INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps. Each original is also photographed in one exposure and is included in reduced form at the back of the book.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

UMI

A Bell & Howell Information Company
300 North Zeeb Road, Ann Arbor MI 48106-1346 USA
313/761-4700  800/521-0600
GOVERNMENT BY CONTRACT:
BUREAUCRACY, CONTRACT LAW, AND THE PROCUREMENT OF
PROFESSIONAL SERVICES AT EPA, 1980-1995

DISSERTATION

Presented in Partial Fulfillment of the Requirements for
the Degree Doctor of Philosophy in the Graduate
School of the Ohio State University

By

Charles Howard Munnell, B.A., M.A., J.D.

*****

The Ohio State University
1997

Dissertation Committee:
Professor Warren Van Tine, Adviser
Professor John Rule
Professor John Burnham

Approved by

Adviser
History Graduate Program
ABSTRACT

Contracting for public services is an increasingly important fact of life at all levels of government. This study attempts to understand that practice in the context of American business-government relations in the twentieth century. The Superfund contracting program of the United States Environmental Protection Agency provides the case study which has been selected for analysis. The fundamental question asked in this study is whether contracting out for professional services has altered basic ideas of how government is defined, how it is provided, and its relationship to business.

Following a discussion in chapter 1 of the literature of government contracts, organizational history, business-government relations, and government administrative capacities, this study proceeds to a discussion in chapter 2 of the Superfund program and the contracts created for its support.

In chapter 3, the discussion moves to an examination of the organizational structures within the government (and to a lesser extent, the private sector) which have shaped the contracting program for hazardous waste remediation. The
laws and regulations which have shaped these procurements receive extended discussion in chapter 4.

Chapter 5 concludes with an essay which attempts to define the major problems with government service contracts by placing them in the larger context of business-government relations. The current and doubtless future reliance on service contractors by governmental agencies goes beyond the traditional corporatist affinity of business and government normally found in traditional public procurement practices and has significantly altered the relationship of business and government in the corporate commonwealth.
Dedicated to the memory of my parents
ACKNOWLEDGMENTS

One of the pleasures of finishing any research project is the opportunity it affords the author to thank the many people who have contributed to whatever merits it might have. Without the help, encouragement, and longtime friendship of my adviser, Professor Warren Van Tine, this project never would have been completed. The other members of my committee, Professors John Rule and John Burnham, read my drafts, made valuable suggestions, and tried to save me from errors of both fact and judgment.

I have also benefitted from conversations over the years with many people whose suggestions have directly and indirectly helped my understanding of a complex and sometimes obscure subject. In particular, I want to thank Professors Randall B. Ripley, Austin Kerr, Mansel Blackford, and Rhonda Rivera, all of Ohio State University; Rick Goodman and Dan Guttman of the U.S. Senate Governmental Affairs Committee; Deborah Jacobson of the U.S. House of Representatives Commerce Committee; Ray Gallant of the Small Business Administration; David J. O'Connor, Director of the Office of Acquisition Management at EPA and his deputy, the late Mark Walker, Director of the Superfund contracting program. I especially want to thank my many friends and
colleagues at the Environmental Protection Agency from whom I learned so much about both contracts and government.

Finally, my special thanks to Professor Deborah Ballam of the Max Fisher School of Business Administration at Ohio State, and Dr. Miriam Schwartz of the Department of Slavic Languages at Ohio State, who helped me countless times in the final months of this project. I hope that I will be able to find some way to repay their kindness. I am also happy that I am finally able to justify the faith of my freshman history teacher and oldest friend, Professor Lawrence S. Kaplan of Kent State and Georgetown Universities. I believe that he and Jan are almost as happy as I am that I have finally finished my Ph.D.
VITA

January 4, 1947 .......... Born - Sharon, Pennsylvania

1969 ....................... B.A. History, Kent State Univ.
1969-70 ..................... Fulbright Scholar, Univ. of Munich
1978 ....................... J.D. Law, Ohio State Univ.
1988-1989 .................. Visiting Scholar
                         Univ. of California-Berkeley
                         School of Law
1987-1988 .................. State of Ohio, Office of
                         Collective Bargaining
1986-1988 .................. Adjunct Asst. Professor of Law
                         Ohio State Univ. College of Law
1984 ....................... Office of U.S. Senator John Glenn
                         Ohio State University
                         Readiness Command

FIELDS OF STUDY

Major Field: History
# TABLE OF CONTENTS

Abstract........................................................................................................... ii
Dedication.......................................................................................................... iv
Acknowledgements............................................................................................ v
Vita.................................................................................................................... vii
List of Tables....................................................................................................... ix
Preface................................................................................................................ x

Chapters:
1. Introduction.................................................................................................... 1
2. The Creation of Superfund and its Contracts................................. 46
3. Contracting Organizations................................................................. 79
4. Public Management and Public Contract Law .................... 130
5. Conclusion.................................................................................................. 203

Bibliography...................................................................................................... 218
<table>
<thead>
<tr>
<th>Table</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.1 The Remedial Process</td>
<td>67</td>
</tr>
<tr>
<td>2.2 Number and Distribution of ARCS Prime Contracts</td>
<td>78</td>
</tr>
<tr>
<td>3.1 College Courses Completed by GS-1102 Employees</td>
<td>87</td>
</tr>
<tr>
<td>3.2 Experience Level of Regional ARCS Workforce, 1991</td>
<td>91</td>
</tr>
<tr>
<td>3.3 Total Billings by ARCS Contractors, May 31, 1991</td>
<td>119</td>
</tr>
<tr>
<td>3.4 Top Ten Environmental Consultants, 1990 Revenue</td>
<td>120</td>
</tr>
<tr>
<td>3.5 ARCS Organizational Reporting Relationship</td>
<td>129</td>
</tr>
<tr>
<td>4.1 The High Cost of Management</td>
<td>165</td>
</tr>
</tbody>
</table>
Since the Middle Ages, contracts and contractors have figured prominently in the delivery of governmental services by the state. Until relatively recent times, governmental services meant primarily military services. Feudalism and subinfeudation were, in essence, a series of contractual agreements for the provision of military service. With the beginnings of the modern state in the fifteenth century, governments (particularly Italian governments or governments fighting in Italy) began to procure military services on a short-term, formal, contract basis from bands of armed mercenaries known as condottiere.

Many of the problems of modern government contracting—control, accountability, compensation, and others—could be discerned in the contracts executed with the condottiere. A not-so-extreme example of loose contractor control in this era occurred in Milan, one of the richest and most populous cities in fifteenth-century Italy. Upon the death of the last Visconti duke in 1447, a group of city leaders proclaimed the Ambrosian Republic and hired the condottiere, Francesco Sforza, to defend it against attempts to restore ducal authority. After a series of contractual disputes
with the short-lived Milanese Republic, Sforza ultimately restored ducal government to Milan in the person of Francesco Sforza himself.

By the nineteenth century, two trends began to affect the use of contractors in the West. First, government brought much of the work that had hitherto been performed by contractors inside government. That is, governmental activity increased, and such functions as tax collecting, postal services, diplomatic representation, and especially military service, would increasingly be performed by persons who were directly employed by governments, not contractors. Second, with the rise of the welfare state, first in Germany and then elsewhere, the types of services provided by the state became increasingly varied and non-military.

All trends, however, run their course. At the close of the twentieth century, the Western world has entered a period in which contractors were reasserting their position as middlemen between government and the actual provision of public services. More money is spent by the U.S. Federal government on service contracts than is spent on the compensation of its three million civil service employees. State and local governments contract with private vendors for a large and growing number of social services. Once again, contract law and contract performance are increasingly important considerations in the execution of public policy.
This study focuses on the institutional structures of this new/old arrangement, partly because they have been so little understood, and partly because they increasingly helped shape the broad currents of public policy according to the constraints of little-known public organizations and little-known branches of public law.

Beyond that effort lies a more fundamental question. The most obvious reason governments contract for services is the desire to enhance services already provided or to provide services where none existed. Behind the obvious reason, however, one finds a greater motive, viz., the enhancement of state power.

This study deals with the institutions and processes that the state must manipulate in order to realize public policy through the use of contractors. For governments, travel through that contracting maze is costly, complex, time-consuming, and subject to pitfalls wholly unrelated to the services that government attempts to deliver. The ability of government to deliver services itself, to oversee the work of the contractors it retains, and even more basically, to understand the work being performed may erode.

Can one therefore, speak of the enhancement of state power? Is government contracting for public services, by definition, an act that diminishes government? Before answering these questions, consideration must be given to
the problem of an evolving American corporatism and the business-government relations on which it rests.

This work raises, in essence, two basic questions. First, what has been the place of government contracting in the larger framework of corporatism and American business-government relations? Second, what has been the effect of contracting on the state itself and on the manner in which it has delivered public services?

These questions can best be understood by examining them in a specific case study. Contracting for engineering and other professional services in the Superfund environmental cleanup program presented problems for both public and private sector administrators that have come to define the broader dimensions of a government by contract.

*****

Despite the fact that most of the key events in this study occurred from 1988 to 1994, this study remains a work of historical scholarship. The paradigms and, more generally, the ideas it is meant to address exist in historical rather than social science literature. The methodology emphasizes structures and institutions, topics not emphasized in the behavioral sciences, at least until very recently. No formal testing procedures, another feature of social science, were employed. Although, a great deal of legal literature is discussed, especially in chapter
4, the formal style of legal scholarship, purportedly based on the requirements of practicing lawyers, is likewise rejected.

The author felt free, however, to poach freely on the subject matter of the social sciences and law, in large part because he believes firmly that history could be, perhaps should be, a policy-oriented discipline. Individuals perform their actions in both public and private spheres of life based on an understanding of history. When that understanding is defective, we may, of course, blame the stars, or even ourselves. But in the final analysis, the historian must take his share of responsibility. This work is meant, in some small way, to assume that burden.
CHAPTER 1

INTRODUCTION

Stringfellow

Stringfellow Acid Pits is the name of a hazardous waste dump sixty miles east of Los Angeles near the working-class town of Glen Avon in Riverside County, California.1 For two decades, it was the physical receptacle of such products of American civilization as scrap thinner, degreaser, bonderlube, paint booth waste, lube line waste, sump waste, paint stripper, chromated emulsion cleaner, and paint line waste. The Pits also came to be a symbol of other aspects of American civilization in the last half of the twentieth century: the rapacious exploitation of a fragile environment for quick profits, the assignment of the burdens of externalized costs of production to poor and marginalized social groups, recurring public health scares based on unscientific data, and endless rounds of pointlessly complex litigation.

---

But the dominant flavor in the Stringfellow soup was governmental failure: the development-at-any-cost mentality of local government, the failure of government to license and monitor hazardous disposal activities, the lack of control over the government contractors who produced both the weapons of war and the toxic waste that was the by-product of production, the unwillingness of political leaders to take responsibility for unpopular decisions, and--the subject of this study--the consequences of attempts to delegate the management of public policy to private sector contractors. Since it is often difficult to sort out the numerous and entangling threads of this story, it would perhaps be worth while to begin with the story of the Stringfellow site, although any of the roughly 1400 sites on the National Priorities List (NPL) since the early 1980s might illustrate the problem.

In 1954, the California State Water Pollution Board sent a geologist named Robert Fox to examine the Stringfellow site as potential hazardous waste dump. After a 45-minute examination, Fox declared the site to be suitable for such use. Many years later in a deposition, he called his investigation a "joke" which was performed on a $300 budget. His colleagues likewise testified that any competent geologist of the day would have detected problems with the site.
In 1955, the Riverside County Board of Trade decided that local industrial development would be helped if industry, particularly defense industries that came to play a dominant role in the economy of Southern California beginning in the 1940s, had ready access to a toxic waste dump. With the blessing of the state of California, they persuaded a 28-year-old granite quarry owner, J. B. Stringfellow, to provide his quarries as the site. The County imposed few restrictions on dumping and only rarely enforced those that existed. State officials offered to assist in the design and construction of the site. Industry eventually dumped thirty-four million gallons of hundreds of different types of chemical mixtures into the quarries between 1956 and 1972. By 1972, dumping fees had given Mr. Stringfellow, a high school dropout, a net worth of several million dollars.

Fearing that the quarries were leaking, Stringfellow shut them down in 1972. By the late 1970's, in the wake of Love Canal and other toxic waste disasters, residents of Glen Avon also became increasingly concerned. In 1984, the state of California discovered an underground plume of toxic chemicals slowly moving toward Glen Avon. In 1985, 4,000 residents of the town joined together in the first major lawsuit concerning the pits.

Before an assessment of the role of government and its contractors in the Superfund program can be made, there
first must first be some understanding of the liability issues surrounding a Superfund site. Stringfellow provided a good example, even if the costs involved are greater than those for an average site. The private and public responsibilities can best be delineated by grouping the swirl of litigation into three categories.

*Penny Newman et al. v. J.B. Stringfellow et al.*, an action in state court, was representative of one type of litigation that came to be associated with the Superfund program. In *Newman v. Stringfellow*, the plaintiffs were attempting to fix tort liability on Stringfellow and the companies that dumped their chemical wastes into the quarries. Although begun as a class-action suit, the damage attributed to hundreds of chemicals and hundreds of mixtures of chemicals resulted in hundreds of varying claims of damage. Although similar in origin, most cases were factually and legally distinct. In order to administer such a large number of claims, the court broke the class-action suit of some 4,000 plaintiffs into smaller trials in which groups of approximately seventeen plaintiffs were bundled together. Since the first case took approximately one year to litigate, it seemed likely that the Stringfellow cases could be cleared from court dockets in approximately 200 years.

Despite many references to Dickens' *Bleak House*, no one believed that the litigation would continue that long. Mr.
Stringfellow (whose contribution of $8,000,000 to a pool created to compensate the victims resulted in personal bankruptcy shortly before his death in 1993) and most of the other defendants had contributed money to a $92 million fund which, after providing for legal and court costs, would be available to compensate the victims. The less-than-substantial sums awarded to plaintiffs in the first trial put enormous pressure on subsequent litigants to settle. By 1995, all litigants had settled. Roughly half the total fund for victims' compensation went to legal fees and expenses.

A second class of lawsuits concerned the industrial insurance policies issued by most of the major American insurance companies until the late 1980s. Unlike those written after the 1980s, these policies carried no exemption for hazardous waste liability. State supreme courts have almost always upheld the validity of these policies over the increasingly desperate attempts of insurers to avoid liability. Since some estimates of the cost of hazardous waste cleanup in the United States exceeded $1,000,000,000,000, the pre-1980s industrial insurance policies threatened to bankrupt the entire insurance

---

2Subsequently increased by a $13.5 million contribution from the state of California.

3Eight of the first seventeen plaintiffs were awarded nothing. The other nine received a combined total of $159,147.
industry. This particular class of Superfund lawsuit continues at Stringfellow and elsewhere. As we shall see, the consequences of this litigation were also particularly important for government contractors attempting to obtain pollution liability insurance.

A third class of lawsuit, which was the most directly related to the role of the Federal government, concerned the suits brought by the U.S. Department of Justice against the parties responsible for creating the hazardous waste site. In general, those costs amounted to the sums paid to the contractors for the actual cleanup, the costs of administering the program, and litigation costs. In the case of Stringfellow, the estimated costs totalled roughly $1,000,000,000.4

Normally, the principal defendants in Federal Superfund litigation are the polluters themselves. Public defendants—and a substantial number of potentially responsible parties (PRPs) are municipalities—are frequently involved in Superfund litigation because they owned or licensed landfills. In the case of Stringfellow, the state licensed the dump. But potential liability of the state of California for the entire cost of the cleanup is the result

---

of circumstances that further illustrate the consequences of governmental failure.

**U.S. v. Stringfellow** began in Federal Court in 1983, and in 1986, the Special Master who had been assigned to the case found the companies that had dumped their wastes in the pits liable for the costs of the cleanup. The PRPs, however, claimed that because the state had licensed the site, and they had relied upon the validity of that license, they should be absolved of responsibility for the cleanup costs. Numerous settlement discussions between the PRPs and the state Attorney General were held in order to apportion the costs of the cleanup, but none of the California Attorneys General were willing to settle. The costs to the state and to the reputation of the Attorney General were too great.

In effect, no one in state government had either the power or willingness to settle and many of the largest and most powerful law firms in the state were aligned against the Attorney General. Without informing the state, the PRPs

5The Special Master is a kind of contract employee of the court whose services are needed because of the extreme complexity of the litigation. This will not be the last time we hear of traditional governmental services being contracted out to private parties.

6The office of California Attorney General is a traditional stepping stone to the Governorship (e.g., Earl Warren, Pat Brown). Since the passage of CERCLA in 1980, each of the attorneys general has run (Deukmejian, Van de Kamp) or plans to run (Lungren) for Governor.
settled with the Federal government and paid $150,000,000,000. All that was left to be done was to determine the share apportioned to the state. In the face of evidence of utter incompetence by state employees, and relying on the much-eroded doctrine of sovereign immunity, the state invoked the rather thin defense that it should not be liable because it performed its duties "in a regulatory context."

The Special Master assigned 65% of the cleanup costs to the state of California, 25% to the industrial polluters, and 10% to Stringfellow and related businesses. By 1994, the total litigation costs alone had climbed to $150,000,000,000, but the actual cleanup effort, which would result in hundreds of millions in charges, had only just begun. The case would, of course be appealed in due course to the U.S. Court of Appeals, Ninth Circuit. The state claimed that its actions were covered by insurance companies, although the insurers had not agreed, thus insuring yet another round of litigation.7

Governmental Power and Contractors

It is not without some irony, therefore, that society would turn once again to Federal and state government to solve the problems of hazardous waste. The irony was that

much greater since the scientific knowledge of government personnel in 1980 with respect to environmental hazards had not significantly improved since California gave the Stringfellow Acid Pits a license. A significant part of the responsibility would be assigned to the Federal government, which, apart from lax supervision of the defense contractors who dumped waste into the Stringfellow Pits, had no real responsibility for creating that particular disaster.8 More importantly, Federal personnel did not have the scientific skills to manage such a complex remediation project.

Lacking such talent, the government could turn only to private contractors. Even assuming that the requisite skills could be found in the private sector, the government was now faced with the equally daunting task of how it should contract for such services.

This study will argue that this contracting effort was not successful, to be sure, but that the much more important issue was the administrative environment in which that failure occurred. Before looking for mistakes on the part of government contracting personnel, there is a larger

---

8The most polluted and dangerous hazardous waste sites are, of course, nuclear waste dumps which are the direct responsibility of the Department of Energy. The actual work of running the nuclear weapons factories was performed by contractors, not government personnel. The estimated costs of remediation at those sites—assuming that they can be remediated at all—run into the hundreds of billions of dollars.
question of whether anyone could have succeeded given the institutional and legal arrangements which dominate government contracting. Understanding behavior of individual bureaucratic actors is of little value if they are simply following orders, obeying the law, and doing what had always been done. To a very large extent, that was the case in Superfund contracts. The larger and infinitely more important question was what was wrong with the system. Before we can understand behavior, we must attempt to grasp the basic organizational and legal framework in which important government contracting functions are performed. Those two aspects, organization and law, are at the core of this study.

A contract is an imperfect instrument for the execution of public policy, and yet it is a device to which governments at all levels have increasing recourse. The reasons for this are varied and complex. The work of hazardous waste remediation at the Federal level was performed overwhelmingly by contractors working under contracts awarded by the Environmental Protection Agency (EPA), the Department of Energy (DOE), the Departments of the Army, Navy, and Air Force, and the Department of the Interior. It was also being performed by contractors working for states, local governments, and private industries. The focus of this study will be fixed primarily on the Alternative Remedial Contracting Strategy (ARCS)
contracts, one class of Superfund remediation contracts at the EPA.

The delivery of important governmental services is being frustrated by organizational and legal impediments in the government contracting process. Beyond the immediate problem of remediating hazardous waste sites, even larger stakes are involved. Many—perhaps most—of the needs of society (and the jobs that will be created to satisfy those needs) in the next century will be found in what has historically been considered, at least since the nineteenth century, the public domain—education, environmental services, utilities, road and transportation systems, public health, communications, social services, and parks, to name only a few. Government must act as a paymaster and thus catalyst in these areas before much of the important work of the twenty-first century can begin. In many instances, most or all of these services will be provided by government contractors.

Nonetheless, at all levels of Government, voters and public officials have been unwilling to undertake even modest efforts to provide such services. Undoubtedly there are many factors responsible for this, but surely one of the root causes is a profound distrust of the ability of government to manage the processes needed to achieve these desired ends. Everywhere and at all levels of government, we see politicians and bureaucrats telling us about our
needs, promising results, and in the final analysis failing again and again to deliver satisfactory results. Even when politicians extol the virtues of privatization, and the private sector is enlisted in the effort through the use of contracts, government seems incapable of managing the business and technical problems that such efforts entail.

Government is, as far as possible politically, organized and staffed to deliver the needs of mid-twentieth century America. It does not appear to possess the ability to provide for the needs of the next fifty or one hundred years. Its employees possess the education and skills needed to manage public policies and public organizations of an earlier, industrial era. The structure of government is, for example, reasonably well prepared to wage the cold war.9 Tax collection has yet to enter the computerized age. Public lands are exploited in a way that satisfies the needs of a frontier economy. The contracting workforce and the organizational structures of governmental purchasing offices reflect similar deficiencies.

A major impediment is the body of public law that both authorizes government action and restrains it. This too was created for another time. No one would argue that law should not restrict the actions of government, but like all

institutions, law is expected to change with the times. Nowhere is this more evident than in the laws and regulations surrounding public procurement, which are geared to the production of goods, usually military goods, and the construction of relatively low-technology public works.

The problem is exacerbated by the obscurity of government managers. Politicians and even most senior bureaucrats appointed to high office do not want to be involved in management issues, which they correctly perceive to be a swamp of unresolvable arguments over resources, complicated procurement problems, incomprehensible technological questions, and other career-sinking quagmires. Most prefer instead to concentrate on agency missions in which, again correctly, they perceive glory and career advancement to be found. Moreover, most management issues are too complicated and too time-consuming for investigative journalists to pursue with anything more than sporadic interest and are mauled beyond recognition by the electronic media. Such matters are delegated to unseen and unknown career civil servants.

But the management problems remain, and, in the end, failure to manage effectively defeats even the most determined mission-oriented administrator. To a large

extent, those problems were resolved during the Progressive and the New Deal eras by delegating large portions of the administrative burden imposed by Federal programs on state and local governments. This act of delegation to the lowest possible administrative unit is, in fact, one of the more hallowed precepts of American public administration.

Well below the radar screens of public perception, this tradition of delegation is being continued by Federal, state, and local governments today. The significant difference, however, is that instead of a delegation to lower levels of government, the transfer of managerial responsibility is being made to private-sector organizations. Whether called privatization, contracting out, or outsourcing, or whether to a business, non-profit organization, or quasi-public corporation, such practices are an increasing fact of life in the delivery of governmental services, whether the public is aware of it or not. It would be happening much more quickly but for the organizational and legal problems which are the subject of this study.

Contracting for governmental services is increasingly central to public administration. This fact alone would provide grounds for systematic study. But the consequences of this practice are much more significant, not only because of the questions that are raised concerning the relationship
of business and government, but also because of questions concerning its impact on government itself.

The traditional battles on this subject have usually been fought over cost. Efforts to outsource ever-larger shares of production in private sector industries such as automobiles are driven almost entirely by considerations of cost, especially the cost of labor. Work is given to companies that can produce goods more cheaply because they are non-union operations or because a significant portion of the work is performed in low-wage countries. Similar economies are realized through eliminating the need to maintain large inventories of parts and raw materials.

Given the implications this topic has for government management, there has been relatively little debate on government contracting, and what there has been has largely focused on costs. While that focus may be appropriate in the production of goods in the private sector, when contracting for services in the public sector, it is merely an indication that the debate has missed the point and that the debaters have not considered broader, more important questions. Saving money is not the reason the public sector contracts for services, at least at the Federal level.

Except in the most extreme and obvious cases, it is largely unprovable whether it is cheaper to perform most services within the government or to contract them out. Attempts to compare costs eventually rest on a sea of
unprovable assumptions; costs of production change over time for a variety of reasons in all organizations whether public or private; both government and contractor financial management systems are frequently incapable of providing the information that is needed for meaningful comparison; and, perhaps most significantly, data considered in cost comparisons is often colored by bureaucratic or political motives.

Contracting out public services has been a little-studied chapter in the history of business-government relations in America. Although a case-study approach is necessary to explain some of the basic components of the problem, such an approach is by definition limited to the boundaries of that case study—in this case environmental remediation services. From the standpoint of a case study of business, such a limitation may be of considerable significance since the internal structures of each business will vary depending on the types of services it offers. From the perspective of government, however, one finds little variation in the organizational structures for contracting in each individual agency. With a few exceptions, which are discussed in subsequent chapters, the laws that govern the procurement of professional services are essentially uniform.

Another reason this subject compels attention is the size of the sums of public money actually expended. The
Federal Government spent in excess of $100,000,000,000 in the procurement of services performed by the private sector in fiscal year 1995. To put this in perspective, it is several billion dollars more than was spent on the salaries of the Federal civil service. It is several billion dollars more than was spent on goods, including all military hardware.

It is now generally accepted that the production of services has largely replaced the production of goods as an engine of economic growth in the late 20th century, but the manner in which these services are procured by both government and industry has generated less comment and even fewer attempts at regulation. The United States legal system seems to assume that nothing has changed in the regulation of employment as we shift from the production of goods to the production of services. For the most part, the law assumes that the services required by large corporations and governments are provided by their own employees who work on company property and follow company orders; the laws of agency govern the liability of companies for the actions of their employees; and most importantly, there is a binding, legal relationship between worker and the employer. Such assumptions are not necessarily true in large parts of the economy. How the Federal government--always a major provider of services--has adapted or failed to adapt to this changed environment is an important story.
Finally, we must consider an issue raised in an essay by Samuel P. Hays entitled "Political Choice in Regulatory Administration." Hays argues that regulatory administration is the central realm of political choice. According to Hays, the general public as well as scholars are still heavily influenced intellectually by the formalism of the separation of powers. The political forces which fought over the issues move from the legislature to the administrative agency and then on to litigation before the courts.

"[I]n twentieth century America the politics of administration is the emerging central focus of the entire political system.... administration has become the critical, ongoing, permanent focal point of political choice, and hence of converging political forces. On the one side, the legislature sets some broad limits of administration; and on the other the courts define those limits more precisely case by case. But these actions are sporadic and temporary. The arena of continuous choice which affects the larger society on a day-to-day basis is administration. And the actors well know it. The stakes are enormous. The way in which a regulatory agency calculates a rate base to determine a "fair return" is critical. Each proposed regulation under the Environmental Protection Agency has implications no less extensive. These choices are central to the entire political system. And their observation through the administrative record is central for effective historical analysis."

Thus, the primary concern of this study will be how government functions through the contractual delegation of


12Ibid., p. 127.
its powers to private sector organizations. It attempts to raise questions not so much about the activities of public management, but about its essential nature through an examination of who controls it and how it is controlled.

The amount of money spent on a site, the skills and remedies employed on that site, the speed of the work, and the degree to which a site is remediated, have all depended to one degree or another on the contracts, contractors, and contracting process of the EPA. It is therefore important to answer the question of whether the organizational and legal institutions of the contracting system have evolved sufficiently to meet the requirements that the government increasingly places upon it.

