MOBILIZING THE DEFENSE CONTRACTING PROCESS

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Congress is not shy about using the Department of Defense (DOD) acquisition process to promote interests other than providing our military forces with the best equipment, when and where needed, at the lowest overall cost to the taxpayer. Most of the laws are intended to protect the taxpayers or to achieve broader social goals. An extensive network of regulations implement the laws and ensure that acquisitions reflect sound business judgment and are consistent with DOD policy.

Since many laws and regulations do not contribute directly to the primary mission of supporting the military services, they add a significant cost and administrative burden to the acquisition process. Acquisition officials should accept these burdens and recognize that those entrusted by the Constitution with determining how to allocate the defense budget to reflect the national interests, have done so.

In peacetime, seemingly unrelated laws and regulations present Department Of Defense acquisition professionals with many unique, but tolerable, challenges in their efforts to supply troops with quality goods in a timely manner.

During national emergencies, when the acquisition process impacts directly on the battlefield, delays incident to unrelated laws and regulations are not tolerable. They are not tolerable to acquisition professionals or to their primary customers — Service members who have been placed in harm's way. Nor, should they be tolerable to anyone else, even beneficiaries of the law or regulation.

Fortunately, drafters of most defense acquisition laws and regulations have

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not lost sight of the primary mission of DOD—to fight the Nation's wars. Most laws and regulations contain waiver or exemption authorities, at some level, which are intended to help refocus priorities during a national emergency.

OBJECTIVES

This article will:

1. Assess the extent to which DOD acquisition laws and regulations provide necessary leeway for acquisition professionals to accomplish their primary mission during a national emergency;

2. Examine the ability and willingness of all DOD acquisition professionals, working within the laws and regulations, to refocus priorities during a national emergency situation such as Operation Desert Shield/Storm (ODS); and,

3. Recommend appropriate legislative, regulatory and policy changes to ensure that during a national emergency, all ancillary interests imbedded in the defense acquisition process take a back seat to the primary objective of supporting the troops.

TERMINOLOGY

Acquisition has been used in some contexts to include a broad array of activities from the drafting of requirements, and including every action along the way, stopping just short of the user. Here, only the contracting aspects of acquisition will be reviewed — actions taken by contracting personnel from the receipt of a purchase request to the moment the government enters into a legally binding agreement Federal Acquisition Regulation for the goods or services required.

Mobilization as used herein, refers to the process of directing resources toward resolution of a crisis or emergency situation. This use is more consistent with the concept of Graduated Mobilization Response (GMR) (Department of Defense, 1993) than the traditional use of mobilization to designate specific events or classes of actions (Clem, 1983).

SCOPE

This article reviews all federal contracting actions necessary to support crisis management and early national emergency stages of a mobilization (Department of Defense, 1993). Actions taken by DOD and civilian contracting offices inside and outside the Continental United States (CONUS), including those in the theater of operations, are within the scope of this review.

My intent is not to argue the peacetime merits of the intended outcomes of the myriad laws which control the federal acquisition process. Using the defense

budget to accomplish indirectly related societal goals is a fact of life. If Congress decides to relieve DOD of all acquisition laws except those necessary to ensure that tax dollars are spent honestly and efficiently to support the defense mission, it will be a greater surprise to many than the collapse of the Soviet Union.

WHY FOCUS ON CONTRACTING?

When viewed in the grand scheme of laws, regulations, capital equipment, personnel, training, production capacity, etc., necessary to mobilize, a discussion limited to contracting must be recognized as narrow, but critical. Clearly, even the most efficient contracting process will not, standing alone, provide for an effective mobilization. It makes little sense to have the ability to expedite contracts if there are no providers of the goods and services required. It would make less sense to contract for equipment we did not have the capacity to transport to the theater of operations, or, trained personnel to use the equipment once it arrived. Likewise, the effectiveness of all other elements of mobilization is diminished if the contracting process does not allow us to take full advantage of our capability.

In developing a national strategy to meet future mobilization requirements, we face many difficult decisions.

1. How large should the military force be? What percentage of the force should be active duty, reserve, etc.? How should they be trained?

2. Where will we obtain the weapons and equipment to fight future wars? Should we stockpile equipment? Should we continue to prototype weapons systems without actually going into production? Should we rely on slow, uneconomical production rates to keep the production base warm? Should the government intervene in the marketplace to ensure that critical capabilities survive? Should we encourage arms exports to ease the burden of maintaining the industrial base?

