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SUBJECT: PUBLIC COMMENTS TO THE ACQUISITION ADVISORY PANEL

TOPICS ADDRESSED INCLUDE THE FOLLOWING:

1. INTRODUCTION
2. ORGANIZATIONAL PLACEMENT OF THE ACQUISITION FUNTION
3. ACQUISITION WORKFORCE
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1. INTRODUCTION

The following comments are offered on the issues being considered by the Panel. In order provide perspective to the following comments, let me explain my background. I am currently a Government employee and have worked in Government contracting for my entire 32 year Federal career. I am offering these comments as a private citizen who has unfortunately had to watch the demise of Government contracting as it once was known. Although there have always been critics and criticisms of Government contracting, from an overall perspective the system has worked effectively. In my early days, I often commented, "The Government purchasing system was the most inefficient and costliest but fairest system in the world, and the fairness and integrity of the system was paramount and to be preserved at all costs." However, as discussed below, speed in contract placement and satisfying the latest "initiatives" became more important than the integrity of the system.

These comments reflect my personal experience and opinions from approximately thirty-two years as a practicing Government contracting officer (with ten years experience in the Department of Defense and twenty-two years in a civilian agency). It is my intent to retire within the next fifteen months, so the comments contained herein cannot be "self-serving." Further, it should be understood I have no political affiliations nor any corporate allegiances (not even ownership of any corporate stock). The lack of political affiliation and of any corporate interests has served me well over my career because it freed me to make independent decisions as a contacting officer that I believed were purely in the best interests of the Government. These comments are provided from that same perspective. The opinions expressed herein do not necessarily represent the opinion(s) of my Agency or other U. S. Government officials.

I began my career under the old Defense Acquisition Regulation in 1973, when the theory was that contracting officers only possessed the authorities delegated to them in

the regulations. Compliance with the rules and regulations was the undeniable objective, even sometimes at the expense of the mission or the requirement. However, as changes were sought in the system to decrease inefficiencies and permit faster response to program office requirements, the fairness, and even the integrity of the system, began to suffer. The change from contracting officers only possessing delegated authority to the use of the Guiding Principles in Federal Acquisition Regulation (FAR) 1.102 was a positive step, but at the same time possibly misguided. The idea that a contracting officer was permitted "to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer's needs . . ." and any action not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation was to be considered a permissible exercise of authority may be conceptually sound. But that delegation of discretion assumed that the individual exercising that discretion had the training and experience to utilize that discretion. With the reductions in authorized staffing, combined with the looming mass of retirements, who are the people with the requisite training and experience to now utilize that discretion?

Faster contract placement. The original concept of General Services Administration (GSA) contracts, where specific supplies and even services could be purchased off a select few schedules, generally cheaper than anywhere else, evolved to the point where in order to obtain revenue GSA proliferated its multiple award schedules and indefinite delivery/indefinite quantity contracts. But at what price and quality? This then gave rise to competition among agencies to see who could put out the most Government wide contracts. This was followed by contracting offices selling their services advertising their ability to make "speedy awards," which gave rise to competition among contracting offices for "business," with some offices 'specializing in GWAC's and MAS awards ……. and no one stopped to question what was happening. Unfortunately, Government contracting became a modified game of "I can name that tune in ____ notes," with claims of capabilities to make multi-million contract awards in a matter of weeks. And now the rest is history.

The majority of work awarded under the GSA/GWACs contracts is on a Time and Material/Labor Hour basis. The use of this form of contract has always been limited by the FAR as follows: "A time-and-materials contract may be used (1) only after the contracting officer executes a determination and findings that **no other contract type is suitable**" (FAR 16.601(c)). The worst form of contract in the FAR all of a sudden became "the flavor of the day" and has been subject to wide spread use, and abuse. Under such an arrangement, the contractor has no incentive to complete any work but to simply to keep working and deposit additional fee with each labor hour worked. In the recent past, I actually had a GSA contractor challenge me when I was asking for a reduction in his (outrageous) labor-hour rate, claiming I had no authority to ask for such a reduction because, "GSA had determined his rates 'fair and reasonable'."

The Government is not staffed, nor its processes equipped, to deal with such open-ened labor-hour arrangements on a universal basis, e.g., how many hours should a function have taken to complete, who is going to challenge the contractor on the labor hours used,

and on what basis? However, without such challenges, the contractor increases its profit for every hour worked and billed. Credit cards were issued and hailed as a salvation, producing speedier results for program offices, with a reduction in the numbers of contracting personnel. Yet credit cards have too become subject to widespread abuse, with greater restrictions and massive training of numerous people now required to attempt to stem the abuses. While a good concept, again the problem became controlling use/abuse among thousands of individuals.

