

**THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL
PUBLIC LAW AND LEGAL THEORY WORKING PAPER NO. 109**

**CONTRACTOR ATROCITIES AT
ABU GHRAIB: COMPROMISED
ACCOUNTABILITY IN A STREAMLINED,
OUTSOURCED GOVERNMENT**

STEVEN L. SCHOONER

Accepted Paper

16 STAN. L. & POL'Y REV. 549 (2005)

THE GEORGE
WASHINGTON
UNIVERSITY
LAW SCHOOL
WASHINGTON DC

This paper can be downloaded free of charge from the
Social Science Research Network at:
<http://ssrn.com/abstract=605367>

CONTRACTOR ATROCITIES AT ABU GHRAIB: COMPROMISED ACCOUNTABILITY IN A STREAMLINED, OUTSOURCED GOVERNMENT

Steven L. Schooner[†]

INTRODUCTION	1
I. THE RUSH TO OUTSOURCE	3
II. TROUBLING ANECDOTES FROM ABU GHRAIB.....	7
III. INADEQUATE CONTRACT ADMINISTRATION: A FALSE ECONOMY.....	9
IV. PERSONAL SERVICES CONTRACTS: GOVERNMENT DEPENDENCE ON EMPLOYEE AUGMENTATION	13
V. FLEXIBLE FEE-BASED ACQUISITION INSTRUMENTS: UNANTICIPATED EXTERNALITIES	16
CONCLUSION: RESPONSIBLE DELEGATION OR ABDICATION OF RESPONSIBILITY?	22

INTRODUCTION

Staggering numbers of contractor personnel have supported, and continue to support, American combat and peace-keeping troops and the government's Herculean reconstruction efforts in Iraq.¹ In addition to more than 1000

[†] Steven L. Schooner is an Associate Professor and Co-Director of the Government Procurement Law Program, George Washington University Law School. Professor Schooner previously served as the Associate Administrator for Procurement Law and Legislation at the Office of Management and Budget (OMB) and as a trial attorney in the Department of Justice. As an Army Reserve officer, he is an adjunct professor in the Contract and Fiscal Law Department of the Judge Advocate General's School of the Army in Charlottesville, Virginia. This Article, which derives from the author's September 10, 2004 testimony before the Senate Democratic Policy Committee, was improved by comments from Michael J. Benjamin, Elizabeth D. Berrigan, Daniel Gordon, Dan Guttman, Timothy Pendolino, Heidi M. Schooner, Joshua I. Schwartz, Steven Tomanelli, Jerry Walz, Christopher R. Yukins, and the members of the Procurement Round Table. The author thanks Erin Siuda for her prompt and diligent research assistance and acknowledges the generous support of the Seymour Herman Faculty Research Fund in Government Procurement Law.

1. From an investment perspective, comparisons to the Marshall Plan abound, and

reported military fatalities, many contractor employees have died or been injured in performing these services.² Yet recent experiences in Iraq, particularly allegations that contractor personnel were involved in inappropriate and potentially illegal activities at the Abu Ghraib prison, expose numerous areas of concern with regard to the current state of federal public procurement. Sadly, because these incidents coincide with a series of procurement scandals, the likes of which the government has not experienced since the late 1980s,³

estimates, in the tens of billions of dollars, widely vary. For example, a White House press release stated: "Initial estimates are that Iraq will need between \$50-75 billion to achieve these conditions for success." Press Release, Office of the Press Secretary, The White House, Fact Sheet: Request for Additional FY 2004 Funding for the War on Terror (Sept. 8, 2003), <http://www.whitehouse.gov/news/releases/2003/09/iraq/20030908-1.html> (last visited Mar. 26, 2005). For more on the scope of the effort, see Robert S. Nichols, *Iraq Reconstruction: Needs, Opportunities, and the Contracting Environment*, 80 Fed. Cont. Rep. (BNA) No. 15, at 410 (Oct. 28, 2003). The Center for Public Integrity has published two particularly helpful resources that offer access to many of the relevant contractual documents and organize much of the work by individual contractors: OUTSOURCING THE PENTAGON—WHO'S WINNING THE BIG CONTRACTS, available at <http://www.publicintegrity.org/pns/> (last visited Mar. 26, 2005) and WINDFALLS OF WAR: U.S. CONTRACTORS IN IRAQ AND AFGHANISTAN, available at <http://www.publicintegrity.org/wow/> (last visited Mar. 26, 2005). In addition, see U.S. DEP'T OF STATE, U.S. GOVERNMENT IRAQ RECONSTRUCTION CONTRACTS, available at <http://www.state.gov/e/eb/cba/iraq/> (last visited Mar. 26, 2005).

2. One of the rare efforts to catalog contractor casualties suggests that approximately 213 coalition contractor personnel have died in Iraq. See, e.g., IRAQ COALITION CASUALTY COUNT, IRAQ COALITION CASUALTIES: CONTRACTORS—A PARTIAL LIST, available at <http://icasualties.org/oif/Civ.aspx> (last visited Mar. 26, 2005). Most experts believe the actual number is significantly higher.

3. The prosecutions of high-level government officials, including Darleen Druyun, Robert Neal, Richard Moran, and Kevin Marlowe, merit concern. Druyun, the former civilian chief of Air Force acquisition, pleaded guilty on April 20, 2004 to conspiracy to violate federal conflict-of-interest regulations, admitting that she engaged in job negotiations with Boeing while negotiating the high-profile \$20 billion tanker lease deal with Boeing. Recently, after a polygraph test, she further admitted to helping Boeing obtain inflated prices on several deals, describing one as a "parting gift" made to curry favor with Boeing, her future employer. See George Cahlink, *Deal Breaker*, GOV'T EXECUTIVE, May 15, 2004, at 19; Renae Merle & Jerry Markon, *Ex-Air Force Official Gets Prison Time*, WASH. POST, Oct. 2, 2004, at A1; Renae Merle & Jerry Markon, *Ex-Pentagon Official Admits Job Deal; Civilian Got Boeing Offer While Overseeing Air-Tanker Contract*, WASH. POST, Apr. 21, 2004, at A1. Neal, the former head of the Pentagon's Office of Small and Disadvantaged Business Utilization, was convicted after being charged with conspiracy, extortion, money laundering, witness tampering, and obstruction of justice. See Jerry Markon, *2 Pentagon Officials Get 24 Years in Fraud*, WASH. POST, Dec. 13, 2003, at B3; Jerry Seper, *Pentagon Ex-Officials Accused of Corruption*, WASH. TIMES, Oct. 19, 2002, at A1. Moran, the former commander of the United States Army Contracting Command Korea (a position that allowed him to oversee more than \$300 million worth of contracts), was indicted on July 3, 2002 for soliciting \$850,000 worth of bribes from two South Korean companies. He pleaded guilty to two counts of conspiracy and one count of bribery. See Press Release, U.S. Dep't of Justice, U.S. Army Colonel, Four Others Indicted in Scheme to Collect Bribes From South Korean Companies Seeking to Obtain Large Military Contracts (July 3, 2002), <http://www.usdoj.gov/usao/cac/pr2002/103.html> (last visited Mar. 26, 2005); Press Release, U.S. Dep't of Justice, U.S. Army Colonel Sentenced to Prison for Taking Bribes from South Korean Companies Seeking Military Contracts (June 9, 2003), <http://www.usdoj.gov/usao/cac/pr>

they cannot be dismissed so easily as anomalies.

The Abu Ghraib abuses suggest at least two matters that cry out for government-wide attention and intervention. First, the federal government must devote more resources to contract administration, management, and oversight. This investment is an urgent priority given the combination of the 1990s congressionally-mandated acquisition workforce reductions and the Bush administration's relentless pressure to accelerate the outsourcing trend.⁴ Second, the proliferation of interagency indefinite-delivery contract vehicles and the perverse incentives that derive from these fee-based purchasing vehicles have prompted troubling pathologies in public contracting that require correction and constraint.

I. THE RUSH TO OUTSOURCE

No one should be surprised to find contractors involved in almost every aspect of the U.S. government's efforts in Iraq. No shortage of recent literature focuses upon the outsourcing phenomenon, particularly from a public policy perspective.⁵ Outsourcing, or its more palatable pseudonym, "competitive

2003/088.html (last visited Mar. 26, 2005). Marlowe, a Defense Information Systems Agency senior contracting officer, was indicted for allegedly using a government purchase card to steer \$11 million in business to a company in which he had a secret financial interest. In return, Marlowe and his family allegedly received \$500,000 and other benefits from the company. See Katherine McIntire Peters, *Senior Defense Contracting Officer, Three Others, Indicted for Corruption*, GOV'T EXECUTIVE, Aug. 20, 2004, <http://www.govexec.com/daily/fed/0804/082004kp1.htm> (last visited Mar. 26, 2005); Press Release, U.S. Dep't of Justice, Senior Government Official, Local Attorney and Others Charged in Defense Procurement Fraud Case (Aug. 18, 2004), http://www.dodig.osd.mil/IGInformation/IGInformationReleases/PR-Marlowe8_18_04.pdf (last visited Mar. 26, 2005).

4. For a discussion of some of these issues at a more macro level, see, for example, Steven L. Schooner, *Competitive Sourcing Policy: More Sail than Rudder*, 33 PUB. CONT. L.J. 263 (2004); see also Dan Guttman, *Governance by Contract: Constitutional Visions; Time for Reflection and Choice*, 33 PUB. CONT. L.J. 321 (2004).