3. How will we transport troops and equipment to the theater of operations? Should we build more cargo ships and transport planes? Should we subsidize U.S.-flag vessels and the air transport industry during peacetime to ensure their availability in support of mobilization?

As a nation we probably will not be willing to make sacrifices necessary to meet every mobilization challenge on a moment's notice. The best we can hope for is that our leaders will choose a viable option that reflects a well-reasoned comprehensive defense plan. And, that any political decision to engage in a military situation is consistent with our ability to mobilize and meet that challenge. Even with our best efforts, history tells us we will get caught short in some element necessary to mobilize effectively.[1] To paraphrase a line from

the movie *Body Heat* - "There are 50 ways to screw up a perfect mobilization plan. A genius can think of 35. We're not geniuses."[2]

The good thing about focusing on the contracting element of mobilization is that we have significant opportunities for improvement. If implemented properly, changes to the process add nothing to the peacetime budget, and do not sacrifice peacetime socioeconomic objectives. If the contracting portion of the mobilization puzzle is *fixed,* addressing the 49 less-controllable elements of mobilization will be easier.

HISTORY

In the United States, contracting under a state of mobilization preceded contracting during peacetime. In fact, mobilization contracting preceded the birth of the Nation. In June 1775, when the Second Continental Congress took control of the Army and appointed a Commissary-General to acquire supplies (Culver, 1984), there was no time to pass hundreds of acquisition laws, and generate 30,000 pages of acquisition regulations.

Over the century and a half following the Revolutionary War, acquisition law grew slowly and sporadically. Some laws were enacted or adjusted during the Civil War and World War I (WWI) to facilitate mobilization; other laws were passed after the wars as a result of lessons learned (Culver, 1984). Occasionally, laws were passed during peacetime to ensure the integrity of the acquisition process and for various social causes (Culver, 1984). The Great Depression of the 1930s brought the first concentrated effort to use the federal acquisition process to further social and economic goals such as the Walsh-Healey Public Contracts Act, the Buy American Act, and the Davis-Bacon Act.

With the advent of World War II (WWII), emphasis in legislating the federal acquisition process shifted back to war fighting and mobilization concerns. In 1940, several laws were passed to facilitate expeditious production of defense equipment (Culver, 1984). Eleven days after the Japanese attack on Pearl Harbor, the President signed the first War Powers Act and eliminated much of the administrative baggage that had been legislated into the federal acquisition process. Executive Order 9001 rounded the edges off the War Powers Act and designated authorities necessary to implement it. Within 20 days of the onset of war, the government was able to enact enough emergency authority to support the greatest mobilization in the history of mankind.

One of the lessons learned from WWII was that peacetime acquisition laws

1 Even during Operation Desert Storm (ODS), when we were arguably better prepared to mobilize than for any emergency in the past, the six months prior to the beginning of the ground war were necessary to allow time to work out some of the bugs associated with being prepared to fight in a forest and not in a desert (e.g., uniforms, sandbags, boots, tank paint all needed to be "fixed" prior to engagement).

2 The scene in the referenced movie pertained to the planning and execution of the perfect murder.

and regulations were not flexible enough to accommodate emergency situations. To remedy this situation, one body of law was created to apply to all defense contracting under any circumstance.[3] This law, the Armed Services Procurement Act of 1947, was implemented via the Armed Services Procurement Regulation (ASPR) in 1949. For civilian agency acquisitions, the Federal Property and Administrative Services Act of 1947, and the Federal Procurement Regulation (FPR) in 1959 (Culver, 1984) served the same purpose.

THE ASPR

The ASPR was significant because it provided DOD acquisition professionals and their leaders a mechanism to meet many mobilization challenges without resorting to legislation.

In 1976, the ASPR became the Defense Acquisition Regulation (DAR). In 1984, pursuant to Section 6 of the Office of Federal Procurement Policy Act (41 U.S.C. 405) the DAR and the FPR were combined into the FAR. In DOD, the FAR is supplemented by the Defense FAR Supplement (DFARS), lower level department and agency supplements, and supplements of those supplements (collectively referred to as the FAR System). For mobilization purposes, the FAR System at the outset of ODS (August 1990) provided acquisition professionals with essentially the same tools as the 1949 ASPR.

