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Understanding the Current Wave of Procurement Reform - Devolution of the Contracting Function

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FEATURE COMMENT: Understanding The Current Wave Of Procurement Reform—Devolution Of The Contracting Function

When the Bush Administration began, the procurement community wondered how the new Administration would shape procurement policy. “Competitive sourcing” under Office of Management and Budget Circular A-76 clearly was (and remains) a priority, but it is in many ways a side-show to procurement reform. See, e.g., “OFPP Declares Public-Private Competitions a Success,” 47 GC ¶ 66. After the September 11 attacks, and after wars were launched in Afghanistan and Iraq, many wondered if homeland security or foreign contracting would become the focus of reform.

What has become clearer in recent months, however, is that, at least for the foreseeable future, procurement reform will focus on the procurement function itself—on how goods and services are bought, and on who buys them. See, e.g., “OFPP Issues New Policy Letter on Developing and Managing the Acquisition Workforce,” 47 GC ¶ 187. The pending defense authorization bills, which contain a hodge-podge of reforms aimed at procurement standards and the acquisition workforce, see “HASC Approves Defense Authorization Measure,” 47 GC ¶ 242; “SASC Defense Authorization Bill Addresses DOD Acquisition Challenges,” 47 GC ¶ 230, confirm this trend in procurement reform.

This FEATURE COMMENT suggests that we can make sense of the defense authorization bills’ proposed reforms by focusing on what seems to be Congress’ common purpose in these provisions: to bring order to a procurement function that is rapidly devolving away from the Govern-

ment user. In other words, perhaps we can understand these measures as Congress’ effort to control the devolution of procurement—what some might call the “outsourcing” of the contracting function.

How the Contracting Function Devolves—

Let’s begin our analysis with the user, the ultimate customer who uses the goods and services bought through the acquisition process. In the private sector, it’s normally the user who buys a firm’s goods and services, subject to oversight and approvals by others in the enterprise. The private-sector user/purchaser is generally responsible for ensuring that the purchase represents the “best value” to the firm. The user/purchaser can be held accountable for failed purchases, and will, at least in theory, be rewarded for purchases that add value to the firm.

Although purchasing authority in a private firm may be aggregated in a specific function (for example, to gain economies of scale or to facilitate strategic purchasing), seldom do we see what we might call a “contracting officer” in a private corporation—someone to whom others in the firm have delegated purchasing authority, simply so that authority will reside in one person.

Why, then, has the Government systematically taken purchasing authority out of the hands of users, and given it to contracting officials? If the user (or, in practical terms, the program official) is the most visible individual for Congress to hold accountable, and is in the best position to identify “best value” purchases for the Government, why has purchasing authority devolved to contracting professionals in the Government?

There are many reasons, many of them sound, to devolve procurement authority from the user (typically a program manager) to a contracting official. Devolution reduces risks that funds will be misspent—by consolidating purchasing in a few contracting officials’ hands, monitoring costs can be reduced—and helps to ensure that procurement rules will be consistently followed. We should recognize, though, that devolution has costs, because there are inefficiencies inherent in shifting purchasing authority to a sepa-

rate class of officials. Congress bears at least some of the blame here, for, by burdening the procurement process with layer after layer of special procurement requirements, Congress has in effect made it impossible *not* to shift many forms of purchasing out of users' hands.

Shifting the purchasing function into the hands of professional contracting officials was merely the first step in the "procurement devolution." Under this traditional contracting paradigm, procurement was done mainly by the customer agencies themselves, by in-house contracting personnel.

