Book Review

The Fear of Discretion in Government Procurement

Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance, by Steven Kelman.*
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Buying things necessary to the pursuit of other government tasks is a pretty boring subject. It is not surprising, therefore, that the press reports largely on the discovery of $450.00 hammers in government tool chests and on the nefarious activities of the Wed-Techs of the world and their public sector allies. Media coverage thus encourages Americans to ignore government procurement or to think of it as both inefficient and corrupt.

Steven Kelman's *Procurement and Public Management: The Fear of Discretion and the Quality of Government Performance*, alerts us to another and potentially more serious problem with public sector procurement activity. With considerable regularity the government agencies that purchase complex equipment, computer systems in Kelman's study, do not get what they need. This poor fit between equipment purchased and performance required results, however, neither from corruption, nor the willingness of the government to pay non-competitive prices. On the contrary, Kelman argues, these procurement failures are the direct result of the rules established to promote open competition and protect against improper use of public funds. In Kelman's view, the federal procurement system has largely succeeded in stamping out favoritism and corruption. But that same system fails miserably as a means for assisting agencies to achieve excellence in the pursuit of their primary public goals.

I. The Causes of Failure

In more concrete (but vastly oversimplified) terms, the federal government procurement process features a standard form of equipment and services acquisition—"full and open competition." Under that system, the government specifies its requirements in detail and awards its contracts to the bidder who offers to meet those specifications at the lowest cost. In some sense, the federal government's procurement policies represent a high achievement in public

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sector management. Federal procurement activity relentlessly pursues the three goals of equity (fair access to competing bidders), integrity (reduction in opportunities for corruption) and economy, (obtaining goods or services required at the lowest possible price). Orientation toward these ideas is supported by an extraordinarily detailed and complex compilation of procurement regulations as well as by a "procurement culture" that reinforces adherence to general norms.

Yet, in Kelman's story this system, however well-designed for the procurement of No. 2 lead pencils, repeatedly fails to produce good results in the acquisition of complex computer processing systems. Using a combination of government and private industry surveys directed to computer managers, and a series of intensive case studies of computer equipment procurement, Kelman develops a persuasive explanation for these failures. In a nutshell, the cause is the system's suppression of the sorts of decision processes and business relationships that produce the information upon which sensible procurement judgments might be based. In Kelman's view the government makes bad decisions both because it is badly informed and because its procurement officials are encouraged to disregard some of the important information that they possess. The culprit in both instances is the system of full and open competition.

Consider the Department of Agriculture. In putting together a massive computer scheme for all of its field offices, the Department's specifications led the bidding parties to offer it a system that all of the vendors knew was both bizarre and expensive. But none of them had any incentive to suggest to the Department that its specifications should be reformulated. Or take the IRS. It contracted for the replacement of main frame computers at its service centers with a vendor whose equipment would meet the bench test specifications that the IRS had published, but which the vendor knew had too little capacity for the services' long term needs. Or take the Environmental Protection Agency. It discovered too late that it was being used as a training ground for inexperienced vendor managers and technical personnel who were transferred elsewhere as soon as they achieved the capacity to do EPA any real good with its computer problems.

The question, of course, is why are these vendors so uncooperative in dealing with federal agency buyers? Or to put the matter another way, why are the federal agencies involved doing such a bad job of protecting themselves from vendor abuse? Aren't these just cases in which the government has been stupid?

In a superficial sense the answer to the last question is "yes." In all of these cases something was wrong with the agency's specification of its contract requirements. But, Kelman's point is more fundamental. The agencies involved will *never* be able to specify contracts that are sufficient to protect them against

their own inexperience and lack of information concerning complex systems, particularly systems involving a rapidly evolving technology. They must rely on the vendors and the vendor community for information and continuing assistance. But, given the way in which the government contracts with these vendors, it can neither consult with them informally before contracting, in order to let them tell it what it really needs, nor can it reward vendors for good performance by promising to continue to deal with them. The open competition system discourages, if it does not quite prohibit, both sorts of activities.

Given the emphasis on equity and integrity in the procurement system, the reasons for this discouragement are not hard to find. If vendors are allowed to participate in the process of specifying what the government needs, it is much easier for them to work with sympathetic or even corrupt officials to rig or "wire" specifications to produce a contract for a particular vendor. Similarly, if the government procurement process heavily weighs experience with existing vendors, and rewards those who have provided good support and service in the past with new contracts, it necessarily limits or excludes open competition by others. Indeed, one contract manager told Kelman that refusal to give prior contractors any benefit for prior good performance was a measure of how "objective" the agency was in awarding contracts.

