



GW Law Faculty Publications & Other Works

Faculty Scholarship

2017

Emerging Policy and Practice Issues (2016)

Steven L. Schooner

George Washington University Law School, sschooner@law.gwu.edu

David J. Berteau

Follow this and additional works at: https://scholarship.law.gwu.edu/faculty_publications



Part of the [Law Commons](#)

Recommended Citation

Schooner, Steven L. and Berteau, David J., Emerging Policy and Practice Issues (2016) (2017). West Government Contracts Year in Review Conference - Covering 2016 - Conference Briefs (Thomson Reuters, 2017); GWU Law School Public Law Research Paper No. 2017-7; GWU Legal Studies Research Paper No. 2017-7. Available at SSRN: <https://ssrn.com/abstract=>

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarly Commons. It has been accepted for inclusion in GW Law Faculty Publications & Other Works by an authorized administrator of Scholarly Commons. For more information, please contact spagel@law.gwu.edu.

SESSION 9

EMERGING POLICY AND PRACTICE ISSUES

Steven L. Schooner

Nash & Cibinic Professor of Government Procurement Law
The George Washington University

David J. Berteau

President & CEO
The Professional Services Council

I. UPSETTING THE APPLE CART: A NEW ADMINISTRATION, PERSPECTIVE, APPROACH, AND BASELINE.

2017 is shaping up to be one of the least predictable years in modern memory. Few predicted that Donald Trump would succeed Barack Obama as President of the United States. More importantly, little or no program or contract planning revolved around that outcome. By the time of this conference, President Trump will have been inaugurated, but most senior appointees will not have been confirmed or even nominated. Looking ahead, our sense is that, quite simply, it would be folly to rely on pre-existing assumptions about government contracts or, for that matter, governance. The biggest questions revolve around what aspects – if any – of the status quo remain unchanged. Of course, related questions arise with regard to the pace and extent of change. But, no matter how you want to say it, we'll begin with the words of the 2016 Pulitzer Prize winning bard, Bob Dylan: *the times, they are a-changin'*.... Much more on this, below.

II. SPECULATING ON PROCUREMENT SPENDING: PLATEAU, RECOVERY, RESURGENCE?

A. Good News? After the Bottom, Upward Motion. Attendees should be cheered to learn that 2016 reversed the seven-year decline in federal procurement spending. By the time, we reached bottom, annual federal procurement spending had dropped by more than \$100B. (Go ahead, read that again. It was a significant drop.) We have stopped falling, but are we now headed in the other direction?

The chart below summarizes this post-millennial procurement spending cycle. On first glance, it appears that the post-recession spending plunge has ended. Now the question is whether spending will stabilize, increase, or, of course, drop again. Here, this chapter continues past practice, taking a broader view of the spending picture to redefine the pie by including grant spending. In that context, the 2016 overall spending layouts – combining contracts and grants – appear quite robust, indeed, presenting the third highest total in this century (although, of course, these numbers have not been adjusted for inflation).

NOTES

Federal Procurement and Grant Spending 2001-2016*			
Fiscal Year	<i>Procurement Spending</i> (in Billions of \$)	<i>Grant Spending</i> (in Billions of \$)	<i>Procurement & Grant Spending</i> (Combined, in Billions of \$)
2016	\$462.8*	\$654.5*	\$1,117.3*
2015	\$433.0	\$616.8	\$1,049.8
2014	\$441.8	\$603.4	\$1,045.2
2013	\$460.0	\$521.6	\$981.6
2012	\$519.3	\$543.1	\$1,062.4
2011	\$539.3	\$572.6	\$1,111.9
2010	\$540.2	\$623.2	\$1,163.4
2009	\$540.8	\$675.6	\$1,216.4
2008	\$541.2	\$420.7	\$961.9
2007	\$469.3	\$430.2	\$899.5
2006	\$430.5	\$490.0	\$920.5
2005	\$391.2	\$441.7	\$832.9
2004	\$346.1	\$450.1	\$796.2
2003	\$318.0	\$493.7	\$811.7
2002	\$264.1	\$406.3	\$670.4
2001	\$223.0	\$330.8	\$553.8

*FY 2016 figures reflect an estimate based upon preliminary reporting. See www.USASpending.gov. Also, the total procurement spending amounts reported above, for every year, 2008-2015, changed – in some years, significantly – when compared to last year's USASpending reports. Changes to prior years tend to be less statistically significant.

