

Chapter 9

Regulation and Deregulation in Public Procurement Law Reform in the United States

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INTRODUCTION

The dominant dynamic of public procurement policy at the federal level in the United States in the 1990s is generally regarded to be “reform” of the public procurement regime. Contemporaneous accounts of that reform characterized the reform proposals as generally deregulatory in character. However, little attention was paid to understanding the reforms adopted against the backdrop of the long term historical evolution of public procurement practice in the United States, or elsewhere. Nor has attention been paid to the relationship between the “deregulation” of public procurement practice in the United States, and the broader movement, ascendant since the late 1970s, toward regulatory reform of administrative regulation in the United States. This chapter seeks to fill some of these gaps by situating the United States’ federal public procurement policy reforms of the 1990s more accurately within these two broader contexts. I seek to develop several basic points about the nature of the procurement reforms of the 1990s in the United States.

First, the development of procurement regulation and practice, at least in the United States, is marked by a characteristic process of oscillation between stricter regulation and deregulation. This oscillation is produced, in part, by real costs that are associated with the extremes of insufficient and excessive regulation. And it is potentiated by a political climate in which, too often, shortsighted legislative “reforms” are aimed at abuses or scandals that garner political attention but which may not be representative of the characteristic functioning of the procurement system. To make procurement policy for the future, it will be helpful to learn the lesson that adjustments to the procurement regulatory regime should not blindly respond to abuses when they emerge. For there is an

important tradeoff between the costs of excessive regulation and the costs of insufficient regulation. Moreover, even if an optimal balance can be achieved between the costs of excessive regulation and the costs of excessive deregulation, that optimum is only such in an overall, systemic perspective. In any specific case, there still may be abuses that create an appearance, viewed in isolation, of overregulation or under-regulation. Thus the occurrence of abuses is not, in itself, sufficient ground to conclude that “reform” either in the direction of more or less regulation of the procurement system is warranted. Nor is zero abuses an achievable objective or a sensible goal. The pathological operation of short-sighted, scandal-driven, reactive policymaking was strongly evident in the immediate legislative response to Hurricane Katrina in the United States. However, after the initial overreaction to the procurement difficulties evident in the wake of those events, a more measured response has prevailed.

Second, in important respects the procurement deregulation of the 1990s must be distinguished from other deregulatory reform in the United States in the last quarter of a century. For while the primary objective of regulatory reform in the administrative law system generally in the United States since the 1980s has been to reduce the cost of regulation for regulated parties, the “reform” of government procurement practices in the United States has entailed, for the most part, reducing regulatory control over government actors. Moreover, in enhancing the discretion of those who make procurement decisions on behalf of the United States through a course of procurement “deregulation,” procurement reforms potentially place at risk not only the public interest that was to be served by the procurement regulatory regime, but also the interests of contractors and would-be contractors, who are major beneficiaries of the regulated regime. That regime is aimed at assuring a fair opportunity to compete for government contracts to each qualified competitor, both to secure best value for the government, and to assure equality of treatment and opportunity to would-be contractors. Thus the analytic and policy justifications that have supported incremental regulatory reform in the United States in the last generation generally do not support the course of procurement reform witnessed in the United States. To say this is not to conclude that these procurement regime reforms have been unjustified. But

any balanced assessment of them must begin with an accurate perception of their true tenor.

In one respect, moreover, procurement deregulation is a mirror image of the administrative deregulation movement in the United States of the last quarter-century. Ironically, but perhaps understandably, many of the initiatives toward deregulation of the administrative regulatory system have taken the form of what we might call “meta-regulation” or better, perhaps, “regulating the regulators”: imposing procedural and substantive obstacles on agencies with regulatory jurisdiction that burden the regulatory process, producing a disincentive to regulate. If generic regulatory reform sought, characteristically, to deregulate private parties, indirectly, by burdening regulators and the regulatory process, procurement reform in the 1990s sought to deregulate the procurement process, but risked undermining the public and private interests protected by a system of transparent, competitive, procurement.

A final significant attribute of the procurement reform developments of the last 15 years in the United States that may likewise be regarded as ironic is that efforts to reform the procurement system, advertised as simplifying the procurement process, taken in aggregate, have produced a system that is significantly more complex than its predecessors. That is, although some particular procurements may now be implemented through procedures more streamlined than those previously required, the number of different procedures has grown, so that the process of identifying the correct contract vehicle and procedures is frequently difficult, and demands an increasingly sophisticated, and well-trained acquisition workforce to carry it out successfully. Yet, as we shall see, the evidence suggests that the federal acquisition workforce has not kept pace with the evolving demands of the federal procurement system.

THE SWINGING PENDULUM OF PROCUREMENT REFORM

Historically, much of United States’ federal procurement law has been founded on a pessimistic view of the operation of government and the capabilities and honesty of government employees. The premise often seems to be that procurement officials should not be allowed to exercise significant discretion because, left to their own

unguided discretion, members of the federal acquisition workforce will make undesirable decisions. Specifically, they will spend too much, buy from friends and relatives and be subject to bribery and other corrupting influences. To guard against these risks, the system is full of rules that are designed to systematically reduce discretion in the making of procurement decisions.

