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Risky Business: Managing Interagency Acquisition

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FEATURE COMMENT: Risky Business: Managing Interagency Acquisition

Some celebrities live by the credo that any publicity—positive or negative—is good publicity. In procurement, the better motto is “no news is good news.” Media interest in procurement typically results from bad judgments, errors, wasteful practices or scandals. Similarly, no one wants to see their program headlining a Government Accountability Office report. And, surely, a bureaucrat’s worst nightmare is inclusion in GAO’s *High Risk Series*.

But sometimes the spotlight helps. GAO recently added the management of interagency contracting to its high risk list. GAO-05-207, *High Risk Series: An Update* (Jan. 2005), available at <http://www.gao.gov/new.items/d05207.pdf>; see 47 GC ¶ 58. Bravo for GAO! This FEATURE COMMENT articulates the concern that interagency acquisition, the poster child for the flexible, streamlined, businesslike approach of the 1990’s acquisition reform movement, has become our procurement system’s Achilles heel.

At one level, GAO highlights what we already knew. See, e.g., “Task and Delivery Order Contracting: Congress Speaks, GAO Reports, and the FAR Does a Fan Dance,” 14 N&CR ¶ 32; “Task and Delivery Order Contracts: The Pot Is Boiling,” 13 N&CR ¶ 18 (“The failure of the [Federal Acquisition Regulation] to ... provid[e] the agencies useful guidance on the use of task and delivery order contracts has resulted in virtual anarchy.”); “Task and Delivery Order Contracting: Great Concept, Poor Implementation,” 12 N&CR

¶ 30. In recent years, there’s been growing recognition of the problems and, fortunately, increased congressional and executive branch damage-control efforts. In its January 2005 high risk list update, GAO concedes that much has been done:

In 2003, the Congress sought to improve contract oversight and execution by enacting the Services Acquisition Reform Act. The Act created a new chief acquisition officer position ... and enhanced workforce training and recruitment. More recently, the Congress responded to the misuse of interagency contracting by requiring more intensive oversight of purchases under these contracts. In July 2004, [the General Services Administration] launched “Get It Right,” an oversight and education program. ... Additionally, to address workforce issues, [Office of Management and Budget], GSA, and [Department of Defense] officials have said they are developing new skills assessments, setting standards for the acquisition workforce, and coordinating training programs aimed at improving the capacity of the federal acquisition workforce to properly handle the growing and more complex workload of service acquisitions.

Nonetheless, GAO makes a compelling case for concern:

If not properly managed, a number of factors can make these interagency contract vehicles high risk in certain circumstances: (1) they are attracting rapid growth of taxpayer dollars; (2) they are being administered and used by some agencies that have limited expertise with this contracting method; and (3) they contribute to a much more complex environment in which accountability has not always been clearly established. Use of these contracts, therefore, demands a higher degree of business acumen and flexibility on the part of the federal acquisition workforce than in the past. ... [T]he challenges associated with these contracts, recent problems related to their management, and the need to ensure that the government effectively implements measures to bolster over-

sight and control so that it is well positioned to realize the value of these contracts warrants [attention].

Abu Ghraib: The Final Straw?—So, why did “management of interagency contracting” make GAO’s high risk list this time around? First, the scope of the problem continues to grow as interagency contract vehicle usage steadily increases. GAO notes, “The General Services Administration (GSA) alone ... has seen a nearly tenfold increase in interagency contract sales since 1992, pushing the total sales mark up to \$32 billion. Other agencies, such as the Department of the Treasury and the National Institutes of Health, also sponsor interagency contracts.”