While the government eschews informal relationships with vendors and spreads its business around through its bidding process, Kelman finds that it is much more common in private industry to have continuous liaison between buyers and sellers and to stick with a particular supplier unless or until disappointed by its performance. While government procurement officers try to purge their procurement decision processes of reliance on "experience" and other soft variables like "managerial effectiveness," private firms use general reputation and their "feel" for vendor personnel as very important elements in the determination of where to buy. When purchasing computer equipment in particular, private firms view the vendor's advice as crucial to the development of sensible specifications of their own requirements, and they expect vendors to guide them in reshaping their operations to get the best fit between computer capacity and other business systems.

As Kelman shows, the theoretical economic literature predicts the emergence of these sorts of long-term, intensely-cooperative arrangements where goods and services have a highly specific relationship to the structure, functions, or locations of the parties involved. The value created by continuous exchange of information and the interdependencies created by that exchange lead firms in such circumstances to engage in open textured, long term contracting and "sole source" relationships, if not outright merger. These forms of contracting are, however, anathema in the government procurement world.

To be sure Kelman does not find that all government procurement officers fail, either to take experience into account, or to learn from vendors before

specifying what it is that the government wishes to buy. The point rather is that both the rules and the culture of public contracting make such managers fight an uphill, and sometimes clandestine, battle to get computer systems and other complex equipment and services that will enable their agencies to do their jobs well. It is this systematic bias against excellence in public management that Kelman finds most blameworthy in the current procurement process.

The causes of government failure here are not, however, a simple story of public managers failing to heed the wisdom developed by their counterparts in the private sector. The public managers who deal with the procurement of complex products for federal agencies are subject to quite different demands than their counterparts in private firms. As the subtitle of Kelman's book suggests, the crucial difference between the environment of public management and the environment of private management is the American public's historic distaste for discretionary governmental power. While we exalt entrepreneurship and creativity in the private sector, we prefer our public officers to be carefully constrained both by detailed rules and structural checks and balances. While in private business a few kickbacks to buyers may be a sensible cost to pay for a procurement system that permits the exercise of both common sense and creativity, the calculus of cost and benefits in the public sector is quite different. Incidents of fraud and waste in procurement have demoralizing effects with respect to the whole of government's activities, and they reinforce a distrust of government operations that is so central to our constitutional heritage as to function almost as a civic religion.

Moreover, the modern federal government has taken a major role in the promotion of economic opportunity for all Americans. Fair access to the procurement activities of the federal government is not just an aspect of our general belief that all citizens are entitled to equal treatment by the government. It is also a means of promoting social ideals such as increased opportunities for historically disadvantaged groups and the maintenance of a robust small-business sector. Government procurement activity is much more than buying things in order to carry out prescribed governmental tasks. Procurement must conform to basic political ideals and play a part in governmental social policy as well.

It is not too surprising, therefore, that the procurement system strongly emphasizes norms that may limit the degree to which procurement can be employed in a strictly instrumental fashion to promote excellence in the performance of agency missions. As Kelman is at pains to point out, Americans are both intensely proud and intensely nervous about their government. Our government is meant to live up to ideals that transcend the ideals of the market place, but, as Kelman puts it, "the statutes, regulations, and cultural norms that govern the procurement system reflect the view that, left to their own devices,

government officials will not live up to the ideals we hold."[1] We therefore insist that there are rules and procedures through which we can hold government officials strictly accountable for their behavior. Thus, the procurement system that we have is not some silly aberration brought about by the lack of bottom line accountability on the part of government bureaucrats. It is a system responsive both to our constitutional heritage and to the day to day politics of a system structured to produce continuous oversight. Both the press and the Congress are likely to be more interested that a government procurement officer went to lunch with a potential vendor than that she learned something at that lunch that might be crucial to the design of a request for proposals for a multi-million dollar computer system.

II. Seeking a Cure

While he takes the prevention of corruption and unfairness in the procurement process very seriously, Kelman nevertheless believes that we should radically reorient the structure of federal procurement. In his words "the basic principle . . . should be to increase dramatically the freedom we give public officials to use their judgment in the procurement process."[2] In short, we must somehow free ourselves of our fear of discretion or, more particularly, we must give up those techniques for limiting discretion that produce dysfunctional results.

