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To request Defense Acquisition Research or to become a research sponsor, please contact:

NPS Acquisition Research Program
Attn: James B. Greene, RADM, USN, (Ret.)
Acquisition Chair
Graduate School of Business and Public Policy
Naval Postgraduate School
555 Dyer Road, Room 332
Monterey, CA 93943-5103
Tel: (831) 656-2092
Fax: (831) 656-2253
E-mail: jbgreene@nps.edu

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The Changing Face of Procurement Policy—An Innovative Approach to Competing Requirements

Brian Johnson—Brian Johnson is an intern with the inaugural Contract Specialist Intern class at the VAAA. Mr. Johnson has over 10 years of management experience in industry and military. He acquired extensive training and experience, including various assignments throughout the VA. Prior to joining the VA, he held the position of Director, Medical Assisting/Medical Administrative Specialist Programs at ACT College. In addition, he continued to excel as an instructor at both the associate degree and career diploma levels. Mr. Johnson's military experience includes duties in combat arms, military intelligence, and as a combat medic at both domestic and overseas assignments.

Abstract

Everyday, contracting officers must procure the goods and services for the Federal Government, while balancing competing and oftentimes conflicting demands. Over time a number of laws, regulations and guidance have been put in place to direct the actions of the Government as it interacts with the private sector in this country. As a result of our political process and the method in which laws are created, some of these requirements have conflicted with other guidance already in place within the Federal acquisition process. Several examples are present throughout our history, and in current regulations, to illustrate these forces that the contracting officer must manage. One example is the balancing act required between full and open competition, under *Competition in Contracting Act (CICA)* and the direction given by the *Federal Acquisition Regulation* (*FAR*) to set aside requirements for different types of small disadvantaged businesses. However, through innovative strategies, the creative contracting officer can balance these requirements while providing the best value for the Government. This paper frames the context of how these competing demands have evolved and how the government can balance these different needs and responsibilities.

Introduction

Every day across the government a group of individuals known as Contracting Officers navigate the minefield of procurement policy to acquire the goods and services required for the Government to function. On the other side of this field are the vendors, also known as contractors, competing among each other to "win" the business of the government. As with any competition, certain rules apply to "the game." The origins of this game, for the government, go back to the early days of our country. As the environment the Government operates in changed, the methods of procuring goods and services have evolved. One cannot fully understand the Government procurement process without a little background in the political development of this country. As times change, new laws are passed affecting the procurement process. A number of these laws do have some political influence and address the perceived issues of the time.

The contracting game is not unique to the Federal Government. State governments and private industries buy goods and services from other companies in order to operate more efficiently. As the business world moves faster and becomes more global, companies have had to focus on their core strengths and outsource certain functions and components to remain competitive. As such, the Government did not invent contracting. However, just because the private industry does contracting, does not mean it is identical to Government contracting. Often when a company first enters Government contracting, it stumbles through

the process and make certain mistakes, even if the company has conducted private contracts for some time. Even though the Government tries to model a number of best practices from industry, different rules do apply.

When I first lived in England, after growing up in the United States, I found out two things right away. First, while we both speak English, it is not the same language. Second, if you describe Cricket to someone, it may sound like baseball, but it is a completely different game. In Cricket, a pitcher throws to a batter that tries to hit the ball. If he does hit it, he runs between bases, until someone from the other team gets the ball and tries to throw him out. After hearing this description, you may think you are ready to watch a game and know what to expect. However, with the subtle differences in the rules, most people watching this sport for the first time are as lost as I was trying to follow the game. One must have a strong understanding of the rules in order to follow or play the game. Government contracting is similar; you must know all the rules of the game in order to play successfully.

As long as everyone plays by the rules, the result is a fair competition. Unfortunately, it would appear, the rules in the Government contracting game often change without thoroughly looking at the impact on other rules. In order to understand how this happens, we must first examine the history of our Government.

A New Type of Government

To refresh from high school Government class, the founders of the United States Government mostly came from countries that had governments that exercised complete power over their citizens. Whether it was a monarchy, dictatorship, or some other form of totalitarian rule, the people had little say in how the government exercised its power over the people. As such, the founders of this country were greatly concerned about the Government getting too powerfully and imposing its will on the people. They did not want this new Government to become a version of the governments from which they just broke away.

