CHAPTER 14

FEDERAL CONTRACTING

Government's Dependency on Private Contractors

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In 1961, President Dwight D. Eisenhower devoted his entire "Farewell Address to the Nation" to federal contracting. The topic was seemingly so eye glazing and mind-numbing that choosing it as the centerpiece of a major presidential message to the people appeared to verge on the weird.

It was far from that. In his nationally televised speech, the former Supreme Commander of Allied Forces in World War II and a pro-industry Republican coined the term *military-industrial complex,* warned Americans of its "grave implications," and stated that its "total influence—economic, political, even spiritual—is felt in every city, every State house, every office of the Federal government" (Eisenhower 1961, 2).

Ike's address not only was stunning in its implications for democratic governance, but also eerily prescient. "What had once been an 'arm's-length' relationship between government staff and contractors has become a relationship where these parties are virtually indistinguishable as they carry out agency missions" (Burman 2009, 65). The federal government itself now describes, ominously, its administrative circumstances as "a contractor-dependent environment" (U.S. Government Accountability Office 2006, 15)—and with reason. Nearly 5.17 million private sector workers, a number that is almost three times that of federal civilian employees, work indirectly for federal agencies through some 4 million "contract actions" (Federal Procurement Data System—Next Generation 2008, 1) let to more than 160,000 contractors each year (U.S. Government Accountability Office 2009c, "Highlights").

This chapter addresses the following features of federal procurement contracting: costs; policies and values; public agencies and personnel; inherently governmental functions versus commercial activities; public-private competitions; bidding practices; revolving doors; service contracts and the "shadow government" of consultants; contract management; corruption in contracting; the history and prospects of procurement reform; and current issues, trends, and opportunities for research.

PROCUREMENT: BUCKS, BUREAUCRACIES AND BUREAUCRATS

In the federal government, *procurement,* also known as *purchasing* and *acquisitions,* is government contracting with the private, independent, and public sectors to buy goods and services. Procurement is by far the dominant form of federal privatization. By contrast, state and local governments' predominant privatization type is to outsource their services for delivery to their citizens.

Listing largest expenditures first, federal procurement contracts are let for "other services," accounting for 44 percent of all contract dollars; supplies and equipment (42 percent); construction (7 percent);

automated data-processing services and equipment (5 percent); architecture and engineering (1 percent); and real property (1 percent) (Federal Procurement Data System—Next Generation 2008, 4).

The price of federal procurement is high, its procedures are convoluted, and its personnel overwhelmed.

Big Bucks: The Price of Procurement

From 2000 to 2008, federal contracting costs soared by 162 percent (Hiatt 2009; U.S. House of Representatives, Committee on Government Reform, Minority Staff, Special Investigations Division 2006, 3). This was a record rate that won contracting the title of "the fastest growing component of federal discretionary spending," burgeoning "twice as fast as other federal discretionary spending" (U.S. House of Representatives, Committee on Government Reform, Minority Staff, Special Investigations Division 2006, 1). Washington spent $532 billion per year on procurement in 2008 (Hiatt 2009). Federal contracts amounted to two-fifths of Washington's discretionary spending in 2005 (U.S. House of Representatives, Committee on Government Reform, Minority Staff, Special Investigations Division 2006, 3), up from less than a fourth just four years earlier (U.S. General Accounting Office 2003e, 8–10).

The Department of Defense, as the world's largest, richest bureaucracy, with a budget that exceeds the economies of all but a dozen nations, is Washington's Croesus of contracting. Nevertheless, with the end of the cold war, the Pentagon's share of acquisitions has slipped from 82 percent of all federal contract dollars in 1985 (U.S. General Accounting Office 2000, 2) to 72 percent today (Federal Procurement Data System—Next Generation 2008, 54). About three-quarters of all the remaining contract dollars are spent by just a half dozen civilian agencies (U.S. General Accounting Office 2002a, "Highlights").

Procuring Bureaucracies

Title 7 of the Civil Service Reform Act of 1978 authorizes administrators in all agencies to "make determinations with respect to contracting out" (U.S. General Accounting Office 1991, 19). The General Services Administration (GSA) assists agencies in purchasing and related projects with the goal of ensuring that the government gets good value for the dollar. The Office of Federal Procurement Policy, established by Congress in 1974 and placed in the Office of Management and Budget (OMB), is responsible for providing overall direction for government-wide procurement policies and procedures.

Procurement's Personnel: The Contracting Cadres

The primary purchasing personnel are an "acquisition workforce" that numbers over 61,400, the core of which is more than 28,400 contracting officers who are responsible for the business aspects of outsourcing (Federal Acquisition Institute 2008, 18). Regrettably, contracting officers may be ill equipped for these responsibilities. A fourth of them do not have a college degree (although this figure is shrinking), and they typically occupy midlevel supervisory positions (Federal Acquisition Institute 2008, 18). Yet, these administrators are responsible for managing a hugely complex system in the form of the Federal Acquisition Regulation, a document in excess of 1,600 pages, plus agency supplements amounting to another 2,900 pages. Moreover, the federal contracting workforce declined in size during the 1990s, led by the Pentagon, which lost nearly half of its contracting employees, and never recovered, even as the number of contracts and the dollars in them more than doubled (U.S. Government Accountability Office 2008a, 7, 1; U.S. Merit Systems Protection Board 2005, i).

