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Book Review

GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION, by W. Noel Keyes, West Publishing Co., St. Paul, Minnesota (1986). Pp. 841.

ROBERT C. GUSMAN*

I. INTRODUCTION

The study of government contracts is similar to the myth of Sisyphus who, as eternal punishment, was ordered by Pluto to roll a huge stone to the top of a high hill. But each time he reached the top, the stone rolled back down. Sisyphus is helpful in appreciating the challenge Professor Keyes assumed when he wrote the handbook *Government Contracts Under the Federal Acquisition Regulation*. He has, paradoxically, begun a descent down a slippery slope into a field that "suffers from the endemic disease of ambiguity and imprecision."¹

Procurement regulations, like the Federal Acquisition Regulation (FAR), are some of the most important written means for directing the government procurement process. At the government's operating level, regulations provide the main reference source for guidance on government procurement policy and procedures. Regulations directly affect contractors to the extent they are given the force and effect of law. For example, the provisions circumscribing powers of contracting officers and other government officials relating to such matters as organizational conflicts of interest and small business and labor surplus programs, necessarily limit what contractors can accomplish by negotiation.

The impact of regulations goes beyond the immediate contracting parties. Subcontractors and vendors are affected through flowdown

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1. *Sturm v. United States*, 421 F.2d 723, 724 (Ct. Cl. 1970).

clauses. Workers, minorities, and others are affected by wage, hour, and work standards, as well as by nondiscrimination, safety, health, insurance, and environmental requirements. Thus, the FAR and other procurement regulations have widespread administrative, legal, and economic ramifications involving many parties in interest.

Professor Keyes' work is important to us from another vantage point. Today, the United States' weapons acquisition and space system contracts are subject to intensive public and judicial scrutiny. The public is concerned because of media reports discussing allegations of contractor misconduct and the possible misuse of public funds. This anxiety is fanned by Congressional oversight hearings and debates concerning which items shall be acquired and by which strategies major acquisition programs should be managed by the executive agencies.

Congressional oversight, in the opinion of some observers, has politicized the acquisition process. Indeed, in one respect it has gone beyond that stage. Congress has intensified its management to the point that it may be said to be acting as the immediate overseer of the contracting process, thus bypassing the heads of the executive agencies who are the ostensible holders of management authority. As a result, the control of government contractors has increased, and the regulation of all phases of the government's business has become both intrusive and pervasive.²

There is the old admonition: "He who seeks to regulate everything by law is more likely to arouse vices than reform them." Similarly, the regulation of government contracts by Congress and the executive branch carry long-term risks. First, there is the simple matter of expense of enforcement and compliance. Further, as the rate of regulation increases, the prospect of actual enforcement declines, leading to petty tyranny by those who are in a position to enforce law selectively. The government's regulation of a contractor's costs, profits, management, employees' conduct, and resolution of disputes frequently raises the threshold question of whether we are dealing with law at all, as opposed to the raw power of a monopsony. After all, in government procurement there are competing sellers, but there is only a single buyer, who is a sovereign.

As Professor Keyes observes, this system causes, among other things, tension between Congress and the executive branch of government. Similarly, it produces between the United States and the contractor an inefficient and adversarial relationship. Generally, in major acquisition contracts with the United States, there is now an

2. *See generally* THE PACKARD COMMISSION, FINAL REPORT TO THE PRESIDENT'S BLUE RIBBON COMMISSION ON DEFENSE MANAGEMENT, A QUEST FOR EXCELLENCE (June 1986).

attitude which emphasizes the adverse interests of buyer and seller. It is a relationship which assumes an overriding propensity for each party to try for maximum legal and economic advantage.³

Still, a government contract serves an economic purpose that is identical to a commercial contract—to move goods or services from the seller to the buyer at reasonable cost and in a reasonable time. As to major government contracts, it has been suggested that this principle is paramount because the underlying public purpose is to fulfill the nation's security and scientific interests.⁴

In the award of government contracts, however, this commercial principle is circumscribed by the theory of public law which seeks free and open competition based upon the government's explicit specification of the goods or services it intends to procure. In this way, at least in concept, all bidders are treated equally and the government will pay a fair price resulting from the competition. Nevertheless, the law's prerequisite for the government's solicitation of competitive bids (subject to certain exceptions), and its requirement for the award to be made to the responsive and responsible bidder offering the lowest reasonable price, is a mandate for a rigid contracting system. This inflexibility is reinforced by the system of procurement regulation described in Professor Keyes' book.⁵

