

2007

Guarding the Government's Coffers: The Need for Competition Requirements To Safeguard Federal Government Procurement

Lani A. Perlman

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Law Commons](#)

Recommended Citation

Lani A. Perlman, *Guarding the Government's Coffers: The Need for Competition Requirements To Safeguard Federal Government Procurement*, 75 Fordham L. Rev. 3187 (2007).

Available at: <https://ir.lawnet.fordham.edu/flr/vol75/iss6/17>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

Guarding the Government's Coffers: The Need for Competition Requirements To Safeguard Federal Government Procurement

Cover Page Footnote

J.D. Candidate, 2008, Fordham University School of Law; M.S., 2005, Columbia University; A.B., 2002, University of Chicago. I would like to extend my deepest gratitude to Professor Richard Squire for his invaluable advice; to my family and friends for their support; and especially to Daniel, for all of his encouragement, patience, and love.

GUARDING THE GOVERNMENT'S COFFERS: THE NEED FOR COMPETITION REQUIREMENTS TO SAFEGUARD FEDERAL GOVERNMENT PROCUREMENT

*Lani A. Perlman**

INTRODUCTION

The general rule of government contracting is “full and open” competition.¹ The rules controlling the federal government’s allocation of \$350 billion in contracts² emphasize competition as a safeguard against collusion between government buyers and private sellers. The Department of Homeland Security (DHS), however, was created with a special exemption from these standard rules.³ The rationale behind DHS’s exemptions was that the normal competitive bidding requirements would

* J.D. Candidate, 2008, Fordham University School of Law; M.S., 2005, Columbia University; A.B., 2002, University of Chicago. I would like to extend my deepest gratitude to Professor Richard Squire for his invaluable advice; to my family and friends for their support; and especially to Daniel, for all of his encouragement, patience, and love.

1. Competition in Contracting Act, 41 U.S.C. § 253(a) (Supp. 2006). The Competition in Contracting Act requires “[p]rocurement through full and open competition.” *Id.*

2. Office of Federal Procurement Policy, Office of Management and Budget, <http://www.whitehouse.gov/omb/procurement/mission.html> (last visited Apr. 5, 2007); see also Fin. Mgmt. Serv., U.S. Dep’t of the Treasury, 2006 Financial Report of the U.S. Government 10, available at <http://fms.treas.gov/fr/06frusg/06frusg.pdf>. In fiscal year 2005, the federal government awarded a total of \$384.2 billion in contracts, but only \$180.5 billion, or nearly 47%, under full and open competition. See FedSpending.org, Federal Contract Awards, <http://www.fedspending.org/fpds/tables.php?tabtype=t1&subtype=at&rowtype=a> (last visited Apr. 5, 2007). In fiscal year 2000, by comparison, of the \$208.8 billion in contracts, \$93 billion, or 44.54%, of contracts were awarded under full and open competition. *Id.*

3. Homeland Security Act (HSA), Pub. L. No. 107-296, § 833, 116 Stat. 2135, 2225-2227 (2002) (codified at 6 U.S.C. § 393 (2006)); 41 U.S.C. § 416 (2006) (setting forth general requirements for public contracts and providing special exemptions for Homeland Security contracts); see Letter from William T. Woods, Government Accountability Office (GAO) Dir. of Acquisition and Sourcing Mgmt., to Susan M. Collins, Joseph I. Lieberman, Tom Davis, Henry A. Waxman, Peter T. King & Bennie G. Thompson (June 20, 2006) [hereinafter Woods Letter], available at <http://www.gao.gov/new.items/d06783r.pdf> (describing Department of Homeland Security’s (DHS) special “streamlined” acquisition authorities under § 833 of HSA); David M. Nadler & Robert J. Moss, Government Contracting Under the Homeland Security Act 1-4, available at <http://www.dicksteinshapiro.com/files/Publication/2f2d976e-dbae-48ff-ba3e-55c32e71f6f6/Presentation/PublicationAttachment/5a9c92d5-4506-43ac-b332-58762bfb1b34/HSAct.pdf>.

interfere with the department's unique national security mission.⁴ In 2003, one year after its inception, DHS awarded \$655 million worth of contracts without full and open competition.⁵ By 2005, this figure had risen by 739% to \$5.5 billion.⁶ However, instead of resulting in faster, more efficient procurement of goods and services, DHS's noncompetitive contracting has created widespread waste, fraud, and abuse.⁷ The Office of Management and Budget (OMB) examined thirty-three DHS programs in February 2005 and found that only four were effective in achieving their desired results.⁸ A month later, in March 2005, DHS's own inspector general noted that there had been a "lack of improvement" in screening air passengers,⁹ the very security lapse that had allowed the 9/11 hijackers to board commercial airlines.¹⁰ And, as recently as February 2007, the Government Accountability Office (GAO)¹¹ found that DHS's "implementation and

4. The Department of Homeland Security describes its mission as follows:

The primary mission of the Department of Homeland Security (DHS) is to secure the homeland and protect it against conventional and unconventional attacks in the United States. DHS also leads response efforts to natural disasters, administers our Nation's immigration system, ensures the safety of America's waterways, and helps stop illegal drugs from crossing our borders.

Department of Homeland Security, <http://www.whitehouse.gov/omb/budget/fy2005/homeland.html> (last visited Apr. 5, 2007).

5. See House Comm. on Gov't Reform, 109th Cong., Waste, Abuse, and Mismanagement in Department of Homeland Security Contracts, at i, 3 (2006) [hereinafter Waste, Abuse, and Mismanagement in DHS].

6. See *id.*

7. See House Comm. on Gov't Reform-Minority Staff, 109th Cong., Waste, Fraud, and Abuse in Hurricane Katrina Contracts (2006) [hereinafter Waste, Fraud, and Abuse in Hurricane Katrina Contracts]; Waste, Abuse, and Mismanagement in DHS, *supra* note 5; see also Sarah Posner, *Security for Sale: The Department of Homeland Security Has a Section on Its Web Site Labeled "Open for Business." It Certainly Is.*, Am. Prospect, Jan. 5, 2006, at 28; Bob Williams, *Tiny School Gets No-Bid Work from Homeland Security*, Center for Public Integrity, Mar. 16, 2005, <http://www.publicintegrity.org/report.aspx?aid=669#> (reporting on the award of a no-bid contract to Mercyhurst College, a small school in ex-Homeland Security Secretary Tom Ridge's hometown, for the exclusive right to train intelligence agents for DHS, despite the presence of major universities with similar capabilities in Washington, D.C., where DHS is headquartered). See generally Eric Klinenberg & Thomas Frank, *Looting Homeland Security*, Rolling Stone, Dec. 29, 2005, at 44 (chronicling no-bid contracting for major reconstruction projects in the wake of Hurricanes Katrina and Rita by the Federal Emergency Management Agency (FEMA)).

8. See Scott Higham & Robert O'Harrow, Jr., *Contracting Rush for Security Led to Waste, Abuse*, Wash. Post, May 22, 2005, at A1 (detailing the government's internal audits questioning "the cost and effectiveness of the equipment and security systems bought from corporations that received a torrent of money under loosened regulations, limited oversight and tight congressional deadlines").

9. *Id.*

10. See *Report Says FAA Got 52 Warnings Before 9/11*, Wash. Post, Feb. 11, 2005, at A2.

11. The Government Accountability Office (GAO) is the independent, nonpartisan, investigative arm of Congress. The GAO acts as the federal government's internal auditor and provides the forum in which disappointed bidders can protest the award of contracts. See Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U. L. Rev. 627, 640-42 (2001) ("[T]he GAO functions and is perceived as an administrative dispute resolution forum. . . . GAO has established an intricate web of

transformation” remained “high-risk.”¹² Ever since, newspapers and magazines have been filled with articles about the awarding of noncompetitive contracts to politically connected companies,¹³ and congressional investigators have kept busy uncovering the effects of noncompetitive contract awards, finding scores of ineffective contracts plagued with cost overruns.¹⁴ One congressional report on Hurricane Katrina spending¹⁵ found that competitive contracting was the exception rather than the rule. Uncovering widespread contract mismanagement resulting in enormous costs to the taxpayer,¹⁶ the report found that only 30% of the 1237 contracts awarded as of June 30, 2006, were open to competition.¹⁷ The report further identified nineteen contracts worth a total of \$8.75 billion “that have been plagued by waste, fraud, abuse, or mismanagement.”¹⁸

This Note examines the results of DHS’s exemption from competitive contracting requirements and argues that open competition, as enshrined in

precedent addressing every conceivable nuance implicated in the process of acquisition planning, bid or proposal solicitation, vendor competition, source selection, and contract award.”). In this sense, the GAO has evolved to operate like a federal court.

12. *Homeland Security: Management and Programmatic Challenges Facing the Department of Homeland Security: Hearing Before the H. Subcomm. on Homeland Security, H. Appropriations Comm.*, 110th Cong. 1-4 (2007) (statement of David M. Walker, Comptroller General of the United States). GAO first designated DHS as high risk in 2003 and again in 2005. *See id.* at 1.

13. *See supra* notes 7-8 and accompanying text.

14. *See* Waste, Abuse, and Mismanagement in DHS, *supra* note 5, at i; Waste, Fraud, and Abuse in Hurricane Katrina Contracts, *supra* note 7, at i; Higham & O’Harrow, Jr., *supra* note 8; Klinenberg & Frank, *supra* note 7; Griff Witte & Renae Merle, *Contractors Face More Scrutiny, Pinched Purses*, Wash. Post, Nov. 28, 2006, at D1.

15. FEMA is part of DHS and in charge of the vast majority of hurricane reconstruction spending. *See* Department of Homeland Security, Department Subcomponents and Agencies, <http://www.dhs.gov/xabout/structure/> (last visited Mar. 25, 2007).

16. *See generally* Waste, Fraud, and Abuse in Hurricane Katrina Contracts, *supra* note 7. The Hurricane Katrina recovery effort is emblematic of the use of private contractors to perform essential government roles. *See* Scott Shane & Ron Nixon, *In Washington, Contractors Take On Biggest Role Ever*, N.Y. Times, Feb. 4, 2007, at A1 (reporting on the “contracting explosion” by the federal government, which has included a decline in competitive contract awards; on the use of private contractors to perform even the most sensitive of government tasks, such as intelligence preparation; on the decrease in transparency; and on the success of politically connected contractors in winning federal contracts).

17. *See* Waste, Fraud, and Abuse in Hurricane Katrina Contracts, *supra* note 7, at 3. Immediately after Katrina struck the Gulf Coast, in September 2005, 51% of contracting dollars were awarded without full and open competition. Noncompetitive contract awards continued to rise over the following months. In October 2005, 93% of the dollar value of reconstruction contracts was awarded noncompetitively. Even as the immediate emergency receded, competitive contract awards were the exception rather than the rule. In December 2006, FEMA awarded 57% of the dollar value of contracts without full and open competition. *Id.* at 2-3, 6.

18. *Id.* at i. While the report did not make a causal connection between noncompetitive awards and waste, fraud, and abuse, it is clear that the competitive bidding requirements are designed as a procedural safeguard against those very evils. *See infra* notes 57-68, 277-83 and accompanying text.

the Competition in Contracting Act (CICA),¹⁹ is the best means to safeguard government procurement from waste, fraud, and abuse. Part I of this Note describes the history of competitive contracting requirements in federal government procurement. While there is universal agreement that government procurement must be timely, cost-effective, and fair, there is a deep divide over the best means to reach those end goals. Part II of this Note examines the conflict between the rule-based competition requirements embodied in CICA and the discretionary decision-making scheme implemented by the Reinventing Government reform movement. This Part also examines the effort to rebuild after Hurricane Katrina, as a case study in the dangers of noncompetitive contracting. Finally, Part III of this Note proposes that the best means to ensure the fundamental goals of timeliness, cost-effectiveness, and fairness is a return to statutory competition requirements, with only specific and limited exemptions for national security.

I. COMPETITIVE BIDDING REQUIREMENTS IN FEDERAL GOVERNMENT CONTRACTING

This part traces the development of the competition requirements for federal government contracts. Part I.A begins by showing the decline of competitive bidding during the Cold War arms buildup and the scandals that eventually prompted passage of CICA. Part I.B examines the contours of CICA's competition requirements. While the Act succeeded in making competition the norm in awarding government contracts, it still provided for special exemptions, such as in the case of natural disasters, when contracts could be awarded without full and open competition. Part I.C analyzes the real-world effects of historical reforms to CICA, including the explosion of oversight legislation in the late 1980s. This legislation made government procurement extremely rule bound, frustrating both government buyers and private-industry sellers who had to meet scores of requirements. Part I.D examines the Reinventing Government reforms of the 1990s, which were a reaction to the growth of oversight legislation. The reformers believed that government buyers, freed from the constraints of overly restrictive rules, would act in the government's best interest. Rather than legislating to implement CICA's goals of timeliness, fairness, and cost-effectiveness, the reformers thought they could reach the same ends by a parallel means, namely the motivation of government buyers. This philosophy was embodied in DHS's exemptions from the standard requirements of CICA. As a result of these exemptions, almost none of DHS's procurements are governed by CICA's detailed rules requiring full and open competition.

19. 41 U.S.C. §§ 251, 253 (2000).

A. Competition in Government Procurement Before CICA

Part I.A examines the competition requirements for federal government contracts that were in effect before CICA.²⁰ This part explains the weaknesses in these earlier requirements, which were exploited by unscrupulous private-sector sellers and government buyers and ultimately mired federal procurement in scandals. These scandals, in turn, led to the passage of CICA as a reform measure.

1. The Rules Governing Competitive Bidding for Government Contracts Before CICA

The government has traditionally relied on competition to safeguard procurement awards against the dangers of both intentionally bad decision makers, such as government buyers colluding with private-industry sellers, and from the dangers of bad decisions, such as contracts that would not be the best bargain for the government.²¹ The first government-wide mandate for competitive contracting, which was enacted in 1949, required that purchases be based on "competition in the marketplace whenever practicable."²² Thus, when Congress amended the Armed Services Procurement Act in 1962, it sought "to assure that the competitive mechanism will not be used in part but in the fullest and that the American public and the taxpayer himself will ultimately benefit by this method."²³ But it was not until 1972 that Congress created government-wide acquisition policies under the Office of Federal Procurement Policy.²⁴

20. See, e.g., 41 U.S.C. § 253; *Aero Corp. v. Dep't of the Navy*, 549 F. Supp. 39, 40, 46 (D.D.C. 1982).

21. See, e.g., *Aero Corp.*, 549 F. Supp. at 46.

22. Gov't Accountability Office, No. 134065, *Procurement: Better Compliance with the Competition in Contracting Act Is Needed* 12 (1987) [hereinafter *Compliance with CICA*]; see 41 U.S.C. § 253; see also Comptroller Gen., No. 11841, *Less Sole-Source, More Competition Needed on Federal Civil Agencies' Contracting* 4 (1982) [hereinafter *Comptroller Gen.*].

23. *Id.* (internal quotation marks omitted).

24. The Office of Federal Procurement Policy (OFPP) was established to give overall direction for government-wide procurement policies. See Pub. L. No. 93-400, § 5, 88 Stat. 797 (1974) (codified as amended at 41 U.S.C. §§ 404-436 (2000)); see Office of Management & Budget, Office of Federal Procurement Policy, <http://www.whitehouse.gov/omb/procurement/mission.html> (last visited Apr. 24, 2007). Under the Office of Federal Procurement Act of 1974, Pub. L. No. 93-400, § 5, 88 Stat. 797 (1974) (codified as amended at 41 U.S.C. §§ 404-436), federal procurement was set to be governed by a uniform, government-wide system, the Federal Acquisition Regulation (FAR), which continues, though amended, to the present day. Originally, three agencies, the Department of Defense (DOD), the National Aeronautics and Space Administration (NASA), and the General Services Administration (GSA), issued and maintained the FARs. Changes were coordinated by two councils, one representing the military agencies (DOD and NASA) and the other representing the civilian agencies. See *Compliance with CICA*, *supra* note 22, at 13. OFPP was created in the wake of a massive investigation that revealed widespread corruption in the ranks of government contractors. See *infra* notes 41-54 and accompanying text.

While the regulations espoused competition,²⁵ they did not put detailed rules enforcing competitive bidding requirements in place.

Before CICA, the federal government used two “basic methods” to procure goods on a competitive basis: formal advertising and negotiation.²⁶ Formal advertising was used, whenever practical, in order to generate as many bids as possible, and such contracts were “almost always awarded on a price competitive basis.”²⁷ The advertising process was formalized into four separate steps: (1) invitations for bids, which contained the specifications for the contract; (2) submission of sealed bids; (3) public opening of the bids; and (4) award to the lowest bidder.²⁸ The other method, negotiation, was a catch-all category to describe all contracts not awarded by formal advertising.²⁹ As in advertised contracts, the first step in a negotiation was publication of the contract and submission of bids.³⁰ Then, the government buyers would begin negotiating with bidders in the “competitive range.”³¹ After considering price and “other factors,” the government was supposed to award the contract to the bidder offering the best deal.³²

While use of the negotiation process required an exemption from the competition requirements of the formal advertising method, there were fifteen broad exemptions that allowed a government procurement officer to noncompetitively award a contract.³³ The exemptions, however, were so broad that they undermined the rule, allowing civilian agencies to award over 80% of their procurement dollars by negotiation rather than formal advertising.³⁴

2. Decline in Competitive Bidding

While the aim of the various competitive bidding rules and regulations was to secure the best value for the government’s dollar,³⁵ the reality was

25. See Comptroller Gen., *supra* note 22, at 1.

26. *Id.* at 2.

27. *Id.* Notably, CICA incorporated the requirement of formal advertising as one of the key means to safeguard competition. See *infra* notes 72-74 and accompanying text.

28. See Comptroller Gen., *supra* note 22, at 2.

29. See *id.* “[N]egotiated procurement allows the Government to discuss the features of offers with the offerors, in contrast to the ‘one-shot’ procedure which characterizes formal advertising.” *Id.* For noncompetitive negotiated contracts, the government would negotiate with only one source. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. See 41 U.S.C. § 253(c), (d) (2000); Comptroller Gen., *supra* note 22, at 3.

34. See Comptroller Gen., *supra* note 22, at 3. In fiscal year 1980, civilian agencies awarded 47% of the procurements worth over \$10,000 each, a total of about \$10.9 billion, based on noncompetitive negotiations. *Id.*

35. See generally John Cibinic & Ralph C. Nash, *Formation of Government Contracts* (3d ed. 1998). The reform statutes included requirements that military agencies seek out competition whenever possible for contracts over \$10,000. See Armed Services Procurement Act, 10 U.S.C. §§ 2302-2314 (2000 & Supp. 2006). Additionally, bidders were required to

that contracts were often unnecessarily awarded on a noncompetitive, or sole-source, basis.³⁶ A 1980 report found that while “[f]ederal regulations require contracting officers to award all purchases and contracts on a competitive basis to the maximum extent practical,” 47% of the actual awards of contracts over \$10,000 each (a total of about \$23.2 billion) were awarded noncompetitively or by sole-source procurement.³⁷ The problem peaked during the Cold War, which lasted from the end of World War II in 1947 until the collapse of the Soviet Union in 1989,³⁸ as government spending in general,³⁹ and defense spending in particular, grew exponentially.⁴⁰

3. The Pentagon Scandals Prompt Statutory Reform

In the early 1980s, a series of scandals over lucrative Department of Defense (DOD) contracts that were handed to politically connected contractors drew public attention and congressional concern.⁴¹ As defense spending soared, a small cadre of contractors won contract after contract.⁴² The problem, however, had been festering for decades. In his farewell address, President Dwight D. Eisenhower warned of the “grave

disclose cost information so that government buyers could negotiate prices. If bidders did not reveal “accurate, complete, and current” cost data to the government buyers, they faced monetary penalties. See Truth in Negotiations Act of 1962, 10 U.S.C. § 2306a.

36. See Compliance with CICA, *supra* note 22, at 2; see also Comptroller Gen., *supra* note 21, at 10.

37. Comptroller Gen., *supra* note 22, at i, 3; see also Ronald S. Perlman, *Sole Source Contracts: Basic Principles and Guidelines*, Gov’t Contractor, July 1983, at 24, 27-30 (detailing when sole-source awards are justified and also describing significant procurement types that give rise to sole-source awards). The CICA reformers ascribed the decline to a lack of rules requiring that contracts be awarded on the basis of full and open competition whenever possible. See *infra* Part I.B.

38. See Gov’t Accountability Office, No. PEMD-07-3, Defense Industry: Trends in DOD Spending, Industrial Productivity, and Competition 8-9 (1997) [hereinafter Trends in DOD Spending], available at <http://www.gao.gov/archive/1997/pe97003.pdf>.

39. From 1972 to 1982, the value of government contracts nearly tripled, rising from \$57.5 billion to \$158.9 billion. James F. Nagle, *A History of Government Contracting* 496 (2d ed. 1999).

40. Over the forty years of the Cold War, military spending comprised an average of 7.5% of the gross national product. See Robert Higgs, *The Cold War: Too Good a Deal to Give Up*, Independent Institute, May 15, 2002, <http://www.independent.org/newsroom/article.asp?id=1208>. By the mid-1980s, the Cold War was in full swing and the American military buildup was proceeding at an unprecedented pace. DOD alone was spending \$30 million per hour, twenty-four hours per day, seven days per week. See Nagle, *supra* note 39, at 496. See generally Trends in DOD Spending, *supra* note 38 (detailing the results of a multi-year DOD initiative to increase efficiency and cost savings as spending increased).