Second and Third Devolutions: to Centralized Purchasing Agencies, and Now to the Private Sector—A number of factors combined, however, to move that purchasing function one step further, out of the hands of agency contracting personnel. One factor was the slow, grinding decline in agencies' acquisition workforces. See, e.g., General Accounting Office, *Defense Acquisition Organizations: Changes in Cost and Size of Civilian Structures*, at 1 (GAO/NSIAD-96-46, Nov. 1995), available at <http://www.gao.gov/archive/1996/ns96046.pdf>. By 1999, the civilian acquisition workforce had fallen to 124,000, which, by GAO's estimate, was roughly half of its size a decade before. See General Accounting Office, *Acquisition Workforce: Department of Defense's Plans to Address Workforce Size and Structure Challenges*, at 2 (GAO-02-630, April 2002), available at <http://www.gao.gov/new.items/d02630.pdf>. The slide accelerated, thanks, in part, to the marked aging of the civilian workforce in the Defense Department. See, e.g., Statement of Dr. Diane M. Disney, Deputy Assistant Secretary, Civilian Personnel Policy, Department of Defense (May 18, 2000), available at http://hsgac.senate.gov/051800_Diseny.htm.

Another factor in this "second devolution" was the rise in interagency contracts, which allow agencies to meet their needs through *other* agencies' contracting efforts. See Steven L. Schooner, "Risky Business: Managing Interagency Acquisition," 47 GC ¶ 156; "Interagency Contracts for Interrogation Services Lacked Adequate Oversight," 47 GC ¶ 214. Interagency contracts were celebrated by the Clinton Administration, and they exploded in size partly because some of the agencies sponsoring those contracts, such as the Federal Supply Service in the General Services Administration, lost their traditional appropriations in the mid-1990s. To sur-

vive, these "entrepreneurial" agencies had to sell contracting services to other agencies. See, e.g., "New GSA Audit Cites 'Significant Deficiencies' in CSCs' Contract Compliance," 47 GC ¶ 2.

The role of these centralized purchasing agencies is, of course, tremendously important. Centralized purchasing agencies can leverage enormous Government demand for far better price and quality terms. See, e.g., General Services Administration, *Proposed Organizational Design of GSA's Federal Acquisition Service* (May 31, 2005) (describing mission of consolidated acquisition service), available at www.gsa.gov/gsa/cm_attachments/GSA_BASIC/FTS-FSS-REORG-DRAFT_Plan_R2-w-p9-m_0Z5RDZ-i34K-pR.doc; Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the Coordination of Procedures for the Award of Public Works Contracts, Public Supply Contracts and Public Service Contracts, Article 11 (April 30, 2004) (EU Directive recognizes centralized purchasing agencies), available at http://europa.eu.int/comm/internal_market/publicprocurement/legislation_en.htm#package. At the same time, however, if the role of centralized purchasing agencies is not carefully focused, the centralized purchasing agencies can too quickly slip from their missions—and thus, in essence, dissipate efficiencies gained by devolving purchasing authority to these centralized agencies.

Over the past decade, the second devolution of procurement authority (to centralized purchasing agencies) was accelerated by two important innovations: (1) the Government's embrace of commercial items, see FAR pt. 12, and (2) the rise of indefinite-delivery, indefinite-quantity task-and-delivery-order contracts—what the Europeans call "framework" contracts. See, e.g., Sue Arrowsmith, "Case Comment, Framework Agreements Under the UK Procurement Regulations: The *Denfleet* Case," 2005 Pub. Proc. L. Rev. NA86.

By offering commercial items on IDIQ contracts, the entrepreneurial centralized purchasing agencies were able to resolve many of the traditional obstacles to interagency contracting. Traditionally, "customer" agencies found it difficult to buy through other agencies, because the "customer" agencies couldn't always ensure that the purchasing agencies would meet their needs. (See, e.g., Congress' catastrophic experiment, through the Brooks Act, in centralizing information technology purchas-

ing in GSA.) Those problems fell away, however, with commercial items offered, on a unit basis, on interagency IDIQ contracts: the centralized purchasing agencies could offer their customer agencies an almost infinite array of standardized commercial products and services at competitive prices. In essence, program officials (users) at the customer agencies could use the IDIQ contracts to “reach through” the centralized purchasing agencies to buy directly from commercial vendors, but with relatively little competition or paperwork. Paradoxically, while nominal purchasing *authority* thus ostensibly devolved yet another step away from agency users, to centralized purchasing agencies, at the same time purchasing *choice* may have shifted back to the agency users.

