The Hermeneutics of Government Contracting:
Questions of Meaning, Anti-Essentialism and Anti-Foundationalism

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Introduction

What does hermeneutics have to do with government contracting? Well just about everything. First and foremost, hermeneutics in both its ancient and modern forms is essentially the art or science of interpreting the meaning of something, usually the written word as text but also the meaning, or understanding, of such things as a physical piece of art, a musical composition, or a theatrical performance.¹ Hermeneutics is basically the process of coming to understand the meaning of something by a group of interested persons.

A government contract ultimately becomes a written text and hermeneutics comes into play when parties to that contract turn to it to try to interpret and understand the meaning of their obligations as set forth in the wording of the contract. In this respect, hermeneutics has a long historical association with contracts because of the sub discipline of legal hermeneutics which strives to uncover the meaning of laws. Written contracts ultimately become legal binding instruments which makes them a matter of law for the parties of interest to the contract.²

What does hermeneutics and government contracting have to do with anti-essentialism and anti-foundationalism in public administration? Well contracts are becoming more and more the basis for the legitimacy of public action as agencies at all three levels of government are turning to partnerships with for profit and not for profit organizations to provide good and services to the public and to government itself that were once the sole domain of governmental agencies. The very essence and foundation of governmental aspirations and actions are now being played out upon a fluid field of contractual agreements that require new interpretations of the meanings of public policy
and the administrative actions of public managers; meanings and actions that may run
counter to traditional essential understandings of the role of government in modern
society. As such, this paper calls into question the foundations of carrying out the work of
government through contracts with non governmental organizations. It recognizes that
the legitimacy of traditional public administration is changing as more and more non
governmental actors are performing services for governments and for citizens.

This paper outlines how hermeneutical interpretation comes into play in virtually
all the major steps in a government procurement and contracting process. It begins with a
hypothetical case of a small city seeking a technology solution. The case is used to
present four types of hermeneutical interpretations in the procurement process while
focusing on the foundational nature of contracts for goods and services. This will be
followed up with a true life case of an outsourcing contract between a county and a
consortium of vendors that went sour, and a discussion of how hermeneutics as
interpretation came into play as disputes arose during that contract. Then in the final
section a major interpretive challenge will be presented as managers in the federal
government try to interpret the meaning of what an inherently governmental job is under
the Office of Management and Budget’s Circular A-76 which attempts to downsize the
federal government through contracting out much of its work to the private sector in
order to make government run more efficiently and more effectively supposedly like
business entities.

A Hypothetical Example of Hermeneutics in Contracting

Government procurement and contracting is fundamentally a matter of
hermeneutical interpretation as parties to a contract attempt to come to some mutual
agreement about the meaning of a contract and the circumstances surrounding it. As such, four types of interpretive endeavors come into play. I call them anticipatory hermeneutics, negotiated hermeneutics, administered hermeneutics, and contested hermeneutics.

**Anticipatory Hermeneutics**

Hermeneutics comes into play even before a contract is even written as parties to the potential contract try to understand what each other wants and what each other can provide. This can be called anticipatory hermeneutics because it is a search for meaning about a possible new future relationship between two or more parties; often a relationship that never existed before. This has the potential for creating a new reality that in the anticipatory stage can only be imagined by the potential parties involved.

Consider the case of a small municipality seeking a possible long term relationship with a vendor of computing technologies including personal computers and peripherals such as printers, printer ink cartridges and network devices such as cabling, switches, and routers to replace its old 286 and 386 personal computers and an antiquated client/server network. This example assumes that any relevant state and local ordinances allow the city to enter into sole source contracts.

Now assume that the city administrator gets together with the finance director and the city’s one technology expert. In discussions they arrive at the following scenario. The city needs 100 new desk top model personal computers with 100 color printers, 15 portable notebooks, cabling to hook all of the computers together, a high end personal computer to serve as the network processor and server, access to the Internet, and an e-mail client system. The new PCs are needed to replace aging 286 and 386 models that do
not support modern software applications, and the city’s old client/server network is slow and prone to crashing.

This scenario is called requirements analysis. It is basically a hermeneutical process of interpretation because it involves trying to understand what the city needs in the way of information technology. It is also an anticipation of what the city may want in a new technology reality.

