THERE IS ALWAYS A BETTER WAY: PROPOSED LEGISLATIVE IMPROVEMENTS FOR THE FEDERAL PROCUREMENT SYSTEM

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> *"The Federal Government has an overriding obligation to American taxpayers. It should perform its functions efficiently and effectively while ensuring that its actions result in the best value for the taxpayers."*[1]

On March 4, 2009, United States President Barack Obama issued a memorandum roundly criticizing the Federal Government's poor handling of its contracts and procurement process.[2] The President noted that since 2001, spending on Federal Government contracts had increased to over $500 billion in the 2008 Fiscal Year.[3] He further stated that the Federal Government relied more on sole source contracts[4] and had expanded outsourcing of services.[5] In an effort to correct these issues, the President

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1. *See Memorandum for Heads of Executive Departments and Agencies*, Mar. 4, 2009.
2. *Id.*
3. *Id.*
4. *Id.*

> Excessive reliance by executive agencies on sole-source contracts (or contracts with a limited number of sources) and cost-reimbursement contracts creates a risk that taxpayer funds will be spent on contracts that are wasteful, inefficient, subject to misuse, or otherwise not well designed to serve the needs of the Federal Government or the interests of the American taxpayer. Reports by agency Inspectors General, the Government Accountability Office (GAO), and other independent reviewing bodies have shown that noncompetitive and cost-reimbursement contracts have been misused, resulting in wasted taxpayer resources, poor contractor performance, and inadequate accountability for results.

Id.

5. *See id.*

> Government outsourcing for services also raises special concerns. For decades, the Federal Government has relied on the private sector for necessary commercial services used by the Government, such as transportation, food, and maintenance. Office of Management and Budget Circular A-76, first issued in 1966, was based on the reasonable premise that while inherently governmental activities should be performed by

instructed the Office of Management and Budget (OMB) to assist all federal agencies by conducting immediate reviews, and continuing reviews of, existing contracts.[6] Also, the President directed OMB to develop and issue guidelines concerning closer governance of sole source contracts and the appropriate use of all contract types, including government outsourcing, as well as training guidelines for procurement personnel.[7]

On June 14, 2010, a study entitled "Federal Procurement Reform: Change Takes More Than Words", was released by MeriTalk, the Federal Government's Information Technology Network.[8] The study, based on surveys completed by 200 procurement personnel members, revealed,

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> Government employees, taxpayers may receive more value for their dollars if non-inherently governmental activities that can be provided commercially are subject to the forces of competition.

Id.

6. *Memorandum on Government Contracting, supra* note 2.

> [I] hereby direct the Director of the Office of Management and Budget (OMB), in collaboration with the Secretary of Defense, the Administrator of the National Aeronautics and Space Administration, the Administrator of General Services, the Director of the Office of Personnel Management, and the heads of such other agencies as the Director of OMB determines to be appropriate, and with the participation of appropriate management councils and program management officials, to develop and issue by July 1, 2009, Government-wide guidance to assist agencies in reviewing, and creating processes for ongoing review of, existing contracts in order to identify contracts that are wasteful, inefficient, or not otherwise likely to meet the agency's needs, and to formulate appropriate corrective action in a timely manner. Such corrective action may include modifying or canceling such contracts in a manner and to the extent consistent with applicable laws, regulations, and policy.

Id.

7. *Id.*

> I further direct the Director of OMB, in collaboration with the aforementioned officials and councils, and with input from the public, to develop and issue by September 30, 2009, Government-wide guidance to:
> (1) govern the appropriate use and oversight of sole-source and other types of noncompetitive contracts and to maximize the use of full and open competition and other competitive procurement processes;
> (2) govern the appropriate use and oversight of all contract types, in full consideration of the agency's needs, and to minimize risk and maximize the value of Government contracts generally, consistent with the regulations to be promulgated pursuant to section 864 of Public Law 110-417;
> (3) assist agencies in assessing the capacity and ability of the Federal acquisition workforce to develop, manage, and oversee acquisitions appropriately; and
> (4) clarify when governmental outsourcing for services is and is not appropriate, consistent with section 321 of Public Law 110-417 (31 U.S.C. 501 note).

Id.

8. FEDERAL PROCUREMENT REFORM: CHANGES TAKE MORE THAN WORDS, MERITALK, (June 14, 2010), http://www.meritalk.com/pdfs/MeriTalk%20Federal%20Procurement%20Reform%20Report%20060210.pdf

amongst other things, that federal agency procurement offices needed to improve processes, focus on training, and increase transparency.[9] The survey also noted that the procurement managers believed that they could save over $158 billion with improved processes.[10] Finally, the report found only twelve percent of procurement managers gave their agencies an "A" grade for procurement process maturity[11] and that twenty-eight percent of federally contracted programs were not delivered on time or within the stated budget.[12]

The President's Executive Memorandum and the MeriTalk report lead to a difficult conclusion. First, the Federal Government is investing significant taxpayer dollars for contracting. In fact, hundreds of billions of dollars are flowing from the Federal Government to private sector contractors annually for a wide range of services. Second, while contracting for goods and services is a rapidly growing sector of the government, there is also growing concern related to oversight and control. Third, because of the lack of oversight, this area is vulnerable to fraud, waste, and abuse.

This Article examines whether legislative and policy changes in the federal procurement system will result in major financial and integrity changes. Note that while government procurement activities undertaken by individual states are a substantive part of the Nation's economy, this Article is restricted to federal procurement law and policy. Part I discusses Title 41 of the United States Code, which provides the statutory authority for all federal procurement activities. Part I also briefly covers the supporting regulations known as the Federal Acquisition Rules ("FAR"). Part II examines the roles, membership and obligations of the Office of Federal Procurement Policy, the Federal Acquisition Regulatory Council ("FARC") and the Chief Acquisition Officers Council and their impact on federal procurement policy. Part III scrutinizes three major federal procurement actions which underscore the need for change. Part IV will provide legislative and policy recommendations to improve the federal procurement

9. *See id.*

10. *See id.* at 4. "For purposes of the report, [the authors] define processes as the sum of all steps agencies take to procure goods and services." *Id.*

11. *Id.* The report further noted that thirty-six percent of procurement management officials gave their agencies a grade of "B", twenty-seven percent gave their agencies a grade of "C", fourteen percent gave their agencies a grade of "D", four percent gave their agencies a grade of "F," and seven percent were "unsure." *Id.*

12. *Id.* The report noted that the impact of the lateness of service delivery and budget missteps has a $95 billion impact. *Id.*

system. This Article concludes that the current statutory framework can be modified and creative solutions crafted to establish a more thoughtful and less frenetic federal procurement system.

