

*How the Lead Systems Integrator Experience
Should Enhance Efforts to Rebuild the
Defense Acquisition Workforce*

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Abstract

How the Lead Systems Integrator Experience Should Enhance Efforts to Rebuild the Defense Acquisition Workforce

The primary focus of this paper is on how the lack of qualified acquisition personnel within the Department of Defense (DOD) and Department of Homeland Security (DHS) lead the military services to use lead systems integrators (LSIs) for certain complex programs. This paper explores the growth of LSIs in relation to DOD's and DHS's acquisition of major weapon systems. Namely, this paper will attempt to explain why private contractor LSIs became necessary and what can be done to correct the situation while still advancing the state of the art in major weapons systems procurements.

This paper will explore the lack of strategic planning involved in the drastic cuts to the federal acquisition workforce that occurred during the 1990's. This paper will also explore the massive expansion of procurement requirements post-September 11, 2001, and how, despite this increase in workload, the number of personnel within the acquisition workforce remained fairly constant. This paper will examine two high profile examples of LSIs being used to assist the Army and the Coast Guard in the development of their premier procurement efforts: the Future Combat Systems (FCS) and Deepwater program. The problems associated with these efforts received a great deal of attention, which directly contributed to Congressional attempts to limit and eventually prohibit the use of LSIs.

Ultimately, LSIs were necessary to advance agency goals in the absence of in-house talent. While the LSI experience generated its share of problems, and exposed the

increased potential for OCIs, it was a symptom of a larger problem as opposed to simply being the problem. This paper will also address the foreseeable difficulties of infusing the acquisition workforce with more personnel without strategic planning. Specifically, the military needs a concerted effort, not only to hire competent and professional program managers and systems engineers, but must also continue to train and develop these crucial pieces of the personnel puzzle. While the economic and political environment may make this an uphill climb, the resolve of our political leadership will be necessary to institute the needed infusion of human capital.

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I. INTRODUCTION:

At the moment, in large part due to its ability to purchase and deploy cutting edge technology, the United States military is inarguably the world's most dominant fighting force. However, this current status is not an immutable characteristic or permanent condition.¹ The continued development, production, and acquisition of major weapons systems² is a critical component to ensuring the national security of the United States. It is the responsibility of our political leadership, Department of Defense (DOD) personnel, and Department of Homeland Security (DHS) personnel to seek continual improvements in the process of acquiring the technologies that ensure our military superpower status.³ Secretary of Defense Robert Gates recently stated “[r]eforming how and what we buy

¹ See generally Quadrennial Defense Review Report, Feb. 2010.

² 10 U.S.C. § 2430 - Major defense acquisition program defined:

(a) In this chapter [[10 USCS §§ 2430](#) et seq.], the term "major defense acquisition program" means a Department of Defense acquisition program that is not a highly sensitive classified program (as determined by the Secretary of Defense) and--

(1) that is designated by the Secretary of Defense as a major defense acquisition program; or

(2) that is estimated by the Secretary of Defense to require an eventual total expenditure for research, development, test, and evaluation of more than \$ 300,000,000 (based on fiscal year 1990 constant dollars) or an eventual total expenditure for procurement, including all planned increments or spirals, of more than \$ 1,800,000,000 (based on fiscal year 1990 constant dollars).

³ For purposes of this paper all general references to the United States military includes the Army, Navy, Air Force, Marines, and the Coast Guard, which falls within the Department of Homeland Security (DHS). Additionally, there is much ongoing debate between members of President Obama's administration and members of Congress as to the types of weapon systems that are necessary and the best way of acquiring those weapon systems. This paper will not be engaging in that debate. The focus here concerns the people who will be needed to acquire whichever systems are selected by military leadership and/or funded by Congress.

continues to be an urgent priority.”⁴ The most effective way to achieve this goal would be to rebuild the defense acquisition workforce, so DOD and DHS can internally perform their essential roles in the acquisition process. In order to accomplish this restoration, the defense acquisition workforce must be strategically rebuilt.

The DOD major weapon systems acquisition process⁵ has always carried inherent risks, particularly in relation to the development time, costs, and failure to meet expectations.⁶ Acquiring major weapon systems has never been an easy process, but the difficulty is increasing for a variety of reasons.⁷ However, there is perhaps no bigger obstacle in the acquisition process than the lack of an adequate acquisition workforce⁸

⁴ Robert M. Gates, U.S. Secretary of Defense, DOD News Briefing with Secretary Gates and Adm. Mullen from the Pentagon (Feb. 1, 2010) (transcript available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4549>). Secretary Gates further stated “the department and the nation can no longer afford the quixotic pursuit of high-tech perfection that incurs unacceptable cost and risk, nor can the department afford to chase requirements that shift or continue to increase throughout a program's lifecycle.” *Id.*

⁵ All references to DOD major weapons systems acquisition process are equally applicable to DHS.

⁶ U.S. Gov't Accountability Office, *Defense Acquisitions: Managing Risk to Achieve Better Outcomes*, GAO-10-374T at 1 (Jan. 20, 2010).

⁷ *See generally* Report of the Defense Science Board Task Force on Defense Industrial Structure for Transformation, *Creating an Effective National Security Base for the 21st Century: An Action Plan to Address the Coming Crisis* (July 2008), available at <http://www.acq.osd.mil/dsb/reports/ADA485198.pdf>; *see also* Mario Loyola, *Budget Defense*, Nat'l Rev., May 4, 2009, at 28-29 (author states procurement costs are also rising, because of increased consolidation and reduced competitiveness in the military-industrial base); Michael E. O'Hanlon, *Obama's Defense Budget Gap*, Wash. Post, June 10, 2009, at A19 (author states the administration is adopting a policy of zero real growth in the base budget and procurement is a chief area in which Defense Secretary Robert Gates has sought savings).

⁸ Acquisition workforce as defined by 10 U.S.C. § 1721(b). Required Positions - In designating the positions under subsection (a), the Secretary shall include, at a minimum,

within either DOD or DHS. The best regime of laws, rules, regulations, and policies are inconsequential if there are not enough people, or the right people, to implement them.⁹

In recent years, the lack of an internal workforce, particularly in the areas of program management and systems engineering, has led the military to seek contractors to fill the void.

Congress has consistently targeted the DOD major weapons acquisition process for reform.¹⁰ Most Congressional reform efforts have been aimed at what could be categorized as the symptoms of the problem. These include, but are not limited to, late deliveries, cost overruns, degraded performance, and organizational conflicts of interest (OCIs).¹¹ Unfortunately, Congress has until recently mostly ignored what can be

all acquisition-related positions in the following areas:

- (1) Program management.
- (2) Systems planning, research, development, engineering, and testing.
- (3) Procurement, including contracting.
- (4) Industrial property management.
- (5) Logistics.
- (6) Quality control and assurance.
- (7) Manufacturing and production.
- (8) Business, cost estimating, financial management, and auditing.
- (9) Education, training, and career development.
- (10) Construction.
- (11) Joint development and production with other government agencies and foreign countries.

⁹ Acquisition Advisory Panel (AAP), *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, at 343 (Jan. 2007) (citing Nat'l Performance Review, *Reinventing Federal Procurement*, PROC02 (Sept. 14, 1993)). The Acquisition Advisory Panel was authorized by Section 1423 of the Services Acquisition Reform Act of 2003, which was enacted as part of the National Defense Authorization Act for Fiscal Year 2004.

¹⁰ The most recent example is the Weapon Systems Acquisition Reform Act of 2009, Pub. L. No. 111-23, 123 Stat. 1704 (codified as amended in scattered sections of 10 U.S.C.).

accurately described as the root cause of the problem,¹² which is the lack of a sufficient defense acquisition workforce. This deficiency has only served to compound the difficulty of procuring major weapon systems. As recently emphasized by the Government Accountability Office (GAO), “no reform will be successful without having the right people with the right skills to carry out and manage an acquisition program throughout the entire acquisition process.”¹³

Over the past nine years, due in large part to the terrorist attacks on September 11, 2001, as well as the subsequent conflicts in Afghanistan and Iraq, the DOD has experienced a serious escalation in its overall procurement requirements.¹⁴ The DOD acquisition workforce, however, was not adequately equipped to handle the increased procurement demands. During the 1990’s, the federal government made major cuts to personnel within the acquisition workforce throughout all agencies, including the DOD

¹¹ U.S. Gov’t Accountability Office, *High Risk Series – An Update*, GAO-09-271, at 65 (Jan. 2009).

¹² See Steven L. Schooner and Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, J. Cont. Mgmt., 9 (Summer 2008); *Is DHS Too Dependent on Contractors to Do the Government’s Work?: Hearing Before the S. Comm. on Homeland Sec. & Gov’t Aff.*, 110th Cong. (2007) (statement of Steven L. Schooner, Co-Director of Government Procurement Law Program, The George Washington University Law School). Professor Schooner comments “[u]ltimately, I find the root cause of the problems (concerning DHS’s acquisition difficulties) to derive from resource deficiencies and, more specifically, an inadequate acquisition workforce.” *Id.*

¹³ GAO-10-374T, *supra* note 6, at 1.

¹⁴ Defense Science Board, *supra* note 7, at 43. Figure 7 provides a clear picture of how the procurement budgets increased even as the acquisition workforce declined. The increase applies to both the procurement of services and major systems.

and each of the military branches.¹⁵ From FY 1990 to FY 1999, the DOD acquisition workforce dropped from 460,516 to 230,566.¹⁶ On top of the direct personnel cuts, there was insufficient new hiring and no succession planning leading to what is best described as a “generational void” in the acquisition workforce.¹⁷

The lack of experienced and qualified acquisition professionals has had, and continues to have, a profound impact on all levels of military procurement.¹⁸ One could argue that nowhere has this impact been more noticed than in the procurement of major weapons systems. The decimation DOD’s acquisition workforce directly contributed to the use of the lead systems integrator (LSI) model for major weapons systems procurement.¹⁹ LSIs are “a contractor, or team of contractors, hired by the federal

¹⁵ AAP, *supra* note 9, at 365 (citing U.S. DOD IG, *DOD Acquisition Workforce Reduction Trends and Impacts*, D-2000-088, 4 (2000)).

¹⁶ *Id.*

¹⁷ Steven L. Schooner and Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, J. Cont. Mgmt., 15 (Summer 2008); *Is DHS Too Dependent on Contractors to Do the Government’s Work?: Hearing Before the S. Comm. on Homeland Sec. & Gov’t Aff.*, 110th Cong. (2007) (statement of Steven L. Schooner, Co-Director of Government Procurement Law Program, The George Washington University Law School).

¹⁸ This includes acquisition planning through contract administration and is equally applicable to the procurement of services.

¹⁹ 10 U.S.C. § 2410p(d)(1)

(A) – the term lead systems integrator means a prime contractor under a contract for the development or production of a major system, if the prime contractor is not expected at the time of award to perform a substantial portion of the work on the system and the major subsystems; or
(B) a prime contractor under a contract for the procurement of services the primary purpose of which is to perform acquisition functions closely associated with inherently governmental functions with respect to the development or production of a major system.

government to execute a large, complex, defense-related acquisition program, particularly a so-called system-of-systems acquisition program.”²⁰

Over the past decade, the LSI concept has gone from a panacea within the military procurement community to the equivalent of a four-letter word on Capitol Hill, specifically as it relates to the development and production of major weapons systems.²¹ Members of Congress were outraged to learn that private contractors wielded vast powers over certain government programs, which included providing their own oversight on major weapon systems acquisitions.²² Congress subsequently prohibited the use of LSIs based primarily on the OCI potential presented during major acquisition programs.²³

In all the outrage, however, Congress missed an extremely important point. The skills and expertise provided by LSIs were (and still are) desperately needed by the United States military, particularly as it relates to the area of major weapons system

²⁰ Valerie Bailey Grasso, *Defense Acquisition: Use of Lead System Integrators (LSIs) – Background, Oversight Issues, and Options for Congress*, Cong. Res. Serv., Feb. 10, 2009, at 1.

²¹ See discussion *infra* Part II.A.5, II.A.D.

²² 155 Cong. Rec. S5205, 5210 (daily ed. May 6, 2009)(statement of Sen. Levin). In addressing S.B. 454, which became the Weapon Systems Acquisition Reform Act of 2009 (Pub. L. No. 111-23) Senator Levin stated: “The bill will address the inherent conflict of interest we see in a number of programs today, when a contractor hired to give us an independent assessment of an acquisition program is participating in the development or construction side of the same program; 155 Cong. Rec. S5205, 5211 (daily ed. May 6, 2009)(statement of Sen. McCain). In reference to the same legislation Senator McCain stated: “[T]he relationship between those who are doing the contracting, other contractors, and the awardee is way too close today for us to get truly independent assessments and cost controls.”

²³ P.L. 110-181, National Defense Authorization Act (NDAA) for 2008, Sec. 802(a)(1) placed a prohibition on new LSIs effective October 1, 2010. The Sec. 802(a)(1) LSI prohibition applies to any entity that was not performing LSI functions in the acquisition of a major system prior to the date of enactment.

acquisitions. Turning to LSIs was not a decision made in a vacuum. One can envision no scenario in which the various agencies that contracted for LSI services were seeking to advance the legal and political discussions as to what jobs are “inherently governmental”²⁴ or to push the envelope on OCIs.²⁵ While important, those discussions represent just a small portion of this paper. The focus here is on the lack of critical personnel within the military acquisition workforce.

While DOD has begun to restore some of the lost human capital in the public sector,²⁶ the real life military acquisition requirements did not wait for political leadership to catch on. Thus, this paper focuses on the absence of qualified acquisition personnel,

²⁴ FAR 2.101 defines an inherently governmental function as follows:
[A]s a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees. This definition is a policy determination, not a legal determination. An inherently governmental function includes activities that require either the exercise of discretion in applying Government authority, or the making of value judgments in making decisions for the Government. Governmental functions normally fall into two categories: the act of governing, *i.e.*, the discretionary exercise of Government authority, and monetary transactions and entitlements. *Id.*

²⁵ See generally, Daniel I. Gordon, *Organizational Conflicts of Interest: A Growing Integrity Challenge*, 35 PUB. CONT. L.J. 25 (2005); Keith R. Szeliga, *Conflict and Intrigue in Government Contracts: A Guide to Identifying and Mitigating Organizational Conflicts of Interest*, 35 PUB. CONT. L.J. 639, 640 (2006); Daniel A. Cantu, *Organization Conflicts of Interest/Edition IV*, 06-12 BRIEFING PAPERS (Nov 2006) (provides excellent overview and analysis of OCI issues); FAR 2.101 defines an OCI as a situation that arises when “because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.”

²⁶ 10 U.S.C. § 1705 – [DOD] Acquisition Workforce Development Fund; see also Elise Castelli, *DOD to create 20,000 new jobs to do insourced work*, Federal Times.com (Feb. 1, 2010) available at <http://www.federaltimes.com/article/20100201/ACQUISITION02/2010307/1012/ACQUISITION02>.

which is why the military services originally turned to LSIs for certain complex programs. LSIs were needed in order to make up for the DOD and DHS internal workforce deficits.²⁷

This paper explores the growth of LSIs in relation to DOD's and DHS's acquisition of major weapon systems. Namely, this paper will attempt to explain why private contractor LSIs became necessary and what can be done to correct the situation while still advancing the state of the art in major weapons systems procurements. This paper will explore the lack of strategic planning involved in the drastic cuts to the federal acquisition workforce that occurred during the 1990's. This paper will also explore the massive expansion of procurement requirements post-September 11, 2001, and how, despite this increase in workload, the number of personnel within the acquisition workforce remained fairly constant.

The LSI functions performed by contractors directly resulted from the absence of in-house expertise. The lack of certain specialized, experienced acquisition personnel within the DOD and DHS directly resulted in the growth of the LSI concept. This paper will examine two high profile examples of LSIs being used to assist the Army and the Coast Guard in the development of their premier procurement efforts: the Future Combat Systems (FCS) and Deepwater program. The problems associated with these efforts received a great deal of attention, which directly contributed to Congressional attempts to limit and eventually prohibit the use of LSIs.

Ultimately, LSIs were necessary to advance agency goals in the absence of in-house talent. While the LSI experience generated its share of problems, and exposed the

²⁷ See discussion *infra* Section II.A.

increased potential for OCIs, it was a symptom of a larger problem as opposed to simply being the problem. This paper will also address the foreseeable difficulties of infusing the acquisition workforce with more personnel without strategic planning. Specifically, the military needs a concerted effort, not only to hire competent and professional program managers and systems engineers, but must also continue to train and develop these crucial pieces of the personnel puzzle. The private sector alone will not be able to save us from our shortfalls in these critical areas. While the economic and political environment may make this an uphill climb, the resolve of our political leadership will be necessary to institute the needed infusion of human capital.

II. WHY LEAD SYSTEMS INTEGRATORS WERE NEEDED

A. Growth of LSIs

1. The Purge of the DOD Acquisition Workforce

In November of 1989, the Berlin Wall, perhaps the most recognizable symbol of the Cold War, began to crumble as a wave of freedom swept over Eastern Europe.²⁸ This event, at least symbolically, ushered the world into a new era. After the Soviet Union officially collapsed and the Cold War ended,²⁹ the United States was confronted with new

²⁸ Serge Schmemmann, *Clamor in the East: East Germany Opens Frontier to the West for Migration or Travel; Thousands Cross*, N.Y. Times, Nov. 10, 1989, at A1, available at <http://www.nytimes.com/1989/11/10/world/clamor-east-east-germany-opens-frontier-west-for-migration-travel-thousands.html>.