A central problem engendered by this approach is that it is easier to write rigid rules to prohibit or command certain types of behavior than it is to achieve the subtler goals of the procurement system, such as obtaining “best value” for the expenditure of government funds or optimally advancing the mission of the agency that will use the goods or services to be procured. Accordingly, rigid attachment to rule-bound procurement systems has costs, even though it also serves the procurement system objectives of integrity, equity and efficiency. From time to time the costs of adherence to such rule-driven approaches will appear excessive, promoting a counter-reaction in favor of deregulation. Important elements of the procurement reforms of the 1990s in the United States represent such a counter-reaction, emphasizing the often real losses that occur when procurement managers are so deprived of discretion that they lack authority—or incentives—to make decisions that would promote efficient use of public resources to achieve public goals. At such times, however, there is a serious risk that the fundamental values served by the system of procurement regulation will be eclipsed and lost from sight. Ideally, a procurement system should seek to minimize the net long term cost of losses from overregulation and those from under-regulation, instead of focusing on one to the exclusion of the other.

This task is particularly difficult when approached through the lens of political oversight and campaigning. That is because of two factors, one structural, one political. First, balance between over-regulation and under-regulation can only be achieved in the long run aggregate sense, not in every specific exercise of procurement authority. It is inescapable that acquisition workers will differ, necessarily, in their honesty, commitment to public values and individual capability and acumen, but the procurement system must strike a balance between discretion and directory regulation for the system as a whole. Accordingly, if government procurement procedures are deregulated to a sufficient degree to allow capable

procurement officials to exercise sound discretion in the public interest, they will necessarily allow enough discretion to allow those officials who are less honest and capable to engage in abusive conduct of many different kinds. One simply can't have adequate latitude for the exercise of sound discretion without allowing room for abuse!

At this point the political factor enters our calculus. Regrettably, political oversight of the operation of the federal procurement system in the United States focuses disproportionately on abuses. When abuses emerge in the wake of deregulation, as inevitably they will, they are likely to be spotlighted by the press—always in search of news, whether or not it is “representative” of the state of procurement practice. Similarly, Congress will focus unduly on such scandals and abuses, for the pursuit of scandal and pursuit of reforms to prevent its reoccurrence are surely more politically viable strategies for election and re-election than is a more nuanced attention to the competing benefits and risks of regulation and deregulation of the procurement system. Thus the pendulum begins to swing back in the direction of more regulation of the procurement system and the cycle begins to repeat itself. Without essaying a comprehensive account of the history of United States federal procurement policy and law, we can still see that the broad outlines of policy initiatives in recent decades fit this overall pattern.

Consider, for example, the strong emphasis placed historically on sealed bidding (open tendering) in the United States' federal procurement system. This path was based on the transparency and administrability of the criterion of lowest price as compared with other criteria for optimal performance that are more complex, subtle or judgmental. The sealed bidding procedure, coupled with a selection criterion of “lowest price” is indeed an effective means of preventing some kinds of wasteful spending, nepotism and other kinds of favoritism in contract awards, as well as some types of corruption. On the other hand, it can often lead to behavior that we would recognize as “penny wise, pound foolish”—the acquisition of goods and services that are inexpensive, but of low quality, and, in the end, a bad bargain for the government. This form of regulation of procurement denied procurement personnel discretion to consider qualitative dimensions of value in determining the appropriate source for a given procurement.

After years of dissatisfaction with the results of this rigid preference for sealed bidding in federal government procurement, the United States Congress relaxed this particular rigidity in the 1984 Competition in Contracting Act. There Congress authorized United States federal agencies to choose between two forms of competitive procurement: sealed bidding, with the lowest price selection criterion, and competitive negotiation, which employs a best value criterion for selection. Agencies were henceforth required to consider, initially, whether the lowest price or some other standard of quality and value should be the measure of the best offer to be employed by the purchasing agency. It should be obvious, however, that in permitting more subjective criteria for contract award this shift entails risks, as well as benefits. Among these risks are the kinds of corruption abuses revealed in scandals running from the "Operation Ill Wind" prosecutions in the 1980s through the Darlene Druyun scandal of the current decade (Nagle, 1999; Defense Science Board Task Force, 2005).

In the 1990s efforts at procurement reform continued in a discretion-enhancing vein. A significant contribution to this movement was made by the publication of Steven Kelman's book, *Procurement and Public Management* in 1990. The argument made in this book was that the procurement "system should be significantly deregulated to allow public officials greater discretion" and that empowering officials with this enhanced "discretion would allow government to gain greater value from procurement" (Kelman, 1990, p. 1). Kelman (1990, pp. 5, 1) argued that procurement system circa 1990 tended to "undermine the government's ability to get the most for its money" and that the system of procurement regulation was "more often the source of the problem than the solution to it" A part of his general critique of excessive regulation and limitation of procurement officials' discretion, Kelman proposed certain specific shifts in policy, the most prominent of which, is development of a system for assessing the past performance of would-be government contractors, and making the quality of such performance an evaluation factor used in determining the recipient of the award in competitive procurements.

In large measure because of the argument made in his 1990 book, Kelman was appointed as the Administrator of the Office of Federal Procurement Policy in the Clinton administration. Moreover,

Kelman's deregulatory approach to reform of the federal procurement process became a highlight of the National Performance Review initiative, which was a central feature of the first year of the Clinton administration, for which Vice-President Al Gore was given responsibility.

"Streamlining" of procurement was held out as one of the central objectives of the National Performance Review. Essential components of the recommended procurement policy reforms included: 1) decentralization of procurement, with authority devolving to program managers with enhanced discretion and authority to buy "much of what they need," 2) radical simplification of the procurement regulations and process, 3) expanded use of simplified acquisition procedures for smaller purchases, and 4) shifting federal acquisition toward use of commercially available products (Gore, 1993, pp. 26-31).

