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Reflections on the Federal Procurement Landscape

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FEATURE COMMENT: Reflections On The Federal Procurement Landscape

Having recently completed my service as the Administrator for Federal Procurement Policy, I want to set out here my thoughts about the current state of the federal procurement system. I was greatly honored to be nominated by the president in October 2009, and confirmed by the Senate in November 2009. More than 20 years of work in the federal procurement law field, first in private practice and then at the Government Accountability Office, provided me with the advantage of familiarity with the procurement system and with many of the key stakeholders, especially the attorneys.

By the time I was sworn in, shortly after Thanksgiving 2009, the administration had already issued a number of significant procurement-related documents. While those documents reflected a range of policies, I viewed my key goals as three in number: strengthen the acquisition workforce, increase fiscal responsibility in acquisition and rebalance our relationship with contractors. Those goals were not driven by ideology—at least not on my part—but by an assessment of the reality we faced in 2009.

Before turning to these, it is worth contemplating the goals that are not on the list. I had no interest in pushing another wave of “procurement reform” in the sense of legal reform because I do not view our acquisition statutes as out of date, nor do I believe that our regulations require a major rewrite. On the contrary: Observing the legal reforms in other countries, whether it is the EU’s proposal to revamp its Procurement Directive or the World Trade Organization’s newly

revised Agreement on Government Procurement, I am struck by how fundamentally sound our legal framework is and how little legal reform we need. That is not to say that the Federal Acquisition Regulation cannot be improved—I remain concerned, for example, about the adequacy of the FAR’s guidance on blanket purchase agreements and task orders—but the federal procurement system does not require a massive revision along the lines of what was done in the 1990s.

Contrary to some people’s hopes, I also did not view insourcing as a goal. While, as explained below, some insourcing was needed where work had been improperly contracted out, I never took the view that insourcing per se should serve as a goal. For various reasons, I also had little appetite for restarting public-private competitions, whether under a revised Office of Management and Budget Circular A-76 or otherwise.

Strengthening the Federal Acquisition Workforce—Virtually everyone paying attention to the U.S. procurement system since the 1990s has decried the decline of the acquisition workforce. My new colleagues at The George Washington University Law School repeatedly chronicled this trend. See, e.g., Schooner, Feature Comment, “Empty Promise For The Acquisition Workforce,” 47 GC ¶ 203; Yukins, Feature Comment, “A Pedagogical Perspective On Training The Acquisition Workforce,” 47 GC ¶ 204. One of the most thorough analyses of the impact of that decline on the nation’s defense capabilities was that led by Professor Jacques Gansler, former undersecretary of defense for acquisition, technology and logistics and now at the University of Maryland. *Urgent Reform Required: Army Expeditionary Contracting*, Report of the Commission on Army Acquisition and Program Management in Expeditionary Operations (Oct. 31, 2007) (commonly referred to as the Gansler Commission Report). As professors Schooner and Yukins, the Gansler Commission, and others have pointed out, the acquisition workforce crisis is far more significant than the mere decline in numbers

over the past 20 years, because training and stature also suffered during the last two decades.

Moreover, the decline was not limited to the personnel in the agencies' contracting offices (the people in the 1102 job series). Virtually every key role in acquisition planning, as well as in contract management, was overstretched, undertrained and undervalued. To give one specific, but very important, example: During my tenure as administrator, I consistently heard concern that both defense and civilian agencies had failed to maintain a cadre of cost and pricing specialists, which led to inadequate acquisition planning, poorly conducted negotiations and failures in contract administration.

Particularly problematic because the Government dramatically expanded reliance on contractors was the failure to appoint and train enough contracting officer's representatives or CO's technical representatives. Those officials represent the Government in the field, and—when adequately equipped and trained—play a critical role as COs' "eyes and ears," ensuring that the contractors perform in accordance with the contract, and timely alerting the COs when contractors run into unexpected problems or fail to meet their contractual obligations. Many observers have documented the impact of inadequate staffing of the COR function, particularly in the context of overseas work. See, e.g., Commission on Wartime Contracting in Afghanistan and Iraq (CWC), *Final Report to Congress: Transforming Wartime Contracting: Controlling Costs, Reducing Risks* (August 2011) at 162–63; Dickinson, *Outsourcing War and Peace: Preserving Public Values in a World of Privatized Foreign Affairs* (2011) at 82–86.