This is not, however, a full requirements analysis. It is a high level abstract interpretation of what the city needs. Further and more detailed interpretation is called for in order to determine the exact specifications of all of the desired functional components. For example, consider the desk top models. Should they be IBM clones or Macs? How much hard drive space is needed for each machine? How much random access memory is required? What should the processor chip speed be? What should the operating system be? Turning to the telecommunications technologies a host of other interpretive questions arise. What type of cabling should be used? Will plain old twisted pair phone wiring (POTS) do? Or is coaxial cable needed which is faster, more secure, but more expensive? Is fiber optic called for which is even more expensive, faster, more secure, and more expensive? Will a stand alone e-mail system like Lotus Notes be needed or can the city rely on the e-mail packages that come preconfigured with the computers like Outlook Express? What software applications such as word processing, spreadsheets, or databases are needed?

Answers to each of these questions and a host of additional questions begins to define a new technology reality for the city. Defining a new reality is what anticipatory hermeneutical interpretation is all about. It is visionary in the sense that it anticipates a
future state of affairs based in large part on history, a knowledge of the current state of affairs, a disconnect between way things are now and the way things might be as imagined in the minds of city administrator, the finance, director and the technology expert, all of whom have some sense of what a new technology future for the city might encompass. Although that sense of the future is incomplete and needs to be filled in by further interpretations of possibilities. Because of the open-endedness of any possible future this means that anticipatory hermeneutics is never complete in any formal sense. It is always cut off at some arbitrary point, leaving the decision makers with some degree of uncertainty about whether they should have continued to think more about other possibilities.³

Also note that just three people – the city administrator, the finance director, and the technical expert – are interpreting the future technology reality for all of the city workers who will be using the new equipment. This is an exercise of unilateral power over those workers. To expand the scope of power some potential end users might be consulted about their needs and preferences because they probably have a better understanding of the nature of their work than do the managers and the technical expert.

To complicate the anticipatory interpretive process of defining a new technology reality consider that in the foregoing example proprietary software was mentioned, namely IBM clones and MACS and the Lotus Notes e-mail client and Microsoft’s Outlook e-mail program. In many political jurisdictions it is against procurement rules and regulations to specify name brands because that precludes the possibility of some vendors bidding on a government contract and competition for a government’s business has been a long standing value underlying government contracting. Consequently many
procurement systems require the government customer to write requirements and specifications for technology products and services without mentioning specific brand names. This creates interpretive confusion when a government customer puts out a request for bids because they do not know what might be in the proposals they receive.

Now let us suppose that the city puts out an ambiguous request for bids and three potential vendors have responded: a big box electronics store like Best Buy, a national vendor like Dell Computers, and “Ralph’s Technology Solutions” a local computer firm which happens to provide the lowest bid. Unfortunately, the bid contains a number of features that the technical expert is uncertain about. First is a “no name” processing chip with a dubious performance history. Second, the word processing, spreadsheet, and database software for each personal computer comes from a minor league player in that segment of the technology industry and may not meet the needs of the city. This will also require that the city employees be trained on the new software modules at an unanticipated expense. Third, Ralph’s Technology Solutions’ offers only a 90 day warranty and has been in business for only two months. There is also some question about how long the small company will remain in business so that it might provide continuing support.

If the city operates under a lowest bid rule, they will be stuck with a new technology reality that may not meet their needs because of the ambiguity of the hermeneutical process of arriving at the final vague proposal for bids. The city is operating on a foundation of anti foundationalism because the procurement process does not allow them to specify precisely what they need. In other words, there is no full
interpretive understanding of what the city really needs for their new technology reality to be essentially realized.

Fortunately many political jurisdictions do not hold to the rule of the lowest bidder. They allow for “best value” procurement which means that the government customer can be more precise in stating needs that usually come with a high price tag, but are essential to effectively conducting the business of government. For example, in a lowest bid situation a public agency may have to accept the lowest bid for pens say at 5 cents per unit but they may discover that the pens run out of ink after only a few days. In a best value procurement situation, an agency may be able to specify a certain type of pen that will not run out of ink for several weeks, but it might cost 10 cents per unit. Under best value procurement, the agency will probably opt for the more expensive pen reducing the uncertainty about what it is getting along with reducing some of the foundational uncertainty under which it is operating. Nevertheless there will always be some uncertainty when anticipating the future of a contractual agreement.

Negotiated Hermeneutics

If the procurement rules governing the city allow for best value purchasing, then an entirely different type of hermeneutical process emerges. I call it negotiated hermeneutics because it allows the city and its potential vendors to engage in a discourse about what the city needs, and what the vendors can offer. Thus reducing the uncertainty of the lowest bid contract.

The opportunity for negotiated hermeneutics arises when a public agency uses a request for proposals (RFP) in its procurement process. An RFP process represents an increasingly larger domain of discourse between the government customer and the
potential vendors. It also expands the opportunity for hermeneutic interpretation of what the government customer needs and what the vendors can provide. A broader and deeper mutual understanding of a potential new reality can be achieved through a discourse that increases some of the certainty that the public agency will get what it needs, not to mention that the vendor will also get a better idea of what it is getting itself into. This is particularly true when contracting for services, not just technology services.

