

**THE TWENTY-SEVENTH GILBERT A. CUNEO LECTURE IN
GOVERNMENT CONTRACT LAW***

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Thank you very much. I very much appreciate the honor of giving the Cuneo Lecture. To be invited to give a lecture named after Gil Cuneo is a huge honor for me as a long-time procurement lawyer. It is also a pleasure to stand before so many friends and colleagues today. As I think many of you know, I am a supporter of The JAG School and, in particular, a fan of this symposium. The symposium is a unique

* This article is based on the transcribed and edited lecture delivered by the Honorable Daniel I. Gordon to members of the staff and faculty and students attending the 2010 Contract and Fiscal Law Symposium on November 19, 2010, at The Judge Advocate General's Legal Center and School, U.S. Army, located in Charlottesville, Virginia.

The Cuneo Lecture is named in memory of Gilbert A. Cuneo, who was an extensive commentator and premier litigator in the field of government contract law. Mr. Cuneo graduated from Harvard Law School in 1937 and entered the United States Army in 1942. He served as a government contract law instructor on the faculty of The Judge Advocate General's School, then located at the University of Michigan Law School, from 1944 to 1946. For the next twelve years, Mr. Cuneo was an administrative law judge with the War Department Board of Contract Appeals and its successor, the Armed Services Board of Contract Appeals. He entered the private practice of law in 1958 in Washington, D.C. During the next twenty years, Mr. Cuneo lectured and litigated extensively in all areas of government contract law, and was unanimously recognized as the dean of the government contract bar.

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Before his time with GAO, Mr. Gordon worked in private practice, handling acquisition-related matters, white collar crime cases, and bid protests before both GAO, the Armed Services Board of Contract Appeals, and the General Services Administration Board of Contract Appeals. Mr. Gordon holds a B.A. from Brandeis University, a M.Phil. from Oxford University, and a J.D. from Harvard Law School. He has also studied in Paris, France; Marburg, Germany; and Tel Aviv, Israel.

Mr. Gordon has been an active member in the Public Contract Law Section of the American Bar Associations and earlier served as a member of the adjunct faculty at the George Washington University Law School. He is the author of articles on procurement law and the bid protest process at GAO.

opportunity to spend a week listening and learning and networking with our other government procurement lawyers. It's a really important institution that I very much support. I was honored to speak here two years ago, while I was still at GAO, and, at that time, I raised a number of concerns about developments in our acquisition system that I will be returning to in my remarks today.

Some of you with longer memories may know that, in my GAO days, my favorite way of speaking at the symposium was to have butcher block paper up here on an easel and let you set the agenda. Today, we'll do it a little bit more formally, but I hope we'll still manage to maintain that back and forth. For that reason, I will reserve time at the end so that you can raise any question you want, and I will do my best to answer your questions and respond to your comments on any topic.

I should tell you that today is a very happy day in the Office of Management and Budget (OMB). Our nominee for OMB director, Jack Lew, was finally confirmed last night in the Senate. The hold was lifted, a hold that Senator Landrieu had in place for reasons that baffle some of us. We are delighted that we're going to have Jack Lew on board. It is a tough time at OMB, because we're already well into budget season. We need a director in place, and it is, for our agency, a very important thing to have a confirmed director.

Speaking of confirmations, I was confirmed, as you heard, on November 21st, last year. It has been quite a year. It is a dramatic change for me, particularly, since, as you'll hear once we turn to substance, most of what I do is not in the area of law. It is much more policy than law. I'm the Administrator for Federal Procurement Policy, not Procurement Law. Obviously, law is woven into our policy, just as policy is woven into our procurement law, so there's lots for us to talk about together even though I am, at least in theory, not practicing law in my current job, but am working on policy instead.

