UNIVERSITY OF BALTIMORE SCHOOL OF LAW

Charles Tiefer
Professor of Law
CTIEFER@ubalt.edu

3904 Woodbine Street
Chevy Chase, MD 20815

TESTIMONY BEFORE
THE SENATE SUBCOMMITTEE ON CONTRACTING OVERSIGHT

by Professor Charles Tiefer

THE PRIME VENDOR PROGRAM FOR DoD PURCHASE OF FOODS HAS SEVERE CONTRACTOR CHEATING WHICH WARRANTS OVERSIGHT AND REFORM

Thank you for the opportunity to testify today on the subject of improper food service contracting with the United States government for our forces in Iraq and Afghanistan. I am Professor of Law at the University of Baltimore Law School since 1995, and the author of a casebook on federal government contracting.[1] In 2008-2011, I have been a Commissioner on the statutorily chartered, federal Commission on Wartime Contracting in Iraq and Afghanistan, which held twenty-five hearings on problems in government contracting. I note that the chair, Senator Claire McCaskill, was a key sponsor of the legislation creating the Commission. My Commission could never have performed its work of looking into waste, fraud, and abuse in contracting without her absolutely crucial support and leadership.

For the Defense Department operations in the war zone – including soldiers, civilians, and contracting personnel – the government purchases the necessary food to be served at dining facilities and the like by its "Prime Vendor" contracts, managed by the Defense Logistics Agency (DLA). In recent years, the prime vendor contracts have drawn attention because of massive criminal and civil fraud cases filed by the Justice

[1] GOVERNMENT CONTRACT LAW: CASES AND MATERIALS (Carolina Academic Press 2d edition 2004)(co-authored with William A. Shook).

Department against the Prime Vendor for the Iraq foodservices contract, Public Warehousing Company (PWC) (which has renamed itself Agility).[2]

As the professor of government contracting law on the Commission, and one of its only two lawyers, issues like fraud in the foodservice contract attracted my special interest and attention. As Commissioner, I delved with our staff into these issues. The staff team on logistics, with which I worked closely, led by the highly able Steven Sternlieb, took a full-scale review trip to the Philadelphia office that handles the prime vendor food purchase program. I myself went to Ft. Belvoir for a full-day briefing by the top levels of Defense Logistics Agency, including talking to the head of DLA, Nancy Heimbaugh. DLA provided a length and very concrete in-house report by its Operational Evaluation Team on its current improvement efforts. I raised DLA-related questions at several Commission hearings.[3]

I. Scale of the Improper Charging

At the heart of these cases is cheating of the government by PWC not passing along discounts from suppliers, and similar schemes involving manipulations of costs from suppliers. The scale of these improper discount schemes is breathtaking. PWC earned $8.5 billion in revenue from the Iraq supply contracts. Press accounts in the Washington Post and the Atlanta Constitution-Journal say PWC discussed a settlement with the Justice Department of these cases for $500 to $600 million. Lawyers familiar with the negotiations said that a settlement agreement, if reached, would be $750 million.

Parenthetically, that does not in the least take away from the great significance of the testimony today about the school meals. The Commission's job was review.[4] The NY testimony involves hands-on experience the Commission did not have, and I myself am learning a great deal from it. What I can say complements the school meals testimony, while fully recognizing its importance.

Trial has not yet occurred for the PWC fraud cases because of lengthy pretrial proceedings in the case, and so the best source of information about the case continues to be the Justice Department's detailed criminal indictment of PWC. The indictment's statements, and the prior investigation leading to it, have been used both by DLA and by the GAO to develop and uphold precautions for the program. So, while what I say about the indictment should be regarded as "alleged" and not proven for purposes of the criminal case itself, those statements are relevant , and, they can and should be used for considering both the need, and the methods, to prevent fraud in this context. Parenthetically, the fraud was first exposed by a whistleblower lawsuit by Kamal Mustafa al-Sultan– a qui tam lawsuit pursuant to the False Claims Act. The Justice Department found merit in the suit and announced the United States joined the civil suit at the same time it announced the indictment.

