FROM THE CONSTITUTION TO FAStA — ORIGINS OF ACQUISITION REFORM

Scratching the Surface of a System That is Extremely Complex and Ingrained

Beryl A. Harman

The federal acquisition process is under attack and has been for some time. Our daily newspapers trumpet criticisms of $600 toilet seats and large cost overruns. Because of increasing dissatisfaction with the procurement process, government has generated commission after commission in an attempt to solve this puzzling problem. Why do atrocities occur? Is there a way to make the system more efficient? Do federal employees need more training? What can be done to streamline the process? How do we provide more flexibility in a complex, overburdened system? What will it take to satisfy industry and the public that the federal workforce is, in fact, working in their best interests? Questions like these are generated every day, but answers are not so easily forthcoming. Let's look at past events, the passage of the Federal Acquisition Streamlining Act of 1994, and then consider what our future contains.

A Past Perspective

In 1789, the newly ratified Constitution of the United States, Article 1, Section 8, authorized the new Congress "to raise and support armies, but no appropriation of money to that use shall be for a term longer than 2 years."[1] Therefore, the new Constitution empowered Congress to enact laws affecting military procurement based on acquiring funding in not more than two yearly increments. Article 2, Section 2 of the same document assigned a President as the "Commander-in-Chief of the Army and the Navy of the United States, and of the militia of the several states, when called into the service of the United States." Some factions interpreted this to mean that the President has responsibility for the government purchasing function. Therefore, a shared responsibility exists between the President and Congress, with Congress, in effect, controlling procurement through the appropriations process.

In 1792, 3 years later, the Department of the Treasury, as an Executive Agency of the President, received full responsibility for conducting purchases and contracts for the American Army. Yet, it was not until 1795 that the Department of the Treasury created within its own ranks the position of Purveyor of Public Supplies, to act as the government's purchasing agent. The issue of "agency" is, of course, well known today in government procurement, since the government views the contracting officer as its "agent" in obligating funds.

President Clinton signs Public Law 103-355, commonly referred to as the Federal Acquisition Streamlining Act of 1994, 13 October 1994. From left: Senator Patrick Leahy (D-VT); Senator Strom Thurmond (R-SC); Rep-

Ms. Harman is a Professor of Contract Management, Research, Consulting and Information Division, DSMC.

This "agency" responsibility was later transferred by Congress in 1798 to the chief officers of the Department of War and the newly established Department of the Navy. The position of Purveyor of Public Supplies still remained, though in a somewhat diminished capacity, since its only responsibility was the execution of orders received from the Military Departments for providing stores and supplies.[2] This arrangement is not unlike the division of responsibilities we have today between the Military Departments and the Defense Contract Management Command.

Ethics and Political Influence

The procurement process, of course, was extremely political. In fact, the first procurement problems and abuses arose out of the activities of congressmen in securing contracts for friends and firms with which they were associated. Such that in 1808, Congress was finally forced to take action, and devised a provision entitled "Officials Not to Benefit," which established penalties to prevent these abuses of power. This provision is still included in government contracts today.

This issue of ethics for public officials and business firms came into question from the very earliest days. Accusations of graft and favoritism in the award of government contracts were extremely common. As a result, each administration and political party investigated the prior administration or political party's activities. In 1809, Congress attempting to resolve this problem, established a general requirement for competitive bidding in the procurement of supplies and services. This established the requirement that "lowest price" be the determinant for contract award in certain instances. This was further expanded and institutionalized during the Civil War, and ultimately encapsulated in the Civil Sundry Appropriations Act of 1861. Even so, several scandals erupted concerning excess profits and war profiteering during and after the war.

White House photo

resentative Patricia Schroeder (D-CO); Representative Jane Harman (D-CA); Representative John Conyers, Jr. (D-MI); Senator William Cohen (R-ME); Vice President Al Gore, Jr.; Senator Robert Smith (R-NH); Representative Ronald Dellums (D-CA); Senator John Glenn (D-OH); Senator Carl Levin (D-MI).

The drawback to the use of competitive bidding, known as formal advertising, was the fact that it was very slow and inefficient in emergency situations. So much so that in World War I, emphasis centered on negotiation to obtain supplies. This, in turn, generated the use of cost-plus-percentage-of-cost contracts. Under this type of contract, as the cost of the contract increased, so did the attendant profit. This was later perceived as an incentive to generate waste and create additional inefficiency. Consequently, after the war, the government banned this type of contact, and this ban is still in effect.

