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government contract analysis and advice monthly from professors ralph c. nash and john cibinic

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¶ 22 OUT OF THE WHIRLWIND: What Is Going To Happen To Acquisition And The Acquisition Workforce?

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Addendum by Ralph C. Nash

To paraphrase General Sherman speaking to General Grant after the first day at Shiloh: *Well, folks, we've had the devil's own two and a half months, haven't we?* Pondering what has happened since January 21, 2025, brings to mind the old Chinese saying, *May you live in interesting times*. Some say that's a curse. What a storm we have been enduring, with reformers roaring at us out of the whirlwind. The question is whether they will actually improve anything or just create new currents of chaos. We'll see.

Back To The Past

As of the date of this writing the latest in a stream of presidential executive orders, issued on March 20, 2025, would take us back to Congress's post World War II notion of centralized procurement, as required by the Federal Property and Administrative Services Act of 1949, Title II, Pub. L. No. 81-152, 63 Stat. 377 (1949). That law created the General Services Administration and provided in part as follows:

> SEC. 201. (a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned—
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> (1) prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, property identification and classification, transportation and traffic management, management of public utility services, and repairing and converting; and
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> (2) operate, and, after consultation with the executive agencies affected, consolidate, take over, or arrange for the operation by any executive agency of warehouses, supply centers, repair shops, fuel yards, and other similar facilities; and
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> (3) procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities, and perform functions related to procurement and supply such as those mentioned above in subparagraph (1) . . . .

Under the new executive order the GSA is once again to be responsible for buying all "common goods and services," defined in the executive order as follows: " 'Common goods and services' means the common Government-wide categories defined by the Category Management Leadership Council led by the Office of Management and Budget (OMB)." See Executive Order No. 14240, "Eliminating Waste and Saving Taxpayer Dollars by Consolidating Procurement" (Mar. 20, 2025), 90 Fed. Reg. 13671 (Mar. 25, 2025), stating:

> Sec. 3. Procurement Consolidation. (a) Within 60 days of the date of this order, agency heads shall, in consultation with the agency's senior procurement officials, submit to the Administrator proposals, pursuant to 40 U.S.C. 101, 40 U.S.C. 501, or other relevant authorities, to have the General Services Administration conduct domestic procurement with respect to common goods and services for the agency, where permitted by law.
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> (b) Within 90 days of the date of this order, the Administrator shall submit a comprehensive plan to the Director of OMB for the General Services Administration to procure common goods and services across the domestic components of the Government, where permitted by law.
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> (c) Within 30 days of the date of this order, pursuant to the authority in 40 U.S.C. 11302(e), the Director of [the Office of Management and Budget] shall designate the Administrator as the executive agent for all Government-wide acquisition contracts for information technology. The Administrator, in consultation with the Director of OMB, shall defer or decline the executive agent designation for Government-wide acquisition contracts for information technology when necessary to ensure continuity of service or as otherwise appropriate. The Administrator shall further, on an ongoing basis and consistent with applicable law, rationalize Government-wide indefinite delivery contract vehicles for information technology for agencies across the Government, including as part of identifying and eliminating contract duplication, redundancy, and other inefficiencies.
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> (d) Within 14 days of the date of this order, the Director of OMB shall issue a memorandum to agencies implementing subsection (c) of this section.

That could be a good thing if it works, but what does our historical experience tell us about the effectiveness of "reforms"?

Do you remember when the Brooks Act, Pub. L. 89-306 (1965), a significant "reform" statute, put the GSA in charge of acquisitions of commercial automated data processing equipment (ADPE)? Did that make everyone happy? See *Determining What Constitutes ADPE: Another Congressionally-Mandated Boondoggle*, 7 N&CR ¶ 17. See also Williamson, *Applying Yesterday's Solutions to Today's Problems on Tomorrow's Procurement: Why the Federal Information Technology Acquisition Reform Act Won't Solve IT Procurement Problems*, 45 Pub. Cont. L.J. 733 (Summer 2016):

> Due to the changes in available technology, the ways in which the federal government used technology, and the inadequate staffing levels of GSA personnel reviewing purchase proposals, the system had become incapable of processing requests in a timely and considered manner by the mid-1990s. A study reported that relevant GSA offices were "understaffed, overworked, and subject to high employee turnover." The Brooks Act had become an obstacle to efficient procurement. Its review requirements led to extended acquisition timelines that resulted in mismatches between the request granted by GSA and available technology, ultimately contributing to wasteful spending. The system that the government designed to streamline and expedite the procurement process had come to yield the opposite result. Senator William Cohen highlighted the problems in an extensive investigative report he commissioned during his service on the Senate's Governmental Affairs Committee. This report formed the basis for the next legislative reform of IT procurement, the Clinger-Cohen Act. [Footnotes omitted.]

Federal Acquisition Regulation (FAR) 2.0

Other big news, which we received in an email from a friend, is that the Office of Management and Budget is rewriting the FAR and the Defense FAR Supplement (DFARS) by "lining out" all text that is not directly related to statute, including text based on executive orders, and perhaps any text that is not "central" to implementing a statute. In order to do that the OMB is researching the origins of the FAR and DFARS texts, which undoubtedly reflect statutes, bid protest and contract dispute case law, and bureaucratic imagination. The prospective product of the effort is being referred to as "FAR 2.0." The OMB is said to be planning to complete the project "in weeks, not months." That would be quite an achievement considering that as of March 24, 2025, the FAR alone is 2,034 pages long in its three-ring binder format.

