AN ASSESSMENT
OF TODAY'S FEDERAL PROCUREMENT SYSTEM

REMARKS OF STEPHEN M. DANIELS
CHAIRMAN,
GENERAL SERVICES BOARD OF CONTRACT APPEALS

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The 1990's were a great time in America, and especially a great time for business in America. Or were they? With each passing week, there seem to be more revelations that cause us to question whether the truths that were generally perceived back then are as real as we once believed.

Remember how stock prices would go up and up and up on an almost daily basis? And why not? After all, we were told, shares of dot-coms were worth vast multiples of earnings (or even of anticipated future earnings, for those companies that were not making any money). And all sorts of very big companies were making tremendous profits – or so they said. Private businesses were supposed to be engines driving an economic boom that would make all Americans rich and build bonds that would unify peoples throughout the entire world.

Yes, business was great – and business practices were even better. Business practices were so good that if we wanted to make Government work well, we needed to remake Government processes in the image of business.

We're all a little older and wiser now. We know that the stocks of dot-com companies were enormously overvalued – if those stocks ever had any value at all. The prices of stocks of many other companies were inflated, too – based on some pretty gross accounting tricks and other forms of dishonest behavior. Multinational companies may eventually be a helpful force in bringing about a prosperous, cooperative world – but there seems to be more than a bit of divisiveness on our planet right now. Maybe – well, more than maybe – we have learned that some of those business practices at whose shrine many in Government worshiped are not quite all they were cracked up to be.

Some of those good business practices that we were told to follow were business procurement practices. We were supposed to remake, or "reinvent," or "reform," Government procurement along different lines – what was said to be the business way of doing things. And we did. Government procurement is conducted today in ways which are considerably different from the ways in which it was conducted only a decade ago.

But are the current ways really better than the old ones? Or, to ask the question in a bit more sophisticated manner, in making significant changes, have we abandoned too much of the old? Are the ways in which the Government acquires goods and services today genuinely superior, as their proponents told us they would be – or do they deviate so far from fundamental principles of Government procurement, and incorporate so much of the Enron/WorldCom/whatever-company-is-in-the-news-this-week style of business practices, that they are actually counter-productive?

These are important questions for those of us in the Government procurement world – and for all American taxpayers. I don't mean to sound like the Cassandra of Government procurement, but I did raise similar questions during the past decade, as the "reinventions," or "reforms," were taking hold. Only a few brave souls were willing to acknowledge that they were even listening back then. I'm very much encouraged to see that our Government now has an Administrator for Federal Procurement Policy who is interested in hearing what people have to say about the answers to these questions, in promoting an open and honest discussion on the subject, and in leading the effort to bring balance to our procurement system by combining the best of the new and the old. Understanding that this effort is under way, I was willing to accept her invitation to come here today to share my views with all of you.

I want to acknowledge at the outset my background and my biases. I was a staff member of the House of Representatives' Government Operations Committee – now called the Committee on Government Reform – for nearly 15 years. That committee, then and now, has been responsible for originating legislation which sets the Government's fundamental procurement policies. I worked for a committee leader who had been a member of the Commission on Government Procurement in the early 1970's, and who worked cooperatively with other members of the House and Senate, on both sides of the aisle, to make the procurement system follow the principles enunciated by that Commission. Those principles found a home most notably in the Competition in Contracting Act of 1984, or CICA. I will discuss them in a minute, but for now, I will confess that I continue to believe that they are critical guidance for a successful Government procurement system.

I left the Government Operations Committee in 1987, when I was named a judge on the General Services Board of Contract Appeals, and I have remained a judge on that board ever since. For my first nine years as a judge, the board heard and decided protests involving the procurement by Federal agencies of what is now called information technology resources. This work involved interpreting and applying the Competition in Contracting Act and the regulations which implemented it. Hearing protests reinforced my belief in the validity of the principles of the Act, including the merit of enforcing those principles, as critical to the successful operation of the Federal procurement system.

For the past six years, since the Board's protest authority has been revoked, I have focused my activities on hearing and resolving disputes which arise in relation to Government contracts which have already been awarded. While this work teaches me a good deal about how not to administer contracts, it doesn't give me the ringside seat I once had on how agencies choose the companies with which they do business. But I do follow these activities from a distance, and I do think about how they relate to the principles that guided Government procurement until the past decade. It is these thoughts that I would like to share with you today.