The Constitution of the United States is the governing document for our country, often referred to as “the law of the land.” The founders designed it to spell out the structure of the federal government, and its powers in relation to the state governments. In developing the Constitution, the Founders felt very strongly that it needed to address the government’s interactions with the people and set limits on the power it could exercise over the people. The basic premise is that the government derives all its power from the people and must represent the people that it serves.

The first sections of the Constitution of the United States address the structure of the Government and the powers of each branch, to include methods to balance those powers. This section specifically states that the government derives its power from the people it governs. In addition, any powers that are not explicitly given to the Federal Government by the Constitution remain the power of the individual states. The Founders saw a need for a Federal Government to unite the states and act on certain matters that affect all the states. However, they were cautious of a central government abusing its power over the people. The first ten amendments, also known as the Bill of Rights, focuses completely on how the Government interacts with the people of the United States and restricts the powers the Government can exercise over its people.

To further restrict this power and ensure the government did not turn into an “elected monarchy,” the Federal Government was divided into three branches. Each branch has its role and area in which it has power to act. These powers put “checks and balances” on the other areas of Government for the purpose of ensuring one branch cannot get to powerful

and impose its power on the people, unchallenged. In the simplest definition, each branch has a unique duty and power. The Legislative Branch is responsible for passing all Federal laws. Once passed, the President, Executive Branch, “signs the legislation into law.” The Executive Branch is responsible for enforcing the laws and managing how the government operates. The White House and the Office of the President cannot accomplish all the responsibilities of running the different aspects of government by itself. To accomplish these responsibilities, the Executive branch is further broken down into specialty areas through the establishment of Executive Agencies and Administrations. The Executive Branch manages through directives and Executive Orders to its Administrations. The Judicial Branch is responsible for interpreting the laws and stating how the laws apply to a specific situation. The Judiciary also passes judgment when someone files a complaint that a law or regulation was violated. This judgment can include indemnification of an injured party. Often agencies use these judgments as a basis for determining how to apply the law in the future. These precedents are watched for guidance in future procurements.

Government versus Private Contracting

Contracts have been around for hundreds of years. In simplest terms, a contract is an agreement between two or more parties that can be enforced by a government body. Under the current legal definition, a contract must have four elements to be legally enforced. First, the contract must be between two or more legal entities, individuals or businesses. A person cannot have a contract with himself/herself. Second, all parties must be able to legally enter into the contract and do so freely. The person cannot be coerced, underage, or incapacitated, etc. Third, the contract must have consideration. Consideration is an exchange of something of value. Most courts uphold that it should be an equitable exchange of value to be legal. For example, a contract to purchase a house for a dollar probably would not be enforced in court because the house would be worth more than a dollar, regardless of the condition. As a result, this would not be considered an equitable exchange of value. The most common consideration is exchange of a good or service for a payment of some type. Finally, the substance of the contract must be legal. The court will not uphold a contract for someone to have to perform an illegal act. In private contracts, anything else is allowed. Given these elements, a contract is formed when one party makes an offer and the other party accepts the offer.

As long as the individuals do not break any laws, other salesmanship or common practices are allowed. A common one that is allowed in private contracting and not allowed in government contracting is the “wining and dining” of prospective clients. Another element that is in government contracting that is not present in private contracts is the need for fair competition. In the private sector one company can chose to contract with another simply because the owner likes the other company. This environment is not present in government contracting. The primary reason is the government operated under different rules then the private sector when it comes to contracting. Just as the cricket game mentioned earlier, at first glance it looks very similar to the “same old game” we all know. However, this game has different rules that can be complicated to a new “player.” This complex game can influence some players to stay off the field. Unfortunately, the government can lose out when companies do not want to enter contracting due to this “red tape.” So, if contracting can be simple between private companies, why is government contracting so complicated?

Sources of Government Acquisition Rules

While the “three branches system” of Government helps protect the people from abuses of power with its “checks and balances,” the system complicates the “rule of law” under which government acquisition professionals operate. Since the “checks and balances” gives each branch some influence over the other branches, procurement “rules” are influenced by all three branches. Procurement rules can originate in any of the three branches of government.

The executive branch issues policies and orders that must be followed by all the agencies within the branch. Similar to how a CEO directs the company on how it will conduct business, the Office of the President directs the Agencies on how to conduct different aspects of running the government. In relation to contracting, most of the time these policies are issued from the Office of Federal Procurement Policy (OFPP) under the President. The regulations for procurement are developed in this branch.

