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2005

Katrina's Continuing Impact on Procurement - Emergency Procurement Powers in H.R. 3766

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Recommended Citation

Christopher R. Yukins & Joshua I. Schwartz, Katrina's Continuing Impact on Procurement - Emergency Procurement Powers in H.R. 3766 *Gov't. Contractor*, September 21, 2005 at Vol. 47, No. 35, par. 397.

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THE GOVERNMENT CONTRACTOR[®]



Information and Analysis on Legal Aspects of Procurement

Vol. 47, No. 35

September 21, 2005

FOCUS

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FEATURE COMMENT: Katrina's Continuing Impact On Procurement— Emergency Procurement Powers In H.R. 3766

Editor's Note: Reps. Kenny Marchant (R-Texas) and Tom Davis (R-Va.), Chairman of the House Government Reform Committee, introduced H.R. 3766 September 14 to streamline procurements during national emergencies declared by Congress or the president. The bill would give agencies increased flexibility to use other than competitive procedures when the agency head determines they are necessary to respond to the emergency. In addition, the measure treats disaster-related procurements as "commercial," thus exempting them from many statutory restrictions. The bill would also authorize the Federal Emergency Management Agency to accept volunteer services.

In announcing the bill, Davis said that when the Government responds to an emergency, "time is of the essence." "This legislation will allow federal agencies, during national emergencies or natural disasters, to quickly acquire the goods and services they need to assist relief and recovery efforts." "It's a common sense measure to help us cut through the red tape and get help to people who desperately deserve it," Davis said. In the following FEATURE COMMENT, Professors Christopher Yukins and Joshua Schwartz of The George Washington University Law School offer their critique of the proposed legislation.

* * *

Professor Yukins—On balance, at least H.R. 3766 offers a better approach to reconstruction than the second supplemental appropriation

for Hurricane Katrina relief, which raised the "micro-purchase" threshold to \$250,000 for relief-related purchases. That earlier legislation ripped what are likely to be billions of dollars in small contracts out of the procurement system, without competition, transparency, or regard for socioeconomic requirements.

Rep. Davis' proposed bill, in contrast, takes a more measured approach. Unfortunately, H.R. 3766 would eliminate competition for "emergency"-related procurement. H.R. 3766 would, however, leave most of the basic mechanisms of transparency (notice of award, for example) in place, and would honor most of the socioeconomic goals built into our procurement system.

That's not to say, however, that the bill isn't troubling.

First, the bill would forever open a large and permanent gap in our procurement law. Whenever a "national emergency" or "major disaster" was declared—and goodness knows that's an open-ended contingency—agencies could embark on sole-source procurement.

Our experience with Hurricane Katrina so far teaches us that this could amount to many billions of dollars in sole-source procurement. Nothing I have seen so far in reports from Katrina relief, however, indicates that we do, indeed, need to destroy competition in order to rebuild the Gulf Coast.

Prudence suggests that we await more information from the relief effort so that we can tell whether this sweeping exception from competition is, in fact, needed. In assessing the data from the field, we need to be mindful that, without competition, the procurement system generally lacks most independent guarantors of best value.

The other provisions in H.R. 3766 are also troubling because they would treat all disaster-related procurement as "commercial," and thus would exempt that procurement, whether appropriately or not, from a broad array of laws that protect the Government. As with the recent second supplemental appropriation, the proposed legislation would exempt relief-related procurement from cost standards, truth-in-negotiation

disclosure requirements and from other laws that ensure that the Government pays a fair price for a quality product.

What's interesting, though, is to turn the proposed law on its head: Maybe the bill's insight is not that these exemptions will facilitate recovery, but rather that massive reconstruction cannot be done without these exemptions.

Traditionally, commercial companies have steered clear of serious federal contracting precisely because of the onerous protections this law would sweep away. Most commercial companies simply lack the patience or infrastructure to deal with the Government's often maddening array of procurement requirements.

In a massive reconstruction, however, which in essence "federalizes" much of the economic production across a large geographic area, perhaps these proposed legal exemptions are inevitable. If most of the firms in that reconstruction zone are, in fact, going to be swept up into federal procurement, maybe we have to carve out huge exemptions from our procurement system's requirements.

Before we take that drastic step, however, let's review the news from the Katrina relief effort, to see whether it is, indeed, necessary to force open such huge gaps in the protections our procurement system affords.

