



A Return to Competitive Contracting

Congress Needs to Clean Up the Procurement Process Mess

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Introduction

Selling products and services to the federal government has become an enormous industry in the United States. In 2005, federal contracts represented about 3 percent of U.S. gross domestic product, making it approximately the same size as the entire automobile industry, including the sale of imported cars and auto parts. Insuring that the government maintains a fair, open, and competitive market for the goods and services it purchases is important not only for maintaining the quality of key government services and minimizing their cost but also for setting ethical and performance standards that affect the broader economy.

Yet there are clear indications that serious contract abuse has become a widespread problem affecting programs and agencies across the entire government and involving tens of billions of dollars in federal funds annually. Non-competitive contracting has more than doubled during the first half of this decade. And just during the last three years more than five federal officials have been convicted of crimes involving federal contracting, three others were placed under indictment, and more are under investigation.

Contractors play a central role in the delivery of critical government services, and their work has a direct and immediate impact on everything from the protection of public health and the flow of commerce to the preservation of our national security. Corrupt and ineffective management of government purchasing therefore places all of the government's responsibilities at risk.

Cronyism, corruption, and fraud in government procurement increase the cost of government and, subsequently, the taxes that must be paid to support it—as well as reduce the willingness of citizens to pay those taxes. Such practices not only corrode the standards of the businesses competing for government contracts; they also undermine standards of conduct in other industries, making the entire economy less efficient, less competitive, and less prosperous.

In recent years there appears to have been a failure of oversight into contracting procedures at almost every level of government. Inspectors general within departments and agencies have been pressured to cover up the bad news; some have been fired for their unwillingness to do so, and increasingly it appears as though others were selected because of their willingness to look the other way.

Ultimately the responsibility for ensuring that the money provided to the executive branch is effectively spent rests with the Congress. But clearly the Congress has failed almost completely in its willingness and capacity to perform the constitutional function of insuring

the efficiency and effectiveness of the government that it has funded. Over the course of the last three Congresses, work weeks have often begun on Tuesday evening and ended by noon on Thursday. The Congress's attention has frequently been directed more toward the small percentage of funds that are earmarked for pet projects than on the 98 percent of the discretionary budget spent at the direction of the executive branch.

This paper examines what is presently known about the potential size and scope of wasteful and corrupt contracting within the federal government. It provides the new Congress with hopefully useful guidance for developing a broader understanding the problem. Finally, it outlines some steps that might be taken to restore greater transparency and accountability in the use of public funds in the procurement process.

What Happened to Open Bidding?

When Rep. Randy “Duke” Cunningham (R-CA) pled guilty in late 2005 to accepting bribes from two defense contractors, most commentators viewed the case as proof that the congressional practice of earmarking spending legislation had grown seriously out of control. The practice of earmarking was indeed in need of reform, but what was lost in the circus of the Cunningham scandal was the fact that his case really wasn't about earmarking.

Cunningham merely sought to increase funding for programs already in the federal budget. No language was included in either the legislation providing the funds or the reports that accompanied that legislation directing where the money was to go or for what specific activity it was to be spent.

In a few instances Cunningham personally called program managers at the Pentagon after the legislation was signed to urge that they direct the funds toward those who were paying him the bribes. But in most instances the cozy relationships that the contractors themselves had cultivated with Department insiders and the flexibility those insiders had

in directing the flow federal contract dollars were sufficient to take care of the dirty work.

Perhaps the most important lesson to take from the Cunningham scandal is the flaws it exposes in the federal procurement system and how that system has become increasingly vulnerable to manipulation for corrupt and partisan purposes.

Further evidence of federal procurement problems was made public this past February when the same U.S. attorney who convicted Cunningham—the recently fired Carol Lam of San Diego—won a grand jury indictment of a former top official at the Central Intelligence Agency. Kyle “Dusty” Foggo, who resigned as the CIA's executive director last year after the FBI raided his home and office at CIA headquarters, was indicted for accepting bribes from one of the same contractors alleged to have bribed Cunningham.

According to papers released by the San Diego grand jury, Foggo directed that a \$1.7 million contract be given to his longtime friend, San Diego businessman Brent Wilkes, to supply bottled water to agency personnel in Iraq. Court documents indicate that the agency paid about 60 percent over the market rate for the water. An expenses-paid vacation to Scotland is alleged to be among the bribes Wilkes provided to Foggo, which included, according to the documents,

“over \$12,000 in private jet flights, over \$4,000 for a helicopter ride to a round of golf at Carnoustie, and over \$44,000 for a stay at the Pitcastle Estate, which included trout fishing on hill lochs, salmon fishing on the River Tay, clay pigeon shooting, archery, and a seven-person staff.”