But even more than the quality of work is at stake. If administration is central to political choice, the reality is that contractors are increasingly making the choices. Contractors are intimately involved in determining key administrative matters in the Environmental Protection Agency that have very substantial consequences for the communities and businesses near hazardous waste sites. It is generally accepted that private interests influence public policy to an inordinately large degree in the United States. But if Hays’s views are correct concerning the centrality of administration in making political choices, it then follows that private parties actually make the most
fundamental political choices in a great many government programs.

Is it not possible to hire contractors to do relatively simple chores where they are not in a position to influence outcomes? Government officials invariably chant the well-worn refrain that contractors are hired to "advise and assist" their civil service masters. An examination of the workings of one major environmental program reveals that this is a most unlikely proposition. Contractors alone have the institutional memory, the education, the technical skills, the experience, and the political knowledge to administer programs as complex and controversial as Superfund.

The manner in which public policy is executed by contractors is substantially different from the way in which the civil service works. The contractors involved in the management of Superfund must filter their activities through a complex organizational web of Federal, State, and local agencies, as well as through a bewildering panoply of trade associations, law firms, polluters, environmental watchdog groups, and other institutional players concerned about hazardous waste remediation. Likewise, they must make their decisions pursuant to the specific requirements of the contracts under which they perform their labors. Political choice made by contractors is an even more complicated affair than political choice made by Government officials.
Hays states that it is important to try to understand the values and ideologies that administrators bring to their work. He also acknowledges that studies on these subjects are few and far between. They are completely absent when dealing with contractor personnel. We know next to nothing about the "sociology of the empirical professions" found in the contractor workforce of environmental scientists, engineers, and planners.

One tentative observation, however, seems warranted. Hays's essay speaks of science and technology as instruments of integrating perspectives between private and public sectors. "We can look upon individuals, professional organizations, and overarching scientific institutions such as the National Academy of Sciences as linkage influences and hence crucial integrating forces in the symbiotic relationships between government and the private economy." 13 While not specifically enumerated by Hayes, it would seem that contractors form an important class of linkage organizations. They will be crucial to an understanding of government in the twenty-first century.

The Study of Government Contracts

The study of government contracting is not easily understood by reference to traditional notions of public

13 Ibid., pp. 154-154.
administration and public policy. Non-governmental players occupy a position at the center rather than at the periphery of the process. We shall explore the motives and actions of those players in greater depth in succeeding chapters.

The state of the literature on government contracting in general is far from satisfactory, and the state of the literature on the subject of service contracting is even worse. Very few historians have recognized the significance of government contracting to the national economy and politics. No historian has ever attempted to probe into the mechanisms by which public policy is realized through contractors or to understand what a wholesale delegation of governmental authority to the "private" sector might mean in the larger scheme of things.

The literature on government contracts is almost exclusively by and for practitioners in the field. Few non-practitioners bother to make the considerable effort needed to master the details of the field unless their employment requires it. The American Bar Association, publishes a quarterly journal, The Public Contract Law Journal, which

contains articles on narrow topics of more or less current interest written in the middlebrow style of academic law journals.15

Academic writing on the subject is, again, highly technical, and it is not easy to detect arguments of a broad, theoretical nature. The George Washington University Law School Center for the Study of Public Contract Law publishes legal casebooks on various aspects of government contracting and sponsors university courses and a variety of public programs for lawyers and other practitioners.16

The Foundation Press has published for many years a distinguished casebook by Hastings Law Professor John W. Whalen on government contracting.17 W. Noel Keyes, also a California law professor, has published two editions of a text on government contracts.18 Likewise Stanley Sherman of the George Washington University School of Business & Public Administration has published his two volume textbook

15The journal is published by the Public Contract Law Section of the American Bar Association whose members are the leading practitioners in America of public contract law. Overwhelmingly, the membership is from the private bar and as such they largely share the views of their government contractor clients.

16The founders of this program were two GWU contracts law professors, Ralph C. Nash and John Cibinic.


23
on government contracts for business and public administration students. Finally, there is a reference book by Ralph Nash and Steven Schooner.

The principal failure of this literature is the same problem which is found in most legal writing. A typical analysis would include a discussion of the structure of a particular law or regulation, an observation on its compatibility or inconsistency with other existing laws, and mention of its prospects for successful implementation. These are all matters of interest to a practitioner. Only rarely do such discussions provide insight into the economic, social, political, or historical context in which a law was created and enforced.

Analytic studies of specific aspects of Federal procurement do exist, however, and pieced together offer insights into the process as a whole. Because so large a percentage of Federal procurement dollars have historically been channeled into military procurement of goods and because such studies frequently fit into ideas of "war capitalism," the most important studies on government contracts have concerned military hardware. The most

19Stanley N. Sherman, Government Procurement Management, (Gaithersburg: Wordcrafters Publications, 1985); and Contract Management: Post Award (Gaithersburg: Wordcrafters Publications, 1987).

important of those studies is the work by Jacques Gansler.21 Written from both a government and industry perspective, Gansler assesses the impact of government defense spending on the economy as a whole as well as on individual sectors of the military industry. Later chapters provide one of the few attempts at providing a comparative perspective.

There are other works on the subject of business-government relations in military procurement, even if they tend to follow certain well-trodden paths when the subject turns to the military-industrial complex.22 That same line of thinking will emerge in subsequent discussions of the environmental service-industrial complex.

The traditional view of contracting out for services in the private sector rested on notions of civil service failure. Lacking the discipline of competition, government


was focused on amassing bureaucratic power and placating special interests rather than on cost efficiency. To be sure, it was recognized that not all areas of government activity lent themselves to contracting out, and that the decision that kept work inside the government or contracted it out would, of necessity, be complicated.23

Other writers found further problems in the way the Federal government relied on the contracting power to meet its statutory obligations and uphold its end of the corporatist relationship. Some have argued that public service itself as well as public servants are overregulated.24 This was an approach that informed many of the reinventing government reports issued by the commission headed by Vice Albert President Gore. Most notable of these critics in the field of public procurement is Steven Kelman, formerly of the Kennedy School of Government and Director of the Office of Federal Procurement Policy in the Clinton Administration. Kelman's central argument is that contracting officers lack sufficient


discretion in the source selection process of Federal procurement and that this ensures, at best, mediocre goods and services purchased at premium prices. This will be discussed later, but it should be mentioned at this point that the use of Brooks Act source selection procedures generally guaranteed that best available contractors were chosen to work on Superfund remediation projects.

Still others, such as Mark Goldstein, a professional staff member of the Senate Governmental Affairs Committee, have taken the approach that the administrative capacities of government have atrophied to the point that many agencies are incapable of performing their responsibilities as required by Congress. This is particularly true of government agencies whose mission requires the generation, interpretation, and application of scientific, technical, and even legal information. Since this applies to virtually all government agencies to one degree or another, it is proper to speak increasingly of a "hollow government." 26

Long-time activist and Washington lawyer, Dan Guttman, together with Barry Willner, has provided the most important study to date of the subject of government contracting for


Despite the passage of two decades, Guttman and Willner's criticisms that "private" parties, funded by public dollars have intruded deeply into government decision-making remain on target. They argue that through their control of the minutiae of technical issues, those who provide management consulting services exercise actual control over many government programs. Unaccountable to the public that employs them, these consultants are able to structure the dialogue of public policy in such a way that they themselves are in a position to benefit improperly from the decisions they make.

Finally, a University of Wisconsin political scientist and Brookings Scholar, Donald Kettl, has argued that despite much experience in the management of private-public relations in the field of procurement, the Federal government yet to realize the full benefits of the privatization of government services. Government markets are rarely competitive for a variety of reasons, and this only aggravates problems of cost, accountability, competence, and flexibility. To a large degree this is true in the case of environmental remediation, a topic that


Kettl specifically addresses in some depth in one of his chapters.

Contracting out was the only sensible way to manage the Superfund program. The alternative, alter all, was to create a huge government bureaucracy to duplicate what could be done, often more cheaply and usually more flexibly, in the private sector. The lesson of Superfund, however, is that contracting out does not ensure that it will operate well. Especially in a market with such significant imperfections on the demand side, vigorous oversight, by a smart-buying government, is essential. In Superfund, however, the incentives--on both the supply and the demand sides--undermined government's capacity to buy smart.29

One problem that is common to most of these studies, however, is that each approaches the problem for the most part from the limited perspectives of one discipline, viz., law, political economy, public administration, politics, and management. Such criticism is not entirely fair, however, since the kind of integrated approach one desires is probably beyond the powers of any one scholar. Broader approaches are nonetheless needed as we burrow deeper into the numerous and varied aspects of the subject.

Two final categories of source material must be mentioned in this context. The General Accounting Office, usually at the behest of Congressional committee chairman, publish studies of contracting practices of individual agencies. EPA generated a large number of these reports, which provided an important source of background material for this work. Likewise, EPA itself generated a number of

29Ibid., p. 127.
studies of its own contracting practices, often in response to outside criticism. Although tending to exonerate EPA practices, these documents provide a wealth of valuable information for anyone interested in this topic.

The Growth of Governmental Power and Corporatism

Perhaps the integration most immediately needed for an understanding of public procurement is an attempt to place it in a proper historical context. This task has been made much easier through scholarly efforts over the last twenty or thirty years to understand better the dynamics of the business-government relationship.

The dominant view of business-government relations through the first half of the twentieth century has come to be known as progressive history. Progressivism was a political movement that emerged in the late nineteenth century which advocated the modernization and rationalization of basic American institutions. From 1880 to 1920, government, education, business, the professions, science, religion, leisure, and many other aspects of American life underwent major transformation in the wake of sustained progressive criticism. The basic ideas that supported this progressive synthesis were created by progressive writers themselves. The progressive historians who wrote about these events celebrated them and that...
celebration detracted from serious analysis. In the field of political economy, influential journalists such as Herbert Croly and Walter Lippman supported by historians such as Charles and Mary Beard, other academics such as John Dewey, Adolphe Berle, and Richard Ely, and a large number of public officials created a paradigm for understanding business-government relations which rested on notions of a "public" interest which was challenged by unrestrained concentrations of private economic power.30

Their answer to this situation was an expansion of the regulatory state buttressed by legal recognition of the economic power that they hoped to see vested in large-scale industrial unions. The progressives saw no conflict between the need to protect individual rights and the need to build large-scale institutions. Indeed, the former was dependent on the latter.

In the late 1950s and 1960s, organizational history emerged as the successor to progressive history and as the

30There were, of course, earlier attempts at systemic criticism of American business-government relations, the most important of which was probably the work of Henry George. But George's ideas, an expression of an authentic American left, were too closely associated with George's own political career and frightened conservatives of all stripes into sustained efforts to marginalize his influence. A similar fate awaited marxist historians such as Gabriel Kolko and William Appleman Williams, whose work on American corporatism was never considered sufficiently canonical for sustained criticism because of scholarly defects. For better or worse, the arguments over American corporatism have occurred between progressive and organizational historians.
dominant view of American corporatism and business-government relations. The work of Robert Wiebe, Alfred Chandler, Louis Galambos, Samuel Hays, Ellis Hawley, and others, drew on emerging trends in organizational theory and other social sciences to shape an "organizational" synthesis to explain the history of the American political economy. The central ideas of these studies argued that the modernization process that transformed American life at the end of the nineteenth century required larger and more complex institutional arrangements, organizational units that were increasingly national in scale, and management that would be increasingly centralized. The skills needed to create and administer these institutions would be provided by an emerging class of professionals whose role in this modern world would be legitimated by their exclusive access to "science," or expertise, as in the "Wisconsin idea."

Business led the way in the process, first by undercutting local businesses through economies of scale and

greater access to capital, and secondly by gradually pushing for the preemption of state and local business regulation by uniform, national legal mechanisms. The national government responded by creating the governmental institutions needed for a modern state. Within a relatively short period, Congress created a (small to be sure) professional standing army and a world-class navy, provided for an income tax to pay for a modern state, and established the Interstate Commerce Commission, Federal Trade Commission, the Bureau of the Budget, the Department of Commerce, and the Department of Labor.

Thus the two pillars of American corporatism—business and government—were firmly fixed on the political landscape. Herbert Hoover attempted to solidify this relationship through a corporatist variant known as "associationalism," which stressed Taylorist ideas of scientific management, reliance on "disinterested" managers from the private sector, limited cartellization of certain industries through multi-firm organizations with minimal enforcement of antitrust laws, and the ability to organize national resources in the event of national emergencies (such as World War I). Much of the work of organizational history focused on regulation and subsidization, and the

32Wiebe, Search for Order, p. 11-75;
impact that had on the internal operations of business. The "interests" with which progressives explained the impact business had on government, was largely absent.

Although somewhat belated, organizational historians' efforts to understand the second pillar of American corporatism have led to significant findings. To be sure, the idea of the steady progression of Federal power needed to sustain corporatist power arrangements has never set well with organizational historians. Wiebe recognized the limits of Federal power and Barry Karl saw only disagreements among New Deal policy experts in their attempts to rationalize the emerging state bureaucracy.

They did recognize, however, that the role of the state in American political economy itself rested on two pillars, one regulatory and the other administrative. Regulation drew the interest of organizational historians in an effort to explore the motives of political leaders in their efforts to regulate the economy.


The nature of the state administrative apparatus, however, brought sustained interest only more recently. The ideas of Max Weber about bureaucracy have only slowly become the subject of analysis by organizational historians.36 Samuel Hays has raised centrality of bureaucracy in a number of venues, and believes that administration is the central arena of political choice.37

36 Bureaucracy certainly did not suffer from a shortage of other writers. The word bureaucracy, if not the idea, dates to an 18th century French physiocrat and minister of state, de Gournay. Its use was shortly thereafter incorporated into the English language. Although Hegel, Marx, and others wrote about bureaucracy, its first and perhaps only great theorist was Max Weber. The many studies on the subject since then have, in some respects, been only commentaries on Weber. Weber believed that bureaucracies promoted by merit, produced efficiency, were bound by formal rules, were rational, and that there would always be tension with political officials. By and large, he did not differentiate between public and private bureaucracies. Subsequent writers have seen major divisions within bureaucracies, e.g., Michel Crozier, The Bureaucratic Phenomenon, (Chicago: University of Chicago Press, 1964); very non-rational and inefficient efforts to maximize budgets and thus overproduce bureaucratic services, e.g., W.A. Naskanen, Bureaucracy and Representative Government, (Chicago: Aldine, Atherton, 1971); and, perhaps most importantly, that they were preordained to become oligarchic, e.g. Roberto Michels, Political Parties: A Sociological Study of the Oligarchical Tendencies of Modern Democracy, (Glencoe, Ill: The Free Press, 1958). Nonetheless, Weber remains the starting point for any discussion of bureaucracy, even the public-private organisms under discussion in this study.

An even more important challenge to Weber's idea of bureaucratic rationality came from the political scientist, Stephen Skowroneck who saw the consolidation of state power through the expansion of administrative capacities as haphazard, tortuous, and far from rational. Institutional power relationships had to be negotiated among political parties, courts, the Presidency, the Congress, and state and local governments rather than established by fiat. The governing arrangements had not emerge in response to needs but rather had to be "extorted" from existing power arrangements. According to Skowroneck, "Such factors do not simply complicate the notion of state building as functional adaptation; they ultimately confound that notion altogether. By demanding consideration of the organization of state power itself, this perspective alters our understanding of the state-building problem, the state-building process, and the state-building achievement."38

Organizational history has enjoyed a forty-year run without serious opposition, although certain aspects appear at this point to be at least mildly sclerotic. Part of the trouble stems from the fact that its core ideas were in significant part a product of 1950s intellectual ferment. The organizational behavior literature that initially


inspired organizational history then concerned itself almost exclusively with large-scale organizations. Today its range is substantially broader. In a similar vein, organizational history might also be accused of a kind of imperial overreach. This was the charge of Alan Brinkley who doubted whether there was such a thing as an organizational society and claimed that its proponents attempted to explain too much by pushing large segments of history to the periphery.39 Students of English history might also recognize a "whiggish" tendency in organizational history to assume progress and movement to some preordained outcome. Finally, and with notable exceptions, organizational history rarely goes beyond the New Deal. Like the progressive historians whose focus was on explaining the triumph of their political movement, organizational historians seem to be intent on explaining the advent of the large-scale corporation (and to a lesser extent, government) and the social forces on which it rested.

In 1991, Brian Balogh, a Harvard historian, published an important article that criticized certain shortcomings of the organizational synthesis but more importantly sought to

bring new life into the edifice through the study of professions.40

The founding fathers of organizational history were, of course, aware of the importance of the professions,41 in part because of their importance to the middle classes and in part because these were the interest groups who could legitimize their claims to authority and autonomy on the basis of "expertise," rather than mere access to money or political power.

Not all professions would develop in the same way or achieve the same degree of autonomy. These distinctions could be explained primarily by reference to the economic contexts in which each evolved. Engineers, a profession of particular significance for the subject of government contracts, would be far more dependent on the clients that employed them, in particular, large-scale industrial corporations. "With few entrepreneurial opportunities... engineers molded their professional identity not just by the degree of scientific ability they achieved, but by mobility into corporate management as well."42 This affinity with their client employers would prove highly significant in the


41Wiebe, Search for Order, pp. 111-132.

merger of public and private spheres we see in government contracting.

Government slowly began to employ the services of professionals, initially at the local level, and with the advent of World War II, the Federal government began to devour them. The actual administrative capacities of the Federal government were provided by professionals, and to a very large extent, the access of professionals to "science" legitimated the subsequent extension of Federal power. The discretion needed to administer a complex state likewise came from the "science" which only professionals could provide and interpret.43 Professionals thus became the device that modernizers used to break down the rule of parties and courts described by Skowroneck.44

Balogh thus not only challenged the periodization of Wiebe, et al., but also introduced a new causal "interest" back into the history of American political economy in the twentieth century. Professionals in government used "expertise" not only to justify their authority, but also to create their own interest groups that then demanded public programs which only they could provide.

43For an interesting discussion of the changing nature of the public expert, see Alan I. Marcus, Cancer From Beef: DES, Federal Food Regulation, and Consumer Confidence (Baltimore: The Johns Hopkins University Press, 1994).

44Skowroneck, Building a New American State, passim.
World War II was rightly or wrongly perceived to have been won by professionals, whether military officers, economists, foreign affairs specialists, planners, or especially nuclear physicists. In no small part that victory provided the excuse for the Federal government to continue to employ professionals and accord them a status hitherto unavailable to people whose primary occupation was thinking. For their part, professionals needed money, not only to afford the lifestyle one would associate with such an exalted state, but also to carry on their cultivation of "science."

All this might have dissolved as it had in 1918, had not the cold war intervened to justify further expenditures for national causes, whether they were for education, civil rights, medical research, or, in the last decade of the cold war and in a somewhat convoluted logic, environmental remediation. According to Balogh, at the core of the modern administrative state "lay a symbiotic relationship between expert and Federal government. The Federal government now actively produced and developed experts. Experts, on the other hand,... actively defined what their benefactor's policy agenda should be." The mechanisms for managing contracts and grants "were scattered among hundreds of agencies, dozens of oversight committees, and at least potentially subject to pressure from thousands of interest groups... Nor was it so easy to distinguish between grantor
The Federal administrators responsible for such decisions increasingly were professionals produced by this new relationship. "45

The literature on professions is enormous.46 Only a portion of it seeks to address directly the relationship of the state and the professions. Most of that is concerned with the role of the state in creating professions and guaranteeing clients,47 or in using professions as an


46Much of it, like the study of bureaucracy, has its roots in the work of Max Weber, who emphasized the importance of expertise and the monopolization of that expertise in the modernization of society. Many of the questions still asked are those first posed by Weber. Eliot Freidson is concerned with how the professions are controlled and whether this leads to loss of professional status in Professionalism Reborn: Theory, Prophecy and Policy (Chicago: University of Chicago Press, 1994), especially chapter 8, p. 128-146; Samuel Haber discusses the ways in which professions transmit authority and honor in society and how this process had its origins in earlier class distinctions, The Quest for Authority and Honor in the American Professions, 1750-1900 (Chicago: University of Chicago Press, 1991); Randall Collins is concerned with the process of obtaining credentials and sees education (especially state education) as the legitimating force behind professions in The Credential Society: an Historical Sociology of Education and Stratification (New York: Academic Press, 1976), especially pp.171-204. See also more general works by Steven Brint, In an Age of Experts: The changing Role of Professionals in Politics and Public Life (Princeton: Princeton University Press, 1994), pp. 81-149; Michael Burrage and Rolf Torstendahl, Professions in Theory and History: Rethinking the Study of the Professions (London: SAGE Publications, 1990); and Howard M. Vollmer and Donald L. Mills, eds., Professionalization (Englewood Cliffs: Prentice-Hall, Inc., 1966).

instrument of state policy. Much less is known about how reliance on professions and professionals has altered the state.

Sociologist, Magali Larson asks the question "whether possession of scientific and technical knowledge can now directly confer political power upon its possessors. Implicit or explicit in the asking of this question is the notion that expertise, because of profound transformations in the structure of society, may be in the process of superseding formerly dominant factors of power...." Her ultimate answer to this problem, not entirely satisfactory given the enormity of the undertaking, is to demystify science, thus placing power back into democratic hands.

In 1954, Talcott Parsons set forth the idea that professions and business are and would remain distinct. Forty years later the confidence with which he could make that statement appears unwarranted. The professions under

48 Keith M. Macdonald, The Sociology of the Professions (London: Sage Publications, 1995), pp. 100-123. Macdonald's analysis does suggest that professions thus played a role in state formation as well, although the constituencies of the professions were so large and varied that a causal relationship could not be established.


42
discussion in the following chapters are organized as businesses and provide their services to the Federal government through contracts and organizational arrangements designed for a traditional business-government relationship. This essentially new organism has thus combined the benefits of large-scale organization with the authority of professions and the coercive power of government to create a behemoth of enormous power. This study will argue that the Federal government has not produced an equally capable set of organizations and laws to deal with such a concentration of power.

Public contracting for professional services is increasingly important to public administration in America, and efforts to understand it as an expression of public policy and to understand the business-government relationships on which it rests are increasingly central to an understanding of government. If it is no longer enough to understand only the formal institutions and processes of government, is there a reliable map to lead the way to wherever it is we are going? This study hopes to begin, however tentatively, a dialogue that will lead to some of those answers.

********

Chapter 2 sets the chronological and factual background for this study by a brief discussion of the political
history of the creation of Superfund. The chapter also provides a discussion of the actual work that is performed at a Superfund site and concludes with an analysis of the administrative response taken by EPA in shaping the contracts that would secure the technical skills to do the actual work of remediation.

Chapter 3 discusses the organizations of government and business that are involved in making administrative—and therefore political—choices in the management of the program. The chapter attempts to suggest that the hoary distinctions between public and private sectors are not particularly helpful in understanding this particular enterprise.

Chapter 4 provides an analysis of a number of policy and legal issues in Superfund contracts. Historically, the legal system in general, and contract law in particular, have operated in such a way as to permit business maximum flexibility to achieve its objectives. This chapter will pose the question whether public contract law affords the government similar flexibility in achieving its ends.

Finally, Chapter 5 concludes with a discussion of basic problems inherent in Superfund contracting by categorizing them and attempting place each in the larger context of American corporatism. Problems have recurred in four distinct areas: 1) the basic competence of the contract system and specifically whether the sites are actually being
remediated, 2) the degree to which the Federal government actually controls the work, 3) whether contractors are making governmental decisions, and 4) whether questions of contract law and policy are controlling inordinately the execution of public policy. Understanding that larger context is important not only for practical reasons of program management, but also for understanding the direction of public management in a new millennium.
CHAPTER 2
THE CREATION OF SUPERFUND AND ITS CONTRACTS

Discovery of the Hazardous Waste Threat

The opening shot in the public war over hazardous substances was fired by Rachel Carson and her 1962 classic, Silent Spring. The book was, of course, based on the technical literature that had appeared over a number of years. Despite the opposition of major chemical companies, an industry that would figure significantly in opposition to the passage of Superfund legislation, the concerns she aroused led to the eventual elimination of DDT in the Western world.


But translating the concerns of people like Rachel Carson into an awareness of the toxic environment that threatened the public health of entire neighborhoods, cities, flood plains, and even regions was another matter. By the 1970s, the strongest fears probably concerned radioactive fallout.3 After that, pesticides, such as DDT, exposure to chemicals at the workplace, and threats to drinking water formed the major public health concerns of citizens with respect to toxic substances.

The concern was reflected in an increased volume of regulation from the Occupational Safety and Health Administration (OSHA) and the Environmental Protection Agency, both created by the Nixon administration in 1970. EPA administrators, in particular, were aggressive in seizing public health issues to expand its regulatory reach. In 1972, Congress passed the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), and in 1976, the Toxic Substances Control Act (TOSCA) and the Resource, Conservation and Recovery Act (RCRA), all of which resulted in an expanding mission and increasing resources for the Agency.

By the late seventies, the efforts of environmental organizations to regulate the toxic environment had gained sufficient momentum to create a climate for an even more expansive set of laws once public attention turned to

hazardous wastes buried, abandoned, or otherwise neglected by the companies which generated them. This climate provided the background needed to understand the attention the media focused on one residential community in Niagara Falls, New York in 1978.

Three approaches would eventually emerge with respect to the remediation of hazardous wastes. The first two were obvious to any interested party in the 1970s. The third, which was ultimately adopted and which is the subject of this study, was largely inchoate during the early stages of debate.

The traditional means for establishing liability for hazardous waste remediation was through common law doctrines of tort, especially doctrines of nuisance. Such an approach required, to be sure, a plaintiff with legal standing both willing and able to sue. Such an approach had the certainty that long-established law provided, particularly the ability to adjudicate the rights and responsibility of the parties based on the individual facts of the case. If science was uncertain, that too would be dealt with in an orderly legal manner. If larger social costs required consideration, the law would, over time—perhaps a very long period of time to be sure—address these as well as the claims of the individual litigants. The evolution of the common law, buttressed by an activist Supreme Court, had already proved to be sufficiently flexible to endow non-traditional
litigants such as the Sierra Club with standing to sue parties responsible for pollution.\(^4\)

Such an approach had obvious drawbacks as well as obvious appeal. The common law might evolve, to be sure, but what damage might occur in the decades and centuries it took for such a transformation? Could anyone ascertain that issues would be addressed according to some rational prioritization? Could not the most powerful industries—and therefore possibly the worst polluters, escape liability?\(^5\)

The environmental movement and activists within the government favored more direct action in the form of a regulatory regime based on statutory powers. Such a course would require Congressional action in the form of laws authorizing Federal involvement in matters that had hitherto been the almost exclusive preserve of state and local governments and in the form of additional resources needed to implement the law, study the sites, oversee the cleanup process, and pay for the contractors who would actually "remediate" the site.

This too, had drawbacks. From the zenith of its power in the 1940s after its triumph over Fascism and depression, \(^4\)


\(^5\)See the discussion of common law remedies and various regulatory structures in Roger W. Findley and Daniel A. Farber, \textit{Environmental Law in a Nutshell}, (St. Paul: West Publishing Company, 1988); pp. 60-129.
the Federal government had fallen in repute in succeeding decades. Vietnam and Watergate had so discredited the American power elite in general, and the Federal government in particular, that any attempt to expand the reach of Federal regulatory power would be met with an instinctive opposition. When this opposition was buttressed by hostility from the industries that were to be regulated, the costs of a creating new bureaucracy within EPA, and the perceived infringement on state and local government authority, any proposed expansion of Federal bureaucratic power would prove difficult indeed.