With a new President every four to eight years, executive policies change. Just as each CEO has different management philosophies, each President has his own management policy. The management policy and acquisition philosophy of the President affects the policies coming out to the Administration. The larger the difference between philosophies of different Presidents, the greater the policy changes will be when a new President takes control.

The individual agencies issues guidance on how procurement is conducted within the agency. Each agency has a specific mission. Their specific missions influence the needs of the agency. As a result, some agencies procure goods and services that other agencies do not procure. In addition, different agencies operate in different environments. Each agency must have its own guidance on procurement issue. The individual agencies accomplish this guidance in a few ways. Most agencies issue a supplement to the *Federal Acquisition Regulation* (*FAR*). In addition, they issue internal Informational Letters and handbooks or directives. These methods allow the agencies flexibility in providing internal guidance for procurement issues. However, agencies have to watch executive and legislative directions. The agencies operate in a dual reporting system. As part of the executive branch, the agencies report to the President. In addition, the heads of the agencies are often called to report or testify to Congress. This puts a unique responsibility on the agencies in developing its internal policies.

The Legislative Branch affects government acquisitions a couple ways. First, this branch writes and passes the laws. All citizens and legal entities must follow the laws passed by the government to the degree it pertains to them. Due to the protections the Founders put in place with the interactions of government and citizens, the Federal Government can put restrictions and laws in place that affect how it conducts business easier than laws that affect private companies and citizens. When a law is put in place that directs the government to conduct business in a certain manner, the agencies must follow the laws that affect its contracting. In general, when society decides it needs to change a rule because of its impact on the people, it creates a law to restrict a particular behavior. The government is the largest buyer of goods and services in the marketplace. With this status comes a lot of power in negotiations. Since the government is concerned with the treatment of the citizens, a number of procurement laws over the years have focused on making the contracting process fair for the companies competing for the government’s business.

Another way the Legislative Branch affects government acquisitions is through control of the money for acquisitions. The Constitution states that no money will be spent by the government that is not appropriated by Congress. The appropriations process is accomplished each year through the Federal Budget. This budget authorizes how much each agency can spend. The agencies then decided to split its money up among its program offices. A Contracting Officer is not allowed to enter into a contract for which the money is not available to be obligated. During the budget process, the Congress will often set certain monies aside for a specific purpose. This practice is called earmarks. The money is released to the agency, but the accompanying law says the agency must use it for a specific purpose.

Laws are often written and passed due to current events in society. Unfortunately, other influences affect the creation of laws. Special interest groups push the agenda of their perspective interests. Special interest groups are not just large organizations. Any group with a specific mission is a special interest group. Veteran groups, environmental groups, small business advocates, etc. are all considered special interests. Some interest groups have more influence than others do. These groups strongly encourage Congress to pass laws that assists their mission. Of course, these special interest groups compete with other groups when it comes to influencing Congress. This ebb and flow of power as laws are passed create new procurement policies that change the rules of how items are purchased. These changes can seem to contradict the rules in place prior to the new law. Another influence on the laws that Congress passes is the “TV effect.” The TV effect is change in public opinion after a “news” story comes out. Previous news stories of problems in the acquisition community have led to Congress investigating and often creating a new law on how procurement is accomplished.

Unfortunately, since laws have a political influence in its creation, flaws in the system exist. In response to current concerns of their constituents, Congressional politicians bring forward new laws. When new laws are presented, the effect on current laws are not always addressed. At times, this process creates conflicting guidance. If a new law is passed, the government must follow the new law. However, current laws stay in effect until they are changed or repealed. So often, a new law that is passed will mandate an action that is contrary to an existing law. This is where the confusion originates for the Contracting Officer in the field.

The language of laws adds to the difficulty in interpreting the intent and how the Contracting Officer is supposed to implement the new law. The nature of laws is to write the law in sufficiently vague language. This process is done on purpose. The reason for this is so the law can be applied to different situations. If the language is too specific, it cannot be applied to unforeseen circumstances. A side effect of this process is that laws must be interpreted. The interpretation of laws is a primary responsibility of the Judiciary Branch.

