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Professors Steven L. Schooner & Christopher R. Yukins

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Model Behaviour? Anecdotal Evidence of Tension between Evolving Commercial Public Procurement Practices and Trade Policy

Professors Steven L. Schooner & Christopher R. Yukins
George Washington University Law School
Washington, D.C., USA

In today's global economy, public procurement's profile continues to rise. The World Trade Organization (WTO) and the European Union (EU), as well as organizations such as the World Bank and the regional development banks, increasingly focus upon the purchasing practices of nation states.¹ Not surprisingly, developing nations and states seeking to improve their systems of government procurement law, policy, and/or practice, expect to glean lessons from the evolution of procurement law regimes in developed nations. Frequently, these states turn for lessons learned to the United States, the European Union, and, with less frequency, economic success stories such as Singapore. Ultimately, developing nations recognize that particular value may derive from identifying and replicating the "best practices" of such well-established procurement regimes.²

This process, and its attendant attention, is particularly intriguing because, historically, the U.S. procurement community (including policy makers, buyers, and sellers) all too seldom assesses the international impact – and model – that the U.S. procurement system creates. The United States federal government spends approximately \$200 billion each year procuring goods (or supplies, ranging from submarines and aircraft carriers to personal computers and office furniture), construction, and services. Just as the sheer breadth, size, complexity, and all-encompassing nature of the U.S. system generates interest, these factors breed an inward-looking focus.

The international community's interest in U.S. procurement is not purely academic. Access to any significant portion of that \$200 billion for a state's contractors provides a potent incentive for developing nation states to open their procurement systems (to the extent that the classic *quid pro quo* is required). At the same time, U.S. companies, and those of similarly

¹ See generally, Asian Development Bank, Procurement Page <<http://www.adb.org/Procurement/>>; European Bank for Development and Reconstruction <<http://www.ebrd.com/procure/>>; European Commission Public Procurement <http://europa.eu.int/comm/internal_market/en/publproc/>; World Bank Procurement Policy <<http://www.worldbank.org/html/opr/procure/propage.html>>; and World Trade Organization, Government Procurement <http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm>.

² See, generally, Joshua A. Schwartz, "Learning from the United States' Procurement Law Experience: On 'Law Transfer' and its Limitations" (2002) 11 *Public Procurement Law Review* 115.

situated industrialized nations, crave open access to large-scale public works in developing countries, such as the Three Gorges Dam in China (projected to be the world's largest), airports, infrastructure (roads and bridges), and telecommunications systems. To vendors in the United States, the European Union, and other industrialized states, developing countries offer seemingly unlimited potential to consume services, ranging from air traffic control and environmental remediation to package delivery. Access to these opportunities depends upon open public procurement regimes.

Yet public procurement regimes differ dramatically (and this should not be perceived as a sub-optimal result). As our colleague, Joshua Schwartz, suggests: "Ironically . . . some of the most important transferable lessons that emerge from study of United States practice arise from the failures rather than the successes that can be traced in the history of United States procurement."³ For example, the U.S. procurement system, which historically served as a model of transparency, competition, and integrity,⁴ is – at the same time – perceived as grossly inefficient due to its failure to embrace fully conventional or pure commercial practices.

To the extent that the U.S. procurement regime is perceived (at least by some) as a model, the global community has been intrigued by the United States government's aggressive efforts during and since the 1990s to adopt more commercial practices and buy more commercial items – dubbed by some a "commercial revolution" in U.S. procurement. We do not suggest that the U.S. is alone in pursuing this path, nor that it is breaking new ground. Neither is necessarily the case. For our purposes, however, the U.S. model provides us with sufficient anecdotal material to demonstrate the tension with the larger trade policies.

Numerous impediments to a *purely commercial* public procurement model remain. (Arguably, the very phrase "commercial public procurement" is an oxymoron.) Commercial practices, by their nature, are invariably less transparent, and raise troubling questions regarding competition and integrity, both grave concerns whenever public monies are being spent. Yet the trend towards *more commercial* activity in U.S. public procurement is clear.

This shift in U.S. procurement practices has involved two related changes. First, the U.S. government has stressed its desire to embrace the most successful buying practices of businesses and consumers. Second, the U.S. government has committed itself to relying more heavily upon goods and services already produced in the marketplace. In other words, if possible, the

³ *Ibid.*

⁴ Steven L. Schooner, "Desiderata: Objectives for a System of Government Contract Law" (2002) 11 *Public Procurement Law Review* 103, 104.

Government will avoid demanding that firms create government-unique versions of goods and services.⁵

As a result of this shift to commercial buying, two seemingly ephemeral concepts have entered the vernacular of U.S. procurement: acquisition of commercial items (a focus on *purchasing different things*) and commercial purchasing practices (a focus on *different purchasing methodologies*). For the purposes of the U.S. procurement system, the term “commercial item” today includes “any item . . . that is of a type customarily used for nongovernmental purposes and that [h]as been sold, leased, or licensed to the general public[.]”⁶ As discussed below, the intent of this regulatory definition is to distinguish commercial items from those unique goods (such as sophisticated weapons systems) procured by the government, typically manufactured to idiosyncratic specifications, for which no legitimate nongovernmental market exists. For example, the now-popular term “commercial-off-the-shelf” (or COTS) refers to those goods readily available to the public in the retail marketplace, frequently through catalogue orders or cash-and-carry transactions.

Turning from *what* the government is buying to *how* the government buys, the government’s adoption of the term “commercial purchasing practices” reflects the government’s attempt both to: (1) act more like a consumer or a for-profit business; and (2) avoid buying according to the long-established statutes, regulations, policies, and practices that encompass the federal government procurement regime. To accomplish efficiencies enjoyed in the commercial market, the U.S. government made major revisions to its regulatory structure.⁷ Change of this magnitude is difficult, and it frequently leads to missteps and meets resistance from policymakers, procurement personnel, and entrenched government suppliers. Nonetheless, the trend continues.

