

Reforming the American Military Officer Personnel System

Addendum: Thoughts on Contractors

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*Reforming the American Military Officer Personnel System
Addendum: Thoughts on Contractors*

Testimony of Bernard D. Rostker¹
The RAND Corporation²

Before the Armed Services Committee
United States Senate

May 25, 2016

The subsequent questions and answers found in this document were received from the Committee for additional information following the hearing on December 2, 2015 and were submitted for the record

Senator McCaskill requested for the record that the witnesses who testified before the Senate Armed Services Committee at the hearing “Department of Defense Personnel Reform and Strengthening the All-Volunteer Force” on December 2, 2015, comment on the need to understand when contractors are being utilized and putting in place an authorization level on contractors.

Let me first be clear about what kind of contractors I am talking about, since there are many different types of contractors. Contractors do many things and have delivered goods and services to the federal government since the founding of the republic. There is a class of contractors, however, that in recent times has been hired simply to get around staffing limitations that the Office of Management and Budget (OMB) and Congress have placed upon federal agencies. They are doing work that traditionally has been done by federal employees. Sometimes the contracts that place such workers in the federal workplaces are called personal service contracts, and the people so placed are sometimes called “core” contract personnel. An example of regulations that allow this is Intelligence Community Directive (ICD) 612, put into place on October 30, 2009. This directive says, “core personnel will not engage in inherently governmental activities.” It then lists a number of situations where departments and agencies of the IC can “retain and use core contract personnel,” which seem very appropriate. The list

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includes: immediate surge; discrete nonrecurring tasks; unique expertise; specified services; transfer of institutional knowledge; and support and administrative services, where the provision of such services by contract personnel is determined to be effective or efficient. It also, however, independent of these situations, allows the use of contract personnel “to perform work that would otherwise have been provided by a United States government civilian given *sufficient resources*.” Clearly the sufficient resources implied here is not the budget to pay the employees, because contractors must also be paid, but personnel authorized by the OMB and/or Congress. In other words, IC agencies can hire contract personnel simply to get around ceiling limitations without regard to a range of considerations, including efficiency or effectiveness.

In my judgment this is the problem Senator McCaskill is focusing on when she observed that “it is not that contractors are bad... there are many places that we’re using contractors that it’s saving us money. They are performing functions well at a lower cost. But the problem is, there is so little transparency that oversight is nearly impossible.”

I hope I can provide some of the missing transparency by helping to explain how pervasive the problem is, how it came about, and what we might do to address it. To this end, in 2008, I wrote a report, *A Call to Revitalize the Engines of Government*, which dealt squarely with this issue. While I have not updated the analysis, I believe that the conclusions are still valid. Certainly, the concerns expressed by Senator McCaskill are the same ones that motivated me to write the report. Accordingly, I ask that the report be included in the record. (The report contains the full citations for the remarks that follow).

How Did We Get Where We Are Today

At least since the 1970s, there has been a concerted effort to reduce the size of the federal government. Moreover, it has become fashionable to expound the virtues of contracting, because many saw the government bureaucracy as inflexible and unresponsive. Cost was the easiest metric by which to rationalize a move to competition and contracting, but it was by no means the only motivation. Policies developed during the Reagan administration (e.g., the 1983 rewrite of OMB Circular A-76) and later during the administration of George W. Bush codified a preference for contracting over in-house activities. Lost in these initiatives was the long-standing prohibition that contractors should not perform work that is “inherently governmental.” Prior to May 2003, A-76 defined “inherently governmental” work as follows: “An inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of discretion in applying government authority and/or in making decisions for the government.” The Bush administration’s May 2003 revision added the word “substantial” before discretion, with A-76 then reading, “An inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government.” The key to the 2003 changes was to be “agency

oversight,” which the Acquisition Advisory Panel³ and the Government Accountability Office (GAO)⁴ often found was lacking. As recently as 2014, the GAO found that

