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WIELDING THE VIRTUAL GAVEL—DOD MOVES FORWARD WITH REVERSE AUCTIONS

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I. Introduction

Five hundred years before the coming of Christ, Babylonian men procured wives during an annual auction of women of marriageable age.[2] Would-be husbands bought the attractive women in traditional auctions with the lucky suitor being the highest bidder, but the less desirable females had to pay someone to marry them. The not-so-pretty women auctioned themselves off in what is probably the earliest precursor of a reverse auction in recorded history. Most likely using the prices paid for the good-looking wives as a starting point, the potential suitors competed to reduce their "bids" until hitting their bottom line—the bargain-basement dowry they would accept to marry an ugly wife. The man with the cheapest requirements took home a bride.[3]

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2. RALPH CASSADY, JR., AUCTIONS AND AUCTIONEERING 26 (1967) (citing HERODOTUS, THE HISTORIES OF HERODOTUS 77 (Henry Cary trans., 1899)).

More than 2500 years later, the public sector has turned to auctioning to buy millions of dollars of computers, natural gas, airplane parts, dishwashers, pharmaceuticals, and even goats. In this day and age, however, the auctions have a new twist—they are online and they are "reverse." As they gain in popularity, the virtual gavel can be heard banging across the Department of Defense (DOD) and the entire federal government.

Government agencies are turning to this procurement tool not only as a way of leveraging electronic commerce technology, but also because it has significant potential to shorten the contracting timeline and, perhaps more importantly, to result in dramatic cost savings for the government. Not everyone favors reverse auctions' bid for acceptance, however. A number of legal questions and concerns about reverse auctions still loom in contracting cyber-space.

This article first reviews the background of reverse auctions, starting with their history, including use by the private sector and by state and local governments. The article also provides a general description of how reverse auctions work and looks at the federal government's experience with reverse auction procurements, including an overview of the perspective of the different services. Next, the article addresses the baseline question of whether reverse auctions are legal, followed by explaining what regulatory guidance exists. The article then reviews some of the difficulties previous reverse auctions have faced, the challenges in properly implementing them, and some of the concerns among government and industry users. The article evaluates the validity of some of those criticisms, as well as assessing possible solutions to the various problems. The article next concludes that the reverse auction is a valuable procurement tool that will continue to grow in popularity. With that baseline assumption, the article then analyzes opinions regarding whether reverse auctions require additional regulatory guidance. Finally, the article asserts that while the reverse auction experience to date does not indicate a need for extensive regulation, more formalized guidelines could benefit some areas.

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3. *Id.* Neither Cassady nor, apparently, Herodotus offers any insight into the relationship between the price of a wife and the likelihood of marital bliss.

II. Reverse Auction Background

A. History of Reverse Auctions

After the Babylonians, the British apparently used a descending price auction—also known as a Dutch auction—as far back as the 1600s.[4] A descending price auction is similar to a reverse auction in that participants bid down the price from its beginning level.[5] The two formats differ, however, because a descending price auction still has the traditional goal of selling something *to the bidders*. On the other hand, in a reverse auction, the bidders are vying for the right to sell something *to the auction holder*.[6]

In the private consumer world, Priceline.com uses a reverse auction to match travelers with airline tickets, and the lending industry, automobile sales, and hotel bookings have all employed reverse auctions.[7] At least three online reverse auction Web sites will locate attorneys for legally troubled consumers,[8] and the concept has found a place in class-action suits,[9] environmental siting decisions,[10] and even medicine.[11]

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4. *Id.* at 32 (describing the mention in a seventeenth-century British catalog of a "mineing" auction). Despite its name, "mineing" had nothing to do with underground minerals. Instead, it involved potential buyers driving down an initial bid until someone called "Mine!" and took home the lot. Cassady calls "mineing" an imported version of the Dutch auction, used originally in Holland (thus the name). *Id.*

5. *Id.* at 62 ("The auctioneer determines the starting figure and quotes prices at descending intervals until someone bids the item in."). The Dutch auction is still used today to sell items ranging from art treasures in the Netherlands to fish in Israel. *Id.* at 63.

6. If one views the men as selling themselves as husbands, then the Babylonian auction truly was reverse.

7. Sari Gabay, Note & Comment, *The Patentability of Electronic Commerce Business Systems in the Aftermath of* State Street Bank & Trust Co. v. Signature Financial Group, Inc., 8 J.L. & POL'Y 179, 217 n.178 (1999) (pointing to Priceline.com's patent for reverse auctions as a "name your own price" system that has "expanded to home mortgages, hotel rooms and automobiles").

8. Ralph Warner, *Online Law: Why the Legal System Will Never Be the Same Again*, *at* http://www.nolo.com/democracy_corner/ (last visited June 24, 2002) (listing LegalMatch.com, Lawyers for Less, and SharkTank as reverse auction sites where clients post legal problems and lawyers enter bids). Lawyers for Less trumpets "1000's of qualified lawyers waiting to bid! . . . Emailed quotes save you $100's even $1000's!" Lawyers for Less, *Home Page*, *at* http://www.lawyersforless.com (last visited June 24, 2002).

9. John C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1354 (Oct. 1995) (arguing that in mass tort class actions, defendants will seek favorable settlements by pitting plaintiffs' attorneys against themselves, a process that will degenerate "into a reverse auction, with the low bidder among the plaintiffs' attorneys winning the right to settle with the defendant").

In 1998, online auction transactions (both reverse and traditional "forward" forms) between businesses and from businesses to consumers totaled about $8.5 billion a year.[12] One analyst predicts online auctions will account for an astronomical $100 billion by 2004.[13] Local, state, and federal government currently spend less than one dollar out of every 100 online,[14] but one estimate figures online auctions could cut governmental procurement costs by at least $50 billion.[15]

Pennsylvania was the country's first governmental organization to utilize reverse auctions. Over several months in 1999, the state saved $8.5 million buying online rock salt for roads, aluminum rolls destined to become license plates, and heating coal.[16] In January 2001, San Antonio, Texas, saved forty percent in reverse auctions for equipment for its emergency services.[17] Minnesota's forty-five-minute reverse auction in June

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10. Bradford C. Mank, *Environmental Justice and Discriminatory Siting: Risk-Based Representation and Equitable Compensation*, 56 OHIO ST. L.J. 329, 363 (1995) (stating that a reverse auction is one of five ways that a state can provide compensation to those harmed by siting an environmentally unattractive facility nearby). The siting authority "offers" the facility for consideration and then locates it in whichever community steps forward to accept the facility in return for the least amount of compensation. *Id.*

11. Brian J. Caveney, *Going, Going, Gone . . . The Opportunities and Legal Pitfalls of Online Surgical Auctions*, 103 W. VA. L. REV. 591, 596-97 (2001) (describing MedicineOnline.com's reverse auction where doctors bid on a prospective patient's desired surgery).

12. GENERAL SERVS. ADMIN., FED. TECH. SERV., GUIDE TO BEST PRACTICES FOR CONDUCTING REVERSE AUCTIONS 15 (Apr. 2001 draft) [hereinafter GSA GUIDE] (quoting Carl Lehmann, *Once, Twice, Gone: Auctioning the Future—Part 1*, ELECTRONIC BUS. STRATEGIES, Oct. 14, 1999) (on file with author).

13. *Id.*

14. DAVID C. WYLD, THE PRICEWATERHOUSECOOPERS ENDOWMENT FOR THE BUSINESS OF GOVERNMENT, THE AUCTION MODEL: HOW THE PUBLIC SECTOR CAN LEVERAGE THE POWER OF E-COMMERCE THROUGH DYNAMIC PRICING 7 (Oct. 2000) (pointing out that less than one percent of the more than $1 trillion in federal, state, and local government transactions take place online), *available at* http://www.endowment.pwcglobal.com/publications_grantreports.asp. Wyld's report is an extremely valuable resource for anyone involved in government procurement.

15. *Id.* at 53. Wyld, an associate professor in the Department of Management at Southeastern Louisiana University, is deliberately conservative in his estimate, which would require governments to realize only about one-fifth of the highest savings achieved by private sector firms. *Id.*

16. Ina R. Merson, *Reverse Auctions: An Overview, The Wave of the Future or Just One More Addition to the Toolkit?*, ACQUISITIONS DIRECTIONS ADVISORY, July 2000, at 1, *available at* http://www.wifcon.com/atricle.pdf.

17. Alan Goldstein, *Agencies Move Forward with Reverse Auctions*, DALLAS MORNING NEWS, Jan. 31, 2001, at 1D.

2001 for aluminum was expected to reap five-year savings of more than $175,000.[18]

In short, "the Internet has made procurement sexy"[19]—and the DOD has not proven immune to the enticement of technology's bright lights and big city. Drawn by the lure of big-buck savings and the thrill of the Internet revolution, various government agencies have turned to reverse auctions with varying degrees of enthusiasm and success.

B. How Reverse Auctions Work

Generally, reverse auctions allow companies to bid against each other in real time. The government knows the bidders' identities, but the bidders themselves see only aliases so they do not know who they are bidding against.[20] One of the most critical steps for the government is to determine the opening price, which participants then bid down. This price generally is set using a previous baseline (such as the supply schedule from the General Services Administration (GSA)) or the Independent Government Cost Estimate (IGCE).[21] The auction lasts for a fixed period, usually thirty to sixty minutes. [22] It can be extended past that window, however, if an offeror submits a bid within the closing minutes (again, another set period, for

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18. Press Release, Minnesota Department of Administration, State Launches Reverse Auction Purchasing Initiative (June 29, 2001), http://www.admin.state.mn.us/reverse_auctions.html.

19. WYLD, *supra* note 14, at 97.

20. GSA GUIDE, *supra* note 12, at 5.

21. *See* Air Combat Command, *Reverse Auction Tacklebox, at* https://lg.acc.af.mil/lgc/RA/RA_toolkit.htm (last visited July 18, 2002) [hereinafter ACC *Reverse Auction Tacklebox*] (Lessons Learned) (describing the right starting price as "crucial" and suggesting that it be based on "sound market research, historical pricing and the government estimate"). The Air Force, however, has also let the market set the starting price as well as the ending bid in reverse auctions. Telephone Interview with Lt Col Gregory D. Snyder, Air Force Secretariat Staff Contracting Officer (Mar. 13, 2002) [hereinafter Snyder Interview].

22. Dolores M. Smith, Professor, Defense Acquisition University (DAU), "Reverse Auctions—A New Pricing Tool," Presentation at the Tenth Annual Symposium of the Tidewater Association of Service Contractors, Tidewater Government Industry Council, and Old Dominion University, slide 32 (Nov. 7, 2001) [hereinafter Smith Presentation], *available at* http://www.tasc-tgic.org/Symposium/symposium_overview.htm; *see also* Lieutenant Colonel Alan J. Boykin, Contract Policy and Implementation Division, Office of the Deputy Assistant Secretary of the Air Force for Acquisition (Contracting), "Reverse Auctioning Policy," Presentation at the Federal Acquisition Conference (Apr. 18, 2001) [hereinafter Boykin Presentation] (providing much the same information as Ms. Smith's lecture), *available at* http://www.safaq.hq.af.mil/contracting/reverseauction/.

example, the final five minutes). At this point, each participant gets an additional period to submit new bids and "literally buy themselves more time."[23]

The circumstances—the buyer, the suppliers, the type of contract, the item or service involved, the level of technology and the auction provider used—may require or allow the agency to customize the actual process somewhat. For example, in a negotiated procurement (either a best value tradeoff or lowest price technically acceptable),[24] the process may work this way: [25] The agency identifies and articulates the competitive requirement, synopsizes it, and releases the solicitation. After receiving proposals, the agency determines the competitive range and then schedules the reverse auction. (The agency also often reserves the right to award without using a reverse auction.) All the contractors who will be participating receive training before the agency conducts the auction. After the auction, the agency does a post-auction analysis and awards the contract.

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23. Press Release, Air Force Personnel Center News Service, Reverse Auction Saves AFPC Nearly $1 million (Feb. 1, 2001), http://www.afpc.Randolph.af.mil/pubaffairs/release/2001/01/ReverseAuction.htm. Last-minute bids extended this auction thirty-six times, to more than four hours. AFPC saved more than $930,000 on 833 computers and slashed costs by almost half compared to the GSA quote of $2.065 million. *Id.*

Some agencies set a final closing time—regardless of any last-minute bids submitted—on their auctions. The Naval Supply Systems Command (NAVSUP), however, does not; instead, it has a policy of unlimited overtimes because "[w]e don't want the determining factor of the lowest bid to be who has the faster ISP connection." Telephone Interview with CDR Richard Ellis, Director of Acquisitions Policy at the Naval Inventory Control Point (NAVICP), Philadelphia (Feb. 4, 2002) [hereinafter Ellis Interview]. NAVSUP avoids auctions that run on forever by requiring new bids to drop by a minimum amount, between .25 and .5% of the contract dollar value. *Id. But see infra* notes 163-68 and accompanying text (reporting problems that can arise from the lack of a final ending time).

24. The "best value continuum" includes the tradeoff process, in which the government evaluates a number of factors other than cost or price, assigning them a combined weight determined in relative importance to cost or price. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 15.101-1(b)(2) (Sept. 2001) [hereinafter FAR]. The tradeoff process allows the government to pay more for benefits it believes warrant the additional cost. *Id.* 15.101-1(c). The "lowest price technically acceptable" source selection process, on the other hand, is "appropriate when best value is expected to result from selection of the technically acceptable proposal with the lowest evaluated price." *Id.* 15.101-2(a).

25. *See* Smith Presentation, *supra* note 22, slides 10-11 (explaining all the steps that follow).

C. The Federal Government Experience

1. General Overview

Reverse auctions are attractive first and foremost because of their "dynamic pricing"—their ability to create an environment where prices can fall as much as the market will allow.[26] Government agencies have saved millions after seeing prices drop as much as fifty percent from the starting price. Another benefit has been the ability to award a contract in days, sometimes literally hours, compared to the weeks or days that award traditionally takes.[27]

In May 2000, the Navy conducted the federal government's first online reverse auction, for 756 recovery sequencers used in airplane ejection seats.[28] During the fifty-one-minute auction, the price dropped from the starting bid of $3.2 million to the final price of $2.37 million, a savings of about twenty-eight percent. After the auction closed, the Navy needed less than an hour to award the contract to the winner of the three would-be suppliers.[29]

Also in May 2000, the Army's Communications-Electronics Command (CECOM) carried out two test reverse auctions but on a much smaller scale. The CECOM bought a secure fax machine at a savings of about twenty percent off the GSA schedule, followed by a purchase of two computers for $3280, about half the price the Army would have paid through GSA.[30]

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26. *See* WYLD, *supra* note 14, at 6-7 (characterizing auctions as transforming "pricing from a static to a dynamic model" and describing the "immense potential for cost savings" in using auction technologies).

27. *See* GSA GUIDE, *supra* note 12, at 1 (claiming that the "rapid bid, re-bid and negotiation process done in real-time over the Internet" leads to a reduced acquisition cycle). The time savings may occur, however, only *after* the auction, at time of award. Upfront preparations may require as much, if not more, time than traditional acquisitions. Snyder Interview, *supra* note 21; *see also infra* note 160.

28. Bill Murray, *Navy, Army Find Savings in Initial Reverse Auctions*, GOV'T COMPUTER NEWS, June 12, 2000, at 1 (LEXIS, Industry News Publications).

29. *Id.* In November 2000, the Coast Guard also bought spare airplane parts in its first-ever online reverse auction. Eight firms submitted 291 bids for seven lots, eventually saving the Coast Guard twenty-two percent or about $300,000. Press Release, U.S. Department of Transportation, Coast Guard Holds "Reverse Auction" (n.d.), http://cio.ost.dot.gov/cio_activities/ cg_auction.html.

30. Murray, *supra* note 28.

The Defense Energy Support Center held its first reverse auction in August 2000, knocking about $425,000 off the cost of a month's worth of natural gas for Washington-area military installations. Six suppliers submitted twenty bids in thirty minutes.[31]

The following month, in September 2000, the GSA's Federal Technology Service (FTS) launched Buyers.Gov[32] as an online reverse auction provider. GSA contracted with five companies, called "enablers," to conduct the auctions.[33] After a year, the site had handled about two dozen auctions, about half for information technology products.[34]

During its inaugural month, Buyers.Gov conducted the largest online reverse auction to that point. In September 2000, the Department of Defense Finance and Accounting Service (DFAS) watched fifteen bidders compete to supply its information technology needs. Originally set to last just sixty minutes, the auction went more than four times as long as falling prices extended the deadline. Prices on the four lots dropped from twelve to forty-eight percent, and DFAS paid about $2.2 million less than the $10 million IGCE.[35] Officials gushed, as well, over the speed of the procurement, which closed out that same day.[36]

In June 2001, GSA announced plans to award a long-term, government-wide indefinite-delivery, indefinite-quantity (IDIQ) contract to execute the Buyers.Gov reverse auction program.[37] By June 2002, Buyers.Gov had apparently fallen prey—at least temporarily—to its own success. The former Buyers.Gov web link, operational as late as March 2002, by June 2002 took users to a GSA site indicating that the program had been shelved in favor of contracted-out services: "Buyers.Gov was a pilot program implementing a Web-based exchange . . . . A portion of this pilot involved a technique called 'Reverse Auction.' Because of its success, FTS has decided to award long-term contracts for Reverse Auction applications."[38]

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31. William Jackson, *DOD Saves on Reverse Auctions, Plans More*, GOV'T COMPUTER NEWS, Aug. 14, 2000, LEXIS, News Group File.

32. General Services Administration, Federal Technology Service, *Buyers.Gov, at* http://www.buyers.gov (last visited Aug. 1, 2002).

33. GSA GUIDE, *supra* note 12, at 1.

34. Richard Walker & Kevin McCaney, *Reverse Auctions Win a Bid for Acceptance*, GOV'T COMPUTER NEWS, Aug. 1, 2001, at 21, LEXIS, ASAPII Publications—Federal Public Contracts.

35. GSA GUIDE, *supra* note 12, at 18.

In November 2000, the Small Business Association (SBA) became the first government agency to procure professional services through a reverse auction. The ten-hour competition between three contractors bid-

36. Press Release, ACS Powers Federal Government's Largest-Ever Online Reverse Auction (Sept. 28, 2000) (quoting DFAS Director Tom Bloom as saying, "Our objectives were speed and value . . . . In one afternoon, we saved a considerable amount of money and accomplished a major procurement that might ordinarily take over five days."), *available at* http://www.prnewswire.com/micro/acs2. The entire process, in fact, took just more than a week. During the four days before the auction (18-21 September), DFAS received and evaluated proposals, and it issued delivery orders the next Tuesday, 26 September. General Servs. Admin., Buyers.Gov, "DFAS Auction," slide 3 (undated PowerPoint presentation) (on file with author).

In May 2001, the Internal Revenue Service claimed the "biggest ever" reverse auction title, buying 11,362 desktop computers and 16,354 notebooks through Buyers.Gov. The final price of $63.4 million was less than half the prebid estimate of $130 million. Walker & McCaney, *supra* note 34.

DFAS was so pleased with the results of its first record-breaking auction for computer equipment that it relived the experience a year later. *See* Press Release, DFAS, Reverse Auction Saves Agency Almost $2 Million (Nov. 7, 2001) (quoting Jim Lee, acting director of acquisition services, as saying that the repeat use of a reverse auction was "highly recommended"), http://www.dfas.mil/news/pr/pr02-02.pdf. On 26 September 2001, DFAS saved $1.9 million by using a reverse auction to buy more than 4000 computers and 600 monitors. Four vendors participated in the Buyers.Gov auction. Christopher J. Dorobek, *Reverse Auction Stocks DFAS*, FED. COMPUTER WK., Nov. 16, 2001, http://www.fcw.com/fcw/articles/2001/1112/web-dfas-11-16-01.asp.

