

Why We Should Be Concerned About the Movement Toward Procurement Reform

Remarks by
Stephen M. Daniels*
Chairman, General Services Board of Contract Appeals
Washington D.C.

Presented at the Government Contract Law Symposium of
The Judge Advocate General's School, 12 December 1996

To tell you the truth, I'm surprised to have received an invitation to speak here this morning. Representatives of the General Services Board of Contract Appeals (GSBCA) used to appear at these conferences on a regular basis. I was here myself a couple of years ago and had a great time. This course has a terrific reputation, so being invited to speak here is a real privilege.

But you didn't invite us because you were nice. You wanted us to come because of a particular role we played in the government procurement system. For eleven years, from 1985 until August 1996, we were the guardians of the integrity of the acquisition part of the system, insofar as it involved information technology goods and services. We heard protests against alleged illegalities in those acquisitions, involving virtually every federal agency. We potentially affected the lives of all of you who serve as procurement lawyers and contracting officers for the government.

But as you know, we don't do that anymore. There have been major changes in the world of government procurement over the past few years, and one of them was the enactment of a law which eliminated our protest jurisdiction. The GSBCA now hears and decides other kinds of cases. Our main jurisdiction involves Contract Disputes Act appeals from decisions by contracting officers of the General Services Administration (GSA), the Department of Commerce, the Department of the Treasury, the Department of Education, and many other civilian agencies. We also settle claims against the government by carriers of government goods, and by federal civilian employees involving travel and relocation expenses.

In addition, by request, we provide alternative dispute resolution (ADR) services on contract-related disputes—both contract formation and contract administration—for all government agencies. We have been providing ADR services for GSA for quite

some time, and we are now expanding the effort. We have agreed to provide three judges to serve as a standing dispute resolution panel on a major GSA construction project. Whenever a dispute arises on the project, one of those judges will mediate. We have also entered into an agreement with the Federal Aviation Administration (FAA), and are about to enter into one with the Department of the Air Force, to provide ADR services on request to those agencies. One of our judges served as special master on an FAA protest, and another is going to help resolve a complex Air Force contract dispute. We are available to other agencies as well.

We're no longer in the business you used to invite us to speak about, though. So why am I here? I hope to provide a service by presenting a perspective on the procurement reform ideas which are making major changes in our professional lives. Often, when leaders speak and act forcefully about the need to do things in particular ways, everyone snaps into line and salutes. This is perfectly natural and understandable. If you are a subordinate in a big organization like the government, you rarely help yourself by telling the boss that his ideas aren't the greatest. If you're a businessman or woman who wants to sell to the organization, you won't get far if you express skepticism about the way the organization works, rather than trumpet its "successes."

I have never been a politically correct type, and as a judge, I have the privilege and responsibility of being independent—saying whatever strikes me as right, regardless of the political consequences. I want to make sure you understand, before I get into any specifics, that I am *not* representing the government, or the General Services Administration, or even the GSBCA. The views I will express are strictly my own. I will discuss the reasons why we should approach what is called "reform" with a great deal of caution, and point out the strengths of the way in which, until recently, the federal government bought goods and services.

* Prior to his appointment as Chairman of the General Services Board of Contract Appeals, Judge Daniels worked as counsel to the Committee on Government Operations of the United States House of Representatives. During his fifteen years with that Committee, he worked on numerous matters involving government contracting, to include assisting in the drafting and enactment of the Competition in Contracting Act of 1984 and the Paperwork Reduction Act of 1980 and its 1986 Amendment. The theme of the 1996 Contract Law Symposium was "Implementing Change" and Judge Daniels' presentation analyzes the recent dramatic changes in the field of federal procurements during this time of government downsizing.

Whether you agree with my message or not, I hope you will agree that it is worth thinking about.

The procurement system of the United States Government is the product of many years of evolution. Until recently, it has been built around four guiding principles.

First, the opportunity to sell goods and services to government agencies must be open to everyone. The system must be democratic; it cannot presume that an agency cannot benefit from doing business with a capable vendor simply because the vendor is unfamiliar to the agency.

