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Steven W. Feldman

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DOES GOVERNMENT CONTRACTING HAVE A REMEDIES PROBLEM? A RESPONSE TO ERIC M. SINGER, *COMPETITIVE PUBLIC CONTRACTS*

Steven W. Feldman*

INTRODUCTION

In his provocative article, *Competitive Public Contracts*,¹ Eric M. Singer claims that deficient contractor performance is inherent in government contracting.² Singer asserts that, “fundamentally,” public purchasing has a “contract-remedies problem”—the absence of both any “credible threat” and any “effective contract remedy to deter or correct [contractor] misbehavior.”³ Unlike private buyers, who have plausible threats to motivate contractors to perform properly, governments are said to “often” labor under intrinsic and extrinsic limitations that undermine remedial alternatives.⁴ Consequently, Singer argues that governments (especially state and local agencies) have no “*effective*

* Attorney-Advisor, U.S. Army Engineering and Support Center, Huntsville, Alabama. Thanks to Eric Singer, David Horton, David Hoffman, George Kuney, Ryan Black, Dale Gipson, and Tim Felker for helpful comments and suggestions. Special love and thanks to my dear wife, Gayla Feldman.

¹ Eric M. Singer, *Competitive Public Contracts*, 102 VA. L. REV. 1297 (2016). The federal government is the largest purchaser of goods and services in the world with a procurement budget approximating a half-trillion dollars annually. See Steven L. Schooner & David J. Berteau, *Emerging Policy and Practice Issues*, 2017 GOV'T CONTS. YEAR IN REV. BRIEFS 22 (Feb. 2017); see also K&L GATES LLP, K&L GATES PUBLIC POLICY LAW PRACTICE: GOVERNMENT CONTRACTS AND PROCUREMENT (2011), http://www.klgates.com/files/upload/Public_Policy_Govt_Contracts.pdf [<https://perma.cc/ASS9-8UDN>]. States and localities also expend billions of dollars annually on public contracts. Thus, the issue of remedies in government procurement has major practical and legal importance for the U.S. economy.

² Singer, *supra* note 1, at 1298–99. Although Singer says the remedies problem is particularly acute in state and local public contracting, see *id.*, he states that the delays and expenses pertaining to failed projects are the same for “government contracts of all types and across all jurisdictions.” *Id.* at 1301. Singer repeatedly cites to federal procurement regulations, GAO decisions, and law journal articles on federal procurement. See, e.g., *id.* at 1311 n.59 (discussing article on termination for convenience); *id.* at 1321 n.97 (noting GAO protest decision on past performance evaluations); *id.* at 1323 n.104 (addressing federal acquisition regulation on single versus multiple awards). Accordingly, this response considers municipal, state, and federal procurement procedures.

³ *Id.* at 1299.

⁴ See *id.* (pointing to “various limitations unique to government”).

contract remedy” to induce improved contractor performance.⁵ Among these “ineffective” remedies, according to Singer, are terminations for default and past performance assessments of contractors.

To overcome these obstacles to effective government enforcement of public contracts, Singer proposes “competitive dual sourcing (‘CDS’).”⁶ “Dual sourcing” (“DS”) is the buyer’s horizontal splitting of work between two or more independent contractors.⁷ CDS incorporates DS but goes one step further: it allows the government to “terminate” one firm’s unsatisfactory effort and reassign all or part of the work to another firm through the exercise of contractual options in the replacement contract.⁸ In this way, CDS is said to both decrease costs and effectively address contractor “misbehavior.”⁹ Singer argues that “CDS is the best available remedy for government contracts and should be implemented widely.”¹⁰

Singer’s article is nuanced and delves into the important subject of remedies in public procurement. I take no issue with his challenging the orthodoxy and suggesting new ways to improve the procurement system. Nevertheless, this Response respectfully parts company with Singer’s descriptive and normative critique that remedies in government contracting are *inherently* problematic.

This Response proceeds as follows: Part I disputes Singer’s charge that termination for default fails as a contractor control mechanism. Part II disagrees with Singer’s descriptive claim that agencies “underutilize[]” even “useful” past performance assessments.¹¹ He contends, without empirical support, that government actors “frequently elect not to advertise” contractor performance failures for fears of both generating bid protests from the slighted firm and impugning the integrity of the procurement officer that awarded the earlier contract.¹² Part III asserts that, besides raising efficiency issues, CDS is not legally workable because it conflicts with the principles of default terminations and contract options. Rather than being inherently problematic, current remedies in

⁵ *Id.* (emphasis added).

⁶ *Id.* at 1302.

⁷ *Id.* at 1302, 1322.

⁸ *See id.* at 1302, 1305, 1323. CDS can take the form of geographic divisions (Firm A serves the east side and Firm B serves the west side of a defined region), operational divisions (Firm A works on Facility X and Firm B works on Facility Y), and ongoing competitions (whichever firm completes the first stage of a project would receive a larger share of the project’s second stage). *Id.* at 1304.

⁹ *Id.* at 1302.

¹⁰ *Id.* at 1354. However, Singer does not describe how, exactly, combining CDS with other contract remedies would work. *Compare, e.g., id.* (stating that “CDS can be implemented in nearly all government contracts”), *with id.* at 1309–10 (stating that CDS does not necessarily supplant other remedies but can supplement them).

¹¹ *See id.* at 1321.