37. Colleen O'Hara, *GSA Moves Ahead with Reverse Auctions*, FED. COMPUTER WK., June 6, 2001, http://www. fcw.com/fcw/articles/2001/0604/web-buyer-06-06-01.asp. An IDIQ contract requires the government to order, and the contractor to provide, some minimum quantity of supplies or services. The government often uses these types of contracts when the agency does not know in advance exactly how much of the goods or services it will need. *See* FAR, *supra* note 24, at 16.504(a)-(b).

38. General Services Administration, *IT Solutions Expertise, Reverse Auction*, *at* http://www.gsa.gov (last modified August 23, 2002) [hereinafter GSA, *IT Solutions*]. GSA awarded the reverse auction contracts—worth up to $20 million—on 25 July 2002. *See* General Services Administration, *FedBizOps.gov*, *at* http://www.FedBizOps.gov (last visited August 7, 2002) [hereinafter *FedBizOps.gov*] (Award Notice for solicitation No. 7TS-01-0001). Four companies captured contracts for "hosted" (full service) auctions: B2E Markets, Orbis Online, NB Ventures, and Computer Information Specialist. The first three also received awards for desktop auctions, in which the company provides software, training, and a help desk. GSA, *IT Solutions*, *supra.*

ding for the right to install automated doors appears to have saved the SBA about 17.6% from its the target price.[39]

And then there are the goats. In November 2000, the Army helped the Special Operations Command buy 100 goats (known in official military parlance as "caprines"). With five bidders, the price dropped from $130 a head to $100, a savings of twenty-three percent.[40]

The Defense Supply Center-Columbus (DSCC) has found that using an automated reverse auction system for purchases of less than $25,000 tends to slash procurement time from eighty-seven days to about two weeks.[41] The DSCC's own system—the DSCC Internet Bid Board System (DIBBS)—allows would-be contractors to view their competitors' bids and submit their own bids before a set closing time.[42] As of 24 July 2002, the DSCC had 136 open auctions scheduled to close in the next two weeks.

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39. PR Newswire, *FedBid.Com Conducts First Reverse Auction for the Procurement of Professional Services*, Dec. 4, 2000 [hereinafter PR Newswire, *FedBid.Com*], LEXIS, News Group File.

40. *See infra* Appendix 1 (spreadsheet giving an overview of reverse auctions conducted by CECOM) (provided by Matthew Meinert, Group Chief, Electronic Initiatives Group, Acquisition Business Process Sector, Army Communications-Electronics Command, Fort Monmouth, New Jersey). As of February 2002, the Army had conducted about fifty auctions for customers who ranged from various Army commands to the Air Force, the Marine Corps, the State Department, and the Department of Energy. Telephone Interview with Matthew Meinert, Group Chief, Electronic Initiatives Group, Acquisition Business Process Sector, Army Communications-Electronics Command, Fort Monmouth, New Jersey (Feb. 5, 2002) [hereinafter Meinert Interview]. Cumulative savings totaled more than $2.17 million, with per-auction savings ranging between seven and fifty-three percent. *See infra* Appendix 1. Additionally, in a number of cases, the Army completed the auction *and* issued the contractual instruments in less than an hour. Matthew Meinert, Group Chief, Electronic Initiatives Group, Acquisition Business Process Sector, Army Communications-Electronics Command, Fort Monmouth, New Jersey, "Reverse Auctioning," slide 23 [hereinafter Meinert Presentation] (undated PowerPoint presentation) (on file with author).

41. Mark A. Kellner, *Winning Bid Can Be Determined in One Minute with Automated Reverse Auction*, GOV'T COMPUTER NEWS, Oct. 16, 2000, at 33, LEXIS, News Group File.

42. Susan Pavilkey, *DSCC Auction Site Saving Time, Administrative Costs*, COLUMBUS BUS. FIRST, Nov. 17, 2000 (quoting Kate Minor of the DSCC), http://columbus.bcentral.com/columbus/stories/2000/11/20/focus4.html. The DSCC runs its auctions slightly differently than the usual reverse auction, leaving the bidding open for longer periods, usually two weeks. Bidders can submit quotes at any point during that time and need not necessarily beat the previous bid. DEFENSE SUPPLY CENTER-COLUMBUS, DIBBS AUCTION USERS GUIDE 3-4 (Nov. 2000) [hereinafter DIBBS AUCTION USERS GUIDE], *available at* http://dibbs.dsccols.com/ RFQ/Auction.

Since August 2000, the agency had awarded almost 4500 contracts through DIBBS.[43]

A check of active postings on FedBizOpps.gov on 18 July 2002 showed thirty-six solicitations in which the agency had, at a minimum, reserved the right to conduct a reverse auction. [44] They ranged from GSA buying natural gas for various federal buildings[45] to dry-dock and repair services for Coast Guard patrol boats[46] to laboratory animal feed and bedding for the National Institutes of Health.[47]

2. Service-Specific Perspectives

Each of the largest three services—the Army, Navy, and Air Force—are wielding the reverse auction gavel in different ways. The Navy has perhaps been the most ground-breaking, the Army the most all-encompassing, and the Air Force the most decentralized.

a. The Navy Sets Sail

The Navy began using reverse auctions after meeting with auction service provider FreeMarkets, Inc., at the request of the Navy's Chief

43. Defense Supply Center-Columbus, *DSCC Internet Bid Board System, DIBBS Auctions, at* http://dibbs.dscccols.com/RFQ/Auction/ (last visited July 24, 2002) [hereinafter *DIBBS Auctions*]. In the same period, the DSCC terminated 707 auctions because it did not receive any qualified quotes. Another 108 contracts were still awaiting award, including seventeen in which the auctions closed at least six months ago. *Id.*

44. *FedBizOps.gov, supra* note 38. Effective 1 January 2002, FedBizOpps.gov became the single point of universal electronic access to federal procurements for more than $25,000. On 4 January 2002, the Department of Commerce stopped printing the *Commerce Business Daily,* which publicized government contracting opportunities. OFFICE OF ACQUISITION MGMT., U.S. DEPT. OF COMMERCE, CBD FINAL NOTICE (n.d.), *available at* http://oamweb.osec.doc.gov/docs/CBDTerminationNotice_final.pdf.

45. *FedBizOps.gov, supra* note 38 (Solicitation No. GS-00P-02-BSC-0199).

46. *Id.* (Solicitation No. DTCG80-02-B-3FAU20).

47. *Id.* (Solicitation No. 264-02-B(GC)-0052). Archived postings from September 2000 to July 2002 showed another sixty-two procurements involving reverse auctions, including installing modular offices for the Marine Corps, more aircraft components for the Navy, tactical body armor for the State Department, and an IDIQ contract for the U.S. Postal Services (USPS) for 115 different types of pressure-sensitive labels and similar items, estimated to be worth $25 million. *Id.* (archived solicitations). In May 2002, the USPS also awarded FreeMarkets, Inc. a $4 million contract to provide reverse auction services. *Id.* (award notice for Contract No. 102594-01-H-2169M002).

Information Officer.[48] Excited by the potential reverse auctions offered, the Navy revised its already published solicitation for ejection seats to include a reverse auction as "discussions over price." During the auction's first eight minutes, the Navy got four bids—and then nothing for about the next seventeen.[49] Eventually, thirty-eight bids came in, extending the auction to fifty-two minutes.[50]

Converted by the outcome, the Navy decided to set up its own auction system.[51] The Navy secured five-year IDIQ contracts with two different companies, each providing different options and approaches to online reverse auctions—one a full-service provider, the other a "do-it-yourself" software program.[52] The Navy has made the contracts available for a fee to other DOD and federal agencies.[53]

In the first two years after the original auction, the Navy conducted about forty-three more, for agencies such as the Air Force, the Coast Guard, the Veterans' Administration, and the Defense Logistics Agency (DLA). Customers bought items ranging from light bulbs to shipboard lockers to pharmaceuticals and frozen potatoes.[54] The total "through-put" value was about $144 million, with customers saving about $37 million, or twenty-six percent, and the Navy anticipated expanding its reverse auction use.[55]

b. An Army for Everyone

The Army began investigating reverse auctions at the direction of senior Army procurement officials. A team of Army acquisition staffers worked with the Massachusetts Institute of Technology to figure out how

48. Ellis Interview, *supra* note 23. Commander Ellis assumed this position in 1999. *Id.*

49. *Id.* "Those were the longest seventeen minutes of my life," Commander Ellis remembered. *Id.*

50. *Id.*

51. *See id.* (reporting that the Navy was "ecstatic" over the results).

52. Office of the Assistant Secretary of the Navy (Research, Development and Acquisition), Acquisition and Business Management, *ABM Online: Business Practices—Reverse Auctioning*, *at* http://www.abm.rda.hq.navy.mil/revauct.cfm (last visited July 18, 2002) [hereinafter *ABM Online*].

53. *Id.*

54. Ellis Interview, *supra* note 23.

55. *Id.* ("As much as we've done, we're starting to get pressure to do more.").

the Army could integrate reverse auctions into its procurement system quickly, easily, and relatively cheaply.[56]

The Army evaluated a number of approaches and decided to go with a software- and Web-based approach rather than hiring a commercial vendor to provide auction services. The Army saw two advantages in this approach: One, it would let any contracting officer anywhere in the world conduct reverse auctions from his or her desktop. Secondly, it gave the Army the capability to do reverse auctions for smaller-dollar acquisitions, which would not be cost effective if the Army were paying a commercial reverse auction provider a hefty fee for each auction. The Army also has made the software available, for a fee, to other federal government agencies, including the Marines Corps and the Air Force. [57]

The Army has since bought everything from Patriot Missile parts to lumber to dishwashers.[58] The CECOM has made several multi-million dollar buys, including an acquisition of desktop computers that saved the customer eighteen percent by slashing $400,000 off the starting price of $2.2 million.[59]

c. Users' Choice in the Air Force

The Air Force approach has been more restrained and low-key. Before holding any reverse auctions, the Office of the Deputy Assistant Secretary of the Air Force for Acquisition (Contracting) (SAF/AQC) carried out a series of studies to evaluate how and when Air Force acquisition officials could best use this tool. The September 2000 studies were followed by a SAF/AQC guidance memo, a research paper, strategy- and policy-related guidelines, a PowerPoint briefing, and designated reverse

56. Edward G. Elgart, *Army Reverse Auctions: An E-Commerce Acquisition Tool*, PUB. MANAGER, Mar. 22, 2001, at 13. At the time, Elgart was acting deputy assistant secretary of the Army for procurement. He also has been director of the CECOM Acquisition Center since 1989. *Id.*

57. *Id.*

58. *See infra* Appendix 1.

59. *Id.*

auction points of contact (POCs) at the Pentagon, all available on the SAF/AQ Reverse Auction Web site.[60]

By June 2001, the SAF/AQ newsletter heralded the Air Force's foray into the reverse auction world, including a partnership with CECOM to use the Army's auction software.[61] The article went on to close with this:

> [The reverse auction] is shaping up to be a very interesting practice that deserves the Acquisitions community's attention. SAF/AQC has helped set the stage for the Air Force's adoption of reverse auctioning as a new tool to drive the warfighter's costs down. Keep your eyes open for more on this interesting approach.[62]

Six months later, however, the Air Force approach had changed as part of an overall SAF/AQ reorganization from five divisions to three that were aligned more closely with operational units.[63] Part of that realignment transferred responsibility for implementing e-commerce to Gunter Air Force Base, Alabama. The Air Force made that move "not to diminish reverse auctions" but rather to refocus SAF/AQ on overarching policy determinations instead of "hands on" acquisitions activities.[64]

Additionally, after a test partnership using the Army's reverse auction programs, the Air Force was not convinced that this type of a service-wide agreement was cost effective, given the approximately twenty reverse auctions it had done.[65] Because other options existed (for example, using the Navy's or GSA's enablers or other providers for a per-auction fee), the Air Force decided to allow each contracting office to determine if, when, and

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60. Office of the Deputy Assistant Secretary of the Air Force for Acquisition (Contracting), *Reverse Auction*, *at* http://www.safaq.hq.af.mil/contracting/reverseauction/ (last modified Apr. 24, 2001) [hereinafter SAF/AQC *Reverse Auction*].

61. *See Air Force "Aims High" with Reverse Auctioning Strategy*, AEROSPACE ACQUISITION (Office of the Ass't Sec'y of the Air Force (Acquisition)), May/June 2001, at 3, 7 [hereinafter *Air Force "Aims High"*].

62. *Id.* at 7.

63. Snyder Interview, *supra* note 21.

64. *Id.* Transferring the e-commerce workload to Gunter was a logical move because Gunter already was the Air Force "center for excellence" for computer-related activities. While a second lieutenant at Gunter has day-to-day responsibility for reverse auctions, SAF/AQ has retained a POC responsible for reverse auction policy and retains overall e-commerce program direction "for the end-to-end vision and standard procurement system." *Id.*

65. *Id.*

how to use reverse auctions. "What we wanted to do was say, this is a tool you can use" if it fits into the organization's acquisition planning.[66]

III. Legal Framework

Despite thousands of years of private-sector auction experience, the federal government is a "johnny-come-lately" to the reverse auction block. Until five years ago, auctions and federal government procurement were an illegal combination. Regulatory changes now seem to permit auctions (although some disagree), but the specific guidance is still evolving.

A. Are Reverse Auctions Legal?

Five years ago, the Federal Acquisition Regulation (FAR) flatly outlawed negotiated procurements using auctions or "auctioning techniques."[67] The ban may have been due, at least in part, to opposition from industry sources who disliked the lowest-price emphasis and the competitive edge auctions gave to buyers.[68] A 1997 rewrite to the FAR Part 15 eliminated the auction prohibition, although it still forbids releasing one offeror's price to any others without advance approval.[69] That ban, however, is a general one—not one specifically aimed at auctions. The current FAR is simply silent on reverse auctions.

Closely intertwined with this issue is the Procurement Integrity Act (PIA), which prohibits anyone acting on the government's behalf from

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66. *Id.* That shift, however, means that the local unit pays for the auction enabler or provider's costs, rather than having the auctions centrally funded as they were under the Army agreement. *Id.* This can prove rather tricky because the auction services are just that—services. Thus, in some instances, they cannot be paid for with the same procurement dollars the organization is using to buy its commodities, due to fiscal rules. *Id.*

67. Steven Kelman, *Auctions the Next Tool for the Federal Buyer*, FED. COMPUTER WK., July 26, 1999, http://www.fcw.com/vcw/articles/1999/fcw_072699_831.asp. Kelman was administrator of the Office of Federal Procurement Policy (OFPP) at the Office of Management and Budget (OMB) from 1993-97. *Id.*

68. *Id.*

69. *Id*; *see also* FAR, *supra* note 24, at 15.306(e)(3) ("Government personnel involved in the acquisition shall not engage in conduct that . . . [r]eveals an offeror's price without that offeror's permission."); Timothy D. Palmer et al., *Can The Government Go Fast Forward on Reverse Auctions?*, GOV'T CONTRACTOR, July 12, 2000, at 1, 4 (concluding that "the propriety of auction techniques under the new FAR Part 15 appears to turn on obtaining advance consent from all participants to release bids").

knowingly disclosing a contractor's bid or proposal before the contract award.[70] The PIA "could be interpreted as forbidding auctions, although this clearly was not the intent of the legislation."[71]

Further complicating the picture is FAR 14.202-8, dealing with electronic bids. This section allows contracting officers to authorize electronic bid submission in sealed bid procurements and arguably permits reverse auctions.[72] Because Part 14's provisions were "still largely written with traditional (that is, paper-based) procedures in mind," however, a strict literal interpretation of Part 14 is problematic.[73]

For example, FAR Part 14 outlines a scheme of one bid per offeror—nothing in the section envisions or sanctions *successive* bids.[74] Reverse auctions do not quite fit a model in which sealed bids are to be "submitted at an exact time, opened at an exact time and safeguarded in the interim."[75]

Given the FAR's absence of express authorization, are reverse auctions lawful? Despite the FAR revision, some skeptics assert that reverse auctions border on illegality, at a minimum.[76] The American Bar Associ-

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70. 41 U.S.C.S § 423(a) (LEXIS 2002); *see also* FAR, *supra* note 24, at 15.608(a) ("Government personnel shall not use any data . . . or other part of an unsolicited proposal . . . in negotiations with any other firm unless the offeror is notified of and agrees to the intended use.").

71. Kelman, *supra* note 67.

72. *See* Smith Presentation, *supra* note 22, slide 37 (opining that this section "[p]rovides the flexibility to use" reverse auctions).

73. Palmer et al., *supra* note 69, at 6.

74. *See* AIR FORCE MATERIEL COMMAND, AIR FORCE MATERIEL COMMAND ATTORNEY'S GUIDE TO ELECTRONIC COMMERCE 37 (Sept. 2001) [hereinafter AFMC ATTORNEY'S GUIDE] (stating that sealed bidding procedures "were never designed to accommodate iterative rounds of bids").

75. Palmer et al., *supra* note 69, at 6; *see also* Scott M. McCaleb, *Reverse Auctions: Much Ado About Nothing or the Wave of the Future?*, PROCUREMENT L. ADVISOR, Sept. 2000, at 3 (asserting that it is "doubtful" that reverse auctions meet the requirements of a FAR Part 14 procurement).

76. *See, e.g.*, Bob Little, *Legal Questions Loom for Reverse Auctions*, GOV'T COMPUTER NEWS, Aug. 1, 2000, at 37, LEXIS, News Group File (contending that case law can be interpreted to prohibit contract activity in which offerors know "the previous bid of another," as in a reverse auction); Stephen M. Ryan, *Reverse Auctions Need Regulatory Guidance*, GOV'T COMPUTER NEWS, Aug. 14, 2000, at 22, LEXIS, News Group File (declaring that the law is unclear on reverse auctions' legality); Robert Antonio, *Do Reverse Auctions Violate FAR 15.307(b)?*, WHERE IN FEDERAL CONTRACTING?, July 24, 2000 (maintaining that the reverse auction fails to satisfy all FAR requirements), *at* http://www.wifcom.com/anallegal.htm.

ation (ABA) has called for an unequivocal FAR pronouncement that reverse auctions are legal when done properly.[77]

No court has ruled specifically on reverse auctions, although several have addressed auctions in general.[78] To date, there have been only two reported reverse auction protests—both involving the Navy's attempts to acquire moving services. In both, the Navy voluntarily took corrective action, and so the General Accounting Office (GAO) denied the protests.[79]

In the second case, however, the GAO evidently felt compelled to point out, in the opinion's final footnote, that the decision did "not address the more general question of the propriety of reverse auctions, since that is not at issue in the protest."[80] Is that an invitation for someone to raise the issue of whether reverse auctions are proper—a veiled hint that GAO thinks they are not? Or is it simply one of those throwaway remarks that sometimes are made in dicta (and then overanalyzed by lawyers who read way too much into them)?

If the footnote is GAO's oblique signal that it believes reverse auctions are unlawful, GAO is taking the minority view. The DOD General Counsel's office has advised DOD acquisition officials that current statutes

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77. Letter from the Public Contract Law Section of the American Bar Association, to the General Services Administration (Jan. 5, 2001) [hereinafter ABA Letter] (calling for explicit FAR guidance that properly conducted reverse auctions are permitted), http://www.abanet.org/contract/federal/regscomm/ecomm_003.html.

