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COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515–6143

MAJORITY (202) 225–5051
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MEMORANDUM

March 27, 2007

To: Members of the Committee on Oversight and Government Reform

Fr: Majority Staff, Committee on Oversight and Government Reform

Re: Supplemental Information Regarding Full Committee Hearing on the General Services Administration

On **Wednesday, March 28, 2007, at 10:00 a.m., in room 2154 of the Rayburn House Office Building**, the full Committee will hold a hearing entitled, "Allegations of Misconduct at the General Services Administration." The official Committee memo for this hearing was circulated last week. This memo offers supplemental information to assist members in preparing for the hearing.

On March 6, 2007, Chairman Waxman sent GSA Administrator Lurita Doan a 10-page letter describing concerns about (1) Ms. Doan's efforts to award a no-bid contract to Edie Fraser; (2) Ms. Doan's role in political activities at GSA headquarters; and (3) Ms. Doan's involvement in contract negotiations with Sun Microsystems. This letter, a copy of which is attached, provides additional background about issues that may be raised at the March 28 hearing. A front-page article in yesterday's *Washington Post* provides further important details.

Since the March 6 letter, the Committee has conducted 14 transcribed interviews and one deposition and reviewed thousands of pages of documents related to allegations of misconduct at GSA. As described below, these interviews and documents provide significant new information about one of the issues to be discussed at the hearing: Ms. Doan's involvement in the Sun Microsystems contract.

The new information suggests that Ms. Doan and her top advisors pushed through a government contract with Sun Microsystems under terms that will cost the taxpayer millions of dollars more than these same services cost in the open market. Email correspondence, other internal documents, and interviews provide evidence that the decision to award this contract under such unfavorable terms contradicted the explicit recommendations of multiple civil service

contracting officials at GSA and was made after direct intervention by Sun representatives with Ms. Doan herself.

I. BACKGROUND

In the late 1990s, GSA awarded several contracts that allowed Sun Microsystems to sell its products and services to government purchasers through supply schedules maintained by GSA. These contracts were eventually merged into one contract, which GSA signed on August 23, 1999. This contract had a duration of five years, and it included three options to renew for five-year periods. Under the contract, Sun sold government customers its information technology hardware and software products, as well as "support services" to maintain these products.

The first contract term expired on August 22, 2004. GSA did not approve a five-year renewal at that time because Sun and GSA were unable to resolve several key terms. Over the course of the next two years, GSA granted Sun at least eight temporary, short-term extensions, allowing Sun products and services to remain on the GSA schedule while negotiations continued. Between 1999 and 2006, Sun sold products and services worth over $120 million to government purchasers under the contract.

During the period between the expiration of the contract in August 2004 and August 2006, at least three warranted GSA contracting officers, with combined federal procurement experience of almost 50 years, refused to renew Sun's contract for a new five-year term. They objected for two primary reasons: Sun's refusal to provide competitive "discount rates" for services; and Sun's refusal to honor "price reduction" clauses.

Under federal acquisition regulations and GSA rules, companies seeking to make their products available to federal government purchasers through GSA's "Multiple Award Schedule" are required to extend to GSA the same prices that they give their "most favored" commercial customers.[1] Before products and services can be placed on the schedule, a GSA contracting officer must certify that the prices a company is offering the government are "fair and reasonable."[2] GSA has the ability to obtain marketing and pricing information from potential GSA contractors to ensure that the government is getting the lowest price to which it is entitled.

With respect to the Sun contract, Sun offered discounts to its commercial customers that GSA contracting officials wanted for the government. After examining Sun's discount rates under its first five-year contract, the GSA Inspector General issued a report on January 20, 2006, that concluded that Sun failed to extend to government buyers discount rates as favorable as those offered to comparable commercial customers. This report suggested that government purchasers were paying millions of dollars more than commercial buyers for the same products and services. For example, the IG found that Sun's discount rates under the first five years of the

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[1] General Services Administration Manual § 538.270.

[2] Federal Acquisition Regulation § 8.404(d).

GSA contract for support services should have been roughly twice as large.[3] The IG also found that during its 1999 initial contract negotiations with GSA, Sun misled GSA negotiators about the discounts it extended to certain commercial customers. The Committee has learned that the IG shared this information with federal prosecutors in the spring of 2006.

During the negotiations over the contract extension, Sun agreed to increase its discount rates to the government. But according to GSA contracting officers interviewed by the Committee, the company still provided greater discounts to its commercial customers.