I. UNDERSTANDING THE GRAY AREA: THE LAW AND REGULATIONS GOVERNING FEDERAL CONTRACTING

A. Title 41

Title 41 of the United States Code, divided into ten separate chapters, provides the federal statutory authority for all federal procurement activities.[13] The major sections include General Provisions, Termination of War Contracts, Procurement Procedures, Judicial Review of Administrative Decisions, Service Contract Labor Standards, and Contract Disputes.

i. General Provisions

Title 41, Chapter 1 provides for General Provisions. First, the section restricts the government from purchasing and contracting for supplies or services unless advertised for a sufficient amount of time.[14] The provision grants narrow exceptions to the advertising requirement, based on the purchase price or exigent circumstances.[15] Second, the provision disallows any contract or purchase that has not been specifically funded, except in specialized circumstances involving the Department of Defense and the Department of Homeland Security.[16] The section further requires the

13. *See generally* 41 U.S.C. §§ 1-707 (2006).

14. *See* 41 U.S.C. § 5 (2006).

> Unless otherwise provided in the appropriation concerned or other law, purchases and contracts for supplies or services for the Government may be made or entered into only after advertising a sufficient time previously for proposals, except (1) when the amount involved in any one case does not exceed $25,000, (2) when the public exigencies require the immediate delivery of the articles or performance of the service, (3) when only one source of supply is available and the Government purchasing or contracting officer shall so certify, or (4) when the services are required to be performed by the contractor in person and are (A) of a technical and professional nature or (B) under Government supervision and paid for on a time basis.

Id.

15. *Id.*

16. 41 U.S.C. § 11 (2006).

> No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment, except in the Department of Defense and in

creation and maintenance of a distribution list of contractors who have breached their contracts.[17] Finally, the statute imposes criminal and civil penalties for violations[18] and institutes specified Contractor responsibilities.[19]

ii. Termination of War Contracts

Title 41, Chapter 2 outlines the process for the termination of war contracts. Normally, this section would not be particularly relevant; however, the United States is currently embroiled in conflict abroad and thus, a brief review of this section is instructive. First, the chapter creates an administrative board to oversee the winding down and eventual termination of war contracts.[20] This board is composed of, among others, the Secretaries of the Army, Navy, State, Transportation, and Commerce, the Administrator of the General Services, and the Attorney General.[21] This chapter requires the government to develop a thoughtful and thorough

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the Department of Homeland Security with respect to the Coast Guard when it is not operating as a service in the Navy, for clothing, subsistence, forage, fuel, quarters, transportation, or medical and hospital supplies, which, however, shall not exceed the necessities of the current year.

Id.

17. 41 U.S.C. § 37 (2006). Requiring the Comptroller General to distribute a list to all agencies the names of firms that have been found by the Secretary of Labor to have breached their agreements. *Id.* Unless otherwise recommended by the Secretary of Labor, the listed firms are to be banned from receiving future contract awards. *Id.*

18. 41 U.S.C. §§ 54 (2006) (stating that one who knowingly or willingly violates this section of the law can be sentenced to up to 10 years in prison and an undefined fine.); 42 U.S.C. § 55 (2006) (stating that the law allows the Federal Government to recover civil penalties from anyone violating the law by collecting twice the amount of a kickback and not more than $10,000 per occurrence).

19. *See* 41 U.S.C. § 57 (2006). The section requires agencies to develop procedural requirements for prevention and detection of violations, requires cooperation in investigations, has a reporting requirement and requires cooperation in investigations regardless of the contract size. *Id.*

20. *See* 41 U.S.C. § 105 (2006).

> There is created a Contract Settlement Advisory Board, with which the Administrator of General Services shall advise and consult. The Board shall be composed of the Administrator of General Services who shall act as its Chairman, and of the Secretary of the Army, the Secretary of the Navy, the Secretary of Transportation, the Secretary of State, the chairman of the board of directors of the Reconstruction Finance Corporation, Secretary of Commerce, and the Attorney General or any alternate or representative designated by any of them. The Administrator of General Services shall request other Government agencies to participate in the deliberations of the Board whenever matters specially affecting them are under consideration.

Id.

21. *Id.*

contract termination process,[22] creates a basis for settlement of terminated contracts,[23] and provides guidance on the administration of specified contracts.[24]

iii. Procurement Procedures

Within Title 41, Chapter 4 is arguably the most important chapter of the law as it statutorily outlines the necessary requirements for pre- and post-award contract administration.[25] The chapter initially requires full and open competition for all contracts, places strict limits on contracts not meeting this requirement, and calls for justification for failing to award contracts without competition.[26] Next, the law requires each agency to engage in detailed acquisition planning, ensure each solicitation has met basic standards, and provides requirements for the evaluation factors used in soliciting contracts.[27] In addition the section discusses the evaluation of purchase options.[28] Third, the law outlines the requirements for agencies pre-award and post-award debriefings, the process for rejecting bids and proposals, maintaining bid protest files, and actions subsequent to protest

22. *See* 41 U.S.C. § 111 (2006) (requiring that prime contractors be provided advanced notice of the termination of war contracts, develop procedures for terminating subcontractors, and allow for the continuation of some work under the prime contract.

23. *See* 41 U.S.C. § 106 (2006) (providing priority funding for wartime contractors, establishes methods and standards for determining compensation, defines conclusiveness of settlement, outlines allowable costs, discusses settlement between the parties and when a contractor is entitled to interest payments)..

24. *See* 41 U.S.C. § 117 (2006) (dealing with defective, informal or quasi contracts.).

> Where any person has arranged to furnish or furnished to a contracting agency or to a war contractor any materials, services, or facilities related to the prosecution of the war, without a formal contract, relying in good faith upon the apparent authority of an officer or agent of a contracting agency, written or oral instructions, or any other request to proceed from a contracting agency, the contracting agency shall pay such person fair compensation therefor.

Id.

25. *See generally* 41 U.S.C. §§ 201-5, §§ 281-91.

26. *See* 41 U.S.C. § 253 (2006).

27. *See* 41 U.S.C. § 253a (2006).

28. *See id.*

filings.[29] Fourth, the law gives broad latitude to agency heads in determining contract procedures, requirements,[30] determinations and decisions,[31] and allowable costs.[32]

iv. Judicial Review of Administrative Decisions

Chapter 5, in the simplest terms, outlines the standards of review for a final contract decision and prohibits contract provisions from making an administrative official's decision final as a question of law.[33]

v. Service Contract Labor Standards

In Chapter 6, the government outlines wage standards for any employee working for a contractor or subcontractor.[34] Specifically, each contract must contain provisions identifying minimum wage for various levels of

29. *See* 41 U.S.C. § 253b (2006).