41. See generally James G. Burton, *The Pentagon Wars: Reformers Challenge the Old Guard* (1993); Andy Pasztor, *When the Pentagon Was for Sale: Inside America’s Biggest Defense Scandal* (1995).

42. See generally Burton, *supra* note 41; Pasztor, *supra* note 41.

implications” of the unchecked growth of “an immense military establishment and a large arms industry.”⁴³

In the councils of government, we must guard against the acquisition of unwarranted influence, whether sought or unsought, by the military-industrial complex. The potential for the disastrous rise of misplaced power exists and will persist.

We must never let the weight of this combination endanger our liberties or democratic processes. We should take nothing for granted only an alert and knowledgeable citizenry can compel the proper meshing of huge industrial and military machinery of defense with our peaceful methods and goals, so that security and liberty may prosper together.⁴⁴

From 1974 to the early 1980s, DOD spending, which was a huge chunk of the federal government’s annual expenditures, grew increasingly less competitive.⁴⁵ In 1974, DOD reported that just over 43% of its contracting dollars were awarded on a competitive basis.⁴⁶ From 1977 to 1980, the level of competition never rose above 38%.⁴⁷ In 1982, for example, a GAO investigation found that, despite Congress’s long-standing requirement that the federal government purchase goods and services using competitive bidding whenever possible,⁴⁸ only 37% of dollars spent through the federal government’s contracts were actually awarded on a competitive basis.⁴⁹ The same year, there was a total amount of \$146.9 billion spent on contracts worth over \$100,000 each, and of that total amount only \$54.5 billion were awarded competitively.⁵⁰

In 1983, defense spending made headlines across the country when news reports and congressional hearings revealed that “[t]he Pentagon was paying \$18 for a \$.67 cent bulb and five hundred percent markups on aircraft engine parts. An ashtray for a Navy Hawkeye Radar Plane cost \$600. A coffee brewer on the C-5A Transport cost \$7,400 . . . the

43. President Dwight D. Eisenhower, Farewell Address (Jan. 17, 1961), available at <http://www.eisenhower.archives.gov/farewell.htm>.

44. *Id.*

45. See Compliance with CICA, *supra* note 22, at 77. This decline in competitive bidding could be attributed to the entrenched cabal of defense contracts that Eisenhower warned against, to a lack of rules detailing when contracts should be awarded competitively, to a lack of sanctions for noncompetitively awarded contracts, or to a lack of oversight. See *id.*

46. *Id.* (reporting that 43.5% of the dollar value of DOD’s contracts was awarded competitively).

47. *Id.*

48. Kevin M. Tansey, *Sole-Source Versus Competitive Contracting: Why a GAO Audit Guide Is Needed*, GAO Rev., Winter 1984, at 14 (describing 41 U.S.C. § 401 as “calling for the executive branch to use full and open competition to promote economy, efficiency and effectiveness in the procurement of its property and services. Consequently, federal regulations require agencies to award all contracts competitively to the maximum extent practical.”).

49. *Id.*

50. *Id.*

commercial version cost \$283.”⁵¹ Congress saw competition as the cure to remedy such inflated prices.⁵² Inadequate competition requirements were the “root cause” of the grossly inflated prices the government was paying.⁵³ By creating and enforcing detailed competition requirements for federal government procurement, Congress hoped to prevent a recurrence of the scandals and inflated prices of the early 1980s.⁵⁴

B. *Competition in Contracting Act: The 1984 Reforms*

In reaction to the Pentagon procurement scandals, Congress passed CICA in 1984. Part I.B examines CICA’s general competition requirements and the exemptions from competition. The Act provides for two main exceptions from full and open competition in the case of national or general emergencies. CICA reflects Congress’s faith in competition as a remedy for the ills plaguing federal procurement. To ensure that the cure was applied government-wide, Congress enacted CICA and the Federal Acquisition Regulations (FAR), comprising some 2000 pages covering a solid nine inches of bookshelf,⁵⁵ not counting the supplements for individual agencies.⁵⁶

1. The Rationale of CICA: Full and Open Competition Should Be the Rule, Rather Than the Exception, in Government Procurement

In 1984, CICA declared “full and open competition” the rule for federal government contracting.⁵⁷ The Act, designed to bring transparency and uniformity to the murky world of government contracting, established competitive bidding as the primary safeguard against the dreaded trio of

51. See Nagle, *supra* note 39, at 496. These hearings and news reports revealed the ludicrous sums the Pentagon was spending on seemingly ordinary items, such as the infamous \$400 hammers, \$700 toilet seats, \$2000 pliers, and \$9000 wrenches. *Id.*

52. *Id.* While Congress ascribed the inflated prices to lack of competition, it ascribed the lack of competition to a lack of requirements. In other words, because there were not rules that specifically mandated competitive bidding, government buyers were not awarding contracts competitively. The cure, therefore, was a detailed set of rules telling government buyers exactly when contracts should be awarded on a competitive basis. *Id.*

53. *Id.*

54. See *id.* “Alarmed by the huge sums and appalled by the scandals, Congress prescribed a cure In 1984, Congress enacted the Competition in Contracting Act,” which finally implemented many of the recommendations originally made by the Commission on Government Contracting in the 1970s. *Id.* The Commission first recommended a uniform, government-wide system of procurement rules to combat the “burdensome mass and maze of procurement regulations emanating from too many primary sources, with numerous levels of supplementing and implementing regulations, plus numerous collateral regulations” handicapping federal government procurement. *Id.* at 488 (internal quotation marks omitted).

55. See Schooner, *supra* note 11, at 635.

56. See, e.g., 48 C.F.R. §§ 601.1-653.219 (2006 Supp.).

57. 41 U.S.C. § 253(a)(1)(A) (2000); see also 10 U.S.C. § 2304 (2000) (establishing full and open competition as the standard for DOD and NASA procurement); 41 U.S.C. § 253 (establishing full and open competition as the rule for all other executive agencies). See generally Cibinic & Nash, *supra* note 35.

waste, fraud, and abuse that had plagued the Pentagon.⁵⁸ While CICA emphasized competition across the board, the Act nevertheless recognized that competitive bidding would not benefit the government in all situations,⁵⁹ such as when only one reliable source made the needed product⁶⁰ or if the terms of a treaty required that a contract be awarded based on criteria other than full and open competition.⁶¹

The philosophy of the Act reflected a sort of trickle-up theory of general economic health springing from a larger field of government contractors.⁶² Increased transparency in federal contracting would best serve the government itself by ensuring that it received the best possible value and would best serve private-sector contractors by providing them with equal notice and opportunity to win lucrative government contracts.⁶³ Moreover, increasing competition for government dollars would increase the number of contractors seeking—and winning—government business.⁶⁴ In other words, even if the number of government-awarded contracts remained steady, the contracts now would be distributed among a larger number of contractors. As the ranks of government contractors swelled, the industrial base would naturally expand, providing much needed business

58. See Compliance with CICA, *supra* note 22, at 2 (“Congress enacted the Competition in Contracting Act of 1984 to enhance competition and limit unnecessary sole-source contracting.”); see Exec. Order No. 12,352, 47 Fed. Reg. 12,125 (Mar. 17, 1982). CICA also signified a “philosophical shift” from the previous sense of entitlement to government contracts. See Nagle, *supra* note 39, at 496-97. After the competition requirements were in place, no one had a right to win a government contract, but everyone had the right to know about the opportunity to win it. See *id.* at 497.

59. See 41 U.S.C. § 253(b)-(d), (g). Thus, CICA defined its required full and open competition as allowing “all sources capable of satisfying the government’s needs to compete.” Compliance with CICA, *supra* note 22, at 2; see also John R. Luckey, Cong. Research Serv., CRS Report for Congress, Emergency Contracting Authorities (2005). Additionally, so long as a modification to the original contract is within the scope of the change clauses, CICA allows the modification to be made without full and open competition, i.e., modifications to a sole-source contract will generally be awarded to the same contractor. See Andrew Jackson & Steven A. Aldering, *Expanding Contracting Opportunities Without Competition*, 26 Pub. Cont. L.J. 205, 213 (1997); Perlman, *supra* note 37, at 1 n.6; see also 41 U.S.C. § 253(c). This really is not an exception to the competition requirement “because the modification—or, more accurately, the potential for the modification—was included with the original competition . . . CICA does not require a new competition for a within-scope modification because the potential for the modification was competed with the original procurement.” *Id.* at 206-07.

60. 41 U.S.C. § 253(c)(1).

61. *Id.* § 253(c)(4).

62. In other words, requiring competitive bidding would weaken the ability of well-established contractors to dominate government procurement and broaden the field of contractors vying for the government’s business. As the number of contractors winning lucrative federal government contracts increased, the economic benefits of those contracts would be more widely shared.

63. According to its Congressional Statement of Purpose, CICA was designed to “eliminate procurement procedures and practices that unnecessarily inhibit full and open competition for contracts.” 41 U.S.C. § 251.

64. See Exec. Order No. 13,005, 61 Fed. Reg. 26,069 (May 21, 1996), *reprinted in* 41 U.S.C. § 251 (2000)).

opportunities for economically distressed communities and strengthening the national economy.⁶⁵

Thus, CICA envisioned competitive bidding not only as a preventative measure against corruption, but also as a means to ensure that contracts were awarded to the bidder offering the best price for the best product.⁶⁶ Moreover, not only would government be getting a better value, but the competitive process would also increase efficiency among the different contractors vying for the government's business. "The chance of winning a government contract, or the threat of losing [one] . . . provides an incentive for greater efficiency and effectiveness. When competition is restricted, the government loses opportunities not only to obtain lower prices but also to increase the productivity and the effectiveness of its programs."⁶⁷ The chance to win a government contract, or the risk of losing one to a competitor, would motivate companies to act with "greater efficiency and effectiveness," leading to innovative solutions, new ideas, and, ultimately, a better deal for the government.⁶⁸

2. CICA's Innovations

While CICA espoused competition as the best means to safeguard procurement from the evils of waste, fraud, and abuse, it nevertheless recognized that there would be situations where competition would not be the most efficient means of awarding a contract.⁶⁹ The following discussion examines the exemptions from the Act's general competition requirements.

One of CICA's major innovations was to require federal government agencies to justify, in writing, any decision not to use competitive bidding.⁷⁰ Other provisions of the Act also enshrined competition with

65. *See id.* A stated purpose of CICA was to "promote the use of contracting opportunities as a means to expand the industrial base of the United States." 41 U.S.C. § 251. By requiring that contracts were awarded competitively, Congress hoped to encourage businesses to bid for the government's business. Moreover, Congress specifically hoped to encourage "small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals" to bid for government contracts. *Id.*

66. *See* Compliance with CICA, *supra* note 22, at 12 ("The government is best served when all potential contractors have the opportunity to compete equally with others for its business. Contracts should not be awarded on the basis of favoritism, but should go to those submitting the most advantageous offers to the government. Offering all contractors the opportunity to compete helps to minimize collusion and ensure that the government pays fair and reasonable prices."); *see also* Comptroller Gen., *supra* note 21, at 12 (explaining that competition between qualified contractors guards against favoritism, results in the best terms for the government, and ensures that the government pays a reasonable price).

67. Compliance with CICA, *supra* note 22, at 12.

68. *See id.*

69. *See supra* notes 59-61 and accompanying text.

70. When using an exemption from competitive bidding, the contracting agency must supply a written justification and approval (J & A) and publish a notice in the *Commerce Business Daily*. *See* 41 U.S.C. § 253(f) (2000); *In re Sprint Commc'ns Co.*, B-262003, 1996 WL 36219, at *5 (U.S. Comp. Gen. Jan. 25, 1996) ("[R]eview of an agency's decision to conduct a sole source procurement focuses on the adequacy of the rationale and conclusions

statutory safeguards.⁷¹ CICA required agencies to publish notice of contract opportunities and awards with enough time for hopeful bidders to put together a proposal.⁷² Additionally, the Act required that such advertisements provide bidders with enough details so that the bidders could tailor a proposal to meet the agency's needs.⁷³ This publication requirement alone constituted a major change from the previous statutory preference for formal advertising, which often lacked the details necessary for a contractor to craft a viable proposal.⁷⁴ Under CICA, even the bidding process itself was supposed to be competitive; rather than sorting through offers from a group of preselected contractors, the Act created a framework

set forth in the J & A. When the J & A sets forth reasonable justifications for the agency's actions, [the GAO] will not object to the award."); *see also* Compliance with CICA, *supra* note 22, at 2. This requirement of written justification for noncompetitive bidding is of key importance because it makes competitive bidding the default means of awarding federal contracts. *See id.* Any deviation must be justified under one of the limited statutory exemptions. *See id.* CICA provides a scale of approval such that approval from persons of increasing levels of authority is required as the size of the noncompetitive contract increases. Thus, for a contract worth over \$500,000, but worth less than \$10 million, the competition advocate for the procuring authority has to sign off on the noncompetitive award. However, for a contract worth over \$10 million, but less than \$50 million, the head of the procuring agency has to approve. *See* National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, 110 Stat. 186 (1996) (codified at 41 U.S.C. § 253(f)(1)(B) (2000)) (requiring approval by the agency head for any procurement of over \$10 million but less than \$50 million).

71. In addition to its other safeguards to ensure competitive bidding, CICA also requires that the head of each executive agency designate a competition advocate. *See* 41 U.S.C. § 253(f)(1)(B). Competition advocates are responsible for "promoting full and open competition and challenging barriers to such competition . . . [and] may not be assigned any duties or responsibilities inconsistent with [their position]." Compliance with CICA, *supra* note 22, at 56. In 1985, DOD generally had more staff devoted to competition than sister civilian agencies, including 137 at the 310-person Naval Aviation Supply Office procurement division, who supervised 14,243 contract actions worth more than \$3.6 million. *See id.* at 57.

72. *See* 48 C.F.R. § 5.301 (2006).

73. *See* Deficit Reduction Act of 1984, Pub. L. 98-369, 98 Stat. 494 (1984) (codified in 41 U.S.C. § 251); *see, e.g.*, 10 U.S.C. § 2304 (2000). "Publicizing contract actions [before the award] is intended to (1) increase competition, (2) broaden industry participation in meeting government requirements, and (3) assist small businesses and certain others in obtaining contracts and subcontracts." Compliance with CICA, *supra* note 22, at 34. CICA requires an agency to publish a post-award notice in the *Commerce Business Daily*, the same publication in which notices of contracting opportunities are published, when a contract over \$25,000 is awarded and there are subcontracting opportunities. *See* § 48 C.F.R. 5.301; *see also* Compliance with CICA, *supra* note 22, at 43. When an agency begins the bid process, CICA requires (1) that the agency advertise for bids and allow sufficient time to receive and evaluate them, and (2) make awards that are "most advantageous to the government, price and other factors considered," but (3) allows the agency to reject the bid if it is in the public interest to do so. 41 U.S.C. § 253.

74. *See* Compliance with CICA, *supra* note 22, at 111. Before CICA, there was no requirement that the advertisement be published in a certain forum or that the advertisement have essential details, like when the proposal was required. CICA's requirement that all bid requests be published in *Commerce Business Daily* made it the sole, and authoritative, site for businesses hoping to win a federal government contract. *See id.*

for negotiations, bargaining, and revisions to refine an offer before it was submitted as a final bid.⁷⁵

CICA required government agencies to go through a formal procurement process. First, agencies must have their procurements planned in advance.⁷⁶ The Act specifically disallowed lack of advance planning as an excuse for noncompetitive bidding.⁷⁷ Second, agencies were required to develop contract specifications that allowed for full and open competition (i.e., a request for bids could not call for a specific brand-name item).⁷⁸ Third, and finally, the Act required sealed bidding if (1) time permitted; (2) the award would be based on price; (3) discussions were not necessary; and (4) the request was likely to receive multiple sealed bids.⁷⁹

3. Exemptions from the Statutory Competition Requirements

CICA provided for two categories of specialized exemptions⁸⁰ and for seven general exemptions from the competitive bidding requirements⁸¹ and for two categories of specialized exemptions. The first specialized exemption allowed an agency to exclude a particular source and restrict bidding to small businesses.⁸² Under this exemption, an agency could exclude a bidder if the agency head determined that doing so (1) would actually increase or maintain competition in the industry; (2) would lead to a lower overall cost; or (3) was required by national defense considerations, such as (a) maintaining essential facilities or (b) ensuring the availability of a reliable supply to satisfy either projected needs or based on a history of high demand.⁸³ Additionally, an agency had the option of simply restricting competition to small businesses.⁸⁴

The second specialized exemption set a price floor beneath which the competitive bidding requirements did not apply.⁸⁵ The standard micro-purchase threshold, beneath which no competition is required, was \$2500.

75. *See id.*

76. *See id.*

77. *See* 41 U.S.C. § 253a. "CICA requires advance procurement planning—and does not recognize a lack of such planning as a valid justification for a sole source procurement." *In re Sprint Commc'ns Co.*, B-262003, 1996 WL 36219, at *6 (U.S. Comp. Gen. Jan. 25, 1996); *see also In re TMS Bldg. Maint.*, 65 Comp. Gen. 222, 224 (U.S. Comp. Gen. 1996) (allowing an agency to use noncompetitive procedures under circumstances of unusual or compelling urgency, but refusing to recognize lack of advance planning as creating such unusual or compelling urgency).

78. *See* Compliance with CICA, *supra* note 22, at 111.

79. Sealed bidding allows contractors to submit information to the purchasing agency without running the risk of their competitor contractors seeing it. Sealed bidding is defined as "competitive sealed bids, public opening of bids, and awards." *Id.* at 111 n.4.

80. 41 U.S.C. § 253(b), (g).

81. *Id.* § 253(c).

82. *Id.* § 253(b).

83. *See id.*; *see also In re Space Vector Corp.*, 73 Comp. Gen. 24 (U.S. Comp. Gen. 1993).

84. *See* 41 U.S.C. § 253(b).

85. *See id.* § 253(g).

For such contracts, the only requirement was that the government purchasing agent “determine[] that the price for the purchase is reasonable.”⁸⁶ The statutory aim was “to promote efficiency and economy in contracting and to avoid unnecessary burdens.”⁸⁷ For procurements beneath this micro-purchase threshold, federal buyers were free to use their discretion and were not required to meet any of the statute’s requirements.⁸⁸

CICA’s seven General Exemptions from the competitive bidding requirements are as follows:⁸⁹

- *Available from only one source:* The agency determines that necessary goods/services are available from only one responsible source, such as when an unsolicited research proposal shows a “unique and innovative concept” unavailable anywhere else.⁹⁰
- *Unusual and compelling urgency:* The agency may limit the number of sources permitted to bid if the agency’s need “is of such an unusual and compelling urgency that the Government would [otherwise] be seriously injured.”⁹¹
- *National emergency:* The agency must award the contract to a particular source in order to maintain a facility. In the case of a national emergency, the agency may award the contract to a particular source to mobilize industry, establish or maintain an essential capability, or ensure the services of an expert for possible litigation.⁹²
- *International agreement:* The agency determines that the terms of a treaty or international agreement require the use of procedures other than full and open competition.⁹³
- *Statutory authority:* A statute expressly authorizes the agency to purchase from another agency or to purchase a particular brand-name item.⁹⁴
- *National security:* The agency determines that the “disclosure of the executive agency’s needs would compromise the national security” unless bidding were limited to a number of sources.⁹⁵

86. *See id.* § 428(c).

87. *Id.* § 253(g). To this end, a number of laws are inapplicable to micro-purchases. *See id.* § 429.

88. *See id.* § 253(g). CICA attempts to prevent bidders from avoiding the competition requirements by prohibiting contracting officers from breaking a large purchase, one which would fall under the general competition requirements, into component parts that fall beneath the micro-purchase threshold. *See id.*

89. *See id.* § 253(c). Hereinafter, “General Emergency” will refer to the seven exemptions listed in § 253 (c).

90. *See id.* § 253(d); *see also id.* § 253(c); Jackson & Aldering, *supra* note 59, at 217-19.

91. 41 U.S.C. § 253(c).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

- *Public interest:* The head of the agency determines that noncompetitive procurement is in the public interest and notifies Congress of this decision at least thirty days before awarding the contract.⁹⁶

CICA also permits two exceptions for follow-on contracts.⁹⁷ Competition is not required if (1) opening the bidding to competition would make it more expensive, and that expense would probably not be recovered through competition; or (2) the follow-on contract is for the continued development or production of a major system or highly specialized equipment where award to another source would likely result in either “substantial duplication of cost to the Government which is not expected to be recovered through competition” or “unacceptable delays in fulfilling the executive agency’s needs.”⁹⁸

In addition to the follow-on contract and general emergency exemptions,⁹⁹ CICA includes two “National Defense” exemptions¹⁰⁰ that suspend competitive bidding requirements:

- *Contingency operation:*¹⁰¹ An agency head acquires special procurement authority if he determines that the procurement supports a contingency operation.¹⁰² This determination raises both the micro-purchase¹⁰³ and simplified acquisition

96. *Id.*

97. A follow-on contract is a contract awarded after the initial contract, often for related work or a continuation of the work in the original contract. *See, e.g.,* AAA Eng’g & Drafting v. Windall, 129 F.3d 602, 603 (Fed. Cir. 1997).

