

## THE VIEW FROM WASHINGTON ON THE EVE OF PROCUREMENT REFORM

Federal Contracts Report (FCR) is the major publication covering news stories about procurement. It reports on developments among Washington policymakers, not on activities at the working levels of the system. Some of the policymakers on whom it reports are elected officials or political appointees, while others are senior career officials whose views might reflect, more than for politicians and political appointees, currents further down in the system. Two conclusions emerge from this examination. One is that many topics that were to become part of procurement reform after 1993 appeared in news stories in FCR during 1991 and 1992. So this account will complement that of the existence of discontent on the front lines. The other conclusion is that articles discussing topics that, starting in 1993, would come to dominate elite-level pronouncements on procurement were, in 1991 and 1992, more like a few needles in a prodigious haystack. When the new ideas got raised, they were typically attacked, and few became policy. More importantly, the dominant messages in FCR during these two years were a continuation of the past, not a premonition of the future. The contemporary observer would almost certainly have paid attention mostly to the haystack, not the needles.

The most important of the topics soon to be associated with reform appearing in articles in 1991 and 1992 were ones associated with “best value” source selection, including past performance. In December 1991 OFPP proposed a policy on past performance that, FCR reported, “would require agencies to consider contractor performance on prior contracts as one element in the source selection process.”<sup>vi</sup> And the largest number of agency-specific initiatives reported during this period involved this theme in one form or another. In February 1992 the General Services Administration

proposed a rule growing out of its Quality Contractor Program that allowed the agency to place options into contracts allowing contract extension based on excellent performance under the contract.<sup>ii</sup> Also in 1992 the Defense Logistics Agency proposed adopting a “vendor rating” system that would reward suppliers for good performance (such as on-time delivery and absence of product defects) by giving them credit that could be weighed against a somewhat higher price. “A major theme,” FCR reported, of an address in July 1992 by newly appointed NASA Administrator Dan Goldin to a professional association, was “increased contractor accountability and quality in performance.” As part of this, Goldin announced establishment of a past performance database; “new contracts will be awarded,” he stated, “to companies which have demonstrated that they are accountable by delivering quality systems that meet cost, schedule and technical requirements.”<sup>iii</sup>

Other ideas reflecting what was to become the reformers’ better value agenda also emerged. In April 1991 OFPP finalized a policy letter calling on agencies to adopt performance-based service contracting “structuring all aspects of an acquisition around the purpose of the work to be performed as opposed to either the manner by which the work is to be performed or broad and imprecise statements of work.”<sup>iv</sup> The policy also endorsed the use of best-value source selection, although without that phrase. A group of industry associations led by the Professional Services Council endorsed OFPP’s approach and stated they “strongly believe that a best-value concept must be clearly incorporated” in the regulation.<sup>v</sup>

Ideas about “best value” source selection in general and increased use of past performance in particular were controversial. In 1991 Senator Glenn, Chair of the Senate

Government Affairs Committee, criticized a large IRS computer contract not awarded to the low bidder.<sup>vi</sup> In 1992 the Director of Defense Procurement (the Defense Department's senior procurement policy official) objected that an OFPP proposal to establish a central past-performance database "could be used to deny contracts to otherwise responsible contractors resulting in de facto debarment without any formal process."<sup>vii</sup> A few months later the American Bar Association urged that the General Services Administration proposal to extend contracts based on good contractor performance be withdrawn, arguing that the provision "grants the contracting officer too much discretion." The key defense industry association, the Council of Defense and Space Industry Associations, criticized the proposed Defense Logistics Agency vendor rating system. It would "directly and materially impact a contractor's potential for government business – without any assurance of due process or equal treatment."<sup>viii</sup> The group also endorsed the concern regarding de facto debarment had made regarding the OFPP proposal. It asked for "a procedure to dispute the performance rating...by an objective third party."