Since the end of WWII, the DOD acquisition process has been encumbered by a succession of laws designed to use the defense budget to achieve goals other than buying defense capability. In most cases, these laws are written to allow for waivers and exemptions during a national emergency.

LAWS AND REGULATIONS

Do acquisition laws and regulations *impede* or *facilitate* contracting during a mobilization?

The answer to both parts of this question can be Yes! Every action that does not add value to the war effort can be an impediment to mobilization. This includes contracting actions not directly related to mobilization in CONUS contracting offices where efforts expended on nonemergency acquisitions detract from the resources available to support the mobilization. Laws and regulations are impediments even when they provide for exemptions or waivers, because resources are consumed and time is lost processing the exemptions and waivers. Of course the most significant impediments come from; (1) laws from which there is no exemption or waiver, or which require approval of the waiver or exemption at an unreasonably high level; and (2) regulations which require more than the law.

3 Independent laws like the Buy American Act and the Davis-Bacon Act were not incorporated into the Armed Services Procurement Act.

While acquisition laws and regulations are usually considered to be impediments, they can also be viewed from the perspective that they facilitate a mobilization. In a report prepared at the request of the Under Secretary of Defense (Policy), Richard Danzig (1983, p.3) stated, "... one cannot usefully speak of 'barriers' to mobilization. Instead, one ought to recognize that the law lays out roads that channel bureaucratic (and private) traffic moving over the unfamiliar terrain of a mobilization." Danzig's comment here referred generally to his findings after reviewing ten "substantive areas," including "Procurement" (i.e., "Contracting"). In the specific area of procurement, Danzig (1983, p.34) noted that the bulk of limitations did not flow from statute, but rather from the predecessors to the FAR, and from excessive centralization of approval authority. Danzig (1983, p. 35), stated that existing legislation typically permits necessary waivers and pointed out the significant emergency contracting authority available under Public Law 85-804.

In 1987, the DOD Logistics Systems Analysis Office (LSAO) completed a narrow study of acquisition policies specifically affecting procurement administrative lead time (PALT) during mobilization (Department of Defense, 1987). The study team offered 34 proposals, 23 for consideration by the Assistant Secretary of Defense for Logistics and 11 for action by DOD components. Nine of the recommendations were for statutory revision. Others recommended FAR, DFARS, or other regulatory changes. All proposals were directed at the reduction of PALT (the time necessary to turn a funded purchase request into a contract). While few of the legislative problems dealt with "show-stoppers," (laws for which there is no waiver or exemption authority short of another law or national emergency declaration), the cumulative burden of laws on the acquisition process is significant. There is no evidence that the proposals in the LSAO study were ever collectively acted upon by OSD.[4] However, some impediments were subsequently overcome or minimized,[5] and others have been added (10 U.S.C. 2326).

In summary, you can view the overwhelming majority of acquisition laws and regulations as impediments, since they do not enhance the primary mission of DOD during a mobilization. However, if you accept socioeconomic and oversight legislation as a fact of life in the DOD acquisition process, you must view the waivers and exemptions available during mobilization as facilitators.

Do DOD acquisition laws and regulations provide the leeway necessary for

4 The author provided Defense Logistics Agency (DLA) support for the study in 1987. The author called OSD during ODS and was advised that the recommendations had made little progress since 1987.

5 For example, statutory relief was granted to some extent for Justification and Authority for Purchases from Foreign Governments. Also, the small purchase threshold for contracts outside the United States in support of contingency operations was authorized during ODS, and is now permanent law.

acquisition professionals to accomplish their primary mission during a mobilization? There are few laws from which there is no relief short of new legislation. In most cases, there are alternatives to the peacetime acquisition process, which the contracting officer can employ to accomplish the mission during mobilization. In a traditional mobilization or declared national emergency, extraordinary authorities such as the War Powers Act or the provisions of Public Law 85-804 can be invoked. Or, new laws may be enacted as in WWII.

However, the existence of work-around procedures and exemption authorities is of little value if the contracting officer is not aware of the authority, or is not allowed to exploit the authorities. So, even if the acquisition laws and regulations are adequate, there is no guarantee they will be employed optimally.

