PLAYING BY ITS OWN RULES: TSA'S EXEMPTION FROM THE FEDERAL ACQUISITION REGULATION, AND HOW IT IMPACTS PARTNERSHIPS WITH THE PRIVATE SECTOR

HEARING

BEFORE THE

SUBCOMMITTEE ON MANAGEMENT, INVESTIGATIONS, AND OVERSIGHT

OF THE

COMMITTEE ON HOMELAND SECURITY HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

AUGUST 1, 2007

Serial No. 110–65

Printed for the use of the Committee on Homeland Security

Available via the World Wide Web: http://www.gpoaccess.gov/congress/index.html

U.S. GOVERNMENT PRINTING OFFICE

48–960 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
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PLAYING BY ITS OWN RULES: TSA'S EXEMPTION FROM THE FEDERAL ACQUISITION REGULATION, AND HOW IT IMPACTS PARTNERSHIPS WITH THE PRIVATE SECTOR

Wednesday, August 1, 2007

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON HOMELAND SECURITY,
SUBCOMMITTEE ON MANAGEMENT, INVESTIGATIONS,
AND OVERSIGHT,
Washington, DC.

The subcommittee met, pursuant to call, at 10:04 a.m., in Room 311, Cannon House Office Building, Hon. Christopher Carney [chairman of the subcommittee] presiding.

Present: Representatives Carney, DeFazio, Thompson, and Rogers.

Mr. CARNEY. [Presiding.] The subcommittee will come to order.

The subcommittee is meeting today to receive testimony on "Playing by Its Own Rules: TSA's Exemption from the Federal Acquisition Regulation and How It Impacts Partnerships with the Private Sector."

Government contracting is by no means a sexy subject. That said, in this day and age, government alone is not going to keep us safe. Instead, we need government and the private sector working together. One of the main ways this happens is through contracts.

Today we are looking at TSA's partnership with the private sector and how its exemption from the Federal Acquisition Regulation impacts that cooperation.

Frankly, I am struggling to understand why TSA currently plays by its own set of rules. I look at the rest of the federal government: intelligence agencies trying to protect us from terrorists; the Department of Justice enforcing our laws; the Department of Defense fighting a war. They are all governed by the Federal Acquisition Regulation. I look within the Department of Homeland Security itself: CBP working to secure our borders; FEMA responding to catastrophes; Secret Service protecting the president. They are all governed by the FAR.

Simply put, the FAR is the norm.

Yet TSA is different. It uses the Federal Aviation Administration's Acquisition Management System, or AMS.

If this were just a benign difference, perhaps it wouldn't matter. The DHS is an agency that is struggling to integrate numerous dis-

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parate components into a cohesive entity. Having two distinct contracting systems in one department necessarily makes that process more complicated.

I am also concerned about what would happen if TSA had a sudden need for contracting officers due to a terrorist threat or an attack. Where would the surge capacity come from? The rest of the contract professionals in the department know the FAR, not TSA's AMS.

And finally, as we are going to hear today, I am concerned about the challenges AMS poses for TSA's private-sector partners.

In the face of these concerns, it really comes down to a simple question: If the FAR is good enough for the overwhelming majority of the federal government, why not for TSA?

Before I close, I would like to thank Ms. Duke and Mr. Gunderson and their staff for submitting their testimony on time. It really helps; it makes a huge difference. We have had a hard time getting the department to submit their testimony on a timely basis, and I do appreciate your efforts. I hope that this is a sign of things to come.

Thank you very much.

Good. The note just given to me means we actually have some time for this hearing, given the schedule.

I now recognize the ranking member of the subcommittee, the gentleman from Alabama, my friend, Mr. Rogers, for an opening statement.

[The statement of Mr. Carney follows:]

PREPARED OPENING STATEMENT OF THE HONORABLE CHRISTOPHER P. CARNEY, CHAIRMAN, SUBCOMMITTEE ON MANAGEMENT, INVESTIGATIONS, AND OVERSIGHT

Government contracting is by no means a sexy subject.

- That said, in this day and age, government alone is not going to keep us safe. Instead, we need government and the private sector working together.
- One of the main ways this happens is through contracts.
- Today we are looking at TSA's partnership with the private sector, and how its exemption from the Federal Acquisition Regulation impacts that cooperation.
- Frankly, I am struggling to understand why TSA currently plays by its own set of rules.
- I look at the rest of the federal government—
  - intelligence agencies trying to protect us from terrorists;
  - the Department of Justice enforcing our laws;
  - the Defense Department ***fighting a war.***
- They are all governed by the Federal Acquisition Regulation.
- I look within the Department of Homeland Security itself—
  - CBP working to secure our borders;
  - FEMA responding to catastrophes;
  - Secret Service protecting the President.
- They are all governed by the FAR.
- Simply put, the FAR is the norm.
- Yet TSA is different—it uses the Federal Aviation Administration's Acquisition Management System, or AMS.
- If this were just a benign difference, perhaps it wouldn't matter.
- But DHS is an agency that is struggling to integrate numerous disparate components into one cohesive entity.
- Having two distinct contracting systems in one department unnecessarily makes that process more complicated.
- I'm also concerned about what would happen if TSA had a sudden need for contracting officers due to a terrorist threat or an attack.
- Where would the surge capacity come from? The rest of the contract professionals in the Department know the FAR, not TSA's AMS.
- And, finally, as we're going to hear today, I'm concerned about the challenges AMS poses for TSA's private sector partners.

• In the face of these concerns, it really comes down to a simple question: if the FAR is good enough for the overwhelming majority of the federal government, why not for TSA?
• Before I close, I'd like to thank Ms. Duke and Mr. Gunderson, and their stuff, for submitting their testimony on time.
• We've had a hard time getting the Department to submit their testimony on a timely basis, and I appreciate your efforts. I hope that it is a sign of things to come.

Mr. ROGERS. Thank you, Mr. Chairman. I appreciate you calling this important hearing.

And I want to thank the witnesses for taking the time out of their busy schedules to be here with us today.

We welcome back three of our witnesses to the subcommittee, including the chief procurement officer of the Department of Homeland Security, one of my personal favorites.

Today the subcommittee will examine the Acquisition Management System, which TSA uses in its contracting process. Specifically, the subcommittee will evaluate why TSA still uses this system instead of the process used by the rest of DHS. The system is the Federal Acquisition Regulation, commonly known as the FAR, which applies to agencies throughout the federal government.

Shortly after the terrorist attacks of September 11, 2001, TSA was established within the Department of Transportation. The agency inherited the same acquisition system used by another agency in that department, namely, the Federal Aviation Administration.

When the Department of Homeland Security was created in 2003, TSA was one of the agencies which was moved into the new department. Today, the FAR applies to all of DHS except the Transportation Security Administration, which still uses its original Acquisition Management System.

Our hearing will examine whether this distinction still makes sense after over 4 years since the creation of DHS. We will explore with our witnesses a number of questions, including: What are the implications of having one DHS agency with a separate acquisition process, compared to the process used by the rest of the department? What are the pluses and minuses of TSA's original acquisition process, as compared with the FAR? How well does the private sector work with a major Cabinet department that operates two different acquisition systems? Does DHS have the necessary contracting staff to effectively manage these two systems? And wouldn't it be better to apply the FAR uniformly throughout all of DHS?

I look forward to hearing from our witnesses on these issues and, again, thank them for being here today.

And I yield back to the chairman.

[The statement of Mr. Rogers follows:]

PREPARED STATEMENT OF THE HONORABLE MIKE ROGERS, RANKING MEMBER, SUBCOMMITTEE ON MANAGEMENT, INVESTIGATIONS, AND OVERSIGHT

Thank you, Chairman Carney, for holding this important hearing on the acquisition process at the Transportation Security Administration.

First, I would like to thank our witnesses for taking time out of their busy schedules to be here today.

We also welcome back three of our witnesses to this Subcommittee, including the Chief Procurement Officer for the Department of Homeland Security.

Today the Subcommittee will examine the Acquisition Management System which TSA uses in its contracting process.

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The agency inherited the same acquisition system used by another agency in that Department—namely, the Federal Aviation Administration.

When the Department of Homeland Security was created in 2003, TSA was one of the agencies which was moved into the new department.

Today, the FAR applies to *all* of DHS—*except* the Transportation Security Administration—which still uses its original Acquisition Management System.

Our hearing will examine whether this distinction still makes sense after over four years since the creation of DHS.

We will explore with our witnesses a number of questions, including—

- What are the implications of having one DHS agency with a separate acquisition process. . .compared to the process used by the rest of the department?
- What are the pluses and minuses of TSA's original acquisition process, as compared to the FAR?
- How well does the private sector work with a major Cabinet department that operates two different acquisition systems?
- Does DHS have the necessary contracting staff to effectively manage these two systems?. . .and,
- Wouldn't it be better to apply the FAR uniformly throughout all of DHS?

I look forward to hearing from our witnesses on these issues, and again thank them for being here today.

Thank you, Chairman Carney.

I yield back.

Mr. CARNEY. Thank you, Mr. Rogers.

The chair now recognizes the chairman of the full committee, the gentleman from Mississippi, Mr. Thompson, for an opening statement.

Mr. THOMPSON. Thank you very much, Mr. Chairman and Ranking Member.

And, our witnesses, we are glad to have you.

As you know, TSA was created in a time of high anxiety, and it was in that environment that it was exempted from the traditional government contracting rules. Instead of the Federal Acquisition Regulation, TSA used the Federal Aviation Administration's Acquisition Management System, or AMS.

We are not here to second-guess that decision. Instead, we are looking at whether this makes sense for the future.

Does it make sense for contractors who want to work with TSA to have a master set of contracting rules? TSA tells us that this is not a problem. Its partners in the industry, however, say it differently. They tell us that this is difficult for large, sophisticated contractors to keep track of two different procurement regimes.

If the Fortune 500 companies struggle, imagine how hard it is for the little guy. The simple reality is that a small business to obtain expertise in a different set of contracting rules costs money. And added costs are added barriers to entry.

Another question is whether it makes sense for the TSA to be exempt from the Competition in Contracting Act. TSA says that, under AMS, competition is the preferred method. But the FAR and the Competition in Contracting Act require more. They require full and open competition. And our friends in the industry tell us that "preferred" falls far short of "full and open."

Finally, does is make sense for the Department of Homeland Security to oversee two distinct contracting systems? The department

says it supports the exemption, but I am concerned about the cost of having two systems, in terms of training staff, conducting oversight, and fostering departmental integration.

The FAR is not perfect, but it is used by virtually the entire federal government and it is well-known to industry. Moreover, it has been refined and improved over the past 30-plus years.

Removing TSA's exemption will not magically solve all the contracting problems it has had, but it seems to me that it is a good start.

And I yield back, Mr. Chairman. And I look forward to the witnesses' testimony and the questions to follow.

[The Statement of Mr. Thompson follows:]

PREPARED STATEMENT OF THE HONORABLE BENNIE G. THOMPSON, CHAIRMAN COMMITTEE ON HOMELAND SECURITY

- TSA was created in a time of high anxiety.
- And it was in that environment that it was exempted from the traditional government contracting rules.
- Instead of the Federal Acquisition Regulation, TSA uses the Federal Aviation Administration's "Acquisition Management System," or AMS.
- We are not here to second-guess that decision.
- Instead, we are looking at whether this makes sense for the future.
- *Does it make sense for contractors who want to work with TSA to have to master a new set of contracting rules?*
- TSA tells us that this is not a problem.
- Its partners in the industry, however, say differently.
- They tell us that it is difficult for large, sophisticated contractors to keep track of two different procurement regimes.
- If the Fortune 500 companies struggle, imagine how hard it is for the little guy.
- The simple reality is that asking a small business to obtain expertise in a different set of contracting rules costs money.
- And added costs are added barriers to entry.
- *Another question is whether it makes sense for the TSA to be exempt from the Competition in Contracting Act?*
- TSA says that under AMS, "competition is the preferred method."
- But the FAR and the Competition in Contracting Act require more—they require "full and open competition."
- And our friends in the industry tell us that "preferred" falls far short of "full and open."
- *Finally, does it make sense for the Department of Homeland Security to have to oversee two distinct contracting systems?*
- The Department says it supports the exemption.
- But I'm concerned about the cost of having two systems, in terms of training staff, conducting oversight, and fostering departmental integration.
- The FAR is not perfect.
- But it is used by virtually the entire Federal Government, and it is well known to industry
- Moreover, it has been refined and improved over the past 30-plus years.
- Removing TSA's exemption will not magically solve all the contracting problems it has had.
- But it seems to me that it is a good start.

Mr. CARNEY. Thank you, Mr. Chairman.

Other members of the subcommittee are reminded that, under committee rules, opening statements may be submitted for the record.

I welcome the witnesses this morning. I really appreciate you being here.

Our first witness is Elaine Duke, chief procurement officer for the Department of Homeland Security. Ms. Duke is a career executive with 23 years of public service. Before coming to DHS, she

spent the majority of her career in acquisition with the U.S. Navy. She became DHS chief procurement officer in January of 2006.

Our second witness is Rick Gunderson, assistant administrator for acquisition at the Transportation Security Administration. Mr. Gunderson is a career executive, with almost 19 years of public service. Mr. Gunderson joined TSA in 2002, after 14 years with the Naval Sea Systems Command. He took his current position in November of 2005.

Our next witness is David Bodenheimer. Mr. Bodenheimer is a partner at the law firm of Crowell & Moring, where he is head of the Homeland Security Practice Group and specializes in government contracts. He is also co-chair of the American Bar Association's Special Committee on Homeland Security. Prior to joining the firm, Mr. Bodenheimer spent 6 years as a civilian lawyer in the Navy, where he handled a broad spectrum of government contract matters.

Our final witness is Alan Chvotkin. Mr. Chvotkin is a senior vice president and counsel of the Professional Services Corporation. PSC, a national trade association for companies that provide services to virtually every agency of the federal government, has more than 220 member companies. Prior to joining PSC, Mr. Chvotkin had a career in both the private sector and in the staff of the United States Senate. Most important, however, Mr. Chvotkin had the privilege of being born and raised in Scranton, and his father now lives in Clarks Summit.

Welcome, Mr. Chvotkin.

Tip of the hat to the homies here.

[Laughter.]

Without objection, the witnesses' full statements will be inserted into the record.

I now ask each witness to summarize his or her statement for 5 minutes, beginning with Ms. Duke.

STATEMENT OF ELAINE DUKE, CHIEF PROCUREMENT OFFICER, DEPARTMENT OF HOMELAND SECURITY

Ms. DUKE. Good morning, Chairman Thompson, Chairman Carney and Ranking Member Rogers. Thank you for having me here this morning.

Before addressing the issue at hand, I would like to restate my top three priorities, which are not only my priorities but adopted by all the head of contracts in the eight contracting activities throughout DHS, including at TSA. And those are, first, to build the DHS acquisition workforce; second, to make good business deals; and third, to perform effective contract administration.

As the chief procurement officer for DHS, I provide oversight and support to the eight procurement offices within DHS, and my primary responsibility is to manage and oversee the DHS acquisition program: provide the acquisition infrastructure that includes the policies, procedures, training and workforce initiatives to make the department effective in acquisition.

Mr. Chairman, I appreciate your interest in the DHS acquisition program and, in particular, TSA's procurement system, the Transportation Security Administration Acquisition Management System, or TSAAMS.

While TSA's procurement system offers some process flexibilities beyond those offered by the Federal Acquisition Regulation, or FAR, both systems competition and the use of small business, and both systems require the procurement of goods and services at a fair and reasonable price. The differences are the mechanics of how goods and services are purchased.

Regardless of the procurement system, however, all components, including TSA, are subject to the same level of oversight. For example, TSA's capital investments, a major acquisition program, are subject to the department's investment review board, and their contracting operations are subject to the department's acquisition oversight program.

My office reviews the acquisition plans and justifications for procurements that are done by other than full and open competition over $50 million.

Additionally, TSA must adhere to key elements of the DHS acquisition program, which include: advanced acquisition planning; appointment of a competition advocate for TSA; establishing a small-and-disadvantaged-business utilization office; adherence to federal-wide acquisition certification programs for contracting officers and program managers; and the policies regarding issuing contracting officer warrants, which allow actual individuals to find contracts on behalf of TSA.

TSA is an active participant in my Chief Acquisition Officers Council and shares the resources available to the other seven component contracting activities. As I will explain in more detail later, TSA participates in department-wide recruiting efforts, training opportunities, and our newly established intern program.

I support the TSA's continued use of TSAAMS. The system stood up when TSA was created and is now an integral part of TSA's infrastructure.

TSA's procurement system serves as one example of how the component's contracting activity possesses unique characteristics for the purpose of achieving its mission. While TSA conducts its procurements using AMS, the Coast Guard conducts its procurement through decentralized contracting offices—another example of the differences between the components. When responding to disasters, FEMA awards this contract, pursuant to the Stafford Act, which gives preferences to local businesses—a statute unique to FEMA.

My responsibility as the chief procurement officer is to understand the unique needs of each contracting activity and to provide appropriate infrastructure in support.

One of the ways we are doing this is through the acquisition workforce. Three major initiatives in that area: The first is establishing a centralized hiring initiative. We are now issuing and managing hiring of acquisition workforce professionals through a centralized approach through my office in concert with our chief human capital officer, Marta Perez. This is to ensure both that we get the ramp-up of personnel we need and that they are appropriately trained and qualified for DHS acquisition.

The red light is on. Am I back too far? Okay.

The second initiative is establishing an acquisition intern program. And this will be a centrally managed program, where the in-

terns will rotate for 3 years through the components and will be placed in a DHS component at the completion of their intern program.

The third initiative is establishing a centralized acquisition workforce training fund to ensure all our acquisition professionals are trained appropriately and meet the federal certification standards.

The underlying principles of FAR and TSAAMS support my goal in building a world-class acquisition program. And this morning I look forward to answering your questions in this regard.

And, again, I thank you for the opportunity to testify before you this morning. Thank you.

[The statement of Ms. Duke follows:]

PREPARED STATEMENT OF ELAINE DUKE

Chairman Carney, Ranking Member Rogers, and Members of the Subcommittee, thank you for this opportunity to appear before you to discuss the Department of Homeland Security (DHS) acquisition program. I am the Chief Procurement Officer (CPO) for the Department of Homeland Security. I am a career executive and I have spent most of my 23 years of public service in the procurement profession.

Before addressing DHS' procurement systems, I would like to convey my top three priorities, which are essential elements to achieving the DHS mission:

- First, to build the DHS acquisition workforce.
- Second, to make good business deals.
- Third, to perform effective contract administration.

As the CPO, I provide oversight and support to eight procurement offices within DHS—Customs and Border Protection (CBP), Federal Emergency Management Agency (FEMA), Immigration and Customs Enforcement (ICE), Transportation Security Administration (TSA), United State Coast Guard (USCG), United States Secret Service (USSS), Federal Law Enforcement Training Center (FLETC), and the Office of Procurement Operations (OPO). As the CPO, my primary responsibility is to manage and oversee the DHS acquisition program. I provide the acquisition infrastructure that includes acquisition policies, procedures, training and workforce initiatives that allow DHS contracting offices, as appropriate, to operate in a uniform and consistent manner.

Mr. Chairman, I appreciate your interest in the DHS acquisition program and in particular TSA's procurement system, the Transportation Security Administration Acquisition Management System (TSAAMS). TSA was authorized under the Aviation and Transportation Security Acct (ATSA) of 2001 to utilize the procurement system of the Federal Aviation Administration (FAA), known as FAA Acquisition Management System (AMS).

While TSA's procurement system offers some process flexibilities beyond those offered by the Federal Acquisition Regulation, the two systems' underlying principles are the same—to acquire quality goods and services at a fair and reasonable price with integrity fairness and transparency. Both systems promote competition and the use of small businesses. Both systems also require the procurement of goods and services at a fair and reasonable price. The differences are the mechanics of how goods and services are purchased.

Regardless of the procurement system, however, all Components, including TSA, are subject to the same level of oversight. For example, TSA's capital investments are subject to the Department's investment review board and their contracting operations are subject to the Department's acquisition oversight program. My office reviews acquisition plans and justifications for procurements that exceed $50 million. Furthermore, TSA must adhere to the key elements of the DHS acquisition program which included

- Advanced acquisition planning,
- The appointment of a Competition Advocate,
- Adherence to Federal-wide acquisition certification requirements for contracting professionals and program/project managers, and
- The issuance of contracting officer warrants to certified contracting professionals.

TSA is an active participant in the DHS Chief Acquisition Officers Council. This council, composed of the head of each contracting activity, was established for the purpose of integrating contracting functions while maintaining each component's

ability to meet their customers' unique needs. Further, TSA also shares in the resources available to the other seven Component-contracting activities. As I will explain in more detail later, TSA participates in Department-wide recruiting efforts, training opportunities, and our newly established intern program.

I support the TSA's continued use of TSAAMS. The system "stood up" when TSA was created and hence is now an integral part of TSA's infrastructure. Most notable regarding the TSA procurement system, however, is that it serves as one example of how each component's contracting activity possesses unique characteristics for the purpose of achieving its mission. While TSA conducts its procurements using AMS, the Coast Guard, for example, conducts its procurement through decentralized contracting offices; and when responding to disasters, FEMA, pursuant to the Stafford Act, is to give preference to local businesses when awarding contracts.

WORKFORCE

My responsibility as the Chief Procurement Officer is to understand the unique needs of each contracting activity and to provide the appropriate infrastructure to support each of these offices. While each contracting official is necessarily unique, they also share the common objective of acquiring goods and services to meet the mission's need at a fair and reasonable price, with integrity and transparency. To ensure we meet our collective objective, my goal, as the CPO, is to develop a "best in class" acquisition workforce. To do this I am focusing on three workforce initiatives:

My first initiative is the establishment of a centralized hiring initiative. A successful acquisition program requires a team of integrated acquisition professionals who manage the entire lifecycle of a major procurement effort. However, the competition for highly qualified acquisition and procurement professionals is intense both within the Federal government and the private sector. Therefore, in partnership with the Office of the Chief Human Capital Officer, we have initiated an aggressive staffing solution to resolve personnel shortages and have centralized recruiting activities to better manage similar needs across the Department.

The centralized recruiting efforts include department-wide vacancy announcements, print advertisements in major media publications as well as attendance at key acquisition recruiting events. In addition, for Contract Specialists, one of our most critical staffing shortages, we received the authority to maximize the use of hiring flexibilities such as Direct Hire Authority and Re-Employed Annuitants. While these authorities are extremely helpful to our recruiting efforts, given the complexity of our acquisition programs, the recruitment of talented acquisition professionals will take time and I appreciate your continued support of these initiatives.

