THE USA GOVERNMENT PROCUREMENT SYSTEM: THE POWER OF THE CONTRACTING PERSONNEL

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ABSTRACT

This research investigates the evolution of the procurement system in the United States and the power of the government personnel to binding the government in the government contracts. In the Colonial System, the procurement system was found with malpractices during the 18th century, which was moderated through establishing regulations. Remarkably, much advancement was done after the Second World War to improve the United States' procurement system. Contracting Authority and Officer's role has been refined in the current procurement system to ensure a smooth government contract system. Moreover, the principle of good faith and internal control system found constructive in all government contract procedures.

Keywords: Procurement Law, Government Contracts, Internal Control System, The Principle of Good Faith.

INTRODUCTION

In the United States, federal government agencies have established requirements for obtaining goods and services from the local or foreign private sector through government contracts. The U.S. federal agencies follow U.S. federal laws and granted legal power to the government agencies. This contract system is based on the successive and intricate changes of objectives since its antiquity. Accordingly, one must study the history of the federal government contracts system and the history of the broader legal system of the United States to understand the modern government contracts system and its function (Nagle, 1999). Historically, the U.S. federal legal system's roots are dated back to the English Common law, which is brought to the United States by the English Colonists. Although the American Revolution markedly affected the United States legal system, it did not alter or reject the common law. The legal system incorporates the traditional legal principles, which were found in English laws. The United States legal system's roots are rested upon English common law that has been legislated (Legal Systems, 2020).

The federal government contracts legal system is a part of the United States legal system, so it has the same background roots. The earliest examples of government contracts arose in connection with military procurement. In the English Colonists' period, the British army took the needed supplies from local marketplaces. The military was authorized to acquisition its needs and was approved to make its contracts. Consequently, the British military procurement system was decentralized. The contracts were subject to the will of the officers who had the authority to contract with local farmers and merchants. After the English Colonial period, Americans have adopted a similar government contract method (Nagle, 1999).

The History of Colonial System in the U.S.

In general, the Colonies were always influenced by the Colonial system, usually taking a long time to appear as part of the national identity laws after the Colonial period ended. Accordingly, the government contracts system of the United States was significantly influenced by the British legal system. The Continental Congress was formed in 1774, and the role of that Congress was primarily to coordinate the Colonies. During that time, the Continental Congress' authority was to pass legislation and its power to bind all Colonies that lacked such legislation. As a result, Congress could not have enough power to adopt rules, which were obligations on all the states.

Furthermore, with the lack of Continental Congress authority, it could not tax the states or their people or regulate foreign or commerce laws applied to the Colonies. However, the Continental Congress had the power to supply an army's specific needs during the fight. The Continental Congress had also acted with inclusive authority to contract with private commercial firms to specific supplies. Therefore, the Continental Congress had faced a lack of authority by finding various contracting methods with private suppliers. Then, the problem of the lack of authority of the Continental Congress led that Congress with the inability to act with its full authority as a whole body of the United States government to develop the government contracts system (Nagle, 1999; Titl and Geys, 2019). The Continental Congress's authority demonstrated that the authority to bind all the Colonies. Nevertheless, it was trying to act on behalf of the Colonies to provide the army with goods it needed through government contracts. By establishing the various committees created by the Continental Congress to do procurements activities, it was the right course of action needed to face this problem. The committees did specific purposes, and history shows that the committees' activities were satisfied with their required tasks.

In the days of the war, the Continental Congress decided to work through a series of temporary committees to procure military supplies. Those temporary committees' specific purpose was to act under the state legislatures' authority to equip and to buy for the troops directly from the private sector. The Continental Congress has appointed two permanent committees, i.e., the Secret Committees for Trade and the Committee of Secret Correspondence. On the one hand, the Secret Committee of Trade was established in September 1775, which was comprised of nine members. The committee acted on behalf of the Continental Congress to provide the army with various kinds of purchases such as goods and supplies as needed.

