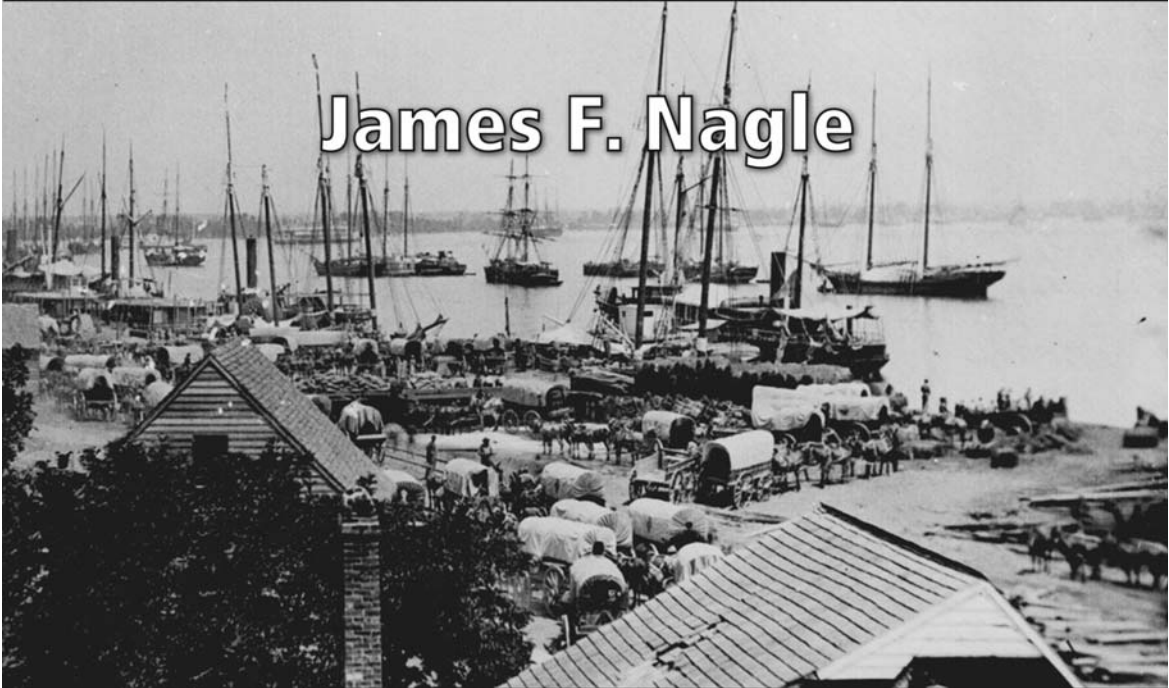


A History of Government Contracting

Third Edition, Vol. I

James F. Nagle



Cover image: Landing supplies at the Army of the Potomac - Quartermaster & Commissary supply area – the wharf at City Point, Virginia, 1864

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A word from the Publisher...

This has been a very personal project for us. I first bought Mr. Nagel's book in 1993 – the first edition. At that time, I was VP for Business Development with a DC-based federal systems integrator, and federal contracting was my business.

I am also a history buff and quickly became absorbed in Nagel's book. Actually, my friends kidded me about reading a 575-page book titled "A History of Government Contracting." Looking back on it, I really don't blame them.

The book is fascinating. It takes the reader through U.S. history as a series of pendulum swings to our acquisition system. Nagel did a superb job in documenting his sources and bringing pages to life through quotes and anecdotes. The book was tough to put down. I still have my original copy of this book, a bit worn and filled with my hand-written notes.

The reader quickly learns that our contracting system was born in the Roman Empire, taken to Great Britain to support the far-flung legions of the Roman Empire, then formalized into a logistics system by the Brits called the Quartermaster System, and then brought to the U.S. and adopted here prior to our independence. Many of the common terms we use to define quality, such as "shoddy," came out our contracting system. Each war from the Revolutionary War through recent middle-east actions brought change to the system's rules and how they are applied.

This book is an invaluable resource to acquisition and contracting professionals. It provides a perspective on the system, its flaws, its maturing, and its resilience. The fundamental terms of today's acquisition system were in place during the Revolutionary War and have withstood both wars and times of peace.