My second initiative is the establishment of an Acquisition Intern Program. In order to satisfy the long term need for qualified acquisition personnel, my office sought centralized funding in order to attract, hire, and train exceptional new talent. Beginning in fiscal year 2008, my office is centrally funding an Acquisition Intern Program that will start with 66 participants and grow to a total of 300 participants by fiscal year 2011. Our objective is to grow our talent and develop a pipeline for our future acquisition leaders. Interns would participate in a three-year program, rotating through three contracting offices within DHS, and would graduate from the program as journeyman-level professionals. This program is modeled after highly successful Department of Defense (DoD) programs and is especially critical for contracting. Unlike engineering, IT or finance, contracting is a field that is essentially learned. That is why DoD and others have relied on intern programs to develop the leadership pipeline for this profession and why it is perhaps the most critical initiative for strengthening the acquisition workforce.

My third initiative is the establishment of a centralized acquisition workforce training fund. By centralizing or training program, the Department is better positioned to deliver a unified training program that enables our acquisition professionals to achieve the appropriate certification levels and to develop the necessary skills and competencies to negotiate good business deals. We will maximize the use of the training resources available to federal agencies from the Federal Acquisition Institute. In May, the Under Secretary for Management signed a partnership agreement with the Under Secretary of Defense (Acquisition, Technology, and Logistics) and the President of the Defense Acquisition University to leverage existing DoD training and development opportunities. This agreement will enable DHS to use DoD's capabilities and talent pool to help develop our workforce on a long-term partnership basis. We will supplement these resources with specialized targeted training in areas such as the Safety Act, Performance Based Acquisition, and Buy American Processes and Compliance. Based on the results of reviews conducted by my Over-

sight Division, our training program will develop or purchase, as needed, training aides to close identified competency gaps.

SUMMARY

The underlying principles of FAR and TSAAMS ensure the Department meets its goal of acquiring goods and services at a fair and reasonable price, while accommodating the mission of the organization. Both systems support my goal in building a world-class acquisition program and workforce integrating the necessary disciplines of program management, risk assessment, engineering, cost analyses, and logistics. This will take time, but building a solid infrastructure to include the appropriate mix of skilled acquisition professionals will enable DHS to achieve mission success while being good stewards of the tax payer's money.

Thank you, Mr. Chairman for your interest in and continued support of the DHS Acquisition Program.

Thank you for the opportunity to testify before the Subcommittee about DHS contracting procedures. I am glad to answer any questions you or the Members of the Subcommittee may have for me.

Mr. CARNEY. Thank you.

Mr. Gunderson?

STATEMENT OF RICK GUNDERSON, ASSISTANT ADMINISTRATOR FOR ACQUISITION, TRANSPORTATION SECURITY ADMINISTRATION, DEPARTMENT OF HOMELAND SECURITY

Mr. GUNDERSON. Thank you. Chairman Thompson, Chairman Carney, Ranking Member Rogers, thank you for the opportunity to discuss TSA's acquisition program and, specifically, our use of the Acquisition Management System.

As the assistant administrator for acquisition, I provide direction and oversight of TSA's acquisition program. My office negotiates, awards and manages TSA's $2.5 billion acquisition program.

In addition to awarding contracts, we focus on strengthening program management and "Big A" acquisition. "Big A" acquisition requires the integration of numerous disciplines, including program management, engineering, budgeting, test and evaluation, and logistics, to name a few.

This contrast to the typical contract shop is important, as it reflects one of the key differences between TSA's Acquisition Management System and the Federal Acquisition Regulation.

Like the FAR, AMS provides guidance around how to negotiate and manage contracts. In contrast, AMS also establishes a framework to drive sound business decisions throughout the acquisition lifecycle, from concept exploration through sustainment and disposal.

I believe TSA's Office of Acquisition is a model in the department for centralizing lifecycle acquisition management. As a result, we have the highest program management certification rate in the department.

Congress authorized TSA's use of AMS through the Aviation and Transportation Security Act in 2001, with the initial goal of federalizing checkpoints and rolling out screening technology at airports on an aggressive timeline. We accomplished that goal. But the greatest value of AMS is not to speed the contract; rather, it is the lifecycle framework that allows my office to develop business solutions that align with TSA's mission.

The tenants of AMS are the same as FAR. Competition is our standard way of doing business. TSA's small-business program is important to our success in the business community, and our in-

creasing statistics demonstrate our commitment to the program. The program has trended positively each year, increasing over 25 percent in the past fiscal year alone.

Our procurements are transparent to the public. We provide public notice of opportunities on Fed Biz Opps, the government's single point of entry. My team frequently conducts industry days with interested firms throughout the process. These open communications provide industry with greater insight into our mission and allow us to better understand their capabilities.

So what is different about AMS that warrants its use at TSA? Our intent is to make common-sense, effective business decisions that support our mission. AMS leverages the best practices of industry. It was developed following a full-up review of the best in business.

Whereas the FAR requires full and open competition, AMS is based on managed competition. This is consistent with how industry conducts its own purchasing and supply chain management. As a result, government resources are not spent on firms that have no chance of receiving award, and industry maximizes the impact of their bid and proposal costs.

Our interactions with industry under AMS are also a differentiator. AMS encourages frequent and open communications with industry throughout the lifecycle of an acquisition, without giving any of them a competitive advantage.

Communications, especially during the solicitation phase, are highly regulated under the FAR, so much that the terms clarifications, discussions and communications have unique meaning. The FAR requires an agency to conduct discussions with all offerors in a competitive range. But AMS allows TSA to focus on those most likely to receive awards.

If there is a dispute during solicitation and selection, AMS offers alternative dispute resolution, which is another best business practice. AMS recognizes that effective communication is the key to good relationships, and relationships are the key to good business.

In addition, I believe AMS has enhanced TSA's ability to recruit outstanding acquisition professionals. My office has a comprehensive human capital strategy that ensures we recruit and retain a highly qualified workforce that is certified by DHS and empowered to negotiate good deals. Our staffing has significantly increased over the last 3 years, including the establishment of a fellows program for entry-level contracting professionals.

While we face challenges similar to the federal acquisition corps, the diversity of training and exposure to alternative systems benefits TSA and the workforce as a whole.

During my career, I have conducted acquisitions in both AMS and FAR. At its most basic level, I believe AMS continues to deliver positive results for TSA, even as a unique system in the department, because its framework sets the stage for good business.

While AMS does not differ vastly from the FAR, TSA and its industry partners do benefit from its flexibilities.

I look forward to answering your questions. Thank you.

[The statement of Mr. Gunderson follows:]

PREPARED STATEMENT OF RICHARD GUNDERSON

Chairman Carney, Ranking Member Rogers, and members of the Subcommittee, thank you for the opportunity to discuss the Transportation Security Administration's acquisition and contracting programs. I am the Assistant Administrator for Acquisition and the Chief Procurement Executive for the Transportation Security Administration (TSA). I am a career executive and have nearly 19 years of public service in the acquisition profession. I joined TSA in December 2002 after 14 years of service in the Department of Defense's Naval Sea Systems Command. Since joining TSA, I served as a Division Director and Deputy Chief Procurement Executive prior to my selection as the Assistant Administrator for Acquisition in November 2005.

As the Assistant Administrator for Acquisition, I provide direction and oversight of TSA's acquisition program, including award and administration of contracts and other agreements. At TSA, the Office of Acquisition is more than a contracts organization. Not only do we award contracts, we focus on strengthening program management and what we call "Big A" Acquisition across the TSA organization. Acquisition encompasses much more than the procurement aspect of conducting business. It is a life cycle approach to investments and requires the integration of numerous disciplines, including program management, engineering, budgeting, logistics, and contracting to name a few. This contrast to the "typical" federal contracts office is important to note, as it is similar to one of the key differences between TSA's Acquisition Management System (AMS) and the Federal Acquisition Regulation (FAR).

As you know, the Aviation and Transportation Security Act (P.L. 107–71) authorized TSA to utilize the FAA's AMS for our acquisitions. AMS provides TSA with flexibility to support security screening operations and address new security challenges. AMS allows TSA's acquisition office to provide timely contract support that is fully integrated with program development and program management needs. But the value of AMS should and does not focus on expediency, rather it emphasizes sound business decision making. AMS not only provides procurement policy and guidelines, but establishes an acquisition lifecycle framework that drives sound business decisions from concept exploration through sustainment of operations.

It is important to note that AMS shares the fundamental tenets found in the FAR:

- **Competition**—Competition is the preferred method of procuring technology and services under TSA's AMS and the FAR. While there may be cases where market analysis results in a determination not to compete, TSA continuously strives to develop requirements and procurement strategies that maximize competition. Similar to the FAR's list of exceptions to full and open competition, the AMS requires single source procurements to be documented and approved at the appropriate levels, identifying the rational basis for such a determination.
- **Small Business**—TSA's small and disadvantaged business utilization program has steadily grown since 2003. The program has trended positively each year, and we are currently running significantly higher again this year versus Fiscal Year 2006.
- **Transparency**—TSA's acquisition and procurement processes are transparent to the public.
    - TSA publicly announces its business opportunities on Fed Biz Opps, the Government's single point of entry for government procurements. As a result, commercial vendors have visibility into the product and service needs of TSA.
    - AMS encourages frequent and open communications with industry and offerors, from market analysis through contract award and administration. It is common practice for TSA to conduct "industry days" with interested firms prior to and/or after release of a solicitation. These open communications provide industry with greater insight into TSA's needs as well as allowing TSA to better understand the capabilities of our industry partners.
- **Procurement Integrity**—The Procurement Integrity Act applies to TSA and DHS equally.

While AMS shares these common tenets and principles, it does provide some important flexibilities or differences from the FAR that enable TSA to perform its mission efficiently and with value to the taxpayer:

- **Competitive Screening Process**—As I mentioned earlier, competition is the preferred way of business for TSA. Where the FAR emphasizes "full and open" competition, AMS is based on managed competitions which focus on firms that are most likely to be considered for award. Additionally, following market analysis, and through a series of screening information requests, AMS provides TSA with the flexibility to determine the best candidates for award. As a result,

industry and government resources are not wasted by including firms that are not likely to receive an award. Also, the communication process with industry differs slightly from the FAR in a positive way in that AMS provides for flexible communications with industry throughout the process with one or more of the firms without giving any of them a competitive advantage. The FAR requires an agency to conduct discussions with all offers not eliminated if the Government has discussions with one vendor.

- **Commercial Contracting**—While the FAR allows commercial contracting procedures to be used only on procurements under $5 million, AMS allows their use for commercially-available goods and services at any level. The use of commercial contracting procedures streamlines the procurement process and applying its use to commercial contracts that exceed $5 million makes good business sense.
- **Disputes Resolution**—Whereas FAR-based organizations fall under the Government Accountability Office (GAO) protest process (and the board of contract appeals or U.S. Court of Federal Claims for all contractor claim appeals), TSA uses the FAA's Office of Dispute Resolution for Acquisition (ODRA) to resolve protests and contract disputes. For protests and contract disputes, the ODRA process encourages resolution at the agency level, but if not feasible, it offers Alternative Dispute Resolution (ADR) approaches to possibly reach mutual resolution. If the ADR effort does not result in resolution then ODRA fully adjudicates the matter. Although the courts and contract appeal boards also provide for ADR, the ODRA actively utilizes ADR in protests and contract disputes with its immediate offer to the parties to resolve a matter under ADR. When this does not occur, the ODRA continuously encourages the parties to employ ADR processes during the numerous litigation stages. This streamlined process facilitates timely resolutions, resulting in a more efficient use of industry and government resources in protests and contract disputes. The ODRA process has worked extremely well for TSA, the contracting community, and the taxpayers. Based on our experience over five years with numerous cases, this ODRA dispute system under the AMS allows TSA to maintain business relationships with our industry partners with less animosity and lower litigation costs usually encountered when resolving matters through formal litigation.
- **IPT Structure**—Under AMS, the use of Integrated Product Teams (IPTs) is fundamental to doing business. While many FAR based organizations use IPTs to get the job done, they do not use it to the extent that we do under TSA's AMS. The use of formal IPTs facilitates the communication between organizations and ensures participation from the various disciplines throughout the acquisition life cycle. My organization leads workshops on IPTs for TSA, bringing together program office, legal counsel, budget, and finance personnel to develop strategies and execute them, resulting in reduced costs and accelerated schedules to meet the mission.
- **Acquisition vs. Procurement**—While the FAR provides a prescriptive procurement framework, AMS provides lifecycle management guidance for acquisition. Sound procurements are the product of a strong acquisition program. AMS guides programs through the acquisition lifecycle and drives sound business decisions. These decisions are based on a mission need and requirement, alternatives analysis and investment reviews, planning, execution and oversight.
  - Since TSA awarded its early contracts to support the stand up of operations, the Office of Acquisition has continuously reviewed our business models to identify more effective strategies. Working within the AMS framework, TSA has implemented new business strategies that have resulted in lower costs, increased competition, and increased small business opportunities.
  - The Office of Acquisition includes a division dedicated to strengthening "Big A" Acquisition across TSA. This group provides outreach to the various programs, providing support in the areas of planning and program oversight. Their work was recently recognized in an award from the Chief Acquisition Officer's Council. The award citation stated: "TSA's Acquisition and Program Management Support Division built a framework of certification and training, and implemented program management support tools such as the TSA Acquisition Program Status Report system—an executive-level tool to monitor key program metrics such as Program Manager Certification."

With respect to staffing and training, TSA has invested in the development of our employees to allow them to operate in both an AMS and FAR environment. While the significant portion of our funding is obligated via AMS, our contracting professionals do use pre-established federal schedules such as GSA and DHS's EAGLE

and First Source programs. These government-wide or department-wide contracts are FAR-based, and our personnel are trained and certified to utilize such procedures.

For those unfamiliar with AMS, my organization routinely holds training classes on acquisition subjects that span the range of AMS, from "Big A" workshops on how to conduct market analysis to specific topics like the Office of Dispute Resolution procedures. Attendees include customer and program personnel, legal advisors, budget professionals, and contracting employees.

In addition, I believe AMS has assisted in our ability to recruit employees. The Office of Acquisition has a comprehensive Human Capital Strategy Plan, focused on recruiting, developing, and retaining highly qualified people. Our staffing has significantly increased over the last two years, including the establishment of a novel intern program for entry-level contracting professionals. The challenges we face in staffing are not significantly different from those faced across the Federal Government acquisition corps. It is merely a function of supply and demand for contracting professionals. However, TSA senior leadership has continued to support the acquisition function and has increased our hiring authority. We continue to aggressively hire to meet our targets.

We believe that for an individual with a FAR background, AMS provides career broadening opportunities. Many of our mid and senior career level staff came to us from FAR-based organizations. The environment is attractive to individuals looking to exercise sound business judgment to get the best value for the Government, not just comply with a prescriptive rule set.

In summary, AMS authority has provided TSA with the ability to conduct business efficiently and effectively. While AMS does not differ vastly from the FAR, TSA does benefit from its flexibilities. TSA complies with DHS policies and directives and I share the Chief Procurement Officer's (CPO) priorities. After five years of conducting business within the AMS framework, I am confident that TSA will continue to utilize AMS to develop and implement sound business strategies in support of our mission.

Mr. Chairman, thank you for the opportunity to testify before the Subcommittee about TSA's acquisition program. I am glad to answer any questions you or the Members of the Subcommittee may have for me.

Mr. CARNEY. Thank you, Mr. Gunderson.

We are going to take a quick technical timeout while we replace the microphone.

[Laughter.]

That is the kind of cooperation we like to see.

Okay. Mr. Bodenheimer, you are recognized for 5 minutes. Thank you.

STATEMENT OF DAVID BODENHEIMER, ESQ., PARTNER, CROWELL & MORING LLP

Mr. BODENHEIMER. Good morning, Mr. Chairman and members of the committee. Thank you for holding these hearings on TSA's exemption from fundamental procurement laws requiring competition, external oversight, and due process protection.

After nearly 6 years with TSA's exemption from procurement laws governing the rest of DHS and other federal agencies, it is time to ask some basic questions: Does TSA still need an emergency exemption when procurement laws already have built-in flexibility? Does the history of TSA acquisition show the benefit of continued exemption?

And finally, does the TSA exemption justify forgoing full and open competition, government-wide efficiency and uniformity, and other laws assuring accountability, transparency, and oversight? I believe the answer is no.

Ending this exemption will be a win-win for everyone, promoting competition and procurement best practices within TSA, reducing

fragmentation within DHS, improving congressional and GAO oversight, and reducing compliance burdens on contractors.

I am David Bodenheimer, a partner in the law firm of Crowell & Moring, where I head the Homeland Security Committee and specialize in government contracts. I spent 6 years with the Navy as a civilian attorney in the field, at the commands, and as assistant to the general counsel.

My comments today are my own.

TSA has a tough job for protecting the transportation infrastructure and deserves our gratitude for their efforts. However, TSA's exemption from competition rules and the FAR have not yielded the hoped-for payoff: faster, more efficient contract awards and on-time deliveries within budget.

In fact, TSA procurement history has been disheartening. Experience tells us that following the rules, including competition and the FAR, will yield better acquisition results than continuing with the TSA exemption.

I would like to address four points.

First, TSA no longer needs a special exemption. This exemption arose out of emergency legislation in the aftermath of the 9/11 terrorist attacks. This exemption is no longer necessary because existing procurement law already builds in the flexibility for responding to urgent needs. Furthermore, the rest of DHS, as well as the military departments, handle emergency contracting without having TSA's wholesale exemption. And finally, TSA's procurement history over the last 6 years does not show the real benefits of this exemption.

Second, full and open competition is the right standard for TSA. TSA's exemption from the Competition in Contracting Act means that TSA is operating under the old competition standard that Congress long ago found to be ineffective and inadequate.

Bringing CICA's full and open competition to TSA procurements would not only benefit TSA but the taxpayers as well, with the undeniable benefits of competitive savings, controlled cost growth, technological innovations, and fair play.

In addition, the Competition in Contracting Act assures accountability and transparency through statutory notices, high-level justifications, and public access relating to sole-source contracting.

Three, aligning TSA with the procurement mainstream will promote greater efficiency and uniformity. With this exemption, TSA is isolated in some ways from the rest of DHS and the federal acquisition community, denying it the efficiencies and uniformity of government-wide regulations, policies and training specified in the OFPP act and the FAR.

Fragmented regulations, policies and clauses magnify the compliance burden for contractors and government personnel alike. Small businesses, in particular, bear the greatest brunt of trying to track, update and train to two different and sometimes inconsistent sets of rules.

Fourth and finally, effective GAO oversight assures greater accountability. TSA's exemption cuts off GAO oversight through the protest process. With more than 80 years of experience in reviewing agency acquisitions, GAO brings unparalleled experience, established precedent, and unquestioned independence to the protest

process, all of which bring greater due process to the contractors and oversight for TSA procurements. Such GAO oversight would be particularly effective in promoting greater competition, with all of its benefits, in TSA procurements.

In conclusion, I thank you for your leadership on this issue, and I welcome your questions.

[The statement of Mr. Bodenheimer follows:]

PREPARED STATEMENT OF DAVID Z. BODENHEIMER, ESQ.

Introduction

Mr. Chairman and Members of the Committee. Thank you for holding these hearings today on the Transportation Security Administration's (TSA) exemption from fundamental federal procurement rules requiring competition, external oversight, and due process protections. As part of the national mobilization to combat terrorism after the attacks on September 11, 2001, TSA received exemptions from such rules in order to expedite procurement of critical anti-terrorism needs. Nearly six years later, the time is ripe to ask how TSA's continued exemption from basic procurement rules can be justified. In particular,

- *Payoff.* What successful TSA acquisitions demonstrate the need for, and benefits of, continued TSA exemptions?
- *Uniqueness.* Why does TSA need special emergency authority that no other part of the Department of Homeland Security (DHS) has?
- *Cost/Benefit.* Do the benefits of TSA's exemption outweigh the costs and risks of forgoing competition, oversight, and other bedrock procurement rules?

I am David Bodenheimer, a partner in the law firm of Crowell & Moring LLP in Washington, DC where I am head of the Homeland Security practice and specialize in government contracts. As part of this practice, I have advised clients, published articles, and lectured extensively on Homeland Security and government contract matters. In addition, I serve as Co Vice-Chair of the ABA Science and Technology Section's Special Committee on Homeland Security. Prior to entering private practice, I served six years (1982—88) as a civilian attorney for the United States Department of the Navy where I handled a broad spectrum of government contract matters in the field, at the Commands, and as Assistant to the General Counsel. However, I appear before your Committee today in my personal capacity and the views that I express are my own.

Since its inception in 2001, TSA has borne heavy responsibilities for establishing and implementing security measures for protecting our transportation systems from terrorist attacks and other catastrophic threats. The magnitude of this task is underscored by the sheer size of the transportation infrastructure, its geographic dispersion, and the non-stop movement of passengers and cargo both domestically and internationally. For undertaking these Herculean tasks, the TSA team deserves our gratitude for its efforts to make our transportation system safer.

In the acquisition arena, TSA's exemption from competition rules and the Federal Acquisition Regulation (FAR) have not yielded the anticipated payoff—faster, more efficient contract awards producing on-time deliveries, within-budget costs, and concrete results meeting the TSA mission. To the contrary, TSA procurements have a disheartening history of schedule delays, cost overruns, and performance shortfalls, as documented in Congressional hearings, Government Accountability Office (GAO) reviews, and Inspector General and audit reports. History tells us that following the rules—including competition and the FAR—will yield faster, cheaper, and better acquisition results than will continuing with TSA's exemption.

As a starting point, we need to look at the scope of TSA's exemption from acquisition statutes and regulations. The next step is to consider the need for, and benefits of, continuing this exemption. Finally, the exemption should be weighed against the fundamental procurement principles that TSA may disregard under its current authority. By returning TSA to the acquisition fold applicable to nearly every other procuring agency, both TSA and the taxpayers should benefit in all of the following areas:

- Assuring "full and open" competition;
- Enhancing efficiency and consistency for DHS and TSA acquisitions;
- Improving GAO oversight of TSA procurements; and
- Avoiding "emergency exemption" creep beyond TSA needs.