What actually emerged was a system that no one had contemplated in December, 1980, when the legislation creating Superfund was passed and signed into law. Politics in the form of the 1980 Presidential election intervened into the process and hastened the increasing reliance on a new form of state administration based on both traditional and substantially different types of business-government relations. The role of the contractor would be central in this new administrative order, not only as the agent that actually moved and disposed of the hazardous substance, but also as the agent that selected the sites, designed the remedies, allocated resources, and even oversaw the entire cleanup process. By the time this sequence of

6Ibid.
7codified as 42 U.S.C.A. 9601 to 9675.
events had become clear, public administration had moved—ever so quietly—into a new era.

Love Canal

Love Canal was an abandoned canal that led into the Niagara River. The Hooker Chemical Company had dumped tons of chemical waste into the canal for a decade, and once it was filled, covered the canal with landfill. The site was then given to the Niagara Falls School Board, which built a school and playground on it. Residential development followed and a substantial middle and working-class community grew up along the banks of the canal.

Beginning in 1976, a series of newspaper stories, based primarily on studies that are now considered of dubious scientific merit, began to raise public health questions concerning the hazardous substances buried in the canal. In August, 1978, the New York State Health Commissioner, responding in part to heightened political pressures, declared a public health emergency. The subsequent report issued by the Commissioner's office further inflamed public

fears and led to protests and organizational efforts that brought national and even world attention to Love Canal.

State politicians quickly jumped on the media bandwagon but began to withdraw once it became clear that no Federal money was available to buy out the residents or to engage in any large scale remediation of the site. In the meantime, epidemiological and even pseudo-scientific studies continued with increasing rapidity in the absence of harder scientific evidence. They further exacerbated the fears of the public and stimulated demands for government action. The demand for quick studies was driven, in part, by the litigation that the U.S. Justice Department had eventually initiated against Hooker.

The matter was intensified by the *New York Times*, *Buffalo Evening News*, *Buffalo Courier Express*, and *Niagara Gazette*, which together contained 544 articles on Love Canal between May 17 and June 16, 1980. *Sixty-Minutes* (5/25/80), the *Today Show* (5/22/80), the *MacNeil-Lehrer Report* 5/22/80, and even *Phil Donahue* (6/19/80), aired the matter extensively and this meant that politicians would be forced to act. The President, facing both primary and general election campaigns in 1980, could no longer ignore the political implications. President Carter declared an emergency and undertook to find the money to pay for the temporary relocation of many residents. Eventually, Carter and Congress would agree to provide $15 million to purchase
the houses in the Love Canal neighborhood. The matter would have ended here but for initiatives that were already underway within the U.S. Environmental Protection Agency.9

Passing a Law

Love Canal gave momentum to the efforts of Carter's EPA Administrator, Douglas Costle, to expand EPA authority ever more firmly into the field of hazardous waste regulation. The Agency already had significant responsibility in this area by virtue of provisions of the Clean Water Act and Resource Conservation and Recovery Act (RCRA). The immediate objective was to take responsibility away from the Department of Transportation, which had hitherto been responsible for handling hazardous waste matters (many of the previous problems had involved chemical spills by trucks and railroads). Indeed, Transportation was already at work leading an interagency committee to deal with situations like Love Canal.

Giving Thomas Jorling, Assistant Administrator for Water and Hazardous Waste, carte blanche to draft hazardous waste cleanup legislation as quickly as possible, Costle was able to send the EPA version to the White House for approval before the Transportation proposal was ready. Costle then ordered regional EPA officials to find as many hazardous

---

9Levine, *Love Canal*, pp.115-211.
waste sites as possible in their respective regions to persuade Congressmen of the seriousness of the problem. Regional officials complied, albeit grudgingly, since they knew that once the media interest diminished, "they would be faced with the task of calming fears of angry residents and local officials."10

Three central features of the bill would prove the most important and most controversial. First of all, it provided that EPA would be required to initiate cleanup action before the courts resolved liability issues and through cost recovery actions would sue responsible parties, even those only minimally responsible, for the full cost of the cleanup. Secondly, liability was declared retroactive, which meant that even though polluters were in full compliance with the law when the pollution was generated, they would be responsible for compliance standards of the present. Finally, a dedicated trust fund—the Superfund—was created by a special fee on chemical feed stocks, by general appropriations, and from other sources. Although the fund would be replenished by fines generated through cost recovery litigation, a permanent taxing authority was needed to cover the costs of cleaning up abandoned sites where liability could not be fixed.

OMB Director James McIntyre and his deputy John White had initially opposed the idea of a dedicated tax on the chemical industry but was ultimately overruled by the President. The financing scheme would ensure a firm resource base to fund the program as well as the enduring hostility of the chemical industry.11

The administration sent the bill to Congress on June 13, 1979. Because of its broad scope, the bill was sent to a number of subcommittees in both houses, some of which were hostile. Jorling, a former member of Senator Edmund Muskie’s staff, was particularly skillful in managing the legislative strategy that resulted in final passage of the legislation. The two key subcommittee chairmen, Congressman James Florio of New Jersey and Senator Edmund Muskie of Maine (who would soon become Secretary of State), were both enthusiastic supporters. The most aggressive opponent in the House was Commerce Committee Member David Stockman of Michigan. Stockman wanted the Federal role limited to financial assistance to the states, which would be responsible for their own cleanup programs. Florio and Muskie were able to prevail only after substantial compromises on the exclusion of oil and chemical spills from coverage and on the size of the dedicated fee.

The most pressing problem faced by EPA was the fact that time was running out on the 96th Congress. More than

11Ibid., pp.148-149.
once, EPA acquiesced in less stringent legislation than Congressional supporters wanted in order to get the bill--any bill--to conference where Costle and Jorling felt the most serious defects could be remedied. The House passed the bill on September 19, 1980, but their anxiety was fully justified in November, 1980, when Carter was defeated and control of the Senate passed to the Republicans.12

Nonetheless, the Senate did pass the bill on November 24 by a vote of 78 to 9. Since there was no time for a conference bill, the House had to accept the Senate version which was considerably weaker. The House vote of 274-94 came on December 3, two days before final adjournment. The bill was signed into law by Carter on December 31, 1980. The Comprehensive Environmental Response Compensation and Liability Act (CERCLA), popularly known as Superfund, was now Federal law.13

The Reagan Revolution

Environmental issues were not central to the 1980 Presidential campaign, although most of the key people in the Reagan campaign probably did share the pro-growth views common to most Western Republican politicians. They held the early twentieth century progressive view that commercial

12Ibid., pp. 149-154.
13Ibid., pp. 154-162.
exploitation of natural resources could be done without
harming forests, wilderness areas, and wildlife.14

Whatever the private wishes of Reagan administration
officials at EPA and Interior with respect to environmental
protection, they quickly came up against a basic factor that
all Republican politicians have faced at least since
President Taft dealt with the Pinchot-Ballinger controversy
in 1910. Environmental protection is a middle-class
concern. The same voters that elected Republican presidents
and sent Republican legislators to Congress and state
legislatures also cared about their suburban property
values, about the exposure of themselves and their children
to toxic substances, about the preservation of wilderness
vacation areas, about the protection of wildlife, and about
the safety of their drinking water.

While it is doubtful that CERCLA would have passed in
the early years of the Reagan administration, at least in
the form in which was ultimately enacted into law, attempts
to undermine an existing law were quite a different matter.
A significant body of Republican legislators had, in fact,
voted for it.

Many of Reagan's advisors did little to hide their
dislike of environmental concerns. Three in particular,
James Watt, Secretary of the Interior, Robert Burford,

14In many ways, the best account of the 1980 Republican
campaign remains Lou Cannon, Reagan, (New York: G. P.
Putnam's Sons, 1982).
Bureau of Land Management Director, and Anne Gorsuch (later married to Burford), EPA Administrator, came to serve as symbols of the new environmental order. In retrospect, however, the three proved remarkably ineffectual and within a few years were dismissed. Gorsuch even came to be seen as having "gone native" and defended the activities and budgets of her Agency against an increasingly hostile White House.15

An equally serious threat to environmental programs was the incompetence of some of the individuals Reagan appointed to administer them. Superfund was singled out for special treatment in this regard with the appointment of Rita Lavelle, a public relations specialist with no known environmental credentials. A protege of Presidential advisor and later Attorney General Edwin Meese, she ended her Federal career in a Federal prison after lying to Congress about her relationships with industries that her office regulated.

The prime focus for reining in the EPA and other environmental enforcement agencies would shift to the Office of Management and Budget.16 In addition to its budget-making powers, OMB had assumed broad control over information management, reports, and, most importantly, 


review and approval authority over new regulations. In the case of EPA, this was crucial since in order to meet its statutory obligations, EPA had to issue a large and steady volume of regulations.

The new Director of OMB, David Stockman, made every effort to scale back the issuance of regulations, limit new requirements on industry, and take broader cognizance of costs to business. But an even greater constraint which OMB placed on EPA was a requirement for sharply reduced budgets and a reduction in the number of full time equivalent (FTE) employees.

Such personnel reductions would have the impact that OMB desired, viz., the reduction of environmental enforcement actions. But they would also have more long range consequences that would eventually raise complex and difficult contracting problems and that would affect every aspect of the Superfund program down to the present day. Without personnel resources to staff the Superfund program, the Agency would be forced to rely almost exclusively on contractor personnel to carry out the mandates of the law.

The Superfund Process

In order to understand just how serious that restriction was, it is necessary to examine in some detail

the administrative process of the Superfund program. It is also necessary to understand the highly scientific and technical nature of this process before it is possible to assess the role played by private sector contractors.18

The initial steps of the process concerned site discovery. Site identification had not been significantly improved since the days when Costle and Jorling ordered Regional Administrators to identify sites in order to build a national consensus for the need for Superfund legislation. While many sites were identified by state and local governments, businesses and private citizens were also encouraged to contribute to the list through a 24-hour hotline to the EPA National Response Center (manned by contractors). All reported sites were entered into the computerized Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS).

After identification, either EPA or state officials assessed the site with a preliminary assessment (PA) in an attempt to ascertain whether the evidence indicated a sufficient hazard to warrant further action. The Agency then considered all relevant and available documentation relating to the site. Agency personnel then made one or two visits to the site, although they would not normally take

18This discussion relies in part on the discussion found in Environmental Protection Agency, Office of Solid Waste and Emergency Response, Technology Innovation Office, CERCLA/Superfund Orientation Manual, EPA/542/R-92/005, October, 1992, Sections III and IV.
soil or water samples at this time. If the evidence
established that there was no significant danger, no further
action was taken.

If the PA indicated some degree of danger and need for
further assessment, a site inspection (SI) took place. Two
activities characterized the SI. First, sampling of the
contaminated area began in earnest. Secondly, EPA would
begin efforts to establish liability through the
identification of potentially responsible parties (PRPs).
If one or more PRPs could be identified, they had the option
of cleaning up the site themselves under EPA supervision.
If they decided not to cooperate, EPA would then continue
with the cleanup efforts and compel payment from the
responsible party through cost recovery action in the
courts.

If a site presented such immediate threats to health
and safety that further delay would endanger the public, EPA
was empowered to initiate a removal action. This action was
short-term and was intended to stabilize conditions on the
site. Separate legislative authority existed for such
activities and was conducted on both official Superfund
sites and non-Superfund sites such as road spills. A
typical removal action would occur if dangerous chemicals
were to spill on a highway following a truck accident. The
types of activities provided in removal actions would
include removing containers of hazardous materials, putting
up fences, or providing drinking water to local residents if the hazardous materials were posing a threat to drinking water supplies.

At this point, EPA attempted to assess the relative threats a site presented to public health and the environment. The Hazard Ranking System (HRS) assigned a numerical score from 0 to 100. The criteria included the possibility that the site would release pollutants into the environment, the toxicity and amount of the contaminant, the threat to human health, or particularly sensitive environments. If the score was 28.5 or higher, the site was eligible for inclusion on the National Priorities List (NPL) which was a listing of the most dangerous sites in the nation. NPL listing was a prerequisite for long-term remediation paid for from the Superfund trust fund. The NPL, which was mandated by Congress, served to establish a system of priorities for the Agency, but also helped to ensure that political pressures were kept as far away as possible from Agency decision-making in designating remedial sites.

The next step was the remedial response. The objective of that step was the elimination or substantial reduction of the threat posed by the contaminant or combination of contaminants at the site. These actions were long-term and often very costly, frequently amounting to tens of millions of dollars in charges.
EPA was permitted by statute either to proceed with the cleanup or to enter into agreements with other Federal agencies, states, or private parties to effect the cleanup. Whoever accepted this responsibility was known as the lead agency. In a Fund-lead site (i.e., one where the trust fund had direct financial responsibility for the cleanup effort) the lead agency was either the EPA, the Army Corps of Engineers, or the Bureau of Reclamation.

There were two main phases to the remedial response. First a remedial investigation and feasibility study (RI/FS) took place. The site was studied in depth and possible cleanup methods and technologies were considered. The RI/FS took anywhere from a few months to several years to complete and frequently generated criticism from citizens and local governments that EPA did nothing but study problems without ever remediating dangerous sites. At this stage, a decision was normally made concerning the means that would be employed to remediate the site. Such means included incineration on site, removal to a licensed storage or disposal facility, containment on the site, or use of a growing number of innovative technologies appropriate to the type and extent of the contamination.

The remedial investigation consisted of (1) project scoping in which all relevant data was evaluated, sites visited, computer graphics developed to conceptualize site problems, remediation goals and data needs determined, and
the identification of applicable or relevant and appropriate requirements (ARARs); (2) site characterization where field investigations concerning the physical characteristics of a site were performed, sample analysis was conducted (with great care since future litigation might depend on the results), the extent of the pollution defined, risk assessments performed, further ARARs and data requirements identified; and finally, (3) the performance of treatability studies.

Feasibility studies were attempts to develop possible remedies and perform analyses of the costs and benefits of those remedies. Goals were defined, appropriate technologies were identified and assessed for adequacy, compliance with ARARs was determined, effectiveness, likelihood of success, and cost were also considered.

The proposed remedy was presented to the public, business, and local governments concerned about the site for comment. At this and other stages, community relations specialists were needed to present the case of the government in non-technical language to often very hostile gatherings. The proposed plan was addressed in substantial scientific detail. The public had 30 days to comment. The Agency then considered the comments and the remedy was selected. The resulting Record of Decision (ROD) provided legal notification of the official decision concerning the
remedy and documented all activities conducted by the Agency up to that point.

The next phase of the process involved remedial action (RA). This was the most complex and most costly part of the operation and might take many years and the expenditure of tens of millions of dollars before completion. The objective was a permanent solution to the threats posed by the contaminants. For the most part, sites that required RAs had multi-media contamination (e.g., ground water, surface water, and soil contamination) by many different types of contaminants. If a site covered a large amount of ground, it was broken down into smaller operable units that were then addressed individually.

The RA was divided into two phases, the remedial design (RD) and the construction phase. In many important respects this part of the project resembled a typical construction project. During the remedial design phase, engineers produced technical drawings and specifications in accordance with the ROD, the Agency obtained permits, specialists began a dialogue with the community surrounding the site, and estimators produce cost estimates for the construction. The construction phase involved not only the actual removal of soil or whatever other remedies were required, but also a wide variety of activities concerning project management, contract compliance, environmental regulations, health and safety requirements, inspections, ground water and air

65
monitoring, inspection and maintenance of equipment, and site security precautions.

Finally, when all work on the site was completed, site closeout was performed. Equipment must be decontaminated, site damage caused by cleanup efforts must be corrected, residents returned to their houses, and many other activities. At this time, the site would be formally delisted from the NPL, unless remediated contaminants remained on the site. In that case, a final examination was conducted five years later, at which time the site might be delisted.

The purpose behind this fairly detailed examination of the Superfund process was to describe the complexity, and above all, the highly technical nature of the work involved in hazardous waste remediation. It is even more significant because nowhere in the Environmental Protection Agency was there a pool of technical talent that was capable of managing an undertaking of this scope and magnitude. Beginning with the first call to the hot line, virtually all of the work described in the preceding section was performed not by government employees but by employees of government contractors. The Superfund contract moved to center stage of the Superfund program.
1. Remedial Investigation (RI)
   An assessment of the nature and extent of contamination and the associated health and environmental risks

Feasibility Study (FS)
Development and analysis of the range of cleanup alternatives for the site, according to the established criteria; usually undertaken concurrently with the RI

2. Selection of Remedy
   Selection of the remedial alternative for the site; this step includes:

Proposed Plan
Identifies a preferred remedial alternative for a Superfund site and explains why it is the preferred alternative, and allows for public comment

Record of Decision (ROD)
The official report documenting the background information on the site and describing the chosen remedy and why it was selected

3. Remedial Design (RD)
   Preparation of technical plans and specifications for implementing the chosen remedial alternative

4. Remedial Action (RA)
   Construction or other work necessary to implement the remedial alternative

5. Operation & Maintenance (O&M)
   Activities conducted at a site after a response action occurs to ensure that the cleanup methods are working properly and to ensure site remedy continues to be effective

TABLE 2.1: THE REMEDIAL PROCESS

The Contracts That Support Superfund

The contract support that Superfund required grew somewhat more slowly than the regulatory scheme. The Agency and its supporters in Congress concentrated on the environmental mission first and would worry about environmental management later. This was a pattern that plagued environmental and other Government programs for years and would continue to do so for years to come.

Because of the lack of technical knowledge found within EPA, many types of contractor support would be required. Moreover, in the beginning, both supporters and opponents of Superfund believed that the program would be relatively short-lived. Thus a large body of civil servants dedicated to hazardous waste control would not be needed. Contractors would provide a flexible workforce that could be adjusted to accommodate changes in site conditions. Using contractors would provide expertise in certain advanced technologies that would be unavailable within the Government. Finally, contractors would already have made capital and training expenditures that the government would be required to make if it attempted to do the work itself.

---

20The initial authorization was for five years.

For the most part, the contracts were awarded either on a national or regional basis. In a few instances, some of the smaller regions formed zones for certain classes of contracts and would administer them jointly.

The most important classes of support that would be needed by EPA would be defined, at least initially, on a functional basis. Enforcement support contracts provided the kinds of support lawyers required in their enforcement efforts. This included contracts for paralegal services, services to search for PRPs and successor companies, title search services, and other kinds of litigation support. The removal program, which handled emergency responses, required contractors who would be able to respond to spills and other releases of contaminants within a few hours notification. Contracts for analytical support involved contractor support for testing and sampling services that would be needed throughout the life of a project. Preremedial site assessment contracts would be required as would separate contracts for the transportation and disposal of hazardous wastes found on individual sites. Finally, on some occasions, individual regions would award contracts on a site-specific basis and the activities of those contractors would be limited to the site in question.

The most important contracts and those with the highest potential values were the remedial contracts awarded to support remedial activities. The first generation of remedial contracts, known as the Interim Remedial Contracts (Interim REM), were awarded in 1981. These three contracts were awarded on a zonal basis to Camp, Dresser & McKee, Roy F. Weston, and Black and Veatch. The period of performance was limited to one year and the contract type was cost plus fixed fee (CPFF). In 1982, Two Remedial/Field Investigation Team (REM/FIT) contracts were awarded to NUS Corporation and CH2M Hill for the period 1982 to 1986. These and all subsequent remedial contracts would be awarded on a cost plus award fee (CPAF) basis. These contracts combined preremedial and remedial work, in theory to promote economies of scale and a smooth transition from preremedial to remedial stages of the project. Some degree of inflexibility emerged in these contracts because of the combination of functions within a single contract. This was to be a problem that would occur with increasing frequency as the contracts came to include more and more unrelated functions.

In 1984, three remedial (REM) contracts were awarded to Camp, Dresser & McKee, Ebasco, and CH2M Hill for the period


23We will have a further discussion of contract type later in this chapter and in chapter III, infra.
1985-1990. These contracts were needed because the growing volume of work that the Agency was now performing under Superfund. In particular, the remedial capacities of the REM/FIT contracts were quickly exhausted and had to be replaced with contracts with expanded capacity. In some respects, this utilization rate was according to plan, since EPA initially assigned many remedial design and remedial action (RD/RA) projects to the U.S. Army Corps of Engineers pursuant to an interagency agreement.

Involvement of the Army Corps of Engineers and Bureau of Reclamation

The use of the Army Corps of Engineers by EPA further complicated the Superfund contracting process. Well into the program, the Corps would spend roughly half the Superfund procurement dollars that had been authorized in any given year. This was primarily because Corps contractors (frequently the same contractors retained by EPA) were utilized to perform the complex, intrusive, and expensive remedial action portions of the Superfund process.

The reason the EPA chose to assign such work to the Corps was primarily because the Corps, long the premier construction organization within the Federal government, possessed the expertise and the construction management skills that EPA so palpably lacked. In the course of its
long history of bridge-building, river dredging, dam construction, and infrastructure development—not to mention its obvious role in military construction—officers in the Corps developed the capacity to manage large projects of this type in accordance with Federal contract law and in a relatively cost-effective manner.

Why then did Congress not assign the management of Superfund to the Corps in the first place? Undoubtedly the primary reason is that the Corps was widely distrusted in the environmental community.24 For years before and even well after the advent of the environmental movement, the Corps continued to lobby for and execute large-scale construction projects with little regard for environmental concerns. A second reason is that the managers of the Corps, generally considered to be politically astute, were uncertain they wanted such a mission the future of which was uncertain at best and always likely to be the subject of hostile political attacks.25 Finally, it was likely that the Corps would have a substantial role in hazardous waste remediation apart from Superfund by virtue of the enormous

24Based on discussions with Rick Goodman of the Senate Governmental Affairs Committee, 1990-91.

25Discussions among Corps officials at which the writer was present, 1989-1991.
cleanup tasks of Federal facilities that were finally coming to public attention in the course of the 1980s.26

To a far smaller extent, the Bureau of Reclamation, the agency primarily responsible for water and other construction projects west of the one hundredth meridian, would play a role similar to the Corps. In a few instances, EPA would assign some cleanup projects to the Bureau in Western states.

The Alternative Remedial Contracting Strategy (ARCS)

In 1986, Congress reauthorized and significantly expanded Superfund by injecting several billion dollars into the program.27 All at once the planning that had been undertaken concerning program growth was obsolete. Especially critical was the shortage of personnel capable of providing the kinds of skilled services needed in the Superfund process. There was such a shortage of environmental engineers and other environmental technical personnel by the late 1980s and early 1990s that even contractors had trouble finding adequate staffing.28 For


28Based on discussions with contracting officers who were responsible for the administration of Superfund
the Federal government, locked into relatively low professional salaries and limited career advancement, the situation was even worse.

The only avenue open to EPA was a much expanded reliance on contractor support for Superfund projects. Because of the growing complexity of the contracting effort, some attempt now was made to provide a more comprehensive approach to contract planning through an evolving document called the Long-Term Contracting Strategy (LTCS).

In addition to a vastly expanded capacity, the principal objective of the resulting Alternative Remedial Contracting Strategy (ARCS) contracts, was to keep as much work as possible under the aegis of the EPA. Hitherto, significant delays had occurred when EPA completed work under the REM contracts and transferred RD/RA work to the Corps. Often months were required for the Corps and its contractors to familiarize themselves with the requirements of the project. Virtually all work required by the Superfund process would be performed by ARCS contractors under a large umbrella prime contract in which the statement of work included all types of activities required for site cleanup.

Second, EPA officials openly spoke about the fact that its pool of prime contractors would have to be enormously expanded to meet the demands placed on it. But the size and

contracts.
complexity of the contracts presented substantial obstacles to the realization of that goal. The REM contracts themselves all carried high dollar values, typically between $100,000,000 and $200,000,000 and ARCS contracts might very well carry even higher potential values. Finally, virtually all of them would cover huge geographic regions with many potential cleanup sites that contained many types of unknown contaminants. Only the largest engineering firms could hope to offer the financial resources and the range of professional skills needed to undertake such work.29

A third feature of the ARCS contracts involved transfer of the management of the contracts to the ten regional offices of the Agency.30 This was partly to encourage competition of more regionally-based engineering firms and to break down the size of individual contracts so that more firms might compete. It was also determined that the mix of contracts in each region should contain at least one or two smaller contracts. While this might create an


30The contracts were awarded at headquarters in Washington. Eventually power struggles between regional offices and headquarters would erupt resulting in endless arguments over contracting authority and personnel resources.

31EPA has its offices in the ten standard Federal regions: Region I-Boston; Region II-New York; Region III-Philadelphia, Region IV-Atlanta; Region V-Chicago; Region VI-Dallas; Region VII-Kansas City; Region VIII-Denver; Region IX-San Francisco; and Region X-Seattle.
overcapacity, it would give EPA the option of terminating less successful performers without jeopardizing the mission. Only one contract per contractor was permitted in each region. Finally, it was believed that placing management of the ARCS contracts in regional offices would create greater responsiveness to the needs of program offices theoretically responsible for oversight of the cleanup.

Officials in Regions I through V opted for individual, regionally-managed contracts in their respective regions. Regions VI-VIII formed a zonal arrangement known as ARCS-Central, and Regions IX and X formed the ARC-West zone. Neither of the zonal arrangements worked particularly well as competing priorities in the individual regions, capacity problems, and contractor performance issues took their toll. By the end of the contracts, the zonal arrangements of ARCS-West had all but dissolved.

Fourthly, the Agency attempted to enhance contractor performance through the use of Cost-Plus-Award Fee (CPAF) contracts. While the contractor would be reimbursed for allowable costs, what in effect became their profit was tied to a periodic rating of the quality of their work by regional officials, subject to review by the contracting office in Washington. The higher the rating, the higher the resultant award fee.

The contracts themselves provided for two broad categories of activity. The program management portion of
the contract consisted of those activities that supported the delivery of technical services. The remedial activities portion of the contract concerned those services actually delivered on the site. The program management activities would become the subject of extensive controversy in the early 1990s and will be discussed in chapter IV.

Twenty-three contractors were ultimately awarded 45 ARCS contracts. Notwithstanding efforts of EPA to broaden the base of available contractors, the successful offerors were among the largest engineering and consulting firms in the country. The award criteria contributed significantly to this result as did the statutory requirements imposed by Congress, both of which will be discussed in depth in chapter IV.

At the conclusion of the award cycle in June, 1989, the stage was set for a series of developments that would demonstrate not so much weaknesses in the ARCS contracts but rather weaknesses in the service contracting system as a whole. But this is not simply the story of poor contract management as the media and many in Congress came in the end to believe. Indeed by the standards of the day, it could be argued that the ARCS contracts were relatively well managed.

32The term, "offeror" is derived from the legal requirements of offer and acceptance, a key element of any contract. In the case of government contracts, the contractor, responding to a solicitation of the government, "offers" to perform the contract under terms and conditions contained in his proposal. If the contractor is successful, the government "accepts."
The following story is a tale of structural failure, and to understand that failure better, an analysis of the structure is now required.