⁵ Three decades of study have confirmed the inefficiencies associated with governmental purchasing of custom-designed goods and services. Steven Kelman, “Buying Commercial: An Introduction and Framework” (1998) 27 *Public Contract Law Journal* 249, note 1. For a retrospective view of the last decade’s shift in procurement strategies, see Steven Kelman, “Remaking Federal Procurement,” (2002) 31 *Public Contract Law Journal* 581.

⁶ 48 C.F.R. § 2.101. We should note, though, that the outer boundaries of the term “commercial item” themselves mark the outlines of an ongoing policy debate. *See, e.g.*, 43 *Government Contractor* No. 32, ¶ 336 (Aug. 29, 2001) (industry lobbying for broader definition of “commercial item,” to encompass anything produced by primarily “commercial” company). The U.S. Federal Acquisition Regulation defines “commercial items” to include, for example, items that have undergone minor modifications from the commercial marketplace; this reflects the practical reality that the U.S. government ultimately differs from any other consumer.

⁷ Federal Acquisition Circular 90-32, 60 *Federal Register* 48206 (September 18, 1995) (includes revised Federal Acquisition Regulation Part 12 rules for commercial items).

This paper briefly reflects upon the U.S. Government's efforts to make its government purchasing regime more commercial. These efforts entail the introduction of new policies, vocabulary, purchasing authorities, and practices. Inevitably, those efforts have stumbled in certain respects. As the discussion below reflects, those failures – that “stumbling” – have occurred primarily where the shift to commercial practices has proceeded without full consideration for the nature of government, the specific needs of the government, and the public's expectations regarding the expenditure of public funds. Ultimately, the paper suggests that the U.S. government was well served in its efforts to become *more* commercial, but divining a happy medium – or determining just how commercial to become – remains a daunting task. Moreover, we sound a cautionary note to developing states with regard to lessons learned from fully evolved procurement regimes. Efforts to conform private sector models to government procurement regimes – no matter how efficient or practical – may prove inconsistent with the expectations of trade negotiators and could, for example, jeopardize accession to the WTO's Government Procurement Agreement.

1. The U.S. Government Embraces Commercial Behaviour

It is difficult to understand the shift to “commercial” practices without understanding the political milieu in which this shift occurred. In 1992, President William Clinton and Vice President Al Gore concluded that they were elected on a platform of reform. They perceived a wave of enthusiasm for reform that carried them into the White House, much as a driving call for change carried John F. Kennedy a generation before. Vice President Gore recognized that maintaining momentum – continuing reform – would prove a critical part of his own drive for the White House eight years later. Rolling forward with reform, therefore, was a political imperative.⁸

At the same time, industry was pressing hard for reforms that would simplify U.S. federal procurement.⁹ This was especially true for the information technology industry, which correctly saw a robust field of opportunity in the federal government, but which refused to embrace the federal government's cumbersome rules of procurement. The government, with ever-growing needs for information technology, grew ever more willing to bend its traditional rules to

⁸ A central player in the Clinton administration's procurement reform efforts was Harvard University Professor Steven Kelman. *See, e.g.*, “Kelman Will Be Remembered As Facilitator of Revolutionary Procurement Reform,” 39 *Government Contractor* No. 35, ¶ 444 (Sept. 1997). The importance of the procurement reform movement to Vice President Gore's reinventing government campaign is discussed in Steven L. Schooner, “Fear of Oversight: The Fundamental Failure of Businesslike Government,” (2001) 50 *American University Law Review* 627.

⁹ In the United States, state and local governments carry out their procurements. Although the core principles are generally the same across federal, state and local procurements, the state and local rules can differ dramatically from the federal rules.

accommodate the then-robust, confident, and fiercely independent information technology industry.

These various strands – the Clinton/Gore administration’s thirst for reform, industry’s demand for streamlined rules, and the government’s growing willingness to soften its rules in order to gain access to cutting-edge technology at a reasonable price – came together in the Federal Acquisition Streamlining Act of 1994 (FASA),¹⁰ probably the most important piece of procurement reform enacted in decades. The new Act reformed U.S. procurement law in many different regards. One of the most important, though, was in the purchase of commercial items.

The new approach to commercial items, reflected, at its core, in the new Part 12 of the Federal Acquisition Regulation,¹¹ touched many different aspects of the procurement system:

- The new law created a recognized category of goods and services called “commercial items.” As the discussion below reflects, because streamlined procedures meant that those selling “commercial items” would bear far lower costs (including lower transaction costs), vendors had every incentive to ensure that their goods or services qualified as “commercial items.”
- The new law revamped how agencies would procure commercial items. Following commercial norms, the new law called for agencies to perform “market research,” and to define agencies’ needs against what is available in the commercial market.¹² The law permitted government agencies to use much simpler procurement procedures¹³ and to rely upon “standard” terms and

¹⁰ Public Law No. 103-355, 108 Stat. 3243 (1994).

¹¹ The Federal Acquisition Regulation, known colloquially as the “FAR” in U.S. procurement circles, appears (as noted) at volume 48 of the Code of Federal Regulations. The FAR is also available online, at <www.arnet.gov>, and (along with many FAR supplements from the military departments and other agencies), at <farsite.hill.af.mil>, a website maintained for the U.S. Air Force.

¹² 48 C.F.R. § 12.202.