78. *See, e.g.*, DGS Contract Serv., Inc., 43 Fed. Cl. 227 (1999) (upholding auctioning techniques). The court said, "Construing (FAR) section 15.306(e), an agency theoretically could conduct an auction and disclose prices of each offeror in the competitive range provided it obtained their consent." *Id.* at 239. *See also* Thomas F. Burke, *Online Reverse Auctions*, WEST GROUP BRIEFING PAPERS, Oct. 2000, at 1 (noting that the General Accounting Office (GAO) has repeatedly found "nothing inherently illegal" in procurements through auctions but instead has criticized the "unfair competitive advantage" gained through disclosing offerors' proposals).

79. Pacific Island Movers, Comp. Gen. B-287643.2, July 19, 2001, 2001 CPD ¶ 126 (upholding the Navy's decision to cancel the reverse auction and obtain revised price proposals because of software malfunctions and other deficiencies); Royal Hawaiian Movers, Inc., Comp. Gen. B-288653, Oct. 31, 2001, 2001 CPD ¶ 182 (ruling that obtaining revised price proposals was an appropriate solution to resolve an ambiguous solicitation); *see also infra* notes 161-72, 178-80 and accompanying text (discussing the cases in more detail).

80. *Royal Hawaiian Movers*, 2001 CPD ¶ 182, at 4 n.4.

and regulations allow reverse auctions,[81] and the bulk of other commentators seem to agree.[82]

Yet all the opining that reverse auctions are legal does not really answer the question of *why* that is so. To resolve the issue, one must view reverse auctions in the context of the evolving laws and statutes governing acquisitions and electronic commerce in the federal government—for example, the Federal Acquisition Streamlining Act of 1994 (FASA)[83] and the Federal Acquisition Reform Act and the Information Technology Management Act (the latter two known as the Clinger-Cohen Act of 1996). [84] These acts, and the resulting FAR revisions, signaled a drastic shift in policy: [85] "Previously, the intent of the FAR was that nothing could be done

81. AM. MGMT. SYS., INC. & FREEMARKETS, INC., ONLINE AUCTIONS IN THE PUBLIC SECTOR: A POWERFUL NEW TOOL FOR REDUCING ACQUISITIONS COSTS 5 [hereinafter AMS & FREEMARKETS] (citing a Mar. 24, 2000 letter from David Oliver, Undersecretary of Defense for Acquisition and Technology, to Sen. Rick Santorum, R-Pa.), http://www.amsinc.com/FedeProcurement/pdfs/OnlineAuctionsinthePublicSector.pdf.

82. *See, e.g.*, AFMC ATTORNEY'S GUIDE, *supra* note 74, at 35 ("If properly structured, reverse auctions comply with all procurement statutes and regulations."); Captain Mike Darby, Naval Supply Systems Command, "Reverse Auctions," Presentation at the Defense Acquisition University Lunchtime Series, slide 13 (Oct. 3, 2000) [hereinafter Darby Presentation] (concluding that reverse auctions are "permissible" contracting techniques), http://www.dsmc.dsm.mil/contracting/FAIDAU/racop/documents/docs_top.htm; Boykin Presentation, *supra* note 22, slides 18, 23 (asserting that reverse auctions require no "enabling FAR coverage" nor do they conflict with statutory requirements for full and open competition); Merson, *supra* note 16, at 11 (reporting that most legal opinions have found properly conducted reverse auctions to be lawful).

83. Pub. L. 103-355, §§ 9001-9004, 108 Stat. 3243, 3399 (Oct. 13, 1994).

84. Pub. L. 104-106, § 4304, 110 Stat. 659 (Feb. 10, 1996).

85. *See* Defense Systems Management College, *Federal Acquisition Regulation (FAR) Changes*, *at* http://www.dsmc.dsm.mil/jdam/contents/far_rewrite.htm (last visited Mar. 21, 2002) [hereinafter DSMC, *FAR Changes*] (asserting that the FAR—including Part 15—was significantly rewritten in response to these acts); AFMC ATTORNEY'S GUIDE, *supra* note 74, at 6 (discussing the amendment's impact). Pages 3-20 of the AFMC guide also provide an excellent discussion of the evolution of electronic commerce in the federal government.

unless it was expressly permitted; circumstances that were simply not mentioned were automatically prohibited."[86]

The FASA and the Clinger-Cohen Act, however, led to the discretion-enhancing philosophy found in the FAR's "Statement of Guiding Principles for the Federal Acquisition System," which states:

> The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer's needs. In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.[87]

The FAR's guiding principles work hand-in-hand with the Office of Federal Procurement Policy (OFPP) Act.[88] The OFPP Act requires agencies to use electronic commerce in procurement "to the maximum extent that is practicable and cost effective."[89] In implementing this mandate, the FAR grants agencies "broad discretion" to choose which methods they use.[90]

Read together, these statues, at a minimum, permit reverse auctions and arguably encourage using new tools such as reverse auctions. Any agency that does not at least explore reverse auctions for procurements is neither maximizing electronic commerce usage, nor exercising initiative to find new ways to meet customers' needs.

Additionally, case law on the extent of the PIA's limitations seems to back up the contention that Congress did not intend the law to ban disclosure in a reverse auction context. In *Pikes Peak Family Housing, LLC v. United States*, the court reviewed the act's legislative history to conclude "that the Act prohibits not *all* disclosure of procurement-related informa-

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86. DSMC, *FAR Changes*, *supra* note 85.

87. FAR, *supra* note 24, at 1.102(d).

88. 41 U.S.C.S. §§ 401-436 (LEXIS 2002).

89. *Id.* § 426(a). Electronic commerce is defined as "electronic techniques for accomplishing business transactions, including World Wide Web technology . . . and electronic data interchanges." *Id.* § 426(f).

90. FAR, *supra* note 24, at 4.520(b).

tion, but rather, disclosure 'other than as provided by law'."[91] While the statute's actual language was a last-minute compromise that lacked explicit legislative commentary, the court thought that the law was "obviously directed" at situations where procurement officials leak confidential information in hopes of receiving some type of benefit in return.[92] A reverse auction, where all the bidders agree up front to releasing their bids, does not implicate these concerns.[93]

It does, however, raise the question of what constitutes "consent" to release. Those who participated in GSA's Buyers.Gov auctions signed a written agreement authorizing disclosure of their bids to the auction enabler before the auction starts.[94] In some reverse auctions, however, the only consent the government obtains is implied through the bidders' auction participation. For example, sample solicitation language from the Navy states: "Submission of a proposal in response to the solicitation will be considered consent by the Offeror to participate in the CBE [competitive bidding event] and to reveal their prices in anonymity during the CBE."[95]

No regulatory guidance addresses the issue of whether consent *implied by* participation is sufficient.[96] Equally unsettled is the question

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91. 40 Fed. Cl. 673, 680 (1998).

92. *Id.* at 681 (quoting the legislative history as describing the act's purpose as "the abatement of 'insider trading of sensitive procurement information'" and combating procurement fraud).

93. *See* AFMC ATTORNEY'S GUIDE, *supra* note 74, at 36 (stating that dicta from the Court of Federal Claims and GAO precedent seem to support the position that the government does not violate the PIA if it reveals a bidder's price after the bidder authorizes disclosure in advance).

94. General Services Administration, Federal Technology Service, *Buyers.Gov* [hereinafter *Buyers.Gov*] (Questions and Answers section, No. 56) (on file with author).

95. Air Force Materiel Command Operational Contracting, *Reverse Auctioning*, *at* https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pko/revauctn/ramain.htm (last modified Jan. 23, 2002) [hereinafter AFMC *Reverse Auctioning*] (providing a sample Section L—Instructions, conditions and notices to offerors or quoters—from the Navy). Army sample specifications similarly advise: "Submission of an offer during the reverse auction will be considered consent by the offeror to participate in the reverse auction and to reveal their prices in anonymity." *Id.* (offering language used by CECOM and the 48th Contracting Squadron, RAF Mildenhall, England, for an information technology (IT) reverse auction in September 2000).

96. The GAO has ratified the use of consent through participation. *See* Pacific Island Movers, Comp. Gen. B-287643.2, July 19, 2001, 2001 CPD ¶ 126 (holding that revealing bidders' prices was fair because the offerors agreed to disclosure by participating in the auction).

of whether consent *required for* participation is freely and voluntarily given.[97] "To the extent that the PIA, or for that matter, the Trade Secrets Act, 18 U.S.C. § 1905, gives a contractor legal rights to protect proprietary information, it is unclear whether a contractor's 'consent' to waive confidentiality in an online auction setting would be enforceable if challenged."[98]

In fact, very few reverse auction questions are answered by explicit, formalized guidance. So, as reverse auctions began to make a bang in government procurement, the issue of whether regulatory guidance was needed began to surface. In the fall of 2000, OFPP officials solicited input from the commercial, governmental, and educational communities to help craft reverse auction policy. At the time, OFPP said it planned to issue the guidance by the spring of 2001.[99] As of August 2002, it had not yet done so.

In October 2000, the Defense Acquisition Regulations (DAR) Council and the Civilian Agency Acquisition Council sought input on FAR guidance. But instead of following customary practice of publishing a proposed rule for public comment,[100] the councils took the unusual step of asking whether any guidance on using reverse auctions was even needed, and, if so, how it should be handled.[101] Acting on behalf of the DOD, the National Aeronautics and Space Administration, and GSA, the councils stated that they recognized that not everyone wanted to see formalized guidelines. The councils acknowledged other opinions as well, including allowing agencies to set their own guidance through policy, that the agencies' reverse auction experience is still too limited to provide an adequate basis for developing useful guidance, and that the FAR does not need to

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97. *See* AFMC ATTORNEY'S GUIDE, *supra* note 74, at 36 (questioning whether "requiring consent as a condition to participate in the acquisition suffices to constitute voluntary consent").

98. Palmer et al., *supra* note 69, at 4.

99. Tanya N. Ballard, *OMB to Issue New Rules on Reverse Auctions*, GOV'T EXECUTIVE, Nov. 20, 2000, http://www.govexec.com/dailyfed/1100/11200t2.htm.

100. *See* FAR, *supra* note 24, at 1.501-2(b) (directing the councils to publish proposed significant revisions to the FAR to provide interested parties the chance to submit written comments).

101. Reverse Auctioning Notice, Department of Defense, General Services Administration, National Aeronautics and Space Administration, 65 Fed. Reg. 211 (Oct. 31, 2000) (seeking comments on "whether there is a need for guidance on the use of reverse auction techniques, and, if so, how it can be most effectively communicated").

address reverse auctions because "FAR 1.102(d) permits any technique that is not expressly prohibited."[102]

Besides asking whether agencies needed guidance, and, if so, the form it should take, the councils suggested a number of topics for comments. These topics included determining when reverse auctions are appropriate, auction ground rules, how to do best value, cost-technical tradeoffs in connection with an auction, ensuring small business participation, the pros and cons of reverse auctions (for both the government and contractors), and possible hurdles to conducting auctions.[103]

The FAR councils received thirty-eight comments regarding reverse auctions.[104] In April 2001, the DAR Council met to review them and decided to do . . . nothing. Why? Because even though "the majority of the respondents believed that FAR guidance would be helpful," the DAR Council simply could not agree on *any* revision or proposal: "Every change caused a problem for someone at the table. The principal concern was that nothing be included that might interfere with what agencies are already doing in this area."[105] Inaction (in the form of a recommendation to the OFPP that the case be closed because it was premature to develop FAR guidance) was the only action that could garner a consensus.[106]

B. Existing Guidance

Because the FAR councils opted against regulatory revisions, the reverse auction community must rely on existing guidance that fluctuates considerably in both quality and quantity. The Office of the Secretary of Defense, Acquisition, Technology, and Logistics (Acquisition Initiatives) gives reverse auctions a passing mention in its *Commercial Items Handbook*.[107] The Army has added references to reverse auctions in its service supplement to the FAR regarding blanket purchase agreements (BPAs).[108]

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102. *Id.*

103. *Id.*

104. DEFENSE LOGISTICS AGENCY, DLA DAR COUNCIL ACTIVITY REPORT (Apr. 25, 2001) (referencing Case 2001-010), *available at* http://www.dla.mil/j-3/j-336/logisticspolicy/DARcouncil.htm (DAR Council Policy Member Web Page).

105. *Id.*

106. *Id.* The council did note, however, that its recommendation was only advisory and that the OFPP might not agree with it. Additionally, the council realized it might need to revisit the issue if future events indicated a renewed need for regulatory guidance. *Id.*

The Army's discretionary Source Selection Guide also covers reverse auctions in Appendix I.[109]

The Air Force put out mandatory reverse auction guidance in a February 2001 memorandum from SAF/AQC.[110] The Air Force Materiel Command (AFMC) offers an *Attorney's Guide to Electronic Commerce* with a few pages on reverse auctions.[111]

A variety of sites scattered across the Web offer guidance ranging from minimal (a page or two)[112] to extensive.[113] The sites are not easy to locate if one does not know the Internet addresses, however, and there is no single consolidated location offering definitive guidance for those involved in DOD contracting (on either the government or the supplier side).

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107. OFFICE OF THE SEC'Y OF DEF., ACQUISITIONS, TECH. AND LOGISTICS (ACQUISITION INITIATIVES), COMMERCIAL ITEM HANDBOOK 13 (Nov. 2001) [hereinafter OSD HANDBOOK] (advising that commercial item procurements can use reverse auctions to determine a fair and reasonable price and to ensure competition), *available at* http://www.acq.osd.mil/ar/doc/cihandbook.pdf.

108. U.S. DEP'T OF ARMY, ARMY FED. ACQUISITION REG. SUPP. 5113.301-1(j)(1), 5113.303-2(a)(3) (Oct. 2001) (stating a preference for establishing prices between BPA holders using reverse auctions).

109. U.S. DEP'T OF ARMY, ARMY SOURCE SELECTION GUIDE app. I, at 76 (June 2001) [hereinafter ARMY SOURCE SELECTION GUIDE], *available at* http://acqnet.saalt.army.mil/library/default.htm.

110. Memorandum from Brigadier General Darryl A. Scott, Deputy Assistant Secretary (Contracting)/Assistant Secretary (Acquisition), U.S. Air Force, to ALMAJCOM-FOA-DRU (CONTRACTING), subject: Reverse Auction (RA) Guidance (19 Feb. 2001) [hereinafter Scott Memo], *available at* http://www.safaq.hq.af.mil/contracting/reverseauction/. SAF/AQC issued the guidance after reviewing corporate use of reverse auctions, evaluating commercial reverse auction providers, and analyzing reverse auctions to see if they conflicted with current regulatory and statutory rules. *Id.*; *see also supra* note 60 and accompanying text.

111. AFMC ATTORNEY'S GUIDE, *supra* note 74, at 35-37.

112. *See, e.g.*, the Defense Supply Center-Philadelphia, *Reverse Auctioning* (July 31, 2001) [hereinafter DSCP *Reverse Auctioning*] (offering just two pages), *at* http://www.dscp.dla.mil/counsel/REVERSEA.htm; Defense Acquisitions University & Federal Acquisitions Institute, *Reverse Auction Community of Practice*, *at* http://www.dsmc.dsm.mil/CONTRACTING/FAIDAU/racop/ (last visited July 24, 2002) (a site that has been "under development" for more than a year and offers just four documents, all more than eighteen months old); *ABM Online*, *supra* note 52 (providing three pages of information).

IV. Difficulties and Challenges

Although the DOD may share the credit for creating the Internet,[114] it has long since been left in the cyber-dust by the business community, which—lacking guaranteed operating funds—has been forced to seek out more innovative (and more efficient) operating methods.[115] The entrenched bureaucratic mentality and its penchant for doing things "the way we have always done them" have hampered DOD's use of reverse auctions.[116] "The demands of the e-marketplace will challenge our fundamental notions of what it means to be in the public sector, from the highest

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113. *See, e.g.*, ACC *Reverse Auction Tacklebox*, *supra* note 21 (providing a fair amount of information, although most of it has not been updated in some time); AFMC *Reverse Auctioning*, *supra* note 95 (offering links to Air Force-wide guidance, Professor Wyld's report, enablers, news articles, sample specifications and briefings); Naval Inventory Control Point-Philadelphia, *auctions.navy.mil*, *at* http://www.auctions.navy.mil (last visited July 18, 2002) (including a reverse auction overview and links to news articles and the two GAO decisions); U.S. Dep't of Treasury, *Get Educated on Reverse Auctions*, *at* http://www.treasury.gov/procurement/training/ (last visited July 18, 2002) [hereinafter Treasury, *Get Educated*] (providing a primer, guidelines for determining when reverse auctions are appropriate, "Ten Commandments" for reverse auctions, and a side-by-side comparison of enablers in fifty areas).

The best resource *was* GSA's now-defunct Buyers.Gov Web page, which had a guide to best practices for reverse auctions, links to news articles, frequently asked questions, PowerPoint presentations, a demonstration of how auctions work, and more. When the Web page went down, all that valuable information apparently disappeared into the cyber-netherworld; it does not appear to be available through any link or search from the GSA home page. Whether it will return under the new contracted-out program remains to be seen. *See* E-mail from Ben A. Reed, E-Business Program Manager, Center for Business Innovations, Federal Technology Service, General Services Administration, to the author (Aug. 27, 2002) (leaving unsettled the question of whether his information will reappear on the Web) (on file with author).

114. *See* Public Broadcasting System, *Life on the Internet: Net Timeline*, *at* http://www.pbs.org/internet/timeline (last visited Mar. 18, 2002) (crediting the DOD for conceiving the Internet in the early 1960s).

115. *See, e.g.*, WYLD, *supra* note 14, at 8 (quoting one former government official as saying that "[i]t's clear to everybody that the public sector is behind the private sector when it comes to the use of information technology"); Meinert Interview, *supra* note 40 (observing that the digital transformation in the business community compared to that of the DOD is "mind-boggling" and that for the first year or two after the FAR rewrite, no one was willing to undertake a reverse auction).

116. *See* WYLD, *supra* note 14, at 43-45 (arguing that public government must undergo a significant "cultural change" before it can truly take advantage of electronic commerce); Meinert Interview, *supra* note 40 (stating that reverse auctions are such a different process that many people still do not feel comfortable using them).

elected and appointed officials to the front-line employees in all agencies at all levels of government."[117]

As a result, despite the high-profile reverse auction success stories, reverse auctions still represent a minuscule portion of the federal government's vast array of procurement activities.[118] The reasons are myriad and range from the tangible and logistical—technology failures and cost—to the theoretical and philosophical—resistance to change and concerns about how the government avoids being penny-wise but pound-foolish.

A. Industry's Distrust of, Unfamiliarity with, and Plain Dislike for the Process

While many government users are reverse auction disciples, the method has drawn significant criticism from the private sector. For example, one prominent procurement law report decried the Navy's first reverse auction as having "used an elephant gun to shoot a flea."[119] Before the first DFAS auction, "one well-known computer technology vendor refused to participate, saying it did not believe in reverse auctioning and had reservations about whether all the bidders truly would remain anonymous. The

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117. WYLD, *supra* note 14, at 44; *see also* U.S. GEN. ACCOUNTING OFFICE REPORT, DEFENSE ACQUISITIONS: DOD FACES CHALLENGES IN IMPLEMENTING BEST PRACTICES (Feb. 27, 2002) [hereinafter GAO, DEFENSE ACQUISITIONS] (Statement for the Record of Jack L. Brock, Jr., Managing Director, Acquisition and Sourcing Management, and Randolph C. Hite, Director, Information Technology Architecture and Systems) ("Incentives driving traditional ways of doing business, for example, must be changed, and cultural resistance to new approaches must be overcome."). After September 11, Professor Wyld wrote an article urging the procurement community to use reverse auctions as an acquisition streamlining tool that can "make government work better and produce the efficiencies necessary to fund a war on terrorism." David C. Wyld, *After September 11th: Reverse Auctions in Government Procurement*, CONT. MGMT., Feb. 1, 2002, at 54.

