

Procurement During the Civil War and Its Legacy for the Modern Commander

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Introduction

Despite two turbulent years of acquisition reform caused by the much-heralded Federal Acquisition Streamlining Act of 1994,¹ and the Clinger-Cohen Act of 1996,² most of the fundamental aspects of government contracting actually remain unchanged. The government still does business through contracting officers,³ who generally seek competition⁴ before obligating congressionally-appropriated funds⁵ to pay for the goods and services that they buy. A significant number of safeguards still remain to protect the government against poor contractor performance⁶ or outright fraud.⁷ To ensure that the government does not pay exorbitant amounts or suffer unacceptable delays when unexpected contingencies arise⁸ or changes are necessary in the way work must be performed,⁹ the government continues to employ a vast array of contractual risk-shifting mechanisms. Thus, although recent reform legislation has affected many of the more sophisticated aspects of government procurements,¹⁰ most of the fundamentals remain unaltered.

Why do these fundamentals remain in place? Why must commanders or other Army supervisors use contracting officers? Why not eliminate costly government inspection and acceptance procedures? Why does Congress not permit purchasing officials to choose whether to obtain competition for their requirements without restriction like private parties? The answers to these questions lie principally in the Army's history, and in particular in the Army's purchasing experiences during the Civil War.

Historical Perspective on Private Sector Support

Commanders historically have relied to a significant degree on contracted support to supplement the commodities and services available through organic logistics systems. Commanders and their subordinates have procured food, forage, arms, and other goods from private citizens and commercial sources since the first time a warring clan turned to its allies for hunting bows and spears to use against its enemies. As the United States' procurement statutes and regulations became more complex over

¹ Pub. L. No. 103-355, 108 Stat. 3243 (1994).

² Originally passed as Divisions D and E, National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, 110 Stat. 186, 642-703 (1996), the name of the Clinger-Cohen Act of 1996 flows from the Federal Financial Management Improvement Act of 1996, Pub. L. No. 104-208, § 808, 104 Stat. 3009 (1996), which itself was included as part of the Omnibus Consolidated Appropriations Act of 1997, Pub. L. No. 104-208, 104 Stat. 3009 (1996). Division D of the National Defense Authorization Act for Fiscal Year 1996 originally was called the Federal Acquisition Reform Act of 1996, while Division E's original name was the Information Technology Management Reform Act of 1996. Congress renamed both as the Clinger-Cohen Act of 1996 in honor of retiring lawmakers who played key roles in the passage of the two acts, former Representative William Clinger of Pennsylvania and former Senator (now Secretary of Defense) William Cohen of Maine.

³ GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 1.602 (1 Apr. 1984) (as amended) [hereinafter FAR].

⁴ Competition in Contracting Act of 1984, Pub. L. No. 98-369, §§ 2701-53, 98 Stat. 1175-1203 (1984) (implemented in FAR Part 6).

⁵ "No Money shall be drawn from the Treasury but in consequence of appropriations made by Law . . ." U.S. CONST. art. I, § 9, cl. 7; see 31 U.S.C. §§ 1341-42, 1511-19 (1994) (commonly known as the Antideficiency Act).

⁶ See, e.g., FAR Part 46 (Quality Assurance).

⁷ See 10 U.S.C. § 2393 (1994) (debarment and suspension of defense contractors); 18 U.S.C. §§ 286, 287, 371, 1001, 1031 (1994) (criminal penalties for fraud and false statements); see also FAR Part 3 (Improper Business Practices and Personal Conflicts of Interest); FAR Part 9 (Contractor Qualifications).

⁸ See, e.g., FAR 52.212-5 (Liquidated Damages); FAR 52.236-2 (Differing Site Conditions); FAR 52.242-14 (Suspension of Work).

⁹ See generally FAR Part 43 (Contract Modifications).

¹⁰ For instance, the Clinger-Cohen Act of 1996 changes the rules for when a disappointed offeror seeking to do business with the government may request a debriefing explaining why it did not receive a contract award; it exempts providers of commercial items from providing certain cost data to the government; and, it establishes a preference for procuring large information technology systems incrementally through modules rather than all at once. Pub. L. No. 104-106, §§ 1104, 1201, 1202, 104 Stat. 186, 644-45, 649-52, 690 (1996).

time, however, commanders became separated from the procurement process. Until recent times, Army commanders often overlooked the usefulness of this technique for satisfying the needs of modern armed forces.