Moreover, despite prior GAO and IG reports and warnings, nothing garners attention like a high-profile scandal. The incendiary allegations of contractors participating in the Abu Ghraib prison abuses apparently provided the straw that broke the camel’s back. As GAO explained, “The inspector general for the Department of the Interior found that task orders for interrogators and other intelligence services in Iraq were improperly awarded under a GSA schedule contract for information technology services.” But the out of scope work—a longstanding problem with these vehicles—was the tip of the iceberg. The larger concerns with the use of interagency contracting were (1) the lack of post-award contract management and (2) the pathologies associated with fee-based Government procurement. See, e.g., the Fay Report, <http://news.findlaw.com/hdocs/docs/dod/fay82504rpt.pdf>, at 47-52; and “Contractor Atrocities at Abu Ghraib: Compromised Accountability in a Streamlined, Outsourced Government,” 16 Stan. L. & Pol’y Rev. 549 (forthcoming 2005).

The Contract Management Crisis—While much of the audit community’s energy has been applied to chronicling the lack of competition during the award of interagency contracts, less attention has been focused upon the troubling vacuum surrounding the post-award management of task orders. On the one hand, it seems reasonable to suggest that the servicing agency, in return for the fee it receives, should bear responsibility for managing the work. Conversely, the purchasing agency seems better positioned to supervise the work. Unfortunately, anecdotal evidence suggests that the diffusion of responsibility often results in neither agency properly managing the task orders. For example, the Fay in-

vestigation found that the officer in charge of interrogations received no parameters or guidance for use of contractor personnel, was unfamiliar with the contract’s terms and procedures, made no mention of a Government Contracting Officer’s representative, and understood her primary point of contact to be the contractor’s on-site manager. This sub-optimal situation is exacerbated because neither the purchasing nor the servicing agency enjoys sufficient personnel to manage their contractors’ efforts.

No issue threatens the integrity—perceived and actual—of our procurement system more than the (current and prospective) inadequacy of the Government’s contract management resources. GAO recently found insufficient post-award contract management on more than a quarter of the DOD contracts it reviewed. GAO-05-274, *Contract Management: Opportunities to Improve Surveillance on Department of Defense Service Contracts* (March 2005); see 47 GC ¶ 161, this issue. It’s disheartening to read DOD’s perception that “insufficient surveillance occurred because surveillance is not as important to contracting officials as awarding contracts. ...” Nor is it encouraging that “surveillance was usually a part-time responsibility and some personnel felt that they did not have enough time in a normal workday to perform their surveillance duties.”

Accordingly, it’s easy to agree with Steve Kelman’s conclusion “that ‘contract administration was largely a stepchild of procurement reform’ in the 1990s and ... [needs] attention in the future.” “Acquisition Reform, A Progress Report,” 16 N&CR ¶ 48. And maybe most right-thinking minds now appreciate the fundamental risk of governing amid an aggressive outsourcing (OK, competitive sourcing) regime that woefully lacks appropriate acquisition resources. But don’t bet on it. Investing in acquisition workforce remains a tough sell on both the Hill and on Pennsylvania Avenue.

Reliance on interagency contracting makes sense in such an environment. GAO explains, “These types of contracts have allowed customer agencies to meet the demands for goods and services at a time when they face growing workloads, declines in the acquisition workforce, and the need for new skill sets.” Similarly, we must question whether agencies will be willing (or able) to wean themselves from these practices.

The Fee as Incentive—The other concern highlighted by the Abu Ghraib experience—skewed incentives that derive from fee-based purchasing vehicles—

is less well documented. GAO explains that a “fee-for-service arrangement creates an incentive to increase sales volume in order to support other programs of the agency that awards and administers an inter-agency contract. This may lead to an inordinate focus on meeting customer demands at the expense of complying with required ordering procedures.”

These observations mirror the Interior Department’s findings. After finding that eleven of the twelve procurements it reviewed fell outside the scope of the GSA schedules used, the Interior Department IG focused on the role played by inter-agency contracting fees. The IG concluded that the pursuit of fees distorted the moral compass that we expect to animate Federal Government procurement officials. Specifically, the IG highlighted “[t]he inherent conflict in a fee-for-service operation, where procurement personnel in the eagerness to enhance organization revenues have found shortcuts to Federal procurement procedures and procured services for clients whose own agencies might not do so.” Memorandum from Earl Devaney, inspector general, Department of the Interior, to assistant secretary for policy, management and budget (July 16, 2004), at <http://www.oig.doi.gov>. A similarly critical assessment recently came from the GSA IG’s review of the Federal Technology Service (FTS).