**Prime Contractors** | **# of Contracts** | **Region or Zone**
---|---|---
CDM | 4 | I, II, IV, Cent
Ebasco | 3 | I, II, IV
Arthur D. Little | 1 | I
Metcalf & Eddy | 1 | I
NUS | 2 | I, III
TRC | 1 | I
Weston | 6 | I, II, IV, V, Cent, West
ICF Kaiser | 2 | II, West
Malcolm Pirnie | 1 | II
TAMS | 1 | II
Black & Veatch | 3 | III, IV, V
CH2M Hill | 5 | III, IV, V, Cent, West
Ecology & Environment | 3 | III, V, West
Tetra Tech | 1 | III
Bechtel | 2 | IV, West
Donohue | 1 | V
PRC | 1 | V
WW Engineering | 1 | V
Fluor | 1 | Cent
Jacobs Engineering | 1 | Cent
Morrison Knudsen | 1 | Cent
Sverdrup | 1 | Cent
URS | 2 | Cent, West

**TABLE 2.2: NUMBER AND DISTRIBUTION OF ARCS PRIME CONTRACTORS**
CHAPTER 3

CONTRACTING ORGANIZATIONS

The structure of an organization will explain much about how it operates. This is especially true for efforts to understand the government contracting system. The focus of this chapter is mainly on how the government organized itself to contract with the private sector, although some effort will also be made to discuss internal operations of contractors. By and large, only the largest defense contractors maintained large contracting offices. Thus much of the interaction between government and private sector in the world of government contracts occurred between government bodies and intermediary organizations in Washington that represent contractors such as law firms and trade associations.

Within the Government, actual control of the process was decentralized to the Agency level. In 1974 Congress created the Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget (OMB). The intent of the legislation was to give OFPP broad authority over Federal procurement, but no such power ever emerged,
notwithstanding the importance of OMB in the Washington bureaucratic hierarchy.

Despite repeated attempts, Congress never succeeded in pushing OFPP to take an active role in procurement oversight. Shortly after the Clinton administration came into office in 1993, Rep. John Dingell and Senator David Pryor, the two most persistent critics of government service contracting within Congress, complained to OMB Director Panetta about contracting out of Federal services, citing EPA contracts as warranting special attention. According to Dingell and Pryor, in 1993, the total spent on service contracts exceeded $100 Billion and at the Departments of Education, Energy, Health and Human Services, Housing & Urban Development, Labor, as well as at the Environmental Protection Agency, over 80% of procurement dollars were spent in the form of service contracts.1

OFPP responded with a study and little else. Whatever improvements might result would thus depend on the individual players in the procurement process, rather than on centralized direction from OFPP. This chapter attempts to describe the activities of the public and private organizations found in the public procurement process, with particular emphasis placed on the institutions involved in hazardous waste remediation contracts.

---

The Government-EPA Bureaucracy

Because of the complexity of any Federal procurement, there was a need for teams of specialists that performed a wide variety of functions. In general, almost all of the offices within an agency that have organizational relations with contractors can be divided into two broad categories. This traditional division of work was common at EPA. The first of these was the acquisition workforce itself, those employees classified as General Schedule-1102 "contract specialists". The second field, commonly referred to as "program" included a number of different technical specialties, the most common one at EPA was the catch-all classification "environmental protection specialist."

Contract specialists were the business specialists of the Government. In 1992, there were 31,794 in all branches of the Federal Government.3 1102s planned, negotiated, awarded, administered, terminated, and performed "closeout" on all Federal contracts. The Contracting Officer, whose

---

2This excludes many thousands of Federal employees who provide supporting skills such as financial managers, information specialists, voucher processors, procurement clerks, property specialists, inventory managers, etc. The focus in this study is on business-government relations and only those with some direct role in that relationship are included for study.

3General Services Administration, Federal Acquisition Institute, Report on the Federal Acquisition Work Force Fiscal Year 1992, May, 1993, p. 2. Since 1974, the FAI, pursuant to the Federal Procurement Policy Act, has kept data on the procurement workforce in a number of categories, including hires, losses, education, and grade.
signature must appear on all official transactions between the Government and the contractor, is an 1102. Various other job titles existed within the 1102 series such as procurement analysts, who researched legal and policy questions, cost analysts, who priced individual actions and conducted audits, and small business specialists, who found various ways to assist small and disadvantaged businesses to participate to the maximum extent possible in Federal contracting.

The educational characteristics of the 1102 are instructive. From 1980 to 1992, the years of the Reagan military buildup, the workforce grew from 19,428 to 31,794. 17,028 or 54% of these individuals were college graduates, and 55.5% of that number held degrees in business, 2.3% in law, and 3.2% in public administration. Government-wide, the average grade was 11.2.4 Within the Office of Acquisition Management (OAM) at EPA5, 279 persons were employed as 1102s (up from 177 in 1987), the average grade

4The regular 3,000,000-member Federal civilian workforce is classified into 15 grades for purposes of pay and supervisory responsibilities. GS-1 is the lowest and GS-15, the highest. There is an additional layer of "Senior Executive Service" (SES) employees superimposed on top which includes longtime members of the civil service and a limited number of political appointees. In theory, SES officials enjoy fewer job protections than the regular civil service and may be demoted at any time to GS-15, although this rarely happens.

5This is the present name for the contracting office. Throughout much of this period, the appropriate organizational name was the Procurement and Contracts Management Division.
was 12.34, and 69% were college graduates. There was no separate breakdown for 1102's dedicated to Superfund contracting, but the number since the late 1980s has been roughly 100, with approximately 60% of these in regional offices.6

1102s were the Federal employees who had primary responsibility for spending in—recent years—a quarter of a trillion dollars annually. Concern has often been expressed about the adequacy of that workforce to manage such a vast expenditure of public money. In July, 1992, the Merit Systems Protection Board published a report to the White House and Congress that addressed this concern.7

The report concluded that while there was little evidence to suggest that the quality of the Federal procurement workforce had declined, there was also none to suggest that it had increased to match the growing demands that have been placed on procurement professionals. According to the report, the workforce was struggling to keep up with the growth in Federal procurement policy and procedures and a growth in the complexity of the goods and services that the government procured.8


8Ibid., p. iii.
Superfund contracts presented precisely that type of complexity which the 1102 workforce was ill equipped to handle. As we have seen, the contracts attempted to include under each contract an enormous mix of services and construction which even if separated out into individual contracts would have presented substantial difficulties. In addition, EPA was the first Agency to deal on any scale with the problems of hazardous waste remediation. Even familiar procurement problems presented novel aspects that demanded resolution beyond the level of the Contracting Officer. Finally, far too many aspects of Superfund contracting became politically-charged, the subject of intense Congressional scrutiny, and unwanted media attention. This last problems proved especially beyond the training and competence of the Contracting Officers and their superiors.

While the contracting workforce at EPA had many competent employees, they were, in fact, not up to the extraordinary demands of the job. What would have been adequate, even superior performance in the traditional atmosphere of repetitive contracting procedures, proved to be disappointing in the far more complicated world of Superfund. By late 1992, the first generation of top managers, who had been responsible for much of the innovative contracting practices of Superfund, were no longer at OAM, and by wide-spread agreement, their
replacements inspired little confidence.9 While slightly higher than the federal average, the educational backgrounds of the acquisition workforce were sadly inadequate for the job. Few had any higher education related to business, law, or public administration, and the in-house training (provided by vendors) was scarce and of extremely low quality.

The Merit Systems Protection Board Study pointed to a number of specific government-wide deficiencies in skills and education. According to self evaluations and their supervisors' evaluations, at least one-third of the middle and senior (grade 9 and above) acquisition workforce needed additional training in the critical subject matter areas of market research, reviewing statements of work, identifying price-related factors, review of business management factors, review of technical evaluations, evaluation of offers, conduct of cost analysis, development of negotiation strategy, conducting negotiations, response to General Accounting Office protests, identification of contractual remedies, and researching claims.10 Over half of these employees needed additional training in such basic work skills as directing work activities, planning and

9The Director of OAM, for example, advertised widely her "doctorate," which on closer scrutiny was found to be in "business philosophy" from "California Coast University."

organizing, human relations, analytical ability, oral communication skills, the ability to innovate, writing skills, and conducting negotiations.11

The same report also recorded that the formal college training of the total acquisition workforce in business-related courses was even more deficient. Table 3.1 suggests the inadequacy of this training. According to the study, only about 40% of the GS-1102 workforce would be eligible for appointment if the Government were to impose a requirement of hours of related college-level coursework.

<table>
<thead>
<tr>
<th>Course Title</th>
<th>Undergraduate</th>
<th>Graduate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Marketing</td>
<td>34</td>
<td>4</td>
</tr>
<tr>
<td>Accounting</td>
<td>49</td>
<td>5</td>
</tr>
<tr>
<td>Business Management</td>
<td>43</td>
<td>7</td>
</tr>
<tr>
<td>Business Statistics</td>
<td>30</td>
<td>4</td>
</tr>
<tr>
<td>Business Economics</td>
<td>37</td>
<td>5</td>
</tr>
<tr>
<td>Other Business</td>
<td>38</td>
<td>5</td>
</tr>
<tr>
<td>Banking &amp; Finance</td>
<td>24</td>
<td>3</td>
</tr>
<tr>
<td>Operations Research</td>
<td>7</td>
<td>1</td>
</tr>
<tr>
<td>Mathematics</td>
<td>45</td>
<td>3</td>
</tr>
<tr>
<td>Computer Science</td>
<td>26</td>
<td>2</td>
</tr>
<tr>
<td>Economics</td>
<td>44</td>
<td>5</td>
</tr>
<tr>
<td>Political Science</td>
<td>28</td>
<td>2</td>
</tr>
<tr>
<td>Principles of Contracting</td>
<td>28</td>
<td>2</td>
</tr>
<tr>
<td>Contract Law</td>
<td>41</td>
<td>3</td>
</tr>
</tbody>
</table>

TABLE 3.1. COLLEGE COURSES COMPLETED BY GS-1102 EMPLOYEES

12Ibid., p. 18. The last two courses are required in the 1102 series and probably reflect completion of college-level government-sponsored training.
Program employees presented a similar picture. If business skills were the currency for competence in the acquisition workforce, technical skills and education were the core requirements for project officers. The organizational unit responsible for management of the technical affairs of the remedial program was the Hazardous Site Control Division (HSCD), which in turn was an organizational unit of the Office of Emergency and Remedial Response (OERR), which in turn was part of the Office of Solid Waste and Emergency Response (OSWER).

The key individuals on the remedial program side of the house were the project officer (PO) and the regional project manager (RPM). They were responsible for the entirety of the technical mission of the Superfund process that was described in chapter 2. Typically, the PO was located in the regional offices, was a grade 12 or 13 in the Federal Civil Service, and had a varied educational background. The RPM was frequently a recent college graduate, had a GS grade of 11 or 12, and worked on-site. If the job series of the PO and RPM was environmental specialist, they would have at least 24 hours of relevant college-level courses in the sciences. Before a conclusion can be drawn concerning the adequacy of this training, there must also be a consideration of the requirements of the job.

The project officer had to oversee the work of the RPMs and deal with the contracting officers in the regional
Both technical and business training was essential. It was the responsibility of the PO to coordinate the technical, enforcement, financial, and business logistics of the hazardous waste site. He was typically responsible for many different sites in his respective region.

The RPM oversaw the contractors who, nominally at least, supported him. In most instances—because it was a requirement of the contract—contractor personnel had far more education, experience, knowledge of technical processes, and political skills than the PO who oversaw and evaluated his work. Limited to the technical problems of the site, forced to rely on vastly more experienced contractor personnel, and out of touch with the larger political and business dimensions of the Superfund process, the RPM and PO were frequently in conflict with the Superfund contractor workforce that theoretically support him.

There was also a second fault line in the Superfund service delivery organization. After the Superfund process was decentralized following the 1986 reauthorization, there was constant tension between headquarters in Washington and the ten regional offices. The regional organizations mirrored the organizational divisions of headquarters, in particular the conflict between contracting and program offices. Both generally united on the regional level to
fight headquarters for greater autonomy and to demand more resources.

To be sure, there was nothing unusual in this pattern. Centralization and decentralization and recentralization have been a hallmark of procurement organizations in the Department of Defense, Department of Energy, and elsewhere for years. Grant administration offices in the Federal Government have experienced similar conflicts as well. The intensity of these particular conflicts, however, seemed at times to spill over into a question of the integrity of the procurement function itself.

Contracting and program personnel of the Superfund program did, however, share an important characteristic. Both were relatively inexperienced.
<table>
<thead>
<tr>
<th>Job Title</th>
<th>Total</th>
<th>Weighted Average Experience in Years</th>
</tr>
</thead>
<tbody>
<tr>
<td>ARCS Contracting Officers</td>
<td>23</td>
<td>2.85</td>
</tr>
<tr>
<td>ARCS Contract Specialists</td>
<td>9</td>
<td>2.44</td>
</tr>
<tr>
<td>ARCS Project Officers</td>
<td>23</td>
<td>3.83</td>
</tr>
<tr>
<td>ARCS Dep. Project Officers</td>
<td>6</td>
<td>2.08</td>
</tr>
<tr>
<td>Reg. Project Managers</td>
<td>511</td>
<td>4.44</td>
</tr>
</tbody>
</table>

TABLE 3.2. EXPERIENCE LEVEL OF REGIONAL ARCS WORKFORCE, 1991

Even GAO joined in the debate in October, 1991, by finding in one of its reports on EPA contracting management that EPA had delegated management responsibility to the regions without sufficient oversight and accountability. They found that the regions had not received enough advice or training from headquarters on a variety of issues. Also the regions had not followed headquarters policy on issues such as invoice review, indemnification, and conflict-of-interest controls, even when it was officially promulgated.

While GAO agreed that decentralization could be effective, it stated the belief that such policies must be accompanied by guidance from Washington, enough oversight to ensure that national priorities are observed, and accountability for regional performance.14

In late 1993 and early 1994, the Agency held a series of conferences on the issues surrounding centralization and decentralization of the contracting function. OAM produced a draft report which questioned the wisdom of decentralization of Superfund contracts. The report considered four possibilities: (1) full decentralization to regional offices of all Superfund contracts; (2) a freeze on decentralization as it existed at that moment; (3) line authority by OAM over all contracting personnel in regional offices instead of the existing practice in which they reported to Regional Administrators; and (4) recentralization of all Superfund contracting personnel to Washington.

The draft report recommended recentralization because of greater flexibility in the management of personnel resources, savings of resources, better contract management, and a better definition of responsibility through the elimination of diffuse lines of decision making.15


15The writer was author of the draft report.
Although the report was eventually watered down through bureaucratic infighting to a reaffirmation of the status quo, its basic tenets raised questions whether priorities unrelated to actual service delivery would always undermine the cost-effectiveness and efficiency of public contracting.

The primary factor driving contracting decentralization in the late 1980s was the decision by OSWER to decentralize its program officials. That decision made a good deal of sense in that it allowed greater access to sites by program officials and put them in better touch with the political and community responses which their activities engendered. Most other media programs had similarly decentralized activities as well. But OSWER insisted that Superfund contracting support personnel be decentralized as well, unlike the practice anywhere else in the Agency.

Such a move was tantamount to giving program personnel authority over contracting officers and violating basic assumptions about checks and balances within the contracting system. OAM would not have authority over their activities and the small size of each of these offices would guarantee both their isolation and their exposure to pressures by program officials. Because the offices were relatively small, they would have no direct access to contracts counsel, cost advisory personnel, or other kinds of specialized support. Not surprisingly, vastly different productivity rates surfaced among regional contracting
offices and large gaps in quality of work was similarly apparent.

To be sure, a form of contract decentralization had already taken place within the emergency program, but this involved simple, low risk contracts with few contracting officers. Moreover, a separate statutory grant of authority had authorized a limited contracting authority in the on-scene coordinators, which reflected a clear Congressional intent that speedy responses to spills and other emergencies were more important that cost or the finer points of procurement law.

The ARCS contracts were another matter, however. These were large, complex contracts for billions of dollars worth of scientific, technical, and construction services. Moreover, from the beginning, the original premises upon which the contracts rested was undermined by changing circumstances. The most complex work found at many sites, including construction, was transferred to the Corps of Engineers. Under threat of increased enforcement efforts, more and more polluters began private party cleanups of the contamination they had caused. This led to a rapid escalation of the relatively fixed costs of the program management portions of the contracts relative to cleanup costs.16 The eventual shrinkage of Superfund budgets that

16Program management costs are the costs which the contractor incurs regardless of the actual amount of work ordered by the Government. This subject is discussed in
began by early 1992 further reinforced this escalation since reductions had little impact on the fixed costs of either the contractor or the government bureaucracy.

The flexibility needed to manage the contracts effectively was further undermined. As the result of study sponsored by the Administrator's Office, it became a much-heralded Agency policy in 1989 to rely less on contractors for policy and regulatory development. This was, of course, a policy without actual consequences since reliance on contractors continued, of necessity, unabated. The policy did have the effect of throwing into gray legal areas some of the work that both EPA and its contractors had assumed would be performed under the ARCS contracts. Finally, with little power to control regional contracting, assignment of work to the Corps of Engineers, or assumption of cleanup work by private parties through enforcement efforts, OAM was powerless to effect any consistent policy with respect to these changes.

The National Performance Review, which had been initiated by the Clinton administration as soon as it took office in January, 1993, had advocated decentralization of governmental functions where possible. But it had also

17The initial report of this review, which appeared with much fanfare, was published as Al Gore, Creating a Government That Works Better and Costs Less: The Report of the National Performance Review (New York: Plume, 1993).
emphasized downsizing the number of employees, greater accountability, streamlining, and efficiency, goals that seemed to argue against decentralization.

The draft report recommended recentralization of the Superfund function. It cast doubts on what benefits were obtained from co-location of contracting and program personnel and on whether such arrangements conferred too much authority on the project officer. It argued that regional contracting allowed too little flexibility to adjust to changing workloads through transfer of site assignments to the Corps or the states or through further reductions in Congressional appropriations. It argued that centralization would allow for greater consistency with respect to the implementation of policies such as indemnification that had come to occupy a significant portion of the contracting workforce by 1994. Finally, and perhaps most importantly, centralization would allow for the transfer or work among contracting officers, which could not presently be accomplished if it meant crossing regional lines.

Although consuming much time and effort, such intra-Agency arguments rarely result in change. This particular exercise was no exception to the rule. Nonetheless, it highlighted continuing tensions within EPA over the organizational form best needed to manage Superfund contracts.
The Government—EPA Political Appointees

EPA was an Agency ruled in all aspects of its management by consensus. Indeed this preference for consensus provided fertile ground for the assertion of contractor influence. Decisions—whenever they might occur—were very much products of "group think." This was especially true when it came to the "decisions" of political appointees.

The Executive Schedule appointments and the non-civil service Senior Executive Service appointments require some consideration at this point. Because of the technical nature of much of the work of EPA, career civil service personnel are somewhat more likely to find their way into the top administrative ranks of the Agency than in many other parts of the Federal bureaucracy. Nonetheless, throughout the period of this study, the top positions in the Office of Solid Waste and Emergency Response and the Office of Administration and Resources Management were a mixture of political appointees and civil servants.

The seven individuals who have held the top post of EPA Administrator have, however, all come from outside the Agency. Only one was a non-lawyer (Lee Thomas), two have held elective office in state legislatures (William Ruckelshaus and Anne Gorsuch Burford), two have held the top environmental affairs post in state governments (Costle and Browner), and one had not held any government position
either elective or appointive (William Reilly). Most ended up disappointing both friends and opponents of the Agency. Service as EPA Administrator has not, to date, been stepping stone to higher office.

A 1990s appointment, Carol Browner, provided an instructive example. Browner, a lawyer and former member of then-Senator Albert Gore's staff, came to EPA in January, 1993, at the age of 37. Her administrative experience consisted exclusively of a two-year stint as head of the Florida Department of Environmental Regulation. The Florida Bureau of Waste Cleanup and the Emergency Response Division, the organizations analogous to the Federal Office of Emergency and Emergency Response, together had 73 employees in 1990. Like all other EPA Administrators, she did not have a scientific background, but unlike many, she also lacked a political base and the political skills to do little more than survive.

Despite her intelligence, she was considered by Congress and the bureaucracy to be ineffective. In an effort to appease the unappeasable John Dingell, Chairman of the House committee with oversight jurisdiction over EPA,


she took the occasion of her initial appearance before the House Commerce and Energy Committee to attack contract management at EPA. "I am appalled by what I have learned about the EPA's total lack of management, accountability, and discipline," she said and decried "poor management practices, serious violations of rules, and intolerable waste of taxpayers' money."20

Dingell was not impressed, and whether she was actually "appalled," the bureaucracy clearly was. Even more serious to Agency insiders, she had no clout within the administration. The New York Times placed her in the nether fringes of access to power in the Clinton administration, on a par with the Secretary of Veterans Affairs. She managed somewhat better relations with environmental organizations, but in the end they, too, were disappointed with her inability to carry their agenda either in Congress or in the White House. Only the overreaching in environmental affairs on the part of the Republican leadership after the 1994 elections forced the bureaucracy and proponents of environmental causes to rally behind Browner and other political appointments in the EPA. Lacking any real knowledge of procurement or other management issues, she was forced to rely on the same bureaucrats who "appalled" her in 1993.

Certainly, it would not be entirely fair to blame twenty years of management failure on Administrator Browner. Equally clearly, the ability to manage major programs lies beyond the ability of all but the most skilled administrators. Given such problems, officials were less likely than ever to expend any serious effort to master either the procurement problems or the scientific issues facing their agencies. The most they could hope for is management of the political relations of their Agency. Whatever possibility of change there might be would come from the actions of other players.

The Government--Department of Energy and Department of Defense

At this point it is necessary to discuss a particular class of hazardous waste sites that included the worst and most dangerous sites in America. The federal facilities--hazardous waste sites of the Department of Energy (DoE) and Department of Defense (DoD)--included a number of sites that were listed on the NPL. DoE sites such as Hanford in eastern Washington, Fernald near Cincinnati, Rocky Flats near Denver, Savannah River near Aiken, South Carolina, and several others presented the Government with the most serious and most costly problems in the entire catalog of pollution disasters. DoD had a much larger number of
smaller sites scattered around the country. It is unlikely that DoE sites would ever find a useful life even after remediation. The Government hoped to return both Superfund sites and DoD sites to productive use. Indeed, decommissioned military bases in many parts of the country, California in particular, occupied some of the most valuable real estate in America.

These sites constituted the detritus of the cold war. DoE, continuing a mission it inherited from its predecessor, the Atomic Energy Commission, was the civilian agency given the mission of manufacturing nuclear weapons and processing nuclear materials. DoD maintained a large number of military bases in the United States where it manufactured, tested, loaded, and packaged weapons, maintained and repaired aircraft and vehicles, and plated metal. Although DoE waste was concentrated in relatively few sites, it was mainly radioactive and mixed hazardous waste and therefore presented extraordinary dangers to community residents and contractors engaged to remediate it. Except for unexploded ordinance, DoD sites presented less immediate threats in the form of oil, gasoline, degreasing solvents, obsolete spare parts, heavy metals, pesticides, cleaning agents, and other items that had been buried in the soil.

21The Department of the Interior has two small sites on the NPL, which I shall omit from this discussion. Interior, however, may well prove a major player in future hazardous waste remediation efforts because of the large number of abandoned mining sites that are situated on Federal lands.
There were many parallels between the contracting work of DoE, DoD, and EPA. Each relied on the same pool of large engineering firms to perform the work, although DoD with its far greater resources, had greater scientific talent in-house to manage the effort. An interagency task force had in fact been formed to deal with some of the problems common to all government agencies faced with hazardous waste remediation.22

The differences are significant. In terms of dollars available for this effort, DoD and DoE had far greater resources than did EPA. Environmental remediation programs at DoE and DoD were funded by their own appropriations independent of EPA. In Fiscal Year 1992, each Agency had roughly $5.5 Billion annually compared to the $1 Billion available to Superfund. This would threaten to put EPA at a competitive disadvantage in its competition for the still relatively scarce pool of environmental engineering talent.

Even more serious for the EPA contracting mission was the oversight role which Congress had assigned to EPA in Section 120 of CERCLA.23 The Office of Federal Facilities Enforcement (OFFE) in EPA was responsible for assisting EPA regional offices to enter into agreements with DoD and DoE concerning the cleanup processes which they employ. Like

22The Interagency Contracting Hazardous Waste Coordinating Council.

2342 USC 9620 et seq.
every other major arm of EPA, OFFE relied on contractor support. To a certain extent, this support was coming from EPA remedial contractors, some of whom were also engaged in cleanup work for the Federal Agencies they were now supervising.24 Even though the Federal Facilities Enforcement contracting requirements were relatively small, inclusion of this requirement in the statement of work would be sufficient to raise serious legal problems and jeopardize the successor generation of remedial contracts.

The simple fact was that regional contracting offices could not perform their responsibilities for Federal Facilities oversight without its contractors. And many of these contractors were engaged in work cleaning up Federal sites. Even with respect to the liability faced by DoD, DoE, and other Federal Agencies, contractors had a major role in deciding remedy selection, which meant deciding how much Federal money was spent and according to which priorities. The problems inherent in a government by contract would intrude into even the relations among Governmental entities.

The Government--Congress

Congress had traditionally provided the only sustained criticism of the service contracting practices of EPA, or

24 Discussed in chapter IV.
for that matter those of other federal agencies. Like all agencies, EPA had long placed mission over management and the means by which it attempted to fulfill its obligations were rarely questioned. Only Congress and, to a lesser extent, the media were left to question the wisdom of overreliance on the private sector for the performance of public responsibilities.

The attitudes of Congress on this subject were not monolithic. To the very small extent one can generalize, Republican legislators, on the whole, tended to favor more extensive use of contractor support and Democrats pursued policies in the other direction. But it would be a gross distortion to say that the subject engendered much division along party lines. Some contractor firms were widely perceived to be run by Democrats and a somewhat larger number were likewise understood to be Republican firms.25

The more meaningful divisions in the Congress to the contracting out of Government services appeared to be along the lines of how much effort individual subcommittee chairmen wished to invest in this subject, the quality of their staffs, and the intellectual questions they brought to

25These assertions are based on discussions with Congressional staff members of both parties. It remains to be seen how the Republican majorities in Congress following the 1994 elections will handle this issue. As of this writing, no significant changes in contracting have emerged from the Republican leadership in either house. Given the reception larger issues on the agenda have received, it is not likely that the leadership would be likely to address contracting reform any time soon.

104
the exercise. A series of hearings run by three different subcommittee chairmen will illustrate the point.

Democratic Representative Mike Synar of Oklahoma, before his defeat in the 1994 primaries and his subsequent death the following year, had long been a liberal champion and advocate of good government. On April 9, 1992, he chaired a hearing of the Subcommittee on Environment, Energy, and Natural Resources of the House Government Operations Committee. The principal topic of the hearing was an examination of contractors billing EPA for certain kinds of expenses "such as gold watches, gold tournaments, floral arrangements, and lavish Christmas parties in the name of contractor morale and welfare," by three ARCS contractors, Bechtel, ICF Kaiser, and Roy Weston. The major problem with the hearing was the fact that the items in question, were allowable under government cost accounting standards and therefore perfectly legal.

26He had, for example, been a sharp critic of DoE contractor indemnification policies which we shall discuss in the next chapter and helped uncover mismanagement in the contracting practices of EPA laboratories in a hearing on June 25, 1993. See also "U.S. Picks Up Legal Costs for Nuclear Firms," Los Angeles Times, 30 March 1992, p. A1.