The Scope of TSA's Acquisition Exemption

TSA and its exemption from federal acquisition rules arose out of the emergency legislation enacted in the wake of the 9/11 terrorist attacks.[1] This exemption states:

> The acquisition management system established by the Administrator of the Federal Aviation Administration under section 40110 shall apply to acquisitions of equipment, supplies, and materials by the Transportation Security Administration, or, subject to the requirements of such section, the Under Secretary may make such modifications to the acquisition management system with respect to such acquisitions of equipment, supplies, and materials as the Under Secretary considers appropriate, such as adopting aspects of other acquisition management systems of the Department of Transportation.[2]

The scope of this exemption is specifically defined in the referenced "section 40110" allowing the Federal Aviation Administration (FAA) to issue procurement rules "notwithstanding provisions of Federal acquisition law." This exemption cuts through a wide spectrum of acquisition statutes and regulations, including the following: (1) Competition in Contracting Act; (2) Office of Federal Procurement Policy Act (except for Procurement Integrity Act provisions); (3) Federal Acquisition Streamlining Act (except for whistleblower provisions); (4) Small Business Act (except for a general duty to provide "reasonable opportunities" to small businesses); (5) procurement protest system provisions (31 U.S.C., Chapter 35(V)); and (6) the Federal Acquisition Regulation (FAR). 49 U.S.C. § 40110(d). As Senator Snowe explained, TSA "is exempt from every major procurement law" and may "sidestep normal competitive bidding practices" under this authority.[3]

Assessing the Need for, and Benefits of, TSA's Exemption

TSA received its acquisition exemption in the midst of a national emergency in 2001. This raises key questions of whether (1) TSA still needs this emergency acquisition authority; and (2) this emergency authority has produced faster, cheaper, and better acquisitions.

Assessing the Need for Continued Exemption

In times of war or national emergency, exceptions to major procurement laws may be necessary in order to meet urgent needs of the troops, disaster victims, or other public exigencies. However, wholesale exemptions are no longer necessary for TSA because the major procurement statutes and regulations incorporate built-in safeguards to allow emergency contracting to meet urgent needs of the agency and the public. For example, both the Competition in Contracting Act (CICA) and the FAR carve out special exceptions to the requirement for "full and open competition" when the agency determines that "an unusual and compelling urgency" exists. 41 U.S.C. § 253(c)(2); FAR § 6.302–2.

Indeed, the revisions to the FAR in 2006 now assist agencies in meeting urgent needs by devoting an entire section of the regulation to "emergency acquisitions." 71 Fed. Reg. 38247 (2006); FAR Part 18. In particular, this recent FAR revision "identifies acquisition flexibilities that are available for emergency acquisitions." As a result, agencies have sufficient authority within the existing statutory and regulatory framework without the need for any broad exemption like that applicable to TSA.

In addition, the question arises as to why TSA alone needs a special emergency exemption not available to any other part of DHS—or even to the military departments. As Senator Snowe stated, "TSA is one of the few federal agencies and the only agency within the Department of Homeland Security that is exempt from federal procurement laws."[4] TSA should be able to achieve its critical mission as readily under the FAR as the rest of the DHS contracting community and the military departments.

Weighing the Benefits of the TSA Exemption

If TSA's emergency exemption had contributed to a record of acquisition successes, a continuation of this exemption might be a worthy consideration. However, the past six years do not readily demonstrate the benefits of TSA's exemption. To

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[1] Aviation and Transportation Security Act, Pub. L. No. 107–71 (2001) *codified* at 49 U.S.C. § 114(o); *see Resource Consultants, Inc.,* B–290163, June 7, 2002, 2002 CPD ¶ 94 ("In the aftermath of the terrorist hijackings and crashes of passenger aircraft on September 11, 2001, the Congress passed and the President signed, the Aviation and Transportation Security Act").

[2] *See* Pub. L. No. 109–90, Title V, § 515, 119 Stat. 2084 (Oct. 18, 2005) (extending exemption to acquisition of services; *Knowledge Connections, Inc.,* B–298172, Apr. 12, 2006, 2006 CPD ¶ 67 (applying exemption to services).

[3] Sen. Snowe's News Release, "Snowe Brings Increased Transparency, Accountability to Transportation Security Administration Contracting" (July 13, 2006).

[4] *Id.*

the contrary, TSA's acquisitions not only have drawn bipartisan criticism, but also have accumulated a history of delays, overruns, and other problems documented in GAO and DHS reports, as illustrated below.

- *TSA Procurements Generally*
  - *Sen. Snowe.* "TSA has a record of mismanagement and lack of transparency in its acquisitions that provide little justification for a permanent exemption from the FAR." [5]
  - *Sen. Kerry.* "The TSA has been the subject of several Department of Transportation and DHS Inspector General investigations regarding the mismanagement of contracts that have cost taxpayers hundreds of millions of dollars." [6]
  - *DHS IG.* "[W]e conducted audits and reviews of individual DHS contracts, such as the Transportation Security Administration's (TSA's) screener recruiting and TSA's information technology services. . . . Common themes and risks emerged from these audits, primarily the dominant influence of expediency, poorly defined requirements, and inadequate oversight that contributed to ineffective or inefficient results and increased costs." [7]
- *IT Managed Services*
  - *DHS IG.* "Another example of where an expedited schedule led to DHS acquisition deficiencies is TSA's information technology managed services contract with Unisys. . . . By the beginning of fiscal year 2006, TSA had spent most of the contract ceiling, 83 percent, without receiving many of the contract deliverables critical to airport security and communications." [8]
- *Secure Flight*
  - *o GAO.* "TSA has not followed a disciplined life cycle approach to manage systems development, or fully defined system requirements. Rather, TSA has followed a rapid development method to develop the program quickly. This process has been ad hoc, resulting in project activities being conducted out of sequence, requirements not being fully defined, and documentation containing contradictory information or omissions."[9]
- *Transportation Security Operations Center*
  - *House Report.* "Moreover, an unnecessary decision to accelerate the construction deadline cost TSA between $400,000 and $600,000, not including approximately $575,000 in unjustified approved construction change orders.'"[10]
- *Transportation Worker Identification Credential Program (TWIC)*
  - *GAO.* "TSA experienced problems in planning for and overseeing the contract to test the TWIC program, which contributed to a doubling of TWIC testing contract costs and a failure to test all key components of the TWIC program." [11]

In summary, the proven benefits of the exemption from major acquisition laws is not readily apparent from TSA's six years of acquisition experience with this exemption.

Assuring "Full and Open" Competition

The Competition in Contracting Act (CICA) does not apply to TSA. 49 U.S.C. §§ 114(o) and 40110. Instead, TSA may award noncompetitive contracts based upon

[5] *Id.*

[6] Sen. Kerry's Letter to Kip Hawley (TSA Administrator) (Dec. 13, 2005).

[7] *Procurement Practices of the Department of Homeland Security: Hearings Before the House Comm. on Oversight and Government Reform,* 110th Cong., 1st Sess. (2007) (statement of DHS IG Richard Skinner).

[8] Code Yellow: *Is the DHS Acquisition Bureaucracy A Formula for Disaster? Hearings Before House Comm. on Government Reform,* 109th Cong., 2nd Sess. 69 (2006) (statement of DHS Asst. IG David Zavada) (hereinafter *"2006 House Code Yellow Hearings"*).

[9] GAO, *Aviation Security: Significant Management Challenges May Adversely Affect Implementation of the Transportation Security Administration's Secure Flight Program* 1 (Feb. 9, 2006) (GAO–06–374T); *see also* GAO, *Homeland Security: Progress Continues, but Challenges Remain on Department's Management of Information Technology* 30 (Mar. 29, 2006) (GAO–06–598T).

[10] 2006 House Code Yellow Hearings 25 (House Comm. on Government Oversight Report, Waste, Abuse, and Mismanagement in Department of Homeland Security Contracts (July 2006) citing DHS IG Report).

[11] GAO, *Transportation Security: TSA Has Made Progress in Implementing the Transportation Worker Identification Credential Program, but Challenges Remain* 12 (Apr. 12, 2007) (GAO–07–681T).

its "best interest" and a "rational basis" standard.[12] TSA's threshold for sole-source contracts is even lower than the old competition standard—maximum "practical" competition—that Congress found to be inadequate and ineffective prior to the enactment of CICA.[13]

In support of CICA's mandate for competition, Congress established an overwhelming case for how competitive procurements serve the public interest:

- *Cost Savings.* "First, competition in contracting saves money. Studies have indicated that between 15 and 50 percent can be saved through increased competition."
- *Cost Control.* "In addition to potential cost savings, competition also curbs cost growth. According to an October 1979 Rand Corporation analysis . . ., competitive procurement has led to improvements in system performance and on-schedule delivery by contractors, which have subsequently lowered real cost growth."
- *Innovation.* "Competition may also promote significant innovative and technical changes. In some cases, competition serves as an incentive for firms to be more progressive in developing cost-reducing design changes and improvements in manufacturing technology in order to gain advantage over their competitors."
- *Fair Play.* "The last, and possibly the most important, benefit of competition is its inherent appeal of 'fair play.' Competition maintains the integrity in the expenditure of public funds by ensuring that government contracts are awarded on the basis of merit rather than favoritism." [14]

More than twenty years later, the case for competition pursuant to CICA remains equally compelling, as Congress continues to find in recent hearings:

> Experience has proven that there is a direct connection between an agency failing to adequately compete a contract and poor performance on that contract. The billions wasted in no-bid, sole-source contracts awarded after Hurricane Katrina stand as a testament to that fact.[15]
>
> Competition in federal contracting protects the interests of taxpayers by ensuring that the government gets the best value for the goods and services it buys. Competition also discourages favoritism by leveling the playing field for competitors while curtailing opportunities for fraud and abuse.[16]In fact, DHS officials have agreed that "competitive contracting is the preferred way to go" and that noncompetitive contract modifications have contributed to cost overruns.[17]
>
> > CICA not only mandates competition, but also establishes concrete requirements to enforce transparency and accountability. In particular, CICA requires high-level review and written justifications for high-dollar sole-source procurements. 41 U.S.C. § 253(f). In addition, such justifications must be available for public review, thus enhancing effective oversight. *Id.*[18] Such requirements may not only facilitate GAO and DHS IG oversight, but also assist TSA in performing its acquisition functions.[19]

In summary, a powerful case exists for Congressionally-established "full and open" competition under CICA. Given that CICA specifically allows flexibility for urgent procurements and emergencies, TSA should be able to accomplish its mission and obtain the undeniable benefits of competition—including cost savings, controlled

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[12] *See* TSA Acquisition Management System (linking to FAA Acquisition Management Policy § 3.2.2.4) (*http://www.tsa.gov/join/business/index.shtm*); GAO, *Transportation Security Administration: High-Level Attention Needed to Strengthen Acquisition Function* 14 (May 2004) (GAO–04–544).

[13] *See* Defense Acquisition Regulation (DAR) § 3–101(d); Federal Procurement Regulation (FPR) § 1–3.101.

[14] S. REP. NO. 98–50, at 3 (1983).

[15] *Responsibility in Federal Homeland Security Contracting: Hearings Before House Comm. on Homeland Security,* 110th Cong., 1st Sess. (2007) (statement of Chairman Thompson).

[16] 2006 *House Code Yellow Hearings* 11 (incorporating House Comm. on Government Reform's on *Report Waste, Abuse, and Mismanagement in Department of Homeland Security Contracts*).

[17] *2006 House Code Yellow Hearings* 87 (statement of Elaine Duke) (agreeing that "competitive contracting is the preferred way to go"); *id.* (statement of Rick Gunderson) (agreeing that when a $104 million contract "grows to $700 million, it is not competitive all the way through").

[18] CICA's legislative history confirms that Congress viewed the mandate for written justifications to be "necessary to permit effective oversight of the use of noncompetitive procedures." S. REP. NO. 98–297, at 5 (1983).

[19] *See* Sen. Snowe's News Release, "Snowe Brings Increased Transparency, Accountability to Transportation Security Administration Contracting" (July 13, 2006) ("GAO conducted an investigation into TSA's acquisition office which required staff to rummage through boxes of files to piece together the details of 21 contracts it was reviewing"); GAO, *Transportation Security Administration: High-Level Attention Needed to Strengthen Acquisition Function* 13—14 (May 2004) (GAO–04–544).

cost growth, innovation, and fair play—without any need for a special "TSA-only" exemption from CICA.

Enhancing Efficiency and Consistency Within DHS

With its exemption, TSA is also not subject to the Office of Federal Procurement Policy Act and the Federal Acquisition Regulation that establish government-wide rules offering economy-of-scale efficiencies and cross-cutting consistency. 49 U.S.C. §§ 114(o) and 40110.

Congress established the Office of Federal Procurement Policy (OFPP) "to provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies and to promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government." 41 U.S.C. § 404(a). Indeed, a "uniform procurement system" represented one of the key objectives of the OFPP Act, as amended.[20] These key Congressional objectives for efficiency and uniformity are undermined when the "Government-wide" procurement system is fragmented and TSA may play by its own unique acquisition rules.

This fragmentation of the procurement system creates two parallel sets of rules with differences and conflicts—ranging from subtle to significant—between the FAR and the separate TSA Acquisition Management System (TSAAMS) set of clauses. Examples include:

- *Cost or Pricing Data.* The FAR establishes a uniform threshold of $650,000 for obtaining cost or pricing data. FAR § 15.403—4(a). In contrast, TSAAMS 3.2.2.3–27 sets a $1,000,000 threshold, while TSAAMS 3.2.2.3–26 imposes yet another threshold of $550,000.
- *Environmental.* The FAR includes the Pollution Prevention and Right-to-Know Information clause (FAR 52.223–5), but not Clean Air & Clean Water clause (deleted over 5 years ago). The TSAAMS has the opposite—the outdated Clean Air & Clean Water clause (3.6.3–2), but no Pollution Prevention clause.
- *Buy American.* The FAR recognizes certain exceptions to honor international trade agreements (FAR § 25.1101), but the TSAAMS does not mention them (3.6.4–2).

Other differences include TSAAMS provisions (3.6.4–2 and 3.2.2.3–27) that omit FAR provisions recognizing commercial item exceptions (FAR § 25.1101(a)(1) and § 15.403–3(c)).

This fragmentation cuts against the OFPP and FAR objectives of efficiency and uniformity in such areas as contract administration, compliance, training, and research. For contract administration, contractors—particularly small businesses—bear a heavy burden of tracking, updating, implementing, and flowing down not just one, but two, separate regulatory regimes if TSA is to have the benefit of competition from companies with government-wide experience. For compliance, contractors need a system of policies, procedures, and training to assure that their personnel are following the rules; this burden multiplies when contractors must address two separate sets of regulatory requirements. For training and research, separate FAR and TSA systems undermine the OFPP objectives of "development of a professional acquisition workforce Government-wide" and coordination of "Government-wide research and studies." With TSA's exemption, such training and research must be done twice—once to cover the FAR's general rules and then again for the unique aspects of TSA acquisitions.

Improving GAO Oversight Over TSA Procurements

With its exemption, TSA is not subject to the procurement protest system provisions (31 U.S.C., Chapter 35(V)) applicable to other agencies. 49 U.S.C. §§ 114(o) and 40110. As a result, GAO lacks jurisdiction to oversee TSA acquisitions through the protest process.[21]

For TSA acquisitions, the only protest option is the FAA's Office of Dispute Resolution for Acquisitions (ODRA).[22] While the ODRA protest process is available, the GAO protest process offers compelling advantages:

- *Unparalleled Experience.* For more than 80 years, GAO has served an a forum for resolving protests involving federal agencies;[23]

[20] S. REP. NO. 98–50, at 6 (1983).

[21] *See, e.g., Knowledge Connections, Inc.,* B–298172, Apr. 12, 2006, 2006 CPD ¶67 (dismissing protest against TSA for lack of jurisdiction).

[22] 14 C.F.R. §§ 17.11—17.21; FAA ODRA website (procedures, cases, and background) (*http://www.faa.gov/about/office*_org/headquarters_offices/agc/pol_adjudication/agc70/).

[23] H.R. REP NO. 98–1157, at 23 (1984) (nearly 60 years of experience in the 1980s).

- *Established Precedent:* Over the many decades of its protest review, GAO has generated thousands of precedent-setting decisions informing both agencies and contractors of what conduct passes muster;[24]
- *Unquestioned Independence.* GAO has a well-earned reputation for independence and objectivity.

As one of the critical reforms established by CICA, Congress determined that an effective protest function required additional teeth.[25] First, because many agencies rendered protests meaningless by proceeding with contract performance pending protest resolution, Congress established a statutory stay of performance to assure effective relief. 31 U.S.C. § 3553(c). In contrast, protests under ODRA generally do not stay contract performance.[26] Second, CICA generally provides for payment of successful protest costs (31 U.S.C. § 3554(c)), while ODRA procedures place significant restrictions on such recovery. 14 C.F.R. § 17.21(c). Third, Congress must receive notification if agencies fail to implement corrective action specified by GAO. 31 U.S.C. § 3554(b)(2) & (e). In contrast, ODRA includes no such mechanism for Congressional or GAO notification and oversight for TSA acquisitions.

While comparative assessments of GAO and ODRA effectiveness are complex undertakings, one measure would be the advancement of competition in federal procurements. By this yardstick, the ODRA protest function has had limited success.

- *Denied Protests.* As a general rule, ODRA protests against sole source procurements have failed.[27]
- *No Remedy.* Even while sustaining the protest, ODRA has declined to overturn the award and reopen the competition.[28]
- *Limited Success.* In over a decade, ODRA has apparently sustained only two protests against sole-source procurements.[29]

In general, GAO has applied greater scrutiny, with greater success, in enforcing competition in federal contracting.[30] As a result, the availability of the GAO protest process would not only assure greater due process protections for competing contractors, but also benefit both TSA and the taxpayer by spurring greater, more vigorous competition.

A***voiding "Emergency Exemption" Creep***

For good reason, emergency exemptions have been extended to procuring agencies in times of war and national emergency. However, history has repeatedly underscored the risks of leaving such emergency authority in place too long. Too often, the emergency becomes the routine and the exemption swallows the governing procurement rules. The emergency authorities during the Korean War and the Katrina aftermath illustrate these risks.

Korean War Emergency Authority. In the Armed Services Procurement Act of 1947, Congress established a statutory "emphasis. . .upon formal advertising as a proven method and upon competition as a means of procuring Government supplies, with a fair and equal opportunity for suppliers and at prices brought about by competition in the market."[31]

> Then came the Korean hostilities, and, on December 15, 1950, the President issued a national emergency proclamation, which has not since been revoked. Immediately upon its issuance, the Secretary of Defense directed that all procurement be undertaken under the authority of section

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[24] *Id.* (GAO's "decisions are relied upon for guidance by Congress, the courts, and the procurement community, including executive branch contracting agencies").

[25] *Id.* at 25.

[26] *J.A. Jones Management Services,* 99–ODRA–00140 (Sept. 29, 1999) ("The FAA's Acquisition Management System ('AMS') includes a presumption in favor of continuing procurement activities and contract performance during the pendency of bid protests"); *accord Glock, Inc.,* 03–TSA–003 (Oct. 28, 2003).

[27] *J&J Electronic Systems,* ODRA–05–346 (June 3, 2005) (denied); *Aviation Research Group,* ODRA–99–138 (Oct. 28, 1999) (summary dismissal); *Raisbeck Commercial Air Group, Inc.,* ODRA–99–117 (May 14, 1999) (summary dismissal); *Wilcox Electric, Inc.,* ODRA–96–8 (Oct. 9, 1996) (denied).

[28] *Haworth Incorp.,* ODRA–98–74 (June 2, 1998) (holding that ODRA did not have to follow CICA and recommend termination of improperly awarded contract).

[29] *Hasler, Inc.,* ODRA–07–404 (Jan. 16, 2007) (finding rejection of lower-priced, technically compliant offer to be improper); *Raytheon Co.,* ODRA–01–177 (June 15, 2001) (sustaining protest against sole-source award after FAA requested independent review by the General Services Board of Contract Appeals (GSBCA) that had developed great experience and expertise in protests at that time).

[30] *See, e.g., eFedBudget Corp.,* B–298627, Nov. 15, 2006, 2006 CPD ¶ 159; *Europe Displays, Inc.,* B–297099, Dec. 5, 2005, 2005 CPD ¶ 214; *WorldWide Language Resources, Inc.,* B–296984.2, Nov. 14, 2005, 2005 CPD ¶ 206; *Sabreliner Corp.,* B–288030, Sept. 13, 2001, 2001 CPD ¶ 170; *Lockheed Martin Systems Integration—Owego,* B–289190.2, May 25, 2001, 2001 CPD ¶ 110.

[31] H.R. REP. NO. 87–1638, at 2 (1962).

> 2304(a)(1) of the Armed Services Procurement Act of 1941. This section permits negotiation of contracts during the period of a national emergency proclamation of the President. Such use of the national emergency authority in subsection (a)(1) effectively suspended the duties, limitations, and requirements specified in the other 16 exceptions where negotiation is permitted by the act of 1947.
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> * * *
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> In 1955 and 1956, this committee, on inquiry, developed the fact that 94.19 percent of the defense procurement dollar was contracted for under the authority of the Presidential Korean National Emergency Proclamation (sec. 2304(a)(1)).[32]

Congress ultimately had to intervene by amending the Armed Services Procurement Act and reaffirming "the congressional intent and policy that formal advertising, the proven method of public procurement, shall be the rule, where it is feasible and practicable."[33]

Katrina Authority. After Hurricane Katrina, federal agencies quickly employed available emergency authority in order to respond more quickly to urgent needs of the Katrina victims.

> In the case of Hurricane Katrina, full and open competition has been the exception, not the rule. The urgent needs in the immediate aftermath of Hurricane Katrina provided a compelling justification for the award of non-competitive contracts. Yet as the immediate emergency receded, the percentage of contract dollars awarded without full and open competition actually increased. In September 2005, the month after Hurricane Katrina, 51% of the contract dollars awarded by the Federal Emergency Management Agency were awarded without full and open competition. Rather than declining after September, the percentage of contract dollars awarded non-competitively increased to 93% in October.[34]

TSA Exemptions. Even if TSA procurements were not currently far out of the federal procurement mainstream, history warns that "emergency exemption" creep will drive an ever widening gap between TSA and the rest of the federal contracting community. As discussed above, such disharmony will further undermine some of the most fundamental Congressional directives, including CICA's "full and open competition" mandate, the OFPP Act's "Government-wide" initiatives for efficiency and uniformity in federal contracting, and GAO's oversight through the protest process for enforcing competitive fair play in the public marketplace.