Second, vendors' offers must be evaluated fairly. The chance to bid cannot become a sham; equal opportunity must be an ingrained practice, not just a slogan.

Third, the agencies must select for contract award the offers that are in the best overall interest of the taxpayers. Genuine economy is the goal; there is no sense in being penny-wise and pound-foolish.

Fourth, the best way of maintaining the integrity of the system is to give vendors who believe that they have been treated unfairly a full and fair chance to air their grievances; impartial reviewers can then hold the agency personnel's feet to the fire to make sure they remember the importance of the first three principles.

This system, in design, represents the triumph of capitalism at its best. It channels the creative, competitive impulses of private businessmen and women into developing more innovative solutions to government problems and giving agencies the best possible prices for those solutions. Real competition in the government marketplace should bring about the same kind of benefits for the government that it provides throughout the general marketplace to each of us as consumers.

Like all other designs for the operation of government programs, of course, this one has not been implemented perfectly. I'm sure you have heard stories about agencies that paid \$600 for toilet seats, or bought computer systems that didn't meet their needs, or spent more than they expected and took longer than they planned to buy all sorts of things.

These are problems of execution, not design. The errors have primarily been the result of bad definition of needs and bad acquisition planning and management; we really need to focus on fixing them.

But improving our planning and management of acquisitions is hard work; it doesn't make a big political splash. So we have been concentrating instead, over the past three years, on something much more sexy—making major changes in our procurement system through new laws, new regulations, and new administrative practices. The basic principles under which our procurement system had been developing for many years have been relegated to secondary importance. While we still pay lip

service to them, we now care far more about different values—speed and ease of conducting procurements. Full and open competition, which was the cornerstone of our procurement law, is in danger of becoming a slogan, not a standard. Under a recently enacted law, agencies now have to implement competition mandates only "in a manner that is consistent with the need to efficiently fulfill the government's requirements."

What is happening in the bid protest area is symptomatic of this elevation of administrative efficiency over basic democratic and capitalistic values. Over time, a system developed through which bidders who felt that they were being treated unfairly could challenge the government's procurement actions. Opportunities for challenge were limited, though. A bidder could protest to an administrative agency, the General Accounting Office (GAO), but there was very little likelihood that this would do any good. The GAO allowed the agency in the procurement to stack the deck by deciding what facts were relevant to the complaint. On the rare occasions when the GAO found that those facts required ruling for the protester, the decision often came after the agency had already received and paid for the goods or services, so no meaningful relief could be granted. A bidder could also file a protest in court, but few did because of the expense, the great difficulty in getting an injunction against continued action in the procurement, and the length of time needed to get a decision.

In 1984, when Congress enacted what had until recently been our fundamental law in the procurement area, it expressed concern about the existing bid protest processes, but endorsed the concept of protests wholeheartedly. It said that the most efficient means of making agencies accountable for ending favoritism and ineptitude in contracting was to capitalize on the self-interest of the bidders by deputizing those companies to help police the system. Congress left in place the existing protest forums, and also established a new one as an experiment to see whether it could breathe life into this concept.

The new forum, as you know, was the General Services Board of Contract Appeals. The GSBICA brought a fresh approach to the protest process. Let me mention a few of the novel aspects of our practices. We assigned each case to a judge who was experienced in government contracting and could work with the parties on a frequent basis to resolve the case as efficiently as possible. We authorized discovery, so that all parties could learn what really happened during a procurement, not what one party—the government—said happened. We instituted protective orders, under which important information that was proprietary or source selection sensitive could be used only by lawyers and the tribunal during the case; thus, we could base our decisions on the facts without fear that disclosures might prejudice future competition. We had hearings, where appropriate, so that all parties could present the relevant evidence to us. By statute, procurements were suspended while our cases were pending, unless an agency persuaded us that it had good justification for proceeding, so the possibility of viable relief was preserved.