On the one hand, the Committee of Secret Correspondence was established in November 1775. The committee was created to deal with political relations, and the committee provided overseas aid for the Colonies. Political competition may affect public procurement (Auriol et al., 2016; Thai, 2001). Following that, the Committee of Secret Correspondence's name was changed to the Committee for Foreign Affairs. The Continental Congress appointed other committees and those committees for procurement activities, such as the Cannon Committee, the Saltpeter Committee, Medical Committee, and Clothing Committee. In general, all the committees were contracting on behalf of the Continental Congress to equip the Continental Army with supplies (Nagle, 1999).

Procurement System under Colonial System

Congress organized the procurement system by adopting a new regulation on June 1777, composed of fifteen pages. Congress has been trying to find an application process for government procurements. These regulations allowed establishing independent departments that might be dealt with purchases and other issues. In addition, Congress desired to make more arrangements for the purchase system. Corruption may have long-lasting effects on public procurement (Fazekas and Kocsis, 2020). Hence, Congress issued additional legislation to prevent corruption and the deliberate raising of prices. The rising prices may increase the contract cost if a contract is assigned on favoritism (Keulemans and Walle, 2017; Miyagiwa, 1991). Congress issued a book of ten-column pages that included the purchases and contractors' information. Therefore, the frequent legislation has made the procurement departments unable to be absorbed and felt confused and unprepared for their tasks. The Commissary Department's commissary has submitted his resignation that was frustrated with the department's work system. Thus, Congress has revised the purchasing system and the Commissary Department regulation. At that time, the new system granted the department's commissary full authority to run the department's work and appoint or remove any officers (Nagle, 2000).

Malpractices in Procurement System

Congress attempted to reduce the conflict of interests, thefts, and frauds in the course of regulations. However, the consequences of the efforts were challenging and complex. During that time, all the principal officers and the inferior officers were merchants, who worked in the Quartermaster, Commissary, Clothier, and Hospital Departments. Combining the public interest and private interest could not be considered illegal or immoral because all procurement services had commercial and public clients (Auriol et al., 2016; Amann et al., 2014; Grandia and Meehan, 2017). Congress selected merchants to serve as supply chiefs because they had the comprehension of the trade connections. It had recorded cases of overlapping of public interest with the private interest of the agents. The agents used government funds to finance their private business enterprises. Consequently, in the eighteenth century, some agents had scrambled to government positions because they believed that governmental employment was a path to wealth (Nagle, 2000).

The profiteering from the federal government procurements was rampant, and it was a huge problem facing every government over the world. The crisis of conflicts between the different interests had roots in ancient times in human beings' history, and the United States procurement law was no exception. At that time, favoritism was common when awarding government contracts, quartermasters were generally awarded to cousins and colleagues, and bids' information was leaked out. The quartermaster's general alleged that they recognized the past performance and got the government supplies' best price. Besides, the quartermaster's general pretended that these methods were of practice being sought to get supplies to the troops as speedily as possible (Nagle, 2000). Hence, the Continental Congress had faced several problems such as profiteering, favoritism, and fraud.

Regulations to Moderate Malpractices

Congress had attempted to eliminate the influences of those corruptions through adopting several purchasing regulations. As a result, the regulations had been aimed to protect the army from harmful supplies or destructive behaviors of quartermasters general. After the war, several familiar contracting matters arose, and Congress began to adopt new procedures for the nation's contracts system. Confederation Congress arranged that the government procurement performed under a system of contract agents, and the Board of Treasury was responsible for transporting, storing, and distributing supplies (Nagle, 2000). In 1785, the Treasury Board awarded the government's contract of the annual uniforms of troops' clothing to the lowest bidder. However, the contractor was soon dissolved from the contract because of the new government's financial problems. As a result, the Treasury Board awarded the contract to a higher value with more favorable terms, and Congress agreed because the financial problems justified the action (Nagle, 2000).