I also want to make clear that everything I tell you represents my own opinions. I am not here representing the General Services Board of Contract Appeals, the General Services Administration, the United States Government, or anyone else. One of the privileges and responsibilities of being a judge is to be independent – to give your own honest views on subjects you address, regardless of the political fallout. That is what I am here to do.

Let's begin with the principles of the Competition in Contracting Act of 1984. I want to emphasize that these were hardly new principles at the time. They had been evolving since the early years of the Republic and had come to represent common wisdom. There are, I think we can distill, four guiding principles:

First, the opportunity to sell goods and services to Government agencies must be open to everyone. The system must be democratic; it cannot presume that simply because a capable vendor is unfamiliar to an agency, the agency can't benefit from doing business with him or her.

Second, vendors' offers must be evaluated fairly. The chance to bid cannot become a sham; equal opportunity must be an ingrained practice, not just a slogan.

Third, the agencies must select for contract award the offers that are in the best overall interest of the taxpayers. Genuine economy is the goal; there is no sense in being penny-wise and pound-foolish.

Fourth, the system must be transparent so that participants and taxpayers understand how it is being operated and can hold agencies accountable for their actions. The best way of maintaining the integrity of the system is to give vendors who believe they have been treated unfairly a full and fair chance to air their grievances. Impartial reviewers can then hold the agency personnel's feet to the fire to make sure they remember the importance of the first three principles.

As you will notice, these fundamental precepts of Government procurement are not necessarily business principles. They are principles of political philosophy designed with the interests of the taxpayers foremost in mind. Although the Government can learn

from the private sector, in some respects it can never operate in the same manner as do business concerns. The success of a private company can be measured easily and objectively through profits and losses. An actual or prospective investor can readily perceive whether the company is being managed effectively; if it is not, the investor can sell stock or choose not to invest. Taxpayers, by contrast, cannot choose not to pay taxes. Even if they could, it would be very difficult for them to determine whether their money was being spent wisely. The missions of Federal agencies cannot be measured by profit and loss statements. Whether an agency is operating effectively is a highly subjective matter. Furthermore, purchasing activities are ordinarily secondary to the agency's mission, with the result that evaluating the performance of procurement officials is extremely difficult if not impossible. Government officials owe a much higher degree of duty to the people for whom they perform – the taxpayers – than do their private sector counterparts to stockholders. They owe the duty of adherence to the basic political principles I have just identified – openness, fairness, true economy, and accountability.

And yet, though our traditional procurement system as exemplified by CICA was designed around political principles, rather than supposed business principles, that system, in design, represented the triumph of capitalism at its best. It channeled the creative, competitive impulses of private businessmen and women into developing more innovative solutions to Government problems and giving agencies the best possible prices for those solutions. Real competition in the Government marketplace should bring about the same kind of benefits for the Government that it provides throughout the general marketplace to each of us as consumers.

There were plenty of specifics in CICA that implemented the principles I just described. The law had as its watchword "full and open competition." It imposed tougher standards for justifying and approving exceptions to competition, so that sole-source contracting would be reserved for those instances in which it was truly necessary. Procurements had to be publicized, through notice in the Commerce Business Daily – now it would be FedBizOpps – so that potential suppliers would know of contracting opportunities. CICA was also another step forward in the effort to create a single, unified system of procurement. Reducing agency-specific peculiarities in the process strengthened competition, because it eliminated the handicap to companies that could offer good products at good prices, but weren't plugged into those unique ways of doing business. Finally, CICA strengthened bid protest procedures as an enforcement mechanism designed to ensure that the mandate for competition is implemented and that vendors wrongly excluded from competing for Government contracts receive equitable relief.

Although some parts of CICA remain on the statute books, the guts have been ripped out of it. Openness, fairness, economy, and accountability have been replaced as guiding principles by speed and ease of contracting. Where the interests of the taxpayers were once supreme, now the convenience of agency program managers is most

important. Full and open competition has become a slogan, not a standard; agencies have to implement it only "in a manner that is consistent with the need to efficiently fulfill the Government's requirements." [10 U.S.C. § 2304(j); 41 U.S.C. § 253(h).]