Ironically, the innovations which made possible the *second* devolution—the IDIQ contracts offering commercial items which made interagency contracting so popular—also propelled the *third* devolution, the Government’s decision to shift purchasing authority into private hands. To the extent GSA and the other purchasing agencies have acted only as passive intermediaries between agency “customers” and commercial-item contractors, ostensibly there seems little reason not to shift the purchasing agencies’ functions to *commercial* intermediaries, if the commercial purchasing firms are more efficient. Why, for example, should Government customers use GSA’s clunky online catalogue, <http://www.gsaadvantage.gov>, when <http://www.amazon.com> is much faster and easier? Indeed, § 812 of the pending House defense authorization bill, H.R. 1815, would *require* federal agencies “to the maximum extent practicable, to use commercially available online procurement services to purchase commercial items.” More on this below.

Looking Back on Devolution—and Forward—Now that the procurement system has gone through at least three devolutions of procurement power—from the user (a) to agency contracting officials, (b) to centralized purchasing agencies and now (c) to private firms—we need to stop and ask some basic questions. First, did it make sense to devolve authority away from the Government user, and, second, if it did, what controls do we need to have in place?

An interesting way to assess these questions is to treat the devolution as a form of “outsourcing.”

Though outsourcing is a useful conceptual framework, I should stress that this does *not* mean that our analysis here should be distracted by “competitive sourcing.” “Competitive sourcing,” the Government’s oddly idiosyncratic approach to outsourcing, emphasizes cost reduction above all else, and thus does *not* follow commercial outsourcing theory, which assesses outsourcing against a much more considered range of management goals. See, e.g., Mohab T. Khattab, “Revised Circular A-76: Embracing Flawed Methodologies,” 34 Pub. Cont. L.J. 469 (Spring 2005); cf. OMB Memorandum M-05-12, attachment at 1-2 (May 23, 2005) (A-76 process will exclude contracting official positions from possible elimination through competitive sourcing *only* if having contractors perform those functions would put the agency’s core mission at “substantial risk”). To make sense of our analysis here, we need to sidestep the conceptual mire of competitive sourcing.

Instead, we should assess devolution of the contracting function against traditional outsourcing principles, to ask whether, at each step, it made sense to shift the contracting function farther away from the user. We should ask, for example, whether devolving purchasing authority away from the Government user allowed agencies to better meet their core missions (see Mohab T. Khattab, *supra*, at 506) and to access better, faster and cheaper purchasing processes (see, e.g., Deloitte Consulting, *Calling a Change in the Outsourcing Market: The Realities for the World’s Largest Organizations*, at 5 (April 2005), available at http://www.deloitte.com/dtt/cda/doc/content/us_outsourcing_callingachange.pdf).

At the same time, we should be asking whether shifting the procurement function progressively farther away from the user meant that the Government accumulated additional costs or risks, or lost flexibility or institutional knowledge. See Deloitte Consulting, *supra*, at 5. Outsourcing demands careful quality controls, *id.* at 9-10, and we should ask whether Congress and the agencies have imposed sufficient quality controls on the devolved procurement functions. Finally, under traditional outsourcing principles, we should ask whether Government acquisition is in fact a unique and “propriety” part of the Government, and thus should not be “outsourced.” See Mark Gottfredson, Rudy Puryear & Stephen Phillips, “Strategic Sourcing: From Periphery to the Core,” *Harv. Bus. Rev.*, Feb.

2005, at 6. While acquisition on its face may not seem such a “core” function, since Government’s legitimacy can turn, in part, on how “cleanly” its procurement runs, perhaps procurement is, in fact, a “strategic” function.

Standard commercial outsourcing theory is thus a powerful analytical tool. Beyond giving us objective criteria to assess *whether* the contracting function should have devolved as it has, commercial outsourcing analysis also suggests how the devolved function should be *controlled*—and helps explain Congress’ attempts at control.

Understanding Congress’ Response to Devolution—Viewed against a backdrop of traditional commercial outsourcing principles, many provisions in the pending defense authorization bills seem a classic attempt to address problems in “devolving”—“outsourcing,” in a very broad sense—the procurement function.

