Testimony of

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Impact of Certain Government Contractor Liability Proposals on Environmental Laws

United States Senate, Committee on Environment and Public Works, Subcommittee on Superfund and Waste Management

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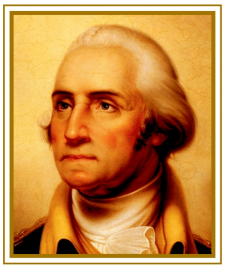

THE GEORGE WASHINGTON UNIVERSITY LAW SCHOOL

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Chairman Thune, Ranking Member Boxer, and members of the Committee, I appreciate the opportunity to appear before you today to discuss the impact of certain government contractor liability proposals on environmental laws. My discussion of S. 1761, the Gulf Coast Recovery Act, and its treatment of government contractor liability, derives from my experience in federal procurement policy, practice, and law.[1] This Committee's focus upon, and interest in improving, the procurement process is an important and valuable public service.

From a public procurement perspective, this legislation is entirely unnecessary. The bill would expose the public, specifically individuals, to unnecessary risk and harm. Moreover, the bill would discourage responsible contractor behavior and, instead, encourage behavior that is harmful to the public. Further, this bill reflects a disconcerting trend of seemingly opportunistic post-crisis behavior. Specifically, the bill seeks to capitalize upon hurricane Katrina's devastation to obtain, for the contractor community, long-sought after, and long-denied, insulation from liability. This type of opportunistic behavior is not only ill-conceived, but it is harmful to the credibility of the federal government's procurement process.

This Legislation is Entirely Unnecessary

The bill's findings assert that "well-founded fears of future litigation and liability under existing law discourage contractors from assisting in times of disaster[.]" Experience suggests that this assertion, the premise underlying S. 1761, is, at best, hyperbole and, at worst, simply false. I have seen nothing that suggests that a significant number of the nation's (or the world's) best contractors have been discouraged from seeking the United States Government's business.

This tactic is not new. Throughout my career (in the private sector, in the government, and in academia), I have heard apocalyptic tales of monumental barriers to entry, erected by the government, that frighten firms away from seeking, or continuing to seek, the government's business. (As a procurement policy official, I most often confronted these assertions in the context of efforts to eliminate the *qui tam* provisions in the False Claims Act.[2]) What I have not seen – and what is again absent here – is empirical data or concrete information supporting the

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[1] I have attached a brief biography to this testimony.

[2] 31 U.S.C. § 3730.

assertion. This absence of support is palpable.[3]

Every day, the best contractors, small and large, domestic and foreign, aggressively vie for a share of the government's $300 billion procurement budget. At one end of the spectrum, firms compete for the lion's share of the government's contracts, which might be described as garden-variety or commercially available work, providing, for example, office supplies, custodial services, construction, or information technology support. At the other end of the spectrum, a far smaller population of firms compete to design and build unique systems involving the most advanced, cutting edge technology imaginable. In a fraction of contracts found in the latter group, where the work can be extraordinarily complex and dangerous, unique rules have evolved to insulate contractors from certain liabilities. But a stark, deep chasm distinguishes these extraordinary contractual actions from the ordinary. S. 1761 does not appear to cover extraordinary work; rather the bill specifically describes seemingly ordinary tasks such as debris removal, logistics, reconstruction, and basic public services. Accordingly, extraordinary measures are neither necessary nor appropriate.

Altering the Existing Risk Allocation Regime Sends the Wrong Message

S. 1761 intends to insulate certain contractors from liability, even when the contractor is at fault. If that is the case, the bill's mechanism is flawed, particularly in its allocation of risk of

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[3] Here, history is instructive. At similar hearings twenty years ago, Senator Grassley asked the Aerospace Industries Association [AIA] whether *any* members of its association "no longer bid on government contracts because of the fear of liability suits?" AIA asserted that it lacked sufficient information to respond at the hearing and, in a subsequent written response, was no more convincing. Even responding "on a non-attribution basis[,]" AIA failed to identify a single firm.

> Q: Has any AIA member company declined to bid for or accept the award of a government contract because that company could not be indemnified by the government for catastrophic risk?
>
> A: The consequences of unusually hazardous or nuclear risks arising under government contract, generally, do influence the business decision process.

