# THE FEDERAL ACQUISITION REGULATION (FAR)

## *Reforming the FAR A Proposed Roadmap*

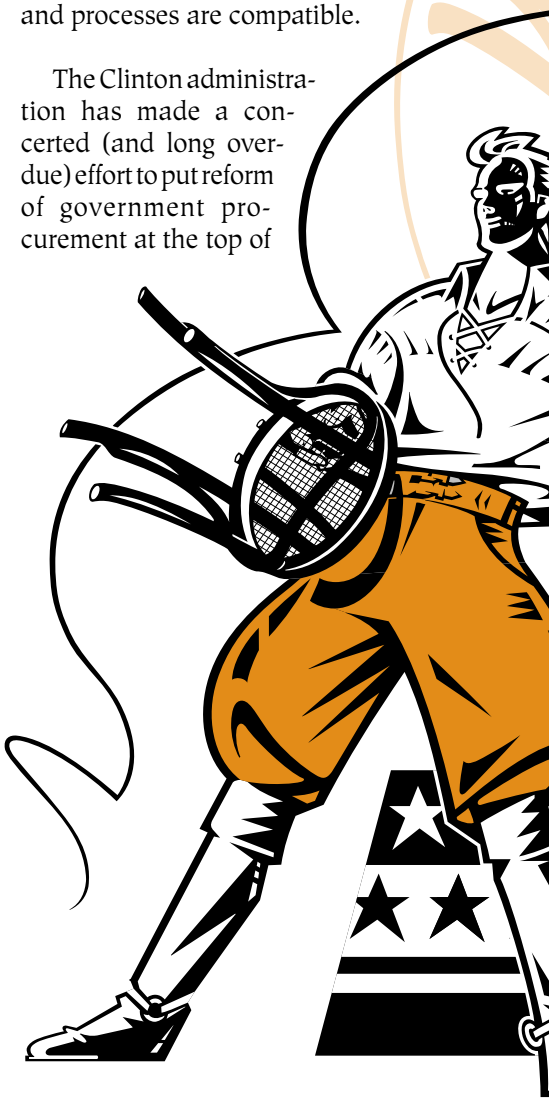
*Debra van Opstal*

The federal procurement system — with its hard-to-read laws, regulations, procedures and forms, and its "gotcha" culture — is the linchpin to the success of many of the Clinton Administration initiatives. Without effective reform of that system, many of its key policy goals simply cannot be achieved. These goals include sustaining military readiness with a declining defense budget; promoting greater reliance on commercial products and processes assisting defense industries to diversify; integrating commercial and military research and development (R&D), engineering and production; and fostering government-industry collaboration in multipurpose technologies.

Given the excellent work of the National Performance Review (NPR), even the most casual observer understands the parameters of the problem. Government procurement rules are so complex as to be incomprehensible to all but the trained specialist. The pool of available contractors is limited to those firms that can hire a staff of attorneys and accountants to chart their way through the minefield of government regulations. Even when the contract requirements are well understood, the cost of complying with many of the government-unique contract terms and conditions either raises the price the government must pay for its goods and services (when the costs can be passed on), or makes it uneconomical for firms to do business with the government when they cannot. Criminalization of error adds unacceptable risk to the process; many firms are simply unwilling to bet their corporate reputations and risk legal liability on factors that are unrelated to price and quality.

The net effect is that no exhortation to explore lower cost commercial solutions will work without a significant change in the process. Attempts to assist defense contractors to diversify away from reliance on government contracting (a path already fraught with difficulty) will flounder or fail if the high overhead costs of government contracting are spread to the nascent commercial businesses. Few commercial businesses would ever willingly commit business, financial, and market suicide by integrating their government and commercial operations, even where the technologies and processes are compatible.

The Clinton administration has made a concerted (and long overdue) effort to put reform of government procurement at the top of



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the list of national priorities. It successfully supported the pathbreaking 1994 legislation that removed many of the unique burdens of government contracting from prospective commercial item transactions. The Department of Defense is in the throes of the first major overhaul in 50 years of military specifications and standards (many of which are obsolete or describe products and processes in unnecessarily rigid detail). The NPR, chaired by Vice President Al Gore, proposed a rewrite of the Federal Acquisition Regulation (FAR), which is the master blueprint for federal contracting procedures, from prescriptive rules into guiding principles.

The FAR is clearly a prime target for reform efforts. As the NPR observed, the thicket of rules and procedures in the current FAR stifles creativity and innovation in contracting. It holds the contracting community captive to process rather than results. After-the-fact second-guessing by the audit and oversight communities creates a hidebound culture of fear and inflexibility.

