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Federal Contracting and Acquisition: Progress, Challenges, and the Road Ahead

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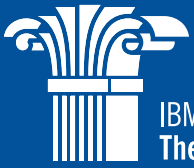
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Framing a Public Management Research Agenda

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Federal Contracting and Acquisition

by Steven L. Schooner

Background

The Obama Administration inherited a public procurement regime stretched to the breaking point and under siege. As the federal government spent more than \$500 billion in fiscal year 2008 purchasing a mind-bogglingly diverse array of services, supplies, and construction, a chorus of voices in Congress, the media, and the public concluded that the current system is broken and demanded dramatic reform. These critiques must be tempered. The statutory and regulatory regime that underlies and guides federal purchasing is well-established and fundamentally sound, and most contractors provide the government excellent value for its money. Unfortunately, there are at least four trends which are now working together to deny the public the full value for its money that it has every right to demand.

Trend One: The Dismantling of the Acquisition Workforce

Beginning in 1989 and continuing until 2000, Congress mandated reductions in the Defense Department's (DoD's) acquisition workforce, which reduced the number of professionals available to plan for, negotiate, and manage the government's contracts. The reductions rendered succession planning impossible, increased future risks associated with the pending retirement bubble, and left the government unprepared for the recent period of dramatically increased purchasing.

Trend Two: Failure to Acknowledge or Adapt to Seismic Changes

An overburdened workforce denied infusions of new talent (and, of course, time and resources to train) failed to adapt to two dramatic changes in federal procurement over the last two decades:

- The government evolved from primarily purchasing supplies into an insatiable consumer of services, specifically including professional and personal services.
- During the 1990s, robust "new public management" initiatives empowered government purchasers to embrace commercial practices, employ flexible contracting vehicles, and ultimately, change business methods in an effort to maximize value for money received and customer satisfaction.

Trend Three: The Post-Millennial Spending Binge

In the past decade, and particularly after the September 11, 2001 attacks, federal procurement spending increased, conservatively, at more than five times the rate of inflation (rising from approximately \$220 billion in FY 2000 to over \$530 billion in FY 2008). [These numbers, of course, exclude grants. Although the amount of money spent annually on grants exceeds that spent through contracts, grant spending is less transparent and subject to far less



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scrutiny.] Driven by, among other things, large-scale military deployments in Iraq and Afghanistan, an increased national focus on antiterrorist security, a natural disaster (Hurricane Katrina), and demands for government stimulus and action to avoid economic catastrophe, this increased volume of purchasing typically was accompanied by increased urgency.

Trend Four: The Inevitable Result—Scandal and Criticism

The trends described above exposed the acquisition system's cracks. A relentless focus on *awarding contracts* (meeting purchasing requirements to accomplish critical agency missions) exacerbated the absence of resources available to actually *manage those contractual relationships*—often including high-profile, complex, flexible agreements. Unrealistic promises in unstable areas (involving, for example, the civic renewal of Iraqi society and infrastructure) were prematurely delegated to contractors and resulted in high-profile disappointments. Hastily negotiated arrangements in unstable areas without adequate or responsible government oversight also permitted unethical actors to exploit the system.

Progress to Date

Faced with financial and economic crises, distracted by multiple military actions, and engaged in a high-stakes debate over the future of health care, the nascent Obama administration—not surprisingly—did not immediately focus its resources on establishing its procurement leadership team. Nonetheless, within a month of its inauguration, the administration issued four pro-labor executive orders that impact the federal procurement process. In early March 2009, a Presidential Memorandum on Government Contracting articulated concerns with recent trends in outsourcing, cost-reimbursement contracting, and insufficient competition. The memorandum implied (and the president's speeches promised) that remedying these perceived pathologies would generate significant savings and highlighted “contracts that are wasteful, inefficient, subject to misuse.”

In late July 2009, the administration expanded upon these policies by issuing memoranda that:

- Mandated savings and advocated the reduced use of high-risk contracting vehicles (such as noncompetitive and/or cost-reimbursement contracts);
- Provided guidance to help agencies improve their management of the multisector workforce (a more constructive, but still premature, approach to the earlier anti-outsourcing rhetoric); and
- Injected rigor into the government's ineffective process for obtaining, managing, and employing contractor performance data.