Basic Example

[2] The contracts covered Iraq, Kuwait, and two other countries, but the bulk of the food was for Iraq.

[3] DLA had other problems in this period, such as with fuel and with the foodservice contract in Afghanistan. So, my briefings and Commission hearing questions included a focus on those other problems.

[4] The Commission did not go into PWC's records, did not sue, did not have negotiation with the vendor, and did not implement remedies.

To understand the problem discussed in the Justice Department's indictment,[5] we focus on the series of contracts in 2002-2005 that went to Public Warehousing Company, later called Agility, for total payment of about $8.5 billion. Suppliers – like producers of prepared foods – charged their supplier rates --"Delivered Price" -- which PWC passed along to the government, adding on its own "Distribution Fee." The contract used the pricing formula: "Delivered Price" plus fixed "Distribution Fee" = Unit Price (per unit of product). For supplies bought in the United States, the Delivered Price consisted of the supplier's charge plus transport costs (unless the U.S. handled transportation) to the place in the United States, called the "place of performance," where the government took over the food product to get it to Iraq.

A great deal of the food, ranging from meat and chicken products to desserts, is produced here in the United States. These are supplied (for the most part) by United States suppliers here in the United States. And, this United States food was delivered to, and received by, delivery points here in the United States. This is important because it means the problems were with the United States food supplying industry that supplies food to government buyers. The same type of United States suppliers who provide prepared food to schools here would provide prepared food to the distribution points in the Justice Department indictment. To me it seems quite obvious that the same types of vulnerabilities to fraud shown in the indictment are the vulnerabilities to fraud shown in the school meals case.[6]

For the Prime Vendor such as Agility, what was supposed to be the limit on how it could profit was the Distribution Fee. This was a firm fixed price. It was supposed to cover all expenses, profit, packaging, and transport to final delivery points. This was the only amount PWC was allowed to add to the suppliers' Delivered Price.

PWC was forbidden to keep rebates or discounts from suppliers, apart from narrowly defined, limited, genuine "prompt payment" discounts for PWC paying a supplier quickly. If Agility got rebates or discounts, it was supposed to pass them on to the government, such as by subtracting them from the Delivered Price. However, PWC was not doing such subtracting. It was allegedly using its marketing muscle to obtain and to keep such discounts, and covering this up by false statements.

Take one of the indictment's examples in some detail, before summarizing others. The indictment explains in paragraph 63a that in 2005 " [U.S.] manufacturer S.L. engaged in discussions with defendant PWC . . . . S.L. proposed that any increase in any discount or allowance be tied to S.L.'s receipt of additional business, in particular, the purchase of pies from S.L." To identify suppliers, the indictment only uses initials like

[5] Of course federal indictments are handed up by a federal grand jury. However, that grand jury receives evidence from a federal investigation headed by the Justice Department. For simplicity we speak of a "Justice Department indictment."

[6] To be sure, there is also a foreign and Iraq aspect to the Public Warehousing indictment. (While prepared foods were produced in the United States, other food was not produced in the United States, such as, typically, fresh food and vegetables.) However, it appears from the indictment that we can readily distinguish the problems that were here in the United States and put aside the foreign and Iraq aspects.

The top entity involved in Public Warehousing is a Kuwaiti corporation. And one part of the fraud charges concerned a related Kuwaiti corporation. However, my testimony will not involve those aspects.

"S.L.," but the press or blogs have attributed named well-known food suppliers, like Sara Lee.

The indictment continues, "Throughout the discussions between defendant PWC and S.L. about discounts, PWC insisted that the discount be called an 'early payment discount,' even though S.L. did not want to use that term and suggested that any discount offered to PWC be called what it was, a marketing allowance or rebate. Defendant PWC insisted that the allowance be labeled an `early payment discount,' even though S.L. did not want to use that term and claimed that it could not be called a marketing allowance or rebate. Ultimately S.L. agreed to use the label that defendant PWC demanded."