5. See, e.g., PHILLIP J. COOPER, GOVERNING BY CONTRACT: CHALLENGES AND OPPORTUNITIES FOR PUBLIC MANAGERS (2003); MARKET BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE (John D. Donahue & Joseph S. Nye, Jr. eds., 2002); THE PROCUREMENT REVOLUTION (Mark A. Abramson & Roland S. Harris III eds., 2003) (particularly chapters 1, 3, and 5-7). Recent symposia have grappled with a host of related issues. See, e.g., Symposium, *Accountability and Democracy in the Era of Privatization*, 28 FORDHAM URB. L.J. 1319 (2001); Symposium, *New Forms of Governance: Ceding Power to Private Actors*, 49 UCLA L. REV. 1687 (2002); Single Subject Issue, *Privatization and Outsourcing*, 30 PUB. CONT. L.J. 551 (2001); Symposium, *Public Values in an Era of Privatization*, 116 HARV. L. REV. 1211 (2003). Scholars also have exposed more of the thorny issues implicated when governments, at the federal, state, and local level, rely on the private sector. See, e.g., Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155 (2000) (discussing accountability mechanisms in contracts and the conflict between public law norms and private law principles); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1371 (2003) ("[C]onstitutional law's current approach to privatization is fundamentally inadequate in an era of increasingly privatized government."); Sydney A. Shapiro, *Outsourcing Government Regulation*, 53 DUKE L.J. 389 (2003) (suggesting that

sourcing,” is one of five government-wide initiatives in the Bush management agenda.⁶ The administration has done little to mask its preference for outsourcing, aggressively relying on contractor personnel in lieu of government employees or soldiers.⁷ While fear of a public backlash may have slowed the administration’s *domestic* outsourcing efforts,⁸ *New York Times* columnist Paul

governments employ a transaction cost or make-or-buy analysis in determining whether to outsource governmental regulation); Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83, 130 (2003) (“[I]n the debate about which government services are best-suited for private enterprise, . . . welfare services should be . . . last in line. The policy goals are simply too complex and, in a democratic society, conflicted.”). A wealth of contemporary comparative scholarship examines lessons learned from experiences outside the United States. *See, e.g.*, Lauren Page Ambinder et al., *The Mirage Becomes Reality: Privatization and Project Finance Developments in the Middle East Power Market*, 24 FORDHAM INT’L L.J. 1029 (2001); Alessandro Ancarani, *The Impact of Public Firms Commercialisation on Purchasing Management*, 3 J. PUB. PROCUREMENT 357 (2003); Bernard Black et al., *Russian Privatization & Corporate Governance: What Went Wrong?*, 52 STAN. L. REV. 1731 (2000); Ellen Dannin, *To Market, To Market: Legislating on Privatization and Subcontracting*, 60 MD. L. REV. 249, 249 n.1 (2001) (containing a wealth of sources relating to privatization in New Zealand in the author’s biographical footnote); Hester Lessard, *The Empire of the Lone Mother: Parental Rights, Child Welfare Law, and State Restructuring*, 39 OSGOODE HALL L.J. 717 (2001); Ewell E. Murphy, Jr., *The Prospect for Further Energy Privatization in Mexico*, 36 TEX. INT’L L.J. 75 (2001); Tony Prosser, *Public Service Law: Privatization’s Unexpected Offspring*, 63 LAW & CONTEMP. PROBS. 63 (2000); Yua Wei, *Corporatization and Privatization: A Chinese Perspective*, 22 NW. J. INT’L L. & BUS. 219 (2002).

6. *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, THE PRESIDENT’S MANAGEMENT AGENDA: FISCAL YEAR 2002 4, 17-18 (2001), <http://www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf> (last visited Mar. 26, 2005). “President Bush is a major advocate of . . . hiring private firms to do the government’s work—and implemented this policy in Texas while he was governor . . .” Stevenson, *supra* note 5, at 83 (citing David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231, 232 (1998) (“Governor Bush’s effort to privatize most of Texas’ welfare system, in turn, seemed rooted in his attempt to make a name for himself with the kind of bold experimentation that could carry him to national office.”)); *see also* Matthew Diller, *Form and Substance in the Privatization of Property Programs*, 49 UCLA L. REV. 1739, 1763 (2002) (“Governor Bush sought to hand the administration of the state’s welfare system over to . . . Lockheed Martin . . . and Electronic Data Systems . . .”).

7. The administration repeatedly offered eye-catching quotas for the number of government employees to be cut. *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT: FISCAL YEAR 2004 7, 39 (2003), <http://www.whitehouse.gov/omb/budget/fy2004/pdf/budget.pdf> (last visited Mar. 26, 2005) (indicating that the Defense Department and the Department of Veterans Affairs planned to outsource 55,000 civilian positions in 2003); *see also* Christopher Lee, *Army Outsourcing Plan Decried*, WASH. POST, Dec. 21, 2002, at A4 (suggesting that the plan could affect more than one of every six Army jobs).

8. Today, these quotas are unofficial and internal. *See, e.g.*, Christopher Lee, *OMB to Drop Quotas for Outsourcing of Jobs*, WASH. POST, July 25, 2003, at A23 (noting that skeptics “said OMB officials could still impose de facto quotas by refusing to bless agency plans that do not meet the old goals”). Nonetheless, the quotas remain the policy’s primary purpose. *See, e.g.*, OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, COMPETITIVE SOURCING: REASONED AND RESPONSIBLE PUBLIC-PRIVATE COMPETITION: AGENCY ACTIVITIES: A SUPPLEMENT TO THE JULY 2003 REPORT (2003), <http://www.white>

Krugman aptly suggests that:

in Iraq, where there is little public or congressional oversight, the administration has privatized everything in sight [Particularly shocking] is the privatization of purely military functions It's one thing to have civilians drive trucks and serve food; it's quite different to employ them as personal bodyguards to U.S. officials, as guards for U.S. government installations, and . . . as interrogators in Iraqi prisons.⁹

Peter Singer, whose recent book *Corporate Warriors*¹⁰ has become required reading in light of the government's practices in Iraq, raises similar policy concerns. In a *Washington Post* article, he noted:

Confronting the problem of controlling private contractors requires challenging a common myth—that outsourcing saves money. This philosophy stems from a wide craze of privatizing government services that began long before President Bush took office. But hiring private employees in Iraq at pay rates several times more than what soldiers make, plus paying the overhead at the private firms, has never been about saving money. *It's more about avoiding tough political choices concerning military needs, reserve call-ups and the human consequences of war.*¹¹

house.gov/omb/procurement/comp_sourc_addendum.pdf (last visited Mar. 26, 2005). Table 1 details the “OMB Estimates of Commercial Activities at Agencies Tracked under the PMA” indicating each agency’s total workforce, the number of full-time-equivalents (FTEs) performing commercial activities, the total number of those FTEs available for competition, and the percentage of the total workforce that this number represents. *See id.* at 10. Various legislative initiatives have impeded implementation of the new rules. One of the most dramatic examples was the successful Van Hollen amendment to H.R. 2989, the 2004 Transportation and Treasury Appropriation, which stated that “[n]one of the funds made available by this Act may be used to implement the revision to Office of Management and Budget Circular A-76 made on May 29, 2003.” 150 CONG. REC. H7138 (daily ed. Sept. 14, 2004); *see* Christopher Lee, *Competitive Sourcing Plan Hits Snag: House Votes Against Rules that Would Speed Up Competition for Federal Jobs*, WASH. POST, Sept. 11, 2003, at A21. In late October, this matter went to conference after the Senate approved an amendment by Senator George Voinovich, which imposed a different set of constraints upon the A-76 process. *Senate Votes to Allow Federal Workers to Protest A-76 Competitions in Funding Bill*, 80 Fed. Cont. Rep. (BNA) No.15, at 389 (Oct. 28, 2003); *see also* Truthfulness, Responsibility, and Accountability in Contracting Act (TRAC), H.R. 721, 107th Cong. § 2 (Feb. 14, 2001) (intending to limit outsourcing until the costs and benefits were analyzed and garnering the support of 190 co-sponsors); *OMB Urged to Halt NIH Job Competitions*, 45 GOV'T CONTRACTOR ¶ 436 (2003) (raising concerns that “this aggressive approach to Circular A-76 is undermining the advancement of science”).

9. Paul Krugman, *Battlefield of Dreams*, N.Y. TIMES, May 4, 2004, at A29.

10. P.W. SINGER, *CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY* (2003).

11. P.W. Singer, *The Contract the Military Needs to Break*, WASH. POST, Sept. 12, 2004, at B3 (emphasis added). I agree with those who dismiss the optimistic projections of outsourcing-based savings, particularly because there is a dearth of empirical evidence linking potential savings with actual or historical savings. *See, e.g.*, SUSAN M. GATES & ALBERT A. ROBBERT, RAND NAT'L DEFENSE RES. INST., *PERSONNEL SAVINGS IN COMPETITIVELY SOURCED DOD ACTIVITIES: ARE THEY REAL? WILL THEY LAST?* xiv (2000) (“[P]rojected personnel cost savings are substantial in both in-house and contractor wins [of sourcing contracts], ranging from 30 to 60 percent.”); Max B. Sawicky, *Show Me the*

In Iraq, our military relies upon contractor personnel not only for transportation, shelter, and food, but also for unprecedented levels of battlefield and weaponry operation, support, and maintenance.¹² Accordingly, defense experts now recognize that, without contractors, our military simply cannot project its awesome technical superiority abroad. But highly publicized incidents of prisoner abuse raise fundamental questions particularly with regard to the tasking of contractor personnel and the oversight of their performance.¹³

Money: Evidence Is Sorely Lacking that the Bush Administration's Proposed A-76 Rules for Contracting Will Bring Budget Savings, ECON. POL'Y INST. BRIEFING PAPER (2003), <http://www.epinet.org/briefingpapers/145/bp145.pdf> (last visited Mar. 26, 2005) (asserting, among other things, that (1) the costs savings do not necessarily derive from examples that are representative of the types of work that may be contracted in the future; (2) the case studies were cherry-picked and, accordingly, provide better results than a random survey would reveal; and (3) the cost savings fail to recognize costs "shifted to other federal agencies or the taxpayer"). Moreover, the Defense Department Inspector General suggested that the pressure to outsource ultimately results in increased costs. See OFFICE OF THE INSPECTOR GEN., DEP'T OF DEF., REPORT D-2000-088, DOD ACQUISITION WORKFORCE REDUCTION TRENDS AND IMPACTS 18 (2000) [hereinafter REPORT D-2000-088]; Keith Hartley, *The Economics of Military Outsourcing*, 11 PUB. PROCUREMENT L. REV. 287, 290 (2002) (suggesting that transaction costs are "[a] central feature of outsourcing and the economics of contracting" and that "the transaction cost analysis shows that the costs of managing contracts, including arranging bids, monitoring outcomes, and taking legal action for contract failures, may offset any efficiency savings"); see also ELLIOTT D. SCLAR, YOU DON'T ALWAYS GET WHAT YOU PAY FOR: THE ECONOMICS OF PRIVATIZATION (2000).

