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Emerging Policy and Practice Issues (2010)

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SESSION 9

EMERGING POLICY AND PRACTICE ISSUES

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I. SHIFTING LEADERSHIP AND PRIORITIES

Last year, we celebrated the recent confirmation of Daniel Gordon as the new Administrator of the Office of Federal Procurement Policy (OFPP), bemoaned the Congressional delay of Martha Johnson's confirmation as the administrator of the General Services Administration (GSA), and could only speculate whether (and from where) some discernable direction might arise in terms of the administration's acquisition reform agenda. See also Steven L. Schooner, *Federal Contracting and Acquisition: Progress, Challenges, and the Road Ahead*, Chapter in FRAMING A PUBLIC MANAGEMENT RESEARCH AGENDA (IBM Business of Government, 2010), available at, <http://ssrn.com/abstract=1542830>. As we approach 2011, a different landscape awaits.

This year, the most dramatic source of activity emanated from the Defense Department, primarily through USD(AT&L) Ashton Carter's Efficiency and Productivity Initiative. *Aviation Week* recently reported that: "Ashton Carter plans to resign his tenured position at Harvard University and continue his work as procurement czar at the Pentagon 'as long as the president and the secretary of defense want me to keep doing what I'm doing[.]' ... [That's significant because most observers agree that] the Pentagon's efficiency initiative — a drive to conduct business leaner and slow the growth of the defense budget — is unlikely to succeed without the teamwork of Carter and Defense Secretary Robert Gates." More on this below.

Meanwhile, OFPP remained busy — impressively so, given its tiny staff. In addition to a host of challenges (demonstrating acquisition savings, rebalancing the federal/contractor workforce, and reimagining the organizational conflict of interest regime), for the first time in decades, the administration appears committed to investing in the acquisition workforce. See, e.g., <http://www.whitehouse.gov/omb/procurement> and http://www.whitehouse.gov/omb/procurement_index_other/topics. And a late-breaking topic to watch appears to be the Office of Management and Budget's (OMB's) initiative to reinvent the government's approach to the acquisition and management of its information technology (IT).

We remain unconvinced — and we attempt not to be distracted by — the dramatic rhetoric promising savings just waiting to be found in the acquisition system; nor do we believe that the system is capable of generating credible data demonstrating or validating the promised results. See, e.g., Peter Orszag, *Cutting Waste and Saving Money Through Contracting Reform* (July 7, 2010), available at <http://www.whitehouse.gov/omb/blog/10/07/07/Cutting-Waste-and-Saving-Money-Through-Contracting-Reform>. "In March 2009, the President directed agencies to save \$40 billion annually by [FY] 2011 through contracting and to reduce the use of high-risk contracts. Last December, OMB reported on agency plans to save \$19 billion in FY 2010, and *agencies are on track to meet that savings goal* as well as the larger one for 2011." (Emphasis added.) See also, July 15, 2010 Testimony of OFPP Administrator Daniel I. Gordon ("There is much work ahead, but early results show that we are on track in our efforts to achieve savings and reduce contracting risk."), available at http://www.whitehouse.gov/sites/default/files/omb/legislative/testimony/ofpp/Gordon_testimony_715.pdf; *OMB Reports on Contracting Reform Successes*,

NOTES

52 GC ¶ 237. Rather, we continue to believe that real savings – as opposed to insignificant, symbolic gestures – will occur when the government curbs its appetite for spending. Reducing requirements – buying less goods and services – will generate savings. And only time will tell whether Congress and the agencies are serious about doing less, jettisoning programs, and eliminating existing mandates.

II. SPENDING: PLATEAU OR DOWNWARD TREND? AN END TO THE POST-MILLENNIUM PROCUREMENT SPENDING BINGE?

A. OK, It's Still A Lot of Money. Throughout the past decade, we continued to be surprised by the increased volume and rate of federal procurement spending. Using adjusted figures (yes, between FPDS and USASpending.gov, history is consistently being re-written), it appears that the annual increases in federal procurement – from 2001 through 2008 – were never less than three times the rate of inflation. The experts swore that the growth would taper, and, in 2009, the growth rate did slow and, apparently, finally, stall. Yet, in retrospect, the dire warnings that the current spending binge was a blip – and that procurement spending would promptly retract – were unfounded.

Now there seems to be greater consensus and empirical evidence that the procurement spending growth cycle finally has run its course. But the news is not all bad for contractors in that – at least for now – the plateau represents the high-end of a robust and sustained growth curve.

Federal Procurement Spending 2001–2010*			
Fiscal Year	Procurement Spending (in Billions of Dollars)	Percentage Increase or (Decrease) From Previous Year	Percentage Increase or (Decrease) in Consumer Price Index (CPI)
2010	\$534.5*	(~1)	0.1*
2009	\$540.4	(~0)	(0.4)
2008	\$541.3	13.9	3.8
2007	\$475.0	10.5	2.8
2006	\$429.8	9.8	3.2
2005	\$391.2	13.1	3.4
2004	\$345.8	8.8	2.7
2003	\$317.7	20.6	2.3
2002	\$263.4	18.0	1.6
2001	\$223.1		

*FY 2010 reflects preliminary reporting.

See www.USASpending.gov. Annual increases in the Consumer Price Index for All Urban Consumers (CPI-U) were extracted from the annual Detailed Report Tables, U.S. Department of Labor, Bureau of Labor Statistics, http://www.bls.gov/cpi/cpi_dr.htm#2010.