PHILOSOPHIES OF FEDERAL CONTRACTING

Federal contracting is best understood as a normative system of values that change over time and are often expressed in administrative regulations.

OMB Circular A-95

The first of these regulations appeared in 1955, when what is now the Office of Management and Budget issued Bureau of the Budget Bulletin 55–4, which stated in a straightforward manner that the government would rely on the private sector for goods and services so that it would not be competing with business.

In 1966, OMB altered this philosophy. OMB Circular A-76, "Performance of Commercial Activities," reiterated that it is the government's policy "to rely on competitive private enterprise" to supply it with goods and services, but the government should itself perform those functions that "are inherently governmental in nature." The circular defined a *governmental function* as one "which is so intimately related to the public interest as to mandate administration by government employees."

Identifying "Inherently Governmental Activities"

All of this may sound crisp, clear, and concise, but, alas, it is not. Messiness emerges when the government tries to identify not its commercial activities, but, peculiarly, its governmental ones. Consider war. Most of us think that war, which constitutionally can be declared only by Congress, is about as "inherently governmental" as it gets, but the Constitution also empowers Congress to "grant Letters of Marque and Reprisal"—that is, to authorize privateers, usually ship owners, to make war on the nation's behalf. Congress used privateers extensively and effectively during the Revolution and the War of 1812, and, just as the fees that the federal government pays its contractors are taxed by the federal government, the booty that privateers looted also was taxed by Washington (Tabbarok 2007).

Today, we are witnessing a resurrection of privateering, or, at least, the privatization of war. At its height, Washington hired some 180,000 private contractors to assist with its military operations in Iraq, a number surpassing that of the troops there (Miller 2007). The Pentagon is quick to state that "we have issued no contract for any contractor to engage in combat" (Barstow 2004), and technically this is true.

In point of fact, however, private contractors ghosted into shadow soldiers. Civilian contractors were "working in and amongst the most hostile parts of a conflict" (Barstow 2004). At least 650 contractors have been killed in Iraq (Merle 2006), and some have even been awarded medals ostensibly reserved exclusively for soldiers (Cha and Merle 2004). "The line is getting blurred . . . and it is likely to get more blurred" (Barstow 2004). Blurred, indeed: A civilian contractor even wrote the Defense Department's policies for civilian contractors on the battlefield (Werve 2004)!

"Inherently governmental," in short, is subject to an infinitude of interpretations.

Identifying "Commercial" Activities

OMB Circular A-76 "appears to allow all functions not governmental in nature to be contracted out" (U.S. General Accounting Office 1991, 19), but, as with inherently governmental activities, the precise nature of those functions was left unsaid. To rectify this, President Ronald Reagan in

1987 issued Executive Order 12615, and Congress in 1998 passed the Federal Activities Inventory Reform Act (the FAIR Act), both of which, in conjunction with OMB Circular A-76, require OMB and the agencies to identify each year their *commercial activities,* or those functions that are more appropriately conducted by businesses (and which perhaps should be outsourced to them, rather than being retained by government).

In contrast to the amorphous and undefined inherently governmental activities, OMB now lists more than seven hundred specific commercial activities, and they are found throughout the federal hierarchy (U.S. Government Accountability Office 2008b, 8). Agencies annually identify those activities that are "competitive commercial." Typically, about a fourth of agencies' functions are so classified. Another quarter are "noncompetitive commercial," or functions that have been exempted from competition by statute or other means, and the remainder is governmental activities (U.S. General Accounting Office 2004, 6).

COSTING CONTRACTING THROUGH COMPETITIONS

More than nine out of ten Americans "do not believe that the [federal] government gets best value from its contractors" (Primavera Systems 2007, 1). Accordingly, gaining better value from privatization has increasingly concerned Washington's policy makers. For more than thirty years, federal officials have tried to ascertain whether government or nongovernmental organizations could conduct more cost-effective commercial activities by relying on *public-private competitions,* in which agencies select from their competitive commercial activities those that they wish to put out for bid. An agency's cost for performing these activities then is compared with the costs of its competitors. Whichever entity has the lowest cost, and still maintains standards, is awarded the contract. In theory, at least, these competitions maximize the competitive field, and, when an agency is underbid, they promote an internal examination of why the agency's costs are higher than its competitors' costs, thereby inducing future public efficiencies.

In 2003, federal officials recognized, for the first time, that public sector agencies were as legitimate competitors for federal contracts as were private and nonprofit sector organizations. This recognition was expressed in the first major revision in almost four decades of OMB Circular A-76, which listed ten "guiding principles" for federal privatization, including one that allows "public and private sources to participate in competition for work currently performed in-house . . . work currently contracted with the private sector, and new work" (U.S. General Accounting Office 2003b, "Highlights").