118. *See, e.g.*, Dan Davidson, *Cost-Saving Auctions Fail to Catch On*, FED. TIMES ONLINE, Nov. 13, 2000 (quoting Ralph DeStefano, GSA procurement analyst and FAR council staffer, as saying that, "overall . . . the use of reverse auctions in government is rare"), *at* http://www.federaltimes.com/infotech/111300infotech1.html; GSA GUIDE, *supra* note 12, at 23 (reporting that "buyers and suppliers are using reverse auctions on only an occasional basis"); Telephone Interview with Alan Thomas, National Account Executive, FreeMarkets, Inc., Pittsburgh (Feb. 4, 2002) [hereinafter Thomas Interview] (offering his opinion that government reverse auctions have not been as pervasive or widespread as anticipated).

119. *Auctions: Some Thoughts*, NASH & CIBINIC REP., July 2000, at 98, 99 [hereinafter NASH & CIBINIC] (charging that using "fancy electronic tools" was inappropriate in this case because there were so few bidders).

company submitted a proposal to DFAS, urging the agency not to conduct the auction."[120] After the auction, one participant called it the "worst procurement scenario ever invented."[121]

Some critics argue that reverse auctions create the risk of collusion.[122] Collusion, according to one researcher, is one of the two greatest weaknesses of a reverse auction.[123] Reverse auctions are "especially vulnerable to such price manipulation because in most cases there are, by definition, few buyers and sellers engaged in a given auction."[124]

Yet, another criticism leveled at reverse auctions is that it pits contractors against each other in virtual "hand-to-hand combat [that] unravels all the . . . work spent building a relationship-based environment" with suppliers.[125] Collusion might seem unlikely in such an open and fiercely com-

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120. Shane Harris, *Bidding Wars*, GOV'T EXECUTIVE, May 1, 2001, at 41, LEXIS, News Group File.

121. Smith Presentation, *supra* note 22, slide 14.

122. *See* Bob Little, *Auctions Can Eventually Reverse the Benefits of Competition*, GOV'T COMPUTER NEWS, Sept. 1, 2000, at 34, LEXIS, News Group File (in which the contract-law teacher and former GAO attorney argues that removing the secrecy of sealed bidding also removed a "bar to collusion"); Merson, *supra* note 16, at 12 (reporting the concern that dominant suppliers will "form alliances for the purpose of collusive bidding").

123. WYLD, *supra* note 14, at 15-16. Wyld defines collusion as "two or more bidders work(ing) in tandem to manipulate the price of an auction." *Id.* The other half of this pair is the "winner's curse." *See infra* notes 133-46 and accompanying text.

124. *Id.* at 16; *see also* Merson, *supra* note 16 (contending that "reverse auctions provide unprecedented opportunity, for those who would choose to do so, to attempt to control the bidding process").

125. *Air Force "Aims High"*, *supra* note 61, at 7; *see also* Letter from the Information Technology Industry Council, to the General Services Administration (Jan. 2, 2001) [hereinafter ITIC Letter] (claiming that reverse auctions could cause "an adverse shift in buyer/seller relationships" in which "suppliers could feel exploited by the process and less trusting of the buyers"), *available at* http://www.itic.org/policy/gsa_010102.pdf; OFFICE OF THE ASSISTANT DEPUTY SEC'Y OF THE AIR FORCE FOR ACQUISITIONS (CONTRACTING), REVERSE AUCTION RESEARCH PAPER 4 (2001) (reporting that private companies also found reverse auctions carried a "risk of damaging supplier relationships"), *available at* http://www.safaq.hq.af.mil/contracting/reverseauction/.

It seems to be too early in the reverse auction experience to gauge just how auctions will impact continuing supplier relationships. It is a legitimate concern, however, that procurement officials should monitor closely. In the DOD where contingencies are often a way of life, units must have suppliers on whom they can depend to meet unplanned requirements. The vendor who slashed his prices to rock-bottom may not be willing or able to satisfy the government buyer with unexpected and immediate deployment needs. *See* Snyder Interview, *supra* note 21 (reporting Air Force concerns that the lowest-price focus was not conducive to gaining long-term commitments from suppliers that would help meet contingency requirements).

petitive environment, but one detractor disagrees: "The bidders would quickly decide that (a) a bidding frenzy is stupid, (b) 'make love not war' works for them, and (c) if we have to conspire, it's better than losing money."[126]

On the other hand, vendors' auction behavior can actually highlight collusion by exhibiting bidding patterns that seem to send signals or by a lack of bids indicating a vendor has conceded a contract.[127] The "transparency" of online markets may in fact prevent graft, fraud, and corruption.[128]

B. Fear That Bidding Will Drive Prices So Low That They Eradicate Any Profit

Much of the criticism from suppliers and contractors is rooted in their bottom line.[129] One procurement consultant said contractors "fear that reverse auctions will push the prices so low that there is no margin left. . . . What will be left to invest in research, especially in the technology industry?"[130] Another industry analyst argues that the perceived focus on price may "alienate quality vendors who already believe their profit margins from sales to the federal government are too thin."[131] Government officials admit that eating into the industrial base of certain sectors is a legitimate worry.[132]

Behind these concerns looms the threat of the "winner's curse," which afflicts a bidder who gets so caught up in the auction frenzy that he bids far more than an item is worth, or, in a reverse auction, far less than he needs to make a profit or perhaps just break even.[133] Wyld cites the "winner's curse" (also called "buying in") as one of two primary problems confronting online auctions.[134] He says, "[T]he same supply and demand forces that shape markets in the physical realm, and the irrationality that

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126. Little, *supra* note 122.

127. Thomas Interview, *supra* note 118.

128. *See* WYLD, *supra* note 14, at 46 ("[T]he transparency of the cybermarketplace may . . . actually produce more legitimacy in pricing in the public sector.").

129. *See* Merson, *supra* note 16, at 5 (asserting that many government suppliers "already believe that their profit margins are too small"); ITIC Letter, *supra* note 125 (claiming that buyers' savings "may come from the reasonable profits of the suppliers," who then could be driven from the government marketplace).

130. Davidson, *supra* note 118 (quoting Washington, D.C. consultant Ella Schiralli).

131. Kevin Plexico, *Illusionary Automation*, FED. COMPUTER WK., June 5, 2000, http://www.fcw/com/fcw/articles/2000/0606/tec-plexico-06-0600.asp.

sometimes accompanies them, will be present in the e-marketplace as well—making the winner's curse a very real issue."[135]

While such a deal harms the contractor, it does the government no good either if the contract fails to motivate the contractor to perform up to standards. "The benefits of using online auctions as a procurement technique will be lost if the savings in time and cost are consumed through postaward contract claims, contract terminations due to poor performance, or the lack of competition for future contracts."[136] After the first DFAS auction, one participant warned, "When margins are squeezed, corners will be cut."[137] Some fear that reverse auctions could lead to mediocre results.[138]

How does the acquisitions community solve this problem? The ABA wants the FAR to delineate what constitutes a "fair and reasonable price" in a reverse auction.[139] Professor Wyld proposes a more novel solution: a "Vickery auction," in which the winning bidder pays the *second*-lowest price.[140] Thus, if Vendor *A* bids ten dollars per case of toilet paper, then

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132. *See, e.g.*, Smith Presentation, *supra* note 22, slide 15 (listing the threat to the health of an industry where profit margins are already lean as one of the "cons" of reverse auctions); Scott Memo, *supra* note 110, attachment, at 1 (reporting that corporate users also had to monitor the well-being of their supplier base); Ellen Messmer, *Defense Dept.'s Online Auctions Spark Controversy*, NETWORK WORLD, Aug. 7, 2000, at 1, LEXIS, News Group File (quoting Ken Oscar, acting OMB administrator, as saying that one concern is whether profits are being driven so low that "suppliers can't invest for the future"); Meinert Interview, *supra* note 40 (acknowledging that those who conduct reverse auctions have to ensure they keep the industrial base strong). For example, the Army wouldn't do a reverse auction for lithium batteries because "we only have two suppliers and we don't want them to kill each other." *Id.*

133. WYLD, *supra* note 14, at 18.

134. *Id.* at 15-16. The other is the threat of collusion. *See supra* notes 122-28 and accompanying text. *See also* FAR, *supra* note 24, at 3.501-1 (defining "buying in" as submitting offers below anticipated costs in expectation of making up the loss through contract changes or receiving follow-on contracts at inflated prices).

135. WYLD, *supra* note 14, at 16.

136. Burke, *supra* note 78, at 6.

137. Smith Presentation, *supra* note 22, slide 20.

138. *See, e.g.*, Little, *supra* note 76, at 37 (contending that reverse auctions "result in shoddy work"); ARMY SOURCE SELECTION GUIDE, *supra* note 109, at 76 ("When using reverse auctions in a best value acquisition, ensure the auction process does not drive prices down to the point that the resultant contract does not provide enough incentive for the contractor to provide quality supplies and services."); Smith Presentation, *supra* note 22, slide 33 (stating that one concern with reverse auctions is that "buying in" will leave the winning bidder with "no profit (and) no incentive to perform adequately").

139. ABA Letter, *supra* note 77.

Vendor *B* bids eight dollars per case just before the bell, Vendor *B* wins the right to sell the government his toilet paper—but he will do so at ten dollars per case. The Vickery auction allows reverse auction participants

> to bid in the full knowledge that someone would have to undercut their own bid in order to secure the buyer's business for the specific good or service. . . . The Vickery auction takes away some of the "frenzy" from the bidding, allowing prices to be set that are closer to the "true" market value of the item. This is because it allows bidders to be aggressive, while having the knowledge that their competitor(s) will determine the clearing price. . . . With governmental auctions, this may be even more important. This is because the use of the Vickery auction format could help to alleviate most concerns over the propriety of auctions. . . . The winner's curse is based on what is known as the "greater fool theory." In simple terms, this means that there may always be someone out there foolish enough to bid more than you . . . ![141]

A Vickery auction would thus protect bidders from themselves or other competitors, especially small businesses who could participate "with lessened fears that they would be undercut by larger firms."[142] The tradeoff, of course, is that the government pays more for whatever it is buying.[143]

Besides the lost savings, using a Vickery auction to avoid the winner's curse begs the question of whether the government should even be looking for a solution in the first place. If a bidder so lacks self-control that he cannot stop himself from cutting his own throat online, should Uncle Sam really be so paternalistic as to prevent him from doing so?[144]

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140. WYLD, *supra* note 14, at 18 (proposing the use of this Nobel Prize-winning technique developed by economist William Vickery).

141. *Id.* (citations omitted).

142. *Id. Cf.* Harris, *supra* note 120 (claiming that some sellers participate in reverse auctions with their goal not to win but to drive the price so low that it forces their competitors into money-losing contracts).

143. WYLD, *supra* note 14, at 18 (acknowledging that "the government would also not be maximizing its savings from the use of supplier auctions").

144. *See* Meinert Interview, *supra* note 40 ("Industry says we're forcing them to give us a price where they lose money. How? Nobody's holding a gun to their head.").

Even more compelling is the lack of even anecdotal evidence that underbidding is really a problem. Neither published articles nor reports from users in the field seem to document any resulting shoddy performance.[145] One government official has heard industry leaders warn of the danger of underbidding leading to substandard results, but every time he has challenged them to give him proof, "no one's been able to back it up."[146]

Reverse auctions are in fact cutting into profit margins, but perhaps many were not all that slim to begin with. Acquisition staffers are finding that just the possibility of reverse auctions appears to be driving prices down.[147] For example, the Navy had traditionally paid about seventy-five cents apiece for plastic bags used in nuclear repair. The lowest offer—before a planned reverse auction—came in at nineteen cents. The Navy bought the bags without an auction because it could not imagine getting a cheaper price.[148]

Additionally, although the Navy had to reopen the process (in traditional format) and ask for final price revisions after one of its failed auctions for moving services,[149] it still ended up saving sixty-seven percent, thanks to the auction bid-downs. [150] That drastic reduction led contracting officials to believe that perhaps they had been paying too much in past years.[151]

The mindset among many contracting officers, however, can pose a problem. "They've been trained only to drive the price down, but the FAR

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145. The Navy's Commander Ellis said he has checked with contracting officers but never heard any negative reports about auction winners' performance. Ellis Interview, *supra* note 23. At CECOM, Mr. Meinert agrees: "I have not seen one person fail to deliver" after a reverse auction. Meinert Interview, *supra* note 40. Mr. Thomas said FreeMarkets has had some customers for five years, "and I have not ever witnessed that type of irrational behavior." Thomas Interview, *supra* note 118.

146. Meinert Interview, *supra* note 40.

147. The Army has been seeing non-auction, sealed-bid prices twenty-five to thirty percent lower. *Id.* Mr. Meinert believes that before reverse auctions, contractors simply took the historical prices and bid five to ten percent lower. Now, the ever-present possibility of reverse auctions has forced suppliers to look harder for ways to cut costs. *Id.* Similarly, at the Navy, "it seems like because we've told them we're going to do reverse auctions, the proposals come in a lot lower." Ellis Interview, *supra* note 23.

148. Ellis Interview, *supra* note 23.

149. Royal Hawaiian Movers, Inc., Comp. Gen. B-288653, Oct. 31, 2001, 2001 CPD ¶ 182; *see infra* notes 168-70.

150. Ellis Interview, *supra* note 23.

151. *Id.*

is pretty clear on the fiduciary duty of a contracting officer—he has a duty to do something when the price is too low."[152] In other words, practitioners must never forget that a fair price has "three critical components . . . fair to the buyer; fair to the seller; and fair under market conditions."[153]

When contracting officials do not grasp that concept, the results can be wasted time and effort, as evidenced by the experience of one Army division in Alabama that did a reverse auction for contract close-out services. The specification was unclear about whether the contractor would perform the services on-site in Alabama (as the customer wanted).[154] The bidding started at $120 an hour before eventually a company in Texas chimed in at just seven dollars an hour—a drop of almost ninety-five percent. The CECOM warned the Alabama agency that something had to be wrong because the Texas company clearly could not do the job in Alabama for so low a price. Alabama personnel, however, refused to stop the auction. As it turned out, the Texas bidder thought that the customer would send it the documents—not that it would come to Alabama. The agency ended up canceling the procurement and starting over.[155]

C. Not Doing Your Homework Means a Failing Grade

Slipshod procurements like the Alabama one demonstrate why poor preparation, including drafting specifications, carries the greatest potential for "harm . . . to the integrity of the procurement process."[156] As with every procurement, but even more so with reverse auctions, it seems

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152. Meinert Interview, *supra* note 40; *see also* OFFICE OF THE DEPUTY ASSISTANT SEC'Y OF THE AIR FORCE FOR ACQUISITION (CONTRACTING), AF REVERSE AUCTIONING (RA) POLICY STRATEGY No. 2 (Feb. 2001) [hereinafter AF REVERSE AUCTIONING POLICY STRATEGY] ("Policy should emphasize the CO responsibility."), *available at* http://www.safaq.hq.af.mil/contracting/reverseauction/.

153. AF REVERSE AUCTIONING POLICY STRATEGY, *supra* note 152, No. 3; *see also* FAR, *supra* note 24, at 15.402(a) (requiring contracting officers to "[p]urchase supplies and services from responsible sources at fair and reasonable prices"); *Buyers.Gov*, *supra* note 94 (News & Links, Question & Answer No. 34) (stating that "use of the auction does not relieve procurement officials from using their judgment to reach a sound business decision").

154. Meinert Interview, *supra* note 40.

155. *Id.*

156. Royal Hawaiian Movers, Inc., Comp. Gen. B-288653, Oct. 31, 2001, 2001 CPD ¶ 182, at 5.

impossible to overemphasize the importance of meticulous groundwork.[157]

After surveying corporate users, the AF reported that "[t]heir key advice on when [the reverse auction] is an appropriate sourcing strategy can be summarized by saying that *advance preparation is critical.*"[158] Must-have preparation includes well-thought-out requirements, solid market research, a good acquisition plan, and thorough training for participants.[159] Prescreening bidders has also proven crucial—although the up-front effort (and sometimes money) to lay the needed groundwork could negate some of the time and cost savings.[160]

Both GAO decisions on reverse auction protests dealt with poorly written specifications. Both also involved the Navy's attempt to obtain contracts for moving services in the Pacific—one for a requirements contract for packing and crating services on Guam,[161] and the second for movement of containers on Oahu, Hawaii.[162]

In the first, *Pacific Island Movers*, the request for proposals stated that the reverse auction would last sixty minutes and that bids during the last five minutes would extend the auction for an additional fifteen minutes.[163] Only two bidders—Pacific Island Movers and Dewitt Transportation Services—participated, but the limited number of bidders did not translate to a limited number of bids. The auction began on 18 April and was still going—but not yet gone—on 19 April at 1400, when the Navy issued an

157. *See* Smith Presentation, *supra* note 22, slide 39 ("Upfront work (is) vital to success."); ACC *Reverse Auction Tacklebox*, *supra* note 21 ("Good up-front acquisition planning is the baseline for a successful Reverse Auction.").

158. Scott Memo, *supra* note 110, attachment 1, at 1.

159. Smith Presentation, *supra* note 22, slide 39; *see also* Treasury, *Get Educated*, *supra* note 113 (Ten Commandments) (recommending that buyers conduct mock auctions because "practice makes perfect").

160. Merson, *supra* note 16, at 3; *see also* Snyder Interview, *supra* note 21 (asserting that the reverse auction learning curve—for both the government and vendors—may in fact increase the overall time needed to complete a procurement); *infra* notes 213-14. *But see* Gary D. Stephens, A Case Study of the Army Reserve Auction 53 (June 2001) (unpublished thesis, Naval Post Graduate School) (predicting that as vendors gain experience and familiarity with reverse auctions, the advance training will take less time) (on file with author).

161. Pacific Island Movers, Comp. Gen. B-287643.2, July 19, 2001, 2001 CPD ¶ 126.

162. Royal Hawaiian Movers, Inc., Comp. Gen. B-288653, Oct. 31, 2001, 2001 CPD ¶ 182.

163. *Pacific Island Movers*, 2001 CPD ¶ 126, at 2.

amendment unequivocally ending the auction an hour later, no matter how many last-minute bids came in.[164]

When the auction finally ended, Pacific had submitted the lowest bid. Dewitt protested to the GAO, alleging, among other things, that the Navy stifled fair competition when it arbitrarily ended the auction.[165] Conceding a losing battle, the Navy chose not to defend the reverse auction, but instead told the GAO it would fix the problem by "reverting to a traditional negotiated competition and requesting final price revisions."[166]

The GAO then dismissed Dewitt's protest; the Navy began the process of obtaining the final prices; and Pacific protested the corrective action. The GAO denied Pacific's protest as well, finding the Navy's corrective measures to be reasonable,[167] but in its next reverse auction decision it cited this first case as exemplifying the pitfalls of "an inept reverse auction."[168]

The second GAO decision came just three months after the first. *Royal Hawaiian Movers* also concerned ambiguities in the request for proposals (RFP) regarding the conduct of the auction and how it would end.[169] The RFP stated the auction would allow a maximum of fifty extensions and would end no later than 1400 hours local time.[170] If the bidders used all fifty extensions, however, the auction would last until 1410 hours. Four offerors participated in the auction, and Pacific Express submitted the last offer before 1400. Royal Hawaiian Movers submitted the lowest overall bid at 1409:49. The Navy awarded the contract to Royal Hawaiian Movers, and Pacific Express filed an agency protest.[171]

The Navy, believing that the ambiguous solicitation made the auction "inherently unfair," again faced a mess it could not easily clean up. So once again it converted to a traditional negotiated procurement, reopened the competition, and requested final proposal revisions. Royal Hawaiian

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164. *Id.*

165. *Id.* DeWitt also complained about the malfunction of some auction software. *See infra* notes 178-80 and accompanying text.