98. 41 U.S.C. § 253(d)(1)(B); *see* Jackson & Aldering, *supra* note 59, at 217-19 (“Congress has emphasized however, that this exception [] is not intended to serve as a carte blanche justification for awarding all follow-on contracts noncompetitively.”) (internal quotation marks and emphasis omitted). When an agency uses this follow-on exemption, it must issue a J & A with “sufficient facts and rationale to support the use [and] publish a notice in the *Commerce Business Daily*.” *Id.* at 213-14. GAO’s review should focus on the “adequacy of the rationale and conclusions set forth in the J&A.” *Id.* at 214.

99. *See* 41 U.S.C. § 253(c).

100. *See* 50 U.S.C.A. § 1431 (2003). Hereinafter, “National Defense” will refer to the Contingency and National Defense exemptions of § 1431.

101. *See* 41 U.S.C. § 428a. A contingency operation is designated by the Secretary of Defense as (1) a military operation that does, or may, involve members of the armed forces in military actions or hostilities against an enemy of the country or an opposing military force; (2) an operation that results in the call to order or retention of active duty service members; or (3) any other legal provision during a war or national emergency. *See* Luckey, *supra* note 59, at 2.

102. *See* Luckey, *supra* note 59, at 1-2; *see also* 41 U.S.C. § 428a. Hurricane Katrina relief efforts have been classified as supporting a contingency operation. *See* Luckey, *supra* note 59, at 1-2. The simplified acquisition threshold and the micro-purchase threshold for such purchases were both raised to \$250,000. *See* Second Emergency Supplemental Appropriations Act to Meet Immediate Needs Arising from the Consequences of Hurricane Katrina, 2005, Pub. L. No. 109-62, 119 Stat. 1990; U.S. Department of the Interior, Determination and Findings, <http://www.doi.gov/pam/DFKatrina.html> (last visited Apr. 13, 2007); Luckey, *supra* note 59, at 1-2.

103. The standard micro-purchase threshold beneath which no competition is required is \$2500. But, when an agency head determines that either the General or National emergency

thresholds¹⁰⁴ and suspends other laws that generally govern government procurement.¹⁰⁵

- *National defense*: If the President determines that a good or service is necessary to “facilitate the national defense,”¹⁰⁶ then he may authorize agencies to award contracts that do not comply with other provisions of law.¹⁰⁷

Even under these National Defense exemptions, some restraints on government purchasing remain.¹⁰⁸ Moreover, while these exemptions carve out instances where competitive bidding is not required, none seeks a wider reformation of the general rule of competitive bidding. Rather, the General Emergency exemptions are complements to the National Defense exemptions.

C. *The Effects of CICA*

Part I.C discusses the changes CICA wrought on federal procurement, a significant portion of which concentrated purchasing power in Congress’s hands. CICA’s philosophy was that rules could prevent bad results, such as waste, by proscribing bad behavior. The Act sought to remove discretion from the procurement process and render rule bound as many decisions as possible in order to prevent bad decision makers from making bad decisions. The net effect was to remove many decisions from the discretion of individual government purchasers and concentrate that power in Congress. Some discretionary authority remained, however, under the Act’s General and National Defense emergency provisions.

exemptions applies, the threshold floor rises to \$15,000. *See* 41 U.S.C. § 428a(b)(1); *see also* Luckey, *supra* note 59, at 2.

104. For commercial items, i.e., items available on the market and not made specifically for the government, the threshold for simplified purchases doubles from \$5 million to \$10 million. *See* 41 U.S.C. § 428a(c); *see also* Luckey, *supra* note 59, at 2. Procurements that fall beneath the simplified acquisition threshold are exempt from the requirements of several laws, such as the Miller Act, 40 U.S.C. § 270a (2000); the Anti-Kickback Act of 1986, 41 U.S.C. § 57(a)-(b); the Contract Work Hours Act, 40 U.S.C. §§ 327-333; and the Safety Standards Act, 41 U.S.C. § 428a(c). *See* Luckey, *supra* note 59, at 2; *see also* 48 C.F.R. § 13.005 (2006). For contingency operation procurement, the simplified acquisition floor rises from \$100,000 to \$250,000. *See* 41 U.S.C. § 428a(b). *See generally* Luckey, *supra* note 59.

105. *See generally* Luckey, *supra* note 59.

106. 50 U.S.C.A. § 1431 (2003).

107. *See id.*; Luckey, *supra* note 59, at 2-3. Additionally, under this authority, contracts over \$50,000 must be approved by an official at the Assistant Secretary level, and the Armed Services Committees of Congress must be notified of contracts worth over \$25 million. *See* 50 U.S.C. § 1431; 50 U.S.C.A. § 1431 (2003).

108. Labor laws still apply and the emergency powers are “not authority for: using a cost-plus-a-percentage of cost system of contracting; making any contract that violates existing law limiting profit or fees; providing for other than full and open competition for award of contracts for supplies or services; or waiving any bid bond, payment bond, performance bond, or other bond required by law.” Luckey, *supra* note 59, at 3 (citations omitted).

While CICA spurred a huge increase in procurement protests,¹⁰⁹ it failed to cure some of the substantive ills plaguing government contracting.¹¹⁰ CICA's main weakness was in its exemptions to the requirements of full and open competition. Even after the Act's reforms were enacted, well-connected contractors were driving Sherman tanks (almost literally) through the National Defense and General Emergency exemptions in order to maintain their lucrative existences.¹¹¹ Just four years after CICA was enacted, a massive FBI investigation¹¹² revealed that the Act's competition requirements had failed to make full and open competition the rule in government contracting. Rather, "[g]overnment officials improperly steered contracts to preferred contractors," and consultants and insiders were able to "acquire classified information regarding what the Pentagon planned to buy, when it planned to buy it, and how much money was available to buy it" well before the opportunity was published.¹¹³

Public dissatisfaction with the uncurbed corruption of government contracting prompted passage of a host of bills criminalizing fraud in government procurement,¹¹⁴ including the Procurement Integrity Act of 1988, which sought to enforce competition through criminal penalties.¹¹⁵ The Procurement Integrity Act's criminal penalties and massive fines are representative of the other legislation enacted at the time¹¹⁶ and

109. See Nagle, *supra* note 39, at 497. A protest is brought by a disgruntled contractor who alleges some impropriety in the award of a contract. CICA strengthened and formalized this process by providing a statutory basis for the GAO to hear such protests. See 31 U.S.C. §§ 3551-3556 (2000).

110. See Nagle, *supra* note 39, at 497.

111. A 1984 GAO report, *DOD Fraud Investigations—Characteristics, Sanctions, and Prevention*, found that theft, followed by defective pricings, were the most common procurement fraud and that more than fifty of the top one hundred defense contractors had been snared in some two hundred fraud investigations. See *id.* (citations omitted).

112. See *id.* at 498-99. On June 14, 1988, hundreds of FBI agents in 44 cities swept into private homes, corporate offices, and military facilities to search and seize evidence of "defense contract fraud, bribery, and improper disclosure of competitive information." *Id.* The two-year-long investigation, Operation Ill Wind, ended up netting over two million documents; more than 76,000 phone calls were intercepted; and truckloads of evidence were seized. *Id.* Numerous contractor executives and an Assistant Secretary of the Navy were ensnared in the investigation's net. *Id.*

113. See *id.* at 499.

114. See *id.* at 500-01.

115. Procurement Integrity Act of 1988, Pub. L. No. 100-679, 102 Stat. 4068 (codified at 41 U.S.C. § 423) (substantially amended by National Defense Authorization Act for Fiscal Year 1996, Pub. L. 104-106, 110 Stat. 186 (codified in scattered sections of 10, 40, 41 U.S.C.)).

116. See Nagle, *supra* note 39, at 503 (noting that twenty-two major procurement statutes were enacted between 1984, the year CICA was passed, and 1989 (citing John W. Whelan, *Reflections on Government Contracts and Government Policy on the Occasion of the Twenty-Fifth Anniversary of the Public Contract Law Section*, 20 Pub. Cont. L.J. 1, 6-10 (1990))). Some examples of this legislation include the 1986 Department of Authorization Act, Pub. L. No. 99-145, § 911, 99 Stat. 583 (codified at 10 U.S.C. § 2701); the 1987 Department of Defense Authorization Act, Pub. L. No. 99-661, 100 Stat. 3816; and the 1988 Procurement Integrity Act, Pub. L. No. 101-280, 104 Stat. 149 (codified at 41 U.S.C. § 423). See Nagle, *supra* note 39, at 503. These laws removed discretionary authority from government

representative of unprecedented Congressional scrutiny¹¹⁷ designed to stem the tide of government dollars being spent unscrupulously.¹¹⁸ The Procurement Integrity Act was part of a battalion of criminal sanctions designed to enforce CICA's competition requirements.¹¹⁹ And, to some extent, the legislation worked.¹²⁰ By encouraging private enforcement of competition requirements with lucrative civil rewards for anyone who ferreted out a violation of the rules, Congress succeeded in making enforcement of competition requirements more lucrative than colluding with private-sector sellers.¹²¹ The bounty collected from unscrupulous contractors,¹²² however, took a toll on the system itself in the form of frivolous lawsuits scattered among the genuine complaints,¹²³ intense Congressional management,¹²⁴ and a continuous decline in public confidence.¹²⁵

purchasers and consolidated it in Congress. The 1986 DOD Authorization Act, for example, was a specific disallowance of certain expenses, enacted in response to allegations that contractors were improperly charging the government with expenses. *Id.*

117. *Id.*

118. *Id.* at 498-501.

119. *See id.* at 500-03. There was a three-pronged criminalization attack of wrongdoing in federal government contracting. First, there was more aggressive prosecution of procurement misconduct: "Prosecuting contractors became such a top priority that Government auditors were urged to 'think fraud' whenever they audited a contractor." *Id.* at 500-01. Second, courts used the collective knowledge doctrine to expand corporate criminal liability. *See id.* at 501. And, third, Congress expanded the power of internal auditors to issue subpoenas and further Justice Department probes. *See id.* Congress also broadened the criminal penalties with the Program Fraud Civil Remedies Act of 1986 and the 1986 Anti-Kickback Enforcement Act. *See id.*

120. This success can be seen as a victory for the rules-based philosophy of CICA. In effect, by augmenting CICA's competition requirements with more rules, the penalty laws, the original competition requirements became more effective.

121. In addition to laws increasing penalties for misbehavior, Congress amended the *qui tam* provision to make bringing a successful suit more lucrative for the plaintiff. *See Nagle, supra* note 39, at 502. *Qui tam* actions allow an individual to sue as a whistleblower, on behalf of the government. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649-55 (D.C. Cir. 1994). From 1986 to 1991, more than 350 *qui tam* actions against defense contractors were filed. *See Nagle, supra* note 39, at 502. In one 1989 lawsuit, for example, the Justice Department wrangled a \$14.3 million settlement on charges that a contractor had overcharged the Army and Navy for ball bearings and the *qui tam* plaintiff who exposed the overcharges won \$1.4 million for himself. *See id.* Enforcement provisions also netted huge deposits for government coffers. In 1990, the government recovered more than \$260 million just for prosecutions under the amended False Claims Act, 31 U.S.C. §§ 3279-3733 (2000). *See generally* Memorandum by the U.S. Dep't of Justice, False Claims Act Cases: Government Intervention in Qui Tam (Whistleblower) Suits, available at <http://www.usdoj.gov/usao/pae/Documents/fcaprocess2.pdf>.

122. By 1994, \$1.2 billion in criminal fines and civil recoveries, eleven times the annual amount during the mid-1980s, were collected from the defense industry and \$1.4 billion in overpayments were returned to the Pentagon. *See Nagle, supra* note 39, at 502.

123. *See id.* at 502-03.

124. *See id.* at 503. "Congress intensively managed the process to save it from the assaults of criminals and incompetents." *Id.* at 503. In many senses it was this congressional micromanagement that the Reinventing Government reformers sought to limit. *See infra* note 132. The headlines and public scrutiny that colossal procurement mistakes had already

D. Rollback: The Cost of the Reinventing Government Movement on Competitive Contracting

Part I.D examines the changes that the Reinventing Government reformers brought to federal procurement. It begins with a discussion of the philosophical shift from rules to guiding principles. Next, it examines and defines the idea of “businesslike government.” Then, it examines the results that the reformers won in changing the laws that govern federal procurement.

1. The National Performance Review: Remaking Government to Work Better and Cost Less

In the late 1990s, President William J. Clinton and Vice President Albert Gore swept into the White House with a mandate for change—to make government smaller and more efficient.¹²⁶ A centerpiece of their program to make government work more like a private-sector business was broad reform of the government procurement system.¹²⁷ The reformers took a

attracted made procurement reform an easy target for Congressmen eager to claim the mantles of efficiency and reform. *See* Nagle, *supra* note 39, at 495-505.

125. *See* Nagle, *supra* note 39, at 502.

126. *See id.* at 512. The Reinventing Government reform movement was championed by Vice President Albert Gore as a fundamental reconception of how government should work. The fundamental ideas that animated the Reinventing Government reformers, however, dated back to the mid-1980s, when the Packard Commission, a Blue Ribbon Presidential Commission, first recommended “a massive overhaul” of federal government procurement. *See id.* at 498. To restore public confidence in government procurement, which had reached a low point wherein the average citizen believed that almost half the defense budget fell victim to waste and abuse, the Commission recommended that DOD buy more off-the-shelf, commercially available items and that Congress simplify the procurement laws. *Id.* The Reinventing Government reformers also adopted the recommendations of the Section 800 Panel, a DOD advisory panel, which recommended streamlining the legislative requirements burdening government contractors. *See id.* at 511. It is also significant that by this point government procurement had fallen from a high of \$127 billion in 1985 to \$54 billion in 1993. *See id.* at 505. Remaking federal procurement, however, was only part of the reformers’ grand plan. *See* Al Gore, *From Red Tape to Results: Creating a Government That Works Better & Costs Less*; Report of the National Performance Review, at i-iv (1993). The Clinton-Gore reformers saw themselves as a vanguard of change for a new era of government: “The National Performance Review is about change—historic change—in the way the government works. The Clinton administration believes it is time for a new customer service contract with the American people, a new guarantee of effective, efficient, and responsive government.” *Id.* at i.

127. *See* Schooner, *supra* note 11, at 636-37, 656-63 (detailing some of the reforms implemented by the National Performance Review, such as the use of contractor past-performance reports, increased use of flexible contract vehicles, and widespread use of the government purchase card). Vice President Gore’s 1993 National Performance Review committed the new administration to rewrite the FAR and its accompanying agency supplements, some 4500 pages of government procurement regulations. *See* Nagle, *supra* note 39, at 512. The new regulations were supposed to “shift from rigid rules to guiding principles, promote decisionmaking at the lowest possible level, end unnecessary regulatory requirements, and facilitate innovative contracting approaches.” *Id.* In short, the decision-making power was being removed from the highest tier, Congress, to the lowest possible tier, individual government buyers.

different path from that of previous efforts. Rather than trying to increase enforcement of the existing competition requirements, such as by buttressing the requirements with criminal penalties,¹²⁸ the Reinventing Government reformers sought to rewrite the rules themselves.¹²⁹

Whereas previous efforts, such as the criminalization movement marked by the 1988 Procurement Integrity Act, had sought to increase enforcement of the competition requirements codified in CICA, the Reinventing Government reformers sought to rewrite the rules governing competition.¹³⁰ This represented an important philosophical shift. While the goal—a procurement system that inspired public confidence and succeeded in getting the best bargain for the government's money in a time-efficient manner—remained the same, the means for achieving those traditional ends were revolutionary.¹³¹ The reformers sought to increase cost-effectiveness and timeliness of procurement by applying private-sector principles of personal accountability and performance-based rewards.¹³² In other words, by weakening the rules enforcing competitive requirements, the reformers hoped to create a system that better fulfilled the ends of those requirements.¹³³ By increasing individual responsibility and decreasing

128. See *supra* notes 114-20 and accompanying text.

129. See Gore, *supra* note 126, at 5-8; see also Karen DaPonte Thornton, *Fine-Tuning Acquisition Reform's Favorite Procurement Vehicle, The Indefinite Delivery Contract*, 31 Pub. Cont. L.J. 383, 396 (2002) (describing the National Performance Review's changes as "shifting from rigid rules to guiding principles and [] increasing the discretion afforded contracting officials" (internal quotation marks omitted)). See generally Steven Kelman, *Remaking Federal Procurement*, 31 Pub. Cont. L.J. 581, 582 (2002) (describing the philosophy of the Clinton-Gore reformers to make government work more efficiently by "making procurement less rule bound"). Remaking federal procurement policy was a key part of a comprehensive view of a new, streamlined federal government. See Gore, *supra* note 126, at 26-34.

130. See Thornton, *supra* note 129, at 395-96. While the reformers did mount an assault on the rule-bound system of government procurement, they did not seek to weaken its values; rather, they sought to reach the same goals via different means. See *id.* They were really attacking bureaucratic inefficiencies, not "the fundamental procurement principles of integrity, openness, competition, and value." *Id.* at 396.

131. The National Performance Review sought to make government "work better and cost less" by making it work more like a private company. Gore, *supra* note 126, at i, 1-9 (emphasis omitted). The reformers' enemy was the infamous "red tape" that bound government workers to overly detailed rules and procedures. *Id.* at 11. In this view, the problem was not the government employee, but the red tape, a set of overly defined rules and regulations that thwarted any attempt at action. *Id.* The reformers believed it was time to put aside the "good intentions" that generated the red tape and examine the overly rule-bound system they created: "Because we don't want employees or private companies profiteering from federal contracts, we create procurement processes that require endless signatures and long months to buy almost anything." *Id.*

132. *Id.* at 26-35; see Kelman, *supra* note 129, at 584-85. One key criticism was that procurement was "overly centralized," which created a system that "takes decisions away from managers who know what they need, and allows strangers . . . to make purchasing decisions." Gore, *supra* note 126, at 26. Centralization of purchasing power, much of it concentrated in Congress by CICA, had developed as a means to safeguard federal procurement from unscrupulous individuals. See *supra* notes 57-61, 114-18 and accompanying text.

133. See generally Kelman, *supra* note 129.

centralized controls and oversights, government purchasers would be motivated in the same way as their private-sector peers to seek out the best bargain on their own initiative.¹³⁴ Championed by Gore, the Reinventing Government program was “a broad-reaching effort” to make government “more businesslike,” whose “flagship and most visible success” was reforming government procurement.¹³⁵

The mantra of the Reinventing Government reformers was to make government work better and cost less.¹³⁶ The reformers believed that the key to making government procurement more effective was to make it “less rule bound.”¹³⁷ Under the Reinventing Government program, “[r]ules, objectification, and hierarchy in the system were all scaled back.”¹³⁸ By reducing the sheer mass of rules governing federal procurement, government buyers would be empowered to use their own discretion, which would encourage them to seek out better bargains and result in more efficient spending of governmental resources.¹³⁹ The reform movement thus aimed to transform rule-obsessed bureaucrats into buyers as efficient as their private-sector peers.

134. See *id.* at 599-602.

135. Schooner, *supra* note 11, at 628-29. Gore's National Performance Review recommended six major steps to reform federal procurement. See Gore, *supra* note 126, at 28-30. First, the procurement process was to be simplified by “rewriting federal regulations—shifting from rigid rules to guiding principles.” *Id.* at 28. Second, purchasing power was to be decentralized, moved from the centralized authority of the General Services Administration (GSA) back to the separate federal agencies. See *id.* at 29. Third, the procurement process was to be simplified “by allowing agencies to buy where they want, and testing a fully ‘electronic marketplace.’” *Id.* This was aimed at both simplifying the cumbersome procurement process and modernizing it. See *id.* Fourth, the simplified purchase threshold was to be raised from \$25,000 to \$100,000, allowing all such purchases to occur “using simple procurement procedures” that generally took less than a month, compared to three months for purchases going through the standard procurement process. *Id.* at 30. Fifth, government buyers were encouraged to purchase more commercial, off-the-shelf products, rather than products specially designed for government use. See *id.* Sixth, and finally, Gore recommended updating procurement laws and removing irrelevant, or outdated, provisions. See *id.* at 30-31. For general background on the reforms implemented, see Donald F. Kettl, Brookings Inst., *Reinventing Government: A Fifth-Year Report Card* (1998). See also Stephen Barr, *After 5 Years, Gore's Reinvention Gets a 'B': Brookings Analyst Says Results Vary Widely*, Wash. Post, Sept. 4, 1998, at A23.

136. See generally Gore, *supra* note 126.

137. Kelman, *supra* note 129, at 582. By this point, government procurement had reached something of a high point of regulation. “Besides the criminal and financial risks” a contractor undertook in dealing with the government, “the process was cumbersome and discouraged many from government contracting. Seventy-nine separate offices issued voluminous acquisition regulations—a body of rules about five times longer than *War and Peace*.” Nagle, *supra* note 39, at 506; see Gore, *supra* note 126, at 26-27 (detailing examples of overly rule-bound procurement regulations resulting in “wasteful spending [often] . . . produced by the very rules we have designed to prevent it”).

138. Kelman, *supra* note 129, at 584. Business strategy and source selections were two of the reformers' main targets. See *id.*; see also Gore, *supra* note 126, at 28-30.