Despite the inconvenience inherent in many of the current restrictions on who may exercise procurement authority and how this authority is used, America's power-projection Army is now more dependent upon contracted support than before the end of the Cold War downsizing which dramatically reduced the Army's size and the capabilities of its combat service support components.¹¹ With this increased reliance on contracted support has come a demand for relaxed restrictions and delegations of procurement authority to lower levels in deployable units.¹² An examination of the Army's procurement experience during the Civil War, however, highlights the need for most contracting controls in existence today, and provides examples of problems that may arise from relaxed procurement safeguards.

The Army's Civil War Procurement Experience

Procurement was more critical to the Army during the Civil War than perhaps in any other conflict due to the lack of significant existing stocks or robust logistics systems to support an un-

precedented mobilization effort.¹³ Because the War Department could not meet the materiel demands of a mobilizing Army as quickly as volunteers filled its ranks, commanders relied on locally procured goods for many of their requirements. Unfortunately, without training, adequate staffs, or effective controls in place to ensure efficient acquisitions, the procurement of inferior or unsupportable equipment, as well as overcharging, corruption, and fraud, seriously tainted early war efforts and drew Congress into an ever-increasing oversight role that continues today.

The pre-Civil War Army's bureau system compartmentalized purchasing by commodity. The Ordnance Bureau bought weapons and ammunition, commissary officers purchased food, and the Quartermaster Department procured clothing, general supply items, and horses.¹⁴ These supply organizations functioned relatively independently, without effective coordination,¹⁵ and proved inadequate for the task of supporting the huge build-up when war broke out.¹⁶

Field commanders' disappointment with the lack of effective support from the bureaus was due at least in part to the bureaus' status as agencies of the War Department outside the structure of the rest of the Army.¹⁷ The Quartermaster Department in par-

¹¹ Recent widespread use of the contracted Logistics Civil Augmentation Program (LOGCAP) to support contingency missions highlights the significant role contracted support operations will play in the future. See DEP'T OF ARMY, REG. 700-137, LOGISTICS CIVIL AUGMENTATION PROGRAM (1985).

¹² Army units have always wanted greater flexibility and responsiveness in having their small requirements fulfilled. Historically, these requirements were filled by contracting personnel who deployed with their supported units. The provisional contracting offices that these personnel established provided area support if they were within supporting distance of supported units. To supplement the support available from contracting officers, unit ordering officers sometimes were appointed to make purchases and satisfy unit requirements closer to the front lines. Often, too few ordering officers were appointed, and even fewer had the experience and training necessary to enable them to provide effective support without subsequent problems such as slow payments and the acceptance of poor quality goods. See generally DEP'T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 1.602-2-91 (1 Aug. 1996) [hereinafter AFARS].

Recent implementation of the International Merchant Purchase Authorization Card (IMPAC) program has made small purchases easier at the unit level so long as the unit operates in a part of the world where VISA cards are accepted by local merchants. See AFARS Subpart 13.9. Credit card holders under the IMPAC program are now common at fairly low echelons in Army units. This purchasing mechanism has greatly increased the purchasing power available to small unit commanders. Whether the training and experience of cardholders will be adequate to avoid the types of problems addressed in this article remains to be seen.

¹³ The Army expanded to sixty-two times its pre-war size by the end of the Civil War, the greatest proportional increase in the Army's size ever. James Huston, *Challenging the Logistics Status Quo During the Civil War*, DEFENSE MANAGEMENT JOURNAL 33 (July 1976).

¹⁴ Although the Quartermaster General, Commissary General, and Chief of Ordnance supervised the procurement of most of the goods and services needed to support an army in the field, the bureau system further divided responsibilities among the more specialized branches of service. Thus, the Chief of Engineers, Chief of Topographical Engineers, and the Surgeon General were responsible for the procurement of supplies specific to their departments. Charles Shrader, *Field Logistics in the Civil War*, in THE U.S. ARMY WAR COLLEGE GUIDE TO THE BATTLE OF ANTIETAM 256-58 (ed. Jay Luvaas & Harold Nelson, 1987).