II. HISTORY OF THE FEDERAL ACQUISITION REGULATION

The modern history of procurement regulation, as Professor Keyes' text instructs us, has its roots in the Armed Services Procurement Act of 1947, as amended.⁶ This statute was applied to purchases by the army, navy, air force, coast guard, and the National Aeronautics and Space Administration. The Federal Property and Administrative Services Act of 1949, as amended, applied to the purchases of other executive agencies.⁷ Although favoring formal advertising, these Acts permitted the award of contracts by negotiation upon a finding by the head of the procuring agency. They also established certain minimum requirements for the advertisement of bids and, with the

3. W.N. KEYES, *GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION XXIX-XXXVI* & § 33 (1986).

4. Checchi, *Federal Procurement and Commercial Procurement Under the U.C.C.—A Comparison*, 11 PUB. CONT. L.J. 358, 377 (1980); Pasley, *Formation of Government Contracts—Application of Common Law Principles—A Reply*, 40 CORNELL L.Q. 518, 520-24 (1955).

5. W.N. KEYES, *supra* note 3, at XXXVII-VIII.

6. 10 U.S.C. §§ 2301-2316 (1982).

7. 41 U.S.C. §§ 251-260 (1982).

exception of "cost-plus-a-percentage-of-cost" contracts, permitted the use of any type of contract that promoted the best interests of the United States.

The Armed Services Procurement Act of 1947, as amended, and the Federal Property and Administrative Act were *procedural* statutes. They were not a grant of authority to make purchases, but rather assumed that authority was otherwise vested in the procurement official. On this basis, Congress, through these statutes, has listed the applicable procedures.⁸

The Armed Services Procurement Regulation (ASPR) which took its name from the basic procurement statute, and its civilian agency counterpart, the Federal Procurement Regulation (FPR), were based upon the general authority of the department heads to issue regulations for the government of their departments. As to the Defense Department, title 10, section 2202 of the United States Code⁹ requires, in effect, that the Secretary of Defense prescribe regulations governing procurement of supplies and other functions related to supply by offices and agencies of the Defense Department.

This system permitted the executive agencies, especially the Defense Department, to regulate procurement without excessive intrusion by the Congress. This arrangement permitted innovation and flexibility, but it led to an ever-expanding, and ultimately comprehensive, regulation. The ASPR, before it was superseded by the FAR, contained seventeen sections and eight appendices. The sections embraced general policies; procurement by formal advertising; procurement by negotiation; interdepartmental procurement; Buy-American Act procedures; contract clauses; contract termination; patents and copyrights; bonds and insurance; state and local taxes; labor contract clauses and overtime procedures; government property; inspection and acceptance; contract cost principles; contract forms; special procedures dealing with the correction of mutual mistakes; amendments without consideration; and the formalization of informal commitments.

Although the ASPR was issued in the Defense Secretary's name, its contents were under the control of the ASPR committee and its chairperson. Under the ASPR system, the notice and hearing requirements of the Administrative Procedure Act were inapplicable, although industry views were obtained prior to the issuance of a new or revised regulation through coordination with industry trade associations.¹⁰ The FPR generally followed the Defense Department's

8. S. REP. NO. 571, 80th Cong., 2d Sess. 1 (1947).

9. 10 U.S.C. § 2202 (1982).

10. See, e.g., Bonfield, *Public Participation in Federal Rulemaking Relating to Public Property, Loans, Grants, Benefits, or Contracts*, 118 U. PA. L. REV. 540 (1970);

leadership in the promulgation of procurement regulations.

The ASPR was an important economic and legal document. For example, the Supreme Court has made it clear that validly-issued procurement regulations have the full force and effect of federal law, even to the extent of overriding inconsistent state legislation.¹¹

The Competition in Contracting Act of 1984 (CICA), by repealing the Armed Services Procurement Act of 1947, as amended, and other procurement statutes, made fundamental and far-reaching changes to the government's acquisition system.¹² The FAR, which implements the CICA, is developed in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974¹³ as amended by Public Law 96-83.

