Key to the success of the Administration’s strategy is a new level of transparency and accountability that is designed to protect American taxpayers by ensuring proper use of public funds through conditions on lending and executive compensation, and by enhanced reporting requirements.¹

Distinguished Panel Members, thank you for the invitation to discuss the Treasury Department’s use of its exceptional crisis contracting authority under the Emergency Economic Stabilization Act of 2008 (EESA), 12 U.S.C. § 52. It will come as no surprise to you that the oversight of federal government contracting presents daunting challenges, and the unique nature of the Troubled Assets Relief Program (TARP) leaves you navigating relatively uncharted waters. The potential for a suboptimal result is high.²

It is not feasible in this brief document to provide a meaningful summary of the best practices in the field of government contracting. In the interest of brevity, let me suggest two different rubrics for assessing the task you face. The first approach is to ask whether conventional public procurement offers you appropriate measures to judge the


² Two examples of situations in which the government has entered into complicated contractual relationships with the private sector – divorced from the Federal Acquisition Regulation and the “normal” executive branch procedures for public procurement – that have soured and consumed, frankly, staggering litigation expenses, may prove instructive: (1) the Winstar line of cases, arising out of the Savings & Loan crisis, following the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA); and (2) the spent nuclear fuel cases, arising out of the Department of Energy’s breach of the Standard Contract with the nuclear generators due to delays at Yucca Mountain.
performance of Treasury’s efforts in this context. In large part, I conclude it does not. The second approach is to inquire whether the commonly available risk reduction and oversight mechanisms employed by the government in public procurement will prove satisfactory. Again, I am not sanguine.

Ultimately, Treasury – with its eyes open, and for good reason – entered into a large number of risky transactions, under severe time pressure. At this point, the moment had passed for the government to best employ the lion’s share of the best practices to minimize and avoid risk. Many of those transactions will turn out fine. Some will not. But conventional government contracts experience will not, at this point, prove uniquely informative in reducing the government’s risk.

**Objectives, Aspirations, Goals, Metrics, Etc.**

The first approach begins by asking what you hope to achieve through the procurement process. This may seem obvious, but it is often overlooked.

In advising developing countries on the creation, improvement, and reform of the public procurement regimes, I consistently caution against simply copying other states’ procurement codes, regulation, policies, and practices. Instead, I urge them to begin with a stark assessment of what they hope to achieve through the contracting process. There are a number of commonly recognized goals for procurement regimes although, in all fairness, some of these are better described as means or even constraints. Moreover, the key point is most of them require trade-offs or, in other words, more of one typically comes at the expense of another. Although not inclusive, the list includes:

- **Value for Money:** The business of government should focus on getting good value, a good bargain, for the public’s money. As your personal experience no doubt confirms, an excessive focus on low price rarely ensures optimal value or the best exchange for the government’s expenditure. Sometimes, it is worth paying more – often much more – for better quality goods, services, or construction;

- **Customer Satisfaction:** It seems obvious that the contract should please the end user (of the good or service or construction), but the public procurement regime presents a uniquely complex model populated by numerous customers with potentially inconsistent needs and desires. Unlike a consumer – a monolithic entity that pays for and receives a good or a service – the government customer is a disaggregated group of stakeholders, including the end user, the program manager or head of an agency (responsible for accomplishing a government

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3 Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Public Procurement Law Review 103 (2002). This short piece originally was written in conjunction with the Chinese government’s efforts to draft a new public procurement law. Although it offers a convenient rubric, it is by no means the last word on the topic.
mission); Congressional appropriators (the legal source of the funds); and, among others, the public – both in a micro and macro sense (the ultimate source of the funds and, at least hypothetically, the ultimate recipient of the benefit(s) of the contract);

- **Competition**: Because we believe in the power of the marketplace and profit as an incentive, we perceive that effective use of competition results in the government receiving the best value in terms of price, quality, and contract terms and conditions;

- **Integrity or Accountability or Corruption Control**: Bribery, favoritism, and unethical behavior have no place in public procurement. They diminish value for money, and they decrease public trust in governmental institutions;

- **Transparency**: Successful public procurement regimes publicly announce the rules of the games, opportunities to compete for the government’s work, and the results or outcomes of the government’s expenditures. Ultimately, transparency is the means through which we ensure that government business is conducted in an impartial, fair, and appropriate manner;

- **Risk Avoidance**: As steward of public funds, the government, as a customer, seeks to filter out undesirable or incompetent business partners and, upon selection of a business partner, properly allocate risks – such as cost growth, schedule slippage, and compliance with performance specifications – between the parties through use of certain contract types and remedy-granting clauses, etc.;