30. *See* U.S.C. § 254 (2006).

> [C]ontracts awarded after using procedures other than sealed-bid procedures may be of any type which in the opinion of the agency head will promote the best interests of the Government. Every contract awarded after using procedures other than sealed-bid procedures shall contain a suitable warranty, as determined by the agency head, by the contractor that no person or selling agency has been employed or retained to solicit or secure such contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business, for the breach or violation of which warranty the Government shall have the right to annul such contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee. The preceding sentence does not apply to a contract for an amount that is not greater than the simplified acquisition threshold or to a contract for the acquisition of commercial items.

Id. § 254(a).

31. *See* 41 U.S.C. § 262 (2006).

32. *See* 41 U.S.C. § 256 (2006) (requiring agencies to ensure allowable costs during settlement with a contractor conform to the FAR and outlines the penalties for violation of this clause).

33. *See* 41 U.S.C. § 322 (2006).

34. *See* 41 U.S.C. § 351 (2006).

employees,[35] provisions related to fringe benefits,[36] working conditions,[37] notice of wages to proposed employees under the contract,[38] and wage restrictions.[39]

vii. Contract Disputes

Chapter 9 is arguably the second most important section of the law, as it lays the statutory framework resolving disputes between the government

35. *See* 41 U.S.C. § 351(a) (1) (2006).
A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's length negotiations.
Id.

36. *See* 41 U.S.C. § 351(a) (2) (2006).

> A provision specifying the fringe benefits to be furnished in the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, to be provided for in such agreement, including prospective fringe benefits increases provided for in such agreement as a result of arm's-length negotiations. Such fringe benefits shall include medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, accident insurance, vacation and holiday pay, costs of apprenticeship or other similar programs and other bona fide fringe benefits not otherwise required by Federal, State, or local law to be provided by the contractor or subcontractor.

Id.

37. *See* 41 U.S.C. § 351(a) (3) (2006).
A provision that no part of the services covered by this chapter will be performed in buildings or surroundings or under working conditions, provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.
Id.

38. *See* 41 U.S.C. § 351(a) (4) (2006).

39. *See* 41 U.S.C. § 351(b) (1) (2006).
No contractor who enters into any contract with the Federal Government the principal purpose of which is to furnish services through the use of service employees and no subcontractor thereunder shall pay any of his employees engaged in performing work on such contracts less than the minimum wage specified under section 206(a)(1) of title 29.
Id.

and its contractors.[40] The first major provision of the chapter frames the process for contracting officer decision-making.[41] Second, the law gives contractors the right to appeal a contracting officer's decision, which must be in writing and within 90 days of receipt.[42] Third, the law establishes various agency boards of contract appeals,[43] sets the standard for judicial review of board decisions,[44] and outlines the payment of claims.[45]

B. The Federal Acquisition Regulations

The Federal Acquisition Regulations ("FAR") are the federal procurement regulations.[46] The FAR is broken into eight subchapters with fifty-three "Parts," it covers general topics including competition and acquisition planning,[47] contracting methods and types,[48] contracting requirements,[49] and contract management.[50] The FAR is an ever-evolving set of regulations and seeks to cover the normal course of federal procurement actions.

II. HIGH LEVEL MONITORING? A LOOK AT THE OFFICE OF FEDERAL PROCUREMENT POLICY, THE FEDERAL ACQUISITION REGULATORY COUNCIL AND THE CHIEF ACQUISITIONS OFFICERS COUNCIL

Under federal law, there are three distinct entities which impact federal procurement policy. The entities, the Office of Federal Procurement Policy,

40. *See* 41 U.S.C. §§ 601–613 (2006).

41. *See* 41 U.S.C. § 605 (2006). All contract disputes must first be presented in writing to the Contracting Officer of said contract. 41 U.S.C. § 605(a). The Contracting Officer's decision is final unless an authorized appeal or suit is filed. *See id.* Finally, the section outlines a timeframe for which Contracting Officers must provide decisions for contracts under and over $100,000. 41 U.S.C. § 605(b).

42. *See* 41 U.S.C. § 606 (2006).

43. *See* 41 U.S.C. § 607 (2006).

44. *See* 41 U.S.C. § 609 (2006). A contractor may appeal a Contracting Officer's decision directly to United States Court of Federal Claims and must be filed within twelve months. 41 U.S.C. § 609(a). Agency boards of contract appeals decisions are final as to questions of fact, but not on issues of law. 41 U.S.C. § 609(b).

45. *See* 41 U.S.C. § 612 (2006). Any judgment against the United States must be paid in a timely manner. 41 U.S.C. § 612(a). All monetary awards made by an agency board of contract appeals must be paid promptly in accordance with said agency policies and procedure. 41 U.S.C. § 612(b).

46. *See* 48 C.F.R. ch.1 (2009).

47. *See* 48 C.F.R. pt. 7 (2009).

48. *See* 48 C.F.R. pts. 16–17 (2009).

49. *See* 48 C.F.R. pts. 27–33 (2009).

50. *See* 48 C.F.R. pts. 42–49 (2009).

the Federal Acquisition Regulatory Council and the Chief Acquisition Officer Council, are statutorily mandated and are charged with varying roles and responsibilities in federal acquisition policy and practice.

A. The Office of Federal Procurement Policy

The Office of Federal Procurement Policy (OFPP) was established in 1974 as part of the Office of Management and Budget[51] and is led by a presidential-appointed Administrator.[52] The OFPP is responsible for, amongst other things, government-wide procurement policy, regulations and the promotion of efficiency in procurement matters.[53] Some of the more specified responsibilities of the OFPP, *inter alia*, include designing uniform procurement standards government-wide,[54] setting the federal standard for Chief Procurement Officers and other senior procurement executives,[55] developing ethical standards and safeguards,[56] developing a database of federal contract awards,[57] restricting privatization of federal

51. *See* 41 U.S.C. § 404(a) (2006).

52. *See* 41 U.S.C. § 404(b) (2006). The Administrator is appointed by the President and approved by the United States Senate. *See id.*

53. 41 U.S.C. § 404(a).

> There is in the Office of Management and Budget an Office of Federal Procurement Policy (hereinafter referred to as the "Office") to provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies and to promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government.

Id.

54. *See* 41 U.S.C. § 405a (2006).