Congress adopted a new procedure, which made the contracting more formalized. Public advertisements and awarding contracts to the lowest price had become the only method of soliciting bids in the state. The commanding officers had the authority to buy other supplies and charge the purveyor if they failed to deliver the supplies (Coviello and Gagliarducci, 2017). The government tried to ensure that its contract included the best terms. Moreover, the performance of the contract should meet the contract specifications and provisions. In addition, Congress adopted a new statute, which was *"the Official Not to Benefit*." According to this statute, Congress members were forbidden to contract directly or indirectly with U.S. agencies. Furthermore, Congress passed the Act of March 3, 1809, which gave Congress broader control over contracts' financial and procedural aspects. Congress required that all purchases and contracts should be made the open purchase or by advertising for proposals. Moreover, Congress directed agents to submit monthly reports of their contracts to the Treasury's comptroller for audit purposes (Nagle, 2000).

Since 1775, the government has developed U.S. agencies' acquisitions procedure from a few unrelated statutory fragments and common law. The constitution did not find any express provisions to grant the government the authority to acquire goods or services. Nevertheless, the government's authority to contract on behalf of the public was a part of its capacity and aspect of its sovereignty rights (Massengale, 1991). Therefore, Congress used its power by passing several policies to ensure the high quality of contraction. The methods of contracting and performance have evolved by efforts of both Congress and the contracting officers. They have used fair competition between customers and have adopted the advertisement procedures for public bids.

Since the beginning, Congress had expressed its belief that the only effective method of preventing fraud in government acquisitions was employing a competitive and open bid system. The Civil Sundries Appropriations Act was passed on March 2, 1861, and was relied on by the United States during the American Civil War (Nagle, 2000). Under this Act, the government used liberated power to produce its supplies and fix its contracts. The Act used two methods to award the government contracts to the purveyors. The methods were the formally advertised method of purchase, and the Act permitted the government to procurement supplies by negotiation under specific circumstances (Massengale, 1991; Blank and Marceau, 1996).

Procurement System after World War II

After World War II, the federal procurement system was developed as a tool for implementing socio-economic policies. The Act has applied to purchases and procurement contracts. This system was given authority for the acquisition of goods and services by the executive agencies. Moreover, Congress used a policy whereby the agencies may use any contracts that promote the United States' interests. Congress required that agencies place a fair ratio of the purchases and contracts to small business firms (Massengale, 1991). The Army Services Procurement Act of 1947 was appropriate for army supplies, unlike the civilian agencies, which had a likely body of regulation.

In 1956, the president directed administrators of the General Services Administration to review government procurement policies and procedures. As a result, the General Services Administration issued the new rule named Federal Procurement Regulations (Nagle, 2000). Congress passed the Small Business Act in 1958. The new regulation aimed to encourage and develop small business firms because Congress believed that small businesses were good for the American economy. On the one hand, applying this Act has ensured that the small business firms would have a free competition of purchases and contracts with the government. On the other hand, the Act has worked to guarantee the sustained existence of the small business firms in the economy and be a significant part of the supplier of government contracts (Massengale, 1991).

During the Great Depression, Congress passed the Buy American Act. The producers and industries' preferential treatment was adopted to purchase materials, supplies, and construction contracts by federal agencies. In 1974, the Office of Federal Procurement Policy Act was enacted to charge with promoting the economy. The Act gave broad powers to regulate and prescribe government procurement policies in a single set of regulations. The executive agencies were obliged to follow those regulations in the procurement of supplies and services. In 1983, the Federal Acquisition Regulation was issued, and the regulation was issued to provide the codification of uniformity (Massengale, 1991).

The Refined Regulations of Government Contracts

The historical review of the federal government contracts in the United States gives us some understanding of the regulations. It is an essential priority for comprehending contemporary government contracts. Tracing the government contract system's history and changes begins with English common law and is now embroiled in the beltway milieu. The government contract rules have provided the general practitioners with simple references of differences between the government contracts and the commercial contracts.

Generally, there are two sides involved in making a contract. Each contract has at least two parties who are authorized to make the contract, and they are called a seller and a buyer, or the parties. However, Contracting Officer follows the federal government contracts system (Feldman, 2007). Consequently, in the case of government contracts, the contracting officers and governments' agents are authorized to represent and enter into the contracts or to change the existing contacts on behalf of the federal's agencies of the United States. Under the government contracts, the contracting functions and responsibilities are delegated to award the necessary contracts and perform the U.S. federal government's administrative functions.