Rather than meticulous objective rules which separate procurement officials from vendors, limit informal information flow, and stamp out long-term relationships that create value, Kelman favors a system based on broad principles whose protections against fraud and incompetence would be built into the structure of procurement decisionmaking. In particular, he would create accountability through the requirement of written decisions justifying and providing a rationale for any procurement judgment. And, he would guard against corruption by making all procurement decisions through the medium of multiple-member evaluation panels. Coziness and chicanery would be subject to peer-control in the decision process and subsequent oversight of decision rationales. The process would thus function something like informal notice and comment rulemaking in federal agencies. Participation, potentially, would remain broad; *ex parte* or informal contacts would be recorded; and, prudence and probity would be reinforced by the necessity of public explanation.

Moreover, Kelman believes that procurement officials should be encouraged to use more discretionary standards, particularly the past performance of potential vendors. The requirement of explanation would police against these

1. S. KELMAN, PROCUREMENT AND PUBLIC MANAGEMENT: THE FEAR OF DISCRETION AND THE QUALITY OF GOVERNMENT PERFORMANCE 13 (1990) [hereinafter by page number].
2. P. 90.

soft variables as a mere subterfuge for favoritism. Answering potential critics concerned primarily with equity, Kelman argues that the use of experience factors is not a form of discrimination against new firms. Parties would be both advantaged and disadvantaged by prior performance. Moreover, the current system fails to recognize that new entrants are themselves often advantaged in the bidding process by flexibility and technical innovativeness, which would still be important aspects of bidding on complex or high technology systems.

Although Kelman is hardly sanguine that his proposals would stamp out all corruption and incompetence, while promoting procurement activity that supports excellence in the performance of agency missions, he argues quite cogently that no system should be compared with an ideal one. After all, the current system of rulishness, which stamps out creativity and discourages sensible acquisition and utilization of information, is also inadequate to prevent all or identify much corruption. Most of the corruption found in government procurement in recent years has been uncovered, not by following the elaborate paper trail produced by government red tape, but by inside tips or focused investigations.[3] These tools for combating waste and corruption would remain available under Kelman's proposal.

III. The Cultural Overhang

As I have said, Kelman makes a persuasive case both for his view of the real maladies of federal procurement policy and for his proposed cures. The current exemption of the Federal Reserve Board and the Federal Deposit Insurance Corporation from most procurement regulatory requirements has already created a natural experiment that Kelman believes supports his views. A broader, but still limited, trial would seem feasible and sensible.

Yet, I remain quite dubious that the structural changes suggested are sufficient to the task of reorientation. In part these doubts are premised on my own understanding of the federal rulemaking process. But, more importantly, they are premised on my intuitions about the power of the existing political and legal culture and on Kelman's failure to explore and explain the "procurement culture" to which he often refers.

To take the rulemaking process first, Kelman's proposals are quite reminiscent of the reform proposals of the late 1960s.[4] The reformers of that period

3. Pp. 97-98.

4. *See, e.g.*, Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965) (suggesting that greater rulemaking authority would allow agencies to develop policy in a more coherent and forthright fashion). *See also* R. MELNICK, REGULATION IN THE COURTS: THE CASE OF THE CLEAN AIR ACT 5-9 (1983) (describing "new regulation" of late 1960s and early 1970s); Stewart, *Vermont Yankee and the Evolution of Administrative Procedure* 91 HARV. L. REV. 1804-11 (1978) (discussing burdens of trial types proceedings that led federal agencies to turn to rulemaking process).

pointed to a stodgy federal regulatory process that was oriented toward inefficient case by case adjudication and was mired in technicalities that caused it to lose sight of the major goal of regulatory systems—the development of successful public policy. There were, of course, many other failures of regulatory adjudication: Expense, delay, and capture by repeat players—usually the industry targeted for regulation. The system was also arcane and therefore little subject to political oversight.

The remedy proposed then, and often adopted in the regulatory statutes of the 1970s and 1980s, was a rulemaking process that required agencies to confront policy issues directly and to resolve them. The statutory framework for these rulemaking activities provided standards or criteria for the development of rules, but left specific policy development to the expert judgment of administrators informed by a broadly participatory rulemaking process. Control of agency discretion was to be based on review of the agency's rationale for its policy judgments. This would permit both political oversight in the Congress and judicial review for legality.