²⁹ The precise date the Cold War ended has been the subject of much debate, which is not relevant for the purposes of this paper. However, Congress established a Cold War certificate in Section 1084 of the fiscal 1998 National Defense Authorization Act, which designates the Cold War period as Sept. 2, 1945, to Dec. 26, 1991.

national security requirements of the post-Cold War era. Military budgets were one area in which the impact of this change was perhaps most realized.³⁰

By the time President Bill Clinton declared “the era of big government is over,”³¹ the acquisition workforce was already in the midst of its decade long decline.³² In hindsight, the drastic nature of the cuts is clearly evident. As stated above, the DOD acquisition workforce dropped from 460,516 to 230,566 from FY 1990 to FY 1999,³³ driven by Congressional annual statutory mandates.³⁴ To make matters worse, the cuts were made without any strategic plan.³⁵ According to one observer, the DOD’s “[l]ack of

³⁰ Congressional Budget Office, *NATO Burdensharing After Enlargement*, August 2001, at 2-4, available at <http://www.cbo.gov/ftpdocs/29xx/doc2976/NATO.pdf>. In 1985, at the height of the Cold War arms buildup, the United States spent 6.7 percent of its GDP on defense, compared with the European allies’ 3.5 percent of their collective GDP spent on defense. By 1999, those figures declined to 3.0 percent and 2.3 percent, respectively.

³¹ President William Jefferson Clinton, State of the Union Address at the United States Capitol (Jan. 23, 1996), available at <http://clinton4.nara.gov/WH/New/other/sotu.html>.

³² Defense Science Board, *supra* note 7, at 43 (citing DOD IG Report D-2000-088 (Feb. 29, 2000) and DOD IG Report D-2006-073 (April 17, 2006)).

³³ AAP, *supra* note 9, at 365 (citing U.S. DOD IG, *DOD Acquisition Workforce Reduction Trends and Impacts*, D-2000-088, 4 (2000)). The DOD IG Report also found that acquisition workforce reductions including maintenance depot civilian personnel for the Army, the Navy, the Air Force, and other DOD organizations, were about 60, 54, 36, and 31 percent, respectively. *Id.*, at 4.

³⁴ Shelley Roberts Econom, *Confronting the Looming Crisis in the Federal Acquisition Workforce*, 35 PUB. CONT. L.J. 171, 190 n.116 (2006)

³⁵ Lawrence A. Skantze, *Acquisition’s Lost Keystone: The Air Force should reactivate Air Force Systems Command*, Armed Forces Journal, Mar. 2010, available at <http://www.afji.com/2010/03/4486317>. General Skantze writes “[t]he demise of Air Force Systems Command coincided with a drastic reduction in the overall Defense Department acquisition work force, from 240,000 in 1990 to 124,000 in 1999, as part of the Cold War peace dividend. The reduction was done fairly precipitously, without regard to skills retention and future needs. *Id.*

strategic planning or attention to force shaping ... has resulted in a civilian workforce unbalanced in age and experience.”³⁶

The cuts described above have, in the words of one DOD official, created “a crisis within DOD in terms of our people.”³⁷ The major problem pertains to the mid-level experience employee pool. While the senior levels of the acquisition workforce (those who survived the purge) are “much more adequate,” eventual retirements at this level are a major threat to “continuing adequacy of the workforce.”³⁸ When the senior level acquisition workforce personnel retire “we don’t have anybody to replace them.”³⁹

2. The Growth of Procurement Requirements Post 9/11

On September 11, 2001, the United States of America was hit by the worst terrorist attack in our history. Before the sun set on that terrible day, it was clear the attacks had launched this nation into a new era. The attacks exposed numerous weaknesses within America’s intelligence community and airline industry (particularly as it relates to airline security standards).⁴⁰ In addition to the highly publicized failures above, the post 9/11 world exposed a paltry federal acquisition workforce that was ill

³⁶ Econom, *supra* note 34, at 190 (Author provides an excellent summary of the Congressional actions that occurred in the 1990’s, which contributed to the slashing of the acquisition workforce).

³⁷ AAP, *supra* note 9, at 363 (citing testimony of Shay Assad, Director of Defense Procurement and Acquisition Policy, AAP Pub. Meeting (June 14, 2006) Tr. At 57).

³⁸ *Id.*, at 363-64 (citing testimony of Shay Assad, Director of Defense Procurement and Acquisition Policy, AAP Pub. Meeting (June 14, 2006) Tr. At 57).

³⁹ *Id.*, at 363 (citing testimony of Shay Assad, Director of Defense Procurement and Acquisition Policy, AAP Pub. Meeting (June 14, 2006) Tr. At 58).

⁴⁰ See generally *The 9/11 Commission Report: Final Report of the National Commission on Terrorist Attacks Upon the United States*, available at <http://www.9-11commission.gov/report/911Report.pdf>

equipped for the procurement explosion that would be driven in response to 9/11, as well as the conflicts in Iraq and Afghanistan.

Overall federal procurement spending on contracts for FY 2000 was \$208.8 billion.⁴¹ By FY 2008, this amount had grown to over \$527 billion.⁴² By my count, the increase in federal procurement spending more than doubled during the decade. While most of the increase was experienced in the procurement of goods and services,⁴³ the number of major defense acquisition programs has also increased.⁴⁴ Overall, federal procurement spending increased at more than five times the rate of inflation.⁴⁵ Meanwhile, Congressional investment in the personnel responsible for the increased procurement failed to keep pace.⁴⁶

3. Military's Continued Need For Major Weapons Systems

Despite the depleted number of personnel in the acquisition workforce, the need to

⁴¹ Numbers used are available at <http://www.fedspending.org/>

⁴² *Id.*

⁴³ U.S. Gov't Accountability Office, *Department of Defense: Additional Actions and Data Are Needed to Effectively Manage and Oversee DOD's Acquisition Workforce*, GAO-09-342 at 1 (Mar. 25, 2009). GAO states, "since fiscal year 2001, DOD's spending on goods and services more than doubled to \$388 billion in fiscal year 2008...." *Id.*

⁴⁴ *Id.*, at 4 (number of major defense acquisition programs increased from 70 to 95).

⁴⁵ Steven L. Schooner, *Federal Contracting and Acquisition: Progress, Challenges, and the Road Ahead* (2010). Chapter in FRAMING A PUBLIC MANAGEMENT RESEARCH AGENDA, p. 30, IBM Center for the Business of Government, 2010; GWU Legal Studies Research Paper No. 483; GWU Law School Public Law Research Paper No. 483. Available at SSRN: <http://ssrn.com/abstract=1542830>; Schooner & Greenspahn, *supra* note 12, at 12.

⁴⁶ *Is DHS Too Dependent on Contractors to Do the Government's Work?: Hearing Before the S. Comm. on Homeland Sec. & Gov't Aff.*, 110th Cong. (2007) (statement of Steven L. Schooner, Co-Director of Government Procurement Law Program, The George Washington University Law School).

develop and produce major weapons systems has not decreased.⁴⁷ Since 2003, the DOD's major defense acquisition programs grew from 77 to 96.⁴⁸ According to GAO, the total investment in research, development, test and evaluation (RDT&E) and procurement funds in this area is still about \$1.6 trillion.⁴⁹ Because of all of the money allocated, the area of major weapon systems acquisition has been on GAO's high-risk list⁵⁰ since 1990.⁵¹ The risks connected to this area generally concern cost overruns, the length of time it takes to acquire the systems, and failure to meet expectations.⁵²

As stated above, the idea of using LSIs was not created in a vacuum. It is doubtful the military services that contracted with LSIs for the development of major weapons

⁴⁷ U.S. Gov't Accountability Office, *Defense Acquisitions: Assessments of Selected Weapon Programs*, GAO-09-326SP at 1 (March 30, 2009). GAO reports, "over the next 5 years, DOD expects to invest about \$329 billion (fiscal year 2009 dollars) on the development and procurement of major defense acquisition programs." *Id.*

⁴⁸ U.S. Gov't Accountability Office, *Defense Acquisitions: Charting a Course for Lasting Reform*, GAO-09-663T at 2 (Apr. 30, 2009); U.S. Gov't Accountability Office, *Defense Acquisitions: Assessments of Selected Weapon Programs*, GAO-09-326SP at 6 (March 30, 2009).

⁴⁹ GAO-09-326SP, *supra* note 47, at 6.

⁵⁰ GAO-09-271, *supra* note 11, at 6. According to GAO, it has historically designated areas high-risk "because of traditional vulnerabilities related to their greater susceptibility to fraud, waste, abuse, and mismanagement." As the high-risk program has evolved, GAO stated it has "increasingly used the high-risk designation to draw attention to areas associated with broad-based transformations needed to achieve greater economy, efficiency, effectiveness, accountability, and sustainability of selected key government programs and operations." *Id.*

⁵¹ U.S. Gov't Accountability Office, *Defense Acquisitions: DOD Must Prioritize Its Weapon System Acquisitions and Balance Them with Available Resources*, GAO-09-501T at 1 (March 18, 2009).

⁵² *Id.* GAO reports, "the cumulative cost growth in DOD's portfolio of 95 major defense acquisition programs was \$295 billion and the average delay in delivering... was 21 months. *Id.*

systems were not seeking to expand the discussion of OCIs or what type of work is inherently governmental when they entered the contract. The military services were faced with vital procurement responsibilities that could not be ignored, particularly in the wake of 9/11, and the military engagements in Afghanistan and Iraq. LSIs were deemed necessary for the development and production of next-generation weapons programs.

4. Military Turns to LSIs to Solve the Problem

Facing internal manpower deficits, federal agencies began to seek external assistance as a means of compensating for their own technological deficits. The result was the LSI concept. As stated above, LSIs are “a contractor, or team of contractors, hired by the federal government to execute a large, complex, defense-related acquisition program, particularly a so-called system-of-systems acquisition program.”⁵³ As noted by the Congressional Research Service, “LSIs can have broad responsibility for executing ... programs, and may perform some or all of the following functions: requirements generation; technology development; source selection; construction or modification work; procurement of systems or components from, and management of, supplier firms; testing; validation; and administration.”⁵⁴

LSI advocates contend these arrangements, if used correctly, “can promote better

⁵³ Grasso, *supra* note 20, at 1.

⁵⁴ *Id.* Grasso further states:

Source selection means the solicitation, evaluation, and hiring of subcontractors to work under the supervision of the LSI. LSIs manage the procurement of all systems and components including the construction and modification of such systems; the testing of systems by validating their appropriateness and interoperability; and by performing functions usually undertaken by contracting or other acquisition officials. *Id.*, at 1 n.2.

technical innovation and overall system optimization.”⁵⁵ Furthermore, the Army believed, as it related to the Future Combat Systems (FCS) program,⁵⁶ the LSI could serve multiple purposes.⁵⁷ The Army determined the LSI could help it overcome the following challenges: (1) the cultural challenge of crossing traditional organizational lines; (2) the capability challenge related to shortage of skills in key areas (i.e. managing the development of a large information network); and (3) overcome the Army’s lack of capacity to staff, manage, and synchronize multiple programs.⁵⁸

Viewed favorably, LSIs represented a solution to the military’s critical acquisition workforce deficits. If private-sector firms have more knowledge and expertise concerning rapidly developing commercial technologies, then why not use them to achieve the government’s procurement program mission and objectives.⁵⁹ This view is particularly compelling in light of the federal government’s admitted lack of the same. In addition to the Army’s FCS and the Coast Guard’s Deepwater,⁶⁰ which are discussed in greater detail below, other agencies also turned to LSIs. Additional examples include the DHS’s Secure Border Initiative, the Air Force’s Transformational Communication System, the Army’s National Missile Defense Program, and NASA’s partnership with

⁵⁵ *Id.*, at 2.

⁵⁶ See discussion *infra* section II.B.1.

⁵⁷ See U.S. Gov’t Accountability Office, *Defense Acquisitions: Role of Lead Systems Integrator on Future Combat Systems Program Poses Oversight Challenges*, GAO-07-380 at 2 (June 6, 2007).

⁵⁸ *Id.*

⁵⁹ Grasso, *supra* note 20, at 2.

⁶⁰ See discussion *infra* section II.B.2.

United Space Alliance to manage the space shuttle program.⁶¹ In retrospect, giving contractors substantial, if not complete, control over billion-dollar defense acquisition programs would prove not be the answer to military's workforce problem.

5. LSI "Solution" Becomes a Problem

As it turns out, the LSI "solution" exposed as many problems as it solved. The Acquisition Advisory Panel (AAP) found that "some agencies have contracted out substantive, mission critical functions, often without considering the potential adverse implications of such a step for the future."⁶² It is not hard to see that once the LSI is the only entity in possession of the skill or technical expertise to manage a complex major systems program, then "the government no longer has the federal employees with the requisite skills to oversee and manage LSIs."⁶³

In hindsight, it is easy to see how the "solution" to having a lack of experienced acquisition workforce personnel created new problems. "While in the short run such contracts may appear to be the best--or at least the simplest--way for an agency to implement a particular project or program, they can have serious adverse consequences in the long run."⁶⁴ The AAP correctly highlighted that "such consequences in the long run include the loss of institutional memory, the inability to be certain whether the contractor is properly performing the specified work at a proper price, and the inability to be sure

⁶¹ Robert Brodsky, Zack Phillips and Katherine McIntire Peters, *Big Contracts, Big Problems*, Gov't Executive.com, Aug. 15, 2007, available at <http://www.govexec.com/features/0807-15/0807-15s1.htm>.

⁶² AAP, *supra* note 9, at 399.

⁶³ *Id.*

⁶⁴ *Id.*

that the decisions are being made in the public interest rather than the interest of contractors performing the work.”⁶⁵

GAO would likely agree with the above assessment and has expressed concern that “DOD’s reliance on contractors to perform roles that have in the past been performed by government employees” is very problematic.⁶⁶ GAO noted “[w]ithout the right-sized workforce, with the right skills, we believe this could place greater risk on the government for fraud, waste, and abuse.”⁶⁷ Scott Amey, General Counsel for the Project on Government Oversight (POGO), contends “the government’s use of [LSIs] ... increases the risk for OCIs. For example, an LSI might favor its own or a subsidiary’s proposals over those of other contractors. Further, if the LSI stands to benefit from the continuation of a program into production, it has a financial stake in the outcome that could compromise its decisions.”⁶⁸ The recent experiences of the Army with FCS and the Coast Guard with their Deepwater program⁶⁹ only serve to reinforce those concerns.

⁶⁵ *Id.*

⁶⁶ U.S. Gov’t Accountability Office, *Defense Acquisitions: Assessments of Selected Weapon Programs*, GAO-08-467SP at 30 (March 31, 2008).

⁶⁷ *Id.*

⁶⁸ Letter from Scott H. Amey, General Counsel, POGO, to Laurieann Duarte, General Services Administration (July 18, 2008) (details the need for stronger contractor OCI regulations).

⁶⁹ See discussion *infra* Section II.B1-2; see also Don J. DeYoung, *Breaking the Yardstick: The Dangers of Market-based Governance*, Joint Force Quarterly, Oct. 1, 2009, at 5; see also William Mathews, *The End of LSIs*, Defense News, May 28, 2007, at 8.

B. Two Most Significant LSI Experiences : Future Combat Systems and Deepwater

1. Army's Future Combat Systems

The Army's Future Combat Systems (FCS) program is perhaps the prime example of an agency turning to an LSI in order to compensate for its lack of internal capacity. The estimated \$160 billion FCS program⁷⁰ was originally conceived in the 1990's, as the Army had deferred the development of next generation weapons for a decade as it dealt with post-Cold War downsizing and procurement reductions.⁷¹ The Army had traditionally approached modernization by simply performing upgrades to existing or "legacy" systems.⁷²

As a result of operations in Kosovo, the Army, led by then-Chief of Staff Eric Shinseki set upon a course of "transformation" to develop a lighter, more rapidly deployable force.⁷³ As early as 1999, the Army made it a priority program to meet what

⁷⁰ U.S. Gov't Accountability Office, *Defense Acquisitions: Future Combat Systems Challenges and Prospects for Success*, GAO-05-442T, at 1 (Mar. 16, 2005) (original cost estimate was \$108 billion).

⁷¹ Edward F. Bruner, *Army Transformation and Modernization: Overview and Issues for Congress*, Cong. Res. Serv., April 4, 2001, at 1. (Author lists notable exceptions to the deferred development of next generation weapon systems, which included research and development for a howitzer, the Crusader, and the Comanche helicopter.); *see also* U.S. Gov't Accountability Office, *Defense Acquisitions: 2009 Review of Future Combat System Is Critical to Program's Direction*, GAO-08-638T, at 10 (April 10, 2008)(discusses the Army's \$160.9 billion cost estimate).

⁷² Bruner, *supra* note 71, at 2.

⁷³ Andrew Feickert and Nathan Jacob Lucas, *Army Future Combat System (FCS) "Spinouts" and Ground Combat Vehicle (GCV): Background and Issues for Congress*, Cong. Res. Serv., Nov. 30, 2009, at 1; Bruner, *supra* note 71, at 2. Bruner writes, "[i]n 1999, suggestions were made that the Army force sent to Albania in anticipation of action in Kosovo was too heavy for rapid air insertion, and once on the ground, the force was arguably too heavy for the unimproved roads and bridges there." *Id.*

it considered to be its future requirement.⁷⁴ The development of the FCS program was considered to be the cornerstone of the Army's transformation goal. FCS was going to be based on "new technologies that would equip very mobile formations with lethality and survivability equal or greater than that of present heavy units."⁷⁵ Conceptually, FCS was to consist of 18 manned and unmanned ground vehicles, air vehicles, sensors, and munitions that would be linked by an information network.⁷⁶

A 2007 GAO report found the FCS program was "proposed as an integrated, system-of-systems (SOS) concept rather than having integration occur after systems are produced."⁷⁷ The basic goal of an SOS program is to acquire a collection of various technological platforms and link them all together via a computer network, which is designed to create a larger, integrated system.⁷⁸ The Army's game plan for FCS was to

⁷⁴ *Id.*

⁷⁵ *Id.* Bruner's report indicates the Army intended for a key component of FCS to include a capability that could assume the role of an Abrams tank, but with the transportability and mobility of a Light Armored Vehicle (LAV). However, it is important to note that the intended technologies were conceptual and still required actual development; *see also* Feickert and Lucas, *supra* note 73, at 1.