At the same time, in pursuing initiatives to stimulate a stalled economy with government spending, the administration mandated increased transparency in public procurement (and government, generally) and reiterated concerns regarding contractor compliance. The administration also continued to deploy the procurement process to achieve targeted wealth distribution (favoring, for example, domestic manufacturers, environmentally friendly producers, and small businesses, implicitly, at the expense of taxpayers, large businesses, foreign firms, etc.).

To date, the Obama administration's procurement policies lack a cohesive performance- or outcome-oriented theme, suggest a reactive rather than a proactive approach, evidence a special interest bias, and, at best, send a mixed message at a critical juncture.

Key Challenges Facing the Public Procurement System

As the Obama administration belatedly fills in its leadership team, at least five significant challenges must be addressed if the administration desires dramatically different outcomes from the procurement regime over the next decade.

Challenge One: Restore and Stabilize the Acquisition Workforce

Consensus opinion recognizes the need for a large-scale, sustained reinvestment in the acquisition workforce. The DoD, which accounts for two-thirds of the government's annual purchasing, intends to hire 20,000 additional acquisition professionals by 2015 (and many conclude that even that number will prove insufficient). Even if DoD achieves its recruitment goal, and if civilian agencies follow suit, numerous related challenges remain:

- How can the government attract the right talent? Civil service and OPM-based recruitment of acquisition personnel remains slow, cumbersome, and frequently impenetrable for many in the private sector. The Defense Acquisition Workforce Initiative Act and its civilian companion, the Clinger-Cohen Act, make entry-level positions seem unattainable to talented, highly qualified young people. Furthermore, there is insufficient awareness on the nation's undergraduate and graduate campuses of the opportunity to serve the nation as a valued business manager.
- Can the marketplace meet the government's demands for highly qualified talent in certain critical specialties, such as program managers and systems engineers (or experienced experts in complex systems integration)? If not, the government may require years of career development and mentorship to develop that talent.
- How should the government train, integrate, and allocate tens of thousands of new acquisition professionals? Effectively doing so will require leadership, patience, vision, and resources. Historically, all of these have been lacking, as most clearly demonstrated by the government's inability to effectively implement many promising acquisition reforms in the 1990s.
- How significant is the pending acquisition workforce retirement bubble? Estimates as to the magnitude of the problem may differ, but the lion's share of the government's most experienced acquisition professionals are eligible to retire. Current economic conditions may continue to delay this pending crisis, but the eventual exodus cannot be avoided, likely will negate the gains derived from current hiring initiatives, and may thin the existing pool of mentors.

Challenge Two: Achieve Responsible Outsourcing

For the foreseeable future, the government has no choice but to outsource even its most critical and sensitive requirements. The government's increased—and now almost insatiable—demand for services over the last two decades is well-documented. Neither the civil service nor the military is large enough to meet the government's existing mandates. In Iraq and Afghanistan, for example, the government has relied upon more than 200,000 contractor personnel not only for transportation, shelter, and food, but for unprecedented levels of security, battlefield and weaponry operation, support, and maintenance. Without contractors, our military simply cannot project its technical superiority abroad. Despite the extent of this reliance, Allan Burman in a 2009 IBM Center paper noted, "For the past decade, government has increasingly contracted out its operations with little or no overall strategy." This leads to the following questions:

- What tasks should the government outsource? Which must (or should) be kept in-house? If the government (currently) is overly dependent upon contractors, to what extent, and in what areas, should the government's reliance be reduced? If the long-standing "inherently governmental function" standard is an inadequate test, is a superior alternative test or rubric available?
- When presented with immediate requirements that military personnel could not fulfill in Iraq and Afghanistan, agencies turned to the private sector for surge capacity, additional expertise, or, more broadly, more people. Is it feasible for the government to avoid permitting short-term needs to become long-term outsourcing requirements?
- How can the government better structure its service contracts and manage its contractual relationships? Unfortunately, the acquisition workforce lacks (1) the expertise and experience to craft (e.g., plan for, solicit, draft, and negotiate) high-performance, outcome-oriented service contracts (e.g., the 1990s' performance-based service contracting initiative surely has not yet fulfilled its promise); and (2) the skilled personnel to manage and provide sufficient oversight over these contracts once they are in place.

In his 2008 IBM Center paper, Steve Kelman agreed that the "1990s-era reforms paid little attention to improving contract management following [contract award]." Indeed, Kelman asserts that what is lacking today is the personnel available (and skilled) to provide basic supervision of contractor work, executive-type decision making, developing strategy, inspiring the workforce, monitoring, and focusing on metrics or performance outcomes. Can the government employ and deploy qualified personnel to supervise contractor work?

