Statement of

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Committee on Homeland Security and Governmental Affairs
Subcommittee on Contracting Oversight

Interagency Contracts: Anecdotes and Observations

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Chairman McCaskill, Ranking Member Bennett, and members of the Subcommittee, I appreciate the opportunity to discuss the government's ongoing efforts to effectively manage interagency contracts. You asked that I discuss my relevant scholarship,[1] which, among other things, highlighted two instructive anecdotes that still resonate today.

A number of the foundations underlying flexible interagency contracting make sense. Our federal procurement regime is primarily decentralized, permitting individual agencies to fulfill their own needs. Conversely, centralized purchasing, particularly of commodities and certain types of non-personal services (such as fuel, office supplies, telephonic services, travel, delivery services), is a globally accepted practice, particularly given the potential for governments to achieve economies of scale by concatenating its purchases. Governments also have employed centralized purchasing where unique purchasing expertise (for example, related to information technology), concentrated within one agency, could benefit other agencies. Experience suggests, however, that *competition between agencies* to provide these services – specifically, for a fee – introduced a number of, arguably, unanticipated incentives and disincentives into the procurement system that required additional guidance and controls. Since 2005, when the Government Accountability Office (GAO) added interagency contracts to its High-Risk list, I believe the government has made significant progress ameliorating some of the worst aspects of these vehicles. The issues and findings generated by the Acquisition Advisory

[1] See generally, Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STANFORD LAW & POLICY REVIEW 549, 557-561 (2005); *Feature Comment – Risky Business: Managing Interagency Acquisition*, 47 THE GOVERNMENT CONTRACTOR ¶ 156 (April 6, 2005); *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AMERICAN UNIVERSITY LAW REVIEW 627 (2001); *Feature Comment -- The Future of "Businesslike" Government: The CBD Asserts Its Rights Against Debtor Federal Agencies*, 41 THE GOVERNMENT CONTRACTOR ¶ 112 (March 10, 1999).

Panel (AAP or the 1423 Panel) also were extremely helpful, offering an organized approach to many of the vehicles' pathologies and generating some helpful legislative initiatives. Further room for improvement remains.

I remain concerned that these vehicles incentivize agencies to pursue the generation of fees for providing services to another agency, rather than providing services to the public. I do not believe our government exists for that purpose. Moreover, experience has demonstrated that, possibly, the most pernicious effect of the proliferation of these vehicles was that they, all too often, created a post-award contract management vacuum. In addition, as an advocate of transparency and competition, I believe that, empirically, these vehicles have failed to meet the highest standards that we aspire to for our procurement system, although, at least in part, some of the worst pathologies (such as the unjustified protest exemption) have been remedied.

A Minor Anecdote, A Potent Harbinger

More than a decade ago, I was disturbed to learn that the Government Printing Office (GPO) had threatened to bar certain federal purchasing offices from publishing solicitation notices in the Commerce Business Daily (CBD) because those agencies had failed to pay their printing fees. In so doing, the GPO ignored the mandate that the CBD was "the public notification media by which U.S. Government agencies identify proposed contract actions and contract awards." 48 C.F.R. § 5.101. Both the Small Business Act, 15 U.S.C. § 637(e), and the OFPP Act, 41 U.S.C. § 416, required agencies to publish notices in the CBD. An outstanding debt *to the GPO* was never an exception to the publication requirement; nor did such a debt excuse failure to comply with the publication and response times mandated in 48 C.F.R. § 5.203.

This comedy of errors highlighted fundamental questions of entrepreneurial government. CBD publication was not a business enterprise – the CBD was a statutorily mandated vehicle for the publication of certain procurement actions. Contrast this with some of the more appropriate ventures for entrepreneurial government that involve fee-for-service transactions, such as the Postal Service, the Patent and Trademark Office, Federal Deposit Insurance Corporation, or the Defense Commissary Agency. The public interest does not require that citizens refusing to buy stamps be permitted to send holiday cards. The public interest, however, would require that GSA not disconnect the IRS's telephone service in early April if the IRS failed to promptly liquidate its phone bills.

At the time, I concluded that intricacies of fiscal law, particularly the shell game of inter-agency budgetary transfers, need not concern taxpayers. The public - whether contractors hoping to compete for work or those that rely upon government missions facilitated by procurements – cannot be held responsible for inter-agency cash management issues. Nor should one agency's revolving fund status adversely impact another agency's ability to carry out its mission. The anecdote had limited utility in the long run because, since that time, the CBD has been replaced by FedBizOpps. Although it raised a number of intriguing issues – it was wonderful grist for a law school examination – the anecdote generated little concern.

Anecdote Two: The Straw That Broke the Camel's Back?