It is now much easier to acquire goods and services without competition. Notice requirements have been reduced, particularly as the Government increasingly fulfills its needs without conducting formal procurements. The drive to have the Government present a single face to industry has been sent into retreat: agencies have been given greater discretion to procure in their own idiosyncratic ways, Government-wide regulations have been discarded or diminished in importance, and programs and whole agencies (the Federal Aviation Administration being just the first) are being allowed to procure under unique and sometimes vague rules and procedures. The bid protest forums which tended to allow parties to develop facts most fully, and consequently to grant the greatest percentage of complaints – the General Services Board of Contract Appeals and the United States District Courts – have been stripped of their authority to hear protests.

What about these differences? Change can be either good or bad, and it usually has elements of both. The challenge for all of us in the Government contracting field, whether we're in Government or industry, is to manage that change so that the procurement system doesn't get out of kilter. Government succeeds or fails by the confidence of the governed in its fairness and effectiveness. So it is with the procurement system. If the public loses confidence in the system, it will fail. It will not deliver the goods and services that agencies need to perform their missions well, and what it does deliver will not necessarily be at reasonable prices. We procurement professionals need to make sure that at the same time we focus on efficiency and speed, we don't lose sight of the ultimate purpose of the system, which is to serve the taxpayer well.

When the Government contracts for goods and services, it has to spend money in three ways: conducting procurements, administering contracts, and paying for the goods and services themselves. The design for the way we contracted in the past emphasizes savings in the third group – the costs of paying for the goods and services. And this is as it should be. The Federal Government spends about $240 billion a year through contracts, and this figure appears to be growing rapidly. Unless the laws of supply and demand were repealed when no one was looking, it should remain obvious that competition results in firms improving their products and/or reducing their prices to win contracts. Studies have indicated that looking to costs alone, competition can save the Government between 15 and 50 percent of what it ultimately pays for goods and services. Thus, competition can save several tens of billions of dollars – possibly more than a hundred billion dollars – on Federal procurement every single year. We're talking real money here, even by Federal budgeting standards.

The current approach to contracting emphasizes the first group of costs I identified – the costs of conducting procurements. I have never seen an estimate of how big this

amount is, but I'll wager that it is just a tiny fraction of the $240 billion a year that the Government spends on goods and services themselves. The current approach aims at saving part of this little sum. And it may well be succeeding. But whether it does or not won't matter much if it has a deleterious effect on the total price taxpayers pay for the goods and services.

Let's take a look at some of the ideas associated with the current approach. I'll discuss four groups of ideas – organizational structure, emphasis on past performance of vendors, methods of contracting, and the personnel who actually do the contracting. Then I'll close with a couple of thoughts about ramifications of the approach which are critical, but rarely mentioned.

I'll begin with organizational structure. An important theme of Government over the past decade was "empowering" personnel, bureaus, and agencies to acquire things using their own rules, regulations, and practices. As our Government has grown, a constant hallmark of its operation has been disputes between central managers, who want things to run in accordance with standardized principles, and the folks in the agencies and bureaus, who want to be free to pursue their own interests in their own ways. For at least a half-century, in the procurement area, the centralizers were gaining. Under a unified set of regulations, variations in procurement practices among agencies and bureaus had been reduced to the point at which people in private industry knew to a pretty good degree what to expect when they set out to do business with the Government.

In the '90's, however, centrifugal forces gained the ascendancy. The Government became less of a unified whole, and more of a collection of quasi-corporate entities. As these entities do business each in its own way, the basic rules under which procurements take place, like the mechanisms for enforcing those rules, have been weakened.

These changes have created much greater uncertainty about the way in which procurements are conducted. Uncertainty, as anybody who has ever put together a bid or proposal knows, drives potential competitors out of the market and drives up the prices of those who stay in; if a bidder doesn't account for eventualities that might arise, and they occur, he can lose his shirt. Leaving major decisions to individual discretion in individual procurements can have devastating consequences for the prices the Government pays for what it buys.

The uncertainty is more than just momentary coping with change. As different agencies – and different procuring activities within those agencies, and probably even different program and contracting officers within those procuring activities – use different ways to acquire goods and services, potential suppliers face this problem: To the extent that the Government is like a single customer, each company has to spend a certain amount of money to get to know that customer's procedures and practices. If the Government becomes many customers, each firm is going to have to increase that kind of

spending many times. Small companies have to restrict their learning budgets to a limited range of customers, so as the Government becomes fragmented, those companies won't have any real chance of satisfying the needs of as many agencies as they might have before.