This isn't a problem of just a few bad apples. There are clear indications that serious contract abuse has become a widespread problem affecting programs and agencies across the entire government and involving tens of billions of dollars in federal funds annually. At least five federal officials have been convicted of crimes involving federal contracting just within the last three years, and at least three more, including Foggo, are currently under indictment for such crimes.

Press reports indicate that even more current or former federal officials are under investigation for possible criminal wrongdoing in connection to federal contracting. Yet it seems likely that the crimes that have been uncovered are still only a small fraction of the crimes that have occurred given the weakness of oversight efforts within past Congresses and the executive branch itself.

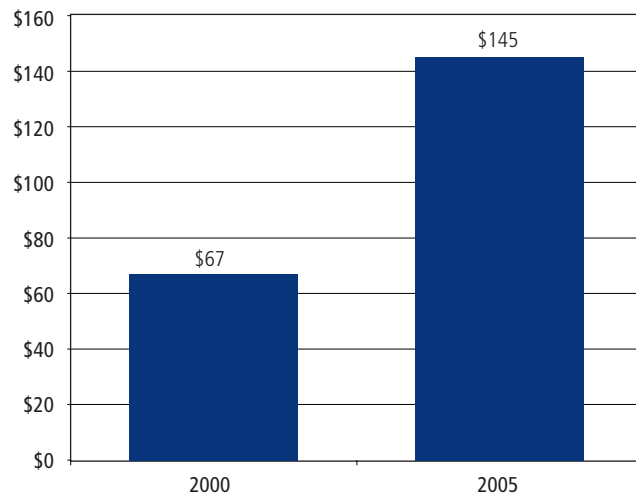
The Growing Number of Non-Competitive Contracts

Federal contracting grew dramatically during the first half of this decade. And the growth in contracts awarded without full and open competition was even more staggering.

According to a 2006 study conducted for Rep. Henry Waxman (D-CA) by the House Government Reform Committee, federal contracting mushroomed from \$203 billion in fiscal year 2000 to \$377 billion by fiscal year 2005—an increase of 86 percent. And the value of contracts not subject to full and open competition grew from \$67 billion to \$145 billion during the same period—an increase of 115 percent.

Contracts now account for nearly 40 percent of all federal discretionary spending. Only 16 countries

FEDERAL SPENDING ON NON COMPETITIVE CONTRACTS INCREASES 115%



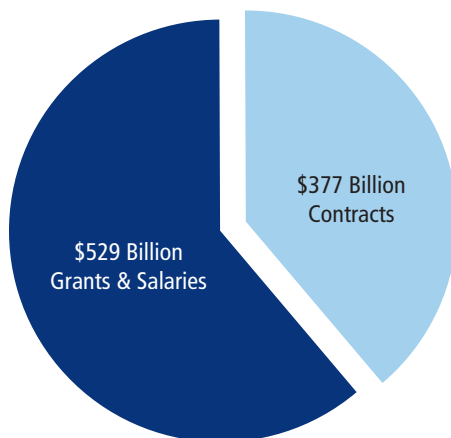
in the world have economies as big as the federal procurement budget.

Last April, Housing and Urban Development Secretary Alphonso Jackson offered an eye-opening public insight into how he thinks the Bush administration should handle all of this money. According to the *Dallas Business Journal*, he concluded a speech before a group of minority business leaders by telling a story about a businessman who had recently sought a HUD contract:

“He had made every effort to get a contract with HUD for 10 years...He made a heck of a proposal and was on the [General Services Administration] list, so we selected him. He came to see me and thank me for selecting him. Then he said something ... he said, ‘I have a problem with your president.’

I said, ‘What do you mean?’ He said, ‘I don’t like President Bush.’ I thought to myself, ‘Brother, you have a disconnect—the president is elected; I was selected. You wouldn’t be getting the contract unless I was sitting here. If you have a problem with the president, don’t tell the secretary.’

CONTRACTS ACCOUNTED FOR NEARLY 40% OF ALL DISCRETIONARY SPENDING IN FISCAL YEAR 2005



He didn't get the contract...Why should I reward someone who doesn't like the president, so they can use funds to try to campaign against the president? Logic says they don't get the contract. That's the way I believe."