⁷⁶ GAO-05-442T, *supra* note 70, at 4; *see also* Congressional Budget Office, *The Army's Future Combat Systems Program and Alternatives*, 21-27 (Aug. 2006) (CBO provides an extremely detailed description of the various vehicles comprising FCS). The number of vehicles contemplated for FCS was later reduced from 18 to 14.

⁷⁷ GAO-07-380, *supra* note 57, at 1.

⁷⁸ Grasso, *supra* note 20, at 1, FN 1 (for more in-depth SOS discussion author refers reader to Joann Lane and Barry Boehm, *System-of-System Cost Estimation: Analysis of Lead System Integrator Engineering Activities*, Inter-Symposium 2006, the International Institute for Advanced Studies in Systems Research and Cybernetics, available at <http://csse.usc.edu/csse/TECHRPTS/2006/usccse2006-614/usccse2006-614.pdf>).

make a break from its large division centric structure of the past and transform itself into a more rapidly deployable, responsive, highly survivable fighting force.⁷⁹

Due to the technical complexity and ambitious five and a half year development timeline of FCS,⁸⁰ the Army decided it needed an LSI “to assist in defining, developing, and integrating” the program.⁸¹ Army leaders fundamentally believed it did not have the workforce to manage the development of FCS within its preferred timelines without external assistance.⁸² Specifically, the Army believed the LSI approach was necessary because it lacked sufficient skilled program managers, scientists, and engineers.⁸³ In consideration of its own lack of in-house technical expertise, the Army turned to private industry in hopes of accomplishing what it determined it could not do on its own.

In March 2002, the Army selected the combined team of Boeing Company and Science Applications International Corporation (SAIC) to serve as an LSI for the concept and development phase of FCS.⁸⁴ In doing so, “the Army delegated much of its

⁷⁹ GAO-08-638T, *supra* note 71, at 2-3.

⁸⁰ GAO-07-380, *supra* note 57, at 7. The complexity of the FCS program, particularly within the 5 ½ year timeline, are highlighted by the major technical challenges set forth in GAO’s report which included the design of 14 major weapon systems or platforms that would have to be designed and integrated simultaneously within strict size and weight limitations. GAO also cited how at least 46 technologies that are considered critical to achieving critical performance capabilities that would need to be matured and integrated into the system of systems.

⁸¹ *Id.*, at 1.

⁸² *Id.*, at 2.

⁸³ Andrew Feickert, *The Army’s Future Combat System (FCS): Background and Issues for Congress*, Cong. Res. Serv., Apr. 28, 2005, at 12, 26.

⁸⁴ Press Release, Department of Defense, DARPA, Army Announce Future Combat Systems Lead Systems Integrator (Mar. 7, 2002), available at

traditional acquisition function to the LSI team.”⁸⁵ As GAO commented, “the Army contracted with an LSI for FCS because of the program’s ambitious goals and the Army’s belief that it did not have the capacity to manage the program.”⁸⁶

In May 2003, the FCS program entered into the system development and demonstration phase.⁸⁷ The Army began this phase without firm requirements or mature technologies.⁸⁸ Furthermore, seeking flexibility to negotiate the terms and conditions with Boeing, the Army entered into the FCS program on an Other Transaction Agreement (OTA) basis.⁸⁹ An OTA allows an agency to avoid compliance with procurement statutes, the FAR, as well as statutes or regulations applying to grants and cooperative agreements.⁹⁰ This arrangement removed most FAR-based contractual protections as the OTA used for FCS included several FAR and DFARS clauses.⁹¹

<http://www.defense.gov/releases/release.aspx?releaseid=3261>; see also Boeing Fact Sheet, *Future Combat Systems: What Is It?*, May 10, 2007, available at http://www.boeing.com/defense-space/ic/fcs/bia/docs/FCS_overview.pdf.

⁸⁵ Steven L. Schooner & Christopher R. Yukins, *Emerging Policy and Practice Issues* (2005), at 9-20 (The George Washington Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 193, 2005), available at SSRN: <http://ssrn.com/abstract=887355>.

⁸⁶ GAO-07-380, *supra* note 57, at 1.

⁸⁷ *Id.*; see also Schooner & Yukins, *supra* note 85, at 9-20.

⁸⁸ GAO-08-638T, *supra* note 71, at 4.

⁸⁹ GAO-07-380, *supra* note 57, at 4 (All work performed from May 2003 through September 2005 is accounted for under the Other Transactions Authority (OTA). However, in response to Congressional concerns the Secretary of the Army directed the OTA be converted into a FAR-based contract); see generally L. Elaine Halchin, *Other Transaction (OT) Authority*, Cong. Res. Serv., Nov. 25, 2008 (provides excellent summary of OTA).

⁹⁰ See John Cibinic, Jr. and Ralph C. Nash, Jr., *FORMATION OF GOVERNMENT CONTRACTS*, 20 (3rd Ed., 1998); see also Giles Smith, Jeffrey Drezner, and Irving

The Army's rationale for doing so was to encourage innovation and provide flexibility in developing professional relationships (i.e. business, organizational, and technical) in order to achieve FCS goals.⁹² While the OTA contained an OCI clause, it did not preclude the Boeing/SAIC LSI from competing for future subcontracts that may emerge.⁹³ This issue was eventually addressed by the subsequent FAR-based contract.⁹⁴

As the GAO acknowledged, mature technologies at the start of development are key to sound business practices.⁹⁵ However, in 2003, only an estimated 40 percent of the critical technologies in the FCS program were near maturity.⁹⁶ The Army assumed it could overcome the technical risks⁹⁷ and achieve its goals by using the LSI to compensate for its own lack of technical expertise and workforce limitations.⁹⁸

Lachow, *Assessing the Use of "Other Transactions" Authority for Prototype Projects*, RAND National Defense Research Institute, 2-3 (2002) (processes normally required by the Truth in Negotiations Act (TINA), the Competition in Contracting Act (CICA), the [FAR], and [DFARS] do not need to be adhered to).

⁹¹ GAO-05-442T, *supra* note 70, at 12.

⁹² GAO-07-380, *supra* note 57, at 4.

⁹³ *Id.*, at 33, Appendix II.

⁹⁴ *Id.*

⁹⁵ *Id.*, at 7.

⁹⁶ U.S. Gov't Accountability Office, *Defense Acquisitions: Issues to be Considered for Army's Modernization of Combat Systems*, GAO-09-793T at 5 (June 16, 2009).

⁹⁷ GAO-07-380, *supra* note 57, at 7. In 2007, GAO noted some of major technical challenges faced by FCS included:

The 14 major weapon systems or platforms have to be designed and integrated simultaneously and within strict size and weight limitations. At least 46 technologies that are considered critical to achieving critical performance capabilities will need to be matured and integrated into the [SOS]. The development, demonstration, and production of as many as

Unfortunately, the LSI solution contained the seeds of its own failure in that the Army lacked the necessary personnel to provide, among other things, program management and systems engineering oversight of the LSI.⁹⁹ This put both the Army and the Boeing/SAIC LSI team in a position of disadvantage, especially in light of the potential financial rewards of the original contractual arrangement. When the Boeing/SAIC team entered the contract, the Army had yet to establish firm requirements matched to mature technologies and preliminary designs.¹⁰⁰ Thus, regardless of whether it was warranted or not, both the Army and Boeing/SAIC faced exposure to accusations of impropriety by virtue of the unique relationship at issue here.¹⁰¹

It is easy to understand the concern of Congress and others regarding the closeness of agency and contractor. In essence, the LSI was acting “like a partner to the Army, ensuring the design, development, and prototype implementations of FCS network and systems.”¹⁰² This admittedly complex relationship posed obvious program management and systems engineering oversight risks. For instance, the partner-like

perhaps 170 complementary systems and associated programs have to be synchronized with FCS content and schedule. This will also involve developing about 100 network interfaces so the FCS can be interoperable with other Army and joint forces. *Id.*

⁹⁸ *Id.*

⁹⁹ Feickert, *supra* note 83, at 11-13 (author highlighted program management and systems engineering as problematic areas early on).

¹⁰⁰ GAO-09-793T, *supra* note 96, at 5.

¹⁰¹ Matthew Weigelt, *Army let contractor get too involved in program, IG says*, Federal Computer Week, Jan. 28, 2010 available at http://fcw.com/articles/2010/01/28/dod-saic-oci.aspx?sc_lang=en; see also DOD IG Report No. D-2010-024, Nov. 24, 2009 available at <http://www.dodig.mil/Audit/reports/fy10/10-024redacted.pdf>.

¹⁰² GAO-09-793T, *supra* note 96, at 7.

relationship at least created the potential for the Army to become increasingly vested in the results of shared decisions and overly reliant on the LSI because of the disadvantage in terms of workforce and technical expertise.¹⁰³

The preceding scenario becomes even more alarming if you accept the premise “the government cannot expect contractors to act in the best interest of the government as that could potentially conflict with their corporate financial interests.”¹⁰⁴ This became a more pressing concern once SAIC was allowed to compete for the FCS contract after it had been involved in developing the contract requirements.¹⁰⁵ Ultimately, a DOD IG report determined the relationship between the Army and SAIC discussed above represented an improper OCI.¹⁰⁶ The IG recommended the FCS program office cease

¹⁰³ *Id.*

¹⁰⁴ *Id.*; see also David R. Graham, *IDA Findings on the Use of the Lead Systems Integrator Structure for the Army's FCS Program*, Statement for the Air-Ground Subcommittee of the Senate Armed Services Committee, March 1, 2006 available at http://www.globalsecurity.org/military/library/congress/2006_hr/060301-graham.pdf.

¹⁰⁵ DOD IG Report No. D-2010-024, Nov. 24, 2009, available at <http://www.dodig.mil/Audit/reports/fy10/10-024redacted.pdf>. The report is dated November 2009, but was released January 2010.

¹⁰⁶ *Id.* The DOD IG concluded:
[C]ontracting officers and agencies have encountered difficulties implementing appropriate OCI avoidance and mitigation measures. The solicitation provisions and contract clauses that the Director of Operation Test and Evaluation (DOT&E), the Army FCS Program Office, and the Army test agencies used to prevent FCS development contractors from providing technical direction or supporting the operational test and evaluation of the system did not prevent the same contractors from supporting development. We also didn't identify any waivers to support and document decisions to use the same contractors when a conflict of interest was apparent. *Id.*

obtaining advisory and assistance services from SAIC, unless it obtained the necessary waivers.¹⁰⁷

On April 6, 2009, Secretary Gates announced plans to “significantly restructure” the FCS program.¹⁰⁸ Secretary Gates recommended retaining and accelerating “the initial increment of the program to spin out technology enhancements to all combat brigades.”¹⁰⁹ However, more importantly for purposes of this discussion, Secretary Gates recommended cancellation of the vehicle component of FCS, as well as a re-evaluation of “the requirements, technology, and approach.”¹¹⁰ According to the Congressional Research Service, the manned ground vehicle program “was intended to field eight separate tracked combat vehicle variants . . . that would eventually replace combat vehicles such as the M-1 Abrams tank, the M-2 Bradley infantry fighting vehicle, and the M109 Paladin self-propelled artillery system.”¹¹¹

While calling for a “re-launch” of the Army’s vehicle modernization program, Secretary Gates maintained he was “troubled by the terms of the current contract.”¹¹² It was clear that he had lost faith in the \$87 billion cost of the vehicle portion of the FCS program. Secretary Gates stated, “I believe we must have more confidence in the

¹⁰⁷ *Id.*

¹⁰⁸ Press Release, Department of Defense, Defense Budget Recommendation Statement of Secretary of Defense Robert M. Gates, April 6, 2009, available at <http://www.defense.gov/speeches/speech.aspx?speechid=1341>.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ Feickert & Lucas, *supra* note 73, at 3.

¹¹² Secretary Gates, *supra* note 108.

program strategy, requirements, and maturity of the technologies before proceeding further.”¹¹³ As original budget estimates for FCS were \$92 billion, having costs balloon to \$234 billion¹¹⁴ may be factor in the Secretary’s decision to shelve major portions of the project.¹¹⁵ Secretary Gates’ recommendations to cancel the vehicle portion of FCS were endorsed by both the Senate and House Armed Services committees during debate of the FY2010 National Defense Authorization Act.¹¹⁶

Fortunately, not all news concerning FCS is negative. Despite the major cancellation, GAO noted, “[t]he Army’s experience with FCS has been productive” and “worthy of emulation.”¹¹⁷ The difficulties FCS encountered in execution and oversight were apparent from the beginning, as opposed to unexpected discoveries made along the way.¹¹⁸ It should be noted the Army conceded from the outset FCS would be a work in progress and all parties involved never expected FCS to fulfill all the Army’s objectives.¹¹⁹ The Army had planned to prioritize the projects it would pursue, and

¹¹³ *Id.*

¹¹⁴ DeYoung, *supra* note 69, at 5.

¹¹⁵ Christopher Drew, *Conflicting Priorities Endanger High-Tech Army Program*, N.Y. Times, July 19, 2009, at B1; Kris Osborn, *FCS is Dead; Programs Live On*, Defense News, May 18, 2009, available at <http://www.defensenews.com/story.php?i=4094484>.

¹¹⁶ Feickert & Lucas, *supra* note 73, at 8; *see also* H.R. 2647, P.L. 111-84.

¹¹⁷ GAO-09-793T, *supra* note 96, at 13.

¹¹⁸ *Id.*

¹¹⁹ Hearing Before, Subcomm. on Federal Financial Management, Gov’t Information, Federal Services, and International Security of the S. Comm. on Homeland Security & Gov’t Affairs, 110th Cong. (Sept. 25, 2008) (statement of Steven L. Schooner, Co-Director of Government Procurement Law Program, The George Washington University Law School).

conversely not pursue, within the monetary constraints imposed.¹²⁰ The creative shift of funds from unproven to proven technologies could prove a valuable lesson for the future.

Secretary Gates has indicated his support moving forward for the acceleration of FCS's Warfighter Information Network development and fielding, along with proven FCS spin-off capabilities.¹²¹ Ultimately, remaining FCS technologies will be incorporated into the Army's successor program, the Army Brigade Combat Team Modernization (ABCTM),¹²² which means FCS should be considered a worthy venture. The Deepwater experience will likely merit a different legacy.

2. Coast Guard's Deepwater Program

The United States Coast Guard's Deepwater Program (Deepwater) represents an even more problematic example of the human capital problem. Deepwater "refers to a collection of more than a dozen Coast Guard acquisition programs for replacing and modernizing the service's aging fleet of deepwater-capable ships and aircraft."¹²³

Deepwater was originally projected to cost \$17 billion and included the modernization and replacement of over 90 cutters and 200 aircraft.¹²⁴ Regrettably, Deepwater may be

¹²⁰ *Id.*

¹²¹ Hearing Before, Subcomm. on Defense of the S. Comm. on Appropriation, 111th Cong. (June 9, 2009) (statement of Robert M. Gates, Secretary of Defense).

¹²² Press Release, Department of Defense, Future Combat System (FCS) Program Transitions to Army Brigade Combat Team Modernization, June 23, 2009, available at <http://www.defense.gov/releases/release.aspx?releaseid=12763>; see also Osborn, *supra* note 115.

¹²³ Ronald O'Rourke, *Coast Guard Deepwater Acquisition Programs: Background, Oversight Issues, and Options for Congress*, Cong. Res. Serv., June 5, 2008, at CRS-1.

better known for the scandal that engulfed the program, which is detailed further in this section.¹²⁵

The post 9/11 United States Coast Guard, an agency within DHS,¹²⁶ is entrusted with the dual responsibilities of homeland security missions (e.g. port security and vessel escorts) and more traditional roles such as search and rescue.¹²⁷ In the performance of these missions, the Coast Guard requires deepwater-capable assets.¹²⁸ The various missions performed by the Coast Guard in the deepwater environment include such

¹²⁴ U.S. Gov't Accountability Office, *Contract Management: Coast Guard's Deepwater Program Needs Increased Attention to Management and Contractor Oversight*, GAO-04-380 at 5 (March 9, 2004).

¹²⁵ Allison Stanger, *One Nation Under Contract: The Outsourcing of American Power and the Future of Foreign Policy*, 150 (Yale University Press 2009) (author refers to Deepwater as “the most glaring example of outsourcing without sufficient oversight.”); Nick Baumann, *Coast Guard: Still in Deep Water?*, Mother Jones.com, July 29, 2009, available at <http://motherjones.com/politics/2009/07/coast-guard-still-deepwater>; Alice Lipowicz, *Deepwater in Trouble, Watchdog Says*, Washington Technology.com, May 22, 2009, available at <http://washingtontechnology.com/articles/2009/05/22/deepwater-in-trouble-watchdog>.

¹²⁶ The Homeland Security Act of 2002, P.L. 107-296 § 888, 116 Stat. 2135. Prior to the creation of DHS, the Coast Guard was an agency within the Department of Transportation.

¹²⁷ For a more detailed description of Coast Guard missions please see <http://www.uscg.mil/top/missions/> (By its own account the United States Coast Guard is a military, multi-mission, maritime service within the Department of Homeland Security and one of the nation's five armed services. Its core roles are to protect the public, the environment, and U.S. economic and security interests in any maritime region in which those interests may be at risk, including international waters and America's coasts, ports, and inland waterways.).