28There was also a somewhat partisan taint when one of the Subcommittee staff investigators attempted to pursue Bechtel, an engineering firm with substantial Republican ties, with overzealous interest.
One might well question whether such expenditures by contractors were wise given the extreme public dissatisfaction with the costs and quality of government services—particularly in the Superfund program. Nonetheless, the courts had repeatedly upheld such indirect charges by contractors for spending in the areas of employee morale and welfare. Such expenditures were commonplace in private sector work, and Federal regulations treated them, with some exceptions, as allowable expenses. The resulting hearing consisted of the recitation of a long series of embarrassing expenditures by EPA contractors. A equally long series of Government bureaucrats, including the Director of the Office of Federal Procurement Policy, which had responsibility for drafting and implementing regulations concerning the allowability of indirect costs, promised to examine such reimbursements. In the end, little was promised and even less accomplished.29

Other Subcommittees fared better. In many important respects, the most powerful man on Capitol Hill since the early 1980s was neither the Senate Majority Leader nor the Speaker of the House. Without much thought, many cognoscenti of either party would have conferred that title on John Dingell of Michigan, chairman of the House Committee on Government Operations, Subcommittee on Environment, Energy, and Natural Resources, Environmental Protection Agency's Superfund ARCS Contracting Process and Contractor Performance Issues. 102d Cong., 2d sess., 1992.

on Energy and Commerce and chairman of its Subcommittee on investigations.30

The committee had jurisdiction over a vast stretch of the American economy. Interstate and foreign commerce, conservation, the energy industry, DoE, the Federal Energy Regulatory Commission, inland waterways, railroads, communications, securities and exchanges, consumer affairs, travel and tourism, insurance, food and drugs, public health and health care, biomedical research, and most aspects of environmental protection all fell within its purview. Since the committee had always construed its jurisdiction quite broadly, most aspects of Federal procurement fell under its jurisdiction as well, concurrent with other committees.31

Although the committee had been in existence in one form or another since 1795, its prominence dated to the New Deal. Sam Rayburn and other Democrats of his generation saw the committee as an effective legislative drafting and enforcement tool in an often fractious House that was needed to create and oversee the expanded regulatory powers of the state. Close to half of all bills reported out by the House


31It was particularly offensive to the Armed Services Committee when Dingell went after defense contractors in the 1980s, citing the jurisdiction of his committee to oversee publicly traded companies. Ibid.
of Representatives during Dingell’s chairmanship had their origin in Energy and Commerce.

Critics charged that the committee became a graveyard of important legislation as well, particularly in areas such as telecommunications, energy, clean air, and medical costs. Much of that criticism must be attributed to the diversity of the committee membership, which House leadership in both parties limited to only those members whom they wished to reward and whose loyalty could be counted upon. However, it was indisputable that Dingell exerted considerable power to protect the automobile industry from antipollution, auto safety, and fuel economy legislation.

With respect to environmental remediation contracts, it was Dingell’s chairmanship of the Investigations subcommittee of the full committee that was of particular importance. In this capacity Dingell was considerably less restrained by the full membership of Energy and Commerce. The subcommittee during Dingell’s tenure had brought down the perpetrators of many abuses in government and business, including Michael Deaver, Reagan Presidential Adviser; Hyman Rickover, director of nuclear submarine programs; Anne Gorsuch, EPA Administrator; David Baltimore, Nobel prize winner and president of Rockefeller University; Robert

32Ibid.

Gallo, Director of Government AIDS research; and Donald Kennedy, the president of Stanford University; to name only a few.

Dingell's assault on EPA contracting followed a pattern that had become common to most criticism of service contracting or for that matter government contracting of any kind. The criticism focused on lack of controls on spending, inadequate supervision of contractors, overcharging by contractors, conflicts of interest, poor contract performance, any many other subjects depressingly familiar to anyone who has followed government contracting issues. Little new policy ground was broken here, but Dingell's objective was not to remake government, but rather to make the government work better.

Dingell's critics regularly complained of abusive treatment, and there was indeed nothing gentle about his technique. Dingell was never reluctant to ridicule waste, inefficiency, and lack of intelligence in the procurement process, and the media were never reluctant to pick up on

the most outrageous findings of his committee. He was particularly outspoken in his criticism of internal Government watchdogs as the EPA Inspector General discovered. Almost singlehandedly he prevented EPA from being raised to a cabinet-level Agency because of poor contract management, thus thwarting the ambitions of the legions of Assistant Administrators who would not become Assistant Secretaries. But no one would ever accused Dingell of using his position for personal gain. The louder the complaints, the happier his admirers.

Dingell, however, carried far greater weight than most committee chairmen who fished in these waters. This was partly attributable to the importance of his full committee, to be sure, but it had far more to do with the intelligence, aggressiveness, and thoroughness of the staff members he employed and with the tenacity of Dingell himself. Few committee staff members were more hated or more respected or more effective.

The Senate figure who rivaled Dingell in terms of authority over Government service contracting was Senator David Pryor of Arkansas, Chairman of the Subcommittee on Federal Services, Post Office, and Civil Service of the Senate Governmental Affairs Committee. Before coming to the Senate, Pryor had been a Congressman who ferreted out abuses in the nursing home industry and a Governor of Arkansas
whose two terms had been sandwiched between those of Dale Bumpers and Bill Clinton.35

Shortly after his arrival in the Senate in 1979, Pryor and his wife shared a cab with two consultants who were on their way to the Department of Health, Education & Welfare. The consultants were trying to decide whether to charge $25,000 or $50,000 for their services when one of them stated that, "[w]e can get $50,000 out of them just as easily as $25,000."36 Many government consultants have regretted their colleagues' choice of taxi companions ever since.

The full Governmental Affairs Committee had broad jurisdiction over the procurement process as well as oversight authority over OMB, OFPP, and the General Services Administration, all of which had rule-making authority for government contracting. The charter of Pryor's subcommittee limited its oversight to service contracting, but this seeming limitation provided just the focus he needed to formulate some of the most important questions that would arise in the arena of service contracts. Moreover, it allowed him to recruit the kind of subcommittee staff he


needed to frame the relevant issues in the context of larger questions of government management.

Pryor's involvement with Superfund contracts came to be focused on inherently governmental functions and organizational conflicts of interest, both of which will be explored in greater depth in the next chapter. Both concerns, however, derived from Pryor's core belief that the ideas of a "Shadow Government" discussed by Guttman and Willner in the mid-1970s presented a serious threat to the accountability of the operations of the Federal Government.37

Indeed, the accountability issue came to permeate most of Pryor's concerns and with good reason. Pryor's office documented all-too-common instances of contractors' preparation of testimony and other communications between the executive branch and Congress, contractors' evaluation of the work of other contractors, contractors' drafting regulations, and contractors' preparation budgets, to name only a few of the activities that compromised the integrity of governmental decision making. His criticism of the extensive use of contractors all seemed to little avail as OMB continued throughout the Reagan years to press for reductions in Federal employment ceilings.

When Democrats returned to the White House in 1993 in the person of a sometime-Pryor protege, Bill Clinton, the

37Ibid.
reduction in employment ceilings only accelerated. The "Hollow Government" idea of Mark Goldstein's important book was rapidly becoming a reality and the immediate consequences of this were becoming increasingly apparent.

Under Pryor's prodding, EPA instituted a computerized system in 1990 to track potential organizational conflicts of interest among Superfund contractors, but years after its implementation, it still was not operational because resources could not be found to manage it and because its design was flawed. To fend off Pryor's unwelcome attentions, EPA promulgated a long list of prohibited services that they declared to be "inherently governmental" and for which the Agency could not contract. But again, the prohibitions and definitions proved to be sufficiently porous that almost any service that a program officer might wish to purchase could be obtained without much difficulty.

The major threads of Pryor's concerns were observable at a hearing on November 6, 1989, in which the use of consultants by EPA and DoE were examined by the

38Most of these reductions were in the Department of Defense where post-cold war budget reductions had been in the planning process well before Clinton took office. See Bob Woodward, The Agenda: Inside the Clinton White House, (New York: Simon & Schuster, 1994), for an interesting account of the budget struggles in the first eighteen months of the Clinton Presidency.

39Based on the personal observation of the writer.

40This list became the basis for OMB Circular A-120 which attempted to prohibit such practices government-wide.
subcommittee. Pryor's questions were: who is running the Government, and has the use of consultants and contractors been disclosed? Does management know who is in their workforce and have they taken steps to ensure that policy is not made by contractors? What is the cost of these practices? Does a capable Federal workforce exist or have we become overreliant on contractors?41

The Director of EPA contracting did his best to deny any improper use of contractors. At the same time, he did admit that he would not be surprised if most or even all EPA Superfund contractors also worked for the private sector clients they regulated as advisory and assistance contractors. He did point out that contract provisions required contractors to disclose situations in which organizational conflicts might arise.42

Follow-up questions to the Agency focused almost exclusively on the accountability issue.43 In most instances the replies indicated that the most important contractor information was considered business confidential under the Freedom of Information Act, the Trade Secrets Act, the


[42]Ibid.


114
and implementing Agency regulations. Again, these issues will be explored in the next chapter, but in general, any request for information that would help the public make up its own mind about the possibility of a conflict of interest would probably prove unobtainable.

Despite their different approaches, Dingell's and Pryor's criticisms of Superfund shared a common view of government, born in the Progressive era and firmly fastened in the 1930s and 1940s. Government should be incorruptible, open, accountable. Dingell, however, tended to view service contracts in the context of his long experience with the military-industrial complex with an emphasis on ferreting out waste and corruption. Pryor concentrated his efforts on trying to understand what the increasing reliance on service contractors meant in a larger context of evolving public management.

At least one other body in Congress played a significant role in government service contracting. The General Accounting Office (GAO), headed by the Comptroller General and a part of the legislative branch, was primarily responsible for the investigation of issues concerning the receipt and disbursement of public funds. It had broad powers in the procurement process, including the evaluation of programs and the issuance of reports, the hearing of protests by unsuccessful offerors after the award of public contracts and with the power to overturn awards of
contracting officers, and the conduct of audits and investigations of contractors.

Largely at the instigation of Pryor and Dingell (and other members of Congress) the GAO conducted a large number of studies of the Superfund contracting program, particularly after Congress substantially increased the cleanup budget in the 1986 amendments. The frequency and increasing harshness of their tone came to play an important part in drawing public attention to the shortcomings of Superfund contracting.44

The Hazardous Waste Industry and Trade Association

Although acutely interested, potential Superfund contractors had no direct role in internal governmental struggles to control the contracting process. They did loom rather larger in the legal and policy issues surrounding Superfund contracts (as discussed in the next chapter.)

The reasons for this are relatively simple, they are profoundly interested in costs and profits and only secondarily on politics.45 They are also wary of open

44See the discussion in chapter 4.

45A few universities, Battelle Memorial Institute, and one or two other non-profit organizations figure in Superfund contracting, but for the most part, Superfund contractors were for-profit entities. Even though profits are not involved for these organizations, the bottom line certainly is.
involvement in political struggles. In the particular case of Superfund, contractors sought to avoid the appearance of any decision-making role because no one wanted to be saddled with the responsibility of deciding how to spend billions of dollars on site remediation when the science involved was less they certain, when liability for cleanup costs was extremely contentious, and when the possibility of failure and subsequent contractor liability was present.

To a certain extent, that is the way the system should operate, but it requires active management by government personnel. While there is always the possibility of large-scale fraud and waste in any program of this size, most contractors would not ordinarily enter into a contract with felonious motives.

But it was not the way the system came to work in the case of Superfund. Even though contractors were unwilling to take responsibility for direction of the program, in practice, many did. Contractors were expected to produce results, but before this could be done, they had to wait for the key decisions to be made by Government personnel. Frequently, the decisions never come.

The contractor then, was left without clear direction, and responded by generating marginally useful studies which contributed little to the understanding of a site, by utilizing technologies which were less than innovative, and by approaching assignments—particularly those involving
intrusive work or waste incineration—with one eye on the possibility of environmental liability litigation.

For all these problems, however, there was rarely any shortage of competitors for Superfund remedial contracts. Even large defense firms seeking new kinds of work for their unemployed and underemployed legions of aerospace engineers eyed the environmental contracts with increasing interest.

The likelihood of making vast sums of money on the initial contracts was not the primary motivation. Most contractors entered into the competition with few illusions about the difficulties inherent in managing a program of this complexity, political sensitivity, and scientific uncertainty. The motives of many were the establishment of a track record in what was seen throughout this period as a rapid growth industry for government agencies, for private industries who were responsible for their own cleanups, and, perhaps most temptingly, for foreign companies and governments who faced even more difficult environmental cleanup problems than those which existed in the United States.46

As table 3.3 indicates, however, significant sums could nonetheless be made in the Superfund program.

46Discussions on the writer with officials of CH2M Hill, 1991.
<table>
<thead>
<tr>
<th>Contractor</th>
<th>Amounts in $</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bechtel</td>
<td>6,615,697</td>
</tr>
<tr>
<td>Black &amp; Veatch</td>
<td>30,657,150</td>
</tr>
<tr>
<td>CDM</td>
<td>21,113,895</td>
</tr>
<tr>
<td>CH2M Hill</td>
<td>31,208,552</td>
</tr>
<tr>
<td>Donohoe</td>
<td>7,389,720</td>
</tr>
<tr>
<td>Ebasco</td>
<td>20,890,351</td>
</tr>
<tr>
<td>E&amp;E</td>
<td>12,392,262</td>
</tr>
<tr>
<td>Fluor</td>
<td>4,072,171</td>
</tr>
<tr>
<td>ICF Kaiser</td>
<td>6,228,941</td>
</tr>
<tr>
<td>Jacobs</td>
<td>7,378,356</td>
</tr>
<tr>
<td>Arthur D. Little</td>
<td>3,272,942</td>
</tr>
<tr>
<td>Malcolm Pirnie</td>
<td>7,286,841</td>
</tr>
<tr>
<td>Metcalf &amp; Eddy</td>
<td>5,614,589</td>
</tr>
<tr>
<td>Morrison Knudsen</td>
<td>3,402,847</td>
</tr>
<tr>
<td>NUS Halliburton</td>
<td>20,857,538</td>
</tr>
<tr>
<td>PRC</td>
<td>7,720,778</td>
</tr>
<tr>
<td>Sverdrup</td>
<td>3,028,728</td>
</tr>
<tr>
<td>TAMS</td>
<td>4,964,682</td>
</tr>
<tr>
<td>Tetra Tech</td>
<td>3,745,912</td>
</tr>
<tr>
<td>TRC</td>
<td>1,812,450</td>
</tr>
<tr>
<td>URS</td>
<td>10,327,494</td>
</tr>
<tr>
<td>Roy F. Weston</td>
<td>18,427,664</td>
</tr>
<tr>
<td>W&amp;W</td>
<td>3,643,769</td>
</tr>
</tbody>
</table>

**TABLE 3.3: TOTAL BILLING BY ARCS CONTRACTORS, MAY 31, 1991**

---

Striking as these sums might be for a relatively new program, overall environmental consulting fees for an industry that scarcely existed a few years before were even more dramatic.

<table>
<thead>
<tr>
<th>Company</th>
<th>Location</th>
<th>Revenue $Mill</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bechtel</td>
<td>San Francisco, CA.</td>
<td>9748</td>
</tr>
<tr>
<td>Foster Wheeler</td>
<td>Clinton, N.J.</td>
<td>470</td>
</tr>
<tr>
<td>CH2M Hill</td>
<td>Denver, CO.</td>
<td>400</td>
</tr>
<tr>
<td>Metcalf &amp; Eddy</td>
<td>Wakefield, MA.</td>
<td>294</td>
</tr>
<tr>
<td>Morrison Knudsen</td>
<td>Boise, ID.</td>
<td>274</td>
</tr>
<tr>
<td>Roy F. Weston</td>
<td>West Chester, PA.</td>
<td>269</td>
</tr>
<tr>
<td>CDM</td>
<td>Cambridge, MA.</td>
<td>228</td>
</tr>
<tr>
<td>Parsons</td>
<td>Pasadena, CA.</td>
<td>222</td>
</tr>
<tr>
<td>Jacobs Engineering</td>
<td>Pasadena, CA.</td>
<td>220</td>
</tr>
<tr>
<td>Dames &amp; Moore</td>
<td>Los Angeles, CA.</td>
<td>210</td>
</tr>
</tbody>
</table>

TABLE 3.4: TOP TEN ENVIRONMENTAL CONSULTANTS, 1990 REVENUE

---------

48 The prominence of Bechtel in this ranking is even more remarkable considering the frequent clashes the firm had with environmentalists over the years over its nuclear plant construction program. See Laton McCartney, Friends in High Places: The Bechtel Story, (New York: Simon and Schuster, 1988), passim.

Like most engineering firms, environmental consulting firms practiced locally and regionally but marketed nationally. This meant that when a successful offeror from California received a contract for remediation services on the East Coast, he would most likely enter into some sort of relationship with an existing East Coast firm. Industry practice would dictate that companies would merge, form joint ventures, or acquire another company. Frequently, larger companies would engage in wholesale hiring from small start-up environmental concerns. In 1991, approximately 550 small environmental firms were acquired by larger concerns. Many buyers were European firms.50

A second characteristic of the industry was that, with a few notable exceptions, most of the firms were thinly capitalized. The principal assets of the firms in most instances were the collective talents and abilities of their professional staff. Because they are such important assets, the names of key personnel performing work on even a government contract are considered confidential business information. This lack of capital (or ability to get bonds) would become a major problem for some firms since most would lack the capacity to withstand a major judgment in the event of lawsuits for professional negligence. But at the same time, it meant that because start-up costs were relatively

modest, there would be frequent new injections of talent into the system. And there would be significant amounts of work for these firms in the form of subcontracts.

A third feature of the industry was that it performed its work on a complex pyramid of subcontracts. Much of this was dictated by the geographic proximity of the subcontractor to a particular hazardous waste site. A second factor in the use of subcontractors was the fact that not even the largest firms could hope to have at their command the full range of skills needed to work on the largest, most complex sites.

In the case of ARCS contracts, EPA officials planned that approximately $4,200,000,000 or roughly 64% of the total value of the contracts would go to subcontractors for the performance of field investigations and remedial action projects, including construction. The prime contractor could not perform these activities without creating an organizational conflict of interest. Thus, so the theory went, prime contractors would not benefit from additional work based on technical decisions made during field investigations by subcontractors. The same prime would not be biased in the remedial design phase of the project since there would be no benefit from work generated for the construction phase.

A fourth characteristic of the industry was its extreme sensitivity to liability and other legal issues.
Construction projects of any kind, whether private or public, large or small, generate substantial amounts of litigation. We shall examine some of the sources of these conflicts in the next chapter, but the organization of the industry, with its many legally distinct subsidiaries, demonstrated an ongoing concern that the company might be forced to defend its decisions in a court of law. Fewer assets present fewer targets for tort litigation.51

Hazardous Waste Action Coalition

At least some reference must be made to the trade association which represented the hazardous waste industry since 1985. The Hazardous Waste Action Coalition (HWAC) was founded under the auspices of the American Consulting Engineers Council, an association of 5,000 member firms which represented engineers in all technical disciplines.52 Understanding the potential for growth in the area of hazardous waste, HWAC was established to deal exclusively with those issues, especially risk, insurance, and liability problems.


Although relatively small, HWAC was effective in forming alliances with other organizations interested in its issues and especially in representing the industry point of view in both the executive and legislative branches of government. The organization played a major role in most of the legal matters which will be discussed in the next chapter. Like all trade associations, it tracked and attempted to influence the development of relevant legislation and regulations, provided market information to its members, developed case histories of technical and legal developments, sponsored conferences, and supplied information on new technologies.

The Superfund Litigants

Notwithstanding the political rhetoric or the latest management fads, the consumers of the services provided by government contractors rarely figure in any consideration of the organizational aspects of the delivery of services. People rarely ask or even care who provides social services. The enforcement role of the public in general is limited to qui tam suits in which the private party plaintiff acts as a private attorney general who alleges contractor misconduct.

But Superfund was no ordinary program. Almost unique in this respect, the Superfund statutes called into existence a large class of corporations and government
entities that had a very direct interest in the cost, quality, and efficiency of the government contracting process. These were the Potentially Responsible Parties (PRPs), who through cost recovery litigation, would ultimately be forced to bear the costs incurred in the cleanup process.

The billing records of Superfund contractors have generally formed the core of the costs the PRPs must pay. Although some have attempted to penetrate into the necessity of many of these charges, courts have to date upheld the government position that as long as the costs were allowable and allocable, PRPs must bear responsibility. As long as this remained the policy of Congress and the courts, PRPs, which included many of the largest and most influential businesses in America, would remain a potent watchdog of Superfund contracting practices. In virtually no other program in the Government was there likely to be such an important check on contracting practices.

The Government Contract Bar

The final section of this chapter will discuss the government contract bar both because it figured in the organizational aspects of the delivery of Superfund services and because it is important to understand its workings before moving on to some of the legal aspects of Superfund
contracting in the next chapter. Even more than most elements of the establishment bar, the government contract bar shuns publicity and rarely welcomes public discussion of its work.

Government contract law emerged as a specialty during World War II, and since then, thousands of court decisions, comptroller general opinions, and boards of contract appeals rulings, together with statutes and regulations, have formed the corpus of this field. While the field encompassed many subspecialties, most practitioners worked for the most part in two practice areas: protests to the GAO over improprieties in the award process and disputes over claims and other contract performance issues. With the growing criminalization of dubious practices by contractors through legislation, many members of the government contract bar also have come to specialize in white collar crime.53

The American Bar Association recognized this as a separate specialty and organized a Public Contract Law Section to support the activities of its members. The section had over four thousand members nationwide by the early 1990s, and close to 40% of these lived in the greater Washington area. Roughly 100 law firms in the Washington area had some kind of government contracts practice and many, such as Crowell & Moring, McKenna & Cuneo, Fried, 

Frank, Harris, Shriver & Jacobson, to name only three have very large government contracts practices indeed.54

Some practitioners limit their government contract specialization still further, although most still accept work on any aspect of the procurement system. Like all specialties, there is constant pressure to find paying clients. Leading practitioners conduct seminars, give lectures, write articles in industry journals, assist trade associations, and "network" with any professional connected to the procurement process in an effort to broadcast their availability.55

As the work of government is conducted more and more by contractors, the government contracts sections of Federal Offices of General Counsel have grown correspondingly. At EPA, a relatively small agency, the contingent of contract lawyers numbered five at the beginning of 1990, but in the wake of mounting criticism of Agency contracting practices, that staff had more than doubled by 1994.

Within the government, contract lawyers have often acted as a check upon some of the more unwise activities of the procurement professionals, especially the program offices. Formally, they have no power to prevent any

54Based on discussions with the Secretary of the Public Contract Law Section, who also provided the author with a geographic breakdown of membership. The writer was for many years a member of the Section.

55Ibid.
procurement action—only the contracting officer is vested with the authority to make business decisions. At the same time, only a very foolish procurement official would act without the concurrence and support of the Office of General Counsel.

Graduates of local, Washington-area law schools were heavily represented in the ranks of government contracts lawyers. With the exception of two law schools in California, no other law school outside the Washington area teaches this subject. George Washington University Law Center is the center for such training, offering several courses in various aspects of the government contracts field and maintaining a separate Government Contracts Program and Library.

It is certainly true that the entire process has become more litigious and more cumbersome in recent years. Lawyers inside and outside the government have contributed to that development. The next chapter will examine in greater detail some of the contentious legal issues that have placed the government contracts bar in such a key position in government. The Superfund procurement program did not lack legal disputes, and they would soon come to have a major impact on the quality, efficiency, cost, and

56Hastings and Pepperdine. All Washington area law schools teach this subject.

timeliness of environmental remediation projects.

Table 3.5: ARCS ORGANIZATIONAL REPORTING RELATIONSHIP
CHAPTER 4
PUBLIC MANAGEMENT AND PUBLIC CONTRACT LAW

Sources of the Law: the Federal Acquisition Regulation and the Environmental Protection Agency Acquisition Regulation.

If flawed contracting organizations contributed to the failure of government programs, so too did a body of public contract law and policy designed for an earlier era. This chapter will discuss key features of those laws and policies that had a major impact on Superfund contracting.

The sources of public contract law have been extremely varied. Relevant statutory provisions are found throughout the United States Code, in particular Title 5, "Government Organization and Employees," Title 10, which contains the text of the Armed Services Procurement Act as amended, Title 31, which deals with the expenditure of public funds and the procurement powers of the General Accounting Office, Title 40, which deals with public property, Title 41, which deals with public contracts in general, Title 42, which deals with atomic energy contracts and the National Aeronautics and Space Administration, and Title 50 and its Appendix, which contain provisions concerning defense procurement. Appropriation and Authorization Acts frequently carried
provisions which had to be followed in the award and administration of government contracts. Congressional hearings and reports sometimes help elucidate Congressional intent in the interpretation of the law. The General Accounting Office publishes some decisions of the Comptroller General concerning the disposition of protests which are considered to have relevance for government contracting as a whole.

In the executive branch, Executive Orders of the President frequently concern contracting matters and have the force of law unless inconsistent with statute. Opinions of the Attorney General play a relatively small role in procurement matters, although the role of the Justice Department in its capacity as chief Federal litigator, is substantial. Although not part of the public record, the opinions of Agency General Counsel carry great weight in determining the conduct of contracting operations.1

Obviously, court decisions are a major source of law. The courts of major importance for government contracting in this period are the United States Claims Court and the United States Court of Appeals for the Federal Circuit. An even larger body of judicial doctrine emanates from the Boards of Contract Appeals, and the decisions of these Boards have usually been the final disposition of public

contract cases. In the case of the Environmental Protection Agency, the relevant Board of Contract Appeal is found in the Department of the Interior.2

For present purposes, however, the most important source of the law is that portion of the Federal Register known as the Federal Acquisition Regulation (FAR).3 The FAR is a compendium of all procurement regulations affecting government agencies in general, and, in theory, reflects the latest proceedings of Congress, administrative bodies, and the courts.4 In addition, each Agency has its own set of acquisition regulations which address matters on which the FAR is silent. The relevant document at EPA is known as the Environmental Protection Agency Acquisition Regulation (EPAAR). The current FAR had its origins in a six-year period of consultation among Federal Agencies before it was finally promulgated on April 1, 1984.

The complexity of the FAR is driven by many factors, although the basic contract ideas upon which it rests are relatively simple. Unlike the procurement policies of even the largest corporations, FAR provisions are concerned with the behavior, actions, and procedures of the seller. The

2Ibid.
348 CFR.
4It is kept current by a steady stream of Federal Acquisition Circulars (FACs), which are incorporated into the body of the FAR. The computer revolution has considerably increased the speed by which this occurs.
need for such comprehensive regulations is governed by the public interest in securing cost controls when competition is not effective, in attempting to achieve social policy objectives, and in acquiring goods and services for which there are no domestic markets other than government (e.g., major weapon systems). Much of the process attempts to keep the process free of graft and appearances of impropriety. Finally, the entire process is expected to be as open as possible to public examination and, where appropriate, public criticism.5

The major problems faced by EPA with respect to its Superfund contracts came from the fact that the needs of the program did not always fit into the established regulatory framework of the FAR and other sets of regulations. The following examples will help explain that difficulty.