* * *

Professor Schwartz—When I first read H.R. 3766, the question that came to mind was simply: *Why?* For there is no adequate practical justification for a sharp move away from competition or transparency either in the emergency situation on the Gulf Coast and in New Orleans, or in the pressing need for a massive reconstruction. Radical departures from basic principles of our federal procurement law simply are not needed to make viable a massive federal reconstruction effort. Instead, they should be viewed as the product of a thoroughgoing opposition to, or at least a radical questioning of, the cardinal tenets of the federal procurement system as we have known it. Those principles are simply that competition and transparency are the best guarantors for achieving best value, efficiency, integrity and fairness among contractors in the operation of our procurement system and in the expenditure of taxpayer dollars. Before returning to that point, let me offer my overview of the big picture as I see it.

The proposals embodied in H.R. 3766 represent another important, and regrettable, step in the radical deregulation of federal procurement that has been occurring piecemeal and in fits and starts over the last decade and a half. Ultimately, I can find no justification for such a far-reaching deregulation. This is true even though it is equally clear to me that many of the significant steps taken to reform our procurement system in the past few decades were long overdue and well-justified. To understand my perspective, which might at first seem contradictory, it is vital to note, initially, that the project of radical deregulation of Federal Government procurement is completely different in purpose and effect from the efforts to lighten the burden of Government regulation of private industry mostly seen in the Republican administrations of the last quarter century:

First, what is being deregulated *here* is Government itself, not private industry.

Second, the very body of regulation being discarded is designed primarily to protect the interests of taxpayers and the private sector (including contractors), not to limit the autonomy of private decision makers.

Third, the corpus of Government procurement regulation being discarded was itself founded on the objective of securing to Government and to taxpayers, on the most efficient and economical terms achievable, the best goods and services available *from the private sector* to meet the needs of the public. In our traditional system of procurement law, these goods and services are secured from the private sector instead of being produced by Government employees precisely because of our strong belief in the superiority of the private sector for such purposes. We hold that the Government can achieve better results at lower cost for the public by making appropriate recourse to the private marketplace. Moreover, and most importantly, the traditional system of federal procurement law in the U.S. regulates the Government's procurement practices, insisting on competition and transparency because of an empirically based belief—reinforced by our nation's strong free market ideology—that competition and transparency offer the best assurance that we will, indeed, achieve these critically important objectives:

- best value for the Government and the taxpayer;

- maximal efficiency in the expenditure of scarce taxpayer resources;
- honesty and integrity in the administration of our procurement system; and;
- a level playing field for, and fairness in the treatment of, competing contractors.

Given all this, why would one be predisposed to deregulating the process of Government procurement? And why, in the name of crisis management would one want to suspend the normal procedures that have generally brought us these important good things? (Indeed, our classical procurement system has been so successful that third-world nations and former Soviet-style economies clamor to learn how to copy it.) The effect of the sweeping deregulation of Federal Government procurement is fundamentally different from, and antithetical to, that of the last quarter century's relaxation of the arguably excessive and burdensome regulation of the private sector. Far-reaching deregulation of Government procurement is, in the final analysis, hostile to the market and the good things it can provide us. It is, therefore, entirely unlike recent and contemporary efforts to deregulate aspects of the private sector.

To be sure, a strong and persuasive case has been made in the last 15 years for moderate deregulation and significant reform of some aspects of our Federal Government procurement system. Indeed, it is important to affirm here that where the Federal Government can make recourse to vigorously competitive private markets for genuinely commercial goods and services to fulfill its needs, the structured competitive process normally required by federal procurement law may be unnecessary. Indeed, in these circumstances, the procedural costs (including delays) entailed by the traditional full and open competition procedures for federal procurement appear to outweigh the incremental benefits of insisting on using that process of structured competition. It is equally important to acknowledge here that the market conditions that justify a move away from the strictures and burdens of full and open competition procedures are far from rare. (On the other hand, they are also far from universal!) Of course, there are costs in any move away from a firm insistence on use of fully competitive and fully transparent procurement procedures. But those costs can be justified in situations where the use of more commercial practices to secure goods and services in vigorously competi-

tive private markets can achieve the benefits of competition with much less procedural cost. These are the ideas that fueled the welcome (but imperfect) procurement system reforms of the 1990s.

Two insights are thus essential to reaching a sophisticated understanding of the strengths and weaknesses of our present hybrid procurement system, particularly as it has developed since the implementation of the procurement reforms of the 1990s:

- There is a tradeoff between the cost of rigorously competitive procurement full and open competition practices and the benefits they attain for the public, and
- *In appropriate circumstances*, use of more commercial procurement practices can produce a more favorable balance of costs and benefits than full and open competition procedures.