Government officials who are encouraged to creatively reinvent procurement practices in unique ways have to realize that the more they do this, the more likely they are to cost the taxpayers money. We can save significantly by preserving a large pool of potential suppliers, cutting overhead costs for each one, and cutting overall prices naturally through competition. A unified approach is necessary to meeting these goals. There is no incompatibility, I should add, between uniform basic practices and creative means of implementing those practices with greater efficiency.

Another aspect of the current approach is to give greater importance to firms' past performance – or reputation – in choosing contractors. The Government has always paid attention to past performance, of course. For decades, it used responsibility determinations to keep from getting stuck with contractors who don't have the financial and other capabilities to perform in accordance with their promises. But there is now an increased emphasis – often an over-emphasis – on past performance as an evaluation factor in negotiated procurements. Some contracting officers are writing solicitations that make reputation at least as important as technical merit or cost in evaluating proposals.

There are a number of difficulties with awarding contracts primarily on the basis of reputation. First, reputation is an inherently subjective measure, but the current procurement scheme requires that it be quantified so that it can be compared to other evaluation factors. By relying heavily on a quantification of an unquantifiable factor, every award decision is of suspect validity.

Even if quantification could be accomplished, while it would be quick and easy to award contracts primarily on the basis of reputation, it wouldn't be very smart. Agencies are buying promises of goods and services to be supplied in the future, not the past. Agencies that buy based on reputation would miss out, for example, on much of the innovation that has been going on in the computer industry, where new and small businesses have been the source of many of the terrific advances taking place in hardware, software, and creative resolution of problems. Government officials have to fight the temptation to overvalue reputation if they want to act, as they are supposed to act, as the taxpayers' proxy.

The need to apply reputational judgments judiciously has impacts far beyond individual procurements. We hear a lot these days about greater partnerships between Government and industry, and of course better communications have the potential for good on both sides. But we have to remember that there isn't a single "industry." Whether a firm is a part of the "industry" that participates in those informal

communications has become critical to the company's ability to compete for and win contracts. Reputational judgments, like many forms of regulation, tend to exclude new entrants from the marketplace.

The use of past performance ratings has implications for restricting companies' legal rights and privileges, as well. The number of protests and contract claims has declined markedly over the past decade. Several lawyers and company officials have suggested to me that this is because "it's not cool" to object to Government actions any more. "It's not cool" is code for "I'm afraid that if I do it, my performance ratings will suffer, and I'll lose the chance for future contracts."

Handled the wrong way, past performance, with its impact on inclusion in the club of "industry partners," has become a hammer with which Government forces companies to give up rights, and ultimately money, for the opportunity to stay in the contracting game. And as valid protests are not filed, the taxpayers suffer – they are denied the benefits that come with informed oversight of the procurement system. Protests of course do have short-term costs in terms of delayed procurements and diverted activities of Federal employees involved in a procurement. But in exchange for these costs – a trade-off that the current approach doesn't take into consideration – protests keep participants in the system alert to wrongdoing, educate them to practices found by an unbiased observer to be fair or foul, thereby instill discipline in the way in which agencies acquire things – and most important, preserve the true competition that brings down prices and improves the quality of product offerings. Similarly, if companies know in advance that they will be strongly dissuaded from litigating contract disputes, they may well increase their prices so as to remove some or all of the risk they face in not being able to recoup later incurred, but initially unexpected, costs they feel should be legitimately paid by the Government. The taxpayers may pay more in the long run than they would if the companies thought they could enforce their contract rights.

Let's move on now to a third aspect of the current procurement system, methods of contracting.

I'll begin with a couple of notes about competitive contracting – and I'll be brief here because this method of contracting, which used to be the paradigm, isn't used so much any more. A significant problem here is the use of contracting techniques which, like heavy emphasis on past performance, lead to highly subjective decisions for which accountability is limited or nonexistent. One is the increased use of oral solicitations, without any limitations, and, even for written solicitations, making contract awards on the basis of oral proposals. There may be no record of what transpired in what passed for a competition – and even if there is one, it will be so skimpy that proving a decision was sound or not will be very, very hard. Both sides may later regret that their contract rights and responsibilities were ill-defined, as well.