I contacted James Nagel and his publisher, George Washington University Press, and the parties graciously agreed to transfer publishing rights to Government Training, Inc. for a Third Edition. James diligently updated the book with recent events, legislation, and policy changes.

Government Training, Inc. offers this book to the acquisition community. We also wish to sincerely thank James Nagel for his years of loyalty to this project and express our gratitude for the cooperation of the George Washington University.

Don Dickson
Vice-President
Government Training, Inc.

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Dedication

for helping me keep things in perspective

To my wife Ann and my children James, John and Steve

Acknowledgments to First and Second Editions

Writing a book is a cooperative effort, no matter how many names appear on the title page. Many people contributed to this book, in a variety of ways. People like Mike Hordell, Thomas Payne, B. Alan Dickson, Dorn McGrath, Leroy Haugh, Jacques Gansler, William Kovacic, Ed Leakley, Robert Leslie, Bob Titlow, and F. Trowbridge vom Baur all provided me with material. Richard and Heather Click generously allowed me the use of their private library. Paul Dembling helped me by sharing his experiences during the early days of NASA. Ralph Nash and John Cibinic, the leading experts in the field, helped me first by educating me, as they have thousands of others, on government contracting. Chuck Culver helped and supported by sharing his extensive knowledge. The National Contract Management Association provided a grant of financial support to begin this project, and Professor Stanley Sherman, the grant director, was especially encouraging. I must also thank all the authors noted in the Bibliographical Essay, whose research and scholarship enabled me to compile this history. I am solely responsible for the contents.

I am indebted to Bill Reilly for his careful editing to improve the clarity of the text throughout, to Midge Easter for editorial support, to Claudia Jao for page design, and to Clare Perry for cover design. I must extend a special heartfelt thanks to Maureen Fountain, a true wizard of the keyboard, who for years has been able to read my hen-scratch penmanship and follow my convoluted instructions to return, in amazingly short time, error-free typewritten pages.

Finally, I must thank my family, whose support and tolerance of me during this project is admirably summarized in the words of my nine-year old son, John. I apologized to him one morning after I had shooed him out of the room in which I was working the night before. He replied, in an analogy he understood, "That's OK Dad, I don't want you to get a bad mark on your book."

Preface

In the first edition of this book, I stated that people would be surprised at how many important recent events I had omitted. While such happenings have great import now, I explained that in the stream of history, they have no more than a temporary ripple. So writing a chapter for this second edition which focuses on the last 15 years gives me great trepidation.

To condense the past 15 years into one average size chapter, I have selected only those milestones which appear to represent significant trends which a historian even 50 years from now will still consider important.

In addition to the fore people listed in the acknowledgments section for the first edition, I would like to thank two more people: Karen O'Brien, the director of publications for the George Washington University Law School's Government Contracts Program who sheparded the project to completion and Christine Jordon Smith, my secretary, who typed, edited and formatted my words with speed, clarity and cheerfulness.

About the Author

James F. Nagle is a nationally known expert in government contracts and construction law. Mr. Nagle received his Bachelor's degree from Georgetown University School of Foreign Service; his J.D. from Rutgers; and his LL.M. and S.J.D. in government contracts from the National Law Center, George Washington University. He is one of only an estimated three people who have ever received this distinction.

In addition to *The History of Government Contracting*, Mr. Nagle has written three other books on federal contracting, *Federal Procurement Regulations: Policy, Practice and Procedures* (American Bar Association Press, 1987); *How to Review a Federal Contract and Research Federal Contract Law* (American Bar Association, 1990); and *Federal Construction Contracting* (Wiley Law Publications, 1992). His over 75 articles, on subjects as diverse as protests, changes, terminations, claims, and the Federal Acquisition Regulation, have appeared in such publications as the *Public Contract Law Journal*, *Military Law Review*, *National Contract Management Association Journal*, and *Contract Management*.