In general a Request for Proposals (RFP) process may be used when the goods or services a public agency needs can be provided in several different ways, the qualifications and experience of the vendors differ, or the quality of the goods or services to be delivered are significant factors of consideration, in addition to price. Also the responses to the RFPs may contain varying levels of service or alternatives which lend themselves to negotiation.

The following is how Miami Dade County handles its RFP process of procurement of good and services for its technology needs which can apply to a wide range of the county’s procurement and contracting needs.\(^5\)

Step 1: the county’s user department requests a RFP for it technology needs.

Step 2: the centralized procurement management department prepares the RFP in conjunction with the user department to make sure that the contracting officers and the ultimate users of the new technology are on the same page as to what the user ultimately needs.

Step 3: the board of county commissioners reviews and approves the request to advertise the proposal.

Step 4: the RFP is advertised.
Step 5: the procurement department along with the requesting department holds a pre-proposal conference with the various vendors to get a clearer understanding of what the county needs and wants, and what the vendors can supply. During this step, potential vendors often have the opportunity to demonstrate how their technologies work, giving the government customer a better idea about what they might be getting for the taxpayers’ money.

Step 6: the proposals are received from the vendors.

Step 7: the proposals are evaluated by the central procurement department and the requesting department to determine which of the proposals best meets its anticipated requirements.

Step 8: negotiations take place between the county and the vendors over what products and/or services will be delivered under the impending contracts to make sure that anticipated requirements are met.

Step 9: the county manager evaluates the proposals in conjunction with the procurement department and the requesting department to determine which proposal best meets the needs of the county. If one does, the county manager recommends awarding the contract. If not, another RFP process may be initiated.

Step 10: the board of county commissioners either approves the award of the contract or advises otherwise.

Notice that the RFP process for our hypothetical city does not preclude Ralph’s Technology Solutions from entering into the bidding, proposal, and negotiation process. There is sufficient transparency in the procurement process to allow Ralph’s small business to compete for the government’s business. What does do is provide the
potential vendors with an opportunity to sit down with the city to discover ways of meeting the technology needs of the city. It also allows the city to develop a more comprehensive, precise, and detailed understanding of its technology needs along with a better understanding of which vendor might best fill those needs and meet the best value criterion for the city. This helps to insure that the city actually gets what it needs to perform its essential work. The pre-proposal conferences and the negotiations opens up the domain of discourse between the city and the vendors so that the potential new technology future of the city can be made more explicitly interpreted and understood by all parties concerned. This is hermeneutics at work because it expands the horizon of mutual understanding. It also decreases the amount of foundational uncertainty in the procurement and contracting process.

**Administered Hermeneutics**

Administered hermeneutics may sound like an odd term, but it is something that is needed because once a contract is entered into between a public agency and a vendor it needs to be administered. This is traditionally called contract administration and it usually involves the agency monitoring what the contractor is doing to see if it is in compliance with the terms of the contract. It can also mean that the vendor is monitoring the city to make sure the city is doing what it promised to do in the contract. Both activities require ongoing interpretations of what each party is doing to see if it is in compliance with the agreed upon contract.

Step back for a moment and consider something very important. Once a contract is entered into by two parties an entirely new social, political, legal, and economic reality is created, one that was not there before. Each party to that new reality must have some
degree of mutual understanding of exactly what that reality is and what that reality might become in the future or how that reality might come to an abrupt and unexpected end or at least not function very well. Consequently, that new reality needs to be administered carefully. This means attending carefully to the meaning of the contract and the changing technological, economic, political, and social context within which the contract functions. As the context or conditions under which a contract is formed change, so can the meaning of the contract.

