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Emerging Policy and Practice Issues (2005)

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SESSION 9

EMERGING POLICY AND PRACTICE ISSUES

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LOOKING FORWARD AND BACK

We began our discussion last year with this admittedly skeptical observation:

The confirmation of David Safavian as Administrator of the Office of Federal Procurement Policy (OFPP), while potentially significant, fails to dominate the procurement policy scene as we enter 2005.... Nonetheless, we hope he makes good on his commitment to the acquisition workforce, our highest priority for his tenure at OFPP. At the same time, we genuinely sympathize with him in his efforts to effectuate a rational procurement policy in light of distractions ranging from what can only be called scandals

We take that last part back. David Safavian's tenure at OFPP lasted less than a year. His arrest in September 2005, allegedly after he resigned his White House appointment, plasters another unnecessary black mark on an already embattled procurement community. Moreover, Safavian's lackluster accomplishments (some of which we address below) were, if not predictable, nonetheless disappointing.

Safavian's arrest and indictment for obstructing investigations and making false statements during his pre-OFPP stint at the General Services Administration, with the potential for a Spring 2006 trial, set back, and may have crippled, serious procurement reform for the remainder of the Bush administration. U.S. Department of Justice, Press Release: *Former GSA Chief of Staff David H. Safavian Indicted for Obstruction of Proceedings and False Statements* (Oct. 5, 2005), available at www.usdoj.gov/opa/pr/2005/October/05_crm_521.htm; John Bresnahan, *Judge Declares April 3 Start for Safavian Trial*, ROLL CALL (Dec. 14, 2005); 47 GC ¶ 399. The Bush administration responded slowly. At the close of 2005, the White House had not nominated a successor, and Robert Burton, a career executive, again soldiers on as the Acting Administrator. [Conversely, we are heartened by reports that the Administration is leaning towards a credible, steady, highly experienced acquisition professional for the position.]

The procurement community has every right to demand more of the next OFPP Administrator. "Safavian spent the bulk of his pre-Government career as a lobbyist, and his nomination to a top oversight position stunned the tightly knit federal procurement community. A dozen procurement experts interviewed by TIME said he was the most unqualified person to hold the job since its creation in 1974." Karen Tumulty, Mark Thompson & Mike Allen, *How Many More Mike Browns Are Out There?*, TIME (Oct. 3, 2005). For the next Administrator, this will be a "rebuilding year." [As we write this, the successes of Joe Paterno and Joe Gibbs suggest optimism.] He or she will have less than two years before the 2008 elections to accomplish meaningful reform.

I. UNDERSTANDING THE FORCES FOR CHANGE: DEVOLUTION OF THE CONTRACTING FUNCTION

To understand the emerging forces for change, we should recognize that one strength of the U.S. procurement system is its sheer longevity. Over many decades, we see patterns emerge, and we can begin to predict future lines of progress. One important area for prognostication is the acquisition function itself: how will it change and reshape over the coming years?

When the Bush administration began, the procurement community wondered how it would shape procurement policy. “Competitive sourcing” under Office of Management & Budget Circular A-76 clearly was (and remains) a priority, but (as discussed below) it has been relegated to a side-show to procurement reform. See, e.g., *OFPP Declares Public-Private Competitions a Success*, 47 GC ¶ 66. After the Sept. 11, 2001 attacks and the commencement of hostilities in Afghanistan and Iraq, many wondered if homeland security, foreign contracting, or contingency procurement would become the focus of reform.

What has become clearer, however, is that procurement reform must and will focus on the procurement function itself—on how goods and services are bought, and on who buys them. See, e.g., *OFPP Issues New Policy Letter on Developing and Managing the Acquisition Workforce*, 47 GC ¶ 187. OFPP’s Robert Burton formed a task force on interagency contracting which will focus, in important part, on how interagency contracts operate. See *OFPP Forms Interagency Acquisition Working Group*, 47 GC ¶ 521. Further, Rob Burton’s key policy initiatives—improving the acquisition workforce, interagency contracting, strategic sourcing, competitive sourcing, performance-based contracting, and the federal procurement data system – focus to a large extent on *how* the procurement function will be done. See Robert A. Burton, *Getting the Best Results from Our Acquisitions*, SERVICE CONTRACTOR, at 7 (Winter 2006). Of course, there are alternative, equally valid visions. Domenico C. Cipicchio, acting director, defense procurement and acquisition policy, sees four key issues likely to dominate the procurement landscape. See generally, *DPAP Head Outlines Major Issues For Defense Procurement*, 47 GC ¶ 460 (Nov. 2, 2005): (1) acquisition integrity [as discussed below, Randy “Duke” Cunningham breathed new life into the post-Drayton self-examination process]; (2) service contracting; (3) strategic sourcing; and (4) use of non-DOD (interagency) contracts.

To make sense of the current reforms, let’s focus on what seems to be the common imperative underlying the various reform initiatives: the need to bring order to a procurement function as it devolves away from the Government user—what some might call the “devolution” or “outsourcing” of the contracting function. See, e.g., *Acquisition Workforce and Interagency Contracting Need Reform, Speakers Tell Panel*, 47 GC ¶ 279 (GovWorks official noted need for further FAR guidance on when procurement should be done through interagency contracting or outsourcing of procurement function); Christopher R. Yukins, *Feature Comment: Understanding the Current Wave of Procurement Reform—Devolu-*

tion of the Contracting Function, 47 GC ¶ 255. But see Ralph Nash, John Cibinic & Vern Edwards, *Contracting Authority: Who Has the Power?*, 19 NASH & CIBINIC REP. ¶ 32 (roundly criticizing “devolutionary” theory).

A. DETOUR: IS COMPETITIVE SOURCING DEAD?

To assess how the procurement function has devolved into the private sector, let’s first step back and assess the progress of outsourcing (or “competitive sourcing”). Last year we suggested that, despite the relentless attention focused upon competitive sourcing, it seemed that the competitive sourcing regime experienced surprisingly little meaningful evolution. That seems similarly apt today. Of course, OFPP continues to tout the initiative’s success. *OFPP Declares Public-Private Competitions A Success*, 47 GC ¶ 66 (Feb. 9, 2005) (claiming annual gross savings of approximately \$500 million (or 1.5 percent of the federal procurement budget)).

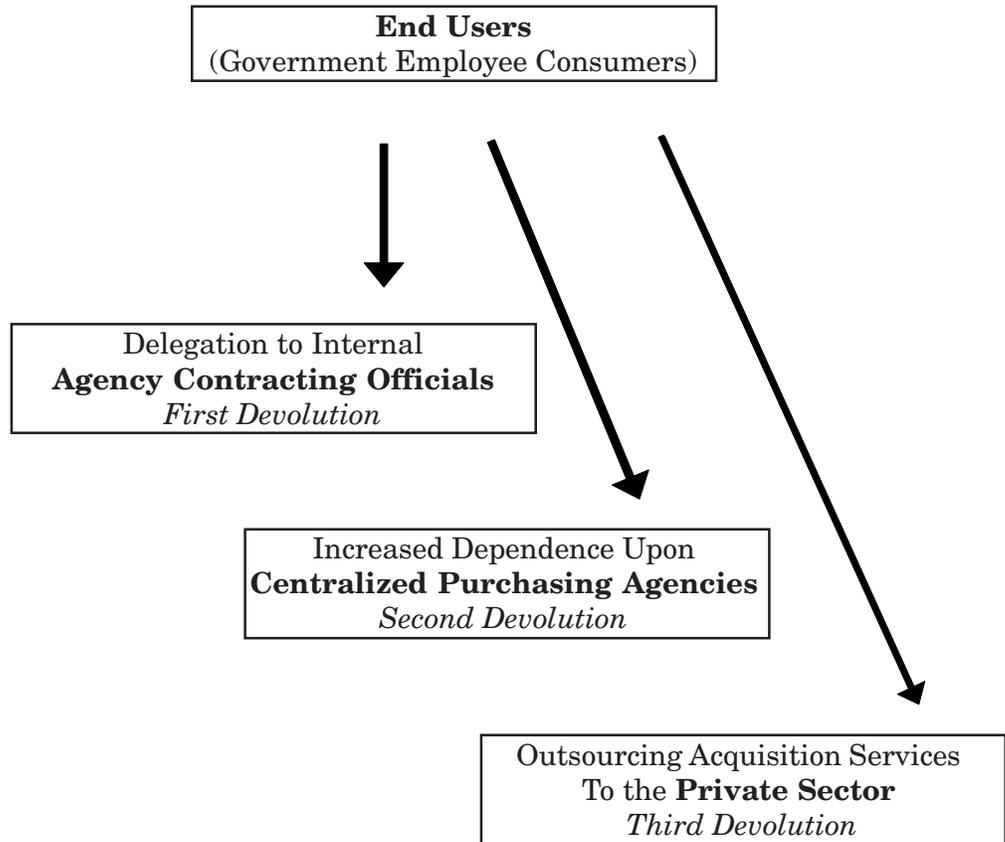
Yet the pressure to scale back, and the reasons to question both the wisdom and the implementation scheme of, the competitive sourcing initiative remains. *Congress Approves Spending Bill With Competitive Sourcing Restrictions*, 47 GC ¶ 498 (Nov. 30, 2005) (contracts must either propose a cost ten to 10 percent below the MEO or project \$10 million in savings); *President Signs Interior Appropriations Act Despite Competitive Sourcing Limitations*, 47 GC ¶ 367 (Aug. 24, 2005); *House Passes A-76 Amendment for Third Straight Year*, 47 GC ¶ 303 (July 13, 2005); DOD IG Report No. D-2006-028, *Defense Infrastructure: DOD Reporting System for the Competitive Sourcing Program*, www.dodig.osd.mil/audit/reports/FY06/06-028.pdf (Nov. 22, 2005); 47 GC ¶ 500. The DOD IG concluded that:

DoD [does] not effectively ... track and assess the cost of the performance of functions under the competitive sourcing program ... [U]sers entered inaccurate and unsupported costs, did not always maintain supporting documentation ..., and the [services] used different methodologies to calculate baseline costs. The overall costs and the estimated savings ... may be either overstated or understated [L]egislators and Government officials were not receiving reliable information to determine ... costs and benefits ... and whether [competitive sourcing] achiev[es] desired objectives and outcomes.