So in the name of speedier placement of contracts and faster acquisition of supplies and materials, and with fewer, and arguably lesser qualified contracting personnel(with greater authority and latitude in making "business judgments), the Government has end up with unprecedented contract and system abuses which we are now seeking to correct.

Although change itself is not bad, many of the changes made in the regulations (or the liberal interpretations of the regulations or law) in the past twenty years, have resulted in the condition of federal contracting today. It is time to swing the pendulum back towards: tighter regulation; renewed emphasis on compliance and reduced 'speed' in placement (where speed, not quality of contract, is the objective); bring orderliness back to the process; and, re-establish the integrity of the Government contracting system. The FAR has always provided mechanisms to deal with true emergencies (see FAR 6.302-2), but unfortuately, most of today's "emergencies" are only the result of a dictatorial supervisor who wants something done on an artificial schedule. "Procurement planning" seems to be a nice regulatory concept, but in reality rarely occurs.

Unfortunately the current conditions have evolved over some twenty years and current contracting staff may require retraining in contracting basics and procedures, along with rebuilding the contracting organizational structure to ensure system integrity can be re-attained.

2. ORGANIZATIONAL PLACEMENT OF THE ACQUISITION FUNTION

The place to begin to re-establish the integrity of the system is to address the organizational placement of the acquisition function. Organizational placement is a valid concern as it may provide some insight into some of the basic problems in Government contracting. First let us address the purpose of the contracting function. There should be no mistake, the contracting function is a support function which should have no operational programmatic responsibility or possess any funds beyond that limited amount necessary to operate the purchasing function itself. This independence from mission execution helps to eliminate any inherent bias in the actions or operations of the personnel assigned to the procurement function. [Note: Having just read the GAO report on the Air Force's C-130 purchase, this need for separation is reinforced. Apparently, Mrs. Druyun was directing program requirements and changes, in addition to orchestrating the procurement itself. Obviously, this dual authority led to the break down of the checks and balances of the contracting system which should have existed.]

As a 'support function,' contracting offices have traditionally been relegated to a sub-staff position within operational organizations. The contracting office has always been the last place the program function (with mission responsibility and funding) had to go once a decision was made some form of contract support was needed. How long the program office had been dealing with a contracting issue, or what actions had been taken, or decisions made prior to the contracting office becoming aware of the "new requirement" only became known after receipt of what normally had become a now "urgent requirement." In many cases, non-contracting personnel, organizationally superior to the contracting function, have directed questionable contracting actions to be taken, against the advice of the contracting personnel, in the name of the program. This places the contracting personnel, the people ultimately held responsible for any contracting action, in the untenable situation of either complying with poor management edicts or potentially having non-contracting supervisors retaliate in the form of performance appraisals or even more subtlety, lack of performance awards.

The guiding principles of the Federal Acquisition Regulation (FAR) recognize that the contracting function is to be part of the Acquisition Team (FAR 1.102(c) and (d)), yet organizationally, the contracting office is normally subservient to non-contracting managers within the organization. Thus, by the time the 'acquisition' has reached the contracting office, pressures to award the contract 'quickly' have already begun. In some cases, contracting strategies have already been 'decided' (or possibly some strategies excluded due to actions already taken by non-contracting officials). These types of problems have been somewhat recognized through the creation of Agency Acquisition Executives, but this concept has not flowed to the lower level buying offices, which are still organizationally subordinate.

The organizational structure of checks and balances also has been lost with many contracting offices place in a 'support role' under the Chief Financial Officer. Under this lately popular scenario, if we could just then place the property/services receiving function under the same organization, an unpalatable situation has been created where a single individual is responsible for (1) creating a requirement, (2) funding it, (3) buying it and then (4) receiving it – a structure fraught with opportunity for fraud, waste and abuse.

In order for Government contracting to recover its integrity and begin to function as it should, as a minimum the contracting function within an organization must be placed in a position reporting directly to the senior leader of the organization and be a participating member of the senior staff of the organization. In this position, the senior acquisition official becomes aware of requirements as they are identified and is in a position to participate in the early 'program decisions' which may ultimately affect the procurement itself. An even better option would be to have the contracting function completely free from direction/control by the organization it supports, reporting only through contracting channels to the Agency Acquisition Executive. This would free the contracting function entirely from being subject to direction from a non-contracting official. (For example, I recently observed an acquisition under which procurement actions were directed by the program people in order to "save schedule." Unfortunately, the people giving the directions did not understand the necessary processes, and what should have been a two

week delay to resolve the contracting issue, ended up a three month delay in placement of the contract due to the problems encountered in trying to short cut the needed corrections. This is not a remote example.) Due to the subordinate organizational placement of the contracting function, this occurs on a regular basis. An independent contracting organization would still be responsible for supporting the program function, but would not be subject to other directions and pressures (e.g., performance appraisals, etc.) which could compromise the procurement process itself. The quality of the support provided by the independent contracting function could be reported through advisory performance appraisals from the receiving program office to the acquisition management structure to ensure that proper and timely support was being provided, but that the support was free from inappropriate organizational pressures and/or direction.