Once a contract has been written and agreed to, three general problems tend to occur. First, people sometimes forget what was agreed to do under the terms of the contract. At such a point, the parties need to return to the contract to try to achieve a mutual understanding of obligations and commitments through interpretations of the text of the contract. Hermeneutical inquiry is required to reorient both parties to the correct meaning of the contract and a correct understanding of the mutually shared new reality. The second problem is that something was agreed to in negotiations but it was inadvertently left out in the actual writing of the contract. Although it might be implicitly inferred to be in the contract, and the parties to the contract may have an expectation that it should have been included in the contract even if it was not. In those cases, an additional agreement may need to be reached and in some cases the contract may need to be amended or a new and separate contract established to stand along side of the original contract. The third problem is that something unforeseeable by one or both parties might happen in the future that might necessitate a change in the meaning of the contract or an actual change in the contract itself, and hence a change in the new reality that both parties share in the hope of prospering together.
All of this can be explained through an expansion of our hypothetical case. Let us assume that during the pre-proposal conferences and in the negotiation stages of the RFP process, the city discovers that it would be better to outsource their personal computers, related software applications, the telecommunications infrastructure, and even the city’s web page. Outsourcing is usually undertaken by a public entity when it realizes that some non-mission critical operations are cheaper to rent than to own. In our present case, this is referred to as “seat management” in which the vendor promises to deliver to the city all of its word processing, spreadsheet applications, database applications, and telecommunications applications on a per “seat” fee. This is a common pricing agreement for this type of situation. The vendor provides the hardware and software for each “seat” or workstation and the related telecommunications technologies to allow the workstations to share data and applications software and have access to the Internet.

Now suppose that the vendor discovers that the city underestimated the number of seats or workstations that it needed. The original 100 new personal computers now grew to almost 150 new personnel computers. There would be no problem under the contract if the contract is written on a “fee for work seat” basis and the city agrees to pay for each additional work seat which it may or may not have to do depending upon how the contract was written. It will, of course, cost the city more for each additional seat but they may have the managerial discretion under the contract to specify how many more seats to add to the contract. All of this decision making would require the city and the vendor to return to the contract and reinterpret its meaning. After doing so, both parties may discover that the city has the right to request as many additional seats as it wishes to for an agreed upon price per seat. The city adheres to the authority given to it by the contract
and orders only an additional 25 seats with a promise to add 25 more seats during the next fiscal year. The city is happy with its autonomy to make this decision and the vendor is all too happy to supply the additional seats at an additional price. A blissful hermeneutic accord has been reached because a relatively firm foundation was in place – the contract itself. This solves the problem of forgetting what was in the original contract itself.

Suppose further that the vendor underestimated its ability to provide the telecommunications technology to get all of the seats hooked up into a client/server configuration so they may share access to data and applications software, and have access to e-mail and the Internet. Unlikely? No. Vendors often underestimate their own capabilities. In this case, the vendor would have to hire a subcontractor to handle the telecommunications technology and pay for it out of its own pocket because they promised to provide this service in the contract and no where in the contract does it say that the city must pay an additional fee for the work of the subcontractor. Obviously the vendor is unhappy because this will eat away at the vendor’s profits but it may not be enough to break the contract.

Suppose also that both parties simply assumed that the city employees would know how to work with the new software applications when in fact the new applications are very different from the old applications. Thus the workforce will have to be trained on the new software applications. Both parties return to the contract thinking that some provision for training would be contained in the contract but the contract is mute on any issues of training. An omission was made by both parties about a possible future occurrence that was overlooked. Since neither party is at fault, they agree to jointly hire
training consultants and share 50—50 in their costs in an effort to keep the relationship
between the city and the vendor under the contract an amicable one. This solves the
problem of assuming something was in the contract when in fact it was not, but it has
become a disappointment for both parties.

Both parties try to blame the city’s technology expert for not foreseeing this but
then they realize that she retired before the negotiations were finalized and the contract
was signed. The city did not expect this problem, but it was staring them in the face. They
simply did not know it because they had no prior experience, although the vendor should
have known. This is a problem as many public agencies are experiencing demographic
shifts in their work forces where seasoned, knowledgeable, and experienced employees
are leaving the public service only to be replaced by younger, less experiences, less
seasoned, and less knowledgeable workers who because of their inexperience have
difficulty in anticipating future events.

Now let us assume that 18 months have passed and the city and the vendor agreed
to use the Microsoft family of products. The vendor acquired licenses for Microsoft’s
Windows XP Professional system; an expensive proposition. Now Microsoft is releasing
its new version of Windows called Vista. Neither party can remember off hand who
would be responsible for software upgrades. They return to the contract to discover that
the vendor agreed to provide for new software upgrades for the next five years, although
the vendor had no idea that Microsoft would be coming out with a new operating system.
The city is relieved that it does not have to pay for the upgrades, but the vendor is very
unhappy because they have to pay for the upgrades to the new Windows platform. The
profit margin on this outsourcing deal has now gotten very low. The vendor did not see
the upgrade coming, nevertheless the contract anticipated an unforeseeable future event. The city was protected but the vendor was hurt. The contract provided a stable enough foundation to protect the city, but not the vendor.

In each of these hypothetical examples the contract was administered hermeneutically by each party returning to the text of the contract to rediscover the meaning of what was agreed to in the contract. There were a few “bumps in the road” so to speak but the new shared reality of the contract persisted even though the vendor was not happy with some of that shared reality. A foundation – the contract -- was still in place to hold the shared reality of the city and the vendor intact.

