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Office of Federal Procurement Policy, OMB

**FROM:** OMB Watch

**RE:** Public Comments on the Government Contracting Memorandum

**DATE:** July 17, 2009

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OMB Watch exists to increase government transparency and accountability; to ensure sound, equitable regulatory and budgetary processes and policies; and to protect and promote active citizen participation in our democracy. Since our launch of FedSpending.org, the first aggregated, searchable online database of federal spending, in October 2006, OMB Watch has become more heavily involved in overseeing the federal procurement process, including pushing the federal government to open the process to the public, and advocating for sensible reforms bringing increased accountability and fiscal responsibility to the procurement process.

These comments are submitted in response to the March 4 Presidential Memorandum on Government Contracting,<sup>1</sup> which establishes a framework for improving critical components of the federal acquisition system and management of the federal government's "multi-sector" workforce of federal employees and private sector contractors. We applaud the Obama administration for tackling this complicated and politically charged sector of government and believe this process creates the opportunity to develop and institute some desperately needed reforms.

### ***Importance of Transparency***

OMB Watch strongly supports the Obama administration's drive to strengthen the federal acquisition system and recommends several courses of action to further that objective. Overall, these recommendations are guided by OMB Watch's belief in the power of transparency and access to government information to transform government processes and produce better outcomes for the public. Without greater transparency, issues of waste, fraud, and abuse; conflicts of interest; and poor performance will continue to plague the federal procurement process.

### ***Transparency of the Contracting Process***

It is crucial for the Obama administration to infuse as much transparency as possible throughout the procurement process. Current practices that conceal information on a contracting officer's process to reach a decision on a contract award, the details of a contract, and the evaluation of a contractor's performance reinforce problems of the federal procurement system, including a lack of accountability,

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<sup>1</sup> Presidential Memorandum, Government Contracting, March 4, 2009. [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government).

resistance to reform, and abuse of the contracting process that results in waste and fraud. An open contracting process that includes details of the decision-making process, copies of enacted contracts, and more and better performance data would instill the impetus among agencies, contracting officers, and contractors to improve performance with the knowledge that the public will have access to information on their actions.

In order to fix these problems, the government should release more information about the processes contracting officers use to make contracting decisions. In addition, the government needs to require greater disclosure of information to the public about all contracts and contractors through an online, searchable database, and obligate agencies to make available performance data of contractors and other related information – such as contractors' compliance with workplace safety and environmental laws – to federal employees and the public. The federal government can disclose this information through existing databases such as USASpending.gov, the Past Performance Information Retrieval System (PPIRS) and the newly mandated federal contractor integrity database.<sup>2</sup>

Currently, very little information about these parts of the federal procurement process is available to the public as both the PPIRS and new contractor integrity database are not made available to the public. In fact, Federal Acquisition Regulation (FAR) § 42.1503 requires that performance reviews "not be released to other than Government personnel and the contractor whose performance is being evaluated...." The rationale is that public release "of such information could cause harm both to the commercial interest of the Government and to the competitive position of the contractor being evaluated as well as impede the efficiency of Government operations."<sup>3</sup>

On the contrary, OMB Watch believes disclosure of such information – with pertinent safeguards to protect vital business information – would foster better and more extensive competition because both contractors and contracting officers would become more responsive to increased public scrutiny of contracting decisions and processes. This would not only help develop better performance and behavior from contractors, but also help to foster better decisions and behavior from federal contracting officers. More exposure of these decisions will further ensure the relationship between contractors and their lobbyists and federal employees does not violate federal ethics and conflict of interest regulations.

Additionally, opening the procurement process in this way is likely to encourage other contractors to submit more bids if they feel the merits of a bid, and not personal relationships or influence with contracting officials, determine the winner of a contract. Disclosure of this information will help to level the playing field in contract competitions by helping to ensure more contracts are competed and more contractors submit bids for those competitions.