139. See *infra* Part II.A-C.

2. Results of the Reform Movement

These changes were codified in the Federal Acquisition Streamlining Act of 1994 (FASA)¹⁴⁰ and the Federal Acquisition Reform Act of 1995.¹⁴¹ Additionally, two major amendments to the FAR embodied this philosophical shift: (1) "A statement of 'guiding principles' . . . established as the fundamental goal for the system to '[s]atisfy the customer in terms of cost, quality, and timeliness of the delivered product or service'";¹⁴² and (2) a statement encouraging personal initiative and business judgment.¹⁴³ Before these amendments, the assumption was that if a situation were not addressed in the rules, it would be impermissible. The new amendments reversed this assumption. After the amendments, if a contracting officer believed an action was in the government's best interest, but the action was not addressed in the rules, the officer could assume the strategy was permissible.¹⁴⁴ The statements crystallized the new philosophy that government should act like a meta-business and seek businesslike purchasing efficiencies in terms of cost, quality, and timeliness.¹⁴⁵ Cumulatively, the changes wrought by FASA, the Federal Acquisition Reform Act of 1995, and the guiding statements represented a fundamental

140. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (codified in scattered sections of 10 and 41 U.S.C.); see Letter from Anthony H. Gamboa, Gen. Counsel, GAO, to Senators Charles E. Grassley & Max Baucus, The Federal Acquisition Streamlining Act of 1994—Fair Opportunity Procedures Under Multiple Award Task Order Contracts (July 21, 2004), available at <http://www.gao.gov/decisions/other/302499.pdf>; see also Nagle, *supra* note 39, at 515-17. "FASA [Federal Acquisition Streamlining Act of 1994] contemplates the repeal or substantial amendment of nearly 225 legal prescriptions affecting the federal procurement system." Thornton, *supra* note 129, at 398. When FASA was passed, it was described as "a comprehensive overhaul of the federal procurement laws . . . ushering in the most extensive changes in federal government contracting since CICA." *Id.* (internal quotation marks and citations omitted).

141. See National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, §§ 801-824, 110 Stat. 186 (codified in scattered sections of 10, 40, 41 U.S.C.); Kelman, *supra* note 129, at 584; see also Schooner, *supra* note 11, at 636 n.26. This was also the age of the electronic revolution. Technology was changing, seemingly overnight, but government buyers were still bound to follow complex, time-consuming procurement regulations. See Gore, *supra* note 126, at 29; Nagle, *supra* note 39, at 509.

142. Kelman, *supra* note 129, at 584; see Gore, *supra* note 126, at 29.

143. See Kelman, *supra* note 129, at 584.

144. *Id.* This also reflected the National Performance Review's recommendation that procurement authority be decentralized. See Gore, *supra* note 126, at 26-30; see also Thornton, *supra* note 129, at 402.

145. See Al Gore, From Red Tape to Results: Creating a Government That Works Better & Costs Less; Reinventing Federal Procurement; Accompanying Report of the National Performance Review 1-6 (1993). The Reinventing Government reformers were optimists. By freeing the hands of government negotiators and enabling private-sector sellers to work with them, they believed that government contracting could be made more efficient in terms of both timeliness and dollar value. See *id.* at 9-17. This reflected a fundamental philosophical shift from the fear of greedy "fat-cat" contractors raiding the government coffers to a belief in a productive public-private partnership. See *id.* at 3-4. "[T]he 1990s recognized that most contractors are industrious resources willing to fulfill the government's needs with ingenious solutions for a fair price." Nagle, *supra* note 39, at 518.

shift away from the traditional government procurement model of strictly rule-based behavior to a businesslike model of broad discretion and guiding principles.¹⁴⁶

a. *Philosophical Shift: From Detailed Rules to General Guiding Principles*

The Reinventing Government movement freed the hands of government negotiators. In moving from a strictly rule-based system to a system of “guiding principles,” the reformers sought to eliminate rules whose sole function was to guard against the worst-case scenario.¹⁴⁷ For example, whereas CICA had erected a “Chinese Wall” between government purchasers and private-sector buyers, banning all one-on-one meetings to prevent collusion,¹⁴⁸ the new laws allowed negotiating sessions and sought to create a forum for constructive dialogue between government buyers and private-sector sellers.¹⁴⁹ Additionally, the reformers removed provisions that had barred government agencies from accepting late proposals. Under the old rules, a proposal that was late by even five minutes would have been excluded.¹⁵⁰ Those rules were designed to guard against a bidder colluding with a government buyer—using insider information gleaned from his competitors’ bids to recraft his own.¹⁵¹ The new rules softened these requirements to allow the government to select the offer that best met its needs.¹⁵² Moreover, the reforms allowed the government and contractors to work together in a collegial, rather than adversarial, way.¹⁵³

146. See Thornton, *supra* note 129, at 402. In other words, “at a macro level, the reinvented procurement system is (1) defined by greater purchaser discretion, (2) less encumbered by bureaucratic constraint and internal oversight, and (3) more businesslike.” Schooner, *supra* note 11, at 636-37 (citations omitted).

147. See Gore, *supra* note 126, at 28; see also Kelman, *supra* note 129, at 589-90.

148. See Kelman, *supra* note 129, at 590. Kelman identifies this rule as one whose “only justification . . . was to prevent abuses—government officials giving information to one potential bidder that had not been given to others or plotting plans to ‘cook’ a solicitation to favor a bidder.” *Id.*

149. See *id.* at 590, 607. The FAR’s part 15 was rewritten to eliminate the rule that had prohibited one-on-one meetings between the government and potential bidders, provided that a contracting official was present at the meeting. *Id.* at 607.

150. See *id.* at 590.

151. See *id.* Kelman cites this rule as being enacted only to guard against the worst-case scenario:

[It] is designed only to prevent the possible abuse of illegal transfer of information from timely bids to a favored bidder who then could submit a winning bid late. There is no reason not to provide government officials the discretion to accept a bid that might turn out to be the best one for the Government where unforeseeable delays . . . cause a proposal to be late, other than to avoid abuse.

Id.

152. Rather than only guarding against the worst-case scenario—the improper transfer of information to a favored bidder—the new rule encouraged cooperation between the government buyer and the private-sector seller, which would then result in the government getting the best bargain. See *id.* at 607.

153. *Id.* For example,

agencies began, for the first time, to set up offsite meetings between agency and contractor personnel as a major new contract was beginning to encourage common

Additionally, the reforms equipped government buyers with performance-based report cards, a new tool with which to examine prospective contractors.¹⁵⁴ Before FASA, government contractors were neither punished for a poor performance¹⁵⁵ nor rewarded for an outstanding one, which resulted in “chronic overpromising prior to contract award, poorer contractor performance once a contract was signed, and less customer satisfaction, compared to comparable contracts in the private sector.”¹⁵⁶ FASA, however, made government evaluations of a contractor’s price, schedule, and quality of performance, as well as business relations, key to awarding future government contracts.¹⁵⁷ The contractor report cards, “aim[ed] to ensure a clear and concise record of a contractor’s performance on every contract, task order or other contractual document exceeding \$100,000, based on a discussion with the contractor about recent performance.”¹⁵⁸ The new regulations required agencies to formally evaluate contractor performance, share this information among other agencies, and use the information in awarding future work.¹⁵⁹

b. Streamlining

A centerpiece of the streamlining of government procurement was the further loosening of the rules governing micro-purchases. Government buyers were given government-issued purchase cards to use for small, daily purchases.¹⁶⁰ When a government office ran out of paper clips, for

perspective and understanding, to establish contract “mission statements” signed by both sides or informal problem resolution procedures, and even routinely to refer to contractors as “partners.”

Id.

154. *See id.* at 593. Before passage of FASA, the government had followed an “informal rule” of refusing to consider a contractor’s past performance in order to prevent “unlevel[ing] the playing field.” *Id.* (internal quotation marks omitted). FASA provided the statutory authority for use of past performance in awarding new contracts. *See* Office of Mgmt. & Budget, Executive Office of the President, Best Practices for Collecting and Using Current and Past Performance Information (2000), http://www.whitehouse.gov/omb/procurement/contract_perf/best_practice_re_past_perf.html (follow “Chapter 1” and “Chapter 2” hyperlinks) [hereinafter Best Practices].

155. *See* Sanchez Porter’s Co., 69 Comp. Gen. 426 (U.S. Comp. Gen. 1990) (noting that under CICA, before the performance-based report cards, agencies could “not exclude a potential contractor because of unsatisfactory prior performance *unless* the firm is found to be nonresponsible under applicable regulations”).

156. Kelman, *supra* note 129, at 593.

157. *See* 41 U.S.C. § 405(j) (2006 & Supp. 2006) (specifying that when awarding new contracts, agencies must consider the contractor’s past performance, including cost, schedule, and compliance with requirements); Schooner, *supra* note 11, at 657 n.96.

158. *See* Best Practices, *supra* note 154, at ch. 2.

159. *See id.*; *see also* Schooner, *supra* note 11, at 657-58.

160. *See* Kelman, *supra* note 129, at 602. Giving government purchasers the discretion to make autonomous decisions within the micro-purchase threshold is emblematic of the philosophy of the Reinventing Government reformers. Rather than requiring all government contracting decisions to go through the rigors of congressional review, purchasing decisions are left to the discretion of individual government buyers. *See id.* This distribution of authority has the twin virtues of distributing responsibility, thereby encouraging the

example, instead of going through a cumbersome procurement process, it simply could order more, similar to a private business.¹⁶¹ In 1993, when the government purchase-card program was in its infancy,¹⁶² there were 50,000 cards circulating.¹⁶³ In 1999, some 500,000 government employees spent more than \$10 billion, over 5% of all federal spending, with government-issued purchase cards.¹⁶⁴ By 2003, 26.5 million transactions worth over \$16.4 billion were made using government purchase cards.¹⁶⁵ As the number of cardholders continues to grow, and as existing cardholders grow more comfortable with their cards, the volume of purchases continues to increase. According to estimates, purchase cards are “poised to account for ten percent of the federal contracting budget within several years.”¹⁶⁶

The purchase cards undoubtedly allowed purchases to be made more quickly. But this newfound purchasing power was certainly not without costs of its own:¹⁶⁷ It extracted a high cost for public notice, competition, and oversight.¹⁶⁸ Essentially buyers were free to “ignore the Government’s normal procurement rules and procedures, which mandate[d] transparency and competition” if the purchase fell below the \$2500 micro-purchase

government purchaser to take more personal pride in making a good purchasing decision, and decreasing the time necessary to make a buying decision. *See, e.g., Gore, supra* note 145, at 1 (critiquing the rule-bound system for its delays and centralization of authority).

161. Kelman notes,

No single change in the procurement system has had more of an impact on the average government employee than granting users a government-issued credit card for making small purchases of ordinary-use items Prior to introduction of the credit card, every purchase, even a \$25 buy, has to go through an agency’s contracting organization Users often waited weeks or months to receive even minor items.

Kelman, *supra* note 129, at 602-03.

162. The first government purchase card appeared in 1989. *See* Neil S. Whiteman, *Charging Ahead: Has the Government Purchase Card Exceeded Its Limit?*, 30 Pub. Cont. L.J. 403, 408-09 (2001). In the program’s first year, 12,000 government cardholders, representing thirty different agencies, made average individual purchases of \$300 that accumulated to over \$9 million. *See id.* at 409. The purchase-card program boomed, however, when it was adopted by the Reinventing Government reformers to streamline the acquisition process of routinely purchased supplies and services. *See id.* at 409-10.

163. *See* Kelman, *supra* note 129, at 603.

164. *See* Whiteman, *supra* note 162, at 413.

165. Gov’t Accountability Office, GAO-04-717T, *Purchase Cards: Increased Management Oversight and Control Could Save Hundreds of Millions of Dollars*; Testimony Before the Senate Committee on Governmental Affairs I (2004) (statements of Gregory D. Kutz, Director, Financial Management and Assurance; David E. Cooper, Director, Acquisition and Sourcing Management; and John J. Ryan, Assistant Director, Office of Special Investigations) [hereinafter GAO, *Purchase Cards Testimony*].

166. Whiteman, *supra* note 162, at 413.

167. *See* GAO, *Purchase Cards Testimony*, *supra* note 165, at 6-7. The GAO found ineffective management oversight and internal control over purchase-card use across the government, which “left agencies vulnerable to fraudulent, improper, and abusive charges.” *Id.* at 6.

168. *See* Schooner, *supra* note 11, at 662. *See generally* Steven L. Schooner & Neil S. Whiteman, *Purchase Cards and Micro-purchases: Sacrificing Traditional United States Procurement Policies at the Altar of Efficiency*, 9 Pub. Procurement L. Rev. 148 (2000).

floor.¹⁶⁹ While the purchase cards enabled government buyers to order their paper clips as easily, and with virtually as little oversight, as the office manager of a business, the scheme meant that their choices were unreviewable by bidders and supervisors, were noncompetitive, and were invisible to public oversight.¹⁷⁰

c. Increased Flexibility in Negotiating Government Contracts: Past-Performance Review and Indefinite Delivery/Indefinite Quantity Contracts

The reform movement also gave birth to a host of new types of contracts, designed to be flexible instruments that could quickly and cost-efficiently supply changing government needs.¹⁷¹ The indefinite delivery/indefinite quantity (IDIQ) contract, for example, is an umbrella contract that sets a maximum quantity or dollar amount and allows for the purchase of varying amounts of supplies or services within those parameters over a fixed period of time.¹⁷² FASA also gave rise to another new form of contract, the multiple-award task order, which provided that the first round of bidding would be fully open to competition, and then a group of contractors would be selected to compete for contracts under simplified procedures.¹⁷³

While the IDIQ and multiple-award task-order contracts increased flexibility in the formation of government contracts, that flexibility itself weakened one of CICA's core requirements: preplanning.¹⁷⁴ With only vague contractual requirements,¹⁷⁵ the IDIQ was also vulnerable to cost overruns, which were often incurred when the initial product did not meet

169. Schooner, *supra* note 11, at 661; *see infra* notes 294-300.

170. Government-issued credit cards allowed micro-purchases to be made "without: (1) risk of protest; (2) full and open competition for the business; (3) use of standard solicitation provisions and contract clauses; and (4) visibility." Schooner, *supra* note 11, at 661. These weaknesses were further exacerbated by a system of flimsy internal controls. *See* GAO, Purchase Cards Testimony, *supra* note 165, 6-9. *See generally* Schooner & Whiteman, *supra* note 168.

171. By encouraging multiple award contracts and precluding disappointed bidders from protesting, FASA sought "to promote innovation and Contracting Officer flexibility." Thornton, *supra* note 129, at 385.

172. *See* 48 C.F.R. § 16.504(a) (2006); Schooner, *supra* note 11, at 658; Thornton, *supra* note 129, at 399. An IDIQ contract states maximum and minimum (but more than nominal) limits for a set period of time. *See* Thornton, *supra* note 129, at 389. "The Government obligates itself to purchase a minimum amount of supplies or services and the contractor is assured of minimal sales." *Id.*

173. Schooner, *supra* note 11, at 658-59.

174. *See* Thornton, *supra* note 129, at 402 (noting that "Contracting Officers will cut corners when overwhelmed by customer demands and desperately turn to indefinite delivery contracts to accomplish assignments with minimal planning, preparation, and competition").

175. *See, e.g.,* Waste, Abuse and, Mismanagement in DHS, *supra* note 5, at 4. When DHS launched a massive \$2 billion contract "to design, build, test, and operate a massive border security system as part of the Secure Border Initiative," which was required "to be highly reliable, available, maintainable, and [a] cost effective solution [] to manage, control, and secure the border," the contract was criticized for lack of planning, making "exactly the same mistakes that expert auditors have cautioned against [and] . . . launching a multi-billion dollar procurement program with only a vague idea of its requirements." *Id.* at 4-5 (internal quotation marks omitted).

the government's needs and had to be revised.¹⁷⁶ The contracts also provided a convenient justification for overwhelmed contracting officers who used the provisions to validate noncompetitive contract awards.¹⁷⁷ Additionally, it was virtually impossible for disappointed bidders to challenge the new contracts.¹⁷⁸

d. *The Death of the Milspec: Ordering Off-the-Shelf Items to Meet Government Needs*

Another major reform was the death of the milspec, a contract vehicle wherein government purchasers would identify exactly what they wanted and how the product should be created.¹⁷⁹ Gore identified the milspec as a prime example of the "rigid rules" and "bureaucratic red tape" handicapping federal procurement.¹⁸⁰ Before the reformers streamlined the federal procurement process, never-ending paperwork, restrictive regulations, and minutely detailed military specifications made doing business with DOD thirty to fifty percent more expensive than private industry.¹⁸¹ "The Army had fifteen pages of specifications for sugar cookies. And Lockheed, when it submitted a bid to build a new transport plane, delivered a package of papers weighing three tons."¹⁸²

176. See, e.g., *id.* at 12-13. For example, DHS awarded an IDIQ contract for the manufacture of radiation detection devices at borders and ports. See *id.* The devices supplied, however, were so sensitive that they could not distinguish between weapons-grade material and normal items, like cat litter, that emit some radiation. See *id.* at 12. The machines set off so many false alarms that customs officials decreased their sensitivity levels, which of course decreased their ability to detect dangerous radiation. See *id.* DHS awarded new contracts worth \$1.2 billion for new screening machines, which are generally better at identifying naturally occurring radiation, but no better than the original monitors at detecting small levels of radiation. See *id.* at 13.

177. See Thornton, *supra* note 129, at 402. "Contracting Officers will cut corners when overwhelmed by customer demands and desperately turn to indefinite delivery contracts to accomplish assignment with minimal planning, preparation, and competition." *Id.*

178. See *id.* at 402-14. Using IDIQs to justify the use of noncompetitive procedures often limits opportunities for small businesses. See *id.* at 403. As the number of IDIQs increases, the number of contracts exempt from bid protests increases. See *id.* at 408. "Well-founded bid protests clarify regulations, enforce procurement laws, ensure a sense of fair dealing, and provide meaningful deterrence of statutory and regulatory violations." *Id.* While the success of IDIQs "relies in large part on contractors continuing to submit their best proposals throughout the duration of the contract," poorly estimated quantities, which contractors cannot rely on, have undermined the faith of contractors and given new force to the old adage that "anyone who is dumb enough to rely on the Government's promises deserves what he gets." *Id.* at 410-13 (internal quotation marks omitted).

179. See Kelman, *supra* note 129, at 606; see also Gore, *supra* note 126, at 30. The milspec was a detailed government specification for exactly how an item, such as an ashtray, should be made. See Gore, *supra* note 126, at 27. In 1993, the specifications for a government-issued ashtray, for example, were nine pages long, including not only specifications and drawings, but the specific dimensions, color, polish, and markings that should appear. See *id.*

180. See Gore, *supra* note 126, at 26-27.

181. See Nagle, *supra* note 39, at 506-07.

182. *Id.* In its crusade against fraud and corruption, Congress had made contracting with the government too expensive and time-consuming. Instead of increasing competition and

Instead of dictating exactly how a contractor should supply goods or services to the government, Gore's reformers implemented a fundamental shift to rely on the commercial marketplace.¹⁸³ For example, before the Reinventing Government movement, a contract would have required mowing the grass once every two weeks.¹⁸⁴ After the reforms, the same contract simply would say to keep the grass under two inches, leaving it up to the contractor to figure out how often the grass needed to be mowed.¹⁸⁵ The death of the milspec thus represented not only a cost-savings measure,¹⁸⁶ but perhaps even more significantly, marked an important philosophical shift—trusting contractors to figure out how to create what the government needed.¹⁸⁷

e. Cumulative Effects of the Reform Effort: Protest-Proof Procurement

Historically, government contracting had relied on a system of internal checks (the rules governing procurement) and external balances (challenges by disappointed bidders).¹⁸⁸ In fact, when CICA was drafted, Congress envisioned that “disgruntled competitors” would act as “a strong mechanism to enforce competition.”¹⁸⁹ Under this scheme, protests not only “polic[e] the contract formation process” but also “clarify regulations, enforce procurement laws, ensure a sense of fair dealing, and provide meaningful deterrence of statutory and regulatory violations.”¹⁹⁰ The reforms of the mid-1990s, however, removed many contracts from such challenges by increasing discretionary procurement authority and giving

reaping the gains of competitive bidding, the government was left with a dearth of offers; fewer and fewer contractors were bidding for government business. *See id.* at 506-09.

183. *See Gore, supra* note 145, at 79-81.

184. *See Kelman, supra* note 129, at 613.

185. *See id.* In addition to switching to commercially available rather than specially made products, this also represents a shift towards performance-based contracting. *Id.*

186. *See Gore, supra* note 129, at 30.

187. *See Gore, supra* note 145, at 79-81.