166. *Pacific Island Movers*, 2001 CPD ¶ 126, at 2.

167. *Id.*

168. Royal Hawaiian Movers, Inc., Comp. Gen. B-288653, Oct. 31, 2001, 2001 CPD ¶ 182, at 5.

169. *Id*.

170. *Id*.

171. *Id*.

then protested to the GAO. Although the GAO upheld the Navy's actions, it said, "The circumstances of this case, in our view, highlight the importance of having unambiguous ground rules in reverse auctions."[172]

Because reverse auctions often compress the actual purchase period, watertight specifications are critical. As an example, the GSA points to a reverse auction for information technology in which the specification failed to address the warranty, after-sale service, or a minimum quality standard for vital computer components. Without meticulous specifications, the government could end up with a winning bidder incapable of meeting the agency's needs.[173]

D. "I'm Sorry, Dave, I'm Afraid I Can't Do That,"[174] or the Role of the Computer

Computers—and those who run them—make online reverse auctions possible. But the dependence on technology is fraught with potential minefields, ranging from systems that crash to the cost of conducting the auction to whether contracting officers are abdicating their responsibility to machines.

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172. *Id.*

173. GSA GUIDE, *supra* note 12, at 8 & n.3; *see also* AMS & FREEMARKETS, *supra* note 81, at 3 (recommending that buyers expand traditional specifications by adding detail for online auctions). Specifications also must permit "apples to apples" comparisons, especially in auctions for services. For example, if trying to acquire transportation services, it is not enough to tell the suppliers to get people from point A to point B—the specifications should delineate whether the services are to be by ground, air, etc. Thomas Interview, *supra* note 118. While all this is also true in traditional procurements, if the agency catches the discrepancy early enough in the standard process, it may be able to resolve the problem. But that luxury of time to fix flaws disappears in the middle of a sixty-minute auction. *See Royal Hawaiian Movers*, 2001 CPD ¶ 182, at 4 (observing that "under the time pressure of a reverse auction," firms may have no choice but to continue bidding even if they believe some impropriety has occurred).

174. HAL 9000, the artificially intelligent computer in *2001: A Space Odyssey* (Metro-Goldwyn-Mayer 1968).

1. Technology Failures

Computers are wonderful things—until they quit working. In reverse auctions, Internet or systems failures are potentially catastrophic.[175]

In the Navy's first reverse auction, it thought the auction had ended after thirty-eight minutes.[176] Then FreeMarkets, the auction provider, called and said that one of the bidders had lost connectivity in the middle of the auction. The contracting officer chose to reopen the bidding. The eventual losing bidder—the original winner—protested the award because it thought FreeMarkets had unilaterally chosen to reopen the auction. Once the protestor found out the contracting officer made the decision, it withdrew the protest.[177]

Besides sloppy specifications, *Pacific Island Movers* also involved the Navy's inability to deliver promised "real-time software" that would have allowed each bidder to see its standing in the auction.[178] Dewitt complained that, because it could not see its relative position in the auction, it could not actively compete with Pacific, as intended by the reverse auction procedures.[179] The GAO agreed, stating that "the undisputed software malfunctions . . . called into question the fairness of the competition."[180]

The Army has a help desk available during every auction and gives each vendor training on how to handle problems such as connectivity losses.[181] The solicitation for GSA's enabler services requires the enabler to provide the "ability to recover from a catastrophic outage (*i.e.*, ability to re-create the Reverse Auction from the point of failure)"[182] and a "pause"

175. *See* Mary Galbraith, *Internet Contract Auction Saves Money*, HILLTOP TIMES (Hill Air Force Base, Utah) (Jan. 25, 2001) (quoting a Hill contracting official as saying that "the process' weak point is the possibility of a lost Internet connection"), http://www.hill-toptimes.com/archive/20010125/Mainstory.html.

176. Ellis Interview, *supra* note 23.

177. *Id.*; *see also* ACC *Reverse Auction Tacklebox*, *supra* note 21 (Lessons Learned) (recommending that, in case of bidding or connectivity problems, contracting officers reopen the reverse auction to give bidders another chance to submit offers).

178. Pacific Island Movers, Comp. Gen. B-287643.2, July 19, 2001, 2001 CPD ¶ 126.

179. *Id.*

180. *Id.*; *see also* Snyder Interview, *supra* note 21 (reporting that the Air Force also cancelled one of its reverse auctions and requested final paper bids because of software problems).

181. Meinert Interview, *supra* note 40.

182. *FedBizOps.gov*, *supra* note 38 (Solicitation No. 7TS-01-0001, para. B.5.b).

capability to halt the auction if a bidder loses communications (or a similar method to handle system failures).[183]

2. The Cost of Doing Business

While a good auction provider can mitigate some of the danger of a system failure, the services do not necessarily come cheap: For "simple" auctions, the cost under the Navy's contract is one to two percent, with a $500 minimum and a $10,000 maximum. "Full-service" users will pay $20,000, $25,000 if the service provider also does market research.[184] The GSA's Buyers.Gov charged a fee of two to nine percent, depending on the size of the sale.[185]

Additionally, these companies are vulnerable to the same troubles that have beset the rest of the "dot.com" industry. For example, FedBid.Com conducted the SBA's auction for professional services in November 2000.[186] By December 2000, the company had shut down due to lack of funding.[187] One industry analyst anticipated that half of the seventy "e-government" companies will go offline in 2002.[188]

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183. *Id.* (Solicitation No. 7TS-01-0001, para. B.6.g). Auction provider FreeMarkets' services include setting up an operations center during the auction, where personnel monitor the bidding and troubleshoot any problems. Thomas Interview, *supra* note 118. If necessary, FreeMarkets will provide "surrogate bidding" for a vendor or make arrangements for a participant to bid over recorded telephone lines. Surrogate bidding involves the enabler entering the bids for the supplier, either over the telephone or online. *Id. See also* GSA GUIDE, *supra* note 12, at 11 (recommending use of a "phone bridge" for backup communications during the auction).

184. *ABM Online*, *supra* note 52. The Navy is paying eBreviate, Inc. $13.8 million over five years for the full-service option. Patience Wait, *Navy Awards eBreviate $13.8 Million Deal for Online Auctions*, WASH. TECH., Dec. 12, 2000, http://www.washingtontechnology.com/news/1_1/egov/15021-1.html.

185. Jackson, *supra* note 31. The Treasury Department's survey of five enablers concluded that the companies' pricing was extremely flexible and negotiable. Variables that impacted price included the number and value of auctions, the length of time over which they were to be conducted, and the service level and add-on options. Price structures included a percentage share of the savings, a per-event fee, or fees based on licensing agreements, such as the Army's. *See* Treasury, *Get Educated*, *supra* note 113 (Enablers' Capabilities).

186. PR Newswire, *FedBid.Com*, *supra* note 39.

187. Nick Wakeman, *E-gov Vender Portals Go Belly Up*, GOV'T COMPUTER NEWS, Feb. 5, 2001, at 11, LEXIS, ASAPII Publications—Federal Public Contracts. In April 2001, another e-commerce partnership acquired FedBid.Com, enabling it to resume providing its Web-based marketplace for business-to-government procurement. FedBid.Com, *About FedBid.Com*, *at* http://www.fedbid.com/aboutfedbid.jsp (last visited Mar. 21, 2002).

3. Whose Line Is It, Anyway?

Additionally, some question how much the reverse auction providers can actually do. Are reverse auctions an inherently government function, one so "intimately related to the public interest as to mandate performance by government employees?"[189] The OFPP has specifically categorized approving contract documents, awarding contracts, and administering contracts as inherently governmental functions.[190]

Attorneys for the DLA's Defense Supply Center-Philadelphia warn against allowing reverse auction enablers to do too much: "The agreements with them must be structured to avoid their performing inherently governmental functions . . . including approving contract documents and awarding and administering contracts."[191]

The DIBBS, the Defense Supply Center-Columbus e-commerce procurement system, has a built-in screening program. Once the auction closes (always at 1700 hours on the solicitation return date), an "automated awards program takes all the bids and applies a sophisticated price-reasonableness algorithm to evaluate the bids. If the offers pass various tests involving contractor reliability and price reasonableness," the system automatically sends an e-mail message to the winning contractor notifying it of award, followed by a second message with the contracts attached.[192] Close to half of the online procurements are completely automated, handled entirely by a computer without human intervention in a process that takes less than one minute from the auction close to the online contract delivery.

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188. Wakeman, *supra* note 187; *see also* Treasury, *Get Educated*, *supra* note 113 (Ten Commandments) (warning auction holders to choose a "solid performing enabler" that is more likely to survive the troubled digital economy).

189. Office of Federal Procurement Policy Letter 92-1, Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. 45,101, para. 5 (1992) [hereinafter OFPP Letter 92-1].

190. *Id*.

191. DSCP *Reverse Auctioning*, *supra* note 112; *see also* GSA, *Buyers.Gov*, *supra* note 94 (News & Links, Information Technology Association (ITAA) Questions & Answers, No. 17) ("At no time will the enablers approve contract documents, award contracts or administer contracts.").

192. Pavilkey, *supra* note 42.

The DIBBS highlights questionable or non-routine bids that need oversight by human eyes.[193]

During DIBBS' first three months online, the DSCC used it to make 863 fully automated auction awards. The DSCC realized monetary savings in only slightly more than a third of those procurements, for a total of about $147,000, but officials also touted the reduced lead time and labor, which allowed DSCC personnel to focus on more complex acquisitions.[194]

The DIBBS is an in-house governmental system, not a contracted-out function, so arguably it follows the technical letter of the OFPP policy on inherently governmental functions. The question of whether it adheres to the spirit of the law is more troubling. The OFPP states that inherently governmental functions "include those activities that require either the exercise of discretion in applying Government authority or the making of value judgments in making decisions for the government."[195] No matter how "sophisticated" the "price-reasonableness algorithm," a computer still cannot exercise discretion or make a value judgment.

Even if one accepts that the OFPP inherently governmental policy does not apply to DSCC's automated contracting activities, it does not necessarily follow that a completely automated contract award is appropriate. The FAR is explicit about who has responsibility for awarding contracts—and it is not a machine. Only *contracting officers* have the authority to enter into contracts,[196] and the *contracting officers* "shall" award the contract. [197] "*No* contract shall be entered into unless the *contracting officer* ensures that all requirements of law, executive orders, regulations, and all other applicable procedures . . . have been met."[198]

Admittedly, requiring a live body to sit at the computer and simply rubber-stamp the electronically made decision may seem a triumph of form over substance. But slavish devotion to the gods of technology and automation can end up sacrificing the integrity of the process. As the Air Force warns, "Regardless of the acquisition method, contracting officer responsibility still prevails."[199] When contracting officers cede that responsibility and control, it damages the credibility of and public faith in

193. *Id.*
194. *Id.*
195. OFPP Policy Letter 92-1, *supra* note 189, para. 5.
196. FAR, *supra* note 24, at 1.602-1(a).
197. *Id*. 14.408-1(a) (for sealed bids), 15.303(c) (negotiated procurements).
198. *Id*. 1.602-1(b) (emphasis added).

the government procurement system. For example, one government contractor in Columbus has reservations about the DSCC system's ability to distinguish higher priced but better value offers.[200] He is right—a computer *cannot* be that discerning.[201]

E. When the Best Price Is Not the Best Deal

That clash between price and value is perhaps the most intense—and certainly one of the most valid—concerns regarding online auctions. One acquisitions staffer admits, "Collectively, in the DOD, we are too focused on just price in reverse auctions."[202]

Some government vendors also fear that the price will trump consideration of best value.[203] One critic charges, "A reverse auction by definition must result in an award based purely on price. It does not permit differing technical evaluations of competing products."[204] Another indus-

199. Boykin Presentation, *supra* note 22, slide 12; *see also* GSA, *Buyers.Gov*, *supra* note 94 (News & Links, ITAA Questions & Answers, No. 17) ("The government has not given up control and does not intend to give up control of its procurement process by using auction techniques . . . . There will always be contract specialists and contracting officers involved in the process, ensuring that the integrity of the process is intact.").

200. Pavilkey, *supra* note 42 (quoting Eric Tubbs, government contracts manager at Columbus Equipment Co.). Tubbs gives the example of a contractor who offers two filters, one cheaper but less efficient, while the more expensive filter is also more effective. "That isn't necessarily going to show upon the bid," Tubbs says. "I question whether an automated system can adequately evaluate the technical issues involved." *Id.*

201. *See also infra* notes 218-22 and accompanying text (discussing automated best value selection).

202. Meinert Interview, *supra* note 40. The Air Force also found that "in the long term, with most of the stuff we buy, price and only price is not in the best interest of what we do." Snyder Interview, *supra* note 21.

203. *See, e.g.*, Burke, *supra* note 78, at 2 (noting the apprehension that auctions "place undue emphasis on price in a procurement in relation to its importance in the evaluation criteria"); Davidson, *supra* note 118 (quoting one industry leader as saying that "there is a profound concern that they will do away with value and put the emphasis squarely on price"); Harris, *supra* note 120 (warning of industry's worries "that the government will end up with a fleet of Yugos").

204. Ryan, *supra* note 76, at 22. Ryan also calls reverse auctions "antithetical to the principle . . . of using best value and past performance." *Id.*

try observer claims, "It is impossible to do a proper best value award on a reverse auction."[205]

Proponents disagree. The GSA asserts: "Reverse Auctions do not preclude the use of best value criteria for consideration in the contract award. You must not consider only the price, but also the technical management and past performance of the bidder."[206] The GAO also said:

> When the government first began using reverse auctions for online procurement, the lowest price[,] technically acceptable bid award was more common, because they are simpler and more applicable to commodities. As we have progressed in our thinking about the use of reverse auctions for online procurement, we now see that reverse auctions are an effective tool for promoting best value selection during the procurement process.[207]

During its September 2000 studies, SAF/AQC found that most corporate users did *not* award solely to the lowest bidder but instead made reverse auction awards on a best value basis.[208] FreeMarkets has done about 17,000 reverse auctions, mostly for the private sector, and the low bidder lost out in about half of the auctions.[209]

Accomplishing this "best value" consideration probably will require at least two steps. Contracting officers may first have to get information such as technical proposals from bidders to evaluate the non-price factors. The reverse auction then becomes simply a "price negotiation tool."[210] The Air Force's guidance envisions a similar phased approach: Phase I involves determining supplier capability to meet the agency's needs; the second phase is the reverse auction to establish the best price, followed by

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205. Terry Miller, *Miller on Procurement; Government Activity*, FED. COMPUTER MARKET REP., Oct. 23, 2000, at 6, LEXIS, News Group File. According to the magazine, Miller spent thirty-five years in federal procurement.

206. GSA GUIDE, *supra* note 12, at 3.

207. *Id.* at 1. *Cf.* Stephens, *supra* note 160 (manuscript at 61) (maintaining that a lowest-price, technically-acceptable acquisition is the best choice for reverse auctions because it minimizes the selection factors other than price, which in turn simplifies the procurement as well as keeping it objective).

208. Scott Memo, *supra* note 110, attachment, at 1.

209. Thomas Interview, *supra* note 118; *see also* Amy Santenello, *Government Uses of Internet Auctions*, META GROUP DELTA, July 24, 2001, at 1, LEXIS, News Group Files (reporting a claim that best value reverse auctions lead to award to the lowest bidder in only about five percent of the auctions).

the last phase of determining best value and bidder responsibility in order to make the final award.[211]

In January 2001, the Ogden Air Logistics Center (ALC) at Hill Air Force Base, Utah, used a reverse auction for a best value acquisition for airplane parts.[212] Contracting officers first screened potential bidders based on past performance. Vendors had to document their capability to provide a quality product. Those who did not submit the required information were denied the user name and passwords required to participate in the auction.[213] The advance preparation added weeks to the process, although AFMC officials touted the auction as a "way to streamline the contracting process and make it faster."[214]

The Army's CECOM developed an award-winning program to help buyers evaluate bids on subjective quality factors and variables such as warranties and quality guarantees.[215] The Army now is able to give added

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210. GSA GUIDE, *supra* note 12, at 1; *see also* Meinert Interview, *supra* note 40 (noting that the Army has also used this approach with good results); AFMC *Reverse Auctioning*, *supra* note 95 (providing the Navy's sample instructions, which advise offerors that initial proposals would be used to establish the competitive range, and then the auction would be used as "discussions" to allow offerors to revise their price proposals); ACC *Reverse Auction Tacklebox*, *supra* note 21 (reporting that this two-step process has seemed to work well).

211. AF REVERSE AUCTIONING POLICY STRATEGY, *supra* note 153, No. 13. The Air Force labels using reverse auctions in the best value environment as "can-do"—but only with such a three-phased approach. *Id.*; *see also* ITIC Letter, *supra* note 125, at 2 (recommending that the government evaluate factors other than price before the auction, conduct the auction to determine price, then perform an "integrated evaluation of both price and factors other than price to quantify the 'Best Value' "); AMS & FREEMARKETS, *supra* note 81, at 3-4 (suggesting qualifying bidders before the auction and evaluating bids and weighing "all relevant factors—not just the price"—after the auction to make a best value award); Richard Rector, *As E-Buying Hits Fed World, Time to Draw Lines*, WASH. TECH., May 22, 2000 (asserting that this three-step method would "provide the government with the best of both worlds"—the lowest price and the best value), http://www.washingtontechnology.com.

212. Galbraith, *supra* note 175.

213. *Id.* Hill also ran a mock auction with practice bids, documenting problems and gathering recommendations from vendors. Together, the contracting officers and the potential vendors made fifteen recommendations to improve the process—fourteen of which were accepted by the Army, which provided the system. Most were aimed at simplifying the process or making the site more user-friendly for the bidders. *Id.*

214. *Id.* After eighty minutes of bidding, the Air Force had realized savings of about nineteen percent. In this auction, not only did the competing vendors have real-time views of the bidding, but staffers at other ALCs and the Secretary of the Air Force acquisitions office watched the online action from their own computers. *Id.*

weight (e.g., an extra ten points to the bidder's total score) for options such as upgraded power, faster performance, and more responsive service.[216] The weighting occurs simultaneously with the bidding, and bidders see their score or range online. As with traditional procurements, contracting officers still have to do a source-selection plan and provide a rationale for how the award decision will be made, with the evaluation factors fully explained up front to the bidders.[217]

Enablers or auction service providers offer a variety of methods to conduct an auction that does not focus solely on price. FreeMarkets, for example, can build a decision matrix into the software that allows the customer to give various weights to each of three different payment options, or it can even give the bidders an online ranking.[218] The Buyers.Gov enablers offered some tools that automated best value evaluations, as well as separating price from subjective and technical assessments when needed.[219] The GSA stressed, however, that "the entire process will be monitored by Government personnel. All award decisions will be made by Government personnel."[220]

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215. Shane Harris, *Acquisition Awards—Army, BestBuy.Gov*, GOV'T EXECUTIVE, Aug. 1, 2001, http://www.govexec.com/top200/01top/army.htm. Experience led the Army to realize that a best value determination should be an option in reverse auctions. "Gateway would call in the middle of an auction and offer a flat screen," instead of the traditional screen, and CECOM had no way to take advantage of that feature. Meinert Interview, *supra* note 40.

216. Meinert Interview, *supra* note 40. For example, the Army was able to factor in the speed of service for an Army customer in Germany that wanted on-site service within three days. *Id.*

217. *Id.* Another suggestion to avoid overemphasizing price is to conduct quantity-based auctions. In such an auction, the buyer sets the amount it wants to spend—for example, $1 million for computers—and the vendors base their bids on how many computers they can provide for that amount. Treasury, *Get Educated*, *supra* note 113 (Ten Commandments).