¹² *Id.* at 1320–22, 1323 n.105.

government contracting reflect the reality that “[t]he Government wields enormous powers in its contractual relations.”¹³

I. IS TERMINATION FOR DEFAULT AN EFFECTIVE DETERRENT AND CORRECTIVE REMEDY?

“Termination for default” is the Government’s exercise of the right to discharge a contract, either in whole or in part, “because of the contractor’s actual or anticipated failure to perform its contractual obligations.”¹⁴ A termination for default discharges the Government’s remaining contract duties and renders the contractor liable for the consequences of poor performance. These ramifications include such actions as the requirement to reimburse the government for its excess costs above the original contract price, provided the government conducts a reprocurement of the same or similar items from another source.¹⁵ Under the *Christian* doctrine, the default clause is mandatory by operation of

¹³ WALTER F. PETTIT ET AL., GOVERNMENT CONTRACT DEFAULT TERMINATION 1-2 (1991 & Supp. 1995). Singer fails to mention the full universe of remedies by which governments can hold contractors accountable for breach or other misconduct. Singer makes no argument that these important remedies are inherently problematic or lack credibility. Regarding these other remedies, two commentators discuss the following federal contract rights: “Correction or Re-Work at the Contractor’s Expense”; “Equitable Reduction in Price or Other Compensation”; “Liquidated Damages”; “Reduction or Withholding of Award or Incentive Fees”; “Rejection of Nonconforming Supplies or Services”; and “Re-procurement at the Contractor’s Expense”. KATE M. MANUEL & RODNEY M. PERRY, CONG. RESEARCH SERV., R44202, SELECTED LEGAL MECHANISMS WHEREBY THE GOVERNMENT CAN HOLD CONTRACTORS ACCOUNTABLE FOR FAILURE TO PERFORM OR OTHER MISCONDUCT i (2015). The same commentary lists some off-contract disciplinary procedures, including: “Responsibility Determinations Prior to Award of a Contract”; “Debarment and Suspension”; “Civil Provisions of the False Claims Act”; and the “Program Fraud Civil Remedies Act.” *Id.* Parallel regimes for a number of these remedies often exist for state and local governments. *See, e.g.*, NASHVILLE & DAVIDSON CTY., TENN., GEN. ORDINANCES tit. 4, (2006), <http://www.nashville.gov/Finance/Procurement/Procurement-Division-Office.aspx> [<https://perma.cc/S7AX-RB4S>] (Procurement Code); PROCUREMENT STANDARDS BD., METRO. GOV’T OF NASHVILLE & DAVIDSON CTY., TENN., REGULATIONS TO THE 1992 PROCUREMENT CODE (Feb. 2014), <http://www.nashville.gov/Portals/0/SiteContent/Finance/Purchasing/Regulations%2020140206.pdf> [<https://perma.cc/2RD8-ZUHH>] (Procurement Regulations). Debarment in even a single county can have far-reaching consequences for a contractor. *See, e.g.*, *Listing of Contractors Debarred in Los Angeles County*, L.A. COUNTY ONLINE: DOING BUSINESS WITH US, <http://doingbusiness.lacounty.gov/DebarmentList.htm> [<https://perma.cc/8RFX-MJCZ>] (last visited Dec. 21, 2017) (providing publicly accessible list of locally debarred contractors).

¹⁴ 48 C.F.R. (FAR) § 49.401(a) (2016). State and local public contracts almost always contain default provisions. *See* Aaron P. Silberman, *How Public Agencies May (Or May Not) Terminate Contracts*, 49 PROC. L. 5, 5 (2014).

¹⁵ *See* JOHN CIBINIC, JR. ET AL., ADMINISTRATION OF GOVERNMENT CONTRACTS 883–84 (4th ed. 2006); PETTIT ET AL., *supra* note 13, at 2–20; *see also* *Armour of Am. v. United States*, 96 Fed. Cl. 726, 759–69 (2011) (comprehensive discussion of excess costs of reprocurement). State remedies for default sometimes incorporate this same governmental right of redress. *See, e.g.*, 41-1 R.I. CODE R. § 1 app. a (2017) (“[T]he contractor shall be liable for the excess costs incurred by [the State] as a result of the contractor’s default.”).

law—even when it is expressly absent from the contract—as a deeply ingrained strand of public procurement policy.¹⁶

Singer briefly acknowledges that termination for cause is a “drastic remedy.”¹⁷ Nevertheless, Singer says that the administrative and political costs of termination for default “often” disqualify this remedy as a “credible threat” to discipline a contractor’s performance.¹⁸ This Response addresses these administrative and political costs in turn.

A. Administrative Costs of Default

Singer emphasizes that the administrative time and effort for the government to prove a termination for default are cost prohibitive and “often lead” the government to convert the termination for default to one for the government’s convenience.¹⁹ The latter “termination for convenience” remedy has no requirement for the government to prove a material breach (or even any contractor fault). Termination for convenience must be in the government’s, and not necessarily in the contractor’s, interests (for example, when the government no longer needs the product or service).²⁰ Thus, this remedy generally results in greater contractor compensation than what would otherwise be available in a termination for default—such as compensation for contractor costs on work undelivered to the government.²¹

Singer’s argument regarding prohibitive administrative costs depends largely on a single anecdote: the failed Los Angeles subway replacement procurement.²² Singer indicates that this procurement history illustrates how the

¹⁶ See, e.g., *H & R Machinists Co.*, ASBCA No. 38440, 91-1 BCA ¶ 23,373 (citing *G.L. Christian & Assocs. v. United States*, 312 F.2d 418 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 954 (1963)). Some state courts have approved the *Christian* doctrine. See, e.g., *Dep’t of Gen. Servs. v. Harmans Assocs. Ltd. P’ship*, 633 A.2d 939, 947 (Md. Ct. Spec. App. 1993).

¹⁷ Singer, *supra* note 1, at 1312 n.61. This passing remark does not convey the broad impact of a possible default. Respected commentators have said, “Termination . . . for default is the most traumatic experience that can befall a Government contractor.” *PETTIT ET AL.*, *supra* note 13, at i; see also *id.* at 1-7. A default termination usually entails “severe” consequences to the contractor and “not infrequently leads to the contractor’s financial ruin.” *CIBINIC*, *supra* note 15, at 883-84.

¹⁸ Singer, *supra* note 1, at 1299. Singer’s claim about the inefficacy of a termination for default is striking considering his advocacy for CDS. Singer does not sufficiently answer a critical question: why is termination a “genuine threat” (and therefore a motivating force that deters contractor breach) under a CDS approach, *id.* at 1324, even though it is (apparently) not a “credible” measure for achieving remedial success during ordinary contract administration, *id.* at 1299?

¹⁹ *Id.* at 1312 n.61.

²⁰ *CIBINIC ET AL.*, *supra* note 15, at 1054 (no longer needing products/services is the “most common” ground for termination for convenience).

²¹ Compare FAR 49.402-2(a) (2016) (default terminations), with FAR 49.201(a) (convenience terminations).