12. These services range from the huge Logistics Civil Augmentation Program (LOGCAP) contract with Halliburton subsidiary, Kellogg Brown & Root (KBR), to the security services provided by Blackwater for Ambassador Paul Bremer. See, e.g., ARMY MATERIAL COMMAND, LOGISTICS CIVIL AUGMENTATION PROGRAM, available at <http://www.amc.army.mil/LOGCAP> (last visited Mar. 26, 2005). Paul J. Kern describes the program:

LOGCAP is about providing support to our troops and this support covers the full logistics spectrum. Some of the more critical functions include laundry and bath, facilities and billeting, clothing exchange and repair, waste and sanitation, food service, mortuary affairs, supply support, maintenance, transportation and distribution, and power generation and distribution to list but a few.

The Complex Task of Coordinating Contracts Amid Chaos: The Challenges of Rebuilding a Broken Iraq: Hearing Before the House Comm. on Gov't Reform, 108th Cong. 3 (2004) (statement of Paul J. Kern, Commanding General, U.S. Army Material Command), <http://reform.house.gov/UploadedFiles/Army%20Material%20-%20Kern%20Testimony.pdf> (last visited Mar. 26, 2005); see also Website of Blackwater Security Consulting, available at <http://www.blackwatersecurity.com/dospsd.html> (last visited Mar. 26, 2005); Website of Blackwater USA, available at <http://www.blackwaterusa.com/> (last visited Mar. 26, 2005).

13. By no means have all of the legal issues associated with contractors on the battlefield been resolved. See, e.g., Brian H. Brady, *Notice Provisions for United States Citizen Contractor Employees Serving with the Armed Forces of the United States in the Field: Time to Reflect Their Assimilated Status in Government Contracts?*, 147 MIL. L. REV. 1 (1995); Michael J. Davidson, *Ruck Up: An Introduction to the Legal Issues Associated with Civilian Contractors on the Battlefield*, 29 PUB. CONT. L.J. 233 (2000); Karen L. Douglas, *Contractors Accompanying the Force: Empowering Commanders with Emergency Change Authority*, 55 A.F. L. REV. 127 (2004); Hartley, *supra* note 11; Steven B. Hilkowitz, *Contractors on the Battlefield*, 44 CONT. MGMT. 24 (2004); James J. McCullough & Courtney J. Edmonds, *Contractors on the Battlefield Revisited: The War in Iraq & Its Aftermath*, 04-6 BRIEFING PAPERS 1 (May 2004); Todd S. Milliard, *Overcoming Post-*

II. TROUBLING ANECDOTES FROM ABU GHRAIB

The disturbing allegations of prisoner abuse at the Abu Ghraib prison become all the more unsettling because, unfortunately, they involve contractor personnel. The widely circulated Fay Report, which concludes that “[c]ontracting-related issues contributed to the problems at Abu Ghraib prison,”¹⁴ and the less well-known Interior Department Inspector General report are instructive in regard to the role of contractor personnel in and around the battle area.¹⁵

The Army relied upon two relevant contractual agreements for operations at the Abu Ghraib prison: CACI International provided more than half of the interrogators employed at the facility,¹⁶ while Titan supplied linguistics personnel.¹⁷ General Fay’s assessment of the use of these contracts—and his conclusion that more than a third of the improper incidents involved contractor personnel—suggests the obvious: “The general policy of not contracting for intelligence functions and services was designed in part to avoid many of the problems that eventually developed at Abu Ghraib”¹⁸

As a threshold issue, most observers (in or out of government) object, with good reason, to the use of contractors to perform interrogations, assuming that prisoner interrogation is an inherently governmental function: “Concern about which . . . activities are inherently governmental functions . . . goes back as far as the . . . discussion in the *Federalist Papers* among the framers of the *Constitution* over what functions are appropriate for the federal government to exercise.”¹⁹ Although the Fay Report does not seek to resolve this issue (instead suggesting that use of contractor personnel may be unavoidable in

Colonial Myopia: A Call to Recognize and Regulate Private Military Companies, 176 MIL. L. REV. 1 (2003); Katherine McIntire Peters, *Buck Private*, GOV’T EXECUTIVE, Oct. 1, 2004, at 40; Rebecca Rafferty Vernon, *Battlefield Contractors: Facing the Tough Issues*, 33 PUB. CONT. L.J. 369 (2004).

14. The 143-page report details the results of an Army inquiry into the role of military intelligence personnel in prisoner abuse at the Abu Ghraib prison in Iraq. MG GEORGE R. FAY, AR 15-6 INVESTIGATION OF THE ABU GHRAIB DETENTION FACILITY AND 205TH MILITARY INTELLIGENCE BRIGADE 52 (2004) [hereinafter FAY REPORT], <http://news.findlaw.com/nytimes/docs/dod/fay82504rpt.pdf> (last visited Mar. 26, 2005). Granted, the contract-related issues were but one of several institutional factors identified by the Fay Report, including a failure of leadership and confusion over interrogation procedures. *See id.* at 8. Ultimately, the report implicates both military personnel and civilian contractors, finding that more than 50 people had some degree of culpability for nearly four dozen instances of prisoner abuse occurring between July 2003 and February 2004. *Id.* at 7-8.

15. *Id.* at 47-52; Memorandum from Earl Devaney, Inspector Gen., Dep’t of Interior, to Assistant Sec’y for Pol’y, Mgmt. & Budget (July 16, 2004) [hereinafter Interior IG Report], <http://www.oig.doi.gov/upload/CACI%20LETTER3.pdf> (last visited Mar. 9, 2005).

16. FAY REPORT, *supra* note 14, at 48-49.

17. *Id.* at 48.

18. *Id.* at 49.

19. GEN. ACCT. OFFICE, GAO/GGD-92-11, GOVERNMENT CONTRACTORS: ARE SERVICE CONTRACTORS PERFORMING INHERENTLY GOVERNMENTAL FUNCTIONS? 2 (1991).

“urgent or emergency situations”), this policy question offers a window into a long-running ad hoc battle over how our government serves the public.²⁰ A deep chasm separates the putative government policy expressed in the recently revised OMB Circular A-76²¹—that the government should not compete with its citizens—and a regime in which the government competes with its citizens when monetary savings might result.²²

On a less philosophical level, the Fay Report leaves no doubt that some of the specific problems experienced in Abu Ghraib can be traced to insufficient contractor oversight.²³ The Fay Report identified two main manifestations of the problem: a lack of training and inadequate contract management. According to the Report, as many as thirty-five percent of the interrogators supplied by CACI lacked formal military interrogation training.²⁴ Even more troubling are the indications that CACI, in a rush to fill military demands for

20. The battleground included the language in the revised OMB Circular A-76 and the implementation of the FAIR Act. *See* Federal Activities Inventory Reform (FAIR) Act, Pub. L. No. 105-270, 112 Stat. 2382 (1998); OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, CIRCULAR NO. A-76 (REVISED), PERFORMANCE OF COMMERCIAL ACTIVITIES (2003), 68 Fed. Reg. 32,134 (May 29, 2003) (reflecting the longstanding distinction between *inherently governmental functions* (which government employees must, or at least should, perform) and *commercial activities* (for which the private sector should be given the opportunity to compete)); *see also* OFFICE OF MGMT. & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, 2003 FAIR ACT INVENTORY USER'S GUIDE (2003), http://www.whitehouse.gov/omb/procurement/fair/2003users_guide.html (last visited Mar. 26, 2005) (explaining that agencies must create inventories for Congress and the public “of all commercial activities performed by federal employees”).

21. *See* OFFICE OF MGMT. & BUDGET, CIRCULAR NO. A-76, *supra* note 21.

22. Choosing between the labels “outsourcing” and “competitive sourcing” involves a significant policy decision, rather than mere semantics. In an outsourcing regime, government relies upon the private sector to perform its commercial activities. In other words, if the private sector can perform a task for the government, it should. Conversely, competitive sourcing permits existing government personnel (through the guise of a putative “most efficient organization” or MEO) to compete with the private sector to perform the same commercial activities. Under a competitive sourcing regime, the private sector only should perform commercial activities if cost savings are anticipated.

23. FAY REPORT, *supra* note 14, at 49. Several other findings, with regard to the CACI contract, merit attention. First, a CACI employee participated with the contracting officer's representative in writing the statement of work (SOW) prior to the award of the contract. As the Fay Report notes, such a practice—what appears to be an organizational conflict of interest (OCI)—appears to violate the Federal Acquisition Regulation (FAR). *See id.*; *see also* FAR, 48 C.F.R. § 9.502-2 (2005). Second, it was unclear whether anyone in the Army's contracting or legal organizations approved the use of the blanket purchase agreement (BPA). *See* FAY REPORT, *supra* note 14, at 49. Third, the Army general counsel's office concluded in May of 2004 that these and other delivery orders for interrogator services were outside the scope of the GSA Schedule contract and should be cancelled. *See id.* at 48-49.