218. Thomas Interview, *supra* note 118.

219. GSA, *Buyers.Gov*, *supra* note 94 (News & Links, ITAA Questions & Answers, No. 2). Optional "value added" features discussed in the outstanding enabler solicitation include the "ability to accommodate variables other than just a price comparison (for example, delivery time, warranty, stock availability, etc.)," software that allows the government to define best value evaluation criteria, and "real-time evaluation of bids based on best value designated variables." *FedBizOps.gov*, *supra* note 38 (Solicitation No. 7TS-01-0001, para. B.7).

220. GSA, *Buyers.Gov*, *supra* note 94 (News & Links, ITAA Questions & Answers, No. 2).

The GSA is right to be concerned. Using an automated best value evaluation capability suffers from the same weakness as the DIBBS contract award system. It abdicates the selection decision to a machine, while the FAR places the responsibility for choosing among offerors on the source selection authority (SSA).[221]

> Although the SSA may rely upon analyses and the like in making its determination, GAO may understandably reject an award in which the SSA relies too heavily on a predetermined, routinized "best value" formula to reach an award decision. Indeed, GAO has ruled on a number of occasions that a mathematical tradeoff formula may be used as one source selection tool, but it has insisted that qualitative assessment is still required.[222]

F. Not a Perfect Match for Everything

Part of the reverse auction growing pains have been users' difficulty and inexperience in determining which types of procurement are appropriate for reverse auctions. No one says that reverse auctions are a one-size-fits-all solution.[223]

A significant number of reverse auctions have been for information technology (IT) products. In fact, the Army has promoted IT products as "good candidates" for reverse auctions.[224] Commercial, "off-the-shelf"

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221. *See* Palmer et al., *supra* note 69, at 8 (concluding that FAR 15.308 "clearly requires that the source selection decision be made by the source selection authority and not by a software package").

222. *Id.* at 8-9.

223. *See, e.g.*, Smith Presentation, *supra* note 22, slides 38-39 (stating that a reverse auction should be used only where "it makes sense"); Stephens, *supra* note 160 (manuscript at 63) ("Reverse auctions are not 'silver bullets' designed for use in all situations."); Harris, *supra* note 120 ("The prevailing wisdom among buyers, sellers and providers of auction services is that the technique is one more tool in the procurement toolbox.").

224. Chris Vuxton, Analyst, Office of the Deputy Assistant Secretary of the Army (Procurement), "Reverse Auctions," Presentation at the U.S. Army Corps of Engineers Principal Assistant for Contracting Roundtable 2001, slide 8 (June 14, 2001) [hereinafter Vuxton Presentation] (on file with author). *See also* Meinert Interview, *supra* note 40 (stating that IT requirements are by far the easiest to fulfill through reverse auctions because they can be so clearly defined); AFPC Press Release, *supra* note 23 (reporting that the Air Force Personnel Center called its purchase of 833 computers "an ideal requirement for online auctioning").

type items or commodities (e.g., toilet paper in bulk) are natural subjects for reverse auctions as well.[225]

Some detractors, however, have taken that practice a step further, saying DOD should not use reverse auctions for *anything* other than buying fungible commodities.[226] One skeptic argues that the Navy's groundbreaking purchase of ejection seats is exactly what the military should *not* do, because it puts pilot safety at the mercy of a component made by the lowest bidder.[227]

Air Force procurement officials are wary, as well, about using reverse auctions in the sustainment arena versus the operational side of the house. They cite the complexity of the acquisitions (fewer commercial products), the lack of competition (almost two-thirds of the sustainment spare con-

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225. *See, e.g.*, Stephens, *supra* note 160 (manuscript at 65) (asserting that reverse auctions are most appropriate for these types of items); ACC *Reverse Auction Tacklebox*, *supra* note 21 ("Commercial items with build to print specifications are the most lucrative targets."). The DOD acquisition guidelines say reverse auctions are useful techniques for determining a fair and reasonable price, as well as bringing competition to commercial item procurements. OSD HANDBOOK, *supra* note 107, at 13. The Marine Corps Regional Contracting Office Southwest had plans to buy at least one-fourth of its commodity-type items through reverse auctions. *ABM Online*, *supra* note 53. Almost all DSCC's reverse auction buys were for mechanical parts—transistors, brake drums and shields, semiconductors, tires and wheels, etc. *DIBBS Auction Records*, *supra* note 43.

226. *See, e.g.*, NASH & CIBINIC, *supra* note 119, at 99 (expressing reservations about using reverse auctions for buying complex items); Davidson, *supra* note 118 (quoting one industry representative as saying reverse auctions are "appropriate only for a limited number of interchangeable, nontechnological products"); *see also* Treasury, *Get Educated*, *supra* note 113 ("What's Appropriate, What's Not) (warning that reverse auctions may not be appropriate when dealing with complex requirements and purchases that include significant servicing needs).

An Army researcher who studied CECOM's first forty-three auctions found that eight were for "military unique items," built to agency-written specifications. Twenty-five were for IT-related products, six were for appliances such as dishwashers, and four were for "other" items (for example, the goats). Of the eight military-unique items, *none* was for a new requirement—all were for previously developed and procured items. The researcher concluded that the DOD should not employ reverse auctions to fill new requirements for items built to military-developed specifications. Stephens, *supra* note 160 (manuscript at 49-51).

227. Ryan, *supra* note 76; *cf.* Snyder Interview, *supra* note 21 (noting that AFMC's auctions for airplane components were for "non-safety-of-flight parts"). *But see* Ellis Interview, *supra* note 23 (stressing that the reverse auction contracts required the "same 100 percent quality assurance tests that were required in the traditional procurements").

tracts in fiscal year 1999 were sole-source awards), and the possibility of compromising flight safety as cautionary issues.[228]

Moving beyond *any* type of product into the realm of auctioning for services makes even some government officials a little leery. Deidre A. Lee, DOD director of procurement and former OFPP administrator, has said, "I think reverse auctions work well for commodities or products. I'm a little less sure about how we expect to buy best-value services."[229] Using reverse auctions for services—especially those with complex requirements or without well-defined specifications—can increase the risk of unsatisfactory results.[230]

One researcher, however, wants to see reverse auctions extended to service contracts:

> Recently, the dollars spent by the . . . DOD on services surpassed the amount spent on goods. The future use of the reverse auction in acquisition for services is a logical path. . . . The question is not whether to use or not use a reverse auction for the acquisition of services, but when.[231]

Reverse auctions may work for procuring services "as long as they are non-complex and well-defined."[232] The ability to articulate and delineate

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228. Major Randy Looke, Air Force Materiel Command Contracting Office, Presentation, "Reverse Auctioning in the Sustainment World," slides 2-3, 6 (Aug. 2000), *available at* https://www.afmc-mil.wpafb.af.mil/HQ-AFMC/PK/pko/revauctn.ramain.htm. A recent GAO report, however, found the Navy, Marine Corps and DLA were experiencing worrisome price increases for spare parts—an annual average of 12% for the Navy, 14% for the Marine Corps, and as much as 1000% or more a year for a few parts bought by DLA. GAO, DEFENSE ACQUISITIONS, *supra* note 117, at 21-22. In the right circumstances, a reverse auction could provide a viable option to help curb such costs.

229. Dawn S. Onley, *Procurement Is a People Business; Interview with Deidre A. Lee of DOD*, GOV'T COMPUTER NEWS, July 23, 2001, at 17, LEXIS, ASAPII Publications—Federal Public Contracts; *see also* Ryan, *supra* note 76 (urging the FAR councils to "warn agencies away from purchasing . . . services" through reverse auctions).

230. GSA, *Buyers.Gov*, *supra* note 94 (News & Links, Question & Answer No. 31). For example, one of the flaws in the Navy's first failed auction for moving services was the extensive requirement that included 170 line items. Each line item required a minimum price, and any one or all could be revised, a process that significantly complicated the auction. Ellis Interview, *supra* note 23.

231. Stephens, *supra* note 160 (manuscript at 66). The 2002 National Defense Act also requires the DOD to "establish and implement a management structure for procurement of services" comparable to that for procuring products. GAO, DEFENSE ACQUISITIONS, *supra* note 117, at 6.

the needed services and their required features is critical.[233] Potential candidates include training, security, janitorial and housekeeping, printing operations, groundskeeping, vehicle maintenance, and lodging.[234]

The GSA also says reverse auctions work best for "high dollar" purchases—those of at least $500,000—because of the time needed to prepare, the administration costs, economies of scale, and volume discounts.[235] Yet some of the Army's auctions have been for total dollar values of less than $10,000, including one for five fax machines with a beginning total cost estimate of $2500 and a final price of $2200—a savings of only $300.[236]

Despite the conflicting views, agencies are not totally bereft of guidance on when reverse auctions are appropriate. The Air Force's research gleaned three baseline prerequisites from corporate-sector experience that apply no matter what the type of procurement: "The presence of a number of competent, competitive suppliers;[237] the presence of a clearly defined requirement that competitors find attractive; and management support for changing suppliers if needed."[238]

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232. GSA GUIDE, *supra* note 12, at 9.

233. *See id.*; Robert L. Neuman, *The Basics About Reverse Auctioning*, PURCHASING TODAY, Nov. 2001, at 18 ("Anything that you can describe well can be reverse-auctioned. This includes goods and services. The key is that the item must be discrete—that it has features that are well-measurable."), http:www.ism.ws/Pubs/ISMMag/110118.cfm. In the SBA auction for construction services, each participant conducted a pre-bid inspection. Additionally, the auction provider ensured that all bids complied with access requirements of the Americans with Disabilities Act. PR Newswire, *FedBid.Com*, *supra* note 39.

234. *See* GSA, *Buyers.Gov*, *supra* note 94 (News & Links, Question & Answer No. 2); GSA GUIDE, *supra* note 12, at 9 (also suggesting operating 24-hour communications centers and conference facilities); AF REVERSE AUCTION POLICY STRATEGY, *supra* note 152, No. 10 (contending that agencies should seriously consider reverse auctions for services that are available in the commercial marketplace); AMS & FREEMARKETS, *supra* note 81, attachment A (listing thirty-eight services it considers potentially appropriate for online public auctions).

235. GSA, *Buyers.Gov*, *supra* note 94 (News & Links, Question & Answer No. 30); GSA GUIDE, *supra* note 12, at 4, 8. Most GSA auctions were for procurements of at least $1 million. GSA GUIDE, *supra* note 12, at 10; *see also* Merson, *supra* note 16, at 14 (asserting that experience has shown that reverse auctions work best for "large dollar-value auctions for individual agencies (or) aggregated small buys for multiple users"); *cf.* Harris, *supra* note 120 (quoting some government officials as saying vendors will not want to compete for small buys).

236. *See infra* Appendix 1.

G. Mom and Pop and Farmer Bob in Cyberspace

The type and dollar value of a procurement used in a reverse auction also will affect who the bidders are, especially when it comes to small businesses. Opinions vary widely about whether reverse auctions will open up new territory to small businesses or create even more barriers to their full participation. Some say the technology investment and expertise are so formidable that small businesses either cannot or will not be part of reverse auctions.[239] Others fear that dominant contractors may force competitors out of the market[240] and that "Mom and Pop" vendors may find reverse auctions difficult.[241]

Such worries underestimate the extent to which the computer age has pervaded business and the equalizing impact of online transactions. "The Internet in particular is helping to level the playing field among large and small businesses . . . by making it easer and cheaper for all businesses to transact business and exchange information."[242] After all, bidding in a reverse auction requires only a computer and a telephone line, equipment

237. Both Army and Navy officials also said they had found that reverse auctions with only two suppliers were at risk for unsatisfactory results. Ellis Interview, *supra* note 23; Meinert Interview, *supra* note 40; *see also* Thomas Interview, *supra* note 118 ("We start to get nervous when there are just two (bidders), although we have done a number of successful auctions with only two."); AF REVERSE AUCTION POLICY STRATEGY, *supra* note 152, No. 5 (asserting that "using RA for an acquisition with less than three participants should not be viewed as a smart business decision"). The CECOM's spreadsheet shows several instances in which only one vendor actually "showed up" to participate in the auctions. In those cases, obviously, the starting price was also the winning bid and the customer realized no savings. *See infra* Appendix 1.

Yet the Army's statistics also show that the number of suppliers guarantees neither success or failure. In one auction for eyepiece assemblies, only two vendors participated—but the final bid was $228,500, a fifty-two-percent savings off the starting price of $550,000. On the other hand, four suppliers came to bid on computer systems for the State Department, but none was willing to offer anything less than the starting price. *Id.*

238. Scott Memo, *supra* note 110, attachment, at 1. The DAU offers similar guidelines: The presence of an "established competitive environment," which reduces the risk to both the contractors and the agency; the ability to determine a baseline starting price; a well-defined specification—again, reducing the risk to both sides; and true cost savings from the auction—including the "hidden" costs such as the auction expenses and the costs of possibly changing suppliers. Smith Presentation, *supra* note 22, slide 38.

239. Merson, *supra* note 16, at 5.

240. Smith Presentation, *supra* note 22, slide 15.

241. *Id.* slide 32.

242. Merson, *supra* note 16, at 5-6 (quoting ECON. & STATISTICS ADMIN., U.S. DEPT. OF COMMERCE, DIGITAL ECONOMY 2000 (June 2000)).

that is well within the reach of most homes in America, not to mention practically every business.[243]

In the Army's experience, an estimated sixty to sixty-five percent of the auction winners have been small businesses.[244] During the reverse auction for goats, "there were guys in their barns logged onto AOL bidding"[245]—farmers who knew more about auctioning than Army officials did, thanks to their long experience with livestock auctions.[246] In the Navy's auction pilot, small businesses captured four out of five contracts and secured an estimated twenty-five percent of the contracts since then.[247]

Small businesses may actually be better equipped to take advantage of the split-second decision-making required by reverse auctions. A smaller firm can have all its top decision-makers in the same room during an auction, allowing them to react immediately to the bidding action. Huge corporations that have officers scattered across the country may not be capable of such flexible responses.[248]

Ensuring that small businesses are able to participate in reverse auctions may take some extra effort on the part of contracting officers but no more so than traditional small business set-asides or similar programs. When the Army Forces Command conducted its first reverse auction, buying forty computers at Fort Hood, Texas, it did so with only small or small disadvantaged businesses.[249] The Army researched the market using existing GSA computer-equipment supply schedules to identify appropriate candidates.[250] When a Navy customer held a reverse auction for wooden

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243. *See* GSA GUIDE, *supra* note 12, at 13 ("Reverse auctions are small-business friendly since you need only a Web browser to participate in e-commerce."). For example, FreeMarkets "BidWare" software for reverse auctions needs only an IBM-compatible, Pentium-class personal computer, a modem capable of transmitting at 28.8 kilobytes per second, and thirty-two megabytes of random access memory. Joshua A. Kutner, *Navy Boards Online Auction Boat*, NAT'L DEF., June 2000, at 23.

244. Meinert Interview, *supra* note 40.

245. Harris, *supra* note 215 (quoting Eric Levin, vice president of marketing for Frictionless Commerce, the software provider for the auction).

246. Meinert Interview, *supra* note 40.

247. Ellis Interview, *supra* note 23.

248. *Id.* (pointing out that small businesses may in fact have an advantage over larger companies).

249. *FORSCOM's First Reverse Auction Conducted at Fort Hood*, ARMY ACQUISITION REFORM NEWSLETTER (U.S. Army Acquisition Corps), Sept. 26, 2000, at 1.

250. *Id.* Auction preparations took about six days, but the Army made the delivery order award on the same day as the auction. *Id.*

pallets, it wanted to ensure that long-time Amish suppliers could continue to compete. To accommodate the Amish vendors' religious beliefs, which prohibit the use of electronic equipment, FreeMarkets provided surrogate verbal bidding.[251]

Additionally, the transparency of online auctions—the fact that bidders "can see why they won or lost in real time because it's right there on the screen"[252]—may actually enhance small businesses' faith in the government procurement process. The GAO recently criticized the DOD for failing to adequately compete multiple-award contracts and procurements for information technology products.[253] Yet one of the advantages of a reverse auction is the "increased participation in bid activity and access to new suppliers and markets."[254] Reverse auctions, at a minimum, give the appearance of being more fair and open, offering small businesses a chance to pick up contracts that might ordinarily go to the agency's preferred vendor among existing IDIQ contracts or supply schedules.[255]

H. But What About Everything Else?

Even if reverse auctions are small-business friendly, how does the agency go about applying other socioeconomic preferences?[256] The

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251. Thomas Interview, *supra* note 118. Another way of "spreading the wealth" in a reverse auction is to break procurements into lots or other logical groupings of the items. Not only does this sometimes simplify the acquisition, it allows the agency to award contracts to multiple vendors. For example, in the first DFAS auction, three companies won contracts for four lots—two very large companies, Gateway Computers and Micron Computers, and one small business, SR Tech. GSA GUIDE, *supra* note 12, at 18.

252. Meinert Interview, *supra* note 40; *see also* GSA, *Buyers.Gov*, *supra* note 94 (News & Links, Question & Answer No. 33) (stating that reverse auctions give small businesses an unmatched ability to receive "immediate real-time market data on the pricing of their goods and services").

253. *See* GAO, DEFENSE ACQUISITIONS, *supra* note 117, at 19-20 (noting in that as many as seventy percent of the contracts studied, the DOD organizations failed to give contractors "a fair opportunity to be considered").

254. Smith Presentation, *supra* note 22, slide 12; *see also* GSA GUIDE, *supra* note 12, at 1 (claiming that reverse auctions open up competitions to suppliers who might not have been allowed to participate under methods such as the "standard 'get three quotes' model"); GSA, *Buyers.Gov*, *supra* note 94 (News & Links, Question & Answer No. 33) (maintaining that reverse auctions will enhance small businesses' ability to find and respond to government procurement opportunities).

255. Meinert Interview, *supra* note 40; *see also Air Force "Aims High"*, *supra* note 61, at 7 (asserting that participants in reverse auctions gained the assurance that "the government is not simply selecting its favorite suppliers").

answer, according to those with experience in the process, is exactly the same way the agency would satisfy those requirements in a traditional contract—"anything you can do offline, you can do online."[257] GSA guidance adds:

> Government reverse auctions are like any other government procurement. A Reverse Auction is merely a different way of negotiating and arriving at a fair and reasonable price through dynamic pricing. The requirements of the procurement process do not change with the use of reverse auctions. The applicable FAR clauses, whether they pertain to—say—the Buy American Act (BAA) or the Trade Agreements Act (TAA), small business participation, or another area, will be in, or be referenced in, the solicitation.[258]

In fact, "nothing has changed" could well be the motto for DOD procurement officials involved with reverse auctions. Reverse auctioning, they say, is a contracting *tool*, not a new *kind* of contract, so "[r]egardless of the method of acquisition and price strategy, the fundamental philosophy and policy do not change."[259]

That maxim, however, oversimplifies reality. If, for example, reverse auctions are treated as discussions over price, how is the socioeconomic preference actually factored in? The GSA has suggested using some type

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256. *See* McCaleb, *supra* note 75, at 3 (contending that the method of applying socioeconomic policies in a reverse auction is still unresolved); Merson, *supra* note 16 (stating that reverse auctions' impact on social and economic procurement programs has yet to be determined).

257. Thomas Interview, *supra* note 118; *see also* Meinert Interview, *supra* note 40; Ellis Interview, *supra* note 23 (both asserting that contracting officers apply the same procedures in reverse auctions as they would in traditional procurements).