¹³ Under the reformed regulations, agencies may use radically streamlined procedures for procurements up to the “simplified acquisition threshold,” i.e., \$100,000, under 48 C.F.R. § 12.603. For procurements above \$100,000 but below \$5 million – the vast “middle market” of information technology purchases, for example – agencies may use the slightly-more-cumbersome procedures at 48 C.F.R. Subpart 13.5.

conditions derived from the commercial marketplace.¹⁴ Under the new regulations and FASA, a broad array of procurement laws – laws that generally protected the government, but drove up the costs of contracting with the government – were made *inapplicable* to sales of commercial items to the government.¹⁵

Not all of the reforms stemmed from the Federal Acquisition Streamlining Act. Others grew out of the broader goal of streamlining government. In the mid-1990's, for example, Congress stanching the flow of appropriated funds to the Federal Supply Service (FSS) and the Federal Technology Service (FTS),¹⁶ two critically important sub-agencies with the U.S. General Services Administration. The two sub-agencies, the FSS and the FTS, were left to gather revenues largely on their own, through modest “user fees” that the FSS and the FTS would charge their “customer agencies,” *i.e.*, the other agencies for which the FSS and the FTS would act as purchasers. This reform – intended to reduce the burden of the FSS and the FTS on the Treasury – in fact released what have become two of the most entrepreneurial agencies in the U.S. government.

Other agencies followed the same path, launching their own fee-for-service contract vehicles. Under these initiatives, agencies with extensive in-house procurement expertise contract with vendors under an “indefinite-delivery/indefinite-quantity” (IDIQ) contractual vehicle. The contract with the “host” agency calls for specific items or categories of services, which the vendor provides at a fixed unit price. The vendor is allowed to sell “through” the

¹⁴ The standard terms to be used for commercial item contracts appear in the Federal Acquisition Regulation, at 48 C.F.R. § 52.212-4. To a limited extent, those standard terms may be “tailored” to meet an agency’s specific needs, per 48 C.F.R. §12.302.

¹⁵ 48 C.F.R. § 12.503.

¹⁶ See Conference Report on H. Cong. Res. 67, 141 Cong. Rec. H. 6273, H6298 (June 26, 1995) (calling for sharp reduction in FSS funding); H. Rep. No. 256, 103d Cong., 1st Sess. H6983, H6991-92 (Sept. 24, 1993) (calling for self-funded FSS). The move to shift the Federal Supply Service to a self-funding was underway in 1993, when the House Appropriations Committee noted that this option was on the horizon. House Rep. No. 127, 103d Cong., 1st Sess. 62 (June 14, 1993) (to accompany Public Law No. 103-123, Treasury, Postal Service, and General Government Appropriations Bill). For a comparison between the roles of FTS and FSS and those of their counterpart agencies in other countries, see *Procurement Reform: How Selected Countries Perform Certain GSA Activities* (Letter Report, 07/15/1999, GAO/GGD-99-109). For a discussion of how looser procurement rules for commercial items helped loosen the FSS schedules rules, see Robert J. Sherry, Thomas F. Burke and Kimberly C. Welch, “The Present and Future of MAS Contracting,” (1998) 27 *Public Contract Law Journal* 369.

IDIQ contract to other agencies. (This authority has been likened to obtaining a “hunting license.”) Those customer agencies will, in turn, remit a “user’s fee” (generally 1 percent or more) to the “host” agency.

These special contracting vehicles – the contracts supported by the General Services Administration’s FSS and FTS, and the IDIQ contracts supported by other agencies – have dramatically impacted the federal marketplace since the mid-1990s.¹⁷ To understand the concerns discussed below, i.e., to understand the ways in which the “commercial item” reforms have stumbled, we must pay special attention to these contractual vehicles, which have given the “commercial item” reforms both force and momentum that almost no one could have foreseen.

2. A Critical Framework for Review

To analyze the impact of the “commercial revolution” in U.S. procurement, we should look first to the system’s basic objectives. It is always difficult to articulate objectives for any procurement system.¹⁸ There are many options, and most are contradictory.¹⁹ A previous paper by one of the authors reviewed nine goals frequently identified for government procurement systems: (1) competition; (2) integrity; (3) transparency; (4) efficiency; (5) customer satisfaction;

¹⁷ The General Services Administration’s Federal Supply Service, for example, supports contracts known as the Federal Supply Schedules (also known as the Multiple Award Schedules (MAS)). The Federal Supply Schedules contracts, which were historically a relative backwater in federal procurement, have, thanks to streamlined contracting, grown to represent billions of dollars annually in federal information technology sales. See General Services Administration, *GSA FY2001 Annual Performance Report*, Part V http://www.gsa.gov/attachments/GSA_PUBLICATIONS/extpub/AnnualRepFSS.doc; Accenture, *GSA Delivery of Best Value Information Technology Services to Federal Agencies*, at 4-5 (Apr. 2002) <<http://www.gsa.gov/accnture>> (“In FY2001, FSS provided agencies with \$22 billion worth of products and services ranging from automobiles to office supplies. Approximately \$17 billion of those revenues were generated from schedule sales, of which \$11 billion are IT products and services.”).

¹⁸ Schooner, “Desiderata: Objectives for a System of Government Contract Law,” *supra* note 4.

¹⁹ This reflects not only government procurement, but the nature of government. See Richard Stillman II, *The American Bureaucracy: the Core of Modern Government* 360-94 (2d ed., 1996), distinguishing the Hamiltonian, Jeffersonian, and Madisonian normative models of government – all of which have, in turn and in combination, shaped Americans’ vision for government.

(6) best value; (7) wealth distribution; (8) risk avoidance; and (9) uniformity.²⁰ Here, though, we will focus on three “pillars” that, in our opinion, underlie the United States procurement system: competition, system transparency; and procurement integrity. With regard to each core principle, we assess how the shift to “commercial” contracting has succeeded – or failed – in U.S. procurement.

2.1. Competition and the “Commercial Revolution”

In the United States, we believe that our government enjoys access to the best contractors, lowest prices, most advanced technology, favourable contract terms and conditions, and the highest quality goods and services. We think this is so because our system encourages participation by the widest possible pools of potential competitors; consistently demonstrates that competitors will be impartially considered for award of contracts; and treats all contractors in a manner that balances appropriate risks with meaningful profit incentives and rewards.