The strengths and weaknesses of these policy recommendations can both be glimpsed in the Report's uncritical endorsement of the complaint of an unnamed manager that the existing Federal Acquisition Regulations "Do[] not even state clearly the main goal of procurement policy: "Is it to avoid waste fraud and abuse? Is it to implement a social-economic agenda? Is it to procure the government's requirements at a fair and reasonable cost?" (Gore, 1993, p. 28). Implicit in this complaint, of course, is recognition that there are tradeoffs amongst these goals (and others, like equity among would-be contractors), and that they cannot each be given overriding priority. At the same time, there is discouraging refusal in the Report's recommendations to recognize just how difficult it is to strike a proper balance between the multiple objectives of the federal procurement regime, and that no one ideal can be given absolute priority. The failure of the Federal Acquisition Regulations to clearly disclose the "main goal" of the system of procurement regulation surely does not result from a desire to keep a single goal a secret! Of course, the problem of juggling multiple, competing and priorities has been exacerbated by political failure to recognize that the multiple desiderata for a procurement system must be balanced because of the tradeoffs inescapably presented. The problem is further aggravated by political dynamics in which reactions to the latest scandal or excess are likely to have a disproportionately powerful effect on policy initiatives at any point in time.

Jerry Mashaw, one of the most thoughtful commentators on the United States' administrative law and regulatory regime generally, has criticized the thrust of the broad reinventing government initiative, claiming that it "misunderstands the purpose of most federal administrative activity" because most federal agencies "develop general norms and adjudicate cases" They are in the "governance business, not the service provision business." Moreover, Mashaw claimed, the reinvention reform agenda makes a fundamental "category mistake—confusing citizens with customers"—a stance that he argues is inconsistent with the fundamental demands of political and legal accountability that are basic to our governance norms. (Mashaw, 1996, pp. 412-415). To be sure, even critics of the "reinventing government" agenda such as Mashaw acknowledge that procurement is an area in which the activities of the federal government more closely resemble those of private enterprise such that the relevant "primary goals of quality and cost-effectiveness are clear" (Mashaw, 1996, p. 410). Thus, a strategy of enhancement of managerial discretion has some plausibility in this context. Still, Mashaw (1996, p. 410) argues that much of what might appear to be dysfunctional "administrative 'red tape' [in procurement] is an attempt to pursue complex, multiple objectives while guarding against the misuse of public money." Mashaw's critique, like my own response to the National Performance Review's oversimplification, suggests that the problem of complex multiple objectives thus cannot be escaped, though the balance among competing objectives can be adjusted if that balance is askew. Viewed in this light, the Kelman/Gore critique of the existing procurement system in the United States should be understood less as making a case for a sweeping transformation, and more for marginal change, signaling that the costs of overregulation had to exceed those of under-regulation in certain contexts.

In the 1990s, Congress and the federal procurement bureaucracy undertook a number of initiatives designed to implement the philosophy of empowering procurement managers along the lines suggested by Kelman and Gore. Among other provisions, the Federal Acquisition Streamlining Act of 1994 created a Simplified Acquisition Threshold of \$100,000 and also extended a set of simplified procedures to acquisitions of commercial items below a \$5 million dollar threshold. Such acquisitions are exempted from the generic requirement for full and open competition and subject only to the

lesser requirement that the agency head should promote competition to the maximum extent practicable. Furthermore, FASA established the micro-purchase threshold of \$2,500 below which no competition requirement applies, so long as the contracting officer determines that the price paid is reasonable. For purchases below the micro-purchase threshold, use of purchase cards—government credit cards placed in the hands of non-procurement personnel to enable them to directly buy supplies that they need from commercial vendors with a minimum of procurement process – became the norm. Use of interagency and government-wide contracts accessible through task orders was dramatically expanded so that it now represents 40% of spending on federal procurement annually (Acquisition Advisory Panel, Working Group on Interagency Contracts, 2006. p. 5). On the administrative side, in the 1990s, Part 15 of the Federal Acquisition Regulation was revised to significantly enhance the managerial discretion of federal acquisition managers, and to institutionalize the evaluation of past performance of a government contractor as part of the source selection process.

But these reform initiatives predictably contributed to instances of abuse even as they made generally valuable adjustments to the system. One such area of abuse that has attracted significant attention is the misuse of government purchase cards (Schooner & Whiteman, 2000; Whiteman, 2000). But viewed properly, the abuses of the government purchase cards do not destroy the case for the development of this system. They simply demonstrate that a credible system of supervision of the use of the cards was necessary, so that the threat of exposure of misuse was sufficiently realistic to deter most potential misuse and to detect and sanction much of the misuse not deterred.

Of course, the need to develop such an oversight mechanism complicates the calculation of the true costs and benefits of this element of the deregulatory program. It is regrettably characteristic of the manner in which procurement reform was implemented in the 1990s in the United States that too much attention was paid to the areas in which acquisition workforce savings could be achieved, and not nearly enough attention was paid to the need for oversight and many other respects in which new demands would be made on the federal acquisition workforce. Still, it appears reasonable to believe that the efficiencies achieved by empowering the federal government's end users of most routinely available commercial

supplies to buy relatively small quantities of those supplies without formal procedures for competition would outweigh the costs of abuses. And this calculation actually seems clearer, not less clear, if one considers both the costs and benefits of establishing an adequate level of supervisory control and oversight on the program.