¹²⁸ O'Rourke, *supra* note 123, at CRS-2. Deepwater-capable refers generally to the Coast Guard's ability to perform missions performed that are more than 50 miles from shore.

highly important matters as search and rescue, drug interdiction, and alien migrant interdiction.¹²⁹

By the early 1990's, the Coast Guard had determined that many of its "assets were reaching the end of their usable lifespan and were not ideally suited to the modern Coast Guard's mission."¹³⁰ According to the Congressional Research Service, "the Coast Guard's legacy assets at the time included 93 aging cutters and patrol boats and 207 aging aircraft."¹³¹ The cost of maintaining and operating these assets, combined with their outdated technology and poor suitability for performing deepwater missions, led the Coast Guard to conclude a new acquisition effort was required.¹³²

When the Coast Guard initially envisioned a desired replacement for its aging assets, it decided to conduct a system-of-systems acquisition¹³³ (similar to the Army's decision with FCS described above). To restate, GAO defines the SOS procurement strategy used here as "the set or arrangement of assets that results when independent

¹²⁹ *Id.* Additional deepwater missions noted include:
[F]isheries enforcement, marine pollution law enforcement, enforcement of lightering (i.e., at-sea cargo-transfer) zones, the International Ice Patrol in northern waters, overseas inspection of foreign vessels entering U.S. ports, overseas maritime intercept (sanctions-enforcement) operations, overseas port security and defense, overseas peacetime military engagement, and general defense operations in conjunction with the Navy.
Id.

¹³⁰ Trevor L. Brown, Matthew Potoski & David M. Van Slyke, *The Challenge of Contracting for Large Complex Projects: A Case Study of the Coast Guard's Deepwater Program* 12, IBM Center for Business of Government (2008).

¹³¹ O'Rourke, *supra* note 123, at CRS-2.

¹³² *Id.*

¹³³ U.S. Gov't Accountability Office, *Coast Guard: As Deepwater Systems Integrator, Coast Guard is Reassessing Costs and Capabilities but Lags in Applying Its Disciplined Acquisition Approach*, GAO-09-682 at 3 (July 14, 2009).

assets are integrated into a larger system that delivers unique capabilities.”¹³⁴ What this means in real terms is the Coast Guard sought assets that could “work in concert” and any new or upgraded asset must be able to “communicate and synchronize its capabilities with existing assets.”¹³⁵

According to a report conducted by the IBM Center for Business of Government (IBM Report), “[t]he Coast Guard’s goal was to acquire a system of interoperable assets whose seamless communication and coordination would make the efficacy of the whole system greater than the sum of its parts.”¹³⁶ This paper will avoid debating the merits the decision to pursue a more complex SOS procurement versus the more traditional approach of buying and replacing classes of ships or aircraft through a series of individual acquisitions.¹³⁷ However, as one commentator learned in an interview with a former DHS inspector “the DHS procurement office had ‘so few people expert in contract procurement, the private sector was able to take [DHS] for a ride.’”¹³⁸

On June 25, 2002, the Coast Guard formally awarded the Deepwater contract to a partnership consisting of Lockheed Martin and Northrop Grumman.¹³⁹ Awarded as an

¹³⁴ *Id.*

¹³⁵ Brown, Potoski & Van Slyke, *supra* note 130, at 12.

¹³⁶ *Id.*

¹³⁷ GAO-04-380, *supra* note 124, at 6.

¹³⁸ Stanger, *supra* note 125, at 150 (citing Sarah Posner, “*Security for Sale*,” American Prospect 17, no. 1 (2006)).

¹³⁹ Ronald O’Rourke, *Coast Guard Deepwater Program: Background and Issues for Congress*, Cong. Res. Serv., Sept. 6, 2006, at CRS-2.

indefinite delivery, indefinite quantity (ID/IQ) contract,¹⁴⁰ the partnership between Lockheed Martin and Northrop Grumman was known as Integrated Coast Guard Systems (ICGS), and was selected by the Coast Guard to serve as the LSI for the various Deepwater Acquisition Programs.¹⁴¹ As the largest program in the Coast Guard’s history, Deepwater was originally estimated to span thirty years¹⁴² at a cost of \$17 billion,¹⁴³ but this eventually ballooned to over \$24 billion.¹⁴⁴

GAO was concerned about this program from the outset and was one of the first to criticize the program.¹⁴⁵ In 2004, the GAO opined the Coast Guard had “embarked on a major transformational effort using an acquisition strategy that allows a system integrator to identify the Deepwater assets and to manage the acquisition process.”¹⁴⁶ The GAO was concerned the Coast Guard’s strategy carried “inherent risks that must be mitigated

¹⁴⁰ Brown, Potoski & Van Slyke, *supra* note 130, at 27-28. The contract’s precise structure actually consisted of three tiers: the performance-based ID/IQ, individual task orders, and Integrated project teams (IPTs). *Id.*

¹⁴¹ GAO-04-380, *supra* note 124, at 1.

¹⁴² Represents an original five-year contract with five separate option periods (each option contained five-year periods).

¹⁴³ GAO-04-380, *supra* note 124, at 1.

¹⁴⁴ Allison Stanger, *One Nation Under Contract: The Outsourcing of American Power and the Future of Foreign Policy*, 150 (Yale University Press 2009).

¹⁴⁵ U.S. Gov’t Accountability Office, *Coast Guard: Changes to Deepwater Plan Appear Sound, and Program Management Has Improved, but Continued Monitoring Is Warranted*, GAO-06-546, at 2 (April 28, 2006)(From the outset, [GAO has] expressed concern about the risks involved with the Coast Guard’s acquisition strategy, which involves relying on a prime contractor (or system integrator) to identify the assets needed and then using tiers of subcontractors to design and build the actual assets); *see also* GAO-04-380 *supra* note 124; U.S. Gov’t Accountability Office, *Coast Guard: Progress Being Made on Deepwater Project, but Risks Remain*, GAO-01-564 (May 2, 2001).

¹⁴⁶ GAO-04-380, *supra* note 124, at 26.

by effective government oversight of the contractor.”¹⁴⁷ However, because the Coast Guard lacked the necessary acquisition personnel to provide oversight it was destined to fail in meeting this critical responsibility.

A couple of factors played a part in this failure. First, the Deepwater contract was a performance-based acquisition that put a priority on results as opposed to processes.¹⁴⁸ Additionally, as stated above the Coast Guard recognized that it did not have the personnel with the experience and depth to manage the acquisition, hence the reason it contracted with ICGS to be the LSI in the first place.¹⁴⁹ This latter point is a DHS-wide problem.¹⁵⁰ In fact, the former Chief Procurement Officer for DHS, testified before the AAP where he described the DHS acquisition workforce resources as having been “guttled.”¹⁵¹ In fact, DHS’s extensive institutional reliance on contractors (from inception to the present day) to carry out critical missions remains the subject of Congressional scrutiny.¹⁵²

¹⁴⁷ *Id.*

¹⁴⁸ Stanger, *supra* note 125, at 151; GAO-04-380, *supra* note 124, at 2.

¹⁴⁹ GAO-09-682, *supra* note 133, at 1.

¹⁵⁰ *See generally* Schooner & Greenspahn, *supra* note 12.

¹⁵¹ AAP, *supra* note 9, at 364 n.59 (citing testimony of Greg Rothwell, DHS, AAP Pub. Meeting (Mar. 17, 2006) Tr. At 215).

¹⁵² Letter from Senator Joseph I. Lieberman and Senator Susan M. Collins to DHS Secretary Janet Napolitano (Feb. 23, 2010), available at http://hsgac.senate.gov/public/index.cfm?FuseAction=Press.MajorityNews&ContentRecord_id=01a96af1-5056-8059-7687-4190c852b289. Senators Lieberman and Collins lament the fact DHS contractors (over 200,000) outnumber civilian employees (188,000). “[T]he sheer number of DHS contractors currently on board again raises the question of whether DHS itself is in charge of its programs and policies, or whether it inappropriately has ceded core decisions to its contractors.” *Id.*

In application to Deepwater, this management experience deficit meant the Coast Guard would specify the outcomes it sought to achieve, but gave ICGS complete responsibility for identifying and delivering the assets to achieve the desired outcomes.¹⁵³ Therefore, the resulting situation had ICGS armed with overall management of the project, which provided them with oversight of how federal funds would be spent and assessment of the impact.¹⁵⁴ As GAO noted, “ICGS’s role [as LSI] included managing requirements, determining how assets would be acquired, defining how assets would be employed by Coast Guard users in an operational setting, and exercising technical authority over all asset design and configuration.”¹⁵⁵ In effect, “ICGS was assigned the task of choosing who should perform the work as well as the task of evaluating itself.”¹⁵⁶ As ICGS, the prime contractor, was a partnership between Lockheed Martin and Northrop Grumman, the “scandal” was cemented when both companies were chosen by ICGS to be the primary subcontractors.¹⁵⁷

The foregoing decision looks particularly scandalous when considered in connection with the CBS *60 Minutes* program dedicated to Deepwater,¹⁵⁸ which stands in contrast to the IBM Report’s more balanced examination of the positive, negative and

¹⁵³ GAO-04-380, *supra* note 124, at 2.

¹⁵⁴ Stanger, *supra* note 125, at 151.

¹⁵⁵ GAO-09-682, *supra* note 133, at 7.

¹⁵⁶ Stanger, *supra* note 125, at 151.

¹⁵⁷ *Id.*; GAO-06-546, *supra* note 145, at 6.

¹⁵⁸ *60 Minutes: The Troubled Waters of Deepwater* (CBS News broadcast Aug. 19, 2007) available at <http://www.cbsnews.com/video/watch/?id=3182951n&tag=mncol;lst;1> (Steve Kroft reports on the U.S. Coast Guard and its Deepwater refurbishment program).

mixed returns of Deepwater's early performance.¹⁵⁹ While this episode could hardly be considered objective, the most scandalous failures of Deepwater are highlighted,¹⁶⁰ including (perhaps most importantly) the fact that after four years the Coast Guard had fewer operational boats than when it began the program.¹⁶¹ A former Coast Guard officer describes Deepwater's contractual arrangement as follows:

People say that this is like the fox watching the henhouse. And it's worse than that.... It's where the government asked the fox to develop the security system for the henhouse. Then told them, you are going to do it. You know, by the way, we'll give you the security code to the system and we'll tell you when we're on vacation.¹⁶²

Since Deepwater's beginning, GAO documented the need for effective oversight in order to ensure complex, performance-based contracts such as the one here achieved intended results and did not waste taxpayer dollars.¹⁶³ Unfortunately, the Coast Guard's primary means of managing the program and oversight was the integrated product teams (IPT).¹⁶⁴ The IPTs were found to be less than effective in their performance for a variety

¹⁵⁹ See generally Brown, Potoski & Van Slyke, *supra* note 130.

¹⁶⁰ *60 Minutes*, *supra* note 158. The episode also details the allegations former Lockheed Martin project manager Michael DeKort who gained internet notoriety via his claims of corruption on YouTube available at <http://www.youtube.com/watch?v=qd3VV8Za04g>; see also Alice Lipowicz, *Deepwater whistle-blower case moves forward*, Washington Technology.com, Apr. 8, 2010, available at <http://washingtontechnology.com/articles/2010/04/08/deepwater-false-claims-lawsuit-to-proceed.aspx>

¹⁶¹ *60 Minutes*, *supra* note 158.

¹⁶² *Id.*; see also Stanger, *supra* note 125, at 151; *But see* Brown, Potoski & Van Slyke, *supra* note 130, at 35 (this report provides a more objective examination of Deepwater).

¹⁶³ GAO-04-380, *supra* note 124, at 8.

¹⁶⁴ *Id.*, at 2.

of reasons.¹⁶⁵ Ultimately, Deepwater’s primary lesson was “effective acquisition of complex product requires an expanded and more highly skilled acquisition workforce.”¹⁶⁶

In response to heavy criticism,¹⁶⁷ Admiral Thad Allen, the Commandant of the Coast Guard, stated on April 17, 2007, the Coast Guard would make fundamental changes in the management of the Deepwater program.¹⁶⁸ Admiral Allen stated months

¹⁶⁵ GAO-06-546, *supra* note 145, at 7. GAO found IPT problems related to changing membership, understaffing, insufficient training, and inadequate communication among members. Also, the Coast Guard’s failure to adequately address the frequent turnover of personnel in the program and the transition from existing assets to those assets that would be part of the Deepwater program. *Id.*; GAO-04-380, *supra* note 124, at 10. GAO identified four major issues impeding the effective performance of IPTS: Lack of timely charters to vest IPTs with authority for decision making; inadequate communication among members; High turnover of IPT membership and understaffing; and insufficient training. *Id.*

¹⁶⁶ Brown, Potoski & Van Slyke, *supra* note 130, at 37. The IBM report made a comment of extreme importance stating, “[s]mart buying of complex products is not simply an exercise in following procedures and punching checklists, but rather it requires personnel who can synthesize information, adapt quickly to changing circumstances, and selectively apply different tools and skills to match the dynamic challenges they face.” *Id.*

¹⁶⁷ See Ronald O’Rourke, *Coast Guard Deepwater Acquisition Programs: Background, Oversight Issues, and Options for Congress*, Cong. Res. Serv., Mar. 30, 2010, at CRS-34-35 (Appendix A) (provides in-depth discussion of Deepwater criticism). Author notes: Observers also expressed concern that the Coast Guard did not have enough in-house staff and in-house expertise in areas such as program management, financial management, and system integration to properly oversee and manage an acquisition effort as large and complex as the Deepwater program, and that the Coast Guard did not make sufficient use of the Navy or other third-party, independent sources of technical expertise, advice, and assessments. *Id.*, at CRS-35.

¹⁶⁸ O’Rourke, *supra* note 123, at CRS-14-15. Admiral Allen stated in part: Working together with industry, the Coast Guard will make the following six [6] fundamental changes in the management of our Deepwater program:
[1] The Coast Guard will assume the lead role as systems integrator for all Coast Guard Deepwater assets, as well as other major acquisitions as appropriate....

earlier that Coast Guard engineers and procurement staff team would now play a much larger role in overseeing the project in an effort to rein in its private sector partners, adding that the mistakes made were unacceptable.¹⁶⁹ In fact, 2007 would later be referred to as a watershed year for Deepwater.¹⁷⁰

Among the changes the Coast Guard made that year, it went from a single, integrated Deepwater acquisition program to a collection of separate Deepwater acquisition programs.¹⁷¹ The Coast Guard also shifted from a SOS performance-based acquisition to what it refers to as a “defined-based” acquisition, which entails the use of

[2] The Coast Guard will take full responsibility for leading the management of all life cycle logistics functions within the Deepwater program under a an improved logistics architecture established with the new mission support organization.

[3] The Coast Guard will expand the role of the American Bureau of Shipping, or other third-parties as appropriate, for Deepwater vessels to increase assurances that Deepwater assets are properly designed and constructed in accordance with established standards.

[4] The Coast Guard will work collaboratively with [ICGS] to identify and implement an expeditious resolution to all outstanding issues regarding the national security cutters.

[5] The Coast Guard will consider placing contract responsibilities for continued production of an asset class on a case-by-case basis directly with the prime vendor consistent with competition requirements if: (1) deemed to be in the best interest of the government and (2) only after we verify lead asset performance with established mission requirements.

[6] Finally, I will meet no less than quarterly with my counterparts from industry until any and all Deepwater program issues are fully adjudicated and resolved. Our next meeting is to be scheduled within a month. These improvements in program management and oversight going forward will change the course of Deepwater. *Id.*, at CRS-15.

¹⁶⁹ Eric Lipton, *Billions Later, Plan to Remake the Coast Guard Fleet Stumbles*, N.Y. Times, Dec. 9, 2006, at A1.

¹⁷⁰ O’Rourke, *supra* note 167, at CRS-1. In 2007, the Coast Guard announced a number of reform actions that significantly altered the service’s approach to Deepwater acquisition (and to Coast Guard acquisition in general). *Id.*

¹⁷¹ *Id.*, at CRS-3.

more-detailed specifications of the capabilities that various Deepwater assets must have.¹⁷² Lastly, the Coast Guard decided it would take over as the system integrator.¹⁷³

As of March 2010, the Coast Guard has assumed full control of program development marking the end of DHS's reliance on ICGS.¹⁷⁴ Deputy Homeland Security Secretary Jane Holl Lute reportedly informed a House Homeland Security Appropriations Subcommittee that DHS has "reorganized its acquisition review process to better manage major procurements" in order to address the GAO finding it "lacked the involvement of senior leadership in major procurement efforts."¹⁷⁵

However, there is no indication the Coast Guard is in any better position in 2010 from a management standpoint than it was in 2002. Neither the Coast Guard, nor DHS, should fool themselves in believing that either simplifying Deepwater program requirements or bringing the program under internal control, remedies the underlying basis for the LSI. Both DOD and DHS would be wise to recognize additional contractor support in the areas of program management and systems engineering will still be

¹⁷² *Id.*

¹⁷³ *Id.*; see also John T. Bennett, *U.S. reasserts control over contractors: Despite Deepwater Takeover, Many Say Gov't Lacks Skills To Run Programs*, Defense News, April 23, 2007. Admiral Allen is quoted stating, "[w]e've relied too much on contractors to do the work of government as a result of tightening budgets, a dearth of contracting expertise in the federal government, and a loss of focus on critical governmental roles and responsibilities in the management of acquisition programs." *Id.*

¹⁷⁴ Chris Strohm, *Coast Guard takes control from Deepwater's 'integrators,'* CongressDaily, Mar. 3, 2010, available at http://www.govexec.com/story_page.cfm?articleid=44706&sid=61.

¹⁷⁵ *Id.*

required until this underlying problem is addressed.¹⁷⁶ Thus, both entities will need to cognizant of the OCI issues that could still arise in the future.