24. The government has attempted to remedy some of these ills at Abu Ghraib. *See, e.g.*, Ellen McCarthy, *Changes Behind the Barbed Wire: New Standards Are in Place for the Oversight of Contract Workers at Abu Ghraib Prison*, WASH. POST, Dec. 13, 2004, at E01 (“Fay said the Army is making changes recommended by his panel to ensure that civilian interrogators and contractors have qualifications and training equal to that of their military counterparts.”).

more personnel, failed to conduct adequate background investigations on prospective employees before hiring them. Lack of training was not only evident on the side of the contractors. Military personnel themselves did not have the necessary training in the area of contract administration to adequately monitor and oversee the contracts. If the Army plans to rely upon contractors to provide such sensitive services as translation and interrogation, it must maintain tight control over the operations. However, the small number of contracting officer representatives assigned to oversee the performance of hundreds of private employees made proper management virtually impossible. Additionally, as discussed below, confusion permeated Abu Ghraib with regard to who was supervising whom.²⁵

III. INADEQUATE CONTRACT ADMINISTRATION: A FALSE ECONOMY

As the Fay Report gleaned from the Abu Ghraib experience, “it is very difficult, if not impossible, to effectively administer a contract when the COR [contracting officer’s representative]²⁶ is not on site.”²⁷ While this finding might appear obvious, the larger point cannot be avoided. If the government plans to rely heavily upon contractors, it must maintain, invest in, and apply appropriate acquisition professional resources to select, direct, and manage those contractors. Unfortunately, insufficient contract management resources have been applied in Iraq. General Fay poignantly articulated this point:

Meaningful contract administration and monitoring will not be possible if a small number of CORs are asked to monitor the performance of one or more contractors who may have 100 or more employees in theater, and in some cases, perhaps in several locations . . . [T]he CORs do well to keep up with the paper work, and simply have no time to actively monitor contractor performance. *It is apparent that there was no credible exercise of appropriate oversight of contract performance at Abu Ghraib.*²⁸

Long before the prison scandal led to increased scrutiny, the government’s failure to properly staff its contracts in Iraq was pervasive and well-known. Last year, there was every reason to fear that the government lacked adequate

25. *See infra* notes 47-50.

26. “‘Contracting officer’ means a person with the authority to enter into, administer, and/or terminate contracts . . . The term includes certain authorized representatives of the [CO] acting within the limits of their authority as delegated by the [CO].” FAR, 48 C.F.R. § 2.101 (2005). “[CO]s are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships.” 48 C.F.R. § 1.602-2.

27. FAY REPORT, *supra* note 14, at 50 (footnote added). The Fay Report later reiterated that “[a]n important step in precluding the recurrence of [these types] of situations . . . is to insure that a properly trained COR is on site.” *Id.* at 52.

28. *Id.* at 52 (emphasis added). The report states what common sense dictates: “Failure to assign an adequate number of CORs to the area of contract performance puts the Army at risk of being unable to control poor performance or become aware of possible misconduct by contractor personnel.” *Id.*

resources on the ground in Iraq to properly manage and administer its contractual undertaking. Few doubted that the government lacked sufficient personnel and mechanisms to ensure appropriate oversight of this massive contracting enterprise.²⁹ Sadly, a steady stream of empirical research confirms the worst. Recent audits of Iraqi and U.S. funds awarded by the Coalition Provisional Authority reveal the gross inadequacies underlying contract management and administration for Iraqi reconstruction.³⁰

Unfortunately, this problem is not unique to the Iraq contracting process.³¹ The federal government currently lacks sufficient numbers of qualified acquisition professionals to conduct appropriate market research, properly plan acquisitions, maximize competition, comply with a plethora of congressionally imposed social policies, administer contracts to assure quality control and guarantee contract compliance, resolve pending protests and disputes, and close

29. The Defense Department was not alone in lacking sufficient resources to manage its requirements in Iraq. *See, e.g.*, Jeffrey Marburg-Goodman, *USAID's Iraq Procurement Contracts: An Insider's View*, PROCUREMENT LAW, Fall 2003, at 10. Explaining the compromises required during a crisis, Marburg-Goodman notes:

[The FAR] constitutes the most complex, yet also the most transparent, government purchasing code in the world. Still, the success it ensures for fundamental fairness, transparency, and maximum competitive benefit is normally achieved at considerable costs in time and staffing effort There is a tremendous tension between this purposely deliberate and unhurried process and the occasional emergency needs of a government agency.

Id.

30. *See, e.g.*, OPEN SOCIETY INST., REVENUE WATCH: REPORT NO. 7, DISORDER, NEGLIGENCE AND MISMANAGEMENT: HOW THE CPA HANDLED IRAQ RECONSTRUCTION FUNDS (2004), <http://www.iraqrevenuewatch.org/reports/092404.pdf> (last visited Mar. 26, 2005). As of April 12, 2004, the Coalition Provisional Authority (CPA) had awarded a staggering \$847 million worth of contracts to be paid for by the Development Fund for Iraq (DFI), a fund made up of earnings from the sale of Iraq's oil and gas. *Id.* at 7. "Although the CPA was required to manage the DFI in a transparent manner, it chose not to apply the same standards that apply to U.S. funds." *Id.* at 3. Apparently, this decision was based on "the 'wide uses' of DFI along with environmental factors unique to Iraq." *Id.* Even under the more stringent procedures mandated for the allocation of U.S. money, poor contractual oversight and management are prevalent. Therefore, it should come as no surprise that when operating under less transparent standards, the CPA failed to properly award and monitor its contracts:

The CPA Contracting activity had not issued standard operating procedures or developed an effective contract review, tracking, and monitoring system. In addition, contract files were missing and incomplete. Further, contracting officers did not always ensure that contract prices were fair and reasonable, contractors were capable of meeting delivery schedules, and payments were made in accordance with contract requirements.

OFFICE OF INSPECTOR GEN., COALITION PROVISIONAL AUTH., REPORT NO. 04-013, COALITION PROVISIONAL AUTHORITY'S CONTRACTING PROCESSES LEADING UP TO AND INCLUDING CONTRACT AWARD (2004). For a list of agencies that oversee spending on Iraqi reconstruction, see OPEN SOCIETY INST., *supra*, at 13-15.

31. "For insiders in the corridors of the Pentagon, the pervasive role of contractors in the replacement of civil servants is a given." Dan Guttman, *The Shadow Pentagon: Private Contractors Play a Huge Role in Basic Government Work—Mostly Out of Public View* (Sept. 29, 2004), at <http://www.publicintegrity.org/pns/printer-friendly.aspx?aid=386> (last visited Mar. 26, 2005).

out contracts.³²

This point bears emphasis for two reasons. First, the GAO's³³ "prior work has shown that when workforce reductions do not consider future needs—such as the staff reduction at DoD [Department of Defense] during the 1990s—the result is a workforce that is not balanced with regard to experience and skill sets."³⁴ Frankly, the government did not have enough qualified contracts professionals to meet its needs before the events of September 11th. Since that time, despite a dramatic spike in procurement spending for homeland security and military operations in Iraq and Afghanistan, the federal government has failed to engage in a meaningful effort to recruit the staff necessary to manage the government's increased contracting burdens.

Second, given the administration's competitive sourcing initiative, the most rapidly growing area of procurement activity lies in service contracting.³⁵ Successful service contracts are difficult to draft and, more importantly, require significant resources to administer or manage. Thus: "The extent of reliance on service contractors is not by itself a cause for concern. *Agencies must, however, have a sufficient number of trained and experienced staff to manage Government programs properly.* The greater the degree of reliance on contractors the greater the need for oversight by agencies."³⁶

32. See generally Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 AM. U. L. REV. 627 (2001) [hereinafter Schooner, *Fear of Oversight*] (discussing reduced oversight in government procurement throughout the 1990s). Last year, the GAO conceded that the acquisition workforce has declined dramatically, while "all agencies face the prospect of losing many of their skilled acquisition personnel over the next 5 years—with a significant portion of the government's acquisition workforce becoming eligible to retire by fiscal year 2008." GEN. ACCT. OFFICE, GAO-03-443, FEDERAL PROCUREMENT: SPENDING AND WORKFORCE TRENDS (2003) [hereinafter GAO-03-443]; see also REPORT D-2000-088, *supra* note 11.

33. Recently Congress changed the name of the General Accounting Office (GAO) to the Government Accountability Office. GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, § 8(a), 118 Stat. 811, 814 (2004); see also GEN. ACCT. OFFICE, GAO'S NAME CHANGE AND OTHER PROVISIONS OF THE GAO HUMAN CAPITAL REFORM ACT, available at <http://www.gao.gov/about/namechange.html> (last visited Mar. 26, 2005) (noting that the name change "better reflects the modern professional services organization GAO has become").

34. GAO-03-443, *supra* note 33, at 22 (citing *inter alia* GEN. ACCT. OFFICE, GAO-01-753T, CONTRACT MANAGEMENT: TRENDS AND CHALLENGES IN ACQUIRING SERVICES (2001)).

35. The government has failed to fully recognize, let alone adapt to, its increasing reliance on service contracts. The increase is dramatic. See, e.g., COMMERCIAL ACTIVITIES PANEL, IMPROVING THE SOURING DECISIONS OF THE GOVERNMENT 27 fig. 5 (2002), <http://www.gao.gov/a76panel/dcap0201.pdf> (last visited Mar. 26, 2005) (demonstrating that, between 1986 and 2001, the percentage of federal procurement dollars devoted to service contracting rose from 31% to 51% of total procurement spending); see also Larry Makinson, *Outsourcing the Pentagon: Who Benefits from the Politics and Economics of National Security?*, available at <http://www.publicintegrity.org/pns/report.aspx?aid=385> (last visited Mar. 26, 2005) (showing in the figure, "The Switch to Services: Defense Contracting, 1984-2003," the growth of services as a percentage of total defense contracts).