¹⁵ *Id.*

¹⁶ A key reason for the inability of the bureaus to support the build-up effectively was that they were continuously understrength until near the end of the Civil War. CARL DAVIS, *SMALL ARMS IN THE UNION ARMY 27-35* (1971) (Thesis, Oklahoma State University).

¹⁷ *Id.* at 36. The problem of one part of the Army not being totally responsive to the needs of another has not been eliminated in today's organizational structure. Battles are fought by units from U.S. Army Forces Command while the requirements for the materiel that those forces use are defined by U.S. Army Training and Doctrine Command and procured both by U.S. Army Materiel Command and the Defense Logistics Agency. Nevertheless, the present constant migration of personnel between these organizations and oversight provided by Headquarters, Department of the Army, generally has improved intra-departmental coordination from the situation that existed before and during the Civil War when the bureaus exercised considerably more autonomy than any agency within the Department of the Army today.

ticular developed a reputation for never anticipating a need and preparing for it, but instead waiting until an emergency arose and then muddling through the legislative and executive processes required to remedy it.¹⁸ Wartime commanders quickly took matters into their own hands.

Among the most urgently needed supplies were arms for the troops. Legislation required the senior ordnance officer of the Army to contract for ordnance items,¹⁹ but a court decision early in the war recognized that a general's first duty was to arm his troops as best he could in the face of enemy threats, notwithstanding a statute to the contrary reserving ordnance procurements to the Chief of Ordnance.²⁰ Commanders took full advantage of this inherent authority. They also pushed the envelope of ordnance regulations allowing any officer, in circumstances of "urgent necessity," to purchase items normally procured by the Ordnance Bureau, and to submit a report explaining the necessity to obtain government reimbursement.²¹ Although expedient, such uncoordinated procurements, together with purchases of private arms by soldiers in units as small as company size, greatly compounded the logistics problems associated with resupply.²²

Additionally, state governors regularly intervened to press for arms for their troops, sometimes providing them directly through state purchasing agents when the War Department responded too slowly. These actions disrupted planning and made the work of those involved in arms procurement more difficult.²³ Finally, fluctuating Ordnance Bureau policies regarding the procurement

of foreign arms provided opportunities for some military commanders and state governors to dispatch buying agents to Europe, adding still greater variety to the mix of weapons entering the Army's inventory.²⁴

The introduction of nonstandard, difficult-to-support arms in the Army's inventory presented severe logistics challenges during the Civil War, but these problems did not attract the adverse publicity nor Congressional scrutiny that accompanied contractor overcharging and government corruption. These problems began to appear at the first outbreak of hostilities, when, in the unrestrained rush to mobilize a bigger Army, legislation regulating procurement was "flung to the winds in the first flush of war."²⁵

Before the war, in order to check for irregularities, War Department regulations required purchasing officers to send accounts through the bureau chiefs for approval before they went to the Treasury for payment. Slow payments caused by logjams of paperwork in bureau headquarters led to the passage of a 1862 law requiring direct transmission of accounts from disbursing officers to the Treasury; this sped payments but eliminated the checks that the bureaus provided on prices paid and the proper application of appropriations.²⁶ Previously, the failure to follow accepted procedures could have resulted in nonpayment for items provided.²⁷ Without bureau scrutiny of their accounts, commanders essentially gained *carte blanche* procurement authority.

Although many commanders exercised their procurement authority using reasonable business judgment and some measure of

¹⁸ FRED SHANNON, ORGANIZATION AND ADMINISTRATION OF THE UNION ARMY 100 (1928). Later in the war, Quartermaster General Montgomery Meigs reorganized the bureau and made it quite effective. HERMAN HATTAWAY & ARCHER JONES, HOW THE NORTH WON 138-39 (1991). General Meigs achieved increased efficiency first by requiring decentralized purchases to be made by quartermaster officers rather than field commanders, and later through a more centralized procurement system that required all contracts to be forwarded to the Quartermaster General in Washington for payment. Shrader, *supra* note 14, at 267.

¹⁹ James Huston, *Guns for Sale: No Unreasonable Offer Refused*, 6 ARMY LOGISTICIAN 22 (ed. U.S. Army Logistics Management Center, Nov.-Dec. 1971). The law entrusted this responsibility to ordnance officers because they were deemed best qualified to assess the quality of the arms procured, but ordnance officers became so specialized in manufacturing that they often lost touch of the needs of the user. Huston, *supra* note 13, at 28.