B. Big Business, Major Players. Looking behind the data, the concentration of spending amongst the largest contracting agencies and government contractors remains significant. For example, for fiscal year 2009:

- The Defense Department accounted for sixty-nine percent of the total procurement dollars awarded.

- The seven largest procuring agencies (DoD, Energy, HHS, GSA, NASA, VA, and DHS) accounted for ninety percent of the total dollars awarded.
- The 100 largest federal contractors received more than \$294 billion in contracts or more than half of the total dollars awarded.
- Conversely, the 521,036 contract actions they received, as a group, accounted for less than ten percent of the total actions.
- The top five federal contractors (Lockheed Martin, Boeing, Northrop Grumman, General Dynamics, and Raytheon) received more than \$112 billion in contracts or more than twenty-one percent of the total dollars awarded.
- Thirty-four firms received contract awards of more than \$2 billion.
- Sixty-nine contractors were awarded, individually, more than \$1 billion in contracts.

C. Data Quality: Incremental Improvement. Due in large part to the introduction of *USASpending.gov*, the procurement spending data to which the public enjoys access continues to improve, but it remains far from perfect. Consider, for example, that the government still lacks a means for quantifying *money actually spent* on contracts, as opposed to the amount of dollars awarded. While FPDS is far more user-friendly (for registered users) and visually pleasing (to casual users) in its current iteration, it seems less inclined to concatenate and publish obvious, significant, macro-level information. For instance, a casual user might conclude that, for whatever reason, FPDS apparently has not run or published a Federal Procurement Report since Fiscal Year 2007. Still, the greatest concerns lie with data input and accuracy, and in that regard, much work remains. See, e.g., *IG Faults SBA Efforts to Improve FPDS Data Quality*, 52 GC ¶ 99; *DHS FPDS-NG Data Incomplete, IG Finds*, 52 GC ¶ 70.

D. Grants: The Next Frontier. For now, it remains our little secret that, despite all of the attention focused upon government contracting, over the last decade grant spending outpaced procurement spending by more than sixteen percent. Indeed, grant spending exceeded procurement spending for eight of the last ten years. We can only hope that, at some point, the oversight and regulatory community shifts its focus from procurement to grants. If the government is serious about reducing its debts and its annual deficits, this seems unavoidable.

Federal Procurement and Grant Spending 2001–2010*		
Fiscal Year	Procurement Spending (in Billions)	Grant Spending (in Billions)
2010	\$534.5*	\$553.8*
2009	\$540.4	\$662.8
2008	\$541.3	\$418.1
2007	\$475.0	\$429.6

NOTES

2006	\$429.8	\$489.9
2005	\$391.2	\$441.6
2004	\$345.8	\$450.1
2003	\$317.7	\$493.7
2002	\$263.4	\$406.3
2001	\$223.1	\$330.8
*FY 2010 reflects preliminary reporting.		

Total Federal Spending, *www.USASpending.gov*.

III. TIME FOR REAL CHANGE? THE DOD EFFICIENCY AND PRODUCTIVITY INITIATIVE

From our perspective, the most important trends in 2010 emanate from the Defense Department's initiatives to squeeze savings, efficiencies, and productivity out of the acquisition regime. The volume and pace of activity have been high, and the scope and breadth of the initiatives are broad. See, e.g., Ashton B. Carter, *Memorandum for Acquisition Professionals, Better Buying Power: Mandate for Restoring Affordability and Productivity in Defense Spending* (June 28, 2010) available at [http://www.acq.osd.mil/docs/USD\(AT&L\)_Memo_to_Acquisition_Professionals_June_28_2010.pdf](http://www.acq.osd.mil/docs/USD(AT&L)_Memo_to_Acquisition_Professionals_June_28_2010.pdf). Accompanying slides emphasize the following goals and approaches:

Obtain 2-3% net annual growth in warfighting capabilities without identifying and eliminating commensurate budget increase by unproductive or low-value-added overhead and transfer savings to warfighting capabilities. Do more without more.

...

Providing Incentives for Greater Efficiency in Industry, including

- Leveraging Real Competition
- Using Proper Contract Type for Development and Procurement
- Using Proper Contract Type for Services
- Aligning Policy on Profit and Fee to Circumstance
- Sharing the Benefits of Cash Flow
- Targeting Non-Value-Added Costs
- Involving Dynamic Small Business in Defense
- Rewarding Excellent Suppliers

Adopting Government Practices that Encourage Efficiency

- Adopting "Should-Cost" and "Will-Cost" Management
- Strengthening the Acquisition Workforce
- Improving Audits
- Mandating Affordability as a Requirement
- Stabilizing Production Rates
- Eliminating Redundancy within Warfighter Portfolios
- Establishing Senior Managers for Procurement of Services
- Protecting the Technology Base

The September 14 “Guidance Roadmap” refined the message, packaging twenty-three “principal actions to improve efficiency” into five “major areas.” In many ways, particularly the use of italicized first person commentary interspersed throughout the text, the memorandum is unique. See Ashton B. Carter, *Memorandum for Acquisition Professionals, Better Buying Power: Guidance for Obtaining Greater Efficiency and Productivity in Defense Spending* (September 14, 2010), available at http://www.acq.osd.mil/docs/USD_ATL_Guidance_Memo_September_14_2010_FINAL.PDF. The Guidance Roadmap slide, http://www.acq.osd.mil/docs/USD_ATL_Guidance_Roadmap_September_14_2010.pdf, repackaged the initiative under the following headings:

- Target Affordability and Control Cost Growth
- Incentivize Productivity & Innovation in Industry
- Promote Real Competition
- Improve Tradecraft in Services Acquisition
- Reduce Non-Productive Processes and Bureaucracy

The guidance evolved into an implementation directive in early November. See Ashton B. Carter, *Memorandum for Secretaries of the Military Departments (and) Directors of the Defense Agencies, Implementation Directive for Better Buying Power—Obtaining Greater Efficiency and Productivity in Defense Spending* (November 3, 2010), available at [http://www.acq.osd.mil/docs/USD\(AT&L\)_Implementation_Directive_Better_Buying_Power_110310.pdf](http://www.acq.osd.mil/docs/USD(AT&L)_Implementation_Directive_Better_Buying_Power_110310.pdf). The implementation directive specifies dates by which numerous tasks should be accomplished.