> The Administrator of the Office of Federal Procurement Policy is authorized and directed, pursuant to the authority conferred by Public Law 93–400 [41 U.S.C. 401 et seq.] and subject to the procedures set forth in such Public Law, to promulgate a single, simplified, uniform Federal procurement regulation and to establish procedures for insuring compliance with such provisions by all Federal agencies.

Id.

55. *See* 41 U.S.C. § 414 (2006). The law establishes and outlines the functions of Chief Procurement Officers and details the responsibilities for designated senior procurement executives. *See id.*

56. *See* 41 U.S.C. § 405c (2006).

> [T]he Administrator for Federal Procurement Policy shall develop and issue a standard policy to prevent personal conflicts of interest by contractor employees performing acquisition functions closely associated with inherently governmental functions (including the development, award, and administration of Government contracts) for or on behalf of a Federal agency or department.

41 U.S.C. § 405c(a) (2006).

57. *See* 41 U.S.C. § 417b (2006). The statute requires the OFPP Administrator to develop a database-tracking contractors who have been involved in civil, criminal or administrative proceedings as a result of performance of a federal contract worth over $500,000. *See id.*

workforce responsibilities,[58] creating an "Advocate for competition" in each agency[59] and the authority to test innovative procurement methods and procedures.[60]

B. The Federal Acquisition Regulatory Council

Title 41 of the United States Code creates the Federal Acquisition Regulatory Council (the Council).[61] The purpose of the Council is "to assist in the direction and coordination of Government-wide procurement policy and Government-wide procurement regulatory activities in the Federal Government."[62] The Council is composed of the heads of four

58. *See* 41 U.S.C. § 439 (2006). The statute prohibits the privatization of any function performed by 10 or more Executive agency employees unless the results are based on:

> **(1)** A function of an executive agency performed by 10 or more agency civilian employees may not be converted, in whole or in part, to performance by a contractor unless the conversion is based on the results of a public-private competition that—
> **(A)** formally compares the cost of performance of the function by agency civilian employees with the cost of performance by a contractor;
> **(B)** creates an agency tender, including a most efficient organization plan, in accordance with Office of Management and Budget Circular A–76, as implemented on May 29, 2003, or any successor circular;
> **(C)** includes the issuance of a solicitation;
> **(D)** determines whether the submitted offers meet the needs of the executive agency with respect to factors other than cost, including quality, reliability, and timeliness;
> **(E)** examines the cost of performance of the function by agency civilian employees and the cost of performance of the function by one or more contractors to demonstrate whether converting to performance by a contractor will result in savings to the Government over the life of the contract, including—
> **(i)** the estimated cost to the Government (based on offers received) for performance of the function by a contractor;
> **(ii)** the estimated cost to the Government for performance of the function by agency civilian employees; and
> **(iii)** an estimate of all other costs and expenditures that the Government would incur because of the award of such a contract;
> **(F)** requires continued performance of the function by agency civilian employees unless the difference in the cost of performance of the function by a contractor compared to the cost of performance of the function by agency civilian employees would, over all performance periods required by the solicitation, be equal to or exceed the lesser of—
> **(i)** 10 percent of the personnel-related costs for performance of that function in the agency tender; or
> **(ii)** $10,000,000; and
> **(G)** examines the effect of performance of the function by a contractor on the agency mission associated with the performance of the function.

59. 41 U.S.C. § 418 (2006). The Advocate for competition is responsible for promoting full and open competition, promoting the acquisition of commercial items, and challenging barriers to Executive agency acquisitions. 41 U.S.C. § 418(c) (2006).

60. 41 U.S.C. § 413(a) (2006).

61. 41 U.S.C. § 421(a) (2006).

62. *Id.*

separate agencies[63] and is required to issue and maintain the Federal Acquisition Regulations.[64] Further, this section of the law specifically limits the ability of federal agencies to issue its own procurement regulations[65] and requires all regulations be consistent with the FAR.[66] Finally, this section seeks to eliminate or reduce redundant or unnecessary levels of review and approval in any agency's procurement system and redundant or unnecessary procurement regulations unique to that agency.[67]

C. The Chief Acquisitions Officers Council

Title 41 creates a second policy body to coordinate procurement policy in the Chief Acquisitions Officers Council (the CAO Council).[68] The CAO Council is chaired by the Deputy Director for Management of the Office of Management and Budget and has several members from other federal agencies.[69] Statutorily, the CAO Council is the "... principal interagency forum for monitoring and improving the [f]ederal acquisition system."[70] The CAO Council has seven major functions including developing

63. 41 U.S.C. § 421(b) (2006). The Counsel is composed of the Administrator for Federal Procurement Policy, Secretary of the United States Department of Defense, Administrator of the National Aeronautics and Space Administration and the Administrator of General Services. *Id.*

64. 41 U.S.C. § 421(c) (2006).

> Subject to the provisions of section 405 of this title, the General Services Administration, the Department of Defense, and the National Aeronautics and Space Administration, pursuant to their respective authorities under title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251, et seq.), chapters 4 and 137 of title 10, and the National Aeronautics and Space Act of 1958 (42 U.S.C. 2451, et seq.), shall jointly issue and maintain in accordance with subsection (f) of this section a single Government-wide procurement regulation, to be known as the "Federal Acquisition Regulation."

41 U.S.C. § 421(c) (1) (2006).

65. 41 U.S.C. § 421(c)(2) (2006). These regulations must be limited to those essential to implementing Government-wide policies and procedures and additional policies and procedures required to satisfy the specific and unique needs of the agency. *Id.*

66. 41 U.S.C. § 421(c)(3) (2006) ("The Administrator, in consultation with the Council, shall ensure that procurement regulations promulgated by executive agencies are consistent with the Federal Acquisition Regulation and in accordance with any policies issued pursuant to section 405 (a) of this title.").

67. 41 U.S.C. § 421(d) (3) (a–b) (2006).

68. 41 U.S.C. § 414b(a)(2006).