²⁰ The United States Court of Claims issued this decision after the United States attempted to avoid payment on a contract for arms not made by the Ordnance Bureau. Huston, *Guns for Sale*, *supra* note 19, at 23. See *The Stevens Case*, 2 Ct. Cl. 95 (Dec. 1866).

²¹ DAVID ARMSTRONG, BULLETS AND BUREAUCRATS 9 (1982). General James Ripley, the Chief of Ordnance, was much more conservative in his approach to procurement than the field commanders; he rigorously followed both the letter and the spirit of every regulation. *Id.* at 26.

²² DAVIS, *supra* note 16, at 95. Aggravating the problem of nonstandard arms in units was the failure of many new soldiers who placed requisitions for supplies through ordnance channels to specify the proper caliber, or any caliber at all, for arms and munitions they needed. *Id.* at 42-43.

²³ *Id.* at 54.

²⁴ *Id.* at 75.

²⁵ HOWARD MENEELY, THE WAR DEPARTMENT, 1861-252 (1928).

²⁶ Huston, *supra* note 13, at 31-32.

²⁷ ARMSTRONG, *supra* note 21, at 40.

discretion, the *carte blanche* authority given commanders proved a great mistake in many cases, the most notable being that of Major General John Fremont, Department of the West, who surrounded himself with "conniving, dishonest men."²⁸ The Department of the West under General Fremont was notorious for its irregular operations,²⁹ particularly those involving General Fremont's assistant quartermaster, Major Justus McKistry. Major McKistry repeatedly agreed to pay contractors above market prices, then suggested that they might have trouble getting their bills paid if they did not make substantial gifts to his or General Fremont's wife.³⁰ General Fremont's command was not the only one in which dishonesty became rampant (the War Department itself even had problems with civilian clerks steering business to certain contractors),³¹ but the irregularities within the Department of the West are among the most notorious and the best documented.

³ Much more widespread than dishonesty in Civil War procurement operations were poor business practices by government personnel and price gouging (overcharging) by contractors. The military simply was more interested in overcoming delay than in paying fair prices during the early months of the war.³² The lack of a robust, centralized procurement system led to the growth of an industry of middlemen, who matched Army buyers with sellers able to satisfy requirements, but whose commissions³³ added significantly to the cost of goods procured.³⁴ Vendors sometimes won contracts when they had no plants in which to pro-

duce the goods ordered, brokering the contracts to others instead, and adding further to the prices paid by the Army.³⁵

Much of the blame for the high prices paid for goods early in the Civil War lies with the War Department, which abdicated a considerable amount of its procurement authority to the states, resulting in confusion, graft, and hardship on soldiers.³⁶ Through haste, carelessness, and occasional criminal collusion, state and federal officers bid against each other, accepting almost any offer and paying almost any price for needed commodities, regardless of quality. Poor business practices resulted in the government sometimes getting sand for sugar and brown paper for leather.³⁷ When Edwin Stanton became Secretary of War in 1862, he tried to reign in the free-wheeling organization, declaring that he wanted everything done systematically and in order through a quartermaster officer at all key locations who would make all contracts and supervise all disbursements.³⁸ This change in the War Department, and General James Ripley's desire for economy and the use of formal advertising in lieu of open market purchases in the Ordnance Bureau,³⁹ gradually brought order to the purchasing chaos that was rampant early in the war.

Congress quickly became aware of the many procurement irregularities associated with the war effort. Its Committee on Contracts severely criticized Lincoln's first Secretary of War, Simon Cameron, for appointing incompetent men and allowing the suspension of contract safeguards without good reason.⁴⁰

²⁸ MENEELY, *supra* note 25, at 271.

²⁹ SHANNON, *supra* note 18, at 58.

³⁰ One substantial gift that Mrs. Fremont received was a horse and carriage. *Id.* at 65.

³¹ DAVIS, *supra* note 16, at 36.

³² James Huston, *Procuring Quick and Dirty*, 5 *ARMY LOGISTICIAN* 22 (ed. U.S. Army Logistics Management Center, Sept.-Oct. 1971).