Increasing Fiscal Responsibility—This priority, too, was a reaction to the changes that had occurred in the years between 1992 and 2009, and especially since 2001. The amount of taxpayer funds spent on contracted goods and services rose almost nonstop from 1992 through 2009. Instead of annual figures in the range of \$150–\$200 billion, as we had seen in the 1990s, by 2009 we were spending \$550 billion a year. That rate of increase—something like 12 percent per year between 2001 and 2009—was unsustainable. Moreover, the increased spending translated into increased work for the overworked acquisition professionals in the agencies.

The dramatic dollar increases only tell part of the story. How we bought was also problematic. More and more, we had shifted from individual procurement

contracts to the use of indefinite-delivery, indefinite-quantity contracts, frequently awarded to multiple contractors and often used by multiple agencies. The General Services Administration's Federal Supply Schedule (FSS) alone came to account for nearly \$40 billion in annual sales—nearly one in 12 of the taxpayer dollars paid to contractors. When the FSS number is included in the overall figure for spending going through IDIQ contracts, our estimate was that it reached something like \$200 billion a year. That shifted the focus in the acquisition system from the award of these "umbrella" contracts to the award of task and delivery orders under them. But at that lower level, the rules, at least as they were widely understood in the late 1990s and early 2000s, led to inadequate transparency, competition and accountability. Although Congress had legislated improvements in all three of those areas in recent years, implementation challenges abounded.

The situation was made more complicated by two further changes, one substantive, one procedural. The substantive change was the shift from buying mainly goods to buying mainly services. Buying services, especially professional services, requires skills and knowledge different from what is needed to buy goods, and the skills and knowledge were not always present in our acquisition workforce. To those challenges we had added, in the world of the FSS, a new layer of procedural complexity, through the widespread use of blanket purchase agreements.

Developed for reasons outside the scope of this FEATURE COMMENT, BPAs became a new layer between the FSS contracts and the individual task and delivery orders. Unlike the Government-wide FSS contracts, BPAs have typically been agency-specific (or even component-specific), and, again unlike the FSS contracts, they have been cloaked in a lack of transparency. The result was that if a CO in one agency was considering entering into a BPA with a vendor for goods or services under the vendor's FSS, she or he would effectively have no way to know whether another agency had already negotiated and signed a BPA for the same goods or services with that vendor. Instead, the CO would need to spend time and effort negotiating a new BPA with the vendor, which might have prices less favorable than those already negotiated by the other agency. In short, BPAs, as they were being used, encouraged agency- and even component-specific contracting, and impeded Government-wide approaches.

Rebalancing Relations between the Government and Contractors—In the years since 1992, relations between the Government and its contractors had changed dramatically and, in our judgment, gotten badly out of balance. One example is the weakness of the Government’s management of its contractors, noted above, but there were more fundamental imbalances. One was highlighted in the Memorandum on Government Contracting that President Obama issued March 4, 2009. As the president explained in that memo, the line between work that could appropriately be assigned to contractors and work that should be reserved for performance by federal employees had become blurred.

Since the mid-1990s, an enormous amount of work that historically had been performed by civil servants was outsourced to contractors. While the decision to outsource was sometimes based on solid analysis, in many cases it was driven by ideology (some believed that contractors were by definition less expensive or more efficient), or by all-too-practical considerations (getting contractors on board through a task order under an existing IDIQ contract can be accomplished much faster than hiring federal employees), or even by what I suspect were unconscious political assumptions regarding optics (by relying on contractors, the Government could do just as much without looking like “big government”).

But whatever the reason, the Federal Government had come to depend on contractors—at home, but also in Iraq, Afghanistan and elsewhere overseas. And dependence on contractors sometimes crossed the line from healthy use to unhealthy overreliance, especially with respect to services. As the CWC wrote in its report, the use of contractors had become the “default option.” I remember a junior member of an agency’s contracting office telling me, in a mix of frustration and regret, that in her agency service contractors told the agency what it needed, wrote up those needs as statements of requirements and then won contracts to meet those needs. At another agency, I was told that no federal employee understood the agency’s information technology system and that the contractors were in control.