A. Sidebar: Major Systems. Last year, we suggested that it was premature to conclude that major change has come to the major systems acquisition regime despite the good intentions behind the Weapons Systems Acquisitions Reform Act (WSARA). That opinion is, to some extent, fleshed out in the CSIS report, David J. Berteau, et al., *Implementation of the Weapon Systems Acquisition Reform Act of 2009: A Progress Report* (May 26, 2010), available at http://csis.org/files/publication/20100528_WSARA_Progress_Report.pdf (“Any reliable assessment of whether this objective has been achieved – i.e. the spirit of WSARA has been implemented – is going to take at least three to four years, given that cost and schedule performance data are lagging indicators and are unlikely to provide useful measures of effectiveness in the interim.”) The report cautions that the “emerging challenges for the acquisition system illustrate that legislation[, regulation, and policy guidance] are certainly necessary, yet they are far from sufficient to fix the defense acquisition system. Additional actions remain necessary to ensure better acquisition results in the future, including a greater focus on the acquisition workforce as a critical enabler and the backbone for successful acquisition outcomes.”

B. The Tanker Procurement: A Never-Ending Major System Acquisition Case Study. We previously noted that the Obama administration would inherit one of the hottest potatoes imaginable—the future of in-flight refueling for the Air Force. This incredibly important, high-profile procurement has attracted (and, frankly, merited) extraordinary attention. Last year, we joined the critics who do not understand why DoD or the

Air Force refused to fund competitive prototypes and conduct a fly-off. We went so far as to suggest that it was worth giving the two major players funds to provide *two* prototypes each – one larger, one smaller. Then, the Air Force could deploy the *four* tankers – for a year or even longer – and let the end users weigh in. Ultimately, we would prefer an outcome where both pricing and technical performance are based on experience and customer satisfaction rather than aspiration. In retrospect – particularly to the extent that the contract still has not been awarded – there seems little reason why the Air Force did not embrace this approach. This would have been at least somewhat consistent with the Navy’s approach with the littoral combat ship, where two contracts, each worth slightly more than \$3.52 billion, including options, call for Lockheed Martin and Austal USA each to assemble ten coastal warships. Christopher Drew, *Navy Awards Two Contracts to Build New Combat Ships*, NY TIMES (December 30, 2010); *Navy, LCS Design Instability Leaves Dual-Award Strategy on Uncertain Course, GAO Finds*, 52 GC ¶ 399. See also *KC-X Procurement Takes Another Turn*, 52 GC ¶ 400 (contract award delayed until 2011; proprietary information shared with competitors); *GAO Denies Protest of Air Force Rejection of Late Tanker Proposal*, 52 GC ¶ 331.

IV. ACQUISITION WORKFORCE: FINALLY, SOME ACTION

Last year, we were pleased that the acquisition workforce was increasingly, and seriously, addressed—both as a matter of policy and legislation. (We apologize here for again attempting to summarize the familiar tale that brought us to this point. The federal acquisition workforce declined dramatically due to congressionally mandated personnel reductions in the 1990’s. We agree with those who assert that the government has not hired an appropriate number of new acquisition professionals in any year since the 1980’s. Accordingly, a disproportionate share of the existing workforce is aging and, in large part, retirement-eligible; most of that workforce was neither hired nor trained to primarily purchase services using flexible contractual vehicles. In addition, as discussed above, the volume of purchasing exploded during the last decade. Thus, the government faces a problem of enormous proportions.)

We continue to applaud both the message and the delivery of that message by OFPP Administrator Gordon. Most importantly, he has acknowledged the existence of the problem. “The federal government has not invested in the acquisition workforce enough to allow it to adequately cope with the growth in contract spending or the increased complexity of agencies’ missions This inattention to the workforce resulted in increased use of high-risk contracting practices and insufficient focus on contract management, as well as the especially troubling phenomenon of agency dependence on contractors to support the acquisition function.” At the same time, he has articulated a vision for remedying the situation. “The Administration is committed to investing in the growth and development of the entire acquisition workforce The President’s Budget for FY 2011 requested \$158 million to increase the capability and capacity of the civilian agency acquisition workforce, and these funds will improve the ability of agencies to hire, train, develop, and retain entry-level as well as mid-level acquisition professionals OFPP established an annual acqui-

sition workforce human capital reporting requirement for civilian agencies, which should help institutionalize planning for our workforce and tie it more closely to mission needs as well as to agencies' budget processes ... [OFPP is] working closely with ... the Office of Personnel Management (OPM) to improve the hiring process for contracting professionals [and] ... conducting outreach to agencies to ensure that existing flexibilities for hiring and retaining employees are used, whenever possible." Testimony of Daniel I. Gordon Before the Commission on Wartime Contracting (September 16, 2010), available at http://www.whitehouse.gov/sites/default/files/omb/legislative/testimony/ofpp/2010-09-16_Gordon-OFPP.pdf.