For example, the Senate Armed Services Committee’s central theme regarding procurement reform was the committee’s belief “that continuing problems [in contracting] are attributable, in significant part, to inadequate human capital planning and continuing reductions in the defense acquisition workforce.” S. Rep. No. 109-69, 109th Cong., 1st Sess. 344 (May 17, 2005). The committee seemed, in other words, to be arguing that the Defense Department’s contracting ranks should be bolstered, so that the contracting functions on more Defense procurements can “un-devolve” back to the customer agency. The Senate committee’s pending bill, S. 1042, reflects the committee’s intent to bolster contracting inside the Defense Department, for the bill’s § 806 calls for the Defense Acquisition University to conduct a thorough review of contracting gaps in the Department of Defense.

The “outsourcing” or “devolution” model helps to illuminate many other parts of the Senate defense authorization bill, S. 1042, as it emerged from the Senate Armed Services Committee. (Our focus here is on Title VIII, the traditional vehicle for acquisition reform in the annual defense authorization acts.) Section 801 of the Senate bill, for example, requires a review to ensure that agencies purchasing on the Defense Department’s behalf comply with DOD requirements. This is a classic problem (and response) in outsourcing, for buyers will impose requirements to ensure that their outsourced suppliers conform to the buyers’ stan-

dard quality expectations. See, e.g., Deloitte Consulting, *supra*, at 10-12.

That principle of quality assurance is taken a step further in § 822 of the Senate bill, which would call for a review of ethics principles—arguably part of the Government’s quality assurance system—for contractor employees when those employees are in “functions closely associated with inherently governmental functions,” or in “functions historically performed by Government employees.” Viewed through the prism of the “devolution” model, § 822 is arguably another effort—and an important effort—to extend the Government’s performance quality requirements to cover its newly “devolved” or “outsourced” functions, including its acquisition functions.

Section 802 of the Senate bill seems to reflect more of Congress’ efforts to “un-devolve” service contracting functions back into the Defense Department. Over the past decade, much of the Defense Department’s services contracting has devolved to outside agencies, such as GSA’s Federal Technology Service. Section 802 would probably reverse that trend. Section 802 would set up special centers to coordinate the Defense Department’s services contracting, and would require that these acquisition centers, located within the Defense Logistics Agency and the various services, eventually serve as the *sole* agents for purchasing contract services for the Department of Defense. See S. 1042, § 802(f) (“After September 30, 2009, no officer or employee of the Federal Government outside the Defense Contract Support Acquisition Center[s] may, without ... prior written approval ... engage in a procurement action for the acquisition of contract services for the Department of Defense that is valued in excess of the simplified acquisition threshold. ...”). While § 802 raises its own concerns—it may in fact *overcentralize* the purchasing of contract services—it does reflect the Senate Armed Services Committee’s intent to return contracting functions to the Defense Department.

Similarly, § 804 would bar Defense agencies from treating major weapon systems as “commercial items,” absent specific authorization from Congress. This initiative is a response to sharp criticism that commercial-item procurement authority was being overused for major weapon systems. See, e.g., Statement of the Hon. Joseph E. Schmitz, In-

spector General, Department of Defense, before the Airland Subcommittee, Senate Armed Services Committee, on Air Force Acquisition Oversight (April 14, 2005), available at www.dodig.mil/fo/Testimony_DoDIG_4-14-05_Final11.pdf. Section 804 of the pending Senate bill would, in effect, slow or stop the “devolution” of procurement authority over major weapon systems, for typically only traditional DOD procurement offices can shoulder “non-commercial” requirements such as cost accounting standards.

In the same vein, § 805 of the Senate bill would effectively press for tighter “un-devolution” of the procurement function, back into the customer procuring activity, for under § 805 Defense Department customer agencies would have to report how much they paid other DOD agencies in fees for acquisitions. This again responds to a classic outsourcing concern, that the outside firm is able to charge its “captive” customer too much for its outsourced services. See Deloitte Consulting, *supra*, at 12.

