

**WEST GROUP
GOVERNMENT CONTRACTS
YEAR IN REVIEW CONFERENCE
– COVERING 2003 –
CONFERENCE BRIEF**

EMERGING POLICY AND PRACTICE ISSUES¹

by

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Last year, it seemed that the new Department of Homeland Security (DHS) was the big story. In retrospect, with few exceptions, that proved more of a large-scale reorganization project (with some, albeit limited, increased responsibility). *DHS Issues Homeland Security Acquisition Regulation*, 45 GC ¶ 508 (December 10, 2003); *Feature Comment: DHS Interim SAFETY Act Regulations*, 45 GC ¶ 445 (November 5, 2003); *Congress Approves First DHS Appropriations Act*, 45 GC ¶ 391 (October 1, 2003); *House Passes \$29.4 Billion DHS Budget; Exceeds President's Request By \$1 Billion*, 45 GC ¶ 256 (June 25, 2003); *EO Implements Transition to DHS*, 45 GC ¶ 107 (March 12, 2003).

I. LESSONS LEARNED FROM IRAQ?

Even with no controversy surrounding the politics involved in invading and rebuilding Iraq, the amount of money being spent – last year and for the foreseeable future – places Iraq front and center in any attempt to assess the emerging issues in federal procurement policy and practice. Unlike the DHS phenomenon, contracting in Iraq represents entirely new requirements driven by ambitious aspirations, huge sums of money, aggressive (and frequently unrealistic) timetables, and intense scrutiny from various sources (domestic and foreign).

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It is difficult to capture the enormity of the task involved. Comparisons to the Marshall Plan abound, and estimates, as high as \$50-75 billion, widely vary. See, e.g., the White House, *Fact Sheet: Request for Additional FY 2004 Funding for the War on Terror*, Sept. 8, 2003, available at: <http://www.whitehouse.gov/news/releases/2003/09/iraq/20030908-1.html>; *House and Senate Pass Emergency Supplemental Bills*, 45 GC ¶ 426 (October 22, 2003); *Reconstructing Iraq*, 45 GC ¶ 182 (April 30, 2003). The projections suggest that the Iraq procurement operation, if independently reflected in the Federal Procurement Data System (FPDS), is, in effect, a major procuring agency. Yet there is every reason to fear that the government lacks adequate resources on the ground in Iraq to properly manage and administer these contracts or ensure appropriate oversight of this massive enterprise. (As discussed below, this concern is not unique to Iraq contracting.) The controversial nature of the endeavor, and the scope of funds involved, prompted a unique media focus on public procurement rivaling (yet more sustained than) when Vice President Al Gore, riding the acquisition reform tide of the National Performance Review (NPR), shattered an ashtray on the David Letterman show.

One remarkable aspect of this is the number of seemingly uncoordinated players involved. See, e.g., the State Department's Iraq Reconstruction Contracts, <http://www.state.gov/e/eb/cba/iraq/>. The major players on the scene include: [end page 1, begin page 2]

A. After initially operating outside of the public view, the United States **Agency for International Development** (USAID or AID) has endeavored (for the most part, successfully) to provide information relating to its contracting activities on its web page, including information regarding each of its Iraq-related contracts see, *Assistance for Iraq*, available at <http://www.usaid.gov/iraq/activities.html>. (Take a moment to visit this website: I believe that USAID has set a new standard for transparency in public procurement.)

While it is easy to criticize USAID's first round of contracts awarded for Iraq reconstruction for inadequate acquisition planning, limited competition, or insufficient transparency, USAID's efforts are impressive given their limited resources. USAID administrator Andrew S. Natsios conceded that, in its 40-year history, his agency has never spent this kind of money this quickly in a single country. "The \$680 million [Bechtel] contract ...was the largest single direct contract awarded by USAID in its 42-year history and [may be] the largest single non-military foreign aid contract to be awarded since the Marshall Plan.... Collectively, the initial Iraq contracts, [then] approaching \$2 billion in value, comprise the largest single country foreign aid program since the Marshall Plan." Jeffrey Marburg-Goodman, *USAID's Iraq Procurement Contracts: An Insider's View*, 39 PROCUREMENT LAWYER 10 (Fall 2003); *USAID IG Investigation Probes Iraq Reconstruction Contracts*, 45 GC ¶ 278 (June 18, 2003). Marburg-Goodman convincingly responds to three (rather hyperbolic) criticisms leveled against USAID that: (1) the limited competition employed by USAID violated the law; (2) the secrecy employed by USAID suggested that politics played a role in contractor selection; and (3) USAID improperly excluded foreign firms. Conversely, nothing in the article convincingly disputes that USAID could and should have: (1) obtained *more* competition, (2) operated in a *more* transparent fashion, and (3) included foreign firms.