C. The OCI Concern

1. Summary of OCI Rules

As addressed more fully below,¹⁷⁷ much of the Congressional concern with LSIs pertained to the inherent OCI problems associated with them.¹⁷⁸ OCIs are distinguished from personal conflicts of interest (PCIs), which are generally more obvious to the casual observer and more heavily regulated by the Office of Government Ethics (OGE).¹⁷⁹ PCI rules regulate individual persons and can be adequately explained by the basic obligation of public service:

Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain. To ensure that every citizen can have complete confidence in the integrity of the Federal Government, each employee shall respect and adhere to the principles of ethical conduct set forth in this section, as well as the implementing standards contained in this part and in supplemental agency regulations.¹⁸⁰

¹⁷⁶ See Schooner & Greenspahn, *supra* note 12, J. at 10 n. 28.

¹⁷⁷ See discussion *infra* Section II.D.

¹⁷⁸ 155 Cong. Rec. S5205, 5210 (daily ed. May 6, 2009)(statement of Sen. Levin). During debate of S.454, which eventually became the Weapon Systems Acquisition Reform Act of 2009, Senator Levin stated: “The bill will address the inherent conflict of interest we see in a number of programs today, when a contractor hired to give us an independent assessment of an acquisition program is participating in the development or construction side of the same program.”; 155 Cong. Rec. S5205, 5211 (daily ed. May 6, 2009)(statement of Sen. McCain). Senator McCain stated: “[T]he relationship between those who are doing the contracting, other contractors, and the awardee is way too close today for us to get truly independent assessments and cost controls.”

¹⁷⁹ See generally 5 C.F.R. Part 2635, Standards of Ethical Conduct for Employees of the Executive Branch.

¹⁸⁰ 5 C.F.R. § 2635.101(a).

OCIs can be less apparent and require special attention by both the government and contractors. As one observer wrote, “an OCI arises when a contractor possesses (1) an economic incentive that renders it unable, or potentially unable, to provide impartial assistance or advice; or (2) an unfair competitive advantage in obtaining a contract as the result of access to nonpublic information about a competitor or a procurement.”¹⁸¹ The Federal Acquisition Regulation (FAR) defines an OCI as a situation that arises “because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person’s objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.”¹⁸² The usefulness of this definition in terms of assisting either the government or private industry is certainly open to debate. What is not debatable is “OCIs are a significant part of the landscape of public procurement today.”¹⁸³

2. OCI Categories

Based on the language of FAR 9.5, as well as the case law issued by the GAO and the Court of Federal Claims (COFC), OCIs have three generally recognized categories: (1) “biased ground rules,” (2) “unequal access to information,” and (3) “impaired

¹⁸¹ Szeliga, *supra* note 25, at 640.

¹⁸² FAR 2.101; *see generally*, Gordon, *supra* note 25 (provides a detailed analysis of what constitutes an OCI); Cantu, *supra* note 25 (provides excellent overview and analysis of OCI issues).

¹⁸³ Gordon, *supra* note 25, at 41.

objectivity.”¹⁸⁴ Daniel Gordon, currently Administrator of the Office of Federal Procurement Policy (OFPP), explains:

“Biased ground rules” refers to situations where a company sets the ground rules for a future competition by, for example, writing the specifications that competitors for a contract must meet. “Unequal access to information” arises where a company has access to nonpublic information (typically through performance of a contract) that gives it an unfair advantage in the competition for a later contract. “Impaired objectivity” comes into play when a company is asked to perform tasks that require objectivity, but another role the company plays casts doubt on the company’s ability to be truly objective (for example, where a company is to give the government an assessment of the performance of firms, where one of those firms is an affiliate of the company giving the assessment).¹⁸⁵

FAR 9.5 states, “the government is concerned with both actual conflicts as well as potential conflicts, both in current and future acquisitions.”¹⁸⁶ The AAP suggested “the principles guiding the government’s efforts to avoid such conflicts are: (1) preventing the existence of conflicting roles that might bias a contractor’s judgment; and (2) preventing unfair competitive advantage.”¹⁸⁷ Importantly, the AAP also acknowledged the difficulties faced by contracting officers who are entrusted with the responsibility to identify and mitigate actual and potential OCIs.¹⁸⁸

¹⁸⁴ *Id.*, at 32; *see also* Szeliga, *supra* note 25, at 648-672 (provides detailed analysis of each of the three categories); Aetna Gov’t Health Plans, Inc.; Found. Health Fed. Servs., Inc., Comp. Gen. B-254397, et al., July 27, 1995, 95-2 CPD P129 (provides excellent description and discussion of the three recognized OCI groups).

¹⁸⁵ Gordon, *supra* note 25, at 35; *see also* Ralph C. Nash, 20 NASH & CIBINIC REP. ¶24 (May 2006) (provides further explanation of OCI categories).

¹⁸⁶ FAR 9.502(c).

¹⁸⁷ AAP, *supra* note 9, at 405 (citing FAR 9.505(a)-(b)).

Despite being given the above responsibility, contracting officers are provided “no detailed guidance in the FAR how to accomplish these tasks.”¹⁸⁹ Of course this is little consolation to contracting officers who still must perform the avoidance, neutralization, or mitigation of OCIs required by FAR 9.5 in the absence of clear guidance. As a recent GAO decision stated, “[t]he responsibility for determining whether an actual or potential conflict of interest will arise, and to what extent the firm should be excluded from the competition, rests with the contracting agency.”¹⁹⁰ DOD is currently in the process of amending the DFARS to address OCIs,¹⁹¹ but the results of this effort are unknown at this point.¹⁹² Contractors would be well advised to devise their own OCI mitigation plans.

The mitigation of OCIs is undoubtedly a critical piece to any reform of major systems acquisitions. As one commentator has suggested “two overarching tools have

¹⁸⁸ *Id.*, at 405, citing FAR 9.504

¹⁸⁹ *Id.*, at 405, citing FAR 9.504(a)(1), (a)(2)(the Panel states guidance is limited to the “general rules, procedures, and examples” in FAR 9.5).

¹⁹⁰ *See* L-3 Servs., Inc., B-400134.11-12, 2009 U.S. Comp. Gen. LEXIS 163, at 10; *citing* Aetna Gov’t Health Plans, Inc.; Foundation Health Fed. Servs., Inc., B-254397, et al., July 27, 1995, 95-2 CPD P129 at 12.

¹⁹¹ As required by the Weapon Systems Acquisition Reform Act of 2009, Pub. L. No. 111-23, 123 Stat. 1704 (codified as amended in scattered sections of 10 U.S.C.), Sec. 207.

¹⁹² *See* Defense Federal Acquisition Regulation Supplement, 75 Fed. Reg. 20954 (Apr. 22, 2010) (to be codified at 48 C.F.R. Parts 202, 203, 212, and 252). In a public meeting held on December 8, 2009, which I attended, DOD considered the comments of various presenters on this subject. The various presenters reflected (1) a desire to see a policy and regulation to emphasize the importance of using mitigation strategies to address OCIs; (2) development of a more consistent approach to addressing OCIs within the government; and (3) a strong desire to allow for additional public comment prior to DOD’s issuance of any rule on this subject. *Id.*

proven to make reform effective: competition and transparency.”¹⁹³ Professor Schooner adds a third “pillar,” namely that of integrity.¹⁹⁴ Therefore, it stands to reason if mitigating steps or precautions are not taken, then OCIs will continue to “present challenges to the integrity of the procurement system” and for all parties involved in the process.¹⁹⁵ The logical presumption is that with transparency comes competition and “with competition, one expects to receive better quality and lower prices.”¹⁹⁶ Or to state it another way, “transparency helps insure integrity which, in turn, promotes competition.”¹⁹⁷ OCIs create an atmosphere, which at a minimum has the potential to undermine competition, integrity and transparency. Thus, DOD's ability to procure major weapons systems in a cost-effective manner could certainly be degraded.

It is an accepted premise that the integrity of the entire procurement system can be injured by OCIs. As stated by the AAP, “the public expects there to be no preferential treatment for particular contractors, no self-interest in the decision making process, and no hidden agenda impacting contractor selections.”¹⁹⁸ The best interests of the taxpayers are not being served when there is either an actual OCI or the perception that any of the foregoing expectations are not being met because of an OCI.

¹⁹³ Jennifer Jo Snider-Smith, *Competition and Transparency: What Works for Public Procurement Reform*, 38 PUB. CONT. L.J., 85 (2008).

¹⁹⁴ Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Public Procurement Law Review 103 (2002), available at <http://ssrn.com/abstract=304620>.

¹⁹⁵ Gordon, *supra* note 25, at 41.

¹⁹⁶ Snider-Smith, *supra* note 193, at 88.

¹⁹⁷ Schooner, *supra* note 194.

¹⁹⁸ AAP, *supra* note 9, at 407.

POGO shares the above concern and argued that “[e]arly identification and mitigation of OCIs could have various financial benefits for the government.”¹⁹⁹ While there is admittedly a difficulty in accurately quantifying such benefits, this should discount the utility of the effort. As Scott Amey, POGO’s General Counsel wrote, “[e]nsuring that the best qualified, not the best connected, contractor is providing the government with essential goods and services could potentially decrease cost overruns resulting from less qualified contractors encountering difficulties fulfilling contractor requirements.”²⁰⁰

Nevertheless, the OCI problem can serve as distraction to Congress, the media, and the public at-large. The scandals, such as the one that enveloped Deepwater, certainly grab headlines and stir the masses. However, the more pressing concern should be to understand the systemic problem that created such a scenario in the first place. A partial answer may lie in determining the proper roles of the government employee and the contractor.

3. Inherently Governmental Functions

An issue inextricably linked to the LSI OCI issue is related to the determination of which functions are inherently governmental.²⁰¹ While a single bright line definition of

¹⁹⁹ Letter from Scott H. Amey, General Counsel, POGO, to Laurieann Duarte, General Services Administration (July 18, 2008) (detailing the need for stronger contractor OCI regulations).

²⁰⁰ *Id.*

²⁰¹ Office of Management and Budget Circular A-76 (Revised) (May 29, 2003); U.S. Gov’t Accountability Office, *Defense Management: DOD Needs to Reexamine Its Reliance on Contractors and Continue to Improve Management and Oversight*, GAO-08-572T, at 5 (Mar. 11, 2008). GAO writes, “the Circular reinforces that government personnel shall perform inherently governmental functions.” *Id.*

inherently governmental has been elusive, efforts are ongoing to do just that.²⁰² The Office of Federal Procurement Policy (OFPP) recently issued a proposed policy letter seeking to build a single definition around the Federal Activities Inventory Reform (FAIR) Act²⁰³ definition of inherently governmental function.²⁰⁴ The FAIR Act defines inherently governmental function as “function that is so intimately related to the public interest as to require performance by Federal Government employees.”²⁰⁵ The purpose of this effort is to establish clarity throughout the federal government with a single definition.²⁰⁶ However, this effort is not without critics who assert the proposed phrases “closely associated with inherently governmental function” and “critical function” create further confusion.²⁰⁷

While the debate over what constitutes “inherently governmental” cannot be fully addressed here, it is fair to state that some functions “are so intimately related to the public interest are considered inherently governmental and should only be performed by

²⁰² See President Barack H. Obama, Remarks by the President on Procurement at the Dwight D. Eisenhower Executive Office Building (Mar. 4, 2009); P.L. 110-417, § 321; Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16188 (Mar. 31, 2010); Robert Brodsky, *Administration puts its stamp on ‘inherently governmental,’* Gov’t Executive.com, Mar. 31, 2010, available at http://www.govexec.com/story_page.cfm?articleid=44925&sid=59.

²⁰³ P.L. 105-270, 112 Stat.2382 (1998).

²⁰⁴ Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16188, (Mar. 31, 2010).

²⁰⁵ P.L. 105-270 § 5(2)(A).

²⁰⁶ Work Reserved for Performance by Federal Government Employees, 75 Fed. Reg. 16188, (Mar. 31, 2010).

²⁰⁷ Matthew Weigelt, *Inherently governmental job proposal blurs a blurry world*, Federal Computer Week (Apr. 29, 2010), available at <http://fcw.com/articles/2010/04/28/panel-inherently-governmental-function-insourcing.aspx>

government personnel.”²⁰⁸ Thus, having contractors operating in areas that should be the federal government’s responsibility strikes at the heart of Congressional concern associated with LSIs. While contractors and government “are partners in public procurement, the government and industry have separate agendas.”²⁰⁹

Because of these separate agendas, “the closer contractor services come to supporting inherently governmental functions, the greater risk of their influencing the government’s control over and accountability for decisions that may be based, in part, on contractor work.”²¹⁰ It is not an attack on contractors to state they are typically motivated by profit.²¹¹ However, it is a legitimate concern that allowing them into areas that are inherently governmental “may result in decisions that are not in the best interest of the government, and may increase vulnerability to waste, fraud, and abuse.”²¹²

D. Congressional Response

Congressional action in response to the use of LSIs for FCS and Deepwater can be summarized as focused on the symptoms of the problem as opposed to the manpower problem itself. Although, Congress has been concerned with the use of LSIs for several

²⁰⁸ GAO-08-572T, *supra* note 201, at 5.

²⁰⁹ Snider-Smith, *supra* note 193, at 89.

²¹⁰ GAO-08-572T, *supra* note 201, at 6.

²¹¹ Entities such as not-for-profit firms and federally funded research and development centers (FFRDCs) may have different institutional agendas than the federal government as well, but the profit motive of defense contractors arguably causes greater concern for those charged with protecting taxpayer dollars. Whether this viewpoint is fair, or even accurate, is not the focus of this paper.

²¹² GAO-08-572T, *supra* note 201, at 6.

years,²¹³ Congressional focus has mostly centered on OCI issues inherent in the use of LSIs.²¹⁴ While OCIs are not unimportant and adversely affect the procurement process,²¹⁵ this author's opinion is that this focus is a distraction to the larger issue of why LSIs were needed in the first place. Congress needs to understand that the root cause of the LSI OCI problem lies in its mandated decimation of the defense acquisition workforce. Unfortunately, it is much more palatable to place blame elsewhere.

The first Congressional attempt to address LSIs, Section 805 of the National Defense Authorization Act (NDAA) for FY2006,²¹⁶ merely called for information.²¹⁷ This mandate stemmed from complaints from contractors on the FCS program who were concerned the LSI role gave the prime contractor too much authority in the selection and award of contracts.²¹⁸ Congress required DOD to address how LSI OCIs would be

²¹³ See P.L. 109-163, National Defense Authorization Act (NDAA) for FY2006, Sec. 805; P.L. 109-364, John Warner NDAA for FY2007, Sec. 115 and Sec. 807; P.L. 110-181, NDAA for FY2008, Sec. 802(a)(1); P.L. 110-417, the Duncan Hunter NDAA for FY2009, Sec. 112 amended P.L. 110-181, Sec 802; and Weapon Systems Acquisition Reform Act of 2009, Pub. L. No. 111-23, 123 Stat. 1704 (codified as amended in scattered sections of 10 U.S.C.), Sec. 207.

²¹⁴ Grasso, *supra* note 20, at 4. Author states "some observers have expressed concern that LSI arrangements can create conflicts of interest for an LSI in areas such as determining system requirements and soliciting, evaluating, and hiring contractors." *Id.*

²¹⁵ See discussion *infra* part IIC.

²¹⁶ P.L. 109-163 § 805.

²¹⁷ P.L. 109-163 § 805(a) (Not later than September 30, 2006, the Secretary of Defense shall submit to the congressional defense committees a report on the use of lead system integrators for the acquisition by the [DOD] of major systems).

²¹⁸ Schooner & Yukins, *supra* note 85, at 9-21.

prevented and mitigated,²¹⁹ as well as how DOD would minimize functions that could be considered inherently governmental.²²⁰

Certain legislation was specifically aimed at either FCS or Deepwater. For instance, Section 115 of the John Warner NDAA for FY07, required the GAO to review and report on the use of the LSI (Boeing/SAIC team) involved with the Army's FCS.²²¹ GAO was required to provide a description of the LSI's responsibilities in managing FCS under the contract, as well as an evaluation of whether those responsibilities differed from other LSIs under DOD contracts.²²² Section 115 also tasked GAO with providing a description and assessment of the Army's responsibilities in managing FCS, including the Army's oversight of the LSI's activities and decisions.²²³ Finally, Section 115's final provision reflected Congress' primary concern with OCIs.²²⁴ Congress requested GAO identify the mechanisms in place to mitigate OCIs in connection with future competition on FCS technologies and equipment under FCS subcontracts.²²⁵

²¹⁹ P.L. 109-163 § 805(b)(2).

²²⁰ P.L. 109-163 § 805(b)(3).

²²¹ P.L. 109-364, John Warner NDAA for FY2007 § 115(a). Not later than March 15, 2007, the Comptroller General of the United States shall submit to the congressional defense committees a report on the participation and activities of the lead systems integrator in the [FCS] program under the contract of the Army for the [FCS]. *Id.*

²²² P.L. 109-364 § 115(b)(1).

²²³ P.L. 109-364 § 115(b)(2); P.L. 109-364 § 115(b)(3) required GAO to provide "[a]n assessment of the manner in which the Army-- (A) ensures that the lead systems integrator meets goals for the [FCS] in a timely manner; and(B) evaluates the extent to which such goals are met.." *Id.*

²²⁴ P.L. 109-364 § 115(b)(5).

²²⁵ P.L. 109-364 § 115(b)(5).