At the Center for Strategic and International Studies, a Working Group on FAR reform, chaired by former Office of Federal Procurement Policy (OFPP) Administrators Karen Hastie Williams and Robert Bedell, was created to assess the NPR's proposal. Although the Working Group concurred that federal acquisition is profoundly flawed, it took issue with the conclusion that the proper remedy is to translate the rules of acquisition into guiding principles.

The FAR is not just a document; it is a system. Its intrinsic rigidity stems more from a breakdown in process than from overly prescriptive language. Although no one would assert that the FAR is a perfect document, the Working Group concluded that merely changing the language of the FAR without simultaneously addressing the underlying process would have limited, if not perverse, effects.

**Converting From Rules to Principles**

The Working Group saw some clear benefits in providing the contracting workforce with guiding principles and greater discretion, as proposed by the NPR. Under no acquisition regime have contracting officers been given explicit guidance on the statutes, policies, or ultimate goals behind the regulations. Indeed, it recommends that a description of the objectives and purpose of the regulations should be provided for each section of the FAR and for the document overall. However, the group concluded that an across-the-board substitution of principles for rules is neither warranted nor desirable for several reasons.

**THE CLINTON ADMINISTRATION HAS MADE A CONCERTED EFFORT TO PUT TAMING THE FEDERAL PROCUREMENT SYSTEM AT THE TOP OF ITS LIST OF NATIONAL PRIORITIES.**

First, many sections of the FAR are not in dispute. They are based on a long history of administrative interpretation, case law, and government-industry dialogue; sweeping away these commonly understood terms and procedures in a FAR rewrite would complicate rather than simplify the procurement process. The Working Group recommended identifying and targeting specific problem areas instead of scrapping the whole document.

Second, the FAR already provides a substantial degree of flexibility to contracting officers in many of its sections — a discretionary authority that is simply underutilized. Where little or no discretion is available, such as in the implementation of socio-economic goals, the requirements typically flow from law or executive order and could not, in any case, be unilaterally eliminated in a FAR rewrite. But the fact that contracting officers choose not to exercise the discretion provided in the FAR indicates that process and culture, not language, are first-order problems.

Third, the Working Group is concerned that granting contracting officers essentially a "green light" to interpret contractual requirements as desired runs the risk of creating an even more onerous procurement system. Clearly, the current "red light" approach — which sends the signal that anything that is not specifically permitted is prohibited — is far too rigid. Nevertheless, the pendulum swing to a "green light" mentality — which permits anything that is not specifically prohibited — might not yield the desired results. The danger of such an approach is that it fails to take into account the formidable and entrenched cultural barriers that will complicate, if not compromise, the reform effort. It sets no limit on the ability of contracting officers to impose additional contract requirements in an environment in which all contractors appear to be viewed a priori as profiteering felons; all contracting of-

ficers face the possibility of administrative, civil or criminal penalties for exercising too much flexibility and initiative; and the audit and oversight communities are actively encouraged to "second-guess" both the contacting officers and the industry contractors.

In the existing environment of fear and mistrust, there is room for honest doubt that guiding principles would work as intended. The geographic and cultural distance between the White House and field contracting offices (where contracting decisions are actually made) typically attenuates the impact of top-down policy directives. Moreover, the lack of any evaluating measures to assess how well the guidance is applied makes follow-through a virtual impossibility.

**Problems in the Process**

The Working Group found that the fulcrum for change resides in the FAR process, not in the language of the document. It identified five systemic problems so profound as to derail any policy reform effort:

**Lack of Leadership Over the FAR System.** Although the OFPP has the legislative mandate to oversee the regulatory process and to eliminate unnecessary or burdensome regulations, it has never decisively exercised that authority. Without strong leadership, FAR reform cannot be successfully implemented. The Working Group recommended that, at a minimum, the president modify Executive Order 12931 in a way that—

- clearly establishes the preeminence of OFPP over the process (rather than sharing responsibility with the agencies); and
- provides the OFPP administrator with adequate authority to request temporary staffing as needed from other agencies.

**Lack of Uniformity Across the System.** Prior to the creation of the FAR, contractors found that doing business with different federal agencies — even different offices within the same agency — was like selling to different foreign governments. The FAR was designed to bring some semblance of consistency and uniformity to the federal procurement system. Even before the ink was dry on the new FAR, however, the goal of a single regulation was undermined by voluminous agency-unique statutory requirements that were implemented in agency supplements. Lower levels within agencies began issuing their own guidance and interpretation of the FAR. Because agency contracting officials invariably look to their own sets of "shadow regulations" for guidance, effective procurement reform will require tighter controls on the ability to promulgate regulations at the agency level. The Working Group recommended that—

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- all agency and lower-level regulations, directives, and instructions that repeat, reinterpret, or conflict with the FAR be eliminated by a certain date; and
- agency supplementation authority be limited to requirements that are both specific and unique to their procurement needs, as approved by the OFPP Administrator.