If I were to think of highlights of the past year, those highlights would probably be my sessions with the acquisition workforce. It is so interesting, refreshing, educational, and enlightening to actually talk with our 1102s, our contracting officers and contract specialists, and have them say what's on their mind, what drives them crazy, what their frustrations are, but also what their accomplishments are. One of the things that I did between being nominated and being confirmed was meet with former OFPP administrators and asked them what they thought I

should do, what I should focus on, and what I should be sure not to do, and I heard lots of good advice. One of the pieces of advice that I adopted was from Steve Kelman, who, as many of you know, was the administrator early in the Clinton administration. He said, “Revive the Frontline Forum,” and that was one of the first things that I did. We just had this past Monday the third session of the Frontline Forum. It is about thirty-eight 1102s—not all of the attendees were contracting officers or contract specialists, but most of them are—from across the government: from DoD, from civilian agencies, including small ones, such as the National Science Foundation. We meet from 9 in the morning until 2 in the afternoon. We bring two items to the agenda, so we can have an in-depth discussion, typically an hour per topic, and then we have time for them to raise topics that weren’t on the agenda in advance. For example, we talked about large IT procurements this last Monday. They have been a talkative group, and that is good. I have benefited from understanding the challenges that they see, such as the roles of our contracting officers’ representatives.

While the Front Line Forum may be the quintessential example of my interaction with the federal acquisition workforce, it is not the only instance. In fact, whenever I visit an agency, which I spend a lot of my time doing, I tell people, “I do need to meet with the senior managers—they are very important. But if I come to your agency, I’d like to have a separate session with your frontline contracting people.” It is the meetings with the frontline staff that I often find most illuminating. In one of those sessions at a civilian agency, a woman stood up and said, “Dan, they told me they hired me to be a business advisor. They said they wanted me for my brain, but all they have me do is do data input. I spend all of my time putting in data into FPDS and these other databases.” Her one comment helped me understand the real-world impact of all our data-input requirements. It’s the sort of thing that you won’t hear if you’re not talking to the people who are actually on the front lines. It lets you find out how all these noble things coming out of Congress and OMB get translated to the people on the front line.

That said, let me now turn to the goals of our work. We have three priorities in OFPP. Priority number one is our acquisition workforce. It is not a partisan issue. The fact is that we ran down the acquisition workforce under both Democratic and Republican administrations. We failed to invest in them. We failed to hire enough people, whether it’s procurement lawyers, contracting officers, contract specialists, or contracting officers’ representatives. We did not invest in hiring or in

training nearly adequately. We badly need to build up our acquisition workforce. The good news is in this area, as in almost every one of the areas I'll be talking about, I do think that we've turned a corner. I cannot say that we have made huge progress, but we're no longer running down the numbers. There is an uptick in terms of hiring at DoD, at VA, DHS, and a good number of the other civilian agencies, although there are agencies that are not making enough progress. The President's budget for 2011 included, for what is I think the first time in history, 158 million dollars exclusively for the civilian agency acquisition workforce (DoD has its own funding stream under DAWIA). I can tell you, having spent months in meetings on the Hill with the appropriators, that there is bipartisan, bicameral support for this. The challenge we face now in obtaining the funding is not based on opposition to supporting the acquisition workforce. The 2011 budget is very much up in the air, and the overall budget battles are impeding our ability to get additional funding for the acquisition workforce—unlike the 1990s, when there were focused efforts to reduce funding for that workforce. We are also working on improving training, not only for our contracting officers and the contract specialists, but also for the contracting officer's representatives, because we view the acquisition workforce, as I hope you all do, very broadly. We are particularly concerned about the contracting officer's representatives, because they so frequently do not receive enough training. Moreover, we don't train our people as an integrated team, so that the contracting officer's representatives learn to work together with the CO and the program team. We've got a long, long way to go. There are, however, some bright spots. FEMA has put together a good training curriculum for contracting officer's representatives that I've been briefed on, and DAU has been working this area. FAI and the VA Acquisition Academy in Frederick have been working on this, too, but we have a long way to go. Overall, with respect to strengthening the acquisition workforce, I feel like we've moved the ship so at least we're not going in the wrong direction, but we've only begun to make progress.