**Contested Hermeneutics**

Contested hermeneutics occurs when two parties cannot agree on what the contract has to say perhaps because of omissions, or because it was poorly written, or because one party willfully or unintentionally cannot fulfill some contractual obligation. Usually the vendor and may have to pay a monetary penalty for non compliance with the contract provisions leading to possible litigation. Let us continue with our hypothetical example.

Suppose our city insisted on having a one day turn around time for system break downs meaning that the vendor agreed to have someone on site within the same or next business day to fix the technical problem and get the system up and running again. The city was smart enough to put monetary penalties into the contract specifying exact dollar amounts for missed, delayed, or unfinished service repairs. This is not an uncommon contract provision in many public sector out sourcing arrangements.
Now two problems have arisen. One, the vendor’s overall business is suffering losses and one way they dealt with those losses was to let some of their technical support people to go. Consequently the vendor has missed an increasing number of service calls for the city, often by days and the city is withholding contract payments to the vendor to cover the monetary penalties for non compliance with service agreements which worries and angers the vendor straining their relationship with the city. The second problem is that the contract does not specify what a system breakdown means. Is it the failure of a piece of hardware or is it a failure of a piece or software or is it both? The contract simply contains the words “system breakdown.”

The vendor decides to threaten to file suit against the city for the withheld contract payments on two grounds. One is that they could not foresee their loss in overall company profit and they had to let the technical support staff go. Although they are slow in responding to service calls, they are making a good faith effort to do so and should not be penalized for conditions not under their control. The other ground is that they are indeed responsible for hardware breakdowns which rarely happens unless the city is negligent in their treatment of the hardware devices which they are on occasion (like spilling liquids into a personal computer or dropping a lap top on the floor or cutting a fiber optic cable during an office remodeling). These could be interpreted as actions of the city for which they should be held responsible and pay for out of city coffers. The vendor should not be responsible for the negligence of the city.

More importantly, the vendor claims they have no responsibility for problems with software malfunctions because the city requested proprietary software in the contract. So if the software is not doing what the maker said it should be doing or if the
software is malfunctioning in some way then it is the responsibility of the maker of the software to rectify the problem, not the vendor. Thus the original software maker should be held accountable by the city, not the vendor who does not have access to the source code of the proprietary software to fix the problems. The city can of course counter this claim by saying that the vendor did not offer them the proper software applications to conduct its essential business processes.

Now things have come so contentious between the city and the vendor that neither party is willing to come to some agreement about the meaning of the words in the contract that assign legal rights and responsibilities to one or the other parties. When this happens a lawsuit usually ensues and the meaning of the contract falls into the hands of the lawyers for each of the parties and possibly into the hands of a judge. Then it becomes the job of the lawyers to interpret a meaningful settlement between the two contesting parties or ultimately such a hermeneutical judgment might fall into the hands of a court and a judge, but most vendors and public agencies try to settle such matters out of court and away from unfavorable publicity.

Ultimately under contested hermeneutics each party turns over their responsibility for coming to some mutual understanding to a third party who defines the meaning of their relationship for them according to the third party’s interpretation of not only the contract but also related conditions. This could mean that the contract is declared null and void and the relationship between the two parties is terminated. The foundation of their once mutually profitable relationship has crumbled. There is no longer anything essential about their relationship in providing public services via a contract.
The Case of San Diego County

The classic case of a public sector outsourcing deal that went sour occurred in 1999 when San Diego County entered into an outsourcing contract with Pennant Alliance, a four-partner group of private-sector firms led by the Computer Services Corporation (CSC), to manage the county’s entire IT processes for an initial estimated amount of $644 million for seven years.8

The reasons behind the deal were simple. The county expected to save money by eliminating some 275 current IT employees and some 100 contractors, and CSC would assume the responsibility of dealing with the county’s antiquated legacy systems. The plan was to replace the county’s aged and dysfunctional telephone system that often failed to work, replace old 286 and 386 PCs that could not support modern software applications with modern workstations, replace an old LAN and a WAN that frequently went down, replace the IT staff who were knowledgeable about old mainframe technology but not modern client/server technology, replace old legacy applications with two new ERP systems (one for finance and one for human resources), and improve the functionality of the county’s web portal. There were some initial successes. Some 2,000 new state-of-the-art PCs were installed, 1,000 phones were replaced, 533 of the county’s legacy applications were assessed, the speed of the county’s Internet was increased significantly, security vulnerabilities were fixed, and 22 help desks were consolidated into one help center.