The Judicial Branch also influences the acquisition process. Most of the states in the US follow common law. Common law is derived from the practices and court rulings. These rulings create a precedence that other courts take into account in future cases. Since these rulings can influence future decisions a court makes, the acquisition community closely follows the court decisions on topics related to contract law. Two types of decisions from the courts affect acquisitions. The first is if a law is challenged as unconstitutional, it could be heard by the US Supreme Court. If any law is determined to be unconstitutional, the law is overturned and people no longer have to follow that law. This is true of any law, including procurement laws. The other way decisions affect procurement is when a claim of unfair treatment is filed by a party harmed by Government in the award of a contract to another party.

Protests and Disputes

Each branch has its processes for hearing complaints that a vendor was treated unfairly in competition for a contract. In the Executive Branch, the vendor files an agency level protest. This protest goes to the Contracting Officer or one level above. If the agency determines the protest is valid, it can overturn the Contracting Officer's decision. In the Legislative Branch, protests are filed with the Government Accountability Office, or GAO. The GAO is a nonpartisan group that reports to Congress. The GAO reports its findings and recommendations to the agency, whether it upholds a protest or not. While the agency does not have to implement the GAO recommendations, Congress watches how much agencies follow these recommendations. The Judiciary Branch hears complaints through the court system. Currently, the court structure that claims progress through is the Civilian Board of Contract Appeals (CBCA). This court was established by section 847 of the *National Defense Authorization Act for 2006*. This is a continuation of the authority to hear disputes between the individuals and the executive agencies established under the *Contract Disputes Act of 1978* (www.cbca.gsa.gov).

The court makes a ruling on the claim in favor of the company or for the Government. If the contractor wins, the court will normally award damages. In these decisions, the court normally states a legal opinion or rational for its decision. The procurement community pays attention to these decisions. The result of these decisions from the different branches can give insight into what was intended by the law or policy that was the topic of the protest or claim. The legal opinion or decision can give great insight into how future decisions will be made. If a Contracting Officers encounters the same policy or law in the procurement of a good or service, he or she will be able to address the situation properly.

History of Procurement Policy

Since the founding of the United States, the government has paid for goods and services from individuals. As stewards of the people's money, the government must ensure it spends the money wisely. Over time, the government has become the largest buyer of goods and services in the country. With that status, comes a power that could be abused. As a result, the government has passed laws to protect the citizens' interests. These laws protect those doing business with the government and ensure the government is getting a value for the people's money. As problems have developed, actual or perceived, policies have been changed. Contracting policies can be divided into three main historical periods, pre-WWI, WWII, and current.

Prior to WWI, the government started enacting laws to guide its contracting activity with the public. Most of the needs in this time dealt with defense. Some major enactments (PWC, 2008) include *Advertising and Sealed Bids*[1] in 1842, *Civil Sundry*[2] in 1861, and the *Antifraud Act*[3] *of 1862*. From 1862 to 1921, not a lot activity occurred in procurement policy. In the pre- and post-WWII period, some additional issues became known. As a result,

[1] Required advertising, sealed bids, formalized procedures, and regulations to ensure accountability and reasonable prices (DAU, 2008).

[2] Set up a competitive open bid system and formal advertising.

[3] Requires all contracts to be written, signed and kept on file to help eliminate carelessness and corruption.

several policies were enacted. In 1921 the *Economy Act*[4] was passed. The *Davis-Bacon Act*,[5] *Buy American Act*,[6] and *Miller Act*[7] were passed in 1931, 1933, and 1935, respectively. As the war moved to an end, the *War Powers Act*[8] and *Berry Amendments*[9] were enacted in 1941. After the war in 1947, the *Armed Services Act*[10] was passed in 1947.

The 1970 Commission on Government Procurement[11] starts recent history with a study of how the government procures goods and services and how to improve the process. In 1984, the *Competition in Contracting Act* was passed and the *Federal Acquisition Regulation* (*FAR*) was developed. These two policy changes resulted in a mandate for all contractors to be treated fairly and on a level playing field. In addition, the *FAR* set a policy for all government agencies to follow in procurement of goods and services. In 1996, the Packard Commission[12] studied successful companies to determine what the Government could learn from industry. This starts a shift in government to incorporating best practices into how it manages the large agencies. *The National Performance Review*[13] *of 1993*, the *Federal Acquisition Streamlining Act*[14] *of 1994*, and *Federal Acquisition Reform Act*[15] *of 1996* start addressing the issues companies have in doing business with the government. They also bring to light why companies are able to keep up with changing industries better than government. The processes and bureaucracy was adding a lot of waste to the process, especially with commercial items. A number of the requirements present in a noncommercial item are unnecessary when acquiring a commercial item that has been tested and available to the public.