Conclusion

Six years have passed since TSA received its emergency exemption from the major procurement laws governing other federal agencies. With the passage of time, bipartisan Congressional investigations, GAO reviews, and DHS IG audits have yet to identify tangible benefits resulting from TSA's sweeping exemption. On the other hand, both TSA and the taxpayer stand to gain from the Congressionally recognized values flowing from "full and open competition," "Government-wide" efficiencies of common regulations and training, and effective GAO protest oversight. Accordingly, the time is ripe to end TSA's exemption from major procurement laws and to bring TSA acquisitions into the federal procurement mainstream.

Thank you for your leadership on the TSA acquisition process that directly affects one of the most visible and vital components of America's critical infrastructure—our transportation system. Bringing greater competition, efficiency, and oversight to the TSA acquisition process will serve not only the interests of TSA and DHS, but the public at large.

This concludes my statement and I would be happy to answer any questions you might have.

Mr. CARNEY. Thank you, Mr. Bodenheimer.

Now I recognize Mr. Chvotkin for 5 minutes.

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[32] *Id.*

[33] *Id.* at 3; *see* Pub. L. No. 87–653.

[34] *House Comm. on Government Reform—Minority Staff: Waste, Fraud, and Abuse in Hurricane Katrina Contracts 2* (Aug. 2006).

STATEMENT OF ALAN CHVOTKIN, SENIOR VICE PRESIDENT AND COUNSEL, PROFESSIONAL SERVICES COUNCIL

Mr. CHVOTKIN. Thank you, Mr. Chairman and Chairman Thompson, Ranking Member Rogers. On behalf of the more-than-220-member company of the Professional Services Council, many of whom do business with the Transportation Security Administration and other components of the Department of Homeland Security, thank you for the invitation and the opportunity to provide our views.

Today, federal spending on the purchase of goods and services exceeds $400 billion, representing nearly 40 percent of the total discretionary budget for the federal government. Spending on services contracts represents nearly 60 percent of that spending. Thus, federal procurement must be a core competency of the federal government and prioritized as such. And by any measure, TSA is a major procurement organization.

There is no doubt that the federal government generally, and the Department of Homeland Security in particular, faces many difficult challenges in the acquisition arena. The human capital challenge is real and impacts the acquisition workforce as much as, if not more so, than the rest of the federal workforce.

PSC members believe strongly that an experienced, smart and well-prepared customer makes the best customer. We see many examples in the private sector where companies take special effort to ensure that their procurement workforces are well-prepared for the significant work that they are assigned.

Yet, across the board, workforce development in the federal government is a glaring weakness and has been for a long time. Training funds for the acquisition workforce remain relatively flat and are far from adequate.

To this committee's credit, and yours, Mr. Chairman, Title 4 of H.R. 1684, the 2008 Department of Homeland Security Authorization Act, provides for important workforce development improvements for the Department of Homeland Security.

And we support these initiatives, but more needs to be done.

If we want to improve the quality of federal acquisition, we should not start by layering an already-beleaguered workforce with more regulations and process demands. Rather, TSA has called for an "Acquisition Marshall Plan" that aggressively addresses the hiring, retention, training, reward and development of the acquisition workforce on a government-wide basis.

This would involve recognizing, as most high-performing companies do, that those elements of the workforce that are most directly critical to the functioning or the success of the institution receive special and appropriate focus.

In addition, PSC has called for the creation of a government-wide contingency contracting corps, drawn from across the government workforce.

And I note, Mr. Chairman, that to make these important reforms a reality will require Congress to be the catalyst. We were pleased that, today, your counterpart committee, the Senate Homeland Security and Governmental Affairs Committee, will adopt this recommendation as part of its markup of a broader government-wide contracting accountability bill.

With respect to TSA's exemptions, there were valid reasons for exempting TSA from the acquisition laws and regulations when it was created in late 2001, even while good arguments also existed at that time to treat TSA as most other agencies, particularly with respect to federal acquisition policy.

To be sure, the TSA acquisition system works, as has been demonstrated over the past 5 years. It has built on the principles of the FAR, even though some of the obvious differences exist in implementation.

The flexibilities that TSA has used to meet past threats and may need to respond fully and promptly to emerging and future threats need to be carefully considered. Although, in our view, the current acquisition statutes, the FAR and the DHS authorities also provide broad flexibility for agencies, including TSA, to meet emergency situations.

This committee and others have reviewed many of the procurements entered into by TSA. Many of them have achieved exactly the goals that TSA has had, and have been implemented as intended. Others have raised issues regarding performance by both federal officials and contractors, with examples of problems at all phases of the acquisition system.

I cannot say that TSA's exemptions from the FAR was the cause for any of these problems. Nor can I say with certainty that bringing them under those laws and regulations will ensure that there will not be problems in the future.

But I can say with confidence that bringing TSA at least under the common rules applicable to the Department of Homeland Security will increase competition, expand opportunities for greater small-business participation, provide greater accountability and transparency in the procurement process, and provide greater options for addressing the challenges of the department's acquisition workforce.

Mr. Chairman, as you noted in your opening statement, these unique processes make it difficult to share acquisition resources across the department, let alone on a government-wide basis, as we suggested in our proposed contingency contracting corps. It puts an added burden on the responsibility of the department's chief procurement officer to provide training and to meet the higher needs of the department.

But from an industry perspective, this separate-but-unequal system creates other challenges. We encourage you to look carefully at those challenges and for solutions.

In conclusion, we believe that bringing TSA at least under the common rules applicable to the Department of Homeland Security will increase competition, expand small-business participation, and provide accountability and transparency.

Thank you for the opportunity to provide the views of the Professional Services Council on this important public policy issue. We look forward to responding to any questions you may have.

[The statement of Mr. Chvotkin follows:]

PREPARED STATEMENT OF ALAN CHVOTKIN

Introduction

Mr. Chairman, Ranking Member Rogers, members of the Subcommittee, I am Alan Chvotkin, Senior Vice President and Counsel of the Professional Services

Council (PSC). PSC is the principal national trade association for companies providing services to virtually every agency of the Federal government. Many of our member companies now do business with the Transportation Security Administration (TSA) and other components of the Department of Homeland Security. On behalf of the more than 220 member companies, thank you for the invitation and the opportunity to provide our views on TSA's acquisition policies.

Growth in Federal Procurement

Since 9/11, federal procurement spending on goods and services has grown dramatically. This should not come as a surprise. Among other things, 9/11 significantly changed many of the government's missions and created requirements for new technologies and innovative solutions to improve our homeland security and fight the war on terror. Needless to say, the wars in Iraq and Afghanistan have also contributed significantly to this growth.

Today, federal spending on the purchase of goods and services exceeds $400 billion, representing nearly 40% of the total discretionary budget of the federal government. Spending on services contracts represents nearly 60% of that federal spending. Thus, federal procurement must be a core competency of the federal government and prioritized as such.

But this growth has not occurred in a vacuum. During the same period, the discretionary budget has grown nearly 65%. Thus, while significant and clearly growing, spending on services has increased about 15% as a proportion of the government's operations.

Given the central role that acquisition plays in the proper functioning of our government, it is important that Congress, as part of its oversight role, continually assess federal acquisition policies and performance and explore changes to policy or practice that might be needed. We appreciate the thoughtful leadership of this Subcommittee and its continued vigilance in this complicated field that is too often dominated by myths and hyperbole. However, it is important to recognize that workforce challenges, honest mistakes, or other structural problems, while serious, do not equate to fraud or abuse. As such, we appreciate your seriousness of purpose and the openness of the discussion we are having today.

Acquisition Workforce Challenges

There is no doubt that the Federal government generally, and the Department of Homeland Security in particular, faces many difficult challenges in the acquisition arena. The human capital challenge is real and impacts the acquisition workforce as much as, if not more than, the rest of the federal workforce. PSC members believe strongly that an experienced, smart, and well-prepared customer makes the best customer. We see many examples in the private sector where companies take special effort to ensure that their procurement workforces are well prepared for the significant work they are assigned.

Yet across the board, workforce development in the federal government is a glaring weakness and has been for a long time. When federal agency budgets get tight, the first thing cut is training. That is why five years ago PSC recommended to Congress, and the Congress enacted, what is now known as the Federal Acquisition Workforce Training Fund.[1] While initially available only to the civilian agencies, Congress acted to bring the Defense Department fully into the Fund;[2] in addition, the House-passed version of the fiscal year 2008 National Defense Authorization Act recommends, and PSC strongly supports, making this training fund permanent.[3] Although the fund is growing and the resources are being put to use to benefit the federal acquisition workforce, training funds for the acquisition workforce remain relatively flat and it is far from adequate.

To this Committee's credit, title IV of HR 1684, the FY 08 Department of Homeland Security Authorization Act, provides for important workforce development improvements for the Department of Homeland Security, including addressing home-

[1] Enacted as Section 4307(a) of the Services Acquisition Reform Act of 2003 (P.L. 104–106) and codified in Section 37(h)(3) of the Office of Federal Procurement Policy Act (41 U.S.C. 433(h)(3))

[2] Section 821 of the FY 06 National Defense Authorization Act P.L. 109–163 (1/6/06), available at: *http://frwebgate.access.gpo.gov/cgi–bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ163.109.pdf*

[3] Section 802(a) of the FY 08 National Defense Authorization Act (HR 1585), as passed by the House of Representatives on May 17, 2007, available at: *http://frwebgate.access.gpo.gov/cgi–bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1585eh.txt.pdf*

land security procurement training and authority to appoint retired annuitants,[4] and we support these initiatives. We were surprised that the Administration opposed those changes on the grounds that it would undermine efforts by the Office of Federal Procurement Policy to standardize government-wide competency and training requirements so that the government can recruit and retain the best talent.[5]

PSC Acquisition "Marshall Plan"

But more needs to be done. It is our belief that if we want to improve the quality of federal acquisition, we should not start by layering an already beleaguered workforce with more regulations and process demands. Rather, as PSC President Stan Soloway testified on July 17, 2007 before the Senate Homeland Security and Governmental Affairs Committee,[6] we need an "Acquisition Marshall Plan" that aggressively addresses the hiring, retention, training, reward and development of the acquisition workforce on a government-wide basis. This would involve recognizing, as most high performing companies do, that those elements of the workforce that are most directly critical to the functioning and success of the institution must receive special and appropriate focus and support.

In addition, in keeping with other models for emergency relief, PSC called for the creation of a government-wide "Contingency Contracting Corps" drawn from across the government contracting workforce, with special training in emergency and contingency contracting, to be deployable when the need arises. When not deployed, the individuals populating this vital cadre would continue to perform their regular functions at their home agencies. To make these important reforms a reality will require Congress to be the catalyst.

TSA's Current Procurement Authority

As you know, in 2001, before the Department of Homeland Security was created, the Aviation and Transportation Security Act[7] established the TSA as a new agency within the Department of Transportation with security responsibility for all modes of transportation then overseen by the Department of Transportation and other related activities. Pursuant to Section 101(o) of that 2001 Act,[8] TSA procurements were to be governed by the Federal Aviation Administration's Acquisition Management System (AMS) and were specifically exempt from most of the Federal procurement laws and the Federal Acquisition Regulations (FAR), in the same manner as the FAA was and remains exempt from the FAR. I was privileged to play a small role representing industry in meetings with the FAA's Blue Ribbon panel that provided recommendations to the FAA on the AMS.

Section 101(o) provides:

> Acquisition Management System.-The acquisition management system established by the Administrator of the Federal Aviation Administration under section 40110 shall apply to acquisitions of equipment, supplies, and materials by the Transportation Security Administration, or, subject to the requirements of such section, the Under Secretary (for the TSA) may make such modifications to the acquisition management system with respect to such acquisitions of equipment, supplies, and materials as the Under Secretary considers appropriate, such as adopting aspects of other acquisition management systems of the Department of Transportation.

Instructively, the 2001 Act did not explicitly cover the acquisition of services. Subsequently, TSA adopted the FAA's AMS as its procurement regulations (TSAAMS) with modifications to address TSA unique requirements.

Although the 2002 Homeland Security Act transferred TSA to the Department of Homeland Security (DHS), the 2002 Act did not alter or amend the exemption from either the procurement laws or the FAR.

In 2005, Congress enacted the fiscal year 2006 Department of Homeland Security Appropriations Act[9] and reaffirmed that the TSA acquisition management system,

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[4] Sections 401 and 402 of the FY 08 Homeland Security Authority Act (HR 1684), as passed by the House of Representatives on May 9, 2007, available at: *http://frwebgate.access.gpo.gov/cgi–bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h1684eh.txt.pdf*

[5] *See* OMB Statement of Administration Policy on HR 1684, available at *http://www.whitehouse.gov/omb/legislative/sap/110–1/hr1684sap–h.pdf*

[6] Available on the PSC website at: *http://www.pscouncil.org/pdfs/solowaystatementhsgac07–17–07.pdf*

[7] *See* P.L. 107–71, enacted 11/19/01, available at: *http://frwebgate.access.gpo.gov/cgi–bin/useftp.cgi?IPaddress=162.140.64.183&filename=publ071.pdf&directory=/diska/wais/data/107_cong_public_laws*

[8] Codified at 49 U.S.C. 114(o)

[9] HR 2360, enacted as Public Law 109–90, and available at: *http://frwebgate.access.gpo.gov/cgi–bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h2360enr.txt.pdf*

and the exemptions from the procurement laws and regulations of the FAR, *is* the appropriate acquisition model. The statute also closed the gap in the coverage of the 2001 statute relating to services.[10] Section 515 of that 2005 Act provides:

> For fiscal year 2006 *and thereafter,* the acquisition management system of the [TSA] shall apply to the acquisition of services as well as equipment, supplies and materials (emphasis added).

GAO subsequently affirmed that the 2005 Act now exempts TSA's services procurements from its bid protest jurisdiction.[11]

While in 2006 the Senate adopted an amendment to the fiscal year 2007 Department of Homeland Security Appropriations Act offered by Senators Kerry, Snowe and Lautenberg to repeal the TSA procurement exemption,[12] the conference report failed to adopt that provision.[13] Again last week, the Senate adopted an amendment by Senators Kerry and Snowe to repeal the TSA exemption 180 days after enactment.[14] In a July 24, 2007 letter to Senators Kerry and Snowe, PSC was pleased to support that amendment.[15]

By any measure, TSA is a major procurement organization. According to statistics from DHS,[16] in the last fiscal year TSA issued almost two thousand actions with a value in excess of $1.55 billion dollars. In PSC's analysis, over 80% of TSA's spending has been for the purchase of services; TSA has identified information technology, administrative support services, guard services and program management support services as among the top five categories of services purchased; the top five services categories accounted for over $610 million in agency purchases in the last fiscal year. Overall, in fiscal year 2006, DHS obligated over $15.7 billion, of which 83 percent was for services,[17] making it the third largest government agency in terms of annual procurement spending, behind the Defense Department and the Department of Energy.

Mr. Chairman, there were valid reasons for exempting TSA from the acquisition laws and regulations when it was created in late 2001, even while good arguments also existed to treat TSA as most other agencies – particularly with respect to federal acquisition policy. There was a second opportunity to review that decision in 2002 when Congress created the Department of Homeland Security and transferred TSA from the Department of Transportation into the Department of Homeland Security, but the provision was not changed. There was yet a third reaffirmation of the procurement authority applicable to TSA provided for in the 2005 Appropriations Act.

To be sure, the FAA's acquisition system works for TSA, as has been demonstrated over the past five years. It is built on the principles of the federal acquisition system, even though there are some obvious differences in implementation. Further, the flexibilities TSA has used to meet past threats, and may need to respond fully and promptly to emerging and future threats, need to be carefully considered, although the current acquisition statutes, the FAR and the DHS authorities also provide broad flexibility for agencies to address emergency situations.

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[10] See the decision of the Comptroller General of the United States in the bid protest filed by *Resource Consultants, Inc.* (B–290163; B–290163.2 (6/7/02) 2007 CPD 94 at 5), holding that the ATSA limited the bid protest exemption at GAO to acquisitions involving "equipment, supplies, and materials."

[11] See the decision of the Comptroller General of the United States in the bid protest *Knowledge Connections, Inc.,* B–298172 (4/12/06), holding that the solicitation for services by TSA is expressly exempt from GAO's bid protest jurisdiction.

[12] See Senate Amendment 4552 to H.R. 5441, the fiscal year 2007 Homeland Security Appropriations Act, available at: *http://frwebgate.access.gpo.gov/cgi–bin/getpage.cgi?dbname=2006_record&page=S7387&position=all* However, it is not clear that simple repeal of the underlying authority would, by operation of law, bring TSA under the FAR.

[13] While the TSA exemption was deleted, Section 542 of the Act provides that the TSA acquisition management system is subject to the provisions of the Small Business Act; the conference report is available at: *http://frwebgate.access.gpo.gov/cgi–bin/getdoc.cgi?dbname=109_cong_public_laws&docid=f:publ163.109.pdf*

[14] See Senate Amendment 2463 to HR 2368, the fiscal year 2008 Homeland Security Appropriations Act, adopted 7/26/07, available at: *http://frwebgate.access.gpo.gov/cgi–bin/getpage.cgi?position=all&page=S10109&dbname=2007_record*

[15] The PSC letter was printed in the *Congressional Record* and is available at: *http://frwebgate.access.gpo.gov/cgi–bin/getpage.cgi?dbname=2007_record&page=S9909&position=all*

[16] As reported by DHS and recorded in the Federal Procurement Data System, current as of 2/2007, available at: *http://www.dhs.gov/xlibrary/assets/opnbiz/cpo—acquisitionreportfy2006.pdf. Data does not include grants and purchase card transactions.*

[17] Id. See also testimony of DHS Inspector General Richard Skinner before the House Oversight and Government Reform Committee's Subcommittee on Government Management, Organization, and Procurement, July 18, 2007, available at: *http://governmentmanagement.oversight.house.gov/documents/20070718162847.pdf*

This committee and others have reviewed many of the procurements entered into by TSA. Many of them have achieved exactly the goals the TSA had and have been implemented as intended; others have raised issues regarding performance by both federal officials and contractors, with examples of problems at all phases of the acquisition system.

I cannot say that TSA's exemptions from the key federal acquisition statutes and government-wide Federal Acquisition Regulations was the cause for any of these problems; nor can I say with certainty that bringing them under those laws and regulations will ensure that there will not be problems in the future. But I can say with confidence that bringing TSA at least under the common rules applicable to the Department of Homeland Security will increase competition, expand opportunities for greater small business participation, provide greater accountability and transparency in their procurement processes, and provide greater options for addressing the challenges of the department's acquisition workforce. Indeed, there are clear advantages for all parties when agencies operate under common, government-wide rules and procedures. Moreover, as TSA seeks to train its current workforce and expand its acquisition workforce, the degree of commonality between its acquisition procedures and other federal agency practices will have a real effect on the cost and efficiencies of bringing in skilled professionals from other agencies.

What Acquisition System Should the TSA Be Under?

If TSA were not authorized to retain the current explicit authority to maintain its own acquisition systems, what system should it be under?

On July 18, 2007, the DHS Inspector General testified before the House Oversight and Government Reform Committee [18] and spelled out five elements of an efficient, effective and accountable acquisition process, relying on the September 2005 Government Accountability Office "Framework for Assessing the Acquisition Function at Federal Agencies' [19] and the July 2005 DHS Acquisition Oversight Program Guidebook [20] as a baseline. The DHS IG identified five interrelated elements essential to an efficient, effective and accountable acquisition process:

1. Organizational alignment and leadership
2. Policies and processes
3. Financial accountability
4. Acquisition workforce
5. Knowledge management and information systems

He concluded that, within DHS: (1) an integrated acquisition system does not exist; (2) full partnership of acquisition offices with other department functions has not been realized; (3) comprehensive program management policies and processes are needed; (4) staffing levels and trained personnel are not sufficient; (5) financial and information systems are not reliable or integrated; and (6) timely, corrective actions have not been taken in response to the IG's and GAO's recommendations.[21] While we take issue with some elements of the IG's testimony, we concur in the overarching conclusions he reached.

We believe that several of these conclusions result from the fact that TSA has its own procurement system, its own policies and processes, its own workforce with separate needs for training, and its own financial and information systems based on its unique acquisition system.[22] Furthermore, these unique processes make it difficult to share acquisition resources across the department, let alone on a government-wide basis as we suggested in our proposed Contingency Contracting Corps; it puts an added burden on the responsibility of the Department's Chief Procurement Officer to provide the training for them and makes rotational assignments across the department to meet higher priority needs of the department more difficult. It also calls into question whether their performance statistics match with the rest of the government.

From an industry perspective, this separate but unequal system creates other challenges. Since TSA uses a unique acquisition process, doing business with the TSA requires a thorough understanding of a different procurement system, built

[18] IG testimony, note 17 *supra*

[19] GAO 2005 Report 05–218G (September 1, 2005), available at: *http://www.gao.gov/new.items/d05218g.pdf*

[20] DHS, *Acquisition Oversight Program Guide,* available at: *http://www.dhs.gov/xlibrary/assets/DHS_ACQ_Planning_Guide_Notice_05–02.pdf*

[21] IG testimony note 17 *supra* at page 5.

[22] The Coast Guard, also now part of the Department of Homeland Security, is governed by the "standard" federal procurement system except when called into service as part of the Department of Navy, when it will be governed by the "standard" Defense Department procurement system. Of course, the FAA retains its separate procurement system while remaining part of the Department of Transportation.

upon, but separate from, the standard civilian agency procurement system for the rest of the Department and even most of the Federal government, which acts as a market limiting factor for those firms who do not have the resources to master and navigate through multiple systems. There are also other significant procedural differences between TSA and other departmental procurements, such as access to the GAO protest process for stand alone contracts, even though TSA relies on the FAA's agency-based Office of Dispute Resolution for Acquisition (ODRA) as an independent review forum.[23]

What Acquisition System is the Department of Homeland Security Now Under?

It is also fair to carefully inspect the current procurement system for DHS. As you know, Section 101 of the Homeland Security Act[24] established the Department as an "executive department." Subtitle D of title VIII of that Act also provides the Department with specific exemptions to government-wide procurement rules: one for "personal services," one providing "other transaction authority," coupled with other flexibilities related to the regular acquisition process[25] plus additional flexibilities for emergency procurements.[26] These exemptions help the Department meet its specialized mission and have proven to add valuable flexibilities to meet the department's needs. There is transparency in the department's procurement rules and both internal and external accountability and oversight for procurement actions. At a minimum, TSA should be held to the same procurement rules as applicable to the Department of Homeland Security.

