

# Caveat Emptor: Reversing the Anti-Competitive and Over-Pricing Policies that Plague Government Contracting

Richard C. Loeb

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# ABOUT THE AUTHOR

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## RICHARD LOEB

Richard C. Loeb is Senior Counsel for Policy in the Office of the National President, American Federation of Government Employees (AFGE), and an adjunct professor of government contract law at the University of Baltimore School of Law.

Prior to joining AFGE in 2016, Mr. Loeb spent over thirty-six years as an attorney and executive at several different federal agencies. A member of the federal Senior Executive Service (SES), Mr. Loeb served in the Office of Federal Procurement Policy (OFPP), Office of Management and Budget (OMB) from 1987 – 2005, including service as Acting Deputy Administrator of OFPP. During his tenure at OFPP, Mr. Loeb served as Executive Secretary and Counsel of the Cost Accounting Standards Board from 1991 – 2005. Subsequent to his service at OMB, Mr. Loeb served for ten years as the Executive Director, and later as General Counsel, of two other federal agencies.

Mr. Loeb specializes in government contract, appropriations, fiscal and personnel law. In addition, Mr. Loeb's legal experience encompasses virtually every aspect of federal agency administrative law, from ethics requirements to the Freedom of Information Act (FOIA) to agency rulemaking processes.

Mr. Loeb has also taught government contract law at the Catholic University of America. In addition, he has participated in hundreds of seminars and training sessions involving government contracts and administrative law, and has published numerous articles and book chapters on government contract law topics.

Mr. Loeb has chaired several American Bar Association (ABA) Section of Public Contract Law Committees, including the Committee on Accounting Cost and Pricing. He has been a member of the advisory board of Thomson Reuters flagship government contract publication, *The Government Contractor* since 1993.

Mr. Loeb is an elected Fellow of American Bar Foundation (2007).

Mr. Loeb received his BA, with honors, from the University of Maryland, and his JD from Case Western Reserve University School of Law. He is admitted to the Courts of Appeals of Maryland and the District of Columbia.

# INTRODUCTION

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Americans polled in 2014 believed that 51 cents out of every dollar spent by the Federal government was wasted.<sup>1</sup> Rooting out waste, fraud, and abuse in federal spending is an age-old political goal, with reformers of all stripes attempting to take it on. For conservatives, sloth is an inherent aspect of a large bureaucratic government. The libertarian Cato Institute, for instance, encourages not only spending cuts but also “privatizing federal activities where we can.”<sup>2</sup> The other side, the center-left, tends to see waste in terms of unnecessary defense or national security spending. In other words, they see spending on certain programs as wasteful, rather than how the government administratively interacts with recipients of those funds. Ezra Klein recently wrote of a large government as a necessary check on big business, drawing from John Kenneth Galbraith’s theory of “countervailing power.”<sup>3</sup>

But what if the problem with waste is not due to the inherent size of government or business, but to how the government buys from business? Perhaps the waste Americans decry is not the result of a large or small government versus the corporate arena, but that the government pays far too much to the private sector for goods and services, and often doesn’t get what it pays for. If that’s the case, we would need to look at the rules for government contracting, which structure the relationship between government purchasing and business. Last year, in a hearing on price gouging and contracting law, that’s exactly what Congress did.

In May 2019, the House of Representatives’ Committee on Oversight and Reform delved into the pricing practices of TransDigm, a sole-source supplier of military equipment spare parts to the Pentagon.<sup>4</sup> The hearing came out of a Department of Defense (DoD) Inspector General report that TransDigm was “overcharging” DoD by as much as 4,000 percent. TransDigm earned excessive profits on nearly every spare part DoD audited, selling a \$1,700 cable assembly for \$7,800, a \$300 connector for \$1,100, and a \$650 motor rotor for \$5,500.<sup>5</sup>

The hearing was intense, with tongue-lashings by nearly everyone on both sides of the aisle. TransDigm eventually agreed to *voluntarily* refund \$16 million to the federal government. But more remarkably, the company maintained that it had done nothing wrong. “As detailed in the DoD IG’s audit, TransDigm did nothing in contravention of the federal acquisition laws

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1 “Americans Say Federal Gov’t Wastes 51 Cents on the Dollar,” Rebecca Riffkin, *Gallup*, Sept. 17, 2014, <https://news.gallup.com/poll/176102/americans-say-federal-gov-wastes-cents-dollar.aspx>.

