace with contractors federal employees who retire from federal service or are reassigned to other functions, without any consideration of the costs let alone whether the functions formerly performed by federal employees should be reserved for in-house performance. Please see Attachment 1 to this testimony for a documented example of a DoD installation that regularly contracts out functions performed by federal employees when they retire or are reassigned. The use of direct conversions by the installation discussed in the attachment blocks promotional opportunities for actual civil servants—which in turn induces other federal employees to retire or be reassigned, who are replaced by contractors through more direct conversions, which in turn induces more retirements and reassignments.

No single factor is more responsible than direct conversions for the hollowing out in all agencies of the federal civil service and the substitution of a myriad of private interests for the public interest. Functions that meet the definition of inherently governmental, closely associated with inherently governmental, or critical, are more likely to be retained in-house if agencies are at least required to conduct cost comparisons prior to conversion to contractor performance. When the in-house workforces do not prevail, then the paper trails created by cost comparisons, particularly the descriptions of the functions being reviewed, can give conscientious managers opportunities to draw attention to schemes to outsource functions that should be reserved for federal employee performance.

Even if the functions involved are not normally reserved for federal employee performance, they may become critical or even closely associated with inherently governmental either because of the agency's special circumstances or a need to right-size the human capital mix. For example, as discussed earlier, the functions performed as part of cemetery caretaking may be considered commercial in most agencies. However, because of its importance to the agency's mission and the sensitivity of the function to the families of veterans, cemetery caretaking in the DVA is clearly not a commercial function.

Enforcement of the statutory prohibitions against direct conversions would be a significant safeguard against contracting out functions that should be reserved for federal employee performance. A new definition of "inherently governmental" should include guidance to agencies so that they can become compliant with the laws against direct conversions.

6. FREE AGENCIES FROM IN-HOUSE PERSONNEL CEILINGS

The most daunting human capital-related challenge to insourcing is the inequitable and sometimes onerous constraint imposed on agencies by OMB in the budget process in the form of in-house personnel authorization requirements.

OMB authorizes the number of federal positions in each agency through the budget process. Annually, agencies submit to OMB the number of Full Time Equivalent (FTE) positions they need. If OMB approves the number, it is included in the budget authority numbers OMB sends to Congress for its approval and grant of appropriations. The requirement to submit FTE numbers to Congress is set forth in OMB Circular A-11. In addition, each agency is required to report monthly to the Office of Personnel Management (OPM) that they are in compliance with the number of FTEs that has been approved by Congress for that fiscal year.

The costs for both federal FTEs and contractors are paid out of agencies' Salaries and Expenses accounts (except at the Department of Defense, where contractors are paid, in part, out of an Operations and Maintenance account). However, agencies lack sufficient flexibility to shift funds in their Salaries and Expenses accounts to pay salaries to federal employees rather than to contractors for government work that should be performed by federal employees or could be performed more efficiently by federal employees.

The need for such flexibility arises in two scenarios: when an agency submits to OMB its annual request for authorization of a particular number of FTEs to be included in its budget authority before the beginning of a fiscal year, and in the midst of a fiscal year when an agency seeks to shift funds away from paying for contractors towards paying for FTEs. Prior to the fiscal year, the agency would have to justify the shifting composition of its workforce by reference to the requirement established in law to give "special consideration" to insourcing certain functions. During a fiscal year, the situation is more complicated. Because there is no counting of the number of contractors, no legal or budgetary limit on the number of contractors hired, and therefore no negative consequence for agencies if they shift monies in the Salaries and Expenses accounts from FTEs to contractors, it is easy for agencies to decide to contract out. Insourcing, however, is another story. Because federal FTEs are counted, and exceeding the approved ceiling is forbidden, agencies must gain explicit permission to replace contractors with federal FTEs if doing so would violate the approved limit on FTEs, even if doing so saves money or at least does not exceed the agency's budget authority.