He is a partner with Oles Morrison Rinker & Baker, LLP in Seattle, Washington. He is a former Chief of the Logistics and Contract Law Branch of the Department of the Army Staff and trial team chief in the Army's Contract Appeals Division. His extensive experience includes supply and services, international, major system and construction contracts. Besides representing contractors, he has mediated disputes both between the government and the prime, and between the prime and its subcontractors. Other lawyers often consult Mr. Nagle on government contracts and use him as an arbitrator. Both the Justice Department and contractors have used him to explain federal contracting as an expert witness. Mr. Nagle often advises clients on ethics issues stemming from his experience as an ethics advisor in the government, culminating with his serving as Ethics Advisor with the Office of Chief of Staff of the United States Army.

Actively involved in professional organizations, Mr. Nagle serves as the past President of the BCA Bar Association; on the Board of Editors of the NCMA Journal, as the Book Review Editor for the *Public Contract Law Journal* and *The Construction Lawyer*, and as the Director of Publications for several organizations. He has won the Federal Bar Foundation Award for Distinguished Accomplishment in the Study of Procurement Law and is listed in *Who's Who in American Law*.

He has lectured in nineteen states, the District of Columbia, and three foreign countries on all aspects of government contracts, construction law and contract management for the Graduate Program on Contract Management at the Florida Institute of Technology, the George Washington University's School of Business and Public Management, the George Washington University Law School, the University of Washington, and other professional organizations.

Introduction

General

Most people have neither the time nor the inclination to examine the intricacies of our modern government procurement system and the Buck Rogers-type equipment it buys. Nearly anybody, however, would recognize the folly of a system that purchased hammers for \$400 apiece. Such horror stories have made government procurement synonymous with corruption and inefficiency. While headline-grabbing episodes are not new, the history of government contracting is not all scandal, of interest only to those who thrive on tales of greed and sensationalism. Much of value has been accomplished through government contracting.

A history of government contracts is a chronicle of the country's changing goals and needs. The government has long used the procurement process to further social and economic objectives. In 1969, the Administrative Conference of the United States noted that the procurement process had been one of the government's primary weapons in the fight against such societal ills as poverty, discrimination, and environmental blight. Indeed, many socioeconomic statutes, such as those prohibiting discrimination, had their origins in government contract clauses.

A historical review of the government's contracts traces the country's most important priorities contemporaneous with those contracts. It demonstrates, for instance, the country's exploration of the West and later the heavens, the purchase and manufacturing of armaments for national defense, and advances in transportation for faster and farther mail delivery. We shall see how seemingly unconnected events began a chain reaction that altered the course of government contracting and the history of the nation it served. For example, the Quasi War with France in 1798 started a series of events that led to the American system of mass production and machine tools. An accidental dis-

covery in California in 1848 triggered the westward expansion of the transportation industry and, with it, the development of the continent.

Military Contracting

Military contracts command center stage in any history of government procurement. Merritt Roe Smith has pointed out that military enterprise has been vitally important to America's status as an industrial power.¹ The noted American anthropologist Otis T. Mason concluded as early as 1895 that "war . . . stands forth preeminently as an incitement to the genius of invention and discovery," and Werner Sombart, in his *Krieg und Kapitalismus* a generation later, argued that Western military enterprise had mainly caused the rise of modern industrial capitalism. Since the country's birth, industrial development has been tied to military contracts. Besides mechanized production itself, such items as computers, sonar, radar, jet engines, swept-wing aircraft, insecticides, transistors, fire and weather-resistant clothing, antibacterial drugs, numerically controlled machine tools, high-speed integrated circuits, and nuclear power are just a few of the best-known industrial products of military enterprise since World War II.

Two of the most important technological innovations are the establishment of specifications and the spread of designs.² By establishing standards and specifications for various goods and contracting with private manufacturers to produce them, military contracts spread the design of many inventions throughout the civilian community. That community often quickly accepted such items as cooking pouches, weather-resistant shoes, Air Force parkas, or dehydrated foods. Not only have the end products received acceptance, but the manufacturers have often adapted and used for commercial ventures the related processes, production methods, machine tooling or numerically controlled tools. The explosion of consumer goods and mail order catalogs in the last thirty years of the nineteenth century resulted from industries converting to commercial use the mass production and other techniques they had learned on contracts for the Union army.