Coupled with these problems, though, I also heard repeatedly about a breakdown in communication between the Government and contractors. In many cases, I heard that the acquisition professionals were uncertain how to interact with contractors. They feared that communications with contractors

would lead to problems with their agency’s inspector general or their agency’s attorneys, or to the filing of a bid protest. In many cases, it seems, the overworked federal acquisition staff simply did not believe that they could afford to take time to meet with contractors. Whatever the reason, the result was a strained relationship with inadequate communication.

Tackling the Priorities—Throughout my tenure as OFPP administrator, I worked to open up channels of communication. With my background in acquisition, I was comfortable listening to other acquisition professionals across the Federal Government, and I did that in abundance. For example, the priorities set out above, and potential ways to address them, were discussed in meetings of the Chief Acquisition Officers Council as well as in monthly conference calls that we initiated with agencies’ senior procurement executives. Because the Department of Defense accounts for more than 60 percent of contract spending, I spent much time working with DOD, especially with the leadership of the Defense Procurement and Acquisition Policy office.

We also revived the Front Line Forum that Professor Steve Kelman had created when he was OFPP administrator in the mid-1990s. Four times per year, we brought together about three dozen front-line acquisition staff from civilian and defense agencies. We heard their views on the challenges they faced and on the steps that we were considering taking. I also conducted dozens of visits to agencies, and whether at Kirtland Air Force base in Albuquerque, N.M., or at the Centers for Medicare and Medicaid Services outside Baltimore, Md., whether at large agencies or small ones, the discussions were a chance to hear from people on the front line and to get their input.

Throughout my tenure, I also met with other stakeholders in the complex world of federal acquisition. From my very first day on the job, I was meeting with contractors—officials from professional associations as well as from individual companies—because I was determined to increase and improve communication between us in the administration and Government contractors. Meeting with other stakeholders was a routine part of my job, including (but, as they say, not limited to) members of Congress and their staff; trade unions and their representatives; staff from GAO, where I worked before my appointment as OFPP administrator; academics; and representatives of professional associations, such as the American Bar Association’s Section of Public Contract Law.

From the start, we were focused on addressing the three priorities set out above. But there were, of course, other issues along the way, some of them very important, such as increasing small business participation in the federal marketplace. Other issues were frustrating distractions, such as responding to efforts on the Hill to legislate automatic, punitive debarment of contractors for various reasons. While our work was sometimes used by stakeholders for parochial purposes—to trash the federal workforce or bash contractors, depending on the individual stakeholder’s agenda—we tried to stay focused on our priorities throughout.

Progress Made in Strengthening the Acquisition Workforce—Although the progress was limited and the outlook remains problematic, I believe that we made headway in strengthening the federal acquisition workforce. In terms of numbers, the president’s fiscal year 2011 budget included \$158 million for the civilian agency acquisition workforce (the Department of Defense has separate funding). Despite the investment of much time on the Hill and the generally supportive reaction we received from both Republicans and Democrats, in both houses, we did not get the full \$158 million we asked for—but we nonetheless saw agencies devote more resources to their acquisition professionals. That pattern repeated itself for FY 2012 as well.

We succeeded in reversing the trend of slashing the numbers of 1102s, both across DOD and in many (but not all) civilian agencies. The numbers of 1102s are up, on the order of a 5- to 12-percent increase from a few years earlier. While the various formulas for calculating the number of contracting staff that an agency needs are problematic, I am confident that we are not yet at an adequate level. Moreover, we still have a disproportionate number of acquisition staff in many agencies who are at or near retirement eligibility, so we must anticipate a large number of retirements over the next five years.

With the mood on the Hill not favorable to further federal hiring, I am concerned that we will repeat the mistake of the past and let the number of 1102s go down again. There is some comfort in hearing supportive words from all sides; notably, both Rep. James Lankford (R-Okla.), chair of the Oversight and Government Reform Subcommittee on Technology, Information Policy, Intergovernmental Relations and Procurement Reform, and Rep. Gerry Connolly (D-Va.), ranking member on that subcommittee, expressed sup-

port for the acquisition workforce in my last hearing as administrator, on Nov. 16, 2011. Nonetheless, as I indicated at that subcommittee hearing, I believe that the acquisition workforce numbers are very much at risk going forward.