Challenge Three: Focus on Best-Value Outcomes

This challenge centers on developing performance metrics which are appropriate for assessing the success of a public procurement regime. Economic and business experts assert that procurement policy must be driven by a focus on "best value" or what some call "value for money"; end user customer satisfaction is equally important. Contrary to a significant amount of public administration research, agreement with this approach suggests that the administration should shift its focus away from constraints or "controls" to a more constructive emphasis on performance results. Third World and developing economies routinely elevate (1) "corruption control" and (2) targeted wealth distribution as their highest-order priorities in an effort to instill or maintain credibility, willingly incurring increased transaction costs and sacrificing marginal potential savings, flexibility, speed, and customer satisfaction. But the United States can do better. This leads to the following questions:

- To what extent should the government use the procurement process to effectuate various social policies? The existing procurement regime favors a dizzying array of private interests ranging from organized labor; domestic manufacturers and firms located in areas of high unemployment; small businesses, including disadvantaged and women-owned firms; blind, severely-handicapped, and prison industries; and, most recently, environmentally friendly vendors. Affirmatively steering the government's business from the open marketplace to preferred providers adds complexity, thus increasing transaction costs throughout the procurement process, which absorbs scarce resources.
- How significant are the transaction costs resulting from the administration's commitment to transparency (generally, and specifically in the context of stimulus or recovery spending)? In a representative democracy, transparency is critical. But transparency is expensive and time-consuming, and the additional resources required to comply with the recently enhanced disclosure standards remain an unfunded mandate. Thus, the existing acquisition workforce must devote scarce resources to an (admittedly legitimate) end *other than the pursuit of value for money or customer satisfaction*. Is there an optimal balance or a point of diminishing returns?

Challenge Four: Neutralizing the Toxic Environment

Particularly given the perceived failure of the free market in the financial and mortgage industries, contractors increasingly are vilified, and resources are shifted from pursuing value-based outcomes to creating compliance and risk avoidance regimes. At a macro level, this is an inefficient overreaction. The United States enjoys one of the world's best public procurement regimes. Government customers enjoy excellent value for taxpayer money. Contractors provide extraordinary levels of support, particularly in extreme conditions such as those in Iraq and Afghanistan. This leads to the following questions:

- Is the current perception of the procurement process—by Congress, the media, the public—reflective of reality? If the perception is inaccurate, does it impact (adversely) the allocation of scarce acquisition resources? Pervasive antic contractor rhetoric colors public perceptions of contractors and the acquisition profession. Does it adversely impact recruitment and retention of acquisition personnel? While a successful procurement regime depends upon high standards of integrity and compliance, a pervasive "corruption control" focus not only stifles creativity and encourages mechanical rule adherence, but encourages timidity and risk-averse behavior. Kelman hits close to the mark in his prediction that public managers (or procurement professionals) over the next decade:

[r]ather than transforming, learning, and challenging themselves ...
could be preoccupied with "ferreting" out waste, fraud and abuse, ...
"exposing mismanagement," ... "complying with rules and procedures"
... in a mode of "hunkering down" and "keeping out of trouble[.]"

- Is there a proper balance between integrity concerns and government purchasing efficiency? Is there a point of diminishing returns on compliance? An ethical procurement process, where both parties perform their contractual obligations with the highest degrees of integrity, is a worthy aspiration. But there are significant costs associated with sophisticated rules-based procurement regimes and the resulting compliance programs—and the audit, oversight, and prosecutorial functions required to validate and sustain them. Historically, Congress willingly has funded oversight functions and ignored the popular axiom that an ounce of prevention is worth a pound of cure. More

auditors and inspectors general will uncover more problems, but they will not write or negotiate better contracts, nor will they manage contractor performance to ensure customer satisfaction.

- Does the government have a social responsibility to its business partners? Does the government have a responsibility to disclose its dependence upon contractors and laud their successes? Does the government have an interest in communicating the importance—to every government mission—of effectively managing the government's business partners, its vendor and supplier base, or, simply put, its contractors?