2 “Why Is the Federal Government So Wasteful?,” Chris Edwards, *CATO Institute*, Jan. 9, 2014, <https://www.cato.org/publications/commentary/why-is-federal-government-so-wasteful>.

3 “Countervailing powers: the forgotten economic idea Democrats need to rediscover,” Ezra Klein, *Vox*, May 17, 2019, <https://www.vox.com/policy-and-politics/2019/5/17/18626801/2020-democrats-sanders-warren-buttigieg-power-socialism>.

4 Committee on Oversight and Reform, Hearing on DoD Inspector General Report on Excess Profits by TransDigm Group, Inc., May 15, 2019, <https://oversight.house.gov/legislation/hearings/dod-inspector-general-report-on-excess-profits-by-transdigm-group-inc>.

5 Report No. DODIG-2019-060, February 25, 2019.

and regulations with respect to its pricing,” a spokesperson for the company said following the hearing.<sup>6</sup> The spokesperson was entirely correct. TransDigm had not violated any laws, regulations, or other government contracting policies. And TransDigm continues to overcharge the government, an ability reflected in the company’s stock price today.

TransDigm’s pricing policies are not unusual. Every major defense contractor follows the same pricing laws, regulations, and government policies as TransDigm to boost their own profits at taxpayers’ expense. They are able to do so because, in the 1990s, Congress and the Clinton administration executed dramatic but little-noticed changes to federal contracting laws. These changes were the defense industry’s equivalent to the repeal of the Glass-Steagall Act, fueling the concentration of economic power in the hands of a diminishing number of firms. Now, with government contracting representing nearly half of all federal discretionary spending, it is time for Congress to repeal the 1990s laws that led to legalized overcharging—restoring competition, promoting transparency, and breaking federal contractors’ hold over our government.

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## THE NEOLIBERAL ECONOMICS OF GOVERNMENT CONTRACTING

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Like so many other areas of the economy, government contracting has been entirely transformed over the past 25 years, and almost exclusively to the benefit of corporate interests.<sup>7</sup>

Though government contracting is now a \$600 billion-a-year industry, for decades the federal government imposed protections that limited the industry’s power and wealth.<sup>8</sup> It did so primarily by mandating competition, and, where price competition was lacking, by requiring contractors to provide data on their costs to ensure fair and reasonable pricing under the Truth in Negotiations Act (TINA).<sup>9</sup> These protections were imposed specifically to limit the growing influence of the “military-industrial complex,” which, as President Dwight Eisenhower warned in his farewell speech to the nation, has the “potential for the disastrous rise of misplaced power.”<sup>10</sup>

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6 “Military parts supplier TransDigm draws scrutiny over prices,” Aaron Gregg, *Washington Post*, Jun. 8, 2019, <https://www.washingtonpost.com/business/2019/06/08/military-parts-supplier-transdigm-draws-scrutiny-over-prices/>.

7 Lockheed-Martin, the largest government contractor, was trading at approximately \$26/share in 1995. Today it trades at over \$410/share.

8 “Federal Contract Spending: Five Trends in Five Charts,” Daniel Snyder, *Bloomberg Government*, Jan. 6, 2020, <https://about.bgov.com/news/federal-contract-spending-five-trends-in-five-charts/>.

9 10 U.S. Code § 2306a. 41 U.S.C. chapter 35. (The title of the law was changed to “The Truthful Cost or Pricing Data” statute during a 2014 recodification of procurement laws, allegedly undertaken for the purposes of “simplification.” However, for ease of reference, this paper shall hereinafter refer to the statute by its historical name and acronym.)

10 Transcript of President Dwight D. Eisenhower’s Farewell Address, 1961, <https://www.ourdocuments.gov/doc.php?flash=false&doc=90&page=transcript>.