### ***Consolidation of Contracts***

It is essential for the federal government to loosen the current contractor oligopoly as much as possible to increase competition within the acquisition process. After years of mergers and acquisitions and an over-reliance on non-competitive contracts, especially within military contracting, a very small number of contractors receive a massively disproportionate share of federal contracting dollars. In FY 2008, the

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<sup>2</sup> For more information on USASpending.gov, visit [www.usaspending.gov](http://www.usaspending.gov); for more information on the Past Performance Information Retrieval System, visit [www.ppirs.gov](http://www.ppirs.gov); for more information on the federal contractor integrity database, see Public Law 110-417, Sec. 872, October 14, 2008. [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_public\\_laws&docid=f:publ417.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ417.110.pdf).

<sup>3</sup> FAR § 42.1503 Procedures. <http://www.acquisition.gov/far/current/html/Subpart%2042.15.html#wp1075411>.

top 25 government contractors, or 0.01%, (out of 193,259 total contractors) received 41.39 percent of all contracting dollars, according to USASpending.gov. The top 100 contractors received 58.32 percent of all contracting dollars.<sup>4</sup> This creates a reliance on certain contractors by the government and an inherently non-competitive system across some of the most expensive and important government procurements.

Without wading into difficult antitrust waters to breakup large contractors, the government can increase competition within the contracting process by de-bundling contract requirements. According to Scott Amey, general counsel at the Project on Government Oversight (POGO), the current practice of agencies lumping "together multiple goods and services exclude smaller businesses that could successfully provide one good or service, but are incapable of managing massive multi-part contracts." Moreover, Amey insists, "[b]reaking apart multi-supply or service contracts would also assist the government in reducing the multiple layers of subcontracting now prevalent in federal contracting...."<sup>5</sup>

Conventional wisdom dictates that de-bundling contracts would cost the government more money because it would prevent large contractors from using economies of scale to provide a good or service at a lower cost compared to a smaller competitor. OMB Watch believes, however, that the lack of competition for bundled contracts – due to the inability of smaller contractors to bid on massive multi-part contracts – reduces the incentive for large contractors to provide the lowest possible cost to the government. In fact, use of multi-supply or service contracts "can drive up costs while adding little value" to the contract because large contractors act as a middleman – adding a fee for their services, of course – and employ an army of subcontractors to carry out the multiple part contract.<sup>6</sup>

To remedy this, the federal government must stipulate within FAR that all federal agencies must minimize use of multi-supply or service contracts. The regulation would provide impetus to contracting officers to limit multiple services and supply contracts, thereby introducing more competition within the procurement process by preventing the largest contractors from crowding out smaller and less well-connected companies. Moreover, the regulation would help to drive down costs, as the absence of middleman fees would be reduced, and allow many more small companies to compete for a contract that used to be a piece of larger multiple part contract.

### ***Contractor Performance Data***

Poor performance on past contracts should be a critical factor in awarding future contracts. Unfortunately, this is not currently the case. It is important for the federal government to provide contracting officers with all the tools necessary to examine a contractor's past performance to help level the playing field between contracting companies competing for taxpayer dollars. This will help contracting officers be better stewards of taxpayer dollars by allowing them to make more informed decision in contracting competitions.

A recent case sheds light on the possible benefits of using past performance in contract decisions. In June 2007, the Army awarded the fourth iteration of the Logistics Civil Augmentation Program (LOGCAP IV) in Afghanistan to two contractors: Flour International, DynCorp International. The

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<sup>4</sup> See USASpending.gov. <http://www.usaspending.gov/fpds/tables.php?tabtype=t2&subtype=t&year=2008>.

<sup>5</sup> Testimony of Scott Amey, General Counsel, Project on Government Oversight, before the House Committee on Oversight and Government Reform, Subcommittee on Management, Organization, and Procurement, pp. 4, June 16, 2009. <http://www.pogo.org/pogo-files/testimony/contract-oversight/co-cfc-20090616.html>.

<sup>6</sup> Ibid. pp. 4.

government awarded the previous LOGCAP contract solely to KBR, but accusations of misdeeds under the previous contract caused the Army to rethink the sole-source selection. The inclusion of multiple contractors, according to the Army, allowed the government to mitigate risk by not having to rely on only one source.