Section 807 represented the first general Congressional limitations on LSIs.²²⁶ With certain statutorily defined exceptions,²²⁷ Section 807 mandated that no entity performing LSI functions in the acquisition of a major system by the DOD may have any direct financial interest in the development or construction of any individual system or element of any SOS.²²⁸ Additionally, Section 807 added to the requirements of the report required by Section 805(b) of NDAA FY06, by requiring the Secretary of Defense to provide a precise and comprehensive definition for LSIs.²²⁹ Congress also required DOD to specify the various types of contracts and fee structures that are appropriate for use by LSIs in the production, fielding, and sustainment of complex systems.²³⁰

²²⁶ P.L. 109-364 § 807; 10 U.S.C. § 2410p.

²²⁷ P.L. 109-364 § 807(a)(1); 10 U.S.C. § 2410p(b). Section 2410p(b) provides the following exceptions--An entity described in subsection (a) may have a direct financial interest in the development or construction of an individual system or element of a system of systems if--

- (1) the Secretary of Defense certifies to the Committees on Armed Services of the Senate and the House of Representatives that--
 - (A) the entity was selected by [DOD] as a contractor to develop or construct the system or element concerned through the use of competitive procedures; and
 - (B) [DOD] took appropriate steps to prevent any organizational conflict of interest in the selection process; or
- (2) the entity was selected by a subcontractor to serve as a lower-tier subcontractor, through a process over which the entity exercised no control.

²²⁸ P.L. 109-364 § 807(a)(1); 10 U.S.C. § 2410p(a). Per 10 U.S.C. § 2410p(c), the prohibitions in subsection would not preclude an LSI from performing work necessary to integrate two or more individual systems or elements of a SOS with each other.

²²⁹ P.L. 109-364 § 807(c)(1).

²³⁰ P.L. 109-364 § 807(c)(2).

In the NDAA for FY08, Congress took its concern to another level by placing a prohibition on DOD's use of any new LSIs effective October 1, 2010.²³¹ Section 802 set forth that DOD may not award a contract to LSIs in major systems acquisitions if that entity was not performing LSI functions in the major system before the enactment of this law.²³² Additionally, Congress placed restrictions on DOD's use of LSIs beyond low rate initial production.²³³ The abovementioned statute led directly to a revision of the Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 209.5.²³⁴ An important

²³¹ P.L. 110-181 § 802.

²³² P.L. 110-181 § 802(a)(1).

²³³ P.L. 110-181 § 802(a)(2). [DOD] may award a new contract for lead systems integrator functions in the acquisition of a major system only if—

(A) the major system has not yet proceeded beyond low-rate initial production; or

(B) the Secretary of Defense determines ... that it would not be practicable to carry out the acquisition without ... a contractor to perform lead systems integrator functions

(3) REQUIREMENTS RELATING TO DETERMINATIONS. - A determination under paragraph (2)(B)—

(A) shall specify the reasons why it would not be practicable to carry out the acquisition without ... a contractor ... (including a discussion of alternatives, such as the use of the [DOD] workforce, or a system engineering and technical assistance contractor);

(B) shall include a plan for phasing out the use of contracted [LSI] functions over the shortest period of time consistent with the interest of the national defense;

(C) may not be delegated below the level of the Under Secretary of Defense for Acquisition, Technology, and Logistics; and

(D) shall be provided to the [Congress] at least 45 days before the award of a contract pursuant to the determination; *see also* DFARS Subpart 209.570-2(d).

²³⁴ DFARS Subpart 209.570-2(c). In accordance with Section 802 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181), DOD may award a new contract for [LSI] functions in the acquisition of a major system only if—

(1) The major system has not yet proceeded beyond low-rate initial production; or (2) The Secretary of Defense determines ... that it would

facet of Section 802 that we will revisit in further depth below is the Congressional recognition of the acquisition workforce connection to the LSI issue.²³⁵

The Duncan Hunter NDAA for FY09, amended Section 802 above to include a new subsection specifically relating to FCS.²³⁶ In addition to clarifying how long the FCS prime contractor would be considered the LSI,²³⁷ Congress provided that any modification to the existing FCS contract for the purpose of entering into full-rate production of FCS major systems or subsystems would be considered a new contract.²³⁸

Deepwater was by no means exempt from Congressional attention. On September 27, 2008, despite ultimately becoming a failed Congressional initiative, the

not be practicable to carry out the acquisition without ... a contractor to perform [LSI] functions and that doing so is in the best interest of DOD. The authority to make this determination may not be delegated below the level of the Under Secretary of Defense for Acquisition, Technology, and Logistics. (Also see 209.570-3(b).)

(d) Effective October 1, 2010, DOD is prohibited from awarding a new contract for [LSI] functions in the acquisition of a major system to any entity that was not performing [LSI] functions in the acquisition of the major system prior to January 28, 2008.

²³⁵ P.L. 110-181 § 802(b).

²³⁶ P.L. 110-417 § 112. Reads as follows: Section 802 of the NDAA for FY08 (P.L. 110-181; 10 U.S.C. § 2410p) is amended by adding at the end the following new subsection:

(e) Status of Future Combat Systems Program Lead System Integrator.--
(1) Lead systems integrator.-- In the case of the [FCS] program, the prime contractor of the program shall be considered to be a [LSI] until 45 days after the Secretary of the Army certifies in writing to [Congress] that such contractor is no longer serving as the [LSI].

(2) New contracts.--In applying subsection (a)(1) or (a)(2), any modification to the existing contract for the [FCS] program, for the purpose of entering into full- rate production of major systems or subsystems, shall be considered a new contract."

²³⁷ 10 U.S.C. § 2410p(e)(1).

²³⁸ 10 U.S.C. § 2410p(e)(2).

House of Representatives passed H.R. 6999, the Integrated Deepwater Program Reform Act of 2008.²³⁹ The bill has essentially died in the Senate, but would have prohibited the Coast Guard from using a private contractor as LSI,²⁴⁰ mandated use of full and open competition,²⁴¹ established a new Chief Acquisition Officer position,²⁴² and generated other reporting requirements (costs, changes, deliveries and contracts).²⁴³ With the changes the Coast Guard has already made discussed above, further legislation on Deepwater is unlikely at this point.

On May 22, 2009, President Barack Obama signed the Weapon Systems Acquisition Reform Act of 2009 (WSARA),²⁴⁴ the most recent Congressional attempt to deal with the OCI issue within in major defense acquisition programs.²⁴⁵ Section 207

²³⁹ H.R. 6999, 110th Cong. (2008); *see also* Grasso, *supra* note 20, at 6.

²⁴⁰ H.R. 6999, 110th Cong. § 102(a)(1) (2008).

²⁴¹ H.R. 6999, 110th Cong. § 102(a)(2) (2008).

²⁴² H.R. 6999, 110th Cong. § 107 (2008).

²⁴³ H.R. 6999, 110th Cong. § 109 (2008).

²⁴⁴ Weapon Systems Acquisition Reform Act of 2009, Pub. L. No. 111-23, 123 Stat. 1704 (codified as amended in scattered sections of 10 U.S.C.).

²⁴⁵ *See id.* § 207. Not specifically addressed in this paper, but worthy of note here is § 207(b)(2)-(4) which states the revised regulations ... must also:

(2) ensure that [DOD] receives advice on systems architecture and systems engineering matters with respect to major defense acquisition programs from federally funded research and development centers or other sources independent of the prime contractor;

(3) require that a contract for the performance of systems engineering and technical assistance functions for a major defense acquisition program contains a provision prohibiting the contractor or any affiliate of the contractor from participating as a prime contractor or a major subcontractor in the development or construction of a weapon system under the program; and

requires the Secretary of Defense to provide uniform guidance and tighten existing requirements for OCIs by contractors in major defense acquisition programs.²⁴⁶

First and foremost, those regulations are required to address OCIs that could arise as a result of LSI contracts on major defense acquisitions and the follow-on contracts related to those programs, particularly production contracts.²⁴⁷ In addition, the regulations must also address potential OCIs in connection with contractors who own business units who compete to perform as the prime contractor or supplier of a major subsystem of a program in which they are already providing systems engineering and technical assistance functions, professional services, or management support services.²⁴⁸ Another area of OCI concern DOD was required to address is the award of major subsystem contracts by a prime contractor to business units or affiliates of the same parent corporate entity.²⁴⁹ Finally, DOD had to address the OCI concern stemming from a private contractor's performance or assistance with conducting technical evaluations.²⁵⁰

(4) establish such limited exceptions to the requirement in paragraphs (2) and (3) as may be necessary to ensure that [DOD] has continued access to advice on systems architecture and systems engineering matters from highly-qualified contractors with domain experience and expertise, while ensuring that such advice comes from sources that are objective and unbiased.

²⁴⁶ *See id.* § 207(a).

²⁴⁷ *See id.* § 207(b)(1)(A).

²⁴⁸ *See id.* § 207(b)(1)(B).

²⁴⁹ *See id.* § 207(b)(1)(C). Congress noted particular concern for the award of subcontracts for software integration or the development of a proprietary software system architecture.

²⁵⁰ *See id.* § 207(b)(1)(D).

All Congressional efforts to deal with OCIs are no doubt necessary, but once again these efforts only address the symptoms of a much bigger problem. The common denominator in all of this is the human capital deficit within the acquisition workforce. Whether the issue is FCS, Deepwater, LSIs, or OCIs, a general recognition that it was DOD's and DHS's lack of internal human capability that required each to turn to LSIs from the outset.

III. SOLUTION: ADDRESS THE HUMAN CAPITAL CRISIS

A. Recognize the Root Problem

On March 4, 2009, President Barack Obama signaled that government procurement problems such as “massive cost overruns, outright fraud, and the absence of oversight and accountability” were going to be major reform priorities for his administration.²⁵¹ While acknowledging that overall “government spending on contracts had doubled to over a half trillion dollars,” the President further stated, “in some cases, contracts are awarded without competition. In others, contractors actually oversee other contractors. We are spending money on things that we don't need, and we're paying more than we need to pay. And that's completely unacceptable.”²⁵²

The President's statement particularly focused on defense contracting:

Last year [2008], GAO looked into 95 major defense projects and found cost overruns that totaled \$295 billion. Let me repeat: That's \$295 billion in wasteful spending. And this wasteful spending has many sources. It comes from investments and unproven technologies. It comes from a lack of oversight. It comes from influence peddling and indefensible no-bid contracts that have cost American taxpayers billions of dollars. In Iraq, too much money has

²⁵¹ President Obama, *supra* note 202.

²⁵² *Id.*

been paid out for services that were never performed, buildings that were never completed, companies that skimmed off the top. At home, too many contractors have been allowed to get away with delay after delay after delay in developing unproven weapon systems.²⁵³

The President's perspective is probably widely held, but placing the blame primarily on contractors or on particular types of contracts misses the bigger picture of why the system is "completely unacceptable."

The entire government is experiencing a human capital crisis in the federal acquisition workforce generally, and the military acquisition workforce specifically.²⁵⁴ As one expert commented, "there simply are not enough warm bodies in government service to man the oversight positions."²⁵⁵ As Professor Schooner aptly noted in his September 2008 congressional testimony, "the government has not sufficiently invested in its acquisition workforce since the 1980's, precipitating a crisis even before the massive post-2000 increase in federal procurement spending."²⁵⁶ As GAO recently noted "[p]rogram offices have reported that workforce shortfalls have resulted in a degradation in oversight, delays in certain management and contracting activities, and increased

²⁵³ *Id.*

²⁵⁴ See generally Tishisa L. Braziel, *Contracting Out Contracting*, 38 PUB. CONT. L.J. 857 (2009); Stanger, *supra* note 125, at 17; AAP, *supra* note 9, at 327; Econom, *supra* note 34 35.

²⁵⁵ Stanger, *supra* note 125, at 17.

²⁵⁶ Hearing Before, Subcomm. on Federal Financial Management, Gov't Information, Federal Services, and International Security of the S. Comm. on Homeland Security & Gov't Affairs, 110th Cong. (Sept. 25, 2008) (statement of Steven L. Schooner, Co-Director of Government Procurement Law Program, The George Washington University Law School).

workloads for existing staff.”²⁵⁷ This only highlights the fact noted by both GAO and DOD “that without an adequate workforce to manage ... acquisitions, there is an increased risk of poor acquisition outcomes and vulnerability to fraud, waste, and abuse.”²⁵⁸

The National Defense Industry Association (NDIA) agrees and supports bolstering the federal acquisition workforce because “an overburdened and under staffed acquisition workforce is frequently a factor in problems that arise during the life-cycle of major acquisition programs.”²⁵⁹ An industry authority remarked “[t]he major issue is there are too few government acquisition personnel with the right measure of critical skills such as system engineering, program management, contract oversight, and cost estimating to name a few.”²⁶⁰

It is no accident that DOD relies heavily on contractor personnel “to supplement its in-house acquisition workforce.”²⁶¹ GAO stated “the institutional resources we have must match the outcomes we desire.” For example, if more work must be done to reduce technical risk before development start—milestone B—DOD needs to have the organizational, people, and financial resources to do so. Once a program is approved for

²⁵⁷ GAO-10-374T, *supra* note 6, at 15.

²⁵⁸ *Id.*, at 1.

²⁵⁹ National Defense Industry, *Top Issues 2010*, at 11 (Nov. 24, 2009) available at <http://www.ndia.org/Advocacy/PolicyPublicationsResources/Documents/2010-Top-Issues-Final-to-the-Printer.pdf>.

²⁶⁰ Defense Acquisition Reform Panel: Hearing Before H. Comm. on Armed Services, 111th Cong. (2009) (statement of Lawrence P. Farrell, Jr., President of the National Defense Industry Assoc.) available at http://armedservices.house.gov/DAR_072109/Farrell_Testimony072109.pdf

²⁶¹ GAO-10-374T, *supra* note 6, at 15.

development, program offices and testing organizations must have the workforce with the requisite skills to manage and oversee the effort.²⁶² At this point, DOD and DHS are still behind the power curve.

Fortunately, it appears the highest levels of our government are recognizing the importance issue. The 2010 Quadrennial Defense Review (QDR) recognized “the Pentagon’s acquisition workforce has been allowed to atrophy, exacerbating a decline in the critical skills necessary for effective oversight.”²⁶³ While not accounting for the purge of the 1990’s, the QDR acknowledged that as DOD’s contractual obligations tripled over the past ten years the acquisition workforce decreased by ten percent.²⁶⁴ The QDR further noted that DOD has operated with vacancies in key acquisition positions over the past eight years.²⁶⁵ These vacancies have averaged between 13 percent for the Army to 43 percent for the Air Force.²⁶⁶

Secretary Gates recently stated that fundamental changes to how the DOD procures major weapon systems “requires enough full-time professionals with the right

²⁶² GAO-09-663T, *supra* note 48, at 13.

²⁶³ QDR, *supra* note 1, at 76. QDR recognizes four major problems within DOD acquisition: the requirements for new systems are too often set at the far limit of current technological boundaries; atrophy of acquisition workforce; system of defining requirements and developing capacity encourages overly optimistic cost estimates; and effective and efficient delivery of logistical support to troops in the field. *Id.*; *see also* Geoff Emeigh, *QDR Amplifies Pentagon’s Need To Reform Acquisition System, Develop Acquisition Cadre*, 93 Fed. Cont. Rep. (BNA) 112, Feb. 16, 2010.

²⁶⁴ *See* QDR, at 76.

²⁶⁵ *Id.*

²⁶⁶ *Id.* QDR further recognized the DOD’s urgent need for technically trained personnel, namely cost estimators, systems engineers, and acquisition (or program) managers to be able to conduct effective oversight responsibilities. *Id.*

skills and training.”²⁶⁷ Thus, the DOD’s FY 2011 “budget plan includes an increase of more than 20,000 such positions to supervise or replace contractors by 2015.”²⁶⁸ In order to fully realize the opportunity inherent in this plan, care must be taken in order to avoid this simply becoming a numbers game.²⁶⁹

In March 2009, House Armed Services Committee created the Panel on Defense Acquisition Reform (DAR Panel) to carry out a comprehensive review of the defense acquisition system.²⁷⁰ In March 2010, the DAR Panel issued its final report in which it acknowledged “[e]nsuring that the acquisition workforce is adequately staffed, skilled and trained, and improving the workforce’s quality and performance are as important as improvements to acquisition processes and structures.”²⁷¹ While this author believes the

²⁶⁷ Robert M. Gates, U.S. Secretary of Defense, DOD News Briefing with Secretary Gates and Adm. Mullen from the Pentagon (Feb. 1, 2010) (transcript available at <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4549>).

²⁶⁸ *Id.*

²⁶⁹ See discussion *infra* Part III.B.; see also Gregg Carlstrom, *Tables turned: Contracting complain insourcing tactics unfair*, Federal Times.com, Mar. 21, 2010, available at <http://www.federaltimes.com/article/20100321/ACQUISITION03/3210306/1009/ACQUISITION>

²⁷⁰ Defense Acquisition Reform Panel, *House Armed Services Committee Panel on Defense Acquisition Reform Findings and Recommendations* (Mar. 23, 2010) available at <http://armedservices.house.gov/pdfs/DARFINALREPORT/DARFINALREPORT032310.pdf>.

²⁷¹ *Id.* at 35. The DAR Panel provided the following aspirational statement:
[DOD] should establish the acquisition workforce as a model within the Department for more flexible personnel management that rewards success and includes accountability. The Department’s Acquisition Workforce Demonstration Program and the authorities in section 1113 of the National Defense Authorization Act for Fiscal Year 2010 provide a solid foundation for creating an acquisition workforce that will obtain the value the Department needs. To achieve this, the Department requires flexibility to efficiently hire qualified new employees, and to manage its workforce

human capital problem is the root cause of most of the other systemic DOD acquisition problems, the foregoing at least demonstrates a cognitive Congressional recognition of an extremely important problem.