AFGE believes that OMB's guidance on work reserved for federal employee performance should grant agencies broad flexibility within the limits of their budget authority to hire federal FTEs for insourcing initiatives. Agencies should still be required to report monthly to the Treasury Department that they are operating within the limits of their budget authority. However, agencies should clearly be permitted to exercise the same degree of flexibility with regard to allocations from Salaries and Expenses accounts between contractors and federal FTEs. The decision whether to hire federal employees or contractors to perform government work should no longer be decided by FTE ceilings.

This OMB deserves credit for being less restrictive in its management of the federal employee workforce. However, because of the long custom of having OMB enforce FTE ceilings through the budget process, it will be necessary for OMB to be extremely clear in its instructions regarding this matter. If agencies are not made aware that carrying out OMB guidance with respect to insourcing may require shifting allocations within Salaries and Expenses accounts, agencies will be reluctant to do so. Thus the guidance should be disseminated widely to both human resources *and* budget offices, because granting equivalent flexibility toward federal employees and contractors will upset years of established processes related to budgeting and FTE ceilings. Compliance with budget authority limits can be achieved without FTE ceilings, but compliance with any definition of work reserved for federal employee performance as well as the insourcing law cannot be achieved with FTE ceilings.

7. FUND EXISTING HUMAN RESOURCES FLEXIBILITIES[ii]

Largely thanks to the fine, bipartisan work of this subcommittee, particularly Chairman Akaka and Ranking Member Voinovich, agencies already have several tools available to promote insourcing. The Federal Employees Pay Comparability Act and subsequent laws such as the Federal Workforce Flexibility Act allow numerous avenues for raising salaries in order to recruit and retain federal employees for positions deemed "hard to fill" or critical to an agency's mission. The idea that the federal pay system is too inflexible to attract people with the kind of "cutting edge" skills and expertise needed in federal agencies is based largely on myth, and is propagated mostly by those with a political agenda of privatization and/or pay-for-performance. To the extent there are limitations, they exist not because the pay system is limited or inflexible, but because agencies lack the funding to exercise authorized flexibilities.

For critical or "hard to fill" positions, the Federal Workforce Flexibility Act allows agencies to pay up to the rate of level 1 of the Executive Schedule--the same pay level received by members of the President's cabinet, which was $196,700 in 2009. In addition, with the President's approval, even higher rates of pay can be established for such positions. This authority is reserved for positions that require an extremely high level of scientific, professional, or technical expertise. Prospective federal employees can also be attracted to government service through recruitment bonuses of up to 100% of salary, payable over four years, plus annual bonuses. OPM can certify that a position is "hard to fill" and thereby authorize special higher rates of pay for that occupation in a particular locality or nationwide. Once hired, prospective employees can also receive quality step increases and paid time off awards for extraordinary service. They receive employer-subsidized health insurance, a modest defined benefit retirement benefit, and a retirement-savings program with a generous employer-matching subsidy. While federal salaries, on average, continue to lag behind those in the private sector by more than 20%, there is ample flexibility authorized in the law to increase salaries for those in hard to fill positions.

Conclusion

1. **The establishment of a schedule for agencies to achieve milestones of reform:**

OMB should establish a schedule by which non-DoD agencies

a. develop contractor inventories, consistent with Section 743 of the FY10 Financial Services Appropriations Bill;

b. review all contracts compiled in these inventories, consistent with Section 736 of the FY09 Financial Services Appropriations Bill;

c. correct those contracts through modification or insourcing, consistent with Section 736 of the FY09 Financial Services Appropriations Bill, giving "special consideration" to contracts that include closely associated with inherently governmental functions, poorly performed work, or were awarded without competition—particularly personal services as well as advisory and assistance contracts;

d. integrate the results of those reviews in the budget process in order to promote greater oversight of procurement costs;

e. comply with the prohibition against direct conversions, consistent with Section 735 of the FY09 Financial Services Appropriations Bill; and

f. manage their federal employee workforces without regard to personnel ceilings and implement human resources policies that accommodate insourcing imperatives.