Organizational Conflicts of Interest

The FAR defines an organizational conflict of interest as a "conflict of interest of a Government contractor that arises or might arise because the nature of the work to be performed may, absent some restriction on future activities, result in an unfair competitive advantage to the contractor, impair the contractor's objectivity in performing the

contract work, or make the contractor unable or potentially unable to render impartial assistance or advice to the Government." Of special concern are contracts for management support services, consultant or other professional services, performance or assistance in technical evaluations, and systems engineering or technical direction where the contractor does not have ultimate responsibility for development or production. All such types of work are found in Superfund remedial contracts.

The existence of potential conflicts of interest problems may affect contractor qualifications and thus eligibility for both award and future work under other contracts. The contracting officer must take affirmative steps to identify and evaluate potential conflicts of interest as early in the acquisition process as possible as well as avoid, neutralize, or mitigate significant potential conflicts before award. EPA rules also require disclosure by the contractor when potential conflicts of interest first surface. In general, subsidiaries and parent firms are accorded the same degree of scrutiny that is given the prime contractor who is the successful offeror.


7FAR 9.502.

8FAR 9.504.
Performance under the contract may be jeopardized because contractors may not perform when conflicts of interest occur in the course of contract performance. The head of the contracting activity may grant a waiver to this rule following a determination "that its application in a particular situation would not be in the Government's interest." 9 No authority exists for a general waiver for an entire class of contracts or class of work assignments. Each determination must be handled on a case-by-case basis and each must be preceded by the identification, evaluation, avoidance, neutralization, and mitigation requirements of FAR.10

It is important to note, however, that there is no outright ban on organizational conflicts of interest. The FAR recognizes that market conditions may leave the Government no alternative but to rely on the contractor who may face such a conflict. In such instances, disclosure and closer supervision are the prescribed remedies.

ARCS contracts were multi-year contracts in which the scope of work included remedial investigations, feasibility studies, remedial design, remedial action, program support, non-time critical removal actions, certain kinds of enforcement support, and technical assistance. Since Superfund remedial contracts included such a wide diversity

9FAR 9.503.
10FAR 9.504.
of work is performed and since the reach of Superfund extended across such a wide spectrum of the American economy, it was inevitable that such conflicts would arise.

Sustained criticism of the handling of these conflicts first began in Congress, especially in the subcommittees headed by Congressman John Dingell and Senator David Pryor. The opening round was fired by Dingell in 1988 when he requested GAO to perform an investigation of EPA Organizational Conflict of Interest Procedures.11

The resulting report, "Superfund Contracts; EPA's Procedures for Preventing Conflicts of Interest Need Strengthening,"12 stated that the problem as emanated from the need for EPA to rely on contractors for almost all of the significant remediation services provided by the Agency. The report also found that failure to enforce organizational conflict of interest provisions could cause very serious harm to the program. Much of the enforcement work of the Agency was performed by contractors. EPA would be vulnerable to charges by PRPs in Superfund cost recovery litigation that the information it received from contractors was tainted and therefore insufficient to establish liability. Moreover, the credibility of the program with

11See discussion in chapter 3.

the public could easily become tarnished. Despite confidentiality agreements executed by contractor personnel, the access they had to sensitive enforcement information might eventually find its way into the hands of the private parties for whom they worked under other contracts. These concerns were heightened because of the rapid growth of Superfund responsibilities in the late 1980s.

EPA had relied on contractor self-enforcement to handle organizational conflicts of interest. Solicitations for new contract proposals included notification that contractors had to certify that they were not aware of any organizational conflict associated with the proposed contract. One standard contract clause, "Organizational Conflicts of Interest," required the contractor to make full disclosure in writing should an actual or potential conflict of interest be discovered. In particular, special notification to the contracting officer was required if the contractor planned to use his own proprietary technologies. Such restrictions would help to prevent conflicts in situations where a contractor would benefit from recommending their own technologies.

13 Ibid., p. 16.

14 Ibid., passim.

15 Organizational conflicts of interest have generated some literature in the professional journal although not in the specific context of environmental contracting. Charles D. Woodruff, "Organizational Conflicts of Interest: Not What It's Been Said to Be," 16 Public Contract Law Journal.
Another clause, "Limitation on Future Contracting," placed restrictions on future work that a Superfund contractor might perform for private parties at hazardous waste sites. Conflict of interest provisions applied to individual employees of the contractor as well as to the corporate entity. Although there is no privity of contract between EPA and its subcontractors, prime contractors are required to include organizational conflict of interest provisions in subcontracts for Superfund work and to enforce them rigorously.16

Finally, EPA officials believed that its right to terminate contracts for convenience provided a final safeguard against organizational conflicts of interest. Should a contractor willfully fail to perform required duties with respect to conflict of interest provisions, the Agency believed that it had the right to terminate for default. Unlike termination for convenience, termination for default released the Agency from any obligation to pay the contractor damages.17

The GAO report on organizational conflicts of interest had identified serious weaknesses in Agency efforts to manage actual and potential organizational conflicts of

---

16Ibid., pp.17-22.

17FAR 49.401 et seq.
interest. EPA maintained no system to document conflicts. Between June, 1984, and August, 1988, remedial contractors had submitted 251 requests to the Agency to compete for or engage in private party work. Complete records concerning the disposition of those requests could not be located, and standards for evaluating such work were unclear. Adequate guidance to contracting officers, program officers, and contractors alike was inadequate. Although EPA claimed that organizational conflicts of interest were under control, GAO questioned whether the Agency could reasonably make such claims given the absence of adequate documentation.18

Two and a half years later, Dingell and Pryor, together with Senator Frank Lautenberg, Chairman of the Subcommittee on Superfund, Ocean, and Water Protection of the Senate Committee on Environment and Public Works, requested from GAO a second report on Superfund contracts, including an evaluation of EPA attempts to remedy organizational conflict of interest problems. GAO found that significant problems continued to exist in Superfund conflict-of-interest controls.19

The Agency had taken some actions to correct the problem, including a four-person unit to develop policy and issue guidance, a requirement that contractors submit

18Ibid., pp.24-34.

conflict-of-interest plans when responding to contract solicitations, an outright ban on permitting remedial contractors to compete for policy development contracts (a ban subsequently upheld in a GAO protest), and an automated system to help identify business relationships among contractors (a system that never became operational). Most important, EPA drafted and attempted to secure approval of a new set of conflict-of-interest regulations which would place a number of requirements on contractors beyond those contained in contract clauses.20

GAO still found that the old problems persisted. The data base did not have adequate input from regional offices, and the conflict of interest unit in EPA had only input 36 of the 500 cases it had received to date. The unit was to conduct reviews of ARCS contractors, but after nearly two years, only 2 reviews had been performed. After two and a half years, EPA organizational conflict of interest policy was still almost totally reliant on self-regulation by contractors.

Federal Facilities Oversight and Organizational Conflicts of Interest

Organizational conflicts of interest surfaced again in 1993 in a way that might have compromised the succeeding

20Ibid.
generation of Superfund remedial contracts with a potential value of $4,000,000,000. The Federal Facilities Compliance Act of 1992 waived sovereign immunity for Federal hazardous waste generators, thus reducing their legal situation to one that more closely resembled a private PRP. CERCLA 120 had delegated extensive oversight responsibilities to EPA for hazardous waste remediation projects at Federal facilities. The Office of Federal Facilities Enforcement (OFFE) in EPA was given authority to review documentation generated by contractor and government employees involved in these projects, approve remedies, coordinate enforcement activities with state and local officials, assist in deliberations leading to agreements with other Federal agencies, and determine appropriate penalties where necessary. Because of its extremely small size, OFFE would be forced to rely on contractors.

As noted earlier, all of the major Government agencies involved in environmental remediation wanted the same group of contractors working for them. Because of the complexity of many of the sites, program officials in EPA, DoE, and DoD, all attempted to obtain the services of large engineering firms which possessed a range of skills thought not to exist in smaller organizations. Most of these contractors already worked for EPA and everyone believed they would complete for future Superfund remedial work. Far more lucrative markets were emerging, however, in DoD, and
especially DoE, with its string of nuclear waste dumps threatening major metropolitan areas. If these contractors were in any way responsible for the oversight of Federal facilities cleanup, organizational conflicts of interest would multiply to uncontrollable levels.

At the same time, no one in EPA wanted an additional class of contracts that involved the relatively small amount of money which OFFE would spend. In theory contracts took approximately 18 months to award. In reality, the figure for Superfund contracts was approaching, and in some cases exceeding, four years.21

Organizational conflicts of interest for Federal facilities work might arise in three possible circumstances: because of the nature of the work being performed by the contractor; out of the financial, legal, or contractual relationships that the contractor has with other business or governmental entities; and because of problems arising out of work at a specific site or geographic region. If OFFE work was to be included in remedial contracts, each possibility would have to be documented each time a contractor was employed at a different site. The tangled nature of this problem can be suggested only by examining each of these possibilities somewhat more closely.

21Planning for The Remedial Action Contracting Strategy (RACS) contracts, which were to replace the ARCS contracts, began in 1991 and as of this writing (1997) have not yet been fully awarded.
The most obvious situation for a conflict of interest arising out of Federal facilities oversight work concerned the nature of work performed by the remedial contractor. Obviously, no contractor should participate in the oversight of itself or the work of its parent or subsidiary firm under contract to another Federal agency without creating a conflict of interest. The force of this rule applied to both prime contractors and subcontractors of any tier.22

Conflict of interest problems relating to the type of work performed might arise out of diverse fact patterns. Contractors should not be involved in remedy selection or approval if the same company was in a position to benefit from that remedy. If oversight contractor "A" possessed specialized expertise or proprietary rights to a specialized technology, a potential conflict of interest would be created if that contractor were to recommend use of that technology or expertise to a Federal facilities cleanup contractor. Similarly, a contractor should not be involved in EPA deliberations if those discussions ultimately resulted in policies from which the same contractor might benefit. In the event of disputes between EPA and other Federal Agencies, it was likewise clear that the same contractor might not advise both EPA and the other Federal Agency on the same issue without creating the potential for a conflict of interest.

22FAR 9.501 et seq.
Access to enforcement, confidential business, or other proprietary information obtained in the course of contract performance for EPA was even more likely to create conflict-of-interest problems. Review would be triggered by giving EPA oversight contractors in a particular region privileged enforcement, business, or technical information that might affect either its objectivity or competitive position somewhere else in the country. If remedial contractor "A" were to gain access to proprietary technical information in the course of his oversight of cleanup contractor "B" at a Federal facility, contractor "A" would then be placed in an unfair competitive advantage over contractor "B" in future procurement competitions.

A second area of considerable potential for organizational conflicts of interest concerned the financial dependence of contractors on work generated by Federal facilities remediation. The core question was whether an EPA oversight contractor, which also performed work for another Federal agency, was so dependent on the corporate revenues generated by that work that its objectivity might be called into question. The source and amount of the contractor's revenue as well as its corporate relationships with parents, subsidiaries, and other affected businesses would require detailed consideration.
For example, the first Environmental Restoration Management Contract (ERMC) awarded by DoE was for work on the Fernald site near Cincinnati. The award was to a major design and construction firm, Fluor Daniel, and had a potential value of $5,000,000,000. If Fluor Daniel, also an EPA remedial contractor, were to perform oversight for OFFE at some other DoE facility, a conflict of interest review might well be required to determine that the contractor's objectivity would not be compromised by the magnitude of its corporate revenues which came from DoE.

On the other hand, if a contractor held roughly comparable contracts in terms of potential value with both EPA and the Federal Agency, there would be presumably less incentive for bias in its performance. Both clients represented comparable income flows to the contractor.

Could not one reasonably treat the Federal Government as a single entity in such circumstances? According to this argument, no EPA oversight contractor would feel his Federal facilities contract and thus his revenues at risk should he recommend positions contract to the wishes to the other Federal Agency. Unlike the case of private PRPs, Federal procurement law prohibited Federal agencies from imposing penalties such as termination on its contractors in an arbitrary manner.
There were, however, substantial areas where all Federal Agencies exercised discretion in the administration of their contracts. All contractors were evaluated in some manner during the period of their performance, and in the case of a cost plus award fee contract (which included all Superfund remedial contracts) considerable discretion was exercised in the fee determination process. Unfavorable evaluations would affect the future Federal contracting opportunities of Federal facilities contractors. The greatest incentive of all, new work assignments, was similarly within the discretion of the individual agency. Finally, EPA had been given the responsibility for ensuring compliance with all provisions of CERCLA, and consistent with existing law, EPA treated other federal agencies like any other PRP, including the assessment of penalties. The interests of EPA and other Federal Agencies might sometimes be very different and, therefore, the single entity theory would fail to dispel the appearance of an organizational conflict of interest among contractors.

Finally, relationships arising out of the site or geographic area itself might have created a potential conflict of interest which did not readily fit into either of the preceding categories. These relationships related principally to past activities on the site. It might be possible that a contract awarded to a subsidiary of "A" might raise questions of a conflict of interest if that
subsidiary were put in the position of reviewing work performed by "A" in its capacity as a defense contractor for DoD or a maintenance and operations contractor for DoE or in some other non-environmental capacity.

A wide range of alternatives was considered for support of the OFFE mission, including contracts limited to OFFE support, use of non-profit contractors, site-specific contracts, and not utilizing contractors at all, i.e., hiring sufficient technical personnel to work directly for OFFE. In the end, none of these choices was adopted and EPA continued its long painful stumble forward into more and more complex organizational conflict of interest problems.23

---

23For sake of clarity, it is important to understand that organizational conflicts of interest are unrelated to the more common type of personal conflict of interest in which Government personnel using contacts made as regulators enter into lucrative employment with the businesses which they had hitherto regulated. In this regard, however, there does seem to be a much higher instance of high-level Government employees who once worked for Superfund going to work for the industries and contractors they once regulated. This is distinct from organizational conflicts of interest. See Eric J. Greenberg, "Toxic Temptation; The Revolving Door, Bureaucratic Inertia and the Disappointment of the EPA Superfund Program," Washington, The Center for Public Integrity, 1993. The author wishes to acknowledge the contribution of William (Beau) Mills of the Office of Federal Facilities Enforcement, who worked closely with the author on the COI problems of Federal Facilities.
Legal Problems of Confidential Business Information

Open access to the business information contained in government contracts presented a further complicating factor in attempting to use private sector companies to perform public services. In 1948, Congress passed the current version of the Trade Secrets Act24 which made it a crime for an employee of the United States to disclose trade secrets and other confidential information obtained in the course of their employment. Little thought was given to information generated by government contractors. The purpose of the law was to protect information gathered from regulated communities by the Government in the course of its official regulatory duties. No person has ever been prosecuted under the Trade Secrets Act.

In 1966, Congress passed the Freedom of Information Act (FOIA),25 which permitted the public to gain access to records of the Federal Government. There is a presumption that all information maintained by the Government is releasable unless it falls into one of nine exemptions provided for in the statute. As in the case of the Trade Secrets Act, there is no indication in the legislative history that Congress gave any sustained consideration to the problems posed by business information found in

25 5 U.S.C. 552
government contracts. Exemption 4 to FOIA does, however, provide that "trade secrets and commercial or financial information obtained from a person and privileged or confidential," may be withheld. One or two other exemptions were also employed by EPA from time to time,26 but by far, the most common grounds for refusal to release contract information was Exemption 4 and the statutory basis for that exemption was the Trade Secrets Act.27

The only individuals who requested contract information under the FOIA were rival contractors trying to find out what the competition was doing. For example, in 1990, OAM received approximately 600 requests for contract information under the FOIA. Virtually all came from contractors, the law firms that represented them, or law firms representing PRPs.

The costs to the Agency of collecting, reviewing, copying, and where appropriate, redacting contract document information could frequently be quite high, and the costs were never covered by the largely nominal fees charged to the requestor. OAM employed a unit of four para-professionals who worked exclusively on contract information matters, in addition to the work of several supervisors who

26Most commonly, Exemption 5 for privileged internal documents.

27Based on the author’s experience as head of the FOIA unit in OAM in FY 1990.

149
reviewed their work. Other agencies had even larger units dedicated to this purpose.28

Few would take exception to restrictions on the release of truly proprietary information such as technological processes, proprietary scientific information, contract proposals, or similar classes of information. The need for withholding becomes less clear when the subject turned to the names of "key personnel," names of private clients, direct labor rates, fees, or the indirect rates contractors charged the government.29 Because contractors frequently hired employees of their competitors, it was widely assumed in the industry that such information was already known among contractors.

Moreover, such restrictions operated as a serious check on the albeit sporadic efforts of the media and watchdog groups to assess program performance. An abiding concern of Senator Pryor has been the fear that governmental activities that would be subject to scrutiny if they were performed by government personnel now became cloaked in secrecy by the Trade Secrets Act.30


29Indirect rates will be discussed later in this chapter.

30The exemption to FOIA does not apply to "official" requests of the Congress, which essentially means that all information is releasable to the formally organized committees and subcommittees of Congress when needed in the performance of their legislative duties.
Besides rival contractors, one other group was seriously interested in obtaining Superfund contract information. PRPs, or more precisely, the law firms that represented them, frequently used the FOIA to try to obtain information about the work that was actually being done on a site and for which their clients would ultimately be responsible in the course of cost recovery litigation. As noted above, the position of the Government was that all costs that were allowable under the contract and allocable to the site in question were subject to reimbursement by the responsible party. This did not stop the litigation machines of the large law firms, fueled as they were by billable hours to the client, from collecting masses of contract documents anyway.31

One tactic that PRP lawyers began using in the late 1980s was suing contractors directly for business information contained in their files. This particular discovery tactic resulted in not only new charges by the contractor to the government for the costs of generating the documents, but also the very real prospect that the government would lose control over the releasability of its business documents.

310AM processed approximately 600 FOIA requests per annum. Many were relatively uncomplicated requests for printed materials or copies of documents concerning a particular site. However, a large number concerned requests for specific work assignments from many different contractors and printouts of financial information.
Besides the standard business information, PRPs tried to obtain information on the deliberative processes of the contracting and program offices of the Agency for purposes of attacking the validity and cost effectiveness of remedy selections. Another favorite target was the award fee process in which a large amount of documentation was generated by field and regional personnel for purposes of deciding the size of the award fee in CPAF contracts. The documents frequently contained candid evaluations of contractor performance that PRPs hoped could be used to discredit site management by EPA.

In theory, Federal courts supervising Superfund litigation issued protective orders that gave all litigants access to all needed information in exchange for non-disclosure agreements on the parts of the parties receiving such information. EPA officials were never comfortable in releasing such information, particularly given the large number of litigants involved. In the period under review, the issue was never clearly resolved in the courts and every situation resulted in a compromise agreement between PRPs on the one side and EPA regional enforcement personnel and Department of Justice lawyers on the other.
Contractors with Access to Confidential Business Information

The most difficult issue for the Agency on the subject of confidential business information, however, concerned granting contractor personnel access to confidential business information. Because the Agency was so overwhelmingly reliant on contractors to perform its work, and because so much of that work concerned business regulated in some manner or another by EPA, it was inevitable that contractors would gain access to confidential business information prohibited to them by statute. The efforts of Agency officials to ignore a problem that had no answer would eventually fail.

In addition to confidential business information generated by contractors, the Agency collected large amounts of confidential business information under CERCLA, the Toxic Substance Control Act (TOSCA), the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), the Resource Conservation and Recovery Act (RCRA), the Clean Air Act, and the Clean Water Act. Such information might have included formulas, devices, and identities of chemicals, identities of pesticide inerts, the fact that a company is manufacturing, importing, or processing a particular chemical, production or storage volumes of chemicals, industrial process information, and any financial data concerning the company such as assets, profits, or taxes.

153
To a certain extent some of this information could be released to contractors in the performance of their contractual obligations provided the environmental statutes which authorized collection of such information also authorized such disclosure.

The only way contractor-generated confidential business information could have been released to other contractors in the absence of such statutory authorization was if the contractor consented to its release or if the Agency had determined after a lengthy process subject to appeals, that the information in question was, in fact, not protected by the Trade Secrets Act. Most Government Agencies required such consent from successful contractors as a condition of contract award. Such was not the policy at EPA.

Failure to resolve this led to the removal of a Director of OAM and the Chief Contracts Counsel of the Agency. One of the functions contracted out by EPA was the work of the EPA National Contracts Payment Division located in North Carolina. Computer Sciences Corporation (CSC), a large computer service firm headquartered in California, had been providing this service since 1989, and in January, 1991, EPA awarded another contract to CSC under

32The information concerning this matter is discussed in detail in the report of the standing committee set up by the Administrator to review contract management at EPA. Environmental Protection Agency, Contracts Management at EPA: Managing our Mission. EPA/200/R-92-001; Appendix K, Case Study #3, p. K-7.
which it continued this work. CSC employees had access to confidential business information contained on invoices from other contractors.33

The Standing Committee on Contracts Management at EPA that was established to review this and other matters found that everyone involved in the matter was blaming another party. Program officers would rarely take responsibility for contract problems even though it was program officials who would insist that all work would cease if contract and legal personnel did not accede to their wishes. Program officials would also blame OMB since they would not "give" EPA enough in-house staff to perform the work. OAM, which in the end, made the ultimate decision on whether to award the contract, was concerned that there was "no immediate alternative" to allowing the CSC procurement to proceed. Although the chief of the contracts section of Office of General Counsel did raise the issue of confidential business repeatedly with OAM, it did not raise its opposition to the Administrator because of program opposition.34

Although this matter took the form of a legal issue, it pointed to larger system problems. None of the responsible parties was willing to raise the issue to the the Administrator for resolution since the Administrator cared

33For a while it appears that they were processing their own invoices, although this practice was eventually terminated by management. Ibid., p. K-7.

only about the "mission" of the Agency and expected "management" matters—and especially ones as obscure as the law concerning contractor business information—to be resolved elsewhere.

Ultimately, the program chief responsible for the CSC contract retired from the Agency, the contracts counsel responsible for the contract was removed from a supervisory position he was holding, and the OAM Director was removed and placed in a subordinate role elsewhere in the Agency. Unfortunately for the Agency, these were three people who for years had tried to impress upon their fellow Agency managers the importance of taking management problems in the Agency seriously. Because they allowed themselves to be persuaded of the overriding importance to the "mission," they became the scapegoats for larger structural failings of the procurement system.35

As best they could, the political appointees and senior bureaucrats tried to avoid any responsibility. The Assistant Administrator for Administration and Resources Management, hoping to be retained by the incoming Clinton administration, made appropriate remarks wondering how such things could happen (he was not retained). The Inspector General was shocked to discover such activity in his Agency. He had recently been bloodied himself by Congressman Dingell for lax oversight, and wanted the Justice Department to

35Ibid.
prosecute all the individuals involved. The Justice Department declined.36

**Labor Rates**

In 1931, Congress passed the Davis Bacon Act, which required contractors to pay workers engaged in Federally-funded construction projects not less than the prevailing wage rates paid to workers in a given locality.37 Prevailing wage rates, which are set by the Department of Labor, are the wages paid to the majority of laborers or mechanics falling within the same specific classifications on similar projects in the area during the period in question.38 In 1965, Congress passed the Service Contract Act,39 which required contractors to pay not less than prevailing wages and fringe benefits as well as provide safe

36 For those unfamiliar with government organization charts, the Inspector General is an official appointed by the President in each Agency for a fixed term whose sole responsibility is finding and prosecuting fraud, waste, and criminal abuses in the internal operations of the Agency. The office was established by the Inspector General Act of 1978, 5 U.S.C. app. 2. It should be noted that much of the work of the EPA Inspector General is contracted out to private auditing and other professional firms. See "U.S. Auditors Are Criticized on Use of Contractors," New York Times, January 8, 1992, p. A17.


39 41 U.S.C. 351-357.
working conditions under Federal contracts for services. Prevailing wages for service contract workers were also set by the Department of Labor. All Federal Service contracts over $2,500 must contain contractual provisions establishing these requirements, and workers must receive notification of the minimum allowable compensation.40

Superfund contracts were subject to both laws, and the contracts contained both sets of the respective clauses, since the statements of work contained significant construction as well as services. Frequently, the work performed on location at a hazardous waste site could fall into either category. Not surprisingly, unions strongly pushed for the significantly higher Davis-Bacon rates. In some instances, they were supported by contractors because higher direct labor charges resulted in higher overhead changes that would accrue to the contractor. After much internal discussion, EPA officials arrived at guidelines for determining which work fell in which categories. Unions did not accept the result, however, and persuaded Congress to add language in the 1994 Superfund reauthorizing bill which would have mandated Davis-Bacon rates.41


The law authorizing Superfund was set to expire on September 30, 1994, and the reauthorization process had consumed Agency planners throughout 1993 and 1994. Members of the Clinton administration attached great importance to the bill, since they had to date virtually no legislative accomplishments in the environmental arena. The internal Agency committee established to propose reauthorizing legislation had refused to deal with indemnification and a number of other contract and management questions that Congressman Dingell had expressly requested it to consider. Committee members accepted without objection the position of labor unions on broader use of Davis-Bacon wage rates.

The bill was put together under the personal direction of the Deputy Administrator, who managed to secure consensus support from most environmental organizations, insurers, and the chemical industry. In the end, however, House Republicans blocked the bill before it came to a vote by demanding a series of votes on amendments that would have weakened enforcement provisions and thus overall support for the bill. Those amendments concerned the ever-intractable issues of cleanup standards and environmental cost-benefit analyses, as well as a relative newcomer to environmental

protection debates, the requirement of Davis-Bacon wage rates in Superfund contracts.42

Property Management

Any program the size of Superfund will require large amounts of property. For the most part, large earth-moving equipment is leased directly by the contractors, but smaller items, such as computers, testing equipment, safety devices, vehicles, measurement devices, books, protective clothing, fencing, and many other items were gradually accumulated by contractors. Internal Agency estimates placed the value of that equipment over $50,000,000 by the early 1990s.43

Property management systems within the Agency were weak. Most of the work of tracking the equipment was done by contractor personnel. Since Superfund equipment was scattered over headquarters, 10 regional offices, various laboratories throughout the country, numerous contractor facilities, and hundreds of hazardous waste sites, the challenges presented by that single program began to mount.

The most pressing problem was that utilization rates of the equipment were extremely low. Contractors even when


43FAR Part 45 regulates in considerable detail both government-furnished property and contractor-acquired property. It is silent on utilization rates and pools, the key issue in this discussion. Thus, the Agency was free to fashion policies which best satisfied its requirements.
located in the same region would rarely pool equipment, an action that inevitably led to duplication in purchasing. To be sure, special problems, such decontamination, frequently complicated the transfer of equipment from one contractor to another or from one site to another.

The obvious solution, which had been advocated for a number of years by regional offices, was the establishment of an equipment pool in each region that would manage Superfund equipment. The pool would distribute the equipment, decontaminate it after use, transport it to and from hazardous waste sites in accordance with RCRA and other applicable regulations, arrange for training in its utilization, maintain it according to established procedures, as well as store it in appropriate facilities. Since no Government personnel could be found for such duties, and since no existing workers would be displaced, and since such non-discretionary, blue collar functions are precisely the kinds of activities for which governments have always contracted, it would seem that few objections could be raised for contracting out this function.

Officials of Region IX (San Francisco) had volunteered to develop a prototype of an equipment pool that could be adapted for use in other regions. To do this they issued, with the permission of OAM, a work assignment to one of its ARCS contractors (Bechtel) to develop such a facility. The work assignment was clearly characterized as a developmental
project that would not be continued after a two-year developmental period.