3. ACQUISITION WORKFORCE

With an independent organizational structure in place, attention must be focused on the acquisition workforce itself. The downsizing of the workforce, and the looming numbers of contracting personnel eligible for retirement has created a crisis in Government contracting. The acuteness of the crisis is so significant, that recently the General Services Administration issued a 'draft statement of work' for the acquisition of contract personnel from private industry to perform Government contracting duties! With all of the criticism of Government contracting, including lack of proper contract administration, improprieties in contract awards, misuse of other agency contracts, etc., the concept of "buying contracting personnel" from the private sector to perform Government contracting duties is, quite simply, ludicrous. Unfortunately, such a ludicrous action may now be a necessity based upon the actions and decisions of the past. If "contracting for contracting personnel" is permitted to occur, it should only be allowed long enough to recover from the poor personnel decisions of the past – a maximum of five years is suggested. Further **existing contracting personnel must be exempted from competitive sourcing activities** – as any such action will only exacerbate the current staffing situation, driving away the mid-level contracting personnel that are needed as part of the recovery program. It is these junior and mid-level workers who will become the contracting officers of tomorrow. Without a source to replace retiring workers, where does the Government think replacements will come from?

Although human capital 'studies' may be underway to ascertain the depth of the problem, studies do not solve the problem. Doing 'more with less", using lesser qualified personnel is not a beneficial practice considering the million of dollars at stake. Any reasonably good purchasing agent/contract specialist/contracting officer can pay for themselves many times over in the form of proper contract pricing/negotiation. (But as an aside, that is not, and should not be, the next 'metric' to be measured.) While studies are being made of the 'staffing needs," I am confident every purchasing manager can immediately identify his/her offices critical staffing needs if they were simply asked. Authorizing increased staffing to the contracting office that are undermanned, or will be undermanned as a result of retirements, is needed immediately. The learning curve is such that even if some over staffing occurs for some interim period that will not be a

detrimental as waiting and studying to get the staffing numbers precisely correct. Waiting and studying is not in the Government's best interests at this time.

Until contracting offices can be adequately staffed and trained, hiring needed assistance from the private sector may be an evil necessity. However, the evil can be mitigated to some degree by providing preference in hiring to retired Government personnel – which may necessitate revision of OPM's regulations on reemploying retirees to attract retirees back into service long enough to provide the needed training and guidance to the existing contracting staffs. Special authority should be created to contract for non-Government retiree personnel to work in the contracting organizations. Regardless how one attempts to justify such an action, there is no doubt these are, and would be, personal services contracts. And those non-Government individuals (retirees or private sector workers) should be subject to the same rules and constraints from an ethics and conflict of interest perspective as the active duty Federal employees.

The current initiative to create a single acquisition career development standard and Acquisition Certification Program for all Federal Agencies should be implemented immediately, and should provide for grandfathering of the existing (and retired) workforce. Such an action would provide for mobility of Federal personnel and also provide agencies the opportunity to hire seasoned contracting personnel without regard to which agency they served in. For example, contracting personnel in civilian agencies have operated under the FAR, and although not familiar with some of the Department of Defenses rules and regulations, could operate much sooner and more effectively than any new hire or 'contracted' support. An individual serving as a contracting officer in one agency should be able to transfer his/her credentials to another agency without having to become 'recertified' by the new agency.

In terms of the acquisition career development program, it appears the basics of Government contracting are being neglected in the quest for contracting personnel to become 'business managers.' This latest "fad" has permeated the new acquisition training programs from Defense Acquisition University (DAU). It appears that the system has lost sight of the fact that without a thorough understanding of the basics of Government contracting, e.g., contract law, contract pricing, contract administration, etc. the ability to be a business manager is lost. A return to basics is a necessity. Whereas for thirty plus years I have considered myself a contracting official, the work that I performed was in fact conducting the 'business of the agency' with the commercial sector. Changing the label of the work does not change the work. But without understanding the basic business structures, contract types and proper usage/application, contract pricing, proper proposal evaluation and award, contract law and contract administration, the concept of training someone to be a 'business manager' is a farce.

The second problem with the current training viewpoint is it is assumed that just because someone has been to a training course that they then have acquired the ability to apply those concepts to the work at their office. This is most likely not the case. Whereas training provides the concepts, it is the actual use of the concepts/processes under real life work which provides the experience. Without the experience, it becomes exceedingly

difficult to adapt the school house concepts to other work situations. Training must be reinforced by experience and that experience needs to be obtained under the guidance of seasoned and knowledgeable contracting personnel if sound business decisions and transactions are to occur.