During 1991-92 the reform theme of gaining access to more commercial items was also present. In January 1991 FCR reported on the reintroduction by Senator Carl Levin, who served on both the Government Affairs and Armed Services committees, of a bill encouraging the Defense Department to acquire commercial items.<sup>ix</sup> The bill represented the latest round in Levin's ongoing efforts to call attention to problems with milspec clothing and food items. FCR devoted a lengthy article to a 1991 report by the Center for Strategic and International Studies that argued that the Defense Department needed to reduce government-unique cost information and other contractor oversight requirements for contractors providing commercial items, in order to promote a more integrated

commercial and military industrial base, a theme only minimally present in Levin's efforts.<sup>x</sup>

FCR also devoted a number of articles during 1992 to deliberations of the so-called "Section 800" panel, named after the section of the 1991 Defense Department authorization bill that established it. The panel was directed to examine statutory and regulatory barriers to greater Defense Department access to commercial items. In February FCR reported that the Panel planned to propose exemptions from requirements for cost data for commercial items.<sup>xi</sup> This theme was also controversial. FCR's article on recommendations of the Section 800 panel on cost data for commercial items noted, consistent with the view the purpose was to reduce the Defense Department's dependence on traditional defense contractors, that the Council of Aerospace and Defense Industry Associations "advocated no changes to (the Truth in Negotiations Act) whatsoever." At a July 1992 hearing before the House Armed Services Committee where the subcommittee chair, citing the Center for Strategic and International Studies report, criticized milspecs, "DOD officials acknowledged some problems associated with milspecs and standards, but defended their use, saying specifications and standards benefit both the user and the supplier." And the Aerospace Industries Association witness told the hearing that milspecs "can be valuable tools for government and industry."<sup>xii</sup>

Reducing procurement paperwork received less attention in the 1991-92 articles than did best-value source selection and commercial items, but it was not absent. The Section 800 panel ended up recommending raising the "small purchase" procurement threshold to which fewer rules applied from \$25,000 to \$100,000, but this recommendation was never discussed in any of the FCR articles. In July 1992 the new

NASA Administrator, Dan Goldin, announced the agency was preparing a streamlined system for awarding “midrange” contracts valued between \$25,000 and \$500,000.<sup>xiii</sup>

And, as will be seen below, OFPP succeeded in gaining a provision to increase the small purchase threshold to \$50,000 added to Congressman Conyers’ 1992 procurement bill, though the bill never passed.

One reform theme that was almost entirely missing from FCR was the underlying reinventing government theme that got applied to procurement, empowerment of the federal workforce. In two years of issues, I saw only two mentions of this subject. In November 1991, testifying on legislation introduced in the House, OFPP Administrator Burman criticized features of the bill for adding new controls on government officials and stated that “(we) believe acquisition officials need more, not less discretion.”<sup>xiv</sup> And FCR reported that in his July 1992 speech Dan Goldin – not a contracting person, but an agency head -- stated that “‘empowerment’ of acquisition personnel was another element in his vision for NASA procurement. The system (in Goldin’s words) ‘teaches procurement people to fear making mistakes,’ rather than ‘innovation, creativity, and efficiency.’”<sup>xv</sup>

But, mostly, the two years of FCR are a story of haystacks rather than needles. None of these new topics received as much attention as a highly technical issue involving “certification of claims” that appeared repeatedly on FCR’s pages during these years. And the two years were mostly filled with articles about audit reports, debates about legislation to reduce the ability of government to talk to industry people after procurement had started, and recriminations back and forth over a cancelled weapons system (the Navy A-12 airplane).

In February 1991 FCR reported that the “Pentagon has shelved a draft report recommending ways to reduce oversight of contractors” after inquiries about the report from Congressman John Dingell, House Energy and Commerce Committee Chair.” Although the article contained few details about the draft, those presented seemed quite modest. One month later, FCR announced in a lead headline that “DOD Plans Incentives, Less Oversight For Exemplary Contractor Facilities,” involving both source-selection advantages (in a spirit of past performance) and “reduced physical inspection and oversight activity on the government’s part,” such as fewer “reviews, audits, assessments, (and) reporting requirements” for so-called Exemplary Facilities that “consistently deliver superior products and services to DOD pursuant to contractual requirements, and who demonstrate a commitment to continuous process improvement in all aspects of their operation.” However, a senior Defense Department official was quoted in the article as stating “he does not expect (the Defense Department) to reduce its overall level of contractor oversight as a result of the... program. ...’I don’t want to associate (this) with any disengagement at all as far as our oversight,’ (the official) stressed. He added that that would be the wrong signal to send Congress, where some members, especially...John Dingell (D-Mich), have expressed doubts about reported DOD efforts to reduce the overall level of contractor oversight.”<sup>xvi</sup> After this possible program was announced, nothing further appeared about it.