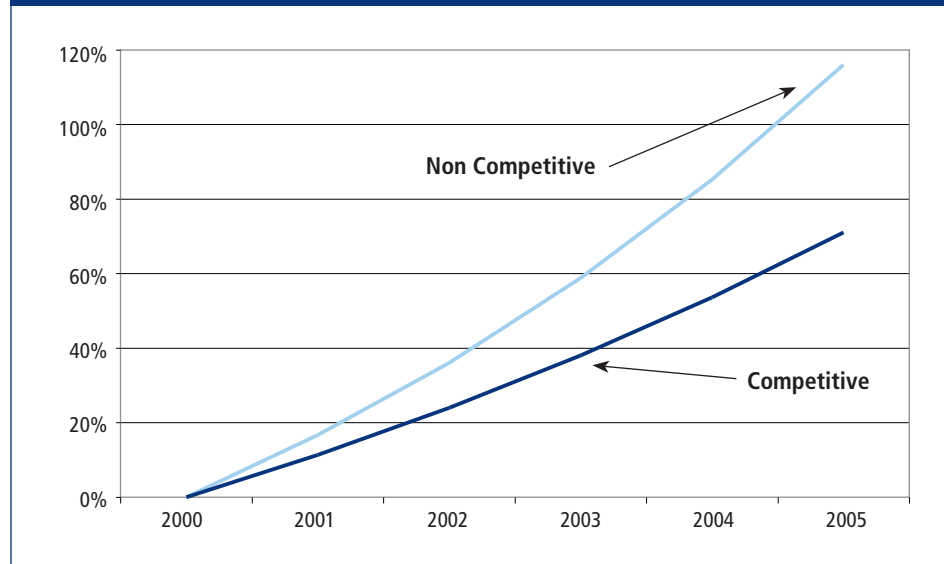
Jackson later claimed that he had made the story up and that no such incident had ever occurred. The HUD inspector general, however, issued a report last September stating that two senior HUD staffers had confirmed to investigators that Jackson had advised "...that when considering discretionary contracts, they should be considering supporters of the president." Jackson remains at the head of the Department and there is no record of a reprimand or letter of disapproval from the president or the White House.

The Erosion of Legal Requirements for Competition

Arguments about the importance of transparency and competition in government procurement date back to the American Revolution. But the basis of current federal procurement law was established in the Competition in Contracting Act of 1984, legislation that evolved after stories of serious contract abuse at the Pentagon gained national attention. Congress enacted CICA to ensure that all interested and responsible parties have an equal opportunity for government business and to clearly state the importance of competitive bidding as the guiding principle in government procurement.

Congress has amended CICA three times since 1984 and each time it has made it easier for program managers and contract officers to avoid full competition when awarding contracts. The rationales offered for these changes have included needing to cut the

GROWTH OF COMPETITIVE AND NON COMPETITIVE FEDERAL CONTRACTS



time required for procurement, reduce the cost of selling to the federal government in order to encourage more competition and drive down prices, and minimize the time and effort that federal workers need to complete procurements.

New acquisition procedures introduced as a result of these amendments include "competitive one-bid contracting," "commercial items procurement," "share in savings contracts," "blanket purchase agreements," and "indefinite delivery/indefinite quantity contracts." Supporters of these reforms may have had good intentions, but their practical application has often been to reduce competition, increase prices, and open the process to political manipulation—and, in some instances, fraud.

Not only have government watchdog groups such as the Project on Government Oversight characterized these changes as "weakening or bypassing protections" and "unraveling the free market forces that protect the taxpayer," even some former Bush administration officials have expressed grave concern. Former Director of the White House Office of Federal Procurement Policy Angela Styles observed, for example, that *"The rules and the way they were changed allow you to do almost anything"*

One example is the tremendous flexibility provided to program managers and contract officers under “indefinite delivery/indefinite quantity” contracts. IDIQ contracts allow executive branch officials to set up ongoing arrangements with vendors to provide unspecified goods and services over an indefinite period of time. The expectation is that the competition between designated vendors will hold down prices, but a September 2001 report by the Department of Defense Office of the Inspector General entitled “Multiple Award Contracts for Services” found the following:

“Contracting organizations continued to direct awards to selected sources without providing all multiple award contractors a fair opportunity to be considered. We found that 304 of 423 task orders (72 percent) were awarded on a sole-source or directed-source basis of which 264 were improperly supported. As a result, [the Department of Defense] was not obtaining the benefits of sustained competition and the reduced costs envisioned when Congress provided the authority for multiple award contracts.”

Many IDIQ contracts are clearly non-competitive contracts, yet they are exempted from the protections normally required of formal “sole-source” contracts. The CICA mandates, for instance, that when a contract officer determines that only a single vendor can supply a specific product or service, the determination has to be published in the Federal Register so that any business can dispute that finding. Sole-source IDIQ contracts, however, may proceed with no advance notice, which takes away the opportunity for potential competitors to contest the agreement or offer a lower price to the government.