Letter from Lloyd R. Kuhn to the Honorable Charles E. Grassley, June 28, 1985, S. Hrg. 99-321, Hearing before the Committee on the Judiciary on S. 1254, United States Senate, 99th Congress, 1st Session (Serial No. J-99-32, June 11, 1985) at 96-97.

harm between the public, contractors, and the government.[4] As a matter of policy, we should prefer a solution that allocates risk to the superior risk bearer. Here, it seems reasonable to conclude that the superior risk bearer is the party best positioned to, among other things, (1) appraise, in advance, the likelihood that harm will occur; (2) avoid the occurrence of the risk; (3) insure against the risk; or (4) bear the cost of the risk. This bill appears to do the exact opposite. S. 1761 allocates the risk of loss to the individual, the party with the least opportunity to anticipate, assess, or avoid the risk, insure against it, or bear its costs. Ultimately, however, what is particularly troubling is that the bill dilutes contractors' incentives to assume responsibility for their work and adopt prudent risk avoidance strategies.[5]

Again, under S. 1761, the government neither will take responsibility for its contractors' actions, nor will the government permit the public to hold those contractors accountable. The bill appears to determine, in advance, that neither the government nor its contractors would be held responsible if contractors injured (or killed) people or damaged (or destroyed) personal or

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[4] Generally, the government expects contractors to purchase insurance and, accordingly, the government willingly pays contractors to obtain that insurance. Prospective indemnification is employed only in extraordinary circumstances (for example, in the nuclear industry) where contractors either cannot obtain insurance for a certain risk or the cost of insurance would be prohibitive. See, e.g., 48 C.F.R. § 50.403 (indemnification for unusually hazardous or nuclear risks); Public Law No. 85-804. Thus, indemnification – through which the government, in effect, self-insures rather than reimbursing the contractor for its insurance costs – derives from a failure of the marketplace, specifically the insurance industry. See, generally, Ralph C. Nash & John Cibinic, *Risk of Catastrophic Loss: How to Cope*, 7 NASH & CIBINIC REP. ¶ 44 (July 1988). But bear in mind that the *indemnification* debate focuses upon prospective allocation of risk *between the government and its contractors* – it does not suggest that members of the public, if injured, should have no remedy.

[5] As the Defense Department explained twenty years ago:

> .... Indemnification creates a difficult balance. In the commercial world, risks of third party liability are covered by insurance or are assumed by the manufacturer.... We are concerned that blanket indemnification may reduce the contractors' incentive to assume responsibility for the performance of their products.... We prefer to contract in an environment similar to the commercial marketplace where companies must take all the steps that would be required of a prudent businessman in order ensure the safety of the company's product.

Statement of Mary Ann Gilleece, Deputy Under Secretary of Defense for Acquisition Management, S. Hrg. 99-321, Hearing before the Committee on the Judiciary on S. 1254, United States Senate, 99th Congress, 1st Session (Serial No. J-99-32, June 11, 1985) at 30.

commercial property.[6]

Protection of the public from harm – rather than protection of the economic interests of contractors – must come first.[7] In contrast, this legislation appears to mandate that: (1) the party at greatest risk should be the individual, a member of the public, who is harmed; (2) neither the government nor the government's contractors should bear responsibility for harm inflicted upon the public; and (3) this outcome should prevail even if the insurance market could better allocate, in advance, the risk of harm. Again, these issue of contractor liability is not new.[8] But the solution – that the public should bear the risk of loss, rather than the government or its contractors – is as novel as it is unappealing.

Misuse of The Government Contractor Defense

Unfortunately, the bill attempts to apply, quite broadly, the "government contractor defense" to disaster relief. In so doing, the bill turns the government contractor defense on its

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[6] This seems troubling from a behavioral standpoint.

> [T]he immediate effect of the [government contractor] defense is to *place the full cost of mishaps on injured parties* who, but for government involvement, would be able to shift that cost to the contractors. [Conversely, a]ssimilating contractor liability to normal tort rules might advance traditional objectives of compensating injured parties, spreading losses, or implementing generalized notions of fairness.