Here we see the pressure applied by the Government's prime vendor to its suppliers, to take payments that should go to the Government and instead describe these in a false way as early payment discounts so the prime vendor could improperly pocket them and deceive the government about this. Note that the pattern resembles the garden-variety kickback in a government contract in some ways. As with a kickback, the subcontractor receives more business from the prime contractor, under pressure from the prime contractor to "kick" it "back" a payment that raises the government's costs. I would call it a "kickback-like" payment.

Other examples

Now summarize a number of examples. The indictment explains in para. 35 and 36 that PWC turned down the bargains it was contractually required to get for the United States: "PWC failed to purchase less expansive product that it was instructed by [the Defense Department] to purchase because the vendor did not offer PWC a 'prompt payment' discount." Specifically, an honest supplier ("G.S.") with facilities in Conyers Georgia quoted a Delivered Price to defendant PWC of $161 per pound. "G.S." – there is a beef supplier in Conyers, Georgia named Golden State Foods – deserves credit for refusing to cooperate with PWC's scheme, and PWC went elsewhere, to another supplier, R.P.Q.

So in the face of repeated government inquires why PWC was not buying ground beef from G.S., PWC falsely claimed that honest supplier had a significantly higher price. "PWC was buying from R.P.Q., in part, because R.P.Q. offered it a 'prompt payment' discount, and G.S. did not." The aftermath: "From 2004 until 2007, defendant ignored the directive of [the government] to purchase ground beef from G.S. and often purchased it from R.P.Q., at an inflated Delivered Price, in part because R.P.Q. gave PWC a 'prompt payment' discount while G.S. did not."

Here we see a stream of falsehoods to the government by the prime vendor. The normal oversight which the government repeatedly attempted, is frustrated by these contractor falsehoods. And, the concealed corruption punishes the honest supplier who will not cooperate in the scheme, while rewarding the supplier who treats rebates and discounts in a way that is consistent with PWC's schemes.

In para. 44-50, the indictment describes a scheme, which, as simplified, allowed PWC to make the government pay bills that were supposed to be PWC's. PWC engaged a "consolidator" at the delivery point in Front Royal, Virginia. PWC was supposed to pay for consolidation services out of the "Distribution Fee" paid to it by the government. Instead, the suppliers were charged these services and included the charge in the Delivered Price paid by the government, increasing PWC's profit and increasing the United States' costs.

In para 41-60, the indictment describes a similar scheme. As simplified, in one instance, "In October 2005, defendant PWC considered purchasing breakfast sandwiches from [U.S.] manufacturer P.F." A blog has mentioned Perdue Farms as a supplier involved in the indictment transactions; Perdue Farms does make breakfast chicken sandwiches. "P.F. advised defendant PWC that the Delivered Price of the breakfast sandwiches was $90.00 per case with an allowance of 8% or $7.20 per case meaning that the actual case price was $82.80 . . . . through [PWC's designated] consolidator/distributor. . . ." And, "It was part of the agreement between defendant PWC and [its consolidator that the consolidator] would quote a Delivered Price, not of $82.80 or even $90.00 per case as offered by P.F. to PWC, but an inflated Delivered Price of $93.60 . . . resulting in a fraudulently inflated price to the United States for the breakfast sandwiches, while eliminating the distribution fee that PWC would have to pay to [its consolidator]"

Sometimes the schemes affected the packing of the product. Para. 64-66 address this. These relate that "to increase the Distribution Fees paid to PWC by the United States for the same amount of product, PWC asked some vendors to decrease the amount of product in each case (generally referred to as pack size)." "PWC asked a sales representative for vendor Z.I., a company located in Rome, Georgia" – there is a meat processing company sometimes referred to as Zartec Inc. in Rome, Georgia – "to change to a smaller pack size for several products for which the Distribution Fee was calculated on a per case basis."