B. Need a Substantial and Targeted Investment in the Acquisition Workforce

1. Strategic Insourcing

As one scholar wrote “[t]he business of government would grind to a halt if contractors were banned without expanding the federal workforce to replace them.”²⁷² Moreover, the media, public, and Congress all have the unfortunate tendency to scapegoat the contractors.²⁷³ It is easy to blame the contractors when things go wrong, but the government needs to accept accountability for its own shortcomings. In Professor Stanger’s assessment, “contractors aren’t the problem; the problem is loss of good government.”²⁷⁴ Government officials cannot solve the larger human capacity problem by engaging in a blame game.

Now that the Obama Administration and Congress appear to have recognized the human capital problem, where do we go from here? Recent headlines indicate the new government trend is towards insourcing in order to cut our reliance on contractors.²⁷⁵

in a manner that promotes superior performance. Using these tools the Department can develop new regulations for the civilian workforce which include fair, credible, and transparent methods for hiring and assigning personnel, and for appraising and incentivizing employee performance.
Id. at 2.

²⁷² Stanger, *supra* note 125, at 28.

²⁷³ *Id.*, at 11.

²⁷⁴ *Id.*

Unfortunately, simply throwing money and bodies at the problem will not be an adequate solution. Simply adding thousands of new employees to the acquisition workforce could overwhelm a system that is unprepared to receive, train, allocate or develop them.²⁷⁶

Another concern alluded to above, is the possibility the new hiring initiatives will turn into a numbers game as opposed to results-oriented.²⁷⁷

While these are legitimate concerns, if Congress truly seeks to address the problems that made LSIs necessary, then it needs to remain committed to funding a federal hiring campaign of competent and qualified acquisition personnel. Fortunately, it appears Congress has recognized this fact with the creation of the DOD Acquisition Workforce Development Fund.²⁷⁸ The key will be to hire strategically and ensure this does not turn into a quota-driven exercise.²⁷⁹

²⁷⁵ Castelli, *supra* note 26; Walter Pincus, *Pentagon sees big savings in replacing contractors with federal employees*, Wash. Post, Dec. 24, 2009, at A13; Elise Castelli, *How DOD Will Add 20, 000 Acquisition Officers*, DefenseNews.com, Apr. 13, 2009, available at <http://www.defensenews.com/story.php?i=4035334>.

²⁷⁶ Steven L. Schooner and David J. Berteau, *Emerging Policy and Practice Issues* (2009), at 9-8 (The George Washington Univ. Law Sch. Pub. Law & Legal Theory, Working Paper No. 49) available at <http://ssrn.com/abstract=1562842> (citing Vernon J. Edwards, *Feature Comment: Throwing People at the Problem – Massive Hiring Will Not Revitalize the Acquisition Workforce*, 51 GC ¶ 288). Author states “the Government’s primary approach to workforce revitalization, which is to overwhelm the workload problem with numbers, will result in needlessly higher labor and training costs, suboptimal worker performance and suboptimal retention rates among the best new hires.” *Id.*

²⁷⁷ Carlstrom, *supra* note 269; Schooner & Berteau, *supra* note 276, at 9-7.

²⁷⁸ P.L. 110-181, NDAA FY08, Sec. 852; 10 U.S.C. § 1705(a) requires the Secretary of Defense to establish the DOD Acquisition Workforce Fund to provide funds for the recruitment, training, and retention of acquisition personnel within DOD.

²⁷⁹ Defense Acquisition Reform Panel: Hearing Before H. Comm. on Armed Services, 111th Cong. (2009) (statement of Lawrence P. Farrell, Jr., President of the National

One way to do this is to re-examine the types of acquisitions DOD and DHS sought to accomplish using LSIs in the first place. The procurement efforts behind FCS and Deepwater involved complex systems. As one foreign policy expert stated as it relates to the development of complex major weapon system acquisitions, “[w]e still need systems integrators ... the government still does not have that experience in capacity.”²⁸⁰ It is probably no coincidence that when portions of FCS were eliminated and the Coast Guard assumed integrator functions for Deepwater, the complexity of what was being attempted was also significantly reduced.

A partial explanation to the foregoing could be attributed to the viewpoint advanced by Secretary Gates. Secretary Gates has institutionally determined the “[DOD] and the nation can no longer afford the “quixotic pursuit” of high-tech perfection that incurs unacceptable cost and risk.”²⁸¹ However, those objections could be interpreted as based on the economic realities involved in fighting conflicts in Iraq and Afghanistan. If the military can strategically hire the personnel who would put it in the best position to

Defense Industry Assoc.) available at http://armedservices.house.gov/DAR_072109/Farrell_Testimony072109.pdf. General Farrell stated “[revitalizing the DOD acquisition workforce] is a complex task with no easy fix. And it is not just a question of insourcing work. The major issue is there are too few government acquisition personnel with the right measure of critical skills such as system engineering, program management.... *Id.*

²⁸⁰ Alice Lipowicz, *Troubled waters: Systems integrators fall from grace, but many doubt the government can run without them*, Washington Technology.com, June 9, 2007, available at <http://washingtontechnology.com/articles/2007/06/09/troubled-waters.aspx> (quoting James Carafano, a senior research fellow at the Heritage Foundation specializing in homeland security and military operations).

²⁸¹ Press Release, Department of Defense, Defense Budget/QDR Statement of Secretary of Defense Robert M. Gates, Feb. 1, 2010, available at <http://www.defense.gov/speeches/speech.aspx?speechid=1416>.

reduce the unacceptable cost and risk, then much of the opposition to the complexity of the technology involved would likely recede as well.

2. Focus Hiring on Program Managers and Systems Engineers

From the above case studies, it is evident the military is vulnerable to poor outcomes without an adequate acquisition workforce.²⁸² However, determining what is needed to solve this predicament is another problem unto itself. One difficulty in determining how to best address this acquisition workforce crisis is DOD's lack of information on what it has and what it needs.²⁸³ The lack of complete information on the composition and skills of its current acquisition workforce, including contractors, puts the military in a less than ideal position to make an informed decision concerning the way ahead.²⁸⁴

For instance, there have been at least three different way of counting the defense acquisition workforce over nearly two decades: (1) Federal Acquisition Institute (FAI) Count for DOD, (2) Acquisition Organization Count for DOD, and (3) the Acquisition, Technology and Logistics (ATL) Count for DOD, which is also referred to as the "Refined Packard Model."²⁸⁵ The inconsistency of the defense acquisition workforce definition has led to an extreme range of numbers. From the FY04 FAI Count of 25,918, to the DOD Acquisition Organization Workforce FY04 count of 206,653,²⁸⁶ to a DOD

²⁸² Applying the definition in 10 U.S.C § 1721(b), *supra* note 8.

²⁸³ GAO-10-374T, *supra* note 6, at 15; *see generally* GAO-09-342, *supra* note 43.

²⁸⁴ GAO-10-374T, *supra* note 6, at 15.

²⁸⁵ AAP, *supra* note 9, at 346-347 (provides an in-depth description of how each number is calculated).

Refined Packard method count somewhere in between of 134,602.²⁸⁷ Therefore, it is nearly impossible to provide an accurate headcount with such an imprecise means of measuring the defense acquisition workforce.

Regardless of the overall number, what is clear is there are two specific, acute, and problematic holes that need urgent attention. While not the only areas needing attention, the military should focus its immediate hiring needs on two types of personnel: systems engineers and program managers. These areas are absolutely required for the success of a major program. The Defense Science Board Task Force,²⁸⁸ the DAR Panel,²⁸⁹ and experts in this field²⁹⁰ have all been on record in advocating for the hiring of program managers and systems engineers among other specialties.²⁹¹

In seeking to determine lessons learned from successful programs, GAO recently issued a report detailing its examination of the DOD major defense acquisition program

²⁸⁶ *Id.*, at 349 (citing U.S. DOD IG, *Human Capital: Report on the DoD Acquisition Workforce Count*, D-2006-073, at 7 (Apr. 2006)).

²⁸⁷ *Id.* (citing U.S. DOD IG, *Human Capital: Report on the DoD Acquisition Workforce Count*, D-2006-073, at 9 (Apr. 2006)).

²⁸⁸ Defense Science Board, *supra* note 7, at 44.

²⁸⁹ Defense Acquisition Reform Panel Final Report, *supra* note 270, at 37.

²⁹⁰ Defense Acquisition Reform Panel: Hearing Before H. Comm. on Armed Services, 111th Cong. (2009) (statement of Lawrence P. Farrell, Jr., President of the National Defense Industry Assoc.) available at http://armedservices.house.gov/DAR_072109/Farrell_Testimony072109.pdf; Hearing Before, Subcomm. on Federal Financial Management, Gov't Information, Federal Services, and International Security of the S. Comm. on Homeland Security & Gov't Affairs, 110th Cong. (Sept. 25, 2008) (statement of Steven L. Schooner, Co-Director of Government Procurement Law Program, The George Washington University Law School).

²⁹¹ Other areas of need include, but are not limited to contracting officers, software engineers, cost estimators, development planners, and attorneys.

(MDAP) portfolio.²⁹² GAO looked at 63 individual programs and subprograms and found that 13 programs (21 percent) “appeared to be stable and on track to meet original cost and schedule projections.”²⁹³ While the stable programs tended to be smaller, less expensive programs with shorter development cycles,²⁹⁴ there are still lessons to be learned. This is equally true for the unstable programs.

GAO found that a primary reason for cost and schedule problems is the DOD acquisition environment that often allows programs to start without a full understanding of requirements, overly ambitious and lengthy development cycles, and too many unknowns involving performance, production, and technology.²⁹⁵ GAO attributes these knowledge gaps to the lack of early and disciplined systems engineering analysis of a weapon system’s requirements prior to beginning development.²⁹⁶ Systems engineers provide the critical function of translating customer needs into specific product requirements that the necessary technological, software, engineering, and production capabilities can be identified via requirements analysis, design and testing.²⁹⁷ The lack of such systems engineering has resulted in significant cost increases as neither the

²⁹² U.S. Gov’t Accountability Office, *Defense Acquisitions: Strong Leadership is Key to Planning and Executing Stable Weapon Programs*, GAO-10-522 (May 6, 2010).

²⁹³ *Id.*, at 5 (24 programs were determined to be moderately unstable and 26 were highly unstable).

²⁹⁴ *Id.*

²⁹⁵ *Id.*, at 4.

²⁹⁶ *Id.*

²⁹⁷ U.S. Gov’t Accountability Office, *Defense Management: Actions Needed to Overcome long-standing Challenges with Weapon Systems Acquisition and Service Contract Management*, GAO-09-362T, at 5 n.5 (Feb. 11, 2009).

government nor the contractor involved has sufficient understanding of what the program will realistically entail.²⁹⁸ This scenario sets the government up in a poor position before the process really even begins.

Therefore, the military should target systems engineers in an effort to help ensure the planning phase is conducted properly, because “extraordinary implementation cannot save a program with a business case that was flawed from the beginning.”²⁹⁹ However, there are a few notable concerns that loom in this area. First, some in the defense industry have expressed concern the United States not producing enough graduates who can qualify for security clearances in the areas of science, technology, engineering, and mathematics.³⁰⁰ Second, it is also doubtful that the military will be able to hire experienced systems engineers at government salary.³⁰¹ The DOD and DHS will need to cultivate engineers from within, which take more than a few years assuming this matter is addressed immediately. Addressing the foregoing issues will take time, so immediate and careful Congressional examination is clearly warranted.

²⁹⁸ GAO-10-522, *supra* note 292, at 4.

²⁹⁹ *Id.*, at 31.

³⁰⁰ Defense Acquisition Reform Panel: Hearing Before H. Comm. on Armed Services, 111th Cong. (2009) (statement of Lawrence P. Farrell, Jr., President of the National Defense Industry Assoc.) available at http://armedservices.house.gov/DAR_072109/Farrell_Testimony072109.pdf; *see also* Feickert, *supra* note 83, at 12. Feickert posits recruiting scientists and engineers will prove difficult, if not impossible, because: “(1) more than half of the science and engineering graduates from American universities are foreign nationals who are supposedly ‘off-limits’ to federal agencies; (2) a declining number of students entering the science and engineering fields; and (3) stiff competition from the private sector for these graduates.” *Id.*

³⁰¹ *See* Schooner & Greenspahn, *supra* note 12, at 10 n.24.

Program managers are arguably the most important piece of the acquisition puzzle and should be a key target for recruitment and development. The deficit of program managers has been noted with regularity over the past several years.³⁰² Program managers are a primary area to conduct targeted recruitment, because as stated previously “no reform will be successful without having the right people with the right skills to carry out and manage an acquisition program throughout the entire acquisition process.”³⁰³

GAO astutely noted:

Weapon system program managers are the central executors of the acquisition process. They are responsible for all aspects of development and delivery of a new system and for assuring that systems are high quality, affordable, supportable, and effective. In carrying out this responsibility, they are also responsible for balancing factors that influence cost, schedule, and performance.³⁰⁴

In GAO’s examination of strong stable programs, it found that not surprisingly these programs benefitted from solid business plans, strong leadership support, and disciplined program managers.³⁰⁵ The program managers of successful programs shared key traits such as “experience, leadership, continuity, and communication skills that facilitated open and honest decision making.”³⁰⁶ While each program has its own set of

³⁰² See QDR, *supra* note 1; Hearing Before, Subcomm. on Federal Financial Management, Gov’t Information, Federal Services, and International Security of the S. Comm. on Homeland Security & Gov’t Affairs, 110th Cong. (Sept. 25, 2008) (statement of Steven L. Schooner, Co-Director of Government Procurement Law Program, The George Washington University Law School); Defense Science Board Task, *supra* note 7, at 44.

³⁰³ GAO-10-374T, *supra* note 6, at 1.

³⁰⁴ U.S. Gov’t Accountability Office, *Best Practices: Better Support of Weapon System Program Managers Needed to Improve Outcomes*, GAO-06-110, at 4 (Nov. 30, 2005).

³⁰⁵ GAO-10-522, *supra* note 292, at 9.

³⁰⁶ *Id.*, at 9, 14.

unique circumstances, program managers of stable programs were empowered to make good decisions by having the support of top DOD and service leadership. GAO found these program managers “were able to make knowledge-based, disciplined decisions from the start and resist pressure to overreach or add requirements because of this strong institutional support.”³⁰⁷

Leadership must allow the program manager to be accountable for the success or failure of their program, but that program manager should have the necessary qualifications to reduce the risks of doing so. GAO described one program manager in a lessons learned memo developed by program officials as “part technical expert, part bulldog, and part diplomat. Steeped in technical details of weapon development and aircraft integration, he sniffed out and pre-empted technical risks, made quick decisions, and aptly convinced stakeholders to support his positions.”³⁰⁸ It should go without saying that this type of individual is not developed overnight, so there is no time to waste.

C. Incentivize the Acquisition Workforce Career Path

The AAP recommended employing incentives in order to retain senior acquisition workforce personnel.³⁰⁹ The AAP recognized this option was a stop-gap measure only.³¹⁰

³⁰⁷ *Id.*, at 9.

³⁰⁸ *Id.*, at 14.

³⁰⁹ AAP, *supra* note 9, at 339, 373, 381-82.

³¹⁰ *Id.*, at 382. AAP wrote:

Accordingly, it is imperative that we use strong incentives to lengthen the federal acquisition careers of senior and mid-level personnel in the acquisition workforce, while we are recruiting, training, and developing their successors. We need to hold onto the scarce human resources at the mid-level so they can develop into senior acquisition leaders. But at the same time, because of the thin ranks of this mid-level cohort we need also

Unfortunately, every year we are staring further down the barrel of the senior leadership retirement gun. Making the task more difficult is overcoming any negative perceptions of employment within the federal acquisition workforce.³¹¹ However, as the overall prospect of private sector employment has become more difficult any negative perceptions may be overcome by economic necessity. Regardless of the hurdles, a concerted recruitment effort must be implemented that properly incentivizes the acquisition career path.

The Defense Science Board recommended DOD should introduce programs similar to the Presidential Management Fellows (PMF) Program in order to attract top candidates from graduate programs.³¹² The stated purpose of the PMF is “to attract to the Federal service outstanding men and women from a variety of academic disciplines and career paths who have a clear interest in, and commitment to, excellence in the leadership and management of public policies and programs.”³¹³ The board also recommended the development, funding, and implementation of “training, advanced degree education, and

to hold onto senior leadership within the acquisition workforce. At each level we need to “buy time” so that we can develop future leadership from more junior levels. *Id.*

³¹¹ Defense Acquisition Reform Panel: Hearing Before H. Comm. on Armed Services, 111th Cong. (2009) (statement of Lawrence P. Farrell, Jr., President of the National Defense Industry Assoc.) available at http://armedservices.house.gov/DAR_072109/Farrell_Testimony072109.pdf. General Farrell believes “[e]ven in these difficult economic times, attracting qualified, clearable employees, especially low to mid level employees, will be a challenge for DOD due to a negative perception of ‘government jobs.’”

³¹² Defense Science Board *supra* note 7, at 44.

³¹³ The Presidential Management Fellows Program website available at <https://www.pmf.opm.gov/>.

career develop programs for government acquisition civilians, comparable to the military's program.”³¹⁴

The DAR Panel set forth several recommendations related to the acquisition workforce.³¹⁵ A key theme advanced by the DAR Panel was the need for DOD to take advantage of provisions within the NDAA FY10, particularly Section 1112.³¹⁶ The DAR panel believes the Defense Civilian Leadership Program “should provide the DOD with an important tool to recruit individuals with the academic merit, work experience and demonstrated leadership skills necessary to build the most effective acquisition workforce possible.”³¹⁷

The federal government must examine a range of areas to improve recruitment including issues that may otherwise be overlooked. For instance, the NDIA suggests revising the recruitment process, including making substantial changes to “the woefully inadequate government website, www.usajobs.com.”³¹⁸ The NDIA opines that this website “is not only user-unfriendly, but is a disincentive as the first experience for many as they consider government employment.”³¹⁹ It stands to reason that at least some

³¹⁴ Defense Science Board *supra* note 7, at 44.