Tracking the numbers for members of the acquisition workforce outside the contracting offices—in particular, for contracting officer’s representatives—is more difficult than counting 1102s. For various reasons, DOD does not count CORs as part of the acquisition workforce at all, and obtaining reliable data at civilian agencies presents a challenge as well. The Federal Acquisition Institute (FAI) has been working to develop a database that will include better data on CORs, but, as of now, the information is far from complete.

In terms of training for the workforce, we made some progress, but, as with the numbers, the progress is tenuous. Both the Defense Acquisition University and FAI are under new leadership that is committed to improving training. In addition, other agencies have also improved their training capability, most notably the Department of Veterans Affairs, with its Acquisition Academy in Frederick, Md. The challenge will be to ensure that all of those facilities provide training that is well-designed, relevant and timely. Some of the course material that I saw was quite good, and the heightened emphasis on having useful training for CORs is particularly encouraging. Despite the improvements, I did not hear consistently positive feedback from the people on the front lines of the contracting agencies, so much work evidently remains to be done—and in a world in which budget pressures put training dollars at risk.

Progress Made in Buying Less and Buying Smarter—The administration did succeed in stopping the year-on-year increases in spending. That was not something that the acquisition workforce could do, of course, since it is program personnel, not contracting staff, who determine an agency’s needs, whether it is major weapon systems or support services. But the president set a tone of restraint in spending, and the message clearly got through. In FY 2010, for the first time since 1997 (and, aside from a limited increase in that year, for the first time since 1993), spending on contracts went down: from about \$550 billion in FY 2009 to just over \$535 billion in FY 2010. The FY 2011 figures are apparently in that same lower range. That still means more than half a trillion dollars of taxpayer funds spent on contracts each year—but,

as with the number of the acquisition workforce—at least the problematic prior trend was reversed.

The focus of our efforts in the Office of Federal Procurement Policy was buying smarter. It was here, I believe, that our efforts to strengthen, listen to and work with the acquisition workforce paid off. In dozens, if not hundreds, of meetings, we encouraged federal acquisition professionals to innovate, try different approaches and learn from one another. The result: new ideas being tried, and word about them being shared across the Government. I remember a meeting with one agency in which I learned that they had never tried an electronic reverse auction—and when they heard how the auctions work, they were enthusiastic to try one. Similarly, at the annual reviews we conducted with most contracting agencies (called AcqStats, for acquisition status reviews), we learned of innovative approaches that agencies were developing, and we shared that information.

We promoted a reduction in the use of contract types that were risky for the Government, and therefore for the taxpayers: contracts awarded sole-source, and where a competition was held, but only one bid came in; and contracts for which the pricing structure shifted too much cost risk to the Government. We found broad agreement about the need to increase competition, and I was heartened by DOD's focus on "real competition" and reducing the number of one-bid competitions. (I should note in passing that, although DOD often announced its own initiatives, they were fully consistent with the Government-wide effort.)

On pricing structures, I often heard agreement on the need to reduce the use of time-and-materials contracts, but I also heard concerns that pressure to reduce the use of cost-reimbursement contracting might lead to bad results. Those concerns resonated, so I focused primarily on increasing competition and reducing the use of T&M contracts. In our AcqStats with agencies, we saw considerable progress on both of those fronts, but, particularly with respect to avoiding sole-source and one-bid contracts, this is clearly a battle that will need to be fought again and again to increase the competition that is a bedrock principle of our acquisition system.

An important development that arose from studying the data and conducting discussions with agency personnel was our focus on increasing fiscal responsibility in what we came to call management support services—a suite of services that include information technology support as well as more general

professional advisory services. We became convinced that spending on these services warranted further attention, for several reasons.