In 2002 bitter contract disputes between the county and CSC emerged over additional costs, seemingly poor service from CSC, and a late ERP implementation. (ERP stands for enterprise resource planning which is a rather ugly term for an often ugly set of
software modules that promise to integrate all of an agency’s data across all of its functional operations.) From CSC’s perspective, the project went $10 million over budget and required the addition of 300 extra staff assigned to the job. Then Pennant Alliance was struck with a fine of $250,000 for failing to get all of the county’s staff on a common e-mail system. Also several service levels specified in the contract with the county were missed, resulting in fines to the Pennant Alliance and CSC in disputed amounts ranging from $2.1 million to $3.5 million. Finally, the county withheld $45 million in payments to the group because the ERP systems were not implemented on schedule. Although the county had built in safeguards in the contract that allowed them to opt out of the deal with CSC and the Pennant Alliance without any penalties, the county found itself stuck in the relationship because it no longer had the IT talent on hand to take back its IT operations. Relations between the county and the contractor were strained as both threatened litigation. The foundation of their relationship was beginning to crumble. The contract was poorly written, vague in some respects, and open to conflicting interpretations, leaving their future relationship shaky from the start.

In January of 2006, San Diego signed a seven-year, $650-million contract with Northup Grumman Information Technology to run the county’s IT operations. The county seems to have learned its lessons from its prior mistakes. The new contract is much more specific, containing many more definitions of acceptable service levels and clearly identified penalties if the contractor does not meet those service levels on time and to the county’s satisfaction. Generally speaking, outsourcing IT functions in the public sector can work as long as a contract is well written and well managed.
What do the woes of San Diego County and CRC have to do with hermeneutics? Well there were interpretations of meanings and misinterpretations of meanings at every turn. The contract went over budget by $10 million partly because the county seriously underestimated the number of legacy systems it needed to replace and CRC seriously underestimated the number of technicians needed to do the work, and none of this was spelled out in the contract. Why? Because the two parties had never entered into such a contract for work like this before. Anticipatory hermeneutics was lacking.

When they did enter into the contract, it was not administered very well hermeneutically. Misinterpretations were associated with the inability to get the entire county on a common e-mail platform because the contractors were not sure how to do it. The disputed amounts over the fines for missing service levels (the $2.1 million to $3.5 million range) were due to unclear language in the contract, and conflicting claims between the county and the contractors. This became quite clear when the contractors discovered that the reality of the situation did not match with the meaning of the contract. They discovered that the county had many more legacy systems in place than originally specified and it was not clear in the contract who was to pay for the replacement of those systems—CRC or the county? The late ERP implementation which led the county to withhold $45 million in payments to CRC was due to CRC’s inability to in vision unanticipated problems with the implementation of the software; problems that were not covered in the contract. Although there was language in the contract that would allow both parties and even a third party to come to the same interpretation that the county could get out of the contract if they wanted to, the reality of the situation, not the contract itself, prevented them from doing so. Both parties could easily interpret the reality of that
situation but there was really little that either party could do about it. They were stuck with each other in an uncomfortable and often acrimonious reality.

The contracted agreement almost reached contested hermeneutics with threats of litigation. Fortunately the contract was well written enough to specify the ending date of the contract that saved both the county and the consulting group from further pain. The new contract with Grumman Northrop seems more hermeneutically sound with the addition of many more detailed, precise, and clear provisions added to the new contract. Hopefully that new contract will lead to a firmer foundation for mutual prosperity for both parties.

To summarize so far, in situations such as government contracting, hermeneutical interpretation seeks to achieve a mutual understanding between or among parties to what a contract says and consequently what the contract requires various associated parties to do under its terms. Such interpretation also strives to achieve a mutual understanding of the social, political, and economic contexts upon which the contract and the parties to it stand because those contexts can change. As a result, the meaning of what the contract says can also change. In this respect, the meaning of contracts and the situations upon which they were written can be fluid. This can require constant reinterpretations of the contract and the situation. As such, the foundations of a contract agreement between a public agency and a for profit or not for profit organization can shift over time often calling for a reinterpretation of the meaning of the contract and its context.

A Major Question of Hermeneutical Interpretation

The federal government has raised a monumental question of hermeneutical interpretation: What is a government job and what is a private sector job? The answer to
that dual question to our traditional understanding of government and the civil service is open to wide interpretation.