Priority number two is demonstrating fiscal responsibility; that means buying less and it means buying smarter. The "buying less" part is usually not anything that the contracting office has much to do with, because it typically involves a program decision. It is, however, extremely important that we slow the increase in procurement spending.

I often draw two lines to represent the core challenge that we face. We have the acquisition workforce whose numbers have gone down

dramatically from where they were in the early 1990s, so that the line representing those numbers has trended down. Yet after the September 11, 2001, terrorist attacks and the beginning of the war in Iraq, procurement spending skyrocketed. The result was an absolutely impossible pair of lines. Declining numbers of acquisition people doing the work, but a huge increase in the amount of work. Essentially our procurement spending doubled in less than eight years, which was absolutely unsustainable for the workforce and for the country. We just couldn't keep increasing the amount of money we spend on contracts.

The good news is we've slowed the spending increases. From 2001 to 2008, year-on-year increases in procurement spent averaged twelve percent, which explains how cumulatively spending doubled in those eight years. In fiscal year 2009, there was still an increase of about 4 percent, which is better than twelve percent. While we don't have final figures for fiscal year 2010 yet, we expect them to show an increase less than 4 percent, and they may not show an increase at all. What that means is that we've slowed the procurement spending increases, but that really doesn't get to buying smarter; that's only buying less.

Buying smarter has two parts. One is what we call "strategic sourcing," which means essentially leveraging the government's buying power. You may have heard that we've had a significant initiative with respect to office supplies that my office has been very closely involved in, together with GSA. There are a series of innovative things we've done, with GSA, of course, taking the lead. Some of them have legal implications that we can talk about if you want. The bottom line is that GSA awarded fifteen blanket purchase agreements (BPAs) for office supplies, and they have changed the paradigm from what we've seen since the mid 1990s. In those years, we shifted from focusing on a government-wide contract, which is what the GSA schedules were meant to be, and which were supposed to leverage government-wide buying power, to focusing on agency-specific, and sometimes component-specific, BPAs. Whatever advantages those agency-specific BPAs had, they did not reflect the benefits of government-wide purchasing. In the area of office supplies, we said: No more. These BPAs are going to be open to every federal employee government-wide. Not only that, the vendors are going to have to agree to a point-of-sale arrangement where the government employee, as long as she or he uses a government purchase card, automatically gets the discounts. You don't need to know the BPA number. At one point during a hearing when I was trying to explain this, Senator McCaskill interrupted me and said something along

the lines of, “Mr. Gordon, I don’t even know what a BPA is.” I said, “The good news, Senator, is that our employees don’t need to know what a BPA is. As long as they pay with a purchase card, they will automatically get the government’s discounts.”

I can tell you, since we track the sales at every one of the agencies, and at every one of the vendors, week by week, that we’re making progress. The Army, the Navy, and the Air Force are all doing pretty well in terms of having their employees use these BPAs. Government-wide, ten agencies have issued agency-specific direction calling on their employees to use these BPAs to meet their office supply needs. We don’t want to do it from OMB and we certainly don’t want GSA dictating this, but agency-specific mandates to their employees saying that they should be using these vehicles are a good way to go, and they’re working. We’ve started getting complaints from some vendors, which is, in a sense, evidence of our success. We’re getting complaints from small businesses, saying, “We’re on the Schedules and we’ve been selling to the government for years and suddenly our government customers are saying, ‘You don’t have one of the fifteen BPAs. We won’t buy from you anymore.’” The word has obviously gotten out. Our answer to the complaints is this: GSA ran a competition. Thirteen of the fifteen winners are small businesses, and two of them are service-disabled, veteran-owned small businesses. When you lose a competition, it means something. The days of GSA having everything open to everyone all the time, so no one ever loses, are over. The fact is, in any case, that, while there are thousands of Schedule contractors, many of them never get any sales; they simply sit on the contract, without benefit to the government, and only add work for our people

There’s another part of buying smarter that gets much closer to the legal area, and that is reducing risk to the government. It means getting away from sole-source contracts. I recognize that it’s a perennial challenge. It didn’t begin 5 years ago; it didn’t begin twenty years ago. But that doesn’t make it any less important. We need to reduce our reliance on sole-source contracts. We need to focus on increasing competition. Incidentally, this is one of the many issues in which GAO reports have been helpful as we think through where we need to improve our performance in procurement.