Ronald A. Cass & Clayton P. Gillette, *The Government Contractor Defense: Contractual Allocation of Public Risk*, 77 VA. L. REV. 257, 260 (1991) (emphasis added, footnotes omitted).

[7] Consider the 1963 report on catastrophic accidents in government programs prepared by the Legislative Drafting Research Fund of Columbia University on behalf of the National Security Industrial Association. Albert J. Rosenthal, Harold L. Korn & Stanley B. Lubman, *Catastrophic Accidents in Government Programs*, 72-76 (1963). The report staked out the immensely reasonable conclusion that: "The most important objective ... is the assurance of prompt and adequate compensation of the public." *Id.*, Summary at 12.

[8] The Department of Justice (DOJ) objected to a 1985 bill to, among other things, reduce liability of contractors, because it did not "believe that government indemnification of contractor losses is the appropriate way to solve the problems faced by government contractors because of changing tort liability...." S. Hrg. 99-321, Hearing before the Committee on the Judiciary on S. 1254, United States Senate, 99th Congress, 1st Session (Serial No. J-99-32, June 11, 1985). "In the past few years, the efforts of government contractors to transfer their product liability exposure to the government has increased dramatically." *Id.* at 22. Although DOJ acknowledged "that the changes in the tort system have created problems for contractors, [it] did not believe that indemnification is an appropriate response, and certainly it does not correct the underlying reasons for these problems."

head. S. 1761 would create a "rebuttable presumption that ... all elements of the government contractor defense are satisfied; and ... the government contractor defense applies in the lawsuit." This would be a dramatic (and inappropriate) application of the government contractor defense.

The government contractor defense, as it has been interpreted, seeks to insulate (historically, supply) contractors that explicitly follow government direction to their detriment.[9] To the extent that contractors exercise significant amounts of discretion in the performance of their contracts, however, the defense has not protected them.[10] This point is particularly important. When the government rushes to identify contractors, hastily drafts its contracts (or merely relies upon open-ended, vague statements of work), and loosely manages contract performance, the government necessarily delegates the exercise of discretion to contractors in performing their contracts. Specifically, contractors must weigh, among other things, haste versus caution, or, to some extent, profits versus care.[11] It is troubling enough that the government would cede such important decisions to contractors; but it seems strange that the government, prospectively, would insulate its contractors from the fiscal ramifications of those decisions.

This scenario is dramatically different from, for example, the types of contracts intended

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[9] See, e.g., Boyle v. United Technologies Corp., 487 U.S. 500 (1988).

[10] The Boyle decision seems to be providing the logical framework ... to decide whether the Government contractor defense will protect contractors from tort liability.... [T]he Supreme Court has given a set of straightforward requirements – the most important of which is the Government approval requirement. ... [W]here the Government agency is a full participant in the design process, the defense can be predicted to be a winner. In contrast, if the Government has not participated in design the contractor will find it very hard to use the defense. If the plaintiff can prove that the defect occurred in the manufacturing process, the defense will be of little or no value to the contractor.

Ralph C. Nash & John Cibinic, *Postscript: The Circuit Court View of the Government Contractor Defense*, 8 NASH & CIBINIC REP. ¶ 52 (August 1990).

[11] In removing debris, for example, a contractor faces significant economic choices with regard to, among other things, (1) the experience of its personnel (e.g., drivers with spotless safety records might demand higher wages); (2) the quality and maintenance of its equipment (newer, better maintained trucks likely cost more to purchase or lease); (3) the means of performance (the minimally acceptable environmental standards likely cost less than more current, potentially cleaner and/or safer technologies); or (4) time management (truck drivers might save time and money by transporting hazardous waste through, rather than avoiding, residential communities).

to be covered by the Support Anti-Terrorism by Fostering Effective Technologies Act of 2002 (SAFETY Act).[12] The SAFETY Act sought to encourage the development, and protect the use of, new or evolving (and, implicitly, unproven) technologies. The underlying assumption of the SAFETY Act is that, without insulation from liability, contractors might not otherwise permit the government to deploy these technologies, known as qualified anti-terrorism technologies (QATTS), to combat terrorism. In other words, the contracts involve unusual work or technologies (or unusual use of technologies) that is perceived as extraordinarily risky.[13]