OFPP Administrator Gordon also scores points for reminding Congress that the government's problems will not end with a wave of hiring. Training and development are equally critical, and impediments remain to the government effectively addressing these challenges. See, e.g., Vernon J. Edwards, *Foundational Training for New Government Contracting Officials: An Outline and Suggested Reading*, 24 N&CR ¶ 48 ("The surge in employment of new contracting personnel and the availability of high quality candidates ... give federal managers a once-in-a-lifetime chance to create a first-class corps of public administrators to run our \$500-plus-billion-a-year acquisition business. But ... federal managers must envision those officials as being more than administrative/clerical drones sitting in cubicles They must prepare the new hires ... to see their jobs in a larger context, so that they can fully understand the roles that they must play."). See also *DOD Acquisition Workforce Training Needs Improvement*, 52 GC ¶ 365; *DOD Acquisition Workforce Would Benefit From Best-Value Training*, GAO Says, 52 GC ¶ 365.

Following Frank Anderson's retirement in May, DoD announced that Katrina McFarland will serve as the President of the Defense Acquisition University (DAU). Vernon J. Edwards, *Feature Comment: Choosing the Defense Acquisition University's New President*, 52 GC ¶ 112 (envisioning a dramatically different model). The changes in leadership at the Federal Acquisition Institute (FAI) have been less transparent. We understand that Donna Jenkins remains the Acting Director.

Agencies have their work cut out for them, however, in funding additional acquisition billets and investing in training and professional development in an era of pay freezes and pressure to reduce government spending. Hopefully, repeating the mantra "return on investment" will sustain the current trend. See generally *DOD Civilian Workforce Plan Faces Challenges*, GAO Finds, 52 GC ¶ 327; *EPA Contract and Grant Workforce May be Insufficient*, IG Reports, 52 GC ¶ 357; *OFPP, DPAP Say Federal Contracting Is Improving*, 52 GC ¶ 239; *OMB Acquisition Workforce Plan Sets Framework, But Does Not Fulfill Mandate*, GAO Finds, 52 GC ¶ 154; *State Can Better Track CO Training Certifications*, IG Says, 52 GC ¶ 105.

V. THE OTHER PENDULUM: OUTSOURCING-INSOURCING

Throughout our careers, pendulums, waves, and cycles have served as popular metaphors for the "here we go again" aspects of acquisition reform. An oversimplified version of the baby-boomer storyline might begin in the mid-to-late 1980's, an era of robust spending with a series of

high-profile defense acquisition problems. (The Ill-Wind investigations and prosecutions served as the poster child.) The predictable reaction was a period of intense legislation and regulation and, of course, an increase in sanctions. (Consider, for example, the 1986 qui tam amendments to the False Claims Act and the Procurement Integrity Act.) Staffing of the acquisition functions – both operational and oversight – were at astounding levels by today’s standards. By the early 1990’s, however, agency heads and end users complained that the acquisition system was unresponsive and sought a more business-like approach. The 1990’s procurement reforms (again, at a macro-level) sought to reduce regulation and increase purchaser flexibility. (Think, e.g., in terms of the FAR Part 15 re-write – oral presentations, oh my!!! – and the proliferation of multiple-award, indefinite delivery/indefinite quantity contracts.) Alas, the new millennium brought a spate of bad news stories. (A short list might include the Air Force Tanker Lease/Druyun/Boeing debacle, a bottomless grab-bag of horror stories prompted by an understaffed acquisition workforce attempting to meet unrealistic expectations in an unforgiving environment in Iraq, and any number of post-Katrina clean-up contracts.) A new era of constraint and regulation is upon us, and Congress has begun to reinvest in the acquisition workforce for the first time in two decades. Analogous stories played out in prior generations.

Parallel to this saga, a new pendulum has begun to swing: outsource-insource. In past years we have noted that the government’s bipartisan outsourcing (or, at times, “competitive sourcing”) initiative had spanned more than fifteen years (and two two-term administrations), yet, last year, it seemed that insourcing was all the rage. The latest trend focused on “rebalancing” the federal and contractor workforces as a key element of overall acquisition reform. See, e.g., Notice of Proposed Policy Letter, *Work Reserved for Performance by Federal Government Employees* (March 31, April 19, 2010), available at http://www.whitehouse.gov/omb/procurement_index_work_performance; Ralph C. Nash, *Contracting-Out Policy: Guidance From The Office Of Federal Procurement Policy*, 24 N&CR ¶ 23 (“The most interesting aspect of this guidance is the functions that are missing from the illustrations in spite of the fact that many agencies have had these functions performed by contractors.”) To the extent that we have been consistently unpersuaded by much of the insourcing rhetoric and have fretted that much of the insourcing activity (particularly at DoD) is quota-driven rather than results-oriented, we are slightly more sanguine this year. See generally *CWC Probes Inherently Governmental Functions*, *PSC Oversight*, 52 GC ¶ 219; *Industry Suggests Changes to Proposed Guidance on Inherently Governmental Functions*, 52 GC ¶ 195; E. Sanderson Hoe & Phillip Carter, *Feature Comment: OFPP Issues Proposed New Definition of ‘Inherently Governmental,’* 52 GC ¶ 139; *OFPP Seeks Comments on Inherently Governmental Functions Guidance*, 52 GC ¶ 126; Ralph C. Nash, *Contractors That “Closely Support Inherently Governmental Functions”: They’ve Grown Like Topsy*, 24 N&CR ¶ 8 (“Trying to develop a competent Government workforce to award and manage contractors that closely support inherently governmental functions may be a sound short-term goal but it is poor long-term strategy. It makes ... more sense to develop a competent Government workforce to perform those functions that closely support inherently governmental functions.”).