Have Competitions Worked?

Nearly three decades after federal agencies began public-private competitions, Congress tardily required all agencies to report annually on savings derived from their public-private competitions. Section 647(b) of the Transportation, Treasury, and Independent Agencies Appropriations Act of 2004 enacted this government-wide policy, known as the "Section 647 reporting requirement." In the first five years that data were collected, 1,375 public-private competitions were completed (U.S. Office of Management and Budget 2008, 1).

The question of whether public-private competitions have helped make federal acquisitions more efficient is increasingly controversial. At root, the controversy centers on how widely one defines its costs and benefits. At the narrower end of this spectrum, when analysts focus solely on fiscal facts, these competitions have a definite allure. Thanks to public-private competitions, according to OMB, the government saves more than a billion dollars each year. For every one

dollar that Washington spends to conduct these competitions, it saves thirty dollars (U.S. Office of Management and Budget 2008, 1, 2, 11).

The rub in these impressive figures is one of numbers. Out of all the eligible positions, the feds have conducted public-private competitions for only 1.5 percent of them (U.S. Office of Management and Budget 2008, 1). Statistically, the competitions fail to provide "sufficient data" for determining whether the government saves or loses money by hiring contractors rather than using its own employees (U.S. Government Accountability Office 2008a, 11). Nevertheless, Congress has unearthed figures suggesting that the average annual cost of a federal contract employee ($250,000 in 2006 in selected agencies) may be almost twice that of a federal civil servant ($126,000) (O'Harrow and Higham 2007; O'Harrow 2007; Pincus and Barr 2007).

When the analytical scope is broadened to include factors other than fiscal savings, it is not at all clear that these competitions induce longer-term federal efficiencies. During the 1990s, when public-private competitions were at their lowest ebb (Gansler and Lucyshyn 2004, 9), the number of federal civilian employees sank by 11 percent, a record reduction (U.S. Bureau of the Census 2006, Table 481), reflecting the fulfillment of a prime objective of privatization, that of a leaner federal workforce, but one that seems not to be attributable to privatization. Even though public-private competitions have been conducted according to federal guidelines, their "full costs" are understated and result "in few job losses or salary reductions," but they do have "a negative impact on morale" (U.S. Government Accountability Office 2008b, "Highlights"). Public-private competitions are "a huge drain on management attention, deeply divisive, and stressful to the workforce, sucking up resources for minimal gain. . . . It is hard to find anyone inside or outside government who will privately say it's a good idea" (Wagner 2008, 51).

The Demise of Public-Private Competitions?

These concerns appear to have been heard. In 2008, the Office of Federal Procurement Policy introduced "commercial services management" noting that this new policy would "not ordinarily involve public-private competition or the potential conversion of work from the government to the private sector" (Johnson 2008, 1). The Clean Contracting Act of 2008 (Subtitle G of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009) overrode much of OMB Circular A-76 as it pertained to public-private competitions in the military services.

Section 324 of the National Defense Authorization Act for Fiscal Year 2008 and Section 736 of the Omnibus Appropriations Act of 2009 required the Pentagon and civilian agencies, respectively, to devise and implement in-sourcing guidelines that will ensure, on a regular basis, that consideration is given to using federal workers for new duties and duties performed by contractors.

"Many procurement analysts suspect" that public-private competitions "will tail off." In the words of a union member, "We could be the last guys with A-76" (Brodsky 2009).

BIDDING: RARELY OPEN

The enormous irony in public-private competitions, which have consumed so much time, money, and energy, is that there is very little competition in a far costlier aspect of contracting—federal bidding practices. Federal agencies select contractors for federal business by *full and open competition,* or soliciting competitive bids through widely distributed announcements; or by using various permutations of *negotiation,* which involves bargaining with a small number of preselected firms and, occasionally, some limited advertising; or by selecting a *sole source,* in which a contracting officer unilaterally selects a corporation that seems most qualified.

The central repository for federal procurement data maintains that two-thirds of all contracts, and half of all contract dollars, are let *without* "full and open competition" (Federal Procurement Data System—Next Generation 2008,1). These numbers appear to be defensively low (U.S. General Accounting Office, 2003c, 22–24; U.S. Government Accountability Office, 2004, 3).

How do agencies circumvent the bid procedure? Much of this circumvention is legal, if still questionable. Contracting officers have the power to waive bidding requirements, and they waive with gusto. Depending on the study, from about a third to nearly nine-tenths of all contracts are officially exempted from the "fair opportunity process" (U.S. General Accounting Office 2003c, 22–24; U.S. Government Accountability Office 2004, 3). In most cases, these waivers are granted without "fair and open competition," or with "unjustified exceptions" or "faulty justifications" (U.S. General Accounting Office 2003c, 22–23).