Though neither competition nor transparency requirements were a panacea for government contract pricing, they were a reasonable response to an industry that often used raw political power to obtain contracts. This was especially true in the defense industry, where comparison price-shopping for military aircraft, ships, missiles, and submarines is often impossible. And, for 30 years following Eisenhower’s address—under both Democratic and Republican administrations and even during the Reagan administration’s Cold War military buildup—the system delivered weapons that functioned, in some cases extraordinarily well. The nuclear submarine, the F-16, the A-10 were remarkably innovative, and the Defense budget supported a host of industries that themselves became pivotal to the economy, like microchips and electronics. When the United States unleashed its arsenal in the 1991 Gulf War, it defeated the fourth-largest army in the world with minimal casualties.

Yet, just after this crushing victory, chalked up to a technological lead in functional weapons, newly-elected President Bill Clinton decided to take apart the contracting system, asserting the era of “big government” was over and initiating a major effort to downsize and “reinvent” government. Clinton’s rationale made sense: the Cold War had ended and the country wanted to cash in its “peace dividend” after a sluggish recession. But there was more to these changes than strategic sense, for Clinton also brought with him a new Wall Street friendly ideology. Reinventing the defense industrial base came in two waves. First was the consolidation of the industrial base itself. Then, the administration changed contracting law in what was known as “acquisition reform”—changing the way the government purchases good and services from the private sector.<sup>11</sup>

The Clinton administration recognized contractors would lose business when the defense industry was downsized and sought to reduce the military while maintaining the industry’s health. So, the administration did what it could to make sure that while defense purchasing declined, defense contractor profits would not. Most famously, then-Deputy Secretary of Defense William Perry held a “Last Supper” meeting with the CEOs of major defense contractors in 1993 to tell them they would not all survive downsizing and to offer federal financial assistance to help them merge and acquire one another.<sup>12</sup> This caused a huge wave of mergers, with the number of significant defense contractors plunging from 107 to five in less than six years.<sup>13</sup>

**The government pays far too much to the private sector for goods and services, and often doesn’t get what it pays for.**

<sup>11</sup> “A Brief History of Vice President Al Gore’s National Partnership for Reinventing Government During the Administration of President Bill Clinton 1993-2001,” John Kamensky, Jan. 12, 2001, <https://govinfo.library.unt.edu/npr/whowere/historyofnpr.html>.

<sup>12</sup> “How a Dinner Led to a Feeding Frenzy,” John Mintz, *Washington Post*, Jul. 4, 1997, <https://www.washingtonpost.com/archive/business/1997/07/04/how-a-dinner-led-to-a-feeding-frenzy/13961ba2-5908-4992-8335-c3c087cdebc6/>. When contractors approached Dick Darman, then head of the Office of Management and Budget during the first Bush administration, to seek similar financial incentives for mergers, he effectively threw them out of his office.

<sup>13</sup> “The Structure and Dynamics of the Defense Industry,” Pierre A. Chao, *Center for Strategic and International Studies*, Mar. 2, 2005, [http://web.mit.edu/SSP/seminars/wed\\_archives05spring/chao.htm](http://web.mit.edu/SSP/seminars/wed_archives05spring/chao.htm).

The result: less innovation, higher prices, and an industry led by firms such as Boeing that now appear “too big to fail.”

In addition to reducing the number of players, the administration sought to boost margins by changing the rules by which government could structure purchasing decisions. Contracting rules seem arcane, but “acquisition reform” had been a goal of the major government contractors for decades. They had long chafed at a number of laws designed to promote contractor accountability. While Republicans often deferred to the wishes of industry, Democrats had stood firm, often accepting higher defense spending but only on the condition of strong contracting rules.