B. The Post-Millennial Trend Line? Too Early for Extrapolation?

Regular attendees of this conference are familiar with this chapter's coverage of the post-millennium federal procurement spending trend. The post-millennial binge (before the 2008 economic crisis) was significant not only for its longevity but for its size. To review:

- In Fiscal Year 2001, federal procurement spending rose to just over \$223 billion.
- The following years, in 2002 and 2003, we witnessed 18 and 20 percent spending increases.
- After steady increases in the middle of the decade, we reached an unprecedented plateau where federal procurement spending stabilized at approximately \$540 billion from Fiscal Years 2008 through 2011.
- In 2009, we experienced the first decrease in federal procurement spending for well over a decade, but the decreases were statistically insignificant (and it took a number of years for the data to catch up). Indeed, much of the post-2008 panic seemed either premature or an over-reaction, as, for a number of years, the only macro-level spending effect was an absence of growth or expansion.
- In 2012, we finally experienced the first dramatic decline in spending and, then, a plunge below the (oh-so-dramatic) \$500 billion threshold in 2013.
- Two years later, procurement spending appeared to bottom out at \$433B, more than \$100 billion below the 2008-2011 plateau.

- Last year saw a nearly seven percent increase in procurement spending (erasing two years' worth of decreases), bringing the number back to the 2013 spending level.
- *It's worth paying attend to grants!* Consistent with the trend this chapter has previously reported, in 2016, grant spending exceeded procurement spending, as it has for *fourteen of the last sixteen years*. And the gap is widening. For the last three years, the government expended 35-45 percent more dollars through grants than through contracts.

C. No Sequestration, Continuing Resolutions, A Half-Year Budget Cycle? Fortunately, despite some last minute drama, we did not experience the dramatic disruption of sequestration in 2016. For better or worse, Congress decided to kick the can down the street, failing to pass appropriations either before or even after the election. With a continuing resolution that runs through April 2017 for all but VA and MilCon, we worry about how Congress or the agencies execute a 5 month appropriations. Many, including PSC, argued that their time and energy would be better spent planning for the following (full) fiscal year. None of this supports the kind of stable funding that facilitates efficient, long-term investment decisions and contractual relationships.

D. The Future of Procurement Data: Something Better? A Global Standard? There is an evolving global conversation on open contracting data. "The Open Contracting Data Standard (OCDS) enables disclosure of data and documents at all stages of the contracting process by defining a common data model. It was created to support organisations [sic] to increase contracting transparency, and allow deeper analysis of contracting data by a wide range of users." Open Contracting Data Standard at <http://standard.open-contracting.org/latest/en/>. This is a much more far-reaching effort than simply improving the Federal Procurement Data System (FPDS) or USASpending data resources. The Open Data advocates envision global standards on what we generally refer to a single point of entry site – e.g., our www.AQUISITION.Gov site, managed by GSA. But the open contracting data initiative aspires to encourage nations to publish data for each step of the contracting process, create summary records for an overall contracting process, and make available re-useable objects, such as tender (or bid or proposal) information, line-items, amounts, milestones, documents etc. The United States, historically a leader on procurement transparency, is not driving the train on this and, arguably, is lagging behind. See, generally, *Bill Would Require Posting Large Contracts Online*, 58 GC ¶ 107; *Congress Has Limited Visibility Into DOD Service Acquisitions*, GAO Determines, 58 GC ¶ 67, GAO-16-119, *DOD Service Acquisition: Improved Use of Available Data Needed to Better Manage and Forecast Service Contract Requirements*, available at www.gao.gov/assets/680/675276.pdf; The U.S. Government's *Open Data* initiative at: www.data.gov and <https://project-open-data.cio.gov/>. See also the Sunlight Foundation's *Open Data Policy Guidelines*, at <https://sunlightfoundation.com/opendataguidelines/>. Keep in mind that the leap from the (largely impenetrable) FPDS to USASpending derived from a private sector (OMB Watch) initiative. Time will tell how quickly the U.S. embraces this global movement.

III. FAREWELL TO BETTER BUYING POWER: A NEW APPROACH AT DOD

A (dramatic) change of administrations ensures that there will be significant leadership, managerial, and philosophical changes at the Defense

Department. It is premature to anticipate what the defense acquisition leadership will look like, but some things are clear.

A. Whither the 809 Panel? Of course, we are curious what will happen, if anything, with the DoD 809 panel's work product. See NDAA Section 809 for Fiscal Year 2016, Pub. L. No. 114-92, which required the Secretary of Defense to establish an advisory panel on streamlining and codifying acquisition regulations. The massive study panel has been working on five target areas: (1) establishing and administering appropriate buyer and seller relationships; (2) improving the functioning of the system; (3) ensuring the continuing financial and ethical integrity of defense procurement programs; (4) protecting the best interests of DoD; and (5) eliminating any regulations that are unnecessary for the purposes described. Will there be an audience for the panel's work? At a minimum, given the amount of energy expended, we hope the Panel publishes a summary report. See, generally, Vernon J. Edwards, *The Department of Defense's Section 809 Advisory Panel: Recommendations*, 30 N&CR ¶ 52 (October 2016) (offering 15 recommendations, including: "Free the DOD from the [FAR] system and let it write its own Defense Acquisition Regulation[;].... Raise the simplified acquisition threshold to \$1 million and the micro-purchase threshold to \$25,000[;]... Take the rules and procedures for simplified acquisitions out of the FAR (or a new DAR) and put them in a separate publication[;] ... Prohibit price competition (evaluation of proposed estimated costs) in the award of cost-reimbursement contracts[;] ... and [include] at least one knowledgeable Gen Xer, Gen Yer, and maybe even a Millennial.... They're going to be in charge in a very few years, if they aren't running a contracting office or contracting activity already. They probably have a lot more recent working-level experience with the current regulations than the named appointees.")