Challenge Five: Major System Acquisition Reform

A relatively small number of extremely large programs, typically referred to as “major systems,” absorb a disproportionate amount of the annual procurement budget. Empirical evidence demonstrates that—particularly at DoD—major system acquisitions rarely are completed on time, routinely cost more than originally expected, and often fail to meet the performance requirements that the government and the contractor initially agreed upon. This leads to the following questions:

- Are the currently employed metrics sufficient to assess the success of the system? Three metrics—cost, schedule, and the original contractual performance requirements—make an apparently compelling case that DoD's major system acquisition program is fundamentally flawed. Although this view is widely accepted, it potentially overstates the potential problem and masks related pathologies. Employing these metrics, the solution to the perceived problem is that DoD must curb its appetite for purchasing technology beyond the current “state of the art.” Purchasing presently available technology, no doubt, would permit more credible contractual promises with regard to delivery dates, expected costs, and technological capabilities. Conversely, purchasing currently available technology may not permit the military to maintain future battlefield superiority over the nation's enemies.
- Can the pathologies caused by the Congressional appropriations process be mitigated? Potent institutional forces inherent in the budget cycle drive the government and the contractor to agree to contract pricing, schedules, and requirements that subsequently prove unrealistic. Because DoD cannot afford to pay for the necessary research and development needed for systems to mature, contractors submit proposals for immature technologies and commit to long-term delivery schedules fully cognizant that both technology and the government's needs (and wants) continue to evolve. DoD is fully complicit in this overpromising, believing that it is required to placate Congressional appropriators.
- Can the government more effectively employ incentives and disincentives? Agencies routinely struggle to inject meaningful incentives and disincentives into the procurement process to help achieve better results. Recent examples—such as the cleanup of the Rocky Flats Environmental Technology Site and the replacement of the Minneapolis I-35 Bridge—demonstrate that aggressive incentives motivate contractors to overcome daunting tasks and, in so doing, satisfy their government customer. Yet efforts to aggressively employ profit policy remain problematic because well-intentioned participants believe the public good is served by artificially suppressing contractor profits or, as they see it, controlling excessive profits.

The Road Ahead

The Obama administration would do well not only to continue, but accelerate, its efforts to restore and stabilize the acquisition workforce. Strong leadership will be required to sustain the investment required to recruit talent, plan for the training and integration of tens of thousands of new professionals, and better address the long-term necessities of professional development and succession planning, the absence of which caused the current state of affairs.

Just as the private sector is increasing its focus on optimizing its vendor and supply chains, the government must invest talent, energy, and resources in managing what is, in effect, its contractor workforce. Long-term personnel planning may (or may not) reduce the need to employ contractors to perform inherently governmental functions. But proper management of the acquisition workforce should permit the government to more accurately define its requirements, negotiate performance-based contracts intended to meet those requirements, and manage the contractors who support agencies in performing their missions.

History demonstrates that a rules-based command and control procurement system will not provide the flexibility, speed, and customer satisfaction necessary for a heavily outsourced government to effectively perform its missions. Nor will such an approach maximize the value of taxpayer dollars spent. Performance objectives—outcomes, rather than processes—must move to the forefront of acquisition reform. Bold leadership will be required to make such a transition.

Federal Contracting and Acquisition

The following research questions are based on discussions by participants in small group working sessions at the November forum:

1. How can the government attract the right talent to the acquisition profession?
2. Can the marketplace meet the government's demands for highly qualified talent in certain critical specialties, such as program managers and systems engineers (or experienced experts in complex systems integration)?
3. How should the government train, integrate, and allocate tens of thousands of new acquisition professionals?
4. How can the government systematically evaluate its acquisition workforce needs and capabilities?
5. What types of skills will be needed in the contracting and broader acquisition workforce to meet the challenges of the next five to seven years?
6. What are effective organizational structures for growing and deploying specialized acquisition expertise to manage complex products and services?
7. How does government assess the impact of an acquisition workforce development program on acquisition outcomes? How will government know if it is successful?
8. To what extent, and in what areas, should the government's reliance upon contractors be reduced or increased?
9. How significant are the transaction costs resulting from the administration's commitment to transparency (generally, and specifically in the context of stimulus or recovery spending), and who will bear those costs?
10. How can government develop and define better metrics on acquisition outcomes?

