TESTIMONY OF RALPH C. NASH

before the

Subcommittee on Contracting Oversight
Committee on Homeland Security and Governmental Affairs

February 23, 2010

For many years, Congress has authorized agencies to establish contracts that could be used by other agencies to meet their acquisition needs. The traditional contracts of this nature are issued under the Federal Supply Schedule, pursuant to Title III, of the Federal Property & Administrative Services Act, 41 USC § 251, et seq. These contracts permit agencies to buy directly from holders of the contracts (hence they are termed the "direct acquisition" form of interagency contract). The contracts contain prices but they place the burden on the contracting agency to enure that they are receiving the best price that can be obtained from a vendor. The major problem with these contracts is that the prices in these contracts are stated in FAR 8.404(d) to be "fair and reasonable" even though the General Services Administration has not compared the prices with the prices of other vendors when placing them on the contract (the issue addressed by GSA in making the "fair and reasonable" determination is whether the vendor has offered a discount from its commercial prices). This has a tendency to mislead contracting officers buying off of the schedule. This tendency is exacerbated in the case of "prices" that are actually fixed rates for hours of labor which is the predominate form of price on the contracts for services. The Subcommittee might want to explore the amount of overpricing that has occurred because of this situation.

The other form of interagency contract is the "assisted acquisition" contract where the agency issuing the contract actually conducts the acquisition for the originating agency. The traditional form of contract of this type was issued pursuant to the Economy Act, 31 USC § 1535, as implemented in FAR Subpart 17.5. The regulations here provide good guidance in controlling this type of interagency contract with the result that there appear to be few problems in the use of this authority.

In the 1990s Congress authorized two new forms of "assisted acquisition" contracts – Government-Wide Acquisition Contracts (GWACs), 40 USC § 11302, and Franchise Fund contracts, § 403 of the Government Management Reform Act of 1994, Pub. L. No. 103-356. These types of contracts apparently were based on the theory that allowing a single agency to acquire certain types of products or services would allow the government to obtain better prices by taking advantage of economies of scale. They may also have been the result of a belief at the time that having competing contracting agencies would induce contracting offices to improve their acquisition practices. It is my view that neither of these theories have worked out in practice.

Unfortunately, the result of the 1990s legislation was a competition among agencies to

create multiple assisted acquisition contracts charging significant fees as a way to bolster their contracting activities. Some of these contracts covered a limited scope of work, carrying out the apparent Congressional intent to establish specialized buying activities. Other such contracts claimed to offer the capability to acquire any and all types of work – a claim that was preposterous on its face. Many of the contracts overlapped the contracts issued under the Federal Supply Schedule. The end result was an excessive proliferation of interagency contracts that bewildered agency contracting officers and forced contractors to enter into multiple contracts for the same work in order to ensure that they would be considered for a contract no matter which vehicle the ordering agency selected. In some cases, we saw ordering agencies sending funds to an assisted acquisition office (paying a fee) which would then acquire the product of services from the Federal Supply Schedule (paying another fee). Furthermore, we saw numerous instances where requirements offices in agencies ran around their own contracting office and went to an interagency contract to obtain needed goods and services – frequently dealing with an agency that did not understand fully the special provisions applicable to that agency. In my teaching I used to warn contracting officers that these interagency contracts were hunting licences issued to contractors and they were not the quarry. Early into this decade, the Government Accountability Office, the Office of Federal Procurement Policy, and the Office of the Secretary of Defense recognized that this situation was chaotic and needed to be addressed.

I would draw several conclusion from this recent history of interagency contracting:

1. We need to reduce the proliferation of interagency contracts. If the fundamental premise is that the government should have specialized acquisition offices to obtain certain types of products or services, there should be a very limited number of such offices for each type of product or service. Furthermore, these assisted acquisition vehicles should be limited to situations where an agency has special ability to procure a narrow class of supplies or services or can accumulate the requirements of a number of agencies to take advantage of economies of scale. It makes little sense to force a contracting agency to understand the capabilities of numerous offices in other agencies in order to assess which office to use. Furthermore, having a number of offices acquiring the same product or services deprives the government of the benefits that can be obtained through economies of scale. In some cases, there should only be one office established to acquire a specified product or service. While it makes sense for the Federal Supply Schedule to duplicate such vehicles when the product or service is simple in nature (allowing the contracting office to buy directly from the vendor with a schedule contract), it is questionable whether such duplication should be allowed when complex transactions are required (where the assisted acquisition office has the specialized skills to acquire that type of product or service).

2. We need to assist contracting activities in using interagency contracts to their fullest advantage. First, the Office of Federal Procurement Policy should publish and maintain a catalog of assisted acquisition vehicles that clearly states the specific supplies or services that can be obtained through the vehicle, the procedures to be followed in using the vehicle and the fees that will be charged. Second, interagency contracting offices should be certified by the Office of Federal Procurement Policy as being fully competent to acquire the product or service in which they specialize. It is unreasonable to require an ordering office to determine by itself whether an

interagency contracting office is competent. Once an office is certified as being competent, there should be regular reviews of that office's contracts to ensure that it has actually obtained a favorable deal for the government.

3. Requirements personnel in agencies should not be permitted to run around their own contracting offices to obtain their products of services. The idea that providing competition between contracting offices would induce them to improve their capabilities was an interesting idea but in my view our experience with interagency contracts demonstrates that it was not sound. Put another way, the decision to use an interagency contract should be reserved solely to the contracting officer of the ordering agency.

4. It follows that contracting offices in each contracting activity should be staffed with sufficient personnel to acquire the unique products and services required by that activity and to determine when to use an interagency contract to obtain common products and services. Even with simplification and consolidation of interagency contracting vehicles, each contracting office will need to have a cadre of personnel that have the expertise to choose among the available interagency contracts. The government should institute training programs to ensure that these people are given the tools necessary to make wise choices in this regard.

5. The contracting office in each contracting activity should have full discretion to use an interagency contracting vehicle, establish an agency task or delivery order contract in lieu of using an interagency contract, or acquire the product or service as a separate procurement. However, such discretion should be limited when there has been a high level decision to fulfill the entire needs of the government for a certain product or service by the issuance of a government-wide contract.