B. The United States **Army Corps of Engineers** (USACE or the Corps) began its Iraq operations with a more limited mandate, responsibility for the Iraqi oil industry (although the Corps has awarded a number of smaller contracts for potential work in the region). See, e.g., <http://www.hq.usace.army.mil/cepa/CENTCOMRFP.htm>. The Corps turned to Kellogg, Brown & Root (KBR, the Halliburton subsidiary), which prepared the contingency plans under the Army Field Support Command's Logistics Civil Augmentation Program (LOGCAP). See, <http://www.hq.usace.army.mil/cepa/iraq/oilfires.htm>. Many believe the LOGCAP contract – an indefinite delivery/indefinite quantity (ID/IQ) vehicle almost breathtakingly broad in scope – has successfully permitted the U.S. military to more quickly and effectively project its fighting forces and technical superiority around the globe. See, Army Material Command, Logistics Civil Augmentation Program (LOGCAP) <http://www.amc.army.mil/LOGCAP/>. Because this large contract involved a subsidiary of Halliburton, a company with long-standing ties to the Vice President, intense scrutiny followed (and has not abated). The Corps planned to replace the sole-source KBR contract with two competitive contracts: one for the Northern Oil Company area and one for the South. The process has been delayed and the solicitation has increased the maximum value for Northern oil fields contract to \$800 million and \$1.2 billion for the Southern. [**end page 2, begin page 3**] Critics bemoan that, the longer the Corps waits, the longer KRB continues to perform under a sole source contract. See, e.g., *Halliburton's Potential Overcharges Spark Congressional Inquiry*, 45 GC ¶ 468 (November 19, 2003); *Legislators Ask GAO to Investigate DOD's Awards to Halliburton*, 45 GC ¶ 160 (April 16, 2003); ¶ 150 (April 9, 2003).

C. The nascent **Coalition Provisional Authority** (CPA) and the **Iraq Program Management Office** (CPA-PMO) continue to defy classification. See, <http://www.rebuilding-iraq.net>. The creation, standing, and authority of the CPA raise a host of interesting (and, arguably, perplexing) issues far beyond the scope of this summary. See, e.g., *Coalition Provisional Authority Regulation Number 1*, available at <http://www.cpa-iraq.org/regulations/REG1.pdf>. The CPA's contracts are supposed to be funded by foreign assistance, with most of the spending deriving from the Development Fund for Iraq (DFI). The most intriguing document along those lines is the Department of the Army's October 21, 2003 letter to the GAO's Procurement Law Control Group, General Counsel's Office, regarding the protest of Turkcell Consortium, B-293048. The Army argued that: (1) the CPA is not a federal agency and (2) the CPA is not using appropriated funds for its contracts. But see, e.g., the *Minutes of CPA Program Review Board, September 1, 2003 Emergency Meeting*, available at: <http://www.cpa-iraq.org/budget/PRBMinutes9-1-03EmerMtg.html> (discussing the reprogramming of appropriated funds).

The CPA deserves high marks for transparency for its efforts to publish its contracting rules and its contracting opportunities. See, e.g., *Coalition Provisional Authority Regulation Number 4, Contract and Grant Procedures Applicable to Vested and Seized Iraqi Property and the Development Fund for Iraq*, available at http://www.cpa-iraq.org/regulations/CPAMEM04_AND_APPENDICES.pdf; see also, *Coalition Provisional Authority Regulation Number 3*, available at <http://www.cpa-iraq.org/regulations/REG3.pdf>. These rules, however pithy, track and mostly capture the essence of the FAR. Conversely, the CPA's procedures do not permit the same due process rights typically enjoyed by most contractors – specifically, firms may pursue limited

administrative remedies, but CPA contractors cannot access the GAO or the COFC.