More recently, the *Defense Transformation Act of 2004* and *Service Acquisition Reform Act Final Report*[16] *of 2007* have influenced government contracting (Vincent, 2009,

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[4] Established the ability of an agency to purchase products or services from another agency.

[5] Requires contractors to pay the "prevailing rate" to workers in construction.

[6] Sets a preference for American products. It was established during the Great Depression to protect American companies.

[7] Set requirements for payment and performance bonds to protect government interests under construction contracts over $100,000.

[8] Removed most statutory requirements to allow rapid mobilization of industry during WWII. The end result was a more distant relationship between government and contractors.

[9] Required the Department of War (now the DoD) to buy domestic end products.

[10] Established extensive regulations for military procurements. Gave the DoD authority to contract for National Defense needs.

[11] After WWII, increase in regulations. Took away much of the discretion of the Contracting Officer that was granted under the *War Powers Act*.

[12] Determined many problems in procurement were a result of too much regulation over the decades.

[13] Focused on reform and reducing costs.

[14] Focus on efficiency in contracting. Eliminates some regulations and restrictions when procuring commercial items and set up simplified procedures.

[15] Established dispute resolution procedures, setting competitive ranges and allowed rejected offerors to request debriefings.

[16] Revised definition of commercial services and incorporated best practices from industry into the government procurement process.

Slide 8). The *American Recovery and Reinvestment Act of 2009* added a new emphasis on transparency and reporting. The implementation of the reporting aspect for vendors has proven challenging to companies, especially one new to government contracting.

Conflict in Guidance

This concern for fair treatment is present in a number of the laws affecting the Federal Procurement process. Such laws as the *Competition in Contracting Act*[17] *(CICA)* and *Truth in Negotiation Act*[18] *(TINA)* address how the Government interacts with prospective vendors. The *Small Business Act* put an emphasis on contracting with small disadvantaged business. However, the Government has a fiduciary responsibility to spend the taxpayers' money wisely. The Government has had to balance using economies of scale to secure a better price for the taxpayers and assisting socioeconomic groups. As issues become a higher priority for the Government, it will get more attention from the President and rules or laws are passed to focus more of the contracting business on that area. A recent example of this is "green," or energy efficient, products[19]. Guidance has come out recently on green contracting and the use of more Energy Efficient equipment. However, the *FAR* directs the Government to avoid using Brand Names as much as possible. Since "green" technology is new, this emphasis can limit competition to specific brands.

Another priority for the Government is the veterans returning from war zones. Recently Public Law 109-461 includes the Veteran's First Program for the Department of Veteran Affairs (VA). This allows the VA to choose Service Disabled Veteran Owned Small Business (SDVOSB) or Veteran Owned Small Business (VOSB) before any other groups.[20] The conflict arises when the SDVOSB does not sell the more energy efficient product. Then the Government Official needs to make a decision between the SDVOSB and the more energy efficient product that may be only made by a large business. Another conflict occurs when a small business gets a contract due to competition restrictions, but does not add value to the final product or service. The government must balance the need for spending money wisely and its social responsibility to help small businesses. In addition, the priority order under the socioeconomic programs changes over time. These changes result from the small business groups fighting, through special interest groups, for a better position in the order of priority.

Recently, the government has shifted to more of a focus on using fixed price contracting whenever possible. This is supposed to lower risk and expense for the Government. However, by shifting risk onto the contractor, the vendor considers that risk when pricing their product of service. With commercial items, this makes more sense, because a company can better gauge its cost due to the large volume of an item or service it has already sold. Similarly, once a noncommercial product is developed for the Government and had several production runs, the contractor should have a better control on its cost and the Government can procure future production on a fixed price basis.

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[17] Increase competition to more companies resulting in lower prices for the government.

[18] Requires contractors to submit cost or pricing data and certify data is current, accurate and complete.

[19] Energy Star programs require items on this list to meet certain energy efficiency standards.

[20] This reorganizing of priority groups is specific to the VA and as a statute overrules the *FAR* guidance.