³³ The five percent commissions paid to the "five-percenters" who lobbied the War Department and Congress to arrange contracts were among the more frequently paid commission amounts levied during the Civil War. *Id.* at 23.

³⁴ Most of the additional costs attributable to middlemen were due to ordinary price markups, but occasionally the higher costs were due to deception and collusion as well. Shrader, *supra* note 14, at 269.

³⁵ DAVIS, *supra* note 16, at 88.

³⁶ SHANNON, *supra* note 18, at 54.

³⁷ *Id.* at 55. This practice was particularly reprehensible because the federal government ultimately bore the cost of all contracts, regardless of whether its own agent or a state's agent awarded the contract initially. *Id.* at 115.

³⁸ HATTAWAY AND JONES, *supra* note 18, at 138.

³⁹ ARMSTRONG, *supra* note 21, at 11.

⁴⁰ MENEELY *supra* note 25, at 267-68.

Congress acted further by passing legislation in July 1862 requiring open bidding and written contracts, prohibiting contract brokering, requiring all contracts to be reported to Congress, and making contractors subject to military law and court martial if they were indicted for fraud.⁴¹ Congress did not pass detailed provisions governing the making of contracts during the war, however, to avoid encumbering the war effort too severely.⁴²

Of course, there were contracting success stories to accompany the many procurement travesties during the Civil War. Quartermaster and commissary officers bought supplies as close to the troops as possible to save transportation costs.⁴³ Union Army procurements normally provided all subsistence requirements, both for men and animals, without resort to pillaging the countryside.⁴⁴ Overall, the procurement practices of the Civil War sustained the Army more or less adequately (if not always efficiently), and enabled it to achieve victory over the Confederacy. Nevertheless, enough abuses like those in the command of General Fremont occurred to warrant close congressional scrutiny. As a result, a body of strict safeguards developed that continues to apply to procurements conducted today; undoubtedly, these safeguards will continue to apply in the future, providing an underlying framework for the federal acquisition system which no procurement reforms are likely to alter significantly.

The Civil War's Procurement Legacy

Today, a variety of control measures in the contracting process seek to avoid the problems that arose in General Fremont's

command by requiring protection of procurement-sensitive information,⁴⁵ separation of the contracting and paying functions during contract performance, and adherence to rigid standards of conduct.⁴⁶ Additionally, a variety of auditing and investigating agencies ensure that those who might be tempted to stray toward dishonesty in the award or administration of government contracts run a high risk of detection and vigorous prosecution.⁴⁷

Since the Civil War, the volume of legislation dealing with federal procurements has expanded to provide comprehensive congressional direction in the conduct of federal procurements through a body of law consisting of some 4000 statutes. These laws provide overall guidance for the conduct of defense-related procurements,⁴⁸ and limit to trained contracting officers the authority to contract for the United States for supplies and services valued above \$2500.⁴⁹ These laws also impose severe penalties for contracting without proper funds for any goods or services,⁵⁰ and highlight the importance of competition in securing fair prices for government requirements.⁵¹ These requirements apply equally during war and peace to help ensure that the procurement debacle of the Civil War is not repeated.

Implementation of these general mandates has affected the conduct of Army and other federal procurements in many ways. To ensure competition, requirements are generally advertised through one or more of several specified publication means.⁵² Contractors must execute a variety of certifications in conjunction with each offer they submit to the government to ensure that the integrity of the procurement process has not been compro-

⁴¹ SHANNON, *supra* note 18, at 74. Despite this congressional initiative to end contract fraud, fraudulent contractual dealings continued to some extent to be a problem through the end of the war. *Id.*

⁴² MENEELY, *supra* note 25, at 254.

⁴³ DARLIS MILLER, *SOLDIERS AND SETTLERS: MILITARY SUPPLY IN THE SOUTHWEST, 1861-1885* 3 (1989).

⁴⁴ Foraging, though officially prohibited unless specifically authorized, was generally overlooked. SHANNON, *supra* note 18, at 240. Commanders would crack down on the practice as necessary to redress the complaints of inhabitants in the areas of operation of the Union Army, unless soldiers' foraging efforts received command sanction.

⁴⁵ Procurement Integrity Act, 41 U.S.C. § 423 (1994 & Supp. II 1996).