Conclusion

Mr. Chairman, we are coming up on six years since 9/11 and almost six years since TSA was established. TSA has accomplished an enormous mission under some of the most trying circumstances. But it is appropriate to again ask what the best acquisition policy for TSA should be going forward. For PSC, we believe that bringing TSA at least under the common rules applicable to the Department of Homeland Security will increase competition, expand opportunities for greater small business participation in the Department's procurements, provide greater accountability and transparency to all stakeholders in their procurement processes, and provide greater options for Congress and for the Secretary and the Under Secretary for Management of the Department to address the challenges of TSA's and the department's acquisition system and workforce.

Thank you again for the invitation to provide the Professional Services Council's views on this important procurement policy issue. I look forward to responding to any questions you may have.

Mr. CARNEY. I thank you, Mr. Chvotkin, for your testimony.

And I want to thank all the witnesses.

I will remind each member that he or she will now have 5 minutes to question the panel. I will recognize myself for 5 minutes. I think maybe we will get one round of questions in. You hear the summons sounding right now. And then we will suspend until we get back. We will probably do a couple rounds anyway.

Okay, all right, let's start the questions. I will recognize myself for 5 minutes.

Mr. Bodenheimer, in your prepared testimony, you list several examples of how AMS creates parallel sets of rules that sometimes conflict with FAR. Could you describe these examples and explain in layman's terms, please, the kinds of difficulties they pose for contractors?

Mr. BODENHEIMER. I will be glad to, Mr. Chairman.

One of the examples is the requirement to provide cost or pricing data in non-competitive contracts—the so-called "Truth in Negotiations Act" requirement. The FAR exempts smaller procurements,

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[23] Information on the ODRA process is available at: *http://www.faa.gov/about/office_org/headquarters_offices/agc/pol_adjudication/agc70/index.cfm?print=go*

[24] Section 101(a) of P.L 107–296 (Nov. 25, 2002), codified in 6 U.S.C. 111

[25] See Subtitle D of title VIII of the Homeland Security Act of 2002, codified in 6 U.S.C. 391, *et. seq.*

[26] See Subtitle F of title VIII of the Homeland Security Act of 2002, codified in 6 U.S.C. 431, *et. seq.*

those under $650,000, and says, "You do not need to furnish cost or pricing data because it is burdensome and costly."

Under the TSA system, there is both a lower and a higher threshold. So one of the clauses provides for a lower threshold, meaning that there are certain contracts for which the government doesn't get the cost or pricing data that it perhaps needs to do the job. And then, as well, you have a higher threshold.

These inconsistencies create certain compliance burdens for contractors, you know, when they are trying to determine, what is the rule, what do I need to follow?

When I teach the defective pricing course in this area, I teach the general rule, the one in the FAR. And, for small businesses, knowing that there are different rules that they have to follow, it is a real challenge.

Mr. CARNEY. Thank you.

Ms. Duke, most of the department uses the FAR. Do you believe that the FAR offers enough flexibility for CBP, ICE, FEMA, the Coast Guard and the rest of the department to fulfill their missions, even in time of crisis?

Ms. DUKE. I do believe that the FAR does provide flexibilities in times of crisis. I think the tenants underlying the AMS and FAR are very similar. It is really process and procedural issues; that both systems do allow for special practices for urgent reasons.

Mr. CARNEY. Okay.

Mr. Gunderson, I guess a similar question: You say that AMS gives you more flexibility than you would have under FAR. Do you believe that there is not sufficient flexibility under FAR for TSA to fulfill a mission?

Mr. GUNDERSON. With respect to urgent procurements, I agree with what has been said, that there is not a significant difference between the FAR and the AMS.

What I do believe is that, having worked in both a FAR and AMS environment, that the Acquisition Management System provides a framework to make sound business decisions, efficient contracting practices, that mirror the commercial business practice.

Mr. CARNEY. Can you give us some concrete examples where AMS allows you to do something that FAR would not allow you to do?

Mr. GUNDERSON. Okay. A couple of key differentiators between the two systems: First is the extent of communications that AMS provides for throughout the acquisition lifecycle.

Under a FAR environment, communications are very regulated, very structured, and they can, I believe, slow down and drag out the procurement process, which takes away from government resources as well as industry resources.

AMS encourages those communications throughout the process to create a better understanding between the government's requirements and the industry capabilities. The communications throughout the process and how we conduct our discussions with industry is a difference.

The second one is how we go about screening our contractors. And this gets to the heart of competition.

Where the FAR offers what is called a multi-step advisory process, which doesn't necessarily narrow the playing field effectively,

the AMS does provide the ability to have those communications, get information and proposals from the contractors, and be able to focus on those companies that are most likely to be eligible for award.

Mr. CARNEY. In your testimony, you implied that AMS uses industry best practices. Does FAR not use industry best practices, as well?

Mr. GUNDERSON. I believe that AMS goes farther than FAR does, with respect to mirroring commercial practices.

When AMS was established by FAA, they went out and looked at best of business and said, "How should we do business better?" And I have also seen some recent reports done that talk about, what are commercial best practices when it comes to competition? And I don't believe that your corporations out there are going with full and open competition. They go with effective competition.

Mr. CARNEY. Okay, thank you.

I will revisit this question again on my next round for Mr. Bodenheimer and Mr. Chvotkin.

The chair now recognizes the ranking member from Alabama, Mr. Rogers, for 5 minutes.

Mr. ROGERS. I thank the chairman.

Just a couple of questions.

In listening to Mr. Bodenheimer's comments, I was curious, Ms. Duke, when you talked about both programs had sufficient latitude, what do you feel about Mr. Bodenheimer's perspective about the exemptions being unreasonable given the exigent circumstances that seem to have passed?

Ms. DUKE. I don't think the premise for AMS and its benefits is really speed. That is not the underlying principle. The underlying principle of why AMS is better and was used in FAA is managed acquisition as a whole. The procurement is one piece. In fact, the whole section on procurement is just one chapter out of all of AMS. And AMS seeks to manage acquisition programs, from requirements all the way through disposal at the end. And that is a key principle in why it is more effective for acquisition.

And then the second reason is it has some of the basic principles, but rather than dictating steps of processes, it allows the contracting officer more judgment in coming to decisions.

And so, I think you can still use speed. For instance, under CICA, you can go sole-source rather than pulling off the cogitation for "urgent and compelling." Under AMS, it is for a rational basis. And the rational basis, again, can be an urgency or another reason.

So I think the focus on it just for speed is really an inappropriate focus.

Mr. ROGERS. Mr. Bodenheimer, can you give me a practical example of how a company would be disadvantaged because of the exemption staying in place?

Mr. BODENHEIMER. One of the examples would be compliance. As Oliver Wendell Holmes said, "When you deal with the government, you have to turn square corners." And one of those square corners that contractors have to have in place are compliance programs, which provide procedures, training and monitoring in accordance with the requirements with which they have to meet to do business.

By having two sets of rules, particularly for a small business that struggles with one set of compliance procedures, rules and training, having two is really a difficult and expensive process.

Mr. ROGERS. Which brings me to Mr. Chvotkin.

You are not from Alabama, are you?

[Laughter.]

Mr. CHVOTKIN. North Alabama.

Mr. ROGERS. North Alabama.

[Laughter.]

You made reference to the common rules. Tell me, what are the common rules that you think should be adhered to?

Mr. CHVOTKIN. The point I was trying to make is that the Department of Homeland Security itself has a set of unique regulations and statutory authorities that separate it from the rest of the government. And the question we were posing, the position that we are taking at the Professional Services Council is, at a minimum, TSA ought to be brought in under the same set of rules and regulations as the rest of the Department of Homeland Security is for its procurements.

And there are flexibilities in emergency procurements, simplified acquisition thresholds in response to emergency circumstances, that exist only for DHS and not for the rest of the government.

So when we talk about the FAR, the government-wide regulations, just to give you a sense, that is what they look like. These are not simple, in and of themselves. It is to at least recognize that TSA becomes part of the rest of the department.

Mr. ROGERS. I understand. Thank you.

I yield back.

Mr. CARNEY. Thank you.

We are going to suspend now until we complete our votes. And we will readjourn—your guess is as good as mine.

[Laughter.]

Stand by.

[Recess.]

Mr. CARNEY. We will reconvene now.

Is Mr. Gunderson available? Oh, okay.

It is going to be one of those days. We just got called back to vote. But let's ask some questions anyway.

[Laughter.]

Let's just have a little conversation.

Mr. Chvotkin, in your prepared testimony, you say that TSA's use of AMS "acts as a market-limiting factor for those firms who do not have the resources to master and navigate through the multiple systems."

Can you explain what you mean by that and tell me how that impacts small and disadvantaged businesses?

Mr. CHVOTKIN. I would be happy to, Mr. Chairman. Thank you.

As we have talked earlier today, the federal government's procurement system, as you know, is a rule-based system. It contracts and sets the terms and conditions between the government, who acts as a purchaser, actually the buyer, and the private sector, who acts as the seller.

And so, what this separate-but-unequal provides is increased cost to learning, as we talked about, the increased compliance cost,

added barriers of knowledge because of those rules and the inconsistencies between the AMS and others in the procurement area.

There are really three types of companies that are out there: those that are already doing business with the TSA and have either mastered the rules or felt comfortable with them; those that are already government contractors somewhere else and know the FAR a little bit but don't know the AMS system and maybe think they could learn that; and those that are not government contractors today, who don't know anything about even the government-wide system and find this very daunting.

And so, when you tell people that there are really several systems—if you want to do business only with TSA, you can learn one rule. But if you have any interest in doing business elsewhere in the government, those multiple systems really present a daunting task, particularly for small businesses. It is a cost, it is a compliance, it is a knowledge base—all three of those factors.

Mr. CARNEY. I would like to return back to the conversation we were having before we broke to go vote. We were talking about some of the issues—I think you addressed them, Mr. Chvotkin.

But, Mr. Bodenheimer, would you care to re-engage on that discussion we were having?

Mr. BODENHEIMER. Thank you. With respect to the difficulties of trying to comply with two sets of rules?

Mr. CARNEY. Correct.

Mr. BODENHEIMER. One of the most sophisticated contractors that I deal with and one of the attorneys with the most experience in the business was commenting on the challenges of trying to follow not only the TSA clauses, which are somewhat different from some of the FAA clauses, which are different from the FAR clauses. And when you put them all together, it becomes an alphabet soup of trying to figure out, "What clauses am I complying with today?"

That was very persuasive to me, when somebody with that level of sophistication and experience said what a challenge it is trying to comply with these multiple sets of clauses. He said he was old enough; he would like to have one rule.

[Laughter.]

Mr. CARNEY. Understood.

Ms. Duke, I am trying to understand the justification for having only TSA under AMS. What is different or special about TSA that only it should be exempt from the FAR?

Ms. DUKE. Actually, there is nothing currently that—I think TSA was stood up with AMS, and it was given that authority at the beginning. And we have not asked for that authority for the rest of the department. But there is nothing specifically unique about TSA.

It is nice for TSA to have that flexibility of authority because it does give some good flexibilities in the procedures for TSA. So really, it was given it, and it is a matter of there has not been a discussion of giving it to the rest of the department but, rather, taking it away from TSA.

Mr. CARNEY. Are you, then, sort of advocating, because of the flexibility issue, that AMS be extended to the rest of the department? If not, why not?

Ms. DUKE. I think there are benefits to AMS. With the qualified workforce, it allows the contracting officers to make good judgment calls; it allows them to have more open discussions with industry; and it allows for, really, better business deals, a more closer meeting of the minds at the time the contract is signed.

At this point, we are not arguing for it for the department, I would say principally because, with all the procurement and acquisition legislation going on, it really doesn't seem like one that would be entertained with any earnest. And I guess it is a matter of picking the battles.

Mr. CARNEY. So we get to pick the battles here.

Ms. DUKE. Yes.

Mr. CARNEY. All right. I mean, just from the outside, somebody who is kind of looking at it, it doesn't quite jibe. If you are so sold on it, why would you not advocate that it be spread throughout the entire department, in fact, indeed, the government?

Does FAR not give you the flexibility you need? Is that the issue?

Ms. DUKE. I think for us, Mr. Chairman, it is a maturity issue. Right now we are developing the basics of our workforce, and I think, to appropriately use the flexibilities and the judgments that AMS gives, that, as we grow the maturity of our workforce, we would be better positioned to use that overall as a department.

And so, that would be principally why I am not arguing for it now, is I really think that, with the flexibilities comes responsibilities. And I would like to grow our workforce and make sure they have the basic competencies before I advocate for the additional flexibilities and authority.

Mr. CARNEY. Okay. We will come back to that.

Mr. Chvotkin, in your testimony, you state that you can "say with confidence that bringing TSA at least under the common rules applicable to the Department of Homeland Security will increase competition, expand opportunities for greater small-business participation, provide greater accountability and transparency in their procurement processes, and provide greater options for addressing the challenges of the department's acquisition workforce."

Can you expand on that and tell us the basis of that belief, please?

Mr. CHVOTKIN. Yes, sir.

Many of our member companies—and we have had the opportunity to participate in broad procurement fairs with members of Congress, hosted by the Professional Services Council. The companies tell us that their understandings—they put systems in place; they want them to apply government-wide. They want to address those issues on a government-wide basis.

We comment frequently on rules and regulations and on legislation that move us farther and farther away from that uniform set of regulations. And so, as we have talked before, from a cost standpoint, from a compliance standpoint, and from an education standpoint, all of these factors tend to drive people away from a marketplace that they don't know, don't know whether they can be successful, from the company's standpoint.

Couple that with an acquisition system where there is no predictability and consistency, and there is no way for companies to know that they can be successful. They will husband their resources care-

fully and go look for opportunities where their chances of success are greater.

Mr. CARNEY. Thank you. Thank you.

Mr. Bodenheimer, can you describe the FAR process for resolving protests and disputes and compare it to the AMS process, please?

Mr. BODENHEIMER. I would be glad to, Mr. Chairman.

The technology is obviously overwhelming to me.

[Laughter.]

I would be glad to answer the question.

With respect to the difference between the two processes, certainly the TSA protest process has experienced people, well-respected people who hear the disputes and the protests and make the decisions. However, when you compare that to GAO, GAO has over 80 years in deciding protests, has thousands of precedents that tell you what the rules are, and they have unquestioned independence.

So if we gave a choice to the companies I talk with, "Would you rather use the TSA protest process or the GAO protest process?", they would almost uniformly pick the GAO protest process.

In addition, the GAO protest process has certain teeth that come with it, such as the stay of performance, the protest costs.

And finally, the last thing I would like to add, as a Navy attorney, one of the things that really got my attention were GAO protests and the concern about getting one. So with that hanging over my head, we tried to build the quality in upfront in the procurement process so we wouldn't have that later.

Mr. CARNEY. Right. Between the two processes, the FAR and the AMS, which do you think private industry prefers?

Mr. BODENHEIMER. My understanding is they would like to have one system, which would be the FAR system, that works, particularly the competition component.

Mr. CARNEY. Okay.

Anybody else care to comment on that question?

Mr. CHVOTKIN. I would concur, as that has been the experience from our member companies.

Mr. CARNEY. Thank you.

Ms. Duke?

Mr. Gunderson?

Okay, I have to go vote——

Mr. GUNDERSON. Mr. Chairman?

Mr. CARNEY. Yes?

Mr. GUNDERSON. If I could just make one comment on that.

When you look at the industry base that we deal with, these companies deal in business not only with the federal government but they are dealing in business in the commercial world, as well as with states.

So these firms are used to dealing in multiple environments. So for them to be able to adapt to an AMS environment, I do not see that as a significant issue.

Mr. CARNEY. Elaborate. Why?

Mr. GUNDERSON. As I have addressed before, again, the fundamental tenants are the same. And while I recognize that there are some differences in maybe how the clauses are worded from the FAR, the tenants are the same. We have, over the past 5, 6 years,

spent about $2.5 billion a year dealing with large firms and small firms. We have had an open dialogue. We engage with them before we issue solicitations, through the solicitation process, providing every opportunity for them to express a concern, ask a question, receive guidance on how to deal with our system.

I have not had one person address me, say that they have had an issue with this. So I think that open dialogue has, you know, provided them an opportunity to say that AMS is causing them problems. And I have not seen it.

Mr. CARNEY. I understand. But it seems to me, if the tenants are the same and we are not in an emergency environment any longer, having duplicative systems, well, is duplicating efforts.

In any event, I am going to go vote, and I will adjourn this hearing for the day.

I appreciate all of your testimony. And I imagine there will be questions that you will be asked to submit in writing. Please do so promptly. And we appreciate you showing up today.

The committee stands adjourned.

Appendix: Additional Questions and Responses

QUESTIONS FROM THE HONORABLE BENNIE G. THOMPSON, CHAIRMAN, COMMITTEE ON HOMELAND SECURITY

RESPONSES FROM DAVID Z. BODENHEIMER

Question 1.: Please explain what "requirements definition" is, why it is important in government contracts, and whether you believe that the FAR results in better defined requirements than AMS?

Response: Requirements definition represents one of the most critical steps in the acquisition process in which the agency specifies its minimum needs clearly, fully, and openly so that the government gets what it must have, the contractor delivers what it promises, and the taxpayers get what they pay for. Well-defined requirements establish the baseline against which offerors will compete for contract award, the agency will measure the progress and performance of the contractor who wins the competition, and the winning contractor assesses whether it is meeting its contractual duties on time and within budget. Poorly-defined requirements too often foretell schedule delays, cost overruns, and disappointing contract performance.

Sound requirements definition stands as one of the cornerstones of the Competition in Contracting Act. Consistent with the duty to maximize "full and open competition," the Competition in Contracting Act requires that the agency:

- "specify the agency's needs and solicit bids or proposals in a manner designed to achieve full and open competition for the procurement" and
- "develop specifications in such manner as is necessary to obtain full and open competition with due regard to the nature of the property or services to be acquired."

10 U.S.C. § 2305(a)(1)(C); *see Competition in Contracting Act of 1983,* S. REP. NO. 98–50, at 14 (1983) (duty to develop requirements and specifications that promote competition); *MadahCom, Inc.,* B–298277, Aug. 7, 2006, 2006 CPD ¶ 119 at 3 (agency "is generally required to specify its needs and solicit offers in a manner designed to achieve full and open competition").

Ill-defined, incomplete, or ambiguous statements of agency requirements undermine this Congressional mandate for "full and open competition" because contractors cannot compete fairly and equally against a common set of ground rules if the rules are not clear. *See National Aerospace Group, Inc.,* B–282843, Aug. 30, 1999, 99–2 CPD ¶ 43 at 7—8 (sustaining protest where agency failed to disclose its requirements fully and openly); *Businessland, Inc.,* GSBCA No. 8586–P–R, 86–3 BCA ¶ 19,288 at 97,514 (sustaining protest where "requirements . . . had never been articulated to the protester"). In sustaining a protest where the agency failed to communicate its requirements and concerns clearly to a potential competitor, the Government Accountability Office (GAO) explained that "it was the Air Force's duty to make its essential requirements clear to potential offerors and allow them an opportunity to demonstrate their ability to comply before rejecting them as potential sources of supply." *Masstor Systems Corp.,* B–215046, Dec. 3, 1984, 84–2 CPD ¶ 598 at 3. Making TSA subject to the Competition in Contracting Act would provide the statutory discipline for assuring the timely preparation of well-defined, pro-competitive requirements that promote "full and open competition."

In addition to the Competition in Contracting Act, the Federal Acquisition Regulation (FAR) establishes sound rules for defining agency requirements. In particular, the FAR defines multiple factors and steps necessary for acquisition planning and requirements definition, including:

- Assuring that the agency planners "address the requirement to specify needs, develop specifications, and to solicit offers in such a manner to promote and provide for full and open competition" [FAR § 7.103(c)];
- Structuring "contract requirements to facilitate competition by and among small business concerns" [FAR § 7.103(s)(1)];

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- Engaging in early acquisition planning to "avoid issuing requirements on an urgent basis" that "restricts competition and increases prices" [FAR § 7.104(b)];
- Coordinating the acquisition with "all those who will be responsible for significant aspects of the acquisition, such as contracting, fiscal, legal, and technical personnel" [FAR § 7.104(a)];
- Considering critical factors in requirements definition and planning, including cost, life-cycle cost, required capabilities, delivery requirements, trade-offs, and risks [FAR § 7.105].

In addition, FAR Part 11 devotes an entire section of the regulation to "Describing Agency Needs" and developing the necessary requirements.

By following the Competition in Contracting Act and FAR rules for planning acquisitions and defining requirements, TSA would have a more structured, better defined process that would enhance the likelihood of developing requirements that are clear, firm, and pro-competitive. While proper requirements definition alone does not guarantee program success, TSA and its contractors would both benefit from the statutory and regulatory steps prescribed by the Competition in Contracting Act and the FAR. In short, a solid requirements baseline increases the probability of meeting the TSA mission and reduces the risk of schedule delays, cost overruns, and performance shortfalls.

Question 2. In your prepared testimony you compare the AMS "preference" for competition with the FAR requirement for full and open competition. Could you describe the two, and say which you believe best maximizes competition?

Response: TSA's standard for competition is even lower than the old standard—maximum "practical" competition—that Congress found to be inadequate and ineffective prior to the enactment of the Competition in Contracting Act (CICA). Examples of the differences include the following:

- *"Rational Basis" Test.* TSA only needs a "rational" basis to avoid competition,[1] meaning that virtually any non-frivolous reason can justify a sole source. In contrast, CICA mandates competition unless the agency can justify noncompetitive actions based upon one of the limited number of Congressionally-defined exceptions. 10 U.S.C. § 2304(b), (c).
- *No Legal Duty.* The TSA system (TSAAMS) only provides "policy and guidance"[2] which generally imposes no enforceable legal duty to comply. However, CICA mandates competition: "The award of a contract on a sole-source basis would for the first time constitute a clear violation of statute unless permitted by one of the following exceptions."[3]
- *No Certified Justification.* While TSAAMS does contemplate a documented basis for a sole source,[4] CICA requires a written justification certified as accurate and complete by the contracting officer. 10 U.S.C. § 2304(f)(1)(A).
- *No High-Level Statutory Approval.* Unlike TSAAMS, CICA specifically requires high-level approvals by the agency's competition advocate ($500,000 to $10 million), head of procuring activity ($10—$50 million), or senior procurement executive (over $50 million), thus assuring high-level accountability. 10 U.S.C. § 2304(f)(1)(B).
- *No Duty to Promote Competition.* Unlike the TSA system that includes no express duty to promote competition, CICA explicitly requires agencies to take affirmative steps to seek and obtain competition.[5]
- *No Effective Enforcement.* The Office of Dispute Resolution that oversees TSA protests lacks an aggressive history of challenging sole-source procurements. In contrast, GAO has a long history of effectively enforcing CICA and challenging sole-source actions.[6]

In stark contrast to TSA's permissive "rational" basis standard and unenforceable "preference," the Competition in Contracting Act offers a far superior means for

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[1] *See* TSA Acquisition Management System (TSAAMS) (linking to FAA Acquisition Management Policy § 3.2.2.4) (*http://www.tsa.gov/join/business/index.shtm*).