We resolved cases quickly—most settled within a month, and even full consideration, with a hearing and a written opinion, took only two months. Thus, the disruption to procurements

was minimized. We wrote comprehensive decisions which explained procurement law and why we interpreted it in certain ways. This created a body of case law which educated the entire government contracting community and, over time, served to reduce the number of disputes about the conduct of procurements.

Our protest jurisdiction was limited to procurements of computer and telecommunications goods and services. We also never heard more than three hundred cases in any year—challenges to about one percent of procurements in this area. However, as a result of our work, these and other acquisitions (to a lesser extent), became more competitive, more open, and more professionally run than ever before. Government agencies received more innovative solutions to their problems at better prices than before. The competition had an impact on the GAO protest process, too; the GAO improved its process, for example, by allowing protesters to ask for and receive specific agency documents, and by using protective orders to be more fair.

Congress and the President or Executive weren't sold on these virtues, though. In a complete turnaround from 1984, they adopted the bureaucracy's position that protests are bad because they delay procurements and add administrative costs, and a fully informed protest process is especially bad because it delays and costs more. In early 1996, Congress not only did away with our protest jurisdiction, but also eliminated federal district courts' jurisdiction to hear procurement protests, effective in four years. Serious questions are being raised about the value of protests at the GAO, as well. The GAO as a whole has lost more than twenty-five percent of its budget in recent years, and whether the agency will be able to continue to devote sufficient resources to maintain its current protest process is in doubt. The new law cuts the amount of time the GAO has to resolve a protest by twenty percent, to one-hundred days. Whether the agency can give full and thoughtful consideration to every complaint within that time is uncertain. Without competition from the GSBCA, there certainly won't be as much incentive for the GAO to do a fair and thorough job.

Whether GAO protests, or any protests, survive as an effective means of demanding accountability of government officials for their procurement actions is becoming less important, though, as a result of changes in government procurement. Protests can target whether agencies follow rules that are designed to provide fairness to prospective contractors and thereby give the government better deals. They can't guard against choices that are within an agency's discretion, but are unwise. As processes and forms of contracting change, we are building so much discretion into the system that increasingly fewer actions can be protested. The procurement system is losing its accountability to the taxpayers.

I would like to devote the remainder of my time this morning to discussing these changes—changes which, as I have suggested, you should accept with caution and skepticism. The on-going reform is geared to increasing efficiency, speed, and freedom for contracting officials. These are useful goals—but we need to make sure that at the same time we focus on them, we don't lose sight of the ultimate purpose of the system, which is to serve the taxpayer well.

When the government contracts for goods and services, it has to spend money in three ways: conducting procurements, administering contracts, and paying for the goods and services. The design for the way we've been contracting in the past emphasized savings in the third group—the costs of paying for the goods and services. And this is as it should be. The federal government spends about \$200 billion a year through contracts. According to various studies, competition saves anywhere between fifteen and seventy percent on these contracts. Putting these two numbers together, competition has the potential to save from tens of billions to hundreds of billions of dollars per year.

The new approach to contracting emphasizes the first group of costs—the costs of conducting procurements. I have never seen an estimate of how big this amount is, but I'll wager that it is just a tiny fraction of \$200 billion a year. The new approach aims at saving part of this little sum. It may well succeed, but whether it does won't matter much if it has a deleterious effect on the total price taxpayers pay for the goods and services themselves. Protests are one example—the new approach focuses only on immediate costs and ignores the long-term, systemic benefits of stimulating competition.

Let's take a look at some of the other new ideas. A principal one is "empowering" government personnel, bureaus, and agencies to acquire items using their own rules, regulations, and practices. As our government has grown, a constant hallmark of its operation has been disputes between central managers, who want things to run in accordance with standardized principles, and employees in the agencies and bureaus, who want to be free to pursue their own interests. For at least the past half-century, in the procurement area, the centralizers were gaining. Under a unified set of regulations, variations in procurement practices among agencies and bureaus had been reduced to the point at which people in private industry knew to a pretty good degree what to expect when they set out to do business with the government.

Centrifugal forces are now in the ascendancy, though. The government is becoming less of a unified whole, and more of a collection of quasi-corporate entities. As these entities are being encouraged to do business each in its own way, the basic rules under which procurements take place, like the mechanisms for enforcing those rules, are being weakened.