A senior agency official, preferably the Chief Human Resources Officer or another human resources expert, should be assigned responsibility for coordinating an agency's expeditious achievement of these milestones. Compliance with this schedule should be enforced through the budget and management processes of both OMB and the non-DoD agencies. OMB should publicly grade agencies on their progress towards achievement of these reform milestones on a quarterly basis. Federal employees who faced the "competitive (sic) sourcing" onslaught understand how successful OMB can be in getting agencies to buy into its sourcing agenda. Although the Office of Federal Procurement Policy coordinated the effort, agencies complied with, however much against their better judgment, the "competitive (sic) sourcing" mandate because it was integrated into OMB's management and budget processes during the Bush Administration.

2. **And those who are determined to distract us from reform:**

I think a good rule-of-thumb would be that we know an agency is conscientiously striving to rebalance its civil service and contractor workforces, pursuant to the insourcing and inventory laws, when contractors are the most aggrieved and indignant. Conversely, when contractors are quiet and

contented, then we know that nothing's happening, i.e., that the agency is conducting business as usual. We have reason to believe that DHS' own rebalancing effort is promising because of the predictable hullabaloo that it has generated, even before it has really started.[iii] And we know that DoD is at least striving to do the right thing because the usual suspects are raising a racket.

Nevertheless, the recent ruckus raised by contractors about DoD's fledgling insourcing effort did surprise me, given the discredited policies for which they advocated during the two previous Administrations:

- Contractors opposed efforts to free agencies from "competitive (sic) sourcing" quotas.[iv]

- Contractors opposed efforts to require that federal employees lose cost comparisons before their work could be converted to contractor performance.

- Contractors opposed efforts to inventory service contracts so that agencies could identify contracts that include functions poorly performed or that should be reserved for federal employee performance.

- And contractors opposed efforts to empower agencies to restore outsourced functions to in-house performance.

Other than officials in the two previous Administrations, nobody did more than contractors to wrong-size the federal employee-to-contractor mix. I would have thought that the predictably disastrous results of contractors emphasizing their own interests at the expense of the public interest for sixteen years would have eventually induced in them a feeling of humility. Quite the contrary. They've actually become even more shameless.

- Contractors loved quotas when they were used to promote outsourcing. Now, they insist that any insourcing is somehow based on quotas—which they breathlessly denounce.

- Contractors regularly recruited senior federal officials to work as contractor executives. Now, when agencies make job offers to rank-and-file contractor employees, contractor bosses call that "poaching" and insist that the practice be forbidden.

- Contractors, without complaint, took tens of thousands of federal employee jobs during the previous two Administrations, without ever having to compete for our work. Now, they roar with rage at the detailed costing methodology used for insourcing.[v] Because of sole-sourcing, contractors infrequently compete with one another for work, and agencies have always been able to terminate contracts for convenience with few restrictions and to not renew contracts without any restrictions. Now, however, contractors want to impose unprecedented restrictions on the ability of agencies to insource.

- Contractors used to brag about their flexibility. Now, they insist on retaining contracts merely because they've held the contracts for several years.

- When federal employees lost their jobs because the competition process was flawed or wasn't even used, or when they were veterans in work-therapy or even disabled, contractors said, "It's business". Now, when contractors are losing their contracts, it has suddenly become personal.

While federal employees are surprised that contractors take no responsibility for their actions during the two previous Administrations, and while federal employees are surprised that contractors now oppose ideas they once supported and support ideas they once opposed, what's most surprising to federal employees is contractors' hysterical reaction to insourcing.

DoD is striving to reduce its reliance on contractors to pre-Bush Administration levels in order to cut costs and reassert government control over work that is best performed by federal employees because of its importance or sensitivity. (Contractors insist that this target is arbitrary and wrong. They're right, of course. DoD should have tried to reduce its reliance on contractors to pre-Clinton Administration levels.) This means that DoD is attempting to reduce its contractor workforce by 41,000 jobs over five years. Let's put that into perspective so we can show you why we characterize contractors' reaction as hysterical.

According to DoD, there were 732,000 contractor employees in the department's workforce in FY2000. In the last report of its kind filed during the Bush Administration, at the end of calendar year 2006, there were 1,300,000 contractor employees in the department's workforce. The size of DoD's contractor workforce had almost doubled in that relatively short period of time, and the number of contractor employees has likely increased since the last report was filed. According to budget documents, the number of active duty military personnel increased by 2% from FY2000 to FY2010. The number of civilian employees increased by 7% during that same period. Contracts for services, however, grew over that time from $86 billion in FY2000 to $195 billion in FY2009, using data from the Federal Procurement Data System. Please see Attachment 2.