[2] TSAAMS (*http://www.tsa.gov/join/business/business_tsaams.shtm*).

[3] *Competition in Contracting Act of 1983,* S. REP. NO. 98–50, at 21 (1983).

[4] TSAAMS (linking to FAA Acquisition Management Policy § 3.2.2.4) (*see* note 1 above).

[5] The duty to take affirmative steps to promote competition under CICA is well-established. *See* 10 U.S.C. § 2304(f)(5); *Competition in Contracting Act of 1983,* S. REP. NO. 98–50, at 18 (1983) (requiring agencies to make an affirmative effort to obtain effective competition); *eFedBudget Corp.,* B–298627, Nov. 15, 2006, 2006 CPD ¶ 159 at 7 (sustaining protest where agency had no record of taking affirmative steps to promote competition by resolving issue relating to restricted access to software source code); *Test Systems Associates,* Inc., B–244007.2, Oct. 24, 1991, 91–2 CPD ¶ 367 at 7, n.8 (sustaining protest where "the Air Force has had a duty to take practicable steps to avoid a noncompetitive follow-on contract," but failed to do so).

[6] *See* Written Statement of David Z. Bodenheimer, p. 10 (notes 27–30).

maximizing competition with its “full and open competition” mandate, “absolute preference for competition,” and effective teeth for oversight and enforcement.[7]

Question 3.: During your time as a lawyer in the Navy, did you ever encounter a situation where the Navy was unable to buy something it critically needed because of FAR requirements, or was the FAR flexible enough to allow for emergency contracts?

Response: During my tenure with the Navy, we had ample flexibility under the FAR (and its predecessor regulations) to handle urgent demands for critically needed requirements. In one instance at the Washington Navy Yard, we received direction from the Pentagon to award a contract within 30 days. We issued the solicitation, called in industry, explained the urgency, answered questions, received and evaluated proposals, and made award—all within 30 days. While we had to work hard and partner closely with industry, we met the requirement.

QUESTIONS FROM THE HONORABLE MIKE ROGERS, RANKING MEMBER, SUBCOMMITTEE ON MANAGEMENT, INVESTIGATIONS, AND OVERSIGHT

Question 4.: From your perspective, what are some of the major differences between the Acquisition Management System (AMS) and the Federal Acquisition Regulation (FAR)?

Response: While a wealth of differences exist between TSA’s system (TSAAMS) and the FAR that governs nearly all other agencies, TSA’s exemption goes well beyond the FAR itself. The exemptions for TSA also nullify: (1) the Competition in Contracting Act, (2) the Office of Federal Procurement Policy (OFPP) Act (except for Procurement Integrity Act provisions); (3) Federal Acquisition Streamlining Act (except for whistleblower provisions); and (4) the procurement protest system (31 U.S.C., Chapter 35(V)). Some of the major differences between TSAAMS and the exempted statutes and FAR include the following:

- *Effective Competition.* In contrast to TSAAMS, both CICA and FAR are far superior in maximizing competition. *See* Answer No. 2 above.
- *Effective Requirements Definition.* In contrast to TSAAMS, CICA and FAR both more effectively enforce requirements definition. *See* Answer No. 1 above.
- *Accountability.* Unlike TSAAMS, both CICA and FAR establish express requirements for certified justifications, high-level approvals, and public transparency for sole-source procurements. 10 U.S.C. § 2304(f)(1); FAR §§ 6.303 & 6.304; *see* Answer No. 2 above.
- *Enforceability.* While TSAAMS merely provides “policy and guidance,”[8] the FAR has the force and effect of law and can be enforced in court if the agency fails to comply.[9]
- *Consistency.* The TSAAMS conflicts with FAR provisions in such areas as cost or pricing data thresholds, Buy American protections, environmental requirements, and commercial item provisions. *See* Bodenheimer Written Statement, p. 8.
- *Oversight.* Unlike TSAAMS where the FAA ODRA system handles protests, CICA and FAR recognize GAO authority to decide protests based upon more than 80 years of expertise, experience, and precedent.

Question 5.: What are the implications of having one Department agency with a separate acquisition process compared to the process used by the rest of the Department?

Response: With a set of regulations comes a host of agency responsibilities. During my tenure as Assistant to the General Counsel, I served on one of the regulatory subcommittees and also assisted the Office of the Assistant Secretary of the Navy (Shipbuilding and Logistics) with compliance reviews for a number of Navy procuring commands and activities. In order to keep an acquisition system going, an agency must perform multiple functions:

- *Upkeep.* Regulations must be maintained, reviewed, and updated as external requirements and internal agency needs evolve.
- *Documented History.* The history of regulatory revisions needs to be documented and published for the same reasons that legislative history is important—to understand the drafter’s intent and assure consistent implementation.

[7] *Competition in Contracting Act of 1983,* S. REP. NO. 98–50, at 17–18 (1983).
[8] TSAAMS (*http://www.tsa.gov/join/business/business_tsaams.shtm*).
[9] *See Beta Systems, Inc. v. United States,* 838 F.2d 1179, 1185 (Fed. Cir. 1988) (enforcing regulations relating to economic price adjustment); *Chris Berg, Inc. v. United States,* 192 Ct. Cl. 176, 183 (1970) (enforcing regulations regarding correction of pre-bid mistakes).

- *Compliance.* The agency needs to establish procedures and conduct periodic reviews to assure that agency personnel (contracts, program, technical, etc.) understand and comply with the governing acquisition rules.
- *Training.* Any effective compliance program requires regular training to ensure that acquisition personnel—particularly in agencies with high turnover rates—understand the rules and apply them consistently and properly.

The OFPP Act, as amended, seeks to reduce the burdens of these essential regulatory duties by establishing a "uniform procurement system" to promote efficiency, economy, and effectiveness in federal procurement. S. REP. NO. 98–50, at 6 (1983). When an agency must maintain two separate acquisition processes, it loses the economies of scale inherent in a "uniform procurement system" and must therefore duplicate the cost and burden of maintaining, documenting, and updating its two regulatory systems (TSAASM and FAR), as well as creating dissimilar compliance and training programs.

Question 6.: What are the pluses and minuses of TSA's Acquisition Management System (AMS) and the Federal Acquisition Regulation (FAR) that applies to the rest of DHS?

Response: TSA's overview of its acquisition system states that "TSAAMS mirrors acquisition goals of other federal agencies of streamlining, and integrating processes that result in time and cost reduction, and quality products and services." However, as Congress, GAO, and the DHS Inspector General have all found, TSA has fallen well short of these objectives, instead accumulating a history of delays, overruns, and performance problems that are documented in many Congressional hearings and other official reports.

As Congress noted in the history of the Competition in Contracting Act, federal procurement policy dates back to 1792. S. REP. NO. 98–50, at 4 (1983). However, the FAR traces most of its lineage to regulations (such as the Armed Services Procurement Regulation (ASPR)) largely written since the 1940s. In other words, the FAR reflects decades of effort, thought, and input that carefully balance the need for efficient and timely acquisition with the necessity for accountability, transparency, and oversight. While the FAR is not perfect (and never will be), it has been built steadily, publicly, and often painstakingly, based upon decades of hard "lessons learned" that should not be lightly discarded. Many of the "pluses" of the FAR are described in Answer Nos. 4 and 5 above. See Bodenheimer Written Statement, pp. 4–5.

Question 7.: In your view, do you believe the historical reasons that existed in 2001 when TSA inherited the acquisition system used by the FAA, instead of the FAR, still exist today?

Response: No. Congress created TSA in the midst of national crisis and those historical reasons for providing the exemption from various statutes and the FAR no longer exist.

Question 8.: How well does the private sector work with a major Cabinet department that operates two different acquisitions systems?

Response: Just like agencies, contractors must track regulatory requirements and changes, keep compliance programs up-to-date, and conduct regular training based upon the governing regulations. *See* Answer No. 5 above. When facing two separate—and sometimes inconsistent—sets of acquisition rules within one agency, contractors (particularly small businesses) bear a heavy burden of tracking, updating, implementing, and flowing down not just one, but two, separate regulatory regimes. In addition, two sets of rules create the risk of confusion, misunderstanding, and accidental noncompliance, especially for new contract administrators and thinly staffed small businesses that may be more vulnerable to the predictable blurring of the systems (*e.g.,* misapplying TSAAMS to non-TSA acquisitions and the FAR to TSA acquisitions). Uniform regulations reduce this likely—and unnecessary—risk of noncompliance resulting from two sets of rules.

Question 9.: Do you believe the Department has the necessary contracting staff to effectively manage these two systems?

Response: Various GAO reports have identified DHS personnel as a risk area due to high turnover and continuing vacancies. *See, e.g., GAO, Department of Homeland Security: Progress Report on Implementation of Mission and Management Functions* 20–21 (GAO–071081T) (Sept. 6, 2007) (DHS has "Generally not achieved" its objective to "Develop an acquisition workforce to implement and monitor acquisitions"); GAO, *Homeland Security: DHS's Actions to Recruit and Retain Staff and Comply with the Vacancies Reform Act* 14 (GAO07–758) (July 2007) (DHS senior-level attrition rate nearly twice the federal average).

Similarly, GAO concluded that the DHS Chief Procurement Officer (CPO) "has limited oversight resources to implement the [acquisition oversight] plan." GAO, Department of Homeland Security: Progress and Challenges in Implementing the Department's Acquisition Oversight Plan 3 (GAO–07–900) (June 2007). In combination, these factors—high turnover, continued vacancies, and limited personnel resources—all illustrate the challenges that DHS faces in accomplishing its most basic missions. These problems can only be exacerbated when DHS must operate two separate—and sometimes inconsistent—acquisition systems within a single agency.

Question 10.: In your view, should Congress consider applying the FAR uniformly throughout all of the Department? If so, why? If not, why not?

Response: Yes. By applying the FAR and various statutes (including the Competition in Contracting Act) to TSA, Congress can maximize competition, improve requirements definition, increase accountability and transparency, enhance oversight, and promote acquisition uniformity and efficiency. *See* Answer Nos. 1, 2, 4 and 5 above; Bodenheimer Written Statement, pp. 5—12.

Question 11.: In your view, does one system compared to the other promote more competition? Promote fairer competition? Ensure greater financial accountability?

Response: The Competition in Contracting Act and its implementing FAR provisions offer a superior "full and open competition" standard backed by far more robust statutory tools to require affirmative steps to seek competition and to assure enforcement and compliance with the "full and open" competition standard. *See* Answer No. 2 above; Bodenheimer Written Statement, pp. 5—7, 9—10.

Question 12.: Under each system, how are contract disputes resolved? In your view, does one system provide greater fairness than the other?

Response: For TSA, contract disputes are resolved under the Federal Aviation Administration's (FAA) Dispute Resolution System.[10] In contrast, contract disputes for other agencies are subject to the Contract Disputes Act of 1978, as implemented by the FAR. *See* 41 U.S.C. §§ 601—613; FAR Subpart 33.2.

Both the FAA Dispute Resolution System and the Contract Disputes Act encourage early dispute resolution short of litigation. For example, the FAR establishes the following obligation for such dispute resolution:

> The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim. Agencies are encouraged to use ADR [alternate dispute resolution] to the maximum extent practicable.

FAR § 33.204; *compare* FAA AMS § 3.9.5.

When disputes cannot be resolved by the contracting officer, the TSAAMS provides for resolution by the FAA Office of Dispute Resolution (ODRA). *See* AMS § 3.9.4. As stated on the FAA Office of the Chief Counsel's website, "Components of the Office also serve as the FAA Administrator's adjudicative forums for civil penalty and acquisition disputes."[11]

In many ways, the FAA's ODRA system is similar to the old method of agency dispute resolution that pre-existed the Contract Disputes Act of 1978. In particular, the head of the agency would appoint agency personnel to an agency board to resolve disputes against the agency. Not surprisingly, Congress found that agency personnel deciding agency disputes "often fail to provide the procedural safeguards and other elements of due process that should be the right of litigants." S. REP. NO. 95–118, at 2 (1978), reprinted in 1978 U.S.C.C.A.N 5235, 5236. In justifying the waiver of sovereign immunity for contract disputes under the Tucker Act, Congress explained that "the Government subjects itself to judicial scrutiny when it enters the marketplace, and should not be the judge of its own mistakes nor adjust with finality any disputes to which it is a party." *Id.* at 12, *reprinted* in 1978 U.S.C.C.A.N. 5235, 5246.

For constitutional due process reasons alone, the Contract Disputes Act of 1978 offers a dispute resolution process superior to FAA's ODRA process: "Contractors should not be denied a full judicial hearing on a claim they deem important enough to warrant the maximum due process available under our system." *Id.* In addition, both the courts and the Boards of Contract Appeals now have nearly three decades of experience in applying the Contract Disputes Act process itself—and even greater

[10] *See* TSAAMS (linking to FAA Acquisition Management Policy §§ 3.9.4, 3.9.5, and 3.9.6) (*http://www.tsa.gov/join/business/index.shtm*).

[11] FAA Office of the Chief Counsel's Office of Dispute Resolution for Acquisition (*http://www.faa.gov/about/office%5Forg/headquarters%5Foffices/agc/*).

experience in deciding contract disputes of every type and size. Finally, these decades of judicial and administrative decisions offer a firm baseline of precedent that offers greater certainty and predictability to the parties who can then adjust their actions and expectations to resolve disputes and avoid litigation altogether. As a result, the Contract Disputes Act of 1978 provides the parties with a depth of experience, wealth of precedent, and level of due process protection that FAA's ODRA cannot match.

Question 13.: Over the past 2–1/2years, this Subcommittee has examined a number of problematic DHS contracts. In your view, is this a problem with the particular acquisition management system being used or the failure of a contracting officer to follow the rules or under-staffing, or a combination of factors?

Response: No one at the hearing disputed the fact that TSA has experienced numerous problems with its acquisitions over the last six years. *See, e.g.,* Sen. Snowe's News Release, "Snowe Brings Increased Transparency, Accountability to Transportation Security Administration Contracting" (July 13, 2006); Sen. Kerry's Letter to Kip Hawley (TSA Administrator) (Dec. 13, 2005); *Procurement Practices of the Department of Homeland Security: Hearings Before the House Comm. on Oversight and Government Reform, 110th Cong., 1st Sess. (2007) (statement of DHS IG Richard Skinner); Code Yellow: Is the DHS Acquisition Bureaucracy A Formula for Disaster? Hearings Before House Comm. on Government Reform,* 109th Cong., 2nd Sess (2006); GAO, *Progress Continues, but Challenges Remain on Department's Management of Information Technology* 30 (GAO–06–598T) (Mar. 29, 2006); Bodenheimer Written Statement, pp. 4—5.

While no single factor explains all of these TSA acquisition problems, the TSA acquisition process (TSAASM) certainly elevates the risk and exacerbates the procurement problems by deemphasizing competition, requirements definition, accountability, transparency, consistency, and oversight. *See* Answer Nos. 1, 2, 4 and 5 above; Bodenheimer Written Statement, pp. 4—5. Even if the application of the Competition in Contracting Act, FAR, and other procurement statutes do not solve all of TSA's acquisition problems, ending TSA's exemption represents an essential first step towards improving a system plagued for years with schedule delays, cost overruns, and performance shortfalls.

Question 14.: In your testimony (page 5), you state that the "proven benefits of the exemption from major acquisition laws is not readily apparent from TSA's six years of acquisition experience with this exemption." What are some of the benefits we could expect to see if TSA were truly benefiting from the exemption?

Response: On its website, TSA suggests that "TSAAMS mirrors acquisition goals of other federal agencies of streamlining, and integrating processes that result in time and cost reduction, and quality products and services." However, TSA has not met these objectives, as underscored by its procurement history documented in numerous Congressional hearings, GAO reports, and DHS Inspector General audits. See Answer 13 above; Bodenheimer Written Statement, pp. 4—5.

Question 15.: Do you believe the FAA has "proven benefits" from its exemption? If so, why do you think TSA has not realized "proven benefits" after six years?

Response: No. FAA has a procurement history that rivals TSA's acquisition troubles. Again, Congressional hearings, GAO reports, and Inspector General audits describe the problems.

> *Representative Mica.* "Since I joined the House of Representatives in 1993 the FAA has had a reputation as being one of the Federal Government's most dysfunctional agencies. Its record in modernizing air traffic control has been the poster child of how to not run a government program. Unfortunately, year after year, the FAA allowed its major modernization programs to falter. What began in 1983 as a 13-year, $2.5 billion effort has ballooned into a $35 billion enterprise that is still some 10 years away from completing its original mission." [12]
>
> • *GAO.* "According to these reviews, issued from 1997 through 2004, the same problems have persisted over many years, despite various initiatives to address them, and FAA needs to strengthen its management controls. For example, a key FAA review of eight major ATC acquisitions, published in 1999, 3 years

[12] *Transforming the Federal Aviation Administration: A Review of the Air Traffic Organization and the Joint Planning and Development Office: Hearing Before House Subcomm. on Aviation of Comm. on Transportation and Infrastructure,* 109th Cong., 1st Sess. 1 (2005) (statement of Rep. Mica).

after AMS was implemented, found that these acquisitions, though on track to meet their performance goals, were not meeting their cost and schedule baselines."[13]

- *Inspector General.* "In fact, half of the contracts were awarded without any competition."[14]

In another report, the DOT Inspector General warned that the FAA's Air Traffic Modernization programs "continue to be plagued by requirements changes, technical difficulties, or reduction in performance capabilities" and "it is not clear how much these programs will cost, how long it will take to complete them, or what capability will finally be delivered."[15] In summarizing the FAA's problems with these programs, the DOT Inspector General provided the following table:

Table 1. Programs Requiring Key Agency Decisions before FAA Completes Implementation

Program *	Estimated program Costs (in Millions)		Percent Cost Growth	Implementation Schedule		Schedule Delay
	Original	Current		Original	Current	
Wide Area Augmentation System	$892.4	$3,339.6*	274%	1998—2001	2005—2013	12 years
Standard Terminal Automation Re-placement System	$940.2	$2,760.4***	194%	1998—2005	2002—2012	7 years
FAA Telecommunication Infrastructure	$205.5	$310.2	51%	2002—2008	2004—2008	2 years
Airport Surveillance Radar-11	$743.3	$1,003.0	35%	2000—2005	2003—2013	8 years
Integrated Terminal Weather System	$276.1	$286.1	4%	2002—2003	2003—2009	6 years
En Route Automation Modernization	$2,154.6	$2.141.9	N/A	2009—2010	2009—2010	N/A

*A detailed listing of cost and schedule variances of all 16 systems can be found in Exhibit B.

**Cost includes $1.2 billion to acquire geostationary satellites.

***Cost of preferred STARS solution to deploy to 162 sites.

This FAA acquisition history of huge cost overruns and multi-year schedule delays offers strong reasons for why Congress should not allow TSA to continue with the AMS acquisition system.

Question 16.: If TSA took certain steps, do you believe it could realize "proven benefits" from its exemption? If so, what steps would those be?

Response: No. If TSA could deliver "proven benefits" from TSAAMS, it would have done so by now. Second, the FAA experience predicts that TSA will not solve its procurement problems so long as it remains under TSAAMS. *See* Answer No. 15 above.

Question 17.: In your testimony (page 9), you point out that TSA is not subject to the procurement protest system that other agencies follow, and that GAO does not have jurisdiction to oversee TSA acquisitions through the protest process. Could you please discuss the implications of GAO's lack of jurisdiction in this area?

[13] GAO, *Air Traffic Control: FAA's Acquisition Management Has Improved, but Policies and Oversight Need Strengthening to Help Ensure Results* 29 (GAO–05–23) (Nov. 2004).

[14] Department of Transportation (DOT) Inspector General, *Audit of the FAA's Results National Contracting Service* 5 (Sept. 21, 2006).

[15] DOT Inspector General, *Status of FAA's Major Acquisitions: Cost Growth and Schedule Delays Continue to Stall Air Traffic Modernization* 5 (May 26, 2005).

Response: With no protest jurisdiction, GAO cannot review protests against TSA procurements. Without the GAO protest oversight, many TSA acquisition problems will never be uncovered, thus allowing TSA to continue the cycle of awarding poorly defined, ill-conceived, noncompetitive acquisitions that will reinforce the current cycle of schedule delays, cost overruns, and performance problems that have characterized TSA procurements for six years.

Question 18.: What impact does this have on companies that file bid protests?

Response: With no GAO protest jurisdiction, contractors are deprived of GAO's unparalleled experience (over 80 years), established precedent (thousands of decisions), and unquestioned independence in resolving bid protests. In addition, the Competition in Contracting Act established additional protest enforcement mechanisms that Congress found to be critical to an effective protest remedy, including stay of contract performance (31 U.S.C. § 3553(c)), payment of successful protest costs (31 U.S.C. § 3554(c), and Congressional notification of agency noncompliance with recommended corrective action (31 U.S.C. § 3554(b)(2) & (e)). Finally, GAO has more aggressively enforced competition through its protest jurisdiction. *See* Bodenheimer Written Statement, pp. 9—10. For all of these reasons, GAO bid protest jurisdiction will better serve Congressional objectives, protect contractors, and encourage greater TSA compliance due to closer scrutiny and greater oversight.

QUESTIONS FROM THE HONORABLE BENNIE G. THOMPSON, CHAIRMAN, COMMITTEE ON HOMELAND SECURITY

RESPONSES FROM ALAN CHVOTKIN

Question 1.: Do you have a recommendation as to what acquisition system the TSA should be under if Congress was to repeal the separate statutory procurement authority?