We promote *competition* because we believe in the power of the marketplace. By optimizing competition, the government – in principle, at least – receives its best value in terms of price, quality, and contract terms and conditions.²¹ Contractor motivation to excel is greatest when private companies, driven by a profit motive, compete head-to-head in seeking to obtain work. Yet, maintaining a robust competitive regime requires more than a commitment to the marketplace. Accordingly, we promote and sustain contractor competition by instilling transparency and integrity into the system. Conversely – and as the discussion below reflects – *failures* in competition, transparency and procurement integrity tend to swell and amplify one another.

Over the past decade, competition in the U.S. procurement system has declined substantially. This indirectly derives from legal changes: as a result of a loosening of the regulatory scheme, new contractual vehicles have emerged which have resulted in dramatically lower levels of competition.²²

²⁰ Schooner, “Desiderata: Objectives for a System of Government Contract Law,” *supra* note 4.

²¹ See generally, the Competition in Contract Act of 1984 (CICA), Pub. L. No. 98-369, Div. B., Title VII, 98 Stat. 1175 (July 18, 1984); 10 U.S.C. § 2304; 41 U.S.C. § 253. CICA imposed upon the procurement system the now well accepted standard of “full and open competition,” which “when used with respect to a contract action, means that all responsible sources are permitted to compete.” 48 C.F.R. § 6.003.

²² See, e.g., Steven L. Schooner, “Fear of Oversight,” *supra* note 8 at 659-60 “Recent Procurement Changes Have ‘Gutted’ CICA, GSBICA Chairman Says,” 44 *Government Contractor*, No. 31, ¶ 324 (Aug. 21, 2002) (discussing speech by General Services
(footnote continued ...)

These new contractual vehicle, the “schedules” and “IDIQ” contracts to which we alluded above, generally take the form of “task order” contracts. The contracts, typically sponsored by the General Services Administration or by other agencies with strong contracting capacity, could be described as standing “master” contracts against which other agencies may issue task or delivery orders.

Experience demonstrated that little real competition preceded the award of many of these “master” task-order contracts. To be accepted as a General Services Administration schedules contractor, a vendor need only submit a proposal (albeit a complex proposal) with stated discounts against its commercial prices. A prospective GSA schedule contractor is not really “competing” against other contractors; if the vendor feels any price pressure to gain award from GSA, that pressure is generally only to discount against the vendor’s own commercial prices (which may or may not have been subject to true competitive pressures in the open marketplace). And with regard to quality, the General Service Administration contracting officer has very few tools to “screen,” or eliminate, prospective vendors with shoddy goods.

Once a General Services Administration task-order contract (a “schedules” contract) is in place, little real competition is required when task or delivery orders are awarded under that contract. Federal regulations allow federal buyers to issue purchase orders to schedules contractors with little, if any, real price or quantity competition.²³ As a consequence, many observers fret that GSA schedules purchases, with far less competition, result in higher prices and lower quality.²⁴

Nor is there always meaningful competition when other U.S. agencies award “master” task order contracts (those contracts generally referred to as “Indefinite Delivery/Indefinite Quantity” or “IDIQ” contracts). The law and regulations favor making multiple awards when master IDIQ contracts are awarded. Thus, for example, an agency may award several, parallel

Administration Board of Contract Appeals Judge Stephen Daniels); General Accounting Office, *Contract Management: Not Following Procedures Undermines Best Pricing Under GSA's Schedule* (Letter Report, Nov. 28, 2000), GAO/GAO-01-125) (blaming weak competition in GSA schedules buys on buyers’ failures to follow procedures for competition).

²³ 48 C.F.R. § 8.404 (limited competition required for GSA schedule purchases). Although the rules call for allowing competition for every task order issued under a multiple-award IDIQ contract, *see* 48 C.F.R. § 16.505(b), the rules also allow contracting officials substantial discretion to narrow competition for the task orders, *id.*

²⁴ *See, e.g.*, General Accounting Office, *Contract Management: Interagency Contract Programs Need More Oversight*, GAO Rep. No. GAO-02-734 (July 25, 2002) (citing overcharging of fees by hosting agencies); General Accounting Office, *Contract Management: Trends and Challenges in Acquiring Services*, GAO Rep. No. GAO-01-753T (May 22, 2001) (noting poor management practices leading to lack of competition in services contracting).

IDIQ contracts for information technology equipment at the same time. Multiple awards, however, do not guarantee strong competition.²⁵ If, for example, vendors know (or suspect) that multiple awards likely will be made, contractors have less incentive to compete fiercely on price or quality. If many awards will be made, being second-best (or worse) may prove perfectly adequate.

Nor will the multiple awards ensure competition once the master contracts are in place. In theory, with multiple contractors in place with parallel contracts, an agency should benefit as those contractors compete for future task orders under the “master” contracts. In practice, however, the current regulatory structure leaves agencies with great discretion to narrow competition on any given task order, by limiting competition to a narrow subset of all of the master contract holders. For a variety of reasons,²⁶ an agency may open a task order under a master IDIQ contract to competition from only one or two contractors. Although the other, excluded contractors may claim that this denies them the required “fair opportunity” to compete,²⁷ as a practical matter, contractors excluded in this may have little legal recourse.²⁸

What, then, drove the enormous growth in these types of contracts? The growth seems to stem from several causes. First, contractors prefer to use these streamlined vehicles, which are far cheaper to negotiate, impose much lower competitive demands, and are largely immune from disruptive bid challenges or protests. Customer agencies, for their part, welcome the relative ease of use of these contractual vehicles and the much faster award cycles that task-order contracts allow.²⁹ The “hosting” agencies – the General Services Administration and the other

²⁵ See, e.g., Cheryl Lee Sandner & Mary Ita Snyder, “Multiple Award Task and Delivery Order Contracting: A Contracting Primer,” (2001) 30 *Public Contract Law Journal* 461 (discussing legal background and game theory to competition in multiple-award contracts).