These changes are creating much greater uncertainty about the way in which procurements are conducted. Uncertainty, as anybody who has ever put together a bid or proposal knows, drives potential competitors out of the market and drives up the prices of those who stay in. If a bidder doesn't account for eventualities that might arise (and they do occur), he can lose his shirt. Leaving major decisions to individual discretion in procurements can have devastating consequences for the prices the government pays for what it buys.

The uncertainty is more than just momentary coping with change. As different agencies—and different procuring activities within those agencies, and probably even different program

and contracting officers within those procuring activities—use different ways to acquire goods and services, potential suppliers will face the following problem: To the extent that the government is like a single customer, each company has to spend a certain amount of money to get to know that customer's procedures and practices. If the government becomes multiple customers, each firm is going to have to increase that kind of spending many times. Small companies have to restrict their learning budgets to a limited range of customers, so as the government becomes fragmented, those companies will not have any real chance of satisfying the needs of as many agencies as they might have before.

Government officials who are being encouraged to creatively reinvent procurement practices in what amounts to idiosyncratic ways will have to realize that the more they do this, the more likely they are to cost the taxpayers money. We can save significantly by preserving a large pool of potential suppliers, cutting overhead costs for each one, and cutting overall prices naturally through competition. To do that, though, officials will have to work hard to keep their rules and practices comprehensible and consistent with one another. There should be no incompatibility between uniform basic practices and creative means of implementing those practices with greater efficiency.

Another aspect of the new approach is to give greater importance to firms' past performance, or reputation, in choosing contractors. The government has always paid attention to past performance, of course. For decades, it has used responsibility determinations to avoid having to do business with contractors who don't have the financial or other capabilities to perform in accordance with their promises. We're now seeing an increased emphasis, though often an over-emphasis, on past performance as an evaluation factor in negotiated procurements. Some contracting officers are writing solicitations that make reputation at least as important as technical merit or cost in evaluating proposals. Of course, it would be quick and easy to award contracts primarily on the basis of reputation, but this wouldn't be very wise. Agencies are buying promises of goods and services to be supplied in the future, not the past. Agencies that buy based on reputation would miss out, for example, on much of the innovation in the computer industry where new and small businesses have been the source of many of the terrific advances in hardware, software, and problem resolution generally. Government officials will have to fight the temptation to overvalue reputation if they are going to continue to act as the taxpayers' proxy.

The need to apply reputational judgments judiciously has impacts far beyond individual procurements. We hear much these days about greater partnerships between government and industry, and of course better communications have the potential for good on both sides. We have to remember, though, that there is no single "industry." Whether a firm is part of the "industry" that participates in those informal communications is going to be increasingly important to the company's ability to compete for and win contracts. Reputational judgments, like many forms of regulation, tend to exclude new entrants from the marketplace.

The use of past performance ratings has implications for restricting companies' legal rights and privileges as well. The number of protests and contract claims have been declining over the past few years. Several lawyers and company officials have suggested to me that this is because "it's not cool" to object to government actions anymore. "It's not cool" is code for "I'm afraid that if I do it, my performance ratings will suffer, and I'll lose the chance for future contracts."

Handled the wrong way, past performance, with its impact on inclusion in the club of "industry partners," can become a hammer with which government forces companies to give up rights, and ultimately money, for the opportunity to stay in the contracting game. As valid protests are not filed, the taxpayers suffer—they are denied the benefits that come with informed oversight of the procurement system.

The changing nature of the contract vehicles being used also creates impediments and challenges to keeping the procurement system the servant of the taxpayer. Under a 1994 law, agencies are encouraged to award umbrella contracts within which, at the agencies' discretion and without possibility of outside review, agency officials will issue task or delivery orders. This concept is subject to abuse, which we are seeing in some agencies: the agencies award contracts to most companies that want them, and choose later, for reasons of convenience rather than best value, which ones will get the orders. This process empowers procurement officials without giving them standards against which to make selections. The concept has some utility where differences are measurable, which is frequently true for goods, but where the differences are very difficult to gauge, which is often true for services, the use of umbrella contracts makes decisions about who gets contract money highly subjective. Because the laws about competition (and protests to enforce it) do not apply to issuing of delivery and task orders, we may never know whether the use of umbrella contracts gives taxpayers beneficial results.