At the same time, consideration of the history of the purchase card program suggests that a more thoughtfully incremental approach to this reform might have been preferable to the course actually followed. Although there were scattered experiments with precursors to the government-wide purchase card, no substantial demonstration project was undertaken before instituting the micro-purchase threshold and extending use of the card to non-contracting officers (Whiteman, 2000, pp. 407-412). Of course, these were both the factors that unleashed explosive growth in the program and the factors that, even independent of considerations of scale, created the greatest risk of abuse. If a more prudently incremental approach had been followed it is likely that the need for a responsible regime for oversight and supervision would have been recognized before the program was institutionalized on a government-wide basis.

Other areas in which the procurement reforms may have misfired to some extent include inappropriate use of commercial item acquisition methods, in circumstances in which the policy rationale for simplification of acquisition rules was at best debatable. Still another is hidden in the mushrooming use of interagency and other task order contracting. There is strong reason for concern that hoped-for levels of competition have not been achieved either at the stage of creation of the contract, or by agencies ordering from these interagency and task order contract vehicles (Schooner, 2001). Moreover, the fact that issuance of task orders generally cannot be challenged in bid protests creates additional ground for concern about the explosive growth in use of these vehicles and the non-competitive manner in which these vehicles are, too often, being used. And the misuse of an interagency contract vehicle to secure contract personnel who participated in the interrogation abuses at Abu Ghraib prison in Iraq also gives rise to concern.

Use of interagency contract vehicles and commercial item acquisitions and other commercial practices are among the areas for study with which the United States' Congress has tasked the Acquisition Advisory Panel created pursuant to Section 1423 of the

National Defense Authorization Act for Fiscal Year 2004. The present author is a member of that panel. As this chapter is submitted, it is too soon to be sure what the final conclusions and recommendations of that Panel will be. But the author's hope is that the Panel will be attentive to the concerns about reactive, scandal and abuse-driven policymaking in the public procurement arena in the United States that are identified here. I have suggested here that the reforms of the 1990s, viewed in their best light, should be understood as seeking an incremental adjustment in the balance struck between the costs of underregulation and those of overregulation. Accordingly, the author's hope is that the Panel's recommendations will seek incremental change at the margin in the practices it addresses, rather than a radical shift either to dramatically extend or sharply roll back the deregulatory reforms of the United States' procurement system adopted in the 1990s. The goal should be to tweak these programs so that they can achieve as much of their objectives as possible, while limiting their abuse.

An additional area in which the pathologies of scandal-reactive policy should be considered is the United States' response, legislative and administrative, to the procurement failures that occurred in the government's response to the destruction wrought by Hurricane Katrina in September 2005. This plainly could be, and is in fact the subject of entire papers (Schwartz, 2005; Schwartz, 2006), but because of its relevance should be noted briefly here as well. An important part of the United States Congress' immediate response to the Katrina emergency was to increase 100-fold, from \$2500 to \$250,000, the micro-purchase threshold, which, as a practical matter, controls the use of government purchase cards to engage in virtually unregulated, non-competitive procurement. This was done even though there was little, if any, reason to believe that the well-publicized procurement failures and omissions of the Federal Emergency Management Agency, which did hamper relief efforts, had anything to do with the unavailability of this kind of authority. Moreover, this was done even though there were substantial problems known to exist with the operation of the purchase card program. The good news about the aftermath of Hurricane Katrina is that, in very short order indeed, the White House limited the damage that Congress's action had made possible by instituting strong administrative controls on the exercise of the expanded micro-purchase authority. In this instance, appreciation of the costs of

deregulation caught up with the exercise of unconsidered reactive policy-making almost immediately. Similarly, additional legislative proposals made in the wake of Hurricane Katrina for sharply deregulating emergency procurement and for achieving further deregulation by defining a significant class of procurement as “commercial” even though it fails to meet the applicable requirements for such treatment, seem to have achieved a much deserved inactive status. Though one might be alarmed by the apparent effort in the heat of the Katrina disaster to seize on legitimate concerns about the government’s procurement response to justify a radical deregulation of procurement, again, a more balanced perspective seems now to have prevailed.

Of course, none of this is to suggest that Katrina does not reflect problems in the federal acquisition system. However, a more reflective response to Katrina suggests that the problems revealed relate mostly to agency management and the inadequacy of the federal acquisition workforce. Those shortcomings led to an almost complete failure to make effective use of task order and interagency contracting vehicles, to line up, in advance of the disaster, on a competitive basis and at competitive prices, contingency contracts for prompt provisions of goods and services such as drinking water, food, emergency shelter, clothing, ambulances, emergency fuel supplies, generators, body bags and evacuation transportation services and vehicles. The ability to use task order contracting to provide competitively selected resources to deal with emergencies is one of the most positive legacies of the procurement reforms of the 1990s. The great irony of Katrina is that these tools did not fail; they failed to be used. So the proper lessons to learn from the Katrina experience are the need for timely acquisition planning and an adequate acquisition workforce. The Katrina experience thus neither supports rollback of the acquisition reforms of the 1990s nor further radical deregulation, but again makes the case for thoughtful consolidation of past gains, and targeted attention to weaknesses in the implementation of past reforms.

In sum, because there are real costs associated both with regulation and unregulated discretion in the procurement function, an optimal procurement system will need to strike a balance between the costs of overregulation and the costs of insufficient regulation. But the optimal system can only hope to strike a balance that ON

AVERAGE minimizes the sum of the costs of overregulation and the costs of underregulation. Even when this average optimal balance has been struck, there will be a nontrivial level of abuse—which when discovered will create the appearance of scandal. For the very same level of regulation that affords sufficient opportunity for acquisition professionals within the federal government to exercise sound discretion will afford a minority of acquisition staff sufficient latitude to make abusive and improper decisions. Yet if the reaction to the predictable incidence of the latter is to willy-nilly increase regulatory control over procurement, substantial costs will be paid because of the excessiveness of the regulation thus adopted for more typical procurement situations and for most procurement workforce members.