Formal Advertising of Contracts vs. Flexibility

The problems experienced in the purchasing system caused disillusionment and the search for a scapegoat. The "Merchants of Death" as contractors came to be called, were blamed for American involvement in the war on the assumption that they engineered American involvement to make excess profits. As a result, the War Policies Commission of 1930 and the Nye Committee of 1934 recommended limiting industry profits through price control and taxation. In fact, between World War I and World War II, Congress passed over 200 bills and resolutions to solve the problem, and the process of formal advertising was once again reinforced as the preferred method of contracting.

At the same time, Congress found the federal contract a useful vehicle for implementing socio-economic legislation. As a result—

> ...the United States went into the test of World War II with a procurement system governed by an astonishing mass of undigested and uncoordinated legislation. Statutes had accumulated on the books over a period of more than 100 years. Many were completely archaic. Many were conflicting, and not a few had been born to serve special and forgotten interests. In the aggregate, they presented a serious obstacle to efficient and speedy purchasing...

Many of these laws are still in existence and were considered as a part of the recent Section 800 Panel tasking activities.[3]

During World War II, the War Powers Act lifted some of the competitive restrictions. Contracts could be acquired through negotiation, but the government required contractors to warrant that they were not paying commission agents any fee for soliciting or securing a contract. Neither could they practice racial discrimination because Executive Order prohibited racial discrimination on government contracts. Once again, the government emphasized securing sources and production, not price. However, since many of these were temporary requirements and were passed in order to facilitate the emergency, the conclusion of the war necessitated a return to the old system of formal advertising. Yet, the War had demonstrated the need for flexibility.

In 1945, the Procurement Policy Board of the War Production Board recommended that government agencies propose new procurement legislation to take effect after the emergency. This legislation was to recognize the need for formal advertising, but at the same time allow for broad authority to negotiate price if circumstances warranted. The result was passage of the Armed Services Procurement Act of 1947, which was designed to pull together in one statute all Department of Defense (DoD) procurement authority and replace many of the former laws in the process. It was this law that established the ground rules for the formal federal procurement process we know today.

Standardized Rules for Defense Procurement

The Armed Services Procurement Act of 1947 established the Armed Services Procurement Regulation (ASPR). Its purpose was to establish a set of standardized rules for DoD procurement. Although still the preferred method, it established 17 exceptions to the use of formal advertising. Fifty-two different sections documented a set of extensive procedures for ensuring the fairness and efficacy of the procurement process. This was closely followed by the Federal Procurement Policy Act of 1948, which extended this same process to all other federal agencies.

Socio-economic Impact of Procurement Legislation

During the next two decades, the procurement system became the natural target for the institution of socio-economic laws, legal constraints and extended competition practices. For instance, the Contract Work Hours and Safety Standards Act of 1962 established the requirement that laborers or mechanics working under certain government contracts be paid time-and-a-half for time worked in excess of an 8-hour day or a 40-hour week. The procurement process also facilitated the implementation of the Small Business Act of 1963, from the collecting of statistical data to the enforcement of small business goals, in the award of contracts to small business concerns. Furthermore, the Brooks Act of 1965 established special procedures to procure Automatic Data Processing equipment for government agencies.

The Federal Acquisition Regulation (FAR)

In 1974, the rules set forth in the ASPR came under attack because government and industry viewed them as voluminous and cumbersome. In addition, growing discontent surfaced with the requirement for two sets of rules for the Federal Government to follow: one set for DoD, and another for the other federal agencies. Therefore, in 1978 Congress amended the Federal Procurement Policy Act to direct creation of one reduced set of procurement regulations for the entire Federal Government — the Federal Acquisition Regulation (FAR).

The FAR, originally envisioned as a small, streamlined manual with limited guidance became, in fact, a set of specific constraints embodied in laws to control the contracting process. This living document is now considered the bible of all federal contracting officers.