A series of sensational hearings Congressman Dingell held in 1992 on contractor overbillings of EPA probably best stand for these two years.<sup>xvii</sup> The hearings featured tales of bizarre items, such as a reindeer suit for a holiday party, which had been partly billed to some EPA contracts.<sup>xviii</sup> The money involved was miniscule, and in a number of

cases, the government's share was only a small fraction of the total cost.<sup>xix</sup> But a parade of witnesses participated in a Dingell-orchestrated orgy of demands for more control of the depredations of government and industry. At one point, a senior EPA political appointee, under withering attack from Dingell for an award that had been given a (highly respected) EPA career manager "implicated" in the "scandal," announced in front of the committee (and without the manager's prior knowledge) that the award would be withdrawn.<sup>xx</sup> For a contemporary, these hearings were likely to have characterized these two years considerably more than any of the articles discussed above, or even all of them added together.

In response to the hearings, OFPP unleashed a self-described "'SWAT' Team," which OFPP Administrator Burman co-chaired along with the EPA Inspector-General and the head of the Defense Contract Audit Agency, whose "primary focus," according to the article in FCR, would be on improving the government's willingness and ability to detect costs inappropriately charged the government<sup>xxi</sup> Dingell noted after the November 1992 election that the report growing out of the SWAT Teams "serve as a good jumping-off point for the Clinton administration to address the real problems in the federal procurement system."<sup>xxii</sup> This hardly constituted a signal that a major change in procurement direction was about to occur.

The dominance of the haystack rather than the needles is also seen clearly in discussions over legislation during these two years. With the exception of encouragement of government purchases of commercial items, just about everything on the legislative agenda involved moving the system further down its traditional path of increased regulation and litigation. At the beginning of 1991, in its annual outlook

section, FCR reported that, beyond Levin's efforts on commercial items, the most important legislative issues expected for the year involved reducing inappropriate government-industry contacts and calls for increased profit reporting.<sup>xxiii</sup> In July 1992 Senator Pryor introduced a bill requiring government contractors be licensed.<sup>xxiv</sup>

In August 1991 Congressman Conyers, chair of the House Government Operations Committee, introduced a procurement bill. Its key elements of the bill (those the FCR article highlighted) all involved increasing the authority of the General Services Board of Contract Appeals<sup>xxv</sup> over bid protests. The bill also contained a requirement that all acquisitions of commercial items give price an evaluation weight of at least 30% and expanded requirements to re-compete contract modifications using "full and open competition."<sup>xxvi</sup>

After a year of political maneuvering, a modified version of the Conyers bill – which had been endorsed by Senator Glenn as well -- passed the House but, at the last moment, failed to reach the Senate floor before adjournment.<sup>xxvii</sup> Conyers had accepted a number of changes based on Administration suggestions, driven especially by the Defense Department: in particular, the revised bill included an increase in the small purchase threshold from \$25,000 to \$50,000 and some reduction in requirements for contractor submission of cost data. Nonetheless, the provisions expanding bid protests and re-competitions of contract modifications remained, and in April the Defense Department asked OFPP to cease negotiating with Congress on the bill, arguing that it was still fatally flawed (it would "expand significantly the opportunities for protest, will lengthen the procurement cycle by imposing additional costly and rigid procedures on an already overburdened system, and will seriously undermine the ability of executive agencies to streamline and make more efficient the procurement process").<sup>xxviii</sup>

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<sup>i</sup> "OFPP Draft Policy Letter Would Require Past Performance Consideration in Contract Awards." (FCR, December 9, 1991).

<sup>ii</sup> "GSA Proposes to Use Contract Options to Reward Contractors for Quality Performance" (FCR, March 9, 1992); "GSA Issues Final Rule to Encourage Use of Options for Quality Vendors" (FCR, December 28, 1992).

