CONTRACTING FOR GOVERNMENT

by Dan Guttman

CHALLENGE

Whether the term used is "privatization," "reinvention," "contracting out" or "downsizing," there is agreement on the need to reform and reduce "Big Government." But the various means proposed to cure today's ills -- particularly contracting -- long have been in use. The federal government now relies on an official workforce and a contractor workforce, a fact ignored by most reform proposals.

One half century of federal reliance on contractors has produced some remarkable successes. At the same time, increased reliance on contractors to perform basic governmental functions calls into question a basic presumption of accountability -- i.e., that officials must and can be accountable to taxpayers for the basic work of government.

It is often in the government's interest to exploit the private sector's experience, resources, and management skills. Agencies should be able, however, to make reasoned choices, independent of irrelevant constraints, as to whether to administer a program "in-house" or by contract. The challenge today is to learn from past successes, to understand our legacy of unanswered questions, and to use past experience and present reality to undergird action.

SUMMARY

As we proceed with the reform of government through reliance on contractors, it is necessary to step back and:

1. consider that the longstanding principle that officials must and can be accountable for the basic work of government is now often more a matter of form than reality; therefore, those who would reform government must either make a realistic commitment to this principle or provide alternative visions of the way in which taxpayer funded programs are to be accounted for;

2. consider the means by which third parties can be used effectively and accountably if and as official capacity is diminished. This should encompass:

> _ recognition that the taxpayer funded workforce must be visible as a whole, but is not now;
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> _ recognition that dual sets of rules now govern official and non-federal workforces who perform the basic work of government;

_ recognition that claims that better contract management will assure accountability have not been a panacea in the past, and are unlikely to be so where government lacks official capacity to define contract terms and manage contractors;

_ recognition that commitments to program evaluation are essential, but have also often been of limited reliability;

_ identification of new and alternative means of accountability, including those which new information technologies may make possible.

3. seek to preserve the value of the experienced workforce as new institutional arrangements are undertaken;

4. consider that courts will be called upon to revise and define reform proposals in ways that may alter them;

5. recognize that it is essential to go beyond buzzwords and that the devil is in the details.

BACKGROUND: THE CONTEXT

The Tools Of Reform Are Not New

The 1992 book Reinventing Government identified 36 alternatives "to standard service delivery." "Surprisingly," the authors wrote, "the federal government already relies heavily on many of these alternatives" (Osborne and Gaebler, Reinventing Government, p. 30.). Similarly, the basic tools identified in 1988 by the Reagan Commission on Privatization -- vouchers, sale of government assets, contracting -- were not new (Privatization: Toward More Effective Government; Report of the President's Commission on Privatization; March, 1988).

In the 1950s a policy (today embodied in OMB Circular A-76, "Performance of Commercial Activities") was established to guide government contracting for commercial functions performed by government.

In addition to commercial functions, contractors increasingly have been relied on to perform the basic work of government itself -- planning, making policy, writing and enforcing rules and managing government programs (including other contractors). For decades, bipartisan agreement to limit the number of official workers ("personnel ceilings") has operated as a hydraulic force by which non-federal workforces have been engaged to perform a significant part of whatever work is needed to get the job done.

The Shortcomings Of Past Reforms Remain To Be Addressed

Past leaders were aware of the need to view the use of non-Federal resources in the context of the official workforce's ability to account to the public. In 1961, President Kennedy commissioned a high level panel to consider the wisdom of exploding reliance on private enterprise in managing Cold War research and development. The "Bell Report" (Budget Bureau director David Bell chaired the panel) concluded that continued reliance was in the national interest. At the same time, the panel expressed concern that blurring "the traditional dividing line between the public and private sectors of our nation" raised "profound questions." One half century of federal use of contractors and grantees has produced remarkable successes, such as the Manhattan and Apollo Projects. Nonetheless, "Profound questions" identified in the 1962 Bell Report remain very live today (The quotations are from "Report to the President on Contracting for Research and Development," April 30, 1962):

l. Will increased reliance on third parties pose the danger of contracting for those crucial powers to manage and control governmental activities which must be retained in the hands of public officials directly answerable to the president and Congress?" If so, what should be done?

2. Which kinds of non-Federal institutions are best suited for which purposes? How can contractors' private interests be prevented from conflicting with public purposes?

3. If more government work is given to the non-federal workforce, and restrictions on civil service employment such as pay caps are retained, will the government retain the official talent needed to make "policy decisions concerning the types of work to be undertaken ... to supervise the execution of the work ... and to evaluate the results?"

The challenge is to match today's proposals to reform government through increased reliance on contractors with the experience and reality of longstanding reliance upon them.

