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from professors ralph c. nash and john cibinic

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¶ 41 OFPP: Dead Letters?

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When we discussed the recent withdrawal of President Biden's nomination for Administrator of Federal Procurement Policy as a possible topic for the REPORT, one question was whether an article about the Office of Federal Procurement Policy would be worthwhile. We decided to say something about it.

The Office Of Federal Procurement Policy

Congress created the OFPP in 1974 in Pub. L. No. 93-400 at the recommendation of the Commission on Government Procurement. See *Summary of the Report of the Commission on Government Procurement* 3–6 (Dec. 1972), available by searching Google Books:

The Report recommends an Office of Federal Procurement Policy, high in competence and small in size, established by law and responsive to Congress, and placed in the executive branch at a level where it can oversee the development and application of procurement policy. The contracting agencies should continue to be charged with clear responsibility for individual procurement actions.

The organization and purposes of the OFPP are stated in 41 USCA § 1101 as follows:

Organization.—There is an Office of Federal Procurement Policy in the Office of Management and Budget.

(b) Purposes.—The purposes of the Office of Federal Procurement Policy are to—

(1) provide overall direction of Government-wide procurement policies, regulations, procedures, and forms for executive agencies; and

(2) promote economy, efficiency, and effectiveness in the procurement of property and services by the executive branch of the Federal Government.

The OFPP has long been something of a mystery to most of the acquisition workforce. They know it is out there, but they are not sure why or where. Despite the fact that the Administrator is supposed to provide leadership, at any given moment most Government contracting personnel and contractor personnel cannot name the current occupant of the office and do not seem to care who it is.

Although the OFPP is supposed to provide overall policy direction, the office has no website of its own. There is a White House website about its policy issuances, accessed on June 20, 2022, <https://www.whitehouse.gov/omb/management/office-federal-procurement-policy/#policy-letters>. The website includes links to Circulars, Guides, Memoranda, Policy Letters, Reports, Government-wide Acquisition Legislative Proposals, “Other,” Cost Accounting Standards Board, Contractor Employee Compensation Cap, Federal Activities Inventories Reform (FAIR) Act, and Service Contract Inventory.

The White House website provides no detailed information about the OFPP and its staff. There is very little information about the office online. The OFPP gets only a bare mention in the current U.S. GOVERNMENT MANUAL, and good luck finding out the number, identities, functions, organization, and ongoing projects of its staff other than on the basis of pronouncements in the Federal Register, which has mentioned various administrators, acting administrators, deputy associate administrators, principal associate administrators, etc.

The Administrator Of Federal Procurement Policy

The OFPP is supposed to be headed by an Administrator of Federal Procurement Policy, nominated by the president and confirmed by the Senate. See 41 USCA § 1102. According to the White House website:

Today more than ever, the government must ensure that it spends money wisely and eliminates waste and abuse of taxpayer dollars. With approximately one out of every ten dollars of Federal government spending going to contractors, it is imperative that contract actions result in the best value for the taxpayer.

The Office of Federal Procurement Policy (OFPP) in the Office of Management and Budget plays a central role in shaping the policies and practices federal agencies use to acquire the goods and services they need to carry out their responsibilities.

That being the case, one would think that prompt appointment of a highly qualified administrator would have been a top priority of the Biden Administration. But it does not appear to have been a high priority of any president since Clinton.

We were unable to find a complete list of the names, tenures, and accomplishments of its past administrators, although we presume that such a list exists somewhere. We compiled a list of 14 appointed and confirmed administrators, from various sources, but we are not sure it is complete. The last appointed and confirmed administrator was Michael E. Wooten, nominated by President Trump and confirmed in 2019. See *At Long Last: A Nominee for Administrator of Federal Procurement Policy*, 33 NCRNL ¶ 17. He left office upon the inauguration of President Biden.

At any given time few working-level procurement folks have been able to name the current administrator, and since Steven Kelman (1993–1997), whose name almost everyone knew, left the post in 1997, most appointed administrators have been short-term and undistinguished. The OFPP has had an impact, however, through its policy letters, memoranda, and other issuances. Not all of the impacts have been on target or had salutary effect.

41 USCA § 1122 lists the 13 functions of the Administrator:

- (a) IN GENERAL.—The functions of the Administrator include—
 - (1) providing leadership and ensuring action by the executive agencies in establishing, developing, and

maintaining the single system of simplified Government-wide procurement regulations and resolving differences among the executive agencies in developing simplified Government-wide procurement regulations, procedures, and forms;

(2) coordinating the development of Government-wide procurement system standards that executive agencies shall implement in their procurement systems;

(3) providing leadership and coordination in formulating the executive branch position on legislation relating to procurement;

(4) (A) providing for and directing the activities of the computer-based Federal Procurement Data System (including recommending to the Administrator of General Services a sufficient budget for those activities), which shall be located in the General Services Administration, in order to adequately collect, develop, and disseminate procurement data; and

(B) ensuring executive agency compliance with the record requirements of section 1712 of this title;

(5) providing for and directing the activities of the Federal Acquisition Institute established under section 1201 of this title, including recommending to the Administrator of General Services a sufficient budget for such activities[;]

(6) administering section 1703(a) to (i) of this title;

(7) establishing criteria and procedures to ensure the effective and timely solicitation of the viewpoints of interested parties in the development of procurement policies, regulations, procedures, and forms;

(8) developing standard contract forms and contract language in order to reduce the Federal Government's cost of procuring property and services and the private sector's cost of doing business with the Federal Government;

(9) providing for a Government-wide award to recognize and promote vendor excellence;

(10) providing for a Government-wide award to recognize and promote excellence in officers and employees of the Federal Government serving in procurement-related positions;

(11) developing policies, in consultation with the Administrator of the Small Business Administration, that ensure that small businesses, qualified HUBZone small business concerns (as defined in section 31(b) of the Small Business Act), small businesses owned and controlled by socially and economically disadvantaged individuals, and small businesses owned and controlled by women are provided with the maximum practicable opportunities to participate in procurements that are conducted for amounts below the simplified acquisition threshold;

(12) developing policies that will promote achievement of goals for participation by small businesses, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns (as defined in section 31(b) of the Small Business Act), small businesses owned and controlled by socially and economically disadvantaged individuals, and small businesses owned and controlled by women; and

(13) completing action, as appropriate, on the recommendations of the Commission on Government Procurement.