Within the IC, core contract personnel perform functions that could influence the direction and control of key aspects of the U.S. intelligence mission ... Our prior work and OMB policies have underscored the importance of agencies having guidance, strategies, and reliable data to inform decisions related to the appropriate use of contractor personnel. Building on longstanding OMB policy, [the Office of Federal Procurement Policy’s] September 2011 guidance requires agencies to develop internal procedures to identify and oversee contractors providing services that closely support inherently governmental functions. Yet, of the agencies we reviewed, [the Office of the Director of National Intelligence (ODNI)], [the Central Intelligence Agency (CIA)], [the Department of Justice], [the Department of Energy (DOE)], and Treasury have not fully developed such procedures or established required time frames for doing so. Without these procedures in place, ODNI, CIA, and the civilian IC elements within these three departments risk not taking appropriate steps to manage and oversee contract personnel, particularly those performing work that could influence government decision-making.⁵

The increased use of contractors over the last several decades also came about because hiring a civilian employee into the federal government often frustrates managers. In addition, limitations placed on the size of the federal work force by Congress and OMB in the form of “personnel ceilings,” or restrictions on the number of federal employees that may make up an agency’s headquarters staff, push managers to take the path of least resistance, and contractors were seen as a source of manpower that they could otherwise not hire.

Hiring contractors is much easier, especially when it can be done without having to compete individual tasks where contractors are prequalified and tasks can be added to existing contracts. With money and a contract in hand, managers are able to give new tasks to an existing contractor without competition. The contractor, unencumbered by having to compete for the task or to meet employment standards, can supply workers in short order, sometimes within hours—though usually at a substantial premium, by some accounts as large as 50 percent. Make no mistake about it, this is not new. It goes back decades, is well documented, and is not restricted to the Defense Department. In 1991, for example, GAO found the DOE had increased the money it spent on support services by 56 percent. DOE officials told GAO that “they did not compare

³ Acquisition Advisory Panel, *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*, Washington, D.C.: Office of Federal Procurement Policy, 2007.

⁴ U.S. Government Accountability Office, “Department of Homeland Security: Improved Assessment and Oversight Needed to Manage Risk of Contracting for Selected Services,” in *Report to Congressional Requesters*, Washington, D.C.: U.S. Government Accountability Office, 2007.

⁵ Timothy J. DiNapoli, *Civilian Intelligence Community: Additional Actions Needed to Improve Reporting on and Planning for the Use of Contract Personnel*, GAO-14-204, United States General Accountability Office, January 2014, pp. 29–30.

costs since they could not get additional staff to perform the work in-house because of personnel ceilings.”

Cost of Contracting

At the December hearing, Senator McCaskill observed, “there are many places that we’re using contractors that it’s saving us money. They are performing functions well at a lower cost.” Unfortunately, as her statement implies, that is not always true, particularly when it comes to personal service contracting for core contract personnel. As early as 1991, the GAO compared the costs of contractors and government employees of 12 contracts at DOE and found that 11 of the 12 contractors were, on average, 25 percent more costly.⁶ While cost comparisons raise many methodological issues,⁷ in 2007, the House Permanent Select Committee on Intelligence found that, on average, a contractor costs almost twice as much as a government employee.⁸ In 2008, the Office of the Director of National Intelligence estimated that the cost of salary, benefits, as well as full lifecycle costs, including pension costs and health benefits, for government employees was \$125,000, compared with a per-capita cost per contractor of \$207,000 for direct labor, not including overhead.⁹

This, however, is not the whole story when it comes to personal service support services. Contractors routinely bill the government for the supervision of contract workers and charge overhead for the operations of the contractor’s organization, even when the contract workers do their jobs in government facilities and sometimes have little direct contact with the firm that employs them.¹⁰ All too frequently, the contract workers work behind the desk once occupied by a government employee, taking direction from a government supervisor. Anecdotally, some contract workers have never even been to their firms’ facilities. At the Naval Air Weapons Station China Lake, contractors are charged a fee for all the costs the installation incurs to support and housing them. This allows the base to generate the funds needed to maintain its facilities, since the public funds it receives are based on the number of government employees working at China Lake. The contractors do not mind paying the tax since it is just another cost that is added to the contract. Given all of this, one has to ask: what is it that the government really gets from the contractor that justifies the cost differences between government employees and contract workers?

⁶ Dexter Peach, *Energy Management: Using DOE Employees Can Reduce Costs for Some Support Services*, Washington, D.C.: U.S. General Accounting Office, GAO/RCED-91-186, 1991, p. 2.