No matter how the pendulum swings, the government faces enormous challenges managing its service contracts. See also Vernon J. Edwards, *Contracting for Services: Challenges For The Next Generation*, 24 N&CR ¶ 59 (“Services confront acquisition personnel with many challenges with which our experience in the acquisition of supplies has not prepared us to cope It seems unlikely that in the current economic and political climate the Government is going to significantly reduce its reliance on contractor services in the near term. Thus, the problem must be managed.”); Vernon J. Edwards, “*Tradecraft*” in *Services Acquisition: DoD’s New Policies*, 24 N&CR ¶ 55 (“While we think that the USD AT&L memo proposes to do some good things, the road to better services acquisition does not run through policy. While policy is necessary, it does not solve problems. People solve problems—people with know-how and skill. The DOD memo focuses on procedures, making only a passing, one-sentence allusion to the need for a more competent workforce.”)

A. Understanding The Outsourced Industrial Base for Services.

Despite its increased significance to the government’s ability to function, the government consistently appears to lack accurate insight into the extent and nature of its reliance on the private sector. One of our recent reports sheds light on this topic. Defense-Industrial Initiatives Group, Center for Strategic & International Studies, *Structure and Dynamics of the U.S. Federal Professional Services Industrial Base 1995–2009*, available at http://csis.org/files/publication/101112_fps_report_2010.pdf. The report details, with extensive macro- and micro-level analysis, how the government has grown into its permanent and growing reliance on contracts for a wide range of professional and support services. Over the fifteen-year period 1995–2009, the professional services industry expanded at a compound annual growth rate (CAGR) of 5.2 percent per year, from \$137 billion in 1995, to \$280 billion in 2009. Professional, administrative, and management services (PAMS) represented by far the largest segment within the federal professional services industry, accounting for \$93.6 billion worth of contracts in 2009, up from only \$27.4 billion in 1995.

During the same period, indefinite delivery vehicles (IDVs) experienced a remarkable 13.3 percent CAGR and, since 2006, accounted for a majority of all professional service contract dollars. From 2005 through 2009, multiple-award indefinite delivery contracts (IDCs or ID/IQ’s) have become a favored form of IDVs; they now annually distribute \$47.1 billion of contract funding, compared with only \$1.9 billion in 1995. Multiple-award IDC growth remained robust in the last five years, achieving a 16.8 percent CAGR for contract value and a 13.6 percent CAGR for number of contract actions.

The report identifies sustained areas of concern in service contracting:

- inadequate contract oversight,
- difficulties with the formulation of requirements,
- the usage of suitable contract vehicles,
- workforce issues—for contract surveillance in particular,
- lack of visibility and effective metrics for performance assessments,

- insufficient strategic leadership and independent management reviews,
- lack of risk assessments for contractors closely supporting inherently governmental functions, and
- fragmented organizational structures supporting services contracting.

Unfortunately, important policy issues regarding the U.S. professional services industrial base cannot be resolved due to lack of data. Specifically, as noted above, FPDS presents a substantial obstacle; it contains no data on contract performance despite the fact that acquisition regulations already mandate collection of contract performance data.

B. Another Nail In The “Personal Services Prohibition” Coffin? One intriguing, yet little-known trend we confronted this year is that contractor employees are more frequently suing the Government, alleging employment discrimination on the part of Government managers, supervisors, or even coworkers. See, e.g., Steven L. Schooner & Collin D. Swan, *Feature Comment: Suing The Government As A ‘Joint Employee’-Evolving Pathologies Of The Blended Workforce*, 52 GC ¶ 341 (October 20, 2010). At some level, this should not surprise us, as the government’s increased reliance on employee-augmentation contracts has blurred the distinction between contractor employees and civil servants throughout the government workspace. Across the government, it is increasingly common to find contractor personnel and civil servants working in the same offices and, all too often, performing the same or similar functions. And the federal courts’ and the EEOC’s willingness to define federal agencies as *de facto* employers of contractor employees seems to offer further evidence that the prohibition on personal service contracts is—or should now be deemed—a dead letter.

Moreover, our sense is that most Government managers and contracting professionals have not fully recognized their potential liability as a so-called “joint employer” of contractor personnel. Many a frustrated Government manager has favored outsourcing because it is easier for managers to jettison individual contractor employees, for whatever reason, than to terminate or reassign civil servants. Apparently, however, it seems increasingly likely that a contractor employee’s denial of a preferred assignment or an employment opportunity today could spur a discrimination claim against the agency.

VI. INFORMATION TECHNOLOGY: A NEW APPROACH?

[D]espite spending more than \$600 billion on [IT] over the past decade, the Federal Government has achieved little of the productivity improvements that private industry has realized from IT. Too often, Federal IT projects run over budget, behind schedule, or fail to deliver promised functionality. Many projects use “grand design” approaches that aim to deliver functionality every few years, rather than breaking projects into more manageable chunks and demanding new functionality every few quarters. In addition, the Federal Government too often relies on large, custom, proprietary systems when “light technologies”

or shared services exist. Government officials have been trying to adopt best practices for years But obstacles have always gotten in the way.