In addition to sole-source contracts, there are too many procurements where a competition is conducted, but only one bid is received. In my opinion, every one of those should be a red flag. While we obviously

don't have the resources to track them all down, wherever we can, particularly with the larger procurements, we should follow up and ask, "Why did we get only one bid?" In addition, when we talk about reducing the risk to the government, we need to worry about the cost risk for the government—for the taxpayers—arising from the pricing arrangement. That's why we are pushing very hard to get agencies to decrease their use of time-and-materials contracts and cost-reimbursement ones. Unless, that is, a cost-reimbursement arrangement actually protects the government's risk better than a fixed-price arrangement would, in which case, we should use cost-reimbursement, of course. We are very pleased to see that our colleagues in the Department of Defense are pushing in the same direction as we are, in terms of increasing competition and reducing use of time-and-materials contracts

Along with strengthening the acquisition workforce and increasing fiscal responsibility, we have the third priority, which in some ways is the most challenging. That is rebalancing our relationship with contractors. It certainly has political aspects, and it has legal aspects as well. I appreciate that it is a sensitive topic, but I'll tell you that my strong sense is that we went too far in outsourcing. We've been outsourcing for bad reasons, such as a lack of "slots" for federal employees. Ironically, the efficiency of our procurement system was one of the reasons people liked to outsource, because if you're buying services and the choice is spending months and months trying to hire one federal employee or getting on the GSA schedule and obtaining the services almost overnight, the answer can seem obvious. The procurement system delivers, and fast, but that can be a challenge, because we've gotten in the habit, almost a reflexive habit, of using contractors, including for very sensitive things. We need to pull back and rebalance that relationship. Our office issued, as many of you know, a draft policy letter in March called "Work Reserved for Performance by Federal Employees." In it, we talk about "inherently governmental" and "critical functions," and we state very clearly in that draft that inherently governmental functions have to be staffed one hundred percent by federal employees; critical functions do not. We can use contractors in critical functions on one condition: that we have enough internal capacity—federal employees with enough knowledge, experience, and numbers—that we can maintain control of our mission and operations. I have to tell you that, as I've gone around the country and listened to federal employees, I've been told that we have agencies where there is no federal employee who understands the IT operations in the agency. As a result, I've been told, when they need to write statements of work for

upcoming contracts, they use contractors to write the statements of work. When they're evaluating proposals, they use contractors. There's no federal employee who understands the subject matter enough to evaluate the proposals. That is unacceptable. It means that we have lost control. I have also heard that similar situations arise in our contracting shops, and that many of our contracting shops are heavily dependent on contractor support.

This is not a "global war on contractors," as some people have said. Even more important, insourcing is not our goal. Let me say it again. Insourcing is not a goal for us. That is not what we're about. We're talking about small numbers of positions insourced, and only where they matter. Where we've outsourced something that was inherently governmental, it had to be brought back in, but those situations, in the final analysis, do not involve that many positions. Where we've lost control of a critical function, we need to strengthen our in-house capacity. Again, though, that does not involve large numbers, and in any event, insourcing is often not the appropriate solution. In many cases, improving training and staffing up the contracting officer's representative function have been all that we need to do. The appropriate action depends on the specific function and the particular circumstances. There was one agency where I heard recently that they had shifted something like 2 or 3 percent of the slots from contractor to federal employees over the past year, and they said that it had made an extraordinary difference—and they don't think that they need any more federal employees there. Small changes, strategically placed, can make a significant difference. I know that there are some people who would like us to do massive insourcing. That has never been on the agenda for us, which frankly makes life somewhat easier with the new Congress coming in, in January, but our position has not changed, at least not since I joined last year.