- **Uniformity**: Due to its interest in maximizing competition (above), transparency (above), administrative efficiency (below), governments (like any large, complex institution) reap benefits from uniformity. This reduces uncertainty, training and implementation costs, and, of course, the private sector’s transaction costs (which, in turn, should reduce the government customer’s costs);

- **Administrative Efficiency**: The government customer would rather spend its scarce resources obtaining the goods and services it needs, rather than funding the process of obtaining those goods and services. Human capital is expensive, and governments (such as ours) routinely underestimate and under-invest in identifying, recruiting, hiring, training, developing, incentivizing, and retaining top talent to staff the procurement function; and

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4 See, e.g., Steven L. Schooner & Daniel Greenspahn, Too Dependent on Contractors? Minimum Standards for Responsible Governance, 6 JOURNAL OF CONTRACT MANAGEMENT 9 (Summer 2008); Steven L. Schooner, Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government, 16 STANFORD LAW & POLICY REVIEW 549 (2005); Empty Promise for the Acquisition Workforce, 47 THE GOVERNMENT CONTRACTOR ¶ 203 (May 4, 2005).
• **Wealth Distribution**: Governments routinely (but incorrectly) perceive the procurement system as a costless tool to distribute wealth to favored interest groups. For example, our procurement regime favors, among others: domestic firms (large and small); domestic textile and specialty metal producers; firms from our favored trading partners; small businesses; small disadvantaged business; service-disabled veterans; women-owned small businesses; small businesses in areas of high unemployment (HUBZone businesses); union labor; convict labor; businesses that employ blind and severely-handicapped individuals; Alaska Native firms; Native Americans; Historically Black Colleges and Universities and Minority Institutions, etc.\footnote{GAO noted that “Treasury has encouraged small businesses to pursue procurement opportunities for TARP contracts and financial agency agreements[,]” and “[t]he share of work by small businesses—including minority- and women-owned businesses—under TARP contracts and financial agency agreements has grown substantially since November 2008.”}

Many of the tradeoffs are obvious, and permutations are endless. Increasing competition, maintaining transparency, and controlling corruption all typically increase transaction costs, thus reducing administrative efficiency. Many states attempt to reduce risk by awarding contracts to the lowest bidder, often at the expense of customer satisfaction. Wealth distribution, by its very nature, decreases competition, increases the risk of performance failure, and reduces the value for money received and customer satisfaction. Uniformity, while a boon to administrative efficiency, rarely coincides with high degrees of customer satisfaction.

**Ultimate Aspiration: Relief? Crisis Avoidance?**

The main point I hope to emphasize with this summary is how – to a great extent – this analysis is irrelevant to many of the TARP contracts. After all, this was a relief program, not an exercise in pitting business competitors against each other to maximize the government customer’s value. The lion’s share of these contracts were not intended to exploit the competitive marketplace for the government customer’s benefit; rather they were intended, as Treasury suggests, to “spur economic recovery and rescue the financial system [as a] … first phase of a comprehensive cure for the crippling conditions that confronted President Obama as he assumed office…”

In other words, if the ultimate goal of these contracts was to avoid a financial disaster, the procurement community will not – nor should it – be the ultimate arbiter of whether the potential for such a disaster was real, whether it was averted, and to what extent the contracts – individually or collectively – averted that crisis.
Transparency and Accountability

As noted above, Treasury asserts that it aspires to a contracting regime that is both transparent and accountable. That’s commendable, but transparency and accountability alone cannot a successful public procurement regime make. Indeed, both transparency and accountability are frequently viewed as constraints rather than aspirations or outcomes. Yes, both transparency and accountability are important, but both can be achieved in a procurement system devoid of the characteristics that define the leading public purchasing regimes, specifically, receiving value for money and generating high degrees of customer satisfaction.

Still, Treasury earns strong marks for its transparency efforts. Treasury’s website is informative, well organized, visually attractive, and extremely navigable. It offers an impressive array of contracts and includes the full text of those contracts. Indeed, Treasury arguably has set a high mark not only for disclosing all of its contracts, but by organizing them in a meaningful manner.

Conversely, the website is not flawless. The full text of the various contracts are provided in PDF. While this is superior to not publishing the contracts, these documents are extremely difficult to navigate, particularly because many are lengthy, complicated, and lack a cover sheet or a table of contents. (Contrast this with a standard government contract under the Federal Acquisition Regulation (FAR), organized pursuant to the Uniform Contract Format. 48 C.F.R. §§ 14.201-1, 15.204-1.) Moreover, the President’s Open Guidance Directive instructed that “agencies should publish information online in an open format that can be retrieved, downloaded, indexed, and searched by commonly used web search applications….” (M10-06, December 8, 2009.) Along those lines, see the TARP Transactions Reports, rich in their detail, but available in an Excel format.