Vivek Kundra, U.S. Chief Information Officer, *25 Point Implementation Plan to Reform Federal Information Technology Management* (December 9, 2010), available at <http://cio.gov/documents/25-Point-Implementation-Plan-to-Reform-Federal%20IT.pdf>; see also *Administration Issues IT Procurement Strategy*, 52 GC ¶ 391. This has the makings of an ambitious reform agenda:

[H]ighlights of the implementation plan include:

- Turnaround or terminate at least one-third of underperforming projects in IT portfolio within the next 18 months
- Shift to “Cloud First” policy....
- Reduce number of Federal data centers by at least 800 by 2015
- Only approve funding of major IT programs that:
 - Have a dedicated program manager and a fully staffed integrated program team
 - Use a modular approach with usable functionality delivered every six months
 - Use specialized IT acquisition professionals
- Work with Congress to:
 - Consolidate commodity IT funding under the Agency CIOs and
 - Develop flexible budget models that align with modular development
- Launch an interactive platform for pre-RFP agency-industry collaboration

It is encouraging to hear that OMB, in this context, seems to have embraced some of the lessons learned from the government’s failure to adequately invest in the acquisition workforce. “Effective IT acquisition requires a combination of thorough knowledge of the Federal acquisition system, including the tools available, a deep understanding of the dynamic commercial IT marketplace, and the unique challenges inherent to successfully delivering large IT programs in a modular time-boxed manner.” Accordingly, OFPP and the Federal CIO “will design a specialized IT acquisition cadre.” OFPP also will “develop guidance on requirements for IT acquisition specialists ... [and] develop guidance on curriculum standards to cross-train program managers and IT acquisition professionals.” Also watch for contract vehicles for cloud-based Infrastructure-as-a-Service (IaaS) and Software-as-a-Service (SaaS) solutions. Overall, it is an optimistic and far-reaching agenda. Strong promises have been made:

Federal IT projects will no longer last multiple years without delivering meaningful functionality. Poorly performing projects will be identified early and put under a spotlight for turnaround – those that continue to flounder will be terminated. No longer

NOTES

will large IT contracts be negotiated by individuals without IT expertise. No longer will one agency build expensive new data centers when other agencies have excess capacity. And no longer will rigid budgeting constraints prevent executives from making smart decisions with taxpayer dollars; flexible models will allow agency leaders to shift funds where and when they are needed, ensuring that results matter more than plans.

Despite this soaring, all-encompassing prose, it remains unclear whether OMB achieved buy-in from the government's large and diverse IT community. On the same day that OMB launched its twenty-five-point plan, DoD released its Section 804 Report, *A New Approach for Delivering Information Technology Capabilities in the Department of Defense (November 2010)*, available at https://dap.dau.mil/policy/Lists/Policy_Documents/Attachments/3255/OSD13744-10-804ReportToCongress.pdf.

The DoD is developing a comprehensive new process to acquire and deliver IT capabilities. This process will leverage ongoing Department efforts to streamline Defense Business Systems (DBS) acquisition and incorporate best practices garnered from engagement with industry and lessons learned from ongoing DoD efforts. The new process is intended to take full advantage of the speed of IT innovation from commercial industry to foster an environment for mission-focused and time-critical deliveries that support the full spectrum of IT applications within the DoD. Significant and fundamental change ... is envisioned to not only improve the IT acquisition cycle time but also to realize the advantages inherent within the operations and maintenance of IT products and services. Requirements, resourcing, and acquisition management will be synchronized and streamlined with risk-scaled oversight through frequent in-process reviews and milestone decision points. IT will be acquired as "time-boxed" projects delivering capability in an iterative fashion using mature technologies, while managed in capability-aligned portfolios to identify and eliminate redundancy. The new IT acquisition process will apply across the DoD information enterprise, delivering effective IT to our front line warfighters and enabling more efficient business operations.

Guiding Principles:

- Deliver Early and Often.
- Incremental and Iterative Development and Testing.
- Rationalized Requirements.
- Flexible/Tailored Processes.
- Knowledgeable and Experienced IT Workforce.

VII. QUANTIFYING THE TOXIC ENVIRONMENT?

We remain concerned that, all too often, for political purposes, the public is not exposed to an objective, even-handed assessment of the roles contractors play and the extent of their contribution to the government's

myriad missions. In large part, however, much of the worst anti-contractor rhetoric has been toned down, particularly from the White House. We credit OFPP Administrator Dan Gordon's steady leadership and balanced approach for this positive trend.

Nonetheless, we remain wary that if contractors are unnecessarily vilified, resources will be shifted from pursuing value-based outcomes to creating compliance and risk avoidance regimes, which would be an inefficient over-reaction. The United States enjoys one of the world's best public procurement regimes. Government customers enjoy excellent value for taxpayer money. Contractors provide extraordinary levels of support, particularly in extreme conditions such as in Iraq and Afghanistan. This does not mean there is no room for improvement. But optimizing return on investment entails a different approach from many of the initiatives we see, particularly from Congress. As discussed below, we are not alone in this belief.