The CPA, initially, did not engage in the type of large-scale contracting discussed above, yet its transaction volume appeared far greater. The scope of CPA's purchases covers the waterfront, including construction materials (T-walls and jersey barriers), supplies (up to 50,000 new AK-47 rifles; portable latrines, public address system, and a broad range of components and parts for turbines, power plants, water treatment facilities), and services. See, Coalition Provisional Authority, *Request for Proposals and Quotations/Solicitations*, available at <http://www.cpa-iraq.org/business/>. On November 21, the landscape changed, and the PMO set an (almost shockingly) aggressive schedule for competing 17 major construction contracts and a program management services contract. These potential contracts then generated significant controversy with the issuance of the December 5 Defense Department determinations and findings (D&F) document stating that only firms from the United States, Iraq, Coalition partners, and force contributing nations would be eligible to [end page 3, begin page 4] compete for the prime contracts. See http://www.rebuilding-iraq.net/pdf/D_F.pdf; *U.S. Bans Countries Opposed to Iraq War From Bidding on Reconstruction Contracts*, 45 GC ¶ 516 (December 17, 2003).

D. I understand the attraction of **protectionism**, and I am cognizant of the argument for the exclusion. The President said: "Men and women from other countries, in a broad coalition, risked their lives to free Iraq. And the expenditure of U.S. dollars will reflect the fact that U.S. troops and other troops risked their life." But as I explained in a letter to the editor of the FINANCIAL TIMES, *Bush Policy on \$18bn Iraq Reconstruction Deals is Short-sighted and Counter-productive*, on December 23, 2003, the policy seems calculated to pour salt in old wounds. It erected barriers against our trading partners simply because they disagreed with the U.S. decision to unilaterally invade Iraq, an admittedly thorny, controversial issue. That sets a chilling precedent. As the World Trade Organization's (WTO's) Government Procurement Agreement (GPA) makes clear, reciprocity is the foundation upon which trade depends. If we close our public procurement market to foreign firms, we empowers foreign states to exclude our firms from their public works projects. That's short-sighted, because \$18 billion in Iraqi public works is peanuts compared to the potentially lucrative public works projects around the globe that our firms will want access to in the future. Moreover, experience teaches us that broad limits on competition are rarely in a buyer's best interest. Also, the legal justification for the policy seems thin, particularly if the government is claiming it has not violated its trade agreements because the CPA is not a government agency. Nor is it clear to most observers how Deputy Secretary Paul Wolfowitz could sign a D&F authorizing a public interest exception to the Competition in Contracting Act. See, generally, 10 U.S.C. § 2304(c)(7) & (d)(2) (The authority of the head of an agency under subsection (c)(7) may not be delegated. . . .); FAR 6.302-7(c)(1) ("written determination to use this authority shall be made ... by ... the Secretary of Defense. . . . This authority may not be delegated.); DFARS 206.302-7(c) ("For the defense agencies, the written determination to use this authority must be made by the Secretary of Defense").

E. Of course, **other government participants**, a host of contractors, and an ever-growing cadre of subcontractors create a dynamic, rapidly fluctuating landscape, including the Commerce Department's Iraq Reconstruction Task Force. See <http://www.export.gov/iraq/>. For additional reading and research, I recommend: Robert S. Nichols, *Iraq Reconstruction: Needs*,

Opportunities, and the Contracting Environment, 80 FEDERAL CONTRACTS REPORTS 410 (October 28, 2003); *Feature Comment: The Iraq Reconstruction Effort: Potential Opportunities and Roadblocks for Contractors*, 45 GC ¶ 203 (May 14, 2003); The Center for Public Integrity, *Windfalls of War: U.S. Contractors in Iraq and Afghanistan*, available at: <http://www.publicintegrity.org/wow/>. This report provides access to many of the relevant contractual documents, at <http://www.publicintegrity.org/wow/resources.aspx?act=resources>. It also organizes much of the work by individual contractors, <http://www.publicintegrity.org/wow/bio.aspx?act=pro&fil=IQ>.