²⁶ 48 C.F.R. § 16.505(b)(2).

²⁷ *Id.* § 16.505(b).

²⁸ A recent decision by the U.S. Armed Services Board of Contract Appeals (ASBCA), however, found that denying IDIQ contractors a fair opportunity to compete for task orders may be a breach of the government’s contractual promise to ensure fair competition. *Community Consulting International*, ASBCA No. 53489, 02-2 BCA ¶ 31,940 (2002).

²⁹ Ralph C. Nash & John Cibinic, “Task and Delivery Order Contracting: Great Concept, Poor Implementation,” 12 *Nash & Cibinic Report*, No. 5, ¶ 30 (May 1998) (“What the Comptroller is describing in these passages is a fact of life known to all in the practical world--contracting agencies will follow the path of least resistance when it comes to satisfying their requirements.”). The General Services Administration estimated that while a traditional full and open competition may take several months, a task order under a GSA schedules contract can be awarded in a matter of hours or days. See General Services Administration, “White Paper: (footnote continued ...)

agencies that “host” these contractual vehicles -- clearly welcome the fees earned on these vehicles.³⁰ What is left unanswered, though, is why customer agencies migrated to these vehicles, when lower competition almost certainly means longer higher prices and lesser quality?

A multitude of explanations, some generic and some peculiar to the U.S. government, may resolve this puzzle.³¹ Generally speaking, the key driver seems to be the agencies’ keen appreciation for the rapidity and flexibility of the task order vehicles, and the agencies’ *under-appreciation* of the higher real costs – in higher prices and lost quality – caused by diminished competition.

This imbalance – this irrational weighing of costs and benefits – predominates because government agencies are driven by their missions (as opposed to a profit motive). If agency officials can achieve their mission goals at lower transaction costs, and with little or no delay, the officials appear willing to accept higher long-term costs (in higher prices or lower quality). The officials’ “irrational” decision-making may be driven not only by the relatively short time horizon of politically elected decision-makers, but also by the funding cycle in U.S. procurement. In many cases, appropriated funds must be spent before the budget year expires, which creates tremendous pressure to use efficient contractual vehicles.

This brief history outlined above – the history of the rapid shift to task-order contracting - - seems to hold several comparative lessons for the international community. First, the U.S. experience shows that it is not enough simply to mandate a policy of “competition.” Whether required by statute or treaty, competition is often a secondary goal (at best) for purchasing officials. If there is a gap in the regulatory scheme, and the purchasing agency can drive through that gap to a faster purchase with lower transaction costs, the purchasing agency may well take that path – even if the loss of competition means higher real costs in the long term.

Acquisition Sources and Alternatives” (Aug. 1998)
<<http://www.acqsolinc.com/pastperfdoc/acqsourceswp.html>>

³⁰ The General Services Administration is under pressure to reduce its one percent fee on schedule sales, because it appears that the agency’s revenues from that fee far exceed the General Services Administration’s costs. *See, e.g.*, Diane Frank, “GSA Ponders Cut in Schedule Fees,” *Federal Computer Week* (Sept. 16, 2002) (available at <http://www.fcw.com>). It is not entirely clear, though, that hosting agencies are in fact always recovering more than sponsoring these vehicles costs. *See* General Accounting Office, “Multiple-award Contracting at Six Federal Organizations,” GAO Rep. No. NSIAD-98-215 (Sept. 30, 1998) (data unclear as to whether agencies under study were recovering more in fees than their costs incurred in hosting contractual vehicles).

³¹ For example, the shift to General Services Administration contracts has been driven, at least in part, by a marketing effort launched by the agency on the backs of public buses in the Washington, D.C, metropolitan area.

This observation – that, in agencies’ eyes, speed and lower transaction costs tend to outweigh the more enduring benefits of competition – leads to a second, more subtle lesson. The current U.S. procurement system, in which traditional competition has collapsed on a number of fronts, is a system with deep legal and cultural roots in competition. Even here, where competition is required by law³² and ingrained in practice for over a century, and where the surrounding society thrives on competition – even here, competition has faltered badly. Again, competition cannot be achieved by simple fiat, statute, or treaty. Competition must be carefully nurtured and jealously guarded. Simply erecting structures that should, in theory, protect competition – such as awarding multiple IDIQ contracts simultaneously to allow future task-order competition – is insufficient. Some mechanism must ensure that those structures yield the desired competition.

That leads to the third lesson: *how* to ensure that competition thrives in a procurement system. The lesson here comes from a gap in the U.S. regulatory structure. Historically, the chief guardian of competition in the U.S. system has been the General Accounting Office (GAO).³³ The GAO hears bid protests involving federal procurements, and if the GAO perceives a lack of competition, it will move forcefully to demand competition. Under the current regime of rules, however, task-order contracting is largely immune from GAO review. Although the GAO has striven gamely to expand its jurisdiction to ensure competition in task-order contracting,³⁴ and other cracks have emerged in the walls barring review,³⁵ the task-order contracting system is still largely beyond effective review — and beyond internal checks. For other procurement systems, this is a cautionary lesson: if competition is to succeed as a policy, an effective enforcement mechanism must be kept in place.

2.2. A Failure in Transparency

³² *E.g.*, 41 U.S.C. § 253; 10 U.S.C. § 2304.

³³ See, e.g., <http://www.gao.gov>.