In contrast, if parties are without authority, their power is limited to binding the U.S. federal government. Their legal capacity is derived mainly from regulations and all other applicable procedures to represent the public body of government contracting processes. Under the federal system, the contracting officers and the government's agents have limited rights to perform specific acts on behalf of the U.S. federal government, which might be derived mainly from the law. This power is delegated to the officers, the employees, or the United States government's agents, who constitutionally carry out the business on behalf of the U.S. government. As a result, this section of the Act imposes that officers or employees cannot be contracted voluntarily on behalf of the United States Government (Massengale, 1991).

Contracting Authority

The contracting officers' authority or government agents are derived mainly from a written delegation of authority from the Head of Contracting Activity, called "*The Contracting Warrant."* Given that, the government's agencies are not bound once the contracting officers exceed the limits of their authority as government agents. In the other case, the contracting officers or government agents should follow government agencies' prescribed internal procedures to approve a proposed agreement (Cases, 1991; Goldstein, 1980). These rules make a pre-arranged agency. Accordingly, in contrast to the private sector, government contracts' laws, regulations, and the contract officers must have explicit authority to execute the government contract.

Generally, the principal may bind to a contract if the representative or the agent has actual, implied, or apparent authority. However, under the U.S. principles of government contracting, the authority to award government contracts is more limited than the customary authority, which is applied in the private sector. Besides, the concept of apparent authority does not apply to government representatives. Laws and regulations confine the discretion of the contracting officers and the government agents within the contracting process. Thus, even though the contracting officers or government agents believe that their authority is an actual authority to do contracting actions for the government, it is still a limited authority until they have determined their actual authority's accurate limits. Feldman (2007) stated in his book of Government Contracts Guidebook:

> *"Thus, as has already been noted, Contracting Officers and their representatives all should have specific limitations outlined in writing regarding what they can do concerning the contractor (this is their actual authority)."*

The contracting offices have unique limited authority to exercise acquisition functions and to bind the government. The government personnel, who interact with government contracts, are not authorized to deal with the contractors according to the regulations and do not have the contracting warrants. However, they are typical representatives of the contracting officer who have been appointed as the responsible person with actual authority to monitor and inspect the tasks of contracts. On the other hand, if the contracting officers or their representatives lack authority or are without absolute actual authority, the contract's obligations would generally be refused. It is for this reason that the power of the government personnel is limited to binding the government. Moreover, the U.S. government's contracting processes require applying all the approved procedures (Keyes, 2004).

The parties of the government contracts have to assume the risk of having ascertained that the representative or agent who represents the government in the contracting. These parties would possess the scope of authority to execute an agreement. As a result, contracting with the government is not binding unless the contract of government is signed with authorized authorities. In case of oral agreements or negotiations, the oral agreements do not bind the government even the agreement is later ratified by the government's agents who have actual authority and have full knowledge of the unauthorized acts (Cases, 1987). The contracting officer's subsequent approval of the oral agreement is reflected in his signature of the written contract on the modification prepared form. The Contracting Officer should turn the prior oral agreement into a valid contractual commitment that may bind the government. Otherwise, the oral agreement may not be validated because the negotiator does not have the authority to bind the government.

The Contracting Officer possibly disclaimed any knowledge of the settlement negotiations and stated that he had been consulted and he would never have approved the settlement that was reached. On the other hand, unless the agreement is palpably illegal, the government was bound by its agents' commitments acting within their authority, even if they made a unilateral error of law or fact in the transaction (Feldman, 2007). Section 1.602-3 of the Federal Acquisition Regulation (FAR) Act provides that the contracting officer has authority in the case of the oral agreements or negotiations of the contract. The contracting officer may follow the ratification of unauthorized acts, which was given effect as it had been authorized. The rules applicable to the government contracts' ratification were the same as the private contracts' ratification. World Trade Organization also aimed to improve the rules and regulations for improved public procurement performance (Hoekmann and Mavroidis, 1995; Pomeranz, 1979). As a result, the government is respected the representative's agreement. In contrast, the contracting action becomes a government's binding if the unauthorized act becomes ratified adequately by a government official with actual authority. Under the FAR, a government commitment is only subject to ratification (Branca et al., 2014).