But with Clinton, contractors saw an opportunity to persuade the new administration to revise or repeal these laws as a “Nixon goes to China” moment.<sup>14</sup> Much of this initiative was triggered by business-friendly Democrats who comprised the Democratic Leadership Council (DLC). Vice President Al Gore’s “reinventing government” initiative—an effort to downsize and streamline government processes and shrink the bureaucracy—included “acquisition reform” as a centerpiece. The reinventing government initiative was run by Elaine Kamarck, a prominent figure in the DLC.<sup>15</sup> Working with like-minded Republicans, DLC adherents in the Clinton administration promoted changes to contracting laws and regulations that provided benefits to federal contractors, weakening competition requirements for the award of contracts, gutting TINA’s fair and reasonable contract-pricing requirements, and removing traditional oversight measures from the federal contracting process.<sup>16</sup> Ultimately, the new laws allowed federal agencies to award de facto sole-source contracts on a routine basis with little or no protections against overpricing by contractors.

Taken together, these changes created a bonanza for federal contractors in general—and for defense contractors in particular.<sup>17</sup> In its quest to show corporate America that Democrats were business-friendly, Congress and the Clinton administration adopted purchasing practices that moved bargaining leverage to the contractor.<sup>18</sup> The government had to accept fewer choices and higher prices and allow the seller to charge almost whatever it wanted. The result of these changes in obscure and arcane contracting laws was to virtually gut competition and common-sense pricing protections—to turn the buyer into adopting a seller’s strategy. It was like buying a used car, with the salesperson as your financial advisor.

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14 “Nixon goes to China,” Wikipedia, The Free Encyclopedia, Jun. 6, 2020, [https://en.wikipedia.org/wiki/Nixon\\_goes\\_to\\_China](https://en.wikipedia.org/wiki/Nixon_goes_to_China).

15 Elaine Kamarck, Brookings Institution, <https://www.brookings.edu/experts/elaine-kamarck/>.

16 The Clinton administration’s point person on “acquisition reform” was Steven Kelman, a professor at the Kennedy School of Government at Harvard, who served as Administrator for Federal Procurement Policy in the Office of Management and Budget from 1993–1997. Prior to his nomination to the post, Kelman had published “Procurement and Public Management: The Fear of Discretion and the Quality of Government,” American Enterprise Institute Press: Washington, DC, 1990, which has as its central thesis the idea that practices designed to prevent collusion between contractors and government officials are often counterproductive.

17 “Defense Stocks Are Going Great Guns,” Amy Borrus, *Bloomberg Business*, September 20, 1993.

18 <https://govinfo.library.unt.edu/npr/library/nprprt/annrpt/sysrpt93/reinven.html>. Although the reinventing government initiative did not explicitly state that contractors were to be favored in the procurement process, its thesis that government processes often ‘stood in the way’ strongly implied that government contract negotiators were to take a lighter touch in their dealings with the companies that contract with the government.

Of course, proponents of “acquisition reform” could not openly claim that they were trying to enhance contractor profits. Instead, they asserted they were removing red tape, increasing efficiency, and ensuring the U.S. would remain on the cutting edge of technological changes. The major defense contractors even argued that many firms refused to do business with the government, and the repeal of contracting laws they had bristled at for decades would lead to a plethora of “commercial firms” suddenly seeking government business. (Left unexplained was why “traditional contractors” would desire to provide their potential competitors with advantages in seeking government work.)

## **THE EVERYTHING IS A “COMMERCIAL ITEM” SCAM**

Government contract law is full of Alice in Wonderland terms, where up is down and competition means monopoly. One of the extraordinarily misleading terms, and a key to upending federal procurement, was changing what the phrase “commercial item” means in contracting. Buying a nuclear submarine is different than buying a pencil, and contracting law always reflected that. The government would accept market-based pricing when buying goods or services available in the commercial marketplace. These purchases were routine and involved little more than a simple purchase order or contract to complete: agencies, like any private or commercial enterprise, were buying items that any buyer could purchase in the marketplace, like computers, desks, machinery, or office supplies. Thus, the government would accept contractor-offered prices, more or less at face value, provided the prices were reflective of the marketplace.

Until the Clinton administration, the government defined goods and services as “commercial” if the goods or services were sold in substantial quantities to the general public, what was called the “economic penetration test.” Only goods and services that were actually in general market circulation qualified as “commercial.” On the other hand, contractors would have to justify their prices for goods or services when purchases were made on a sole-source or other non-competitive basis. This is very frequently the case in government contracting—especially for large dollar contracts, and for defense contractors in particular. Indeed, very few high-dollar defense or even civil agency items or services qualified as “commercial” under the pre-“acquisition reform” definition. It was simply understood that commercial meant the things you could buy where there was an established commercial marketplace, with lots of buyers and sellers.