Thanks very much for asking AFGE to provide its views at today's hearing. I look forward to responding to your questions.

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[i] As a point of reference, the Bush Administration issued guidance for the exclusion in certain circumstances of health care and retirement costs from the contracting out cost comparison process two months after the law was changed. Given the intellectual simplicity of prohibitions on direct conversions and the consistency with the May 2003 A-76 circular, federal employees are not unreasonable in expecting that guidance to end this abhorrent practice would have been issued by now.

[ii] It is actually the contractors who are now experiencing a "human capital crisis"—or, more accurately, what feels to them like a "human capital crisis"—because, thanks to insourcing and the possibility of

recruitment into the civil service, there is now much greater demand for contractor employees, which translates into better pay and benefits for them. Obviously, to contractor employees, their increased marketability is anything but a "crisis". However, that hasn't stopped contractor bosses from claiming However, that hasn't stopped contractor bosses from claiming that insourcing has incentivized agencies to "poach" from their workforces—a term which implies that contractor employees are the property of their employers and even that contractor employees are being abducted against their will by roving that insourcing has incentivized agencies to "poach" from their workforces—a term which implies that contractor employees are the property of their employers and even that contractor employees are being abducted against their will by roving gangs of muscle-bound federal human resources specialists.

As a longtime federal employee, I was naturally surprised to hear contractor bosses, of all people, complain about contractor employees being recruited to join the civil service. After all, how many federal employees had contractors recruited over the years? Indeed, how could contractors even operate without recruiting federal employees? Now, contractors are suddenly insisting that there be a formal agreement between agencies and contractors not to recruit from one another. And how long would contractors adhere to such an agreement? Until the possibility of insourcing had subsided?

Absent the imposition of a "no-compete" agreement that would arbitrarily make their employees less marketable, contractors are insisting that agencies compensate them for the costs of training their employees. Maybe we should simply deduct those costs from the huge bill that contractors owe the taxpayers for the costs incurred by agencies in training federal employees who were subsequently induced by contractors to leave the civil service?

However, the most unexpected argument made by the contractors against "poaching" is that it would hurt the merit process! [(Professional Services Council President and CEO Stan "Soloway cites a recent example: a contractor, 18 months out of college, who was given a GS-14 level to enter government. `What does that say to all of the people under GS-14 level in that department who've been spending 10 or 15 years building their capabilities to get to that level?' asks Soloway. `Clearly,' he adds, 'it's going to have a morale impact internally.' Such recruitment practices also run counter to the government's 'merit systems hiring process'; grievances have been filed by federal employees as a result. 'That's a real issue that the government has to be sensitive to,' he adds." ExecutiveBiz, "Is insourcing a mandate? Does it rest on `fuzzy math'?" November 17, 2009]

Let's put to one side that the same contractors heap scorn on the merit process and use the hiring requirements of the civil service process as a rationale for outsourcing. Clearly, the best way to strengthen the merit process and the civil service is to ensure that federal employees perform inherently governmental, "closely associated", and critical functions; that any work they perform that does not come under those categories cannot be contracted out without first conducting a cost comparison consistent with the law; and that they have opportunities to perform federal work currently outsourced, particularly if it is poorly performed or was contracted out without competition.

[iii] Contractors have complained that DHS has imposed insourcing quotas. During the Bush Administration, Congress enacted two laws to prevent the use of outsourcing quotas. The first, included

in Section 647 of Division J of the FY2003 Consolidated Appropriations Act prohibited the use of an outsourcing goal, target, or quota—unless it is "based on considered research and sound analysis of past activities and is consistent with the stated mission of the executive agency." The second, Section 325 of the FY08 National Defense Authorization Act, prohibited OMB from directing or requiring DoD "to prepare for, undertake, continue, or complete a public-private competition or direct conversion of a Department of Defense function to performance by a contractor under Office of Management and Budget Circular A-76." We have no reason to disbelieve DHS' confident assurances that the department is not using insourcing quotas. However, assuming only for the sake of argument that was not the case, DHS would not be in violation of either law if they are applied in the insourcing context. With respect to the first law, DHS could easily show that its notional use of quotas is in fact "based on considered research and sound analysis of past activities and is consistent with the stated mission of the executive agency." And the second law is not relevant as even contractors have not alleged that this insourcing-averse OMB is pressuring DHS to bring work in-house.