³¹⁵ Defense Acquisition Reform Panel Final Report, *supra* note 270, at 38-41.

³¹⁶ P.L. 111-84 § 1112, Department of Defense Civilian Leadership Program.

³¹⁷ Defense Acquisition Reform Panel Final Report, *supra* note 270, at 38.

³¹⁸ National Defense Industry, *Top Issues 2010*, at 11 (Nov. 24, 2009) available at <http://www.ndia.org/Advocacy/PolicyPublicationsResources/Documents/2010-Top-Issues-Final-to-the-Printer.pdf>.

³¹⁹ *Id.*

qualified candidates may abandon the government hiring process from the outset if the process proves unduly burdensome.

IV. ECONOMIC AND POLITICAL PROBLEMS FACING THE SOLUTION

Since September 2008, the United States has been in the midst of a serious economic crisis.³²⁰ Arguably, there may not be a worse time politically or economically for the political leadership of the United States to try to sell a massive federal hiring binge to the American people.³²¹ Concern about the federal budget deficits and the national debt are affecting the national political discourse.³²² As one New York Times columnist recently noted “[b]y President Obama’s own optimistic projections, American deficits will not return to what are widely considered sustainable levels over the next 10 years.”³²³

The federal budget deficit continues to expand and was reported to be \$1.42 trillion in 2009.³²⁴ The non-partisan Congressional Budget Office (CBO) states if there is no change to the current laws and policies, then the federal budget deficit would be about

³²⁰ While many of the systemic reasons leading to the recent economic recession occurred prior to September 2008, the current U.S. financial crisis is generally traced to the collapse of Lehman Brothers on September 14, 2008. See Andrew Ross Sorkin, *Lehman Files for Bankruptcy; Merrill is Sold*, N.Y. Times, Sept. 14, 2008, at A1.

³²¹ *But see* discussion *infra* concerning New Deal economic philosophy.

³²² David E. Sanger, *A Red Ink Decade*, N.Y. Times, Feb. 2, 2010, at A1; Dana Milbank, *Bipartisan action on the federal debt – outside the Capitol, of course*, Wash. Post, Jan. 26, 2010, at A02; Richard Wolf, *U.S. in fiscal peril with \$12.1 trillion debt*, USA Today, Jan. 4, 2010, available at http://www.usatoday.com/news/washington/2009-12-30-debt_N.htm.

³²³ Sanger, *supra* note 322, at A1.

³²⁴ Martin Crutsinger, *2009 federal deficit surges to \$1.42 trillion*, A.P., Oct. 16, 2009, available at http://www.realclearpolitics.com/news/ap/us_news/2009/Oct/16/2009_federal_deficit_surges_to_1_42_trillion.html (discusses the 2009 federal deficit).

\$1.3 trillion for fiscal year 2010.³²⁵ CBO further estimates projected federal budget deficits over the 2011-2020 period will average \$600 billion per year provided current laws remain unchanged.³²⁶ The conservative Heritage Foundation believes a more realistic budget baseline will “keep the budget deficit to \$1.4 trillion in 2010 and drive it to \$1.9 trillion by 2020.”³²⁷ Neither scenario paints a rosy fiscal outlook for the country.

If the federal budget deficit issues listed above do not provide concern, then the overall national debt should. The United States national debt is currently in excess of \$13 trillion³²⁸ and continues to grow. In September 2009, David Walker, former Comptroller General of the United States, stated “we suffer from a fiscal cancer ... our off balance sheet obligations associated with Social Security and Medicare put us in a \$56 trillion financial hole – and that’s before the recession was officially declared last year. America now owes more than Americans are worth – and the gap is growing!”³²⁹

Adding the cost of wars in Iraq and Afghanistan³³⁰ to the other costs of the post 9/11 military spending binge, it is logical the DOD budget must inevitably decline at

³²⁵ *The Budget and Economic Outlook: Fiscal Years 2010 to 2020: Hearing Before the S. Comm. on the Budget, 111th Cong. 1(2010)* (statement of Douglas W. Elmendorf, Director Cong. Budget Office) available at http://www.cbo.gov/ftpdocs/110xx/doc11014/01-28-Testimony_Senate.pdf.

³²⁶ *Id.*

³²⁷ Brian M. Riedl, *Realistic Budget Baseline Shows \$13 Trillion in Debt over the Next Decade*, WebMemo No. 2780, The Heritage Foundation, Jan. 26, 2010, available at <http://www.heritage.org/Research/Budget/wm2780.cfm>.

³²⁸ U.S. National Debt Clock, available at <http://www.usdebtclock.org/>; *see also* http://www.brillig.com/debt_clock (as of June 2010).

³²⁹ John Fund, *Warning: The Deficits Are Coming!*, Wall St. J., Sep 4, 2009, at A11.

³³⁰ Amy Belasco, *The Cost of Iraq, Afghanistan, and Other Global War on Terror*

some point. DOD must begin to plan for this inevitability and institutionally grasp that it will soon be receiving less money proportionally via congressional appropriations than it has grown accustomed to.³³¹

Combining the foregoing with rising personnel costs, modernization efforts, and “cost overruns in its major defense acquisition programs,” GAO suggests DOD should be getting the best value for every dollar it invests by prioritizing its weapon system programs.³³² As stated by Michael J. Sullivan, GAO Director Acquisition and Sourcing Management “[e]very dollar wasted during the development and acquisition of weapon systems is money not available for other priorities within DOD and elsewhere in the government.”³³³

While the financial problems being experienced by the United States government are not exclusively within the control of DOD to address, Secretary of Defense Robert Gates’ words and actions indicate he expects DOD to be part of the solution and not part

Operations Since 9/11, Cong. Res. Serv., Sep. 28, 2009, at 1-2. Based on DOD estimates and budget submissions, the cumulative total for funds appropriated from the 9/11 attacks through FY2009, total funding enacted to date for DOD, State/USAID and VA for medical costs for the wars in Iraq, Afghanistan and enhanced security is \$944 billion. Of this total, 72% is for Iraq, 24% for Afghanistan, 3% for enhanced security and 1% unallocated. Almost all of the funding for Operation Enduring Freedom (OEF) is for Afghanistan. Some 94% of this funding goes to the Department of Defense to cover primarily *incremental* war-related costs, that is, costs that are in addition to normal peacetime activities. These costs include funds to deploy troops and their equipment to Iraq and Afghanistan, to conduct military operations, to provide in-country support at bases, to provide special pay for deployed personnel, and to repair, replace, and upgrade war-worn equipment. *Id.*

³³¹ See Loyola, *supra* note 7, at 28-29; O’Hanlon, *supra* note 7, at A19.

³³² GAO-09-501T, *supra* note 51, at 1.

³³³ *Id.*

of the problem.³³⁴ During a speech on May 8, 2010, Secretary Gates remarked that the large post-September 11th military defense budgets were a thing of the past.³³⁵ He pointedly stated, “[g]iven America’s difficult economic circumstances and parlous fiscal condition, military spending on things large and small can and should expect closer, harsher scrutiny. The gusher has been turned off, and will stay off for a good period of time.”³³⁶ Secretary Gates is now seeking ways to reduce DOD’s costs at nearly every level, but understands that rebuilding the acquisition workforce would ultimately serve cost saving principles.³³⁷

³³⁴ See Jim Garamone, *Gates Calls for Significant Cuts in Defense Overhead*, Armed Forces Press Service, May 8, 2010, available at <http://www.defense.gov/news/newsarticle.aspx?id=59082>; Christopher Drew and Elisabeth Bumiller, *Military Budget Reflects a Shift in U.S. Strategy*, N.Y. Times, April 7, 2009.

³³⁵ Robert M. Gates, U.S. Secretary of Defense, Address at Eisenhower Library (May 8, 2010), available at <http://www.defense.gov/speeches/speech.aspx?speechid=1467>.

³³⁶ *Id.* Secretary Gates further stated:
“The Defense Department must take a hard look at every aspect of how it is organized, staffed, and operated – indeed, every aspect of how it does business. In each instance we must ask: First, is this respectful of the American taxpayer at a time of economic and fiscal duress? And second, is this activity or arrangement the best use of limited dollars, given the pressing needs to take care of our people, win the wars we are in, and invest in the capabilities necessary to deal with the most likely and lethal future threats?” *Id.*

³³⁷ *Id.* (While lamenting DOD’s overall lack of reductions in overhead costs, Secretary Gates aptly noted “[t]he one area of real decline in overhead was in the area where we actually needed it: full-time contracting professionals, whose numbers plunged from 26,000 to about 9,000. We ended up with contractors supervising other contractors – with predictable results.); see also Craig Whitlock, *Pentagon asking Congress to hold back on generous increases in troop pay*, Wash. Post, May 8, 2010, at A01; Jordan Reimer, *Officials Announce Plans to Curb Fighter Program’s Cost*, American Forces Press Service, Mar. 12, 2010, available at <http://www.defense.gov/news/newsarticle.aspx?id=58317>; Walter Pincus, *Pentagon sees*

In addition to the growing concern over burgeoning deficits, the national debt, and reduced defense budgets, the current political winds are also not very favorable to any perceived or actual expansion on the federal workforce. A recent Washington Times headline trumpets “Largest-ever federal payroll to hit 2.15 million.”³³⁸ Any large federal hiring initiative, even one that is desperately needed, will not be without opposition.

At a time when the national unemployment rate is hovering near ten percent,³³⁹ the public is becoming increasingly reticent to see further expansion of the federal government.³⁴⁰ We have even seen this anti-expansion sentiment manifest itself in the form of a political movement.³⁴¹ In spite of the current environment, it is incumbent upon political leadership to be more forward looking in this vital area that directly impacts national security.

big savings in replacing contractors with federal employees, Wash. Post, Dec. 24, 2009, at A13.

³³⁸ Stephen Dinan, *Largest-ever federal payroll to hit 2.15 million*, Wash. Times, Feb. 2, 2010, available at <http://www.washingtontimes.com/news/2010/feb/02/burgeoning-federal-payroll-signals-return-of-big-g//print/>. Author writes “The era of big government has returned with a vengeance, in the form of the largest federal work force in modern history. The Obama administration says the government will grow to 2.15 million employees this year, topping 2 million for the first time since President Clinton declared that “the era of big government is over” and joined forces with a Republican-led Congress in the 1990s to pare back the federal work force.” *Id.*

³³⁹ U.S. Department of Labor Bureau of Labor Statistics available at <http://www.bls.gov/cps/> (Unemployment rate fell from 10% to 9.7% in January 2010).

³⁴⁰ Kent Osband, *Fatted Leviathan*, Nat’l Rev., Feb. 22, 2010, at 40-42 (author asserts that while payrolls and benefits are shrinking for the private sector, the public sector continues to increase its benefits); *see also* Frank Newport, *Americans Concerned About Gov’t. Spending, Expansion*, Gallup, July 22, 2009, available at <http://www.gallup.com/poll/121829/Americans-Concerned-Govt-Spending-Expansion.aspx>.

³⁴¹ *See generally* Liz Halloran, *What’s Behind The New Populism*, NPR.com, Feb. 5, 2010, available at <http://www.npr.org/templates/story/story.php?storyId=123137382>.

The President and Congress must be prepared to articulate the reasons why replenishing the acquisition workforce is necessary now more than ever. In fact, an argument could be made that the Obama administration should emulate President Franklin D. Roosevelt's New Deal strategy of reducing overall unemployment through federal hiring programs.³⁴² While such a strategy would likely be in accordance with the political philosophy of the current administration, this paper does not advocate a large-scale New Deal style expansion of the federal government.

The focus here is limited simply to restoring the defense acquisition workforce. In this regard, the current environment presents an opportunity to make use of the excess capacity in the marketplace. There are potentially a large number of talented people who are unemployed and could be utilized to revitalize the acquisition workforce. Whether the nation's unemployed workers possess the desired skills needed is at best speculative. What is clear is an opportunity exists within the current economic environment to attract new hires into the acquisition workforce. A targeted recruitment effort among this group could provide a high economic return on investment and should be explored further.

In this regard, it would pay to heed the words of the AAP when it stated "[i]nadequacy in the acquisition workforce is, ultimately, 'penny wise and pound foolish,' as it seriously undermines the pursuit of good value for the expenditure of public resources."³⁴³ As Professor Schooner once commented, "[m]ore auditors and inspectors general will guarantee a steady stream of scandals, but they'll neither help to avoid the

³⁴² This author will not delve into the debate as to whether it was President Roosevelt's New Deal economic policies or the industrial mobilization requirements of World War II that led the United States out of the Great Depression. The point here is to simply highlight a historic parallel to the current situation.

³⁴³ AAP, *supra* note 9, at 363.

scandals nor improve the procurement system. Conversely, a prospective investment in upgrading the number, skills, and morale of [the acquisition workforce] would reap huge dividends for the taxpayers.”³⁴⁴ If we fail to do the correct thing by rebuilding the defense acquisition workforce, then we should fully expect an even more demoralized acquisition community besieged by procurement requirements it cannot handle and the future scandals such an environment will produce.

V. ALTERNATIVES TO REBUILDING ACQUISITION WORKFORCE

There are simply no attractive alternatives to rebuilding the acquisition workforce. However, one option is to do nothing. The military could continue to do business as usual and hope to get a different result, but the folly in that approach should be apparent. Doing nothing is a bad idea, provided you consider the status quo as unacceptable. While this alternative does not warrant a lengthy discussion, it must still be considered as a possibility. As discussed above, rebuilding the acquisition workforce has some institutional momentum at the moment from both the executive and legislative branches, but such moments can be fleeting, particularly in Washington, DC. Future Congresses or Presidents may view this issue in a different light than the current occupants. However, for the reasons stated throughout this paper this option should not receive any consideration.

Another alternative would be to reduce acquisition requirements by reducing the size of the federal government. One thing we learned from the so-called end of “the era

³⁴⁴ *Is DHS Too Dependent on Contractors to Do the Government’s Work?: Hearing Before the S. Comm. on Homeland Sec. & Gov’t Aff.*, 110th Cong. (2007) (statement of Steven L. Schooner, Co-Director of Government Procurement Law Program, The George Washington University Law School).

of big government”³⁴⁵ is that despite the significant reductions in the number of government employees in the acquisition workforce, the work itself did not go anywhere.³⁴⁶ In fact, the work increased dramatically. Simply shifting jobs from the public to the private sector does not equate to reducing the size of government.³⁴⁷ This alternative would require a full-scale examination of the federal government in order to determine if certain agencies and departments could be eliminated. The theoretical discussion that could ensue from this alternative goes well beyond the limited scope of this paper, but on a surface level a reduction in the size of the federal government could potentially provide the opportunity to consolidate acquisition personnel into fewer organizations. This option would likely be dead on arrival in Congress, but the financial benefits may be worth exploring.

Another alternative to hiring more DOD or DHS employees would be to waive or relax the existing rules concerning OCIs, or simply manage the OCI or contract process more aggressively. The current OCI rules summarized more fully above³⁴⁸ essentially prohibit contractors from operating in the manner the LSIs discussed in this paper did. The author does not recommend this approach. In fact, this alternative would certainly create more problems. However, if significant opposition to reinforcing the acquisition

³⁴⁵ President Clinton, *supra* note 29.

³⁴⁶ See Schooner & Greenspahn, *supra* note 12, at 10. “Despite a generation of bipartisan efforts to portray a ‘small government’ to the public, government mandates continue to increase, leaving agencies no choice but to increasingly rely upon contractors....” *Id.*

³⁴⁷ See Steven L. Schooner, *Competitive Sourcing: More Sail Than Rudder?*, 33 PUB. CONT. L.J. 263, 276-278 (2004) (provides a discussion of the “Shrinking Government Myth”).

³⁴⁸ See discussion *supra* II.C.

workforce arises, then we must at a minimum consider this idea for purposes of intellectual discussion. This option would require new legislation, which would likely be more politically unfeasible than efforts to rebuild the military's acquisition workforce.

VI. CONCLUSION

While the LSI potential for OCIs is an important issue, the OCI issue has served primarily as a distraction because of its ability to attract media and Congressional attention. The more significant issue here, although perhaps less interesting to the casual observer, is how OCIs in relation to LSIs are but a symptom of a larger problem. The larger problem is the lack of an adequate defense acquisition workforce to effectively develop and manage the desired major programs. When the military decided it had a need to develop complex weapon systems, as it did with FCS and Deepwater, then what should give concerned parties pause is it could not do so without outside assistance. Neither the wholesale cancellation, nor the major restructuring of those programs truly addresses this underlying problem.

The ugly truth is that LSIs were needed because the military lacked, and frankly still lacks, the skills and expertise to develop and produce complex weapon systems internally. This deficiency of internal capacity extended to the inability to perform any meaningful oversight of the LSIs performance. There will always be a need for contractors in the development of major weapon systems, but the United States military should never be in a position where it is so devoid of internal technological expertise and management capability that it cedes its governmental responsibility to the private sector.

It is not an overstatement to say the future of our military superiority depends on rebuilding the military acquisition workforce with skilled, competent, and professional

personnel. There are many positive signs that the Administration and Congress have recognized this point. However, the military must be strategic in its targeting of the positions necessary to achieve the desired efficiencies in the system. In order to realize any benefit from a rebuilt system, this cannot become a numbers exercise.

In the absence of viable alternatives, the benefits to rebuilding the defense acquisition workforce should be sufficient selling points to diffuse any potential opposition that may be mounted in the effort. In fact, if the United States has any chance of maintaining our military's technological dominance, then the military has no choice except to rebuild this vital function. Because absent an unforeseen legislative retreat, the military will no longer have the option of turning to LSIs to aid in attempts to advance the state of the art.