In their pursuit of higher margins for contractors, the Clinton administration and Congress re-wrote the definition of “commercial item.” The definition of “commercial” was completely turned on its head to include goods and services that are “of a type” relating to something that exists in the commercial world. As promoted by contractors and championed by the Clinton administration, the only requirement for “commercial” pricing treatment is to convince the government’s contracting officer that there is a similarity—in the absolutely broadest sense—to something that can possibly be purchased in the commercial world. In other words, the “new”

commercial item definition does not require an item to have actually been sold commercially, or in fact ever sold to anyone for that matter, to qualify for favorable “commercial item” pricing treatment. Contractors can basically get what the market will bear.<sup>19</sup>

Under this Orwellian definition of “commercial item,” military aircraft, combat vehicles, specialized and classified electronics, rockets, and nearly every other imaginable product or service may be considered to be “of a type” of commercial item (or service)—and thus can be purchased without contractors disclosing cost or pricing data to the government. This is true even when unique defense items are purchased on a sole source basis, as long as the purchase can be described as similar to something that can be found in the commercial world. This crazy definition allowed the Air Force to proceed to buy the C-130J cargo transport on a sole source basis as a “commercial item,” i.e., without cost or pricing data, despite the fact that no C-130J had ever been sold to any organization other than the government.<sup>20</sup> The rationale that the contractor provided and the government accepted was that the aircraft is a transport aircraft, and aircraft are “commercial items.” Predictably, the price per unit essentially doubled from \$35 to \$65 million, and the contractor refused to provide cost data to justify the increase—much like the TransDigm pricing scandal in 2019. In both cases, the government was left without the information it needed to negotiate a better price. And most cleverly, the changes to the definition of commercial item were worded in such a way as to be about as understandable to the media and the general public as the more nuanced aspects of the Tax Code.<sup>21</sup>

## THE END OF OPEN COMPETITION FOR FEDERAL CONTRACTS

The Clinton administration also eviscerated the requirement that the government encourage competition in federal contracting. In 1984, during the height of the Reagan Cold War defense build-up, Congress enacted the Competition in Contracting Act (CICA)<sup>22</sup>, strengthening an already-robust statutory competition scheme in federal contracting. CICA requires public competition for federal contract awards under most circumstances. CICA also contained a number of competition-enhancing provisions, including, for the first time, statutory rights for review of contract awards by the General Accounting Office (since renamed the Government Accountability Office), and in instances involving information-technology purchases, an administrative body—the General Services Board of Contract Appeals.<sup>23 24</sup>

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<sup>19</sup> For a particularly eye-opening discussion of this issue, see “Selling Movie Theater Popcorn: A Treatise on ‘Excess Profit,’” John Krieger, *Contract Management*, June 2020, p. 42, *defending* TransDigm’s government contract pricing practices.

<sup>20</sup> “We Pause for this Commercial . . . Sale,” Dana Liebelson, *Time*, May 22, 2012, <https://nation.time.com/2012/05/22/we-pause-for-this-commercial-sale/>.

<sup>21</sup> See 48 CFR, Chap. 1, Section 2.101.

<sup>22</sup> 41 U.S.C. 253.

<sup>23</sup> Since 1970, government contract awards had also been subject to reviews (“bid protests”) in U.S. District Courts. See *Scanwell Laboratories, Inc. v. Shaffer*, 424 F.2d 859 (D.C. Cir. 1970). The Clinton administration’s “acquisition reform” initiative sought to strip the District Courts of jurisdiction to hear bid protests. In 1996, Congress enacted the Administrative Disputes Resolution Act of 1996, which ended District Court jurisdiction on January 1, 2001.

<sup>24</sup> In 1996, the General Services Board of Contract Appeals (since renamed the Civilian Agency Board of Contract Appeals) was stripped of contract award review authority pursuant to the Federal Acquisition Reform Act/Information Technology Management Reform Act (later renamed the Clinger-Cohen Act).