69. 41 U.S.C. § 414b(b) (2006). The CAO Council consists of the Deputy Director for Management of the Office of Management and Budget; the Administrator for Federal Procurement Policy; the Under Secretary of Defense for Acquisition, Technology and Logistics; the chief acquisition officer of each agency required to have said position under Title 41; the senior procurement executive of each military department; and any other senior agency officer of each executive agency, appointed by the head of the agency with consultation with the Chairman, who can assist the Council in performing its functions. *Id.*

70. 41 U.S.C. § 414b(d) (2006).

recommendations to the OMB Director, promoting effective business practices and sharing business experiences and ideas.[71]

III. THE PROBLEM: OUT OF CONTROL FEDERAL CONTRACTING

The global economy has been under strain like never before.[72] This economic crisis originated with the U.S. subprime mortgage crisis, then expanded into a reversal of the housing boom and other issues related to the credit markets.[73] To stave off a complete collapse of the American economy, the U.S. government passed various legislation, [74] including the American Recovery and Reinvestment Act of 2009 (ARRA).[75] The ARRA allowed the Federal Government to spend over $787 billion to stabilize the American economy. Of that total sum, $275 billion was set aside for federal contracts, grants and loans.[76] To date, $26,498,869,058 has been

71. 41 U.S.C. § 414b(e) (2006).

> The Council shall perform functions that include the following:
> (1) Develop recommendations for the Director of the Office of Management and Budget on Federal acquisition policies and requirements.
> (2) Share experiences, ideas, best practices, and innovative approaches related to Federal acquisition.
> (3) Assist the Administrator in the identification, development, and coordination of multiagency projects and other innovative initiatives to improve Federal acquisition.
> (4) Promote effective business practices that ensure the timely delivery of best value products to the Federal Government and achieve appropriate public policy objectives.
> (5) Further integrity, fairness, competition, openness, and efficiency in the Federal acquisition system.
> (6) Work with the Office of Personnel Management to assess and address the hiring, training, and professional development needs of the Federal Government related to acquisition.
> (7) Work with the Administrator and the Federal Acquisition Regulatory Council to promote the business practices referred to in paragraph (4) and other results of the functions carried out under this subsection."

Id.

72. *See generally* Anup Shah, *Global Financial Crisis*, Global Issues, July 25, 2009, http://www.globalissues.org/article/768/global-financial-crisis.

73. *Id.*

74. *See e.g.* Emergency Economic Stabilization Act of 2008, Pub. L 110-143, 122 Stat. 3765 (codified as amended in scattered sections of 12 U.S.C.). The Emergency Economic Stabilization Act created the Troubled Asset Relief Program (TARP). 12 U.S.C. § 5211 (2008). TARP was a program created to allow the United States government to purchase "troubled assets" from private financial institutions in order to stabilize each private financial institutions financial situation. *Id.*

75. American Recovery and Reinvestment Act of 2009, Pub. L. 111-5, 123 Stat. 115. The full title to the law reads "An act making supplemental appropriations for job preservation and creation, infrastructure investment, energy efficiency and science, assistance to the unemployed, and State and local fiscal stabilization, for the fiscal year ending September 30, 2009, and for other purposes." *Id.*

76. *See id.*

made specifically available for contracts.[77] The United States Government Accountability Office, congressionally mandated to audit ARRA funds and utilization, issued a critical report around the monitoring of awarded contracts.[78]

Over the last decade, the United States has been involved in wars in Afghanistan[79] and Iraq.[80] These wars have taken a definitive financial toll on the Federal Government, as total spending has gone over $1 trillion dollars.[81] From 2004 through 2006, the Federal Government spent $11 billion, $17 billion and $25 billion on contracts in Afghanistan and Iraq.[82] Given the values of these contracts, a number of concerns surfaced regarding fraud, abuse and waste.[83] In response, a bipartisan, Congressional committee was formed to looking into these issues.[84] The Commission on

77. Recovery.gov, Where is the money going?, http://www.recovery.gov/Transparency/RecipientReportedData/Pages/RecipientReportedDataMap.aspx (last visited Dec. 3, 2010).

78. *See* GOVERNMENT ACCOUNTABILITY OFFICE, GAO 09-1016, RECOVERY Act (Sept. 2009). The GAO made three recommendations: 1) clearer accountability for recipient financial data; 2) program-specific examples of recipient reports, outreach to nonfederal recipients, and further guidance on program performance measures; and 3) timely notification of funding provided within a state to key state officials and a master schedule for anticipated new or revised federal agency guidance. *Id.*

79. Craig Whitlock, *Kandahar Offensive Not on Schedule; McChrystal says Efforts Could Take Months Longer than Expected,* WASH. POST, June 11, 2010, at A1.

80. Mary Beth Sheridan and Ernest Lodono, *Self Sufficiency Still Eludes Domestic Security Forces,* WASH. POST, Nov, 9, 2008, at A1.

81. *See* Richard Wolf, *Afghan War Costs Now outpaces Iraq's*, USA TODAY, May 13, 2010, at A1.

> Pentagon spending in February, the most recent month available, was $6.7 billion in Afghanistan compared with $5.5 billion in Iraq. As recently as fiscal year 2008, Iraq was three times as expensive; in 2009, it was twice as costly. The shift is occurring because the Pentagon is adding troops in Afghanistan and withdrawing them from Iraq. And it's happening as the cumulative cost of the two wars surpasses $1 trillion, including spending for veterans and foreign aid.

Id.

82. Bill Buzenberg, *The Top 100 Contractors in Afghanistan and Iraq*, CTR. FOR PUBLIC INTEGRITY, Jan. 2008.

83. Khadijah Rentas, *Senate Agrees to Audit War Contracts*, COLUM. MISSOURIAN, Oct. 1, 2007.

> In July, the House Armed Services Committee heard from Defense Department officials who said the department had 90 ongoing criminal investigations of contractors and government personnel. The department recovered more than $10 million from investigations, according to the report from the principal deputy inspector of the Department of Defense, Thomas Gimble.

Id.

84. Comm'n On Wartime Contracting, http://www.wartimecontracting.gov (last visited Oct. 15, 2010). Members of the Commission were appointed by President George W. Bush, United States Senate Majority Leader Harry Reid, United States Senate Minority Leader Mitch McConnell, United States House of Representatives Speaker Nancy Pelosi and United States House Minority Leader John Boehner. *Id.*

Wartime Contracting released its first report on September 21, 2009, with the overall finding that Department of Defense agencies needed to improve oversight of contractor business systems to reduce fraud, waste, and abuse.[85]

On August 29, 2005, Hurricane Katrina, considered one of the worst natural disasters in American history, made landfall in the Eastern Gulf of Mexico region.[86] Hurricane Katrina, a Category 4 Storm, displaced thousands of people in Louisiana, Mississippi and Alabama[87] and caused over $2 billion in damages.[88] To assist in the reconstruction of the region, the Federal Emergency Management Agency (FEMA), part of the Department of Homeland Security, distributed over $33 billion by late 2007.[89] FEMA awarded $8.8 billion in contracts related to hurricane damage, mostly for Katrina victims.[90] Prior to Hurricane Katrina, FEMA failed to award contracts to vendors to provide post-disaster housing. Subsequent to Hurricane Katrina, to meet the emergent need, FEMA awarded four no-bid contracts, which eventually totaled $3 billion.[91] A