F. Recent **legislative changes** were intended to make the process slightly more transparent (particularly with regard to publication of the determinations and findings underlying limits on competitive awards). [end page 4, begin page 5] See Fiscal Year 2004 Department of Defense Authorization Act, Public Law No. 108-136, Title XIV, § 1442. See, e.g., *Senate Passes Amendment Mandating Full and Open Contracting in Iraq*, 45 GC ¶ 415 (October 15, 2003); *Senators Continue to Investigate “Secretively Awarded” Iraq Reconstruction Contracts*, 45 GC ¶ 390 (October 1, 2003). But see, Rajiv Chandrasekaran, *In a Hostile Land, Trying Whatever Works*, WASH. POST, A1 (December 23, 2003).

II. THE ACQUISITION WORKFORCE IN CRISIS

Closer to home, the single most important (and pervasive) issue remains what can only be termed the “acquisition workforce crisis.” (Sure, I’m repeating myself, since I said this last year, and probably the year before that. But it’s true.) The macro (government-wide) and micro (acquisition workforce) effects of the 1990's downsizing frenzy left the federal government woefully unprepared to identify, recruit, and manage the revolutionized workforce that the administration’s competitive sourcing initiative envisions. That the competitive sourcing initiative (more on this below) exacerbates a previously existing human capital crisis within the government acquisition workforce is no secret. “The increasing significance of contracting for services has prompted – and rightfully so – a renewed emphasis ... to resolve long-standing problems with service contracts. To do so, the government must face the twin challenges of improving its acquisition of services while simultaneously addressing human capital issues. One cannot be done without the other.” General Accounting Office (GAO), *Contract Management: Trends and Challenges in Acquiring Services*, GAO-01-753T at 10 (May 22, 2001), <http://www.gao.gov/new.items/d01753t.pdf>. The failure to address the problem prompts a race towards chaos and suggests a troubling outlook for governing.

Of the various statutory changes that survived the multi-year Services Acquisition Reform Act (SARA) saga, a number merit attention in this context. See Fiscal Year 2004 Department of Defense Authorization Act, Public Law No. 108-136, Title XIV.

A. The civilian training fund should help. § 1412. Let’s hope that the Federal Acquisition Institute (FAI) is up to the task. DoD, conversely, need not contribute to the fund, nor will it benefit from the fund. See, generally, *Proper Training for Acquisition Officials is Critical*, 45 GC ¶ 87 (February 26, 2003).

- B. The senior acquisition leadership will become more political and less stable. §§ 1421, 1422. Agencies will replace (or supplement) their current career senior procurement executives with chief acquisition officers (CAO's). A new Chief Acquisition Officers Council (CAOC?), headed by the OFPP Administrator, will replace (or supplement) the Procurement Executives Council (PEC).
- C. A new study panel (of at least nine experts) should be formed by the end of February, with a report due date one year later. § 1423. If the Section 800 panel experience is a guide, this could prove a Herculean task. Depending upon your perspective, this **[end page 5, begin page 6]** either raises or lowers the bar for the tenure of OFPP administrator nominee David Safavian.
- D. Time-and-materials contracting gained increased recognition. § 1432. Expect significant increases in the use of this contracting type (particularly in light of the competitive sourcing initiative, discussed below).

III. COMPETITIVE SOURCING AND THE REVISED OMB CIRCULAR A-76

For better or worse, the revised OMB Circular A-76 may become the legacy of Angela Styles' tenure as the Administrator of the Office of Federal Procurement Policy. Office of Management and Budget (OMB) Circular No. A-76 (REVISED), *Performance of Commercial Activities*, 68 Fed. Reg. 32134 (May 29, 2003), http://www.whitehouse.gov/omb/circulars/a076/a76_incl_tech_correction.pdf. *New OMB Report Touts Competitive Sourcing Progress*, 45 GC ¶ 416 (October 15, 2003); *Feature Comment: The New A-76 – OMB Adopts Familiar Framework for Public-Private Competitions*, 45 GC ¶ 277 (July 16, 2003); *OMB Publishes Final A-76 Rules*, 45 GC ¶¶ 223, 225 (June 4, 2003). But like so many of the 1990's reforms, a chasm – both deep and wide – separates the mere promulgation of rules and the challenging implementation of policy.