²² Singer, *supra* note 1, at 1298-1301 (detailing the failed Los Angeles subway replacement project).

government will “[often] thr[o]w in the towel” when it engages the contractor in high-stakes litigation over a default.²³ But such an outcome is not the norm; rather, the limited available evidence shows that, once the government initiates a default action, it generally litigates to a judgment with great success. One commentator notes that the federal tribunals consider about 100 termination-for-default cases a year, and that, on average, contractors have about a five-percent chance of prevailing.²⁴ Without sufficient corroborating empirical data, Singer’s thesis—that the incidence of prohibitive costs commonly discourages the government’s full pursuit of a termination for default—is, at best, unproven.

Singer further indicates the administrative costs are prohibitive for a default termination because the agency cannot simply hire a replacement contractor, but rather “ordinarily” must commence the procurement anew in accordance with competitive bidding requirements.²⁵ These steps, he says, include market research, a new solicitation, new proposals, additional evaluation committee meetings, more oral presentations, re-ranking offers, performing a new responsibility review of the proposed awardee, possible administrative bid protests, and public hearings on the award decision.²⁶ The process of selecting a new contractor for a “complex, contested” project “often lasts two years or more and can cost of millions of dollars.”²⁷

Singer cites no sources for his assertion that the reprourement after a default “ordinarily restart[s] the entire selection process.”²⁸ Singer’s (unsupported) claim differs markedly from the federal experience. In construing the federal regulations, the U.S. Government Accountability Office (GAO) has said in its bid protest decisions that the full range of procurement statutes and regulations governing conventional procurements, including the full-scale competition rules, are not strictly applicable in a reprourement after a default.²⁹ The

²³ *Id.* at 1312 n.61.

²⁴ See PETTIT ET AL., *supra* note 13, at 16-2 (“Moreover, only about one out of four appealed terminations is actually decided by a board; the remainder are withdrawn or settled before the board renders a decision. Therefore, if one considers *all* appealed terminations, rather than merely the appeals that are *decided*, the contractor is successful in overturning only about one out of 20 terminations.”).

²⁵ Singer, *supra* note 1, at 1299 n.6.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See *id.* Indeed, in the example of the failed Los Angeles subway replacement project, Singer notes that “Metro . . . voted to waive its ordinary competitive-bidding procedures and instead award the remaining tunneling work to its existing contractors via an expedited, competitive process.” *Id.* at 1300 n.10. Significantly, Singer is left without a single example of a project where the reprourement process took several years and cost several million dollars.

²⁹ See, e.g., Premier Petro-Chem., Inc., B-244324, 91-2 CPD ¶ 205, 1991 WL 177321, at *2 (Comp. Gen. Aug. 27, 1991). The GAO is an agency within the U.S. Congress and is the leading administrative forum where aggrieved firms can allege that a solicitation, a proposed award, or an award violates a federal procurement statute or regulation. See 31 U.S.C. §§ 3551–57 (2016) (providing the GAO’s authority to review bid protests).

reasoning behind this is that the Government is not letting a new contract but rather is enforcing its right of cover under the default clause against the account of the terminated contractor.³⁰

GAO bid protest decisions have permitted contracting officials “considerable latitude” in using the selection method best suited to accomplishing the reprocurement after a default.³¹ To conserve agency resources and to minimize procurement processing times, the federal Government may simply negotiate an award with the next offeror in line on the original solicitation, at the original price. Under such circumstances, an agency can reasonably view the offers received under the original solicitation as an acceptable measure of what the competition would have been and therefore whether it met the regulatory requirements.³²

The GAO’s bid protest decision in *Performance Textiles* exemplifies this approach.³³ In that case, the field agency originally solicited bids for a nylon fabric purchase but terminated the lowest bidder for default because the awardee had repudiated the contract. Performance and Landau were, respectively, the second and third-lowest bidders in line for award. Prior to the default action, and approximately ninety days from the bid opening, the field agency contacted Performance and inquired whether it would revive its original bid. Performance revived its bid, conditioned on a price increase stemming from changed market conditions. The field agency’s procurement officer accepted Performance’s conditions and submitted the Performance award package to higher authority for approval.

The agency’s higher-level Procurement Executive rejected the field agency’s proposed award. This official first noted that Performance’s revised bid price was higher than Landau’s original bid price. The Procurement Executive concluded that, because Landau had confirmed its original bid price upon notification, an award to Performance at a price higher than Landau’s confirmed

³⁰ See *CIBINIC ET AL.*, *supra* note 15, at 1023 (“A reprocurement is technically a purchase for the contractor’s account and not a new purchase by the government.”).

³¹ *Master Sec., Inc.*, B-235711, 89-2 CPD ¶ 303, 1989 WL 241198, at *2 (Comp. Gen. Oct. 4, 1989). Some states and localities use the same or similar standard for a reprocurement after a default. See, e.g., 27-1 MISS. CODE R. app. c (West 2016) (Termination for Default) (“[T]he Agency Head or designee may procure similar supplies or services in a manner and upon terms deemed appropriate by the Agency Head or designee.”); 41-1 R.I. CODE R. § 1 app. a (2017) (state agency “[m]ay procure similar goods or services in a manner and upon terms it deems appropriate . . .”). Similarly, Los Angeles County’s sample contract provides that, after a termination for default, “the County may procure, upon such terms and in such manner as the County may deem appropriate, goods and services similar to those so terminated.” *CTY. OF L.A., STATE OF CAL., SAMPLE COUNTY CONTRACT WITH COUNTY HEALTH AND HUMAN SERVICES (H&HS) DEPARTMENT SPECIFIC CONTRACT LANGUAGE INSERTED* ¶ 8.46.2, at 88 (2003), <http://ceo.lacounty.gov/sib/pdf/SampleContract.pdf> [<https://perma.cc/4VE9-H6M4>] (last visited Oct. 25, 2017).

³² *Performance Textiles, Inc.*, B-256895, 94-2 CPD ¶ 65, 1994 WL 424235, at *2 (Comp. Gen. Aug. 8, 1994).

³³ See generally *id.*

price would have violated the government's duty to mitigate damages resulting from the default. When the agency awarded the reprocurement contract to Landau, Performance protested to the GAO. In denying the protest, GAO said the agency had no obligation to solicit (or entertain) a new offer from Performance and that the agency had followed all the proper procedures.