85. COMM'N ON WARTIME CONTRACTING IN IRAQ AND AFGHANISTAN, SPEC. REP. ON CONTRACTOR BUS. SYS., (Sept. 21, 2009). The Commission made five specific findings, including the Department of Defense needed to ensure the government spoke to contractors with one voice; the Department of Defense needed to improve government accountability by rapidly resolving agency conflicts on business systems; the Defense Contract Audit Agency needed to expand its audit reports beyond a pass/fail opinion; the Defense Contract Management Agency needed to develop effective processes including aggressive compliance enforcement; the Defense Contract Audit Agency and the Defense Contract Management Agency needed to request additional resources and prioritize contingency-contractor oversight workload. *Id.*

86. H.R. REP. NO. 109-396, at 92, 397 (2006).

87. *See* Brian Handwerk, *Eye of the Storm: Hurricane Katrina Fast Facts*, NAT'L GEOGRAPHIC NEWS, Sept. 6, 2005, http://news.nationalgeographic.com (search article title in site search box); Michelle Krupa, *Katrina's Displaced Worry About Census Count*, Nola.com, July 25, 2009, http://nola.com (search article title in search box).

88. *See Lloyd's Estimates Katrina Impact at $2.54 Billion*, INS. J., Sept. 15, 2005, http://www.insurancejournal.com/news/international/2005/09/15/59634.htm.

89. *See* Press Release, Federal Emergency Management Agency, FEMA Reforms Maintenance and Deactivation of Housing Contracts Post Katrina, (Nov. 16, 2007), *available at* http://www.fema.gov/newsrelease.fema?id=41717; Peter T. Leeson & Russell S. Sobel, *Weathering Corruption*, 51 J.L. & ECON. 667,678 (2008).

90. *See* FEMA: GAO Report on Katrina/Rita Maintenance and Deactivation of Housing Contracts Post Katrina, http://www.fema.gov/media/archives/2007/111607.shtm.

91. *See* U.S. GOV'T ACCOUNTABILITY OFF., INEFFECTIVE FEMA OVERSIGHT OF HOUSING MAINTENANCE CONTRACTS IN MISSISSIPPI RESULTED IN MILLIONS OF DOLLARS OF WASTE AND POTENTIAL FRAUD, GAO No. 08-106, at 9 (2007).

> FEMA was in the process of competing this contract – bids had been solicited and evaluated, but n o contract was in place. Therefore, FEMA awarded 'no-bid' contracts to four major engineering firms (Bechtel Corporation, Fluor Corporation, the Shaw Group Incorporated, and CH2M Hill Incorporated) for, among other things, the support of staging areas for housing units, installation of housing units, maintenance and upkeep,

report released by the United States Government Accountability Office criticized FEMA for the contracts awarded in the aftermath of Hurricane Katrina and outlined millions of dollars of waste.[92]

IV. GETTING TO A BRIGHTER DAY: LEGAL AND POLICY RECOMMENDATIONS FOR A BETTER FEDERAL PROCUREMENT SYSTEM

There are five legislative and policy recommendations which may assist in restoring efficiency and the public trust in the federal procurement system. For the most part, these recommendations seek to utilize existing institutions within the law to achieve the majority of these changes.

A. Amend Title 41 to elevate the Office of Federal Procurement Policy to a stand alone agency

In its establishment, Title 41 directs the Office of Federal Procurement Policy to "provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies and to promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government."[93] The statutory language gives the OFPP broad power over the federal procurement process. However, there is little evidence that this control is impacting federal contracting. The lack of impact on the federal procurement process could stem from the diminutive nature of the OFPP.

As of today, there is no cabinet-level agency dedicated solely to developing, implementing and monitoring procurement policy. There seems to be little or no real coordination for procurement activities throughout the Federal Government. At the agency level there may be internal controls, but where is the government-wide coordination envisioned in the establishment of OFPP? A review of a newspaper or

> site inspections and preparations, site restoration, group site design, group site construction, site assessments, property and facility management, as well as housing unit deactivation and rehabilitation. In total, FEMA made almost $3 billion in payments to Bechtel, Fluor, Shaw and CH2M Hill from September 2005 to January 2007.

Id.

92. *See id.* at 3 (reporting that FEMA essentially wasted $32 million on post-Katrina contracts through poor monitoring and improper activities).

93. 41 U.S.C. § 404 (2006).

magazine will prove that agencies such as the Departments of Defense or State function as they choose, with very little accountability for their actions.

One answer to this problem may be found in amending Title 41 and elevating the Office of Federal Procurement Policy to a stand-alone agency. One agency should be given the power and authority to coordinate all facets of federal procurement. Any reform of the federal procurement system must begin with identifying a sole entity empowered to oversee and coordinate those efforts. A single entity charged with instilling consistency, continuity, efficiency, and proficiency in procurement matters can make accountability actually possible. This single entity could be held accountable if procurement disasters occur, such as the aftermath of Hurricane Katrina. The single entity would be responsible for holding each agency's procurement operation accountable for the contracts they award and manage. Assuredly, there is not an entity currently with that level of authority in the Federal Government.

Some would argue that the Office of Federal Procurement Policy is already dedicated solely to procurement issues. However, OFPP is merely part of the Office of Management and Budget.[94] Elevating OFPP to a stand-alone agency and giving it true authority over procurement is the best answer. In its current form, OFPP is not sufficiently impacting procurement within various agencies. OFPP has not made a difference with wartime procurement nor has it affected the contracts awarded as part of the ARRA. Thus, for anyone to argue that OFPP's current authority is sufficient makes little sense.

Ideally, once elevated, OFPP could take a stronger hand in oversight of the federal procurement system. Some suggested oversight methods include requiring all agencies to submit an annual acquisition plan, with quarterly updates; copies, and annual updates of, each agency's Procurement Standard Operating Procedures; obligate each agency to provide a procurement organizational chart and personnel qualifications; annual reports from each agency detailing procurement strengths, weaknesses, changes, audit findings, and assessing whether it met the objectives of its acquisition plan. Finally, the OFPP could submit an Annual Federal Procurement Report to the President detailing the information learned from the various exercises, provide guidance as to how the information should be construed, and suggest statutory and policy

94. *Id.*

improvements. Every agency would be required to justify its acquisition plan and prove the efficacy of its procurement system.