New Research Calls Into Question Efficacy of Outsourcing, 47 GC ¶ 206 (May 4, 2005); *DOD Competitive Sourcing Personnel Lack Training, IG Finds*, 47 GC ¶ 65 (Feb. 9, 2005).

The overall record of competitive sourcing has been mixed. Thus, the question is whether the *procurement function itself* has been outsourced successfully to the private sector. Our analysis of that question will proceed through three “devolutions”: (1) from the user to the agency’s own contracting personnel, (2) to centralized purchasing agencies, and (3) to private firms providing acquisition services. This model, while imperfect, provides a theoretical construct to understand where we stand in procurement reform, and how we expect future reform to unfold.

**Purchasing Authority
Devolution**



II. THE FIRST DEVOLUTION: SEVERING THE CONTRACTING FUNCTION FROM THE GOVERNMENT END USER

Our analysis proceeds with a focus upon the end user, the customer who uses purchased goods and services. For consumers, the user simply buys goods and services; in a firm, the same purchases likely are subjected to oversight and approvals by others. The private sector user/purchaser generally is responsible for ensuring that the purchase represents good “value for money,” can be held accountable for failed purchases, and, in theory, could be rewarded for purchases that add value.

Although purchasing authority within firms may be aggregated in a specific function (in order, for example, to gain economies of scale or to facilitate strategic purchasing), seldom do private entities employ what we might call a “contracting officer,” someone to whom others delegate purchasing authority, simply to cabin that authority. Why, then, has the Government systematically divorced purchasing authority from users (or “accountable” program managers) —those in the best position to identify “best value” for the Government—and centralized it with contracting officials?

Many sound reasons justify devolving procurement authority to a contracting official. Devolution reduces risks that funds will be misspent. Consoli-

dating purchasing in fewer hands reduces monitoring costs and helps ensure compliance with procurement rules. Conversely, there are costs of devolution. Inefficiencies are inherent in shifting purchasing authority to a separate class of buyers. At the same time, by burdening the procurement process with layers of special procurement requirements, Congress has made it impossible *not* to take many forms of purchasing out of users' hands.

A specialized system of "federal" contracting thus accumulates its own set of rules, which may be internally logical but pose an enormous barrier to entry for newcomers. Not surprisingly, many have argued for reducing those cumbersome rules for purely commercial purchases by the Government, see, e.g., *Technology Group Seeks Greater Parity Between Commercial Services and Commercial Supplies*, 47 GC ¶ 379, or simply dismantling those specialized rules, at least with regard to contract administration.

Much as a specialized procurement system accumulates inefficient rules, so too does it breed an inflexible workforce which, absent careful management and training, cannot keep pace with a rapidly advancing procurement system. See *Acquisition Workforce and Interagency Contracting Need Reform, Speakers Tell Panel*, 47 GC ¶ 279 (a "common theme emerged from remarks about acquisition personnel: Federal procurement has changed dramatically; the acquisition workforce has not"). As the acquisition workforce's ability to keep pace with change erodes over time, pressure grows to push the procurement function outside the Government—often without full consideration of outsourcing's costs.

III. ACQUISITION WORKFORCE: STILL WAITING

It is impossible to discuss the procurement system without acknowledging this human capital problem. In his confirmation hearings, David Safavian testified: "The strategic management of the human capital that makes up our acquisition workforce will be my number one priority." True to his word, he promptly promulgated a new OFPP Policy Letter 05-01, *Developing and Managing the Acquisition Workforce* (April 15, 2005), available at www.whitehouse.gov/omb/procurement/policy_letter_05-01.html; 47 GC ¶ 187. Despite the letter's bold, optimistic title, OFPP aimed too low, missed the mark, and squandered an important opportunity to effect meaningful change. The letter attempted to redefine cosmetically the acquisition workforce and describe how a portion of this deputized acquisition workforce should be trained. While the latter is important, the letter dodged the primary issue that daunts the workforce, potentially painted a deceptive picture of a growing acquisition workforce, and failed to communicate either a vision for, or leadership of, a reinvigorated corps of contracting professionals. See, e.g., Steven L. Schooner & Christopher Yukins, *Feature Comment – Empty Promise for the Acquisition Workforce*, 47 GC ¶ 203 (May 4, 2005); David H. Safavian, *Feature Comment – Delivering Results for the Acquisition Workforce*, 47 GC ¶ 267 (June 15, 2005) (retorting that Schooner "ignores the strategic approach and vision that the [OMB] and OFPP are implementing to improve agency human capital and financial and performance management[,] and concluding that: "OFPP's Policy Letter establishes a strong framework that will allow the workforce to grow, develop, mature and serve in the best interest of the Government and taxpayer."); see also 47 GC ¶ 257.

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It is difficult to improve upon the Senate Armed Services Committee's articulation that: "continuing problems ... are attributable, in significant part, to inadequate human capital planning and continuing reductions in the defense acquisition workforce Rather than developing new skills and new resources to address these new challenges, the Department of Defense tried to address them with existing resources using an already undermanned legacy acquisition workforce accustomed to staffing traditional defense procurements in the 1980's and early 1990's." S. Rep. 109-069—National Defense Authorization Act of 2006 (accompanying S.1042) (May 17, 2005). Further, "the increased flexibility provided by acquisition reform has not always been used in the best interest of the Department of Defense and the taxpayer. Over the last five years, a series of audits of [DOD] contracts by the [DOD] Inspector General and the [GAO] have revealed case after case of inadequate acquisition planning, insufficient competition, overpriced contracts, inappropriate expenditures of funds, and lack of attention to contract management." See also *SASC Continues Scrutiny of DOD Procurement*, 47 GC ¶ 419 (Oct. 5, 2005); 47 GC ¶ 230.

DOD is not alone. "[B]ecause of staffing shortfalls ... [among other things,] DHS procurement operations had transferred almost 90 percent of its obligations to other federal agencies through interagency agreements in FY 2004." Andrew Irwin, *Feature Comment: Homeland Security—Successes and Challenges in DHS' Efforts to Create an Effective Acquisition Organization*, 47 GC ¶ 300 (July 13, 2005); GAO-05-179, *Davis Raises Concerns About DHS Procurement Following GAO Report* (March 2005), www.gao.gov/new.items/d0179.pdf; 47 GC ¶ 217 (May 11, 2005). A number of recent GAO and IG reports offer additional anecdotes that highlight the seemingly pervasive inadequacy of resources available for contract management.

The power of monetary incentives to motivate excellent contractor performance and improve acquisition outcomes is diluted by the way DOD structures and implements incentives DOD has paid out an estimated \$8 billion in award fees ... regardless of outcomes [T]hese practices, along with paying significant amounts of fee for "satisfactory" performance, undermine the effectiveness of fees as a motivational tool and marginalize their use in holding contractors accountable for acquisition outcomes Despite paying billions in fees, DOD has little evidence to support its belief that these fees improve contractor performance and acquisition outcomes.

GAO-06-66, *Defense Acquisitions: DOD Has Paid Billions in Award and Incentive Fees Regardless of Acquisition Outcomes* (Dec. 2005), www.gao.gov/new.items/d0666.pdf; 47 GC ¶ 525 (Dec. 21 2005); GAO-06-144, *Contract Management: Further Action Needed to Improve Veterans Affairs Acquisition Function* (Oct. 2005), www.gao.gov/new.items/d06144.pdf; 47 GC ¶ 451 (Oct. 26, 2005) (factors that impeded implementation included insufficient staffing); *Study: Federal Agencies Support Earned Value Management in Theory, Not in Practice*, 47 GC ¶ 482 (Nov. 16, 2005) (earned value implementation suffered due to, among other things, lack of trained personnel and lack of senior management interest), study available at www.primavera.com/ev_study_results/. As the DOD IG noted in Report No. D-2006-010, *Contract*

Surveillance for Service Contracts, www.dodig.osd.mil/audit/reports/FY06/06-010.pdf (Oct. 28, 2005), 47 GC ¶ 483:

contracting officials ... did not provide sufficient contract oversight for service contracts to ensure that contractors were performing in accordance with contract specifications [For many of contracts in the sample,] contracting and program offices performed cursory reviews of contractor performance against costs ..., did not adequately record past performance history ..., and did not use performance-based contracting methods Overall, DoD could not be assured that it received the best value when contracting for services.