Another streamlined competition technique is where the agency continues the original negotiated procurement by first soliciting additional final proposal revisions from the previously unsuccessful offerors and then making an award based on the final round of submissions.³⁴ (Note that the protester in *Performance Textiles* had advocated this approach, but the GAO upheld the agency's discretion in making the award on the *original* bids.³⁵) In other cases, however, the GAO has approved of situations where agencies solicited modified proposals.³⁶ These results are not contradictory but instead show the agency's wide discretion in adopting a reprocurement procedure in accordance with its best interests under the particular facts. If the agency strives for the maximum practicable competition,³⁷ obtains reasonable prices to the extent practicable,³⁸ and mitigates damages,³⁹ then the chances are high that the agency's method of competition will be upheld in a protest.⁴⁰

These foundational principles are not limited to federal contracts. Most state and local jurisdictions have limited guidance regarding the procedures for reprocurring a contract after a default. When conducting such a reprocurement, states and localities may properly follow the GAO decisions construing the federal model where state and local procedures are sparse or unclear.⁴¹ State

³⁴ See, e.g., *DynaLantic Corp.*, 68 Comp. Gen. 413, 414 (1989).

³⁵ See *Performance Textiles*, 1994 WL 424235 at *2. See generally *supra* text accompanying notes 32–34.

³⁶ But see, e.g., *DynaLantic*, 68 Comp. Gen. at 415 (sustaining protest on the separate issue that “[t]he Army failed to assure that offerors were competing on an equal basis, and that this failure clearly could have affected the outcome of the competition”).

³⁷ *Master Sec., Inc.*, B-235711, 89-2 CPD ¶ 303, 1989 WL 241198, at *2 (Comp. Gen. Oct. 4, 1989).

³⁸ *Id.*

³⁹ *Hemet Valley Flying Serv., Inc.*, 57 Comp. Gen. 703, 705–06 (1978).

⁴⁰ In my thirty-four years of experience as an Army procurement attorney, I have seen many default cases where the agency uses the most expeditious procurement method possible simply because a pressing need exists for the items or services. Even for larger projects, the ordinary reprocurement time frame was weeks or months (not years), and the administrative costs were in the thousands of dollars (not in the millions). In only one or two instances have I seen where the process began anew—and those two instances were due to some irremediable defect in the procurement process warranting cancellation (such as a deficient Scope of Work that could not be repaired to permit a fair competition).

⁴¹ See Silberman, *supra* note 14, at 5 (“Public agencies often use, or at least borrow from, the Federal Acquisition Regulation (FAR) standard termination clauses. . . . Where there are no state law decisions that directly involve the termination of contractors by public agencies, state courts will likely find federal decisions persuasive.” (endnotes omitted)).

and federal courts alike often afford great weight to GAO doctrine on procurement issues.⁴²

B. Political Costs

The other issue Singer identifies as working against termination for default is the political costs of this procedure. He posits that state and local politicians (and not the “bureaucracy”) “generally” or “often” award contracts, which gives these officials “strong political incentives to overlook contractor problems.”⁴³ These incentives are said to exist because these officials are reluctant to admit they erred upfront in selecting the contractor and because contractors can unduly influence these officials through election campaign “donations” and other financial inducements.⁴⁴

While Singer is certainly correct that some procurement officials are too beholden to political influence, Singer’s broad empirical claims closely linking politics and procurement are ultimately unsupported. Singer references merely two anecdotes where he finds that politics unduly discouraged contracting officials from completing a termination for default. In the first circumstance, a single member of the Metro Los Angeles Council spoke out against the government’s contract manager and in favor of the contractor who had botched the Los Angeles subway replacement project.⁴⁵ In the second example, the lead contractor on Boston’s failed “Big Dig” underground transportation project had many political ties with local officials, including lobbying, employment of family members, and campaign contributions.⁴⁶

Even if the individuals involved in those two contracts did in fact engage in misbehavior (Singer offers no such evidence), Singer’s speculation and insinuations about the perceived misbehavior of a few government officials in just two procurements in no way credit his broad accusation that many, if not most, state and local governmental officials have “strong political incentives to overlook

⁴² *E.g.*, *B.K. Instrument Co. v. United States*, 715 F.2d 713, 729–30 (2d Cir. 1983) (“[W]e look for guidance to decisions of the Comptroller General, an official with wide expertise and experience concerning government procurement awards to which federal courts should accord deference when deciding procurement cases.”); *accord, e.g.*, *Pac. Architects Collaborative v. State*, 166 Cal. Rptr. 184, 191 (Cal. Dist. Ct. App. 1979) (“We are strongly persuaded by decisions relating to federal procurement bidding.”).

⁴³ Singer, *supra* note 1, at 1311 & n.55, 1315. Singer offers no support for his assertion that elected officials (the “legislative body”) “generally award[]” state and local contracts. *See, e.g., id.* at 1311 n.55. However, in most states and localities, contracting authority in fact resides within the executive branch. *See, e.g.*, MASS. GEN. LAWS ch. 41 § 103 (1989) (city mayor appoints purchasing agents in cities that have adopted the statutory program); *see also, e.g.*, ARIZ. ADMIN. CODE § 2-7-202 (2006) (state procurement administrator delegates contracting authority to state governmental units).

⁴⁴ Singer, *supra* note 1, at 1311–12, 1315.

⁴⁵ *Id.* at 1311 n.56. *See generally id.* at 1298–1301.

⁴⁶ *Id.* at 1311 n.58. *See generally id.* at 1300 n.9.

contractor problems.”⁴⁷ Instead, the great majority of state and local procurement officials do their best to comply with stringent standards of conduct that forbid politics from tainting procurement decisions.⁴⁸

II. PAST PERFORMANCE EVALUATIONS AS A REPUTATIONAL SANCTION

Singer calls out adverse past performance evaluations as an ineffective reputational sanction. He argues that, even if adverse past performance information exists on a contractor, the government “infrequently ha[s] reliable, usable information on a contractor’s past performance issues.”⁴⁹ Singer further contends agency past performance assessments are “underutilized” because “governments frequently elect not to advertise the failures of their contractors” and officials lack sufficient incentives to uncover damaging information.⁵⁰ Even when they have these reports, procurement agents are “often hesitant to use” them because of the “fear” of a bid protest from an aggrieved firm.⁵¹

Singer cites the federal government for much of his criticisms. Relying upon a 2009 GAO study, Singer argues,

A recent study by the U.S. Government Accountability Office found that, even where the solicitation emphasized past performance as an evaluation criterion, past performance was only rarely considered by the procuring agency, and the officials interviewed explained that the major impediments to a consideration of past performance were lack of an ability to verify the objectivity of the information or properly assess its relevance.⁵²

Singer’s critique is out of date because he fails to mention many significant statutory, regulatory and policy developments occurring after the GAO’s 2009 study.