Danzig correctly pointed out that *most* contracting laws provide mobilization waiver or exemption authorities. He also pointed out that centralized authority and overregulation detracted from the ability of acquisition professionals to operate effectively during a mobilization. Even if regulations and personnel take full advantage of available authorities, there are *some* laws from which there is no relief. And, *every* law that adds no value to the mobilization effort represents misplaced prioritization of resources. Also, in a GMR environment, some contracting activity occurs before declaration of a national emergency or war can rescue contracting personnel with the type of sweeping authority introduced at the beginning of WWII. Finally, acquisition laws and regulations that add no value during a mobilization have continued to increase since 1983, and show no sign of letting up. Danzig's assessment was more accurate in 1983 than in 1993.

USING AVAILABLE TOOLS

How effectively did acquisition professionals use the tools available to them to fight in ODS?

Performing effectively during a mobilization requires a reprioritizatio — sacrificing peacetime goals and objectives for wartime goals and objectives. Depending on the severity and duration of the conflict, every level of government and citizenry can be involved intimately in a mobilization. For a mobilization such as the air strike on Libya in 1986, participation was limited largely to a handful of military personnel and executive branch officials. During a declared war, on the other hand, drastic measures such as commodity rationing, selective service, and internment of entire segments of the population have been implemented. How much of a mobilization we are in is a matter that should be decided at the highest levels of Government. For domestic political reasons, or international coalition-building or power projection considerations, our leaders have been reluctant to use terms associated with a level of mobilization. There have been no declared wars since WWII, and only limited national emergency authority (not acquisition related) was invoked during ODS.

When there is no declared level of emergency, acquisition professionals are

challenged to assign priorities on their own. All decisions of contracting officers and their superiors play a large role in determining the extent of peacetime/wartime trade-offs we are willing to make as a Nation. Every time an acquisition official uses a waiver or exemption to dislodge peacetime policy, the scope of the mobilization effort is more precisely defined.

During ODS there is evidence that the overwhelming policy decision by contracting officers was that since our troops had been committed to the battlefield, we were at war. Accordingly, contracting officers and supporting personnel at contracting activities called every tool available into play to support ODS requirements (Killen & Wilson, 1992). To the extent contracting officers could trade off peacetime policies and objectives to support mobilization objectives, they did. When contracting officers lacked authority to reprioritize the accomplishment of conflicting national objectives, they requested support from the higher echelons of their organizations. This response is not surprising. To the contracting officer, reprioritization means taking whatever action is necessary, on each contract, to enhance the chances of success in the emerging conflict.

Support at levels above the contracting officer was not as uniformly in favor of "pulling out all the stops" as were contracting officers. In a headquarters/field activity relationship, disagreements over autonomy and oversight are not uncommon. From agency to agency, and sometimes between components within the same agency, there were significant differences in what officials were willing to waive or exempt (Killen & Wilson, 1992). Some agencies undertook comprehensive up-front efforts to provide blanket ODS waivers where appropriate, and to lower review and approval levels.

Other agencies were less forthcoming with the kind of help field activities needed to ease the burden of supporting ODS. Therefore, within the existing laws and regulations, the package of tools available to contracting officers varied. The reason for the variance is difficult to ascertain. It may have been that an honest evaluation of the circumstances led reasonable people to different conclusions about how requirements could be met without extraordinary procedures. Or, perhaps the difference was in a misplaced view of a headquarters as an overseer instead of a facilitator. Whatever the reason, some headquarters activities retained more authority to reprioritize national objectives during the mobilization than did others.

In addition to reviewing how acquisition officials used the tools available to them during ODS, it is appropriate to review attempts to secure additional contracting tools — requests for statutory relief. With the support of the military departments and the Defense Logistics Agency (DLA), OSD compiled a list of acquisition laws that could be impediments to the efficient execution of ODS.[6]

6 The author was the DLA representative. The process action team that met was the same group that

The list relied heavily on field input based on current experience and "laundry lists" of proposals generated in previous years, such as the LSAO study. The OSD legislative proposals were sent informally to Capitol Hill on January 18, 1991 (shortly after the onset of the air war) (Federal Contracts Report, 1991). No action was taken on the informal package, and OSD never did submit formal legislative proposals for ODS.[7] In the way of legislation, the only new tool made available was an increase to $100,000 in the threshold for small purchases, but only for purchases outside the United States in support of ODS (Public Law 101-510). This authority was a significant timesaver to contracting officers located outside the United States. (Blyther, 1991).