A few years later, interagency contracting became part of the Abu Ghraib prison debacle. This anecdote offered insight into how the proliferation of fee-based arrangements permitted government agencies to avoid longstanding contracting management and oversight constraints by off-loading their procurement function to other agencies. By the time the U.S. government became active in Iraq, these highly-flexible, contractual vehicles had become immensely popular, but concerns regarding their misuse increasingly surfaced. Numerous GAO and IG reports had disclosed agency practices in awarding task and delivery order contracts which, almost uniformly, included insufficient competition and poorly justified sole-source awards.[2] In principle, contractors were supposed to compete to become part of an "umbrella contract," which offered them little more than the opportunity to compete for individual task or delivery orders. Unfortunately, the anticipated competition rarely materialized – agencies tended to include all comers on the contract vehicle. That makes sense, to the extent that inclusion on the contract is no more than an opportunity to compete, akin to a "hunting license." Yet real competition also proved absent during the task order stage. Because all "contract holders" could market their services directly to individual agencies, those agencies – affected by considerations including speed, convenience, personal preference, and human nature – frequently obtained those services on a sole source or non-competitive basis from those possessing these hunting licenses. As a result, legitimate competition infrequently materialized.[3]

In the Abu Ghraib prison, the military relied upon one of these vehicles, managed by the Department of the Interior's National Business Center,[4] to procure contractor personnel to assist

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[2] Section 803 of the 2002 Defense Authorization Act was intended to rein in some of these practices. *See* 67 Fed. Reg. 15,351 (Apr. 1, 2002); 67 Fed. Reg. 65,505 (Oct. 25, 2002). "It remains to be seen, however, whether these new regulations will enhance competition because agencies often have disregarded the existing FAR provisions...." Steven N. Tomanelli, *Feature Comment: New Law Aims to Increase Competition and Oversight of DoD's Purchases of Services on Multiple Award Contracts*, 44 GOV'T CONTRACTOR ¶ 107 (2002).

[3] *See generally* GEN. ACCOUNTING OFFICE, GAO/NSIAD-00-56, CONTRACT MANAGEMENT: FEW COMPETING PROPOSALS FOR LARGE DOD INFORMATION TECHNOLOGY ORDERS 4 (2000).

[4] It was difficult to get a sense of the mission, purpose, or mandate of the National Business Center at that time. In 2004, NBC's website touted that its new or expanded customers included: (1) the Public Defender Service of the District of Columbia (PDS), a federally funded, independent agency of the District of Columbia; (2) the Millennium Challenge Corporation (MCC), a new government corporation, which provides U.S. foreign development assistance to countries that adopt pro-growth strategies for meeting political, social and economic challenges; and (3) the African Development Foundation (ADF), a government corporation, which provides small grants directly to private organizations in Africa to carry out sustainable self-help development activities in an environmentally sound manner. Like a commercial firm, to the

(footnote continued…)

in interrogations in Iraq and Guantanamo Bay. Despite the relatively small size of this transaction, the attention it generated may have been the straw that broke the camel's back on interagency contracts, spurring the GAO to add interagency contracting to its High Risk list.

In reviewing the Abu Ghraib transactions, the Interior Department Inspector General concluded that the pursuit of fees distorted the moral compass that we would otherwise hope to animate federal government procurement officials. "The inherent conflict in a fee-for-service operation, where procurement personnel in the eagerness to enhance organization revenues have found shortcuts to Federal procurement procedures and procured services for clients whose own agencies might not do so."[5] The federal procurement statutes and regulations assume a model in which agencies rely upon warranted purchasing professionals to procure their needed supplies and services. This longstanding arrangement bifurcated programmatic authority from procurement authority – in other words, program or project managers (PM's) must rely upon contracting officers (CO's) to fulfill their requirements. Our procurement regime assumes that CO's will be familiar with, understand, and follow Congressional mandates and effectuate the government's procurement policies in making these purchases. Contracting officers are expected to meet the PM's needs, but only within the established constraints of the procurement system.

Unfortunately, perverse incentives associated with flexible, interagency, fee-based acquisition vehicles turned this system on its head. Various statutory schemes, dating back to the Economy Act,[6] permit interagency transfers, such as permitting one agency to conduct a purchase for another. Of particular relevance here, the Clinger-Cohen Act[7] resulted in a proliferation of governmentwide acquisition contracts, popularly knows as GWAC's. While the Economy Act authorized interagency transfers, the statute permitted "an agency to take advantage of another agency's expertise, not merely to offload work, funds, or both to avoid legislative restrictions."[8] One of the most common violations of this prohibition was "parking" funds before they expired. As the end of the fiscal year approaches, agencies "parked" or "dumped" funds by issuing open-ended or vague orders that did not state a specific and definite

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extent that "[t]he NBC operates on a full cost-recovery business basis[,]" it had to generate fees. Unlike a commercial firm, one might expect its ultimate purpose to derive from a Congressional authorization in some way related to the Interior.