In 2011 and 2012, Congress required executive branch agencies to develop effective strategies for obtaining timely, accurate, and complete past perfor-

⁴⁷ *Id.* at 1311.

⁴⁸ For example, Tennessee state procurement officials are subject to the Tennessee Central Procurement Office’s Business Conduct and Ethics Policy and Procedures, which cover all aspects of contract formation and administration while promoting full and competition, integrity, and transparency. *See* CENT. PROCUREMENT OFFICE OF THE STATE OF TENN., Policy No. 2013-009, BUSINESS CONDUCT AND ETHICS POLICY AND PROCEDURES (Mar. 20, 2014), https://www.tn.gov/assets/entities/generalservices/cpo/attachments/Business_Conduct_and_Ethics_Policy_and_Procedures_3_20_14.pdf [<https://perma.cc/2DEE-SSP3>].

⁴⁹ Singer, *supra* note 1, at 1321 (also claiming “most performance problems are not documented in the public record”).

⁵⁰ *Id.* at 1320–21.

⁵¹ *See id.* at 1321–22.

⁵² *Id.* at 1321 n.99 (citing U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-374, FEDERAL CONTRACTORS: BETTER PERFORMANCE INFORMATION NEEDED TO SUPPORT AGENCY CONTRACT AWARD DECISIONS 2–3 (2009)).

mance information (PPI) from government databases.⁵³ The statutes and implementing regulations⁵⁴ had the desired effect: In a 2013 congressional report, the GAO noted that the Department of Defense (DOD) increased workforce training and developed tools and metrics to improve PPI oversight.⁵⁵ While challenges remained because of acquisition workforce shortages, personnel turnover, and the difficulty of obtaining needed information, the GAO said that the DOD—in almost doubling the number of PPI assessments from Fiscal Years 2010 to 2013—had “greatly improved” oversight and accountability.⁵⁶

In 2014, the GAO issued an executive-branch-wide PPI study.⁵⁷ The GAO noted that, since 2009, the Office of Federal Procurement Policy (OFPP) had issued numerous policies to improve the reporting and use of this data.⁵⁸ For one, the GAO praised the federal government’s May 2010 decision authorizing the web-enabled Contractor Performance Assessment Reporting System (CPARS)⁵⁹ as the single government-wide database for agency past performance evaluations (and any contractor rebuttals).⁶⁰ The GAO also reported that “[executive-branch] agencies have generally improved their level of compliance with [PPI] reporting requirements”⁶¹ The GAO did not find, as Singer speculates, problems with PPI usage due to any need to avoid media coverage, lack of positive incentives, desire to protect fellow officials, or fear of protests.⁶²

⁵³ National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 853, 126 Stat. 1632, 1856 (2012) (Government-wide); National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 806, 125 Stat. 1298, 1487 (2011) (DOD-specific).

⁵⁴ See FAR 42.1502 (2016).

⁵⁵ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-589, CONTRACTOR PERFORMANCE: DOD ACTIONS TO IMPROVE THE REPORTING OF PAST PERFORMANCE INFORMATION 5–8 (2013) [hereinafter GAO 2013 REPORT].

⁵⁶ *Id.* at 6–7.

⁵⁷ U.S. GOV’T ACCOUNTABILITY OFF., GAO-14-707, CONTRACTOR PERFORMANCE: ACTIONS TAKEN TO IMPROVE THE REPORTING OF PAST PERFORMANCE INFORMATION (2014) [hereinafter GAO 2014 REPORT].

⁵⁸ *Id.* at 5.

⁵⁹ CONTRACTOR PERFORMANCE REPORTING SYS., <https://www.cpars.gov/> [<https://perma.cc/B4KE-TNXZ>] (last visited Oct. 23, 2017).

⁶⁰ See GAO 2014 REPORT, *supra* note 57, at 4, 7–9.

⁶¹ See *id.* at 9.

⁶² See *generally id.* Although Singer contends that the prospect of a protest induces agencies to ignore PPI, the agency prevails in almost all past performance protests. See Vernon J. Edwards, *Postscript VI: Past Performance Evaluations*, 20 NASH & CIBINIC REP. ¶ 51 (2006) (GAO sustains only about 13% of such protests on the merits). In truth, agencies have *more* fear of protest when they ignore PPI, because, as the GAO has long held, “In certain circumstances, when evaluating past performance, we have held that evaluators cannot ignore information of which they are personally aware (i.e., information that is ‘too close at hand’), even if that information is not included in the offeror’s proposal.” Consummate Comput. Consultant Sys., LLC, B-410566.2, 2015 CPD 176, 2015 WL 3814381, at *4 n.6 (Comp. Gen. June 8, 2015).

Lastly, terminations for default are a special PPI concern. Federal Acquisition Regulations require that both contractors and agencies promptly report terminations for default to the Federal Awardee Performance and Integrity Information System (FAPIIS),⁶³ which was established in 2010. FAPIIS compiles in one location information from four pre-existing contract performance-related databases (one being CPARS).⁶⁴ Generally, contracting officials must check FAPIIS prior to the award of a new contract before deciding the contractor's work history clears the contractor as a responsible entity.⁶⁵ If an agency issues a termination for default, a high likelihood exists that sister agencies will use FAPIIS to obtain reliable information about recent default actions on a contractor—even if the matter is still in litigation. Similarly, in a 2016 Survey of State Procurement Practices, the National Association of State Procurement Officials found that state central procurement offices across twenty-four states track and maintain a record of vendor performance.⁶⁶ This simple act of clicking on a link in FAPIIS (or in a similar state database) undercuts Singer's contention that "relevant [performance] information is not often readily available."⁶⁷

III. ISSUES WITH COMPETITIVE DUAL SOURCING

Singer's centerpiece reform raises practical and legal concerns that governments should consider before they adopt CDS.