Some contracting offices experienced an initial practical problem associated with the special waivers, exemptions and authorities. The rules for contracting during a mobilization are spread throughout the FAR system. There is no place a contracting officer can find a summary of all available tools. The lack of such guidance was cited as having created some problems during ODS.

ODS LESSONS LEARNED

Lessons learned from any war must be viewed with recognition that the circumstances of that war were unique. Our ability to fight the next war may be tested within an entirely different set of parameters. Many significant aspects of ODS may distinguish it from all future wars and thereby skew our perception of how well prepared we are for future conflicts. Among the significant features from a contracting perspective were — the amount of time prior to military engagement; the relatively short duration of the conflict; the ability and willingness of the host nation to provide significant support; and, the cooperation of contractors, whether due to patriotism, the popularity of the war, or the opportunity to secure additional defense contracts.

The significant contracting lessons from ODS are summarized as—

Legislative

Through the years acquisition law has digressed further and further from the fundamental mission of DOD. The digression has been caused by the addition of hundreds of laws that impact the DOD contracting process. To some extent, each law detracts from DOD ability to function efficiently or effectively during a mobilization. There is a belief among some on Capitol Hill that the authority in existing law is sufficient to support a mobilization. Empirical evidence may

met yearly to develop legislative proposals for consideration by the Director, Defense Procurement.

7 A formal legislative package represents the coordinated position of the Executive Branch and must be submitted through the Office of Management and Budget. The war ended before the failure of this effort caused significant problems.

be requested to support legislative change. A significant overreaching lesson to be learned from ODS was that no emergency declaration was invoked to provide sweeping relief from peacetime acquisition policies. Piecemeal legislation based on empirical evidence may require mission failure prior to receiving congressional support. Easing the burden on contracting offices was not sufficient justification for legislative relief during ODS.

To better understand the legislative impediments encountered during ODS, the laws are categorized according to the severity of the impediment as follows:

Potential "Show-Stoppers"

As mentioned earlier there are relatively few laws in this category. These are laws which could result in the inability to award a contract without statutory relief. Among the laws identified as problems during ODS were:

1. provisions of the Small Business Act that required determinations of nonresponsibility to be referred to the Small Business Administration for Certificates of Competency (CoC), and that small business subcontracting plans be negotiated prior to the award of a contract;[8]

2. the length of time and amount of expenditure allowed prior to definitization of an undefinitized contractual action (UCA);[9] and,

3. the requirement for compliance with cost accounting standards (CAS).[10]

Laws in this category give acquisition professionals no leeway to reprioritize workload or resources when converting from peacetime to mobilization.

The specific lesson learned during ODS was that no action is likely to be taken to remove these impediments unless DOD can demonstrate problems directly related to the legislation. Because the buildup time was so long, and the actual war so short, demonstrating the adverse impact of these laws during the war would have been difficult. For example, the statutory requirement to

8 Sec. 8(b)(7)(A) of the Act gives the Small Business Administration the authority to overturn a contracting officer's determination that a small business is not responsible to perform a particular contract. The referral and appeal process can take up to 60 days. Section 8(d) of the Act applies to most contracts over $500,000.

9 10 U.S.C. 2326 requires definitization within 180 days of the date of the contracting action. The period for definitization can be extended to 180 days after receipt of a qualifying proposal, but no longer. Expenditures are limited to 50 percent of the total "not-to-exceed" price (increases to 75 percent after receipt of qualifying proposal).

10 Public Law 91-379, as implemented in Part 30 of the FAR allows for many exemptions to the CAS requirement. Still, there are situations where no exemption is authorized.

definitize the first ODS UCAs within 180 days of receipt of a qualifying proposal was just beginning to be a problem when the war ended. Delays inherent in the CoC process will always be difficult to demonstrate because the contracting officer always has the unsavory alternative of accepting, without appeal, a CoC.[11] The requirement for a negotiated small business subcontracting plan can be met easily, if the government is desperate to fill a wartime requirement.