REFERENCES

- Acquisition Advisory Panel, *Final Report* (January 2007), available at www.acquisition.gov/comp/aap/finalaapreport.html
- Burman, Allan V. and Marty Wagner. (2008). *Post Award Contract Management: Who's Minding the Store?* IBM Center for The Business of Government (March). Available at www.businessofgovernment.org/pdfs/PostAwardContractManagement.pdf
- Burman, Allan V. (2008). *The Role of Contractors in Government: Have We Gone Too Far?* IBM Center for The Business of Government (November). Available at www.businessofgovernment.org/pdfs/ContractorsBrief_1108.pdf
- Department of Defense Inspector General Report No. D-2000-088. (2000). *DoD Acquisition Workforce Reduction Trends and Impacts* (February 29). Available at www.dodig.mil/Audit/reports/fy00/00-088.pdf
- Dombrowski, Peter and Eugene Gholz. (2006). *Buying Military Transformation* (September 5, 2006) Columbia University Press.
- Executive Order. (2009). *Economy in Government Contracting* (January 30). Available at www.whitehouse.gov/the_press_office/economy_in_government_contracting
- Executive Order. (2009). *Use of Project Labor Agreements for Federal Construction Projects* (February 6). Available at www.whitehouse.gov/the_press_office/ExecutiveOrderUseofProjectLaborAgreementsforFederalConstructionProjects
- Executive Order. (2009). *Nondisplacement of Qualified Workers Under Service Contracts* (January 30). Available at www.whitehouse.gov/the_press_office/nondisplacement_of_qualified_workers_under_service_contracts
- Executive Order. (2009). *Notification of Employee Rights Under Federal Labor Laws* (January 30). Available at www.whitehouse.gov/the_press_office/notificiation_of_employee_rights_under_federal_labor_laws
- Federal Procurement Data System. (2009). *Federal Procurement Data System—Next Generation*, at <https://www.fpds.gov/>
- Field, Lesley A. (2009). *Improving the Use of Contractor Performance Information* (July 29). Office of Federal Procurement Policy. Available at www.whitehouse.gov/omb/assets/procurement/improving_use_of_contractor_perf_info.pdf
- Field, Lesley A. (2009). *Acquisition Workforce Human Capital Succession Plans* (January 7). Office of Federal Procurement Policy. Available at http://www.whitehouse.gov/omb/assets/omb/procurement/awf_succession_plans.pdf
- Gansler Commission Report [Report of the “Commission on Army Acquisition and Program Management in Expeditionary Operations”]. *Urgent Reform Required, Army Expeditionary Contracting* (October 31, 2007). Available at www.army.mil/docs/Gansler_Commission_Report_Final_071031.pdf
- Gilbreth, Alan S. and Sylvester Hubbard. (2008). “How to Make Incentive and Award Fees Work,” *48 Defense Acquisition Review Journal* 48(133).
- Kelman, Steven. (2007). *The Transformation of Government in the Decade Ahead*. IBM Center for The Business of Government (July). Available at www.businessofgovernment.org/pdfs/KettlKelmanReport.pdf
- Orszag, Peter R. (2009). *Improving Government Acquisition*. Office of Management and Budget (M-09-25, July 29, 2009). Available at www.whitehouse.gov/omb/assets/memoranda_fy2009/m-09-25.pdf

Orszag, Peter R. (2009). *Managing the Multi-Sector Workforce*, Office of Management and Budget (M-09-26, July 29, 2009). Available at www.whitehouse.gov/omb/assets/memoranda_fy2009/m-09-26.pdf

Report of the Defense Science Board Task Force on Defense Industrial Structure for Transformation. (2008). *Creating an Effective National Security Industrial Base for the 21st Century: An Action Plan to Address the Coming Crisis* (July). Available at www.acq.osd.mil/dsb/reports/2008-07-DIST.pdf

Schooner, Steven L. (2004). "Competitive Sourcing Policy: More Sail Than Rudder." *Public Contract Law Journal*, 33(263).

Schooner, Steven L. (2005). "Feature Comment: Empty Promise for the Acquisition Workforce." *The Government Contractor*, 47(203).

Schooner, Steven L. (2001). "Fear of Oversight: The Fundamental Failure of Businesslike Government." *American University Law Review*, 50(627).

Schooner, Steven L. and Daniel S. Greenspahn. (2008). "Too Dependent on Contractors? Minimum Standards for Responsible Governance." *Journal of Contract Management*, 6(9) (Summer).

Schooner, Steven L. (2008). "Why Contractor Fatalities Matter" *Parameters*, 38(78) (Autumn).

USASpending.gov or www.usaspending.gov

Van Gemert, Dennis K. and Martin Wartenberg. (2007). "Lessons Learned in Acquisition Management." *Defense Acquisition Review Journal*, 45(133).

White House Memorandum for the Heads of Executive Departments and Agencies. *Government Contracting*. (March 4, 2009). Available at www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government/



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