Another key negotiating term involved price reduction clauses. These clauses ensure that if a contractor extends additional discounts to commercial customers during the course of a contract, it should offer the same additional discounts to the government.[4] This tool keeps government prices competitive over the term of the contract even as the vendor's commercial prices improve. The GSA contracting officials insisted on effective price reduction clauses in the negotiations because IG auditors had discovered that in the contract's first five-year term, Sun had improperly excluded what it called "transactional" discounts from its price reduction calculations. This practice deprived government customers of millions of dollars in discounts.

During the negotiation period between August 2004 and August 2006, Sun conceded some ground on this issue, but it insisted on several "exclusion" clauses and other provisions that GSA contracting officials found objectionable because they diluted the effect of the price reduction clause.

II. THE POSITION OF GSA CONTRACTING OFFICIALS

From August 2004 to August 2006, three different GSA contracting officers independently concluded that entering into further contracts with Sun would not benefit the taxpayer, and they recommended terminating negotiations with the company. Their recommendations were supported by the management of GSA's IT Acquisition Center, which concluded in July 2006 that government purchasers had already lost as much as $77 million in discounts and that millions more would be at risk if a new contract was signed.

In 2004, the GSA contracting officer in charge of the Sun contract, Robert Overbey, recommended canceling the contract because Sun was overcharging government customers.[5] In February 2005, Mr. Overbey's supervisor, Herman Caldwell, took over the Sun contract. Mr. Caldwell told Committee staff that he hoped to reach an agreement to keep Sun products and

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[3] General Services Administration, Office of the Inspector General, *Preaward Review of Multiple Award Schedule Contract Extension, Sun Microsystems, Inc.* (Contract # GS-35F-0702J, Report # A050193/F/3/X06036) (Jan. 20, 2006).

[4] Federal Acquisition Regulation § 8.405-4.

[5] Telephone conversation between Staff, House Committee on Oversight and Government Reform, and Robert Overbey (Mar. 14, 2007); Interview of Herman Caldwell, House Committee on Oversight and Government Reform (Mar. 15, 2007).

services on the GSA schedule.[6] According to Mr. Caldwell, however, Sun would not agree to reasonable contract terms. In June 2005, Mr. Caldwell recommended canceling the contract due to Sun's failure to submit commercial price data in a timely manner and Sun's refusal to move from unacceptable negotiating positions.[7]

In February 2006, GSA replaced Herman Caldwell with another contracting officer, Michael Butterfield. Mr. Butterfield informed Committee staff that he spent four months developing a detailed, peer-reviewed, 30-page "pre-negotiation memorandum," in which he laid out a range of contract prices and terms that would be acceptable to the government.[8] After several months of tough negotiation, Mr. Butterfield informed his superiors that he too had come to the conclusion that a deal was impossible because Sun refused to meet even his minimal negotiation goals.[9]

This two-year negotiation culminated in an official "impasse briefing" on August 14, 2006. The audience at this impasse briefing included Jim Williams, the Federal Acquisition Service (FAS) Commissioner, and David Drabkin, Administrator Doan's senior procurement advisor. During the briefing, Mr. Butterfield's managers at the IT Acquisition Center presented his final position, explaining why he opposed concluding the contract with Sun.[10] Mr. Butterfield told the Committee that he later informed Mr. Williams and Mr. Drabkin that the terms Sun had been offering were "inferior" and did not merit renewal.[11]

Mr. Butterfield's managers prepared a "Fact Sheet" around that time in which they explained how much the Sun contract was costing taxpayers. Using figures provided by the auditors, this Fact Sheet estimated that government customers may have lost as much as $77 million in discounts between 1999 and 2005 due to Sun's failure to honor the price reduction clause.[12] The document also asserted that accepting Sun's current position would be tantamount

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[6] Interview of Herman Caldwell, House Committee on Oversight and Government Reform (Mar. 15, 2007).

[7] *Id.* (citing an email from Herman S. Caldwell Jr., Division Director, Information Technology Acquisition Center, General Services Administration, to Patricia Pierson, Director, Information Technology Acquisition Center, General Services Administration (May 23, 2005), in which he explains to his superiors: "Presently we have no effective price reduction clause and preliminary audit information suggests that there is a substantial disparity between MAS pricing and commercial pricing").

[8] Interview of Michael Butterfield, House Committee on Oversight and Government Reform (Mar. 16, 2007).

[9] *Id.*

[10] General Services Administration, IT Acquisition Center, *Impasse Briefing Slide Presentation* (Aug. 14, 2006) (G-14-10386 through G-14-10396).

[11] Interview of Michael Butterfield, House Committee on Oversight and Government Reform (Mar. 16, 2007).

