Questioning Uncle Sam

The Rise of Contracting Problems

Jaime Gracia

Federal discretionary spending, along with other federal policies and programs, will be facing serious budget pressures stemming from new budgetary demands and demographic trends in the coming years. Exacerbating this trend is defense spending, which falls within the discretionary spending accounts. Current military conflicts in Afghanistan and Iraq are consuming a large share of Department of Defense resources and are causing massive logistical pressures because of wear on weapons and equipment. Restoring or replacing equipment sooner than planned will put further pressure on DoD investment accounts.

Overall, trends in federal contracting indicate that DoD will have difficulties meeting its needs, all while having fewer resources available. Indeed, federal procurement, especially within DoD, has come under increased scrutiny. Exacerbating the scrutiny of contract actions is industry's focus

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on keeping or preventing a shrinking market share of DoD's contracts, resulting in protest actions being used as an industry's business strategy.

Protesting as a Strategy

If the past year is any indication, the government will face an uphill climb to complete its acquisition mission. According to Donna Borak in her article "Federal Contract Protests Hit 10-Year High in 2008" (*AP*, Dec. 30, 2008), more protests were filed in 2008 to challenge federal contracting decisions than in any year during the past decade. That is a sign of more companies competing against one another for smaller shares of a shrinking market for multibillion-dollar projects. As a result of poor source-selection practices and award decisions, the government opened the door to opportunities for protests. Losing bidders lodged protests of more than $70 billion on defense contract actions alone. Contractors filed more than 1,600 protests in 2008, a 17-percent increase over 2007 and the highest level since 1998, according a Dec. 22, 2008, annual report released by the Government Accountability Office (GAO-09-251R). With multiyear deals at stake and a likely downturn in defense spending, companies are using protests as a strategic weapon to ensure they remain viable.

Factors that have contributed to the increase in protests vary, but arguably the most definitive factor has been Congress's decision to allow companies to dispute task orders on major contracts in addition to other recent changes allowing expanded protest action. However, when protests filed under those changes are removed from the count, the total number of protests still rose by 11 percent from last year, according to Robert Brodsky in his June 20, 2008, *Government Executive* article "Large Task Order Contracts Now Open to Protest." According to industry analysts, companies are determined to ride out a federal spending downturn with as many contract wins as possible, which creates a protest-rich environment.

The fallout from such failed efforts has emphasized the gap in leadership by contracting officials and the necessity for reform in federal contracting. Issues include the failure of agencies to follow their own procurement rules, the lack of clearly stated requirements, and overall negligence of acquisition leaders in overseeing the procurement process—all of which has led to protests being backed by government auditors. One of industry's key concerns is the lack of information provided by the government at any point during the contracting process. That lack of transparency often prompts companies to protest in order to get as much data as they can, delaying contract actions and ultimately making the government and the warfighter pay the price for such cumbersome and poorly executed contract actions. What follow are examples of contract processes that had critical problems.

Lack of Oversight

"Alliant is a $50 billion, 10-year government-wide acquisition contract that federal agencies were supposed to begin using in 2007 to buy an array of information technology services," Gautham Nagesh reported in the article "Alliant protest upheld, contract placed on hold," published in *Nextgov*, March 6, 2008. Alliant and a related government-wide acquisition contract for small businesses are the successors to two General Services Administration (GSA) contracts: ANSWER (Applications 'N Support of Widely-Diverse End-User Requirements), which expired in December 2008; and Millenia, which expired in April 2009.

From the beginning, industry criticized the Alliant contract process for its lack of transparency. GSA withheld the requests for proposal (RFP) for an extraordinary long time, which had the effect of driving up bid and proposal costs to the point that some companies did not consider Alliant to be worth the investment. Industry also had an issue with the RFP's instructions about documenting companies' past performance, which along with the basic contract plan, was considered more important than price. Although how well companies executed other government contracts was a key evaluation factor, the RFP did not adequately allow the opportunity for companies to present their past work in their proposals. As a result, the contractor evaluation process was unclear, and that created complications.

Another problem was that because of GSA's failure to provide adequate resources, ensure accountability, and follow established procedures for the source selection, the Alliant award was effectively outsourced to Calyptus Consulting Group. The firm was tasked to check references and research the past performance of contract bidders, which is considered inherently governmental work. Although it is not unusual for contractors to act as advisors and assist the government with source selection, GSA allowed Calyptus to have overall responsibility for the process. GSA further failed to perform quality assurance actions to ensure that Calyptus' work added value to the selection process.