Without drastic change, the Bush administration's competitive sourcing initiative is doomed to fail. That may seem obvious to those who scrupulously followed the barrage of assaults – through legislative initiatives and litigation throughout the year intended to derail the policy. But those pending roadblocks, for the most part overcome, were mere harbingers. Even if the administration succeeds in implementing its policy, failure to achieve the policy's stated aspirations appears imminent. See, e.g., Statement of David M. Walker, *Competitive Sourcing: Implementation Will Be Challenging for Federal Agencies*, Testimony Before the Subcommittee on Oversight of Government Management, the Federal Workforce, and the District of Columbia, Committee on Governmental Affairs, U.S. Senate, GAO-03-1022T (July 24, 2003), <http://www.gao.gov/new.items/d031022t.pdf>. Among other things, the Comptroller General left no doubt that “[e]ffective human capital practices will be key to successful implementation of competitive sourcing[.]” *Id.* at 8. See also, *Walker Answers A-76 Questions; Finds Agencies Need Additional Resources to Meet Circular's Mandate*, 45 GC ¶ 414 (October 15, 2003); ¶¶ 369, 367 (September 17, 2003); ¶ 306 (July 30, 2003); ¶ 290 (July 23, 2003); *Proposed A-76 Revisions Not Consistent With CAP Recommendations*, 45 GC ¶ 35 (January 29, 2003).

The government appears unwilling to recognize the policy's costs and failure to identify, obtain, and invest appropriate resources needed to properly effectuate the policy. Lack of sufficient qualified acquisition, contract management, and quality control personnel to handle the outsourcing burden highlights two separate deficiencies: (1) the number of people available and (2) the qualifications necessary for them to perform a complicated, highly discretionary task over extended periods of time. Continued outsourcing will exacerbate this systemic weakness such that the government cannot successfully out-source in a manner that [end page 6, begin page 7] generates higher quality services, lower prices, greater efficiency, or, ultimately, better government. Instead, the competitive sourcing initiative will further expose "long-standing problems in service contracting, including poor planning, inadequately defined requirements, insufficient price evaluation, and lax oversight of contractor performance." General Accounting Office (GAO), *Contract Management: Trends and Challenges in Acquiring Services*, GAO-01-753T at 5 (May 22, 2001), <http://www.gao.gov/new.items/d01753t.pdf>. The policy invites poorly structured contracting out, specifically increased reliance on employee augmentation and personal services contracts. The proliferation of these open-ended arrangements, susceptible to unintentional abuse with enhanced flexibility with regard to time-and-materials contracts, raises concerns. See, *Contracting for Services: Contractors or Employees?*, 17 N&CR ¶ 64 (December 2003).

IV. ETHICS, PUBLIC TRUST, AND REMEDIES

It is hard to discuss procurement today without mentioning the high-profile travails of, among others, Boeing and MCI/WorldCom. See, e.g., *Boeing Dismisses Two Officials for Ethical Violations, CEO Resigns*, 45 GC ¶ 491 (December 3, 2003); *DOD IG To Investigate Air Force Tanker Lease*, 45 GC ¶ 378 (September 24, 2003). The worst case scenario would be an over-reaction and return to the late-1980's era aggressive fraud, waste, and abuse witch-hunting and proliferation of often inefficient statutes, regulations, and policies.

A. On a less dramatic scale, the government's increased willingness to suspend and debar contractors merits attention. See, e.g., *GW Suspension and Debarment Colloquium Addresses "Show Cause" Notices: Career Versus Political Appointees As Debarring Officials*, 45 GC ¶ 480 (November 26, 2003); *Feature Comment: Government Contract Suspension and Debarment – What Every Contractor Needs to Know*, 45 GC ¶ 465 (November 19, 2003); 45 GC ¶ 235 (June 11, 2003). Given prior practice, both critics and proponents long perceived suspension and debarment as a paper tiger, more symbolic than particularly useful. The Project on Government Oversight (POGO) database appears to demonstrate that large (or important) federal government contracts enjoyed nearly unfettered immunity from both the suspension and debarment remedies. See, <http://www.pogo.org/db/index.cfm>. Until recently, that is.