Our procurement regime assumes a model in which agencies rely upon warranted purchasing professionals to procure their needed supplies and services. See, e.g., FAR subpt. 1.6. This longstanding arrangement bifurcates programmatic authority from procurement authority. We assume that COs will be familiar with, understand and follow congressional mandates and effectuate the Government’s procurement policies in making these purchases. COs are expected to meet the program manager’s needs, but only within the established constraints of the procurement system.

Unfortunately, the incentives associated with interagency fee-based vehicles alter this dynamic. Fee-based purchasing offices (or, in other words, the servicing agency) need revenue to survive. Thus, the pursuit of fees, rather than any congressionally mandated mission, drives these purchasing organizations. The Abu Ghraib experience offers a startling illustration. Lay observers struggle to grasp why the military relied upon the Department of the Interior’s National Business Center (NBC) to procure the services of contractor personnel to

conduct interrogations in Iraq and Guantanamo Bay. Yet NBC’s Web site, www.nbc.gov, touts a diverse customer base including (1) the Public Defender Service of the District of Columbia; (2) the Millennium Challenge Corporation, which provides foreign development assistance to countries that adopt pro-growth strategies for meeting political, social and economic challenges; and (3) the African Development Foundation, which provides grants directly to private organizations in Africa to carry out sustainable self-help development activities. Go figure. Like a commercial firm, to the extent that “[t]he NBC operates on a full cost-recovery business basis[,]” it ultimately exists to generate fees. See NBC, “Overview,” at www.nbc.gov/overview.html. That may constitute businesslike Government, but it’s a strange mandate for a Government instrumentality.

Businesslike Government?—The private sector offers numerous lessons that can increase Government performance. Fees, no doubt, offer a useful incentive structure. But there are limits. Unlike most COs, buyers in organizations dependent upon fees must balance their duty to serve the public with their need to generate income. For example, readers of *THE GOVERNMENT CONTRACTOR* may recall that the Government Printing Office (GPO) previously threatened to bar federal purchasing offices from publishing solicitation notices in the Commerce Business Daily (CBD, since replaced by FedBizOpps). GPO, no doubt, was frustrated that those agencies had failed to pay their printing fees and badly wanted those “deadbeat” agencies to fulfill their commitments.

But GPO lost sight of the big picture. The CBD was “the public notification media by which U.S. Government agencies identify proposed contract actions and contract awards.” FAR 5.101. Both the Small Business Act, 15 USCA § 637(e), and the OFPP Act, 41 USCA § 416, required agencies to publish notices in the CBD. An outstanding debt to GPO was never an exception to the publication requirement; nor did such a debt excuse failure to comply with the publication and response times mandated in FAR 5.203. See Steven L. Schooner, “The Future of ‘Businesslike’ Government: The CBD Asserts Its Rights Against Debtor Federal Agencies,” 41 GC ¶ 112; and Andrew M. Sherman, “GPO Answers Critics: Commerce Department Policy to Suspend Publication of Solicitation Notices for Debtor Agencies Furthers

Procurement Process Objectives,” 41 GC ¶ 167. Remember, businesses may “serve” the public, but only to the extent that they serve their owners. Government serves the public, not the Government. See also the (admittedly lengthy) article, “Fear of Oversight: the Fundamental Failure of Businesslike Government,” 50 Am. U. L. Rev. 627 (2001); “Oversight of Procurements: Is It Adequate?,” 15 N&CR ¶ 64; and “Oversight of Procurements: Delayed Addendum,” 16 N&CR ¶ 1.