Defense Federal Acquisition Regulation Supplement (DFARS)

At the same time Congress enacted the FAR, the DoD established the Defense Federal Acquisition Regulation Supplement (DFARS) to incorporate all the policies and procedures considered unique to the DoD. Other federal agencies followed suit and set up their own supplemental regulations. In turn, the lower operating levels of the agencies created their own supplemental operating procedures. As time went by, these procedures became more voluminous than the regulations they were meant to replace.

"Reforming the Procurement Process" Gains Momentum

Meanwhile, the "reforming the procurement process" movement grew in momentum. Defense acquisition personnel and industry representatives were discussing reform almost before the print was dry on the first set of regulations. As early as 1949, the Hoover Commission considered and recommended changes to the process. Since that time, government has repeatedly studied reforming the procurement process, with varying results: the second Hoover Commission in 1955; the Fitzhugh Commission in 1969; the Commission on Government Procurement in 1972; the Carlucci Initiatives in 1981; the Grace Commission in 1982; the Packard Commission in 1986; and the Defense Management Report in 1989.

All of these commissions suggested changes to improve the acquisition process in the name of efficiency, effectiveness, fairness and simplification, while each time the regulations grew and became more complex as

individual agencies tried to respond to the ever-changing world of procurement and the vagaries of Congress and the White House.

Meanwhile, Congress enacted further legal restraints upon the procurement system. The Contract Disputes Act of 1978 established the procedures for resolving disputes arising under government contracts. The Federal Courts Improvement Act of 1982 reorganized the courts to deal with federal claims, and the Debt Collection Act of 1982 set up a complex set of statutes and regulations to facilitate the collection of government debts. In addition, Congress extended and broadened the use of competition by the Competition in Contracting Act of 1984, which requires that the government pursue full and open competition on all government contracts wherever practicable. This made it decidedly more difficult to pursue negotiation as an alternative to full and open competition on all government contracts.

At the same time, both research and oversight activities alike made numerous recommendations for change. Yet, each time these activities gained ground, problems arose, such as the fiasco of the A-12 program and the vagaries of the C-17. These scandals generated more constraints and more penalties, not only for those in private industry, but for procurement officials as well. Procurement lead times increased, costs increased, dissatisfaction grew, and reform was seen as its saving grace.

The Federal Acquisition Streamlining Act of 1994

The resultant Federal Acquisition Streamlining Act (FAStA) of 1994 was reported out of Joint Conference on 19 August 1994 and signed by the President on 13 October 1994. Though 4 years in the making, this new law still only scratches the surface of a system that is extremely complex and ingrained. What then does the law contain? The most important provisions, from the standpoint of impact on the process and the possibility of success, follow:

Expansion of Commercial Item Definition. A major recommendation of the Panel was to generate an expanded definition of what constitutes a commercial item, hoping to exclude certain acquisitions from burdensome governmental regulations. These included submittal of cost and pricing data in determining a "fair and reasonable" price, and the flow-down of unique government provisions to commercial subcontracted items.

Commercial companies had consistently argued that they would not subject themselves to government pricing rules and flow-down provisions, and had elected to remove themselves from prospective government competition. In this, the Panel recommendation was successful. The Bill contains a vastly expanded definition of commercial items and expresses a preference for using commercial items in developing government contractual requirements. For the first time, the definition not only covers items sold competitively in substantial quantities in the commercial marketplace, but also includes nondevelopmental items and commercial services. Purchasing officials are further charged with actively seeking commercial suppliers through market research. In turn, the Bill also empowers the Government Accounting Office to report on agency progress.

However, Congress constrained the process by upholding the government "best customer" rule, which requires a contractor to sell to the government at the lowest price they have sold an item, regardless of the quantity sold or the quantity being purchased. Many factors affect the determinant of price in the commercial market that are not recognized in government procurement: customer relationships, similar item offsets and international market pricing, to name a few. Since only the head of the agency can waive these rules in exceptional cases, this factor may yet deter many commercial companies from submitting offers on government contracts.

Enlargement of the Simplified Small Purchase Threshold to $100,000. A second success of the Panel was their recommendation regarding a Simplified Small Purchase Threshold of $100,000. The Panel deemed this activity necessary to simplify the actions of procurement officials when issuing contracts with dollar values between $2,500 and $100,000. In other words, streamlining the process makes it more efficient and effective by simply making it easier.