The extremely complex hybrid system of Federal Government procurement that we now have in effect in the U.S. embodies a spectrum of many procedural models ranging from the highly deregulated to the highly regulated. At the deregulated end of the spectrum we find purchases made with Government-wide purchase cards for amounts that fall under the micro-purchase threshold and also the (multiplying) statutory authorizations for agency use of other transactions authority. And at the other end of the spectrum we find the classical default regime, the requirements for full and open competition and transparency under the Federal Acquisition Regulation provisions implementing the Competition in Contracting Act of 1984, and the Federal Property and Administrative Services and Armed Services Procurement Act.

Somewhere in the middle of this spectrum of procurement procedures lie the simplified procedures for certain commercial products and services acquisitions and provisions for task order, schedule and interagency contracting, and similar devices. At least if they are properly implemented to achieve their upside potential and to minimize abuse, this last group of procedures represents a set of welcome procedural innovations that seek to strike a balance between the cost and the benefits of more and less rigid procedures for federal procurement. This is not the place to detail the abundant evidence that implementation of these procedures has yet to achieve this optimal balance. For readers of this publication, it

may be sufficient for now simply to recall the tanker lease deal between the Air Force and Boeing. See 46 GC ¶ 222(a), 46 GC ¶ 393 and 47 GC ¶ 269. These intermediate procedures should be considered works in progress in need of ongoing tweaking to help them reach their potential benefits.

There are pros and cons to the existence of the complex system of multiple procurement modalities that we have developed willy-nilly since the 1980s and particularly in the last 15 years. While the procurement process under any given model (short of the fully regulated transactions) may be quicker and cheaper to administer, and may also produce good substantive results when properly employed, the system as a whole has grown in complexity. And the federal acquisition workforce has failed to keep pace, either quantitatively or qualitatively, with the demands that the system as a whole places on Government procurement personnel. Choosing the right set of procedures and using them properly has become a daunting task in many situations. FEMA's recent efforts to outsource aspects of its procurement responsibilities in order to respond to the Hurricane Katrina situation are just the latest piece of compelling evidence that procurement reform has exacerbated the significant problems of the federal acquisition workforce. See Griff Whitte and Robert O'Harrow, Jr., "Short-Staffed FEMA Farms Out Procurement," *The Washington Post*, Sept. 17, 2005, at D1- D2. Those problems besetting the federal acquisition workforce may indeed be, today, the most substantial obstacle to achieving the potential of the procurement reforms of the 1990s.

But even if we were to fix these workforce problems, pervasive today, and secure procurement personnel qualified to steer procurements through the complexities of the system correctly and expeditiously, the system remains problematic because prescribing the right boundaries between different levels and types of procurement is a difficult task requiring wisdom and sensitive judgment for *legislative and administrative policy makers*. The tradeoffs, noted above, between the costs and benefits of more or less competitive procedure, have to be struck correctly for each class of procurement.

Whether we have achieved the optimal regime in delineating the boundaries within which each type of procurement process is to operate is far

from certain. But what is certain is that we at least attempted, in the 1990s and the first years of this decade, to take our best shot at delineating where these boundaries should be to maintain an optimal set of tradeoffs between the costs and benefits of more rigorously competitive procedures for procurement. Unless those judgments were woefully mistaken, radical and precipitous rearrangements of these boundaries proposed today are almost certain to produce costs that outweigh their benefits.

Careful study might, on the other hand, reveal that we have, by legislation and regulation, established boundaries and tradeoffs that are suboptimal. Tweaking of these boundaries to optimize the tradeoffs struck in the procurement reforms of the 1990s appears to me to be the mission assigned to the Acquisition Advisory Panel, on which I presently am honored to serve, that was established by § 1423 of the Services Acquisition Reform Act provisions of the Defense Authorization Act of 2004. That panel is engaged in studying the present operation of the system in order to make thoughtful and balanced recommendations as to how to optimize these tradeoffs.

By contrast, hasty recasting of this complex system of procedures at the present juncture, without waiting for the results of the ongoing study and without a sophisticated appreciation of the considerable virtues and important values of the system that we now have in place, appears to me to be imprudent and unwise.

The same can be said of the decision by Congress, two weeks ago, seizing on the Katrina emergency, to bump up the micro-purchase threshold sharply, 100-fold, when long-awaited Office of Management and Budget guidance on the proper management of the Government purchase card had just been issued and before it had even gone into effect. Plainly, the awkward timing and ill-considered nature of *that* congressional decision produced in near-record time a damage-limiting White House response: the OMB Guidance Memorandum of Sept. 13, 2005, "Implementing Management Controls to Support Increased Micro-purchase Threshold for Hurricane Katrina Rescue and Relief Operations." See related story, 47 GC ¶ 401, this issue. That memo takes back, with one hand, much of what Congress improvidently had given, with the other, less than a week earlier.