Direct Administrative Burdens

Acquisition laws which allow for exemptions and waivers under certain conditions, at predetermined levels, are included in this category. These laws reflect efforts of lawmakers to recognize that whatever *other* goal a particular law was to achieve, DOD needs flexibility. Examples are the exceptions to requirements for open competition,[12] and the requirement to buy domestic end products.[13] Here, acquisition professionals take on the role of policy makers as they use the flexibility provided in these laws to prioritize mobilization needs over peacetime objectives of each law.

Even though these laws relieve DOD of certain requirements during a mobilization, they are administrative burdens, because determinations, justifications, waivers and exemptions must be prepared and approved at various levels. The extent to which these laws are a burden depends on the level of approval required, and whether blanket or class deviations are authorized.

During ODS, the extent to which contracting offices incurred these administrative burdens varied widely. However, even the contracting agencies which were liberal in granting ODS waivers and exemptions received requests for legislative relief from the associated administrative requirements.[14] The most significant lesson to be learned from ODS about laws of this type is that an administrative cost is associated with every exception from the normal way of doing business. Considered individually, the administrative burden may not

11 When several contract awards were threatened by CoC delays, the SBA advised personnel to prioritize ODS CoCs. (author's personal experience.) This type of cooperation can help minimize the delays inherent in the CoC process, but does not address the larger question of why a contracting officer's determination of responsibility in support of a war effort is subject to being overturned by an agency interested in protecting small businesses.

12 The Competition in Contracting Act, 10 U.S.C. 2304(c)(1)-(7) includes exceptions for "Unusual and compelling urgency," "Industrial mobilization," and, "Public interest."

13 Buy American Act (41 U.S.C. 10) provides five exceptions including one for products acquired for use overseas, which throws many wartime requirements into the nonstatutory realm of the Balance of Payments Program (which also has a list of exceptions).

14 During the OSD roundup of proposed legislative relief for ODS, several activities (including the Defense Personnel Support Center, a DLA field activity) highlighted the cumulative burden on resources created by requirements such as the processing of Justification and Authority documents.

appear to be onerous or unreasonable.

Considered collectively, there is reason to challenge the extent to which the waiver and exemption provisions allow contracting offices to respond to mobilization challenges.

Indirect Administrative Burdens

The rest of the acquisition laws fall into this category. This categorization is not meant to minimize the significance of these laws during peacetime. It does suggest that during a mobilization every law adds to the burden of contracting officers. The indirect burden can be created by the sheer volume of clauses required in each contract, or the volume of representations and certifications generated. Examples are the requirement to comply with the Walsh-Healey Public Contracts Act, and affirmative action requirements for the hiring of handicapped individuals and veterans. 29 U.S.C., 38 U.S.C. and 41 U.S.C.

Another form of administrative burden may not be directly related to a mobilization requirement, but detracts from the contracting officer's ability to satisfy mobilization requirements, by mandating action in another area. Examples are the Freedom of Information Act, 5 U.S.C. and numerous reporting requirements imposed on contracting offices.

The indirect nature of the burden imposed by this category of law does not lend itself to identifying specific examples of problems that were created during ODS. The problem is a result of the cumulative impact of laws designed to impact the DOD acquisition process. The problem becomes more acute during a mobilization, when every action that does not add value to the mobilization effort detracts from its effectiveness.

Regulatory

One measure of the adequacy of acquisition regulations during an emergency is how well they capture the spirit and intent of law, without imposing additional unnecessary burdens, while providing users with maximum flexibility at reasonable approval levels. By this measure, regulations appeared to be adequate during ODS. In other words, the regulations provided the means to fully exploit most mobilization enhancing alternatives available under law. Whether approval for exploitation is at the appropriate level is a matter of subjective judgement, but DOD regulators have reviewed approval levels for appropriateness on several occasions.[15] Despite the general adequacy of the acquisition regulations, shortcomings were highlighted pertaining to some actions.[16]

15 The most recent comprehensive review of threshold and approval levels was being conducted during ODS as part of the Defense Management Review of the DFARS.

16 Killen and Byther pointed out the need for more clear-cut authority to exempt overseas acquisitions during contingency from the Balance of Payment Program, FAR 25.302.