At the same time, a firm grip on the fundamental tensions that affect the design of any public procurement system should promote a healthy skepticism about radical deregulatory proposals, especially when made in response to a specialized crisis like the Katrina disaster. It turns out that these proposals were not a good match for the actual problems that existed. Instead, the unglamorous path of improving agency management and the possibly costly path of bringing our acquisition workforce in balance with the demands placed on it are the courses that demand our attention and support. Katrina should also teach us that the cost of ignoring these needs may be even greater than the cost of addressing them.

REGULATORY REFORM AND PROCUREMENT REFORM

Long before the procurement reform movement of the 1990s in the United States began to gather strength, there was a vigorous movement toward reform of the regulatory system in the United States. Because the procurement reform movement is often viewed as an application of the broader movement toward regulatory reform, it is important to more carefully examine the relationship between procurement reform and deregulation and general regulatory reform in the United States. As we shall see, there are fundamental differences between the two movements. Indeed, mistaking the procurement reforms of the 1990s for a straightforward application of generic regulatory reform principles obscures significant costs associated with the procurement reform agenda, and is a barrier to a

balanced understanding of the costs, benefits, and unintended consequences of the procurement reform agenda.

Since the latter half of the 1970s there has been a major movement toward reform of the regulatory system in the United States. This movement received political impetus in the Reagan administration (1980-1988) when policies aimed at reducing the burdens that regulation placed on private industry were at the top of the Executive Branch agenda (Meiners & Yandle, 1989). Perhaps the signal achievement of this effort was the promulgation, shortly after the start of the Reagan administration, of Executive Order 12291, which established a process of centralized regulatory review. Henceforth, regulatory requirements imposed by federal agencies on private regulated parties would be reviewed by the President's Office of Management and Budget to ensure that they were cost-effective, and represented the most cost-effective approach reasonably available to address the particular regulatory problem. Although the details of this process of regulatory review have been adjusted by subsequent administrations, both Democratic and Republican successors to President Reagan have maintained this basic requirement.

Note that the process of regulatory review has an ironic aspect. In the name of reducing regulatory burdens, a form of meta-regulation was imposed on the regulators themselves. As Jerry Mashaw, an uncommonly penetrating observer of the evolution of the United States regulatory environment, has noted, this "regulate the regulators" strategy was in fact characteristic of many of the achievements of "regulatory reform" in the United States in the last quarter century. Mashaw summed up the impact of legislative regulatory reform efforts: "While arguably reinforcing the accountability, reasonableness, and procedural fairness of administrative policymaking, these 'regulatory reform[s]' are designed to stall and derail many rulemaking efforts" (Mashaw 1996, p. 420). Among the important examples of this approach in addition to the regulatory review process associated with Executive Orders 12291 and its successors, are the Paperwork Reduction Act of 1980, the Regulatory Flexibility Act, Title II of the Unfunded Mandates Reform Act of 1995, and the Data Quality Act of 2000 (Mashaw, 1996; Johnson, 2006). As we shall see, the procurement reform agenda in the United States has, in a sense, operated as a mirror image of the

regulatory reform agenda. That is, while regulatory reform in the United States has characteristically piled meta-regulation of this kind on top of existing regulatory programs to indirectly shield private enterprise from regulatory excess, procurement “reform” has characteristically deregulated procurement, even though much of the benefit of regulated procurement is aimed at private enterprise.

Despite the strong association between the inception of regulatory review and the Reagan Administration, proponents of this kind of regulatory reform can be found on both sides of the political aisle in the United States. Indeed, one of the key texts of the regulatory reform agenda is Stephen Breyer’s 1982 study, *Regulation and Its Reform*. Breyer, a professor at the Harvard Law School, had worked on deregulation of the airline industry as an aid to Democratic Senator Edward Kennedy and the Senate Judiciary Committee in the mid-1970s, and, of course, was subsequently appointed to the Supreme Court of the United States by Democratic President Bill Clinton.

It will be useful to briefly review the central features of Breyer’s recommended approach to regulatory reform, as follows:

- First, no regulation is appropriate unless “the unregulated market possesses serious defects for which regulation offers a cure” (Breyer, 1982, p. 184).
- Second, when regulation is justified, employ the least restrictive alternative, using classical regulation only where less restrictive means will not work.
- Among the less restrictive alternatives to classical regulation to be considered are incentive-based approaches such as taxes and creation of marketable rights regimes, disclosure requirements, and bargaining approaches.

The overriding watchword is to preserve, to the largest extent possible, the inherent advantages of competitive markets (Breyer, 1982, pages 184-188). Recognition that the values sought through regulatory reform flow from competitive markets, not from preserving (or emulating) business practices for their own sake, should therefore inform our consideration of the relationship between procurement reform as it has been practiced in the United States, and the regulatory reform movement.

THE UNIQUENESS OF PROCUREMENT REGULATION AND THE PARDOX OF PROCUREMENT “DEREGULATION”

Highlighted against the backdrop of this understanding of the regulatory reform movement in the United States, the paradoxical nature of the campaign for procurement deregulation in the United States becomes evident. Regulation of government procurement is fundamentally different in purpose and effect from regulation of private economic and social activity. Correlatively, deregulation of government procurement must be recognized as a significantly distinct phenomenon from generic regulatory reform.