Lack of trained, experienced staff has a severe impact on Agency operations. In the May 16, 2005 edition of the Federal Times.com, the following was reported:

> "Bid protests have jumped 30 percent in the last four years . . ." Protests showed a four-year rise from 1,146 to 1,485 starting in fiscal 2001, according to the Government Accountability Office, which adjudicates protests. At the same time, federal procurement grew about 50 percent to more than $300 billion, according to one academic expert who said the increase wasn't coupled with increased staff to handle the spending and make sure it's done correctly."

This is followed with a quote from Mr. James Phillips, executive vice president of Centre Consulting in McLean, Va., on April 25 at a National Contract Management Association conference. Phillips noted that changes to the Federal Acquisition Regulation in July 2004 add more detailed requirements for ensuring competition and getting the best value for the government. He then continued,

> "GAO is all about following correct procedure, so the more procedure that's put in place . . . [the] greater potential for protest regarding contract orders."

The result of conducting more and more complicated procurements by fewer and less qualified/experienced personnel is that each error brings on yet another new procedure thought necessary to correct the "problem." Yet each new procedure serves only to place additional burdens on an already overburdened, inexperienced staff.

There have been discussions on creating "career paths" for contracting personnel, such as contact management, contract pricing, contract administration, etc. and permitting people to only obtain training in the chosen "path." In a time of staffing and expertise crisis, attempting to create <u>specialty workers</u> is not an advisable approach, and will be detrimental as it limits not only work assignments but career advancement. Personnel interested in obtaining higher pay grades will most certainly have to focus on the 'management training path" as under current personnel policies, the higher pay grades are only given to the "managers." Thus, the Government will end up with lots of trained 'managers' and few trained contracting experts.

Consideration needs to be seriously given to a dual grade structure – the management structure of today in the 1102 Classification Standards, and an "<u>acquisition expert" grade structure</u>. Individuals with demonstrated expertise and exceptional skills should be elevated in grade along with the management personnel. Whereas the managers may be guiding and overseeing the operations, it is the 'experts' who are actually making the organizations function writing the contracts and making the 'business deals." By creating

the incentive of higher pay through the gaining of expertise, I believe we can accelerate the knowledge learning process, as well as improve the contracting products.

4. GOVERNMENT-WIDE CONTRACTS AND INTERAGENCY CONTRACT VEHICLES

As discussed above, the current problems with these types of contracts was simply the system was seeking 'speedy' contract awards, and abuse of these processes was virtually encouraged. If one contracting office would not abuse the processes in order to make 'fast awards," then another office was willing to "place orders: as a means to build their organizations and "reputations." I refuse to believe that the contracting officers who were abusing the processes did not know there were taking improper actions. I believe they were under the impression the system, and management, was supporting their misuse of the systems and therefore did not feel uncomfortable in taking those type actions. That is, they felt comfortable until the problems in Abu Ghraib, Iraq arose and the misuse was so blatant that it could no longer be ignored by "the system."

The current solution to "correct" these problems seems to be either: (1) require more (unnecessary) documentation; or (2) in order to avoid perceptions of problems, quit using the schedules. Neither is a desirable solution. The contracting officers who were placing the improper orders knew they were improper – but their actions were endorsed by the "system." The solution is simple - direct such activities to cease, with the penalty for knowingly abusing a contract being the loss of the Certificate of Appointment as a Contracting Officer. If a contracting officer in Agency 'A' provides an order for placement to Agency B and the contracting officer in Agency B places the illegal order, he/she forfeits his/her contracting officer warrant (not Agency A's contracting officer). However, if Agency A's contracting officer actually places the order directly (using Agency B's contract), then if the action is improper, Agency A's contracting officer warrant should be in jeopardy. This returns integrity and accountability to the process and can be clearly understood by all.

Also, the GSA schedules need to be revamped to eliminate the use of the Time and Materials/Labor Hour structures unless absolutely necessary and proper. The use of the Time and Materials/Labor Hour formats provided contracting offices convenient vehicles, supposedly already "priced" which they could them simply place orders against, with or without true competition.

5. COMMERCIAL PRACTICES AND COMMERCIAL ITEMS

This topic becomes comical at times. I can obtain virtually any "commercial service" I want under a GWACs or MAS contract, on a labor-hour basis, yet, cannot contract 'commercially' for those same services on a labor-hour basis. This makes no sense; however, what everyone seems to be missing is the issue, "Should the Government be contracting on a labor-hour basis for those services under any circumstances?" – I would contend the answer is, or should be, "No."