188. *See Schooner, supra* note 11, at 629-30. For instance, after the Cold War, as defense spending dropped, the government encouraged and subsidized consolidation of the defense industry, which had developed to serve the massive defense spending during the Cold War. *See id.* at 653-54; *see also Nagle, supra* note 39, at 497. This decline in defense spending and contraction of the marketplace created a scenario where fewer firms were competing with each other, often viciously, for the reduced pool of defense contracting work. *See Schooner, supra* note 11, at 653-54. As a result of consolidation in the industry, and fewer enormous defense contracts being awarded, one-time rivals often ended up as newfound allies. *See id.* at 654. General Dynamics and Newport News Shipbuilding, for example, once fought bitterly over the award of the early Seawolf submarine contract, but ended up sharing the contracting work for the newest generation of attack submarine. *See id.*

189. Nagle, *supra* note 39, at 497. “CICA strengthened the protest process, providing (for the first time) a specific statutory basis for the GAO to hear bid protests and provided a separate forum, the General Services Administration Board of Contract Appeals, for protests . . .” *Id.* Soon after CICA’s passage and implementation, procurement protests began a slow, but steady, increase, growing from 2891 in 1986, to 2941 in 1987, and 2943 in 1988. *See id.*

190. Thornton, *supra* note 129, at 408; *see Ron Nixon, Small Businesses Fight Fickle Rules*, N.Y. Times, Dec. 27, 2006, at C1.

rise to the protest-proof contracts.¹⁹¹ Professor Steven L. Schooner¹⁹² summarized the new procurement regulations: “[They] insulate an ever increasing piece of the procurement pie from meaningful competition and, of equal significance, den[y] the Government, contractors, and the public of third-party oversight of this spending.”¹⁹³

The reforms implemented by FASA and the Reinventing Government reformers empowered government buyers to act with more freedom—to contract based on their own, individual best judgment.¹⁹⁴ This increase in discretionary authority, however, undermined one of the key protections intended to safeguard competitive procedures envisioned by CICA: an army of disgruntled contractors ready to challenge contract awards they believed were wrongly awarded.¹⁹⁵ As Professor Schooner stated, “In an era of seemingly unfettered contracting officer discretion, and faced with what they perceive as a dismal likelihood of prevailing on the merits, prospective litigants are discouraged from initiating litigation to challenge agencies’ source selection decisions.”¹⁹⁶

While the volume of protests had grown steadily through the early 1990s, protests plummeted after the passage of FASA and the amendments to the FAR.¹⁹⁷ In 1993, GAO received 3377 cases;¹⁹⁸ but in 1999, it received fewer than 1400.¹⁹⁹ This is particularly striking because there was an

191. See 48 C.F.R. § 16.504(a) (1999); Schooner, *supra* note 11, at 658-59.

192. Steven L. Schooner is an Associate Professor of Law and Co-Director of the Government Procurement Law Program at George Washington University Law School. See Steve Schooner’s Government Contracts Law Site, <http://docs.law.gwu.edu/facweb/sschooner/> (last visited Apr. 5, 2007).

193. Schooner, *supra* note 11, at 660.

194. Professor James F. Nagle praised the Reinventing Government reformers with creating a “situation [] as healthy as any I can recall in the history of peacetime government contracting.” Nagle, *supra* note 39, at 518. Nevertheless, he worried that a future scandal would once again prompt congressional overreaction and bring about another era of overregulation of government procurement. See *id.*

195. See Schooner, *supra* note 11, at 630-31. Protests have long played an important role in ensuring oversight and the application of competitive standards. See, e.g., Carl J. Peckinpugh & Joseph M. Goldstein, *Best Value Source Selection—Contracting for Value, or Unfettered Agency Discretion?*, 22 Pub. Cont. L.J. 275, 336-38 (1993). For instance, even before FASA weakened the ability of contractors to protest awards, agencies would seek “to cloak the source selection decision in a cloud of subjectivity immune from review.” *Id.* at 336. Agencies claiming to use “best-value procurement,” an appropriate method of source selection when discretion is necessary to award a contract based on technical superiority, would often fail to release all of the contract’s criteria and even conduct unannounced “‘quantitative’ cost/technical tradeoff analysis.” *Id.* at 337. This created a distinctly uneven playing field and prevented meaningful competition from occurring.

196. Schooner, *supra* note 11, at 663.

197. See *id.* at 644-45.

198. See *id.* at 645.

199. See *id.* The decline in protests has continued. In 2006, for example, the GAO received just 1270 protests. See Letter from Gary L. Kepplinger, Gen. Counsel, GAO, to J. Dennis Hastert, Speaker of the House of Representatives, Bid Protest Statistics for Fiscal Years 2002-2006 (Nov. 15, 2006), available at <http://www.gao.gov/special.pubs/bidpro06.pdf>. The fewer bid protests that are filed, the less effective the system becomes as an external check. See Amitabh Khardori, *Bias in Federal*

expected increase in 1996 or 1997 when GAO became the primary forum for protests regarding information technology contract awards.²⁰⁰ In large part, the dwindling number of protests can be attributed to the general shift towards discretion-based procurement decisions,²⁰¹ especially the increase in contractor performance report cards²⁰² and the growth of protest-proof contract vehicles.²⁰³ While the performance-based report cards undoubtedly provided an important source of information for agencies evaluating bidders, they could also be used as a weapon—a way for agencies to retaliate against litigious contractors. According to Professor Schooner, “The prospects of a negative, or less than stellar, past performance report card increase contractors’ litigation opportunity costs and chill contractors’ willingness to exercise due process rights, whether competing for new contracts or facing efforts to resolve disputes on existing work.”²⁰⁴ The growth in IDIQs has also contributed to the decline in protests.²⁰⁵ FASA generally precludes protests over such contracts, and as contracts have increased in both number and scope contractors are able to protest fewer and fewer awards.²⁰⁶

E. Creation of DHS: The Embodiment of Procurement Unfettered by Competition

While the Reinventing Government reformers succeeded in many aspects of their quest to reform federal procurement, CICA and its ideal of “full and open competition” remain in effect.²⁰⁷ The general idea of DHS’s special acquisition authority, and its mandate to use existing emergency procurement authority, was to remove many of the remaining rules that burdened government contracting and allow an even greater scope of discretion for contracting officers.²⁰⁸ This would, theoretically, allow

Contract Source Selections, 42 Procurement Law. 6, 8 (2006) (noting the role of rules as safeguards against bias in the federal procurement system).

200. Congress eliminated the authority of the GSA Board of Contract Appeals to resolve information technology protests in 1996. See Schooner, *supra* note 11, at 646. The General Services Board of Contract Appeals had been “quite popular with the protest bar,” and scholars expected that when it was eliminated, GAO’s docket would increase because of forum substitution. See *id.*

201. See *id.* at 663-64.

202. See *id.* at 656-57.

203. See *id.* at 658-59.

204. See *id.* at 657.

205. See *id.* at 658; Thornton, *supra* note 129, at 407-11.

206. See Thornton, *supra* note 129, at 407-08; see also Schooner, *supra* note 11, at 659.

207. See Luckey, *supra* note 59, at 3. See generally Woods Letter, *supra* note 3. While FASA and the changes made to the FAR “dramatically altered the federal procurement landscape,” CICA and its ideal of “full and open competition” are still in effect. Schooner, *supra* note 11, at 635-36; see Luckey, *supra* note 59, at 1, 4.

208. See White House, Analysis for the Homeland Security Act of 2002: Title VII, <http://www.whitehouse.gov/deptofhomeland/analysis/title7.html> (last visited Apr. 5, 2007) [hereinafter White House]; see, e.g., Memorandum from David A. Drabkin, Senior Procurement Executive, to GSA Acquisition Workforce Associates 1-2 (May 28, 2003),

national security spending to move even more quickly and efficiently than it could through the streamlined federal procurement framework.²⁰⁹ In other words, DHS's creators adopted the philosophy of the Reinventing Government reformers, equating rules and competition requirements with time-consuming delays and increased cost. They believed that by giving individual contracting officers more discretion and using more businesslike practices, the new agency would be able to buy the goods and services it needed quickly and at a good value.²¹⁰

The following discussion outlines the creation and underlying philosophy of DHS's procurement authority. It begins with a general explanation of why DHS was created and how the department has subsequently developed. Next, it explains DHS's special procurement authority, including exemptions from many of the general competition guidelines and the troubling precedent set by such exemptions. Then, it shows how the combination of weakened general competition requirements and DHS's special exemptions have given the department virtual carte blanche to award contracts without competition.

1. General Background

One year after the 2001 terrorist attacks on the World Trade Center and the Pentagon, Congress created DHS.²¹¹ It was the largest reorganization of government since the New Deal.²¹² The new department was cobbled together out of twenty-two separate federal agencies, ranging from the Coast Guard to the Secret Service to the Federal Emergency Management Agency (FEMA).²¹³ DHS was charged with the monumental task of creating a comprehensive domestic security program, including improving communication between the domestic security agencies, closing holes in airport security, and developing new antiterrorism strategies.²¹⁴

available at http://www.gsa.gov/gsa/cm_attachments/GSA_DOCUMENT/Emergency%20Procurement%20Authority_R2E-c-o9_0Z5RDZ-i34K-pR.doc.

209. See generally Woods Letter, *supra* note 3.

210. See *id.*; see, e.g., Gore, *supra* note 145, at 5-6. This philosophy equated effective procurement with administrative efficiency. See Schooner, *supra* note 11, at 674.

211. See Press Release, Office of the Press Sec'y, President Bush Signs Homeland Security Act (Nov. 25, 2002) [hereinafter Press Release], available at <http://www.whitehouse.gov/news/releases/2002/11/print/20021125-6.html>. See generally Gov't Accountability Office, GAO-03-1134T, Department of Homeland Security: Challenges and Steps in Establishing Sound Financial Management; Testimony Before Subcommittee on Governmental Efficiency and Financial Management, Committee on Government Reform, House of Representatives (2003) (statement of McCoy Williams, Director, Financial Management and Assurance) [hereinafter Williams Testimony]. FEMA was the only agency transferred entirely into DHS. See *id.* at 5.

212. See, e.g., Gov't Accountability Office, GAO-03-102, Major Management Challenges and Program Risks: Department of Homeland Security, at 3-5 (2003). DHS is the third largest government agency, with an estimated budget of nearly \$40 billion and more than 170,000 employees. See *id.* at 3.

213. See Williams Testimony, *supra* note 211, at 1-2.

214. See Press Release, *supra* note 211.

Since its creation, DHS contract spending has increased dramatically. Spending has more than doubled from 2001, when \$20.7 billion dollars were allocated to the Department, to 2005, when \$47.3 billion dollars were allocated.²¹⁵ As DHS's contract spending has increased, so has the number and dollar value of contracts awarded without competition. In 2003, DHS awarded \$655 million worth of contracts without full and open competition.²¹⁶ By 2004, the Department estimated that it had awarded \$6.6 billion in contracts without full and open competition, a 739% increase from 2003.²¹⁷ While DHS's "other transactions" authority gives the Department special exemptions from many competition requirements,²¹⁸ even without relying on that authority, DHS has been able to award contracts noncompetitively because of the changes wrought by FASA and CICA's General and National emergency exemptions.²¹⁹

2. DHS's Procurement Authority

This Section examines the outlines of DHS's special exemptions from the general competitive rules of government contracts. While DHS's "other transactions" authority sets a troubling precedent of giving an agency virtually unfettered discretion—a free pass to ignore the rules that mandate competition—it is equally troubling that the Department has rarely found it necessary to use this special authority.²²⁰

a. *What DHS Can Do That Other Agencies Cannot*

By the very nature of DHS's wide-ranging national security mandate, much of its contracting fell within CICA's National Defense and General emergency provisions.²²¹ Nevertheless, the Department was granted special powers to ensure that, even if a procurement fell within the competitive guidelines, it would still be able to award a contract on a discretionary basis.

215. See Congressional Budget Office, Economic and Budget Issue Brief: Federal Funding for Homeland Security, Apr. 30, 2004, <http://www.cbo.gov/showdoc.cfm?index=5414&sequence=0>.

216. See Waste, Abuse, and Mismanagement in DHS, *supra* note 5, at 2-3.

217. See Gov't Accountability Office, Homeland Security: Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority 7 n.5 (2004) [hereinafter Special DHS Acquisition Authority].

218. A GAO report found that the Science and Technology Directorate was the only DHS organization using the authority. See *id.* at 7. In 2004, "other transactions" constituted \$125 million, or eighteen percent, of the Directorate's \$715.5 million budget. See *id.*

219. "[DHS] has never used the special streamlined acquisition authorities According to the Director of Acquisition Oversight at DHS, use of special authorities has not been needed because existing authorities have been sufficient to meet DHS requirements." See Woods Letter, *supra* note 3, at 2. In fact, DHS has repeatedly been urged to make more efficient use of its special exemptions. See *id.* See generally Special DHS Acquisition Authority, *supra* note 217.

220. See Special DHS Acquisition Authority, *supra* note 217, at 5-7.

221. See *supra* notes 89-107 and accompanying text.

Along with its massive responsibilities, DHS was granted massive authority. Specifically, it was given extraordinary contracting powers designed to allow it to meet deadlines for closing security holes without the delay and costs associated with competitive bidding.²²² Unlike other agencies, which must conform to statutory provisions requiring competitive bidding, DHS was given special “other transactions” authority.²²³ Additionally, DHS can bypass the requirements of any procurement statute or regulation that would impair the Department’s mission.²²⁴

b. “Other Transactions”

The Homeland Security Act of 2002, which created DHS, vested the new Department with five years of authority for “other transactions.”²²⁵ “Other transactions” are defined as acquisition agreements that are free from the standard requirements of government contracts.²²⁶ Specifically, several key statutes designed to enforce competitive bidding are inapplicable to “other transactions”.²²⁷

- CICA, which requires competitive bidding for government contracts;²²⁸
- the Anti-Kickback Act of 1986,²²⁹ which is aimed at prohibiting the use of money to influence the award of contracts;
- the Contract Disputes Act,²³⁰ which provides for the resolution of claims and disputes over government contracts;

222. See Robert O’Harrow, Jr. & Scott Higham, *U.S. Border Security at a Crossroads: Technology Problems Limit Effectiveness of US-VISIT Program to Screen Foreigners*, Wash. Post, May 23, 2005, at A1 (detailing extensive use of IDIQ contracts, and DHS ignoring basic contracting procedures, in the award of a \$10 billion contract to create a “virtual border”); Higham & O’Harrow, Jr., *supra* note 8.

223. See generally Woods Letter, *supra* note 3.

224. The HSA authorizes DHS to invoke 40 U.S.C. § 474 to bypass the requirements of any procurement statute or regulation that would impair the Department’s mission. See Pub. L. No. 107-296, §§ 831-833, 116 Stat. 2224-2227 (2002) (codified at 6 U.S.C. §§ 391-394 (2006); 41 U.S.C. § 416 (2006)); White House, *supra* note 208, at 11. The only other agencies with this authority are the CIA and Atomic Energy Commission. See White House, *supra* note 208.

225. See HSA, Pub. L. No. 107-296, § 833, 116 Stat. 2225-2227 (2002) (codified at 6 U.S.C. § 393 (2006); 41 U.S.C. § 416 (2006)); Special DHS Acquisition Authority, *supra* note 217, at 1.

226. See Special DHS Acquisition Authority, *supra* note 217 at 1.

227. See *id.* at 6. Such procurements are also exempt from other statutes, such as the Drug-Free Workplace Act of 1998, 41 U.S.C. §§ 701-707 (2000) (declining to link drug use or distribution with federal funding), and the Buy American Act, 41 U.S.C. § 10a-10d (2000) (indicating a preference for domestic products).

228. Procurement Protest System, subtitle D of CICA, 31 U.S.C. §§ 3551-3556 (2000), which provides for procurement protests to be heard by the Comptroller General, is also inapplicable.

229. See 41 U.S.C. § 423; 31 U.S.C. § 1352.

230. See Contract Disputes Act of 1978, 41 U.S.C. §§ 601-612.

- and the Procurement Integrity Provisions, which provide for civil, criminal, and administrative sanctions for those who inappropriately disclose or obtain source selection information or contractor bid and proposal information.²³¹

One reason why Congress gave the nascent Department this sweeping authority was to enable it to make high-tech purchases from companies that might have found standard government contract regulations too burdensome.²³²

Because so many of the regulations that normally govern federal procurement are suspended, DHS procurement is often closer to business-to-business contracting than government contracting,²³³ which was the very goal of the Reinventing Government movement. While DHS has begun to use its special authority to make purchases, it has yet to establish internal safeguards, such as training standards for procurement officers authorized to make such purchases or independent audits to evaluate the contracts.²³⁴ DHS's own policies recognize that safeguards are needed to ensure that its broad procurement authority is not misused. While the Department requires that its special authority be used only if there is no other way to buy the needed goods or services,²³⁵ there is neither external nor internal oversight in place to ensure that the requirement is followed.

231. See 41 U.S.C. § 423; see also Special DHS Acquisition Authority, *supra* note 217, at 6.

232. See Special DHS Acquisition Authority, *supra* note 217, at 4. "Other transactions were created to enhance the federal government's ability to acquire cutting-edge science and technology." *Id.* Because of their exemptions from many of the requirements of other government procurements, "other transactions" help agencies attract nontraditional private-sector contractors that have generally not pursued government contracts. See *id.* Congress granted DHS "other transactions" authority to attract "high-tech commercial firms that have [previously] shied away from doing business with the government because of the requirements mandated by the laws and regulations that apply to traditional procurement contracts." *Id.* at 24. Nontraditional government contractors are defined as businesses that have not, for at least one year before entering into a contract, entered into or performed (1) any contract subject to the federal government's accounting requirements for measurement, assignment, and allocation of costs to contracts; or (2) any contract over \$500,000 in compliance with the FAR. See HSA, Pub. L. No. 107-296, § 831(d), 116 Stat. 2225 (2002) (codified at 6 U.S.C. § 391 (2006)); see also Special DHS Acquisition Authority, *supra* note 217, at 25.

233. See Special DHS Acquisition Authority, *supra* note 217, at 6. Specifically, section 732(b) of the Homeland Security Act of 2002 authorizes DHS to contract to form employer-employee relationships with private-sector service providers. See Pub. L. No. 107-296, § 732(b), 116 Stat. 2135 (2002) (codified at 6 U.S.C. §§ 391-394 (2006)); 41 U.S.C. § 416 (2006)); see also White House, *supra* note 208, at 11. This aspect of DHS's procurement authority should not be overlooked. Although the general rule prohibits contracts creating employer-employee relationships between government agencies and private business, the unique nature of the Department's work allows DHS to enter into such contracts. See *id.*

234. See Special DHS Acquisition Authority, *supra* note 217, at 19-20.

235. See *id.* at 17. DHS modeled its policy on DOD's, but has failed to match DOD's audit and training requirements. DOD has independent audit provisions and contract officer training requirements in place. See *id.* at 20-21. DHS has no such audit requirements in place. See *id.* at 19-20. Also, while DHS has tried to emulate DOD's training requirements,

II. THE THEORY OF BUSINESSLIKE GOVERNMENT, EMBODIED IN DHS, MEETS REALITY

This part weighs the costs associated with rules mandating competitive bidding against the benefits of such rules. For the Reinventing Government reformers, this is the question of whether, in their rush for change, they papered over fundamental—and essential—differences between the government and the private sector. In other words, can discretionary government procurement be effective, not only in the sense of getting goods and services to the government more quickly, but by the other standards to which government procurement is measured, such as transparency, public confidence, and fairness? Or, were the drafters of CICA correct in their belief that there must be a rule-based system to enforce competitive standards as an essential safeguard against the sort of scandals that first prompted enactment of the Act?

On a theoretical level, the question is whether the costs of rule-based decision making (hampering a good decision maker from making a good decision based on his own judgment) outweigh the benefits of such a policy (preventing a bad decision maker from making a bad decision). Historically, the federal government procurement system has relied on a series of checks, in the form of the complex regulations that government buyers must abide by, to guard against the perils of a bad decision maker.²³⁶ The Reinventing Government reformers, however, instituted a sea of change; they sought to free the good decision maker from the constraints of the rules by increasing the amount of discretion in federal procurement policy.²³⁷

This part begins with a discussion of the arguments for and against the use of a rule-based procurement system. First, it presents the main arguments in favor of discretionary decision making. Then, it examines the arguments in favor of a rule-based system, using the Hurricane Katrina recovery effort as a case study that exemplifies the importance of competition requirements.

A. *The Costs of Rule-Based Government Procurement Outweigh the Benefits*

This section presents the arguments against having a rule-based procurement system. Part II.A.1 discusses the argument that compliance with rules makes the procurement process too long. Part II.A.2 discusses the argument that rules are overly rigid and handicap good decision makers, ultimately extracting a greater cost than their benefit in guarding against

and does in fact require special certification for contracting officers, the training program designed to issue the certification has not been established. *See id.* at 21.

236. *See supra* Part I.B.1-2.

237. *See* Kelman, *supra* note 129, at 585; Steven L. Schooner, *Procurement Proper*, GovExec.Com, Aug. 15, 2005, <http://www.govexec.com/features/0805-15/0805-15advp.htm>; *see also supra* Part I.D.1-3.

bad decision makers. Finally, Part II.A.3 discusses the argument that rules create a self-fulfilling prophecy of worst-case scenarios—that is, that rules based on the worst-case scenario lead to the worst-case scenario.