While the central problem of regulatory analysis under the reform paradigm is to determine when and to what extent and in what manner unfettered operation of private markets should be constrained by government intervention, government procurement systems implement a fundamental commitment to fulfilling public needs through goods and services secured from the private sector. Regulation of government procurement is only secondarily and indirectly a form of regulation of private entities. Rather, it is regulation of the manner in which the government takes advantage of the strengths offered by the private sector. This fundamental insight—though seemingly obvious—is nonetheless obscured in much of the argument for “deregulation” of public procurement in the United States, which proceeds as though deregulation of procurement, like deregulation of private economic actors, is a tool to unlock the potential of the marketplace. Much of the case for deregulation of public procurement is founded on the argument that the government should act more like a business in carrying out procurement. But it is by no means evident that permitting the government to act as though it is a business, will serve the interests of those genuinely private enterprises that seek to do business with the federal government.

The corpus of government procurement law that is undermined by deregulation of federal procurement activities was itself founded on the objective of securing to the public, on the most efficient and economical terms available, the best goods and services available from the private sector. The classical operation of the procurement system presupposes that goods and services should be secured from the private sector rather than be produced by government employees precisely because of our strong belief—rooted in empirical experience

and in economic theory—in the superiority of the private sector for such purposes. The traditional version of our federal procurement system governs the procurement practices of the federal establishment, insisting on competition and transparency in most circumstances, in the belief that these offer the best assurance that we will indeed achieve to a high degree these critically important objectives:

- Best value and efficiency for the government and in the expenditure of taxpayer funds,
- Honesty and integrity in the administration of our procurement system, and
- A level playing field for, and fairness in the treatment of, competing contractors and would-be contractors.

Given all of this, why might one be tempted even to pursue the course of deregulating federal procurement? Our classical procurement system, and the broadly similar approaches employed in Europe have been sufficiently successful that that developing nations and former Soviet-style economies have treated them as the objects of emulation. A far-reaching deregulation of government procurement, then, is potentially hostile to the market and the good things that it can efficiently provide us, and therefore ought not be viewed as the equivalent of other regulatory reform in the United States, which seeks to limit the burdens placed on the private sector.

To be sure, a strong case has been made in the last fifteen years for incremental and moderate deregulation of certain aspects of our federal government procurement system. Where the federal government can take advantage of vigorously competitive private markets for genuinely commercial goods and services, the highly structured competitive process normally required by the classical full and open competition model of federal procurement may be unnecessary. In such instances the incremental procedural costs – including delay of the completion of procurement—of traditional full and open competition procedures may outweigh the incremental benefits of adhering to that process of competition. These are the insights that properly fueled the procurement system reforms in the United States in the 1990s.

A sophisticated understanding of the competing costs and benefits of procurement system deregulation requires several basic insights, then:

- There is a tradeoff entailed in any shift between the costs and benefits of the structured competitive procurement environment and the costs and benefits of a less regulated (business-like) government procurement environment.
- In appropriately delimited circumstances use of more commercial and less regulated procurement practices can yield a more favorable balance of costs and benefits than strict adherence in all cases to the structured full and open competition procedures.
- Nonetheless, departures from full and open competition cannot become the norm without sacrificing the basic values of efficiency, integrity and equity that underlie traditional public procurement mechanisms.

The complex hybrid system of federal procurement now in effect in the United States embodies a rich spectrum of many procedural models ranging from the highly regulated (e.g., full and open competition through competitive negotiation or sealed bidding) to the highly deregulated (micro-purchases using the government purchase card), with important intermediate models. As described in the next section of this chapter, the very complexity of that system is in part an unintended consequence of the procurement reforms of the last fifteen years, and itself presents a major challenge to the federal acquisition workforce. The complexity of that system is also a response to the tradeoffs identified here between the costs of under-regulation and those of over-regulation. Each alternative model may be ideal for some type of procurement. However, the growing complexity of the system itself imposes significant costs of its own. In light of the growing problem of insufficiency of the federal acquisition workforce to meet the demands placed on it, also described in the next section of this chapter, one must be skeptical indeed about adding any further complexity or alternative procedures to the design of the federal procurement system.

A further consequence of understanding the peculiar relationship between procurement reform and regulatory reform generally in the United States is that the literature and experiences of the regulatory reform movement likely shed more light on how to analyze whether a

particular service ought to be performed by government employees or by contractors, than they do on the optimal design of a process for government procurement. The former is certainly an important problem, and it is one that has received increasingly sustained attention in the last ten years, but it is quite distinct from most of the agenda of the procurement reform movement in the 1990s. Similarly, the insights that fueled the regulatory reform agenda of the last quarter century in the United States may be useful in considering the appropriateness of “collateral social and economic policies” – such as preferences for small businesses—that appear to *limit* the benefit that the government may receive from unfettered access to the goods and services available in the private marketplace. More broadly still, regulatory analysis may be productively applied to question aspects of the dual regulation system that we have created in the United States, under which government contractors often are required to meet standards in collateral areas of regulation that are different from those which are generally applicable to regulated private economic entities that are not government contractors. But all of these matters are distinct from the main outlines of procurement reform as it has developed in the United States.