Pursuant to CICA, and prior to the mid-1990s “reinventing government” movement, most government agency purchases exceeding \$25,000 had to be at least nominally publicly announced and competed. But under the acquisition reform movement of the Clinton administration, Congress was persuaded to enact the Federal Acquisition Streamlining Act of 1994 (FASA)<sup>25</sup> and the Federal Acquisition Reform Act of 1996 (FARA)<sup>26</sup>. These laws legalized and encouraged a novel way of limiting competition to get around CICA: the so-called multiple-award indefinite delivery-indefinite quantity (ID/IQ) contract.

While the solicitation and award of ID/IQ contracts must still be publicly announced, virtually no ID/IQ contracts actually commit the government to buying anything or spending any money. But they allow contracting officers to make “task or delivery” orders, which are treated as orders placed under an existing contract—the underlying ID/IQ contract.

In other words, ID/IQ contracts are a thinly-veiled way to funnel orders to preferred vendors, without ever going through a competitive-contracting process. Normal contracts have competition standards, but this new way of ordering products and services through ID/IQ contracts had effectively no standards requiring multiple bids. Proponents of the new paradigm openly mocked the use of competition to award contracts, dubbing the old government requirements “the constipation of competition.”<sup>27</sup>

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<sup>25</sup> Pub. L. 103-355.

<sup>26</sup> Pub. L. 104-106.

<sup>27</sup> Prepared remarks of Steven Kelman, Administrator for Federal Procurement Policy, Office of Management and Budget on H.R. 1670, the Federal Acquisition Reform Act of 1995, Joint Hearing Before the Committee on Government Reform and Oversight and the Committee on National Security, House of Representatives, One Hundred Fourth Congress, First Session, May 25, 1995, p. 116.

## ID/IQ Contracts

Promoted by the Acquisition Reform Working Group—and other industry-led trade coalitions—the goal of ID/IQ contracts is to “pre-qualify” firms by giving all the firms that want to perform government work an ID/IQ contract (thus the phrase “multiple-award ID/IQ contract,” as there are often many awardees). For example, it is not uncommon for a single agency solicitation to result in over 100 “contract awards,” but only a few of the “contractors” can actually expect to receive any work. Since ID/IQ contracts do not obligate the government to spend any money with an awardee contractor, they are in effect mere hunting licenses. However, prospective “contractors” are virtually compelled to participate in the sham lest they be excluded from consideration for a future order. When goods or services were actually needed and money was ready to change hands, an agency’s contracting officer would simply choose from among firms on the ID/IQ list. Suddenly, there was no need for a contracting officer to formally solicit bids or offers; analyze proposals received; negotiate terms, costs, or price; or justify her decision. The only requirement she need follow was to “fairly consider” firms on the agency’s list.

Predictably, the ID/IQ system favors larger contractors over smaller ones, particularly firms with a strong marketing presence.

Within a few years, ID/IQ contracts became standard operating procedure—resulting in de facto sole-source contracting across the board. Even worse, ID/IQ orders spurred a new type of industry “networking” with government agencies, wherein contractors use direct marketing to agency officials to win business (task or delivery orders) instead of engaging in a public solicitation process. In this system built to evade open competition, contractors with connections can get “orders.”<sup>28</sup>

Only after several high-profile scandals in the contractor-outsourced Iraq war—including the discovery that DoD was using ID/IQ “language translation contracts” to pay for “enhanced interrogation,” or torture, of detainees—did Congress attempt to strengthen competition under ID/IQ contracts. But the revised standards apply only to the largest orders, those above \$250,000. Even orders of up to \$5.5 million require only documentation of the steps the contracting officer considered before placement of the order, not actual competition for the order. Only awards of more than \$25 million at DoD and \$10 million at civilian agencies are subject to meaningful reviews. Today, roughly 50 percent of all federal contract spending occurs through the intentional competition-limiting procedures of ID/IQ contracts.<sup>29</sup>

28 For an incisive analysis of this phenomena in federal contracting, see “‘Competition’ Without Competing” in chapter 4 of Janine Wedel’s *Shadow Elite: How the World’s New Power Brokers Undermine Democracy, Government, And the Free Market*, New York: Basic Books, 2009.