William H. McNeill, in his sweeping survey, *The Pursuit of Power: Technology, Armed Force, and Society since A.D. 1000*, noted that: "Anyone looking at the equipment installed in a modern house will readily recognize how much we in the late twentieth century are indebted to industrial changes pioneered in near-panic circumstances when more and more shells, gunpowder, and machine guns suddenly became the price of survival as a sovereign state."³

On the other hand, the convergence of almost incomprehensibly large sums of money and, especially in wartime, relatively scant oversight have brought out the venality in many contractors and government personnel alike. Winning certain contracts, whether major weapons contracts of today, airmail contracts of the 1920s, or stagecoach contracts of the 1850s, can make the difference between financial success and power for decades—or quick descent into bankruptcy and oblivion. Since staggering sums of money and power are involved, it is not surprising that scandals have been a major part of the history of government procurement. Such scandals, however, have not erupted solely as a result of greed. Other causes have included inefficiency bordering on criminal negligence, personal ambition, or merely the desire to do what one believes is best for the country, the laws be

damned. Some of these scandals were mere theatrical sound and fury designed for political headlines. Others involved such horror stories as sending men into battle with defective weapons.

At the beginning of every war, a cleavage develops between supply and demand that entrepreneurs, both scrupulous and unscrupulous, rush to fill. The result is as chaotic as a barroom brawl. Wars are the severest yet truest test of the procurement system because they test not merely how the system works after the battles begin but how well the nation had equipped its armed forces for hostilities. Until World War II, America supplied its soldiers and sailors on a bare subsistence basis between wars. Thus, when wars came, no matter how long anticipated or even sought with jingoistic oratory, they prompted a frenzy of activity as the country tried to overcome its pre-war lethargy and field enough food, clothing, and equipment to supply the flood of military recruits.

Exasperating slowness is the hallmark of the military weapons acquisition process and does not always result from painstaking deliberateness. Such contracting occurs in a vortex of politics, economics, technological advances, and personality. The slowness can result from simple resistance to change (what Harry Truman in 1941 called the generals' and admirals' "neophobia" or the fear of the new), bureaucratic turf battles, pork-barrel parochialism, or the more credible concerns of funding and maintenance. Orr Kelley's *King of the Killing Zone* chronicling the M1 Abrams tank, and Thomas L. McNaugher's, *The M16 Controversies* tracing the development of the M16 rifle, provide fascinating glimpses and excellent studies of the milieu in which weapons acquisitions evolve. The M1 faced a tremendous debate over how much it should weigh and whether the engine should be a turbine or diesel. Proponents of each position cited numerous advantages about which reasonable people could and did differ.

Similarly, in selecting new rifles for the infantry, the army moves with glacier-like slowness. Such slowness is not always bad. Considering what the Army does and the rifle's role in that mission, generals should not and do not change weapons as cavalierly as law firms change stationery. In the 1930s, Army Chief of Staff Douglas MacArthur selected a .30 caliber weapon despite the benefits of a lighter weapon that the Army had exhaustively studied. He decided for logistical and financial reasons, not technological ones, that the industry and arsenals were already tooled to produce .30 caliber weapons and ammunition.

Slowness also results because new weapons normally force an advance in the present technology. Such advances are not easily and quickly won. Norman Augustine wrote that most of the problems in the acquisition process occur in getting that last 10 percent of expanded performance.⁴ Nevertheless, such advances and the inevitable problems will continue for a most basic reason—fear. Weapons designers have a recurring nightmare—that of a new weapon that is so advanced it becomes a lion among sheep, killing with impunity. Imagine today's world if Hitler's jets or V1 or V2 rockets had gone into full production—or worst of all—if he had developed the atom bomb first.

For these reasons and more, the weapons acquisition process is an important aspect of our history. The contracts of even a young country like America demonstrate the remarkable development of weapons in the last two centuries. The United States has issued contracts for everything from the

edged weapons used in hand-to-hand combat from antiquity, to the muzzle-loading muskets that required the marksman to see the individual he was about to kill, to today's long-range anonymous weapons of mass destruction.