[12] General Services Administration, IT Acquisition Center, *Fact Sheet: Sun Microsystems* (July 26, 2006) (G-14-10383).

to "gutting" the price reduction clause and would forfeit $14.4 million in government discounts over the next three years.[13]

The Fact Sheet stated:

> **Impact**
>
> In the post award audit, which covered 1999 to 2005, we have forfeited $70.4 million in reseller price reductions and $7.04 million in GSA contract price reductions (Total $77.44 million) by having an ineffective price reduction clause. For the remaining three years on the extension option, if we accept SUN's proposed price reduction clause, we estimate we will lose a minimum of $13.1 million in reseller price reductions and $1.31 million in GSA contract price reductions (Total $14.41 million). In all, the Government overpaid an estimated $77.44 million during 1999 to 2005. For the next 3 years remaining on the option, we project a total overpayment of $14.41 million by our customers. If the SUN option is awarded with an ineffective price reduction clause, we risk unrecoverable damages of $14.41 million over the next 3 years. Furthermore, if GSA agrees to effectively granting SUN an exemption from the price reduction clause, we risk negatively impacting the auditor's position with DOJ.
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> * * *
>
> **Conclusion**
>
> We are at an impasse in negotiations over the price reduction clause and maintenance support. To accept SUN's proposal would not be in the best interest of the Government.[14]

At the August 14 impasse briefing, slides prepared for Mr. Williams and Mr. Drabkin included a draft press release announcing that GSA had canceled the Sun contract. The press release read:

> The decision to discontinue the current contract came after many months of exhaustive negotiations. The decision not to continue the current relationship was based on GSA's customers' reliance that, upon order placement, the order represents the best value and results in the lowest overall cost alternative to meet the government's needs.[15]

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[13] *Id.*

[14] General Services Administration, IT Acquisition Center, *Fact Sheet: Sun Microsystems* (July 26, 2006) (G-14-10383, G-14-10385).

[15] General Services Administration, IT Acquisition Center, *Impasse Briefing Slide Presentation* (Aug. 14, 2006) (G-14-10396).

III. INTERVENTION BY THE GSA LEADERSHIP

The evidence before the Committee suggests that in response to the recommendations by the contracting officers to abandon the Sun contract, top GSA officials launched an effort to bypass the contract officers and locate someone else within GSA who would execute the contract on an expedited basis even if that meant accepting terms that were unfavorable to the government. This effort was successful, and the new contracting officer signed the contract extension in a matter of weeks. The evidence indicates that GSA Administrator Doan was personally involved in the effort to override the judgment of career contracting officers.

On August 27, 2006, Marty Wagner, deputy to FAS Commissioner Williams, sent an e-mail to Administrator Doan's Chief of Staff, John Phelps, explaining that the Sun contract was likely to be canceled because "we could not achieve good enough prices and a process for keeping them current that met the requirements for inclusion in a Schedule."[16] Mr. Phelps immediately forwarded this email to Ms. Doan with the message: "Lurita: Wasn't sure you'd seen this or not. Looks like Jim's prediction came true."[17] The reference to "Jim" was a reference to FAS Commissioner Jim Williams.

Three minutes later, Administrator Doan wrote back to Mr. Phelps and Mr. Williams:

> This is truly unfortunate: there will be serious consequences felt across FAS since SUN now intends to run most of its business through SEWP.[18]

Less than an hour later, Mr. Williams wrote back to Ms. Doan and Mr. Phelps that he had scheduled a meeting with Sun's President of Federal sales in order to "see what can be done to resurrect the partnership, but it sounds like it is unlikely to continue any time soon."[19]

After the impasse briefing, Mr. Drabkin, Ms. Doan's senior procurement advisor, began developing a proposal to "exercise the option." Under this proposal, Mr. Drabkin planned to renew Sun's contract for a five-year term with the existing contract language and then attempt to

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[16] Email from Marty Wagner, Deputy Commissioner, Federal Acquisition Service, General Services Administration, to John Phelps, Chief of Staff, General Services Administration (Aug. 27, 2006) (G-14-0009, G-14-0010).

[17] Email from John Phelps, Chief of Staff, General Services Administration, to Lurita A. Doan, Administrator, General Services Administration (Aug. 27, 2006) (G-14-0009, G-14-0010).

[18] Email from Lurita A. Doan, Administrator, General Services Administration, to John Phelps, Chief of Staff, General Services Administration, and Jim Williams, Commissioner, Federal Acquisition Service, General Services Administration (Aug. 27, 2006) (G-14-0009, G-14-0010) (referring to NASA's Scientific Engineering Workstations Program (SEWP), through which government agencies can purchase Sun products and equipment).