We have been heartened by the Section 1423 Panel's attention to this matter. See generally, *Acquisition Workforce and Interagency Contracting Needs Reform, Speakers Tell Panel*, 47 GC ¶ 279 (June 22, 2005) (citing GSA's David Drabkin: "Reforms ... cannot achieve their potential absent a workforce that is both appropriately qualified and sufficiently numerous to implement the reforms[.]"). The pathologies that created this crisis now span nearly fifteen years. See, e.g., GAO/NSIAD-96-46, *Defense Acquisition Organizations: Changes in Cost and Size of Civilian Structures* (Nov. 1995), www.gao.gov/archive/1996/ns96046.pdf. By 1999, the civilian acquisition workforce had fallen to 124,000, which, by GAO's estimate, was roughly half of its size a decade before. See GAO-02-630, *Acquisition Workforce: Department of Defense's Plans to Address Workforce Size and Structure Challenges* (April 2002), www.gao.gov/new.items/d02630.pdf. The slide accelerated thanks, in part, to the marked aging of the civilian workforce in the Defense Department. See, e.g., Statement of Dr. Diane M. Disney, Deputy Assistant Secretary, Civilian Personnel Policy, Department of Defense (May 18, 2000), available at hsgac.senate.gov/051800_Disney.htm.

We can do better. Reformers should take heart from GAO's recent report, which finds commercial program management more disciplined and effective than similarly situated Government projects. GAO-06-110, *Better Support of Weapons System Program Managers Needed to Improve Outcomes* (Nov. 2005), www.gao.gov/new.items/d06110.pdf; 47 GC ¶ 519:

[In] private sector companies that developed complex and technical products ..., we found that their success hinged on the tone set by leadership and disciplined, knowledge-based processes for product development and execution. ... Overall, by providing the right foundation and support for program managers, the companies ... consistently deliver[ed] quality products within targets, and in turn, transform[ed] themselves into highly competitive organizations.

IV. THE SECOND DEVOLUTION – TO CENTRALIZED PURCHASING AGENCIES

One important factor in modern Government program management, of course, is centralized purchasing agencies. To understand how acquisition authority has “devolved” to those centralized agencies, we should recognize that shifting the purchasing function into the hands of professional

contracting officials was merely the first step in the “procurement devolution.” Under this traditional contracting paradigm, procurement was done mainly by the customer agencies themselves, by in-house contracting personnel.

A. FACTORS CONTRIBUTING TO CENTRALIZED PURCHASING

A number of factors combined to further distance that purchasing function from the hands of agency contracting personnel. One factor was the decline in agencies’ acquisition workforces, discussed above. Another factor in this “second devolution” was the rise in interagency contracts, which allow agencies to meet their needs through *other* agencies’ contracting efforts. See Steven L. Schooner, *Risky Business: Managing Interagency Acquisition*, 47 GC ¶ 156; *Interagency Contracts for Interrogation Services Lacked Adequate Oversight*, 47 GC ¶ 214. The Clinton administration celebrated interagency contracts, and they exploded in size partly because some of their sponsoring agencies, such as GSA’s Federal Supply Service, lost their traditional appropriations in the mid-1990s. See, e.g., Federal Procurement Data Center, FEDERAL PROCUREMENT REPORT FY 2003, 14, 74 (2003) (\$85.7 billion of the \$290.3 billion spent on public procurement in 2003 passed through various forms of indefinite delivery/indefinite quantity (IDIQ) agreements), available at www.fpdc.gov/fpdc/fpr2003_final.htm. To survive, these “entrepreneurial” agencies had to *sell* their contracting services to other agencies. See, e.g., *New GSA Audit Cites “Significant Deficiencies” in CSCs’ Contract Compliance*, 47 CG ¶ 2.

These centralized purchasing agencies are tremendously important, particularly to the extent they can leverage enormous Government demand for far better price and quality terms. See, e.g., U.S. General Services Administration, *Proposed Organizational Design of GSA’s Federal Acquisition Service* (May 31, 2005) (describing mission of consolidated acquisition service), available at www.gsa.gov/gsa/cm_attachments/GSA_BASIC/FTS-FSS-REORG-DRAFT_Plan_R2-w-p9-m_0Z5RDZ-i34K-pR.doc; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, Article 11 (April 30, 2004) (EU Directive recognizes centralized purchasing agencies), available at europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm#package. At the same time, however, centralized purchasing agencies can easily lose sight of their missions and dissipate any efficiencies gained by devolving purchasing authority to them.

Over the past decade, two important innovations accelerated the second devolution of procurement authority (to centralized purchasing agencies): (i) the Government’s embrace of commercial items, see FAR pt. 12, and (ii) the rise of indefinite-delivery/indefinite quantity (IDIQ) task- and delivery-order contracts—what the Europeans call “framework” contracts. See, e.g., Sue Arrowsmith, Case Comment, *Framework Agreements Under the UK Procurement Regulations: The Denfleet Case*, 2005 PUB. PROC. L. REV. NA86; see also Sue Arrowsmith, *Framework Purchasing and Qualification Lists Under the European Procurement Directives: Part 1*, 12 PUB.

PROC. L. REV.115, 123 (1999) (attributing increased use of electronic media and electronic ordering to the increased importance of framework agreements).

By offering commercial items on IDIQ contracts, the centralized purchasing agencies erased traditional obstacles to interagency contracting. In the past, “customer” agencies found it difficult to fulfill specialized requirements through other agencies. That barrier dissolved with commercial items offered, on a unit basis, on interagency IDIQ contracts: the centralized purchasing agencies could offer customer agencies an almost infinite array of standardized commercial products and services, at competitive prices. In essence, program officials (users) at the customer agencies could employ IDIQ contracts to “reach through” the centralized purchasing agencies and buy directly from commercial vendors, with relatively little competition or paperwork. Paradoxically, while nominal purchasing *authority* ostensibly devolved *away* from agency users *to* centralized purchasing agencies, at the same time purchasing *choice* may have shifted back to the agency users.

V. ETHICS IN A POST-DRUYUN PROCUREMENT ERA

A. Establishing Priorities in Restoring Integrity: All of these shifts, however, are complicated by a growing unease with the integrity and accountability of those involved in the procurement process. Last year, we demonstrated our naiveté by suggesting that, after the Druyun sentencing and the tanker-lease furor, things could not get much worse. Instead Druyun proved a mere harbinger for, among others, Representative Randy “Duke” Cunningham.

[Cunningham] demanded, sought, and received at least \$2.4 million in illicit payments and benefits ... including cash, checks, meals, travel, lodging, furnishings, antiques, rugs, yacht club fees, boat repairs and improvements, moving expenses, cars, and boats Defendant used his public office and took other official action to pressure and influence [DOD] personnel to award and execute government contracts in a manner that would benefit [his coconspirators] ... because of his receipt of the above-described payments and benefits, and not because using [these firms] was in the best interest of the country[.]

Randall Harold Cunningham Plea Agreement (Nov. 23, 2005), news.findlaw.com/wp/docs/crim/uscnngm112805plea.pdf (Note: for these purposes, we’re ignoring Cunningham’s tax evasion.) Even before it became clear that the sensational Cunningham allegations were true, it was apparent that a strong message regarding the importance of integrity was not emanating from the highest levels of Government. See, e.g., Steven L. Schooner, *Viewpoint: Procurement Proper*, 37 Gov. EXEC. 70 (Aug. 15, 2005, No. 14), www.govexec.com/features/0805-15/0805-15advp.htm. We sense an increasing Pentagon focus on restoring the primacy of integrity to acquisition. That’s encouraging, but this will not be easy. GAO-05-341, *Defense Ethics Program: Opportunities Exist to Strengthen Safeguards for Procurement Integrity* (April 2005), www.gao.gov/new.items/d05341.pdf; 47 GC ¶ 215 (DOD’s “decentral-

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ized ethics program collects insufficient information to judge whether program objectives are being met”). One of the four focus areas of the post-Druyun Defense Science Board report was the role of leadership in addressing ethics.

Leadership is at the center of high integrity organizations. Leadership in DOD should be more proactive to ensure that values and ethics are the foundation for all employee actions. DOD should:

- Articulate DOD values and vision from the top down;
- Expect the highest integrity from its partners in industry;
- Place ethics at the forefront of Department communications: it's more than just compliance;
- Expand orientation programs in ethics and continual learning; and
- Ensure flow-down to every employee.