The past performance of KBR played a central role in the government's decision of the outsourcing of LOGCAP IV, according to a press release from Sen. Byron Dorgan (D-ND), chairman of the Democratic Policy Committee (DPC).<sup>7</sup> Over the past several years, the DPC has held multiple hearings examining the faulty contract work of KBR in Iraq and Afghanistan. According to a press release put out by the senator's office, the Army in fact did use KBR's past performance as a central reason to bypass the award of LOGCAP IV to KBR in Afghanistan. While past performance data should be a determining factor when making contracting decisions, contracting officers should not have to rely on a congressional committee to hunt the information down.

In order to improve the use of relevant performance data on contractors, the Obama administration should work to improve PPIRS by implementing the Government Accountability Office's (GAO) recommendations in *Federal Contractors: Better Performance Information Needed to Support Agency Contract Award Decisions* and by expanding and opening to the public the contractor integrity database congressionally mandated in the FY 2009 National Defense Authorization Act.<sup>8</sup>

In July 2009, the federal government amended FAR to require mandatory use of PPRIS by all contracting officers.<sup>9</sup> Despite this improvement, it is still important the government improve the quality of data in PPRIS. According to the GAO, the government has yet to meet the recommendations of a 2005 Office of Federal Procurement Policy (OFPP) interagency group tasked with generating pertinent and timely performance information. The recommendations included standardizing the different contracting ratings used by various agencies; requiring more meaningful past performance information, including terminations for default; developing a centralized questionnaire system for sharing government-wide; and possibly eliminating multiple systems that feed performance information in PPIRS.<sup>10</sup>

GAO, in turn, recommended standardizing evaluation factors and rating scales government-wide for documenting contractor performance and establishing policy for documenting performance-related information that the government does not currently capture systematically across agencies, such as contract terminations for default and a prime contractor's management of its subcontractors. GAO also recommended developing system tools and metrics for agencies to use in monitoring and managing the documenting of contractor performance, such as contracts requiring an evaluation and information on delinquent reports.<sup>11</sup>

Implementation of these recommendations, together with mandatory use of PPIRS, should help to

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<sup>7</sup> "PENTAGON AWARDS NEW LOGCAP IV CONTRACT FOR AFGHANISTAN TO TWO OTHER FIRMS, BYPASSING KBR" Press Release from Sen. Byron Dorgan (D-ND), July 8, 2009. <http://www.ombwatch.org/files/budget/dorgankbrpressrelease.pdf>

<sup>8</sup> GAO, *Federal Contractors: Better Performance Information Needed to Support Agency Contract Award Decisions*, GAO-09-374, April 23, 2009. <http://www.gao.gov/new.items/d09374.pdf>. Public Law 110-417, Sec. 872, October 14, 2008.

<sup>9</sup> See FAR § 42.1502 Policy. <http://www.acquisition.gov/far/current/html/Subpart%2042.15.html#wp1075411>.

<sup>10</sup> GAO, *Federal Contractors*, GAO-09-374, pps. 19-20, April 2009. <http://www.gao.gov/new.items/d09374.pdf>.

<sup>11</sup> Ibid. pp. 21.

address the shortcomings of the collection and use of performance data in the procurement system identified by the GAO report, including "a lack of accountability and lack of system tools and metrics" and "[v]ariations in evaluation and rating factors." The GAO also concluded that there was a "reluctance to rely more on past performance...[due to] skepticism about the reliability of the information and difficulty assessing relevance to specific acquisitions."<sup>12</sup> Improving the quality and utility of information collected about contractor performance is the key to reducing this skepticism.

The Obama administration should focus on improving the quality of contractor performance data so it is both relevant and usable by contracting officers. Instituting a system where federal employees who are independent from managing a particular contract competition and implementation are responsible for collecting performance data on that particular contract would help to bring more independence to performance data collection. This would also improve the quality of data collected.