B. Amend Title 41 to redesign and expand the role of the Federal Acquisition Regulatory Council

The Federal Acquisition Regulatory Council serves as a government-wide procurement policy group.[95] As previously noted, it is primarily composed of the OFPP Administrator, Secretary of Defense, Administrators of the General Services Administrator and NASA.[96] Generally speaking, this is a powerful group of executives, who are responsible for large, diverse government agencies. To use such a powerful group merely to maintain the FAR and vet agency procurement regulations seems wasteful. A better use of this group's time and resources should revolve around a greater leadership role in monitoring and assessing the procurement system. Specifically, there are two additional tasks that should be assigned to the group and one of its standing responsibilities should be revised. The Counsel should conduct an annual procurement system-wide audit, create an annual report, and revise the FAR maintenance.

The in-depth annual audit would focus on assessing whether established procurement policies and procedures were followed, procurement actions properly and appropriately funded, solicitations properly and appropriately utilized, contract actions managed and monitored, files maintained and contracts properly closed out. The review would be conducted annually with a random sampling from every agency. A final audit report would be prepared and submitted to the OFPP for assessment and inclusion in the OFPP Annual Procurement Report. Given the size and depth of such an audit, a private contractor would be best to assist in managing this process. Obviously, the selected contractor could not be an existing vendor or maintain any other federal contract.

The second task would focus on an annual report to the President and Congress on the results of the annual review. Based on the results of the annual review, the report would make specific legislative, policy and procedural recommendations. This article has advocated greater authority for the OFPP and seemingly, it would make sense that the findings should go there. However, it places additional pressure on the OFPP and federal agencies to improve process and make sound procurement decisions when

95. 41 U.S.C. § 421(a) (2006).
96. 41 U.S.C. § 421(b) (2006).

there is an understanding that the findings are being reviewed at the highest levels of government.

Third, the group's FAR maintenance responsibility should be enhanced. Specifically, a sup-group of representatives of the current members and representatives from the Chief Acquisition Officers Council should be developed. This is crucial, as the Chief Acquisition Officers utilize the FAR on a daily basis and are in the best position to advise the larger group on necessary changes and improvements.

The annual review would force agencies to pay greater attention to its procurement operations, especially understanding that the results will be published in a report to the President and Congress. The review would help identify areas of weakness and can only serve to make procurement more robust.

C. Amend Title 41 and redesign and expand the role of the Chief Acquisition Officers Council

The Chief Acquisition Officers Council is tasked with serving as a forum for policy and idea development.[97] With a forum this large, and with so much procurement expertise in one standing group, it does not make sense to waste such an opportunity. As the Chief Acquisitions Officers work on a daily basis with the vast majority of procurement personnel, they have a unique perspective. As such, the statute should be amended and the group given purview over two important issues: personnel performance metrics and staff training.

The CAO Council should research, develop, and assist with implementation of annual procurement personnel performance metrics government-wide. Specifically, the performance metrics for all Series 1102 employees would be delegated to this group. Some interesting performance metrics could include statement of work/solicitation development, quality control, timeliness of contract activities, file performance for internal and external audits, and timely contract close out. Ideally, the CAO Council would spend the majority of the Fiscal Year reviewing data. The data would include audit results, legislative and regulatory changes and policy developments. Once the review is complete, the metrics would be distributed to procurement personnel 90 days prior to the end of the Fiscal Year.

97. *See* 41 U.S.C. § 414(b) (2006).

Second, under the proposed changes, the CAO Council would develop and implement an annual procurement training plan. Utilizing the same data used in developing the performance metrics, the CAO Council would outline areas in need of intensive training. All Series 1102 employees would be required, as a condition of continued employment, to meet the requirements of the annual training plan. The training could be a combination of in-person or online modules and each agency would be required to track and certify that each employee has complied with the training plan. The training would focus on cradle to grave contract administration issues, policy and legislative updates, and customer service training.

These two issues are critical for building efficiency in federal contracting. First, performance metrics are a positive, simple way to ensure procurement personnel are following unified standards throughout the government. These standards should lead to better, more cost effective procurement outcomes and create a level of consistency throughout the Federal Government. Second, ensuring a standardized training plan is critical for procurement continuity. Through this method, procurement professionals throughout the Federal Government will receive the training they need to manage the contracting process and will lead to fewer errors and more creative approaches to ensuring efficiency. Finally, choosing the CAO Council to handle these functions just makes good business sense. Daily, these representatives are managing procurement operations throughout the government and see the problems on a first hand basis. These individuals are most likely to develop methods which are reasonable, appropriate, and protect the government's interests.

D. Creation of a unified procurement database for all contracting activities

Currently, the United States government uses a number of different databases for its various procurement operations. In fact, the government utilizes six different databases for these activities. For example, there is the Central Contractor Registration database,[98] the Excluded Parties List

98. *See Central Contractor Registration (CCR)* Policy, Central Contractor Registration, https://www.bpn.gov/cc/CCRPol.aspx (last visited Nov. 13, 2010).

> Central Contractor Registration (CCR) is the primary registrant database for the U.S. Federal Government. CCR collects, validates, stores, and disseminates data in support of agency acquisition missions, including Federal agency contract and assistance awards. Please note that the term "assistance award" includes grants, cooperative agreements and other forms of federal assistance. Whether applying for assistance awards, contracts, or

System,[99] Electronic Subcontracting Reporting System,[100] the Federal Procurement Data System,[101] the Online Representations and Certifications Applications,[102] and the Past Performance Information Retrieval System.[103]

It makes little sense to have six different databases of related information that are not connected. Thus, the Federal Government should develop and implement a unified contracts system with multiple modules. The database modules should include a contract writing system, automated contract files, contract management and evaluation modules, contractor registration and a contractor performance/discipline module. Each federal agency would be required to enter all contracts-related information and all audits would be conducted using only information generated from the electronic system for sample development and testing to enforce utilization of the system. A web-based system could be utilized to control cost, ensure seamless implementation and provide easy access for all federal agencies.

The OFPP should manage the proposed system because of the expanded coordinating role in the procurement arena as proposed in the article.

The proposed database system creates efficiencies and reduces redundancies by placing information in one system versus six and is managed by a single entity, rather than seven. It also ensures all federal agencies are privy to the same contractor performance information, which is a critical component in the pre-award phase of contracting. Finally, quite

other business opportunities, all entities are considered "registrants."

Id.; see also 48 C.F.R. § 4.11 (2009) (FAR 4.11 requires prospective vendors to register in the Central Contractor Registration database prior to the award of a contract).

Id.