Response: As I said in my written testimony [page 8], and in my oral statement, PSC believes that Congress should bring TSA under the common rules applicable to the Department of Homeland Security. The Department is already generally subject to the FAR, but Congress has provided specific additional authority and flexibility to the Department to manage its specific mission requirements. For example, DHS has specific statutory authority to use special streamlined acquisition authorities set forth in Section 833 of the Homeland Security Act (6 U.S.C. 393), for any procurement that takes place before September 30, 2007, if the Secretary determines that the mission of the Department would be seriously impaired without the use of such authorities. In addition, DHS is restricted by statute from permitting certain companies to compete for departmental opportunities. In our view, if TSA's underlying procurement authority is changed, it should be given access to the same flexibilities as all other agencies within the Department of Homeland Security. Nevertheless, there are several acquisition policy provisions now applicable to DHS that we find troubling and counter-productive.

Question 2.: In your testimony, you talk about the need for an "Acquisition Marshall Plan." Could you explain what this is, and why the need is so great?

Response: PSC has recommended an "Acquisition Marshall Plan" to address, on a government-wide basis, the critical short-term and long-term shortfalls in the federal acquisition workforce, with a focus on the need to recruit, retain, compensate and develop that workforce. Today, the Federal government spends more than $400 billion on the purchase of goods and services, almost one-quarter of the entire federal discretionary budget. In fiscal year 2006, the Department of Homeland Security spent almost $14 billion on the purchase of goods and services and TSA's share of those awarded contracts was valued at more than $1.4 billion. By any measure, procurement should be a core competency of the agencies and among the highest priority areas of attention for its workforce. Regrettably, the acquisition workforce has not received the attention it deserves—unless there are problems. Study after study, from PSC's own work to the often-repeated conclusions of the Government Accountability Office, to the July 2007 report of the congressionally chartered Acquisition Advisory Panel, have documented the shortfalls in the federal acquisition workforce and the need for aggressive, comprehensive action to support them. While there has been plenty of analysis done on the issues and problems, and numerous recommendations made, little action has been taken. For these reasons PSC calls on Congress and the Executive agencies to undertake efforts to rebuild this workforce. Several bills are pending in both the House and Senate that offer specific provisions to address this federal acquisition workforce issue.

As non-exclusive elements of that Plan, PSC has endorsed internship and rotational programs to attract qualified individuals into the acquisition workforce, expanding authority to hire selective retired annuitants to maintain workforce skills levels and facilitate critical knowledge transfer, and creating government-industry exchange programs with robust conflict of interest controls. We support the provision in title IV of HR 1684, the fiscal year 2008 Department of Homeland Security Authorization Act, approved by this Committee and passed by the House earlier this year, that would provide important workforce development improvements, including requiring department-wide procurement training and providing authority to selectively hire retired federal annuitants.

We also recommend the permanent extension of the government-wide Acquisition Workforce Training Fund, which was created by Congress in 2003 based on a recommendation made by PSC to provide comprehensive training opportunities. Finally, we have recommended creating a "Contingency Contracting Corps" to increase the Federal government's ability to respond to homeland security or natural disasters through a standing, organized and trained cadre of federal resources. We are very pleased that both of these latter two recommendations have been endorsed by the Senate Homeland Security and Governmental Affairs Committee and included in legislation (S. 680) favorably reported by that Committee.

These PSC recommendations for action are certainly not the whole answer to the many challenges agencies face in attracting, maintaining and deploying their acquisition personnel, and many more actions must be taken; but individually and collectively they are significant steps forward.

QUESTIONS FROM THE HONORABLE MIKE ROGERS, RANKING MEMBER, SUBCOMMITTEE ON MANAGEMENT, INVESTIGATIONS, AND OVERSIGHT

Question 3.: From your perspective, what are some of the major differences between the Acquisition Management System (AMS) and the Federal Acquisition Regulation (FAR)?

Response: While there are many similarities between the two sets of regulations, since the TSA AMS was drawn from the FAA's system and the FAR, there are notable differences. There are three primary areas that demonstrate these differences in regulations—although not necessarily in practice in any specific application. With respect to competition, the FAR requires full and open competition with exceptions in narrowly specified categories; the TSA AMS standard is "effective competition" based on market research. With respect to communications, the FAR generally limits communications between the agency and bidders except through the contracting officer and then only on a structured, narrow range of information; the TSA AMS is more flexible and encourages communications throughout the process with the strongest competitors. Finally, with respect to disputes and protests, the FAR provides a formal and time-specific regime for challenges to the contracting officer, with options of further pursuing action in appropriate circumstances at either the Civilian Agencies Board of Contract Appeals or at the Government Accountability Office. At TSA, protests are handled through the FAA's Office of Dispute Resolution for Acquisition, with alternative dispute resolution techniques the norm, and with very limited jurisdiction for further review outside the Office.

Question 4.: What are the implications of having one Department agency with a separate acquisition process compared to the process used by the rest of the Department?

Response: In my view, having a procurement system for TSA completely separate from the procurement system used by the rest of the Department, and from virtually every other agency of the Federal government, creates several issues and missed opportunities. Among the issues raised is the ability to provide uniformity in the department's management, the capability of the information reporting systems to produce consistent data across the department, the oversight of the procurement systems, and providing effective uniform training for the workforce. Among the missed opportunities is an inability to maximize information sharing for small business about the department's business practices and limiting competition and cross-fertilization of the supplier base across multiple agency needs. However, it is important to note that TSA participates in DHS-wide procurements, such as EAGLE and First Source, which originated in and are managed by other components of DHS.

Question 5.: What are the pluses and minuses of TSA's Acquisition Management System (AMS) and the Federal Acquisition Regulation (FAR) that applies to the rest of DHS?

Response: On the plus side of the TSA AMS, TSA has demonstrated that it is able to execute its critical homeland and transportation security missions in a timely manner with general success; in rare cases are the problems with TSA activities associated with problems in their procurement system. With its focus on effective competition, TSA has been able to tailor its system to ensure that critical procurements can be awarded and implemented within tight timeframes. Finally, many PSC member companies doing business with TSA have found its systems workable and sufficiently flexible in awarding and executing contracts.

On the negative side of the TSA AMS, the published system has numerous terms and conditions that differ from the standard procurement system; some of the differences are minor while others are significant; some of these terms and conditions are merely out of sync with the FAR updates while others are intentionally inconsistent with the FAR. Each of these differences imposes challenges and risks for both government acquisition officials and contractors. Each difference also requires bidders and successful TSA contractors who want to do business with agencies other than TSA to understand the differences, and the business and the compliance responsibilities, when seeking to do business with multiple agencies.

On the plus side of using the FAR, it is the uniform regulation governing the overwhelming proportion of all federal procurements. As a result, there are federal employees across the government who work within that system every day to ensure that it operates to provide the goods and services each federal agency needs. Similarly, there are contractors providing goods and services to other federal agencies who would be able to compete effectively for TSA work if TSA used the same rules. The FAR is designed to ensure meaningful opportunities and fundamental fairness to all actual and potential competitors. Finally, there is clear contract administration and government oversight regimes to ensure that the procurement eco-system works as intended.

On the negative side of using the FAR, the FAR must provide tools and techniques that are flexible enough to address the needs of the entire federal government, but it still anticipates that agencies will tailor the rules to meet agency-specific requirements. In addition, agencies are also expected to supplement these core regulations with any agency-specific statutory or regulatory requirements.

Question 6.: In your view, do you believe the historical reasons that existed in 2001 when TSA inherited the acquisition system used by the FAA, instead of the FAR, still exist today?

Response: Although PSC did not support excluding TSA from the FAR when TSA was created, we did not question the need for TSA to have the maximum appropriate flexibility to execute some of the most challenging federal missions assigned to any federal agency at that time. However, six years after the tragic events of 9/11, TSA is not (and should not be) in a crisis response mode and there is little evidence that TSA needs its own unique procurement system to achieve its current and future mission requirements. Nor is there any evidence that the government-wide FAR-based system, with its flexibilities, would not be able to support achieving all of TSA's current and future missions.

Question 7.: How well does the private sector work with a major Cabinet department that operates two different acquisition systems?

Response: All federal acquisition is based on the laws passed by Congress and the implementing regulations adopted by the agencies and many agencies have specialized procedures that tailor some portion of the "standard," government-wide, procedures to unique aspects of an agency's acquisition system. In fact, in addition to the standard, government-wide, Federal Acquisition Regulations, there are numerous agency-specific supplements, most notably for the Departments of Defense, Energy, and Homeland Security and for NASA and GSA. Any private sector firm that seeks to do business with an agency has an obligation to understand and comply with the specialized rules that are applicable to that procuring entity. For some firms, that effort is part of the business development cost when pursuing business; for too many others, particularly smaller firms, finding out and mastering that information is a significant barrier to seeking out and successfully competing for opportunities. Even when a firm does understand an agency's specialized procedures, the firm may still be unwilling or unable to modify its products or services to meet those unique requirements; again, those agency-specific provisions act as a barrier to commercial suppliers and smaller firms. Limiting the competitive landscape disadvantages the agency in both the short and the long term.

Question 8.: Do you believe the Department has the necessary contracting staff to effectively manage these two systems?

Response: There are eight procurement organizations in the Department of Homeland Security and each has their own staff. Each of the eight procurement organizations have specialized procurement provisions to meet their unique mission requirements. However, seven of the eight organizations follow the core requirements of the government-wide Federal Acquisition Regulation; only TSA has a separate core procurement system. Attracting and retaining qualified contracting resources is a challenge for many of the procurement components within the Department; beyond absolute numbers of contracting resources, it is essential that each agency have the "right" resources with the "right" skills to procure the goods and services the component needs, at the "right" time. The DHS Human Capital strategy is addressing the current skills capabilities and future skills needs of its acquisition workforce. The unique nature of the TSA acquisition system adds complexities to ensuring a properly sized, well-trained, acquisition workforce, providing promotion or lateral opportunities into or out of TSA, leveraging broader training, and drawing on temporary resources from outside TSA for high-priority, short-term, needs.

Question 9.: In your view, should Congress consider applying the FAR uniformly throughout all of the Department? If so, why? If not, why not?

Response: We favor such an approach. As I noted earlier, the FAR already applies to all other procurement organizations in the Department, although each of the procuring components have specialized additional supplemental laws and regulations that govern their procurement functions. For example, FEMA must address the specialized requirements of the Stafford Act and the required reliance on local small businesses for certain functions when contracting for disaster recovery. The Coast Guard must be prepared to operate as an element of the Navy in certain narrow circumstances. DHS has specific restrictions on whom it is able to do business with or the amount of subcontracting that is appropriate; we oppose these latter provisions because they drive the Department further and further from the government-wide FAR. We believe Congress and the agencies should carefully assess and justify adopting any provisions that require an agency to divert from the government-wide regulations. Nevertheless, application of a consistent set of procurement rules even across the Department, to the maximum extent, provides benefits for both the Department and the private sector. For the Department, it facilitates cross-agency training, promotes greater consistency and uniformity in implementation, and permits temporary re-assignments to meet higher priority department needs. For the private sector, it increases competition for goods and services to meet the department's needs, expands opportunities for small and small disadvantaged businesses across a broader range of departmental procurement opportunities, and improves company familiarity and thus compliance with commonly used contract terms and conditions.

Question 10.: In your view does one system compared to the other promote more competition? Promote fairer competition? Ensure greater financial accountability?

Response Both the FAR and the TSA AMS have the capability to promote full and fair competition and ensure financial accountability. Similarly, there are regrettable examples where both systems have failed to provide sufficient competition for goods and services or demonstrated financial accountability. However, the FAR is premised on the concept of full and open competition with flexibility to use alternative contracting techniques in specific circumstances while the TSA AMS is premised on the concept of "effective" competition. In our view, while either system has the potential for success or failure, we support the common use of the FAR.

Question 11.: Under each system, how are contract disputes resolved? In your view, does one system provide greater fairness than the other?

Response: The primary authority for addressing contract disputes under the FAR is the Contract Disputes Act (41 U.S.C. 601) which is implemented in FAR Part 33. There are very specific rules requiring contractors to take action to raise disputes with the contracting officer. If the contracting officer denies a claim, the FAR provides very specific requirements for challenging the contracting officer's decision at the Board of Contract Appeals or, occasionally, at the U.S. Court of Federal Claims. Under the FAR, there are very clear lines of precedent governing disputes and both the government and the contractors know what is expected, what is available, and how to proceed.

By contrast, contract disputes for all of TSA's acquisitions of equipment, supplies and materials are resolved by the FAA's Office of Dispute Resolution for Acquisition (ODRA) under a delegation from TSA. The goal of the ODRA is to "resolve acquisition-related controversies in a prompt, amicable fashion, utilizing consensual alternative dispute resolution techniques—primarily through neutral evaluation and me-

diation techniques." Appeals from a final decision are made to the U.S. Court of Appeals for the D.C. Circuit or the U.S. Court of Appeals where the business is located. Since most of the decisions of the ODRA are resolved through alternative dispute resolution, there is little precedent gained from those techniques that can be applied to future challenges or by other participants.

Question 12.: Over the past 2–1/2 years, this Subcommittee has examined a number of problematic DHS contracts. In your view, is this a problem with the particular acquisition management system being used or the failure of a contracting officer to follow the rules or under-staffing, or a combination of factors?

Response: It is difficult to generalize about the cause for "problematic" DHS contracts the Subcommittee has examined; some of those awards may have been from TSA while others were from other components of the department. By the same token, hundreds of contracts have been successfully awarded by TSA and by other DHS components over its five year lifespan, and contractors have fully and successfully provided the Department with the goods and services sought. As a general matter, PSC does not believe that more laws are needed. Most of our experience demonstrates that problems arise in contracting because of a combination of factors—some based on the challenge in fully and accurately describing an agency's needs, some based on the lack of a well-trained federal workforce, some because of staffing limitations or good faith efforts to respond to crisis situations, and some because of poor contractor performance. The concerns we have raised with TSA's use of the TSA AMS relate to how to improve future procurements within TSA and across the Department.

Question 13.: Can you quantify the burden placed on the private sector, especially small business, in having to be familiar with two sets of contracting rules when they work with TSA and DHS?

Response: While I am not aware of any study that has tried to quantify the burden on the private sector, and particularly smaller firms, we believe it stands to reason that smaller companies will face a greater burden becoming familiar with two sets of contracting rules.

Question 14.: You stated in your written testimony that simply repealing TSA's separate statutory procurement authority may not, by operation of law, bring TSA under the government-wide regulations. Would you elaborate on those concerns?

Response: While I have not done the thorough legal research to answer the question of the effect of repealing the special legislative authority in the Aviation Act that now governs TSA's procurement, I simply wanted to highlight that repealing TSA's existing statutory exemption may not automatically revert TSA to either the DHS procurement system or to the FAR system. If Congress intends for TSA to be subject to the FAR, its intent and effect should be explicitly mandated in any legislation.

Question 15.: You pose the question of which acquisition system the TSA should be under if Congress was to repeal the separate statutory procurement authority. Do you have a recommendation?

Response: As I said in my written testimony [page 8], and in my oral statement, PSC believes that Congress should bring TSA under the common rules applicable to the Department of Homeland Security. The Department is already generally subject to the FAR, but Congress has provided specific additional authority and flexibility to the Department to manage its specific mission requirements. For example, DHS has specific statutory authority to use special streamlined acquisition authorities set forth in Section 833 of the Homeland Security Act (6 U.S.C. 393), for any procurement that takes place before September 30, 2007, if the Secretary determines that the mission of the Department would be seriously impaired without the use of such authorities. In addition, DHS is restricted by statute from permitting certain companies to compete for departmental opportunities. In our view, if TSA's underlying procurement authority is changed, it should be given access to the same flexibilities as all other agencies within the Department of Homeland Security. Nevertheless, there are several acquisition policy provisions now applicable to DHS that we find troubling and counter-productive.

Question 16. Your testimony notes that many companies in the private sector take additional steps to ensure the capabilities of their core workforce, such as their procurement staffs. What other primary differences exist between the public and the private sectors when looking at the acquisition systems?

Response: There are differences in just about every phase of the acquisition cycle, from requirements generation, to market research, to contract solicitation and formation, and post-award contract administration. In the area of market research, there is no requirement that commercial firms open their procurement opportunities to all interested parties. In the area of contract solicitation, there is no prohibition on the private sector company sharing its own "procurement sensitive" information with competitors and, in large opportunities, many private sector companies freely disclose significant information to qualified competitors to maximize the success of the procurement. In the area of contract formation, private sector companies adopt a contract format that is best for the transaction, governed by the common framework and interpretations of the Uniform Commercial Code. Finally, in post-award oversight, a private sector company will partner with the provider on contract administration oversight to ensure fairness and full implementation. If necessary, failures are dealt with through civil litigation and by exercising the private sector company's right to refuse to do future business with that firm. Finally, while there is no legal requirement to conduct a competition, make a specific percentage of awards to small business, or provide post-award contract adjustments, many private sector companies employ these techniques as part of good commercial procurement practices. Of course, the public sector is not the private sector and there are often good policy reasons why some of the rules are and should be different.

QUESTIONS FROM THE HONORABLE MIKE ROGERS, RANKING MEMBER, SUBCOMMITTEE ON MANAGEMENT, INVESTIGATIONS, AND OVERSIGHT

RESPONSES FROM ELAINE DUKE

Question 1.: Do you have two different training programs for contracting officers at TSA, who will use AMS, and those for the rest of the Department, who will use the FAR?

Response: There are two different entry level contracting specialist training programs, neither includes formal training on AMS. Any AMS training is informal, on the job training provided by higher level contracting specialists and contracting officers experienced in AMS. TSA's Acquisition Fellows Program is designed for incoming, entry level (equivalent to GS 719) contract specialists. The training these employees receive is in accordance with DHS Management Directive 0781.1 Contracting Professional (GS1102) Career Information. and an interim directive that transitions from the DHS Acquisition Certification Program to the Federal Acquisition Certification Program in Contracting Program.(FAC–C). In the interim management directive all required courses are listed. Informal in-house training and on the job training on AMS is provided to these employees. Contracting courses required for certification for all contracting specialists are the same and FAR-based. The TSA Acquisition Fellows Program welcomed its first Fellows class in FY06 and a second class began in FY07. This program is a three year program and after successful completion, the participants may hold more advanced contracting specialist positions at TSA. The Department will welcome its new class in FY08 and differs from TSA in that the participants, upon successful completion of coursework and one year rotations in the various component contracting activities, are assigned to a component contracting activity. TSA has worked closely with the Department on its Acquisition Fellows Program and the qualifications for contracting officers at TSA are, in fact, the qualifications set forth for certification and warranting by the Department.

What is the additional cost of having to maintain two different training regimens?

Response: The training costs incurred by all contracting activities include the cost of providing the required contracting courses and any additional courses such as costlprice analysis, negotiation skills, or public speaking. The cost differences are based on how the required courses are provided to the participant (on-line versus classroom or on-site) and any additional courses which a participant may take. Contracting staff under both systems attend periodic training as necessary for their career paths.

Question 2.: What is the relationship between your office and the procurement office of the Transportation Security Administration?

Response: The relationship between the two offices is one of mutual cooperation and respect. Both offices freely share information and collaborate as needed. As I mentioned in my testimony, TSA is an active participant in the DHS Chief Acquisition Officers Council and shares in the resources available to the other seven component contracting activities. TSA adheres to the key elements of the DHS acquisition program and its capital investments are subject to the Department's investment re-

view board and their contracting operations are subject to the Department's acquisition oversight program.

Question 3.: Under the current organizational structure of DHS, your position does not have direct line authority over TSA's chief procurement officer. How do you exercise effective oversight of TSA's procurements?

Response: Other than headquarter's, I do not have direct line authority over any component's Head of Contracting Activity (HCA). I exercise my oversight authority with TSA in the same manner as I exercise it with the other HCA's. TSA must adhere to the key elements of the DHS acquisition program which include:

- Advanced acquisition planning
- The appointment of a Competition Advocate
- The establishment of a Small and Disadvantaged Business Utilization Office
- Adherence to Federal-wide acquisition certification requirements for contracting professionals and prograrnlproject managers, and
- Policies regarding the issuance of contracting officer warrants to certified contracting professionals.

TSA's capital investments are subject to the Department's investment review board and their contracting operations are subject to the Department's acquisition oversight program. My office reviews acquisition plans and justifications for procurements that are done by other components which exceed $50 million.

Question 4.: DHS has two acquisition systems -the AMS utilized by TSA and the FAR utilized by the rest of the department.

a. How do you ensure your staffs are properly trained to understand both systems well?

Response: All contracting professionals (GS–1102) in all DHS contracting activities are trained under the FAR, and are certified and warranted based upon the same qualifications set forth in our interim policy on professional certification and training issued April 16,2007. At TSA 1102s operate in AMS and the FAR—they use the FAR environment and therefore receive training on contracting systems. Use of AMS provides TSA contracting staff with additional training and experience. Those experiences broaden their skill set and enhance the diversity of the Department's program. When the Department has a need to redirect acquisition resources, given that TSA contracting professionals receive the same training on FAR contracting procedures as their counter-parts in other DHS contracting offices, DHS can mobilize TSA's resources. An example of this is the month following Hurricane Katrina, when roughly five TSA Office of Acquisition personnel were temporarily detailed to DHS Headquarters and the Federal Emergency Management Agency to support the recovery effort.

b. Wouldn't it be more efficient if DHS has one uniform system so you would not have to maintain expertise in two systems?

Response: By definition, one system is a more efficient way to operate. However, operating one system does not ensure greater effectiveness or, for that matter, efficiency, if the flexibilities that an organization feels it needs are not readily available. All contracting specialists and contracting officers are trained on the FAR, which serves as the basis for AMS. DHS values the diversity of experience and expertise across its acquisition workforce. Knowledge and experience in AMS broadens the skill set of our contracting officers. TSA fully complies with the Department's policies on acquisition—most notably on investment review and certification of our Program Managers, Contracting Officers, and Contracting Officer Technical Representatives. The Department exercises the same review and oversight program on TSA as the other DHS components.

c. From a training perspective, is one system easier to learn than another?

Response: No.

Question 5.: How many staff do you currently have, and what is the projected growth of your staffing level in the coming years?

Response: The Office of the Chief Procurement Officer has 71 appropriated FTE in FY07. There are 100 FTE in the President's budget for FY08 and a 120 FTE in the Department's submission for FY09. In addition to that staff, there are 66 interns in the President's budget for FY08 and 100 interns in the Department's submission for FY09. Department-wide, in the contracting activities there are 1,220 funded contract specialist positions (GS–1102) and there are 956 FTE GS–1102s on board as of July 31,2007. The total number of 1 102 positions desired Department-wide is 2,553. This figure is based on an FY04 independent study recommending workforce size be determined based on procurement dollars spent.