Here, the statute would apply to far more common, if not mundane, tasks. Although clearly important, by and large, the contracts that this bill would cover involve routine tasks such as search and rescue; demolition and repair; debris removal; and dewatering of flooded property. In all such cases, the existing standard of care seems reasonable. Moreover, the rather mechanical certification responsibility assigned to the Chief of Engineers is a far cry from the highly judgmental and discretionary decision required of the Homeland Security Department Under Secretary pursuant to the SAFETY Act. Specifically, the SAFETY Act employs a number of criteria,[14] most, if not all, of which are absent here. For example, it is difficult to create a scenario in which there would be a "substantial likelihood that the technology [involved in, e.g., debris removal] will not be deployed unless the [Gulf Coast Recovery Act] protections are extended."

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[12] Pub. L. 107-296, § 861. See, generally, Homeland Security SAFETY Act page at *https://www.safetyact.gov/DHS/SActHome.nsf/Main?OpenFrameset&6HYKFL;* Alison M. Levin, *Note: The SAFETY Act of 2003: Implications for the Government Contractor Defense*, 34 PUB. CONT. L.J. 175 (2004).

[13] This point cannot be over-emphasized. For a good articulation of this principle, see, e.g., Patrick E. Tolan, Jr., *Environmental Liability Under Public Law 85-804: Keeping the Ordinary Out of Extraordinary Contractual Relief*, 32 PUB. CONT. L.J. 215 (2003) (emphasizing the unique (or, specifically, extraordinary) nature of the contractual requirements, particularly in research and development, that proved uninsurable because they involved, for example, nuclear power or highly volatile missle fuels).

[14] The seven criteria include: prior United States Government use or demonstrated substantial utility and effectiveness; availability of the technology for immediate deployment in public and private settings; existence of extraordinarily large or unquantifiable potential third party liability risk exposure to seller (or another provider of the technology); substantial likelihood that the technology will not be deployed unless SAFETY Act protections are extended; magnitude of risk exposure to the public if the technology is not deployed; evaluation of all scientific studies that can be feasibly conducted to assess the capability of the technology to substantially reduce risks of harm; and whether the technology would be effective in facilitating the defense against acts of terrorism. See, e.g., Homeland Security SAFETY Act page at *https://www.safetyact.gov/DHS/SActHome.nsf/Main?OpenFrameset&6HYKFL.*

Opportunistic Post-Crisis Legislation
Harms the Procurement Process

As discussed above, this legislation may be good for contractors, but it does not appear to be in the best interests of the nation. Frankly, it is difficult to understand why Congress would rush to protect, prospectively, those contractors that, in performing post-Katrina construction work, unnecessarily fail to take precautions, inadequately supervise employees, or employ unduly risky processes or substandard materials or equipment that place the public's health, safety, and property at risk. Unfortunately, this bill seems to further the trend, since hurricane Katrina, to utilize the disaster to pursue public policies that otherwise might prove untenable.

For example, in its $51.8 billion post-Katrina emergency supplemental appropriation, Congress hastily raised the "micro-purchase threshold" (which, in effect, serves as the charge card purchase cap) to $250,000 for purchases relating to relief and recovery from Hurricane Katrina.[15] That's a 100 percent increase on the typical $2,500 limit and a completely different animal from the $15,000 limit previously imposed during contingencies and emergencies. Fortunately, the administration soon thereafter chose to bar further use of this authority.[16] That this authority became law is breathtaking.[17] At the time, more than 300,000 government purchase cards were in circulation. A mountain of Inspector General reports, Government Accountability Office studies, and Congressional hearings have demonstrated that the government's management of its charge cards has been abysmal. In August, the White House issued long overdue guidance mandating fundamental training and risk management policies.[18] Moreover, the effect upon small businesses would have been devastating.

The same can be said for the administration's suspension – and subsequent repeal of the suspension – of the Davis-Bacon Act.[19] The suspension of this law, which requires that workers on federal construction contracts be paid prevailing wage rates, would have ensured that *contractors* could profit from the massive reconstruction effort without permitting *minimum wage workers* to receiving prevailing wages that might permit them to rise into the lower middle class. The administration's putative explanation – that without suspension of the Davis-Bacon

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[15] Public Law 109-62, § 101(2).