In practice, the rulemaking process of federal regulatory agencies has hardly lived up to our aspirations. Agency after agency has been faulted for the hypertechnicality of its rules, its failure to address the important policy concerns within its jurisdiction, and its dilatoriness in doing anything about those problems it does address. It is hard to find analysts who view the rulemaking efforts of the Environmental Protection Agency, the Occupational Safety and Health Administration, the Consumer Product Safety Commission, or the National Highway Traffic Safety Administration as major success stories.

The principal problem with regulatory rulemaking, as David Harfst and I have argued recently,[5] has been the intrusion of that same political and legal culture that Kelman identifies early in his discussions of the development of procurement policy. Having empowered agencies to make policy by rule, the legal and political system immediately set about the task of constraining that discretion. The Congress acted both generally and specifically. It adopted a multitude of general procedural statutes imposing onerous decisional obligations on all or most agency rulemaking. The Government in the Sunshine Act, the Regulatory Flexibility Act, the Paperwork Reduction Act, the Intergovernmental Cooperation Act, not to mention the Freedom of Information Act and the National Environmental Policy Act, have all insisted that agencies devote significant resources to the pursuit of goals other than those directly within their central missions.[6] Congress further constrained exercises of agency discretion, first by attaching numerous legislative veto provisions to federal regulatory

5. J. MASHAW AND D. HARFST, THE STRUGGLE FOR AUTO SAFETY (1990).

6. On the general statutory environment of federal administrative decisionmaking see J. MASHAW AND R. MERRILL, ADMINISTRATIVE LAW: THE AMERICAN PUBLIC SYSTEM 48-63 (2d ed. 1985).

statutes, and, when that activity was ruled unconstitutional,[7] by micromanagement through appropriations riders.

Meanwhile the executive branch got into the same act with an almost religious fervor. It regulated the regulators through OMB reporting and clearance requirements for major regulatory policies and through the imposition of elaborate requirements for agenda development and publication.[8] The courts, as ever the guardians of individual liberties from governmental abuse of discretion, "proceduralized" the rulemaking process in ways that gave significant, if not overwhelming, advantages to opponents of agency policy making. The result of all these efforts to control regulatory discretion has been a regulatory quagmire. The general political and legal culture has strongly reinforced agency incentives for caution and inaction and done little to promote vigor, creativity or excellence.

The question, then, is what would protect a restructured procurement process from the same dynamic of excessive constraint? I confess that I cannot tell, for Kelman's book tells me too little about the internal culture of procurement activities and the way that culture is related to the external environmental within which procurement activity takes place. But, if we presume that this culture is of the standard form, that is, a set of norms or operating guides that have been found to be functional in the relevant environment, then we obviously need to know a lot about that environment. Only then might we be able to tell how a shift of the sort that Kelman proposes would reorient the environmental sanction and reward structure faced by procurement managers. For it is on the basis of that structure that new cultural norms will emerge.

To be sure, not everything can be pursued in a single volume. But the failure to devote more detailed attention to the determinants of the procurement culture is made troubling by the repeated invocation of "culture" as an explanation for procurement practice. Kelman often recognizes that the rules to which procurement managers are subject do not demand that they behave in all the dysfunctional ways in which he finds them behaving. There are other things in the environment that are shaping procurement choices. But, we are not told with any specificity what they are or how they would be reshaped by the structural and decision process changes that Kelman proposes.

If, therefore, the environmental factors shaping the procurement culture are the same or analogous to the political and legal factors that have shaped and constrained federal agency rulemaking, we may not get very far by instituting Kelman's reforms. But then again we might. Environments and cultures are both complex and specific, robust and fragile. Apparently small changes can

7. Immigration and Naturalization Service v. Chadha, 462 U.S. 919 (1983).

8. The principal executive orders implemented by a host of OMB regulatory provisions include: Exec. Order No. 12,291, 46 Fed. Reg. 13, 193 (1981), *reprinted in* 5 U.S.C. § 601 at 473-76 (1988); Exec. Order No. 12, 498, 50 Fed. Reg. 1036 (1985), *reprinted in* 5 U.S.C. § 601 at 476-77 (1988).

reorient incentives in ways that break deadlock and foster the pursuit of excellence for which Kelman ardently argues. Hence, while his analysis fails to give us all of the materials from which we could confidently predict success, he still makes a persuasive case for some limited experiments. After all, given the current (and perhaps permanent) state of organization theory, we cannot do much better than to avoid the mistakes of the past while putting in place new institutional mechanisms that are themselves recognized to be tentative efforts at learning by doing.