In addition, agencies are not above using guile when advertising projects for supposedly open bidding. For decades these deceptions have included the following: The agency miscodes a contract so that potential bidders cannot find it; it mentions a particular contractor in the solicitation for bids, thereby warning off potential competitors; or the agency mandates absurdly brief deadlines in the solicitation so that only preselected, and tipped-off, contractors can meet them ("Most Ads for Contractors Meaningless" 1980).

Even when contracts are let competitively, subterfuge and deceit remain. Contractors' initial estimated costs for hundreds of major projects built over nine decades in twenty countries, including the United States, on five continents were, on average, 28 percent short of their *actual* costs (Flyvberg, Holm, and Buhl 2002). This gap remained quite consistent over time; indeed, the current difference between the Pentagon's contractors' first estimates for weapon systems and their final costs is a remarkably similar average of 26 percent (U.S. Government Accountability Office 2008a, "Highlights"). The "overwhelming statistical significance" of these data is that "the cost estimates used to decide whether such projects should be built are highly and systematically misleading" and are "best explained by strategic misrepresentation, that is, lying" (Flyvberg, Holm, and Buhl 2002, 279).

If lowballing and lying may be commonplace among companies seeking agency contracts, it is a practice in which agencies are complicit. According to a federal "cost containment expert," prospective contractors know that if they tell administrators "how much something is really going to cost, they may scrub it. And they know that if they tell the Congress how much it's really going to cost, Congress may scrub it. So you start in with both sides knowing that it is going to cost more" (Proxmire 1970, 83). Although the quotation is dated, the reality that it reflects remains.

SPINNING THE REVOLVING DOOR

Who better to lobby government than those who know it from the inside? Thus, we enter the infamous revolving door. From the late 1990s to the mid-2000s, 12 percent of Washington's registered lobbyists were former federal officials (Brown 2006, 2). Today, almost one in three are former federal officials (Eggen and Kindy 2010).

Conversely, nearly a third, a plurality, of all upper-level federal hires who are hired from outside the government were working for a federal contractor when they were hired (U.S. Merit Systems Protection Board 2008,13). Administrators in the Department of Energy, which privatizes about 90 percent of its budget and is second only to Defense in the dollars that it contracts out, "bounce back and forth between government and industry just like Ping-Pong balls" (Neumann and Gup 1980). This is the essence of the revolving door.

The revolving door is hardly the exclusive aperture of the executive branch. About a fourth of members of Congress who leave office become lobbyists (up from a mere 3 percent in the 1970s),

and similar patterns pertain for congressional staffers (Abramson 1998). Members of Congress who intend to voluntarily retire and become lobbyists sponsor significantly more legislation during their final term in office than do retiring members in their final term who do not expect to become lobbyists, suggesting that retiring members who become lobbyists may harbor "ambitions that potentially jeopardize the interest of the public" (Santos 2003, 62).

Federal officials who leave for the private sector are lured by greener pastures. Often, their salaries quadruple or even septuple (Abramson 1998; Baer 1996). But the real money is made by the special interests, which spent more than $3.24 billion in 2008 to lobby Washington, more than doubling their spending in just a decade (Center for Responsive Politics 2009). Former federal employees who lobby spend a fourth of all lobbying expenditures in Washington but more than compensate for their spendthrift ways by raking in two-thirds of all lobbying firms' fees (Brown 2006). More than half of all consulting contracts awarded by the Pentagon, virtually none of which are openly bid, go to former Pentagon employees. Significantly, 40 percent of these contracts are originally proposed by the contractor, a figure that appears to be about twice that of civilian agencies (U.S. General Accounting Office 1981).

Federal regulations that address the revolving door are laced with loopholes and are tepidly enforced. In 2000, just twenty-three days before he left office, President Bill Clinton issued Executive Order 13184, thereby revoking his own Executive Order 12834 of 1993 that required senior appointees to "pledge" that they would not lobby any federal agencies for five years after they left the federal employ, and never lobby for a foreign government or political party.

In 2007, Congress partially ameliorated Executive Order 13184 by enacting the Honest Leadership and Open Government Act, which bans Cabinet secretaries and other high-level administrators from lobbying their former agencies for two years following retirement. Congress was less forthcoming in slowing its own revolving door, although the act does apply the same prohibition on senators from lobbying Congress, lesser limitations on staffers, and none on representatives. All members and senior staffers, however, must disclose any current negotiations with prospective employers.

FEDERAL SERVICE CONTRACTS

A *federal service contract* is a legal agreement for the provision by the private sector of training, leasing, technical, professional, logistical, social, or managerial support to the federal government. Examples include computer programming, administrative assistance, and temporary labor. In 1985, service contracts amounted to only 23 percent of all federal contracting dollars (U.S. General Accounting Office 2000, 6). Today, they account for 60 percent (U.S. General Accounting Office 2003d, 1). As an indication of their growing importance, Congress in 2003 passed the Services Acquisition Reform Act, which creates incentives for performance-based service contracts and appoints in civilian agencies "chief acquisition officers" empowered to decide whether or not contracted programs may continue and force accountability among contractors and federal managers alike. Unfortunately, these officers have yet to meet expectations (Burman 2009, 65).