OMB Circular A—76 applies to a wide range of government operations, not just information technology jobs. A—76 directs all executive agencies to identify government jobs that are not “inherently governmental” and to release those jobs so that private-sector firms may bid to perform them. The logic behind A—76 is simple: There are some federal government jobs that do not have to be performed by government workers if the work can be performed by a private firm as effectively or more effectively than by a government worker and at a reduced cost to the federal government. Such jobs as food service, custodial service, and secretarial service do not necessarily have to be performed by federal workers. Often jobs like these can be performed by private firms at a significantly reduced cost to the federal government. Increasingly more professional jobs such as IT technicians, budget analysts, accountants, and policy analysts are being considered for outsourcing because they can be interpreted as being not inherently governmental.

But what is an inherently governmental job and what is not an inherently governmental job? In other words, what governmental functions must be performed by civil servants and what jobs can be contracted out to private or not for profit organizations? The answers to these questions are a matter for interpretations which may differ from situation to situation making them contextual and anti-essential without a firm foundation.

The wording of the definition of a governmental job and a commercial job in OMB Circular A—76 is obtuse enough to cause confusion as well as differing
interpretations of what is governmental and what is commercial. See the appendix for the exact wording of A—76.

Generally speaking an inherently governmental activity is one that is intimately tied to the public interest and requires considerable public policy discretion on the part of the jobholder in making decisions that bind the federal government to a commitment of funds or a new course of action. A commercial activity is one that can be performed under contract because it does not require a public policy decision or commit the government to an expenditure of funds or a new course of action.

For example, under this interpretation of A—76 a food service employee working for a branch of the military does not need to be a uniformed member of the military in order to prepare a meal for a group of troops. But the food service employee would have to be a government employee if her or she had the discretion to determine what type of meal to provide the troops. In other words, the employee could be a commercial employee if he or she simply prepared a meal of beef stew with vegetables for the troops, but the employee would have to be a government employee if he or she had the authority to decide that the troops would be given a dinner of filet mignon and lobster tails with a radicchio and gorgonzola salad which would be considerably more expensive than beef stew and vegetables. In other words, only a government employee can change the level or quality of a good or a service, not a commercial employee.

In some circumstances the logic behind A—76 makes some sense. There are some former government services that probably can be provided commercially under contract to a private sector organization, but there can be some circumstances in which the line between inherently governmental and commercial activities is unclear and open
to interpretation or perhaps misinterpretation, making an A–76 determination a hermeneutical one.

Unfortunately, there are no universal, a priori standards for making a valid hermeneutical interpretation about the meaning of a contract, the facts of a situation, or the rightness of a proposed course of action. There are only historical and social conventions that lend support to the validity of any interpretation of meaning.\textsuperscript{11} If one really needs some foundation to establish the essential meaning of an interpretive claim to truth, one can follow Richard Rorty’s line of thought about the nature of truth as being established within the context of an ongoing conversation among a group of people who share a common culture and language—a shared reality—that that allows them to establish norms about the truthfulness of interpretations.\textsuperscript{12} This will not, however, satisfy someone who is seeking an essential foundation for the meaning of a contract that will compel the parties to act in accordance to some objective criterion stipulated in the contract.

**Summary**

Generally speaking, contracts are funny devices when viewed from the dual tensions between essentialism and anti-essentialism, and foundationalism and anti-foundationalism. A well written and well understood contract can provide a good foundation for the start of an essential alliance that meets the needs of both parties, but contracts are open to interpretation, reinterpretation and misinterpretation which can make them fluid and somewhat shaky, moving them closer to the side of anti-essentialism and anti-foundationalism. Then, of course, most contracts have a termination date which
leads to the ultimate end of no foundation except for mutual respect and trust that might exist among parties outside of the framework of an actual contract.

This leads to interesting questions both epistemologically and ontologically: “Are mutual respect and trust the true foundation that binds people together in essential agreement and wards off threats of anti-foundationalism?” This is an epistemological question because it leads to inquiries about what constitutes mutual respect and trust, and how do we know them when we see them? More importantly, it leads to the question of how do we foster such mutual respect and trust when we find it among a group of people, a culture, or even a nation?

It is an ontological question because it begs us to ask if mutual respect and trust are indeed foundational. Are mutual respect and trust essential for legitimate and effective public action? In many respects this question can be answered on the basis of the quality of the contract that public agencies may enter into with private firms and non profit organizations to provide services to citizens. Yet contracts can differ with regard to how well they are written and interpreted by relevant parties, calling their essentialism and foundationalism into question. As more and more public agencies at all three levels of government are turning to contracting for services that were once provided by civil servants, much more careful attention must be paid to the quality of the contracts that are written because those contracts are becoming the new foundation of public administration; a foundation that is open to potentially conflicting interpretations of what the public service is all about. For example, one still hears quiet a bit about the accountability of the public servant to the agency and ultimately the citizens, if more and more private firms and not for profit organizations are delivering more and more services
to the government and to its citizens, accountably could become redefined as being
simply writing good contracts and good contract administration.
Appendix