More importantly, a significant chasm exists between formalistic transparency and meaningful transparency. For example, posting contracts does not provide much insight into how the government’s business partners were chosen (or excluded from participation), how the actual agreements were negotiated (and, for example, to what extent were financial representations or assumptions audited or verified), and how the

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Another quibble is that the website does not readily identify government personnel qualified to address specific issues. For example, under Staff, it presents biographical information on two individuals: Treasury Secretary Geithner and Assistant Secretary Allison. Under Contact information, Treasury lists a single telephone contact number for “general information” and another for media inquiries; no email address is provided. (From there, the next step is general contact information at the Treasury Department.) Elsewhere on the various web pages, you can find email addresses for, among others, the Treasury Department’s Office of Contract Administration, the Treasury's Office of Small and Disadvantaged Business Utilization, and the Special Inspector General for the Troubled Asset Relief Program (SIGTARP).
parties communicate and resolve issues that arise in the performance of these contracts, etc.

**Oversight**

On the accountability issue, the jury remains out. The literature on compliance, ensuring integrity, and accountability in federal government contracts is rich and immensely instructive. The starting point is a complex, but now familiar, regulatory structure, the Federal Acquisition Regulation. This regulatory structure provides innumerable tools for managing risk at every stage of the contracting process, including an exhaustive suite of remedy-granting clauses developed, over time, to address the unanticipated contingencies that arise during the performance of contracts. In addition, legal publishers and industry organizations produce a wealth of helpful information.\(^7\)

As noted above, the FAR provides numerous tools for ensuring that the government reduces risk before and after entering into contracts. The regulations require, among many other things, that:

- Only contracting officers, officials that possess certain training and skills, may bind the government in contract;
- Acquisition planning precede the contracting process;
- Contracting opportunities be publicized and efforts made to maximize competition;
- Prior to the award of a contract, the government must determine that the selected contractor is responsible, which, means that the contractor must possess adequate financial resources to perform the contract; be able to comply with the required performance schedule; have satisfactory records of performance, integrity, and business ethics; have the necessary organization, experience, accounting and operational controls, and technical skills; and be otherwise qualified and eligible to receive an award under applicable laws and regulations;
- The government use a contract type intended to protect the government’s interest and incentivize contractor performance;

\(^7\) For example, the Organization for Economic Cooperation and Development (OECD) published the OECD PRINCIPLES FOR INTEGRITY IN PUBLIC PROCUREMENT, see, http://www.oecdbookshop.org/oecd/display.asp?K=5KZ9GX38286C&LANG=EN. Closer to home, THE GOVERNMENT CONTRACT COMPLIANCE HANDBOOK (authored by the Seyfarth Shaw law firm), now in its fourth edition, “explains each segment of compliance, including offenses and penalties, conducting compliance audits, [and] responding to criminal investigations,” etc. The Defense Industry Initiative on Business Ethics and Conduct (DII) offers a wealth of examples of corporate compliance regimes and conducts best practices forums. See, www.dii.org. Of course, these are just the tip of the iceberg.
• If the government finds that it has entered into a poor bargain, the government enjoys broad flexibility to modify its agreements and, where appropriate, terminate its relationships with its contractors; and
• Where the contractor fails to live up to its bargain, the government has remedy granting clauses to make itself (financially) whole and, depending upon the circumstances, reduce the likelihood that it will have to deal with the non-performing contractor in the future.

But it is unclear whether this regime is helpful. For example, does having the right to terminate or no longer do business with a non-performing contractor – e.g., a financial institution or automotive company unable to make good on its repayment promises to the government – help keep the economy afloat, maintain investor assets, or help the government recover its funds?

Moreover, as noted above, oversight means many things. Unfortunately, in modern public procurement, both the attention to, and the funding for, contracting oversight disproportionately lies in the form of after-the-fact audit, investigation, litigation, and prosecution. I consistently reject this model and long have advocated instead the familiar principle that an ounce of prevention is worth a pound of cure. Alas, at this point, the government’s greatest opportunity to reduce its risk with regard to these contracts has passed.

The Train Has Left the Station, and There’s a People Problem

Experience suggests that problems await Treasury and the taxpayers. The government customer’s risk is most greatly reduced when – before entering into contracts – the government customer take its time, specifically defines its requirements, and carefully chooses its business partner. After contract award, the government customer best protects its interests when it staffs its contract management function with skilled professionals. Both of these appear problematic.

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8 The government, however, enjoys the flexibility to continue (e.g., not terminate) a defaulting contractor when it is in the government’s best interest.

