

THE NASH & CIBINIC REPORT

government contract analysis and advice monthly from
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DATELINE SEPTEMBER 2020

Ralph C. Nash

Reading LeRoy Haugh's obituary in THE WASHINGTON POST last month led me to reflect on what life was like when we had a smoothly functioning regulatory process. LeRoy was the Navy procurement member of the Armed Services Procurement Regulation Committee for a number of years. That committee had a full-time chairman and a legal and procurement member from each of the four services. (The Defense Logistics Agency was included with the Army, Navy, and Air Force.) The nine members met two full days a week to consider changes to the ASPR. They were backed up by an editing committee that scanned any proposed regulation to ensure that it was clearly worded. With this kind of effort, the committee was able to give careful consideration to the work of its subcommittees and to move proposed regulations expeditiously through the process.

The members of the ASPR Committee were senior officials in their services—reflecting the idea that procurement regulations deserved the attention of highly competent and experienced people. Devoting significant amounts of such people's time to the process yielded a far better regulation than the Federal Acquisition Regulation.

It is sad to compare the current system to that one. Today regulations wend their way through the process at a snail's pace with many of them having to undergo significant alterations after the comments on a proposed regulation are received. Some linger in the system for years before they are abandoned (like the rewrite to the organizational conflict of interest regulation in FAR Subpart 9.5). In this part of the Government procurement process we have regressed rather than improved. *RCN*

A Message To Our Subscribers: Due to the ongoing uncertainties caused by the COVID-19 pandemic, including restrictions on travel and size limitations for public gatherings, Thomson Reuters has made the difficult decision to cancel the 2020 NASH & CIBINIC REPORT ROUNDTABLE, previously scheduled to be held in December in Washington, D.C.

Plans are underway for the upcoming THOMSON REUTERS GOVERNMENT CONTRACTS YEAR IN REVIEW CONFERENCE COVERING 2020 scheduled for February 2021. Further details about this event will be sent to subscribers later this fall.

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PROCUREMENT MANAGEMENT

¶ 51 FRICTIONLESS ACQUISITION: A New Initiative By The Office Of Federal Procurement Policy

Vernon J. Edwards

In the last month or so we have seen a number of articles about Michael Wooten, the Administrator of Federal Procurement Policy, and his ideas about “frictionless acquisition,” which is his metaphor for reducing administrative lead time and speeding up the buying process. Here is how Wooten described the “initiative” in an interview published at Government Matters on August 7, 2020, <https://govmatters.tv/frictionless-acquisition-and-the-presidents-management-agenda/>:

This is a great opportunity for us to talk about the frictionless acquisition CAP [Cross Agency Priority] Goal, we’re excited about that. So we view the frictionless acquisition CAP Goal as a capstone CAP Goal, and that is that it is a management platform to bring together ongoing and new work to modernize the arc of acquisition for both common and complex acquisitions from requirements development through contract and performance assessment. So it is critical in expanding our focus across the arc of acquisition. So at its birth, frictionless acquisition focused on reducing the time between “I need” and “I got.” I wanted to put it in the simplest terms, because some of the way we roll this out can seem a little technical and I want to make sure the language is clear. So again, at its birth frictionless acquisition focused on reducing the time between “I need” and “I got.” I need a thing, when we decide what the requirement is, and when we actually have it delivered. So it encompasses a rich set of activities that improve program management, contracting, and performance management, the full cycle of mission support activities. The supporting pillars also focus on some very important administration priorities, reducing barriers to entry and increasing the number of entities we do business with. And that includes new entrance into small business. Frictionless acquisition relies on a key perspective. This is important to note. We must recognize and understand the considerable flexibility built into our laws and regulations. I digress a second, but when I went to the confirmation hearing process, I was asked where are we going to cut. The focus there with that question was cutting back some of the complexity of regulations. But the reality is that some of the agencies do a better job under the same systems of regulations than others. So we have to ask ourselves, why it takes some agencies six months to purchase a particular good or service, when another agency can purchase the same exact thing in six weeks instead of six months. Both are operating under the same regulatory constraints. Put it this way: the reign of regulation falls equally upon all heads. But under this initiative, we want to ensure that agencies share better practices, especially that reduce the time between “I need” and “I got.”