"As a result of defendant PWC's request, vendor Z.I. reduced the pack size on three products. Defendant PWC utilized the smaller pack size of these three products to invoice DSCP additional Distribution Fees totaling about $1.4 million in excess of what those fees would have been without the artificial reduction in the pack sizes of the three products." In other words, the PWC deal now altered the way the food was delivered.

Besides the scale of the problem with the Prime Vendor foodservice contract, and some of the mechanics, these parts of the indictment reveal something else. They show that a lot of the improper conduct took place here in the United States. These are domestic aspects, not foreign or war zone problems.

Furthermore, the problems involved mainstream food suppliers of substantial size, not tiny or exotic providers. I will not speculate as to whether or how witting they were, what and how much they knew or suspected, or whether their activity was extracted by intense pressure and threats, by incentives, or simply by PWC's cunning. Although these factors matter greatly for some aspects, regardless of these, the problem is not an isolated problem coming out of some narrow context of providers of unique products.

These are mainstream products like ground meat and breakfast sandwiches. These are heartland U.S. locations like Rome, Georgia and Conyers, Georgia. And, the problem is not very different, in terms of the suppliers involved, as would be found in the school meals program. If some would prefer to whitewash or to minimize the problem by saying that it is not serious, or is just from a few rotten apples in an otherwise sound industry barrel, they have an uphill struggle to show this convincingly.

II. Problems and needed reforms exposed by Kickback Abuses

What are some of the overall problems exposed, and corresponding needed reforms, exposed by the kickback-like abuses at PWC? Let us see how important is the

problem with these mislabeled rebates and discounts, and similar schemes. That the schemes worked for a number of years, over the life of an $8l.5 million set of government contracts – judging from the enormous settlement offers, on a huge scale – points up the huge scale.

The problem is not merely of waste, but of corruption. If the food vendor mistakenly, but honestly, buys from a more expensive supplier than necessary, that is mere waste. That is undesirable. But, it may not even be so problematic for the government as to spark a refusal to pay. Assuming proper procedures such as seek several quotes were followed, only in a rather striking case might auditors question the expenditure as unreasonable. More often, waste is deemed unfortunate and regrettable but part of an imperfect world, and its occurrence will be expected to be self-correcting and not to undermine the whole contracting enterprise.

However, the allegations in the indictment amount to something much worse: corruption. The prime contractor makes false reports, both in words and in numbers, and even created an entire false stream of reporting. Moreover, the prime contractor devotes its skills, and its planning and arranging, not to doing its job better, but to cheating the government better and to escaping detection. And, it made use of United States suppliers, including some very large ones, in the schemes.

Furthermore, the suppliers who have acted consistently with the schemes are put in an uncertain situation. However the schemes took place, even if suppliers were in the dark about some or most of what PWC was doing, these suppliers too have been brought by the schemes into a universe of false reporting to the government of their transactions. They have come into a changed foodservice business in which skill, planning, and arranging are not devoted to doing the job better, but to cheating the government and to escaping detection.

Who knows where the moral journey downward that starts in simply participating, even unwittingly, in a prime contractor's scheme, will end for the supplier and for others in the industry? Moreover, competition among suppliers for the prime vendor's business may have the effect of driving down the legal and moral level of activity. The instances just described include specific examples in which a virtuous contractor who firmly refused to mislabel discounts lost out to other contractors who were willing. This is how corruption in federal contracting works a general corrosion – the competition powerfully pressures all providers, prime and subs alike, downward to the lowest common denominator.

III. Lack of visibility

The first problem and corresponding reform relate to the lack of visibility to the government of transactions with subcontractors/suppliers. This is not unique to foodservice contracting, but, it is clearly an acute one in this field.