Furthermore, the government needs to expand the contractor misconduct database congressionally mandated in the FY 2009 National Defense Authorization Act to increase the type of data that contracting officers have access to. The database authorized would catalog civil and criminal misconduct by contractors, but it is circumscribed to those contractors that receive a contract from the Department of Defense. Currently, this type of data on contract performance exists across various agencies in unconnected and disjointed databases and websites. In the absence of such a unified database provided by the government, the Project on Government Oversight (POGO) has compiled a prototype database.<sup>13</sup> This prototype shows the potential of a centralized database to help inform future contracting decisions by the federal government.

While the Defense Department is the largest contracting agency in the federal government, other large contracting agencies include the Department of Homeland Security, Energy, and the National Aeronautics and Space Administration (NASA). It is reasonable to believe that contracting officers within those other agencies would benefit from access to a database of information on misdeeds and poor performance by any contractor that receives a government contract. Therefore, the government needs to expand the misconduct database to include all contractors across the federal government and, like our recommendation for the PPIRS database, make the information available to the public.

### ***Selecting the Right Contract Type***

Within the procurement process, selecting the right contract vehicle is vitally important to the government's ability to achieve good contracting outcomes. Currently, contracting officers too often select an inappropriate contract for a particular situation, and the government does not adequately impart the details of acquisition regulation to contracting officers. The federal government needs to implement GAO's recommendations in *Contract Management: Minimal Compliance with New Safeguards for Time-and-Materials Contracts for Commercial Services and Safeguards Have Not Been Applied to GSA Schedules Program* and stipulate the minimal use of multi-supply or service contracts.<sup>14</sup>

According to the GAO report, a statutory change to FAR, effective February 2007, allows contracting officers to use time-and-materials (T&M) contracts to acquire commercial services. T&M contracts are

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<sup>12</sup> Ibid. Executive Summary.

<sup>13</sup> For more information POGO's Federal Contractor Misconduct Database, visit <http://www.contractormisconduct.org/index.cfm>.

<sup>14</sup> GAO, *Contract Management: Minimal Compliance with New Safeguards for Time-and-Materials Contracts for Commercial Services and Safeguards Have Not Been Applied to GSA Schedules Program*, GAO-09-579, June 24, 2009. <http://www.gao.gov/new.items/d09579.pdf>.

precarious because the government bears the risk of cost overruns. Despite safeguards included in FAR § 12, including a requirement that contracting officers prepare a detailed determination and findings that no other contract type is suitable, contracting officers routinely failed to perform the appropriate determination and findings and continually used T&M contracts in inappropriate situations. Moreover, most contracting officers had the mistaken impression that the fixed labor rate in T&M contracts constituted a fixed-price contract.<sup>15</sup>

The GAO recommended that the Administrator of OFPP amend FAR § 16.6, which deals with T&M, labor-hour and letter contracts, and FAR § 16.2, which deals with fixed price contracts, to make it clear that contracts with a fixed hourly rate and an estimated ceiling price are T&M or labor-hour contracts, not fixed-price type contracts.

The GAO also called for OFPP to amend FAR § 8.4, which pertains to the Government Services Administration (GSA) schedules program, to explicitly require the same safeguards for commercial T&M services (i.e., the FAR § 12 determination and findings and the justification for changes to the ceiling price – that are required in FAR § 12.207). Additionally, GAO called on OFPP to provide guidance to contracting officials on the requirements in FAR § 12.207 for the detailed determination and findings for T&M or labor-hour contracts for commercial services and encourage agencies to provide training regarding the determination and findings requirement.<sup>16</sup>

Furthermore, the OFPP needs to amend the FAR to prevent the excessive use of multi-supply or service contracts and the resultant multiple layers of subcontractors. Multiple layers of subcontracting, found in large multi-supply or service contracts, are so problematic – not only in the difficulty of creating transparency among the layers, but also in the contracts' tendency to drive up costs while adding little value – the FY 2009 National Defense Authorization Act directed the Defense Department to minimize excessive use of multiple layers of subcontractors.<sup>17</sup> The federal government must expand this directive across the entire government and provide oversight to ensure those types of contracts are actually minimized. Regulation and oversight would provide contracting officers with the impetus to limit multiple services and supply contracts, and thereby prevent the boondoggle of multiple layers of subcontractors. If the federal government institutes these remedies, less waste will result from the use of inappropriate contract vehicles by contracting officers.