We have gotten into the issue of 'commercial practices' and commercial items, once again in search of a means for speedier placement of orders. First, the Government is not private industry and cannot act nor function like private industry. In private industry, if I don't like the job being done by a contractor, I can simply let the firm go. The released company's only recourse may be a lawsuit for breach of contract – if they are willing to pursue that course of action and then they have to spend money to hopefully prove breach. Commercial industry has no 'administrative appeal' process to higher level management officials nor will writing your Congressman generate any action. The private owner in this case doesn't even have to be "right" to take whatever action he/she decided upon. Under Government contracts, the contractor has rights and administrative appeal procedures, as well as recourse to the courts. Also, the bureaucracy in the Government is such that if the Government is going to take an adverse action against a company and it is likely to produce some form of adverse publicity, the Government will agonize over the issue requiring reviews by many layers of management before any action will or can be taken. And each higher level review will be looking at how to avoid taking the adverse action and/or avoid public criticism.

If private industry contracts for an accountant on a labor-hour basis and doesn't like the work that is being performed, or perceives the work is being performed too slowly, the owner can simply release the individual. If the contractor objects, he has little recourse and too large of an objection may result in no future work for him with that company. In the Government, somehow it must be demonstrated the work is unacceptable or even more difficult to prove and document, the work is being performed "too slowly." Any contract action taken may result in complaints being filed by either the contractor or the employee, and no amount or level of objection will result in any real impact on the firm's ability to bid on future work.

As a result in the differences in Government and the private sector, the Government may need to contract on a different basis so that at least its not paying profit on every hour used by the slow accountant - whom the Government cannot get rid of as easy as private industry. Also, because of the relative freedom private industry has, whether the work is overseen or not is a matter of preference as if the work product is not what was desired in the time frame desired, the contract employee can simply be "sent away." In the Government, someone has to be appointed to 'oversee' the work being performed and to certify the amount of time actually spent before even a payment can be made.

In commercial activities, the bottom profit line is the primary motivation. Calculated risks which fail only impact the bottom line, and if not too severe and endorsed by the company's senior management simply become a reported loss on a balance sheet. However, in the Government, a calculated 'failure' becomes headline news, a 'waste of Government funds' with all the critics and pundits lining up to participate in what can become a public thrashing. Now, compare the two sectors, and whereas if you were in private industry you may take a calculated risk, in the Government you would have a very difficult time finding someone to make that same risk decision. The Government has an armada of people whose only job is to criticize the work of other Government workers. And since the critics get to write the report, they even get the last word - even

when they are wrong. So the willingness for a Government employee to take such a calculated risk is minimal, at best. Again, the major difference is how private industry can approach a problem versus how the Government will react to that same problem.

In the final analysis, what may be workable and feasible in private industry may not work for the Government due to the differences in law and process. That is not to say, the Government should not look at how industry may conduct some transactions, but the ability to readily transfer and use a commercial procedure or process in Government must be carefully analyzed before being seized upon as the latest innovation in Government contracting.

6. PERFORMANCE-BASED CONTRACTING

One question being reviewed by the Panel is if it is possible for agencies to establish definitive requirements in specific and measurable terms at the beginning of the contracting process. The answer is "maybe." Unfortunately, in the zeal for everything to be claimed as performance-based (because people are reporting and measuring percentage of performance-based contracts awarded), strange arrangements and claims of performance-based are being made in the name of percentages, not in fact. In order to be able to claim 'success' under the "performance-based contracting initiative," even Time & Material/Labor Hour (T&M/LH) contracts have been declared as 'fixed-price' arrangements (because the "rates" are fixed), and therefore the orders placed are reported as "performance-based." While this is patently ridiculous, it has become "accepted" as the interpretation provides favorable statistics.

It was reported in the GovExec.com, May 17, 2005, that the Advisory Panel was advised by acquisition experts from the public and private sectors that performance-based contracts - which include incentives for good work - need to be overhauled. Further, the article indicated that Janice Menker, director of government acquisition policy for Concurrent Technologies Corp indicated, "Performance-based contracting is not working" She said agencies call some contracts performance-based, but they lack incentives and statements of work."

I would contend that the concept does not need to be overhauled, first because there is not a great deal of guidance/direction to "overhaul." The problem is the application and implementation coupled with the expectation that every contract must be performance-based. That expectation is what needs to be overhauled. Government employees' performance is measured how fast contracts are awarded and was the contract "reported" as performance-based. Speed and statistics is the measure of performance, not necessarily quality. So if I quickly cobble together a contract and report it as "performance-based" the program office is happy because they received their contract and the contract managers are happy because it was "reported" as performance-based. The fact that it is poorly written contract and not truly performance-based are neither measured or really cared about.