With services, like construction, the ability to fix the price becomes a little more risky. Even with a set service, the conditions of every project are different. In essence, the "commercial product" is being tailored. In addition, due to the *Service Contract Act*, a firm fixed price service contract is not as firm as a commercial item. When wage determinations change in an area a service is provided, the contractor must adjust wages. This is the one time a contractor can make a change in which the Government really does not have a choice. When the contractor requests an equitable adjustment due to change in wage determination, the government needs to adjust the pricing of the contract, due to law changes. The contract is a firm fixed price in name early. In practice, the contract acts like a fixed price with economic adjustment. The adjustment is tied to the wage determination. The current contracting environment created by these varied laws and regulations have created a jungle for the Contracting Officer to navigate (See Figure 1).

The ideal place to address these conflicting requirements is in the legislative and policymaking level. At the policy level, the *FAR* Council[21] issues proposed rules to the public and allows everyone to comment on the policy before making a final rule. This process helps to bring to light possible conflicts that the new policy could create. However, policies must work within the legislation. If the two are at odds, the law trumps policy. In an ideal process, a study would be done before enacting new laws affecting procurement. A similar period for public comment before the final law is drafted would put a spotlight on some of these issues before the government encounters them in practice. This process would greatly improve the procurement law and policy processes. This new initiative is contrary to how laws are normally made, with lawmakers comprising on different aspects and combining bills to accomplish their goals. However, this new approach would fit in with the new focus on government transparency and use of technology.

Contract administration is another area that has conflicting guidance. Contracts must be properly administered. This is especially true in service or long term contracts. The success of the contract is how the service is delivered. However, many agencies put a focus on activity up to award. Many Contracting Officers are evaluated on contracts awarded, and time to get to award. Direction is given to improve administration, but no resources are expanded to assist with contract administration.

A final example of a conflict in guidance is the directive from the Administration early last year that new service contractors must give "first hire" option to the employees of the incumbent contractor. The purpose of this directive is to minimize the impact of changing vendors, by having individuals familiar with the services and location stay in place to provide the services to the Government. However, this can conflict with the Contracting Officer's fiduciary responsibility to spend the taxpayers' money wisely. If a current contractor is not performing well, then the Government can be stuck with the same underperforming employees under a new contractor. The government made a best value decision to select a company, when it is receiving the employees of a different company, if they accept the offers of the new vendor.

Approaches

A few approaches are currently used to address conflicting requirements. As laws are passed or directives are received by the President, the Office of Federal Procurement Policy starts the process of examining how to implement the new directive or law into the

[21] The governing body that issues changes to the *Federal Acquisition Regulation*.

current Federal Policies. Initially, directives are sent to agencies to start implementing a policy while a proposed change is debated. Once a final rule is made, it is incorporated into the Federal Policy. This process is why different parts of the *FAR* seem to give different guidance from other parts. The result is like several people each writing a different chapter of a book and then putting it together. Periodically, a full review of the *FAR* in whole and how directions affect other parts needs to be accomplished.

One way to address different competition requirements has been the use of thresholds. Under the micro-purchase threshold, the customer can use a government credit card to procure the goods or services needed. Between the micro and simplified thresholds, all procurements should be reserved for small businesses to the greatest extent possible. Above the simplified threshold, the agency should set aside for small businesses in specific socioeconomic groups whenever possible. If the agency must go to a large business, the large business should subcontract some of the work to a small business. A final approach used is writing an exception into the regulation (i.e., exception to the non-manufacture rule). These approaches help to satisfy a specific requirement, but not another. For example, under the *Competition in Contracting Act* all companies should have equal opportunity to bid on contracts. However, the focus on small businesses shuts large businesses out of competition in a number of contracts. If thresholds are used to determine set aside, the spirit of competition in contracting should require procurements above a certain amount be automatically open to large business.

Currently the decision on whether small businesses can compete or the competition should be opened up to larger businesses is left up to the agency through the Contracting Officer and the Review Boards within the agency. As Contracting Officers become better skilled and trained, they can become the trusted business advisors that are needed to make those types of decisions.

Another way to improve efficiency in the contracting field is to focus on training and accountability at the Contracting Officer level. Many agencies have internal policies of higher approval for contracting actions. This oversight is intended to ensure the Contracting Officer's compliance with policies. Compliance with policy is only a problem if one of two causes is present. Either, the contracting officer displays a laxness in the responsibilities of the job; or the person lacks the knowledge and experience to implement the policy properly in the procurement process. The approach best suited to solving this issue is to focus on training and accountability. If organizations ensure the proper, continuing education and hold the Contracting Officer accountable for the actions, a lot of the bureaucracy can be eliminated.