Sections 831 and 832 of the Senate bill offer perhaps the clearest illustration that Congress—at least in the Senate Armed Services Committee—wants to “un-devolve” contracting functions back to traditional contracting officials, but in a way that’s mindful of the trade-offs inherent in outsourcing. Section 831 of the Senate bill reflects blunt support: it would shift millions of training dollars to the defense acquisition workforce. Section 832 of the Senate bill, in contrast, offers much more subtle—and supple—evidence that Congress, too, understands and is concerned by the “devolution” of the procurement function.

Section 832 would require the Defense Department to increase its acquisition workforce by 15 percent by Fiscal Year 2008, *unless* the secretary of defense determined that “the cost of increasing such workforce to the larger size [i.e., 15 percent larger] ... would exceed the savings to be derived from the additional oversight that would be achieved by having a defense acquisition and support workforce of such larger size.” Section 832 is thus built on the *assumption* that broadening the defense acquisition workforce—“un-devolving” the acquisition function back into the Defense Department—will bring efficiencies, but § 832 explicitly acknowledges that there may be a point of diminishing returns to “reverse-devolu-

tion,” impliedly because at least some of the functions at issue can be performed more efficiently outside the Department. Thus, even if only in a clumsy and open-ended sort of way, § 832 seems to acknowledge the cost-benefit tradeoffs that should guide devolution.

Applying the Model to Controversial Aspects of the House Bill: Compulsory Use of Electronic Procurement Functions, and Consolidation of the Boards—Perhaps the keenest tests for the “devolution” model are the two provisions in the House authorization bill (H.R. 1815) likely to prove the most controversial: § 812, which requires the use of electronic online acquisition services, and Title XIV, which would consolidate the boards of contract appeals into two boards, defense and civilian. The House passed H.R. 1815 on May 25, with minimal debate. These provisions must, therefore, be addressed, if at all, when the House and Senate conferees meet to resolve their respective versions of the defense authorization bills.

As the House Armed Services Committee report explained, § 812 “would require the Administrator of the Office of Federal Procurement Policy to revise the [FAR] to maximize the use of commercially available online procurement services to purchase commercial items, including those procurement services that allow the heads of federal agencies to conduct reverse auctions.” H. Rep. No. 109-89, 109th Cong., 1st Sess. 361 (May 20, 2005).

Section 812, which would strongly favor the use of reverse auctions and other “commercially available procurement services,” raises a number of technical issues. There are, for example, deep concerns (both here and abroad) that reverse auctions need to be carefully controlled; see, e.g., Christopher R. Yukins & Don Wallace, Jr., “UNCITRAL Considers Electronic Reverse Auctions, as Comparative Public Procurement Comes of Age in the U.S.,” 2005 Pub. Proc. L. Rev. (forthcoming), available in draft at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=711847. Section 812 (which appears to have been imported, intact, from Rep. Tom Davis’ pending bill, the Acquisition System Improvement Act (ASIA), H.R. 2067), is also completely unclear on *which* “commercially available online procurement services” should be used. Does § 812 mean, as was suggested above, that GSA must abandon its electronic catalogue at <http://www.gsaadvantage.gov>,

if there's a better alternative at <http://www.amazon.com>? Or should agencies use only those online procurement services that focus on the federal sector—or only online reverse auctions? Section 812, which has *not* been the subject of public debate, leaves these and many other technical questions unanswered.

Putting those technical concerns aside, however, there's a larger policy question to be resolved here. By *forcing* agencies to devolve acquisition functions into the private sector, § 812 may be the epitome of the “third devolution,” the final shift of Government acquisition authority into the private sector. If so, acquisition authority will have slipped from agency users, to agency contracting personnel, to centralized purchasing agencies, and now to private “electronic” contractors, with no finding that this final devolution enhances efficiency, or that basic principles of transparency and accountability will be preserved. (There may, of course, be enhanced efficiencies if these online services are, in fact, tools which shift purchasing authority back into the hands of agency users—but there is nothing in the legislative record to suggest that's the intent of § 812.) Until Congress can take a hard look at § 812, the analytical model we've reviewed above—the model which says that purchasing authority should be devolved or “outsourced” away from the agency user only on a clear showing of enhanced efficiency—suggests that § 812 is, at best, premature.