258. GSA GUIDE, *supra* note 12, at 9; *see also* Vuxton Presentation, *supra* note 224, slide 8 ("The auction should be seen as a complement to the procedures that are already in place for conducting . . . acquisitions—not a method to skirt" FAR requirements.); Merson, *supra* note 16, at 7 (warning against using reverse auctions to avoid required suppliers such as nonprofit agencies employing people who are blind or severely disabled or the Federal Prison Industries); ACC *Reverse Auction Tacklebox*, *supra* note 21 ("As always, depending on the dollar threshold, socioeconomic considerations . . . must still be considered."); Smith Presentation, *supra* note 22, slide 32 (asserting that one of the lessons learned through reverse auction use is that socioeconomic goals can be fulfilled).

259. Boykin Presentation, *supra* note 22, slide 17; *see also* Thomas Interview, *supra* note 118 ("The same rules apply—we're just changing how negotiations happen."); GSA GUIDE, *supra* note 12, at 4 ("The laws and government regulations that apply to ordinary acquisitions also apply to reverse auctions.").

of "weighted bid model" or "bid modifiers" *after* the auction ends to take into account such things as socioeconomic preferences.[260] Yet, as discussed above, one of the much-ballyhooed advantages of reverse auctions is the instant feedback it gives bidders, telling them immediately how they rank against other participants. Coupled with the fact that the bidders are anonymous (and presumably do not know if they are competing against, for example, a woman- or minority-owned business), an *ex post facto* weighting does not accurately reflect a bidder's auction standing.[261]

Granted, bidders face this same dilemma in a traditional procurement, but acquisition officials do not tout the immediate transparency of paper-based contracting. While there is nothing inherently wrong with weighting bids after the auction ends, it does degrade the accuracy of the real-time feedback.

V. Conclusions and Recommendations

Even the most vocal critics seem to realize that e-commerce, including reverse auctions, is here to stay.[262] Some observers say that the "Internet Revolution" is a technological revolution similar to—but far faster-paced and intense than—those prompted by innovations such as the steam engine, the telephone, and the television. In their eyes, society is on the cusp of an unprecedented historical transformation from an economy

260. GSA GUIDE, *supra* note 12, at 5-6.

261. *See* McCaleb, *supra* note 75 (suggesting that perhaps the socioeconomic preference should be applied through software that adjusts the price in real time "so that offerors are aware of the 'real' bid against which they are competing"). The DSCC's DIBBS provides a public, real-time abstract of all qualifying bids that includes not only total quoted prices, but also "other factors that could affect price evaluation," such as the Buy American Act. DIBBS AUCTION USERS GUIDE, *supra* note 42, at 4. *See also supra* notes 216-17 and accompanying text (discussing real-time weighting and ranking of bids in best value procurements).

262. *See* Rector, *supra* note 211 (calling for public debate to put appropriate limits on federal reverse auction use, but acknowledging that "the concept of e-acquisition has clearly arrived"); Plexico, *supra* note 131 (recognizing that while many suppliers dislike reverse auctions, "they are likely to be a permanent addition to the toolbox of government acquisition professionals"). The GSA certainly anticipated banging the reverse auction gavel frequently in the next few years. The agency's solicitation for reverse auction services gave an estimated annual number of auctions for the contract's first two years: fifty for dollar amounts between $500,000 and $2 million, seventy-five for $2 million to $5 million, and 100 for more than $5 million. The estimate for the third year (first option year) increases by twenty percent. *See FedBizOps.gov*, *supra* note 38 (Solicitation No. 7TS-01-0001).

where e-commerce is an enhancement of traditional business methods to the point where it becomes "simply the way things work."[263]

A. Where Do We Go from Here?

Given that baseline prediction, the appropriate tack each federal organization should take is not *if* it will be doing reverse auctions, but *how and when* it should be doing them to best serve its own specialized needs and customers. In addition to those mentioned above, a plethora of solutions abound for every problem and potential issue. Evaluating every one is beyond this article's scope. The possible responses, however, can be simplified and summed up in two opposing points of view: legally binding FAR provisions or agency-developed policy guidance.

Some say the lack of regulatory guidance makes agencies and contractors skittish about using reverse auctions.[264] They say agencies especially need guidance to settle the issue of whether reverse auctions are legal and, if so, to ensure they do them properly.[265] "Rather than have people read between the lines, just come out and say it," because without that definitive guidance, some agencies will always hesitate to commit to something new.[266]

Additionally, besides calling for FAR language to explicitly permit reverse auctions, the ABA told the FAR councils that it also wants to see FAR revisions address the following topics:[267] writing reverse auction solicitations, complying with the PIA, allowing for an alternative Certificate of Independent Price Determination,[268] handling mistakes in bids, underbidding or buying-in, and identifying situations where reverse auc-

263. WYLD, *supra* note 14, at 41.

264. Davidson, *supra* note 118 (quoting Ina Merson, an acquisitions consultant and former Department of Commerce contracting officer, as saying reverse auctions "are not catching on now because there is no guidance for their use," a sentiment echoed by Deidre Lee, director of DOD procurement, who said agencies and contractors need more guidance).

265. Telephone Interview with Thomas F. Burke, Attorney, McKenna & Cuneo (Feb. 7, 2002) [hereinafter Burke Interview]. Mr. Burke is vice chair of the Commercial Products and Services Committee of the ABA's Public Contract Law Section, which submitted the ABA's comments to the FAR councils. His firm handled the bid protest (later withdrawn) of the Navy's first reverse auction. *Id.*

266. *Id.*

267. ABA Letter, *supra* note 77.

268. *See infra* note 281.

tions are appropriate "without precluding the use of reverse auctions in other situations."[269]

Those calling for guidance recognize that "a certain amount of trial and error is necessary" in learning to use new acquisition tools.[270] But, the argument goes, "the downside of any experiment is that if you don't get it right," the costs—in time, labor and dollars—can wipe out any benefit.[271] Additionally, without firm guidance, reverse auctions are likely to prove a fertile breeding ground for protests, especially as agencies branch out into more complex procurements.[272]

The Air Force, on the other hand, does not seem to believe that regulatory changes are needed in *any* area except for perhaps the relationship of reverse auctions to sealed bidding, where it "may be the right time and environment for a total 'rethink' of Part 14."[273] In its opinion, policy guidance—not regulation—can adequately address all of the following issues: determining reverse auction pricing policies and analysis; ensuring price independence and integrity; promoting full and open competition; publicizing and planning for reverse auctions; making responsibility determinations; deciding when reverse auctions are appropriate; using reverse auctions in both best value acquisitions and when accepting the lowest-price, technically acceptable offer; and promoting small-business participation.[274]

The argument behind the Air Force position is that the federal government cannot fully realize reverse auctions' untapped potential if it is fettered by too much regulation.[275] "'Try it, test it, do it,' should be the mantra of the public sector in regards to the application of all e-commerce concepts, including the auction model."[276]

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269. ABA Letter, *supra* note 77.

270. Burke Interview, *supra* note 265.

271. *Id*.

272. *Id*.

273. AF REVERSE AUCTIONING POLICY STRATEGY, *supra* note 152, No. 11. FAR Part 14 covers sealed bidding.

274. *See generally id.* (listing each of these positions in relation to specific FAR provisions).

B. Less Is More When It Comes to Regulation

1. Learn by Doing

The arguments for binding regulations carry some validity. After all, while reverse auctions can benefit the government significantly, they also seem to offer breathtaking potential for new and unlimited ways to really botch up an already complex process. As one skeptic wrote in August 2000, "If the Office of Federal Procurement Policy is even thinking about drafting reverse auction regulations, it should do so in Internet time. A lot of damage could occur in, say, 18 months."[277]

Yet here things are, twenty-four months later—and where is the damage? Two bid protests, both denied. Savings totaling millions of dollars.[278] Happy agency customers who have been able to adapt reverse auctions as they desire, to use or not to use. Procurement times often cut

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275. *See, e.g.*, Meinert Interview, *supra* note 40 (asserting that the DOD experience with reverse auctions is still too new for heavy regulations to be appropriate—"we're still in the infancy with this"); Merson, *supra* note 16, at 11 (reporting that the consensus at a GSA-sponsored reverse auctioning conference in August 2000 favored eliminating FAR "impediments" over issuing regulations that "might constrain innovation"). Professor Wyld cautions:

> Almost every agency at all levels of government will find that they have guidelines in place that will either hinder or completely prevent involvement in the emerging marketplaces. . . . These guidelines, along with the legislation and regulations behind them, will need to be updated, if not completely revised and "downsized" for the New Economy.

WYLD, *supra* note 14, at 45.

276. WYLD, *supra* note 14, at 54. One student of the Army's reverse auction program concluded:

> The procedures for using a reverse auction strategy are still developing. . . . The process is simply still evolving. . . . Any statutory or policy implementation restricting innovation with this process will have detrimental effects on its usefulness. The best recommendation is to let the process evolve into a well-defined procedure before considering any policy regarding its use.

Stephens, *supra* note 160 (manuscript at 66-67).

277. Ryan, *supra* note 76.

significantly. Not even any anecdotal evidence (let alone hard statistics) that reverse auctions are the contracting doomsday the critics predicted.

Most of the alleged problems appear to be solving themselves. Case law and the majority of published opinions seem to come down squarely on the side of legality for reverse auctions. Small businesses appear to be right in the thick of the bidding wars.[279] Government buyers don't seem to be complaining about performance deficiencies after underbidding.[280] The threat of collusion is no greater than in the traditional world.[281] As contracting officers and others gain reverse auction experience, sloppy specifications should become rarer. [282] Because the government cannot seem to avoid this problem entirely in *traditional* contracting, there is no reason to expect—or demand—that it do so in e-procurement.

Agencies seem to recognize that they cannot allow focus on price to run roughshod over obtaining quality products. The "best value contin-

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278. However, it remains to be seen whether these low prices are simply one-time good deals. If a reverse auction truly drives prices to their absolute market lows, then it seems unlikely that follow-on procurements will realize similar savings. *See* Nick Wakeman, *Feds Shift Reverse Auctions into Gear*, WASH. TECH., Aug. 14, 2000 (suggesting that after the first year, "the rate of savings drops"), http://www.washingtontechnology.com; *Business Down? Reinvent Purchasing*, PURCHASING MAG. ONLINE, Mar. 8, 2001 (quoting former Chrysler Motors president Thomas Stallkamp as saying he doubts reverse auction savings are permanent), http://www.manufacturing.net/pur/index.asp?layout=archiveTOC. Without more long-term reverse auction data to evaluate (including contracts that have run to completion), the jury is still out on that question.

279. Not only are small businesses participating as bidders, but also as auction providers. Out of nine companies that initially participated in various GSA online procurement programs as enablers, five were classified as small—including two small disadvantaged businesses (one also woman-owned). Merson, *supra* note 16, at 10-11. All four companies that received awards for GSA's new reverse auction program are classified as small. Again, two of those are disadvantaged, and one is also woman-owned. GSA, *IT Solutions*, *supra* note 38.

280. Admittedly, however, with just more than two years having elapsed from the first DOD reverse auction awards, it simply may be too soon to make an accurate assessment on this issue as well. At least one private-sector reverse auction user apparently met with unsatisfactory results. Aerospace contractor Pratt & Whitney reportedly had to terminate a reverse-auction contract for aerospace parts after a year of substandard performance from the winning bidder. Pratt & Whitney then had to pay significantly more to get the parts from its previous supplier. *Online Reverse Auctions Create Two Procurement Camps*, PURCHASING MAG. ONLINE, Mar. 21, 2002 (quoting former company commodity manager David Stec), http://www.manufacturing.net/pur/index.asp?layout=archiveTOC.

uum" in reverse auctions does not seem to differ that much from traditional procurements. As the FAR explains:

> An agency can obtain best value in negotiated acquisitions by using any one or a combination of source selection approaches. In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection.[283]

All that is equally true whether using reverse auctions or paper-based negotiations—and, again, as contracting personnel learn how to wield this new procurement tool, they will hone their ability to successfully traverse the continuum.[284]

The acquisitions community lacks agreement on when reverse auctions are appropriate, but so what? The GSA and others may say that only high-dollar auctions bring in sufficient bang for the buck. But if Army acquisition personnel have found what they consider to be a satisfactory and economical way to conduct reverse auctions for small requirements

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281. After all, certain types of contracts have always required the offeror to provide a "certificate of independent price determination," certifying that he has not acted in collusion with anyone else in reaching his price. *See* FAR, *supra* note 24, at 52.203-2; *see also* AF REVERSE AUCTION POLICY STRATEGY, *supra* note 152, No. 4 (asserting that this section provides the security and guidance needed to prevent collusive bids).

As with consent to disclose bidders' prices during the auction, however, this certification often is implied solely from the offeror's participation in the auction. The Navy informs bidders as follows: "Submission of a proposal by the offeror shall be considered certification by the offeror that the only knowing disclosure by the offeror of its prices to any other offeror will be during the CBE." AFMC *Reverse Auctioning*, *supra* note 95 (Navy sample Section L instructions, para. II.g). The Army advises essentially the same thing: "By participating in the reverse auction, offerors certify that the only knowing disclosure by the offeror of its prices to any other offeror will be during the reverse auction." *Id.* (Army sample instructions, para. I.f).

282. *See* NASH & CIBINIC, *supra* note 119, at 99 ("As with any tool, its use requires a certain degree of skill and knowledge on the part of the user.").

283. FAR, *supra* note 24, at 15.101.

284. *See* Harris, *supra* note 120 (predicting that as federal buyers become "savvier purchasers . . . (and) equip themselves with tools . . . such as reverse auctions, they will find ways to assure both best prices and best value").

(like a couple of fax machines), why should regulations tell them they cannot?[285] They are going to buy the fax machines one way or another;[286] leave it up to them to choose the appropriate method (just as the current regulatory regime does).[287]

If experience truly is the greatest teacher, it seems that allowing government agencies the leeway to figure out on their own when reverse auctions work and when they do not is preferable to regulations written by some bureaucrat who may never even have signed onto E-bay.[288] The key for contracting officers and agency customers is to go through the same analysis they would when deciding what type of method to use for any other procurement.[289]

For example, using reverse auctions to acquire construction services would seem to be pushing—if not exceeding—the limits of what is appropriate. But contracting officers apparently recognize that. Only a few

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285. *See* Stephens, *supra* note 160 (manuscript at 62) (noting that success in the reverse auctions he studied "was not limited to small or large acquisitions, nor did a relationship exist between the savings rate and the quantity required"). Additionally, requiring a minimum value for reverse auctions could also diminish small-business participation, since acquisitions with an anticipated value of more than $2500 but less than $100,000 are automatically reserved for small businesses. *See* FAR, *supra* note 24, at 19.502-2(a).

286. Even GSA acknowledged the reality that an estimated eighty percent of government procurement is for no more than $2500. Its answer was to set up online auctions that allowed government buyers to aggregate purchases, that is, combine them into one larger order. GSA, *Buyers.Gov*, *supra* note 94 (Reverse Auctions, Frequently Asked Questions No. 2).

287. As a case in point, the FAR and case law vest contracting officers with significant discretion in choosing the appropriate contract type. *See generally* FAR, *supra* note 24, subpt. 16.1, "Selecting Contract Types." For example, with a few exceptions, the agency may select any type or combination of types of contract for a negotiated procurement "that will promote the Government's interest." *Id.* 16.102(b). Contracting officers are expected to exercise "sound judgment" when selecting among the variety of types made available to give the agencies the flexibility to meet their needs. *Id.* 16.101(a), 16.103(a). Ultimately, selecting a contract type remains within the contracting officer's reasonable discretion. *See* Diversified Tech. & Servs. of Va., Inc., Comp. Gen. B-282497, July 19, 1999, 99-2 CPD ¶ 16 (leaving it to the agency to decide which type of pricing format to use).

288. *See* WYLD, *supra* note 14, at 17 (quoting Hal Varian, Dean of the School of Information Management and Systems at the University of California at Berkeley, as saying that "[t]he Internet is the greatest medium in the history of economics for testing all manner of hypotheses about which auctions work best under what circumstances").

289. Meinert Interview, *supra* note 40.

public reports of construction auctions have trickled in, and those all involved small-scale projects.[290]

The baseline issue that seems to underlie much of the controversy is how much one trusts contracting officers and other agency procurement staffers to do the right thing and to do things right.[291] One would like to think that, for the most part, well-trained, experienced, and conscientious professionals make up the acquisition corps.[292] Current procurement statutes grant them the ability to "exercise personal initiative and sound business judgment . . . to meet the customer's needs."[293] Until experience shows that agencies are incapable of properly exercising that initiative and

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290. *See supra* note 39 (discussing the SBA's modification auction). In June 2002, the Air Force Center for Environmental Excellence (AFCEE) held its first reverse auction, for a project building a motorized security fence at a New York facility. The winning bid after a forty-eight minute auction was $39,000. The AFCEE plans to use reverse auctions only on a limited basis for Environmental Minor Construction, Operations and Services (EMCOS) projects. In fact, AFCEE selected the EMCOS program for reverse-auction experimentation because it involves simple, small-dollar projects stateside. Press Release, Air Force Center for Environmental Excellence, In This Auction Lowest Bidder Wins (Aug. 1, 2002), http://www.afcee.brooks.af.mil/ms/newsreleases/auction.htm..

291. *See* Captain Doug Roark, Navy Supply Systems Command, Deputy Commander for Contracting Management, *Safety, Not Price, Was First in Reverse Auction*, GOV'T COMPUTER NEWS, Oct. 2, 2000, at 24, LEXIS ASAPII Publications—Federal Public Contracts (letter to the editor) (noting that reverse auctions are beneficial when conducted by "acquisition professionals").

292. *See generally* Michael Organek, U.S. Army Corps of Engineers, "Qualifications for Being a Contracting Officer or an Administrating Contracting Officer in the U.S. Army Corps of Engineers," Presentation at the Road Show 2000 of the U.S. Army Corps of Engineers, Principle Assistant Responsible for Contracting (undated PowerPoint presentation) (on file with author). Procuring Contracting Officers must have at least two years of experience and at least seven contracting-related courses. Administrative Contracting Officers must have four to five courses, depending on their warrant amounts, and two years contracting experience. Those with authority above $100,000 also must have a bachelor's degree with at least twenty-four credit hours in disciplines such as law, accounting, business, finance, economics, management, and contracts. *Id.*

Additionally, while it is risky to extrapolate much from the small number of reported reverse auction protests, the fact that the last two years have seen only two cases does suggest, at least minimally, that acquisition staffers are doing something right. *But see The Service Acquisition Reform Act of 2002: Hearing on H.R. 382 Before the House Comm. on Gov't Reform, Subcomm. on Tech. & Procurement Policy* (Mar. 7, 2002) (statement of Professor Steven L. Schooner, George Washington University Law School) (charging that so-called acquisition "reforms" of the 1990s resulted in an "overwhelmed, under-trained" acquisition workforce), *available at* http://www.house.gov/reform/tapps/hearings/3-7-02/SARAschooner.pdf.

293. FAR, *supra* note 24, at 1.102; *see also supra* notes 87-90 and accompanying text.

judgment with regard to reverse auctions, they deserve the right to "try it, test it, do it" without being hobbled by too much regulation.

2. The Question of Legality

Yet even with all those arguments, one area of potential regulation still seems to be eminently reasonable and easily doable: having the FAR unequivocally recognize the legality of reverse auctions. This would solve the split in opinions and assuage any lingering doubts that might be inhibiting use. The ABA wants only an "explicit statement that . . . reverse auctions are permitted provided they are conducted in accordance with all applicable laws and regulations and do not otherwise compromise the integrity of the procurement process."[294] Such a move seems unobjectionable and simple enough, yet upon closer examination, it would create more difficulties than it would solve.

What would it take, specifically, to satisfy the requirement that auctions be "conducted in accordance with all applicable laws and regulations and do not otherwise compromise the integrity of the procurement process?" The powers that be cannot add such a statement to the FAR or any other regulation without explaining it. And to explain *anything*, that explanation would have to address *everything*.