The government has only a narrow window on subcontractors/suppliers: it may see their invoices in paying the vendor's price. It does not see the rest of what goes on with the subcontractors/suppliers that is involved in the fraud. The government does not see private discounting deals between PWC and the supplier, let alone their details, negotiations, impact, and implications. In most of these instances, the government has not even pinned down a prime vendor like PWC to certifying falsely that it is not

cheating the government by deals with the subcontractors, let alone pinned down the subcontractor about anything remotely bearing on the discounts and similar transactions.

Moreover, the government makes a kind of contract, with the prime vendor like PWC, that was apparently viewed by some in the past as entailing a lack of visibility of the subcontracting. This keeps the government completely in the dark about the basic costs of the contractor covered by its Distribution Fee, and all about the subcontractor/suppliers. The Distribution Fee to the contractor is deemed a fixed price or fixed rate per unit. Although the "Delivered Price" has a cost that changes from time to time, and there is a danger of rearranging of rebates, discounts, and other amounts between the "Delivered Price" and the "Distribution Fee," there has been a tendency in the past to note that this is not a cost-reimbursement contract so the prime vendor does not have to provide the kind of information and access on costs provided by a cost-reimbursement contractor.

The subcontractor/supplier, too, sells the product on a fixed rate basis, and does not have to provide the kind of information and access on costs provided by a cost-reimbursement subcontractor. Moreover, since PWC is not a cost-reimbursement contractor, it does not have a "purchasing system" which government auditors can check to see whether sound practices are being followed adequately.

It is not merely that PWC did not have to furnish regularly to the government the kind of records that would reveal the fraud. Rather, PWC does not even have to allow an auditor to have access to the records that would reveal the fraud. Auditors ordinarily have no basis to ask, for a contractor like PWC, to provide access to the contractor's books. And, the subcontractor/suppliers would certainly look askance if government auditors showed up on a routine basis to review their books, with no clause in their own subcontracts providing for this.

I am not going to try to precisely dictate the changes to be made, but simply say that there is a need to increase the visibility of subcontractors, and of the prime's dealings with subcontractors. This does not at all involve transforming the contract from to a cost-reimbursement one. Cost-based contracting has to do primarily with the distribution of the risk between the government and the contractor, not primarily with the records. There are two ways to increase the visibility without necessarily prescribing in any great detail the creation of records beyond those currently present.

First, the government may provide for increased access by government officials and auditors on a routine basis to foodservice corporate officers and employees, and, records, at both the prime vendor and supplier level. A possible way to arrange this flexibly would be to provide that they shall have such access as the prime vendor contracts or subcontracts specify. Then it would be left to DLA, in setting up prime vendor contracts and its subcontracts, to decide whether to include such authority. Auditors or other involved supervisory personnel would set up procedures to inquire, using this authority, on a schedule that would detect improper activity without unduly burdening the prime vendor and its suppliers.

It should not take a fraud investigation, for a criminal or civil fraud case like PWC's, to obtain such access. And, it should not take subpoenas. Agencies may have subpoena authority which they husband for the most extreme cases. By limiting the auditing to prime vendor contracts and their subcontracts, arguments against that

auditing should not be persuasive that would be made if this went beyond the particular troubled prime vendor context to sweep up large areas of government contract.

Second, both prime vendors and suppliers should declare all the discounts they have given or received, and all redistributions of costs (such as consolidation costs) between the supplier and prime vendors, and certify these are transparently described and that there are none except the declared ones. If there are very frequent or small-volume transactions, then rather than have the declaration and certification occur for each transaction, it could occur periodically (i.e., depending on the volume of activity, anywhere from every year down to some fraction of a year). DLA should advise contractors and suppliers to maintain systems for reporting discounts and redistributions of costs to the officials who perform the declaration and certification.

This would not require contractors to maintain cost-type books and accounting as to anything besides such discounts and cost redistributions. It would detect improper activity without unduly burdening vendors. An additional benefit of such certifications is that it would increase the effectiveness of whistleblower lawsuits and other False Claims Act suits. It was just such a lawsuit by Kamal Mustafa al-Sultan that exposed the PWC fraud.