Inherently Governmental or Commercial Provisions of OMB Circular A-76

1. Inherently Governmental Activities. The CSO shall justify, in writing, any designation of government personnel performing inherently governmental activities. The justification shall be made available to OMB and the public upon request. An agency shall base inherently governmental justifications on the following criteria:

a. An inherently governmental activity is an activity that is so intimately related to the public interest as to mandate performance by government personnel. These activities require the exercise of substantial discretion in applying government authority and/or in making decisions for the government. Inherently governmental activities normally fall into two categories: the exercise of sovereign government authority or the establishment of procedures and processes related to the oversight of monetary transactions or entitlements. An inherently governmental activity involves:

(1) Binding the United States to take or not to take some action by contract, policy, regulation, authorization, order, or otherwise;

(2) Determining, protecting, and advancing economic, political, territorial, property, or other interests by military or diplomatic action, civil or criminal judicial proceedings, contract management, or otherwise;

(3) Significantly affecting the life, liberty, or property of private persons; or

(4) Exerting ultimate control over the acquisition, use, or disposition of United States property (real or personal, tangible or intangible), including
establishing policies or procedures for the collection, control, or disbursement of appropriated and other federal funds.

b. While inherently governmental activities require the exercise of substantial discretion, not every exercise of discretion is evidence that an activity is inherently governmental. Rather, the use of discretion shall be deemed inherently governmental if it commits the government to a course of action when two or more alternative courses of action exist and decision making is not already limited or guided by existing policies, procedures, directions, orders, and other guidance that

(1) identify specified ranges of acceptable decisions or conduct and
(2) subject the discretionary authority to final approval or regular oversight by agency officials.

c. An activity may be provided by contract support (i.e., a private-sector source or a public reimbursable source using contract support) where the contractor does not have the authority to decide on the course of action but is tasked to develop options or implement a course of action, with agency oversight. An agency shall consider the following to avoid transferring inherently governmental authority to a contractor:

(1) Statutory restrictions that define an activity as inherently governmental;
(2) The degree to which official discretion is or would be limited, i.e., whether involvement of the private sector or public reimbursable provider is or would be so extensive that the ability of senior agency management to develop and consider options is or would be inappropriately restricted;
(3) In claims or entitlement adjudication and related services (a) the finality of any action affecting individual claimants or applicants, and whether or not review of the provider’s action is de novo on appeal of the decision to an agency official; (b) the degree to which a provider may be involved in wide-ranging interpretations of complex, ambiguous case law and other legal authorities, as opposed to being circumscribed by detailed laws, regulations, and procedures; (c) the degree to which matters for decisions may involve recurring fact patterns or unique fact patterns; and (d) the discretion to determine an appropriate award or penalty;

(4) The provider’s authority to take action that will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of the provider’s need to resort to force in support of a police or judicial activity; whether the provider is more likely to use force, especially deadly force, and the degree to which the provider may have to exercise force in public or relatively uncontrolled areas. These policies do not prohibit contracting for guard services, convoy security services, pass and identification services, plant protection services, or the operation of prison or detention facilities, without regard to whether the providers of these services are armed or unarmed;

(5) The availability of special agency authorities and the appropriateness of their application to the situation at hand, such as the power to deputize private persons; and
(6) Whether the activity in question is already being performed by the private sector.

2. *Commercial Activities.* A commercial activity is a recurring service that could be performed by the private sector and is resourced, performed, and controlled by the agency through performance by government personnel, a contract, or a fee-for-service agreement. A commercial activity is not so intimately related to the public interest as to mandate performance by government personnel. Commercial activities may be found within, or throughout, organizations that perform inherently governmental activities or classified work.
References


3. Ralph P. Hummel observes that:

   In hermeneutics, interpretation is never finished. You interpret a situation at one time, go away for a little while to mull things over and let developments happen, then you return at a different point in time and, changed by your first contact, approach the original event, now also changed, from a new point of view. This path of interpretation is always one of looking backward to the way we were. Tracing this path by projecting it forward and thinking ahead to how situations might develop is anticipatory hermeneutics. (Personal communication.)

   I would add that as a matter of practicality, anticipatory interpretation is always shut down somewhat arbitrarily, otherwise nothing would ever be decided and future actions would never take place.

5. An explanation of the Miami-Dade County logic for using requests for proposals can be found at www.miamidade.gov/dpm/rfp-process.asp (accessed December 10, 2006).

6. Schooner, note 4 above.


13. See note 10 above.