Frictionless acquisition is now a part of the “President’s Management Agenda.” Wooten has not written a manifesto that explains his concept of frictionless acquisition, but someone has developed a 20-page *Cross-Agency Priority (CAP) Goal Action Plan* for frictionless acquisition, available at <https://www.performance.gov/CAP/frictionless-acquisition>. According to the goal statement:

The Federal Government will deliver commercial items at the same speed as the market place & manage customers’ delivery expectations for acquisitions of non-commercial items by breaking down barriers to entry using modern business practices and technologies.

The action plan states that the Government will achieve that goal by 2025. It then describes a “goal structure” that consists of three strategies: (1) “promote continual input and process improvement,” (2) “support a hi-definition acquisition information environment,” and (3) “create pathways for the workforce of tomorrow.” The goal leaders are Wooten, Soraya Correa of the Department of Homeland Security, and Barry Berkowitz of the Department of Commerce. Of course, everything will eventually be “world class.”

You are to be forgiven if your reaction to Administrator Wooten’s “initiative” is that it is just another presidential appointee’s sloganeering campaign, a kind of “Reinventing Government/Acquisition Reform” *redux*, complete with explanatory/aspirational roadshow speeches such as we got for performance-based contracting back in the mid-to-late 1990s. But give it a second thought. We like the “friction” metaphor. It’s nifty. It’s also hazy, but we think we can give it some substance.

Friction And Its Effects

In physics, friction is resistance to motion when the surfaces of two objects are in contact and rub against one another. Physicists consider it to be a kind of force. The concept is often used as a metaphor. One of the most famous such uses appears in *ON WAR* by Carl von Clausewitz, Book I, Chapter 7, p. 119 ((Howard and Paret, eds. and trans., Princeton, 1976):

Everything in war is very simple, but the simplest thing is difficult. The difficulties accumulate and end by producing a kind of friction that is inconceivable unless one has experienced war....

Friction is the only concept that more or less corresponds to the factors that distinguish real war from war on paper. The military machine—the army and everything related to it—is basically very simple and therefore seems easy to manage. But we should bear in mind that none of its components is of one piece: each part is composed of individuals, every one of whom retains his potential of friction. In theory it sounds reasonable enough: a battalion commander’s duty is to carry out his orders; discipline welds the battalion together, its commander must be a man of tested capacity, and so the great beam turns on its iron pivot with a minimum of friction. In fact, it is different, and every fault and exaggeration of theory is instantly exposed in war. A battalion is made up of individuals, the least important of whom may chance to delay things or somehow make them go wrong.

In acquisition, friction is one of the causes of excessive procurement administrative lead time and partially explains why it can take years to award a contract. See *Longer Than World War II: When Do You Know A Procurement System Is In Trouble?* 31 NCRNL ¶ 32. It is one of the reasons why the process of awarding the mission-critical Joint Enterprise Defense Infrastructure Cloud Program (JEDI) contract is, as of this writing, still underway more than two years after release of the Request for Proposals in July 2018.

The friction that Wooten is talking about is bureaucratic in nature. It is any constraint on action that arises from the need for intra- and interorganizational cooperation in order to comply with the rules and norms of Government business processes. Such constraints inhere in all bureaucratic processes and are thus present in all acquisitions.

The byproduct of bureaucratic friction is organizational sluggishness and delayed action. We expect it to some extent, because we consider it to be a “natural” phenomenon in bureaucracies. Devices such as “peer reviews” and bid protests are built into processes to intentionally cause friction as a safeguard. We consider it a problem when it slows a process without contributing to better outcomes than would otherwise occur.

Sources Of Friction: Statutes And Regulations

There are several sources of bureaucratic friction. Rules, also called “red tape,” are among the greatest of such sources. See Kaufman, *RED TAPE: ITS ORIGINS, USES, AND ABUSES* (Brookings 1977). By “rules” we mean official issuances—statutes, regulations, and official policies.