Even if the longstanding suspension and debarment policy lacked teeth, that did not render the policy totally ineffective. Policy makers and government officials assumed that the threat of suspension or debarment serves as the proverbial Sword of Damocles. Even when the government imposed neither suspension or debarment, the threat of a corporate death penalty provides sufficient incentive for firms to enter into less draconian compliance agreements, and

then comply with the terms of those agreements. POGO dismisses this, arguing that many sophisticated contractors recognize that they must fail miserably or commit a spectacularly heinous violation or crime in order to be suspended or debarred. Others question the viability of a suspension and debarment remedy during a period of aggressive consolidation of the defense industrial base. With fewer major, critical contractors available to compete for the government's most sophisticated requirements, it seems disingenuous **[end page 7, begin page 8]** to bar a key player from future competition. Such behavior might be described as cutting off one's nose to spite one's face.

Both the Boeing and MCI/WorldCom cases reinforce this perception. Despite high-profile actions to exclude these firms from future contracting opportunities, both have continued to land lucrative government work. Even if the price of continuing to do business with these firms could be calculated in terms of loss of public trust, how much more are taxpayers willing to pay less tainted firms in a less competitive marketplace? (Let's not lose sight of the fact that suspension and debarment are merely options in an otherwise eclectic and potent quiver of judicial, administrative, and contractual remedies available to the government.)

B. Empirical evidence supports the criticism that the government's suspension and debarment powers are not applied fairly. These tools are used heavily used against small firms and individuals who, confronted with a demanding, rule-obsessed government customer, find themselves in over the heads. Large, important, or merely useful firms appear immune to the suspension and debarment remedy. For larger contractors, alternative actions (again, typically compliance agreements) seem to suffice. As POGO's database demonstrates, the government has a long history of successfully prosecuting its contractors – or suing contractors for false claims – without suspending or debarring them. Before Enron and Andersen, the only major defense contractor suspended for decades was General Electric, and that appeared a largely symbolic gesture.

A survey of the Excluded Party Listing System confirms this perception. There are few, if any, "household names" (as a proxy for large, well-known firms) among the group. In fact, the contrast between POGO's list and the EPLS community is stark. [See, e.g., 48 C.F.R. § 9.404, List of Parties Excluded From Federal Procurement and Nonprocurement Programs, Excluded Party Listing System (EPLS), <http://epls.arnet.gov/>; and Contractor Misconduct Database, <http://www.pogo.org/p/contracts/ca-030701-contract.html>.] Surprisingly, as of November, 2003, the list of excluded parties (for procurement) included only 375 names. Given the number of routine and episodic participants in the procurement system, that's a small number, because: (1) some individuals and firms have been on the list for long periods of time; and (2) the lion's share of these appear to be individuals, rather than entities, and many of the entries are related (e.g., family members). Of the firm entries, many appear to be affiliates, sometimes in various geographic locations. More than three-quarters of the entries – whether individuals or firms – contain cross-references to other entries. Accordingly, the total number of affected parties is statistically insignificant.

C. I criticized the General Services Administration's (GSA) suspensions of Enron and Arthur Andersen, because risk to the government did not cause those suspensions. I appreciate efforts to utilize these remedies and others to maintain public trust in our procurement system, but I am unpersuaded that a genuine concern for public trust animated these actions. I fear this was political posturing (which compromises, rather than enhances, public trust). This type of pandering to the public is relatively inexpensive, but you get what you pay for. So, if it was appropriate to suspend [end page 8, begin page 9] Arthur Anderson for its role in the Enron debacle, is it now appropriate (or necessary, or fair) to also consider suspending Grant Thornton for its role in the Parmalat implosion? In not, what's the difference? (I'm not encouraging such an action, I'm just asking.) Consider three potential justifications for the suspension or debarment remedy: (1) protect the government; (2) punish contractors; or (3) maintain the public trust (e.g., send appropriate messages to elected representatives, the media, and the public). The government long has rejected the use of these remedies as punishment; whereas protecting the government and maintaining public trust justify these, and other, remedies.