Again, because public procurement and the reform initiatives that have been adopted in this context are about *how* to buy goods and services from the private marketplace, rather than whether to intervene in the decisions of private economic actors, procurement regulation does not have the same potential to burden the productive potential of the private sector. Moreover, public procurement regulation has significant potential to enable the federal government to take advantage of the benefits of competition in the private marketplace. It operates in a setting in which, absent regulation, potential benefits of recourse to privately provided goods and services could be undermined by corruption, favoritism, and the fundamental lack of a profit incentive for government employees to choose best value solutions for the government in the procurement process. Accordingly, despite some of the enthusiastic claims of its proponents, wholesale deregulation of government procurement is not the logical end point for the procurement reform movement in the United States. Rather, procurement reform properly should take the form of identifying markets in which the considerable benefits of insisting on the full and open competition model are outweighed by costs that can be avoided by employing a less- regulated model of

procurement. The task for those who want to appraise or improve the procurement system is to make sure that the initiatives represented as procurement reform genuinely adhere to that model.

Another factor that significantly distinguishes the problems addressed by the procurement reforms of the 1990s from those addressed by the regulatory reform agenda of the last quarter century in the United States is that increased centralization of control over the policies of disparate agencies has been a major objective in the area of regulatory reform and is not a major concern for procurement reform. First, a major strand in the regulatory reform agenda responded to the concern that statutory delegations of regulatory authority to heads of agencies had made it difficult or impossible “to coordinate policies among the executive branch and independent agencies” (Breyer, 1982, p. 359). Thus the regulatory review regime initiated by Executive Order 12291 and its successors not only instituted a substantive policy favoring cost-effectiveness in the choice of regulatory means, it also instituted an unprecedented level of formal centralization of oversight of regulatory initiatives from disparate agencies under the aegis of the White House.

The pattern that prevails with respect to federal procurement in the United States is considerably different, however. Procurement policy and procedure is defined government-wide, for the most part, by enactment of umbrella statutes applicable to all federal agencies, and by the promulgation of the Federal Acquisition Regulation, applicable, to all federal agencies engaged in procurement. Although some aspects of procurement by the Department of Defense have been singled out for special treatment, this is not the norm; rather, parallel, if not identical, legal requirements usually apply to Defense and non-Defense procurement. Implementation of procurement policy and the required procedures is, on the other hand, mostly decentralized. But failure of procuring agencies to hew to a common set of policies has not been a significant part of the problem addressed by procurement reform in the United States. Indeed, a significant thrust of the National Performance Review reform recommendations regarding procurement, the reader will recall, was to further decentralize procurement and even much of procurement policy by empowering program managers to do their own purchasing.

CHALLENGE TO THE FEDERAL ACQUISITION WORKFORCE: THE UNINTENDED CONSEQUENCES OF PROCUREMENT REFORM ON THE COMPLEXITY OF THE FEDERAL PROCUREMENT SYSTEM

A clear result of the last decade and a half of procurement reform in the United States has been the gradual but continual increase in the complexity of the procurement system, with attendant increasing demands on the federal acquisition workforce. To a significant extent, this complexity may be viewed as a foreseeable consequence of the competing risks of overregulation and under-regulation. Specifically, Congress and regulators have responded to those competing risks by layering alternative procedures on top of one another, multiplying choices, and by segmenting the field of procurement by prescribing more or less regulated procedures for procurement for different classes and scales of procurement. But the multiplication of competing vehicles and procedures increases the challenge to the procurement workforce to select the optimal procedure and vehicle, while the segmentation of the procurement field burdens the acquisition workforce by requiring a series of threshold choices as to the proper means of proceeding in a given acquisition.

Although there were always additional choices, in the federal procurement system of the 1980s, the basic question for acquisition workforce was whether the acquisition was subject to full and open competition, or not, and if it was, whether sealed bidding or competitive negotiation procedures were to be applied. The choices and decisions facing procurement personnel today are markedly more complex. In addition to the statutory exceptions to full and open competition requirement that were built into the Competition in Contracting Act in 1984, we have

- The micro-purchase procedures, which most often can be implemented through the use of government-wide purchase cards;
- The Simplified Acquisition procedures, applicable to purchases below the simplified acquisition threshold;
- The extension of simplified procedures to commercial item acquisitions up to \$ 5 million;

- The statutory preference for use of commercial items and streamlining of procedures for commercial items even above the \$5 million dollar threshold;
- The availability of the federal supply schedules and other interagency and government-wide contract vehicles, as well as other vehicles for task order purchasing without full and open competition (which produce a situation in which, a given product or service often can be secured through a range of alternative contracting vehicles that are already in place but there is still no assurance of meaningful price competition); and
- Increasingly widely available “other transactions authority” that may permit circumvention of many of the protections of classical federal procurement law.

The net effect of the evolution of the federal procurement system in the last fifteen years has been to create a system that is dramatically more complex than its predecessors. Unfortunately, this is just one of several factors that increasingly suggest that the government workforce expected to administer the procurement system lacks the resources to do the job satisfactorily.

In addition to the growing legal complexity of the system, other demands on the procurement workforce have grown. There has been a dramatic expansion of federal procurement activity, especially in the wake of the 9/11 attacks, the government’s responses thereto, and the war in Iraq. Qualitative demands on the workforce have also grown in other respects. Increasingly the federal government’s acquisition consists of services, rather than goods. The formation of such contracts and the management of them once formed imposes unfamiliar and enhanced burdens on the federal acquisition workforce. There has also been a major drive for use of “performance-based” acquisition of services. Like the shift from sealed bidding to competitive negotiation, this has the potential to increase the ultimate benefit received by the government from the contracting, but again it results in enhanced burdens on an understaffed and unprepared federal acquisition workforce.