³⁴ See, e.g., Karen DaPonte Thornton, “Fine-Tuning Acquisition Reform’s Favorite Procurement Vehicle, The Indefinite Delivery Contract,” (2002) 31 *Public Contract Law Journal* 383, 408-09 (discussing GAO decisions); see also Michael J. Benjamin, “Multiple Award Task and Delivery Order Contracts: Expanding Protest Grounds and Other Heresies” (2002) 31 *Public Contract Law Journal* 429.

³⁵ See *Community Consulting International*, ASBCA No. 53459, 02-2 BCA ¶ 31,940 (Aug. 2, 2002) (concluding that agency’s failure to honor its commitment to “fair competition” for task orders was a breach of contract, actionable under the Contract Disputes Act). We should note that Steve Kelman, the key official in the Clinton/Gore administration behind many of these reforms, takes a much dimmer view of protests. In his view, historically the threat of protests stifled innovation and undercut agencies’ relationships with their vendors. See Steven Kelman, “Remaking Federal Procurement,” 31 *Public Contract Law Journal* 581, 595 (2002).

This brings us, then, to the next (and related) failure in the “commercial” revolution: a failure of transparency. Arguably, no issue dominates the WTO’s procurement agenda more than transparency.³⁶ By system *transparency*, we mean a system employs procedures by which offerors and contractors (and even the public at large) ensure that government business is conducted in an impartial and open manner.³⁷ Professor Sue Arrowsmith suggests that, in a transparent system, the affected parties clearly know both the rules to be applied in conducting procurements as well as information on specific procurement opportunities.³⁸ Transparency is maintained in many ways.³⁹ In a truly transparent system, a government will announce all of its

³⁶ See, e.g., the WTO’s Government Procurement web site, which features transparency as the first of its three areas of work, and offers additional information regarding the Working Group on Transparency in Government Procurement Practices (WTGTP). http://www.wto.org/english/tratop_e/gproc_e/gproc_e.htm .

³⁷ See generally, Sue Arrowsmith, “Towards a Multilateral Agreement on Transparency in Government Procurement” (1998) 47 *Int’l & Comp. L.Q.* 793, 796. In the broader context of transparent government, see the excellent resource, *Transparency International, the global coalition against corruption*, at <http://www.transparency.org/>.

³⁸ See 47 *Int’l & Comp. L.Q.* at 796. Further, Professor Arrowsmith explains that transparency:

ensure[s] that procurement decisions are based only on considerations regarded as ‘legitimate’ within the system. . . [It also] supports the goals of procurement systems by encouraging and facilitating participation by suppliers. Publicity for procurement opportunities, the application of clear and accessible rules, and the assurance that these rules will be adhered to all mean that suppliers are more willing and able to bid. There is less risk that their participation will prove wasteful. . . .

47 *Int’l & Comp. L.Q.* at 796-97.

³⁹ To ensure transparency, a government may publish all of the statutes, regulations, and rules that define a procurement process. For example, visit the GPO Access Site at http://www.access.gpo.gov/su_docs/index.html for Federal statutes, regulations, and related materials or, more specifically, visit the Federal Acquisition Regulation site at <http://www.arnet.gov/far/>. The decentralization of U.S. procurement, launched by the reforms of the 1990s, and spurred by advances in information technology, has meant that more U.S. procurement rules are *not* centrally published or controlled. See, e.g., Federal Aviation Administration, *Acquisition Management System* (June 2002) (separate body of FAA procurement rules) (available at <http://fast.faa.gov/ams/>).

requirements – what it expects to purchase – for all the world to see (“publication”).⁴⁰ Following publication, the government will clearly articulate in every solicitation how offerors will be evaluated (“articulation”).⁴¹ The government will notify all unsuccessful offerors (and interested members of the public) who received the award, and for what amount (“notification”). The government will debrief offerors and explain to them how all of the rules and regulations were followed (“explanation”).⁴² The government will provide for challenge procedures,⁴³ generally quasi-judicial proceedings through which unsuccessful offerors (and other interested parties) may protest agency procurement decisions – and gain redress (“review and rectification”).⁴⁴

⁴⁰ The U.S. government publicizes its pending requirements on the Internet through a site known as “Federal Business Opportunities,” or “FedBizOpps.” See generally 48 C.F.R. § 5.101(a)(1); <www.fedbizopps.gov>.

⁴¹ To ensure that a government procurement market remains open to international trading partners, these transparency requirements will often be imposed by treaty. See, e.g., North American Free Trade Agreement, Chap. 10: Government Procurement <<http://www.nafta-sec-alena.org/english/index.htm>>.

⁴² In negotiated U.S. government procurements, offerors are entitled to prompt debriefings. 10 U.S.C. § 2305(b)(6)(A); 41 U.S.C. § 253b(f)-(h). Debriefings have, in recent years, played a vital role in reducing the numbers of bid protests, as debriefings help to dispel disappointed offerors’ (or, in other words, “losers”) suspicions and disappointment.

⁴³ The Federal Acquisition Regulation, 48 C.F.R. § 33.101, defines “protest” as:

a written objection by an interested party to any of the following:
(a) A solicitation or other request by an agency for offers for a contract for the procurement of property or services. (b) The cancellation of the solicitation or other request. (c) An award or proposed award of the contract. (d) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

Ibid.

⁴⁴ Protest procedures can benefit both the parties involved and the procurement system in general.

When the Congress has laid down guidelines to be followed in carrying out its mandate in a specific area, there should be some procedure whereby those who are injured by the arbitrary or capricious action of a governmental agency or official in ignoring

(footnote continued ...)

Transparency, unfortunately, has been a major casualty in U.S. procurement's "commercial revolution." As task-order contracting for "commercial" items has expanded, thousands of opportunities annually awarded through task orders are rarely published for review. Because publication (the first link in the chain of procurement transparency) has been lost, the following links in the chain – articulation, notification, explanation, and review and rectification – generally fail as well. As a practical matter, billions of procurement dollars are now spent behind what is, for most purposes, a wall of silence.