### ***Inherently Governmental/Commercial Model***

The determination of what is an inherently governmental function and what is commercial within the procurement process is a difficult task. OMB Watch supports the government's drive to clarify the current definition of inherently governmental function, but believes that the ambiguous distinction between inherently governmental and commercial will not improve with clarification of the current definition of inherently governmental function. Instead, OMB Watch believes that the federal government must reexamine the inherently governmental/commercial model.

Any further distinction between inherently governmental and commercial functions by the government would jeopardize the general applicability of the inherently governmental test across government

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<sup>15</sup> See FAR § 12.207 Contract Type. [http://www.acquisition.gov/far/current/html/Subpart%2012\\_2.html#wp1087410](http://www.acquisition.gov/far/current/html/Subpart%2012_2.html#wp1087410); GAO, Contract Management, GAO-09-579, executive summary, June 2009. <http://www.gao.gov/new.items/d09579.pdf>.

<sup>16</sup> GAO, Contract Management, GAO-09-579, pp. 29, June 2009. <http://www.gao.gov/new.items/d09579.pdf>.

<sup>17</sup> Public Law 110-417, Sec. 866, October 14, 2008. [http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110\\_cong\\_public\\_laws&docid=f:publ417.110.pdf](http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_public_laws&docid=f:publ417.110.pdf).

agencies. On the other hand, the definition of the terms as they stand provide little direction for agencies to determine what activities stay in house and what jobs are contracted out. Thus, any list of inherently governmental or commercial activities based on these definitions is inherently flawed.

Therefore, government agencies must start by defining their core competencies and the activities that help the agency meet its statutory and performance obligations. Once an agency defines its core competencies, it can proceed to a more traditional review of commercial versus inherently governmental activities to determine which noncore activities it might be able to contract out and which should stay in because of lower cost.<sup>18</sup>

According to Paul Light, a government process expert, the result of this procedure would produce "a multi-tiered work force built around a relatively small center of civil servants who hold clearly identified core competencies, a larger group of civil servants who perform noncore functions for clearly defined reasons, and a still larger group of employees who were not civil service employees who perform noncore functions on behalf of the federal government under contracts, grants, and mandates."<sup>19</sup>

### ***Inherently Governmental Function Criteria***

The criteria upon which the federal government bases its decisions on which functions to contract out and which functions should stay in house matter immensely. There are two instances where OMB Watch believes all outsourcing activities should be forbidden.

First and foremost, in order to prevent possible conflicts of interest, the federal government should not allow any contractor to oversee or manage a federal contract. This includes managing collection of performance information, conducting pre-award audits, or any activities that help in the selection of winning contract bids. There have been recent problems at the General Services Administration during the Bush administration with just this type of outsourcing<sup>20</sup> and any other instances of contracting oversight being privatized need to be identified and eliminated.

Second, to prevent the disclosure of sensitive, personal information of U.S. citizens held by the federal government, the contracting process should be reformed to eliminate the use of private contractors in areas where they will encounter sensitive personal information. This includes tax enforcement and management of tax records, health care delivery and management of health care histories, particularly at the Department of Veterans Affairs, and any other work at federal agencies that would encounter or work directly with sensitive citizen data. The federal government should not allow contractors to handle, analyze, store, or manipulate such information under any circumstances.

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<sup>18</sup> For a full treatment of this analysis, see Paul C. Light, *The True Size of Government* (Washington, DC: The Brookings Institution, 1999), pps. 170-3.

<sup>19</sup> Ibid. pp. 173.

<sup>20</sup> See OMB Watch Questions GSA's Approach to Accountability, December 14, 2006. <http://www.ombwatch.org/node/3118>