1. Red Tape: Rules Create Unnecessary Delays

One of the fundamental principles of the businesslike government reforms was that rules make government decisions overly complicated, causing enormous delays.²³⁸ The reformers cheered the elimination of regulations as saving time and money.²³⁹ In fact, the National Performance Review recommended cutting government procurement regulations in half.²⁴⁰ Removal of these unnecessary rules was essential to speed procurement and make government work more like a giant, efficient business.²⁴¹

To the advocates of businesslike government, the thousands of rules governing procurement were not important procedural safeguards but meaningless red tape.²⁴² Even if some of the rules were justified as safeguards against abuse, as a whole, the system had become so Byzantine that the cost of following the rules outweighed their benefit.²⁴³ “[The] large agglomeration of rules, each of whose benefits individually outweigh

238. See Kelman, *supra* note 129, at 596; see, e.g., Sam Kazman, *Red Tape for the Dying: The Food and Drug Administration and AIDS*, Heritage Found., Apr. 8, 1988, available at http://www.heritage.org/Research/Religion/upload/87778_1.pdf (explaining that the distribution and approval of AIDS drugs was being delayed by rules and regulations).

239. See Gore, *supra* note 126, at 33 (noting with approval a sweeping change in the Air Force’s internal regulations that replaced 1510 regulations with 165 policy directions and 750 sets of instructions, which cut some 55,000 pages of policy and procedure down to 18,000 pages of clearly delineated policy and procedure).

240. See *id.* (recommending that the President order all federal agencies to review their procurement regulations over three years, with a stated goal of eliminating fifty percent of those regulations).

241. See *id.*; Barr, *supra* note 135 (describing the program to reform government “to make it more businesslike”); see, e.g., Senator Charles E. Grassley, *Reinventing Government: The Final Verdict*, Address to the Heritage Foundation (Nov. 24, 1993), in *Heritage Found., Heritage Lectures 474* (1993) (praising the idea of applying lessons learned from efficient private-sector businesses to government reform). The National Performance Review compared the amount of time it took the government to buy information technology with the amount of time it took a private-sector business. See Gore, *supra* note 145, at 49-50. They found that what took industry thirteen months, took the government forty-nine months. See *id.* To them, this process was unnecessarily lengthy and exemplified the problems of rule-based government procurement. *Id.* at 50. But the reformers failed to take account of the toll faster procurements were extracting from the competitive contracting system. See Gov’t Accountability Office, *Year-End Spending: Reforms Underway but Better Reporting and Oversight Needed* 7 n.8 (1998) (citing a Senate report based on three days of testimony that concluded there was a correlation between time-pressed negotiations and unnecessary noncompetitive contracting).

242. See Kelman, *supra* note 129, at 596.

243. See *id.* In other words, even if some delay was justified by some worthwhile rule, the system as a whole was still plagued by the collection of rules. See *id.*

its costs, may [nevertheless] together create so much delay that the *system* of rules comes to have greater costs than benefits.”²⁴⁴

The reformers saw the rules as unnecessary and therefore saw the delays they created as unnecessary. It is also important to think of this idea in the larger context of the Reinventing Government movement. The goal of the movement was to make government work like a giant business.²⁴⁵ Fundamental to the reformers’ idea of “effective, entrepreneurial governments” was the concept that having fewer rules would be more efficient.²⁴⁶ Free from the time-consuming task of meeting rule-based requirements, government would be able to act quickly and efficiently based on the decisions of its employees.²⁴⁷ Thus, removing rules was also essential to other key goals of the reform movement, such as (1) decentralizing procurement authority and increasing responsibility for individual contracting officers, (2) streamlining, (3) using commercial products, and (4) working more closely with the private sector.²⁴⁸

2. Rules Are Overly Rigid

Traditional bureaucracies are built on a mountain of rules.²⁴⁹ The Reinventing Government reformers railed against the rule-based system of government procurement because of its rigid, universal nature.²⁵⁰ They argued that the rules are both over- and under-inclusive and that because of the rules’ uniform requirements, the rules sometimes “get applied even to situations where they produce a bad decision. . . . [R]ules [don’t] always produce good decisions.”²⁵¹ Thus, by moving to a system of general, guiding principles, rather than strict rules, individual government officers would be able to make more efficient decisions.²⁵² This would also solve the problem of under- and over-inclusiveness: With no uniform rules mandating behavior, individuals would be free to act as circumstances

244. *Id.* “[C]ollectively the sum of all the rules in the traditional procurement system slowed the system down enormously, so that buying products or services took far longer than in the private sector and following the rules took up much of the time of contracting officials.” *Id.*

245. *See Gore, supra* note 126, at 5-8.

246. *See id.* at 6-7.

247. *See id.* at 7; *see, e.g., supra* notes 242-44 and accompanying text.

248. *See Kelman, supra* note 129, at 602.

249. *See Schooner, supra* note 237.

250. *See Kelman, supra* note 129, at 585-86, 601-02. Kelman sees the rigidity of rules, especially their application to inappropriate situations, as the system’s fatal flaw. *See, e.g., id.* at 585-86.

251. *Id.* Arguably, this is a weakness in any rule-based system. So, for example, a park’s no-dogs rule would exclude both badly behaved dogs, the intended target, and well-behaved dogs. *See id.*

252. *See Gore, supra* note 145, at 5. The move from “rigid rules to guiding principles” was also motivated by the vision of businesslike government. *Id.* In addition to giving broader discretion to “line managers,” the Reinventing Government reformers believed that decreasing the number of rigid rules would help the government “build a more professional workforce and encourage innovation.” *Id.*

demanded.²⁵³ The reformers believed that by freeing government decision makers from the rigid constraints of the traditional rule-bound bureaucracy, they would be able to act more cost-effectively and quickly, without sacrificing either fairness or quality.²⁵⁴

3. A Self-Fulfilling Prophecy of Doom: Rules Premised on Worst-Case Scenarios Lead to Worst-Case Scenarios

“A basic tenet of the National Performance Review is that agency heads and line managers are intelligent, honest people capable of making good decisions on how to allocate resources to best accomplish their missions.”²⁵⁵ This philosophy is in sharp contrast with a basic tenet of a rule-based system, which is premised on prevention.²⁵⁶ If “[p]rocurement officials free to make decisions unconstrained by rules might give contracts to their relatives, take bribes, or just lazily refrain from doing the work

253. In other words, instead of a park posting an ultimatum that no dogs are allowed, which properly excludes badly behaved dogs but improperly excludes well-behaved dogs, the park would post a guiding statement like “only well-behaved dogs allowed.” This would not only solve the over- and under-inclusiveness problem of the old rule, but also more properly achieve its ends.

254. The Federal Aviation Authority’s (FAA) Acquisition Management System (AMS) is an example of businesslike government, specifically a move from rigid rules to guiding principles, in action. *See generally* Gov’t Accountability Office, Air Traffic Control: FAA’s Acquisition Management Has Improved, but Policies and Oversight Need Strengthening to Help Ensure Results (2004), available at <http://www.gao.gov/new.items/d0523.pdf> [hereinafter Air Traffic Control]. In late 1981, the FAA began a multibillion dollar modernization of the nation’s air traffic control system. *See id.* at 1. The program was plagued by cost, schedule, and performance shortfalls. *See id.* The FAA blamed these ills on the burdensome federal procurement process, so in 1995 Congress granted the FAA exemptions and authority to develop a new acquisition management policy, AMS, which the FAA began using in 1996. *See id.* *See generally* Rand L. Allen & Christopher R. Yukins, *Bid Protests and Contract Disputes Under the FAA’s New Procurement System*, 26 Pub. Cont. L.J. 135 (1997). “AMS consists of broad guidance,” whereas the FAR is very detail and rule oriented. Air Traffic Control, *supra*, at 3, 8-13. “For example, although AMS states a ‘preference’ for competition, FAA personnel may use single-source contracting when necessary [O]ther federal agency contracting officials operating under the FAR are generally required to seek ‘full and open competition’—a more rigorous standard.” *Id.* Yet AMS and the decision-making authority that it delegated to procurement officers did not cure the FAA’s ills. *See id.* at 5. A GAO audit of the program found that AMS requirements were too vague and did nothing to minimize the development of new requirements, resulting in additional unplanned work in five out of the seven systems reviewed. *See id.* Moreover under AMS, the air traffic control system continued to be plagued by the same problems that the FAA had blamed on the FAR’s requirements: unexpected needs, higher costs, and delays. *See id.* The real cure, the GAO found, was in “effective acquisition management, rather than the use of a specific contracting process.” *Id.* at 5-6; *see also* Letter from John H. Anderson, Jr., Dir., Transp. Issues, Gov’t Accountability Office, to Senator William V. Roth, Jr. (Oct. 27, 1995), available at <http://archive.gao.gov/paprpdf/155498.pdf>.

255. Al Gore, *From Red Tape to Results: Creating a Government That Works Better & Costs Less*; Gov’t Services Administration 9 (1993) (accompanying Report of the National Performance Review).

256. *See, e.g.,* Schooner, *supra* note 237.

necessary to protect the Government's interests,"²⁵⁷ then there must be rules in place to guard against those exact dangers.²⁵⁸ The reformers believed, however, that in guarding against the worst possible scenario, the rules actually ended up setting a *de facto* maximum performance standard.²⁵⁹

In the reformers' eyes, the old system was overly rule bound²⁶⁰ and unnecessarily removed all discretion from government buyers.²⁶¹ The rules themselves were essential accomplices in creating the bungling, inefficient bureaucracy.²⁶² The sole justification for many rules was to "avoid abuse, particularly corruption."²⁶³ Such rules disabled good decision makers in order to disarm bad ones.²⁶⁴ While disarming bad decision makers prevents them from wreaking havoc, disabling good decision makers prevents them from making good decisions.²⁶⁵ Thus, the rules end up setting a common denominator that is at once both over- and under-inclusive.²⁶⁶ Protecting government from the disaster of a bad decision maker (which the reformers argued was a distinct minority)²⁶⁷ costs the government in that it can

257. See Kelman, *supra* note 129, at 587.

258. This was the philosophical basis of CICA. See *supra* Part I.C. Kelman argues that rules with the sole function of preventing abuse should be "the least-restrictive possible" and, whenever possible, augmented by the criminal justice system. Kelman, *supra* note 129, at 602.

259. See Kelman, *supra* note 129, at 587.

260. In other words, the voluminous requirements set forth in the FAR bogged procurement down in an unnecessary morass of rules and regulations. See Gore, *supra* note 127, at 27.

261. See Gore, *supra* note 255, at 9 (criticizing "present management policies" that remove authority and control from the agency's own management process and place it in control of a third party, which dilutes accountability, impairs oversight, and nullifies pride in mission accomplishment).

262. See Kelman, *supra* note 129, at 583.

263. See *id.* at 589. The Reinventing Government reformers also recognized the procurement culture that such rules created, with their inherent mistrust of the procurement workforce itself. See Gore, *supra* note 146, 19-21 ("[T]he procurement system's many control mechanisms discourage innovation. Good ideas are often squashed by any or all of these mechanisms or by the procurement culture itself.").

264. See Kelman, *supra* note 129, at 588. This is another example of rules being both under- and over-inclusive. See *supra* notes 148-53 and accompanying text. In other words, a rule guarding against giving contracts to companies because they employ a relative of the contracting agent might be premised on the idea of guarding against favoritism by bad decision makers. See *supra* note 257 and accompanying text. However, because of the uniform nature of rules, the proscription would apply across the board, even to an honest contracting officer who sought to award a contract to a company that employed a relative because the company was the most qualified and submitted the best bid.

265. See Kelman, *supra* note 129, at 587-89.

266. See *id.*

267. See *id.* "[R]ule-based decision-making ordinarily entails disabling wise and sensitive decision-makers from making the best decisions in order to disable . . . wicked decision-makers from making wrong decisions." *Id.* at 587 (internal quotation marks omitted). Rule-based systems embrace the idea that sometimes guarding against the worst-case scenario is the most we can hope for, embracing a worst-case perspective. See *id.* Rather than aiming for the best possible results, the rule-based system is predicated on avoiding the greatest risk. See Gore, *supra* note 126, at 3. "[C]ontrol system after control system is piled up to

prevent good decision makers from making good decisions.²⁶⁸ In such a situation, government officials have no incentive to hire a good decision maker and good decision makers certainly have no incentive to work for the government.²⁶⁹

B. Rules Designed to Protect Competitive Bidding in Government Procurement Are Essential Safeguards and the Best Means to Ensure Public Confidence, Cost-Efficiency, and Transparency

The government is an enormous bureaucracy that relies on rules as essential procedural safeguards.²⁷⁰ Rules are a procedural means to protect an important end. For example, if government values competition in procurement, then a rule mandating full and open competition is the proper way to ensure that such an end is met.

This section examines the arguments in favor of a rule-based system. Part II.B.1 discusses the argument that rules provide an essential procedural safeguard ensuring that federal procurement is efficient and fair. Part II.B.2 analyzes the argument that rules are essential for public confidence in the federal procurement process.

1. Government Is Different in Kind from Business

Whereas the Reinventing Government reformers advocated private-sector business practices as a paradigm of efficiency and a model to which government operations should aspire, other procurement scholars argued that government is, by its very nature, inherently different from a private-sector business.²⁷¹ Government differs in several fundamental aspects from a business,²⁷² and the incentives that motivate private-sector employees

minimize the risk of scandal. The budget system, the personnel rules, the procurement process, the inspectors general—all are designed to prevent the tiniest misstep.” *Id.*

268. The Reinventing Government reformers saw this as a major problem because it deprived government of the benefits of its workforce. *See id.* Unlike lumbering, inefficient bureaucracies, “[e]ffective, entrepreneurial governments . . . empower those who work on the front lines to make more of their own decisions and solve more of their own problems.” *Id.* at 7.

269. *See id.* at 20-25. This belief was fundamental to the National Performance Review’s recommendation that government decentralize much of its decision making, including in the procurement area. *See id.* The reformers also saw it as essential to building an innovative procurement workforce. *See Gore, supra* note 145, at 15-17. And building an innovative workforce was key to another goal, namely encouraging more procurement innovation. *See id.* at 19-21.

270. This, in large part, was the philosophy that justified CICA. *See supra* Part I.C.

271. *See Schooner, supra* note 11, at 715; *see also* Steven Kelman & Steven L. Schooner, *Scandal or Solution?*, GovExec.Com, Nov. 7, 2005, http://www.govexec.com/story_page.cfm?articleid=32732&printerfriendlyVers=1&.

272. *See* Project on Gov’t Oversight, Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the U.S. Congress 3-4 (2006) (final working paper draft), *available at* <http://www.acquisition.gov/comp/aap/documents/Introduction%20and%20Executive%20Summary.pdf>. Factors affecting the government but not commercial businesses include the

simply do not work to motivate government agents. Perhaps foremost among the differences is a lack of a personal profit motive.²⁷³ In fact, personal profit is an undesirable incentive for government employees, as it influences the individual employee to place his own welfare before that of the agency. This subverts the government's fiduciary role and undermines public faith in the procurement process.²⁷⁴ Thus, modeling government procurement on the workings of a private business "exhibits disregard for whether noncompliance (or worse, corruption) permeates the system."²⁷⁵ Although government can take advantage of some techniques used in the private sector, such as buying commercially available products that cost less than products specially made for the government, the government's unique status prevents federal procurement from being modeled directly on the workings of a private-sector business.²⁷⁶

In this view, the idea of businesslike government makes sense only when applied with a scalpel—grafting bits and pieces of wisdom from the private sector onto the government might work, but simply grafting the ethos of the private sector onto government procurement will not.²⁷⁷

2. Invaluable Red Tape: Rules Are Essential Procedural Safeguards Against Waste, Fraud, and Abuse

According to Professor Schooner, federal procurement is "premised on: (1) robust competition; (2) high standards of individual and institutional integrity; and (3) system transparency—all of which are key to maintaining

annual appropriations process; "use of the procurement system to accomplish a host of government social and economic objectives," such as helping small businesses; fiduciary duty; "the need to accomplish urgent missions with limited time and personnel"; and the audit process. *Id.* at 3.

273. See, e.g., Gore, *supra* note 126, at 21 (giving the example of a federal worker who preferred to work for the government and make less money than work for a private-sector government contractor and make more money). The government also has a fiduciary responsibility that is unparalleled in the private sector. See Kelman & Schooner, *supra* note 271.

274. See, e.g., Khardori, *supra* note 200, at 8-10 (noting that the "worst and most blatant example in the procurement system in recent times" was Air Force Procurement Chief Darleen Druyun's admission that she gave Boeing favorable treatment in exchange for jobs for herself and her relatives).

275. Schooner, *supra* note 11, at 722. Schooner urges a balance between the two extremes: "No one expects the government to make a profit . . . [or] a government that is so inefficient that it is wasteful . . . Within those extremes, Professor Kelman [and the Reinventing Government reformers] . . . have pushed in the direction of businesslike government. I fear they may have pushed too far." *Id.* at 722-23.

276. See Project on Gov't Oversight, *supra* note 272, at 1-3.

277. See Schooner, *supra* note 11, at 722-23. There is no comparison to be made, for example, between the federal government and General Motors. Schooner, *supra* note 11, at 719-21. *Contra* Gore, *supra* note 127, at 3. While successful companies, like government agencies, must inspire public confidence and there must be clear levels of accountability, there are nevertheless key differences between the private and public sector. For example, the sheer immensity of the government distinguishes it from any private-sector business. See, e.g., Project on Gov't Oversight, *supra* note 272, at 3-4.

public trust.”²⁷⁸ Without rules protecting each of these core concepts, the concepts are left vulnerable to the discretionary decision making of a government purchasing agent.²⁷⁹ Therefore, if the goal is for the government to purchase the best quality at the best price, compliance with competition requirements is the best means to achieve that goal.²⁸⁰ Rules are the procedural means that protect the end goals of federal procurement. The rules are essential not in and of themselves, but rather for the roles they serve as guardians and enforcers of the goals of the procurement system.²⁸¹

Moreover, rules are the best means to ensure the ends of the procurement system are met because they provide two levels of protection. First, in a proactive sense, the rules themselves are an internal mechanism to ensure that the end goals of the procurement system are reached.²⁸² Second, in a reactive sense, when a rule is broken, the ability of a disappointed bidder to press his claim provides an external check on the system.²⁸³ Therefore, the rule-based system is not the enemy of efficiency. The true culprit, responsible for miring government purchasing in unnecessary delays and

278. Schooner, *supra* note 11, at 710. Rules do double duty in this view because, in addition to guarding against bad results, they ensure good results. See Project on Gov’t Oversight, *supra* note 272, at 1-4. Thus, a rule requiring competition, for example, not only ensures that a contract is awarded on a valid basis, but also ensures that the government reaps the benefits of competition, such as high quality, innovative solutions, and good prices. See *id.* at 2-3.

279. See Kelman & Schooner, *supra* note 271. “Surely, transparency, fairness, integrity and competition are bedrock values in our procurement system. And the government’s fiduciary responsibility demands prudent protections against contractor cheating and malfeasance.” *Id.*

280. See Schooner, *supra* note 11, at 674 (arguing that if the goal is “to purchase quality at good prices . . . compliance with the congressional *competition* mandates achieves that purpose” and criticizing the reinventing government reformers for reformulating “efficiency” to mean “enhancing *administrative* efficiency”); Scott Higham & Robert O’Harrow, Jr., *GSA Chief Scrutinized for Deal with Friend: No-Bid Contract a Mistake, She Says*, Wash. Post, Jan. 19, 2007, at A1 (reporting on a chief GSA procurement officer sidestepping most major procurement rules and regulations to award a no-bid contract to her friend’s firm).

281. The rules are not important because of their individual value, but because of (1) the role they play in the larger system and (2) the procurement goal that they protect. In other words, the importance of rules lies in their operation as procedural safeguards.