[iv] There has been an alarming amount of historical revisionism over the Bush Administration's use of "competitive (sic) sourcing" quotas. Specifically, some contractors have tried to make it seem as if they at least had qualms with quotas or even opposed them. Here is an excerpt from a contractor coalition letter in 2002 against an anti-quotas House floor amendment: "The amendment strikes at the heart of the President's ability—any President—to manage the Federal government. It is directly counter to efforts by the Bush Administration aimed at increasing Government efficiency through COMPETITION between the public and private sectors. And, if it were enacted during the last Administration, the amendment would have paralyzed former President Clinton's 'reinventing Government initiative,' which also established goals for outsourcing, and other procurement and acquisition workforce initiatives." Among the signatories to the letter: Aerospace Industries Association Airport Consultants Council, American Congress on Surveying and Mapping, American Council of Independent Laboratories, American Council of Engineering Companies, American Electronics Association, American Institute of Architects, Associated General Contractors of America, Business Executives for National Security, Contract Services Association of America, Design Professionals Coalition, Electronic Industries Alliance, Information Technology Association of America, Management Association for Private Photogrammetric Surveyors, National Association of RV Parks and Campgrounds, National Defense Industrial Association, National Society of Professional Engineers, Professional Services Council, Small Business Legislative Council, Textile Rental Services Association of America, The National Auctioneers Association, and United States Chamber of Commerce.

In an early 2003 floor statement during consideration of an anti-quotas amendment, Senator George Allen (R-VA) identified a wide range of contractor groups in support of quotas: "(L)et me share with my colleagues the views of people who would be affected by this in the private sector. The Information Technology Association of America recognizes that as a result of this amendment, rather than promote competition and better management of the Federal Government, the Bush administration would face restrictions. There are many companies in the ITAA. There are large companies, some small startups, as well as industry leaders in software and the Internet. All of these companies would be denied opportunities or hampered by this amendment and therefore urge us to vote no. Other associations, such as the Northern Virginia Technology Council, which consists of 1,600 members and 180,000 employees, urge us to vote no as well. Bobbie Kilberg, the president, says this amendment would

significantly limit private sector involvement and discourage competition vital to the technology community. The Contract Services Association of America, an industry representative for private sector companies that provide services to the Federal, State, and local governments--they include small disadvantaged businesses, Native American-owned businesses, section 8(a)-certified companies--wants to have those folks working for the public good. The Professional Services Council recognizes that we want to hold the executive branch responsible for efficient management of services and looks at this amendment as one that would harm the ability of the administration to do so. The Chamber of Commerce of the United States looks at this issue in a way with which I agree, and that is, that this is the time to create more efficient and effective partnerships between the public and private sectors, not to restrict policies that limit funding or flexibility in sourcing and decision making processes."

[v] Recent contractor correspondence insists that DoD "is not considering the broad scope of other costs, borne by the taxpayer, and which are ineffably associated with the federal employee infrastructure (overhead, lifetime benefits, personnel support and systems, pay support, and systems, management/oversight, training, etc.)." Professional Services Council Letter to Secretary of Defense Robert Gates of May 3, 2010. AFGE understandably approaches contractor claims of inadequate in-house overhead with a great deal of skepticism. It is not an exaggeration to say that many contractors would like to charge every in-house workforce involved in a sourcing decision with a fraction of the cost of running Air Force One. The DoD IG has pointed out that a significant amount of the overhead contractors have tried to attribute to federal employees in OMB Circular A-76 privatization studies is unjustified. DoD should be prepared to defend the costing methodology generally as well as its use in specific situations. However, let the record show that, contrary to contractor assertions, DoD's costing methodology does indeed take into account "Recruitment, Advertising, Etc.", "Training", "Unfunded Civilian Retirement", "Postretirement Health Benefit", and "Post Retirement Life Insurance". Directive-Type Memorandum (DTM) 09-007, "Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contract Support", page 20.