9 Thus, it is not surprising that the Government Accountability Office recommended that efforts be made to: “ensure that sufficient personnel are assigned and appropriately trained to oversee the performance of all contractors, especially those performing under contracts priced on a time and materials basis, and move toward greater reliance on fixed-price arrangements, whenever possible, as program requirements are better defined over time; AND institute a system to effectively manage and monitor the mitigation of conflicts of interest going forward.” Government Accountability Office, Troubled Asset Relief Program: Capital Purchase Program Transactions for October 28, 2008, through September 25, 2009, and Information on Financial Agency Agreements, Contracts, Blanket Purchase Agreements, and Interagency Agreements Awarded as of September 18, 2009 (GAO-10-24SP, October 2009), an e-supplement to GAO-10-16.
As noted above, the contracts – awarded relatively quickly – already exist. As for post-award contract management, the last decade of federal government contracting does not bode well for Treasury’s prospects. Consider some of the major trends:

- Beginning in 1989 and throughout the 1990’s, the federal government aggressively sought to reduce its acquisition workforce; among other things this made succession planning all but impossible. While the cuts finally ended, the last decade passed with little or no effort made to restore the acquisition workforce;
- During the 1990’s, aggressive reforms were introduced that were intended to change the way the acquisition workforce behaved; but inadequate time and resources were available to train the workforce to implement the changes;
- During the last decade, federal procurement spending more doubled, ultimately increasing at a rate five times the rate of inflation;
- Two significant military actions, in Iraq and Afghanistan, plus natural disasters, such as Hurricane Katrina, placed inordinate strain on the acquisition workforce by dramatically increasing the immediacy of the government’s needs and frequently demanding that acquisition professionals perform under extraordinary (e.g., dangerous and substandard) working conditions;
- Faced with relentless demands, the acquisition community had no choice but to shift its focus and its resources to awarding new contracts and, thus, starving the post-award contract management function; and
- Over the two decades, the government customer morphed from a purchaser of supplies (deliverables) to primarily a consumer of services; conversely, the government’s acquisition workforce, by and large, was neither hired nor trained to efficiently manage that type of work.

Ultimately, a generation of ill-conceived under-investment in the federal government’s acquisition workforce, followed by a government-wide failure to respond to a dramatic increase in procurement activity, led to a buying and contract management regime animated by triage, with insufficient resources available for contract administration, management, and oversight. Add in a high volume of TARP contracts, and it is difficult to be optimistic that these contracts will be effectively managed.

The number of parties required to sustain successful public procurement regimes is significant, including, among others: the policy makers, the requirements generators (or those best positioned to describe the purchasing agency’s needs), those that perform market research; non-legal and legal personnel that draft the contracts, and negotiators (whose access to information from others in necessary). After contracts are awarded, key players include the contract managers, the community that supports the contract manager (such as contracting officer’s representatives, technical specialists, etc.); and, of course, the conventional oversight community, which includes: auditors, agency inspectors general, prosecutors, and adjudicators.¹⁰

¹⁰ Of course, it is also common to deploy and rely upon external sources for oversight, such as: private industry (which is interested in ensuring that the government
Nor is this simply a numbers game. Throwing people at the problem isn’t enough. Among others, some critical considerations in assessing the relevant human capital or, more specifically, the acquisition workforce (or the individuals responsible for managing these contracts, include: education and experience; ensuring independence; offering meaningful incentives (compensation) and disincentives; providing professional development; identifying and deploying productive supervision and mentoring; and creating and instilling professional standards related to their performance and ethics.

On all of these issues, the federal government lags behind the private sector. In the last few years, we have seen the government – and to some extent, this administration – begin to acknowledge and commit itself to remedying the inadequacies of the acquisition workforce. But it is naïve to expect immediate results.

To the extent that you asked about the transparency and quality control implications of subcontracting and, specifically, what would be needed to ensure effective monitoring of subcontracting, I have little to offer. Traditionally, the government customer delegates the duty of subcontractor management to its prime contractors. As the government’s acquisition work shrank relative to the volume of public procurement, the government correspondingly delegated increasing responsibilities to its prime contractors. The lead system integrator model – increasingly disfavored by Congress – represents the culmination of that trend. Ultimately, subcontracting poses all of the same problems as contracting, it’s just one (or more) layer(s) removed from direct government oversight and, thus, correspondingly disaggregated.

**Conclusion**

As I testified (on another matter) earlier this year, after two decades of ill-conceived under-investment in the federal government’s acquisition workforce, any prospective investment by the federal government in upgrading the number, skills, and morale of government purchasing officials would reap huge dividends for the government and the taxpayers. Of course, that won’t solve your problems overnight. But it’s a responsible investment in the future. Thank you for the opportunity to share these thoughts with you. I would be pleased to answer any questions.
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