The basic concept of performance-based contracting is good. When it makes sense and can be applied correctly, it can produce meaningful benefits. When misapplied, it can produce undesirable results. My favorite example, actually published on a Government website as a "good practice," was a sample performance-based service contract (PBSC) for "training services." The measures of performance upon which fee/profit was based were: (a) percentage of students passing the exam; and, (b) student rating of the instructor. While passing the exam and student satisfaction with the course would initially seem to be meritorious values – how is the contractor supposed to perform under this contract? The options for the contractor are: (1) hope the instructor establishes some rapport with students and hope the students learn the course material to be able to pass the exam; or, (2) teach the exam questions, entertain the students and to really make them happy, let them out of school early each day. I would contend option 2 is the most assured way for a company to maximize profits under such a "performance-based" arrangement. Unfortunately, when the students return from work, they will have learned little to nothing about the subject matter to apply to their work – but nevertheless, a "performance-based contract" had been awarded.

Similarly, claiming T&M/LH contracts are performance-based simply falsifies the reporting systems leading organizations like OMB and OFPP into thinking all is well within the systems and that there are only pockets of resistance with a few recalcitrant contracting officers that are not "getting with this innovative and worthwhile program."

The "Seven Steps" training program for performance-based contracting emphasizes the significance of Performance Work Statements, yet this is viewed as a "contracting" training program. Work Statements are generally considered a "technical product" which has to be (should be) written by the program offices. The FAR contemplates the creation of "Acquisition Teams" consisting of all participants in Government acquisition including the technical, supply, and procurement communities but also the customers they serve, and the contractors who provide the products and services. Such "teams" are created for the major and most significant contracts, but these large dollar contracts comprise the smallest number of actual contracts written within Government. The day-to-day support contracts written in every contracting office however, are generally written under 'urgent' conditions, with little 'advance planning" occuring, and by the time the contracting office becomes involved, some form of statement of work has been literally thrown together by the program office. Of course, the requirement is "urgent" and there is no time to rewrite the statement of work into a Performance Work Statement. But the contracting office is supposed to somehow convert the requirement into a PBSC because the contracting office is being measured on percentage of PBSC contracts written. (See issue above on the organizational placement of the contracting office.) The result being either the contract not being performance-based, or even worse, a poor example of a PBSC is written with the wrong measures for the work being sought in order to get the contract placed "quickly" and to be able to report it as "performance-based." [The adage of a "successful operation but unfortunately the patient died" comes to mind.]

In order for performance-based contracting to become embedded within the Government, training on the concept needs to be incorporated into the basic technical training programs for program personnel, so that the program personnel understand the value of the concept and the processes necessary for creation of an effective contract to support their programs. Holding 'special contracting training" for the technical personnel simply reinforces the concept that this is a "procurement program" which the program personnel perceive as being forced to attend to satisfy some political agenda.

There should also be some recognition that all contracts cannot be written in a performance-based manner, and such exceptions should be clearly recognized in the regulations. As an example, let's assume an attempt was made to write a performance-based contract for the Advisory Committee's work. The Committee charter is to provide independent advice and recommendations to the Office of Management and Budget. As a performance measure, upon which the Committee Members would be paid "fee" or bonuses, we could measure the number of recommendations made. Whereas the Committee would certainly produce a plethora of recommendations, the quality of all of those recommendations would be highly suspect – the "objective" was number of recommendations, not quality of the recommendations. Quality would be subjective and if used would result in the "contract" not being performance-based. Another "performance-based" alternative would be to measure the amount of private sector and public sector input received in the formulation of the advice and recommendations. Thus the incentive would be for the Committee to gather as much input as possible, again without regard to quality and content, and simply report thousands of comments from both sectors. However, the Committee's final report could simply say, the consensus was, "no problems exist." In either of these two cases, both "contracts" would be reported as "performance-based" but the outcome of both is not what was really sought. I would contend that the work output sought from the Committee would not be suitable for use of a "performance-based" contract. Contracts for true consultants providing advice, research and development contracts, applied research, and support service contracts where quality of the product is the desired objective are a few exceptions which immediately come to mind. T&M/LH contracts should be banned from being reported as performance-based on the basis they are 'fixed-price" (which could have dual benefits resulting in reduced use of these contract forms). It is conceivable however, to have a T&M contract (if that form can be justified) which could be truly established as performance-based, particularly on a task order basis.

One of the issues under review by the Advisory Panel was what metrics are agencies using to assess the benefits of PBSA? I am not aware of any regulatory requirement to attempt to maintain such comparative data, although there are Government claims of x % "savings" when using PBSA procedures. Further, such a comparison can be misleading unless the predecessor contract and the PBSA contract each required the exact same work. For example, converting a non-PBSA contract for janitorial services to PBSA, but changing the frequency of cleaning in the PBSA contract (increase or decrease) does not permit meaningful comparison, without a great deal of analysis (if even possible at all).