Administrators have issued many “policy letters,” and they have had effect, but the White House website currently lists only one, Policy Letter No. 11-01, *Performance of Inherently Governmental and Critical Functions*, which the website dates as of March 26, 2019, but which was actually issued on September 12, 2011, 76 Fed. Reg. 56227. Many policy letters have been rescinded after their subject matter was incorporated into the Federal Acquisition Regulation.

Choosing An Administrator

What kind of person should a president choose to be Administrator of Federal Procurement Policy

and leader in procurement? One would think that a good procurement policy leader would have middle-to-higher level inside experience working with Government bureaucracies, know something about Government procurement policies and their history, and have some insight into to the procurement system and how it works. In order to lead, the Administrator must be able to communicate and enjoy communicating with the workforce. Perhaps most importantly, the Administrator should be someone who believes in the power of ideas, has ideas, encourages new ideas, and actively encourages intelligent and informed experimentation.

The OFPP came into existence in the same year that I started out as a GS-1102-05 Air Force Copper Cap trainee after college. But the only Administrator in my memory who met those criteria was Steve Kelman, who was appointed by President Clinton in 1993. Kelman was a Harvard academic who had written a book based on his own research: *PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE* (AEI Press, 1990). He was an idea person *par excellence*.

Once in office, Kelman had the backing of the president and the vice president, who both wanted to “reinvent” Government. Not only did he have ideas, he encouraged others to have them. There was a rush of ideas during his tenure in office. Not all of the ideas that he pushed were good ones—performance-based contracting, which he pushed and still haunts us, was a singular misfire, but it actually pre-dated his tenure. See OFPP Policy Letter No. 91-2, *Policy Letter on Service Contracting*, 56 Fed. Reg. 15110 (Apr. 15, 1991). It was a failure of critical thinking. See *Performance Work Statements: The Policymakers' Monster—Where Is Our Theseus?*, 35 NCRNL ¶ 11, and *The Service Contracting Policy Mess*, 15 N&CR ¶ 55.

But experimenting with half-baked ideas is better than just continuing to do the same old things that are not working, like source selection and contract award based on essay-writing contests instead of oral presentations. The key is to design and critically assess experiments, to throw out or modify an idea as soon as it is clear that it does not work as predicted, and to not oversell the unproven, which prompts Congress to jump on the bandwagon and put a half-baked idea into a statute. See 10 USCA § 4502(c)(5) and 41 USCA § 1702(b)(3)(C). There were a few too many unsubstantiated “success stories” and Hammer Awards during the Clinton Administration and not enough tough questions. All the same, we think Kelman did a fine job and was the best Administrator we have had.

Wither OFPP?

The Government is virtually powerless without effective contracting policy. Is there any hope of vitality for the OFPP? Not until we get a president who understands the critical role of contracting in the functioning of the Executive Branch, who understands that we have a largely contracted-out Government, and who understands that procurement needs a leader, a leader who is put into office in the first year of a new administration, who has a clear mandate, who has a voice independent of the Office of Management and Budget bureaucracy, who has ideas, who has a strategy for putting those ideas into effect, who understands and can explain to Congress that new procurement laws create as many problems as they solve, if not more (Has the Truth in Negotiations Act solved pricing problems? Has it saved as much as it has cost?), and who knows how to revitalize and encourage the workforce.

Just before finishing this piece we received a flyer from Bloomberg Government telling us that

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the Acting Administrator has prioritized hiring the best and brightest to replace the aging workforce and to do something to improve their retention.

Acquisition workforce changes are a top priority for Leslie Field, a White House official tasked with improving federal procurement policy.

The cohort of federal procurement professionals is aging, while agencies face challenges competing with the private sector to recruit younger workers.

There are more people 70 and older than there are people under 25 years old working in federal procurement, Field said at the Professional Services Council's Federal Acquisition Conference on Tuesday. Overall, only 7% of the acquisition workforce is under 30 years old.

"These statistics make a pretty compelling case to make our workforce a top priority—both the pipeline, the recruitment, the development, and the retention," she said.

The best way to revitalize the workforce is to get rid of the contracting office chiefs and supervisors who are not devoted to educating and training the new hires. We recommend that the OFPP take note of professional social media posts like this one at the *Where In Federal Contracting?* (*Wifcon*) website, <http://www.wifcon.com/>, dated June 9, 2022:

I'm a new specialist and other than FAC Level I classes my team won't provide any hands on training. I've asked several team members and was ignored. They don't even respond to my emails any more. I've talked to my supervisor and didn't get any help.

Is there a way to gain practical experience without throwing my new team under the bus or is my career over before it even started?

And this one, dated June 4, from a different source:

As for training, yeh, unfortunately I've been bounced around multiple COs who tell to do contradictory things, and my training most of the time was basically being told to "use this template for this" (which sometimes turned out to be outdated).

A leader would have something clear, direct, and critical to say about things like that, and then try to do something about them. See Administrator function No. 6, above. *VJE*