The principal acquisition statutes are in Titles 10 and 41 of the U.S. Code, but such statutes appear in other titles, as well. They reflect congressional responses to various issues that have annoyed politicians from time to time. Examples include the Competition in Contracting Act, 10 U.S.C.A. § 2304 and 41 U.S.C.A. Ch. 37, and the Truthful Cost or Pricing Data statute, 10 U.S.C.A. 2306a and 41 U.S.C.A. Ch. 35, which are implemented in FAR Parts 6 and 15. More specifically, they include things like the mandate to establish and document a “competitive range” before conducting discussions and allowing offerors to revise their proposals, the mandate to analyze and document the reasonableness and the realism of proposed costs and prices, and the mandate to prepare a determination and findings before using a time-and-materials contract.

The Federal Acquisition Regulations System, Title 48 of the Code of Federal Regulations, which implements the statutes is frequently said to be a source of bureaucratic friction. Not only is it voluminous—thousands of pages long—but much of it is poorly thought out, badly written, and hard to understand. See *A Simple, Uniform Contracting Regulation: That Was the Plan*, 25 N&CR ¶ 40, and *Postscript: A Uniform Procurement System*, 28 NCRNL ¶ 29. Understanding it is made more difficult by the need to be familiar with and refer to the “case law” interpretations of the courts, the boards of contract appeals, other administrative tribunals, and the decisions of the Government Accountability Office.

Internal Agency “Guidance”

Friction is also caused by procedural dictates that are imposed not by statute or the FAR but by agency managers who do not trust their own personnel. In the late 1990s and early 2000s, the Department of Defense suffered some source selection fiascos, the most notable of which was the 2008 Air Force source selection for the KC-X air refueling tanker (now designated KC-46) and the subsequent GAO protest decision. See *The Boeing Co.*, Comp. Gen. Dec. B-311344, 2008 CPD ¶ 114, 2008 WL 2514171, 50 GC ¶ 230, and Edwards, *Feature Comment: Boeing Versus The Air Force—The KC-45 Tanker Protest and*

the Future of Major System Source Selections, 24 GC ¶ 230 (June 25, 2008). In reaction, the department developed two policies that were designed to prevent such fiascos in the future. The first such policy was that it would conduct “pre-award peer reviews” of selected source selections. See the memorandum dated September 29, 2008, <https://www.acq.osd.mil/dpap/policy/policyvault/USA000820-08-DPAP.pdf>:

This Office will organize teams of reviewers and facilitate pre-award Peer Reviews for all contracts with an estimated value of \$1 billion or more (including options) and post-award Peer Reviews for all service contracts with an estimated value of \$1 billion or more (including options). The teams for these Peer Reviews will be comprised of senior contracting leaders from across DoD as well as members of the Office of General Counsel. The team of reviewers will be comprised of civilian employees or military personnel from outside of the military department or other defense agency whose procurement is the subject of the Peer Review.

Pre-award Peer Reviews will be conducted in three phases for competitive procurements: 1) prior to issuance of the solicitation; 2) prior to request for final proposal revisions; and 3) prior to contract award. For continuity, review teams will be comprised of the same members for all three phases, whenever possible.

The second policy was to turn the five pages of rules in FAR Subpart 15.3, Source Selection, into a 71-page source selection procedures directive, <https://www.acq.osd.mil/dpap/policy/policyvault/USA004370-14-DPAP.pdf>. See *Source Selection Procedures: New DOD Guidance*, 25 N&CR ¶ 29, and *Postscript: DOD Source Selection Procedures*, 30 NCRNL ¶ 24. Each of the military services has supplemented the DOD procedures. The peer reviews and top-down mandated source selection procedures have undoubtedly been a source of bureaucratic friction, yet neither has prevented significant fiascos, including the JEDI source selection. See *Amazon Web Services, Inc. v. U.S.*, 147 Fed. Cl. 146 (2020), 62 GC ¶ 72; Williams, *DOD “On Schedule” for August JEDI Announcement*, FCW (July 30, 2020), <https://fcw.com/articles/2020/07/30/williams-jedi-dod-cloud.aspx>; and Foley, *Pentagon Seeks an Extra 30 days To Decide on JEDI Cloud Contract*, ZDNet (Aug. 19, 2020), <https://www.zdnet.com/article/pentagon-seeks-an-extra-30-days-to-decide-on-jedi-cloud-contract/>.