Particularly disturbing in H.R. 3766 are proposals that would eliminate competition requirements for a vast amount of procurement that would come into play when an emergency is invoked as a reason for dispensing with full and open competition. These provisions would gut the procedural safeguards that Congress deliberately erected in 1984 in CICA, including those designed to address emergency procurement. I want to make it absolutely clear that I favor a striking degree of flexibility in procurement practice for disaster relief operations. But there is no evidence that the existing system fails to offer just that. To be sure, there is a distressing amount of evidence already publicly available that procurement failures and omissions by FEMA undermined disaster relief and rescue operations, and made impossible prompt provision to evacuees of essential goods and services. But these extraordinary failures seem to have entailed (1) a woefully inadequate acquisition workforce and (2) a complete failure to make effective use of task order and interagency contracting to line up, in advance of a disaster, on a competitive basis, and at a competitive price, contingency contracts for prompt provision of goods and services such as drinking water, food, shelter, clothing, ambulances, emergency fuel supplies, generators, body bags, and evacuation transportation services and vehicles. If we have learned anything from the procurement history of our present efforts in Iraq, it should be that a lack of timely acquisition planning is not conducive to achieving best value for the Government. The procurement history of Iraq also makes clear that a lack of flexible devices for emergency acquisition is not a problem that our system has today.

Accordingly, there is no real need for radical procurement deregulation to cope with the Katrina emergency. The proposal to define a large and important class of transactions as commercial that are not presently treated as such, thereby eliminating transparency and integrity requirements and safeguards that apply in the system of full and open competition, is also extremely troublesome. Of course, there *are* substantial questions as to whether we have drawn the lines between acquisitions of commercial goods and services and our default acquisition procedures in an optimal manner. The present arrangements certainly should *not* be regarded as sacrosanct. These precise questions

about optimizing our use of commercial goods and services are among those being studied today by the § 1423 Acquisition Advisory Panel, presently due to report in several months, in early 2006. On the other hand, radically shifting the line between commercial and non-commercial acquisitions at the present time, as the pending legislative proposal would do for a significant class of Katrina-aftermath acquisition, simply has not been justified.

Particularly disturbing is the proposal to simply redefine a class of purchases, not today defined or treated as commercial, as just that. I am reminded of President Lincoln's well-known exchange with a visitor to the White House. Posing a riddle to his visitor, Lincoln is reported to have asked: "If you call a tail a leg, how many legs does a dog have?" The visitor understandably replied that his answer was "five legs." Lincoln reputedly replied that the visitor was "Wrong!" Explaining, Lincoln noted that "calling a tail a leg doesn't make it one."

Likewise, simply labeling as "commercial" a class of procurement that lies beyond the boundaries of the class of procurement so defined today does not establish that the benefits of invoking the commercial purchase model will, haphazardly, outweigh the costs of doing so (including the foregone benefits of using a fully competitive model). Congress should look carefully before it leaps.

Finally, at the end of his comments, my colleague, Chris Yukins, raises the possibility that a radical deregulation of procurement might be necessary to entice the private sector to participate in the post-Katrina market for relief and reconstruction goods and services. Chris does not necessarily conclude that this is so, but only identifies this as a point worthy of more careful study. Indeed, it seems clear that Chris is skeptical of the empirical foundation of any such claim, as am I. In any event, I certainly agree that careful consideration of any such claim is warranted before Congress acts in reliance on this speculative and novel hypothesis.

At first glance, the hypothesis that radical deregulation is needed to entice contractors to participate in post-Katrina reconstruction contracting is inherently implausible. It is precisely when the Government creates a large and valuable set of business opportunities for would-be Government contractors that would not otherwise exist (with the same magnitude and timing) that the procedural burdens that the federal procurement system can

impose on contractors will not operate as a significant barrier to entry to this lucrative marketplace. The conditions, the economic opportunities and the contractor interest that should make for a vigorous and competitive supply side are all likely to be present on a historically unprecedented scale in the market for reconstruction and rebuilding services for New Orleans and the Gulf Coast. The barrier-to-entry hypothesis thus seems almost uniquely unpersuasive in this context. Congress should accordingly think carefully before it jumps on the bandwagon of the pending legislative proposals. At the very least, this would dictate waiting for the forthcoming recommendations of the current Acquisition Advisory Panel, in the absence of any compelling emergency that actually justifies abandoning either competition or transparency safeguards for the vast spending on post-Katrina acquisition that is forthcoming. Existing procurement law, coupled with the already overbroad provisions of the first round of post-Katrina procurement “emergency reforms” related to the micro-purchase threshold, makes more than adequate provision for emergency procurement, including, where justified, both non-competitive procurement and procurement under simplified procedures.



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