**Lack of Internal Discipline.** The FAR system, while imposing a great many restraints on industry, fails to impose discipline on itself. A multitude of conflicting signals permeate the system, such as oversight directives that contradict the FAR. Policy directives are not always followed in the field. Few means exist to enforce adherence, and even fewer ones to assess internal compliance. For example, although certain types of agreements, such as cooperative research and development agreements, are excluded from FAR requirements, they are routinely imposed on industry partners. Moreover, widespread and repetitive use of "nonstandard" clauses adds contractual requirements that have no basis in either the FAR or the agency supplements. The Working Group acknowledged that there are no "silver bullet" recommendations to create discipline on the government side of the contracting process. Nevertheless, a clearer management voice that can be heard through the contracting ranks of many agencies (and over the dull roar of competing directives), and well-established lines of management authority and accountability throughout the system are essential prerequisites to reform.

**Systematic Barriers to Empowerment of Contracting Officers.** Discretion is a double-edged sword for the contracting community. Few incentives, other than policy exhortation, encourage innovative contracting approaches, while disincentives abound. The personnel system does not reward acceptance of risk or exercise of initiative. Error or a failed pro-

curement could result, in the best case, in a black mark on the contracting officer's personnel file and, in a worst case, in a criminal investigation. Indeed, contracting is one of the very few functions in the Federal Government in which employees may be criminally liable for errors they make on the job. Moreover, their ability to innovate is constrained by the audit and oversight functions, which tend to drive the procurement process in more conservative directions. The Working Group recommended that—

- the contracting function be decriminalized except in cases of wilful misconduct;
- alternative evaluation criteria and reward methods be adopted to encourage contracting officers to manage risk; and
- the FAR be revised to eliminate the need for contracting officers to seek higher-level approval for any deviation from the audit opinion.

**Overly Prescriptive Procedural Guidelines Imposed by the Audit and Oversight Functions.** Just as military specifications and standards tend to specify a unique production process, the audit and oversight guidelines tend to prescribe a contractor's organizational and management structure. Although these guidelines have no basis in the FAR, they are a key determinant of the contracting process. In a number of key functional areas — accounting, material management, government property, supplier management procedures — compliance with quantitative, how-to checklists creates a structure that is at odds with best commercial practices. The problem is that the government tends to fixate on process when it should be focusing on end results. The failure to meet numerical targets or detailed process guidelines — developed years ago in a totally different business and procurement environment — often has little bearing on whether the company is delivering high quality at a reasonable price.

Reform of the FAR system must surmount the hurdle of an audit and oversight-driven culture. The Working Group developed the following recommendations:

- Oversight functions should set performance rather than process or quantitative targets.
- Agencies should be encouraged to establish a "Commercial Process Center of Excellence" to provide support to administrative contracting officers and auditors in evaluating key output attributes of commercial organizations.
- Government activities exemplifying progressive procurement practices should be recognized through a Baldrige-type award for excellence.
- Criteria should be established to measure how well the audit and oversight communities are supporting innovative contracting mechanisms, and these criteria should be part of their personnel evaluations.
- Audit efficiency should not be based on the inflated number of expenditures that an auditor queries (which sends the unproductive signal that success is measured simply by questioning more expenditures), but on the more realistic number of cost savings through adjustments in contract price.
- Audit personnel should acquire greater exposure to state-of-the-art accounting practices through joint training with industry, participation in professional associations, or fellowships in industry.

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## Conclusion

The government is no longer a major buyer in many of the markets it once dominated, and it can no longer arbitrarily impose its ways and culture on U.S. business. It cannot afford — on economic or security grounds — to put U.S. companies at a competitive disadvantage simply because they sell to the government. Neither can the government afford to sustain its own captive industrial base.

Simplifying the purchasing procedures for commercial items is an important first step. But commercial item procurement, which has been the target of the most recent reform efforts, is only part of the solution — not a solution in itself. The ultimate goal of procurement reform should be to permit the government to take advantage of existing research, engineering, and manufacturing capabilities in the U.S. industrial base to provide the government with items developed for and tailored to its needs. Without a fundamental reorientation of the government's contracting philosophy and buying practices, current reform efforts will fail to achieve this objective.

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**Editor's Note:**

Copies of the full report, *Roadmap for Federal Acquisition (FAR) Reform*, 1995, are available by calling the Center for Strategic and International Studies, 1800 K Street, N.W., Washington, D.C. 20006. Telephone (202) 887-0200; Fax (202) 775-3199.