Costly Consultants

An extensive and expensive use of service contracts is the hiring of private consultants, who operate in a netherworld of dank and bureaucratic murk. Had the Departments of Energy and Defense used government employees instead of consultants, they would have saved significant sums—from more than a fourth to more than half (U.S. General Accounting Office 1994, Appendix 4).

More anecdotal, but revealing, evidence on the utility of the "Beltway bandits" abounds. Consider some statements by federal contracting officers (Neumann and Gup 1980):

- "The bottom line on contracts—pure paper studies. . . . The public gets . . . maybe 10 percent of their money's worth."
- Of one $250,000 study, described as "an unintelligible pile of papers," a federal administrator said, "Nothing was received and we paid thousands for it. It really is a lot of gobbledygook. . . . As a taxpayer, I'm sick" (Neumann and Gup 1980).
- "We're so busy trying to shovel money out the door, we don't have time to see what happens to it after it leaves. All the money could be stolen and I wouldn't know it. . . . The place is a madhouse" (Neumann and Gup 1980).

The waste (and the opportunity) is also recognized by the more enlightened consultants. A board member of the Institute of Management Consultants observes, "It's a game. . . . Government comes to us and wants help in identifying their problems, but they don't seem to be able to use the material. They could spend much less and get more for it" (Neumann and Gup 1980). "It looks like a conspiracy, but really it's chaos" (Guttman 1982). So stated one of the nation's leading experts on governing by contracting, and it is likely that he is accurate.

The Shadow Government

Chaotic incompetence is one thing. Policy manipulation, however, is another. A serious problem emerges when "advice" from private consultants waxes into policy executed by public administrators. The Government Accountability Office (GAO) has called Congress's attention to "contractors' influencing agencies' control of federal policies and programs" (U.S. General Accounting Office, 1981, 6), in reports dating from 1961. As a top GAO executive put it, "We've seen situations where an agency contracts out so much of its data gathering and policy analysis that it thinks it has control, but the consultant is, in effect, making the decision" ("Consultants: New Target for Budget Trimmers" 1981).

The question raised by these comments is fundamental. Who makes and implements public policy? Is policy made by representatives of the public interest or by representatives of private interests? The government first addressed these concerns in 1980 with OMB Circular A-120, which prohibited consultants from performing policy-related work that was "the direct responsibility of agency officials." The Office of Management and Budget replaced its circular in 1993 with OMB Policy Letter 93–1, which states, in even stronger language, that consultants' and other service contractors' "services are to be obtained and used in ways that ensure that the Government retains inherently governmental decision-making authority." A decade following the initial issuance of this policy, however, more than a fifth of federal contracts for consultants' services appeared to involve "inherently governmental functions" (U.S. General Accounting Office 1991, 5).

CONTRACTING IN INCOMPETENCE

Much federal contracting is a model of efficiency. The Pentagon, for example, pays less for some items than the private sector does because it is "already using commercial practices commonly followed by large firms" (Besselman, Arora, and Larkey 2000, 421). But much is not. For instance, at least a third of the American interrogators who were implicated in the severe

mistreatment of prisoners in Iraq's infamous Abu Ghraib prison were not American soldiers, but private businesspeople. They were hired not by the Pentagon, as one might reasonably assume, but through a computer services contract overseen by a Department of the Interior's office in Arizona. In apparent violation of federal regulations, the contract was never opened for bid, and the contract itself was written by an employee of the firm that won the contract. The process was so convoluted that the army could not determine who wanted to hire private interrogators in the first place (Singer 2004a, 2004b).

How did this debacle happen? Unfortunately, it is an example of a far more pervasive problem of federal incompetence in privatizing. Time is money. Federal purchases of less than $100,000 take an average of three months to complete, compared with one to four weeks in the private sector, and buying information technology consumes more than four years, compared to thirteen months in the private sector, a practice that ensures permanent obsolescence (Gore 1993, 28, 1).

A lack of due diligence is money. Some federal contracts require that administrators assess the past performance of prospective contractors before awarding them contracts, but in seven out of ten of these contracts, contractors' previous performance is never assessed (U.S. Government Accountability Office 2009c, "Highlights").

Change is money. The Pentagon alters a whopping 63 percent of weapon systems requirements *after* their development has begun, and this dubious practice is associated with "significant program cost increases" (U.S. Government Accountability Office 2008a, "Highlights").

Unused leverage is money. Federal agencies miss "opportunities to leverage the government's buying power" by failing to use interagency contracts to purchase the same goods and services from common vendors. Although the data are dim, perhaps only a tenth of contract dollars are leveraged (U.S. Government Accountibility Office 2010, "Highlights").

Senseless rules are money. Federally imposed requirements tote up to 12 percent or more in additional contract costs (Gore 1993, 80).