Report of the Defense Science Board Task Force on Management Oversight in Acquisition Organizations (March 2005), www.acq.osd.mil/dsb/reports/2005-03-MOAO_Report_Final.pdf; *DOD Must Reform Acquisition Oversight to Reduce Opportunities for Self-Dealing, Task Force Finds*, 47 GC ¶ 228 (May 18, 2005); see also *Top DOD and Air Force Officials Accountable for Tanker Lease Missteps, DOD IG Says*, 47 GC ¶ 269 (June 15, 2005); DOD IG, *Management Accountability Review of the Boeing KC-767A Tanker Program* (May 13, 2005), www.dodig.mil/tanker.htm. We won't fault you if you're curious as to: (1) exactly what "accountable" means in this context, or (2) why the IG report was so heavily redacted. See also Lockheed Martin, et al., B-295401, et al., (Feb. 24, 2005); Lockheed Martin Corp., B-295402, 2005 CPD ¶ 24 (Feb. 18, 2005) (fascinating reading: protests sustained where Air Force failed to demonstrate that: (a) Druyun's bias did not prejudice the protester and (b) the integrity of the procurement process was not compromised); *GAO Sustains Second Round of Protests Over Druyun Bias*, 47 GC ¶ 97 (March 12, 2005); 47 GC ¶ 87 (Feb. 23, 2005).

It is fitting, therefore, that this conference now devotes entire sections to business ethics and compliance (Session 3) in addition to practical business guidance related to accounting and compliance (Session 15). Instilling high ethical standards in governmental organizations is challenging, and public policy and ethics experts debate various approaches:

- Traditional bureaucracies employ *rule-based* compliance, which emphasizes laws and regulations and a pervasive "Thou shalt not" commandment. Clear rules tell public officials how to behave. (Critics, of course, fear these rules stifle creativity.)
- A *principle-based* approach envisions an ethical high road, emphasizing the positive and offering guidance rather than strict prohibitions. For example, the American Society for Public Administration's code of ethics offers five commandments for public servants: Serve the public interest, respect the Constitution and

the law, demonstrate personal integrity, promote ethical organizations, and strive for professional excellence. (Critics scoff that these platitudes are too abstract to meaningfully guide behavior.)

- The *consequentialist* approach evaluates outcomes as a moral indicator. Actions are judged in light of their consequences rather than the morality of the actions themselves. This resonates with proponents of the New Public Management, who favor accountability for performance. (Critics fret the lack of prospective guidance.)

B. Agency Solutions to the Integrity Crisis: Educating the Workforce: In a seemingly endless stream of procurement- and lobbying-related scandals, few have explored how agencies and contractors should respond to the current integrity crisis. See, e.g., *Administration's Top Procurement Official Charged with Lying to Investigators*, 47 GC ¶ 399 (Sept. 21, 2005); Sharon Theimer, *Tyco Acknowledges \$1.6M Link to Abramoff*, AP (Jan. 5, 2006); *Halliburton Contractor Arrested for Alleged Bribery Attempt*, ABC NEWS (Dec. 15, 2005), abcnews.go.com/US/LegalCenter/story?id=1411121; Lois Romano, *Bluster Marked Career of Bribe-Taking Cunningham*, WASH. POST (Dec. 4, 2005). On the Government side, it is become clear that the Government has skimmed on training, while contracting officers faced growing workloads and confronted increasingly complex contractual challenges. Scarce resources, when they became available, were allocated to oversight, rather than to supplementing, supporting, and training procurement experts. The old adage—an ounce of prevention is worth a pound of cure—rings true. More auditors and inspectors general guarantee a steady stream of scandals, but they won't help avoid the scandals nor improve the procurement system. Conversely, a prospective investment in upgrading the number, skills and morale of Government purchasing officials would reap huge dividends for taxpayers.

C. Contractor's Response: Identifying New Risks in the Anti-Kickback Act: Contractors also need to invest in training, especially in emerging areas of risk such as the Anti-Kickback Act, long the sleeping tiger of, and an oft-under-addressed risk in, contracting compliance. See, e.g., Margaret Shulenberger, *Validity, Construction and Application of Federal Anti-Kickback Act (41 USCA § 51-54)*, 19 A.L.R. Fed. 545. The problem is that, read broadly, the Anti-Kickback Act could prohibit almost any gift from a supplier to a prime contractor. The Act explicitly prohibits – with civil and criminal sanctions—the “payment of any fee, commission, or compensation of any kind or the granting of any gift or gratuity of any kind, either directly or indirectly, by or on behalf of a subcontractor ... to any officer, partner, employee, or agent of a prime contractor ... for the furnishing of supplies ... or services of any kind whatsoever; or to any such prime contractor or (2) to any officer, partner, employee, or agent of a higher tier subcontractor ... either as an inducement for the award of a subcontract or order from the prime contractor ... or as an acknowledgment of a subcontract or order previously awarded.” 41 USCA § 51. Indeed, the Ninth Circuit Court of Appeals deemed the Act “extraordinarily ambiguous” and bemoaned its “inconclusive legislative history” and “nearly complete absence of relevant precedent.” *U.S. v. Perry*, 431 F.2d 1020 (9th Cir. 1970).

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Little clarification emerged over the last thirty-five years, until a recent Court of Federal Claims decision. In *Morse Diesel International, Inc. v. U.S.*, 66 Fed. Cl. 788 (2005), the court held that bonding brokerage fees that brokers had split with a prime contractor were an inducement to use the broker and thus violated the statute. The scope of the Act, Judge Braden held, “extends to conduct akin to commercial bribery, even if [the alleged kickback] did ‘not directly [impact] the federal treasury.’ Of course, payments specifically authorized by a contract or behavior that would be commonly recognized as incidental business accommodations are excluded.” *Id.* at 800.

Judge Braden, however, did not explain which “incidental business accommodations” could pass muster. Nor did she consider whether the prime contractor would have been under competitive pressures on price and quality—to buy the best bonds, at the lowest prices—that would have outweighed any distortions caused by the split commissions. Nor did she deem it material that the offending contractor’s employees may not have fully understood the alleged circumstances of the “kick-back.” It was enough that the broad terms of the Act were violated.

The decision did not recognize what contractors must recognize—that *Morse-Diesel* poses new risks for primes and subcontractors who regularly exchange gifts, rebates and the like in the normal course. Contractor personnel must recognize that *any* gift between a supplier and a prime, however innocent, could trigger scrutiny. Indeed, contractors selling non-commercial items to the Government must have compliance systems in place to catch Anti-Kickback Act violations. FAR 3.502-2(i). To address this emerging risk, contractors should train their employees and erect appropriate compliance systems to defeat and deter potential violations. To do otherwise in the post-Druyun world is risky business. Against this backdrop, it’s almost quaint to recall sage advice, such as that found in Gayle R. Girod & Lorraine Campos, *Feature Comment—Gift Rule Guidelines: Ensuring Goodwill Gestures Do Not Backfire*, 47 GC ¶ 54 (Feb. 2, 2005).

VI. LEGISLATIVE LESSONS: THE SECOND DEVOLUTION MATURES

As the discussion above reflected, many of the current challenges in contracting stem from the devolution of the contracting function to centralized agencies. Recent legislative developments, especially in the most recent defense authorization act, confirm that the “second devolution” is a *fait accompli* to which the procurement system must adapt.

A. Service Contracting Not Decentralized to Department of Defense: Indeed, this year’s final defense authorization act marked a quiet triumph for centralized purchasing agencies, because of a provision *not* included in the final legislation. The initial Senate version of the bill included a provision (section 802) which would have required each military department to establish a Contract Support Acquisition Center to act as the executive agent to buy that department’s contract services. See S. 1042, § 802(f) (“[N]o officer or [Government] employee ... outside the Defense Contract Support Acquisition Center[s] may, without ... prior written ap-

proval ... engage in a procurement action for the acquisition of contract services for the [DOD] that is valued in excess of the simplified acquisition threshold”).

The final conference report included a much narrower provision, which merely requires DOD to institute a stronger management structure for procuring services. See H. Rep. No. 360, 109th Cong., 1st Sess. (conference report) (discussing section 812 of final legislation), reprinted in 164 Cong. Rec. H12739, H13096. Services purchasing has long been criticized in centralized purchasing. Yet while the bill ostensibly would have *centralized* services purchasing in the “Contract Support Acquisition Centers,” using our analysis, the Senate bill would have *decentralized* services purchasing by shifting authority back into the DoD. By rejecting that approach and permitting open services buys through centralized agencies, Congress decided *not* to turn back the clock on devolution.

B. Fees Under Scrutiny: Still, we recognize that devolving acquisition functions to centralized purchasing agencies has been a bumpy process. As noted above, we were ecstatic to see the GAO add the management of interagency contracting to its High Risk List. GAO-05-207, *High Risk Series: An Update* (January 2005), www.gao.gov/new.items/d05207.pdf; 47 GC ¶ 187 and ¶ 58. 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 oversight and control so that it is well positioned to realize the value of these contracts warrants [attention].

But what should be done? There’s nothing inherently wrong with interagency contracting. The problem lies in implementation. GAO understood that diffusion of responsibility created an oversight and management vacuum: “Ensuring the proper use of interagency contracts must be viewed as a shared responsibility of all parties involved.” The new OFPP Administrator needs to restore and reinvigorate the acquisition workforce, and Rob Burton’s creation of a working group signals cognizance of the issue. Someone, preferably OFPP (or, in the alternative, GSA), must assert supervisory control over, and potentially consolidate, the various interagency purchasing organizations.