A. Practical Concerns

One weakness of CDS as an instrument for transformational procurement reform is the absence of empirical evidence showing proof of this remedy's purported reduced costs and improved contractor performance.⁶⁸ Singer also makes the major (and similarly unsubstantiated) leap that what might work for a large project would be just as effective for all projects of varying magnitudes and complexity.⁶⁹ He omits any mention of implementing a pilot study prior to

⁶³ See FAR §§ 42.1501–1503 (2016).

⁶⁴ See FAR 9.104-6; *id.* § 9.105-2(b); *id.* § 42.1503(g)–(h).

⁶⁵ See FAR 9.104-6; *see also id.* § 9.105-1(c).

⁶⁶ NAT'L ASS'N OF STATE PROCUREMENT OFFICIALS, SURVEY SUMMARY REPORT: 2016 SURVEY OF STATE PROCUREMENT PRACTICES 9 (2016), <http://www.naspo.org/2016Survey> [<https://perma.cc/6WBP-DTKS>]. *See generally, e.g., Listing of Contractors Debarred in Los Angeles County, supra* note 13.

⁶⁷ Singer, *supra* note 1, at 1317.

⁶⁸ Singer cites just three examples of CDS: New York City's procurement for home construction services after Hurricane Sandy, *id.* at 1327; the replacement of the New York Subway system in 1913, *id.* at 1328–30; and the construction of the Transcontinental Railroad in 1861, *id.* at 1330–32. These projects did not contain the contract options that are integral parts of Singer's CDS reform, and he proffers no specific corroborating data on cost savings and improved performance flowing directly from CDS.

⁶⁹ *See id.* at 1304 (arguing that "CDS can be implemented as a remedial solution in subnational government procurement contracts of all types and . . . can . . . fit virtually any procured good or service"); *see also id.* (advocating for "CDS as the best available remedial

his suggested wholesale adoption of CDS. He does not mention the likely outcome for the wholesale adoption of an unproven remedial tool: the occurrence of unforeseen effects pursuant to the law of unintended consequences—when a deceptively simple solution (such as CDS) seeks to regulate a highly complex world (such as that of government purchasing).⁷⁰

Nevertheless, Singer would require a CDS approach—without empirical proof of its potential effectiveness— for “nearly all government contracts” and with only limited avenues for waiver.⁷¹ His reason for this lack of flexibility is that, because government employees innately prefer the “tried-and-true” over untested alternatives (even “at the expense of innovation”),⁷² any implementation of “CDS cannot be left to the discretion of the procurement officer[.]”⁷³

As stated above, Singer’s prescription bypasses a pilot study. The advantages of a pilot study (defined as a smaller scale implementation of the larger proposal) are well-known: namely, (a) it allows preliminary testing of the hypothesis that can lead to a more realistic and verifiable hypothesis; (b) it can suggest ideas, approaches and clues the researcher might not have foreseen before conducting the pilot study; and (c) it can save a great deal of time and money if it turns out that the hypothesis is unproductive, in whole or in part,

strategy for nonmilitary public procurement contracts, particularly at the state and local level”).

⁷⁰ See *In re Schwartz*, 461 B.R. 93, 98 n.4 (Bankr. D. Mass. 2011) (noting similar observation about the typical impact of the law of unintended consequences).

⁷¹ Singer, *supra* note 1, at 1342, 1354. Singer acknowledges certain circumstances where CDS would be unproductive, such as for off-the-shelf commercial products available from multiple sources). See *id.* at 1354. However, Singer overlooks that law and policy can actually require purchase of such commercial items—for instance, “when they are available to meet the needs of the agency.” See FAR 12.101(b) (2016). In Fiscal Year 2016, the Department of Defense alone spent \$47 billion for commercial items. *GAO Reports Decline in DOD Use of Commercial Item Contracting Procedures*, 59 GOV’T CONTRACTOR ¶ 225 (July 26, 2017). By failing to discuss special procurement procedures for large-scale commercial items, Singer significantly (and inadvertently) undermines his claim that CDS can “fit virtually any procured good or service.”

⁷² Singer, *supra* note 1, at 1344.

⁷³ *Id.* Singer argues public servants have a disincentive for exercising ingenuity because they “do not receive bonuses for taking risks that pay off, or for ingenuity in general.” *Id.* Singer has overlooked that in many government offices, managers do place high value on skilled employees who suggest creative ways of doing business. For example, each year the Secretary of the Army personally hands out various excellence-in-contracting awards to deserving individuals and teams in the procurement work force. See *generally Acquisition Awards*, U.S. ARMY: ACQUISITION SUPPORT CTR. <http://asc.army.mil/web/acquisition-awards/> [https://perma.cc/A5YE-GFQ8] (last visited Oct. 25, 2017). Recipients value these awards both for the public recognition and their role in facilitating career advancement. Additionally, federal agencies have a very active program for awarding monetary bonuses to employees who execute their duties in an exemplary manner. See *generally* U.S. Office of Personnel Mgmt., *Approaches to Calculating Performance-Based Cash Awards*, OPM.GOV <https://www.opm.gov/policy-data-oversight/performance-management/performance-management-cycle/rewarding/approaches-to-calculating-performance-based-cash-awards/> [https://perma.cc/EA5F-KPE3] (last visited Oct. 25, 2017).

when put in practice.⁷⁴ Given the breadth of CDS and of Singer's sweeping proposal to transform governmental procurement, a pilot study would be quite useful for a government considering CDS to experiment on a smaller scale with this new (and presently untested) contracting solution.

B. Legal Problems

Singer's proposal also raises legal concerns because: (1) CDS is a constructive termination for default; and (2) it violates the rules on contractual options.