Cost-reimbursement contracts are money. *Cost-reimbursement contracts* ask contractors to make a good-faith effort to meet estimated costs, but the government will (with some restrictions, depending on the contract) pay any costs exceeding that estimate. (The other two main types of federal contracts are *fixed cost,* in which the contractor is not reimbursed for expenses that surpass the agreed-upon cost, and *time and materials,* in which the government pays fixed, per-hour rates for all expenses within a preestablished ceiling.) A cost-reimbursement contract "involves high risk for the government because of the potential for cost escalation and because the government pays a contractor's costs of performance regardless whether the work is completed. . . . The complete picture of the government's use" of these contracts "is unclear," but it appears that they account for at least a fourth of all federal contract dollars (U.S. Government Accountability Office 2009a, "Highlights").

These poor practices have costly consequences.

CORRUPTION IN CONTRACTING

The feds' privatization procedures are meant to ensure, if not efficiency, then at least honesty. In this, they frequently fail. Between 1995 and 2007, seventy-one of the top one hundred federal contractors were fined more than $26 billion for 678 "instances of misconduct," including fraud, "defective pricing," poor performance, and violations of environmental, antitrust, health, ethics, tax, labor, and human rights laws, among many others types of misconduct (Project on Government Oversight 2009). In the Pentagon, America's biggest contractor, the Justice Department's

Operation Ill Wind exposed "America's biggest defense scandal." "No one will ever know how much the phony contracts and sweetheart deals really cost taxpayers," but it is known that they amounted to billions of dollars, and resulted in more than ninety convictions of contractors and federal executives for corruption (Pasztor 1995, 38).

The Structure and Culture of Contracting Corruption

Why does corruption in contracting continue unabated? In part, fraud flourishes because the structure of privatization itself is unusually corruptible. Of the twenty-five to thirty "high-risk" federal operations identified each year by the GAO as unduly vulnerable to "fraud, waste, abuse, and mismanagement" (U.S. Government Accountability Office 2005b, 3, 2), more than a third involve "large procurement operations or programs delivered mainly by third parties" (Goldsmith and Eggers 2005).

More deeply, the culture of contracting often places scant value on acquiring one's money's worth. Often, "the concept that the contracting officer's primary purpose is to acquire a contract that promises the highest quality at the lowest price is misleading if not false" (Cooper 1980, 462). The preeminent expectation by management, especially in the military, is that contracting officers produce the goods; keeping their costs down runs a distant second. As a former procurement officer put it, "It doesn't matter if you screw everything up, as long as you keep the dollars flowing" (Mitchell 1990).

Coming Back for More

In sum, Washington has a record of largely poor contract management; has built a privatization structure that allows an unusual level of corruption; and permits a contracting culture that places a greater stress on completion of the project than on honesty and cost-effectiveness. Worse, perhaps, Washington's enforcement of its own contracting regulations is negligible.

Even though the Federal Acquisition Regulation requires officials to do business only with "responsible sources" that have a "satisfactory record of integrity and business ethics," and even as federal contract costs more than doubled (Hiatt 2009; U.S. House of Representatives, Committee on Government Reform, Special Investigations Division 2006, 3), the number of "exclusions"—that is, *suspensions* (i.e., temporary exclusions pending investigations) and *debarments* (fixed-term exclusions, usually not exceeding three years)—issued by all federal agencies to contractors from 2003 to 2007 declined by 43 percent to fewer than forty-three hundred, an infinitesimal subfraction of federal contracts (President's Council on Integrity and Efficiency and Executive Council on Integrity and Efficiency 2008, Table 10).

Of far greater importance, large federal contractors are almost never suspended or debarred, despite long records of serious, including some criminal, violations. Not one of the twenty-five major corporations convicted of defrauding the federal government in the 1980s was banned from further contract work (Stevenson 1990). During the 1990s and 2000s, the top ten federal contractors shelled out almost $3 billion in fines and penalties for 280 instances of proven or alleged misconduct, but not one of them was excluded from further work (Amey 2005).

Why Does Washington Do It?

At least one reason why federal agencies keep contracting with these high-flying felons is practical. Few, if any, other contractors could take over some big, complex projects that these big, complex

companies manage, so firing them may not be a realistic option. Another is technical. Various glitches may conceal from agencies an astounding 99 percent of the suspensions and debarments that other agencies have levied on their prospective contractors for past violations (U.S. Government Accountability Office 2005a, 2–3).

Yet another reason is managerial. Agencies sometimes fail to check the government's list of suspended and debarred companies; or the excluded companies change their identities; or, astonishingly, some agencies continue to contract with companies that they themselves excluded. Examples include the German contractor whom the army debarred because he tried to ship nuclear bomb parts to North Korea; nevertheless the army needlessly continued its contract with this "morally bankrupt individual" (to quote the army's own assessment) to the tune of another $4 million; or the corporation that the navy suspended because one of its employees had sabotaged repairs on an aircraft carrier that could have caused massive deaths—yet, "less than a month later, the Navy improperly awarded the company three new contracts" (U.S. Government Accountability Office 2009b, "Highlights").