We have been told that the OMB has excluded the GSA, the Defense Acquisition Regulations Council, and the Civilian Agency Acquisition Council from the project. Maybe that is good news to them, seeing as the March 21, 2025 report of Open FAR Cases lists 50 open cases going back to 2015. See https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf.

We'll see. Don't get too excited. According to an "iron law" of bureaucracy promulgated by the late David Graeber in his book The Utopia of Rules: On Technology, Stupidity, and the Secret Joys of Bureaucracy (2015), "Any market reform or government initiative intended to reduce red tape and promote market forces will ultimately increase the number of regulations and bureaucrats, as well as the amount of paperwork, that the government employs." Case in point: the Federal Acquisition Streamlining Act of 1994, Pub. L. 103-355, an ironic title if ever there was one, is a perfect example of Graeber's iron law

at work. In fact, part of the intent of Executive Order 14240 is to tame the excesses that FASA produced with respect to multiple-award, multi-agency task and delivery order contracts.

The Government is good at imagining reform, but not very good at implementing it. Our readers might remember the performance-based contracting movement of the 1990s. See Office of Federal Procurement Policy Letter 91-2, "Service Contracting," 56 Fed. Reg. 15110 (Apr. 15, 1991), now embedded in statute. See also 10 U.S.C.A. § 4502, 41 U.S.C.A. § 2310, and 41 U.S.C.A. § 1702. It is a policy based on ambition, shoddy analysis, and willingness to take credit for a reform based on phony claims of success and savings. Nothing has made specification of services worse than the demand for so-called "performance work statements." But FAR 37.102, *Policy*, paragraph (a), which proclaims performance-based contracting to be the preferred method of buying services, refers to the statutes cited above. So, presumably, it will remain in FAR 2.0 after the OMB's line-out.

Many FAR texts are based on interpretations of statutes by the Government Accountability Office, the boards of contract appeals, the U.S. Court of Federal Claims, and the U.S. Court of Appeals for the Federal Circuit. Much of what contracting and legal personnel think they know about contracting is based not on the words in statutes and the FAR, but on their understanding of those administrative and judicial interpretations. Think about the myriad GAO decisions issued since 1968 interpreting (and creating) the rules about discussions in source selection. See FAR 15.306, *Exchanges with offerors after receipt of proposals*, and FAR 15.307, *Proposal revisions*. What will OMB do about such texts and the conduct they induce and inhibit? What will Contracting Officers do if that coverage is removed? Will they change their conduct? Will the protest tribunals abandon their old case law?

What Will Happen To The Acquisition Process?

We have been asked what will happen to the acquisition process under the new organizational regime and in the face of a drastically slimmed down FAR. It's hard to predict. Presumably, those COs, contract specialists and others working in agencies to buy common goods and services, however many remain employed, will be transferred to the GSA and work out of GSA regional offices. It will mean that those in agencies who develop requirements for common goods and services will have to work with contracting personnel who are not members of their agency and not collocated with them. We do not know how the reorganization will affect CO appointments and promotions, or whether there will be any in the future.

Cutting the number of rules and pages in the FAR may well confuse that large part of the workforce who are not well educated and trained with respect to concepts, principles, rules, processes, procedures, methods, and techniques. Will FAR 2.0 make contracting personnel more productive or make them more hesitant or paralyzed by uncertainty and doubt? Many if not most COs shrink from freedom when offered, preferring to stick to the old, safe ways. Will requirements personnel become better specification and statement of work writers? Will program office personnel become better technical and management proposal evaluators? Will contracting personnel become better solicitation writers, cost and price analysts, negotiation tacticians, planners, and bargainers? Will COs and their representatives become better contract administrators?

While we do not like rules and know that they are the source of many problems, we have never thought that the rules are the principal source of the problems in the acquisition business. We have long thought the Government/industry acquisition workforce is the heart of acquisition, and that it needs treatment. Sound rules reform is good, but it is not enough. We also know that the problem of providing effective education and training is extremely difficult to solve.

But these new reforms might indeed save taxpayer money if sensibly, realistically, and efficiently managed, and if the workforce is knowledgeable, skilled, and disciplined. Those are big ifs, especially in light of the poor work being done today, which we have often observed, reported, and complained about. If not done right these changes may well make communication and problem resolution more complex and difficult for contractors, and Government business less attractive. We can only watch to see how things work out in the coming months. It has always been the case that efforts at reform produce false claims of success. We well remember that about the acquisition reform movements of the past, and we hope our readers remember, too. *VJE*

ADDENDUM

Vern is too gentle. These two initiatives are *bad policies* that will seriously damage the procurement system. As to moving a lot of the contracting function to the GSA, the damage will be significant. A good agency contracting office establishes a relationship of trust with the technical and program folks that it serves. They work together closely from acquisition planning to source selection to solving problems that arise during contract performance. It is difficult to envision GSA Contracting Officers in remote locations providing that type of service. It will be back to a stove pipe operation.

As to the FAR rewrite, we may lose the major benefits the current regulation provides. First, it brings together in one document all of the statutory requirements, the regulations of other agencies and the rules that have been developed over many years through case law and considered regulatory action. Taking this tool away from agency personnel will make contracting more difficult. The second benefit of the FAR is the standard solicitation provisions and contract clauses in Part 52 that have been developed in coordination with industry in promulgating the FAR. Removing any of them would allow or require agencies (or the GSA) to draft provisions and clauses on an ad hoc basis, imposing a significant burden on contractors that have to figure out the impact of new language. Hopefully, agency lawyers will file away the current version of Part 52 to ameliorate this problem. *RCN*