ISSUES TO BE ADDRESSED SO THAT REFORMS WILL NOT BE COUNTERPRODUCTIVE

Official Capability To Account For The Basic Work Of Government Must Be Realistically Assessed

Since at least the 1950s, OMB's (and its predecessor's) policies have provided that only officials can perform work that is "inherently governmental" (See Office of Federal Procurement Policy Letter 92-1, "Inherently Governmental Functions,"

September 23, 1992). It has been a given that there must be a workforce directly accountable to Congress and the president for the use of taxpayer dollars. Thus, as a nation born of concern for government misconduct, we long have protected ourselves by laws that guide the conduct of public actors, but which do not apply to those who are not officials.

"Inherently governmental functions" include both sensitive public missions (e.g., national defense, law enforcement) and sensitive activities, whatever the mission involved (e.g., policy making, budgeting, rule writing, representing the U.S. government in dealings with other nations). The line may be difficult to define in practice; even where a mission (such as national defense) is "inherently governmental," there is a long tradition of reliance on non-federal actors.

Today, however, the difficulties do not lie so much in defining the principle as in applying it in the face of longstanding agreement to limit the number of official workers -- often without regard to the principle's existence. Congressional inquiries have found that contractors are employed for preparing policies, budgets, rules, congressionally mandated reports, and officials' congressional testimony, as well as managing other contractors and the civil service itself.

Current proposals would reduce official performance or oversight of such governmental activities as law enforcement (e.g., prison management, alien detention facilities, private enforcement of health and safety rules) and national security (responsibility for nuclear weapons materials in the Uranium Enrichment Corporation, Office of Personnel Management's proposed privatization of security clearances). The privatization of social security and the use of contractors in tax collection are under discussion.

The problems that flow from contractor performance of inherently governmental activities are exacerbated by the related reduction in official capacity to oversee the work of such contractors to assure accountability to taxpayers.

We are at a fork in the road: is the basic tenet of government accountability through an official workforce realistic? Since it increasingly has been dishonored in practice, are we knowingly discarding or attenuating the accountability principle, or are we losing sight of it through a failure of focus? Actions and alternatives needed to address these questions -- and assure the accountability upon which the success of government depends -- are discussed next.

The Government Workforce Must Be Visible

Accountable government requires a government that is known and visible. The third parties relied on by government are often invisible to the public, the press, and within the highest reaches of government itself.

Elementary information needed to answer critical questions is often missing. Often, only "guesstimates" are available about even the number of those working on contracts or grants, although in some cases (for example DOE, NASA) they substantially outnumber the federal workforce. Does contracting for the basic work of government save money? In 1989, DOE told Congress that it assumed contractors used to provide the workforce required when personnel ceilings limited official employment (support service contractors) cost thousands of dollars more per person year than federal employees would have ("Use of Consultants and Contractors by the Environmental Protection Agency and the Department of Energy," Subcommittee on Federal Services, Committee on Governmental Affairs, Senate, November 6, 1989). Comparative cost data however, are available only sporadically.

If reasoned choices are to be made about relocating the government's work, Congress, officials and the public should have the information that would enable them to view the responsibilities, skills and costs of the workforce as a whole.

The Rules Governing The Federal Workforce Must Be Viewed As A Whole

Concern for government abuses led to the enactment of important laws and regulations designed to control those who run government programs, but the same controls do not always apply to government contractors and grantees. For example:

l. Pay - Pay caps and scales for federal officials do not apply to the non-federal workforce.

2. Public Access - The Freedom of Information Act typically does not apply to work done by contractors and grantees (See, for example, Washington Research Project v. HEW, Forsham v. Harris, Public Citizen v. HEW). Where an official decision relies on a grantee's study, for example, citizens who question the decision find that their access to underlying data may depend on whether the study was done "in-house" or by the third party.

3. Ethics - Federal law provides criminal penalties for employees who are involved in conflicts of interest. It is a crime, for example, for a regulatory official to advise a regulated entity while involved in the regulation of that entity (See 18 U.S. Code Sections 203-208). This law does not apply to contractors. Thus, for example, EPA's regulatory programs have historically relied on contractors who also work for regulated industries. Similarly, a DOE contractor called on to help plan for another oil embargo also did oil planning for OPEC countries -- which the contractor did not report to DOE. Another DOE contractor called on to assist on a controversial proposal governing plutonium shipments to Japan simultaneously was reporting back to Japanese beneficiaries of the proposal -- again without DOE's knowledge.

There are reasons for different rules for the official and non-federal workforces,

but if contractors perform basic government on a continuing basis, then accommodation with the rules that apply to officials may be needed.

With the rules governing civil service and contractors in flux, it is essential that changes governing one workforce be viewed in context of the rules governing the other; otherwise today's reforms will be counterproductive and decrease accountability. Today, there is no place where this happens.

The Limits of Conventional Means of Accountability

Traditionally, grant and contract law and management techniques have been the primary means relied on to account for the non-federal bureaucracy. These tools have been supplemented by commitments to make program evaluations. They should play central roles in reform proposals, but must be used with caution in light of what has been learned from experience.