Another measure of the adequacy of acquisition regulations during mobilization is the ease with which they can be used under combat conditions. Several ODS participants complained that the body of acquisition regulations for, or pertinent to, a mobilization was not available. Contracting officers, trained and conditioned to operate in a peacetime environment, had to learn how to contract in a mobilization environment. This appeared to be more of a problem at in-theater contracting offices and smaller CONUS contracting offices without direct access to large policy staffs.

Another concern expressed by in-theater contracting personnel was that the authority to purchase locally, in lieu of from designated centralized managers, was not clear.

The regulatory lessons learned from ODS can be summarized as follows: The regulations provided most of the tools necessary to fully exploit the laws. However, everyone did not have equal knowledge of, or access to, all the tools.

Policy

In the defense acquisition process, policy comes in two forms — fixed and variable. Fixed policy is expressed in the regulations, directives, instructions, and manuals issued by DOD. Variable policy is contained within the parameters of the fixed policy. Variable policy is deferred to individuals throughout the system to set, in accordance with existing circumstances. Waivers and exemptions executed during a mobilization are examples of variable policy. Since different individuals will view the same situation differently, the extent to which peacetime policy will be waived in favor of mobilization policy will vary. The adequacy of fixed policy during ODS is essentially answered in the discussion of "Regulatory" above. The regulations are the fixed policy.

There was some criticism during ODS that certain variable policy makers did not make appropriate decisions for a mobilization environment. It would be inappropriate to conclude, from the information available, that some officials made *wrong* policy choices during ODS. As a lesson learned however, it is safe to conclude that individual policy choices will not be consistent, even in similar environments.

FRAMEWORK FOR RECOMMENDATIONS

Before addressing specific recommendations to improve our ability to contract during the next mobilization, it is useful to establish the framework within which those recommendations should be considered.

The Mission Is Defense

Even though the primary mission of DOD is sacrificed during peacetime by using the DOD acquisition process to achieve many goals, supporting the troops must be the overriding concern in all acquisition decisions and trade-offs during

a mobilization.

Graduated Mobilization Response

Graduated mobilization response (GMR) is the most viable approach to any future crisis. It is unlikely that our first effort to respond to any future crisis will be a declaration of war or national emergency. Under the GMR scenario, we cannot depend on sweeping contracting authority to save the day. Authority to support mobilization needs via contracting must be available as a matter of course. Authority to deviate from peacetime acquisition laws and procedures must be available at operational levels.

National Will

Mobilization signals the will of the nation to divert resources and activities to meet a perceived crisis. The signal should be clear not only to the international community and the general public, but to individuals supporting the mobilization throughout the government. The contracting officer should not be put through extraordinary administrative hurdles to provide support to troops in combat. The wrong signal is being sent to the contracting officer if support of a mobilization, at the expense of a social platform, must be justified.

Element Of Logistics

Logistics is the means of war. (Eccles, 1959 p.46) Good logistics support provides field commanders with opportunities to exploit battlefield situations. During ODS, field commanders had the benefit of approximately six months of logistics preparation to support a brief, but intense, ground war. The CONUS, regional, and in-theater contracting support was a critical element of that logistics support. Lawmakers and policy makers must realize that the efficiency and effectiveness of contracting offices during a mobilization is reflected on the battlefield. Making the right trade-off between social goals and mobilization support is easier if the relationship between the contracting office and the battlefield is recognized.

Flexibility And Timeliness

Flexibility and timeliness[17] are critical to the success of future contracting in support of mobilization. Flexibility is more important than at any time in the past for several reasons. We cannot predict when, where, or who we will be fighting. The degree of host nation or allied support will vary from conflict to conflict. We will need flexibility to contract from anywhere in the world, in

17 Flexibility and timeliness are two of the four mobilization tenets set forth in the Draft DOD Joint Pub 4-05. The other tenets, "objective" and "unity of effort," are not as critical to the contracting aspect of mobilization.

virtually any market open to us during a conflict. From this perspective, we should not create legislative and regulatory conditions that will limit our ability to optimize CONUS, regional, and in-theater contracting platforms.[18] Also, as the number of contractors doing business with DOD in peacetime shrinks, we will need the support of nondefense contractors during a mobilization. Often, DOD may find itself having to accept someone else's rules of engagement in the contracting arena.

At the outset of a mobilization, acquisition professionals must convert on short notice. Timeliness during the mobilization requires quick reaction to the changing circumstances of the conflict and the ability to contract for supplies and services expeditiously. Administrative requirements that add no value to the mobilization effort must be recognized as detracting from the overall timeliness of contracting personnel.