The Administration’s “Close to the Line” Approach

Changes in procurement law account for only part of the shift. Agency heads, White House officials, and others in leadership positions have also pushed aggressively in recent years to free decision-makers from the restraints and “red tape” of procurement laws.

Angela Styles’ successor in the Office of Federal Procurement Policy, David Safavian, who was sentenced to 18 months in prison last October for obstruction of justice and making false statements to federal agents in the Jack Abramoff investigation, spoke to a Federal Acquisition Conference in 2005. *Government Executive* magazine reported on his speech:

“If something is close to the line, document it, but don’t shy away...’ He reminded the audience that if a contracting action is not forbidden by the Federal Acquisition Regulation, then it’s permissible.”

The administration’s “close to the line” approach to procurement has created friction in many agencies between political appointees selected by the president to run the agencies and the career contract officers, auditors, and enforcement personnel who work under them.

Bunny Greenhouse, who became the top contract official for the U.S. Army Corps of Engineers after two decades of federal service, refused to sign an open-ended, non-competitive contract with KBR, formerly known as the Halliburton subsidiary Kellogg, Brown and Root. She later explained:

“I can unequivocally state that the abuse related to contracts awarded to KBR represents the most blatant and improper contract abuse I have witnessed during the course of my professional career.”

More recently, *The Washington Post* revealed that General Services Administrator Lurita Alexis Doan, a government contractor prior to her present appointment, circumvented agency contract officers and personally signed a non-competitive contract with a firm owned by a close friend. The contract was terminated after agency lawyers identified several serious procurement violations, but what is disturbing about the episode is the inattention to rules displayed by the head of an agency that plays a lead role in government procurement policy.

“Close to the line” procurement practices have been facilitated by yet another significant change in contracting: a dramatic decline in oversight in recent years, not just by Congress but by designated executive branch watchdogs as well. The same Washington Post story that revealed Doan’s no-bid contract to a friend also reported that she had attempted to “curb the agency’s contract audits and to cut the inspector general’s budget by \$5 million.”

Serious disputes between politically appointed agency heads and inspectors general have become much more frequent in the Bush administration. President Bush refused to reappoint Department of Homeland Security Inspector General Clark Kent Ervin after a tumultuous year during which Ervin clashed frequently with then-Secretary Tom Ridge and issued reports revealing, among other things, that Boeing had received at least \$49 million in “extra profits” for a contract to oversee other DHS contracts. He also revealed that executives at the deeply dysfunctional Transportation Security Administration had awarded themselves \$1.5 million in year-end bonuses—an amount one-third higher than the bonuses given to executives at any other federal agency—and spent \$462,000 on an awards ceremony, including nearly \$2,000 for seven sheet cakes.

Ervin, a Rhodes Scholar who worked in the White House for George H. W. Bush and served on the younger Bush’s staff in the Texas governor’s office, told ABC News that senior officials at DHS considered him “a traitor and a turncoat.” He said that ultimately Ridge threatened him personally and tried “to intimidate [him], to stare [him] down, to force [him] to back off, to not look into these areas that would be controversial, not to issue critical reports.”

Ridge has denied that he attempted to block reports, but subsequent reviews of the DHS indicate that Ervin was neither overly aggressive in attempting to draw attention to problems nor overly pessimistic about the progress that was being made on management issues.

Other inspectors general selected by the White House were less problematic to agency heads, con-

tractors, and the administration. The most important of these was the Bush administration’s choice for the inspector general position at the Defense Department, since it accounts for more than 70 percent of all government contracts.

Joseph Schmitz became Defense Department Inspector General in 2002 and was a controversial appointment from the beginning. He raised eyebrows when he brought with him the highly partisan political operative L. Jean Lewis to serve as his chief of staff. And suspicions were further raised when he hired a defense contractor to do a “bottom-up review” of the Inspector General’s office, which led to the firing of a number of senior career employees.

But the most serious issues of Schmitz’s tenure were raised in a July 7, 2005 letter from Sen. Charles Grassley (R-IA). Grassley questioned whether Schmitz had “quashed or redirected two ongoing criminal investigations.”

One of these investigations involved Schmitz himself. He had taken the extraordinary step of deputizing John A. “Jack” Shaw, a Defense Department political appointee from outside the Inspector General’s office, to conduct investigations on its behalf. Shaw subsequently used that authority to travel to Iraq and advocate for non-competitive contracts for companies with which he appeared to have personal connections.