Agencies are also limiting, in the interest of efficient contracting, the numbers of firms allowed to compete in individual procurements. As this happens, some companies which submitted proposals that stood a reasonable chance of award will find themselves on the outside looking in. The message to them will be: "I'm sorry, your offer – you know, the one on which you've spent tens of thousands, or maybe even hundreds of thousands, of dollars – had a reasonable chance for award, but for reasons of administrative convenience, we decided that negotiating with you wouldn't have been worth the trouble. It wouldn't have been efficient." Whether those firms could have improved their proposals after discussions, and thereby given the taxpayers a better deal, will be immaterial. What sense does this make? We have to guard against designing a procurement system in which the secret to success is clever marketing or access to the "right" individuals. We don't need a system that favors slick over solid, lucky over smart, the well-connected insider over the ordinary citizen. The ability to limit competitive ranges must be used carefully.

These are problems with actual competitions, in which companies choose to participate after having notice that they exist. But they pale in comparison with the difficulties that result when the competitions are limited without any notice of their existence at all. More and more, this seems to be the preferred way for agencies to do business. It creates impediments and challenges to keeping the procurement system the servant of the taxpayer.

One of the favorite methods of acquiring goods and services without real competition is the use of umbrella task and delivery order contracts. Agencies issue wide-ranging contracts to a number – often a very large number – of firms, and when they need something, they pick one of those firms to give it to them. These contracts are inherently biased against small business, because a small vendor who can provide the item to be ordered but not the wide range of items under the contract is excluded from any consideration. Even if that vendor could provide that item well and at a better price than could be had from one of the big companies that has a contract, it cannot get the business.

A further problem with umbrella contracts is that even among the big firms that do have the contracts, agencies have practically unfettered discretion in making awards of task or delivery orders. The prospect of abuse is readily apparent: agencies award contracts to most companies that want them, and choose later, for reasons of convenience rather than best value, which ones will get the orders. This process empowers procurement officials without giving them standards against which to make selections. The concept has some utility where differences are measurable, which is frequently true for goods, but where the differences are very difficult to gauge, which is often true for services, the use of umbrella contracts makes decisions about who gets contract money highly subjective. Because the laws about competition (and protests to enforce it) don't

apply to the issuance of delivery and task orders, we may never know whether the use of umbrella contracts gives taxpayers beneficial results.

Another way agencies are acquiring goods and services without real competition is by placing orders against multiple award schedule contracts and their cousins, Government-wide acquisition contracts. These vehicles are basically agreements against which specified items may be ordered; the orders automatically incorporate the terms and conditions of the contracts.

CICA gave its blessing to the multiple award schedule program as a form of full and open competition. These contracts should be used, though, Congress explained, only when the Government can negotiate quantity-discount contracts, with delivery to be made directly to the using agencies in small quantities at diverse locations. These limitations are not being observed. Agencies are using schedule contracts to purchase items in large numbers, without any maximum ordering limitations. The dollar values of individual schedule buys are reaching the billion dollar range.

Agencies don't have to announce their use of this program in advance, as they once did. They can simply compare catalog prices or even ask a few pre-selected vendors to give prices, which may change on an order-by-order basis, and then choose a winner. This practice is nice and easy. It's not fair to all potential offerors, though; to have a shot at making a sale, a company must be a member of the "club" chosen in advance by the agency. And it's not fair to the taxpayers, either; they ought to be getting the best deals capable vendors can offer, not the results of secret competitions among a limited in-crowd of companies.

A year ago, the General Services Administration's Office of the Inspector General issued a report which concluded that GSA is not consistently negotiating most favored customer prices for multiple award contracts; many multiple award contract extensions are accomplished without adequate price analysis; and preaward audits are not being used effectively to negotiate better schedule prices. Yet the use of the contracts continues unabated, to the tune of about $15 billion a year. It's much easier than conducting competitive procurements – ergo, in today's world, it's better. But is it really economical, let alone fair? Proponents of buying off the schedules don't seem to care.

Agencies are also using undefinitized vehicles, like letter contracts, to buy things as large as construction of massive buildings. Instead of figuring out in advance what to build, and then taking bids to construct it, agencies are issuing letter contracts which say not much more than, in exchange for a price to be determined later, not to exceed X million dollars, a company agrees to build a building about so big to be used for such-and-such a purpose. There is no telling on what basis an agency might select a contractor to perform under this kind of contract. There is a high likelihood, though, that unless

agencies are very generous to those contractors, the determination of how much to pay for work performed will be contentious.