Similarly, the dramatic growth of interagency and other task order contracting places new burdens on the federal acquisition workforce. Ironically, to be sure, one of the incentives to use such contract vehicles is undoubtedly the inadequacy of the existing acquisition

workforce to meet the demands placed on it; use of existing contract vehicles can often provide a means to get goods and services when an agency is lacking the necessary acquisition workforce of its own (Acquisition Advisory Panel, Working Group on Interagency Contracts, 2006, pp. 20-21). While recourse to interagency vehicles can facilitate initial ordering, in many respects this strategy exacerbates systemic problems. For instance, by dividing responsibility for procurement between an agency that hosts the procurement vehicle and an ordering agency, we appear to have created an environment in which securing meaningful competition is treated as someone else's responsibility. Moreover, reliance on interagency contract vehicles contributes to the United States' procurement culture in which there is too much emphasis on "getting to award" and insufficient resources are allocated to contract management.

The mismatch between the demands that the procurement system places on the acquisition workforce and the resources available to respond to that demand has been exacerbated by trends and pressures on the supply side of this equation. Although we are beset by problems in measurement and reporting, it is clear that there has been a substantial downsizing of the federal acquisition workforce in the last fifteen years. Responsibility for the growing mismatch between the demands placed on the acquisition workforce and the personnel resources available to meet those demands must be borne by both major political parties in the United States. The Clinton Administration accepted or even embraced this downsizing of the workforce, in part as a means of appearing to achieve promised reductions in the size of the federal government. In the last 15 years, in democratic and republican administrations, the United States has selectively attended to the potential of procurement reforms to simplify routine procurement of commercially available products, while ignoring the substantial and growing demands made on the acquisition workforce by other trends in procurement law and policy that are mentioned here. In recent years there has been a continuing failure of human capital planning in most federal agencies with regard to the acquisition workforce. Perhaps because of budget constraints in the current administration, personnel needs for that workforce have not been systematically gauged; budgetary commitments have not been made that would support a workforce able to properly administer the existing procurement system and meet future needs.

One way to respond to the unintended consequences of procurement reform is to be attentive to the growing complexity of the federal procurement system and to resist engrafting further levels of complexity thereon. But the failure to assure and fund an adequate federal acquisition workforce may be the most significant obstacle to achieving the potential of the procurement reforms of the last 15 years in the United States. This failure represents a major shortfall of political will and a critical lack of vision. Precisely because procurement of goods and services from the private sector is an increasingly important means through which vital public ends are achieved in the United States, as in so much of the world, the acquisition function must be recognized as a core area of essential competence for effective public management. Failure to invest in building an acquisition workforce commensurate in size and capability with the workload it faces is a formula for disaster.

REFERENCES

- Acquisition Advisory Panel, Working Group on Interagency Contracts (2006). *Draft Report on Background and Issues*. [On-line]. Available at <http://acquisition.gov/comp/aap/workinggroups/ICWorkingGroupDraftBackgroundandIssuesCreationandContinuationFindings16Feb06.pdf>).
- Breyer, S. G. (1982). *Regulation and Its Reform*. Cambridge, MA: Harvard University Press.
- Defense Science Board Task Force on Management Oversight in Acquisition Organizations (2005). *Final Report*. Washington, DC: Office of the Under Secretary of Defense for Acquisition, Technology and Logistics.
- Gore, A. (1993). *From Red Tape to Results: Creating a Government that Works Better & Costs Less: Report of the National Performance Review*. Washington, DC: U.S. Govt. Printing Office.
- Johnson, S. M. (2006). "Junking the 'Junk Science' Law: Reforming the Information Quality Act." *Administrative Law Review*, 58: 37-83.
- Kelman, S. (1990). *Procurement and Public Management*. Washington, DC: AEI Press.

- Kelman, S. (2002). "Strategic Contracting Management." In J. Donahue and J. Nye, Jr. (Eds.), *Market-Based Governance* (pp. 88-102). Washington, DC: Brookings Institution Press.
- Mashaw, J. L. (1996). "Reinventing Government and Regulatory Reform: Studies in the Neglect and Abuse of Administrative Law." *University of Pittsburgh Law Review*, 57: 405-422.
- Meiners, R. E. & Yandle, B. (Eds.) (1989). *Regulation and the Reagan Era*. New York: Holmes & Meier.
- Nagle, J. F. (1999). *History of Government Contracting*. Washington, DC: George Washington University.
- Schooner, S. L. (2001). "Fear of Oversight: The Fundamental Failure of Businesslike Government." *American Law Review*, 50: 627-723.
- Schooner, S. L. & Whiteman, N. S. (2000). "Purchase Cards and Micropurchases: Sacrificing Traditional United States Procurement Policies at the Altar of Efficiency." *Public Procurement Law Review*, 9: 148-170.
- Schwartz, J. I. (2005). "Feature Comment: Katrina's Continuing Impact on Procurement—Emergency Procurement Powers In H.R. 3766," *The Government Contractor*, 47 (35) ¶397: 3-7.
- Schwartz, J. I. (2006). "Katrina's Lessons for Ongoing U.S. Procurement Reform Efforts." Paper presented to the Conference on Public Procurement, Global Revolution III, University of Nottingham, U.K., June 19.
- Whiteman, N. S. (2000). "Charging Ahead: Has the Government Purchase Card Exceeded Its Limit?" *Public Contract Law Journal*, 30: 403-460.