These actions triggered an investigation of Shaw by leading career staff within the Inspector General’s office. According to The Los Angeles Times, Schmitz refused to allow the investigation to proceed “despite the protests of senior criminal investigators in his office who had already found ‘specific and credible evidence’ of wrongdoing.” Schmitz instead referred the matter to the FBI, but so far none of the results from that investigation have become public.

The other question Grassley raised related to perhaps the most notorious Defense Department contracting scandal in decades. In the Boeing Air Force Tanker case, Schmitz took the unprecedented

step of sending the draft inspector general report to the White House counsel for review and edit before transmitting it to Congress. A freedom of information request by POGO resulted in the release of the original version of the report sent to the White House and demonstrated that the White House had in fact used the opportunity to delete portions of emails and names of senior Boeing officials.

Shortly after Grassley notified the Pentagon of his intention to conduct a Senate investigation of these affairs, Schmitz resigned and took a position with a major Iraq war contractor.

The U.S. Comptroller General serves as a backstop to departmental auditors and inspectors, but the Government Accountability Office has also had difficulty gaining access to the information and documents necessary to perform its work. Comptroller David Walker testified before the House Appropriations Committee in early February of this year:

“The Department of Homeland Security has been one of our persistent access challenges. ... When you have more lawyers in a meeting than program people, you know you’ve got a problem. Something needs to be done about this. There needs to be an understanding that if the general counsel’s office is going to get involved, it’s clearly got to be the exception rather than the rule.... Right now the system is structured to delay, delay, delay. ... We haven’t had a situation where they refuse information, but it might take months to get it.”

Much has already been written on the precipitous decline of congressional oversight over the past decade. During recent Congresses, the House of Representatives regularly held its first roll call vote of the week at 6 p.m. on Tuesdays and often had members on their way home by noon on Thursdays. And that was for the weeks the House was in session. The Congress showed little interest in spending the short period of time they were in the nation’s capital uncovering unpleasant truths about fraud and abuse in the executive branch.

Considering the minimal internal scrutiny within agencies—from the GAO or from Congress—the amount of known contract fraud is remarkable. It is catalogued on the POGO website, listed in reports by the House Oversight and Government Reform Committee, and is the subject of multiples news articles as well as books such as *Blood Money*, T. Christian Miller’s book on Iraq reconstruction, and *Unnatural Disaster: The Nation on Hurricane Katrina*, edited by Betsy Reed.

The combination of weakened legal requirements for competitive contracting procedures, executive branch officials’ desire to bypass the remaining legal requirements, and weak oversight from watchdogs in both Congress and the White House have created ideal conditions for unscrupulous vendors and corrupt officials to bilk the public while also providing substandard products and services. Exactly how pervasive these practices are can only be determined by a Congress willing to use its constitutional authority to examine the books.

Conclusion

Although it is still early in the legislative year, the new Congress has made a good start at reasserting its role as overseer of the executive branch. Committees have been organized expeditiously, investigative staff has been hired, and the new five-day work week adopted by the speaker has provided far greater opportunity for hearings, briefings, and consultation on oversight issues. It will still be months, however, before we know how effective the new Congress has become in the tough game of oversight.

There are enormous challenges in steering this system back toward accountability and transparency. Procurement law must be reexamined in the light of the abuses that have taken place and a determination must be made as to how much of the abuse is attributable to loopholes and weaknesses in the law and how much is the result of behavior outside of the law.

The Congress must identify the bad actors who continue to direct contracts and who will likely continue to use that authority corruptly and wastefully. They must determine which inspectors general have retained the independence and professionalism to continue to function as the law intends. And they must identify the budget accounts that have been most prone to such abuse and find ways of limiting the use of funds in such accounts.

Perhaps the most difficult challenge will be to revisit the decisions made more than a decade ago regarding federal employment ceilings. Malfeasance has clearly played a role in the wasteful and fraudulent use of contract dollars, but the simple lack of federal personnel to manage contracts is also at issue. Between 2000 and 2005, when total federal contracting increased by nearly \$175 billion, or 87 percent, federal employment increased by only 5 percent, and that increase was largely attributable to the replacement of private airport screeners with the TSA and the increase in border security personnel.

Nearly 80 percent of the contract growth occurred in the Department of Defense during that period, but federal civilian employment actually declined there by about 2,000 workers. As a result, contractors have increasingly been hired to draft contract proposals that other contractors—and in some instances even themselves—bid on. This means that in some instances contractors are deciding what the government needs and then monitoring performance under the terms of the contract.

Congress must closely monitor and limit the use of non-competitive contracts. This already appears to be happening in the huge Iraq war supplemental appropriation now pending in Congress. It is a step in the right direction, but many more must follow.

Center for American Progress



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