QUESTIONS FROM THE HONORABLE MICHAEL D. ROGERS, RANKING MEMBER, SUBCOMMITTEE ON MANAGEMENT, INVESTIGATIONS, AND OVERSIGHT

RESPONSES FROM RICK GUNDERSON

Question 1.: From your perspective, what are some of the major differences between the Acquisition Management System (AMS) and the Federal Acquisition Regulation (FAR)?

Response: The Acquisition Management System (AMS) was established, in large part, to provide policy and guidance for all aspects of the acquisition lifecycle, from the determination of mission needs to the procurement and lifecycle management of products and services to satisfy those needs. It was intended to simplify, integrate, and unify the elements of lifecycle acquisition management into an efficient and effective system that increases quality, reduces time, and decreases cost for delivering services to the customer. The AMS serves as a building block of the Transportation Security Administration's (TSA's) culture, and fosters good acquisition management by embodying effectiveness, flexibility, efficiencies, checks and balances and public trust in implementing established industry best practices. Within the guidelines of established law, TSA strives to implement the best business solutions that meet our mission, within realistic constraints. The AMS procurement system enables TSA to be innovative and creative so that the right vendor is selected to implement the right solution in a timely, cost-effective manner.

A number of important changes have been made to the Federal Acquisition Regulation (FAR) over the past decade to improve contracting practices and the tools available for achieving best value for the taxpayer. Despite these improvements, however, there are three main categories of distinction from the FAR that TSA believes warrant continued application of AMS:

1. **Communications**—AMS encourages frequent and open communications with industry and offerors, from market analysis through contract award and administration. While communications with industry are also encouraged by FAR, communications after receipt of proposals and prior to award are highly regulated by FAR. By contrast, AMS encourages frequent one-on-one communications with industry throughout the process. This ensures mutual understanding of the Government's requirement and the offeror's proposed solution, and helps ensure award to the company likely to deliver the best solution to meet TSA's mission. Communications are facilitated by the contracting officer, especially during the solicitation phase, to ensure impartiality is maintained.

2. **Lifecycle Management**—The FAR is **primarily** focused on the procurement part of the process. **By contrast, AMS provides more comprehensive guidance from the earliest stages of acquisition through disposal.** The AMS lifecycle management approach is important to TSA, as our Office of Acquisition has a broader focus than contracts. Not only do we award contracts, we focus on strengthening program management and what we call "Big A" Acquisition across the TSA organization. Acquisition encompasses much more than the procurement aspect of conducting business. It is a life cycle approach to investments and requires the integration of numerous disciplines, including program management, engineering, budgeting, logistics, and contracting.

3. **Managed Competitions—The FAR provides limited opportunities for agencies to reduce the burden associated with conducting initial screenings of sources. As a result, sources who may not be the most competitive may effectively compel an agency to review a full proposal, which can be burdensome and inefficient for both parties. By contrast,** AMS provides for managed competitions where, through multiple screens, detailed negotiations are conducted with the companies most likely to receive award. Under the AMS's multiple screening process, TSA publicizes its initial screening information request (SIR) in FedBizOpps with a statement of the particular requirements and a request for specific preliminary qualifying proposal materials. This announcement also advises that, subsequent to its evaluation of received proposals, TSA intends to then send a more detailed SIR only to those vendors whose proposals met the initial qualifying requirements. In this multiple screen approach, TSA can conduct a series of SIRs and vendors do not have to invest the resources normally required when submitting a comprehensive proposal as required under FAR. Also, the AMS multiple screen process starts with open competitions—where all interested firms may submit a response to the initial screening request. In cases where TSA, through market research, has determined that a limited number of firms could reasonably provide the required products, equipments, or services, AMS allows TSA to conduct its

competition amongst this limited field of vendors. **This process saves offerors the wasted effort of developing proposals that would not likely be selected and TSA the cost of evaluating them. Instead, TSA is able to focus its attention on the most promising sources, allowing them to perform due diligence and enabling TSA to identify the best fit between agency needs and marketplace capabilities.** Even in those cases, for transparency and competition, TSA publicizes the requirements in FedBizOpps to encourage all vendors to pursue subcontracting opportunities. Additionally, throughout its multiple-screening process, AMS allows TSA to eliminate offers that stand no chance for award. FAR offers similar flexibility through the setting of a competitive range, but this involves a more formal and time-consuming process. Managed competitions save Government resources and allow firms to direct bid and proposal budgets at the opportunities for which they are most likely to win.

While the FAR and underlying statutes encourage the use of alternative dispute resolution (ADR), AMS places an even greater reliance on these processes to resolve protests and contract claims. ADR is a best practice across industry, and delivers benefits when compared to costly litigation. Protests and contract disputes involving TSA AMS acquisitions fall under the jurisdiction of the Federal Aviation Administration's Office of Dispute Resolution for Acquisition (ODRA). The ODRA process is less about formalities, as occasioned by a Board of Contract Appeals (Board) or the Government Accountability Office (GAO), and more directed to effective, timely and relatively inexpensive legal proceedings. As an example, the ODRA rules allow for intervention by ODRA prior to a full-blown dispute or contracting officer's final decision in order to resolve the matter.

If the parties are unable to resolve their differences through ADR, the ODRA provides a Default Adjudicative Process under which a member of the ODRA or a Special Master (Board of Contract Appeal Judge/sitting or retired in most instances) is appointed to develop and review the record to make factual findings and a recommendation for final agency action to the Assistant Secretary.

Whether under ADR or the default adjudicative process, the ODRA rules provide for discovery (e.g., depositions, interrogatories, exchange of documents, among others) as well as evidentiary hearings. In this vein, the ODRA encourages the parties to negotiate the terms of discovery as well as to limit the scope of discovery, avoiding unnecessary costs and resources commonly incurred under the guise of discovery purposes.

Question 2.: What are the implications of having one Department agency with a separate acquisition process compared to the process used by the rest of the Department?

Response: The implications of having one Department agency with a separate acquisition process are minimal, if at all. My priorities as the Chief Procurement Officer are in no way affected by the fact that one Department agency, TSA, utilizes a separate acquisition process from the rest of the Department. My goals to build the DHS acquisition workforce, make good business deals, and perform effective contract administration do not have to be adjusted because of TSA's procurement system. The authority I exercise regarding TSA is identical to the authority I have over the other components. My efforts to build an acquisition program and workforce integrating the disciplines of program management, risk assessment, engineering, cost analyses, and logistics will serve as an infrastructure throughout the Department allowing DHS to achieve mission success regardless of the mechanics of the procurement system used.

Question 3.: What are the pluses and minuses of TSA's Acquisition Management System (AMS) and the Federal Acquisition Regulation (FAR) that applies to the rest of DHS?

Response: From the Transportation Security Administration's (TSA's) perspective, the Acquisition Management System (AMS) is about doing the whole business of acquisition better. AMS is part of our culture and creates an environment within TSA which allows us to engage in good business practices. In addition to the distinctions noted below, it takes less time to conduct our procurements under the AMS than under the FAR, which prescribes specific steps for the source selection process. The AMS allows communications with vendors/offerors throughout the entire process, which enables TSA to conduct its source selections much quicker. The main advantages of AMS are:

1. **Communications**—AMS encourages frequent and open communications with industry and offerors, from market analysis through contract award and administration. While communications with industry are also encouraged by FAR, communications after receipt of proposals and prior to award are highly

regulated by FAR—so much so that there are multiple distinct names for talking with industry during that period (e.g., communications, discussions, clarifications). AMS encourages frequent one-on-one communications with industry throughout the process. This ensures mutual understanding of the Government's requirement and the offeror's proposed solution, and results in an award to the company likely to deliver the best solution to meet TSA's mission.

2. **Lifecycle Management**—AMS provides guidance from the earliest stages of acquisition through disposal. The FAR is **primarily** focused on the procurement part of the process. The AMS lifecycle management approach is important to TSA, as our Office of Acquisition has a broader focus than contracts. Not only do we award contracts, we focus on strengthening program management and what we call "Big A" Acquisition across the TSA organization. Acquisition encompasses much more than the procurement aspect of conducting business. It is a life cycle approach to investments and requires the integration of numerous disciplines, including program management, engineering, budgeting, logistics, and contracting.

3. **Managed Competitions**—AMS provides for managed competitions where, through multiple screens, detailed negotiations are conducted with the companies most likely to receive award. Under the AMS's multiple screening process, TSA publicizes its initial screening information request (SIR) in FedBizOpps with a statement of the particular requirements and a request for specific preliminary qualifying proposal materials. This announcement also advises that, subsequent to its evaluation of received proposals, TSA intends to then send a more detailed SIR only to those vendors whose proposals met the initial qualifying requirements. In this multiple screen approach, TSA can conduct a series of SIRs and vendors do not have to invest resources normally required when submitting a comprehensive proposal as required under FAR. Also, the AMS multiple screen starts with open competitions—where all interested firms may submit a response to the initial screening request. In cases where TSA through market research has determined that a limited number of firms could reasonably provide the required products, equipments, or services, AMS allows TSA to conduct its competition amongst this limited field of vendors. Even in those cases, for transparency and competition, TSA publicizes the requirements in FedBizOpps to encourage all vendors to pursue subcontracting opportunities. Additionally, throughout its multiple-screening process, AMS allows TSA to eliminate offers that stand no chance for award. FAR offers similar flexibility through the setting of a competitive range, but this involves a more formal and time-consuming process. Managed competitions save Government resources, and also allow firms to redirect bid and proposal budgets elsewhere.

4. **Alternative dispute resolution**—AMS encourages parties to use alternative dispute resolution, or ADR, to resolve protests as well as contract claims. ADR is a best practice across industry, and delivers benefits when compared to costly litigation. Protests and contract disputes involving TSA AMS acquisitions fall under the jurisdiction of the Federal Aviation Administration's Office of Dispute Resolution for Acquisition (ODRA). The ODRA process is less about formalities, as occasioned by a Board of Contract Appeals (Board) or the Government Accountability Office (GAO), and more directed to effective, timely and relatively inexpensive legal proceedings. As an example, the ODRA rules allow for intervention by ODRA prior to a full-blown dispute or contracting officer's final decision in order to resolve the matter. If the parties are unable to resolve their differences through ADR, the ODRA provides a Default Adjudicative Process under which a member of the ODRA or a Special Master (Board of Contract Appeal Judge/sitting or retired in most instances) is appointed to develop and review the record to make factual findings and a recommendation for final agency action to the Assistant Secretary.

Whether under ADR or the default adjudicative process, the ODRA rules provide for discovery (e.g., depositions, interrogatories, exchange of documents, among others) as well as evidentiary hearings. In this vein, the ODRA encourages the parties to negotiate the terms of discovery as well as to limit the scope of discovery, avoiding unnecessary costs and resources commonly incurred under the guise of discovery purposes.

Question 4.: In your view, do you believe the historical reasons that existed in 2001 when TSA inherited the acquisition system used by the FAA, instead of the FAR, still exist today?

Response: Yes, we continue to operate in a highly volatile arena where the Transportation Security Administration (TSA) must protect the public from future terrorist attacks. The greatest value of the Acquisition Management System (AMS)

is not expediency or speed to contract. Rather it's the flexibility it affords TSA to assess the market and fashion our requirements in a way for the market to provide the appropriate solution in a timely manner. **While important strides have been made to strengthen FAR policies and practices for identifying and acquiring best value solutions, several unique features of AMS, including the ability to conduct more efficient communications and phased acquisitions, have enabled TSA to create a business environment that is even more efficient and effective for dealing with the increased complexities of a post-9/11 world.** The AMS allows TSA's Office of Acquisition to be innovative and flexible to develop business solutions that align with TSA's mission. AMS helps ensure that we are making good deals in support of the deployment of technology and services to ensure the Nation's security.

Question 5.: How well does the private sector work with a major Cabinet department that operates two different acquisition systems?

Response: In FY06, DHS obligated over $15.7 billion, of which 83 percent was for services, making it the third largest government agency in terms of annual procurement spending, behind the Defense Department and the Department of Energy. These were figures used by Richard Skinner, DHS Inspector General in his testimony before the House Oversight and Government Reform Committee's subcommittee on Government Management, Organization, and Procurement, July 18, 2007, as well as Alan Chvotkin, Senior Vice President and Counsel Professional Services Council in his testimony on August 1, 2007. I believe that a company can propose and win a contract following both processes with minimal difficulty. Not until the scheduling of this hearing was I aware that some companies find it challenging to conduct business with the Department under both the FAR and AMS. I am in constant communication with industry and I will solicit their feedback on this issue. Fundamentally, the terms and conditions of both systems are the same, though clauses can more easily be tailored to needs of the government under AMS. In addition to being more timely, communication between the government and a company **under AMS' rules,** can be more direct and specific, which I would expect to be of great benefit to any company in the bidding and negotiating process.

Do you believe the Department has the necessary contracting staff to effectively manage these two systems?

Response: I do not believe managing two procurement systems is the cause of requests for additional staff. The requests for staffing has been based on a cost to spend ratio metric which was recommended in an independent study conducted in FY04. The study recommended workforce size be determined based on the procurement dollars spent, not the type of procurement system used. We have contracted for another study to assess staffing needs, and I do not believe the procurement system to be used will be a factor in determining staffing needs.

Question 6.: In your view, should Congress consider applying the FAR uniformly throughout all of the Department? If so, why? If not, why not?

Response: The AMS system used by TSA allows some valuable flexibility not available in the FAR. Inasmuch as TSA contracting personnel rely directly on these flexibilities to meet mission needs, I do not believe Congress should apply the FAR uniformly throughout the Department. **Taking away AMS' flexibilities would be unnecessarily disruptive. While we appreciate the general benefits of a uniform system, the Department is committed to ensuring that TSA acquisition personnel are adequately trained on AMS processes and use the additional flexibilities offered to them appropriately and effectively.**

In your view, does one system compared to the other promote more competition? Promote fairer competition? Ensure greater financial accountability?

Response: In my view both systems encourage and promote competition **in a fair and** transparent manner. Both systems recognize that competition, wherever possible, is in the best interests of the government to successfully meet its mission while being good stewards of the taxpayer's money. **However, I believe AMS has the ability to facilitate more efficient use of competition by giving contracting officers tools to focus their attention more effectively on the vendors who are most likely to be able to perform and conduct more meaningful communications.** I also believe one system does not ensure greater financial accountability than the other. All contracting officers are required to conduct a responsibility determination prior to award, and it is the responsibility of all involved, from the program manager to the contract administrator to ensure that cost, schedule, and performance requirements are met.

Under each system, how are contract disputes resolved? In your view, does one system provide greater fairness than the other?

Response: Both systems offer vendors mechanisms to dispute a requirement or action. The process to be followed under each system is similar, however, utilizing the disputes system under AMS is considered by many to be more efficient for all parties involved and possibly more cost effective considering the time savings. In fact, alternative dispute resolution (ADR) is considered a best practice by industry. Protests under FAR are filed before the agency or before the Government Accountability Office (GAO) and may result in an automatic suspension of the contracting process until resolution. A protest may also be filed before a federal court. Contract claims may be failed before the Civilian Board of Contract Appeals or federal court. These options are formal and may be time consuming. Under AMS parties are encouraged to use ADR to resolve protests as well as contract claims. TSA uses the Office of Dispute Resolution for Acquisition (ODRA) of the Department of Transportations / FAA. The ODRA process is less about formalities, filings, and timeframes as occasioned by the Board or GAO and more directed to effective, timely and relatively inexpensive legal proceedings. ADR is also available under the FAR system but it is not as frequently and regularly used. If a company has a complaint about a particular source selection, it has the option to protest to the ODRA if it cannot resolve the issue at TSA. If the parties are unable to resolve their differences through ADR, the ODRA provides an efficient Default Adjudicative Process under which a member of the ODRAs or a Special Master (Board of Contract Appeal Judge/sitting or retired in most instances) is appointed to develop and review the record to make a factual findings and recommendation for final agency action to the Assistant Secretary.

NOTE: The Board of Contract Appeals is only for contract claims which are contract administration issues. The Board does not entertain protests which are contract formation issues.

Question 7.: Over the past 2–1/2 years, this Subcommittee has examined a number of problematic DHS contracts. In your view, is this a problem with the particular acquisition management system being used or the failure of a contracting officer to follow the rules or under-staffing, or a combination of factors?

Response: “Problematic” contracts of DHS have been brought about by a number of factors, none of which relate to the procurement systems used. Depending on the contract being discussed, the contributing factor(s) have been one or a combination of the following: under staffing in the areas of contract award or oversight, change in requirements as a result of change in direction, the circumstances under which contracts were put in place, incorrect data in existing databases which were used in determining or verifying a vendor’s eligibility, and last, but not least, the lack of the appropriate mix of skilled acquisition professionals in the disciplines of program management, risk assessment, engineering, cost analyses, and logistics. As I testified, the competition for highly qualified acquisition and procurement officials is intense.

I am addressing the staffing issues and skill mix with three workforce initiatives currently underway. My office has initiated an aggressive staffing solution to resolve personnel shortages and have centralized recruiting activities to better manage similar needs across the Department. We have received authority to maximize the use of hiring flexibilities such as Direct Hire Authority and Re-employed Annuitants to address our most critical staffing shortages—contracting officers. The Acquisition Intern Program is my second initiative to satisfy the long term need for qualified acquisition personnel by developing a pipeline for our future acquisition leaders. Beginning in FY 2008, my office is centrally funding an Acquisition Intern Program with 66 participants which will grow to a total of 300 participants by fiscal year 2011. The third initiative is the establishment of a centralized acquisition workforce training fund. Based on the results of reviews conducted by the Oversight Division, our training program will develop or purchase additional training to close identified competency gaps. By centralizing the training program, the Department is better positioned to deliver a unified training program that enables our acquisition professionals to achieve the appropriate certification levels and develop the necessary skills and competencies to negotiate good business deals. We will maximize the use of the training resources available to the federal agencies from the Federal Acquisition Institute.

Question 8.: Mr. Gunderson, Congress exempted FAA contracting from the FAR in 1995 primarily to address FAA’s need to modernize the air traffic control system. Given TSA’s mission in DHS, what rationale is there to

continue to use FAA's acquisition management system, rather than the FAR?

Response: From the Transportation Security Administration's (TSA) perspective, the Acquisition Management System (AMS) **offers broader guidance than the FAR to address the complete acquisition life cycle and certain tailored flexibilities not available in the FAR that TSA uses strategically to achieve better results than can be achieved without these flexibilities.** AMS is part of our culture and creates an environment within TSA which allow us to engage in good business practices. TSA remains a new agency that must attempt to protect the public from terrorist attacks. TSA faces new challenges everyday to assess and identify new technology, new services, and address new challenges set by Congress. AMS allows flexibility to better meet these challenges—allowing TSA to exercise good, sound business practices in meeting our mission and goals.

Question 9.: Do you find it difficult to attract and retain an acquisition workforce at TSA, when the skills those employees develop with the AMS as TSA contracting officers would not be transferable outside of TSA, FAA, and a small number of firms that specialize in AMS contracting?

Response: The Transportation Security Administration (TSA) is an exciting place to be for acquisition professionals, and our skills are not only transferable outside of TSA, but are highly valued. People have come to TSA from industry and Federal Acquisition Regulation (FAR) organizations—most notably the Department of Defense. During Hurricane Katrina, the Department of Homeland Security leveraged TSA's staff—through temporary reassignment and via after hours support in a war room to help the Federal Emergency Management with its contracting—which is FAR based. For interagency agreements through the General Services Administration, our contract specialists use the FAR. TSA faces the same supply and demand challenges as the acquisition workforce, but the TSA Office of Acquisition developed a comprehensive Human Capital Strategy in 2005 to ensure we continue to recruit and retain the most highly qualified employees.

Question 10.: Did application of the Acquisition Management System contribute to TSA's early contract problems?

Response: No; in fact, the majority of contracts awarded by the Transportation Security Administration (TSA) in its startup were Federal Acquisition Regulation (FAR)-based contracts. The early challenges were driven by limited staff and an incomplete view of the ultimate requirements. TSA was building its agency infrastructure at the same time it was required to federalize all U.S. airports and roll out security technology on an aggressive, mandated schedule. Since then, TSA's Office of Acquisition has developed capabilities that provide program management support and outreach across the agency and significantly increased staffing.

Question 11.: AMS provides additional flexibility to the contract specialist. How do you ensure that award and administration of contracts is executed in a way consistent with Federal acquisition principles?

Response: Increased flexibility does not mean there are no rules. In addition to the Acquisition Management System (AMS) framework, the Transportation Security Administration's (TSA's) Office of Acquisition has developed policies about contract administration and oversight such as our Contracting Officer Technical Representative program. The Defense Contract Audit Agency has an onsite representative that supports our contracts, and we have an agreement with the Defense Contract Management Agency for ongoing administration support. Additionally, TSA complies with Department of Homeland Security Management Directives and guidance (other than the Federal Acquisition Management (FAR) and its Homeland Security Supplement). TSA's business opportunities are publicized via the standard Government website, FedBizOpps. We leverage the U.S. Coast Guard financial system and report our contract actions via the Federal Procurement Data System.

Question 12.: What feedback have you received from industry about the Acquisition Management System TSA uses?

Response: The Transportation Security Administration has not received any negative feedback from industry on its Acquisition Management System (AMS), but we have heard from industry that they appreciate the open dialogue employed throughout the process. To our knowledge, the hearing on August 1, 2007 was the first time that industry representatives voiced concerns about the AMS.

Question 13.: Are there factors that justify TSA/FAA having a separate procurement system from the rest of the government? Especially given the fact that other agencies that purchase high dollar items and need emer-

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gency authorities like the Department of Defense use the Federal Acquisition Regulations (FAR)?

Response: The Transportation Security Administration's (TSA) mission does not demand a different procurement system, but use of the Acquisition Management System (AMS) and its guidance is built into our culture. It is not about doing things faster or responding to emergencies; it is about continually improving our acquisition practices similar to the private industry. It is important to note that in the Government Accountability Office's (GAO) review of AMS at the Federal Aviation Administration (FAA) (Report Number GAO–05–23), it did not recommend that it convert to FAR. The GAO's recommendations focused on strengthening requirements, software development, and investment decision making.

Question 14.: You mentioned that all TSA procurement personnel are trained to use the FAR, as well as the AMS. So there would not be a significant cost to transitioning these AMS procurement officers to the FAR contracting system, would there?

Response: There would not be significant training costs, though the Transportation Security Administration's Office of Acquisition would provide some refresher training on the Federal Acquisition Regulation Part 15—Source Selection.