Singer indicates that CDS is (technically) not a default termination remedy.⁷⁵ Even though he suggests that the agency using CDS may "terminate" one firm's unsatisfactory effort and reassign of all or part of the work, he still considers the remedy essentially akin to a termination for the government's convenience.⁷⁶ However, when the government is discharging a contract due to the contractor's performance deficiencies, that action is *not* akin to a termination for convenience: Both in form and in substance the action is a termination for default (which, like CDS, can be appealed to a board of contract appeals or a court). Indeed, under the procurement regulations, it is improper for an agency to terminate for convenience where the circumstances in fact show a contractor's default.⁷⁷

Case law recognizes that "whether a contractor has been terminated for default is a *functional* determination."⁷⁸ Under CDS, the agency takes away work from one contractor because of its performance deficiencies—which is the hallmark of a termination for default.⁷⁹ Importantly, Singer would have agencies apply the functional equivalent of termination for default without following the procedural steps and safeguards that often must precede imposition of that remedy.⁸⁰

Before finding a contractor in default for reasons other than untimely delivery of supplies or services, the contracting agency must follow the proper procedures, which ordinarily require contracting officers to send the contractor

⁷⁴ See, e.g., Miles D. Woken, Ctr. For Teaching & Learning, *Planning Research Papers 7: Advantages of a Pilot Study*, UNIV. OF ILL. SPRINGFIELD, www.uis.edu/ctl/wp-content/uploads/sites/76/2013/03/ctlths7.pdf [<https://perma.cc/3S54-3BY2>] (last visited Dec. 18, 2017).

⁷⁵ See Singer, *supra* note 1, at 1309–10, 1323–24.

⁷⁶ See *id.* at 1336–37 (stating that the shift in work from one contractor to another "is related conceptually to a termination for convenience").

⁷⁷ See, e.g., Bendix Corp., ASBCA No. 2081, 79-1 BCA ¶ 13,717 ("[W]here the right to terminate for default exists, the contracting officer not only may, but, . . . must terminate for default if he is to terminate at all. Under such circumstances he may not terminate for the convenience of the Government." (quoting Artisan Elecs. Corp., ASBCA No. 14154, 73-1 BCA ¶ 9807, *aff'd* 499 F.2d 608 (Ct. Cl. 1974))).

⁷⁸ See *Tidewater Contractors, Inc. v. United States*, 107 Fed. Cl. 779, 785 (2012) (emphasis added).

⁷⁹ See *supra* notes 14–18 and accompanying text (explaining remedy).

⁸⁰ See generally Singer, *supra* note 1, at 1322–24.

a cure notice.⁸¹ This notice gives the contractor the opportunity to either correct the problem, rebut the agency's grounds for a default, or provide adequate assurances that it will make sufficient progress to complete the contract satisfactorily.⁸² A court or a board of contract appeals may overturn a default termination in this context if the contractor can establish the agency's prejudicial failure to provide the required cure notice advising the contractor of its performance deficiencies and providing a reasonable time for the contractor to resolve the issues.⁸³

Another legal issue with CDS is Singer's treatment of options. In CDS, when the contractor "fails" under a contract permitting reassignment of "all or portions" of the work from one contractor to another,⁸⁴ the government may exercise a "remedial" contract option.⁸⁵ This option, he indicates, "is analogous to" a fixed-price "call option."⁸⁶ In this manner, Singer contends, the government can exercise its discretion to achieve the "full benefits of competition" between the two firms where termination of the original contractor becomes necessary.⁸⁷

Some background on the law of options will illuminate some weaknesses in CDS. An option is an unaccepted offer to sell upon agreed terms that the optionee may unilaterally accept to make those terms part of the contract.⁸⁸ Options should be clear and definite and should not require further negotiations to work out the material terms (including price). When the parties are unable to define the contractor's obligations until they negotiate the option exercise, the attributes of a valid option are absent.⁸⁹ As the GAO has ruled, when the option is indefinite, such an open-ended arrangement is little more than an advance

⁸¹ See *Universal Shelters of Am., Inc. v. United States*, 87 Fed. Cl. 127, 144 (2009) (citing FAR 12.403(c)(1)). See generally *PETTIT ET AL.*, *supra* note 13, at 4-25 to -31.

⁸² See *Composite Laminates, Inc. v. United States*, 27 Fed. Cl. 310, 317-18 (1992). See generally *PETTIT ET AL.*, *supra* note 13, at 4-25 to -31. For a state codification of this rule, see 200 KY. ADMIN. REGS. 5:312, § 2(2) (2004) ("If a contractor is determined to be in default, the commonwealth shall notify the contractor of the determination in writing, and may include a specified date by which the contractor shall cure the identified deficiencies. The commonwealth may proceed with termination if the contractor fails to cure the deficiencies within the specified time.").

⁸³ See, e.g., *Universal Shelters*, 87 Fed. Cl. at 144; *PETTIT ET AL.*, *supra* note 13, at 4-30 to -31; see also *id.* at 16-2 (discussing the low likelihood of a contractor succeeding on the merits in an appeal to convert a default termination into a convenience termination).

⁸⁴ Singer, *supra* note 1, at 1302, 1323.

⁸⁵ *Id.* at 1333.

⁸⁶ *Id.* at 1333-34, 1337. A "call option" is "[a]n option to buy something (esp. securities) at a fixed price even if the market rises; the right to require another to sell." *Option*, BLACK'S LAW DICTIONARY (10th ed. 2014).

⁸⁷ Singer, *supra* note 1, at 1323, 1337.

⁸⁸ Arthur L. Corbin, *Option Contracts*, 23 YALE L.J. 641, 641 (1914); see also *Option*, BLACK'S, *supra* note 86.

⁸⁹ U.S. GOV'T ACCOUNTABILITY OFF., GAO/NSIAD-86-59, PROCUREMENT: THE USE OF UNPRICED OPTIONS AND OTHER PRACTICES NEEDS REVISION 14 (1986), reprinted in B-217655, 1986 WL 312402 (Comp. Gen. Apr. 23, 1986). See generally *id.* at 14-24.

agreement to negotiate a new contract on a sole source basis, which violates the statutory and regulatory mandate for competitive bidding.⁹⁰ As such, an indefinite option “should be deleted” from a contract.⁹¹

The following illustration shows why options in CDS contracts are unworkable: Assume the agency has placed a “firm fixed-price contract”⁹² for construction of an office building and the agency wishes to use CDS by exercising an option in a second contract after the first contractor failed part way through the project. No feasible basis exists to make the CDS option a firm fixed price arrangement upfront because it would be impossible at the original contract placement to realistically price an “option” on a firm fixed price basis that would cover an unknowable amount of unfinished work starting and finishing at unknown times.