Civilian Contracting

Focusing myopically on wars and the military would overlook a tremendous source of history. The activities of civilian agencies such as the Departments of the Post Office and Treasury and the Bureau of Reclamation provide a rich panorama.

The Post Office has dramatically affected America's transportation industry and everyday life. The American orator Edward Everett regarded "the Postal Service next to Christianity as a right arm of our modern civilization."⁵ It was usually the first agency to gamble on a new method of transportation, such as stagecoach, railroad, steamboat or airplane, in an ever-continuing effort to get the mail a little farther, faster. These contracts were not mere largesse generously bestowed and graciously accepted. Many of these contracts, such as those requiring the crossing of the plains in the 1850s, could involve as much danger as any military operation. Often the mail subsidies meant the difference between survival and failure for these fledgling industries. So, contractors competed for these contracts as fiercely and with as much intrigue as for any defense contract.

The Treasury Department has periodically reigned supreme in the procurement hierarchy as it has assumed responsibility for all the nation's contracts. Its practices, stemming from the days of its first secretary, Alexander Hamilton, have established procedures that continue today.

The Bureau of Reclamation's contracts for the construction of Hoover Dam and the other great dams of the 1930s exemplify the use of the procurement process to correct social problems. Besides providing needed electrical power, the government designed these projects to alleviate unemployment during the Great Depression.

Historical Themes

In this two-hundred-year history of government contracting, several themes keep recurring. The same problems that bedeviled us in the Revolution continue to plague us today.

Military-Industrial Complex

First, the country's relationship with what is now called the military-industrial complex has been characterized by both respect and hatred. That relationship has three phases. As the nation mobilizes for an emergency or a great task, such as World War II or the construction of the Hoover Dam, it looks on with reverential awe as America's industrial strength turns to the task. Then, during performance, the nation begins to complain about the speed, efficacy and (more often) the quality of the product—and the cost.

Finally, after the task has been completed and the staggering bills must be paid, the nation reels at the price and the profits.

Profiteering

Second, much of the history of government contracting involves periodic attempts to curtail excessive profits, especially in war contracting. Price gouging is not new to the twentieth century and the multinational conglomerates. Farmers during the Revolution did not miss the chance to hike their prices as the law of supply and demand gave them the opportunity. The government has resorted to various methods to ensure that it only pays reasonable prices: price controls, excess taxes, contract renegotiation techniques, and the forced disclosure of a contractor's cost and pricing data, plus extensive rights to audit a contractor's books and records.

Government versus Contractor Sources

This fear of excessive prices leads to the third theme. Throughout our nation's history, some have argued that the government should produce its own goods and services rather than depend on contractors. They advocated everything from small government-operated factories as yardsticks against which to compare a contractor's prices to the nationalization of entire industries such as shipbuilding, munitions, or aircraft.

Ethics

Fourth, the twin issues of standards of conduct and revolving-door employment have perplexed the nation. In early days, favoritism in awarding contracts and conflicts of interest were so widespread that they did not have to be hidden and were not considered corruption. Even after such brazen problems were corrected, people were selected for their talent, experience, and connections, and that practice continues today. In both world wars, industrialists such as Charles Schwab of Bethlehem Steel and William Knudsen of General Motors were pressed into service. Knudsen was even inducted into the army as a lieutenant general. The highest echelons of the Defense Department are filled with people from the executive suites of the major contractors.

Competition

Fifth, the country, especially Congress, has idealized competition and fixed-price contracts. Since the early days of the Republic, Congress has clearly preferred a competitive bidding system in which contracts are advertised, all bidders given a fair opportunity to compete, and the lowest bidder receives a fixed-price contract. Competitive bidding is often the least efficient way to contract and has often obstructed America's ability to prepare for war. A major part of America's preparation for its wars, both in the nineteenth and especially in the twentieth centuries, has been the need to suspend or modify the competitive bidding rules as the country rushed to overcome decades of neglect in a few short months.

The Contracting Process

Much of the country's contracting history has been spent trying to find the best combination of three factors: the right contracting apparatus, the right government-contractor relationship, and the correct contract form itself.