<sup>iii</sup> "Goldin Outlines NASA Procurement Reforms, Including Streamlined Midrange Contracts" (FCR, July 17, 1992)

<sup>iv</sup> "OFPP Policy Letter Calls for Performance-Based Approach" (FCR., April 15, 1991)



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- <sup>v</sup> “Industry Groups Urge Emphasis on Cost Realism in Best Value Procurement in FAR Part 37” (FCR, November 2, 1992)
- <sup>vi</sup> “Glenn Questions Treasury’s Handling of ADP Contracts, Protests,” (FCR, (March 4, 1991): 276-77.
- <sup>vii</sup> “CODSIA Criticizes DLA Vendor Rating Proposal, Asks for More Specificity on Weight Assigned” (FCR, December 14, 1992) The “responsibility” of a contractor is a term of art, referring to some minimal tests of a contractor’s ability to perform a contract. “Debarment” refers to banning a contractor, typically for some period of time, from doing business with the government.
- <sup>viii</sup> “CODSIA, op. cit.
- <sup>ix</sup> “Levin Reintroduces Bill to Encourage Acquisition of Nondevelopmental Items.” (FCR, January 28, 1991)
- <sup>x</sup> “Report Urges Defense Procurement Reform; Cites Accounting Rules, Data Rights, Clauses.” (FCR, April 22, 1991)
- <sup>xi</sup> “Section 800 Subpanel Recommends Expanding TINA Exception for Adequate Price Competition.” FCR. 57 (February 24, 1992): 306-07.
- <sup>xii</sup> “Milspecs, Standards Add to Cost of DOD Items, Inhibit Commercial Buys, HASC Panel Told,” FCR. 58 (July 27, 1992): 99-100.
- <sup>xiii</sup> “Goldin Outlines,” op. cit.
- <sup>xiv</sup> “Conyers Procurement Reform Bill Gets Mixed Administration Review,” FCR. 56 (November 4, 1991): 597.
- <sup>xv</sup> “Goldin Outlines,” op. cit.
- <sup>xvi</sup> “OMB Creates ‘SWAT’ Team to Review Civilian Agency Contracting Practices,” FCR. 57 (June 15, 1992): 897.
- <sup>xvii</sup> FCR ran approximately five articles on the Dingell hearings. See, for example, “Oversight Needed to Ensure that EPA Implements Contract Reform, IG Says,” FCR. 58 (July 13, 1992): 42.
- <sup>xviii</sup> These sums had been included in the indirect cost pools of some cost-reimbursement contracts.
- <sup>xix</sup> The companies were predominantly commercial and therefore billed only a percentage of total indirect costs to the government.
- <sup>xx</sup> This account is based on interviews with contemporaries, not articles from Federal Contracts Report.
- <sup>xxi</sup> “DOD Plans Incentives, Less Oversight For Exemplary Contractor Facilities,” FCR. 55 (March 18, 1991): 339-40.
- <sup>xxii</sup> “OFPP Plans Major Changes in Civilian Agency Contracting, Audit Practices,” FCR. 58 (December 7, 1992): 621.
- <sup>xxiii</sup> FCR. 55 (February 11, 1991): 187-88.
- <sup>xxiv</sup> “Pryor Offers Bill to Require Licensing of Service Contractors,” FCR. 58 (July 6, 1992): 5.
- <sup>xxv</sup> See above, p. .

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<sup>xxvi</sup> “Conyers Bill Would Revoke CAFC’s ADP Protest Jurisdiction; Make GAO Protest Awards Advisory.” (FCR, July 12, 1991) The specific provisions regarding commercial items were not mentioned in the original FCR article, but come from OFPP Administrator Burman’s later testimony criticizing features of the bill.

<sup>xxvii</sup> Articles on the Conyers/Glenn bills during this period included “House Panel Approves Substitute Version of Conyers’ Procurement Reform Bill,” (FCR, November 18, 1991); “HASC Asks Conyers to Delay Floor Action on HR 3161,” (FCR, February 10, 1992), ‘Atwood Strongly Opposes HR 3161, Urges OMB to End Negotiations with GovOps,” (FCR, May 4, 1992); “Conyers to Offer Compromise Version of HR 3161 on House Floor,” (FCR, July 20, 1992); “DOD Objections, Political Maneuvering Jeopardize Passage of HR 3161,” (FCR, October 10, 1992); “HR 3161 Fails to Reach Senate Floor, Dies as 102nd Congress Adjourns,” (FCR, October 19, 1991).

<sup>xxviii</sup> “Atwood,” op. cit.