Another issue with CDS options involves their funding aspect. Singer suggests that a CDS option may be exercised to fund an advance payment (he calls it an “up-front payment”) to the vendor to cover its “opportunity cost.”⁹³ Besides failing to mention that contracting parties often cannot feasibly price opportunity costs upfront, Singer also overlooks a critical detail: such advance payments to government contractors are widely forbidden by statute.⁹⁴ Moreover, a related concern here is that the agency must have (or obtain) full funding for the new obligation⁹⁵—a difficult task in this era of shrinking governmental budgets. Of course, more fundamentally, if the (eventual) price is presently unknown and subject to later negotiation, a priced option is fictitious—as is, therefore its purported utility in funding advances.

Full contract funding is yet another serious concern with CDS. The general rule is that the agency must have adequate monies obligated on the contract to fund the government’s commitment on the contract (a principle which applies

⁹⁰ See, e.g., *Varian Assocs., Inc.*, B-208281, 83-1 CPD ¶ 160, 1983 WL 26465, at *3–4 (Comp. Gen. Feb. 16, 1983), *aff’d in part, modified in part*, B-208281.2, 83-2 CPD ¶ 78 (Comp. Gen. July 12, 1983). State law cases use the same reasoning in reaching the same result. See, e.g., *On-Point Tech. Sys., Inc. v. State*, 803 A.2d 1175, 1180 (Pa. 2002) (because the original contract failed to contain the essential terms of the option, the contract extension for future work was a new contract in violation of the mandatory competitive bidding statutes).

⁹¹ *Dep’t of Health & Human Servs.*, B-198911.3, 81-2 CPD ¶ 279, 1981 WL 23275, at *2 (Comp. Gen. Oct. 6, 1981), *aff’g Amdahl Corp.*, B-198911.2 et al., 81-1 CPD ¶ 213 (Comp. Gen. Mar. 27, 1981).

⁹² “A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor’s cost experience in performing the contract.” FAR 16.202-1 (2016).

⁹³ Singer, *supra* note 1, at 1333.

⁹⁴ See 31 U.S.C. § 3324 (2012) (generally precluding these payments); *accord*, e.g., Ala. Attorney Gen., Op. No. 85-00212, Opinion Letter on Maintenance Service Contracts and Advanced Payments (Feb. 13, 1985) (noting that advance payments to contractors are generally “violations” of the Alabama Constitution, amended Section 93, which provides that the state may not lend its credit or resources to any private enterprise).

⁹⁵ See 31 U.S.C. § 1341(a); FAR 17.207(c)(1); *id.* § 32.704(c).

equally to procurement contracts).⁹⁶ Accepting for the moment Singer's contention that the shift in work as contemplated under CDS equates to a termination for convenience, this solution would violate the funding procedures. The agency still cannot deobligate funds remaining on the first contract and reobligate them on the second contract to cover the new commitment if the original funds had previously expired for obligational purposes.⁹⁷ By contrast, under the "replacement" doctrine, the opposite is true for a successor contract following a termination for default (i.e., under the replacement doctrine, fiscal law allows an agency to reobligate the funds without regard for their original availability).⁹⁸

To illustrate the above issue more concretely, assume a federal agency under CDS terminates firm A's \$10 million firm fixed price contract (fully funded upfront) halfway through the project after having paid \$5 million of firm A's invoices. If the termination is for the convenience of the government (for some post-award reason), and the funds have otherwise expired for obligational purposes, then the agency may not deobligate the funds from A's contract and reobligate them on to B's contract. The agency usually must return the \$5 million to the Department of the Treasury. This inability to reobligate funds with a convenience remedy gives the agency a strong incentive to invoke the default remedy in lieu of CDS.

Lastly, contrary to Singer's claim that CDS will reduce costs,⁹⁹ CDS might in fact increase costs. For instance, where offerors cannot sufficiently assess contractual risk, they often pad their firm fixed prices to clandestinely account for unknown eventualities.¹⁰⁰ Padded options are very possible under CDS. Thus, if the agency requires the offeror to propose a firm fixed option to take over another contractor's work constructing a building, and no details exist on how much or when the work will be necessary, the contractor would undoubtedly use all the worst case scenarios to make the option a massive windfall. For

⁹⁶ See 31 U.S.C. § 1341(a); FAR 32.704(c) (prohibiting performance of government contracts in the absence of proper funding).

⁹⁷ U.S. GOVT. ACCOUNTABILITY OFF., GAO-04-261SP, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW ch. 5, pt. b, § 6, at 5-28 to -33 (2008) (discussing the fiscal aspects of termination for convenience) [hereinafter GAO RED BOOK]; see also *id.* ch. 5, pt. d, §§ 3, 7. For example, after a convenience termination, year-one 2016 funds cannot be obligated to exercise an option arising in fiscal year 2017. See, e.g., Ariz. Attorney Gen., Op. No. I86-045, Opinion Letter (April 18, 1986) (no new obligations may be made against an expired appropriation absent statutory authority) (construing ARIZ. REV. STAT. § 35-190A (1983)).

⁹⁸ GAO RED BOOK, *supra* note 97, at 5-28 to -29.

⁹⁹ Singer, *supra* note 1, at 1302 (claiming that CDS "decreases" costs); *id.* at 1347 ("[I]n the majority of cases the benefits of CDS should be expected to outweigh the additional costs."). Once again, no data supports these empirical contentions.

¹⁰⁰ See Ralph C. Nash, *Options for Additional Years of Work: Are They Overused*, 23 NASH & CIBINIC REP. ¶ 4 (Jan. 2009) (noting that even options at fixed prices "may impose a significant risk on the contractor or, conversely, induce the contractor to include a contingency in the price to protect against the risk.").

some governments, these pricing issues alone could eliminate CDS as an attractive alternative.

CONCLUSION

Singer correctly maintains that the procurement system requires effective remedies to deter and correct contractor misbehavior. Yet, his CDS proposal is open to several criticisms. First, termination for default is a viable tool to deter and correct contractor misbehavior. Second, past-performance assessments are an effective reputational remedy. Third, CDS raises substantial practical and legal concerns. Consequently, I recommend that any federal, state, or local government considering the adoption of CDS should first weigh these concerns before deciding whether CDS would help it achieve fully satisfactory government contractor performance.