[19] Email from Jim Williams, Commissioner, Federal Acquisition Service, General Services Administration, to Lurita A. Doan, Administrator, General Services Administration, and John Phelps, Chief of Staff, General Services Administration (Aug. 27, 2006) (G-14-0009, G-14-0010).

negotiate retroactive concessions. Mr. Butterfield, the latest contracting officer assigned to the Sun case, told the Committee that when Mr. Drabkin and Mr. Williams presented this "exercising the option" strategy to him, he said he was "uncomfortable" because it would not result in an acceptable level of discounts for the government.[20]

On August 28, 2006, Mr. Drabkin sent an email to top GSA officials. Bearing the subject line "HOT!!!!!! – Expiration of SUN Schedule Contract," his email described his "exercise the option" proposal, while acknowledging that Mr. Butterfield refused to participate:

> KO [contracting officer] does not believe that existing prices are fair and reasonable. His supervisor and the IT Center Director also agree. To exercise the option we would have to find someone in the chain with a warrant or the HCA [Head of Contracting Activity] would have to sign the extension. I would do it myself but I am not in the chain in FSS [Federal Supply Service], nor am I the HCA for FSS.[21]

The following day, August 29, 2006, Ms. Doan requested a meeting on short notice with senior auditing staff from the GSA Inspector General's office. According to IG staff, Ms. Doan said it was essential for GSA to complete the contract renewal with Sun. When the IG officials explained their concerns about Sun's inflated prices, Ms. Doan responded by criticizing the audit of Sun's pricing. Ms. Doan then stated that she believed Mr. Butterfield was too "stressed" to continue in his position as contracting officer.

An additional document produced to the Committee mentions another previously undisclosed conversation between Ms. Doan and Mr. Williams on August 30, 2006, the day after her impromptu meeting with the IG staff. This document is a calendar entry for Ms. Doan setting up a "Phone Call from Jim Williams, Sun Microsystems."[22]

According to Mr. Butterfield, the next day, on August 31, 2006, Mr. Williams told him directly: "Lurita wants this contract awarded. I want it awarded."[23] Mr. Williams then asked

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[20] Interview of Michael Butterfield, House Committee on Oversight and Government Reform (Mar. 16, 2007).

[21] Email from David Drabkin, Deputy Chief Acquisition Officer and Senior Procurement Executive, General Services Administration, to Marty Wagner, Deputy Commissioner, Federal Acquisition Service, General Services Administration (Aug. 28, 2006) (G-14-10409, G-14-10410) (the Head of Contracting Activity is a GSA official designated to have general contracting power by the FSS Commissioner, which at the time of this email was vested with the Assistant Commissioner for Commercial Acquisition at FSS).

[22] Lurita A. Doan, Administrator, General Services Administration, Calendar Entry (Aug. 30, 2006) (G-14-0011).

[23] Interview of Michael Butterfield, House Committee on Oversight and Government Reform (Mar. 16, 2007).

Mr. Butterfield if he wanted to continue working on the contract, and Mr. Butterfield responded that he did not.[24]

A new contracting officer, Shana Budd, was assigned to the Sun contract within a matter of hours. In an interview with Committee staff, Ms. Budd described herself as sympathetic to contractors' points of view. According to Ms. Budd, unlike the previous contracting officers, she does not use audit materials to inform her negotiating posture, nor does she use pre-negotiation memoranda to set out criteria and goals for the contract.[25] Instead, she makes her assessment by "going in and asking questions of the contractor from the horse's mouth."[26] She said that her supervisors knew of her negotiating practices and often called her into stalled contract negotiations because she could quickly conclude them.[27]

Ms. Budd signed an agreement with Sun Microsystems on September 8, 2006, nine days after she was appointed, to exercise the next five-year option on the contract. The final agreement Ms. Budd signed on behalf of GSA contained discount rates and price reduction language that the earlier contracting officers had repeatedly rejected. In fact, according to Mr. Butterfield, Ms. Budd accepted a discount rate for Sun support services that was less favorable than a rate that Sun had proposed a few months earlier. In addition, she accepted Sun's modification to an earlier-negotiated interim discount clause that auditors estimate cost government customers another $1 million in lost discounts.