⁷ See L. Elaine Halchin, *Sourcing Policy: Selected Developments and Issues*, Congressional Research Service, R42341, February 7, 2012; and *The Intelligence Community and Its Use of Contractors: Congressional Oversight Issues*, Congressional Research Service, R44157, August 18, 2015.

⁸ House Select Committee on Intelligence, “Intelligence Authorization Act for Fiscal Year 2008,” Washington, D.C.: U.S. House of Representatives, 2007, p. 28.

⁹ Ronald Sanders, “ODNI Transcript: Conference Call on the Results of the Fiscal Year 2007 U.S. Intelligence Community Inventory of Core Contractor Personnel,” Washington, D.C.: Office of the Director of National Intelligence, 2008, p. 8.

¹⁰ This was the case when the author was the Special Assistant to the Deputy Secretary of Defense for Gulf War Illnesses and the majority of “his staff” were contractors.

Remedial Action

To date, remedial action has been timid and does not address either the fundamental causes of or the needed changes to contracting. There have been moves to convert contract functions to in-house functions where appropriate, but the same forces that cause the problem in the first place generally frustrate efforts. In 2008, the U.S. Merit Systems Protection Board suggested a number of ways to address the contracting problem and improve the hiring process, as noted:¹¹

- Eliminate the use of personnel ceilings at any organizational level as a means to control cost. The contracting for support services must be on a cost-effectiveness basis, with due regard to the restrictions on both “inherently governmental” work and personal services contracting.
- Implement “Manage to Payroll.” Managers at the lowest practical levels of management were allocated a payroll amount for the fiscal year and, within the limits of these allocations, were made responsible for determining the number and classification of the positions they needed to perform their operations.
- Improve the attractiveness of government jobs for new entrants to the labor market.
- Adequately resource a streamlined and effective government hiring process.
- Sustain commitments and funding for the training and career development of civilian personnel analogous to that provided to military personnel.
- Train and hold federal managers responsible to manage and use the flexibilities provided by the various federal personnel systems.
- Develop a transition program to ensure the continuity of work during “in-sourcing.”
- Eliminate the blended workforce. Prohibit support contracts that simply put contractor personnel at desks previously occupied by government workers, or at new desks because of arbitrary personnel ceilings.
- Implement the provisions of A-76 that restrict outsourcing to functions that are not “inherently governmental.”

Absent from the above list is any suggestion of imposing a ceiling on contractors, which would further tie the hands of federal managers in their efforts to accomplish their work. In my view, to correct this problem, the government must eliminate the statutorily set personnel ceilings, determine the proper mix and appropriate roles of contractors and government employees, and ensure that it can recruit, train, develop, and retain a skilled and qualified workforce. There needs to be a clear understanding of what should and should not be contracted out, especially when it comes to service contracts. The historic prohibition on contracting for personal services, which has most recently been interpreted in the most lenient way, needs to be tightened up and strictly adhered to. There needs to be a clear understanding that the government does not contract out jobs, but rather functions—functions that can be measured and for which the government can assess the quality of the work performed by a contractor and the cost it is being charged. But make no mistake about it, even with the elimination of ceilings, bringing essential government work in-house and providing oversight for appropriately contracted-out work will not be easy.

¹¹ John Crum, “Taking Aim at Federal Hiring,” *Issues of Merit*, July 2008.

Summary

At this point in U.S. history, it is particularly important that the government address the use of contractors to accomplish the nation's business. Testimony before Congress suggests that current practices are not cost-effective, as suggested by the comparisons of costs of government employees and contract workers, as well as the number of firms that the government is taking legal action against. There needs to be a clear understanding of when it is appropriate to contract functions (never individual jobs) and the oversight that the government must provide. The government should strictly adhere to the concept of "inherently governmental" and the prohibition on personal services contracting. Contract personnel must never be put in a position where there is any semblance of a conflict of interest. The interests of a contractor are ultimately private gain, and do not necessarily align with the interests of the government. To think otherwise is to invite problems.

Converting positions from contractors back to the government will not be easy and will run counter to the canard that measures the efficiency of government by the number of people it employs. Not counting the hordes of service contractors engaged by the government paints a misleading narrative of smaller government. Clearly, there are things that should be contracted and that the government need not and should not undertake, but the unfettered use of contractors has skyrocketed and must be brought under control.