But the main reason why the feds fire so few felonious firms is political. Canceling a government contract "drastically disrupts the careers of those associated with it," because the cancelation "hurts regional economies. What causes pain locally triggers congressional rescue activity" (Lambright 1976, 123). Bringing Congress into the act can be a federal administrator's worst nightmare, so "government contractual relationships may be more like treaties than contracts in that often no real separation occurs" (Cooper 1980, 462–463).

REFORMING FEDERAL CONTRACTING

Federal attempts to ensure honest dealing between the government and business date back to at least 1863, with the passage of "Lincoln's law," the False Claims Act. More contemporary federal efforts to reform contracting hearken back to the mid-twentieth century.

Early Efforts

Among the more important early legislative efforts to recast acquisitions are the Armed Services Procurement Act of 1949, which mandates advertised bidding for Defense and other agency contracts; the Truth-in-Negotiations Act of 1962, which requires contractors to support their bids with data; the Competition in Contracting Act of 1984, which established a bidding and appeals system that later was significantly simplified but still stands in principle; and the Procurement Integrity Act of 1988, which prohibits contract officers from discussing employment prospects with, and slipping inside information to, contractors with whom they are negotiating.

Congress also took an early interest in upgrading the contracting cadres, and in 1976 Congress created, as part of the General Services Administration (GSA), the Federal Acquisition Institute, designed to improve the professionalism of the civilian procurement workforce.

The Mixed Record of the 1990s

Congress renewed its commitment to deepening the professionalism of federal procurement personnel in the 1990s. In 1990, it enacted the Defense Acquisition Workforce Improvement Act, which ordered the Pentagon to establish a separate career path for its acquisitions specialists, and, in the following year, the Defense Acquisition University was founded as an equivalent to the prestigious National Defense University.

Four Serious Statutes

Also during the 1990s, Congress passed four laws designed to simplify privatization procedures. The Government Performance and Results Act of 1993 requires agencies to measure the performance of contractors. Washington still has some way to travel on this road, and it appears that only 11 percent of contracts meet performance-based criteria (U.S. General Accounting Office 2002b, 3).

The Federal Acquisition Streamlining Act of 1994 dramatically simplifies the buying of items costing less than $100,000, and the Information Technology Management Reform Act of 1996 is designed to shorten the time that it takes to buy information resources. The Federal Acquisition Reform Act of 1996 recasts the Federal Acquisition Regulation in terms of guidelines rather than rules; frees administrators from selecting only the lowest bidder; and simplifies the appeals process, reducing thirteen dispute-resolution boards to two.

Have the Statutes Worked?

Largely as a consequence of these laws, "the federal government is dramatically changing the way it purchases goods and services by relying more on judgment and initiative versus rigid rules for making purchasing decisions" (U.S. General Accounting Office 2003a, "Highlights"). Regrettably, however, judgment and initiative have not always had their intended effects.

In its zeal to streamline procurement, Congress significantly weakened the requirement, first established by the False Claims Act of 1863, that companies certify their prices as being the most favorable to the government; cut back contract audits; and authorized the General Services Administration, the feds' principal purchasing overseer, to collect "industrial funding fees"—that is, a percentage of the sales it handles—from vendors who sell to federal agencies. These changes amount to a set of incentives for GSA to overlook overcharges—the industrial funding fees alone cover GSA's budget—and the results are predictable. A decade following their passage, corporate sales to agencies that were conducted through the GSA's flagship program septupled, and "agencies have used the GSA to avoid true competition and steer work to preferred companies, resulting in cases of waste, fraud and increased cost to taxpayers" amounting to "hundreds of millions, if not billions," of dollars (O'Harrow and Higham 2007).

Trying Reform Again: Frustrations in the 2000s

During the 2000s, Congress tried again to gain a semblance of control over federal contracting. The Federal Funding Accountability and Transparency Act of 2006 (also known as the Obama-Coburn Act) required that all recipients of direct federal contracts, loans, and grants be listed, along with the money awarded, and that this information be made easily accessible to the general public.

The Services Acquisition Reform Act of 2003 and the National Defense Authorization Act for Fiscal Year 2004 authorized and created an Acquisition Advisory Panel. Its 474-page report, issued in 2007, provides a well-considered basis for reform, with systemic recommendations that stress improved definitions, requirements, coordination, and human capital, and more resources for contract management (U.S. Acquisition Advisory Panel 2007).

A result of this renewed thinking about procurement is new ethics rules, enacted by the Federal Acquisition Regulation Council in 2008 and added to the Federal Acquisition Regulation, that require mandatory disclosure when contractors violate particular laws, and expand the grounds for excluding contractors.