⁴⁶ See 10 U.S.C. § 2207 (1994) (gratuities to government contracts personnel in return for the award of a contract are prohibited); DEP'T OF DEFENSE, DIR. 5500.7-R, JOINT ETHICS REG. (30 Aug. 1993).

⁴⁷ See 10 U.S.C. § 2313 (1994) (providing for examination of contractor records by auditing agencies); FAR 52.215-2.

⁴⁸ One of the chief statutes governing procurements conducted by the Department of Defense is the Armed Services Procurement Act of 1947, 10 U.S.C. §§ 2301-31 (1994 & Supp. II 1996) (as amended).

⁴⁹ See 10 U.S.C. § 2311 (1994); FAR Subpart 1.6.

⁵⁰ The Antideficiency Act, 31 U.S.C. §§ 1341, 1342, 1511-19 (1994).

⁵¹ Competition in Contracting Act of 1984, Pub. L. No. 98-369, §§ 2701-53, 98 Stat. 1175-1203 (1984).

⁵² See FAR Part 5.

mised.³³ Both contractor and government personnel are responsible for ensuring that the goods delivered to the government meet specified quality requirements.³⁴ In these and many other ways, the legacy of Civil War procurements, left largely unchanged by recent acquisition reforms, continues to provide a fundamental baseline for the conduct of acquisitions.³⁵

In addition, today's centralized procurement agencies³⁶ and standardization programs³⁷ trace their origins to some of these Civil War problems. Weapons programs today are managed carefully to ensure supportability of fielded systems, and standardized designs are used to the maximum extent possible to avoid the complex logistics problems that arise when an uncontrolled variety of weapons configurations are present on the battlefield. Such organizational and administrative arrangements also are intended, at least in part, to prevent recurrence of procurement problems like those of the Civil War.

Conclusion

The legacy of Civil War procurements for modern commanders is manifest in the many statutory and administrative controls on contracting that have gone into effect since 1861. Civil War abuses cost commanders their ability to contract directly for their requirements, forcing them to rely instead on procurement pro-

fessionals. At least in theory, modern commanders are supported by staffs of officers, enlisted personnel, and civilian employees with the necessary training and experience to conduct government acquisitions properly;³⁸ of course, this theory breaks down if personnel are lacking or they do not have the training and experience needed to provide commanders effective support. With trained personnel, however, current procurement controls effectively safeguard the current federal procurement system without impeding the responsive support essential to deployed forces.

As has been the case in recent deployments, American units deploying to austere environments in the new world order of the late 20th and early 21st Centuries will continue to depend heavily on contracted support for their sustainment because the organic force structure necessary to satisfy all requirements through the Army's logistics system is no longer available. Despite all the talk about acquisition streamlining, however, commanders should not expect relief from the many procurement safeguards that trace their lineage to the Civil War. Instead, commanders should ensure before they deploy that trained procurement personnel and legal advisors will support them in accomplishing their missions so that they can do so in full compliance with the many statutory and regulatory safeguards embedded in today's procurement system.

³³ See *id.* Part 3.

³⁴ See 18 U.S.C. § 287 (1994) (false claims); 18 U.S.C. § 1001 (1994) (false statements); FAR Part 46 (Quality Assurance).

³⁵ But see Clinger-Cohen Act of 1996, Pub. L. No. 104-106, § 4301, 110 Stat. 656-58 (1996) (eliminating nonstatutory contractor certification requirements).

³⁶ The Army Materiel Command and the Defense Logistics Agency procure nearly all the arms, supplies, and other materiel issued to soldiers Army-wide.

³⁷ The Army today seeks to ensure that standardized components are used in fielded systems to the maximum possible extent. See DEP'T OF DEFENSE, DA, 2010.6, STANDARDIZATION AND INTEROPERABILITY OF WEAPONS SYSTEMS AND EQUIPMENT WITHIN THE NORTH ATLANTIC TREATY ORGANIZATION (5 MAR. 1980); DEP'T OF ARMY, REG. 700-142, MATERIEL RELEASE, FIELDING, AND TRANSFER (1 MAY 1995).

³⁸ Defense Acquisition Workforce Improvement Act, 10 U.S.C. § 1735 (1994) (as amended).