[16] Memorandum from Clay Johnson III, Deputy Director for Management, *Limitation on Use of Special Micro-purchase Threshold Authority for Hurricane Katrina Rescue and Relief Operations* (October 3, 2005).

[17] Steven L. Schooner, *Fiscal Waste: Priceless*, L.A. TIMES (September 14, 2005).

[18] Appendix B to Revised OMB Circular A-123, "Improving the Management of Government Charge Card Programs."

[19] Proclamation by the President: Revoking Proclamation 7924 (November 3, 2005), *http://www.whitehouse.gov/news/releases/2005/11/20051103-9.html.*

Act, insufficient labor would be available – was simply disingenuous.

In both of these examples, the rush to change procurement policies subsequently was overcome by reason. Hopefully, reason will prevail here as well. Bear in mind that knowledgeable federal procurement executives – both with regard to Iraq and post-Katrina relief – understand that the current procurement regime contains sufficient flexibility for the government to meet its purchasing requirements in times of crisis.[20]

This Legislation Ignores The Government's Most Critical Procurement Problem

I would be remiss if I failed to take this opportunity to address a pressing matter that cries out for Congressional attention and intervention.[21] The federal government must devote more resources to the acquisition function. This investment is urgent given the combination of the 1990's Congressionally-mandated acquisition workforce reductions, the administration's pressure to outsource,[22] and the dramatic increase in procurement spending since the September 11, 2001

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[20] "Iraq ... taught us that many of the flexibilities contained in the Federal Acquisition Regulation ... are poorly understood by many in Congress and the media.... These flexibilities include limited as opposed to full and open competition, higher levels under which purchases can be made instantly, and more. Capitalizing on these flexibilities enables us to meet the demands for speed and agility integral to any recovery effort." Stan Soloway, *Baghdad's Lessons for Orleans*, GOV. EXEC. (Oct. 1, 2005), *http://www.govexec.com/features/1005-01/1005-01advp2.htm.* Last year, the Defense Department created the Joint Rapid Acquisition Cell (JRAC), because: "Some combatant commanders, as well as acquisition experts, don't realize that many legal requirements that tend to bog down military contracts don't apply during wartime...." See, e.g., *http://www.defenselink.mil/news/Nov2004/n11242004_2004112405.html*.

[21] See also, Steven Kelman & Steven L. Schooner, *Scandal or Solution?*, GOVEXEC.COM *http://www.govexec.com/dailyfed/1105/110705ol.htm* (November 7, 2005).

[22] Outsourcing, or its more palatable pseudonym, "competitive sourcing," has been one of five government-wide initiatives in the Bush management agenda. See, e.g., Executive Office of the President, Office of Management and Budget, *The President's Management Agenda, Fiscal Year 2002*, *www.whitehouse.gov/omb/budget/fy2002/mgmt.pdf*. "President Bush is a major advocate of ... hiring private firms to do the government's work..." Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83 (2003), citing, David J. Kennedy, *Due Process in a Privatized Welfare System*, 64 BROOK. L. REV. 231, 232 (1998) (referencing "Governor Bush's effort to privatize most of Texas' welfare system ... in his attempt to make a name for himself ... that could carry him to national office." See also, Matthew Diller, *Form and Substance in the Privatization of Property Programs*, 49 UCLA L. REV. 1739, 1763, n. 94 (2002) ("Governor Bush sought to hand the administration of

(continued...)

attacks and, now, hurricane Katrina.[23]

Congress has been quick to call for more auditors and inspectors general to scrutinize Katrina-related contracting. That's a responsible gesture. But there has been no corresponding call for more contracting experts to perform the many functions that are necessary for the procurement system to work well. In order to serve the taxpaying public and meet the needs of agency customers, acquisition professionals must promptly and accurately describe what the government wants to buy, identify and select quality suppliers, ensure fair prices, structure contracts with proper monetary incentives for good performance, and manage and evaluate contractor performance.[24]

Sadly, the contracting workforce desperately requires a dramatic recapitalization.[25] A bipartisan, post-Cold War, 1990's initiative severely reduced the contracting workforce, leaving the government unprepared for a post-9/11 spending binge. In the last four years, contracting dollars have increased by half, without a corresponding increase in the workforce. For fifteen

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[22](...continued)
the state's welfare system over to ... Lockheed Martin ... and Electronic Data Systems....").