36. Policy Letter 92-1 from Office of Fed. Procurement Pol'y (OFPP), to the Heads of

Currently, there are inadequate personnel resources, and insufficient investment has been made to train existing personnel in required skills (such as drafting performance-based statements of work).³⁷ In other words, the critical acquisition workforce problems will get worse before they get better.

Demands upon overtaxed acquisition corps lead to a triage-type focus on buying, which has severely limited the resources available for post-award contract administration. Agencies must apply their limited resources to meet their most pressing needs.³⁸ In other words, buyers face enormous pressure to fill vacant seats with bodies. When faced with applying limited resources, agencies focus first upon *awarding* contracts and less upon *administering* those contracts once awarded. To be clear—the government lacks the procurement professionals needed to manage the contractors that continue to replace outsourced government personnel. Steve Kelman, one of the chief architects of the 1990s acquisition reforms, now concedes that “the administration of contracts once they have been signed has been the neglected stepchild of [the procurement system reform] effort.”³⁹ More broadly, the cuts diminished internal (or government) oversight of the contracting process,⁴⁰ limiting the

Executive Agencies and Departments § (7)(h) (Sept. 23, 1992), <http://www.arnet.gov/Library/OFPP/PolicyLetters/Letters/PL92-1.html> (last visited Mar. 26, 2005) (emphasis added).

37. The Commercial Activities Panel found:

[D]own sizing was not guided by strategic planning, nor has adequate consideration been given to implementation challenges, such as the impact of the government’s reduction-in-force rules. Overall, the government’s human resources policies and practices have not reflected, nor been aligned with, current workforce dynamics and challenges, including demographics, professional development, mobility, and other issues.

COMMERCIAL ACTIVITIES PANEL, *supra* note 35, at 28.

38. Joseph A. Pegnato, *Federal Workforce Downsizing During the 1990s: A Human Capital Disaster*, 32 PUB. MANAGER 26, 29 (Winter 2003-04) (“Some of the adverse impacts associated with the workload imbalance include more time to award contracts, increased program costs, insufficient staff to manage requirements, increased backlog of contracts to close out, and personnel retention difficulty.”); *see also* Ralph C. Nash & John Cibinic, *Contracting Out Procurement Functions: The “Inherently Governmental Function” Exception*, 14 NASH & CIBINIC REP. ¶ 45 (2000) (wondering “whether some agencies have enough personnel left in-house”).

39. “The most fundamental problem with the current system is that it insufficiently recognizes contract administration as in the first instance a management function.” Steven Kelman, *Strategic Contracting Management*, in MARKET BASED GOVERNANCE, *supra* note 5, at 89-90, 93 (referring to the “hollow state” while citing *inter alia* DONALD F. KETTL, GOVERNMENT BY PROXY: (MIS?)MANAGING FEDERAL PROGRAMS (1988)).

40. Schooner, *Fear of Oversight*, *supra* note 32, at 671-72 (including the graphic on page 672). Between 1990 and 1999, the number of accounting and budget personnel within the acquisition workforce fell from 17,504 to 6432, a decrease of 63%. The cumulative reduction in these specialties is more dramatic because these figures *exclude* the Defense Contract Audit Agency, whose staffing decreased from 7030 work years in FY 1990 to 3958 in FY 1999, a reduction of about 43%. Further, during the same period, the number of quality assurance, inspection, and grading personnel fell from 12,117 to 5191, a decrease of 57%. *Id.*; *see also* RICHARD J. STILLMAN II, THE AMERICAN BUREAUCRACY: THE CORE OF MODERN GOVERNMENT 307-09 (2d ed. 1996) (suggesting that the growth of contracting out has “tended to accelerate numerous problems and dilemmas of managerial efficiency,

government's insight into how its contractors perform.

This scenario thus hides significant downstream costs and potential performance failures. In Iraq (and, ultimately, throughout the government), it is time to make meaningful investments in restoring, expanding, training, and incentivizing the acquisition workforce. A related concern arises with regard to the proliferation of personal services contracts.

IV. PERSONAL SERVICES CONTRACTS: GOVERNMENT DEPENDENCE ON EMPLOYEE AUGMENTATION

As the administration pursued its outsourcing agenda, it ignored the long-standing congressional prohibitions against personal services contracting. Government procurement law, policy, and practice distinguish contracts for *services* (ranging from custodial or clerical to medical) from those for *supplies* (including end items or widgets ranging from furniture to fighter aircraft) and *construction* (including designing, building, repairing structures, or generally improving real estate).⁴¹ Service contracts are further distinguished as *personal* and *nonpersonal* service contracts. In a nonpersonal services contract, the government delegates a function to a contractor. Conversely, in personal services contracts, the government retains the function, but contractor employees staff the effort.⁴²

The government operates under longstanding legal and policy objections to the use of personal services contracts.⁴³ Yet an increasingly common form of personal services contract is the *body shop* or *employee augmentation arrangement*.⁴⁴ As the name implies, the government uses this type of contract to hire contractor personnel to replace, supplement, or work alongside civil servants or members of the armed forces. This is the antithesis of the government's preferred approach, known as performance-based service contracting (PBSC).⁴⁵ As a matter of *practice and necessity*, however, the

oversight, and accountability").

41. A service contract "directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task *rather than to furnish an end item of supply*." FAR, 48 C.F.R. § 37.101 (2005) (emphasis added).

42. "'Nonpersonal services contract' means a contract under which the personnel rendering the services are not subject, either by the contract's terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees." 48 C.F.R. § 37.101. "A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor's personnel." 48 C.F.R. § 37.104(a).

43. The basic procurement regulation explains that "[a]gencies shall not award personal services contracts unless specifically authorized by statute . . . to do so." 48 C.F.R. § 37.104(b).

44. This poses an interesting pedagogical challenge in the law school classroom, at least until the statutes and regulations are amended to conform to current practice.

45. 48 C.F.R. § 37.102(a) (1983) (citing Pub. L. No. 106-398, § 821 and cross-referencing 40 U.S.C. §§ 541-544). *See generally* Policy Letter 91-2, from Office of Fed.

federal government today relies heavily upon employee augmentation contracts.⁴⁶ The experience in Iraq is not dramatically different from what occurs daily in government offices and organizations across the United States. Civil servants work alongside, with, and at times, for, contractor employees who sit in seats previously occupied by government employees. But no one stopped to train the government workforce on how to operate in such an environment. For example, the Fay Report notes that the use of contractor personnel, “hired in an attempt to address shortfalls,” contributed to the lack of unit integrity in the Joint Interrogation and Detention Center (JIDC), which the Report described as a “fatal flaw.”⁴⁷

One of the most troubling aspects of using contractor personnel to augment government personnel shortfalls is that, all too often, the contractor personnel lack appropriate training to replace government personnel, and government personnel lack appropriate training to supervise the contractor personnel. Another indication of the apparent inadequacy of on-site contract management and lack of contract training is the apparent lack of understanding of the appropriate relationship between contractor personnel, government civilian

Procurement Pol’y, to the Heads of Executive Agencies and Departments (Apr. 9, 1991), [hereinafter OFPP Policy Letter 91-2] http://www.arnet.gov/Library/OFPP/PolicyLetters/Letters/PL91-2_4-9-91.html (last visited Mar. 26, 2005) (commencing the government’s initiative officially). In addition, see GEN. ACCT. OFFICE, GAO-02-1049, CONTRACT MANAGEMENT: GUIDANCE NEEDED FOR USING PERFORMANCE-BASED SERVICE CONTRACTING 1 (2002) (“To achieve greater cost savings and better outcomes . . . , the Congress and the administration have encouraged greater use of performance-based service contracting.”).

Performance-based service contracting (PBSC) emphasizes that all aspects of an acquisition be structured around the purpose of the work to be performed as opposed to the manner in which the work is to be performed It is designed to ensure that contractors are given freedom to determine how to meet the Government’s performance objectives, that appropriate performance quality levels are achieved, and that payment is made only for services that meet these levels.

OFFICE OF MGMT. & BUDGET, OFFICE OF FED. PROCUREMENT POL’Y, A GUIDE TO BEST PRACTICES FOR PERFORMANCE-BASED SERVICE CONTRACTING 4 (1998) [hereinafter BEST PRACTICES GUIDE], <http://www.arnet.gov/Library/OFPP/BestPractices/PPBSC/BestPPBSC.html> (last visited Mar. 26, 2005). “Agencies shall, to the maximum extent practicable, describe the work in terms of ‘what’ is to be the required output rather than ‘how’ the work is to be accomplished.” OFPP Policy Letter 91-2, *supra*, § 5(a). “The PBSC [work statement] describes the effort in terms of measurable performance standards (outputs). These standards should include such elements as ‘what, when, where, how many, and how well’ the work is to be performed.” BEST PRACTICES GUIDE, *supra*, at 7; *see also* OFFICE OF DEPUTY UNDER SEC’Y OF DEF. FOR ACQUISITION REFORM, PERFORMANCE-BASED SERVICE ACQUISITION 11 (2001), <http://www.dau.mil/pubs/misc/pbsa.asp> (last visited Mar. 26, 2005).

46. This reliance is driven by the juxtaposition of two trends: (1) increased government downsizing and (2) the targeted acquisition workforce reductions discussed above.