There are always problems when laws are not structured to permit a natural flow of events. To begin with, Superfund remedial contracts were awarded under Brooks Act procedures, which allowed source selection for architect and engineering contracts to be made without reference to the proposed cost of the contract.\textsuperscript{44} Selection was made on technical merit of the contractor proposal alone. Only after selection was made were negotiations conducted with the successful offeror and only if a satisfactory price with that offeror could not be agreed upon would the Government proceed to the next highest ranked proposal. The purpose of the Brooks Act was to guarantee that the best available talent, rather than the least costly, would be utilized in the design of public construction. In CERCLA, Congress specifically required use of Brooks Act procedures in the selection of Superfund remedial contractors.\textsuperscript{45} This had the effect of further reducing the likelihood that small contractors could compete successfully for Superfund remedial work as prime contractors.

When the time came for the follow-on contract to manage the facility, Region IX balked. Their preferred method was to include the work of running the facility in the statement

\textsuperscript{44}\textsuperscript{40}U.S.C. 541, et seq. and FAR 36.6.

\textsuperscript{45}CERCLA 119 (f).
of work of one of the future remedial contractors. Awarding even small contracts can be a time consuming, frustrating process that the Region did not want. Moreover, OAM was insisting that the work be limited to disadvantaged, minority-owned contractors, which were not significantly represented in work performed under the Superfund statutes. Regional managers wanted the ease of dealing with an established contractor that fully understood what was needed and would require no learning curve.

CERCLA permitted use of Brooks Act procedures only for contracts for certain enumerated types of activities, and running a warehouse was not one of them. Thus inclusion of the equipment pool work in statements of work of the remedial contracts would jeopardize an entire procurement. More serious, was the fact that by assigning the equipment management function to one contractor in a region, EPA would be creating a permanent conflict of interest in which one contractor would have control over the equipment needed by its competitors. Finally, in light of Congressional disapproval of umbrella contracts, in which far too many types of activities were conducted under a single contract, the Agency was making serious attempts to reduce its reliance on such vehicles.46

46This discussion relies on the dissensions of the author with headquarters and regional personnel involved in the property management issue.
Program Management and 'Bonuses'

The biggest splash Superfund contracting made in the national media concerned program management costs of the ARCS contractors. The issue arose in a front-page article in the Washington Post by Michael Weisskopf.47 The issue was quickly taken up by major dailies in other cities.48 At the time Weisskopf wrote, nearly one-third of the total value (or $61,900,000) spent under ARCS contracts for remedial cleanups went to pay for "program management," i.e., administrative costs of contractors. According to the article, some firms, such as Roy Weston, spent twice as much on program management costs as on cleanups. Fluor Daniel bought potted plants for its offices and business cards for its employees. Half the equipment purchased by Malcolm Pirnie sat unused in a warehouse paid for by EPA. EPA spent $210,000 (including $75,000 for transportation, meals, and rooms) for a two-day conference for its contractors, and paid contractors to perform self-evaluations. The article went on to discuss substantial bonuses that were paid to contractors for small amounts of often uninspiring work. The OAM Director, David O'Connor, was quoted in a candid remark which would never be forgiven by Superfund program


48 The San Francisco Chronicle, The Chicago Tribune, and USA Today, among others.
officers, "[w]e're spending too much money for program
management... [w]e have a mess on our hands."

<table>
<thead>
<tr>
<th>Region</th>
<th># sites</th>
<th># cleanups</th>
<th># contractors</th>
<th>prog/mgt cost $Mill</th>
</tr>
</thead>
<tbody>
<tr>
<td>I. Boston</td>
<td>84</td>
<td>0</td>
<td>7</td>
<td>8.3</td>
</tr>
<tr>
<td>II. New York</td>
<td>201</td>
<td>7</td>
<td>6</td>
<td>10.3</td>
</tr>
<tr>
<td>III. Phil.</td>
<td>147</td>
<td>11</td>
<td>5</td>
<td>10.1</td>
</tr>
<tr>
<td>IV. Atlanta</td>
<td>154</td>
<td>14</td>
<td>6</td>
<td>2.8</td>
</tr>
<tr>
<td>V. Chicago</td>
<td>260</td>
<td>16</td>
<td>7</td>
<td>11.1</td>
</tr>
<tr>
<td>Central</td>
<td>171</td>
<td>7</td>
<td>8</td>
<td>11.2</td>
</tr>
<tr>
<td>West</td>
<td>169</td>
<td>9</td>
<td>6</td>
<td>8.1</td>
</tr>
</tbody>
</table>

**TABLE 4.1: THE HIGH COST OF MANAGEMENT**

William Reilly, the EPA Administrator, responded to the
charges, in time-honored and hoary tradition, by the
appointment of a task force to address the allegations.
After months of study, interviews with over 100 regional
personnel and over half of the ARCS contractors, and
countless meetings in Washington, the task force reported

---

data as of June, 1991.
its conclusions concerning Superfund contracts in October, 1991.50

As originally planned under the ARCS contracts, program management was an account under the contract into which all costs not directly incurred on a remedial work assignment (i.e., site work), were accumulated, billed and reported. The costs fell into two categories: contract administration support and technical support. Contract administration costs included progress reports, invoicing and cost documentation, required organizational conflict of interest reviews, management of subcontractors, records management to support cost recovery, and subcontracting support such as establishing prequalified bidders lists for specialty services such as well drilling, surveying, and security. Technical support included actions which supported site work but benefitted several sites rather than just one and included quality assurance project review and audits, equipment purchase, maintenance, storage, and inventory, health and safety training and medical monitoring, and pollution liability insurance.51

---


The task force found that program management costs were indeed high and that this was attributable to three factors. First, shortly after the ARCS contracts were awarded, the Agency decided to step up its enforcement efforts. Rather than face the possibility of paying for EPA-directed cleanups—a potent threat indeed—PRPs settled with the Justice Department and began their own cleanups. Secondly, and again after the contracts were awarded, the Agency decided to assign much of the construction work planned under the ARCS to the Corps of Engineers. Thirdly, many of the costs cited in the *Washington Post* article seemed high because they were start-up costs that would eventually be amortized over the life of the contracts. Within a year of the report, program management costs were under—and in many cases, significantly under—15% of total contract billings.52

The "bonus" issue highlighted other problems in the contracts. ARCS contracts were cost-plus-award-fee (CPAF) contracts. These provide for a base fee which is determined in advance and an award fee based upon periodic evaluations of contractor performance. The idea behind this was to provide motivation for quality, timeliness, technical competence, and cost-effectiveness. The award fee was made solely by the government and was not subject to the disputes clause of the contract. The base fee, on the other hand,  

52Ibid, p. 34-55.
was not dependent on contractor performance, and was supposed to compensate the contractor for risk, finance charges, and other charges not provided for in government contracts. There was an elaborate system for determining the award-fee granted to each contractor. The evaluations were made by regional personnel closest to the work of the contractor and subject to overall approval of the Fee Determination Official, located in OAM.53

There was little in fact to support the idea that award fees did act as an incentive. Most contractors fell into a middle range on their performance evaluations, although those who did receive high ratings frequently used those as an advertisement to private party clients as an indicator of the quality of their work. Rather, the real incentive that EPA held over contractors was the issuance of new work assignments that could be withheld if performance was faulty. Contractors did, in fact, react negatively if they felt that the quality of their work was undervalued. The award fee process functioned as a report card and criticism was rarely welcomed.54

These two issues do help illustrate a major problem in managing government contracts. Contracts should be planned


54Based on author's discussions with the Fee Determining Official and regional evaluators.
and administered, whenever possible, in such a way that their primary features are readily understood by the media and general public. Only rarely have the media be willing to grasp the complexities of government contracting. Outside the Washington Post, New York Times, Wall Street Journal, Los Angeles Times, and one or two other newspapers, stories concerning Federal procurement are almost always unintelligible to anyone familiar with the subject matter. Michael Weisskopf did far better than most reporters in reporting this story, but even he left important parts of the picture out of his reportage.55

While the charges represented on invoices from the contractors may well have been perfectly legal and in full compliance with contract provisions, and while the fee determination process may well have been an orderly and proper process, it is very difficult to convey in a newspaper article the full picture. This was, perhaps, the ultimate shortcoming that could quite properly be laid at the door of EPA. In its attempts to limit the number of procurements and thus circumvent complex, time-consuming contracting rules, EPA officials created contracts of enormous complexity, vulnerable in major ways to changing circumstances and possessing far too many provisions

55An important example of this in the Weisskopf article concerns his failure to understand the incentivizing aspects of the award fee and the legal and practical problems inherent in terminating contractors.
completely unintelligible to the layman. Such contracts would eventually sink under their own weight. No subsequent action by the Agency suggested that this lesson had been learned.

Personal Services and the Case of OPPE

A personal services contract is a contract that by its express terms or by the fashion in which it is administered, makes the contractor personnel appear to be, in effect, government employees. Government agencies may not award personal service contracts unless the authorizing statute expressly permits it. The generally cited reason behind this prohibition is that such contracts circumvent civil service laws that require the Government to recruit employees through competitive hiring practices. The test of whether a contract is being administered as a personal services contract is the degree of relatively continuous supervision and control of contractor employees by government personnel.

Although civil service laws may be one reason for the disallowance of personal service contracts, liability for


57 FAR 37.101, et seq.
the acts of contractor personnel presents another one. In the private sector, the law of agency governs such questions of liability. If contractor personnel appeared to be the employees of the principal, and if they met other agency tests, the law would probably treat them as employees of the principal.

Attempts to avoid these problems complicated contractor relations with the Government. The fact is that many program officials constantly test the limits of the prohibition on service contracts. Contracting officers are frequently locked in combat with all programs in all Federal agencies on this subject.

While much of this dispute occurs in gray areas of fact and law, one particular instance at EPA clearly crossed the line into prohibited activity. The Office of Policy, Planning, and Evaluation (OPPE) was the arm of EPA responsible for a large number of regulatory and policy matters concerning the mission of the Agency. Because of the visibility of its mission, its officials cultivated an elite image within the Agency.

Problems first surfaced when Senator Pryor criticized OPPE for using a contractor to prepare Congressional testimony for the confirmation hearings of one senior officer. OPPE was also criticized for sending a contractor to represent EPA at an international meeting and using
another contractor to help draft language for an international treaty.58

In July, 1990, the Inspector General discovered possibly illegal use of contractors with the intent of circumventing competitive civil service recruitment regulations. The practice, that had existed for a number of years, involved using a prime contractor to subcontract with a prospective employee OPPE wanted to hire. The "subcontractor" would bill his hours through the prime until such time as OPPE would be able to secure a formal appointment at a sufficiently high grade to match his "subcontract" compensation. Many of the individuals in question admitted to the Inspector General that they filed false progress reports on work that was never performed. Some admitted they filed improper claims for education and travel expenses.59

OAM removed all contracting authority from OPPE and the Assistant Administrator who headed OPPE was quietly dismissed. Some years later, however, the Standing Committee on Contracts Management expressed a belief that managers at OPPE believed that mission over management was the route to advancement. Although managers and staff


59Ibid.
involved in the practice received letters of reprimand and had their authority over contracts limited, they were subsequently rewarded for their contributions to EPA through merit pay increases, cash awards, and promotions.60

In an all-too-common practice, contractors were punished for following orders of the government. Each of the four contractors involved was required to return funds to the Agency for the salaries of the prospective hires, and one of the contractors, American Management Systems, was suspended from all Federal contracting as a result of its participation in this practice.61 Contractors frequently serve as the scapegoat for the misdeeds of Government managers, and many contractor executives regard this as part of the job and an acceptable cost of doing business with the Federal Government.62

Architect/Engineer Contractor Responsibility

The idea of architect-engineer liability dates back at least to the Napoleonic Code.63 The provisions that apply

62This view was expressed to the author by an official of a government contractor.
63 Article 1792 of the Code provides, "If a building, which an architect or other workman has undertaken to make by the job, should fall to ruin either in whole or in part, on account of the badness of the workmanship, or even
to Federal contracts for architect and engineering services are found in FAR Clause 52.236-23, which FAR 36.609-2(b) prescribes in certain instances. Part (a) of the clause provides that the contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other services furnished by the contractor under this contract. The contractor shall, without additional compensation, correct or revise any errors or deficiencies in its designs, drawings, specifications, and other services. Part (b) provides, more ominously from the standpoint of the contractor, that "the contractor shall be and remain liable to the Government in accordance with applicable law for all damages to the Government caused by the contractor's negligent performance of any services furnished under this contract." In other words, if negligence could be proved on the part of the design professional, he would be responsible not only for the costs of redesign, but also for any consequential damages which resulted from his negligence. If a building or bridge

because of the badness of the soil, the architect and undertaker shall bear the loss, if the building falls to ruin in the course of ten years." cited in Craig R. Schmauder, "Liability of the Architect-Engineer for Construction Contracts," Public Contract Law Journal, May, 1987, p. 365.

174
collapsed as a result of a negligent design, the design professional would be responsible.64

This was a standard clause in Federal construction contracts. But was such a legal standard appropriate for design professionals in the case of hazardous waste remediation projects? The stakes were potentially high and accordingly, the industry firmly resisted its use.

The FAR was quite specific that this clause applied only to fixed-price contracts. The issue at stake was allocation of risk between the Government and the contractor. While typical public works construction project did involve an element of risk for the contractor, such risks could be minimized if a normal standard of professional care was exercised. Tolerances could be determined, soil and bedrock could be sampled, and ground water could be diverted. Because risks could be determined in advance, fixed-price contracts were the appropriate vehicle.

The ARCS contracts were, however, cost-reimbursement contracts, instruments used when the objective, to some degree at least, was to reallocate some portion of risk back to the Government. Furthermore, the FAR prescribed a specific clause for use in these instances, FAR Clause 52.246-5. In this clause, the negligent contractor would be

64FAR Clause 52.236-23. See also the discussion in Nash & Schooner, Government Contracts Reference Book, pp.29-30.
responsible for the costs of redesign, but not the consequential damages that resulted from that design.

But were the risks as unknown and unknowable as the contractors alleged? The question will remain unanswered, because EPA officials did not have the technical knowledge to fight the issue on those grounds. As time went on, and as contractors became more familiar with the kinds of problems found in hazardous waste sites, the answer seemed increasingly to be that the risks could be determined in most, if not all, instances, and that some reallocation of risk to the contractor might be appropriate.

The legal basis on which EPA chose to fight the battle was deeply flawed. The A/E Responsibility Clause had been in the original ARCS solicitation in 1987. Contractors objected and threatened legal action to prevent use of a clause their legal advisers felt unlawful. It would have been possible for EPA to gain authority to use a non-standard clause from OFPP, but no such attempt was made. Because the procurement had fallen behind schedule, and because the senior administrators in both the program office and in the Office of Administration and Resources Management were eager to complete this highly visible project as soon as possible, they eventually gave in to industry demands to
substitute the less onerous clause used in cost-
reimbursement contracts.65

The issue came to the surface again in 1992, when
criticism from Congress forced the program office to try to
revisit the issue, although this time on very different
legal terrain. The contracts had been awarded and
contractors had a reasonable expectation that the Government
would be obliged to fulfill its obligations. Nonetheless,
the Superfund program office persuaded OAM to attempt to
insert the desired clause unilaterally into all 45 ARCS contracts,
thus effecting a significant reallocation of risk
in the entire program. OAM instructed regional contracting
offices to insert the clause and to threaten contractors
with termination and other drastic measures if they failed
to comply.

Most of the ARCS contractors refused to accept the
clause, although a few either agreed or temporized. HWAC
officials continued to criticize the Agency position and
coordinated planning among industry members to challenge use
of the clause in the courts. At this point, however, the
industry overreached by enlisting the support of the Public
Contract Law Section of the American Bar Association (ABA).

65See John B. Miller, "Architect/Engineer Liability: A
Growth Period," American Bar Association, Section of Public
Contract Law, Monograph Series, 1984, and Donald L.
Anglehart and James A. Thompson, Jr., "The
Architect/Engineer's Role Under Superfund," the American Bar
Association, Section of Public Contract Law, Monograph
In November, 1990, the Chairman of the Section wrote to Allan Burman, Director of OFPP.66 In the letter he complained of the attempt of EPA to use the Architect/Engineer Responsibility Clause in the ARCS contracts. He highlighted the risk-allocation objections and further opined that such an allocation would hinder the use of promising but unproven technologies. He emphasized that EPA could not unilaterally impose the clause without legal challenge. Finally, he stated that attempts to force its use by withholding work assignments constituted lack of good faith and an improper use of economic duress.

Many of the ABA objections were quite valid. Attempts to modify existing contracts in the manner proposed by EPA were neither good law nor good policy. The source of the criticism was not appropriate. The ABA had not ordinarily become entangled in such disputes. While one might agree with the thrust of the ABA argument, it is far more difficult to see how it concerns an issue of good government or the integrity of the legal profession. Moreover, since the membership of the Public Contract Law Section is overwhelmingly composed of representatives of industry, critics might reasonably question the motives of its leadership.

This intervention irked EPA officials, members of Congress, and even some members of the Public Contract Law Section. Senator Pryor, in particular, was displeased with the ABA action. Rick Goodman, Pryor's subcommittee point man dealing with contracting issues was quoted as saying that, "all of a sudden [we're] not just fighting EPA contractors; we're fighting the ABA. It was my perspective for a long time that this was a very objective, noble group, [but] they want to structure government procurement to favor the interests of the private contractor."67 Dan Guttman, a frequent critic of government contracting practices, author of The Shadow Government, twice counsel to Senator Pryor's subcommittee, and a member of the Public Contract Law Section, also joined the debate. "I object to this masquerade," said Guttman; "most companies hire lawyers. It's not everybody that gets the assistance of the ABA for its breach of contract claims."68

Stung by such criticism, the Section Chairman attempted to justify his actions in the Winter issue of the Public Contract Newsletter, but his defense merely revisited old ground.69 At the same time, EPA was reconsidering its


68Ibid.

legal position, and after further consultation wrote to OFPP that "EPA recognizes that such use [of the clause] will require both the agreement of the contractor and reconciliation with other provisions of standard cost reimbursement contracts. If such change effects a reallocation of risk under the contract, the Agency will provide appropriate consideration. Our office of Administration and Resources Management is currently pursuing a deviation from the FAR to allow EPA to incorporate this clause or its equivalent into the ARCS contracts." OAM instructed contracting officers that no ARCS contractor would be denied new work assignments for refusing to accept the Architect/Engineering Contractor Responsibility Clause in an existing contract.70

After further consultation with OFPP, EPA dropped the matter altogether and permitted the ARCS contracts to continue with the existing liability provisions. When the time came to revisit the issue for successor generations of remedial contracts, the EPA program officials once again considered the arguments, but stung by the controversy aroused under ARCS, declined to include the clause in new solicitations.

Thus with uncanny accuracy, EPA officials managed to arrive at the wrong decision every time they considered this issue. It removed the clause from the ARCS solicitation to avoid controversy, tried to restore it in existing contracts because of political pressure, and then failed to push for its acceptance in future contracts with future contractors who were much more familiar with the risks involved. Apart from raising quite legitimate questions of Agency competence to manage its affairs, the Architect/Engineer Contractor Responsibility controversy highlighted continuing problems. It pointed once again to the fragility of the public contracting process and to the difficulty of fitting the four corners of public policy into round legal holes.

Second, it emphasized the fact that public contract disputes are frequently not just between the contracting parties. In such situations, the amicable resolution of problems through informal negotiation became much more difficult.

**Indemnification and Pollution Liability Insurance**

A second risk allocation issue that proved even more intractable than the question of damages caused by design flaws concerned indemnification and pollution liability insurance. Throughout the 1980s, Superfund contractors were unable to obtain liability insurance from insurance carriers at any price. Like much else in the world of environmental
regulation, the general cause was a market failure. The specific reasons behind this were again complex, but four factors stand out.

First, pollution liability was too recent a phenomenon for insurance companies to have compiled the kind of historical data needed for actuarial calculations. This was not because degradation of the environment was unknown, but rather because tort law had not imposed liability for many of the most egregious practices. Without clearly established legal liability, or perhaps more importantly, because liability standards differed so widely among states, insurance companies were unable to determine risk.71

Second, throughout the United States, state courts were finding insurance companies liable under existing property insurance agreements for cleanup costs which companies incurred under Superfund enforcement provisions.72 Only as the decade progressed did standard insurance policies specifically exclude pollution liability from coverage. While this technically had no direct bearing on the work of environmental remediation firms, such a situation made


72For the most part, insurance is regulated by state law, thus it was left to state rather than federal courts to hold insurance companies liable for the property coverage they incurred years before. See Marianne Lavelle, "Industry, Insurers at Odds," The National Law Journal, 30 March, 1992, p. 1.
insurers reluctant to cover environmental remediation costs of any kind.

Third, because relatively few companies were working in the field of environmental remediation at least until the 1990s, the risk pool was not large enough to spread the risk among environmental remediation firms. The award of 45 ARCS contracts helped ameliorate this situation.73

Finally, there was little interest among reinsurers. Reinsurance is largely a European business and European reinsurance markets were only slowly becoming aware of the major financial consequences of environmental regulation in America. To the extent it was aware, the response was one of extreme trepidation. Some estimates of environmental cleanup costs in America substantially exceeded the total assets of all American insurance companies. European reinsurers approached all aspects of Superfund with extreme caution.74

Because of these problems, environmental service contractors turned to Congress for assistance. In the 1986 reauthorization, Congress passed section 119 which dealt with response action contractors.75 With the exception of provisions dealing with use of Brooks Act procedures in the


74This was the subject of an extensive discussion at the seventh annual meeting of the Hazardous Waste Action Coalition, Boston Massachusetts, June 7-10, 1992.

75codified as 42 USC 9619.
selection of remedial contractors, 119 dealt primarily with liability problems of contractors. 76

The Struggle over Indemnification Guidelines

The President was then charged with the development of guidelines for the application of these provisions and subsequently for the development of formal regulations. 77

It took EPA six and a half years, until January, 1993, to

76 Subsection (a)(1) holds the contractor harmless under Federal law for any harm caused in the course of his employment. "A person who is a response action contractor with respect to any release or threatened release of a hazardous substance or pollutant or contaminant from a vessel or facility shall not be liable under this subchapter or under any other Federal law to any person for injuries, costs, damages, expenses, or other liability (including but not limited to claims for indemnification or contribution and claims by third parties for death, personal injury, illness or loss of or damage to property or economic loss) which results from such release or threatened release. Subsection (a)(2) excludes from this coverage "conduct of the response action contractor which is negligent, grossly negligent, or which constitutes intentional misconduct." Subsection (c), the indemnification provision, then covers instances of contractor negligence and provides, "[t]he President may agree to hold harmless and indemnify any response action contractor meeting the requirements of this subsection against any liability (including the expenses of litigation or settlement) for negligence arising out of the contractor's performance in carrying out response action activities under this subchapter, unless such liability was caused by conduct of the contractor which was grossly negligent or which constituted intentional misconduct." Brooks Act procedures are found in Subsection (f).

77 These tasks were delegated to the EPA.
issue the guidelines. Implementation, such as it was, took longer still.78

Like most people, perhaps, bureaucrats are risk-aversive, only more so. Despite a fairly clear expression of Congressional intent that something be done on the subject of contractor liability, authority to grant indemnification was entirely discretionary. If private insurers were unwilling to make decisions, EPA officials were similarly unwilling to do so. All the officials involved in Superfund—the Office of Waste Programs Enforcement, OPPE, OAM, Grants, Office of General Counsel, Office of Enforcement, regional offices, and others all had agendas and concerns of varying magnitude. Every effort to evade responsibility would be taken.

Partly because of this atmosphere, debates within the workgroup set up to draft the guidelines were frequently contentious, as no office was particularly eager to take responsibility for such a potentially massive commitment of Government funds. The first attempt to bring the issue to closure in the summer of 1991 ended when key officials failed to support the draft proposal.

Outside EPA, Dingell, Pryor, the industry and its lawyers and trade association, insurance companies and insurance brokers, DoE and Dod with their own concerns about

78The author was a lead analyst in the Agency on this subject. As of 1997, the actual regulations have not yet been promulgated.
hazardous waste contractor liability issues, and the PRPs, who would be expected through cost recovery actions to bear at least part of the cost of indemnification, all brought forth their views with considerable skill and persistence. The workgroup did not lack opinions on how to proceed. However, at least three factors were insufficiently considered by the workgroup in their six-and-one-half-year deliberations.

First, hazardous waste contractors, like any contractors involved in intrusive work, cared very much about the question of who will bear the loss that results from negligent work. Contractors did not begin work with the intention of performing poorly or negligently in engineering or construction projects, but there were often honest disagreement among experts as to what constituted negligence. Moreover, there has been a tendency among courts, or more specifically among juries, to hold contractors to a standard of strict liability even in the absence of negligence. Given the scientific uncertainly, not to say hysteria, that frequently surrounded hazardous waste remediation efforts, contractors were trying to avoid "betting the company" every time they undertook a complex work assignment. Even in cases of small assignments with small risks of a hazardous waste release, large sums could be expended on nuisance lawsuits. EPA officials feared that failure to resolve this issue would hamper Agency efforts to
get and keep qualified contractors. They also began to fear it would affect the way contractors performed work on site.

Second, in law, someone always bears the risk. Traditionally, industrial polluters have been able to pass the costs of hazardous wastes on to future generations, to neighboring parcels of land and their owners, or to consumers. Remediation efforts similarly carry costs that will be born somewhere in the process. Contractors may opt for endless rounds of study rather than move to the construction phase of a project in an effort to minimize their liability. If insurance companies assumed some of the risk, the premiums would be very high and the coverage limited. Innovative but unproven technologies may be eschewed because of liability concerns. Large companies, with significant assets and capable of providing advanced technologies, may fail to compete for such work altogether, thus reducing the pool of talent available and driving up costs.

Finally, it is inconceivable that the Federal government would have walked away from work, at least theoretically performed under its direction, in the event of a major accident—negligent or otherwise. Disaster assistance of all kinds has been available for floods, hurricanes, droughts, and at least one nuclear accident—even though Federal responsibility was minimal or non-existent. The Federal Government would not, and
politically, and probably legally, could not invoke obscure liability rules to evade compensation to victims for an accident caused by its contractors. Thus, apocalyptic scenarios of multibillion dollar claims against insurance companies and contractors were unwarranted. In the event of a sizable accident, the Federal Government would have been the ultimate financial recourse. Such a recognition would have gone far to lower the perceived stakes and paved the way for a better result.

The consideration that drove EPA administrators to any action at all was the fact that existing ARCS contracts as well as previous generations of remedial contracts contained language that provided for indemnification of contractors. No upper limit of indemnification was specified. Among other things, this meant that the ARCS contracts were not in compliance with statute. Subsection (c)(5)(B) of CERCLA 119 specifically required limits and deductibles in any indemnification agreement which the Government makes with response action contractors. Second, the Comptroller’s Office of EPA became increasingly uneasy about the continued exposure of the trust fund to the possibility of pollution liability claims against Superfund contractors.79

A second force pushing for resolution was Congress itself. Although responsible for authorizing indemnification of response action contractors in Section

7942 USC 9619.
119 in 1986, many in Congress were beginning to have second thoughts about the costs associated with such a move. The opening round was fired by GAO in a report entitled "Superfund Contractors Are Being Too Liberally Indemnified by the Government."80

The report pointed out that some contractors were doing work for private parties and states without indemnification and expressed the belief that at least some would do so for the Federal Government. The procurement process itself would determine whether adequate response could be found among qualified contractors. GAO analysts believed that some types of work required no indemnification. Furthermore, EPA was not in compliance with the statutory requirement of an overall limit on the amount of indemnification available. Lack of limits would "expose the government to potential liabilities that contractors may be willing to assume as a cost of doing business."81

In a follow-up report over two years later, GAO found that the same problems persisted. "EPA has not corrected the problem of excessive contractor indemnification that GAO reported two years ago. While EPA has worked on a new indemnification policy, it has continued to grant unlimited indemnification to almost all of its Superfund contractors."