D. Because procurement involves taxpayer funds, public trust, and the related principles of transparency and integrity, rank near the top of the priority list. Accordingly, I continue to fret over the the erosion of oversight, both internal and external, in the post-acquisition reform era. See also, Christopher R. Yukins, *Ethics in Procurement: New Challenges after a Decade of Reform*, 38 PROCUREMENT LAWYER No. 3, p. 3 (2003). Fewer nations today view our procurement system (or our government) as a model of fair dealing. The global watchdog organization, Transparency International, tracks accountability in government spending. Public procurement is among dozens of metrics used to compile its annual Corruptions Perceptions Index (CPI), ranking 102 countries in terms of the degree to which corruption is perceived (by business people, academics and risk analysts) to exist among public officials and politicians. Our government fares relatively well in this poll, but plenty of room for improvement remains. In 2003, with a score of 7.5 out of a possible 10, the U.S. ranked 18th out of the 133 nations ranked. But we continue to lose, rather than gain, ground. See, Transparency International, *Corruption Perceptions Index 2003*, <http://www.transparency.org/cpi/2003/cpi2003.en.html>. In 2002, with a score of 7.7, we ranked 16 of 102. (Granted, the top ranked states tend to be smallish, advanced, affluent, homogenous, well ordered societies. As many as four Nordic countries often rest in the top ten, with as many as three in the top five.) If our administrative remedies, intended to ensure that public funds are well spent, are ineffective, applied unfairly, or politicized, we cannot hope to reverse that trend. If, however, they are effective and fair, the challenge may lie in correcting public perception.

VI. SOCIAL POLICY, WEALTH DISTRIBUTION: BUNDLING

Arguably, it was a quiet year for social and economic policy in procurement. Granted, protectionist pressures seem to be increasing. See, e.g., *Senators Balk at "Buy American" Compromise in Defense Spending Bill*, 45 GC ¶ 402 (October 8, 2003); *Defense Contractors, DOD Oppose House Buy American Amendments*, 45 GC ¶ 278 (July 16, 2003). And, true to form, small business policy remains a battleground. *Federal Government Fails Yet Again to Fulfill Its Small Business Goal*, 45 GC ¶¶ 269, 271 (July 9, 2003); *GAO Says Large Firms*

Getting Awards Meant for Small Businesses, 45 GC ¶ 204 (May 14, 2003); ¶ 126 (March 26, 2003). Looking ahead, the greatest fear derives from the conventional wisdom that burdening the procurement process with social policies proves particularly attractive to second-term presidents. For now, the tortured evolution of the government's bundling policy appears the most dramatic issue.[end page 9, begin page 10]

A. Federal Acquisition Circular 2001-17 contained the revised bundling rules. 68 Fed. Reg. 59,999 (October 20, 2003); *Anti-Bundling Regulations Finalized*, 45 GC ¶ 430 (October 22, 2003); *Senate Committee Approves Small Business Bill; Limitations on Contract Bundling Included*, 45 GC ¶ 291 (July 23, 2003); ¶ 55 (February 5, 2003). To some, the statutory provisions seem inconsistent with the government's policy of buying in quantities that generate economies of scale to maximize savings. [See 10 U.S.C. § 2384(a), 41 U.S.C. § 253f, and FAR 7.202, which require agencies to procure supplies in quantities that will result in the most advantageous total cost. Solicitations invite offerors to indicate whether the quantity proposed is economically advantageous or recommend a quantity which would be more advantageous.] Before bundling, agencies must determine if anticipated consolidations are necessary and justified (i.e., consolidation would result in measurably substantial benefits in terms of cost savings, quality improvements, reduction in acquisition cycle times, better terms and conditions, etc.). Historically, the battle lines formed around whether the benefits (such as cost savings) *projected* by the procuring agency were *substantial enough* to justify the *de facto* exclusion of small business competitors.