99. *See generally* EXCLUDED PARTIES LIST SYSTEM, http://www.epls.gov (last visited Nov. 13, 2010). The website is maintained by the General Services Administration and chronicles parties banned from receiving Federal Government contracts. *See id.*

100. *See generally* ELECTRONIC SUBCONTRACTING REPORTING SYSTEM, http://www.esrs.gov (last visited Nov. 13, 2010). This database was developed as a way for the government to attract its subcontracting accomplishments. *See id.* The Small Business Administration, Integrated Acquisition Environment and other agencies collaborated to develop the system. *See id.*

101. Federal Procurement Database System, *Frequently Asked Questions,* https://www.fpds.gov/wiki/index2.php/FPDS-NG_FAQ (last visited Nov. 13, 2010) (each contract awarded over $3,000, or could be over $3,000, must be reported).

102. *See Frequently Asked Questions*, ONLINE REPRESENTATIONS AND CERTIFICATIONS APPLICATION, http://www.orca.bpn.gov/miscl/faq.aspx (last visited Nov. 13, 2010). The Online Representation and Certification Application is a one-stop database whereby contractors can electronically file the representations and certifications, which are necessary with large federal contracts. *See id.*

103. *See Past Performance Information Retrieval System*, http://www.ppirs.gov (last visited Nov. 13, 2010). This database holds the past performance information for all federal contractors. *See id.* According to the website, in accordance with the FAR, effective July 1, 2009, all contractor evaluation information must be entered into the database. *See id.*

simply, it is cheaper to maintain one electronic system than it is to maintain six systems.

E. Amend Title 41 and the FAR to require OFPP approval of contract awards over a specified dollar amount

Federal agencies, within their budget authority and executive's discretion, approve contracts a number of different ways. Currently, there is no unifying regulation with regard to the approval of contract awards over a specified dollar amount or any external review of these awards. The value of this proposed legislative change is that it will force agencies to justify every aspect of the contracting process. The statutory change would require agencies to submit finalized contracts over $50 million to OFPP for approval. The legislation would also outline a timeframe for OFPP's approval, so as to allow agencies to conduct proper acquisition planning.

There are a number of options available for developing and implementing such an approval process. Submitting contracts to Congress for approval would bring the contracting process to a halt and would further politicize federal contracting. Seemingly, there are three agencies capable of serving in this capacity: the Government Accountability Office (GAO), the Office of Management and Budget and the Office of Federal Procurement Policy. The Government Accountability Office would not be the best choice because it serves as the investigative arm of Congress.[104] The Office of Management and Budget serves as the President's budget office and also evaluates the efficacy of executive agency rules, regulations and policy.[105] Thus, the OFPP seems to be the more logical choice to administer the proposed system.

The proposed statutory and regulatory changes would require agencies to submit finalized contracts over $50 million to OFPP for approval. The legislation would also outline a timeframe for OFPP's approval, so as to allow agencies to plan properly. This requirement would make agencies

104. *See generally* Government Accountability Office, http://www.gao.gov (last visited Nov. 13, 2010).

105. *The Mission and Structure of the Office of Management and Budget*, http://www.whitehouse.gov/omb/organization_role/ (last visited Nov. 13, 2010).

> OMB's predominant mission is to assist the President in overseeing the preparation of the federal budget and to supervise its administration in Executive Branch agencies. In helping to formulate the President's spending plans, OMB evaluates the effectiveness of agency programs, policies, and procedures, assesses competing funding demands among agencies, and sets funding priorities.

Id.

more accountable by forcing them to explain contracting actions to a third party and would seemingly make it more difficult to award fraudulent, wasteful or legally questionable contracts.

F. Amend Title 41 and the FAR to restrict procurement regulations to only the Federal Acquisition Regulations

Currently, there are over 32 different agency procurement regulations in addition to the FAR.[106] As an example, nine sub agencies of the Department of Defense have published their own procurement regulations.[107] It makes very little sense to allow agencies to contribute to the confusion seemingly surrounding federal procurement. Every agency should follow a unified set of regulations, the FAR, with no exception. While some may argue these additional regulations must meet stringent requirements, there is still an even simpler truth. To date, there is no empirical evidence proving maintenance of separate procurement regulations reduces fraud and improves fiscal accountability. The Department of Homeland Security has its own procurement regulations and still mismanaged contracting for Hurricane Katrina disaster relief. The Department of Defense has multiple regulations and yet, wartime contracting has resulted in chaos. Federal contracting is no more efficient or cost effective by allowing agencies to promulgate their own procurement regulations. If that is the case, there is no practical reason to continue the practice. By only following the FAR, continuity and consistency becomes assured throughout the Federal Government.

106. *See generally* Federal Acquisition Regulation Site, http://farsite.hill.af.mil (last visited Nov. 13, 2010). The following entities have their own procurement regulations in addition to the FAR: United States Department of the Army, the United States Air Force, United States Air Force Material Command, United States Air Force Command, United States Department of Agriculture, United States Agency for International Development, United States Department of Commerce, Defense Information System Agency, United States Department of Energy, United States Department of Defense, United States Department of the Interior, Defense Logistics Agency, United States Department of Labor, United States Department of State, United States Department of the Treasury, United States Department of Education, United States Environmental Protection Agency, United States Office of Personnel Management, the General Services Administration, United States Department of Health and Human Services, United States Department of Homeland Security, United States Department of Housing and Urban Development, United States Broadcasting Board of Governors, United States Department of Justice, Department of the Navy, National Aeronautics and Space Administration, United States Nuclear Regulatory Commission, United States Department of Transportation, United States Special Operations Command, United States Transportation Command and the United States Department of Veterans Affairs. *Id.*

107. *Id.* The nine agencies are United States Department of the Army, the United States Air Force, United States Air Force Material Command, United States Air Force Command, Defense Information System Agency, Department of the Navy and the United States Special Operations Command. *Id.*

V. CONCLUSION

More and more of the United States governmental budget is being consumed by contracting. However, federal procurement activities lack oversight, are wasteful and unruly. The contracting woes from Hurricane Katrina, the wars in Iraq and Afghanistan and contracts awarded through the American Recovery and Reinvestment Act, underscore the serious need for legislative and policy changes. By elevating the Office of Federal Procurement Policy to a cabinet-level agency, re-crafting and expanding the roles of the Federal Acquisition Regulations Council and the Chief Acquisition Officers Council, creating a unified electronic procurement system and eliminating agency specific procurement regulations, the government can take practical steps toward a more efficient and fiscally sound procurement system. In the current financial crisis facing this country, a more efficient procurement system is not just a goal but also a necessity.