Other new contracting devices carry similar problems of highly subjective decisions for which accountability is limited or non-existent. The government is now exploring using oral solicitations without any limitations and, even for written solicitations, making contract awards on the basis of oral proposals. There may be no record of what transpired, and even if there is one, it could be so skimpy, that proving a decision was irrational will be extremely difficult if not impossible. Both sides may later regret that their contract rights and responsibilities were ill-defined.

We're also talking about limiting, in the interest of efficient contracting, the numbers of firms allowed to compete in individual procurements. As this happens, some companies which submitted proposals that stood a reasonable chance of award will find themselves on the outside looking in. The message to them will be: "I'm sorry, your offer—you know, the one on which you've spent hundreds of thousands of dollars—had a reasonable chance for award, but for reasons of administrative convenience, we decided that negotiating with you wouldn't have been worth the trouble. It wouldn't have been efficient." Whether those firms could have improved their proposals after discus-

sions, and thereby given the taxpayers a better deal, will be immaterial. What sense does this make? We have to guard against designing a procurement system in which the secret to success is clever marketing. We don't need a system that favors slick over solid or lucky over smart. The ability to limit competitive ranges must be used carefully.

Proposed changes to the basic regulations for negotiated procurements contain other potential opportunities for favoritism or downright chicanery, too. One proposal, while paying lip service to fairness in the treatment of competing firms, says, "Fairness does not mean that offerors and contractors of differing capabilities, past performance, or other relevant factors must be treated the same." The proposal allows agencies to communicate with some offerors, but not others, in the course of a competition; to award contracts to offerors which propose terms and conditions that are inconsistent with requirements the agencies established; and to write contracts which contain provisions that are different from ones in the last written offers of the companies involved. These are all examples of what is commonly considered unfair. If the people who suggested these ideas actually incorporate them into final regulations, the rules will give agencies so much flexibility in contracting that almost any action short of outright acceptance of bribes will be legally permissible.

These are problems encountered in actual competitions, in which companies choose to participate after having notice that difficulties exist. These difficulties, however, pale in comparison with the ones that may result if the competitions are limited without any notice of their existence at all. That's sometimes a problem with umbrella contracts, where, if a company doesn't have the proper instruments, it will never have a chance to fulfill a requirement for which it could submit a very competitive proposal. We're going down the same path in acquisitions of commercial items with values of up to \$5 million. We're planning to use small purchase procedures, in which an agency can award a contract after getting quotes through phone calls to a favored few pre-selected companies. This is also where we are going with the use of multiple award schedule contracts, for commercial items and now increasingly for services.

Schedule contracts are basically agreements against which specified items may be ordered; the orders automatically incorporate the terms and conditions of the contracts. Existing statutes give their blessing to the multiple awards schedule program as a form of full and open competition. These contracts should be used, though, according to Congress, only where the government can negotiate quantity-discount contracts, with delivery to be made directly to the using agencies in small quantities at diverse locations. These restrictions are already out the window. Agencies are using schedule contracts to purchase items in large numbers, without any maximum ordering limitations. The dollar values of schedule buys are reaching the \$150 million range.

Agencies no longer have to announce their use of this program in advance; they need only to ask a few pre-selected vendors to give prices, which may change on an order-by-order basis,

and then choose a winner. This practice is nice and easy. It's not fair to all potential offerors, though; to have a shot at making a sale, a company must be a member of the "club" chosen in advance by the agency. It's not fair to the taxpayers, either; they ought to be getting the best deals capable vendors can offer, not the results of secret competitions among a limited in-crowd of companies.