Finally, it’s time for a meaningful conversation about the appropriate role of businesslike models, generally, and fees, specifically, in governance. It’s hard to envision 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.” We’d like to see that. Steven L. Schooner, *Feature Comment—Risky Business: Managing Interagency Acquisition*, 47 GC ¶ 156 (April 6, 2005).

Notably, the most recent defense authorization includes a provision, Section 813, which requires the DOD to assess the total fees being assessed by centralized purchasing agencies. See, e.g., *Franchise Funds Offer Expedience, But Their Value to DOD Is Uncertain, GAO Says*, 47 GC ¶ 344; GAO-05-456, *Franchise Funds Provide Convenience, but Value to DOD is Not Demonstrated* (July 2005), www.gao.gov/new.items/d05456.pdf; GAO-02-734, *Contract Management: Interagency Contract Program Fees Need More Oversight* (July 25, 2002), www.gao.gov/new.items/d02734.pdf; see also, 47 GC ¶ 460; 47 GC ¶ 419 (Sen. Carl Levin (D-Mich.) expresses concern); 47 GC ¶ 356. Arguably, this reform merely reflects a classic outsourcing concern, that the outside firm (here, the centralized purchasing agencies) too often is able to overcharge its “captive” customer for outsourced services. See, e.g., Deloitte Consulting, *Calling a Change in the Outsourcing Market: The Realities for the World’s Largest Organizations*, at 12 (April 2005), available at www.deloitte.com.

C. Centralized Agencies Must Accommodate Customers’ Special Needs: Congress also demanded that centralized purchasing agencies change their processes to accommodate their customer agencies’ special procurement requirements. Devolution is simply a form of outsourcing, and Congress’ demands simply reflect a classic problem (and response) in outsourcing: buyers will impose requirements to ensure that their outsourced suppliers conform to the buyers’ special quality expectations. See, e.g., Deloitte Consulting, *supra*, at 5. Last year, after a number of small scandals in GSA contracting, Section 802 of the defense authorization Act required strict reviews of GSA’s contracting centers by the DOD and GSA inspectors general. See *GSA To Face New Audit Requirement for FTS Contracts*, 46 GC ¶ 405; see also *GSA To Consolidate FTS and FSS*, 47 GC ¶ 135; *DOD to Expand “Get It Right” Program*, 46 GC ¶ 442. This year, Section 811 of the defense authorization requires a similar review of several *other* agencies that provide acquisition services to DOD: the Treasury Department, the Department of the Interior, and NASA. See H. Rep. No. 360, 109th Cong., 1st Sess. (conference report) (scope of IGs’ joint review under Section 811 narrowed to three agencies in conference), reprinted in 164 Cong. Rec. H12739, H13096.

Arguably, these legislative developments mark success, not failure, in the devolution of contracting functions to centralized purchasing agencies. To make centralized purchasing work, customer agencies—and DOD towers over all other customer agencies—must be assured that their special purchasing requirements are being met. As we saw with the Abu Ghraib scandal (when the Army obtained interrogator services through a GSA schedules contract), see, e.g., *Interagency Contracts for Interrogation Services Lacked Adequate Oversight*, 47 GC ¶ 214, centralized purchasing agencies offer too convenient a means for customer agencies to bypass the legal obligations that Congress has imposed on their procurements.

Another way of viewing these legislative developments is that, as Congress forces centralized agencies to shift their processes to accommodate their customer agencies' special requirements, the relationship between the centralized purchasing agencies and their customer agencies is cemented. Ultimately, it may be these special requirements—the customer agencies' special legal requirements—which private contractors *cannot* accommodate well. (Private firms performing acquisition functions, for example, struggle to ensure compliance with their customer agency's socioeconomic requirements.) Indeed, accommodating these special legal requirements ultimately may become the centralized purchasing agencies' strongest competitive advantage, as they resist the “third devolution,” the shift of acquisition functions outside the Government entirely.

D. Hurricane Katrina and Transparency in Centralized Purchasing:As the market for “outsourced” procurement services in centralized purchasing agencies matures, we should emphasize that the core problems in this market—a lack of transparency and competition in task-order contracting – remain unresolved. See, e.g., GAO-NSIAD-00-56, *Few Competing Proposals for Large DOD Information Technology Orders*, 8-9 (March 2000), available at www.gao.gov; Thomas F. Burke & Stanley C. Dees, *The Impact of Multiple-Award Contracts On The Underlying Values Of the Federal Procurement System*, 44 GC ¶ 431 (2002). Those failures in transparency and competition mean, ultimately, that the Government probably is not receiving best value. See, e.g., GAO-05-911T, *Contract Management: Opportunities Continue for GSA to Improve Pricing of Multiple Award Schedules Contracts*, (July 26, 2005), www.gao.gov/new.items/d05911t.pdf; GSA IG, *Compendium of Audits of the Federal Technology Service Regional Client Support Centers* 9 (Dec. 14, 2004), available at www.gsa.gov; see Michael Hardy, *FTS Pledges Improvement*, FED. COMPUTER WEEK, Dec. 17, 2004, available at www.fcw.com (review of approximately \$4.6 billion in orders indicated that improper task-order contracting practices were due to “an ineffective system of internal management controls; [purchasing agency] personnel sacrificing adherence to proper procurement procedures in order to accommodate customer preferences; and an excessive focus on customer satisfaction and [fee] revenue growth”).

Last year, a natural disaster, Hurricane Katrina, proved that some of the problems, at least those of transparency, *can* be resolved. No doubt, Hurricane Katrina exposed serious weaknesses in the federal procurement system. See generally Christopher R. Yukins & Joshua Schwartz, *Feature Comment: Katrina's Continuing Impact on Procurement—Emergency Procurement Powers in H.R. 3766*, 47 GC ¶ 397 (Sept. 21, 2005); Christopher R. Yukins, *Feature Comment: Hurricane Katrina's Tangled Impact on U.S. Procurement*, 47 GC ¶ 387 (Sept. 7, 2005); see also 47 GC ¶ 474, ¶ 453, ¶ 430, ¶ 429 and ¶ 398. Nonetheless, in the wake of Hurricane Katrina, and under intense media and political pressure, agencies have made their task-order contracting for Katrina relief more transparent. The lesson, then, is that agencies *can* make task-order contracting transparent and *will* do so if subject to sufficient political and media pressure. See Christopher R. Yukins, *Hurricane Katrina Brings Transparency to Task-Order Contracting*, SERVICE CONTRACTOR, Winter 2006, at 15 (Contract Services Ass'n).

NOTES

Under current rules, once a standing task-order contract is in place, nothing requires transparency for the orders issued under those standing contracts. Billions of dollars in orders can be launched, competed, and awarded in the netherworld, where only the customer agency and select vendors know of unfolding business opportunities. Inevitably, complaints surround this loss in transparency and anti-competitive behavior. See DOD Office of Inspector General, *DOD Use of Multiple Award Task Order Contracts*, Report No. 99-16, 14 (April 2, 1999); GAO-05-207, *High-Risk Series: Management of Interagency Contracting*, at 24-28 (Jan. 2005) (citing selected reports), www.gao.gov/new.items/d05207.pdf; Acquisition Advisory Panel, Interagency Contracts Working Group, *Draft Source Documents* (May 3, 2005), available at www.acqnet.gov/aap/documents/Sources%20for%20Interagency%20Contracting%20Group.pdf (listing reports). These reports note that task-order contracting is so opaque that, not only do we not know when orders are being made, but often we cannot tell *cumulatively* exactly how many billions of dollars in task-order awards have been made.

Why then do agencies embrace task-order contracting, despite the criticism? This question throws into high relief the role that centralized purchasing agencies play – and may explain why the “second devolution” (the shift of acquisition functions to centralized agencies) has been so successful. Customer agencies prefer task-order contracts because they can buy goods and services quickly and easily, with little exposure. Servicing agencies (centralized purchasing agencies) welcome and depend upon that business and have little incentive to open the process to public scrutiny. Vendors intuitively appreciate transparent systems (which reduce search costs and political risk), yet have grown too complacent. Many vendors have invested in the marketplace relationships necessary to replace transparent competition. As those investments deepen, vendors see reduced incentives to break open the closed world of task-order contracting.

Ironically, Hurricane Katrina ripped back the curtain. After the hurricane struck, it became very clear that the emergency relief agencies should have had contracts in place, to buy goods and services quickly to save lives. See *Statement of Richard L. Skinner, Inspector General, U.S. Department of Homeland Security, Before the Select Bipartisan Committee to Investigate the Preparation for and Response to Hurricane Katrina, U.S. House of Representatives* (Nov. 2, 2005), available at www.dhs.gov/interweb/assetlibrary/OIGtm_RLS_Nov05.pdf (noting chaotic contracting in initial relief efforts); John Moore, *A Not So Dry Run*, FED. COMP. WEEK, Dec. 5, 2005, at 18 (noting need for integrated logistics system for emergency response), available at www.fcw.com; cf. Steve Kelman, *Questions Worth Asking*, FED. COMP. WEEK, Sept. 25, 2005 (arguing that Katrina showed need for standing contracts to facilitate rapid response), available at www.fcw.com. The gush of emergency funding also highlighted a special need for transparency. The money that poured into the Gulf Coast bypassed the normal budgetary, oversight, and appropriations protections.