Finally, the Government has handed out credit cards to untold numbers of employees for the purchase of – well, if you've opened a newspaper or watched a TV news show recently, you know that some of those employees have been purchasing all sorts of things that don't exactly meet Government requirements. In our haste to make buying easy, we haven't paid enough attention to controlling what is bought. And no matter how small the number of abuses of credit card privileges, or how few dollars have been involved, the media coverage of this form of ease of acquisition has brought public discredit on the entire Government procurement system.

On to the next aspect of today's procurement system: Who is going to be responsible for all these innovative procurements? The current approach has as one of its maxims that simpler procurements need fewer professionals to conduct. And consistent with this maxim, at the same time that greater discretion is being given to Government procurement personnel, the number of those folks has been reduced, in part by enticing the veterans who know how to get things done out the door through buyouts. What we need to be asking, but aren't, is, How big an investment in trained personnel does the Government need to do its job well? Significant personnel cuts force the contracting professionals who remain to do more work than they are capable of. Government officials are going to have to work hard to keep this trend from going too far.

An inevitable consequence of the personnel cuts, and the new demands on the time of the contracting officials who remain, is the temptation to cede more authority for procurements to the program offices for which the contracting personnel are doing the buying. This is a real problem. Program offices generally want whatever they need immediately, and as long as the contracting staff can bring it in within the budget for the acquisition, they don't particularly care how much it costs or how it was bought. The problem is made especially acute by the way the Government does its budgeting: an office gets its funding year-by-year, and frequently doesn't know how much it has for a procurement until toward the end of a fiscal year. Then it wants to buy right away, because the funding won't necessarily be provided next year if it isn't spent this year. Whether the taxpayer gets a good deal is off the radar screen for many of the people in program offices.

For many years, procurement professionals have been the taxpayers' line of defense against these inclinations. The procurement process, within the Government, has traditionally been marked by a creative tension between contracting and program officials. While the program people have wanted to buy things fast and easily, the contracting staff have put competition, with its consequent savings, first. The current regime has tilted the balance of this creative tension. The contracting personnel are

having a tough time holding up their critical end of the process, and thereby avoiding being demoted, effectively, from professional managers to clerical assistants.

Contracting personnel also need to be on the lookout, more than ever, to guard against political or unethical influences on procurement decisions. One of the problems with a less structured process is that it makes it easier for people with power to exert improper influences on award decisions. Those of us in the Federal Government procurement community are justifiably proud that with some regrettable exceptions, our procurements have been honest and apolitical. As the culture of procurement changes, we must be on our toes to ensure that this aspect of that culture does not suffer.

I promised you earlier that before concluding, I would discuss a couple of ramifications of the current procurement environment that are important, but rarely mentioned. Let me get to them now.

One is the impact of the past decade's changes on what the Government buys. Under the old style of buying goods and services, which was the paradigm under CICA, an agency had to very carefully decide exactly what it needed to acquire, and then present to vendors a statement of work against which it would solicit bids or offers. The vendors would often ask questions about the agency's requirements in the course of the procurement, thereby forcing the agency to think even more closely about what it needed. Then a contract would be awarded and, usually for a firm, fixed price, the contractor would provide what the agency had requested.

Under the current system, as it has developed over the past decade, an agency doesn't have to perform the hard work of defining requirements, partially in response to vendor questions, before awarding a contract. The agency can simply use one of the non-competitive contract vehicles I described earlier – award a contract on the basis of undocumented oral proposals, place a delivery order against an umbrella or schedule contract, or write a sketchy letter contract – and define its requirements later.

There are two principal problems with this approach. One is that by not thinking through in advance exactly what the agency needs, the program officials may wind up with two unwanted results. First, they may need longer to get the job done, since they will be re-thinking it on the fly. Second, they may also pay considerably more money for the results obtained, since far more of those results will have to be purchased on a time-and-materials basis. Purchasing on that basis is inevitably more expensive than buying under a firm, fixed price contract arrived at in a competitive environment. It also contains many of the elements of cost-plus-a-percentage-of-cost contracting, which Congress found so disadvantageous that it has prohibited that method from being used.