The Clean Contracting Act of 2008, mentioned earlier, not only exempted the Pentagon from much of OMB Circular A-76's requirements concerning commercial services, but also launched an extensive assessment of outsourced services, limited noncompetitive contracts, and began an effort to clarify just what "inherently governmental" should mean, with a goal of narrowing standards for what can be contracted out.

Despite these efforts, the same immense issues persist. Years after all the privatization reforms were in place, the comptroller general of the United States testified in 2008 that "we must engage in a fundamental reexamination of when and under what circumstances we should use contractors versus civil servants or military personnel . . . [and] we must address challenges . . . in assuring proper oversight." These problems demand "immediate attention" (U.S. Government Accountability Office 2008a, 13).

THE AUDACITY OF HOPE? A PRESIDENTIAL PRIORITY

Almost a half century following Eisenhower's farewell, the forty-fourth president, Barack Obama, on his forty-fourth day in office, delivered the second major presidential address on federal contracting, appropriately, in the Eisenhower Executive Office Building. Obama, who had long-standing concerns with contracting (as a senator, he had cosponsored the Federal Funding Accountability and Transparency Act), called for the reform of "our broken system of government contracting." He chided contractors who were "paid for services that were never performed, buildings that were never completed, companies that skimmed off the top," and who "have been allowed to get away with delay after delay after delay" (Obama 2009, 1, 2). Obama directed the Office of Management and Budget to identify wasteful and unneeded contracts, predicting that, "altogether, these reforms can save the American people up to $40 billion each year" (Obama 2009, 3), an impressive sum, but still a slender sliver—less than a tenth—of federal contracting costs.

Congress responded to the president's actions by passing three consequential bills that were promptly signed into law. One was the Weapon Systems Acquisition Reform Act of 2009, which received a unanimous vote in Congress, creating a new office for estimating program costs, reemphasized weapons testing before they entered production, and eased their termination.

The Fraud Enforcement and Recovery Act of 2009 dramatically expanded the risk for institutional recipients of federal funds by holding them potentially responsible for frauds perpetrated by their subcontractors; holds contractors liable for not returning overpayments; and eases whistleblowing.

The third law is the American Recovery and Reinvestment Act of 2009. Tucked away in this legislation that distributed $747 billion throughout an economy in crisis are the following clauses: a beefing up of whistle-blowing opportunities; the maximum possible use of competitively awarded, fixed-price contracts; and the establishment of a Recovery Accountability and Transparency Board, composed of inspectors general empowered to issue subpoenas.

Obama also issued three executive orders in 2009 that (1) denied reimbursement to contractors for expenses related to their resistance to, or encouragement of, unionization; (2) required postings about their workers' rights to unionize (or not); and (3) ensured job security for contracted employees when a new contractor took over an existing contract from a former contractor. In 2010, he signed an executive order barring agencies from issuing new contracts to tax scofflaws.

"Government contracting is plainly entering an era of . . . an unprecedented level of scrutiny . . . and significantly greater risk for contractors" (Vinson & Elkins LLP 2009). It is undeniably encouraging that, even though the federal government remains contractor dependent, an effort

is being undertaken at the highest levels to liberate the government's dependency and to reassert its primacy in the implementation of public policy. Perhaps, however, the more potent cure for contracting woes is the likelihood of its shrinking use in the future. It is projected that, due to squeezed budgets resulting from significant deficit spending, federal contracting costs will grow at a compound annual rate of just 2 percent, "a very, very slow growth rate," from 2008 to 2014 (Castelli 2009). This glacial growth rate may be the single best prospect for gaining greater control of federal procurement.

ISSUES, TRENDS, AND NEEDED KNOWLEDGE

For the first time in six decades, the nation has a president, and perhaps a Congress, that recognize that reform must be undertaken. It might be anticipated that both the White House and the Capitol will continue to push for greater transparency, firmer enforcement, and better management in federal contracting. These efforts have begun with the Pentagon, but, given the quarter-century trend of procurement spending lowering in Defense, and its corresponding rise in civilian agencies, the president's focus probably will expand to include the whole of government.

It is, however, difficult to overstate the private sector's resistance to acquisitions reform. As a direct result of the accelerating revolving door, Washington's lobbyists have grown in number, sophistication, and clout, and all signs suggest that these trends will continue their steady expansion, and that lobbyists will challenge any changes that threaten their slurping at the federal trough.

The scholarly community can help federal administrators deal with these realities. Among questions that need answering are:

- How can the term "inherently governmental function" be made more clear and operational?
- What more needs to be done to slow the revolving door?
- In administering the occluded world of federal outsourcing, how can public administrators increase transparency, enforcement, and accountability?

Nowhere is the academic community more relevant to practicing public administrators than in clarifying the complexities of contracting. And no practice so fully expresses the intellectual roots of public administration as does federal acquisitions. Collaboration, competition, corruption, reform, management, and the public interest—it's all there.

NOTE

Portions of this chapter are adapted from Nicholas Henry's *Public Administration and Public Affairs,* 11th ed. (New York: Longman, 2010).

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