The FAR is prepared, issued, and maintained, and the FAR system is prescribed, jointly by the Secretary of Defense, the Administrator of General Services, and the Administrator of the National Aeronautics and Space Administration, under their several statutory authorities. The FAR generally applies to all executive branch acquisitions of supplies or services and is prepared and issued through the coordinated action of two councils, the Defense Acquisition Regulatory Council (DAR Council) and the Civilian Agency Acquisition Council (CAA Council).

The chairperson of the CAA Council is the representative of the Administrator of the General Services Administration. The other members of this council include one representative from each of the Departments of Agriculture, Commerce, Energy, Health and Human Services, Housing and Urban Development, Interior, Labor, and Transportation, and from the Environmental Protection Agency, the Small Business Administration and the Veterans Administration.

The Director of the DAR Council is the representative of the Secretary of Defense, and the operation of the DAR Council is by the Secretary of Defense. Membership includes representatives of the military departments, the Defense Logistics Agency, and the National Aeronautics and Space Administration. Responsibility for processing revisions to the FAR is apportioned between the two

Grossbaum, *Procedural Fairness in Public Contracts: the Procurement Regulations*, 57 VA. L. REV. 171 (1971).

11. *United States v. Georgia Pub. Serv. Comm'n*, 371 U.S. 285 (1963); *Paul v. United States*, 371 U.S. 245 (1963); *Federal Crop Ins. v. Merrill*, 332 U.S. 380 (1947).

12. The Competition in Contracting Act of 1984, Pub. L. No. 98-369 (1984) (amending the Federal Property and Administrative Services Act of 1949, 41 U.S.C. § 253, and U.S.C. tit. 10).

13. Federal Procurement Policy Act of 1974, Pub. L. No. 93-400 (1974).

councils so that each council has cognizance over specified parts or subparts.

The FAR, although the successor to the ASPR and the FPR, consists of eight subchapters and fifty-three parts. When published in the Federal Register on September 19, 1983, it was approximately two inches thick. Its coverage is broader than its predecessors—it regulates improper business practices and conflicts of interest; administration; publicizing contract actions; acquisition planning; required sources of supplies and services; contractor qualifications; contract awards; socioeconomic programs; patents, data and copy-rights; bonds and insurance; taxes; cost regulations; contract financing; bid protests, disputes and appeals; contract management; and clauses and forms.¹⁴

Absent from the FAR process is the notion of an informal negotiation of proposed regulations by affected groups, which would end in an agreement that becomes the basis for a rule.¹⁵ Indeed, the government maintains complete discretion in deciding which matters shall be the subject of proposed regulations and in the disposition of public comments when they are obtained. What is at work here, in reality, are contracts of adhesion—a contract system for carrying out the government's directions for contract performance, used as a device for the manipulation of social policies.¹⁶

It should be abundantly clear that while the FAR affects the public in general, its everyday impact is on lawyers, accountants, and executives in industry and government. Simply, the FAR is the hub of the government's procurement wheel. For many, the question is whether the FAR is a protection and guide established for the mutual use of the government and industry, or whether it is a hostile maze, established to perpetuate bureaucratic power.

III. ANALYSIS OF THE KEYES HANDBOOK

Understanding the history, goals, and weaknesses of the FAR system makes it easier to understand the significance of Professor Keyes' efforts and the usefulness of his text to the government contract community. Although the government contracting field has produced several case books,¹⁷ a loose-leaf service,¹⁸ various texts,¹⁹

14. 48 Fed. Reg. 42,102-42,643 (1983).

15. Note, *Rethinking Regulation: Negotiation As An Alternative to Traditional Rulemaking*, 94 HARV. L. REV. 1871, 1872 (1981).

16. Miller, *Government Contracts and Social Control: A Preliminary Inquiry*, 41 VA. L. REV. 27 (1955); Stover, *The Government Contract System as a Problem in Public Policy*, 32 GEO. WASH. L. REV. 701 (1964).