DEPARTMENT OF THE NAVY
CRANE DIVISION
NAVAL SURFACE WARFARE CENTER
300 HIGHWAY 361
CRANE INDIANA 47522-5001

IN REPLY REFER TO

12711
Ser 00/9001
22 JUN 2009

Mr. Dave Holtsclaw
AFGE Local 1415
Bldg 39
Crane, IN 47522

Dear Mr. Holtsclaw,

1. In response to your inquiry dated 16 June 2009 regarding future plans by Crane Division, Naval Surface Warfare Center (NSWC Crane) for the calibration facility, the following are NSWC Crane's response (in **bold**) to your specific questions.

a. "Is NSWC Crane planning, or considering a plan, to move the calibration function currently performed on base to a facility outside the base?" **NSWC Crane is currently evaluating the solutions for moving the calibration facility out of B-39. One of those solutions does include a facility outside of NSWC Crane.**

"If so, what role will contractors play in this move and/or at the new facility?" **That role is not determined at this time. The option for an off base facility could be a government facility that is leased via NAVFAC.**

b. "Is NSWC Crane planning, or considering a plan, to have contractor employees perform any of the functions, or part of the functions, currently performed by federal employees?" **There are no plans for a contractor to displace any government employee. As the government workforce retires, the replacement of the government worker is subject to hiring constraints and government workforce priorities.**

c. "Is NSWC Crane planning, or considering a plan, to have contractor employees perform a greater portion of the calibration work than they currently perform?"
There are no plans for a contractor to displace any current government employee. As the government workforce retires, the replacement of the government worker is subject to hiring constraints and government workforce priorities.

ATTACHMENT 1

d. "Is NSWC Crane planning to issue a solicitation in relation to the calibration function?" **No, though a SEAPORT task order was awarded to CSC on 12 June 2009.**

e. "Is NSWC Crane planning to accomplish any objective in relation to the calibration function via a current contract, such as the SEAPORT contract?" **The SEAPORT task order was awarded to CSC on 12 June, 2009 with similar scope to the previous SEAPORT contract activity.**

f. "Please identify the contractors NSWC Crane has contacted about this issue." **The Contracting Division performed a full and open competition for the SEAPORT task order. As such, any contractor certified on the SEAPORT contract was eligible to bid on this solicitation.**

2. Thank you for your inquiry. Feel free to contact my office or the Mission Support Services Department, Mr. Matt Craig or Mr. Andy Brough, with any additional questions.