282. See Schooner, *supra* note 11, at 710; see also Waste, Abuse, and Mismanagement in DHS, *supra* note 5, at 2-3.

283. See Schooner, *supra* note 11, at 638-55, 671-705; *supra* notes 188-93 and accompanying text; see, e.g., Nixon, *supra* note 190. Any well-formulated bid protest provides an external check on the procurement system by ensuring that the rules are upheld. For example, when one company challenged the award of a contract to another company, the Comptroller General found that the protest was warranted because the government had not created a fair playing field. See *In re Labat-Anderson Inc.*, 71 Comp. Gen. 252 (U.S. Comp. Gen. 1992). Whereas CICA (the applicable rule) required that the request for bids contain a statement of what criteria will be used to determine the winner, the contracting agency “deviated from the evaluation scheme” and used other unnamed criteria in deciding which company would win the contract. See *id.* Thus the protest brought by the disappointed bidder ensured that the rule was enforced. See *id.*

frustrating the goal of securing the best goods at the best prices, is the bureaucracy.²⁸⁴

3. Without Rules the Public Loses Confidence in the Procurement Process

Professor Schooner's work has emphasized the importance of rules to ensure public confidence in federal procurement: "In a government of the people, where the governed share responsibility with those who govern, public trust is key. For centuries, people have asked 'who watches the watchmen?,' and the question remains vital today."²⁸⁵ For federal

284. See Schooner, *supra* note 11, at 674. This point is key to the argument that the Reinventing Government reformers missed the mark. See *id.* Schooner criticizes Kelman for defining efficiency to mean that fewer buyers could make more purchases in a timely fashion and then proposing administrative reforms that achieved that end. See *id.* at 673-75. In the process of furthering this idea of administrative efficiency, Kelman and the Reinventing Government reformers dismantled many of the rules, statutory safeguards that had traditionally protected the fundamental goals of federal procurement. See *id.*

285. Schooner, *supra* note 11, at 684-85. The government purchase card provides an informative example of how a dramatic decrease in the rules governing federal procurement plays out in the real world. The cards were hailed by the Reinventing Government reformers as a success in government's adoption of efficient private-sector practices. See *supra* notes 160-70 and accompanying text. In 1993, Congress established a \$2500 per-purchase threshold, below which most of the major procurement regulations and requirements did not apply. See Schooner & Whiteman, *supra* note 168, at 149-51. Government use of the cards boomed, reaching a total of \$16.4 billion in 2003, when more than 325,000 cardholders used their cards in about 26.5 million transactions. See GAO, Purchase Cards Testimony, *supra* note 165, at 1. While the cards allowed agencies to quickly and conveniently make small purchases, they resulted in an increasingly large portion of the government's procurement dollars being spent without competition, oversight, or transparency, and in insulating those dollars from federal social policies. See Schooner & Whiteman, *supra* note 168, at 158-66. "This lack of insight restricts more than the public's right to know how the Government spends its money. . . . [It] also limits the information and access available to those who desire to compete for the Government's business." *Id.* at 163. For example, "[f]or decades, government personnel conducted the nation's business wielding basic, universally-recognized, black plastic ballpoint pens assembled by blind workers. . . . Today, despite the fact that [the pens] remain a mandatory source of supply . . . these pens are rarely used in government offices." *Id.* at 168 (internal quotation marks omitted). Now that government employees are free to choose from the vast array of commercially available pens, they often choose "stylish, modern, high technology German imports." *Id.* For some, this "represents the highest evolution of procurement reform and the free-market system. . . . For others, this trend highlights a host of unfulfilled policies, ranging from reduced employment opportunities for blind and severely disabled workers—a trend contrary to a Congressionally-mandated governmental purpose—to a dilution of the long-standing rule that the Government procure only its minimum needs." *Id.* at 168-69 (internal quotation marks omitted). Additionally, use of the cards often results in wasteful spending. A 2004 GAO audit of purchase-card use from 1994 to 2003 found that "ineffective management oversight and weak internal controls [left] agencies vulnerable to fraudulent, improper, and abusive purchase card activity" and to "numerous purchases of personal items such as jewelry, designer leather goods, clothing, stereo equipment, food, and entertainment." GAO, Purchase Cards Testimony, *supra* note 165, at 1. Moreover, use of the cards meant that agencies were not leveraging their buying power to get better prices. See *id.* at 3; see also Schooner & Whiteman, *supra* note 168, at 159-60. If agencies had leveraged their buying power to get a ten percent discount at vendors where the government spends more than \$1 million annually, then they would have saved as much as \$300 million. See GAO, Purchase Cards Testimony, *supra* note 165, at 4.

procurement to succeed, it must be open to public view and inspire public confidence: People must believe that the government is spending their money wisely.²⁸⁶ Without a clear system of rule-based oversight, Professor Schooner argued, reliance on “greatly increased buyer discretion with dramatically reduced oversight . . . erodes the public’s confidence[,] violates established norms, and is antithetical to a host of congressional mandates and policies. Accordingly, a backlash is inevitable.”²⁸⁷ While no one contests that rules might increase the amount of time that it takes for the government to buy something, that increased time may well be outweighed by the benefits of following the rules, resulting in a better quality good at a better price.²⁸⁸

4. The Hurricane Katrina Recovery Effort: A Case Study in the Need for Competitive Bidding Requirements

This section uses the Hurricane Katrina recovery effort to show the importance of rules mandating competition to regulate federal procurement and protect it from the dreaded trio of waste, fraud, and abuse.

a. History Repeats Itself: Loosening the Competitive Requirements for DHS Procurement Results in Scandals

DHS’s special exemptions and widespread use of CICA’s national security, national emergency, and “unusual and compelling”²⁸⁹ exemptions resulted in widespread waste, fraud, mismanagement,²⁹⁰ and allegations of

286. See Aimee Curl, Chris Gosier & Tim Kauffman, *The Safavian Story: Procurement Chief’s Arrest Renews Questions About Integrity in Government*, Fed. Times, Sept. 26, 2005, at 1 (noting that the procurement field has come under scrutiny from auditors and that scandals in the upper echelons of government procurement could deter lower-level procurement officials from acting ethically). See generally Schooner, *supra* note 173. Public confidence in government procurement was shaken by the Cunningham scandal, in which Representative Randy “Duke” Cunningham was forced to resign because he steered tens of millions of dollars of federal contracting funds to military contractors in exchange for \$2.4 million in bribes. See David D. Kirkpatrick, *House Democrats May Aid Corruption Inquiry*, N.Y. Times, Jan. 9, 2007, at A14. Government procurement also suffered a blow when the news of Air Force procurement head Darleen Druyun’s improper dealings with Boeing surfaced. See Leslie Wayne, *Pentagon Is Investigating 8 More Air Force Contracts*, N.Y. Times, Feb. 15, 2005, at C2. Druyun admitted that she gave Boeing preferential treatment in billions of dollars of Air Force contracts in exchange for jobs at the company for herself and her relatives. See Leslie Wayne, *Ex-Pentagon Official Gets 9 Months for Conspiring to Favor Boeing*, N.Y. Times, Oct. 2, 2004, at C1; see also Khardori, *supra* note 200, at 9-10.

287. Schooner, *supra* note 11, at 630. Arguably, the agency entrusted with the most buyer discretion and the most reduced oversight is DHS. See *supra* Part I.E.2. An examination of DHS’s largely discretionary procurement policies in the Hurricane Katrina rebuilding effort shows the essential role of rules, specifically those mandating competitive bidding, as a safeguard against waste, fraud, and corruption. See *infra* Part II.B.4.c.

288. See Schooner, *supra* note 11, at 674.

289. 41 U.S.C. § 253(c)(2) (2000).

290. See generally Waste, Abuse, and Mismanagement in DHS, *supra* note 5.

corruption.²⁹¹ Arguably, the exemptions also allowed for quicker procurement.²⁹² However, congressional auditors found that the “fractured purchasing system” was actually “hobbling the Department’s ability to meet core missions” in a wide range of security areas.²⁹³ Clearly, in assessing the benefits of loosening the competition requirements for DHS procurement, it is necessary to weigh the costs—including scandals, erosion of public confidence, purchase of inferior goods, and delays—against whatever benefits were achieved by the increased administrative efficiency (i.e., the speed of the procurement process).²⁹⁴

An examination of the use of government-issued purchase cards, touted by the Reinventing Government reformers as an ideal example of speedy contracting, demonstrates the detrimental effects of loosening competition requirements on government spending.²⁹⁵ The cards were designed as an “easy, efficient means” for government purchasers “to make small, routine purchases” without getting bogged down in the requirements of competitive bidding.²⁹⁶ At DHS, however, failure to oversee the use of the cards,

291. “[W]e have uncovered clear evidence of huge cost overruns, chronically lax contract management and preventable vulnerability to waste, abuse and mismanagement.” *Code Yellow: Is the DHS Acquisition Bureaucracy a Formula for Disaster?: Hearing Before the H. Comm. on Government Reform*, 109th Cong. 1 (2006) [hereinafter *Code Yellow Hearing*] (statement of Rep. Tom Davis, Chairman, Committee on Government Reform); see Philip Shenon, *Official Vows Investigation of No-Bid Relief Contracts*, N.Y. Times, Sept. 14, 2005, at A23.

292. See, e.g., Robert O’Harrow, Jr., *Report Faults TSA Security Contracting: Airport-Screener Spending Ballooned*, Wash. Post, Jan. 5, 2006, at D1 (detailing how, in a rush to meet congressional deadlines, the Transportation Security Agency failed to give a contractor detailed instructions and violated contracting regulations); Williams, *supra* note 7 (reporting that DHS justified the use of a no-bid sole-source award because of the need to meet deadlines).

293. See *Code Yellow Hearing*, *supra* note 291, at 1. The Committee’s staff obtained and reviewed over 6000 pages of documents. The Committee formally requested documents from DHS, which were provided in five separate document productions and included 196 oversight documents, 149 of which were prepared by the Defense Contract Audit Agency. See *id.* at 1-2.

294. The DHS procurement regime put a premium on administrative efficiency, equating more purchases made in less time with efficiency. See Schooner, *supra* note 11, at 674; see also Woods Letter, *supra* note 3. As DHS spending rose, a congressional investigation found pervasive mismanagement, including poor contract planning, inadequate contract oversight, and abuse of government purchase-card privileges. See Waste, Abuse, and Mismanagement in DHS, *supra* note 5, at 4-9.

295. See *supra* note 285 and accompanying text. See generally Gov’t Accountability Office, GAO-06-957T, *Purchase Cards: Control Weaknesses Leave DHS Highly Vulnerable to Fraudulent, Improper, and Abusive Activity* (2006). Examining the purchase-card problems also shows the government’s willful blindness towards the value of procurement regulations. Well before the purchase-card limit was increased one hundred-fold during the Hurricane Katrina rebuilding effort, there were “mountains” of evidence that the purchase card left government dollars vulnerable to waste, fraud, and abuse. See Steven L. Schooner & Erin Siuda-Pfeffer, *Post-Katrina Reconstruction Liability: Exposing the Inferior Risk-Bearer*, 43 Harv. J. on Legis. 287, 293-96 (2006); *infra* notes 310-11 and accompanying text.

296. See Waste, Abuse, and Mismanagement in DHS, *supra* note 5, at 7. The initial purpose of the cards was to cut unnecessary red tape that slowed the purchase of routine

combined with an ever-increasing ceiling on the amount that could be charged, resulted in waste, fraud, and abuse.²⁹⁷ Investigators found widespread²⁹⁸ abuse of the purchase cards during the Hurricane Katrina recovery effort, including government purchase-card holders who spent \$7000 on Apple iPods;²⁹⁹ \$68,000 on some 2000 sets of dog booties;³⁰⁰ and more than \$10,000 on golf and tennis training at resorts.³⁰¹

b. *Homeland Security Spending Unhinged: Cost Overruns*

From the Department's inception, DHS procurement has been plagued by the very ills that competitive bidding is designed to guard against: waste, fraud, and abuse.³⁰² As DHS spending procurement soared, from \$3.5 billion in 2003 to \$10 billion in 2005,³⁰³ there was a corresponding growth in the award of sole-source and limited competition contracts, from \$655

items. In other words, the credit cards were supposed to allow a government office that ran out of paper clips simply to order more without having to fulfill all of the normal time-consuming requirements of procurement. *See supra* notes 160-70 and accompanying text.

297. *See* Waste, Abuse, and Mismanagement in DHS, *supra* note 5, at 7, 16. For example, two Transportation Security Administration employees used the purchase cards to buy \$136,000 worth of luxurious personal items, including leather briefcases and office furniture, despite the agency's express ban on using the cards for furniture purchases. *See id.* at 16.

298. *See* Gov't Accountability Office, *supra* note 295, at "What GAO Found." GAO estimated that 45% of purchase-card transactions were not properly authorized and that in 63% of the transactions, nothing was received. *See id.* Additionally, GAO found evidence of far-ranging fraud in FEMA, including over 100 laptops worth \$300,000 "missing and presumed stolen" and the unauthorized purchase of \$208,000 for boats by a vendor impermissibly using a government-issued purchase card. *See id.*

299. *See id.* at 26, 28.

300. *See id.* at 26-27.

301. *See id.* at "What GAO Found."

302. *See generally* Waste, Abuse, and Mismanagement in DHS, *supra* note 5. "Competition in federal contracting protects the interests of taxpayers by ensuring that the government gets the best value for the goods and services it buys. Competition also discourages favoritism by leveling the playing field for competitors while curtailing opportunities for fraud and abuse." *Id.* at 2. *See generally* Code Yellow Hearing, *supra* note 290. The case of Eclipse Events illustrates the increased likelihood that a noncompetitively awarded contract will be improperly awarded. Eclipse Events was formed (by two women with ties to the travel industry) two weeks after it received its first \$1.1 million no-bid subcontract from NCS Pearson Inc., with which DHS had contracted to hire 60,000 airport passenger screeners. Robert O'Harrow, Jr. & Scott Higham, *A Subcontractor's Short but Lucrative Existence*, Wash. Post, June 30, 2005, at A13. The Eclipse contract eventually grew to \$24 million. *See id.* One woman was listed as Eclipse's chief executive, secretary, and chief financial officer. *See id.* She claimed \$5.4 million in pay for nine months of work, including a \$270,000 pension. *See id.* Government auditors could not substantiate \$15 million of the work Eclipse charged to NCS Pearson and in turn to DHS. *See id.* For example, government auditors found that two employees charged \$19,950 worth of labor fees to the government at the Hawk's Cay Resort in Duck Key, Florida, without detailing any of the work that was actually performed. *See id.*

303. *See* Waste, Abuse, and Mismanagement in DHS, *supra* note 5, at 2. DHS spending increased 189% from 2003 to 2005, compared with a 17% rise in other federal discretionary spending. *See id.* As DHS spending skyrocketed, so did the number of contracts entered into, rising from 14,000 in 2003 to 63,000 in 2005. *See id.*

million in 2003 to \$5.5 billion in 2005, an increase of 739%.³⁰⁴ One congressional report identified thirty-two DHS contracts, collectively worth \$34.3 billion, that were “plagued by waste, abuse, or mismanagement.”³⁰⁵ The litany of ills beleaguering DHS contracts and chronicled by the congressional investigation reads like a comedy of errors. For example, a contract to create a virtual border (electronic storage of personal travel information) used a fingerprint system that could not be integrated with the FBI’s fingerprint database;³⁰⁶ airport radiation monitors could not distinguish between bananas, kitty litter, and nuclear weapons;³⁰⁷ and cameras deployed to monitor the Mexican and Canadian borders did not work if they got wet.³⁰⁸ In a true example of contracting ineptitude, a contract for passenger-luggage screening devices to be used at airports not only was so vague in its requirements that the machines were too sensitive to be used, but also the form of the contract itself was a prohibited cost-plus percentage contract.³⁰⁹

304. *See id.* at 2-3. Whereas the percentage of DHS contracts awarded without full and open competition increased by 739%, overall federal spending on such contracts only increased by 36% during the same period. *See id.* at 3. By 2005, 55% of DHS’s procurement dollars, \$5.5 billion, was awarded with less than full and open competition. *See id.* Sole-source contracts, awarded with no competition, accounted for \$2.1 billion. *See id.* The remaining \$3.4 billion of contracts were awarded with limited competition, where only a small number of contractors were permitted to submit proposals. *See id.* at 3-4.

305. *See id.* at i. With increases in DHS spending, congressional investigators repeatedly found the same problems, including pervasive mismanagement, poor contract planning, inadequate contract oversight, and abuse of government purchase cards. *See id.* at 4-8; *see also supra* note 294 and accompanying text. The investigators found major problems with the contracts for private airport screeners, including the NCS Pearson contract. *See Waste, Abuse, and Mismanagement in DHS, supra* note 5, at 9; *supra* note 302 and accompanying text. When the Defense Contract Audit Agency examined the \$104 million contract, which had skyrocketed to \$741 million in less than a year, they questioned \$297 million of the entire \$884 million that Pearson billed to the government, including charges for noncompetitively awarded subcontracts. *See Waste, Abuse, and Mismanagement in DHS, supra* note 5, at 9; *supra* note 302 and accompanying text.

306. *Waste, Abuse, and Mismanagement in DHS, supra* note 5, at 14-15.

307. *Id.* at 12-13.

308. *See id.* at 13-14.

309. The Transportation Security Administration awarded a \$508 million cost-plus contract to Boeing for luggage screening at airports in 2002. *See id.* at 10. The cost of the contract soon soared to \$1.2 billion, but the screening equipment did not work because it was too sensitive. *See id.* GAO estimated that upgrading the machines would cost the agency another \$3 billion to \$5 billion. *See id.* Originally, the machines suffered from a large number of false alarms, which caused delays. *See id.*; Higham & O’Harrow, Jr., *supra* note 8. The machines were recalibrated, which lowered the false alarm rate, but also made them less effective. *See Waste, Abuse, and Mismanagement in DHS, supra* note 5, at 10-11. Because the Transportation Security Administration failed to follow sound contracting practices in awarding the contract, until 2003, the contract was a prohibited “cost-plus-a-percentage-of-cost” contract. *Id.* at 11; *see* Higham & O’Harrow, Jr., *supra* note 8. Such contracts, in which the contractor receives its profit based on a percentage of the total cost, remove an important incentive to hold costs down and are prohibited by federal law. *See Waste, Abuse, and Mismanagement in DHS, supra* note 5, at 11 n.51 (citing 10 U.S.C. § 1306 (2000); 41 U.S.C. § 254(b) (2000)); Higham & O’Harrow, Jr., *supra* note 8. Ultimately, the report found that Boeing made a 210% return on their investment in the

c. *Waste and Inefficiency Become Deadly: The Hurricane Katrina Rebuilding Effort*

Despite the problems that plagued DHS's rushed security contracts, Congress once again rolled back the requirements of competitive contracting during the Hurricane Katrina rebuilding effort.³¹⁰ Immediately after the disaster, Congress allowed for purchases of up to \$250,000—a hundred-fold increase in the normal threshold for micro-purchases—to be made without competitive bidding.³¹¹ The only requirement was that the price be “fair and reasonable.”³¹² By late September of 2005, a month after the storm, FEMA had spent \$15.8 billion of the \$62.3 billion Congress had allocated for the recovery effort.³¹³ Of that money, \$1.5 billion went to contracts that FEMA had signed without full and open competition.³¹⁴ In August 2005, the White House finally “issued long overdue (and slow to be implemented) purchase card guidance, mandating fundamental training and risk management policies.”³¹⁵ In the fall of 2006, these contracts came

contract, \$49 million of which was deemed excessive profit. Higham & O'Harrow, Jr., *supra* note 8.

310. Hurricane Katrina, a massive Category 4 storm, struck New Orleans and the Gulf Coast on August 29, 2005. See Cornelia Dean & Andrew C. Revkin, *After Centuries of “Controlling” Land, Gulf Residents Learn Who’s Really the Boss*, N.Y. Times, Aug. 30, 2005, at A14. The storm devastated New Orleans, much of which was below sea level and protected by levees that proved insufficient to protect the city of 500,000 residents. See Robert D. McFadden & Ralph Blumenthal, *Bush Sees Long Recovery for New Orleans; 30,000 Troops in Largest U.S. Relief Effort*, N.Y. Times, Sept. 1, 2005, at A1. In addition to the thousands it left dead, the storm displaced thousands of New Orleans residents from their homes and left them seeking refuge in other states and cities. See *id.*

311. See Schooner & Siuda-Pfeffer, *supra* note 295, at 293-96; Chris Gosier, *Loosened Contracting Rules for Katrina Cause Oversight Concern*, Fed. Times, Sept. 19, 2005, at 6; Higham & O'Harrow, Jr., *supra* note 8. The increase not only exceeded the \$15,000 ceiling Congress had previously made available for spending during emergencies, but also was enacted “without meaningful discussion.” Schooner & Siuda-Pfeffer, *supra* note 295, at 294. This increase was all the more shocking given the “mountain” of evidence that had previously shown “that the government’s management of its charge cards was abysmal.” *Id.* President Bush also suspended the Davis-Bacon Act, which requires that contractors pay workers the prevailing local wage. See *id.* at 295. The suspension was later reversed, but only after it attracted widespread criticism. See *id.*

312. Gosier, *supra* note 311. A September 13, 2005, OMB memo outlined the management controls for the new, higher micro-purchase threshold, which included training purchase-card holders; written identification by the agency head of anyone authorized to spend at the higher threshold; setting policies to determine when a purchase is being made for the relief effort; and requiring that new contracts over \$50,000 be approved by a warranted contracting officer. See *id.*; see, e.g., Schooner & Whiteman, *supra* note 168, at 160 (detailing how cardholders were given as little as three hours of training before being entrusted with government purchase cards).

313. See Eric Lipton & Ron Nixon, *Many Contracts for Storm Work Raise Questions*, N.Y. Times, Sept. 26, 2005, at A1.

314. Companies that won no-bid contracts include the Flour Corporation (a major Republican donor) and the Shaw Group (run by President Bush’s former campaign manager and a consultant who once headed FEMA). See Shenon, *supra* note 291. A Florida company with ties to Mississippi’s Republican governor was awarded \$568 million in contracts for debris removal. See Lipton & Nixon, *supra* note 313.