Because so much money poured into the region with so little Congressional oversight and yet with such profound potential consequences for the region’s recovery, the press played a pivotal part of the oversight process.

Quite simply, the media demanded to know how the Government's money was being spent. See, e.g., Stephanie Grace, *Waste at the Top*, NEW ORLEANS TIMES PICAYUNE, Jan. 1, 2006, at 9; cf. *Public Officials Report Recovery Contracts—Disclosure Required by New State Law*, NEW ORLEANS TIMES PICAYUNE, Dec. 31, 2005, at 4 (Louisiana law forced lawmakers to reveal ties to millions of dollars in recovery contracts). In response, federal relief agencies announced prime contracts (primarily task- and delivery-order contracts), and, in some instances, orders issued against those prime contracts, on the Web.

Was there complete transparency after Katrina? No. The press complained about the quality of the information, often released spasmodically, outside the normal channels for publicizing opportunities and awards in the centralized federal procurement Web site, www.fedbizopps.gov. Yet, despite its shortcomings, the post-Katrina experience proved that agencies can publish task-order award information without disabling the procurement process. It was a small step forward. We expect that, over time, task and delivery orders will be treated as contracts, and opportunities, competitions, and awards will be publicized. Until that becomes the norm, Katrina reminds us that transparent task-order contracting not only is possible, but it makes the procurement system stronger and more accountable.

E. Another Gulf. Of course, the post-Katrina effort continues to be viewed through a lens colored by our Iraq procurement experiences. Despite initial skepticism, the continuing work of the Special Inspector General for Iraq Reconstruction must be taken seriously. See generally 47 GC ¶ 449, ¶ 389, ¶ 348, ¶ 289, ¶ 209, ¶ 185, ¶ 146, ¶ 137, ¶ 123, ¶ 65, ¶ 60 and ¶ 43. At a macro level, we are curious to examine the work of Columbia economist Joseph Stiglitz (the Nobel-prize-winner) and Harvard budget guru Linda Bilmes, which extrapolates the final cost of the Government's efforts in Iraq at \$2 trillion. Apparently, their forthcoming paper includes projected disability and health care costs for more than 15,000 injured veterans, increased recruitment budgets to replenish ranks depleted by multiple tours of duty, debt financing for war expenditures, and macroeconomic effects such as the rising price of oil. See, e.g., Sally B. Donnelly, *Iraq: Counting the Costs*, TIME (Jan. 08, 2006), www.time.com/time/magazine/article/0,9171,1147182,00.html. Of course, attention continues to be drawn to contractors on the battlefield, particularly the tens of thousands of arms-bearing contractor personnel currently employed in Iraq. See generally www.pbs.org/wgbh/pages/frontline/shows/warriors/ (providing a wealth of resources, particularly the “frequently asked questions” and “readings and links”).

Nor was the news particularly good from Afghanistan. The DOD IG found that, among other things: (1) design and construction requirements in reconstruction efforts were unclear and kept changing; (2) the Army Corps of Engineers may have violated the Anti-Deficiency Act; (3) the Corps improperly awarded task orders without clearly describing the work or negotiating a fair and reasonable price; and (4) personnel maintained that certain contracts were firm-fixed-price, yet the contracts incentivized the contractors to increase costs. The IG concluded that no assurance existed that DOD received fair and reasonable prices or the best value for work performed. DOD

IG Report No. D-2006-007, *Contracts Awarded to Assist the Global War on Terrorism by the U.S. Army Corps of Engineers*, www.dodig.osd.mil/audit/reports/FY06/06-007.pdf (Oct. 14, 2005); 47 GC ¶ 450.

F. Fear of Overreaction. As noted, the media relentlessly focused on post-Hurricane Katrina contracting foibles and the Safavian indictment, which followed on the heels of extensive coverage of real or alleged contracting scandals involving Iraq, the Transportation Security Administration, and the Air Force. While this scrutiny is both welcome and long overdue, focusing solely on contracting failures brings a serious downside. See Steven Kelman and Steven L. Schooner, *Scandal or Solution?* 46 *CONT. MGMT.* 62 (Jan. 2006), www.govexec.com/dailyfed/1105/110705ol.htm or www.ncmahq.org/membership/scandal_solution.asp. Not surprisingly, the administration recently assigned a team of inspectors general to scrutinize Katrina-related contracting. Charles R. Babcock, *600 People Monitoring Hurricane Contracts*, *WASH. POST*, January 13, 2006, at D02 (“The federal government has sent nearly 600 auditors and investigators to the Gulf Coast region to monitor \$8.3 billion in contracts awarded to help victims of last year’s hurricanes, according to year-end figures released by the Department of Homeland Security.”). That’s a responsible gesture. But no corresponding call came for more contracting experts to perform the many functions besides auditing that are necessary for the procurement system to work well.

G. Katrina and Political Opportunism: The Micro-Purchase Threshold. Last year, we bemoaned that a deluge of investigations, reports, and prosecutions continue to disclose Government charge-card improprieties. The good news was the OMB issued its long-awaited guidance for management of purchase cards. OMB Circular A-123, *Management’s Responsibility for Internal Control, Appendix B: Improving the Management of Government Charge Card Programs* (Revised, Aug. 5, 2005), www.whitehouse.gov/omb/circulars/a123/a123_appendix_b.pdf; *OMB Revamps Charge Card Guidance*, 47 GC ¶ 358 (Aug. 17, 2005). The bad news was that, even before that guidance could be implemented, Congress used Hurricane Katrina as an excuse to multiply the micro-purchase threshold one hundred-fold, to \$250,000 (with, at the time, more than 300,000 Government purchase cards were in circulation). See, e.g., P.L. No. 109-62, § 101(2); David H. Safavian & Linda M. Combs, *Memorandum for the Chief Acquisition Officers and Chief Financial Officers, Implementing Management Controls to Support Increased Micro-Purchase Threshold for Hurricane Katrina Rescue and Relief Operations* (Sept. 13, 2005), www.whitehouse.gov/omb/procurement/publications/katrina_guidance2005.pdf; Memorandum from Clay Johnson III, Deputy Director for Management, *Limitation on Use of Special Micro-purchase Threshold Authority for Hurricane Katrina Rescue and Relief Operations* (Oct. 3, 2005); Steven L. Schooner, *Fiscal Waste? Priceless*, *L.A. TIMES*, (Opinion, Sept. 14, 2005). Fortunately, OMB eventually intervened and suspended use of the authority. See also 47 GC ¶ 401 and ¶ 392.

H. Katrina and Political Opportunism Redux: Davis-Bacon. A similarly opportunistic anecdote appears with the Administration’s suspension—and subsequent repeal of the suspension—of the Davis-Bacon Act under the guise of facilitating post-Katrina reconstruction. *Proclamation*

by the President: Revoking Proclamation 7924 (Nov. 3, 2005), www.whitehouse.gov/news/releases/2005/11/20051103-9.html. The suspension of this law, which requires that workers on federal construction contracts be paid prevailing wage rates, would have ensured that *contractors* could profit from the massive reconstruction effort without permitting minimum wage *workers* to receive prevailing wages that might permit them to rise into the lower middle class. The Administration's putative explanation—that without suspension of the Davis-Bacon Act, insufficient labor would be available—was simply disingenuous. See also 47 GC ¶ 400.

VII. THIRD DEVOLUTION: OUTSOURCING THE PUBLIC PROCUREMENT FUNCTION TO PRIVATE CONTRACTORS

Ironically, the innovations which made possible the *second* devolution—the IDIQ contracts offering commercial items which made interagency contracting so popular—also propelled the *third* devolution, the Government's decision to shift purchasing authority into private hands. To the extent GSA and the other purchasing agencies acted merely as passive intermediaries between agency “customers” and commercial-item contractors, there seems little reason not to shift the purchasing agencies' functions to *commercial* intermediaries if they are more efficient. Here we offer three recent case studies to shed light on the procurement system's fitful progress in this “third devolution,” to private performance of contracting functions.

Case Study 1: Electronic Procurement & Reverse Auctions

The first case study stemmed from the abortive debate over whether agencies should be required, presumptively, to use electronic means, including reverse auctions. Section 812 of H.R. 1815, the House version of the defense authorization bill for fiscal year 2006, would have required the use of electronic online acquisition services. Section 812 would have required “the [OFPP] Administrator ... to revise the [FAR] to maximize the use of commercially available online procurement services to purchase commercial items, including those procurement services that allow the heads of federal agencies to conduct reverse auctions.” H. Rep. No. 109-89, 109th Cong., 1st Sess. 361 (May 20, 2005).

The strong presumption in favor of reverse auctions and other “commercially available procurement services” raised a number of technical issues. Experience suggests that reverse auctions need to be carefully controlled, see, e.g., Christopher R. Yukins & Don Wallace, Jr., *UNCITRAL Considers Electronic Reverse Auctions, as Comparative Public Procurement Comes of Age in the U.S.*, 2005 PUB. PROC. L. REV. (draft available at: ssrn.com/abstract=711847). The House defense authorization provision (imported from Rep. Tom Davis' pending Acquisition System Improvement Act (ASIA), H.R. 2067) was completely unclear on *which* “commercially available online procurement services” should be used. Would GSA have to abandon its electronic catalogue at www.gsaadvantage.gov if www.amazon.com offered a better alternative? Or should agencies use only those online procurement services that focus on the federal sector? Or only online reverse auctions? Section 812, which avoided public debate, leaves these and other technical questions unanswered.