This issue was strongly contested by representatives of small business who saw fewer opportunities to compete on government acquisitions and wanted to retain the status quo. Increasing the threshold to $100,000, in their mind, would encourage procurement officials to combine acquisition quantities and effectively generate fewer acquisitions. In consideration of small business concerns, the Act reserves all acquisitions between $2,500 and $100,000 exclusively to small business.

This success should be a tempered one, however, since Congress tied this increase to a Federal Acquisition Network (FACNET) capability. The threshold cannot be exercised over $50,000 unless the agency has a certified FACNET capability — to be defined by the Office of Federal Procurement Policy — in place, that increases the opportunity for small businesses to compete on government acquisitions. Has Congress appropriated additional funds for this technology? No! Funds are not authorized by this Bill, and must be budgeted and approved in the Authorization and Appropriations Bills. These Bills are issued each year by the Authorization and Appropriations Committees of the House and the Senate for each federal agency.

In addition, the drafters of the Act felt that adequate funds were already available to implement this activity. Will the agencies agree that no additional funds are necessary? Only time will tell if additional funds are needed and will be authorized and appropriated for implementation.

How then, will the agency pay for the cost of technology if additional funds are needed and are not forthcoming? Usually, this is accomplished in one of three ways, or all three: at the detriment of some other program; a reduction in manpower; or a reduction in performance initiatives. This could, therefore, be a minor victory in times of fiscal crises. In addition, small businesses may be required to obtain additional technology that interfaces with the government procurement system. This is a capitalization expense that could be passed on to the government as an element of overhead cost by those successful enough to win government contracts.

Stabilization of Threshold for Cost and Pricing Data. A third success resulting from a Panel recommendation is the recommended stabilization of the threshold for submittal of cost and pricing data under the Truth in Negotiations Act. To the aggravation of industry, this threshold and the amount of progress payments that can be withheld from payment under a government contract are easily targeted by Congress, and can change from one year to the next — at least in terms of the threshold Congress has finally conceded and allowed for automatic increases tied to inflation. Contractor payment methodology, however, was not revised and, in fact, was further restricted to proof of actual performance tied to measurable performance standards.

Changes to Protest Procedures. A partial success of a Panel recommendation can be inferred in the changes to the protest procedures. The Panel, in the short term, made these recommendations: 1) disappointed bidders be given reasonable and timely debriefings of the weaknesses and strengths of their individual proposals; 2) a protest be given one single standard of review in all protest forums; 3) frivolous protestors be required to pay the costs incurred by the government in defending its actions; and 4) agency heads be authorized to pay bid and proposal costs, attorney fees and expert witness fees to settle meritorious protests.

The law now decrees that protestors can submit a protest 5 days after the government conducts the debriefing. This will avoid late debriefings because the longer the delay, the more potential the schedule impact on the acquisition if it has to be stopped in order to settle a protest. In addition, the law now allows for payment of attorney fees and expert witness fees up to $150 an hour in support of meritorious protests.

The law is silent, however, on the issue of frivolous protest costs, and there is no single standard review process. Furthermore, the long-term recommendation concerning creation of a single administrative protest forum was not addressed.

There were other changes in this area not recommended by the Panel. Documentation submission and review times were altered from working days to calendar days. While this appears on the surface to provide the agency more time to prepare a case, it is, in fact, a misnomer. There was very little change in the preparation or review time, except in the case of the "express option" where the government provides slightly more review time. In addition, the law now allows submission of a "rule 4" file for review if requested by the protestor. This means that an agency could potentially be required to submit a copy of the entire acquisition file to the reviewing forum in defense of the protest. This could substantially increase the work of the protested agency.

The law further directs that an agency will now comply with the recommendations of the Comptroller General concerning protests within 60 days of receipt. If not accomplished, then the Comptroller General may bring some pressure to bear by awarding additional costs to the injured party and reporting the inaction directly to several committees within the Congress: the Committee on Governmental Affairs for the Senate, the Committee on Governmental Operations for the House, and the Appropriations Committees in both Houses. In this manner, Congress can be kept aware of agency compliance.

Congressional Additions. While the Section 800 Panel was somewhat successful in facilitating reform in government acquisition, other provisions in the law cannot be directly attributed to its research and recommendations. These include: relating pay to performance for government employees, establishing goals for women-owned businesses, and a provision entitled, "Sense of Congress on Negotiated Rulemaking."