After she signed the contract, Ms. Budd was transferred to Colorado, a post she previously requested but was denied. She also received a $1,400 bonus in part "for stepping in to negotiate a highly sensitive and political contract with a strategically important vendor after impasse occurred."[28]

IV. MS. DOAN'S LETTER TO SENATOR GRASSLEY

On March 13, 2007, Administrator Doan wrote Senator Charles Grassley about her role in the Sun contract. In her letter, she asserted: "I was not briefed by FAS in August, or at any other time, on the Sun Microsystems contract deficiencies." In addition, she stated she learned of FAS Commissioner Jim Williams' meeting with Sun only when GSA staff informed her of the

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[24] *Id.*

[25] *See e.g.,* Interview of Shana Budd, House Committee on Oversight and Government Reform (Mar. 16, 2007) (describing auditors as "police officers" who write speeding tickets and contracting officials as "judges" who hear "extenuating circumstances" motorists present in court).

[26] *Id.*

[27] *Id.*

[28] General Services Administration, *Cash Bonus Description for Employee Shana Budd* (Sept. 2006) (G-14-10433).

meeting in preparation for her response to Senator Grassley.[29] Based on the evidence received by the Committee, these statements appear to be misleading. As described above, Ms. Doan was personally involved in the efforts to award the contract to Sun and was in regular contact with FAS Commissioner Jim Williams about the Sun contract. In an interview with the Committee, Mr. Williams confirmed providing several updates to Administrator Doan about the Sun contract negotiations.[30]

In her letter to Senator Grassley, Ms. Doan also wrote: "I have never met nor had any discussions with Sun Microsystems Managers since becoming Administrator of GSA" and "I had no knowledge of the negotiations or the basis for decisions made regarding this contract prior to preparing for this submission."[31] When viewed together, these statements by Ms. Doan also appear to be misleading. The evidence before the Committee indicates that Ms. Doan had multiple contacts with a consultant representing Sun's interests during the final stages of the Sun negotiation.

On September 7, 2006, the day before the Sun contract was finalized, Ms. Doan received an email from Larry Allen. Mr. Allen is a senior executive at the Washington Management Group, a consulting firm hired by Sun.[32] Mr. Allen is also the executive vice president of the Coalition for Government Procurement, which is a group that represents "companies that sell commercial services and products to the federal government primarily through multiple award schedule (MAS) contracts and GWACs." Sun is one of the Coalition's top 50 "Premiere" members.[33]

In the email, entitled "Sun Follow up," Mr. Allen states:

> Mrs. Doan – I understand that new life has been breathed into the Sun situation. They are meeting with Mr. Williams today, among other things. I understand that a new deal is indeed possible within the 30 day time frame you have envisioned.[34]

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[29] Letter from Lurita A. Doan, Administrator, General Services Administration, to Senator Charles Grassley (Mar. 13, 2007).

[30] Interview with Jim Williams, House Committee on Oversight and Government Reform (Mar. 26, 2007).

[31] Letter from Lurita A. Doan, Administrator, General Services Administration, to Senator Charles Grassley (Mar. 13, 2007).

[32] Interview of Herman Caldwell, House Committee on Oversight and Government Reform (Mar. 15, 2007); Telephone conversation between Staff, House Committee on Oversight and Government Reform, and Carolyn Alston, General Counsel, Washington Management Group (Mar. 22, 2007).

[33] Coalition for Government Procurement, *List of Premiere Members* (accessed Mar. 26, 2007) (online at www.thecgp.org/content.asp?contentid=418).

[34] Email from Larry Allen, Executive Vice President, Coalition for Government Procurement, to Lurita A. Doan, Administrator, General Services Administration (Sept. 7, 2007) (G-14-0006).

Ms. Doan responded to Mr. Allen within minutes from her Blackberry:

> Thank you also for alerting me. I feel confident that with Jim Williams' involvement, an agreement will be reached to everyone's satisfaction.[35]

Two days later, Ms. Doan received final word from Mr. Williams that GSA and Sun had actually signed the contract papers. Four minutes after receiving this information, Mr. Allen was one of the first people Ms. Doan informed:

> Dear Larry, I believe that the SUN relationship with GSA is back on solid ground again. Jim Williams and his team, as well as SUN's willingness to negotiate, have yielded a true success for the American taxpayer. Thanks so much for your quick alert to me that there was an issue and thus giving GSA an opportunity to resolve. Have a great weekend! Lurita.[36]

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[35] Email from Lurita A. Doan, Administrator, General Services Administration, to Larry Allen, Executive Vice President, Coalition for Government Procurement (Sept. 7, 2007) (G-14-0006).

[36] Email from Lurita A. Doan, Administrator, General Services Administration, to Larry Allen, Executive Vice President, Coalition for Government Procurement (Sept. 9, 2007) (G-14-0006).