RECOMMENDATIONS

Legislative

1. Every law pertaining to the DOD acquisition process, should include a mechanism for prioritization of national defense needs during a mobilization. The mechanisms should be available at an operationally effective level, for classes of items or actions, and involve minimum administrative effort.

2. Simplified procedures should be available to mitigate the cumulative impact of legislation designed to achieve peacetime social goals.The most obvious answer is to increase the threshold for application of all socioeconomic legislation to the simplified small purchase threshold.[19] A force multiplier of this action would be to increase the threshold during mobilizations for contracting offices. During limited mobilization efforts, authority to use simplified procedures may be appropriate only for actions in support of the mobilization. As the mobilization efforts expand, the simplified criteria should apply to all contracts.

Regulatory

Regulators should take a page from Hippocrates and vow to "at least do no harm." Regulations should maximize the flexibility under the law so users can

18 There was evidence during ODS (Byther and Killen) that some contracts which would have otherwise been awarded in CONUS, were awarded in-theater to take advantage of the $100,000 small purchase threshold.

19 Currently $25,000 as set forth in the Office of Federal Policy Procurement Act. The threshold is to be adjusted for inflation every five years beginning in 1995.

apply their knowledge, skills and abilities to meet the widest array of contingencies. Regulations that provide flexibility and decision-making authority to the lowest practical levels are consistent with the goal of having a professional acquisition workforce.[20]

A compendium of acquisition regulations applicable during a mobilization would be useful to acquisition personnel as they transition from peacetime to mobilization contracting. However, the FAR is not the appropriate place for such a compendium.[21] In spite of its size, the FAR is rarely redundant. The basic rules of contracting are spelled out once. Thereafter, coverage pertaining to a particular type of contracting (services, construction, research and development, etc.) discusses only elements of contracting unique to that type. In other words, Part 37, Service Contracting, is not a handbook on how to enter into a service contract. A contracting officer must be knowledgeable in many other aspects of the FAR to enter into a service contract.

Exceptions that may be useful under a mobilization may also be useful under other circumstances and are included in the FAR along with the rule being addressed. A contracting officer trying to list all of the tools that may be available during a mobilization may lose sight of opportunities available elsewhere in the FAR.

Some practical problems occur when using the FAR to assimilate contingency contracting provisions. Most notable is that under the GMR concept, there will be no one set of conditions or authorities appropriate for every mobilization. Another problem is that it may be difficult to get all players (including non-DOD FAR users) to agree to what should be included under contingency contracting.

A more practical answer to the problem of having access to the full range of opportunities during a mobilization would require each level of authority in the contracting chain to maintain lists of what legislative and regulatory alternatives are available that require action at that level. Individual decisions to take alternative actions will depend on the circumstances of the mobilization.

Policy

There is no way to exercise absolute control over individuals entrusted with making policy decisions during a mobilization. The responsible acquisition decision makers should accept that senior officials have decided to reprioritize the concerns addressed by various socioeconomic and oversight laws. Within those parameters, difficult decisions and trade-offs will have to be made. One way to influence behavior under such circumstances, is to minimize the degree of difficulty and risk associated with choices available to the contracting officer.

20 A goal of the Defense Acquisition Workforce Improvement Act, 10 U.S.C. 1746.

21 Killen and Byther suggested a new FAR Part for contingency contracting.

Fear of not meeting socioeconomic goals or of being criticized for abuse of waiver authority never should be on a contracting officer's mind once the shooting starts. Acquisition officials at all levels must understand the implications and parameters of mobilization, so the DOD acquisition community can approach a mobilization with some degree of predictability and cohesiveness.

CONCLUSION

Acquisition laws and regulations did not create any problems during ODS that could not be resolved within the generous and forgiving circumstances of that crisis. There is reason to believe the same laws and regulations may be an impediment in future mobilizations, under different circumstances. The potential problems can be avoided with little cost and minor harm to the peacetime benefactors of socioeconomic laws. A little reflection on why DOD is in business, and what our priorities should be when we send troops into battle should go a long way toward helping us to refocus during a mobilization. Of the 50 potential ways to screw up the perfect mobilization, the failure to award a timely contract may be the least excusable.

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