Not all the fixes have to be done above the Contracting Officer. The *FAR* Guiding Principles state "unless a strategy is expressly forbidden by statute or regulation, the strategy is open to the Contracting Officer." This gives the Contracting Officer a lot of leeway in how to conduct business. The Contracting Officer can use some innovative techniques to satisfy these different requirements and provide the best value for the Government. One method to address recurring needs has been establishing an IDIQ.[22] The primary advantage to an IDIQ is the Government does an evaluation once for multiple requiring requirements anticipated in the near future. This streamlines the process of future procurements because the awardees have already been evaluated for past performance and technical ability to fulfill the requirements. When a future request from a customer occurs, an order can be

[22] Indefinite Delivery Indefinite Quantity contract

placed without having to compete a second time. Eliminating this need for future competitions can speed up the procurement process without sacrificing quality. While this approach works well for most commercial items, problems occur with large quantities and small businesses or with services. Since services are customized, the final price could be different from one order to another. This removes the advantage of streamlining the procurement, the primary advantage of an IDIQ. One product recently used in construction that can be easily used in services is a MATOC[23]. This contract type issues awards to multiple vendors for an expected series of requirements. The same initial evaluation of an IDIQ occurs with a MATOC. The difference between the two is a pool of prequalified contractors is available under a MATOC. The MATOC uses either a seed, or first task order, project or a fictional project within the original solicitation to allow for a proper technical evaluation. This allows the Government to evaluate approach on customized requirements, such as construction or services. The way to use this and still keep competition is to hold competition at the task order level among all the awardees of the MATOC. This ensures the government receives the benefits of a small group of prequalified vendors bidding against each other for the service.

The use of options[24] in a contract has become more popular for ongoing services. This approach works best in services that are required from one year to the next and do not change rapidly in price and specifications. In areas where prices are rapidly dropping, long options are not in the best interest of the Government. If prices are rising rapidly, the contractor is put at a disadvantage. Technology is a prime area where specifications are constantly changing. An IDIQ for installing equipment might be better than option years in this case.

One very effective technique to addressing requirements, when done properly is performance based contracting. This puts a focus on the desired outcome, not how it is accomplished. This lesson was learned from private industry. Companies often present a problem to a potential vendor as “this is what I want it to do, I don’t care how it does it.” Success is measured by the result. The Government took a while to arrive at this same conclusion, but is now taking greater interest in this approach.

In contract administration, focus has shifted back and forth between “cradle to grave” and a separate Administrating Contracting Officer (ACO). Both have advantages. The problem with “cradle to grave” is the focus on Contracting Officers to concentrate on awarding new contracts and the original CO may no longer be with the organization. Since most employee evaluation is directed at this phase, administration gets less attention. However, in the ACO structure, often the ACO did not write the contract and may be in a different location. One way to address this is to adopt the ACO model, but have one at each contracting shop at the base level. This way a focus is on contract administration and the ACO is accessible at the location. In addition, if any questions arise the ACO can ask the CO that wrote the contract.

So how can the Government capitalize on economies of scale and still nurture small businesses. Strategic Sourcing[25] has been offered as a way to leverage the buying power of

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[23] Multiple Award Task Order Contract

[24] Ability to extend a contract for a period of performance or quantity that was agreed to in the original contract.

[25] A directive that agencies put in place contracting vehicles to procure large quantities of products continually bought across the Government, such as office supplies and computers, etc.

the Government. However, this eliminates most small businesses from competing. A couple methods can be used to accomplish both benefits. First, procurements under strategic sourcing can encourage teaming[26] among companies to provide the products or services. Under this approach, companies can ban together in larger joint ventures to handle the large volumes. Another approach is for the agencies to set up large, regional Multiple Award IDIQs to handle these requirements. This approach would set up a "mini-schedule" similar to GSA. While these currently exist as GWACs[27], the communication of availability to contracting offices is lacking. Better use of these contracting instruments can balance the requirements.

Better reporting and contract administration can help ensure the government receives good services. The Presidential directive that new contractors give "first hire" choice to the incumbent's employees can cause some quality issues. While the intent is to minimize delivery of services by having people on the ground that already know the job, often performance issues are rooted in the employee performing the service not necessarily the management. The Government recently expanded the past performance database by requiring all agencies to utilize PIPIRS. Expanding this system to allow the Government to report the performance of individuals would help to ensure the government does not inherit the same bad employees under a new company. In order for this to work, the Government must report bad performance when it occurs. Too often the Government would prefer to let the contract end or Terminate for Convenience because it is the route of least resistance. The Government does a disservice to the taxpayer when neglecting this responsibility.