First, they were an area of particularly fast growth—the rate of increase in spending on them exceeded the already rapid increase in contract spending generally. Second, contracts for these services are frequently structured as T&M contracts, with the associated cost risk to the Government. And third, when we asked agency personnel to identify services for which they were concerned about overreliance on contractors, these services were often named. The bottom line was that we decided, by mid-2011, that we needed to restrain spending in this area—not to stop it, but to restrain it—and to be sure that agencies focused on why and how they were using contractors for management support. I am optimistic that we will achieve the goal of a 10-percent reduction in spending on these services, from something over \$40 billion in FY 2010, in the course of FY 2012.

Throughout my tenure as OFPP administrator, a central part of our effort to promote smarter buying related to interagency contracting. The fact is that when multiple agencies buy the same goods or services on their own, there is a great risk that they are duplicating one another's efforts, wasting the time of their limited acquisition staff and not necessarily all obtaining an equally good deal. In my view, the chaos of interagency contracting in earlier years had wrongly led many people, including on Capitol Hill, to conclude that interagency contracting was inherently bad. People pointed to the fact that the Government Accountability Office had added interagency contracting to its "high-risk" list as proof that more interagency contracting was bad—with the implication that more single-agency contracting was good.

This issue became a core concern of mine. While I agree that interagency contracting had been abused, and I therefore agreed when GAO included interagency contracting on its high-risk list some years ago, our review led me to conclude that the problems that GAO had identified—in particular, the lack of clarity about each agency's roles and responsibilities—had largely been addressed. I was especially concerned about a misunderstanding that arose repeatedly in discussions about duplication, an issue mentioned in connection with interagency contracting in more recent GAO reports. While having two or three interagency contracts for similar goods and services might represent some duplication, replacing those

contracts with 20 or more single-agency contracts would not decrease duplication—instead, it would dramatically increase it. In short, I do not think that there is justification any longer for listing interagency contracting as an area of particularly high risk to the Government.

Perhaps the most notable demonstration during my tenure as OFPP administrator of our efforts to promote the use of interagency vehicles rather than single-agency ones was the campaign referred to as strategic sourcing. As mentioned above, over the prior dozen years, we had seen a proliferation of single-agency blanket purchase agreements under the Federal Supply Schedules.

We decided to work with the General Services Administration to promote the use of Government-wide BPAs. For various reasons, the commodity that we first took on was office supplies, which were frequently being purchased through single-agency, and even single-component, BPAs. We encouraged GSA, as it met with user agencies, the Small Business Administration and industry, to develop an approach that would lead to Government-wide BPAs offering agencies good prices, high quality, sustainability and Trade Agreements Act compliance—all while maintaining a high level of small business participation.

Although the details of the process deserve to be described in more detail than is possible here, the bottom line was this: GSA ultimately awarded a suite of 15 BPAs, 13 of which went to small businesses. We encouraged agencies to carefully analyze the BPAs, and ultimately many agencies came to conclude that the new BPAs met their needs. During the course of 18 months, from July 2010 to December 2011, we watched agency purchasing of office supplies shift to those 15 strategic sourcing BPAs, reaching approximately \$200 million during FY 2011. In the small but not insignificant area of office supplies, we had shifted from single-agency vehicles to Government-wide ones, with results that were beneficial for agencies, taxpayers and small businesses—which obtained over 70 percent of the dollars spent.

We worked with GSA and multi-agency commodity teams to identify the next target of opportunity, which was print management. Wireless and software licenses were not far behind. Especially in a time of severe fiscal constraints, I believe that this shift from single-agency to Government-wide contract vehicles holds enormous potential for buying smarter in the years to come.

Putting these strategic sourcing efforts in a broader context, I would say that during my tenure we witnessed agencies doing more by way of innovation to buy smarter than we have seen in many years—at least since the wave of “procurement reform” in the 1990s. Evidence of the breadth and depth of what was happening was highlighted in a recent GAO report that has received less attention than it deserves. See *Federal Contracting: OMB’s Acquisition Savings Initiative Had Results, but Improvements Needed* (GAO-12-57); 53 GC ¶ 383.