47. FAY REPORT, *supra* note 14, at 9. The government’s failure to train its workforce to operate in such a fluid, highly integrated environment concerns the nation’s public policy schools and scholars who study the “new public management.” *See, e.g.*, John Forrer & James Edwin Kee, *Public Servants as Contract Managers?*, 33 PUB. CONT. L.J. 361 (2004).

employees, and military personnel.⁴⁸

More specifically, the Fay Report found that “[n]o training is conducted at any level . . . on the employment of contract interrogators in military operations [The government’s] interrogators, analysts, and leaders were unprepared for the arrival of contract interrogators and had no training to fall back on in the management, control, and discipline of these personnel.”⁴⁹ Moreover, within Abu Ghraib, it appears that the parties involved lacked a sense “of the appropriate relationship between contractor personnel, government civilian employees, and military personnel. Several people indicated . . . that contractor personnel were ‘supervising’ government personnel or *vice versa*.”⁵⁰ This confusion demonstrates the very scenario that the personal services prohibition was intended to avoid.⁵¹

The worst-case scenario arises where a contractor performs work under an open-ended contract (for example, with a vague or ambiguous statement of work) without guidance or management from a responsible government official (for example, in the absence of an administrative contracting officer or a contracting officer’s representative).⁵² The Fay investigation did well to draw

48. FAY REPORT, *supra* note 14, at 51.

49. *Id.* at 19. Nor was there an established curriculum from which the government could have drawn for its training. The Fay Report found:

No doctrine exists to guide interrogators and their intelligence leaders . . . in . . . contract management or command and control of contractors in a wartime environment. These interrogators and leaders faced numerous issues involving contract management: roles and responsibilities of [government] personnel with respect to contractors; roles, relationships, and responsibilities of contract[or personnel] . . . with military personnel; and the methods of disciplining contractor personnel

Id. Moreover, there was no standardization of the contractor interrogator training. To the extent that the contract required that contractor personnel have training equivalent to government interrogators, “no one was monitoring the contractor’s decision as to what was considered ‘equivalent.’” *Id.* at 51.

50. *Id.* at 51. For example, the Fay Report identifies two organization charts that listed contractor employee supervisors with military subordinates. *Id.* at 52.

51. The regulatory regime anticipates that government personnel manage *contracts* but do not directly supervise individual contractor employees; nor do contractor employees directly report to government personnel. For various reasons, including standards of conduct and compensation regimes, contractor personnel differ from civil servants. “The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures required by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.” FAR, 48 C.F.R. § 37.104(a) (2005).

52. A simple example illustrating this principle can be found in the BTG/Titan contract for linguists. Because the purpose of the contract was to provide linguists, the contract does not contemplate that contractor personnel might conduct interrogations. Accordingly, nothing in the contract required BTG/Titan personnel to review or sign the interrogation rules of engagement. FAY REPORT, *supra* note 14, at 48. The report continues:

Proper oversight did not occur at Abu Ghraib due to a lack of training and inadequate contract management and monitoring. Failure to assign an adequate number of CORs to the area of contract performance puts the Army at risk of being unable to control poor performance or become aware of possible misconduct by contractor personnel. . . . The Army

attention to the oversight vacuum. It is troubling to learn that the officer in charge of interrogations received no parameters or guidance for use of contractor personnel, was unfamiliar with the contract's terms and procedures, made no mention of a government contracting officer's representative, and understood her primary point of contact to be the contractor's on-site manager.⁵³ Sadly, this scenario is all too common today.

V. FLEXIBLE FEE-BASED ACQUISITION INSTRUMENTS: UNANTICIPATED EXTERNALITIES

These problems are exacerbated by the proliferation of fee-based arrangements that permit government agencies to avoid longstanding contracting constraints by off-loading their procurement function to other agencies. No doubt, most Americans are surprised to learn that the military relied upon the Department of the Interior's National Business Center (NBC)⁵⁴ to procure contractor personnel to conduct interrogations in Iraq and Guantanamo Bay.⁵⁵

Yet it is no surprise that problems continue to arise under these immensely popular, highly-flexible contractual vehicles—indefinite-delivery/indefinite-quantity (ID/IQ) contracts. While these vehicles undoubtedly streamline the procurement process, concerns regarding their misuse are neither new nor novel.⁵⁶ Numerous GAO and IG reports disclose agency practices in awarding

needs to take a much more aggressive approach to contract administration and management if interrogator services are to be contracted

Id. at 52.

53. *Id.* at 50.

54. It is difficult to get a sense of the mission, purpose, or mandate of the National Business Center (NBC). For example, a visit to the NBC's website indicates that its new or expanded customers include: (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. *See generally* Website of National Business Center, at <http://www.nbc.gov> (last visited Mar. 26, 2005). Like a commercial firm, to the extent that "[t]he NBC operates on a full cost-recovery business basis," it must generate fees. *Id.* at *Overview*. Unlike a commercial firm, one might expect its ultimate purpose to derive from a congressional authorization in some way related to the Interior.

55. Interior IG Report, *supra* note 15, at 3. The Guantanamo Bay effort involved "intelligence analysis and strategic debriefing services" with regard to the approximately 600 people detained during the government's military action in Afghanistan. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).

56. *See, e.g.*, Michael J. Benjamin, *Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies*, 31 PUB. CONT. L.J. 429 (2002); Karen DaPonte Thornton, *Fine Tuning Acquisition Reform's Favorite Procurement Vehicle, the Indefinite Delivery Contract*, 31 PUB. CONT. L.J. 383 (2002).

task and delivery order contracts which, almost uniformly, include insufficient competition and poorly justified sole-source awards.⁵⁷ In principle, contractors are supposed to compete to become part of an “umbrella contract,” which offers them little more than the opportunity to compete for individual task or delivery orders. Unfortunately, the anticipated competition rarely materializes; agencies tend to include all comers on the contract vehicle. This 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 proves absent during the task-order stage. Because all “contract holders” may market their services directly to individual agencies, those agencies—affected by considerations including speed, convenience, personal preference, and human nature—frequently obtain those services on a sole source or noncompetitive basis from those possessing these hunting licenses. As a result, legitimate competition infrequently materializes.⁵⁸

Moreover, as the Interior Department Inspector General (IG) concluded in this case, the pursuit of fees distorts the moral compass that we would otherwise hope to animate federal government procurement officials. The Interior IG correctly perceived the “[i]nherent 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.”⁵⁹

This point merits elaboration. The federal procurement statutes and regulations assume a model in which agencies rely upon warranted purchasing professionals to procure their needed supplies and services.⁶⁰ This longstanding arrangement bifurcates programmatic authority from procurement authority—in other words, program or project managers (PMs) must rely upon contracting officers (COs) to fulfill their requirements. Our procurement regime assumes that COs 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

57. Section 803 of the 2002 Defense Authorization Act was intended to rein in some of these practices. *See* Defense Federal Acquisition Regulation Supplement; Competition Requirements for Purchase of Services Under Multiple Award Contracts, 67 Fed. Reg. 15,351 (Apr. 1, 2002) (to be codified at 48 C.F.R. pts. 208 and 216); Defense Federal Acquisition Regulation Supplement; Competition Requirements for Purchase of Services Under Multiple Award Contracts, 67 Fed. Reg. 65,505 (Oct. 25, 2002) (to be codified at 48 C.F.R. pts. 208 and 216). “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 for and Oversight of DOD’s Purchases of Services on Multiple Award Contracts*, 44 GOV’T CONTRACTOR ¶ 107 (2002).

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

59. Interior IG Report, *supra* note 15, at 3.

60. *See, e.g.*, FAR, 48 C.F.R. § 1.6 (2005).

within the established constraints of the procurement system.

Unfortunately, perverse incentives associated with flexible, interagency, fee-based acquisition vehicles turn this system on its head. Various statutory schemes, dating back to the Economy Act,⁶¹ permit interagency transfers,⁶² such as allowing one agency to conduct a purchase for another.⁶³ Of particular relevance here, the Clinger-Cohen Act⁶⁴ resulted in a proliferation of government-wide acquisition contracts, popularly known as GWACs.⁶⁵ While the Economy Act authorizes interagency transfers, the statute “permit[s] an agency to take advantage of another agency’s expertise, not merely to offload work, funds, or both to avoid legislative restrictions.”⁶⁶ One of the most common violations of this prohibition is “parking” funds before they expire.⁶⁷ As the end of the fiscal year approaches, agencies “park” or “dump” funds⁶⁸ by

61. In 1932, Congress intended the Economy Act, 31 U.S.C. §§ 1535-1536 (2005), to generate economies of scale by reducing redundant activities of many government agencies.

62. *See, e.g.*, Federal Property and Administrative Services Act (FPASA), 40 U.S.C. § 481(a)(3) (2005); Project Order Statute, 41 U.S.C. § 23 (2005).

63. Within the Defense Department, interagency orders typically are executed by issuing a DD Form 448, Military Interdepartmental Purchase Request (MIPR), <http://web1.whs.osd.mil/forms/DD0448.PDF> (last visited Mar. 26, 2005).

64. National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 5112(e), 110 Stat. 186 (1996) (codified at 40 U.S.C. § 1412(e) (2005)). The Federal Acquisition Reform Act (FARA) and the Information Technology Management and Reform Act (ITMRA) were renamed as the Clinger-Cohen Act of 1996.

65. Government-wide acquisition contract (GWAC) is a task-order or delivery-order contract for information technology established by one agency for government-wide use that is operated (1) by an executive agent designated by OMB pursuant to the Clinger-Cohen Act § 5112(e), 40 U.S.C. § 11302(e) (2005) or (formerly) (2) under a Brooks Act delegation, 40 U.S.C. § 759 (repealed by Pub. L. No. 104-106). The Economy Act does not apply to orders against GWACs. FAR, 48 C.F.R. § 2.101 (2005). Pursuant to § 5112(e) the OMB Director designated GSA as the executive agent for certain government-wide acquisitions of information technology (IT). The scope of the designation is limited to programs funded on a reimbursable basis through the Information Technology Fund established by 40 U.S.C. § 322 (2005). These programs include the Federal Systems Integration and Management Center (FEDSIM) and the Federal Computer Acquisition Center (FEDCAC), as well as other existing government-wide IT acquisition programs. The OMB designation, in combination with 40 U.S.C. § 322, provides separate authority for acquisition from these GSA programs and states that the “Treasury and Information Technology Fund [hereinafter the Fund] . . . shall be available without fiscal year limitation.”