Industry critics may oppose such measures by suggesting that there is something unprecedented about taking such measures about supplier rebates. On the contrary, there is a long, important history of the government vigorously pursuing such rebates and refunds. Richard C. Johnson & Alan M. Bule, *Taxes, Refunds, Credits, and Cash: Handling the Government's Share of Sales and Use Taxes Refunded Under Aerospace Corp. v. State Board of Equalization*, 28 Pub. Cont. L.J. 449 (1999; Ralph C. Nash &John Cibinic, *Credits: Giving It Back*, 9 Nash & Cibinic Rep. para 55 (Sept. 1992). Today this is recorded in the important "Allowable Cost and Payment" clause, 48 C.F.R. 52-216-7.

This is not just for cost-reimbursement contracts. 48 C.F.R. 16.307 about regulating, and 52-216-7 about the clause, regarding refunds and rebates, both apply to time-and-materials contracts, which, like the prime vendor contract, vary with the costs of suppliers of materials. The audit clauses also apply to such time-and-materials contracts.[7] 10 U.S.C. sec. 2313; 48 C.F.R. sec. 52.215-2. And, 48 C.F.R. 1552.232-73, entitled "Payments—fixed rate services contract," has specific subsection (g), entitled "Refunds," that "The Contractor agrees that any refunds, rebates or credits . . . that arise under the materials portion of this contract . . . shall be paid by the Contractor to the Government." It further requires that the contractor make "an assignment to the Government of such refunds, rebates, or credits . . . ."

What these regulations, standard clauses, and their history mean, is that the government has long insisted that supplier rebates and discounts be passed to the government. The government has taken steps to insure, not merely for cost-reimbursement contracts, but also for time-and-material contracts, that rebates and discounts be passed to the government. Like prime vendor contracts, time-and-material contracts pass along the costs of materials to the government in a way that makes the vulnerable to practices like PWC's that keep the rebates and discounts from the government. When necessary, the government has backed this up with audit provisions.

[7] The discussion here is about noncommercial time-and-material contracts. Commercial ones are different.

In responding to the current scandal in foodservice refunds and discounts, we are merely doing what we have to, in order to protect the taxpayer and the fisc.

IV. Oversight Weakness

DLA has weakness of oversight. It simply does not focus on fraud. Its own internal OET team found the most striking example: DLA contracting personnel did not receive enough training on spotting indications of fraud. DLA personnel did not have enough training to spot the signs of fraud in the PWC Prime Vendor contract. There are manuals or chapters of fraud indicators which they could study. And, DLA's heads of Primary Level Field Activities conduct pre-award reviews – i.e., oversight reviews. However, these focus on issues like performance metrics and do not specifically focus on vulnerabilities that create opportunities for fraud. In retrospect, the primary vendor contract used for the Iraq award called out for such review.

Similarly, the internal OET review found that DLA did not have procedures to validate if the vendor was providing discounts to DLA. Moreover, DLA was not set up for meaningfully checking price reasonableness. DLA did not request subcontractor invoices on a general basis, only when introducing new products or for significant price changes.

This is just a sampling of the large number of aspects of weak oversight found by the OET review. To DLA's credit in general, and its Direction Nancy Heimbaugh's credit in particular, DLA conducted such a no-holds-barred internal review, and, is seeking to implement its proposals. Since this is an agency with many critical demands, and new ones may supplant prior ones, it could use Congressional reinforcement of the need for reforms. Either the GAO or the DoD-IG could be tasked to check on whether the program has been reformed sufficiently.

Need to keep government standards above "commercial" practice

One great problem as the government seeks to get a hold on foodservice fraud is the constant pressure to pull government standards down to the level of "commercial" practice. Such pressure pulls the government away from the kind of strictness in the PWC prosecution and in tightened-up DLA administration. That is the kind of strictness that is the goal of the government as the steward of taxpayer funds. That is the kind of strictness for dealing with corruption before it undermines the foundations of the state.