Additionally, the government may be bound under implied actual authority doctrine, developed through court decisions. Therefore, the government's representatives, who have implied actual authority, can bind the government. The implied has a similar effect within the government contracts system because actual authority is not always stated. Usually, the delegation of this type of authority is not an express delegation. However, the federal courts or the boards of contract appeals may find the implied actual authority from the parties' conduct. The boards and court would examine the totality of the circumstances to determine whether a reasonable person would have considered the agent's action to be an integral part of the agent's specifically assigned duties (Feldman, 2007). Accordingly, the courts may apply this doctrine, which must find that the government official, who had taken action, had actual authority and must find a manner in which authority had been implied in some authority delegation. The implied authority is considered the same as actual authority that usually applies to accomplish government agencies' purpose. The government officials authorized may suffice to bind the government by the implied actual authority.

A Doctrine of Estoppel

Each contract requires a consideration, which must be an exchange value for each party to be valid. In that case, courts created an estoppel doctrine, which is existed as a substitute of consideration, especially when the contract's parties have a lack of exchange of value. Courts have applied this doctrine when they find that one of the parties acted on the other's promise. Usually, estoppel is used for a party to avoid escaping liability for reasonable reliance on the other party's promise. Therefore, courts use the estoppel to prevent unjustifiable adversity to the other party who determinately relied on an inconsistent early position of the other party. Nevertheless, this doctrine is not available as a theory to bind the government when the contracting officers or agents have acted more than the scope of their actual authority. However, if the government accepted their actions with the actual knowledge, the contract had been bound to the government (Massengale, 1991).

In general, when a government contract is made on an unauthorized basis, estoppel's doctrine is not used to remedy against the U.S. government. Courts do not use the doctrine estoppel to establish a proper authority that binds the government. Under the "*United States vs. Zenith-Godley Company,"* one may rely upon a government agent's apparent authority, which is necessary and logical. In that case, the court also emphasized that the knowledge of the scope of the statute and regulations is the responsibility of the party who deals with the government when it held that:

> *"It stands also, and perhaps most basically, for the proposition that the burden is on him who deals with the government accurately to discover the scope of the statutes and regulations*" (Keyes, 2004).

Consequently, the estoppel doctrine may work under the facts where the actions are made on an unauthorized basis, and the parties fail to comply with statutory requirements. The estoppel is not available to apply against the United States.

In the government contracts system, the equitable estoppel doctrine may apply against the U.S. government under some circumstances to remedy a contract claim. On the one hand, the estoppel doctrine applies when the government's representative has actual authority to contract on behalf of the U.S. governments and their position as private citizens. On the other hand, the other party who contracts with the government must prove that the representative's action is within the scope of the agent's actual authority and the action is valid under the statute. The courts generally hold that two threshold conditions must be satisfied, and the government's representative should act and form the basis for the estoppel (Massengale, 1991). In the California State Board (Cases, 1955) case, the court held that each case wherein estoppel is sought to be set up against the government must be decided on its facts.

Accordingly, courts may apply in the context of the dispute. It shows that the conduct on which the contractor relied was by an officer or representative of the U.S. The contractor established the four conditions of estoppel doctrine if the U.S. government knew the facts. The U.S. government intended that its conduct be acted when the contractor had a right, and the contractor was a persuader. The contractor detrimentally relied upon the U.S. government's conduct. The U.S. government should treat honesty and fairness with the contractors, and the contractors have the same duty. The government contract system requires that the government

and its contractor deal in a contractual relationship. As a result, both contracting parties must act, and each of the parties has obligations to avoid interfere with the other party's performance.