[23] See, generally, Steven L. Schooner, *Feature Comment – Empty Promise for the Acquisition Workforce*, 47 THE GOVERNMENT CONTRACTOR ¶ 203 (May 4, 2005), available at *http://ssrn.com/abstract=719685*; Griff Witte & Robert O'Harrow, Jr, *Short-Staffed FEMA Farms Out Procurement*, WASHINGTON POST D01 (September 17, 2005).

[24] A simple Iraq "lesson learned" was that, if the government relies heavily upon contractors, the government must maintain, invest in, and apply appropriate acquisition professional resources to select, direct, and manage those contractors. Unfortunately, insufficient contract management resources were applied. See, generally, Steven L. Schooner, *Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government*, 16 STANFORD LAW & POLICY REVIEW 549 (2005). For example, General Fay poignantly articulated: "[T]here was no credible exercise of appropriate oversight of contract performance at Abu Ghraib." MG George R. Fay, Investigating Officer, *AR 15-6 Investigation of the Abu Ghraib Detention Facility and 205th Military Intelligence Brigade*, at 52 ("the Fay Report"). This problem exists government-wide: "[T]he administration of contracts[,] once they have been signed[,] has been the neglected stepchild of [procurement system reform] effort." Steven Kelman, *Strategic Contracting Management*, *in* MARKET BASED GOVERNANCE: SUPPLY SIDE, DEMAND SIDE, UPSIDE, AND DOWNSIDE at 89-90, 93 (John D. Donahue & Joseph S. Nye Jr. eds., 2002).

[25] See, generally, *Federal Procurement: Spending and Workforce Trends*, GAO-03-443 (April 2003); Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government,* 50 AM. U. L. REV. 627 (2001); Office of the Inspector General, Department of Defense, *DoD Acquisition Workforce Reduction Trends and Impacts*, Report D-2000-088 (February 29, 2000).

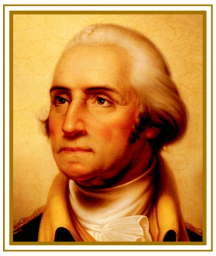
years, the government skimped on training, while contracting officers faced increasing workloads and confronted increasingly complex contractual challenges. Scarce resources, when they become available, were allocated to oversight, rather than supplementing, supporting, or training contracting people. Senior procurement officials increasingly bemoan that no young person in his or her right mind would enter government contracting as a career.

The old adage – an ounce of prevention is worth a pound of cure – rings true. More auditors and inspectors general will guarantee a steady stream of scandals, but they'll neither help avoid the scandals nor improve the procurement system. Conversely, a prospective investment in upgrading the number, skills, and morale of government purchasing officials would reap huge dividends for the taxpayers.

Conclusion

That concludes my statement. Thank you for the opportunity to share these thoughts with you. I would be pleased to answer any questions.

STEVEN L. SCHOONER



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Professor Schooner received his Bachelors degree from Rice University, Juris Doctor from the College of William and Mary, and Master of Laws (with highest honors) from the George Washington University. He is a Fellow of the National Contract Management Association (NCMA), a Member of the Board of Advisors, a Certified Professional Contracts Manager (CPCM), and serves on the Board of Directors of the Procurement Round Table. He is the Faculty Advisor to the American Bar Association's PUBLIC CONTRACT LAW JOURNAL, an Editorial Board member of the U.K.-based PUBLIC PROCUREMENT LAW REVIEW, and a member of the GOVERNMENT CONTRACTOR Advisory Board. He is author or co-author of numerous publications including THE GOVERNMENT CONTRACTS REFERENCE BOOK: A COMPREHENSIVE GUIDE TO THE LANGUAGE OF PROCUREMENT (1992, second edition 1998).

Professor Schooner maintains a Government Contract Law Site at *http://docs.law.gwu.edu/facweb/sschooner/* and his recent scholarship is available through the Social Science Research Network at *http://ssrn.com/author=283370.*