Putting those concerns aside, a larger policy question remains. By *forcing* agencies to devolve acquisition functions into the private sector, Section 812 demonstrated the “third devolution,” the final shift of Government acquisition authority into the private sector. Section 812 would have been the final devolution from agency users, to agency contracting personnel, to centralized purchasing agencies, and then to private “electronic” contractors. All that, with no finding that this devolution enhanced efficiency or preserved basic principles of transparency and accountability.

Section 812 ultimately fell out of the final defense authorization act for FY 2006, perhaps because it was premature. The conferees took a more cautious approach, and directed OFPP, in consultation with the FAR Council, to “review the use of online procurement services, such as reverse auctions, and identify: (1) types of commercial item procurements that are suitable for the use of such services; and (2) features that should be provided by online procurement services that are used by federal agencies.” H. Rep. No. 360, 109th Cong., 1st Sess. (conference report), *reprinted in* 164 Cong. Rec. H12739, H13100.

Case Study 2: Lead System Integrators

The second case study involves the role of “Lead System Integrator” (LSI), in which a contractor that takes the lead in selecting and integrating complex systems for the Government also provides oversight and direction traditionally provided by Government officials. See, e.g., David Moon & Alexandre Schoder, Commentary: *Give Companies Incentive To Seek LSI Role*, DefenseNews.com (May 2, 2005), available at www.defensenews.com/story.php?F=821171&C=commentary; *The Army in 2020: A Vision for the Future*, 45 GC ¶ 506 (discussing Army’s vision for broader use of LSIs in acquisition). The LSI concept was particularly controversial in the Army’s Future Combat Systems (FCS) program, in part because of sharply increasing program costs. See *HASC Approves Defense Authorization Measure*, 47 GC ¶ 242 (“estimated FCS cost between FY 2004 and 2009 rose from \$19 billion to over \$30 billion”); *GAO Again Urges DoD to Adhere to Knowledge-Based Acquisition Policy*, 47 CG ¶ 172.

In March 2002, the Army and the Defense Advanced Research Projects Agency (DARPA) jointly selected a team, including Boeing, to serve as LSI for the Future Combat Systems program, in the program’s concept and technology development phase. See *DARPA and Army Select Boeing and SAIC for Lead Systems Integrator*, 44 GC ¶ 101; Press Release, available at www.defenselink.mil/releases/2002/b03072002_bt109-02.html. The program entered its development phase in 2003. See *FSC Enters \$14.9 Billion Development Phase*, 45 GC ¶ 226. The LSI team selected and awarded subcontracts to other contractors. See, e.g., *Boeing-SAIC FCS Team Announces First Round of BIA Awards*, 44 GC ¶ 228. In essence, the Army delegated much of its traditional acquisition function to the LSI team. Last year, controversy engulfed the program, both because of increasing costs and concerns that, because the FCS contract was structured as an “other transaction,” the LSI enjoyed too much discretion, with too few legal obligations and controls. The Army agreed to restructure the program to rely on a more traditional contract. See *Upon Further*

Review: Army Will Convert FCS' OTA to FAR-Based Contract, 47 GC ¶ 168; see also *Air Force Agrees to Convert C-130J Contract from Commercial Item Acquisition*; *Senate Panel Looks at Department's Acquisition Management*, 47 GC ¶ 182.

Section 805 of the defense authorization act for FY06, H.R. 1815, called for a report on the use of lead systems integrators. This mandate reflected complaints, from, among others, contractors on the FCS program, that the lead systems integrator role gave the prime contractor too much power in selecting and awarding contracts. In many ways, Section 805 provides a checklist of issues that the Government is likely to encounter as it delegates procurement functions to firms in the private sector:

- **Inherently Governmental Functions:** Use of a lead systems integrator is problematic in that the LSI, by taking over much of the acquisition function, performs functions perceived as “inherently governmental.” See P.L. No. 105-270, Federal Activities Inventory Reform Act, Sec. 5 (inherently governmental functions are those “so intimately related to the public interest as to require performance by Federal Government employees”). Section 805 mandates a Defense Department report that it is indeed minimizing lead system integrators’ role in “functions closely associated with inherently governmental functions.” That term, defined by 10 USCA § 2383(b)(3), incorporates the definition at FAR 7.503(d). Oddly, FAR 7.503(d) defines activities that generally are *not* inherently governmental. Accordingly, while Section 805 raises the issue, the legislation does *not* resolve what acquisition functions are so inherently governmental that they should not be delegated to private firms.
- **Organizational Conflicts of Interest (OCIs):** Section 805 also requires the DoD to report on how lead systems integrators’ OCIs will be prevented or mitigated. Lt. Gen. Joseph Yakovac described how an LSI and the Army share the task of selecting technology for weapons programs:

The lead systems integrator is our partner in terms of their role in enabling us to move more effectively toward the system of systems solution. And within that context, we do things together. When it comes to technology assessment, we both go back to the requirements, as stated by the user, and we then collectively flow that requirement into technical capabilities and specifications. (www.military-training-technology.com/article.cfm?DocID=216)

Thus, by outsourcing much of the acquisition function to an LSI, the Government may grant the LSI an unfair competitive advantage in future procurements, or may permit the LSI to favor itself (or an affiliate) in technology selection—a classic OCI. See FAR Subpart 9.5; FAR 7.503(a) (agency must address OCI issues before delegating acquisition functions to contractor). See generally Dan I. Gordon, *Organizational Con-*

flicts of Interest: A Growing Integrity Challenge, 35 PUB. CONT. L.J. 25 (2005). In part because of the devolution of procurement functions to private contractors, GAO remains highly sensitive to OCIs, see, e.g., *Alion Science & Technology Corp.*, B-297022.3 (Jan. 9, 2006) (agency's review of contractor's potential OCIs unreasonably deficient). We expect that OCIs will remain a flashpoint of concern.

- **Intellectual Property Rights:** Under Section 805, DoD must assess “the respective rights of [DOD], lead system integrators, and other contractors that participate in the development or production ... (including subcontractors under lead system integrators) in intellectual property that is developed by the other participating contractors.” Section 805 suggests Congress is concerned that lead systems integrators are not obtaining appropriate IP rights for the Government, and may be taking too many rights from their subcontractors. Given the confused and lopsided hodge-podge of intellectual property law in federal procurement—FAR pt. 27 aggressively arrogates rights to the Government, while FAR pt. 12 defers broadly to contractors' rights in commercial items—it seems inevitable that LSIs will be able to exploit the allocation of rights. Section 805 suggests that the Government will regularize the allocation of rights to ensure that the Government's rights are protected in a measured way, even if procurement and selection have been shifted to a private LSI firm. This issue need *not* always arise when acquisition functions are delegated to private firms. Yet it is symptomatic of problems likely to arise when prime contractors enhance their negotiating positions by stepping into the shoes of the Government.

Personal Conflicts of Interest Not Addressed: The authorization act did not address a fourth key issue in outsourcing acquisition functions: personal conflicts of interest. Section 822 of the Senate version of the bill, which was dropped, would have required a special review of the ethics issues raised by having contractors performing acquisition functions. The conferees deferred to the Acquisition Advisory Panel (“the Section 1423 panel” created by the Services Acquisition Reform Act (SARA)). The conferees “expect [DOD] to review all issues addressed by the SARA panel upon the conclusion of that panel's work.” H. Rep. No. 360, 109th Cong., 1st Sess. (conference report) (discussing Section 812 of final legislation), reprinted in 164 Cong. Rec. H12739, H13096. Unfortunately, Congress' inaction could permit this ethical issue to simply fall through the cracks. Although DOD issued an interim rule, per Section 804 of the National Defense Authorization Act for Fiscal Year 2005, 10 USCA § 2383, regarding “contractor performance of acquisition functions closely associated with inherently governmental activities,” see 70 Fed. Reg. 14572 (March 23, 2005), see also *ABA Comments on Contractor Performance of Acquisition Functions Rule*, 47 GC ¶ 249 (recommending further clarification of when acquisition functions may be delegated), [emissary.acq.osd.mil/dar/dfars.nsf/40d9d4f429f73a4e8525699600776f78/57ed54f249d293a58525700d00475472/\\$FILE/Scan001.pdf](http://emissary.acq.osd.mil/dar/dfars.nsf/40d9d4f429f73a4e8525699600776f78/57ed54f249d293a58525700d00475472/$FILE/Scan001.pdf), that rulemaking process probably will *not* address how

ethics rules might apply to contractors performing acquisition functions. We hope that the 1423 panel will address this in its upcoming reports. There are **essentially three approaches** the Government can take to personal conflicts of interest, when private contractors take on acquisition functions:

- **Option 1: Do Nothing:** Currently, it is difficult, if not impossible, to determine to what extent criminal and civil conflict-of-interest rules apply to private parties that perform federal acquisition functions. If a contractor employee assists a contracting officer, is that private employee bound by the bribery or gratuity rules (18 USCA § 201), the conflict-of-interest rules involving favoritism to family members or those with whom the employee shares an economic interest (18 USCA § 208), the post-employment restrictions of 18 USCA § 207, or the Procurement Integrity Act (41 USCA § 423; FAR 3.104)? See *U.S. v. Dixon*, 465 U.S. 482 (1984) (Justice Marshall, writing for a sharply divided Court, found that bribery statute applied to private executives serving in position of public trust as grantees); Jonathan Feld, *Thou Shalt Not Disclose How the New Laws Will Bring Integrity to the Government Procurement Process*, 1990 CRIM. JUST., No. 4, at 14; Brian C. Elmer, Richard L. Beizer & Alan W.H. Gourley, *Procurement Fraud Investigations*, 84-9 BRIEFING PAPERS 1 (1984). See generally U.S. Office of Government Ethics, *Compilation of U.S. Ethics Laws*, at www.usoge.gov/pages/laws_regs_fedreg_stats/comp_fed_ethics_laws.pdf.
- **Option 2: Contractually Impose Procurement Integrity Obligations:** To preserve integrity, the Government can shift its officials' legal obligations onto private contractors *by contract*. Contractors providing procurement support functions would agree to follow some or all of the rules that ensure the integrity of the procurement system. This was one of the potential solutions proposed by the U.S. Office of Government Ethics. February 8, 2005 letter to the Acquisition Advisory Panel, *205.130.237.11/aap/documents/OGE020805.PDF*, (asking the Section 1423 panel to examine whether contractor employees should be subject to the Government employees ethics rules).
- **Option 3: Statutorily Impose Federal Employees' Conflict-of-Interest Rules on Contractors:** The third and most draconian approach would simply impose all procurement conflict-of-interest rules, civil and criminal, on outside contractors. California adopted this approach, at least for those outside contractors who play a direct role in decision-making in California state and local governments. "Consultants"—outside contractors who stand in the shoes of state decision-makers—must comply with state officials' financial disclosure and conflict-of-interest requirements, including post-employment restrictions. See, e.g., Cal. Gov. Code §§ 82004 (agency officials include "consultants"); 87406(d) ("No ... consultant of a state administrative agency who holds a position which entails the making ... of decisions which may foreseeably have a material effect on any financial interest, ... shall, for compensation, ... represent, any other person, ... be

fore any state administrative agency ... for which he or she worked ... during the 12 months before leaving office or employment, if the appearance or communication is made for the purpose of influencing administrative or legislative action"); Cal. Code Regs. tit. 2, § 18701 (definition of "consultant"). This would impose enormous compliance and monitoring costs on both contractors and the Government and raise entirely new spheres of controversy—such as how contractors would handle post-employment restrictions if their employees qualified as "consultants" on state projects.

In sum, though Section 805 addressed three of the recurring issues in outsourcing the procurement function—contractors that may usurp inherently governmental functions, organizational conflicts of interest, and abuses of negotiating position by the prime contractor—Section 805 ignored personal conflicts of interest.

Other gaps in the act make it even less likely that Section 805 will mark a clear pathway to reform. Section 805 did not define "lead system integrator," beyond describing an LSI as either (a) a "prime contractor ... not expected ... to perform a substantial portion of the work" on a major system (known as an LSI "with system responsibility"), or (b) a services contractor "whose primary purpose is to perform acquisition functions closely associated with inherently governmental functions with regard to ... a major system" (known as an LSI "without system responsibility"). Section 805's vague definitions could render any reform hollow if acquisition functions are outsourced to an LSI-like entity identified with a different moniker.

Nor did the authorization act address how the use of "other transactions authority" can or should be constrained. See, e.g., *Senate Panel Criticizes Use of Other Transactions Authority for FCS*, 47 GC ¶ 134; Marcia G. Madsen, David F. Dowd, Michael J. Farley, *Combating Terrorism: Contracting Approaches & Lessons Learned*, 02-06 BRIEFING PAPERS 1 (May 2002) (discussing use of "other transactions" authority for FCS). Given the strained abuse of "other transactions" authority (authority intended to entice *small, emerging* businesses into federal procurement) in forming the FCS contract, these gaps leave open the door to future scandals.

VIII. BREAKTHROUGH: CONSOLIDATION OF THE BCAs

The long overdue civilian boards of contract appeals (BCAs) consolidation is now a reality. We hope that this transition proceeds promptly and efficiently. We encourage the BCAs to seize this opportunity to improve the efficiency of their dispute (and alternative dispute) resolution services. *ABA Section Calls for More Study Before Consolidating BCAs*, 47 GC ¶ 499 (Nov. 30, 2005); 47 GC ¶ 388. For additional discussion, see, e.g., Frederick J. Lees, *Consolidation of Boards of Contract Appeals: An Old Idea Whose Time Has Come?*, 33 PUB. CONT. L.J. 505; John A Howell, *The Role of the Office of Federal Procurement Policy in the Management of the Boards of Contract Appeals: From Great Expectations to Paradise Lost?*, 28 PUB. CONT. L.J. 559 (1999); Steven L. Schooner & Keith D. Coleman,

The CDA at Twenty: A Brief Assessment of BCA Activity, 34 *PROCUREMENT LAW*. 10 (1999); Steven L. Schooner, *Pondering the Decline of Federal Government Contract Litigation in the United States*, 8 *PUB. PROC. L. REV.* 242 (1999).

IX. FPDS: READY FOR PRIME TIME (WITH EYE-POPPING NUMBERS)?

A. Last year we welcomed the nascent Federal Procurement Data System-Next Generation (FPDS-NG) with hopes that the GSA would deserve kudos for enhancing transparency, improving efficiency in Government, and serving the contractor community. See generally *www.fpdsng.gov*. In the fall, GSA exercised its option for Global Computer Enterprises, Inc. (GCE) to continue to operate the system. You can track the implementation status at *www.fpdsng.com/status.html*. There is no question that the 2004 Federal Procurement Report is more colorful than its predecessors. A particularly popular feature of the FPDS-NG is the *Top Requests* box (in the top right-hand corner), which (as of December 2005) identifies the most heavily requested data for fiscal years 2005 and 2004. But the jury remains out on whether this effort will serve as a useful outsourcing success story. GAO has expressed “concerns regarding whether the new system has achieved the intended improvements in the areas of timeliness and accuracy of data, as well as ease of use and access to data ... [and] as to whether the FPDS-NG system has the flexibility to capture data on interagency contracting transactions.” See GAO-05-960R, *Improvements Needed to FPDS-NG* (Sept. 27, 2005), *www.gao.gov/new.items/d05960r.pdf*; 47 GC ¶ 421.

B. In terms of opportunities, contractors continue to benefit from the series of events begun on September 11, 2001, fueled by a spending spree born of bipartisan lack of fiscal responsibility, and fanned by Hurricane Katrina. After years of stagnation or minimal increases during the late 1990s, the \$300-billion in annual procurement threshold was breached, and the increase continued.

Fiscal Year	Transactions (in millions)	Dollars (in billions)	Percentage increase
2004	10.3	\$341	8.9
2003	11.5	\$305	22
2002	8.65	\$250	6.8
2001	11.4	\$234	7.3
2000	9.8	\$218	-

We continue to fret that, not only has Government (procurement and non-procurement) spending increased, but the Government continues to spend money far more quickly than it generates income. That strikes us as unsustainable. Will 2006 be the year the spending binge ends? If so, fiscal reality could dramatically impact the Federal Government’s purchasing practices.

X. WELCOME PROGRESS ON THE INTERNATIONAL FRONT

We close with an optimistic note regarding international and comparative public procurement law. Reflecting the growing importance of globalization and international public procurement markets, Thomson/West added an “international day” and introduced a number of new, important perspectives to the Year in Review. We applaud these efforts and invite you to learn more. In June, the University of Nottingham will host (and GW Law School will co-sponsor) a two-day conference on comparative procurement law and policy, drawing together leading procurement experts from around the world. See, e.g., *www.global-revolution.com*.

¹ We dedicate this year’s presentation to our predecessor, John Cibinic, Jr. (1930-2005). John leaves behind a remarkable legacy in the literature, pedagogy, and practice of government contract law. John negotiated contracts for the Navy Bureau of Aeronautics, graduated from George Washington University Law School in 1959, worked for the American Machine & Foundry Co., and joined the GW law school faculty in 1963. There he formed a well-known and remarkably productive partnership with Ralph Nash and taught government procurement law for three decades. John authored or co-authored a steady stream of articles, monographs, casebooks, hornbooks, and, until the end, analytical pieces in THE NASH & CIBNIC REPORT. John will be sorely missed by the government contracts community, the law school, the public contracts bar, his students and readers, his wife Jean, his children, Jean, Amy, Jennifer and John, and his grandchildren. Additional memorials written by John’s colleagues, students, and friends are available at 35 PUB. CONT. L.J. 3 (2005); 47 GC ¶ 332 (August 3, 2005); 45 CONT. MGMT. 70 (October 2005); 41 PROC. LAW. 20 (Fall 2005).