

NCMA – History of Government Contracting

James F. Nagle
Oles Morrison Rinker & Baker LLP
www.oles.com
nagle@oles.com

The Current System

- Not designed to be efficient
- Mandates corrective practices and National interests
- 200 years of loophole closing

Every Scandal/Major Problem Has a Reform

- Criminal
- Civil
- Contractual
- Administrative
- Government Contract Jurisprudence

Criminal

- High level of proof
- Limited corporate penalty

Civil

- Lower standard
- Corporate responsibility
- High damages

The Evolution of Procurement Criminal Laws

- From Nothing
- To Sporadic Broad Statutes Rarely Enforced
- To Numerous and Ever Increasing Laws

Government Does Not Trust Contractors

- Washington – “Murderers of our cause”
- Lincoln – Contractors should “have their devilish heads shot off”
- Merchants of Death
 - The 1930s

Government Doesn't Trust Its Own Employees

- Honesty
- Ability to Avoid Appearance of Evil
- Ability to Do the Job Correctly

Military Industrial Complex – a respect/hate relationship

- Initially reverential
- Initial complaints
- Criticism over the skyrocketing cost

Search for Proper Risk Allocation

- Correct Contract Form
- Proper Clauses
- Proper Price
- Speed v. Quality v. Price v. Competition

What Is the Best Relationship With the Contractor?

- Completely Arms' Length
- Long Time Nurturing Relationship
- Or Any Relationship at all?

Competition

- Congress loves competition
- It's hindered by too much paperwork
- It's the first thing scrapped in an emergency

Finding the Right Balance

- If too lax, fraud abounds
- If too constrictive, process becomes
 - Slower
 - More expensive
 - Less competitive

“The matter I allude to, is the exorbitant price exacted by merchants and venders of goods, for every necessary they dispose of. I am sensible the trouble and risk in importing, give the adventurers a right to a generous price, and that such, from the motives of policy, should be paid; but yet, I cannot conceive, that they, in direct violation of every principle of generosity, of reason and of justice, should be allowed, if it is possible to restrain 'em, to avail themselves of the difficulties of the times, and to amass fortunes upon the public ruin.”

George Washington to the President of the Continental Congress,
August 16, 1777.

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- “Every man acquainted with publick business must allow that it cannot be carried on, for a variety of reasons, with that economy which prevails in private affairs.”

General Phillip Schuyler, August 1776

Start of the Arms Industry

- Eli Whitney's contract
- Other industrial pioneers and a quasi-public arms system
- Standardization and Interchangeability
- Importance of Factory Workers
- "Close enough for government work"

The Civil War

- Domestic production and procurement
- Foreign purchases
- Innovations in weapons
- The ironclads
- Congress acts to reform the system

- “A horse that can last a month may in certain cases be worth his weight in silver.”
Montgomery C. Meigs, Quartermaster
General, Union Army

False Claims Act of 1863

- Rampant Fraud
- Abraham Lincoln Act – Informer Act
- Criminal and Civil Penalties
- Court Martial?
- Qui Tam

Contracting 1945-1953

- The Armed Services Procurement Regulation
- Civilian Procurement After the War
- The Korean War

Government Role in the Marketplace Changes

- Small-Sporadically and Suddenly Large
- Huge, Consistent
- Monopsony
- Whether Companies Want to Deal with the United States

Market Place Changes

- Specialized Government Contractors
- Services Industry
- Consolidation

The Modern Era: Sea of Paperwork

- Commission on Government Procurement
- The age of lawyers and litigation

The Modern Age: 1980s-Present

- 1983-1989 Huge amounts, big scandals, fearsome remedies
 - The Competition in Contracting Act
 - The Packard Commission
 - Operation III Wind
 - Criminalization
 - Intensive Congressional management

\$400 Hammer Scandals

- Make or Buy Plans
- Integrity of Unit Prices Clause
- Unbalanced Bidding
- Changes in IP
- No Restrictions on Subcontractor Sales
- Government Failures
 - Excessive Requirements
 - Purchases Through Prime

1989-1993 – The Pendulum Swings

- Procurement budget shrinks
- Paperwork
- Service contracts predominate

Unplanned Result of Increased Paperwork and Criminalization

- Contractors Leave or Don't Enter Market
- Higher Prices

Reform – 1993-Present

- Section 800 Panel
- National Performance Review
- Quest for Commercial Contracting
- The Federal Acquisition Streamlining Act
- Clinger-Cohen Act