29 Snyder, *supra* at note 8.

## THE PERVERSE EFFECTS OF REINVENTING GOVERNMENT AND “ACQUISITION REFORM”

The perverse effects of so-called “acquisition-reform” infect nearly every aspect of the government-contractor relationship. Where once government buyers had a mission of getting the best quality, prices, and terms for the public, now they are expected to “partner” with industry. Some federal contracting officers are literally rated on how much money they award to contractors. This new “paradigm” pushed by contractors and neoliberal policymakers prioritizes industry “best practices” over what’s best for the American people—and spurns any consideration of negotiation to lower contract costs.

Excessive cooperation with contractors has led the federal government to outsource functions previously performed in-house, while hollowing out fundamental oversight capabilities within the public sector so severely that the government now has to hire private sector contractors to oversee other private sector contractors.<sup>30</sup> Take a walk through just about any federal agency, and many of the people you see sitting at desks and in cubicles are not federal employees, but contractors. Prior to “acquisition reform,” about two percent of American civilians on the battlefield serving in the 1990-91 Gulf war were contractors.<sup>31</sup> Today, contractors represent half of all Americans on the battlefield in Iraq and Afghanistan;<sup>32</sup> when locally-hired personnel are taken in account, the ratio of contractors to American service members rises to two-to-one.<sup>33</sup> Contractors call this a “blended workforce.” This is a recipe for conflicts of interest—and a recipe for fleecing the public.

The government contracting policies established under Clinton are still in overdrive, and both Republican and Democratic lawmakers are loath to even tinker with the monster they created. The results of this inaction are dangerous and undercut the U.S. defense posture. One particularly perilous aspect of the faux “commercial item” definition is that contractors can largely own the technical-data rights to equipment they sell to the government, *even when the government has paid for the research and development*. Lucas Kunce and Elle Ekman, two active duty military officers, have written extensively about this dangerous and expensive give-away in the *New York Times*.<sup>34</sup>

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30 For an interesting discussion of this phenomena, see “Why Taxpayers Pay McKinsey \$3M a Year for a Recent College Graduate Contractor,” Matt Stoller, *BIG*, December 5, 2019, <https://mattstoller.substack.com/p/why-taxpayers-pay-mckinsey-3m-a-year>.

31 Total federal and contractor civilian personnel on the battlefield were very small during the Gulf War as compared to military.

32 Including military personnel.

33 Editorial, “Dear Tech Workers, U.S. Service Members Need Your Help,” Lucas Kunce, *New York Times*, Aug. 28, 2019, <https://www.nytimes.com/2019/08/28/opinion/military-war-tech-us.html>.

34 Editorial, “Here’s One Reason the U.S. Military Can’t Fix Its Own Equipment,” Elle Ekman, *New York Times*, Nov. 20, 2019, <https://www.nytimes.com/2019/11/20/opinion/military-right-to-repair.html>.

Finally, contractors have attached themselves to the anti-regulatory agenda of the Trump administration, arguing that government contracting rules that protect agencies from overpricing are burdensome and job-killing. Whatever one's views on the regulatory state, comparison of contracting and purchasing rules to, say, environmental and health regulations, is utterly misplaced. The government applies the latter rules in its capacity as a third-party regulator, not as a party to a transaction. Government contracting rules are essentially purchasing policies, backed in many cases with contract clauses applicable to the parties. No one subjects a government contractor to these policies except as a direct and voluntary party to a contractual relationship. In fact, government contracting rules are not even subject to the Administrative Procedure Act, applicable to most government regulations, precisely because of the voluntary nature of entering into government contracts.<sup>35</sup> No one forces these rules on contractors, they are simply commonsense protections that buyers apply when dealing with sophisticated sellers.