Down at the commercial level, rebates and discounts are taken much less seriously. They are simply one of many kinds of issues that arise regarding who owes how much to whom in the course of fluid commercial transactions. These are not taken too seriously because that would interfere with the wheels of commerce. Whereas bribery of a government official is a felony, commercial bribery is commonly taken as a misdemeanor. The kind of bright lines precluding certain kinds of payments in the government contracting context are replaced by gray areas about payments among agents in the commercial context.

Similarly, at the government level, the need to preclude corruption or fraud leads to requirements of certifications, record-access and record-keeping. The avenues through which corruption can infect the work of the government must be blocked off, even if that requires more oversight and more records. Down at the commercial record, such requirements are given much less of a welcome. Industry groups will say that tolerant commercial standards should govern discount and rebate practices, in order to reduce administrative interference and red tape.

In this very context of foodservice contracting, there have been legal proceedings – protests about the way a procurement was being conducted – resolved by the Government Accountability Office (GAO). In 2009, before the indictment, DLA issued its request for proposals that would lead to award of the next Iraq prime vemndor contract. It was a "commercial" contract, meaning that it should omit terms inconsistent with customary commercial practice. This is done to encourage vendors to compete who come from the general commercial world, and not only from an overly limited pool of government vendors. PWC protested that the clauses requiring discounts be passed on to the government should be eliminated. DLA had obtained a waiver allowing it to have those clauses, but, GAO may review such waivers for reasonableness.

This procedure was in line with an effort since the mid-1990s to obtain more competition by having more commercial practices. Individual companies and sometimes trade associations will seek to restrain efforts DLA has made in the past, or might make in the future, about the improper handling of discounts and similar schemes. My own view has been that taxpayer funds are too vulnerable to waste, fraud, and abuse, to allow the knocking-down of protections by invocation of the commercial practice argument. It is an argument best used against overly rigid specifications, such as "MIL-SPECs." It is not an argument for leaving the government vulnerable to corruption, as in this matter.

GAO rejected PWC's protest. It received government declarations about the problems, with information about the investigation then being conducted (that led soon thereafter to the indictment). GAO said: DLA "faced with possible overcharges to the government under PWC's current contract, has adopted a series of pricing provisions intended to safeguard the government from excessive charges and to ensure pricing transparency and integrity. . . . PWC has not shown nor does the record otherwise indicate, that the agency's objectives with these provisions could be accomplished by the use of commercial clauses."

In 2011, foodservice bidders challenged, at GAO, a recent request for proposals that would lead to award of a prime vendor contract. Once again, DLA had obtained a waiver allowing it to have provisions on such subjects as rebates and discounts. GAO upheld DLA's provisions. It stated, that DLA's "waiver justified changes to these provisions on the grounds that the agency wanted to avoid excessive pass through charges from multiple sources along the supply chain, promote transparency in pricing, and insert integrity into commercial pricing practice." GAO further added that DLA justified its waiver as "necessary to ensure that the delivered price charged to the government only includes the price of the product delivered to the initial entry point of the contractor's distribution network . . . ."

GAO upheld the DLA clauses on rebates and discounts, saying: "we cannot find unreasonable the agency's decisions – when faced with possible overcharges to the government – to adopt a series of pricing provisions intended to safeguard the government from excessive charges and to ensure pricing transparency and integrity." GAO cited its 2009 ruling on PWC's protest.

These are GAO rulings. DLA's clauses may be challenged before the Court of Federal Claims. Accordingly, the Subcommittee should remain vigilant as to the need to reinforce DLA's position in defending the taxpayer against waste, fraud, and abuse in the prime vendor program. Moreover, further reforms are needed, and should not be impeded by "commercial practices" arguments.