Procedural Norms

Procedural norms are another source of friction. By “norms” we mean practices that are not statutorily or regulatorily mandated, but that are typical or standard, usually passed on through on-the-job training. For example, agencies solicit essay-type written technical proposals when acquiring services, giving offerors instructions such as the following, which we quote from the RFP for the JEDI acquisition: “The Offeror shall describe its overarching proposed approach to achieve secure data transfer using a Transfer Cross Domain Solution that is consistent with the 2018 Raise the Bar Cross Domain Solution Design and Implementation Requirements.” See *Essay Writing Contests: How Did We Get Here*, 30 NCRNL ¶ 47, and *Streamlining Source Selection By Improving The Quality of Evaluation Factors*, 8 N&CR ¶ 56.

Such “technical proposals” are not a legal requirement. They are typically not *offers* in the legal sense. They are a norm that is deeply ingrained in the acquisition mindset, due in large measure to the historical origins of source selection in military aircraft design competitions during the 1920s. The preparation of such “proposals” is akin to a rite of passage for offerors, with little to recommend it except Government failure of imagination and dogged persistence. It greatly increases the friction in source selection without contributing much of real value. Contractor selections are, as often as not, based on tradeoffs between dollars and what amounts to little more than ad copy. To make matters worse, agencies routinely produce poorly written requests for proposals containing incoherent proposal preparation instructions and vague descriptions of evaluation factors. See *What We Have Here Is Failure To Communicate: The Poor Quality of Government Solicitations*, 33 NCRNL ¶ 70.

To provide another example, FAR 15.303 describes the responsibilities of agency heads for the conduct of source selections. It makes no mention of written source selection plans. But several agencies require the preparation of written source selection plans that must be approved at higher levels within the agency. The DOD source selection procedures require the preparation and approval of a written plan prior to release of the RFP. If the source selection authority (SSA) is a senior civilian, general officer, or flag officer, the plan will have to be reviewed by several staff offices at several levels before being presented for approval, and every staff office through which the plan must proceed is a source of bureaucratic friction and delay. Requirements for such approved plans are designed to ensure policy compliance and the use of good sense and to protect the approving official from error. The problem with such requirements is that bureaucratic ritual formalities make them a source of friction. Ironically, they undercut real planning, because people commonly develop such plans by cutting and pasting from plans that

were previously developed and successfully staffed for other source selections. After all, why reinvent the wheel? Thus, there is not as much critical thinking as there should be, because cutting and pasting is easier. There's nothing like a "good example." Wasteful practices spread like viruses.

An approved source selection plan did not prevent the 2008 KC-X fiasco or the JEDI fiasco or any of the smaller ones in-between. Planning is necessary, but why an approved plan document and all the bureaucratic folderol that goes with it if your people know what they are doing and can do it well? And what good is an approved plan if they don't know and can't do?

The Greatest Source Of Friction

The reason peer reviews and source selection procedures have produced friction but not succeeded in preventing source selection fiascos is that they are what the DOD has instead of competence in the design and conduct of source selections.

While I was writing this article my wife showed me a recent Instagram post by the French chef Jacques Pépin, who is known for his ability to simplify complex recipes:

Cooking is the art of adjustment. It is not always about following the recipe. The recipe is a guide, but also a restraint. When you cook, you cannot just follow the recipe, you have to adjust to the product that is in front of you. The pears might be more or less ripe, more or less juicy, more or less sweet. Your use of the recipe needs to be adjusted to accommodate the differences.

My response was that Monsieur Pépin is right, *if* you are a reasonably competent cook who knows something about ingredients and technique.

I consider myself to be a connoisseur of cassoulet, a traditional French casserole. I make it using Julia Child's recipe, which takes about two days. I'm no cook, so I follow that recipe as if it were holy writ. But I recently marveled at the flavor of a version that my wife, a very fine cook, prepared in an hour under M. Pépin's guidance. *An hour!* It wasn't "classic" cassoulet, but it tasted much like it. I had seconds. Acquisition is like cooking, an art of adjustment. Competence is everything.