81Ibid., p. 3.
It has also not tested contractors' willingness to do Superfund work without indemnification...or set a limit on indemnification. Moreover, EPA is still not tracking contractors' efforts to obtain private insurance.82

Finally, by the early 1990s, there appeared to be some loosening of the attitudes of insurers, ever eager to make money from new "products," toward the subject of pollution liability insurance. Although very expensive (a cost that would be directly charged to the Government) and providing very little coverage, the availability of this insurance meant that movement was being made toward some sort of market solution.83

Thus the stage was set for issuance of the final guidelines in January, 1993. Limits were set and, more importantly, solicitations for future work would be offered without any indemnification at all. Only if the Agency determined the response to be inadequate would indemnification be offered. The full costs of this one aspect remain unclear.


83AIG, a major property and casualty insurer, led the way, and others began expressing interest. Contractors were offered coverage of up to $5,000,000 per contract, and while this seemed inadequate given the potential for large judgments, it would probably be enough to cover several nuisance lawsuits.
Consequences of the Guidelines

Congressman Dingell had intended that CERCLA 119 should be the sole authority within the Federal Government for the indemnification of responses action contractors regardless of the Agency for which they performed their work. Remedial contractors working for DoE and DoD would be bound by the same procedures and dollar limits that EPA would impose on its Superfund contractors. The stakes were significantly higher in DoE and DoD since much more was being spent by those Agencies and, at least in the case of DoE, the work was arguably far more hazardous and far more likely to result in lawsuits.

DoD had, in fact, long argued that in addition to CERCLA 119, it had additional authority to indemnify contractors, including Public Law 85-804 which provided for extraordinary contract relief to defense contractors, regardless of legal entitlement, "when an actual or threatened loss under a defense contract, however caused, will impair the productive ability of a contractor whose continued performance on any defense contract or whose continued operation as a source of supply is found to be essential to the national defense."84

DoE had an even broader claim of authority to indemnify its contractors and used a number of approaches. DoE provided cost reimbursement provisions in its contracts requiring DoE to reimburse contractors fully for environmental cleanup liabilities. DoE contractors were also exempt from liability from nuclear accidents under the Price-Anderson Act, a cold-war era statute protecting nuclear weapons manufacturers from liability. Likewise, DoE claimed authority to provide extraordinary contractual relief under Public Law 85-804 since its sites were involved in the production of nuclear weapons. Finally, DoE wrote a number of special indemnification clauses into individual contracts specifically limiting contractor liability for environmental cleanup costs.85

GAO found that DoE had selected its indemnification policies without any overall analysis of the cleanup needs of the Agency. Indemnification provisions were far too generous thus exposing the Government to large and indeterminate risks. GAO agreed with Congressman Dingell that a government-wide indemnification policy for hazardous waste contractors was needed and that the CERCLA 119 guidelines of EPA were preferable to the practices of DoE. "We continue to believe...that specific authorizing legislation must take precedence over general nonstatutory procurement

authorities in indemnifying cleanup contractors at Superfund sites. Consequently, section 119 must be used in place of general nonstatutory contracting authorities to indemnify contractors involved in the environmental cleanup of DoE, 16 Superfund sites.86

Another consequence of the promulgation of the guidelines concerned their retroactive application to existing Superfund contracts. Because they considered existing Superfund contracts not in compliance with statutory requirements for set upper limits on indemnification, OGC aggressively pushed for retroactive application of the guidelines. This position was taken notwithstanding the fact that OGC had found the contracts legally sufficient in 1988-1989, when they were awarded with unlimited indemnification. This meant, among other things that the Agency would have to modify all existing Superfund contracts and that all Superfund contractors would be required to modify all existing subcontracts, and that all subcontractors would have to modify contracts with their suppliers to reflect the change in EPA indemnification policies.

CERCLA 119 contained no specific requirement for retroactive application of the final guidelines. Existing contractual provisions provided that indemnification of any contractor would not exceed appropriations available from

86Ibid. p. 10.
the Hazardous Substance Superfund at the time such liabilities were reduced to judgment or settlement. In one sense, existing contracts already had an upper limit on indemnification.

Although the same clauses called for subsequent modification once guidelines were determined, they stated that change would be accomplished by mutual agreement. The only significant inducement that the Agency could use was the threat of contract termination. But even here, it was not entirely clear that the Agency could terminate contracts on grounds that contractors refused to surrender a valuable right, and in any event work on sites would be seriously hampered if even a small number of contractors were terminated. Furthermore, costs associated with termination for convenience (T for C) of the government would be significant since T for C placed the government in the position of a defaulting party and thus liable for termination costs.

In the end, most contractors accepted the limits imposed by the guidelines for a number of individual reasons but also because they determined that a prolonged fight with EPA was not worth the effort. By the early 1990s, the really large contracts were to be awarded by DoE, DoD, and private parties. The endless quarrels with EPA were increasingly pointless. The ARCS contracts would be completed in a few years and a determination could be made
at that time whether working with EPA was in the best interest of the company. To a limited extent, pollution liability insurance was available from at least two insurers in amounts sufficient to cover at least the costs of nuisance lawsuits, and the premiums would be paid by EPA. Finally, some of these contractors had been involved in hazardous waste remediation for nearly a decade, and a better idea was being formed of that quantum of risk which was being assumed at least on a large number of sites.87

But the processes by which EPA arrived at its indemnification policy were deeply flawed. One indemnifies because of risk. One insures because of risk. Different sites and different types of work present different risks. It seems increasingly clear that many types of work and many sites required no indemnification at all because the risks were minimal. But to make such a determination the Agency would in fact have to be in control of the work performed on each site and this required a level of technical competence which was beyond and would remain beyond its grasp.

Nor was it clear that by writing contractor guidelines to avoid significant liability that the problem was really solved. Risks would be born by someone, and in most cases this meant the Government that undertakes the work.

Insurance premiums were be paid by the government, the
degree of Government supervision would be contested in the
event any serious release occured, and in the final
analysis, the Government would bear the costs of even
negligent contractor performance rather than permit innocent
victims to go uncompensated. Whether order has been imposed
on the risk allocation process by the guidelines very much
remains to be seen.88

Inherently Governmental Functions

OMB attempted to define "inherently governmental
functions" as activities "being so intimately related to the
public interest as to mandate performance only by Federal
employees." Although problems in this area had surfaced
from time to time, the issue took on new momentum on a
government-wide basis in the wake of Senator Pryor's
hearings on EPA Superfund contracts."89

88Ibid., passim.

89The policy behind A-76 was first approved in 1955 by
the Bureau of the Budget, and it has been amended several
times, most recently in 1991. The 1991 amendments addressed
the issue of "inherently governmental functions" largely
because of the problems faced by EPA in administering its
Superfund contracts. A-76 established as Federal policy the
proposition that the Government should use the private
sector to provide commercially available goods and services
rather than attempt to produce them inside the government.
A-76 also provided detailed instructions for performing
cost comparisons. See Nash & Schooner, The Government

196
EPA officials were now forced, as a matter of law, to take the major points of Pryor's argument seriously. Were private businesses making public policy and decisions on how public money was being spent? Were employees of private businesses holding themselves out as Government employees? Were enforcement strategies being determined by businesses which had conflicting motives? The definition of inherently governmental function now took on practical dimensions.90

In retrospect, the argument seems to have been about accountability rather than the philosophical issues which were posed. And Pryor had ample reason to be concerned. Contractors were already performing a great many functions assumed to be the domain of Government. Indeed, the practice of contracting out for services now had the official sanction of the Grace Commission, a Presidential panel which reported in 1983 that the Government could save $474,000,000,000 a year in certain limited types services. As the 1980s progressed, recourse to private-sector service contractors increased despite growing Congressional skepticism.91

But the way in which the issue was framed was not likely to lead to accountability. There is no activity performed by Government which does not have a parallel

90See the discussion on acquisition plans and make or buy policies in W. Noel Keyes, Government Contracts, pp.58-65.

91Ibid.
function in the private sector. In some respects, this parallel is more easily observed in local government, where descent from medieval municipal corporations is clearer and where local business elites have a direct impact on public planning and economic development projects. In effect, cities are corporations performing functions that are frequently undertaken by private business as well.

EPA officials predictably avoided any philosophical discussion along these lines as they tried to formulate a policy in this area and placate Senator Pryor. In October, 1990, the Agency issued EPA Order 1900.2, that attempted to define areas which constituted inherently governmental functions for which contracting was therefore prohibited. The order also implemented a number of management controls that would be triggered when the Agency contracted for certain kinds of "sensitive services." The Order placed a flat prohibition on contracting for certain kinds of services. Many of the prohibited

92See Lawrence Friedman, *A History of American Law*, passim. Some theorists argue that the only function which a state can perform which the private sector cannot is the legitimate taking of a human life. Even here the argument breaks down under closer scrutiny. Many would argue that no taking of a human life is legitimate and clearly there are instances when society approves of the private dispensation of justice in this manner.


941. The actual preparation of Congressional testimony. 2. The interviewing or hiring of individuals for employment at EPA. 3. Developing and/or writing
activities concerned relatively obscure pieces of the contracting process itself. When they did address core activities of the mission of the Agency, the list presented another set of questions. For example, Congressional communications in the form of testimony or correspondence found a place on the list, but participation in the process by which those communications were determined was not proscribed. It would not seem that preparation of a little-edited "draft" would fall within the ban.

Preparation of responses to Freedom of Information Act position descriptions and performance standards.
4. The actual determination of Agency policy.
5. Participating as a voting member on a performance evaluation board; participating in and/or attending Award Fee meetings.
6. Preparing award fee letters, even under typing services contracts.
7. The actual preparation of award fee plans.
8. The preparation of documents on EPA letterhead other than routine administrative correspondence.
9. Reviewing voucher and invoices for the purposes of determining whether costs, hours, and work performed are reasonable.
10. The preparation of statements of work, work assignments, technical direction documents, delivery orders, or any other work issuance document under a contract that the contractor is performing or may perform.
11. On behalf of EPA, actually preparing responses to audit reports from the Inspector General, General Accounting Office, or other auditing entities.
12. On behalf of EPA, preparing responses to Congressional correspondence.
13. The actual preparation of responses to Freedom of Information Act requests, other than routine, non-judgmental correspondence— in all cases, EPA must sign it.
14. Any contract which authorizes a contractor to represent itself as EPA to outside parties.
15. Conducting administrative hearings.
16. Reviewing findings concerning the eligibility of EPA employees for security clearances.
17. The actual preparation of an office's official budget request.

As noted above, Pryor's staff had uncovered fairly widespread use of contractors to prepare testimony in DoE, EPA, and elsewhere.
requests—other than routine, non-judgmental correspondence—was prohibited. Yet it would seem that review of all documents—even those that contained trade secrets—to determine what was releasable fell within the "routine, non-judgmental" exception. It strains credulity to believe that the EPA official who signed FOIA correspondence would, in fact, review all the decisions made by contractors as they reviewed hundreds of pages of documents pursuant to a single request for information. If they did review each page, why was a contractor needed in the first place?

Similar problems arose in the area of voucher and invoice review, which was prohibited by the order only insofar as contractors were used to determine whether costs, hours, and work performance were reasonable. Use of contractors in this particular instance fell afoul of other Federal laws that had resulted in a major Agency shakeup.96

The Order provided a second list of contractor activities that placed EPA "in a vulnerable or sensitive position if adequate controls are not implemented." In these cases, additional layers of justification (in addition to the already enormous volume of justification which accompanies procurement requests) were required and dutifully produced, slightly thickening already bulging

96See the discussion of the Trade Secrets Act and information law earlier in this chapter, supra. The EPA order was drafted before the CSC fiasco.
contract files. A third list of activities were "not sufficiently sensitive to require justifications," but did "necessitate the establishment of special EPA control measures. If a new procurement is contemplated involving any of these activities or situations listed below, a special discussion detailing control procedures to be enforced must be included within the pre-award procurement request rationale document."97

The issue was subsequently taken up by GAO in 1991. GAO administrators acknowledged the difficulty of defining inherently governmental functions and provided further guidance to agencies.98 But the more significant effort in this field was the issuance of Policy Letter 92-1 of Office of Federal Procurement Policy.99 Acknowledging their reliance on the "excellent" work of the Environmental Protection Agency in this field, OFPP adopted the formula, and with minor exceptions, the substance of EPA Order 1900.2. Undoubtedly, the "inherently governmental function industry" continues to flourish. The real issue—accountability—remain ed even farther from resolution and

97Ibid., EPA Order 1000.2, pp. 6-7.


even more elusive.
One of the major objectives of this study was to place contracting for professional services in a broader context that would shed light on its significance. The final pages of this work will attempt to interpret, in the context of the evolving business-government relationship discussed in chapter 1, the organizational, legal, and political problems that were explored in chapters 2-4.

The subject has been important from a practical standpoint because large amounts of public money were involved, and the amounts are likely to grow in coming years. Moreover, professional services have been increasingly important in measuring national wealth, and as long as government remains a major consumer of the most advanced of these services, government contracting structures and policies will help determine their development and the development of the professions that provide them. From the perspective of an historian, however, government service contracting policies and practices raised questions which might cause us to consider broader questions on the centralization of government power,
government competence, business-government relations, and the role of contract law in the execution of public policy.

Centralization.

One of the main themes of organizational history, at least in its early years, was the idea that modernization required increasingly centralized management of both public and private institutions, which were becoming increasingly national in scale. Such a development was relatively easy to chronicle in the modern corporation, but much more difficult to achieve when dealing with government. Part of the problem was the fact that American government at all levels was always meant to possess only limited powers and would, in any event, be subject to a wide variety of formal and informal checks and balances. Thanks to the work of Skowroneck and Balogh, it is now much easier to understand just how difficult that task would prove. It is also easier to understand how Federal administrators attempted to increase centralized governmental power through appeals to "science," although it is also worthwhile to note that such appeals could succeed only in the interstices of constitutional and administrative practice. Professionals might well augment Federal constitutional power, but they could not ultimately transcend it.
Even more significant, however, is the fact that science was procured by contract, and the public and private organizational structures concerned with Federal contracts were extraordinarily numerous, complex, powerful, well-financed, and most importantly, all but invisible to the public. There were rivalries among contract, program, and legal offices within the executive branch and with Congressional oversight committees and the General Accounting Office in the Legislative Branch. Trade associations, individual contractors, and Washington law firms competed for power with each other and with the formal offices of government. The recipients of the professional services and the watchdog, community, and environmental groups that monitored all this activity were never reluctant to bring forth their own often complex and contradictory proposals. The parties legally responsible for the costs of environmental remediation had perhaps the biggest stake of all in the Superfund contracting process.

Each had a role to play, and whether in the courts, in the media, in access to public officials, or in some other forum, each had the potential either to delay or in some measure to disrupt the entire process. If this represented centralization of government authority, one can only wonder what decentralization would have looked like. The absence of centralization in such a key governmental function can
work only to increase by default the power of corporate entities.

Government Competence.

As noted above, the process by which professionals came to exercise influence in Federal administration rested on their access to an esoteric "science" that called them into existence and legitimated their authority. When challenges to their competence were raised, their authority in public life was likewise called into question. That is why public policy failures such as Superfund, Savings and Loan regulation, the Vietnam War, or the public health response to the Swine Flu "epidemic" have had reverberations beyond the immediate policy field in question.

Astute bureaucrats created Superfund in the last weeks of the Carter administration by playing on fears of a toxic threat. Despite the billions spent on testing and studying individual sites during the first fifteen years of Superfund, widespread peril to national health caused by abandoned hazardous waste dumps remained subject to legitimate debate. Health, of course, is not the only reason the middle-class public still supported environmental remediation efforts, but it was clearly the wedge that opened the Superfund door before it would be forever closed by a hostile Reagan administration.
The pace of cleanup provided still another occasion to question the competence of Federal employees, their contractors, and the entire process by which professional services were acquired. Relatively few sites were delisted, and even some of those may have had their status changed for political reasons. Government officials and their contractors alone decide what really constituted a clean site. In the final analysis, government by contract did not produce results.

The worst sites remained the nuclear waste dumps created at nuclear weapons factories by the Atomic Energy Commission (now Department of Energy). These disasters were called into existence by feckless Federal nuclear engineers and other officials who assumed that the enormously dangerous by-products of their professional "services" would somehow take care of themselves. Despite billions of dollars spent by the Department of Energy, this archipelago of sites scattered from Fernald, Ohio, to Hanford, Washington, remained as dangerous and unremediated as ever.

While these facts could easily outrage any layman who had to pay for such professional blunders, for the historian, they presented additional questions. As discussed in chapter 1, the business-government relationship and the dynamics of its interaction did much to explain politics, society, culture, science, education, and much else in modern American life. It is, however, far more
difficult to understand that interaction and all that goes with it when one of the pillars of the business-government relationship is less than competent or, on occasion, even incompetent. How, for example, do we explain the billions of dollars spent on environmental litigation if the "science" which provides the bases for that regulatory scheme is subject to endless dispute?

In its classic form, corporatism required an activist, competent government. The literature of corporatism discussed in chapter 1, focused on those aspects of the business-government relationship in which the government could fill such a role: the regulator of monopoly, subsidizer through the internal revenue code, protector from competition.

When one turns to government contracts, however, the picture becomes somewhat more clouded. The subsidies provided in defense contracts helped build electronics and computer industries. Public works projects provided hydroelectric power and highways which aided local economic development. But service contracts presented a different dynamic by virtue of the fact that government voluntarily surrendered its competence. It lost not only the power it once exercised over private-sector institutions, but also mastery of its own internal decision-making. On the surface, this would seem a resurrection of the progressive
paradigm where a less than competent national government exists in the shadow of business.

The Public-Private Question.

For the progressives, all institutions were either public or private. Organizational historians do not think in such black and white terms, or when they do, tend to downplay the sharpness of the dichotomy. Hawley's study of Hoover's "associationalism," for example, suggests that efforts to coordinate public and private policy-making were largely unsuccessful except in wartime.¹

Unlike the rapid unraveling of business-government cooperation that followed World War I, the military-industrial complex that emerged after World War II (or perhaps more precisely after the Korean War), remained a fact of life down to this day.² In some respects, the environmental-industrial complex which is the subject of this dissertation was a smaller clone of the military-industrial complex but with perhaps unlimited potential for growth. This was certainly how Congressman Dingell's oversight committee, the GAO, and the media have seen the problem, and armed with that perspective, they have tried to


²A.C. Koistinen, The Military-Industrial Complex, passim.
regulate it as if they were dealing with military hardware contracts.

The problem, however, was deeper and more complex. Despite its relatively small size, the U.S. Environmental Protection Agency was a bureaucracy with an enormous regulatory reach. Placing contractors at the heart of the Agency to perform work that required professional skills seriously absent in government personnel proved to be an invitation to abuse which went beyond overbilling, fraud, shoddy workmanship, or any of the other shortcomings of traditional government contracting programs. This was true not only because EPA contractors might at some point have been in a position to benefit from those decisions in which they participated, but also because the perspectives that they brought to problem solving and regulation could not, by definition, be informed solely by the public good. Although indistinguishable from the civil servants who sat next to them, and possessed of the same personal attributes, contractors performed their duties as private citizens. Their place in government was created solely by contract, and the scope of their authority was limited by its provisions. The contract could not confer civil service status. Contractors always had to consider the financial welfare of their company as well as that of their country. In the final analysis, they could not act like government employees.
Service contractors ceased to operate at the margins of American public administration. Privatization efforts of state, local, and Federal governments have placed more and more work into the hands of contractors. For the most part, social, medical, and other professional services paid for by state and local government are supplied, in fact, by private contractors. Even in areas once thought off limits to privatization such as education, private schools supported ultimately by taxpayer dollars are making a comeback.3

Such practices require us to revisit Hawley's conclusions concerning "associationalism." The "best men" of the "best companies" were indeed defining, determining eligibility for, and providing public services. At least at the upper reaches of this administrative pyramid, viz., the military-industrial complex and its clones, there was little or no domestic or foreign competition. Whatever labels economists might chose to place on individual firms, the industry was clearly cartelized. By and large, access was limited to those who were already government service contractors by financiers unwilling to risk the vast sums which are required on unproven contractors and by complex rules concerning source selection and progress payments. Finally, these arrangements were enforced by a series of

3See, for example, Steven Rathgeb Smith and Michael Lipsky, Nonprofits for Hire (Cambridge, Mass.: Harvard University Press, 1993), and Myron Lieberman, Privatization and Educational Choice (New York: St. Martin's Press, 1989).
complicated laws and regulations that only large corporate law firms had the skill and capacity to litigate.

One can, perhaps even must, return to the progressives with their paradigms based on the "interests" for an understanding of these institutions and institutional arrangements. Have not rich and powerful business interests penetrated to the heart of American public policy making? Can private gain be far behind? However well organizational historians have illuminated the process by which this has happened, the end result feared by progressives seems to have come to pass.4

Law and Organizational History.

At first glance, it would seem strange that organizational history has inspired so little interest in legal historians or that organizational historians have rarely been drawn to legal topics. Law is one of the principal institutions which has defined the business-government relationship and its records have charted changes in organizational thinking in all societies. Part of the

4For Theodore Lowi, interest group liberalism was inherently undemocratic because it allows private parties to make public policy. His work calls for a renewal of American institutions, particularly governmental. Legislatures in particular should be required to make specific policies rather than delegating them elsewhere. Theodore Lowi, The End of Liberalism, (New York: W. W. Norton, 1969).
problem is that much of the legal history fraternity is tied to the agenda and paradigms of a professional rather than a research discipline. Academic scholars frequently lack the specific skills needed to relate the seeming minutiae of legal instruments to larger philosophical questions.5

The lack of interest in legal proceedings is not entirely wrong. As we have seen in the chapter 1 discussion of the Stringfellow litigation, accounts of legal disputes between government and business do not always illuminate American corporatism. Potentially responsible parties did not want to pay the costs incurred for an immense environmental remediation project for simple reason that the costs were enormous. Such matters are of obvious interest to the litigants, but they do not advance historical understanding.

A focus on legal doctrine and legal institutions does, however, sometimes shed light on some of the darker corners of the business-government relationship. Officials of the Environmental Protection Agency had a very difficult time resolving questions posed by organizational conflicts of interest. Could engineering firms work on the same site for both the government and a private party? Common sense and official policy said no, but such things have happened and

5There are, of course, notable exceptions. A good place to start the search is Lawrence M. Friedman and Harry N. Scheiber, eds., American Law and the Constitutional Order (Cambridge, Mass.: Harvard University Press, 1988).
will happen again with some regularity, and government attempts to craft laws and regulations to meet these contingencies tell us much about the state of business-government relations.

Likewise the subject of confidential business information raised additional legal problems that further illuminated the world of government contracting. Federal law prohibited government personnel from releasing proprietary information to contractors without an elaborate and expensive observance of due process and even then much will remained unreleasable. Yet how could government contractors furnish advice and assistance without such access? Personal service contracts were forbidden for a number of policy reasons and yet they easily came into existence both by design and by inadvertence. Attempts to fashion a legal response in these areas further contributed to a redefinition of the American business-government relationship.

Nowhere was this issue brought into sharper focus than in the area of contractor liability and risk allocation. The Federal government has traditionally operated under a different set of laws concerning its own rather than contractor liability for such failures as faulty design and negligent performance. Awards and procedural matters were governed by Federal tort claim statutes and ideas of sovereign immunity. With some exceptions, such legal
protection did not extend to Federal contractors. The intense struggle over architect/engineer contractor responsibility and contractor indemnification, however, highlighted efforts by contractors and their allies to merge the distinctions between public and private tort claims to ensure protection greater than that afforded to either public or private tort defendants.

Sustained efforts by Senator Pryor and Congressman Dingell to define and regulate "inherently governmental functions" has largely been unsuccessful. Business in the Environmental Protection Agency and other Federal agencies with contracting authority goes on much as always in no small part because Federal managers had no other recourse when they required professional services. Regardless of how many times Federal bureaucrats invoked the legend that contractors were merely providing advice and assistance, actual funding, policy, and even political decisions were, in fact and however indirectly, still being made by contractors because no one else in the Agency had the technical knowledge on which to base these decisions.

The efforts of Dingell and Pryor have at least given the problems created by the special public/private circumstances of government contractors a name. And until the 1994 elections deprived them of their forums, they were able to bring the issue to (somewhat limited) public attention.
The Corporate Commonwealth.

The idea of an corporatist state requires a symbiotic business-government relationship of relatively equal partners. Organizational historians have devoted considerable effort and great skill in the last thirty years in erecting a paradigm that explained the evolution of such a corporate commonwealth. But in their efforts to overthrow the often shrill and overly broad denunciations of progressives and marxists, organizational historians have often underplayed the lasting and pervasive influence of corporate power and wealth. At first glance, government reliance on contractors would seem to be a case study that supported their notions of a corporate commonwealth where government and business pulled together in order to effect public policy responses better than either could do individually.

But there were problems with this view. From the time of the settlement of Jamestown, which was primarily a commercial venture, government has been at best a junior partner, and not infrequently, a servant of business. Absolutist government with its attendant bureaucracies of church, state, and army had been firmly resisted in English America to the applause of subsequent generations. When the time came for national institutions to replace local ones in the nineteenth century, railroads, banks, churches, and
other private-sector entities rather than government led the way.

From the standpoint of a Federal official, use of contractors would appear to be a way to enhance state power by inverting four hundred years of business-government relations in America. By this logic, business—and with it a full panoply of professional skills and services—would be made subordinate to the government by the simple act of purchase.

But those officials did not properly calculate the cost. The primary cost to government of service contracting has proved, in the final analysis, to be something other than financial. The ultimate cost has been the diminishment of the state itself. Service contracting has created a crisis in government authority and competence as the ability of government to manage complex, technical programs wanes. It has eroded the distinctions between business, professions, and government and has placed enormous power in the hands of unaccountable private organizations which derive authority not from the state, but rather from a theology of science. And, as we have seen, the primary focus of government energy has shifted to the complicated, contentious procurement process itself, rather than public policy outcomes. Government remains more than ever the junior partner in the corporate commonwealth.
BIBLIOGRAPHY

PUBLIC DOCUMENTS


______. Environmental Protection: Meeting Public Expectations With Limited Resources (GAO/RCED-91-97, June 18, 1991).


Superfund Program Management (GAO/HR-93-10, December, 1992).


Superfund: Getting Into the Act (EPA/540/G-89/003a, April, 1989).

NEWSPAPERS


**The Recorder.** (San Francisco Legal Newspaper) 18 July, 1994.

**San Francisco Chronicle.** 29 May, 7 August, 3 October, 1991; 10 April, 1992.


BOOKS


ARTICLES


Brinkley, Alan. "Writing the History of Contemporary America: Dilemmas and Challenges," Daedalus 113 no. 3 (Summer, 1984).