The promise of better contract management is no panacea

Current proposals to reduce the official workforce often state that remaining officials can be turned into contract managers, and that contract management techniques can assure accountability. Such optimism is questionable. The federal workforce lacks officials with expertise and institutional memory needed to manage contractors; indeed, contractors themselves long have been at the heart of contract management and institutional memory.

It is often said that performance contracting (where performance terms are specified in advance and the contractor is given incentives to meet them) and competition (where competitors keep one another honest) will help officials ensure contractor accountability. These concepts have long been in use, and their limits should be understood. In the 1960s, for example, the Defense Department invoked performance contracting as a response to cost-overruns, but overruns have not been eliminated.

The reasons for the limited success of performance contracts are basic. Much of what government does is complex and novel -- for example, developing weapons, cleaning up nuclear waste sites, and redesigning the air traffic control network. In such cases the definition of performance measures is often difficult, and, once defined, they are subject to change with changing policies and technologies. Successful use of performance contracts requires a workforce with expertise needed to define and monitor performance. Competition is an imperfect solution as well. For competition to work there must not only be a smart buyer, but also competitive alternatives and the realistic likelihood that contractors who do not perform will be penalized.

The promise of evaluations is also limited

Proposals to use third parties are often presented as experiments with the promise that evaluations will permit accountability. The reality is that once programs are funded few bother to look back -- and the task is not easy for those who do.

For example, a 1995 congressional hearing sought to review the four decades of experience under the policy (OMB Circular A-76) for contracting for commercial activities. The GAO reported that where evaluations of savings had been attempted, they were hampered by lack of baselines and by changes after contracts were begun (Statement of L. Nye Stevens, Director of Planning and Reporting, General Government Division, GAO, March 29, 1995, before the Subcommittee on Civil Service of the Committee on Government Reform and Oversight of the House of Representatives). A-76 is a longstanding, broadly applicable, and highly visible policy. GAO's and OMB's inability to evaluate the costs and benefits of this program after four decades shows that promises of accountability through evaluation must be treated with healthy skepticism.

New means of accountability are needed

Because official capabilities and traditional procurement and evaluation techniques offer incomplete solutions, we must bring alternative resources to bear. Today's information technologies permit data to be organized so that they can be quickly and cheaply accessed by large numbers of people far removed from the centers of bureaucracy. If performance contracts are to be relied on, those who work locally on programs and the citizens affected by them should have the incentive to provide on-the-ground eyes and ears in overseeing them.

In sum, as we increasingly rely on third parties, it must be understood that accountability is hard to assure and will be increasingly so where official capacity is limited. The search for new means and supplemental resources to bring to bear on accountability must continue.

Effort Should Be Made To Retain The Value Of The Experienced Workforce

President Reagan's Commission on Privatization, observing that people are any organization's greatest resource and that the existing workforce is a potent source of potential opposition to change, recommended that means be found to assure that reconfiguration of government institutions be done in a way to maximize the retention of the experienced workforce (Privatization: Towards More Effective Government, op cit., at 141-43). This is a sound goal.

If Reforms Do Not Consider The Big Picture And Its Details Courts Will Likely Be Called On To Do So

The courts will be called upon to review and possibly redefine the rights of third party entities vis-a-vis the government, and the obligations of these third parties to the public at large.

As federal reliance on contractors has grown, so has the willingness of courts to step into relationships once left to executive and congressional definition. In 1940, the Supreme Court (Perkins v. Lukens Steel Co.), refused to even consider an industry challenge to imposing minimum wages on contractors. It declared that "Judicial restraint of those who administer the government's purchasing would constitute a break with settled judicial practice..." Beginning in the 1970s, however, courts have permitted disappointed bidders to challenge contract awards, and stand increasingly ready to hear disputes about the "terms and conditions" on which purchases will be made.

Of no less import, the Supreme Court has shown that it will impose constitutional obligations on non-federal entities even where Congress has sought to define the entity as a non-governmental entity. In 1994, hearing a claim that Amtrak violated First Amendment rights, the court agreed that Congress may provide that an organization is not a governmental entity for purposes such as that of incurring obligations to pledge the credit of the United States. The court concluded, however, that "it is not for Congress to make the final determination of Amtrak's status as a government entity for purposes of determining the constitutional rights of citizens affected by its actions" (Lebron v. National R. Passenger Corp.). At least for purposes of the First Amendment, the court determined, Amtrak was a government agency.

Unless reform proponents consider the big picture, courts may be called upon and affect outcomes. Programs created in the name of ensuring flexibility may become grist for litigation, and governmental constraints may be imposed judicially on private actors called on as alternatives to official bureaucracies.

CONCLUSION

The Devil Lies In The Details

Decades of experience have provided a legacy of tools and rationale for the use of third parties as alternatives and supplements to the official bureaucracy. These tools and rationale have value; but they have limits. Those who employ the tools of past reforms must go beyond buzzwords, pay careful attention to the details of new arrangements in light of past experience, and remain open to better means of assuring accountability.

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