It is no secret that many doubt the competence of our Government. See Kettl, *ESCAPING JURASSIC GOVERNMENT: HOW TO RECOVER AMERICA'S LOST COMMITMENT TO COMPETENCE* (Brookings 2016). Competence is a complex word and idea. We are talking about what Franz E. Weinert called "action competence," which he described as follows:

Unlike concepts of competence that accentuate either cognitive or motivational aspects, action competence includes all those cognitive, motivational and social prerequisites necessary and/or available for successful learning and action. The concept of action competence has been applied especially in the analysis of the necessary and sufficient conditions for success in meeting task, goal and success criteria in selected fields of action (e.g., profession, institution, or social group). The following components are frequently included in action competence models:

- General problem-solving competence
- Critical thinking skills
- Domain-general and domain-specific knowledge
- Realistic, positive self confidence
- Social competencies

The theoretical construct of action competence comprehensively combines those intellectual abilities, content-specific knowledge, cognitive skills, domain-specific strategies, routines and subroutines, motivational tendencies, volitional control systems, personal value orientations, and social behaviors into a complex system. Together, this system specifies the prerequisites required to fulfill the demands of a particular professional position, social role, or personal project (Boyatzis, 1982; Lévy-Leboyer, 1996).

In this theoretical perspective, the concept of action competence is not applied only (or primarily) to an individual's psychological prerequisites, but rather to the complementary performance dispositions across different individuals that are necessary for a group or an institution to function successfully. In addition to the cognitive and motivational components necessary for solving tasks and reaching goals, these models include other individually and collectively available skills, such as:

- nonspecific vocational competencies (e.g., literacy, see OECD, 1996; critical thinking abilities, see Halpern, 1998)
- specific vocational competencies (examples from the most frequently cited competencies for successful teaching: factual knowledge, classroom management competencies, diagnostic competencies, and didactic competencies).
- institutional-specific competencies (for example, for teachers: social behavior with colleagues, parents and school administration; institutional engagement; identification with the institution, and so on).

Weinert, *Concepts of Competence* 10–11 (Max Planck Institute for Psychological Research, Working Paper, 1999).

We think that people in the acquisition workforce who are not steeped in the concepts and principles of acquisition and critical thinking and who have not had experience in their application under the tutelage of competent practitioners are the greatest sources of friction and delay in acquisition. See *Innovation and Responsibility: A Culture of Innovation Needs a Culture of Competence*, 31 NCRNL ¶ 42. We think they constitute a large part of the workforce. And given the size, diversity, and geographical dispersion of the workforce, making them competent, if seriously attempted, will take a lot of time and cost a lot of money. Unfortunately, what we have instead of solutions to that problem are “initiatives,” one slogan after another, which have solved nothing.

We know that to write in terms of competence and incompetence is to risk giving offense. We do not mean to be offensive. We mean that many people in the workforce are not fully capable of doing the work that needs to be done, mainly because their colleges and their employer have not fully prepared them to do that work. That work, to be done well, requires highly specialized knowledge in a broad topical domain and well-developed communication and management skills. The workforce needs and deserves better professional education and training. See *Improving Training for the Contracting Workforce*, 22 N&CR ¶ 6.

Conclusion

We think “friction” is a nifty metaphor and a useful notion, and we think reducing friction is a worthwhile goal. Sad to say, however, we do not think the Frictionless Acquisition CAP Goal Action Plan and goofy devices like “periodic tables” of acquisition innovations are going to do much to reduce friction, much less get us to frictionless acquisition by 2025, any more than reinventing Government, performance-based contracting, and streamlined acquisition have gotten us to better, faster, and cheaper since the mid-1990s. And we are not convinced that the OFPP is the right organization to lead the pursuit of such a goal. We do not think it has the organizational “go power” to do it. Workforce competence is a managerial responsibility. The OFPP is a policy shop, not a managerial consultancy.

We wish that Mr. Wooten would use his office as a platform to tell a simple truth to Congress and the President as often and as pointedly as possible: *That given the importance of timely and effective acquisition to our ability to respond to exigencies, foreign and domestic, and the amount the Government spends each year on the acquisition of supplies and services, they absolutely must take on the workforce competence problem, seriously and soon.* In military terms competence is a force multiplier; in bureaucratic terms it is the ultimate friction reducer. *VJE*