Further breakdowns in GSA's processes occurred when it was determined that Calyptus, at the time of the Alliant award, had two of the contract winners as clients. GSA failed to identify potential conflicts early in the contracting process and ensure there were no organizational conflicts of interest. According to the Federal Acquisition Regulation, an organizational conflict of interest can be the result of an actual or potential conflict that might impair the objectivity of a contractor's judgment. If a conflict of interest is found, agencies must work with contractors to set up firewalls that will ensure objectivity and protect the interests of the government in the procurement process. However, it is unclear whether GSA set up those firewalls or attempted to prevent any appearance of impropriety or favoritism.

As reported by Nagesh:

> Sixty-two companies submitted bids for Alliant, and 29 were selected as service providers on July 31 [*in 2007*]. Following the contract award, eight companies filed protests arguing that the evaluation process was arbitrary and contrary to the law. [*A decision released by*] Judge Frances M. Allegra of the U.S. Court of Federal Claims upheld the protest, stating that GSA attached "talismanic significance to technical calculations that suffer from false precision" and the agency "made distinctions that, in their own right, likely were arbitrary, capricious and contrary to law, but certainly became so when the agency failed adequately to account for price and to make appropriate tradeoff decisions." ...
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> ... Allegra noted that given Calyptus's lack of familiarity with ratings scales and the Alliant procurement, it was hardly surprising that the answers received did not provide much useful information. As evidence, she wrote, "more than one reference simply responded 'very good,' 'very well' or 'very effectively'... It was left to the evaluators to extrapolate a rating out of these two-word descriptions."

The end result, Allegra ruled, was that GSA relied on faulty data when awarding its contract. Allegra prohibited the agency and its contractors from performing any work related to Alliant, and she ordered the agency to consider price and price reasonableness in all future Alliant awards.

After more than three years, the Alliant contract was finally awarded in March 2009 to virtually all the companies that originally submitted bids. According to GSA officials, a major part of the revised strategy was to make absolutely sure there were no major grounds for challenge. Therefore, the strategy evolved to forgo limiting awards to a pre-set number of companies and to evaluate renewed bids based on technical capabilities, past performance, and pricing—all based on negotiation and allowing vendors to improve their proposals such that all would be acceptable.

As a result, Alliant appears to have veered from GSA's earlier vision of selecting the best in class to possibly lowering the bar for quality. Of note is that the current contract award means more work will be involved with a larger pool of competition for task orders. In addition, because large contracts like Alliant are difficult to structure, the likelihood of mistakes being made—and protests being successful—is greater. And that makes the option of a bid protest possibly more attractive to a losing bidder. Task orders for individual sections of the Alliant contract were being worked for release as of this article's publication.

Aerial Refueling Tanker Protest

The Alliant procurement is one of the most glaring examples of the problems that can occur when oversight of contract processes is inadequate. The acquisition of refueling tankers by the Air Force, the KC-X program, is an example of the significant issues with defense procurement and the inherent problems across government with large-scale acquisitions and the infringement of political pressures on the acquisition process.

The KC-X program became a winner-take-all contract, as the awardee would likely be charged with replacing all 530 tankers in the Air Force fleet—a contract valued at more than $125 billion, including logistics, parts, and maintenance. However, the true strategic value was an economic cushion that would protect the winner for decades in the event of a downturn in the highly cyclical market for commercial aircraft. With the award, the Air Force would become the largest customer for either Boeing or Northrop/EADS, keeping a production line running at full capacity well into the foreseeable future.

Analysts expected the losing team to protest the decision, as each team had developed a core constituency in Congress, where members' states stood to gain jobs; however, the actual award and subsequent protest triggered an alarming series of events indicative of a broken system, exacerbated by poor oversight and governance at the highest levels.

After receiving proposals and conducting numerous rounds of negotiations with Boeing and Northrop/EADS, the Air Force selected the Northrop/EADS proposal for award on Feb. 29, 2008. On March 11, 2008, Boeing filed its protest with GAO. After an extensive review that included hearings, GAO concluded that the Air Force had made a number of significant errors that prejudiced and ultimately adversely affected the outcome of what was a close competition between Boeing and Northrop/EADS. Errors identified by GAO included not assessing the relative merits of the proposals in accordance with the evaluation rules and criteria identified in the solicitation, not having documentation to support certain aspects of the evaluation, conducting unequal and misleading discussions with Boeing, and having errors or unsupported conclusions in the cost evaluation. Accordingly, GAO sustained Boeing's protest, thus demonstrating the Air

Force's failure to provide proper oversight and guidance on one of the biggest contracts ever awarded by DoD.