Who is going to be responsible for all these innovative procurements? The new approach has as one of its maxims that simpler procurements need fewer professionals to conduct. And consistent with this maxim, at the same time that greater discretion is being given to government procurement personnel, the numbers of those employees are being reduced. What we need to be asking, but aren't is, "How big an investment in trained personnel does the government need to do its job well?" I am hearing from many agencies that the personnel cuts are already too severe—they are forcing the contracting professionals who remain to do more work than they are capable of, while at the same time, the veterans who know how to get things done are being enticed out the door through buyouts. More cuts are planned. Government officials are going to have to work hard to keep this trend from going too far.

An inevitable consequence of the personnel cuts, and the new demands on the time of the contracting officials who remain, will be the temptation to cede more authority for procurements to the program offices for which the contracting personnel are doing the buying. This is a real problem. Program offices generally want whatever they need immediately, and as long as the contracting staff can bring it in within the budget for the acquisition, they don't particularly care how much it costs or how it was bought. The problem is made especially acute by the way the government does its budgeting: an office gets its funding year-by-year, and frequently doesn't know how much it has for a procurement until the end of a fiscal year. At that point, the particular office wants to buy right away, because the funding won't necessarily be provided next year. Whether the taxpayer gets a good deal is off the radar screen for many of the people in program offices.

For many years, procurement professionals have been the taxpayers' line of defense against these inclinations. The procurement process, within the government, has been marked by a creative tension between contracting and program officials. While the program people have wanted to buy things fast and easily, the contracting staff have put competition, with its consequent savings, first. The new regime has tilted the balance of this creative tension. The contracting personnel are going to have to work much harder to keep up their critical end of the process.

Contracting personnel are also going to have to be on the lookout, more than ever, to guard against political or unethical influences on procurement decisions. One of the problems with a less structured process is that it makes it easier for people with power to exert improper influences on award decisions. Those of us in the federal government procurement community are proud

that, with very rare exceptions, our procurements are honest and apolitical. As the culture of procurement changes, it will be harder to ensure that this aspect of our procurement culture remains.

I am going to mention one more impact that the new style of government procurement will have, and it's indirect, but in the long run, it could be more important than anything I've discussed so far: The international ramifications of what the government is doing. The United States has been making great efforts to open other governments' markets to fair, open competition in which American companies can participate. If our own government abandons full and open competition, in favor of efficiency and unchecked discretion to choose business partners on the basis of reputation, how can we honestly demand that our trading partners do otherwise? For small savings in administrative spending on the procurement process, we may not only be costing the taxpayers big bucks in purchasing costs, but also undermining efforts to open large markets for American capital and labor abroad.

As you can see, I have serious doubts about the wisdom of some of the changes occurring in the government contracting world today. The so-called procurement reform attempts to make government procurement more efficient by misguidedly cutting back on its most important cost-saving feature—full and open competition. Increased administrative efficiency is great. Indeed, it is absolutely required in these times of shrinking budgets. In my opinion, though, we are not carefully balancing increases in efficiency against damages to the system which will result in decreases in long-term cost savings. We know that a

genuinely competitive marketplace works to the greatest benefit of consumers. Why shouldn't this engine of capitalism continue to benefit all of us as taxpayers, too?

Government procurement is an easy target for political rhetoric. Overall, however, we can be proud of its operation. When people from many other countries hear how our system works, they are amazed. Where they come from, those in power award contracts with very little oversight, sometimes to their friends, sometimes even to themselves. That hasn't been our way—and it shouldn't be. If we put our minds to it, we can make government contracting more efficient without going back to a system which limits participation to a favored few contractors.

It never ceases to amaze me that at a time when people are more skeptical than ever about the government, the government's response is to have its officials spend taxpayers' money under relaxed rules and controls, and with reduced oversight of their actions. If only most Americans would cut through the rhetoric and the catchy buzzwords, and understand what is really meant when people talk about procurement reform, I think the reception would be considerably different.

We need to remember that an honest, open, fully competitive procurement system has enormous benefits for all of us—potential suppliers, government officials, and most importantly, taxpayers. As you work at implementing and applying the new ways, I hope you will keep this message in mind and make the best of the bad hand you've been dealt.