Similarly, buying agencies have strong incentives to fuel the fee-based enterprises. Program managers at the purchasing (or receiving) agency willingly pay a franchise fee (or a “premium”) to the servicing agency to avoid the bureaucratic constraints (such as competition mandates) that slow down in-house COs. In turn, the servicing agency gladly streamlines the purchase. Finally, as discussed above, fee-based purchasing instrumentalities have little stake in the outcome of contracts that they award. Once the contract is awarded, the servicing agency lacks both the interest and the resources to manage the contract. Here, Ralph Nash aptly noted that, “[i]n the traditional tug-of-war between ‘customer satisfaction’ ... and obtaining competition, customer satisfaction [is] winning by a large margin.” “Competition for Task Orders: The Exception or the Rule?,” 18 N&CR ¶ 42.

It seems reasonable to ask whether introducing the interagency fee structure accelerates the potential for a “race to the bottom.” For example, while the Economy Act was not intended to permit offloading of work or funds, as the end of the fiscal year approaches, agencies frequently “park” or “dump” funds by issuing open-ended or vague orders that neither state a specific and definite requirement nor identify a bona fide need.

Who’s Responsible?—But what should be done? Although past experience may argue to the contrary, there’s nothing inherently wrong with interagency contracting. The problem lies in implementation. See, e.g., “Acquisition Reform, A Progress Report,” 16 N&CR ¶ 48. GAO reports that one of the difficulties of injecting accountability into the process is that “[e]nsuring the proper use of interagency contracts must be viewed as a shared responsibility of all parties involved.” Until now, this diffusion of responsibility created an oversight and management vacuum. Someone needs to take charge.

OFPP Administrator David Safavian needs to make good on his confirmation pledge to restore and reinvigorate the acquisition workforce. Here, actions will speak louder than words, and time will tell whether he wields sufficient power to achieve anything more than cosmetic improvements. The Government needs more (1) experienced, creative and thoughtful professionals to proactively enter into results-oriented contractual agreements and (2) qualified business people to manage effectively the performance of the contractors until their work is completed. Procurement, particularly the management of service contracts, is a “high-level job not, as presently conceived, a ministerial task.” “Result-Oriented Contracting: Changing Our Thinking,” 14 N&CR ¶ 8; and “Result-Oriented Contracting: Delayed Addendum,” 14 N&CR ¶ 13. Simply adding more auditors won’t solve the problem.

Next, to minimize the chaos, someone, preferably OFPP (or, in the alternative, GSA), must assert supervisory control over, and potentially consolidate, the various interagency purchasing organizations. Our decentralized procurement system empowers agencies to procure to meet their needs. And it makes sense to permit agencies to procure needed commodities through agencies—such as GSA or the Defense Logistics Agency—that purchase those commodities in greater quantities. But interagency purchasing premised upon neither of these rationales leads to the current disaggregated morass based upon entrepreneurial opportunism.

Finally, it’s also time to have a meaningful conversation about the appropriate role of businesslike models, generally, and fees, specifically, in governance. Is it true that agency eagerness to enhance organization revenues might breed undesirable purchasing behavior? Can the Government emulate private-sector incentive structures? On the one hand, momentum is building to increase incentive- and performance-based compensation throughout the civil service. On the other, Congress previously capitulated to adverse public reaction to an Internal Revenue Service, incentivized to maximize recoveries from taxpayers, by creating a kinder, gentler (and, empirically, less effective) IRS. In many U.S. municipalities, furious debate surrounds traffic light cameras, particularly where increased revenues lead to increased profits.

Barring a draconian solution, such as severely limiting usage of interagency vehicles, we can't expect prompt, dramatic improvement. GAO is right that "effectively addressing interagency contract management challenges will require agency management to commit the necessary time, attention, and resources, as well as enhanced executive branch and congressional oversight." In the current environment, that's a tall order.



This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by Professor Steven L. Schooner, Co-Director of the Government Procurement Law Program at the George Washington University Law School, and a member of THE GOVERNMENT CONTRACTOR Advisory Board.