315. Schooner & Siuda-Pfeffer, *supra* note 295, at 295.

under congressional investigation because of their widespread failures and enormous cost overruns.³¹⁶

d. *Housing*

An examination of housing contracts, one component of the recovery effort, provides a telling example of the effect of loosened procurement rules. The temporary housing contracts into which FEMA entered provide a heartbreaking example of the human consequences of poor planning and contract mismanagement.³¹⁷ After Hurricane Katrina, FEMA spent \$915 million on 24,967 manufactured homes and 1755 modular homes for emergency housing and office space.³¹⁸ The agency also spent \$1.7 billion on 114,000 travel trailers, which were supposed to provide temporary emergency housing.³¹⁹ But by January 2006, five months after the storm, only 4600 manufactured homes and 100 modular homes had been used either for housing or office space, and not a single one of the homes had been sent to the areas damaged by the hurricanes because FEMA regulations prohibit the use of such homes in flood plains.³²⁰ More than 23,700 of the trailers were never used,³²¹ 2360 of the homes could not be used at all because they are too big; and another 11,000, worth \$301 million, were left sitting on a runway in Arkansas.³²²

It ended up costing FEMA \$90,000 to \$100,000 to temporarily house a family in a mobile home or \$30,000 to \$40,000 to house a family in a travel trailer for 18 months—the limit on such temporary housing.³²³ If the agency had simply given each family their maximum \$26,200 cash entitlement, as a FEMA official testified before the Senate, the hurricane victims would have been able to begin rebuilding their lives immediately instead of being stuck in the limbo of temporary housing, and taxpayers would have saved hundreds of thousands of dollars.³²⁴

316. Shenon, *supra* note 291.

317. See Waste, Abuse, and Mismanagement in DHS, *supra* note 5, at 16-17. Equally disturbing were reports of FEMA's ineptitude in managing the refugee crisis. In October, 2005, FEMA and the Red Cross were housing 200,000 people in some 70,000 hotel rooms, at a cost of about \$4 million per night. See Eric Lipton, *Number Overstated for Storm Evacuees in Hotels*, N.Y. Times, Oct. 19, 2005, at A1. But FEMA had reported to Congress that it was housing nearly 600,000 people in more than 200,000 hotel rooms, at a cost of \$11 million per night. See *id.* The discrepancy came to light after *The New York Times* "raised questions" with members of Congress and DHS's inspector general. See *id.*

318. Waste, Abuse, and Mismanagement in DHS, *supra* note 5, at 16.

319. *Id.* at 17. None of the trailers were purchased using competitive bidding. At least 27,000 were bought off-the-lot, without negotiations over price or specifications. See *id.*

320. See *id.* at 16.

321. See *id.* at 17. And, because FEMA failed to maintain the trailers, they lost value as housing or for resale. See *id.*

322. See *id.*

323. See *id.*

324. See *id.* The FEMA contract with Carnival Cruise Lines is another example of the enormous potential to waste public dollars due to insufficient contractual oversight. FEMA awarded a total of \$236 million to Carnival to provide temporary housing for evacuees. See

5. Katrina Spending Scandals Prompt Calls for Reform

By the fall of 2005, the enormous sums being spent to repair the damage wrought by Hurricane Katrina, and the lax rules under which those funds were being dispensed, had attracted national attention.³²⁵ In addition to FEMA's failure to adequately house the Katrina refugees, many of the contracts the agency entered into immediately after the storm were besieged by allegations of corruption.³²⁶ A Senate bill "to provide for full and open competition for Federal contracts related to Hurricane Katrina and Hurricane Rita reconstruction efforts" was introduced in October 2005 but has not moved out of committee.³²⁷ OMB issued new management controls over the expanding discretionary spending authority.³²⁸ Members of Congress began calling for investigations and increased oversight, and eight then-minority Democrats sent a letter to GAO requesting "immediate and intensive" oversight of the spending.³²⁹

a. *Transparency for Katrina Reconstruction Spending*

The Hurricane Katrina procurement scandals prompted a host of calls for reform, resulting in the introduction of a number of bills aimed at reforming the procurement system.³³⁰ It is also notable that as soon as they won

id. It ended up costing more than \$300 per person per night, amounting to \$50,000 per person for six months. *See id.* And once again, the terms of the contract were fatally flawed, assuring Carnival the same profit level for housing evacuees as it would have normally received from cruise operations. *See id.* In addition to paying for costs of normal operations, the government reimbursed Carnival for revenues it normally would have made from cruise-ship passengers on casinos, liquor sales, and onshore excursions. *See id.* at 17-18.

325. *See* Yochi J. Dreazen, *No-Bid Contracts Win Katrina Work: White House Uses Practices Criticized in Iraq Rebuilding for Hurricane-Related Jobs*, Wall St. J., Sept. 12, 2005, at A3; Gosier, *supra* note 311; Lipton, *supra* note 317; Lipton & Nixon, *supra* note 313; *see also* Windfalls of Disaster: Information on Reconstruction Contracts, <http://www.corporatepolicy.org/topics/katrina.htm> (last visited Apr. 6, 2007).

326. Shenon, *supra* note 291. On September 13, 2006, DHS's Inspector General said his office had received accusations of fraud and waste and would investigate how "several large, politically influential companies" were awarded no-bid contracts. *Id.* After Hurricane Katrina, Congress appropriated \$62.3 billion in emergency financing for the reconstruction. *See* Lipton & Nixon, *supra* note 313. By late September 2005, FEMA had allocated \$15.8 billion, including \$11.6 billion in contracts, direct aid to individuals, and work by other government agencies. *See id.* Over 80% of the \$1.5 billion in contracts that FEMA signed, including a single \$100 million contract that was awarded to Bechtel and over \$60 million worth of contracts awarded to Kellogg, Brown & Root were awarded with limited competition or without bidding. *See id.* When awarded the FEMA contract, Bechtel was under scrutiny for its oversight of Boston's "Big Dig," and Kellogg, Brown & Root, had been criticized for unsubstantiated and excessively high billing for its work in the reconstruction of Iraq. *See id.*

327. S. 1844, 109th Cong. (2005).

328. *See* Gosier, *supra* note 311.

329. *See id.*

330. *See* Project on Government Oversight, Hurricane Katrina Related Oversight Legislation, <http://www.pogo.org/p/contracts/katrina/legislation.html> (last visited Mar. 31, 2007). Representative Leonard Boswell, for example, introduced a bill that would allow no-bid contracts for the first ninety days after a national emergency, with renewal for an

majorities in the House and Senate in the 2006 elections, Democrats began an oversight campaign, promising renewed congressional scrutiny of government spending.³³¹ Many of the bills aimed to reintroduce oversight controls into federal procurement, making it harder to award large contracts without full and open competition.³³² These bills acknowledge the importance of oversight and, in some sense, represent a return to the rule-based philosophy of CICA.³³³

One such bill was the Hurricane Katrina and Hurricane Rita Fairness in Contracting Act of 2005.³³⁴ On October 6, 2005, Senator David Vitter, a Louisiana Republican, introduced the Fairness in Contracting Act of 2005 to the Committee on Homeland Security and Governmental Affairs, calling for a return to "full and open competition" for federal spending in the recovery effort.³³⁵ The Fairness in Contracting Act calls for written justification of noncompetitive contracting procedures and requires that both Congress³³⁶ and the public³³⁷ be notified before any contract over \$5 million³³⁸ is awarded on the basis of any procedure other than full and open competition. In other words, an agency head would be forbidden from using the unusual and compelling emergency exception unless the contract was for more than \$5 million. If the bill had been law before Hurricane Katrina, FEMA would have had to notify Congress of its award of fifteen

additional ninety days. See Press Release, R. Leonard Boswell, Boswell Introduces Competitiveness in Contracting Act (July 28, 2006), available at <http://boswell.house.gov/article.asp?id=527>.

331. See Paul Singer, *Tips on Oversight*, GovExec.com, Dec. 1, 2006, <http://www.govexec.com/dailyfed/1206/120106nj1.htm>.

332. See Gosier, *supra* note 310.

333. See *supra* Parts I.B, II.B. A month after Senator Vitter introduced the Fairness in Contracting Act, House Democrats Henry R. Waxman and Nancy Pelosi introduced the Hurricane Katrina Accountability and Clean Contracting Act. H.R. 3838, 109th Cong. (2005). The bill, which had not moved out of the Rules Committee as of early April 2007, would increase transparency in hurricane relief spending and create an independent commission to investigate federal relief spending. *Id.*

334. Hurricane Katrina and Hurricane Rita Fairness in Contracting Act of 2005, S. 1844, 109th Cong. (2005).

335. *Id.* It is notable that while advocating a change that returns rules to their role as guardians of the goals of the procurement system, Senator Vitter continues to use the language of the Reinventing Government reformers, urging streamlining as a means to speed the provision of much needed goods and services.

336. See *id.* (requiring that, at least seven days before awarding a contract based on procedures other than full and open competition, the agency head must notify the House and Senate Committees on Appropriations and any standing committees with jurisdiction over the agency).

337. *Id.* § 4(a). There are similar publication requirements for the planned award of such a contract in the *Federal Register* or Federal Business Opportunities. Public publishing requirements also include the size and scope of the contract and "[a] discussion of how the executive agency identified, and solicited offers from, potential contractors to perform the contract, together with a list of the potential contractors that were issued solicitations for the offers." *Id.* § 4(a)(1)(C).

338. See *id.* §§ 3(c)(1), 4(a)(2)(A).

contracts worth over \$100 million, including five worth \$500 million or more.³³⁹

b. *Reining in Government Purchase Cards: A Return to the Pre-Katrina Micro-purchase Threshold*

Government purchase cards, long a favorite of those advocating businesslike government, were used extensively in the Hurricane Katrina rebuilding effort.³⁴⁰ Foremost among the loosening of the rules governing federal procurement was the hundred-fold increase in the purchasing limit to \$250,000.³⁴¹ But as the dangers of procurement without competition or oversight became clear in the scandals and boondoggles of the Katrina recovery,³⁴² the purchase cards were reined in. Just days before the Homeland Security and Governmental Affairs Committee approved a bill that replaced the inflated \$250,000 threshold with the previous \$2500 threshold for standard purchases and \$15,000 in the case of emergencies,³⁴³ the OMB issued guidelines that put the thresholds into effect.³⁴⁴

While the change effectively meant that fewer contracts could be awarded without review or adherence to the procurement regulations, it is nevertheless notable that OMB only said that the present emergency had passed.³⁴⁵ OMB did not acknowledge the importance of regulations to ensure competitive bidding and guard against lucrative contracts being handed out to politically connected companies.³⁴⁶ Rather, the OMB spokesman praised the strengthened threshold as a streamlining measure that “remove[d] barriers” (i.e., procurement regulations) that would have otherwise slowed down the provision of “needed, life-saving aid.”³⁴⁷ Moreover, the increased threshold remains available until precluded by legislation or another OMB directive, should an agency be able to justify “exceptional circumstances.”³⁴⁸

339. See Lipton & Nixon, *supra* note 313.

340. See *supra* notes 298-301 and accompanying text.

341. See *supra* note 311 and accompanying text.

342. See *supra* Part II.B.4.

343. See Press Release, Senator Joe Lieberman, Homeland Security and Governmental Affairs Committee Approves Collins-Lieberman Bill to Help Ensure Responsibility [in] Government Purchases Related to Hurricane Katrina (Oct. 11, 2005), available at <http://www.lieberman.senate.gov/newsroom/release.cfm?id=247170>.

344. See Press Release, Office of Mgmt. & Budget, OMB Guidance Requires Exceptional Circumstances for Use of Increased Credit Card Purchases Limit (Oct. 3, 2005), available at <http://www.whitehouse.gov/omb/pubpress/2005/2005-26.pdf>.

345. See *id.*

346. See *supra* note 314 and accompanying text.

347. See Press Release, Office of Mgmt. & Budget, *supra* note 344.

348. See *id.*

III. RULES WITH THE RIGHT FIT: STRIKING THE PROPER BALANCE SO THAT COMPETITIVE BIDDING REQUIREMENTS SERVE THEIR PROPER ROLES AS SAFEGUARDS

Some competition requirements are surely necessary as safeguards against the waste, fraud, and abuse that has repeatedly handicapped unregulated government procurement, as in the Hurricane Katrina rebuilding effort.³⁴⁹ Moreover, competition requirements have a proactive role to play in that they ensure that the government gets the best deal for its money. These requirements, however, should not repeat the mistake of overregulation that Congress has made in the past.³⁵⁰ In other words, while competition requirements are necessary to safeguard against wrongdoing and ensure that the government gets the best possible deal, the requirements must not be so overly detailed that compliance ends up hamstringing the procurement process.³⁵¹

The Reinventing Government reformers were not wrong when they said that the rules governing federal procurement had become a quagmire, bogging down government purchases in unnecessary delays.³⁵² Their mistake, however, lay in their solution. In their zeal to transform government procurement, the Reinventing Government reformers threw the baby out with the bath water, abandoning many beneficial rules alongside the inefficient ones. As the Hurricane Katrina rebuilding effort clearly demonstrated, some competition requirements are necessary to safeguard government procurement, even during an emergency when purchases need to be made as quickly as possible.³⁵³

This section proposes two reforms by which competition requirements can both play their essential role as procedural safeguards and further the goals of efficiency, value, and timeliness in government procurement. Part III.A suggests that meaningful preplanning could remove many of the emergency situations that agencies use to justify non-competitive, and often inefficient, contract awards. Then, Part III.B suggests that increased oversight would restore important internal and external checks on federal procurement.

A. Preplanning Can Alleviate the Need for Rushed and Often Improper Contract Awards During an Emergency

CICA specifically disallowed lack of planning as an excuse for a noncompetitive contract award.³⁵⁴ FEMA's contracting fiascos during the

349. See *supra* Part II.B.4.

350. See *supra* Part I.D.1.

351. See *supra* notes 114-25, 137 and accompanying text.

352. It is hard to imagine that even the most ardent advocate of competition requirements would defend the nine-page specification for how a government ashtray must be made. See *supra* note 179.

353. See *supra* Part II.B.4.

354. See 41 U.S.C. § 253(f)(5)(A) (2000) (prohibiting the noncompetitive award of a contract "on the basis of the lack of advance[d] planning").

Hurricane Katrina rebuilding effort are powerful testaments to the importance of preplanning to ensure efficient purchases.³⁵⁵ While President George W. Bush and FEMA claimed that they were caught unprepared for a storm powerful enough to breach the levees and destroy New Orleans, there was actually ample evidence well before Katrina struck that just such a disaster would occur. In July 2004, a year before Katrina hit, an “emergency planning exercise” was

held because of common knowledge that New Orleans was susceptible to hurricane-driven flooding[;] emergency planners predicted that in a Category 3 storm, one million people would be forced to move away, 17 percent of the nation’s oil refining capacity would be knocked out and as many as 60,000 lives might be lost.³⁵⁶

The weekend before Katrina made landfall, DHS officials predicted that its impact would be even worse than the 2004 exercise.³⁵⁷

Thus, because FEMA could forecast the effect of a massive hurricane on New Orleans, the agency could have planned for such an event.³⁵⁸ Preplanning for emergency housing for displaced refugees, for example, would have saved millions of dollars because FEMA would not have ordered unusable mobile homes or entered into a prohibitively expensive contract with Carnival Cruise Lines, which ended up costing the government more than \$300 per person per night.³⁵⁹ If FEMA had planned for the housing refugees from New Orleans, it could have entered into competitively awarded contingency contracts, ensuring adequate housing at a fair price. Housing would not only have cost the government less money, but also would have better served the displaced residents of New Orleans—it would have been usable and immediately available. In addition to saving the government money, preplanning would have ensured that government funds were better spent and thousands of refugees better served.

If FEMA had acted based on the 2004 emergency planning exercise, suspending competition requirements would have been unnecessary in awarding contracts on an emergency basis. Rather, FEMA would have had more than enough time to go through a competitive bidding process, allowing the agency to weigh various proposals against each other and

355. See *supra* Part II.B.4.

356. Eric Lipton, *White House Was Told Hurricane Posed Danger*, N.Y. Times, Jan. 24, 2006, at A14.

357. *Id.*; see Aimee Curl, *Feds’ Pre-Katrina Exercise Left Out Levee Failures, Evacuations*, Fed. Times, Sept. 19, 2005, at 1 (reporting that in 2004 federal officials rejected the possibility that the levees could fail because “[i]t was a political no-no,” according to Ivor van Heerden, the deputy director of the Louisiana State University Hurricane Center).

358. See Curl, *supra* note 357 (explaining that in a 2004 emergency planning exercise federal officials did not discuss how to evacuate refugees from the flooded city and accepted the idea that waters could top the levees, but rejected the idea that the levees would be breached).

359. See *supra* note 324.

choose the best one. This would not only have benefited the government's bottom line, but also the people of New Orleans.

The situation FEMA faced in New Orleans is representative of many of the emergencies that government agencies face. Generally, even if not as clearly predicted, agencies have some idea of what could go wrong in the future.³⁶⁰ Because these contingency contracts would be awarded before the disaster occurred, there would be ample time for them to go through the entire competitive bidding process. Moreover, by removing the time pressure of an emergency, the contracts would be subject to oversight, and any problems with them could be corrected before they went into effect. By entering into contingency contracts for possible future disasters, the government can ensure both that its money is well spent and that services are efficiently provided.

B. Unleashing the Watchdogs: Restoring Oversight to Federal Procurement Awards Would Guard Against Waste, Fraud, and Abuse

One of the most lasting legacies of the reforms implemented by the Reinventing Government movement is protest-proof procurement,³⁶¹ especially the extraordinary growth in the government purchase-card program. Below a certain threshold, purchase-card holders are able to make purchases without meeting any of the standard procurement requirements, including competitive bidding. Rather, the only requirement is that the individual government purchaser believes he is getting a fair price for the needed service.³⁶² Because such contracts are awarded not on the basis of set criteria, but rather are left to the discretion of the individual purchaser, they are exempt from both internal and external oversight. This means any purchase-card holder has the keys to the government's coffers. As the Hurricane Katrina rebuilding effort showed, giving individual purchasers such vast and discretionary purchasing power is a recipe for disaster.³⁶³

While surely the most zealous advocate of purchase cards would be forced to admit that raising the purchase-card threshold during Hurricane Katrina was a mistake, even the original \$2500 threshold leaves too much of government procurement vulnerable to waste, fraud, and abuse. Well before Katrina, the ballooning number of purchase-card holders and their increasing use of the cards removed staggering amounts of government procurement dollars from oversight.³⁶⁴ The cards have not only undermined congressionally mandated objectives in government purchasing, but, also have created an unnecessary expense by preventing

360. See, e.g., *Two Months Before 9/11, An Urgent Warning to Rice*, Wash. Post, Oct. 1, 2006, at A17.

361. See *supra* Part I.D.2.e.

362. See *supra* Part I.D.2.

363. See *supra* Part II.B.4-5.

364. See *supra* notes 160-70 and accompanying text.

the government from leveraging its buying power.³⁶⁵ Thus, in order to ensure both the fiscal and sociopolitical objectives of the federal procurement system, the purchase-card program must be fundamentally reformed.

First, per purchase use of the cards should be capped at the original \$2500 micro-purchase threshold (with a provision for increases pegged to inflation). There should be a statutory provision barring any emergency increase in the micro-purchase threshold, such as the staggering increase to \$250,000 that occurred during the Hurricane Katrina rebuilding effort.³⁶⁶ Next, use of the cards should be generally curtailed so that the volume of purchases made is kept in check. This might be achieved by limiting the number of purchases per cardholder per year. Finally, use of the cards should be limited to preselected vendors. This would allow individual government purchasers to make routine purchases without going through a competitive bidding process and allow the government to leverage its purchasing power. Vendors could compete for the initial contract and then be assured of business from the federal agencies. The ballpoint pens are a perfect example of how this system could work.³⁶⁷ Ballpoint pen manufacturers could compete for the umbrella contract, which could be fashioned as a requirements contract or even as an IDIQ. The winning manufacturer would be assured that when government agents needed to buy ballpoint pens, they would be ordering from him or her. While individual purchasers would no longer comparison shop, they would nevertheless be ensured the benefits of competition because of the competitive basis for awarding the initial contract.³⁶⁸ Additionally, this could be an even faster process than the purchase-card regime, because individual purchasers would no longer have to venture into the marketplace themselves.

Moreover, use of competitively awarded umbrella contracts would restore both internal and external oversight.³⁶⁹ Internal oversight in the form of review by an individual purchaser's superior or by an agency's inspector general, and external oversight in the form of congressional review or protests by disappointed bidders, provide essential safeguards to ensure that contracts are awarded fairly and that the government is getting the best possible value. Because the initial contracts would be awarded on a competitive basis, with clearly stated criteria, they would be subject to review not only by government auditors, but also by disappointed bidders.³⁷⁰ This would restore the protest bar to its historical role as an external watchdog.

365. See, e.g., *supra* note 285 and accompanying text.

366. See *supra* notes 103, 310-12, 340-44.

367. See *supra* note 285 and accompanying text.

368. Reasonably limiting the duration of the umbrella contract should alleviate any concerns about a monopolization of the government's business for a certain good or service. See *supra* note 285.

369. See Griff Witte & Renae Merle, *Contractors Face More Scrutiny, Pinched Purses*, Wash. Post, Nov. 28, 2006, at D1.

370. See *supra* notes 188-90, 283 and accompanying text.

CONCLUSION

The maxim that free and open competition leads to the most efficient allocation of scarce resources was enshrined in statutory provisions that regulated government purchases.³⁷¹ The rollback of these regulations has left government procurement vulnerable to waste, fraud, and abuse.³⁷² Competition requirements are essential procedural safeguards to protect government procurement.³⁷³ As procurement scandals have shown, federal government procurement too easily falls victim to costly inefficiencies without rules requiring competition.³⁷⁴ The best procurement system would be one with a sensible system of requirements that ensured competitive bidding was the rule rather than the exception.³⁷⁵

371. *See supra* notes 55-79 and accompanying text.

372. *See supra* notes 289-309 and accompanying text.

373. *See supra* notes 270-83 and accompanying text.

374. *See, e.g., supra* note 285.

375. *See supra* notes 354-69 and accompanying text.

Notes & Observations