66. STEVEN N. TOMANELLI, *APPROPRIATIONS LAW: PRINCIPLES & PRACTICE* 371 (2003).

67. At the end of the fiscal year, appropriated but unobligated annual funds expire or “cease to be available for . . . new obligations.” These funds then reside in an “expired account” for five years during which time they are available to “liquidate obligations properly chargeable to the account prior to its expiration.” Afterwards, the expired account is closed and the unexpended balance returns to the general fund of the Treasury (which, in reality, is a mere bookkeeping adjustment, since the money “never [left] the Treasury to begin with”). GEN. ACCT. OFFICE, OFFICE OF THE GEN. COUNSEL, *PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 5-67 to 5-73* (3d ed. 2004).

68. For example, fearing that some of its appropriated funds might expire before the end of the fiscal year (and thus be lost to it forever), a hypothetical agency (A) might “spend” its remaining appropriation by transferring it into agency B’s revolving fund. The

issuing open-ended or vague orders that do not state a specific and definite requirement⁶⁹ or identify a bona fide need.⁷⁰ However, the Economy Act (or similar inter-agency purchasing regimes)⁷¹ was not intended to facilitate the avoidance of competition.⁷²

The problem arises because fee-based purchasing offices (for example, the servicing agency) need revenue to survive.⁷³ In other words, revolving funds

receiving agency (B) then holds or parks the funds in its revolving fund, where the funds do not expire with the fiscal year's conclusion. Subsequently, consistent with A's wishes, B retains and reimburses a contractor (out of the revolving fund, using what otherwise would be expired funds) to perform services for A. A is pleased to receive services that, pursuant to conventional fiscal law, it could not afford to purchase. B willingly obliges A because B skims an administrative or franchise fee off the top of the transaction which, in turn, funds (or potentially grows) B's operations. *See, e.g.*, Implementation of the Library of Congress FEDLINK Revolving Fund, Comp. Gen. B-288142 (Sept. 6, 2001); Continued Availability of Expired Appropriation for Additional Project Phases, Comp. Gen. B-286929 (Apr. 25, 2001) [hereinafter B-286929]; *see also* OFFICE OF INSPECTOR GEN., DEP'T OF DEF., REPORT NO. D-2002-109, ACQUISITION: ARMY CLAIMS SERVICE MILITARY INTERDEPARTMENTAL PURCHASE REQUESTS (2002) (discussing the U.S. Army Claims Service's (USACS) potential Anti-Deficiency Act violations related to USACS's transactions with the General Services Administration Information Technology Fund).

69. Such general orders (e.g., "provide 100 personal computers") may not be sufficiently definite to satisfy the specificity requirements for recording obligations. "An amount shall be recorded as an obligation . . . only when supported by documentary evidence of . . . a binding agreement . . . that is . . . executed before the end of the period of availability . . . for *specific goods* to be delivered . . ." 31 U.S.C. § 1501(a)(1)(B) (2005) (emphasis added). Failure to create a recordable obligation prior to the funds' expiration should render those funds unavailable thereafter (once the requirement is better defined).

70. Problems arise because the general requirements found in parked orders often fail to represent a bona fide need of the ordering agency *at the time the order is issued*. The problem arises because, despite the IT fund's statutory no-year limitation, the ordering agencies' appropriations remain subject to their original congressionally mandated periods of availability. Thus, an ordering agency cannot cite expired funds on its order under FEDSIM or FEDCAC. *See* B-286929, *supra* note 69, where GAO held: "as with other contractual obligations, once the agency liquidates the obligation, any remaining balances are not available to enter into a new obligation after the account has expired (i.e., if fiscal year funds, after the end of the fiscal year)."

71. "The Economy Act applies when more specific statutory authority does not exist." FAR, 48 C.F.R. § 17.500(b) (2005); *see also In re Interagency Agreement—Administrative Office of the U.S. Courts*, 55 Comp. Gen. 1497 (1976) (finding the Economy Act is not the only authority permitting interagency agreements, and it controls "[i]n the absence of other statutory authority"). But, in this case, the Brooks Act provided independent authority for the procurement of automated data processing (ADP, today known as information technology or IT) equipment. *Id.*

72. In *Valenzuela Eng'g, Inc.*, B-277979, Jan. 26, 1998, 98-1 CPD ¶ 51, the GAO explained that, while Economy Act transactions generally are exempted from the competition mandates in the Competition in Contracting Act of 1984 (CICA), 10 U.S.C. § 2304(c)(5) (2005), that is true only where the agency receiving the Economy Act order has complied fully with CICA requirements. *See also* 10 U.S.C. § 2304(f)(5)(B) (2005); *Dictaphone Corp.*, B-244691.2, Nov. 25, 1992, 92-2 CPD ¶ 380 at 4-5.

73. 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

permit agencies or governmental organizational units to operate like an ongoing business. Like a business, however, the survival of revolving fund instrumentalities depends upon the generation of fees.⁷⁴ Thus, all too often the pursuit of fees, rather than any congressionally mandated mission, drives these purchasing organizations.⁷⁵

Miscellaneous Receipts Statute requires those funds—typically termed miscellaneous receipts—to be returned to the general treasury. *See* 31 U.S.C. § 3302(b) (2005) (requiring that 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 practicable 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. *See, e.g.*, JOHN E. JENSEN, QUICK REFERENCE TO FEDERAL APPROPRIATIONS LAW 172 (2002). Interestingly, under the Economy Act, one of the most frequently used interagency vehicles, the ordering agency must pay the performing agency the actual costs of the goods or services provided. *See* 31 U.S.C. § 1535(b); Use of Agencies’ Appropriations to Purchase Computer Hardware for Dep’t of Labor’s Executive Computer Network, B-238024, 70 Comp. Gen. 592 (1991). There is no such statutory restriction for GWACs; however, OMB guidance requires agencies to charge actual costs and to “transfer GWAC earnings to the miscellaneous receipts account of the U.S. Treasury’s General Fund.” GEN. ACCT. OFFICE, GAO-02-734, CONTRACT MANAGEMENT: INTERAGENCY CONTRACT PROGRAM FEES NEED MORE OVERSIGHT 3 (2002).

74. By analogy, most everywhere I shop these days, sales staff attempt to increase the vendor’s income by offering me a credit card in the hope that I’ll carry a balance and, over time, pay favorable interest rates. These retail establishments are not lending institutions per se, nor is lending their primary purpose. As a business, it makes sense for them to maximize their profit by entering a complementary line of business (in this case, lending).

75. For a useful anecdote, see Steven L. Schooner, *The Future of “Businesslike” Government: The CBD Asserts Its Rights Against Debtor Federal Agencies*, 41 GOV’T CONTRACTOR ¶ 112 (1999); Andrew M. Sherman, *GPO Answers Critics: Commerce Department Policy to Suspend Publication of Solicitation Notices for Debtor Agencies Furthers Procurement Process Objectives*, 41 GOV’T CONTRACTOR ¶ 167 (1999). The Government Printing Office (GPO) 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. (Since that time, the *CBD* has been replaced by *FedBizOpps*.) In so doing, the GPO ignored the mandate that the *CBD* “is the public notification media by which U.S. Government agencies identify proposed contract actions and contract awards.” FAR, 48 C.F.R. § 5.101 (2005). Both the Small Business Act, 15 U.S.C. § 637(e) (2005), and the OFPP Act, 41 U.S.C. § 416, required agencies to publish notices in the *CBD*, and an outstanding debt to 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.

[T]his comedy of errors raises fundamental questions regarding GPO and Commerce Department roles in managing the CBD. Publication of the CBD is not a business enterprise; it is a statutorily-mandated vehicle for dissemination of certain procurement information. There are numerous examples of more appropriate ventures for entrepreneurial Government such as the Postal Service, the Patent and Trademark Office, Federal Deposit Insurance Corporation, or the Defense Commissary Agency, which engage in fee-for-service transactions. The public interest does not require that citizens refusing to buy stamps be permitted to send letters. The public interest would require, however, that GSA not disconnect the Internal Revenue Service’s telephone service in early April if the IRS failed to liquidate its phone bills promptly

Intricacies of fiscal law, particularly the shell game of interagency budgetary transfers, need

In practice, this creates an unfortunate “race to the bottom.” Fee-based purchasing instrumentalities have no stake in the outcome of contracts that they award. The PM at the purchasing (or receiving) agency willingly pays 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 streamlines the purchase. Moreover, once the contract is awarded, the servicing agency has no interest in administering, nor does it have sufficient resources to manage, the contract. Thus, in exchange for a fee, the PM can choose a favored contractor without competition and enjoy the contractor’s performance unfettered by typical contract administration.⁷⁶ The Interior Department Inspector General explained: “Without the checks and balances provided by effective internal controls, the ‘risk taking,’ ‘out-of-box’ thinking, and ‘one-stop shopping’ advertised by NBC and encouraged by fee-for-service organizations can result in inappropriate procurements.”⁷⁷

The Abu Ghraib experience offers a startling illustration of this relationship. Because its existence depends upon generating fees, the Interior Department’s NBC willingly provided the Army with contractor personnel. Despite receipt of that fee, the NBC apparently did not feel compelled to scrutinize whether the contracting vehicle was being used for its intended purpose, whether the scope of the Army’s requirement was too broad, nor how the contractor personnel would be managed. In short, for a nominal fee, the NBC permitted the Army to inappropriately use a streamlined, commercial contracting vehicle to obtain contractor personnel through a closed, noncompetitive process, after which neither the Army nor Interior procurement personnel managed the contractors’ performance.