The Principle of Good Faith

Under the principle of good faith, the parties have to respect the concerning the contract's profits. Besides, the parties should avoid either expressly or implicitly any illegal actions or fail to do their required duties under the contract. A good-faith relationship between the parties may be originated on honesty and fairness in an ever-changing acquisition environment. It is essential during the period once the public and Congress appear to doubt the ability of the government and its private contractors to carry out their roles effectively. Hence, honesty in the federal acquisition process is essential (Massengale, 1991). Accordingly, the U.S. government must treat contractors fairly, as stated in section 1.602-2(b) of Federal Acquisition Regulation. Section 1.602-2(b) of FAR states that the expressions of FAR provisions require the government to conduct in a manner that ensures that contractors may perform the contract without obstacles. The good faith principle is sought from a government contract's parties to establish an honest relationship between both parties. It ensures that it embodies their contractual relationship in an expectation objective. Usually, courts use the good faith principle to interpret the expressed words of the contract's context, ambiguous terms at law, or implication of terms.

The Role Contracting Officer

The government contract and public contract law assume that the all-contractual relationship process must be conducted in an environment transparent to both the government and the public. Federal laws and regulations impose limitations on the conduct of the contracting officers and government's representatives, so long as they relate to any government contract. The contracting officers or government agents are expected to act within their authority delegated as per law and regulations. Likewise, they must administer the contracts in consonance. The contracting officers abuse their authority once they exceed their legal power limits delegated by the law. In that case, courts can impose a legal interpretation of the contracting officers' actions and clarify the legal consequences. Thus, delegated powers are broad indeed, but there are nevertheless limitations on the contracting officer that must be adhered to. If these limitations are exceeded, the courts and Board of Contract Appeals will find that the contracting officer has abused discretionary powers or has acted arbitrarily and capriciously (Massengale, 1991).

The contracting officers' duty and function stated that the government's agent should act impartially and weigh that the government and its party's interest and rights align with the contracts' terms conditions. The contracting officers have discretionary authority to treat the contractors where there has been an improper activity. The discretionary authority is not unqualified. However, law and regulations restrict it. Both parties seek to accomplish the more significant benefit from the contracting. In contrast, some contractors seek to make money as they can, and they try to find ways out of agreements' conditions to do that. Usually, the contracting officers, who are the government's representatives, enter legal battles with the contractors. Thus, the law imposes them to act impartially when facing a dispute with the contractor. The government's representatives or agents are responsible for inspecting the contractor's performance and notifying the contracting officer concerning contract performance

issues. The government personnel's unauthorized obligation is regarded as an abuse of contracting authority under federal laws and procurement regulations.

The Internal Control System

The FAR provisions place prohibitions on improper business practices. The Part-3 of the FAR divides the prohibitions into two main categories. The regulations also place provisions to deal with mandatory disclosure and internal control system of government contracts. The disclosure is a duty of the government contractors, which is affected during the contract period and for at least three years after termination of the contract (Branca et al., 2014). The internal control system aims to satisfy the board of obligations of the federal government contracts. Under this clause, all contractors are subject to the internal control system except the small firm because the division's application depends on the company's size. Additionally, the regulation prohibits improper pricing practices in federal government contracts. The FAR Act forbids all conduct that seeks to abolish the freedom of competition or effect on the choice of competition in the market. Moreover, the regulation includes several terms regarding the fixed-price of solicitation and bid rigging. The proper pricing practices ensure the fairness of completion and the quality of the contracting performance. The prohibition of improper business pursues that both parties are subjected to the regulations, and the contract remains as the government’s award.

CONCLUSION

The federal government contracts have developed over courts, federal regulations, and the law. According to historians, the first law-governed Congress enacted the purchase of the U.S. military in 1795. This system carries many malpractices due to the absence of adequate regulations. Hence, the laws and regulations were improved over time, and the subject of federal government contracts has assumed enormous achievements in the current period. The federal procurement system is today governed by FAR. The regulation seeks to place the best rules to ensure the public interest and lead to the parties' fairness transitions. The Contracting Authority and Officer's role is refined to ensure a smooth government contract system in the current procurement system. Further, the principle of good faith and internal control systems are applied to ensure smooth and fair government contracts.

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