A. The Great Divide? Last year, we conceded that a casual observer could be forgiven for concluding that procurement policy today is being driven primarily by the inspector general and audit community. Accordingly, we were intrigued by the Professional Services Council Acquisition Policy Survey, *The Great Divide* (October 2010), available at http://www.pscouncil.org/Content/NavigationMenu/Publications/ProcurementPolicySurvey/2010_Acquisition_Policy_Survey.pdf. The survey and report chronicled the marked difference in the answers of operational acquisition professionals – the people who actually purchase the goods and services necessary for the government to perform its missions – and those whose role is primarily oversight (e.g., legislative staff, GAO, etc.) of the people and firms that do the work. The survey reveals a widening chasm between the trajectory of acquisition policy and what government acquisition professionals believe will add value to the mission of the government. Many of the results offer stark contrasts. For example,

- Eighty-six percent of all interviewees said that more resources are going to oversight activities than to contract administration [and, to be clear, we find that outcome both frustrating and inefficient];
- The operational community voiced concern that the push for transparency is
 - going too far and
 - requiring labor-intensive reporting with no clear value analysis;
- The acquisition community is still feeling the effects of the arbitrary [personnel] reductions made in the 1990s, but too often, laws are passed or regulations are issued without regard to agencies' ability to implement them and with little concern for potential unintended consequences;
- Two-thirds of all interviewees said the guidance from the Office of Management and Budget (OMB)—much of it based on legislative mandates—was neither clear nor actionable, and eighty percent said they did not have the resources to implement the guidance;

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- Seventy percent of all interviewees said that OMB's proposed guidance on defining inherently governmental functions would not change the way agencies contracted for services;
- With regard to the administration's push to award more fixed-price contracts and less cost-reimbursement (and specifically, less time-and-materials) contracts
 - in 2008: sixty percent speculated that the restrictions would not improve contracting outcomes
 - in 2010: seventy-one percent said that these mandates, indeed, have not resulted in better outcomes (whereas twelve percent saw at least some benefit);
- Seventy-two percent of the operational professionals described the current structure regarding organizational conflicts of interests as *effective*, while sixty percent of oversight professionals found it *ineffective*;
- Operational professionals graded the capacity of agencies to mitigate conflicts as 4.4 out of 5; oversight professionals rated that capacity as 1.8 out of 5;
- More than ninety percent of the operational professionals described the current structure regarding personal conflicts of interests as *effective*, while eighty percent of oversight professional found it *ineffective*;

PSC's report concluded that, as compliance regimes increase, business judgment (on the part of government acquisition professionals) is deemphasized. Not surprisingly, the vast majority of the survey respondents believe this is precisely the wrong direction. Moreover, operational respondents feel that oversight is based on compliance with sometimes irrelevant rules, when it should be based on whether the right capability or outcome was delivered through an appropriately awarded and managed contract.

B. Applying Government Personal Conflict of Interest Rules to Contractor Personnel? In 2010, Congress re-established the Administrative Conference of the United States (ACUS), "an independent federal agency dedicated to improving the administrative process through consensus-driven applied research, providing nonpartisan expert advice and recommendations for improvement of federal agency procedures." <http://www.acus.gov/about/>. One of ACUS' first projects involves "Government Contractor Ethics." <http://www.acus.gov/research/the-conference-current-projects/government-contractor-ethics/>.

The Conference believes that certain important aspects of the ethics rules applicable to government employees should be extended to contractor employees in order to increase public confidence in the government's acquisition system. This should be done in a manner that is cost effective, takes into account the disparate needs of the various agencies that utilize independent contractors, and is sensitive to the burdens that extension of the ethics system to contractor employees would impose on agencies and the companies and small businesses with which they contract.

ACUS is considering two options:

Option 1: The Federal Acquisition Regulation (“FAR”) Council should consider drafting a mandatory FAR clause that would adopt ... standards ... as a minimum set of ethical rules applicable to service contractors and contractor employees who do business with all agencies covered by the FAR system. The FAR clause should [(a)] require that each contractor implement internal mechanisms to train employees ..., to protect against violations of the rules, and to mitigate any violations that occur ...; [(b)] provide that the contracting agency may terminate the contract for material breach of the ethical standards ... and hold the contractor liable for any damages...; [(c) authorize the] contracting agency ... to suspend or bar contractors from further contracting based on past violations.

Option 2: Each executive agency should identify the ethical risks that confront its contractors and contractor employees [E]ach agency should then determine whether adopting ethical rules regulating those risks would be cost-effective and, if so, what ethical standards the rules should impose on contractors and contractor employees [T]he agency should consider whether to adopt rules by a rulemaking process or instead to impose rules on a contract-by-contract basis through appropriate clauses integrated into individual contracts [E]ach agency should determine the appropriate consequences for violation of its rules.

<http://www.acus.gov/wp-content/uploads/downloads/2010/12/COA-Draft-Recommendation-POSTED-ON-WEB.pdf>. ACUS’ first call for public comments on this issue generated, basically, no substantive responses whatsoever. This suggests that the acquisition community is not yet cognizant of this potentially important policy initiative.

C. Organizational Conflicts of Interest. As 2010 was ending, DoD issued a final rule on organizational conflicts of interest in major defense acquisition programs, pursuant to the WASRA. See Final Rule, *Defense Federal Acquisition Regulation Supplement; Organizational Conflicts of Interest in Major Defense Acquisition Programs*, 75. Fed. Reg. 81908, available at <http://origin.www.gpo.gov/fdsys/pkg/FR-2010-12-29/pdf/2010-32713.pdf>. The prefatory language clarifies that: “because the FAR proposed rule has not yet been published, and because the decision has been made to limit this rule to implementation of OCIs in [major defense acquisition programs (MDAPs)], this final rule has been located primarily in [DFARS] subpart 209.5, until such time as the FAR coverage on OCIs may be relocated[.]” Last year, we wondered whether Northrop Grumman’s sale of TASC, a government consulting division, to comply with the WSARA’s new organizational conflict of interest (OCI) requirements was an isolated incident or a harbinger. In retrospect, it did not signal an opening of a floodgate. It seems unlikely that the new DoD rule, with the OFPP initiative pending, will dramatically change the short-term landscape.