Reviving transparency is not simple, for transparency carries its own contradictions in the context of a "commercial" revolution in procurement. In a true commercial marketplace, transparency is never highly valued (and it may be feared), for private firms have many commercial secrets to preserve, beyond those that can be protected under formal intellectual property protections.⁴⁵ Accordingly, transparency often *seems* antithetical to true commercial practices.

Abandoning transparency merely because commercial firms abhor it is not, however, a sound solution. The goal in a "commercial" revolution is to adapt useful practices from the

those procedures can vindicate their very real interests, while at the same time furthering the public interest. . . .

Scanwell Laboratories v. Shaffer, 424 F.2d 859, 864 (D.C. Cir. 1970), following Judge Frank's analysis in *Associated Industries of New York State, Inc. v. Ickes*, 134 F.2d 694, 704 (2d Cir.), vacated as moot, 320 U.S. 707 (1943). The *Scanwell* court further noted that: "The public interest in preventing the granting of contracts through arbitrary or capricious action can properly be vindicated through a suit brought by one who suffers injury as a result of the illegal activity, but the suit itself is brought in the public interest by one acting essentially as a 'private attorney general.'" 424 F.2d at 864. The court adopted the "view . . . that government officers were making contracts on behalf of the government, that Congress is also a participant in the exercise of the government's proprietary functions, and that the most practicable way to keep the government's contracting officers within their statutory powers is by letting complainants . . . obtain judicial review of the officers' action." 424 F.2d at 866 (citing, 3 Kenneth Culp Davis, *Administrative Law Treatise* 220 (1958)). The court concluded: "If there is arbitrary or capricious action on the part of any contracting official, who is going to complain about it, if not the party denied a contract as a result of the alleged illegal activity? It seems to us that it will be a very healthy check on governmental action to allow such suits . . . as a watchdog of government activity. . . ." 424 F.2d at 866-67.

⁴⁵ "Numerous laws designed to ensure transparency, rationality, and accountability in decision making, including the Administrative Procedure Act (APA) and the Freedom of Information Act, apply to agencies, and not to private actors." Jody Freeman, "The Private Role in Public Governance," (2000) 75 *N.Y.U. L. Rev.* 543, 586-87 (citations omitted).

private sector – not to ape the commercial marketplace. Commercial firms shun transparency because they have commercial secrets to hide; the government, for all purposes relevant here, does not. There is no reason, therefore, for the government to abandon its long-term commitment to transparency.

Transparency also illustrates how useful an economic analysis – even a rudimentary analysis – can be in solving puzzles in “commercial” reform. As the discussion above reflects, agencies seem keenly sensitive to transaction costs, and keeping those costs to a minimum seems an important element in marking any pathway to reform. True transparency, however, need not add substantial transaction costs. With Internet technologies, agencies can quite cheaply publicize their needs. The other, linked elements of transparency – articulation, notification, explanation, and review and rectification – flow much more easily once the agency publishes its procurement opportunities.⁴⁶ Low transaction costs (and high benefits in potential competition) thus provide a better gauge of what should (and should not) be adopted as a part of the “commercial revolution.”

2.3. Procurement Integrity

Our last lesson from the “commercial revolution” relates to procurement integrity – a lesson very much still in progress. *Procurement integrity* describes rules of conduct and standards for behaviour for procurement personnel in the government and private industry. Bribery, favouritism, or unethical behaviour have no place in a successful procurement system.⁴⁷ The regulatory mandate in the U.S. system is clear:

⁴⁶ See, e.g., Jennifer E. McCarthy, “Commerce Business Daily Is Dead: Long Live FedBizOpps,” (2002) 31 *Public Contract Law Journal* 513 (discussing electronic platforms for publicizing federal procurement opportunities). Indeed, Section 803 of the National Defense Authorization Act for Fiscal Year 2002, Pub. Law No. 107-107, 115 Stat. 1012 (2001), calls for precisely this source of transparency. Section 803 requires the Department of Defense to give “fair notice” of significant (over \$100,000) procurements of services, if those services will be bought through multiple award contracts, such as GSA schedules contracts or IDIQ contracts. The rules to implement Section 803 have engendered substantial debate between the Bush administration and industry, because of the potential impact on sales of services to the Department of Defense. See, e.g., Christopher J. Dorobek, “Section 803 Remains on Hold,” *Federal Computer Week*, Aug. 27, 2002 (available at <http://www.fcw.com>).

⁴⁷ An extensive statutory and regulatory construct is intended to limit both actual and apparent conflicts of interests involving government procurement officials. See 48 C.F.R. § 3.1. See also, generally 18 U.S.C. § 201, discussing gratuities and bribes. It is unlawful to offer, give, solicit or accept gifts (or things of value) to or by government employees. “*Gift* includes any gratuity, favor, discount, entertainment, hospitality, loan, forbearance, or other item having monetary value.” 5 C.F.R. § 2635.203 (emphasis in original). The same regulations define
(footnote continued ...)

Government business shall be conducted in a manner above reproach and . . . with complete impartiality and with preferential treatment for none. Transactions relating to the expenditure of public funds require the highest degree of public trust and an impeccable standard of conduct. The general rule is to avoid strictly any conflict of interest or even the appearance of a conflict of interest in Government-contractor relationships. While many Federal laws and regulations place restrictions on the actions of Government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.⁴⁸

Procurement ground rules attempt to ensure fair treatment and ethical behaviour. Private industry expects fair evaluation of its proposals to do contract work. Government agencies expect contractors to compete solely upon the merits of their demonstrated capabilities and the quality and price of their offers, rather than their influence on government officials. This mutual trust, bolstered by meaningful oversight,⁴⁹ not only sustains but enhances the competitive environment.