First, the Secretary of Defense has 1 year to review and provide an enhanced system of performance incentives for government employees within the DoD. These incentives will ensure that the government adequately rewards its contractors for achieving cost, performance and schedule goals on existing and new acquisitions. Consequently, pay for performance will be the future basis of compensation.

Second, women-owned businesses are now recognized as a socio-economic discriminated group with regard to subcontracting opportunities on government contracts. Therefore, the government will encourage contractor and government acquisition officials to award 5 percent of total contract dollars to women-owned businesses. Contractors that comply will receive consideration for their achievements during the Weighted Guidelines profit determination pro-

cess, thus reaping the potential benefit of additional profit dollars.

Last, another provision recognizes the use of negotiated rulemaking and other policy discussion group techniques for avoiding litigation and achieving more effective relationships with industry. It appears to favor the use of group decisions in FAR rulings and policy initiatives. While insignificant on the surface, this provision could substantially alter the manner in which administrative decisions are made.

Is FAStA Actually Streamlining the Process?

Is this the last we will hear of acquisition reform? The answer is categorically no! The Deputy Under Secretary of Defense for Acquisition Reform has several process action teams already underway to consider different aspects of acquisition reform, and additional legislation has been forwarded to the "Hill" — legislation that is even more far-reaching than that contained in FAStA. The Office of Federal Procurement Policy has teams established to implement a series of "best practices" guides for use by all federal agencies. A FAR rewrite is being pursued to allow for more discretionary behavior, even though much of the FAR is embodied in law. Even industry is still "negotiating" for additional concessions. They are particularly interested in a comprehensive policy framework to direct the drawdown of the public and private sectors of the defense industrial base and are seeking statutory changes in competition thresholds, raising them from $100,000 to $500,000.

Will FAStA actually streamline the process? While the Act attacks some fundamental issues, it still remains a long way from actually streamlining the process. The procurement system is extremely complex, created by the need to implement a process of fairness and equity to engender public trust. To this end, a set of rules arose, designed to provide a fair capability for anyone to obtain a reasonable share of government business. That the process receives a lot of attention is not surprising, given the fact that over $73.5 billion (fiscal year 1993 appropriation for procurement, and research and development) is spent in 1 year on defense procurements alone.

While budget deficits force us to find new ways to satisfy requirements, we cannot forget that failure to perform brings censure and control. Therefore, the downside to reform, could be yet more reform.

National Performance Review's Role

Clearly, the National Performance Review (NPR) is having an effect. Reengineering and downsizing of the Federal Government are forcing agencies to streamline the procurement system and to invest in greater productivity — a major recommendation of the NPR. The incidence of reform is spiraling at an increasing rate, and statutory and regulatory changes are taking place. A perfect example is the initiative of the DoD to move away from using unique Military Specifications and Standards by taking advantage of the specifications and standards that are used in the commercial marketplace.

Perhaps a better question is, will the culture of the procurement system be able to handle the responsibility generated by the changes? The functional independence of the contracting officer is seriously challenged by the introduction of the integrated product team and the need to learn new skills to cope with the changing environment. Yet, the system is very resilient. As changes occur, they are slowly integrated into the acquisition process. Responsibilities will eventually change with the passage of time.

Perhaps more pointedly, will Congress be able to handle the bad publicity if something like the A-12 happens because of the reforms? If problems occur, most probably Congress will generate more oversight. While budget deficits force us to find new ways to satisfy requirements, we cannot forget that *failure to perform brings censure and control*. Therefore, the downside to reform, could be yet *more reform*.

Endnotes

1. *The World Almanac and Book of Facts*, ed. Mark S. Hoffman (St Martin's Press: New York, 1991), p. 456.
2. *Government Prime Contracts and Subcontracts Service*, Volume 1 (Procurement Associates: Covina, Calif., 1980), p. A-1-1.
3. In 1991, Congress chartered a commission to review all the laws governing the procurement process (now referred to as the acquisition process). To accomplish this task, Section 800 of the National Defense Authorization Act directed the DoD to establish an advisory panel under the sponsorship of DSMC (commonly referred to as the Section 800 Panel).