17. See, e.g., R. NASH & J. CIBINIC, *FEDERAL PROCUREMENT LAW* (3rd ed. 1977).

18. Gov't Cont. Rep. (CCH).

19. See, e.g., J. MCBRIDE & I. WACHTEL, *GOVERNMENT CONTRACTS: CYCLOPEDIA*

and a reporter of current information,²⁰ Professor Keyes' achievement is significant in that he has contributed a broad-based work which focuses solely on the FAR. The author declares that he will be analytical, that his purpose will be limited to practical and business affairs, and that his principal audience will be those who work with the FAR. He explains:

There is no definitive text in the field of government contracting, nor can there be. This book is intended to assist those with the problems most often met by the business world in its dealings with the government and vice versa, as well as to fill, in part, the existing void of critical textual material. The emphasis is on the law of contracts and subcontracts with the federal government; contracts with state or local bodies are not included, nor is the law of grants.

The areas covered by the book are of equal interest to contract administrators as well as to lawyers, and certainly the lawyer must be aware of some administrative matters in order to counsel effectively. However, the aim of this book is to limit discussion of administration to those occasions where it is necessary to delineate the legal background. No endeavor is made to show how to obtain a government contract solely as a business proposition.²¹

Government contracts practitioners are grateful to Professor Keyes for accomplishing this task with great skill and erudition. His work as a law professor, practicing attorney, and attorney for the government is apparent in his commentaries and analyses of the FAR. Professor Keyes has organized his text so that it comments upon, and runs parallel to, each FAR provision under consideration. Professor Keyes intends, of course, for the reader to hold both the regulation and the text before him and move from the FAR to the text in his attempt to find a solution to a problem. We hope the publisher will consider that the book's utility could be improved by the simple device of using tabs for each chapter.

The challenge all practitioners in the field of government contracts have is that the subject is dynamic. We are constantly aware that our advice must be based upon the latest statute, regulation, or case. When using a government contracts text, we know caution is required because the basic material may be noncurrent, or perhaps subject to revision by the government.

Professor Keyes is addressing this issue by preparing supplements to the text. Nevertheless, lack of currentness is a potential deficiency of which the reader must be aware in using this or any other text in

GUIDE TO LAW, ADMINISTRATION, PROCEDURE (1963); M. RISHE, GOVERNMENT CONTRACT COSTS (1984); P. TRUEGER, ACCOUNTING GUIDE FOR GOVERNMENT CONTRACTS (8th ed. 1985).

20. Fed. Cont. Rep. (BNA).

21. W.N. KEYES, *supra* note 3, at VII.

the field. This potential is most apparent in the chapters "Improper Business Practices and Personal Conflicts of Interest"; "Patents, Data and Copyrights"; and "Protests, Disputes and Appeals." As to the first, it should be updated to include an industry self-governance program known as the "Defense Industry Initiative."²² As to the second, continuing Congressional tinkering has resulted in new restrictions on the government's rights to use data.²³ Finally, as to the third, the Navy Department's use of the Alternate Dispute Resolution procedure appears to be a favorable development.²⁴ These areas are to be covered in the Supplement to be published in early 1988.

Professor Keyes has left several subjects for future consideration; or, making this observation more explicit, some areas have not been covered as fully as a critic would like. The following is a brief analysis of specific provisions which this author feels would be aided by supplemental information or analysis.

In section 1.4, "The Force of Procurement Regulations—The Christian Doctrine," Professor Keyes should have discussed the difference between regulations promulgated for the benefit of the government, legislative rules, and those enacted for the benefit of the contractor. The issue that arises is the extent to which a government contractor or the government itself shall be bound by procurement regulations which the government has chosen not to follow.

Section 1.25, "The Absence of Power to Contract—Illegal Contracts," should have included a discussion of the legality of contracts which are entered into in advance of, or in amounts in excess of, available appropriations. A brief reference to the Anti-Deficiency Act appears in section 32.31(d) but, unfortunately, it is not made in the context of the contracting officer acting in excess of his authority where there is a promise to spend or actual expenditure in advance of or in excess of appropriations.²⁵

In section 3.5(a), "Other Improper Business Practices—Buy In," users would have welcomed Professor Keyes' analysis of the government view which does not regard this practice as illegal and, in fact, encourages it.²⁶ Further, in section 25.65, "The Certificate of Cost or Pricing Data," Professor Keyes should have been clearer. It is important to know that the boards and the courts will now hold that defec-

22. 48 Fed. Cont. Rep. 597 (1987).