The May 17, 2005, GovExec.com article also indicated Henry Kleinknecht, the program director for procurement management at the Defense Department's Office of the Inspector General, advised the Committee that performance-based contracts did not produce the promised savings, because they were not effectively implemented and that he also said there was a large number of sole-source contracts, which were awarded without competition. First, sole source contracts and performance-based contract bear no relationship to each other. I can write a very good performance-based contract on a sole source basis, and a very poor, competitively awarded performance-based contract. In fact, I could probably argue I could write a much more effective performance-based contract on a sole source basis because I could deal one-on-one with the company and would not be fettered with all the regulatory and legal trappings (and restrictions and protest potential) of trying to accomplish the same objectives under full and open competition procedures where I had to ensure all companies were treated fairly and equally. Performance-based contracting and sole source contracting are totally unrelated issues. Whereas I will agree that poor implementation of performance-based contracting can result in less than desirable performance, I would have to be convinced with some real comparable data that on a universal basis performance-based contracting will reduce cost. In fact, logic would tell me that if the performance-based contract was written tightly enough to ensure the expected performance was provided, cost/price might in fact increase due to the need for the contractor to ensure the services/products being provided in fact met the specifications.

I believe most Government contracting practitioners would agree that when PBSA concepts are used properly, there can be savings to the Government which can occur in actual cost of the contract, reduced costs of oversight and administration, and/or even a reduction in administrative issues and disputes with the contractor. Conversely however, when used improperly there is an increased cost to the Government in these same areas. A poorly written PBSA contract can not only result in unintended consequences but may result in higher costs to the Government in terms of actual money paid as well as increased administration time, efforts and costs. As an example, if a contract was performed under a cost-plus-award-fee basis, and the contractor did not perform some work acceptably, the work might have to be redone and the contractor's might suffer some reduction in its performance rating for the period. However, if this same work was done under a cost-reimbursement PBSA contract, and the standard for acceptable work was 100%, and fee was tied to that criterion, then the contractor could reasonably be expected to install added quality checks and reviews as part of its initial cost proposal to ensure all services met requirement to ensure fee reductions did not occur. The net result could well be the Government paying more for the services than previously occurred due to the quality standard of the PBSA.

7. CONTRACT BUNDLING, STRATEGIC SOURCING AND SMALL BUSINESS

The Government's policies and expectations on these issues are conflicting. The expectation is for acquisition personnel to save money – which can readily be done by consolidating like items into a single contract. That's considered "bundling" and is

considered improper because it can create a negative impact on awards to small businesses. The Government's initiative is to increase awards to small businesses; but "strategic sourcing," also being touted as being a good means to reduce agency costs, is somewhat by definition "bundling" and also results in reduced opportunities for small businesses. Demands are being made to avoid bundling and increase awards to small businesses, at the same time when there is a recognized staffing crisis in the workforce in terms numbers of qualified personnel. The expectation for acquisition personnel to sort their way through this mine field of conflicting policies and initiatives is a challenge.

These issues can be managed but the expectations and rhetoric must be tempered. Increasing the numbers of contract awards with a reduced acquisition workforce will simply lead to poor contract administration as the focus of any contracting office has to be on satisfying its customers with new awards. Administration of existing contracts has to wait in line for attention and unless contract problems are identified, sometime by accident, they tend to not even be recognized. Yet contract administration is also one of the areas considered to be "high risk." Whether this is really true or not on a universal basis is questionable. In any system, including the commercial world, some level of inefficiency or even poor performance will exist. However, attempting to compare the dismissal of a poor worker in the private sector versus a poor performer in Government service once again reveals stark differences in law and process.

8. PAST PERFORMANCE

This is another arena where a 'fad' has gone overboard. Due to the requirements to evaluate past performance as part of virtually every source evaluation (FAR 15.304(3)(c)(i)), contracting offices are being inundated with past performance questionnaires from multiple companies bidding on various Government projects. I equate these questionnaires to the references people identify on resumes – one can rest assured that someone will not include an enemy or someone who will only provide an unfavorable reference on a personal resume.

Similarly, companies are only going to seek 'past performance' evaluations from those contracting offices where their work is doing well, they certainly are not going to provide a reference if they can avoid it where there are performance problems and an ongoing dispute with the contracting office. The net result of this is that the process of obtaining past performance information has become a burden on contracting offices, sometimes receiving as many as two to three requests a week, with little to no true benefit being gained in the evaluations. (And the "neutral evaluation" standard for company's without any experience in performing a service is perplexing at best.) I have not personally observed the mandated use of past performance evaluation criteria as providing any meaningful information or discrimination between competing firms as the references used almost always provide a rating of "good" or "outstanding." Also, the amount of information requested from offices conducting past performance evaluations varies considerably – from a simple half page check sheet, to a multi-page question and answer form with spaces provided for comments. Obviously, those offices using the half-page

checklist have recognized the marginal value of this process and are literally "checking the box" to claim use of past performance in the proposal evaluation.