How does one avoid collusion and ensure price independence? Obtain consent? Find the proper level of automation? Handle technology problems? Draft good specifications? Prevent buying in, determine a fair price, and ensure quality performance? Limit auction costs? Make best value awards? Apply socioeconomic preferences? Determine when reverse auctions are appropriate? Can one do reverse auctions for sealed bids? For negotiated procurements? For services? For complex military unique items? For small-dollar buys? For construction? With only two bidders?

All these questions would have to be answered to ensure the auction would follow "all applicable laws and regulations" and maintain the integrity of the procurement process. And answers to all those questions are exactly what government users do not want.[295] Rather than heading off bid protests, such extensive regulation could actually engender challenges by providing more ways that unhappy bidders can attack the government's

294. ABA Letter, *supra* note 77.

actions. The more appropriate course of action is to leave the FAR unchanged (i.e., silent)—for now and for the most part—when it comes to reverse auctions.

C. Still, Nobody Is Perfect

Notwithstanding government's desire to avoid being hamstrung by intrusive regulation, some areas still need changes—both in policy and practice.

1. Our Bids Are Sealed

FAR Part 14 does need to be partially reworked to fully capture the reverse auction online bidding process.[296] Guidance from AFMC suggests that it makes no sense to try to force the square peg of reverse auctions to fit into the round hole of sealed bidding. Instead, AFMC says, the more logical course is to conduct reverse auctions as negotiated procurements.[297]

The flaw in this approach is the law's preference—in some cases, mandate—for sealed bidding. The Competition in Contracting Act (CICA) states that an agency *shall* solicit sealed bids: (1) if time permits; (2) the award will be made solely on the basis of price and price-related factors; (3) there is no need to conduct discussions with responding sources; and (4) the agency expects to get more than one sealed bid.[298]

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295. *See* Messmer, *supra* note 132 (reporting that although military officials anticipate some difficulties implementing reverse auctions, "they don't want the OMB, Pentagon or U.S. Congress, which all have the power to dictate procurement rules, to butt in").

296. *See supra* notes 72-75 and accompanying text.

297. AFMC ATTORNEY'S GUIDE, *supra* note 74, at 37 (concluding that negotiations work much better because they "allow enough flexibility to be very similar to sealed bidding procedures, but allow iterative price changes").

298. *See* 10 U.S.C.S. § 2304(a)(2) (LEXIS 2002). Negotiated procedures are authorized *only if* sealed bidding is inappropriate. *See id.* § 2304(a)(2)(B); Racal Filter Tech., Inc., 70 Comp. Gen. 127, 90-2 CPD ¶ 453 (Dec. 4, 1990) (holding that the CICA prohibits an agency from using negotiated procedures when all the elements the CICA enumerates for sealed bidding are present).

With the sole added wrinkle of successive bids, all those factors apply to many reverse auctions, especially for commodities.

How would the government buy toilet paper in bulk in traditional procurements? With sealed bidding. The DOD needs to be able to do so with a reverse auction as well.[299] Given the additional requirements of negotiated procurements (such as debriefs of unsuccessful offerors, if requested[300]), depriving agencies of the option of sealed-bidding methods does not make sense. Instead, the better solution is revising FAR Part 14 (specifically, FAR 14.202-8 dealing with electronic bids) to allow for successive bids in a reverse auction context.[301] The revision need not be lengthy nor complicated. In fact, it conceivably could require just a simple, concise clarification that bidders may submit successive electronic bids in reverse auctions.

2. Just the Facts, Ma'am, Just the Facts

Although experience seems to suggest that reverse auctions do not disadvantage small businesses, some hard-and-fast statistics to back up the anecdotal evidence could prove beneficial. Gathering such figures might take no more than a concerted, formalized, DOD-wide effort to simply track the numbers. Perhaps the value may be simply in silencing any fears about small business participation, or it may point out a problem that no

299. *See* AMS & FREEMARKETS, *supra* note 81, at 2 (asserting that auctions are ideal for sealed bid contracts).

300. FAR, *supra* note 24, at 15.506.

301. Some argue that a FAR Part 14 revision also needs to address the issue of safeguarding bids. *See* Palmer et al., *supra* note 69, at 6 (contending that this requirement is one reason sealed bidding reverse auctions are problematic); AF REVERSE AUCTIONING POLICY STRATEGY, *supra* note 152, No. 11 (asserting that this is an issue relative to sealed bidding in the reverse auction environment). The FAR requires, however, that bids received *before the time of bid opening* be safeguarded. *See* FAR, *supra* note 24, at 14.401. In a reverse auction, bid *receipt and opening* are essentially *simultaneous*, so there is no need to safeguard the bids in the traditional sense. Instead, "safeguarding" bids would seem to more appropriately involve protecting against the looming hazard of a hacker or other security compromise—an e-commerce requirement no matter what the type of procurement. *See* Merson, *supra* note 17, at 6 (maintaining that the auction enablers must guarantee tamperproof online systems); William Matthews, *Bold New Bid*, FED. COMPUTER WEEK, Apr. 17, 2000 (warning of the "ubiquitous computer concern" of security), http://www.fcw.com/fcw/articles/2000/0417/cover-04-17-00.asp.

one knew existed—but regardless of the results, DOD ought to do the analysis.[302]

3. Sign on the Dotted Line

Implied consent may be fine for agreements to monitor use of government telephone systems and taking breath samples from suspected drunk drivers, but not for reverse auctions. Obtaining bidders' consent to reveal their offers during a reverse auction appears to be fundamental to ensuring the auction's legality. Consequently, consent needs to be express, fully informed, and unequivocal, which means in writing and individually obtained, not just presumed from participation.[303]

Although the GAO has upheld the use of implied consent, when one factors in the very minimal added burden of obtaining unequivocal express consent, the cost-benefit analysis clearly favors doing so. In most reverse auctions today, bidders are submitting advance proposals, receiving up-front training, or both, so requiring them to sign an informed consent form seems unlikely to add to the time or effort needed to conduct the auction. Certainly, little danger exists of stifling innovation or hampering development.

The same holds true for the certification of independent price determination, aimed at avoiding collusion in certain procurements. Admittedly, the added step of certifying in writing that "I am not a crook" probably will not deter a contractor who is going to cheat the system by engaging in price fixing. Still, it serves as one more potential check. Additionally, most attorneys would probably prefer an explicit certification of

302. *See* Stephens, *supra* note 160 (manuscript at 67) (recommending further research to analyze how reverse auctions impact contractors, especially small and disadvantaged businesses).

303. Written consent would also help address the issue of true voluntariness. *See supra* notes 97-98 and accompanying text. When someone waives his rights after being fully informed what he is waiving and what his options are, and he acknowledges such disclosure and his resulting waiver in writing, reviewing bodies are far more likely to declare such a waiver truly voluntary than one in which the reviewer must assume or presume a knowing waiver. On the other hand, the argument that requiring consent to participate somehow negates the voluntary nature does not seem especially compelling. As the 800-pound gorilla of public contracting, the government sets similar prerequisites to participation all the time.

non-collusion rather than an implied one if they had to attempt a criminal prosecution or civil recovery.

4. Man over Machine

The DOD should closely scrutinize and possibly rein in the DSCC's use of automated contract award and any similar attempts at full automation. No matter how valuable the computer is as a labor-saving tool, it (just like reverse auctions) is only that—a tool a human being must wield. Failure to do so jeopardizes the validity of the resulting contract awards.

The DIBBS Auction Users Guide explains "that the apparent low quote may not receive the award due to the application of price related evaluation factors and/or price reasonableness and responsibility determinations."[304] Consequently, the guide advises vendors to submit bids even if they cannot beat the apparent low offers. The subsequent "threshold responsibility and price reasonableness" determination is then frequently made by DSCC's "Procurement Automated Contract Evaluation (PACE)" system.[305]

The FAR-mandated "responsibility" judgment involves evaluating a prospective contractor's financial resources; ability to comply with the government's required performance schedule; past performance; integrity and business ethics; experience, organizational structure, and technical skills; and production, construction, and technical equipment and facilities.[306] What kind of computer evaluation system can assess a company's business ethics and integrity? The FAR implies that it cannot, by specifying that only the contracting officer can do that job: "No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility."[307] Before making that determination, "the *contracting officer* shall possess or obtain information sufficient to be satisfied that a prospective contractor currently meets the applicable standards."[308]

A recent case illustrates why over-automation is potentially so dangerous. On 5 March 2002, the GAO decided *Standard Register Co.*,[309]

304. DIBBS AUCTION USERS GUIDE, *supra* note 42, at 4.

305. *Id.*

306. *See* FAR, *supra* note 24, at 9.104-1 (delineating the general standards for determining responsibility).

307. *Id.* 9.103(b).

308. *Id.* 9.105-1(a) (emphasis added).

rejecting a printing company's claim that the government improperly determined it was nonresponsible.[310] The GAO said:

> A contracting agency has broad discretion in making responsibility determinations, since the agency must bear the effects of any difficulties experienced in obtaining the required performance. Thus, a contracting officer has the discretion to determine the weight to be accorded the information he or she receives . . . . Although responsibility determinations must be based on fact and reached in good faith, they are of necessity a matter of business judgment. We will not question a nonresponsibility determination absent bad faith on the part of agency officials or the lack of reasonable basis for the determination.[311]

A computer cannot exercise the "broad discretion" or "business judgment" needed to make a responsibility determination. Lacking this, a computerized responsibility determination also quite possibly lacks a "reasonable basis," making automated evaluations vulnerable to sustained protests. Are the time and labor savings worth that risk?

5. Getting It All Together

Procurement officials at the DOD level should seriously consider providing some type of *discretionary* guidance on reverse auctions, perhaps something similar to the *Commercial Item Handbook* published by the acquisitions community in the Office of the Secretary of Defense.[312] Far too little of the existing guidance is up-to-date and available to acquisition staffers everywhere.[313] Right now, finding needed guidance often depends too much on knowing the right Web address, typing in the right words for the Internet search, or, perhaps, just the sheer dumb luck of stumbling across a Web site. At a minimum, DOD should integrate guidance into an

309. Comp. Gen. B-289579, Mar. 5, 2002.

310. *Id.*

311. *Id.* (citations omitted).

312. *See supra* note 107.

313. *See* Stephens, *supra* note 160 (manuscript at 66) (recommending that the Army issue a reverse auction users' guide to fill this void).

easy-to-find, simple-to-use source, either in paper or on the Internet, or preferably both.

Such a one-stop resource would make life easier for both government buyers and contracting officers. Equally important, headquarters-level consolidated guidelines might also dampen some of the cries for binding regulation and provide direction in areas of uncertainty. But because such guidance would not be mandatory, it should not impede agencies' innovation and flexibility.

VI. Conclusion

While the government may not be using reverse auctions to buy brides, the process does seem to marry up well with many aspects of military procurement. Those organizations that have stepped up to the reverse auction block frequently have left with significant savings in scarce procurement dollars, often accompanied by reduced acquisition periods. Not everyone has found reverse auctions to be a perfect match, but that is to be expected and as it should be. Each agency should be able to exercise its FAR-given discretion and choose the procurement tool that best suits its needs and specific acquisitions.

Reverse auctions also appear to have won their bid for acceptance as legal, albeit grudgingly in some cases. Although there have been some false starts, agencies seem to be acquiring the knowledge and experience to conduct auctions in appropriate cases and in appropriate ways. For now, the law should allow agencies to pioneer innovative methods of using auctions without the rigidity of extensive and all-encompassing FAR regulation.

That does not mean, however, that reverse auctions should be wide-open free-for-alls. Procurement officials need to closely monitor several concerns to ensure they do not become significant problems: the health of the supplier base; underbidding and performance results; technology issues, including the extent of automation and costs; the interplay of price and quality and doing best value acquisitions; appropriate use, to include acquiring services; and applying socioeconomic preferences. Additionally, the DOD acquisitions community should require explicit non-collusion certifications and consent to disclose prices, as well as issuing consolidated, headquarters-level guidance. Finally, the FAR councils should consider revising FAR Part 14's provisions for electronic bids in

sealed bidding as simply and minimally as possible to accommodate reverse auctions an successive bids.

Government procurement truly is undergoing an "e-volution" of historic proportions. Reverse auctions are not a panacea for all that ails the contracting world, but they are an extremely valuable tool that acquisition staffers must have both the flexibility and the know-how to wield. As they do, they will find that there is nothing illusionary about the power of the virtual gavel.

Appendix I

CECOM Reverse Auction Results Through February 2002

(QTY) PRODUCT/ITEM	DATE	ESTIMATED/BEGINNING PRICE	#VEN	WINNER	PURCHASE PRICE	DELTA/ SAVINGS	% SVGS	USER	$2,173,358.68
(1) Ricoh Secure Fax System, TEMAIR Edgar Utilities Software, toner/ items.	05/17/00	$6,891.00	2	Video & Telecommunications, Inc.	$5,511.00	$1,380.00	20%	CECOM	$1,380.00
(2) IBM Thinkpads	05/19/00	$7,000.00	3	Comteq Federal	$3,280.00	$3,720.00	53%	CECOM	$7,460.00
(5) IntelliFAX-2750	07/13/00	$500.00	2	Video & Telecommunications, Inc.	$440.00	$60.00	12%	CECOM	$300.00
(100) Connector plugs	07/24/00	$1,180.00	2	Autodyne	$780.00	$400.00	34%	CECOM	$40,000.00
(20) Pentium computers/items	08/03/00	$2,300.00	5	Micron	$1,850.00	$450.00	20%	AF	$9,000.00
(10) Pentium servers	08/03/00	$4,100.00	6	Dunn	$2,490.00	$1,610.00	39%	AF	$16,100.00
(135) Pentium computers/items	08/03/00	$1,900.00	5	Micron	$1,300.00	$600.00	32%	AF	$81,000.00
(140) Pentium minitowers/items	08/24/00	$1,900.00	4	Dell	$1,470.00	$430.00	23%	AF	$60,200.00
(40) Pentium computers/items	08/29/00	$1,500.00	4	Government Acquisitions	$1,340.00	$160.00	11%	AF	$6,400.00
(1) Photo-workshop	09/19/00	$7,000.00	1	GTSI	$7,000.00	$0.00	0%	AF	$0.00
(520) Pentium servers	09/19/00	$1,550.00	6	Dell	$1,120.00	$430.00	28%	FORSCOM	$223,600.00
(40) Pentium computers/items	09/21/00	$1,900.00	5	Dell	$1,470.00	$430.00	23%	FORSCOM	$17,200.00
(1) Lot Lumber	09/29/00	$17,000.00	3	Not identified	$15,400.00	$1,600.00	9%	SOCOM	$1,600.00
(100) Caprines (Goats/Livestock)	11/03/00	$130.00	5	Sarah Bunter/Farms	$100.00	$30.00	23%	USMC	$3,000.00
(1) Lexar PC Card Type II	11/09/00	$12,200.00	5	Not identified	$7,600.00	$4,600.00	38%	USMC	$4,600.00
(1) Lot Dishwasher (100 each)	12/08/00	$22,000.00	14	Washington Foundries	$15,700.00	$6,300.00	29%	USMC	$6,300.00
(1) Lot Waterheater (100 each)	12/08/00	$20,000.00	6	M.Learner	$12,200.00	$7,800.00	39%	USMC	$7,800.00
(140) Brake shoe 2530-00-602-5783	12/22/00	$815.00	3	Not identified	$700.00	$115.00	14%	TACOM	$16,100.00
(308) Hydrolic Wrench	01/19/01	$1,410.00	1	Stanley Hydrolic Tools	$1,410.00	$0.00	0%	TACOM	$0.00
(35) Collar Assembly Part	01/19/01	$145,425.00	7	BF Goodrich	$121,500.00	$23,925.00	16%	AF	$23,925.00
(200) Lot Office Supplies	01/19/01	$10,000.00	9	Shakir Enterprises	$6,000.00	$4,000.00	40%	USMC	$4,000.00
(1) Lot SUN equipment	02/15/01	$500,000.00	16	Not identified	$368,007.00	$131,993.00	26%	AF	$22,993.00
(40) Laptop computers	03/14/01	$4,650.00	3	Gateway	$2,700.00	$1,950.00	42%	5 SIGCMD	$78,000.00
(1) Lot SUN equipment/Msg Sys	03/21/01	$230,000.00	3	AVR Enterprises	$138,850.00	$91,150.00	40%	AF	$91,150.00
(1) Lot Appliances (Washer/Dryer)	04/05/01	$42,000.00	8	CPC Inc.	$33,600.00	$8,400.00	20%	USMC	$8,400.00
(109) Desktop Computers	04/06/01	$197,000.00	4	Dell Computers	$115,000.00	$82,000.00	42%	5 SIGCOM	$82,000.00
(1) Lot Paper	04/06/01	$43,000.00	22	Sita Business Systems	$37,328.00	$5,672.00	13%	USMC	$5,672.00
(1) Lot Sun Equipment & Services	04/19/01	$1,847,000.00	9	NIS Computers	$1,717,500.00	$129,500.00	7%	AF	$129,000.00
(1) Lot Sun Equipment & Services	04/25/01	$1,052,000.00	4	Dynasystems	$959,000.00	$93,000.00	9%	AF	$93,000.00
(1) Lot Eyepiece Assembly	04/27/01	$550,000.00	2	ITT	$261,500.00	$288,500.00	52%	CECOM	$288,500.00
(1) Lot Modular Office Furniture	05/24/01	$24,000.00	3	Allied Modular Building	$17,400.00	$6,600.00	27%	USMC	$6,600.00
(1) Lot Computer Systems	05/31/01	$149,000.00	4	STG, Inc.	$149,000.00	$0.00	0%	State Dept	$0.00
(1) Lot Wood Chips	06/13/01	$29,000.00	4	Buie Forest Products	$25,000.00	$4,000.00	14%	USMC	$4,000.00
(1) Lot Modular Office Furniture	06/22/01	$91,300	4	Allied Modular Building	$69,500.00	$21,800.00	24%	USMC	$21,800.00
(1) Lot Refrigeration Equipment	06/25/01	$36,000	5	Gill Marketing Company	$27,433.32	$8,566.68	24%	USMC	$8,566.68
(1) Lot Pump Assembly	06/29/01	$522,750	6	RGI, Inc.	$425,850.00	$96,900.00	19%	TACOM	$96,900.00
370 Desktop PCs - Energy Dept	07/05/01	$1,601	4	Force3, Inc.	$1,050.00	$551.00	34%	Energy Dept	$203,870.00
(1) Lot Dual Line Phones	07/25/01	$19,500	5	Cortelco	$17,100.00	$2,400.00	12%	USMC	$2,400.00
(1) Lot Metal Desks	08/01/01	$53,000	2	Commercial Concept Inc	$36,900.00	$16,100.00	30%	USMC	$16,100.00
6 HAZMAT Storage Buildings	08/16/01	$7,000	5	Safety Storage Inc	$4,795.00	$4,795.00	32%	TRADOC	$13,230.00
(1) Lot Projectors, Screens, etc.	08/24/01	$ 34,000.00	5	Total Audio Visual System	$28,550.00	$5,450.00	16%	TRADOC	$5,450.00
62 Monitors	08/31/01	$ 1,600.00	9	Micron Gov Computer Sys	$1,375.00	$225.00	14%	USCCE	$13,950.00
1 Lot Desktop Computers	08/31/01	$2,200,000	4	GTSI, Inc.	$1,800,000.00	$400,000.00	18%	Tobyhanna	$400,000.00
154 Desktop Pentium III	09/25/01	$1,376	9	Dell	$1,040.00	$336.00	24%	5th Signal	$51,812.00
									$2,173,358.68