“prohibited source” as “any person who: *Does business or seeks to do business* with the employee's agency . . .” 5 C.F.R. § 2635.203(d) (emphasis added). Although the Office of Government Ethics has promulgated a number of de minimis exceptions, the exceptions are just that – exceptions to the prohibition. See generally, Standards of Ethical Conduct by Employees of the Executive Branch, 5 C.F.R. § 2635; <<http://www.usoge.gov/>>.

⁴⁸ 48 C.F.R. § 3.101-1.

⁴⁹ In procurement, compliance indicates not just high standards of integrity, but also the maintenance of system transparency, the maximization of competition, and the furtherance of a host of congressionally mandated social policies. Any one of these issues opens to door to a host of pitfalls. For example, integrity in U.S. procurement implicates issues related to, *inter alia*, personal and organizational conflicts of interest, gratuities, bribes, handling and disclosure of proprietary source selection information, contractor certification of compliance with numerous social programs (such as contractor size status, disclosure of cost or pricing data, or origin of end products delivered), contractor maintenance of a drug-free workplace, contractor allocation of specified unallowable costs to specific pools, appropriate supervision and cooperation by government employees, proper use by contractors of mandated supplies or raw materials, and faithful execution by contractors of inspection and testing provisions.

Unlike other areas of procurement regulation, procurement integrity has not undergone a major legal or regulatory overhaul as part of the commercial revolution.⁵⁰ Because of the changes that the “commercial revolution” has brought to the marketplace, however, procurement integrity needs *more* attention – not less.

Historically, the government could strictly channel its officials’ contacts with contractors by forcing contractors through a highly structured bidding or proposal process. When procurements were awarded based on bids or proposals, the government could, and did, keep the contractors at arm’s length. All that changed, however, with the shift to “commercial” procurement and the accelerating shift to task-order contracting. In task-order contracting, there are few formal bids or proposals, and little or no public announcements of pending announcements. As a result, in this new environment, vendors’ salespeople must and do maintain constant contact with their federal customers. Business success is no longer simply a matter of low bids or cleverly written proposals in the federal government. The salesperson, as in the commercial marketplace, is the key.

This new dynamic – the product of the “commercial revolution” -- has obvious ramifications for procurement integrity. Because fewer opportunities are publicized, sales personnel in the federal sector face enormous pressure to gain whatever information – through whatever means – they can on future business opportunities. Moreover, the dangers compound because so many new companies have been drawn into the federal sector, with the streamlining of procurement due to the “commercial revolution.” More often than not, managers and salespeople at those firms lack training, experience, or familiarity with longstanding norms and mores in the federal space regarding procurement integrity. They bring different, more commercial practices and expectations regarding what is (and is not) appropriate in the sales process.

Another, less obvious danger grows out of these new market dynamics. As the “commercial revolution” erodes the barriers to entry that surround the federal market⁵¹ – the regulations and requirements that have traditionally created a sheltered market – those already inside the market must scramble to find new sources of competitive advantage. Market forces in the federal arena tend, over time, to blur price and quality advantages. That leaves, then, many vendors with only one real competitive advantage: their relationships with their federal customers. That, in turn, creates dangerous incentives to test the boundaries of procurement integrity.

⁵⁰ We should note, though, that two standard requirements in federal contracting – the covenant against contingent fees, and anti-kickback requirements – are not applied to “commercial item” contracting. 48 C.F.R. § 12.503(a).

⁵¹ See generally Steven Kelman, “Buying Commercial: An Introduction and Framework,” (1998) 27 *Public Contract Law Journal* 249 (discussing goal of reducing barriers by reducing regulatory burden on “commercial item” procurements).

At least one lesson is clear. Government should recognize that, as it loosens constraints on contracting, it should send very clear signals to its trading partners – its vendors – to comply with procurement integrity requirements. Procurement integrity should, in other words, move to the centre of the trading dialogue. Unfortunately, as one of the authors previously bemoaned, the current procurement environment seemingly places ever-decreasing emphasis on compliance, oversight, and, ultimately, public trust.⁵²

3. Conclusion

The WTO's Government Procurement Agreement and the nascent WTO Transparency Agreement attempt to establish widely acceptable parameters – little more than minimum standards – for public procurement. For developing countries, evolved procurement regimes (such as the U.S. system) typically offer useful models. As mature procurement regimes continue to experiment, or merely tinker at the margins, it is imperative to recognize that those in search of lessons learned risk receiving conflicting messages.

While we may quibble with recent U.S. efforts to implement commercial purchasing programs, we do not mean to suggest that we categorically oppose a commercial model. As one of the authors previously suggested, knowing when to purchase commercial items and when to employ commercial purchasing techniques enables the U.S. to become more efficient.⁵³ But learning to recognize when commercial models are inappropriate is equally important to maintaining the public's trust in the procurement system.

Looking abroad, however, states must not ignore the messages sent by their internal experimentation with their public procurement system. Putative efficiency gains at home must be balanced against international agreements and perceptions abroad. We hope that the U.S. and other similarly situated states recognize that meaningful trade discussions cannot be reconciled with a model that suggests: “do as I say, not as I do.” As last summer's blockbuster movie reminded us, with great power comes great responsibility.⁵⁴ Often, it's hard to lead by example, but it's almost always worth the effort.

⁵² Schooner, “Fear of Oversight,” *supra* note 8.

⁵³ Steven L. Schooner, “Commercial Purchasing: The Chasm Between the United States Government's Evolving Policy and Practice,” in Sue Arrowsmith & Martin Trybus, *Public Procurement: The Continuing Revolution* 137 (forthcoming 2003).

⁵⁴ Advice given by Uncle Ben to Peter Parker, alias the Spider Man. *Spider-Man*, the movie (Sony Pictures, 2002). See <<http://spiderman.sonypictures.com/>>