As a result of the GAO decision and an unprecedented public relations campaign dubbed "Tanker Wars" by the bidding firms and their respective allies on Capitol Hill, the Pentagon canceled the competition. U.S. Air Force Chief of Staff Gen. Norton Schwartz told reporters that a new contract for an aerial refueling aircraft could be awarded within eight to 12 months once the new presidential administration decided how to proceed, but, he said, it could take as long as 36 to 48 months. The conclusion is that the process for acquiring major systems continues to be a difficult and challenging process, with the final result being continual waste, fraud, and abuse, and subsequent operational failures. Warfighters continue to have their needs unmet, and that exacerbates their difficulties in completing their respective missions.

Creating Better Acquisition Outcomes

As the Alliant and KC-X programs demonstrate, government organizations fail to apply the necessary discipline and controls or assign much-needed accountability in the contracting process. The result is poor outcomes. The failure to use knowledge-based acquisition techniques (for example, creating a procurement process that is incremental, manageable, and predictable) results in the inability to measure progress in meeting cost, schedule, and performance goals. The result: fraud, waste, and abuse in a time of diminishing resources and operational failures. Overall, federal acquisition leaders, specifically those in DoD, continue on a path that leads to protests, poor discipline, and weak businesses cases.

Acquisition leaders must foster a disciplined environment for making decisions that will lead to better program choices and better outcomes. In GAO-06-800T, released Sept. 6, 2006, GAO recommended many times the establishment of such an acquisition environment, but leaders still have not taken the necessary steps to realize that environment because of lack of political will and weaknesses in acquisition workforce numbers. If the acquisition process is to be fixed and acquisition outcomes are to be improved, GAO's recommendations must be implemented:

- Constrain individual program requirements by working within available resources and by leveraging systems engineering
- Establish clear business cases for each individual investment
- Enable science and technology organizations to shoulder the technology burden
- Ensure the workforce is capable of managing requirements, source selection, and knowledge-based acquisition strategies
- Establish and enforce controls to ensure appropriate knowledge is captured and used at critical junctures before moving programs forward and investing more money.

The announcement by Secretary of Defense Robert M. Gates to fill 30,000 acquisition positions by 2015 has put pressure on senior leaders to move quickly to confront the growing crisis if the federal government is to execute the acquisition mission. In responding to the challenge, acquisition leaders must take responsibility for timely actions to improve fiscal economies, managerial controls, and acquisition outcomes. Managerial actions must have the long-term effect of providing better policies, structures, and processes to use resources more efficiently and achieve effective outcomes. These changes must take place soon if the federal government, most notably DoD, is to improve the current environment of poor oversight, ineffective management, and the inability to acquire the goods and services needed to complete the mission. The current environment has led to a situation in which contract awards are delayed or canceled because of the inability to execute business needs with personnel hiring goals based on numbers and not capabilities. A coherent acquisition workforce strategy will be one of the critical reform areas that must be implemented correctly and quickly if we are to begin to see positive impacts to the acquisition mission and bring the DoD back in line as a good steward of taxpayer money.

Setting the right conditions for successful acquisition outcomes is imperative if acquisition leaders are to fix the system. GAO continues to examine how to bring discipline to DoD's requirements and budgetary process and the role played by the program manager. Ultimately, acquisition leaders must identify the acquisition objectives and goals and then provide the proper oversight and accountability to focus on effectiveness. Also, the process must consider vendors as stakeholders in the process. Having open communications with industry is vital to ensuring fair, honest, and proper solicitations. More important, open communications will help ensure the government receives best value and will offset protests by creating transparency in the process.

Acquisition problems will likely persist until government leaders make tough decisions as to which programs should be pursued or not pursued; ensure that programs can be executed; lock in requirements before programs are started; and make it clear who is responsible for what and hold people accountable when they do not fulfill their responsibilities. Providing the needed oversight and adherence to established policy is one strategic mission that leaders must embrace for better outcomes. Although the solutions will be difficult, acquisition leaders must view the issues facing the federal acquisition system holistically, focusing on integrating acquisition into the agency's overall mission. It is imperative that leaders tackle the critical issues facing the procurement system if the problems facing government management are to be addressed.

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