[5] Memorandum from Earl Devaney, Inspector General, Department of the Interior, to Assistant Secretary for Policy, Management and Budget (July 16, 2004).

[6] In 1932, Congress intended the Economy Act, 31 U.S.C. §§ 1535, 1536, to generate economies of scale by reducing redundant activities of various government agencies.

[7] National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 5112(e), 110 Stat 186, codified at 40 U.S.C. § 1412(e). The Federal Acquisition Reform Act (FARA) and the Information Technology Management and Reform Act (ITMRA) were renamed as the Clinger-Cohen Act of 1996.

[8] STEVEN N. TOMANELLI, APPROPRIATIONS LAW: PRINCIPLES AND PRACTICE 371 (2003).

requirement or identify a bona fide need. Nor was the Economy Act (or similar inter-agency purchasing regimes) intended to facilitate the avoidance of competition.

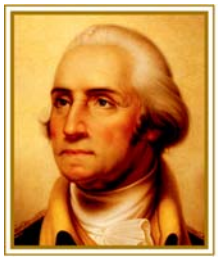
The problem arises because fee-based purchasing offices (or, in other words, the servicing agency) need revenue to survive. In other words, revolving funds permit agencies or governmental organizational units to operate like an ongoing business. Like a business, however, the survival of revolving fund instrumentalities depend upon the generation of fees. Thus, all too often the pursuit of fees, rather than any Congressionally-mandated mission, drives these purchasing organizations. (See the GPO anecdote, above.)

This also answers a question often asked by visitors to the District of Columbia: why are government agencies spending advertising dollars competing for other agencies' business? Most federal government agencies and operations depend upon annual appropriations. Normally, agencies are not permitted to "augment" amounts provided by Congress. To the extent that they generate income or receive funds from the public, the Miscellaneous Receipts Statute requires those funds - typically termed miscellaneous receipts – be returned to the general fisc. 31 U.S.C. § 3302(b) (absent a statutory or regulatory exception, "an official or agent of the government receiving money for the government from any source shall deposit the money in the Treasury as soon as practical without any deduction for any charge or claim"). (In other words, the agency cannot use them to fund other activities.) By contrast, the revolving fund concept permits certain agencies to create funds, credit receipts to the fund, and use the funds without further Congressional appropriation.

In practice, this created an unfortunate "race to the bottom." Fee-based purchasing instrumentalities had insufficient stake in the outcome of contracts that they awarded. The program manager at the purchasing (or receiving) agency willingly paid a franchise fee to the servicing agency to avoid the bureaucratic constraints (such as competition mandates) that slow down the PM's in-house contracting officer. In turn, the servicing agency gladly streamlined the purchase. The servicing agency, which had no vested interest in the purpose of the procurement, also had an incentive to facilitate the purchasing agency's use of personal services contracts for employee augmentation. Moreover, once the contract was awarded, the serving agency had no interest in administering, nor did it have sufficient resources to manage, the contract. Thus, in exchange for a fee, the program manager can choose a favored contractor without competition and enjoy the contractor's performance unfettered by typical contract administration. As the Interior Department Inspector General explained at the time: "Without the checks and balances provided by effective internal controls, the 'risk taking,' 'out-of-box' thinking, and 'one-stop shopping' advertised ... and encouraged by fee-for-service organizations can result in inappropriate procurements."

Conclusion

That concludes my statement. Thank you for the opportunity to share these thoughts with you. I would be pleased to answer any questions.



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Outside of the U.S., he has advised hundreds of government officials on public procurement issues, either directly or through multi-government programs. His dispute resolution experience includes service as an arbitrator, mediator, neutral, and ombudsman.

Professor Schooner received his Bachelors degree from Rice University, Juris Doctor from the College of William and Mary, and Master of Laws (with highest honors) from the George Washington University. He is a Fellow of the National Contract Management Association (NCMA), a Member of the Board of Advisors, a Certified Professional Contracts Manager (CPCM), and serves on the Board of Directors of the Procurement Round Table. He is a Faculty Advisor to the American Bar Association's PUBLIC CONTRACT LAW JOURNAL and a member of the GOVERNMENT CONTRACTOR Advisory Board. He is author or co-author of numerous publications including THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT (now in its third edition). Professor Schooner's recent scholarship is available through the Social Science Research Network at *http://ssrn.com/author=283370.*