It is recommended that the current FAR requirement for use of past performance evaluation criteria, which is currently undefined, be revised and, unless returned to an optional criteria, a standard criteria be established for use by all contracting offices. That criteria should simply be that each company identify in a proposal any contract terminations (convenience or default), provide the original estimated cost or initial price versus final cost/price (on completed contracts), and fee available versus fee earnings for its Government contracts for some period of time (e.g., 1 -2 years), and identify the contracting officer for each contract with a contact phone number. (The FAR language could provide for supplemental information when deemed necessary and appropriate by the contracting officer.) The soliciting office, at their discretion, could then contact some or all of the contract references to validate the accuracy of the information provided. The soliciting office could also check the Government's performance database for information on the offering firm. This process would facilitate the past performance evaluation process, eliminate excessive efforts on the part of the soliciting office and eliminate the labor intensive use of the past performance questionnaires currently being circulated throughout the entire Federal Government in the name of "past performance evaluations."

9. ETHICS

No discussion involving Government contracting in these times can occur without a discussion on ethics. Unfortunately, the issues discussed above have given rise to the ethics problems occurring today in Government contracting. Under the old, traditional processes, rarely did one hear about an ethics problem. This was in part due to the rigidity of the systems, the checks and balances which existed, and the high probability of a dishonest contracting officer being caught. However, as the systems were 'loosen' and program and management personnel became more and more involved in the contracting process, the opportunity and probability of ethics problems arising increased without any change in the ethics programs. There is still the Procurement Integrity Act which covers aberrant situations like the Druyun/Boeing problem; however, with the advent of 'best value' source selections, where political favoritism or the potential for future employment opportunities may exist, the proverbial "unannounced" selection criteria can develop and the opportunity for abuse has increased exponentially.

The Procurement Integrity Act clearly covers the actions of contracting officers and source selection officials. It does not cover however, senior management personnel issuing unwritten directions to those personnel. Let us consider the scenario where some large, multi-million (billion?) dollar procurement program is being conducted. Whichever contracting officer is assigned will most certainly inherit post-employment restrictions and I believe every contracting officer I know is fully aware of those restrictions. (Certainly Ms. Druyun was aware of those restrictions, and was fully aware that what she was doing was wrong at the time she was taking those actions.)

But let's turn our attention to the individuals appointed as the source selection authority/official for the multi-million dollar acquisitions. How many occasions have we seen Secretarial, Assistant Secretary or other high level senior officials serving as source selection officials? Generally, it has been my observation that this 'duty,' which will carry with it, post-employment restrictions, gets delegated to some mid-level executive. The system blindly assumes that this mid-level executive is the final decision maker. Unfortunately, that is hardly even a credible assumption. Can anyone really believe that a major, multi-million (billion) dollar acquisition, potentially critical to an agency, is going to be "independently" decided by some mid-level career executive? No, in reality that mid-level executive is going to select the firm whom he is permitted to select by his/her superiors. And while the mid-level executive inherits the post-employment restrictions, the real selection official (the political appointee or retiring senior executive) who "concurred" with the selection is free to go to work for the "selected company."

The Government personnel working inside the system can plainly observe these type activities occurring, but there is no proof; however, it fosters attitudes of if they can get away with it, why can't I; or, distrust (disgust) with the actions of the senior managers – neither of which is a very productive attitude. So in this case, ethics becomes an issue applicable only for the working level personnel, not to the most senior management. Ms. Druyun was caught because she was too visible and too actively involved in the contract management and negotiations. Better (for her) if she had been an "unofficial" reviewing official and orchestrated the decision though some subordinate selection official or contracting officer instead taking the actions herself. An interesting study would be to review the post-Government employment of the most senior executives and see what correlation exists between their "new employers" and the companies awarded the major contracts by their Agency before their departure.

A simple solution exists, have contract source selection officials certify under penalty of prosecution, that they were not influenced in any form or fashion by anyone in their chain of command, and require contracting officers to document each contract file with the names of those individuals who substantially participated in any acquisition. These relatively simple documentation requirements will aid in easily identifying who really participated, and also serve as a deterrent to senior managers attempting to "influence" selection officials. I believe those of us in the procurement world fully understand our Procurement Integrity limitations. However, I have seen some very liberal legal interpretations about coverage of program and management personnel, i.e., if they were not the final signatory authority they were exempt, regardless of the role they actually played in the proposal evaluation, contract selection and/or contract negotiations.

Hopefully the above comments may be of use and value in your deliberations. Should you or your staff have any questions or wish to discuss any issues further, please feel free to contact me.

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