Conclusion

Contracting Officers operate in a complex environment. Juggling requirements becomes the real art form of Government contracting. At the same time, agencies want to see new innovative methods to purchasing goods and services that will save the taxpayer money. Several methods are available to the well-informed contracting officer to fulfill the socioeconomic goals and be innovative and efficient. One example of this is the MATOC contract for construction. With some creativity, this type of contract can be used for other activities, like services. By using innovative processes; an agency can leverage its buying power over the year. In addition, the agency could make this a set-aside for a specific socioeconomic group if market research shows enough competition. As contracting policies change over time, the Contracting Officer must adapt operations to satisfy customer needs and stay within the regulatory guidelines.

[26] An arrangement where more than one company cooperates on a project. In a number of teaming agreements, the Government has a direct contractual relationship with the members of the team, unlike a prime/sub relationship.

[27] Government Wide Acquisition Contract

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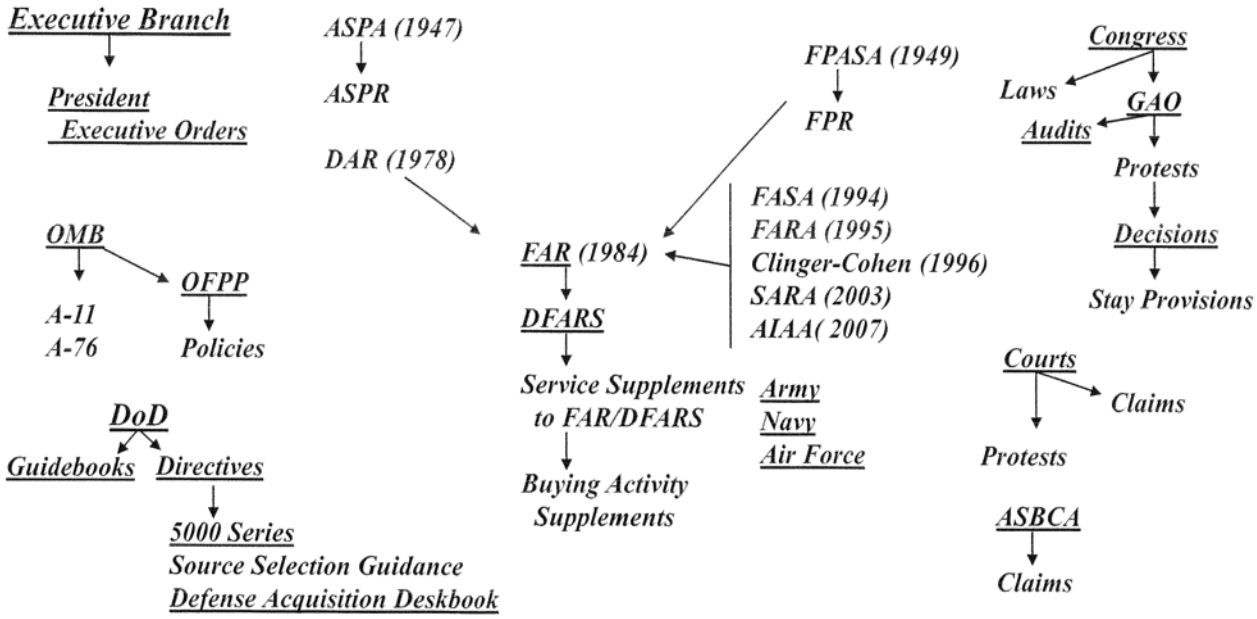
Contracting Environment

Oversight and Guidance



OMB-Office of Mgt & Budget, OFPP-Office of Federal Procurement Policy, ASBCA- Armed Services Board of Contract Appeals, ASPA- Armed Services Procurement Act, ASPR- Armed Services Procurement Regulation, DAR-Defense Acquisition Regulation FAR- Federal Acquisition Regulation, DFARS-Defense Federal Acquisition Regulation Supplement, FPASA- Federal Property & Administrative Services Act, FPR- Federal Procurement Regulation, FASA-Federal Acquisition Streamlining Act, FARA- Federal Acquisition Reform Act, SARA – Service Acquisition Reform Act, GAO- General Accounting Office

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