While GAO criticized the Office of Management and Budget and contracting agencies in the report for various reasons, the report also presented what I view as a picture of unprecedented progress. Among other areas, GAO described agencies’ efforts to strengthen their acquisition workforces, including improved recruitment programs and better training. GAO also recounted some of the steps that agencies are taking to buy smarter. To name only a few of the many identified, GAO cited actions to improve acquisition planning, including measures to help with requirements definition and selection of the appropriate contract type; better communication with contractors to reduce operational costs; better price negotiations, leading to deeper discounts and lower prices; and smarter use of technology to streamline acquisitions, obtain better deals for taxpayers and promote small business participation. I viewed this as the consequence of agencies’ acquisition professionals being allowed, and encouraged, to demonstrate their business skills, and the results have been impressive.

Progress Made in Rebalancing the Government’s Relationships with Contractors—Trying to right the distortions in our relationships with contractors was not easy, and not without controversy. We spent much time in my first 18 months on the job working through issues that were eventually finalized in OFPP’s policy letter on inherently governmental and critical functions. While this is not the place to delve into the details of the policy letter, it is worth noting that the final product benefited from significant input from stakeholders: contractors and their representatives, federal employee unions, contracting agencies (including program staff as well as acquisition specialists), the Hill and many others. We heard from stakeholders in public meetings, in written comments, and in various and sundry venues.

Although none of us would claim that the policy letter solved the problems, I believe that it did clarify

the line between inherently governmental functions and those that can properly be turned over to contractors. More importantly, the policy letter provided extensive management direction to agencies on how to handle contractors' involvement in critical functions. We are not going to stop using contractors to support our critical functions, so it is important that we manage them appropriately.

A good part of rebalancing our dealings with contractors involves not taking work away from them ("insourcing"), but rather providing better oversight and management (and much of our time was spent in various aspects of contract management). One of my disappointments was learning how poor a job we do at recording past performance information about contractors and putting it into the relevant database. Without good information being readily available, the benefits of requiring past performance as an evaluation criterion are largely lost. As a result, we worked, through the Federal Acquisition Regulatory Council and in other ways, to improve the collection and use of past performance information.

One of the most politically charged areas we dealt with was suspension and debarment. I view suspension and debarment as important tools to protect the Government's interests going forward, and talking about them should be constructive. Yet time and again, I found myself having to respond to politically charged efforts to promote automatic ineligibility for firms with one or another strike against them. In October 2011, GAO issued a report identifying characteristics of effective suspension and debarment programs, which we found helpful, and we took those characteristics into account in our efforts to ensure that every agency has a meaningful suspension and debarment function.

Finally, there was the "MythBusters" campaign to increase and improve communication between the Government and contractors. This was also part of correcting our relationship with contractors, but this was one element that contractors have supported enthusiastically. The campaign grew out of our concern, discussed above, that agency personnel were, for many

different reasons, reluctant to talk with contractors, and we were concerned about the impact. In particular, Vivek Kundra (then our federal chief information officer) and I, when we and our teams were probing into the causes of large IT projects underperforming and running over budget and behind schedule, heard repeatedly that, during acquisition planning, there was inadequate input from industry. We were told that the most common result was a poor statement of requirements in the solicitation, sometimes unrealistically overambitious, in other cases, calling for outdated technology or simply poorly thought through. Together, we came up with the idea of the MythBusters campaign, and it found a place in OMB's December 2010 25-point plan to improve federal IT purchasing. I spent much time during my final year at OFPP promoting the MythBusters effort, which involves a culture change and will require a sustained effort, if we are going to change the culture surrounding communications between the Government and contractors.

Conclusion—While I will leave to others to judge how well we did, I believe that we did succeed in stopping, and sometimes reversing, unsustainable and unhealthy trends, some of which had been underway for more than a decade. That is as true with respect to the increase in procurement spending as with respect to the decline in the number of acquisition professionals. While we did not achieve as much progress as we would have liked, for the first time in many years, some of the key trends now point in the right direction. The challenge will be to persist in the face of budgetary constraints, which can lead to pressure to slash spending, in particular on investment in the acquisition workforce. We need to keep in mind the lessons of past mistakes, so that we do not repeat them.



This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by Daniel I. Gordon, former Administrator for Federal Procurement Policy, now Associate Dean for Government Procurement Law at The George Washington University Law School.