It is easy to sympathize with the pro-small-business anti-bundling movement. Nor is it any consolation to the small business community why more contracts are bundled today. There are administrative efficiencies associated with avoiding smaller, more numerous purchases, and the need to pursue these efficiencies has increased over the last decade. The demands upon our acquisition personnel to buy more goods and services with ever-decreasing acquisition resources drive our buyers to use the most efficient (but often less transparent or competitive) vehicles to accomplish their mission.

B. Thus another disconnect exists between aspiration and the realities of implementation. The current debate fails to acknowledge the costs associated with unbundling. Demanding that an over-worked acquisition workforce aggressively unbundle its contracts is akin to squeezing blood from a stone. If the government wants its contracts unbundled, we need a meaningful discussion about how to pay for this additional effort. Otherwise, any unbundling initiative becomes an unfunded mandate burdening an already strained acquisition process. There are not enough qualified acquisition professionals left in the federal government to conduct appropriate market research, properly plan acquisitions, maximize competition, comply with a plethora of Congressionally-imposed social policies, administer contracts to assure quality control and guarantee contract compliance, resolve pending protests and disputes, and close out contracts. And the critical acquisition workforce problems will get worse before they get better. Asking this workforce, without the promise of additional resources, to unbundle its requirements, is unrealistic and, arguably, fiscally irresponsible.

C. I applaud OFPP's initiative to mitigate the effects of bundling by strengthening compliance with subcontracting plans. It makes sense to shift, to the private sector, responsibilities and functions that the government is unable to support with its own resources. If the government cannot devote sufficient resources to the identification, nurturing, selection, and management of small businesses through prime contracts, the **[end page 10, begin page 11]** government can more aggressively enlist its larger prime contractors to do so. Agencies could increase – incrementally or even arbitrarily – subcontracting goals on large contracts. This may prove the proper trade-off where bundling is unavoidable. In addition, Congress or agencies could incentivize – either through evaluation criteria or through award fees – higher small business participation.

Historically, compliance with subcontracting plans and agency oversight of contractor compliance with the plans has been inconsistent, and it is unclear what resources are available to strengthen oversight of subcontracting plans. Oversight and contract administration were hit particularly hard by acquisition workforce reductions. Increasing subcontracting plan compliance will require difficult answers to questions that, to date, have been studiously avoided. Specifically, what personnel will be deemed responsible for monitoring contractor compliance with subcontracting plans? Or, more importantly, which of their current responsibilities can be sacrificed to handle this additional responsibility?

VI. A COURT OF FEDERAL CLAIMS UPDATE

Last year, I ruffled some feathers by suggesting that – despite my respect for many of the court's fine jurists – we should consider what the litigation landscape might look like without the United States Court of Federal Claims. I was pleasantly surprised when that the WASHINGTON POST suggested that the issue merited discussion, *Court of Extravagance*, WASH. POST. A26 (March 26, 2003), and the court's proponents responded with a letter to the editor (April 9, 2003). The paper containing my research recently appeared in print, Steven L. Schooner, *The Future: Scrutinizing The Empirical Case For the Court of Federal Claims*, 71 GEO. WASH. L. REV. 714 (2003), accompanied by a number of papers defending the court (some emphatically, some less so). Few expect to see the type of dramatic reform I propose.

I remain troubled by what appears to be a rather inefficient application of judicial resources. My article demonstrated that an average federal district judgeship bears far more cases (including civil and criminal cases) than the number allocated to a COFC judgeship. See, 71 GEO. WASH. L. REV. 737-743, particularly Figure 9. To the extent that I compared judgeships, not judges, the disparity actually is far greater (because the COFC, due to a statutory anomaly, boasts an inordinately high number of senior judges). Since the data was generated, however, *another six judges were added* to the COFC's bench. See, e.g., *Bush Nominates Several New COFC Judges*, 45 GC ¶ 16 (January 15, 2003). Granted, filling judicial vacancies is a potent and attractive Presidential prerogative, but it's difficult to reconcile this action with common sense or fiscal responsibility.