The other problem is more insidious: The agency officials who enter into the contracts without any concrete idea of their true requirements may <u>never</u> understand

exactly what they need, and by default leave to the contractor the opportunity to define the requirements. And of course this situation tempts the contractor to provide not what a conscientious public servant might decide was necessary, if he or she were forced to write a statement of work that would be subjected to careful scrutiny in a competitive procurement, but rather, what the contractor has available to sell – and at the greatest profit margin. I might have spoken too soon in suggesting that the current system tilts the balance too much toward program officials and away from contracting personnel. The system tilts authority away from all Government representatives by making it all too easy for program officials to cede to contractors authority which is properly Governmental.

The other thought I'll leave you with concerns the international ramifications of the current Government procurement system. The United States has been making great efforts to open other governments' markets to fair, open competition in which American companies can participate. As our own Government abandons full and open competition, in favor of efficiency and unchecked discretion to choose business partners on the basis of reputation, how can we look our trading partners in the eye and demand that they do otherwise? For small savings in administrative spending on the procurement process, we may not only be costing the taxpayers big bucks in purchasing costs, but also undermining efforts to open large markets for American capital and labor abroad.

As you can see, I have serious doubts about the wisdom of some of the changes which occurred in the Government contracting world during the 1990's. These changes have attempted to make Government procurement more efficient by misguidedly cutting back on its most important cost-saving feature – full and open competition. Increased administrative efficiency is great. Indeed, it's an essential element of ensuring that taxpayers' money is spent wisely. But in my opinion, many of the changes have been pound-foolish, and some of them not even penny-wise.

I know from my own occupation that efficiency can be over-emphasized. I hear often, as I'm sure you do, that the legal process is inefficient. It takes too long, and it's too burdensome. I once offered parties who made those complaints an opportunity to have a truly efficient proceeding. The parties would not have to discover what really happened regarding their dispute, and they would not have to present the facts through documents and hearing testimony. They would not have to analyze those facts in the context of statute, regulation, and case law, and brief the matter to me. They wouldn't have to wait for me to write a decision. Instead, we would proceed directly to a highly efficient – and incidentally, fair – resolution of the case. I would simply flip a coin, and whoever called it correctly would prevail.

As I pulled a quarter out of my pocket, everyone else in the room began to sputter. Finally someone had the gumption to say that he didn't think it was appropriate to decide a case that way. Then everyone else said the same thing. And of course, they were right. Flipping a coin would have been efficient, but the parties to a lawsuit – and the taxpayers

who provide the tribunal which hears it – expect and deserve better. The public demands a judicial system which considers matters presented to it fully and fairly – and efficiently, too, but not efficiently, to the suppression of more critical values.

So it should be with the Government's procurement system, as well. Efficiency and ease of contracting are important. But we have not been careful enough in weighing increases in efficiency against the critically important values of openness, fairness, economy, and accountability. By diminishing those key values, we have damaged the system and created a pseudo-efficiency which, on closer inspection, has resulted in greater costs. The procurement system is far less faithful to the democratic and capitalistic impulses that it once reflected.

By disdaining full and open competition, we have sapped the system's greatest strength. We all know that a genuinely competitive marketplace works to the greatest benefit of all of us as consumers. Why shouldn't this engine of capitalism continue to benefit all of us as taxpayers, too?

Government procurement is an easy target for political rhetoric. But overall, it has been a system we can be proud of. Nearly a century ago, Mr. Justice Holmes wrote, "Men must turn square corners when they deal with the Government." [Rock Island, Arkansas & Louisiana Railroad Co. v. United States, 254 U.S. 141, 143 (1920).] And later Mr. Justice Jackson pointed out that the relationship is mutual: "[T]here is no reason why the square corners should constitute a one-way street." [Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 388 (1947) (dissenting opinion).] Government contracting in the United States has been, for longer than any of us can remember, marked by openness, fairness, economy, and accountability.

When people from many other countries hear how our system has worked, they are amazed. Where they come from, those in power award contracts with very little oversight, sometimes to their friends, sometimes even to themselves. That hasn't been our way – and we need to overcome the missteps of the 1990's to make sure it isn't.

An honest, open, fully competitive procurement system has enormous benefits for all of us -- potential suppliers, Government officials, and most important, taxpayers. If we put our minds to it, we can recover that kind of system and make Government contracting more efficient without limiting participation to a favored few contractors.