23. See generally Defense Procurement Improvement Act of 1984, Pub. L. No. 98-525 (1984), modified by 1987 Defense Department Appropriations Act, Pub. L. No. 99-500 (1987); Defense Technical Corrections Act of 1987, 101 Stat. 273 (1987).

24. See *Navy Launches ADR Plan For Contract Disputes*, 5 ALTERNATIVES TO THE HIGH COST OF LITIGATION 33 (March 1987) (publication of the Center for Public Resources); 48 Fed. Cont. Rep. 736 (1987).

25. See Ad Hoc Committee on the Role of DoD Contracting Officers, *The DoD Contracting Officer*, 1987 A.B.A. SEC. OF PUB. CONT. L. 62-65.

26. 1 Gov't Cont. Rep. (CCH) ¶ 353.

tive pricing may exist even though the contractor has not submitted a pricing certificate to the contracting officer.²⁷

Section 24.2, "The Freedom of Information Act" (FOIA), contains no discussion of the Trade Secrets Act²⁸ and the important United States Supreme Court decision in *Chrysler v. Brown*,²⁹ which wove this statute into the FOIA's fabric.

The inclusion of section 25.7, "The Foreign Corrupt Practices Act," in a text relating to the FAR seems questionable. Treatment of this area could be justified, perhaps, where a government contractor contracts with a foreign government, but this seems beyond the scope of the text.³⁰

In section 28.24, "Proposed Indemnification of Contractors for Product Liability," Professor Keyes misconstrues the Comptroller General's holding relating to the "Insurance-Liability to Third Persons" clause. He describes the clause under consideration as an "abuse." The Comptroller General, however, merely held that reimbursement for uninsured third party claims was subject to the availability of appropriated funds at the time of loss. The issue concerns the time when the funds, if any, are available for settlement. This result does not justify the overstatement contained in the text.

In section 42.6, "Negotiating Advance Agreements for Independent Research and Development/Bid and Proposal Costs," a discussion of the possible prohibition against the government's imposition of cost-sharing upon the contractor would have been helpful, despite its earlier discussion in section 31.18, in the chapter on Contract Cost Principles.³¹

The title for the Table of Statutes is inaccurate because it includes the tables for the *regulations* cited in the text as well. Separate tables for statutes and regulations would be more helpful and less misleading.

So, too, one may quarrel with Professor Keyes' observation that, "where not specifically governed by statute or regulation federal law is 'the general law of contracts'—that is, the law as generally applied,

27. *M-R-S Mfg. Co. v. United States*, 492 F.2d 835 (Ct. Cl. 1975); *Numex Elects., Inc.*, 85-3 B.C.A. (CCH) ¶ 18,396.

28. 18 U.S.C. § 1905 (1982).

29. 441 U.S. 281, 318-19 n.49 (1978); see also McCarthy & Kormmeier, *Maintaining the Confidentiality of Confidential Business Information Submitted to the Federal Government*, 36 BUS. LAW. 57, 64-67 (1980).

30. A similar comment could be made with regard to Section 15.71, "Negotiation Skills."

31. See, e.g., *Aerojet-General Corp. v. United States*, 568 F.2d 729 (Ct. Cl. 1977).

in the states of our union.”³² He suggests that legislative action clarifying the proper standard for interpretation of government contracts is needed because the courts generally do not seek to find or apply the general law of contracts.³³

This author, for one, would vote against any legislative attempts to codify the federal law of contracts. The judge-made law in this area is satisfactory. Congress, on the other hand, due to its politicization of government contracts, would likely distort basic contract law principles into draconian doctrines. The federal law of contracts is comprised of the best of the common law’s principles and the Uniform Commercial Code. The latter, with the authoritative body of law construing it, and the importance of the standard contract clauses make it abundantly clear, in this author’s opinion, that we should leave the federal law of contracts free from legislative assistance.

This author’s comments and observations should in no way detract from Professor Keyes’ achievement. This is, to be sure, a practitioner’s handbook which will be a guide to problem solving. But the work is more—it is an intelligent and learned discussion of government contract law and public policy issues. It is a text which is a welcome addition to practitioners’ libraries.

32. W.N. KEYES, *supra* note 3, XLIII.

33. *Id.*