On July 13, 2004, the GSA unveiled its “Get It Right” plan to ensure proper use of its schedule contracts. This initiative is as well intentioned as it is overdue. The plan will assess regulatory compliance and “calls for GSA to proactively supervise the proper use of its contract vehicles. . . .”⁷⁸ More must be done. Without aggressive congressional intervention, it is unlikely that

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 interagency cash management issues. Nor should one agency’s revolving fund status adversely impact another agency’s ability to carry out its mission.

Schooner, *supra*, at 5.

76. Of the 12 procurements reviewed by the Interior Department IG, 11 were outside the scope of the work of the GSA schedules used. For a similar scenario, see, e.g., *Floro & Assoc.*, B-285481.3, B-285481.4, Oct. 25, 2000, 2000 CPD ¶ 172 where the GAO “conclude[s] that the work delineated under the task order is materially different from the work contemplated under . . . [the multiple award ID/IQ] contract and therefore exceeds that contract’s scope.”

77. Interior IG Report, *supra* note 15, at 3.

78. Press Release, Gen. Serv. Admin., GSA “Get It Right” Plan Will Ensure Proper Use of GSA Contract Vehicles (July 13, 2004), http://www.gsa.gov/Portal/gsa/ep/content/View.do?P=XI&contentId=16390&contentType=GSA_BASIC (last visited Mar. 26, 2005).

confidence and credibility can be restored to the existing interagency services procurement regime. More recently, the Government Accountability Office took a huge step in the right direction by adding the “management of interagency contracting” to its High Risk List.⁷⁹ The GAO accurately noted both the benefits—improved speed and efficiency—and risks associated with the current interagency contracting regime:

If not properly managed, a number of factors can make these interagency contract vehicles high risk . . . : (1) they are attracting rapid growth of taxpayer dollars; (2) they are being administered and used by some agencies that have limited expertise with this contracting method; and (3) they contribute to a much more complex environment in which accountability has not always been clearly established. Use of these contracts, therefore, demands a higher degree of business acumen and flexibility on the part of the federal acquisition workforce than in the past. . . . [T]he challenges associated with these contracts, recent problems related to their management, and the need to ensure that the government effectively implements measures to bolster oversight and control so that it is well positioned to realize the value of these contracts warrants designation of interagency contracting as a new high-risk area.⁸⁰

The Fay Report suggests another unanticipated pathology that derives from the use of an interagency purchasing scheme. Keeping in mind that the Army used Interior Department and GSA contracting vehicles to obtain contractor support, the Fay Report expresses concern that because “[s]ome of the employees at Abu Ghraib were not DoD contractor employees,” they may not be subject to the Military Extraterritorial Jurisdiction Act,⁸¹ which might permit them to avoid criminal prosecution.⁸²

CONCLUSION: RESPONSIBLE DELEGATION OR ABDICATION OF RESPONSIBILITY?

The Abu Ghraib experience, while atypical in terms of its brutality and the public outcry it spawned, is sadly typical of a much broader problem that pervades public procurement.⁸³ A unique combination of policies spanning

79. GOV'T ACCT. OFFICE, GAO-05-207, HIGH RISK SERIES: AN UPDATE 24-28 (2005), <http://www.gao.gov/new.items/d05207.pdf> (last visited Mar. 26, 2005).

80. *Id.* at 25.

81. 18 U.S.C. §§ 3261-3267 (2005).

82. FAY REPORT, *supra* note 14, at 50. The Fay Report underscored the word “may,” suggesting that Fay’s legal advisors conceded that this represents an issue of first impression.

83. Problems with Economy Act transactions involving the DoD are not new: DoD activities issued Economy Act orders that increased costs by an estimated \$16.9 million, violated the Competition in Contracting Act, delegated inherently Governmental functions to contractors, procured \$40.1 million in . . . resources without a proper delegation of procurement authority, caused apparent violations of the Walsh-Healey Public Contracts Act of 1936, obtained unauthorized personal services, inappropriately issued \$9.6 million in project orders, and required . . . employees . . . without security clearances to have access to classified information

more than a decade—the outsourcing initiative, the acquisition workforce reductions,⁸⁴ the new public management⁸⁵ (manifested in the form of acquisition reform), and the government's massive post-September 11th surge in activity—has conspired to place unsustainable pressure upon the government's public procurement system.

It is not surprising that a downsized government workforce, facing increasing demands, can lose sight of the foundations of successful public procurement regimes—such as reliance upon competition and a commitment to transparency and integrity⁸⁶—and embrace whatever means are necessary to meet its customers' needs. Thus, the streamlined, highly flexible task or delivery order contract has become the government manager's weapon of choice for surviving the outsourcing crisis. Program managers, faced with severe personnel shortages, favor these fast and all-too-often invisible contracts because they permit seemingly unfettered flexibility in use of contractor employees. In turn, sponsoring agencies, increasingly dependent upon the fees that these cross-servicing agreements generate, gladly serve as a body shop, providing personnel to augment skeletal organizations. This co-dependency accelerates a predictable race to the bottom. However well intentioned the creation of these streamlined purchasing vehicles, the reliance on interagency task order service contracts, in practice, has grown to resemble a self-replicating virus, without checks or controls.

OFFICE OF INSPECTOR GEN., DEP'T OF DEF., REPORT NO. 94-008, DoD PROCUREMENTS THROUGH THE TENNESSEE VALLEY AUTHORITY TECHNOLOGY BROKERING PROGRAM 1 (1993).

84. The acquisition workforce suffered another setback in the Defense Authorization Act for Fiscal Year 2005. Section 841 of the Senate version of the bill, as originally passed, would have limited further reductions in the defense acquisition workforce. See H.R. 4200, 108th Cong. (2004). That protection, however, disappeared in the conference report. See Conference Report to Accompany H.R. 4200, http://www.house.gov/rules/108_conf_dod4200.htm (last visited Mar. 26, 2005).

85. The new public management (NPM) or reinvention of government gained popularity as an alternative to the perceived inefficiencies of government bureaucracies. CHRISTOPHER POLLITT, *THE ESSENTIAL PUBLIC MANAGER* 32-33 (2003). The push to streamline government began in New Zealand, Australia, and the United Kingdom and took hold in the United States in the 1990s through former Vice-President Al Gore's National Performance Review (NPR), which pledged to create a government that "works better and costs less." See Donald F. Kettl, *The Global Revolution in Public Management: Driving Themes, Missing Links*, 16 J. POL'Y ANALYSIS & MGMT. 446, 446 (1997); see also DAVID OSBORNE & TED GAEBLER, *REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR FROM SCHOOLHOUSE TO STATE HOUSE, CITY HALL TO PENTAGON* (1992). With a focus on outcome over process, NPM seeks to cut red tape, downsize the public sector, increase privatization, encourage contracting out, deregulate government agencies, and empower (indeed even expect) public employees to steer, not row. See James Q. Wilson, *Can the Bureaucracy Be Deregulated?*, in *DEREGULATING THE PUBLIC SERVICE: CAN GOVERNMENT BE IMPROVED?* 37, 41 (John J. DiIulio ed., 1994) (citing NAT'L PERFORMANCE REV., U.S. EXECUTIVE OFFICE OF THE PRESIDENT, *FROM RED TAPE TO RESULTS: CREATING GOVERNMENT THAT WORKS BETTER AND COSTS LESS* (1993)).

86. See, e.g., Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 PUB. PROCUREMENT L. REV. 103 (2002).

In processing the relentless deluge of contract requirements that must be fulfilled, individual contracting officers lack the time to contemplate that, through these contracts, the government is delegating the responsibility of governance to contractors. Sadly, the result is that this wholesale delegation of governmental authority is marked by haste, rather than caution. As episodic transgressions become routine, it is not enough for the government to retort that, typically, the government receives good value for its money. Rather, Congress, the media, the contractor community, and the public require sufficient insight into the process to determine whether the government's contracting practices are appropriately competitive, effective, efficient, and fair. Without systemic credibility, even a best-value result cannot sustain a public procurement regime.⁸⁷

To stem the tide, Congress must renew the government's commitment to the long-standing foundations of successful public procurement regimes. Congress must insist that the government's contracting actions take place in the open, subject to competition, oversight, and review. The government must invest scarce resources to recruit, train, motivate, and retain talented purchasing professionals. Similarly, it must either create new, or restore and invigorate its existing (but badly depleted), oversight organizations, such as the Defense Contract Management Agency and the Defense Contract Audit Agency. Congress also must make clear that if sponsoring agencies earn fees for facilitating other agencies' contracts, those sponsoring agencies will be held strictly accountable for the contractual outcomes. In other words, contracting organizations must obey the law, manage the contracts they award, and ensure that the government receives value for its money. The alternative is chaos. As the Abu Ghraib experience demonstrates, when public trust is at stake, that result is unacceptable.

87. Here, I part company with those, like Steve Kelman, who prefer the consequentialist view that public managers should be granted more freedom to determine the means while being held responsible only for meeting certain agreed-upon ends. See Steven Kelman, *Deregulating Federal Procurement: Nothing to Fear but Discretion Itself?*, in DEREGULATING THE PUBLIC SERVICE, *supra* note 85, at 116. "If you want better management," argues David Osborne, "untie the managers' hands and let them manage. Hold them accountable for results—not for following silly rules." David Osborne, *Bureaucracy Unbound*, WASH. POST MAG., Oct. 13, 1996, at 8. Some also refer to this theory as "accountability for performance." See ROBERT D. BEHN, RETHINKING DEMOCRATIC ACCOUNTABILITY 9-10 (2001).