Let me say a few words about legal issues and then open up the discussion for your comments and questions. There are a couple of FAR rules pending. One is on personal conflicts of interest on the part of contractor employees, but it is limited to those in acquisition offices. Another concerns organizational conflicts of interest, where I confess I've been doing some further thinking, and this is one of these instances where moving from GAO to OMB may have slightly changed my perspective on matters. We can talk about either one of those if you'd like.

The hottest topic right now is the question, and it came up in 2008 in my remarks at the symposium that year, is the question of setting aside task and delivery orders for small businesses, the *Delex* question, if you will. We have been in a very unhealthy situation. We know the rules for setting aside contracts; they are well established. We have no clear rules for setting aside orders, either under the schedules or under multiple award ID/IQs. GAO has said that the Rule of Two does not apply to GSA schedules (they said that earlier this year), but they said in *Delex* two years ago that the Rule of Two does apply to multiple award ID/IQ contracts. Many people have told me that GAO was wrong as a matter of law with respect to this because FASA requires that all multiple award contract holders have a fair opportunity to compete for those orders. I usually don't engage in the specifics of whether GAO was right as a matter of law because I recall having some role in the Office of General Counsel back then, but I can say that it is not healthy to have a legal dispute like that. It is not healthy for our procurement staff not to have guidance. We need clear guidance for our acquisition professionals about whether (and, if so, how) they can set orders aside for small businesses. Many of you probably know that Subpart 8.4 of the FAR has somewhat cryptic language that says that agencies can consider socio-economic status in awarding schedule orders. When I ask contracting officers and contract specialists if they know what that means, the answer I get is along the lines of, "I haven't got a clue." That is simply not a healthy situation.

We were directed both by Congress in the Small Business Jobs Act and, earlier, by the President's interagency taskforce on small business contracting to come up with clear rules and clear policies. We've started a series of outreach sessions with agencies, with small businesses, with large businesses, and with professional associations to hear what people think the rules should be. It is a very challenging area. Just as I said two years ago, the multiple award ID/IQ system and the schedules give us speed, flexibility, and efficiency in contracting. I'll tell you, when I ask contracting officers what they think about adding small business set-aside rules, they're worried that we're going to be losing a good deal of that efficiency, that we're going to be destroying the most efficient part of our procurement system, a part accounting for something on the order of 200 billion dollars every year. On the other hand, small businesses are, I think, understandably frustrated that we have a legal requirement for set-asides of acquisitions and yet something like 30 percent of the procurement dollars are walled off, so that set-aside rules don't apply.

We need to reconcile those two policy challenges, although it is not going to be easy.

Let me raise one more issue and then stop to allow you time to raise comments and questions. My boss, Jeff Zients, who has been the acting OMB director and who I'm sure will be very happy to return today to his position of deputy director for management at OMB, is giving a speech later today in which he's going to be talking about large IT projects and how we want to improve them. Let me share with you a few things that he's going to be saying that relate to acquisition. They resonate with what I said here on this stage two years ago. We need to improve requirements definition, and we need to improve contract management. One way that we can make progress in that is to have an integrated, cross-functional team of our contracts people, our program people, our IT people, and our lawyers. From the beginning of acquisition planning, that team needs to be in place and stable. We want to avoid constant churning on that team, so that they can remain engaged and active through the stage of contract management. In addition, that team needs to have support from the top of the agency. We also need to be realistic in our time horizons and our demands. That is a central point that I hear from my colleague Vivek Kundra, who is the head of e-gov. We need to have more modest and shorter term IT projects, and they often talk about "chunking" a large project into shorter, smaller bits. Both Vivek Kundra and Jeff Zients have heard concern from us, though, about the impact of "chunking" on the procurement process and on the acquisition offices. When you start saying you want to "chunk," we begin to have questions. Are you going to do separate contracts? Are you going to have one contract with separate task orders? If the latter, are you going to be competing those task orders? There are a lot of procurement challenges, including legal issues, when you start chunking, so we will need to work our way through that.

Let me stop there. I'm happy to hear your comments and your insights. I'd like to know if the points I raised resonate with you, if you think that we're on the right track, but I also welcome any question you want to ask.

Thank you.