## **RECOMMENDATIONS FOR RESTORING A FEDERAL CONTRACTING SYSTEM THAT PROTECTS TAXPAYERS**

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At its most fundamental level, government contracting is about nothing more than the buyer-seller relationship: the buyer (the government) wants to buy low, and sellers (the contractors) want to sell high. But in its quest to show corporate America that Democrats were business-friendly, Congress and the Clinton administration adopted purchasing practices that sellers could only dream of—accepting fewer choices and higher prices and empowering the seller to charge almost whatever it wanted.

Congress should restore the buyer-seller relationship. Specifically, Congress should adopt four reforms to promote competition, strong pricing practices, and transparency in government contracting:

1. Congress should repeal most of the procurement provisions of the Federal Acquisition Streamlining and Federal Acquisition Reform Acts (FASA/FARA). The definition of a “commercial item” should be restored to its pre-1994 state: goods or services sold in substantial quantities to the general public. Besides ensuring pricing protection for agencies when purchasing on a sole-source basis, such a step would also severely curb the giveaway of taxpayer-funded technical data by the government.

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<sup>35</sup> 5 U.S.C. chap. 5, subch. 1 § 500 et seq.

2. The Truth in Negotiations Act (TINA) should also be restored to its pre-1994 language and require the submission of *certified* cost or pricing data for contracts exceeding \$500,000 where there is not adequate price competition.<sup>36</sup> Congress has increased the TINA threshold from \$100,000 per contract to \$2 million since the early 1990s, increasing it from \$750,000 to \$2 million in 2018 alone—amounts far exceeding any rate of inflation. Adequate price competition should require that at least two priced offers be received, rather than only one offer as currently allowed by law. The submission of other than *certified* cost or pricing data should be eliminated.
3. Putative “orders” placed against multiple-award ID/IQ contracts should be subject to the same requirements for public notice and evaluation required for new contract awards of equivalent dollar value. This would discourage use of ID/IQ contracts, which are little more than pre-qualification procedures designed to mask public bidding. It would also open up the federal contracting system to entrants who did not participate in the initial ID/IQ contract “show horse” award process and would provide that all contracting opportunities be publicly known to all potential vendors beforehand.
4. Congress should require that an inventory be established of contractor personnel performing work under all U.S. government service contracts exceeding the “simplified acquisition threshold” (currently \$250,000).<sup>37</sup> This inventory should include all information relating to the type and nature of work being performed by service contractor personnel, including compensation and the location where the work is principally conducted. The same data is already publicly available with respect to most U.S. government employees. The collection of this information would better inform policymakers as to the number and costs of service contractor employees, and the actual number of people performing taxpayer funded work, whether in federal facilities or elsewhere.

## POSTSCRIPT

As for the TransDigm scandal that triggered the Congressional oversight hearing in 2019: After the conclusion of the hearing, Congressman Tim Ryan and Tom Cole, on a bipartisan basis, proposed an amendment to the House version of the National Defense Authorization Act for Fiscal Year 2020 that would have revised the definition of a “commercial item” back to what it had been before the mid-1990s. The amendment was blocked on procedural grounds in the Democratically-controlled House. America’s adversaries could not have schemed up a better outcome than that.

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<sup>36</sup> In their never-ending quest to avoid fair pricing of government contracts, “acquisition reformers” further contorted TINA’s requirement for the submission of certified cost or pricing data by developing a new “form” of data submission entitled *uncertified* cost or pricing data, also known as “data other than certified cost or pricing data.” This new form of data may be requested of contractors for pricing of contracts below the new higher TINA dollar threshold, or when the TINA dollar threshold applies but the contracting officer believes that certification is not necessary. The significance of lack of certification cannot be overstated. Without certification, a contract clause that provides for price adjustments in the government’s favor for the submission of defective data (defined as data that is not current, complete or accurate) cannot be included in the resulting contract, and the government has no recourse if a contractor submits inaccurate (“defective”) data and overprices the contract. I analogize the situation to not requiring a person to sign their tax return, and as a result the IRS may not seek additional taxes for either understating income or overstating deductions. Almost cynically, the regulation defining uncertified data states at 48 CFR, chap. 1, § 2.101, “Such [uncertified] data may include the identical types of data as certified cost or pricing data ... but without the certification.”

<sup>37</sup> See 48 CFR, chap. 1, part 13.

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