Sincerely,

C. S. LASOTA
Captain, U. S. Navy
Commander, NSWC Crane

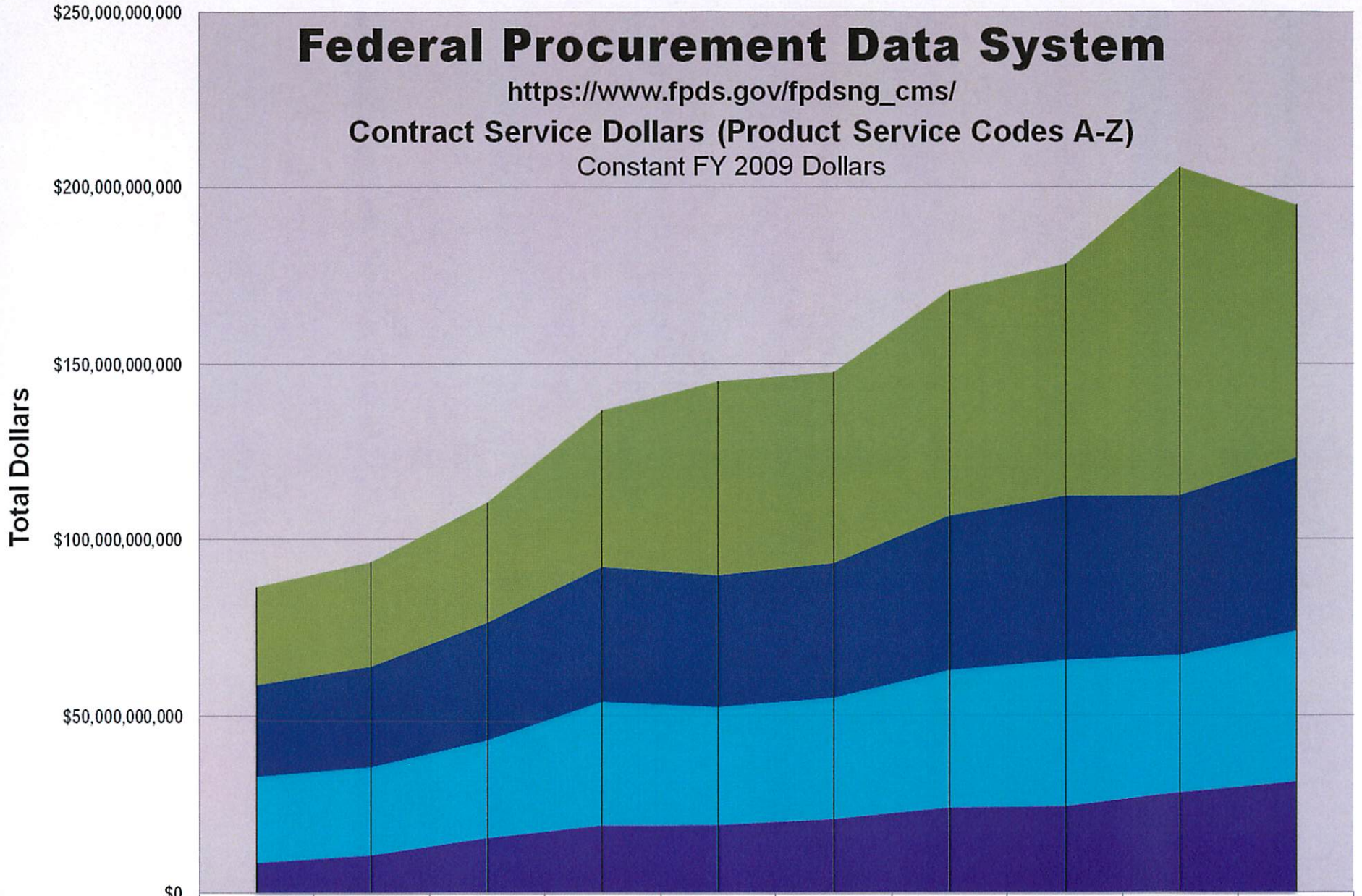
ATTACHMENT 2

Federal Procurement Data System

https://www.fpds.gov/fpdsng_cms/

Contract Service Dollars (Product Service Codes A-Z)

Constant FY 2009 Dollars



	FY2000	FY2001	FY2002	FY2003	FY2004	FY2005	FY2006	FY2007	FY2008	FY2009
Department of the Army	$27,679,824,601	$29,557,304,015	$34,296,895,463	$44,767,596,254	$55,363,117,234	$54,521,198,384	$63,978,556,788	$65,735,848,512	$93,117,017,847	$71,536,762,596
Department of the Navy	$25,655,313,851	$28,147,376,875	$32,965,560,568	$38,037,893,286	$37,151,713,850	$37,978,085,509	$43,838,830,748	$46,597,886,360	$45,419,718,924	$49,348,437,827
Department of the Air Force	$24,321,961,225	$24,889,999,950	$27,513,130,514	$34,791,735,382	$33,216,548,578	$34,132,840,472	$38,631,185,335	$41,123,285,881	$38,639,098,799	$42,353,952,089
Defense Agencies	$8,685,833,520	$10,806,995,658	$15,644,337,157	$19,183,866,045	$19,235,037,976	$20,944,000,619	$24,164,336,827	$24,577,252,773	$28,410,659,004	$31,529,445,384