The second acquisition provision likely to stir real controversy, Title XIV of the House bill, would consolidate the boards of contract appeals into two new boards, one “civilian” and one “defense.” The Bush administration has consistently supported this initiative (see OMB, “Statement of Administration Policy: H.R. 1815—National Defense Authorization Act for Fiscal Year 2006,” at 5 (May 25, 2005), available at <http://www.whitehouse.gov/omb/legislative/sap/109-1/hr1815sap-h.pdf>; “Developments in Brief: Administration Proposes to Consolidate Boards of Contract Appeals,” 44 GC ¶ 118; Frederick J. Lees, “Consolidation of Boards of Contracts Appeals: An Old Idea Whose Time Has Come?,” 33 Pub. Cont. L.J. 505 (Spring 2004)), and the language of Title XIV was also apparently imported from Rep. Tom Davis' pending bill, the Acquisition System Improvement Act (ASIA), H.R. 2067.

The dispute function is naturally part of the acquisition process, and the “devolution” analytical model helps us understand where, optimally, that function should be placed. Leaving the dispute-resolution function with the user or the CO would, of course, probably be unworkable, because of the conflicts of interest that would arise. (The fact, though, that the Contract Disputes Act does, indeed, vest the CO with initial authority to review contractor claims (see 41 USCA § 605) suggests that the optimal location for final dispute resolution may, on reflection, not be too far from the CO.)

The CDA left final dispute resolution authority with boards of contracts appeals in the several agencies, and with the U.S. Court of Federal Claims. The boards have generally been viewed as a success, for on the whole the boards have been professional, objective, efficient and deeply familiar with their agencies. Consolidation of the boards, if it occurs, thus will occur not because of breakdown in the boards' function, but rather largely because their workloads have declined. See Frederick J. Lees, *supra*, at 508 (“Consolidation of the boards is in the interest of management, efficiency, economy, and reduction in the number of sets of procedural rules involved. ...”); Steven L. Schooner & Keith D. Coleman, “The CDA at Twenty: A Brief Assessment of BCA Activity,” *The Procurement Lawyer* (ABA), Summer 1999, at 10 (review of BCA workload statistics).

Consolidating the civilian boards (the current Armed Services Board of Contract Appeals would remain largely unchanged under the proposed legislation) would mean, however, shifting some part of the acquisition authority (the disputes authority) away from the acquiring agencies, to a consolidated board. As with any devolution of procurement authority, though this consolidation might bring efficiencies, it also raises risks if an unaccountable, centralized board were left to resolve other agencies' disputes.

The House defense authorization bill seems to address this risk by placing authority for the civilian board—including authority to oversee the appointment of board judges—directly into the hands of the OFPP administrator, in the Office of Management and Budget. That office, however, has historically done very poorly in overseeing the boards (see, e.g., John A. Howell, “The Role of the Office of Federal Procurement Policy in the Management

of the Boards of Contract Appeals: From Great Expectations to Paradise Lost?," 28 Pub. Cont. L.J. 559 (1999)), and there is an abiding concern that OFPP, which is an important arm of the President's Management Agenda, could in turn politicize the boards. The "devolution" model discussed above—the assumption that the procurement function should, where possible, remain as close as practicable to the customer agency, to ensure that the function remains aligned with the agency's core mission—suggests that primary authority for the boards (however configured) should, if possible, stay with the executive agencies.

Conclusion—As the discussion above reflects, procurement reform now centers, in many ways, on controlling acquisition functions that have "devolved" away from agency users. Devolution thus helps to explain many potential reforms, including many of the acquisition reforms currently pending before Congress. Because devolution of the acquisition function is, at bottom, arguably a form of outsourcing, we can draw on established management theories of outsourcing to gauge where that devolution is likely to succeed, and where it is likely to fail.



This FEATURE COMMENT was written for THE GOVERNMENT CONTRACTOR by Christopher R. Yukins, associate professor of Government contract law, The George Washington University Law School.

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