See also Ralph C. Nash, *Postscript V: Organizational Conflicts of Interest*, 24 N&CR ¶ 39 (“the rule that the GAO has established is that an agency can award a contract containing an OCI and negotiate a mitigation plan at its leisure. This flies in the face of sound policy that should require an acceptable mitigation plan *before* award of the contract—or at least in a very timely manner following a protest ruling that the plan is unacceptable. Otherwise, the Government can be faced with a long period of performance in the face of an OCI[.]”(emphasis added)); *Postscript IV: Organizational Conflicts of Interest*, 24 N&CR ¶ 25.

D. An Update: Transparency Into Contractor Fatalities and Injuries. We previously have expressed frustration that contractor fatalities (and injuries) remained generally outside the public’s consciousness. This seems particularly significant now that, as of the summer of 2010, more than 2,000 contractors have died in Iraq and Afghanistan. Among other things, we believe that, in a representative democracy, public awareness of the human cost of our nation’s security and foreign policies is critical. A significant body of research suggests that the public is at least somewhat sensitive to military casualties, and we continue to wonder what impacts, if any, derive from a significant substitution of contractor fatalities.

We have applauded the government’s efforts, particularly at GAO, to do a better job of both keeping track of and reporting these losses. Not long ago, the only way to obtain any of this data was through a Freedom of Information Act (FOIA) request. See, e.g., Steven L. Schooner, *Why Contractor Fatalities Matter*, 38 PARAMETERS 78 (Autumn 2008), available at <http://ssrn.com/abstract=1303022>. Last year, we commended the Labor Department for a giant step towards transparency for posting on the Internet the data it generates based upon claims filed under the Defense Base Act and the War Hazards Compensation Act, which make contractor employees eligible for worker’s compensation benefits pursuant to the Longshore and Harbor Workers’ Compensation Act. See generally www.dol.gov/owcp/dlhwc/lldbareports.htm. Alas, the trend line was extremely disturbing. The publicly available data showed *steady annual increases in contractor deaths as military deaths declined*. Specifically, the data showed a dramatic increase starting in Iraq in 2007, and in Afghanistan in 2009. Of particular concern was that, according to the Labor Department data, contractor deaths in Iraq in 2009 and 2010 actually surpassed military deaths; similarly, the data indicates that in the first half of 2010, more contractors died in Afghanistan than U.S. soldiers. See, e.g., Steven L. Schooner & Collin D. Swan, *Contractors and the Ultimate Sacrifice*, SERVICE CONTRACTOR (September 2010), available at http://www.pscouncil.org/Content/NavigationMenu/Publications/ServiceContractorMagazine/SC_SEPT2010_Web.pdf.

We now understand that, based upon GAO’s recent work, we need to revisit this data. As we expected, the contractor fatality figures may be significantly higher than the data previously suggested. See generally GAO-11-1, *Iraq & Afghanistan: DOD, State, and USAID Face Continued Challenges in Tracking Contracts, Assistance Instruments, and Associated Personnel* (October 2010), available at <http://www.gao.gov/products/GAO-11-1;OverseasContractTrackingStillFacesChallenges,GAOFinds>,

52 GC ¶ 333 (“SPOT [the Synchronized Predeployment and Operational Tracker] ‘still cannot reliably track information on contracts, assistance instruments, and associated personnel,’ GAO said.”). The Labor Department “explained that injuries to local and third country contractors, in particular, may be underreported.” In addition, GAO acknowledged that it “could not verify whether State’s and USAID’s data were complete ... [and] a recent report from the USAID Inspector General suggested that not all security contractors in Afghanistan are reporting incidents that result in personnel being injured or killed.” DoD continues to lack “a reliable system for tracking killed or wounded contractor personnel[,]” but DoD “eventually intend[s] to track the number of killed and wounded contractor personnel through SPOT.” Moreover: “A DOD official in Afghanistan knowledgeable on the matter cautioned though that the reports most likely understate the actual number of contractor casualties, as not all contractors submit reports as required.” Finally, it may be impossible for the public to chronicle these fatalities with temporal accuracy because “Labor’s Web site provides data on DBA cases by the date that each case was created, which is not always the date that the incident occurred.”

VIII. A LONG, LONG TIME AGO.

It seems fitting to conclude this discussion of emerging issues with at least a passing reference to the A-12 litigation. *McDonnell Douglas Corp. & General Dynamics Corp. v. United States*. The U.S. Court of Appeals for the Federal Circuit described this litigation as the American version of *Jarndyce and Jarndyce*, the fictional court case in the Charles Dickens novel BLEAK HOUSE. (“This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means.”) The Supreme Court granted *certiorari* (in *McDonnell Douglas*, not *Jaryndyce*) for the purpose of reviewing to what extent the government’s invocation of the state secrets privilege may have impacted the outcome of this long-running litigation. Now, “final resolution ... may well turn on the complicated and little explored interplay between the Government’s right to protect highly sensitive information [in] dispute resolution on contracts involving that information.” Neil H. O’Donnell and Dennis J. Callahan, *Feature Comment: The A-12 Saga Continues*, 52 GC ¶ 388. Experience suggests that the Supreme Court will not involve itself with the nuances of a government contract dispute, but nothing is certain. More dramatically, however, this stage of appellate review guarantees that this long-running dispute will survive into its twentieth year. Ask yourself: Where were you in the winter of 1990/1991, when the Navy terminated the contract? How about in June of 1991, when the contractors filed their lawsuit in the U.S. Court of Federal Claims? It is hard not to be cynical about an acquisition regime and a judicial system that keeps this story unfolding.