B. NDAA Eliminates USD(AT&L). In the Fiscal Year 2017 (FY17) National Defense Authorization Act (NDAA), Congress, led by the Senate Armed Services Committee, reversed the central recommendation of the 1986 Packard Commission and eliminated the position of Under Secretary of Defense for Acquisition and Logistics, replacing it with two new under secretaries, one for research and engineering, and one for acquisition and logistics. See http://www.dtic.mil/congressional_budget/pdfs/FY2017_pdfs/AUTH/CRPT-114HRPT-S2943-JES.pdf. Congress gave DoD a year to plan these new organizations with little specific guidance. In reality, any changes to the statute will need to be developed quickly if they are to be included in the FY18 NDAA, which will be marked up in the next few months.

C. DoD Continues Its Effort to Analyze Metrics. For the last few years, these materials suggested that some of the most thought-provoking reading was found in DoD's nascent performance, outcome, or metrics, initiative. *AT&L Issues First Defense Acquisition System Performance Report*, 55 GC ¶ 214, available at http://bbp.dau.mil/doc/Report_on_the_Performance_of_the_Def_Acq_System.pdf; *AT&L Releases Second Annual DOD Acquisition Assessment*, 56 GC ¶ 208; Office of the Under Secretary of Defense, Acquisition, Technology and Logistics, *Performance of the Defense Acquisition System: 2014 Annual Report*, available at <http://bbp.dau.mil/docs/Performance-of-Defense-Acquisition-System-2014.pdf>; *AT&L's Third DOD Acquisition Assessment Scrutinizes Subcontractor Margins, Program Baselines*, 57 GC ¶ 309; and now: *AT&L's Fourth DOD Acquisition Assessment Sees Low Rates Of Cost Growth, Protest Sustainment*, 58 GC ¶ 382, available at <http://bbp.dau.mil/docs/performance-of-defense-acquisition-system-2016.pdf>.

We applaud this initiative, because focusing on outcomes, rather than processes, is critical to successful procurement. As was its predecessors, the new (lengthy – 174 single-spaced pages) report is chock-full of intriguing observations and conclusions. The report begins with an attempt to dispel a number of common myths by explaining that:

- Cost control in defense acquisition programs has improved significantly.
- Most major programs deliver the original baseline quantity or more.
- The dynamics of cost estimates indicate that Operation and Support (O&S) costs are heavily driven by external inflation factors.
- High-level requirements seldom change on major programs, and very few programs have many changes. In other words, program requirements are more stable than you think.
- DoD acquisition can be timely and responsive.
- Contracting processes are generally fair, rigorous, and objective—and protests are rarely sustained. (If you didn't know this, you are probably attending this conference for the first time, and you skipped yesterday's sessions.)
- Major defense companies remain profitable despite the DoD's increased success at tying profits to performance.
- The system is not broken. Instead, the acquisition system for decades has given the United States the most capable military in the world and has been improving both in the past and more recently.

Frankly, we think it's worth the energy it takes for DoD to write – and attempt to demonstrate – the truth of these propositions. Someday, we hope that GAO will join in the enterprise. We also enjoyed the additional insights highlighted by the report. Some of our favorites included:

- The lack of programs in DoD's "new product pipeline" may be putting technological superiority at risk.
- Be particularly careful to ensure realistic program baselines—especially when budgets are tight.
- Be prepared to incur statutory overrun penalties.
- Listen to feedback from the DoD's professional acquisition leadership.
- Focusing on acquisition fundamentals and cost control makes a difference.
- Don't neglect suitability (reliability, maintainability, etc.) in pursuing system performance.
- Use fixed-price contracting judiciously in development.

We hope that Under Secretary of Defense for Acquisition, Technology and Logistics (USD(AT&L)) Frank Kendall's successor (whether under the old or new organization) continues this annual performance assessment reporting enterprise. Ultimately, information is power. As noted in his principles article, discussed below, outside of Frank Kendall's door appears the sign: "In God We Trust; All Others Must Bring Data." We hope the sign remains long after Frank's departure.

D. A Better Buying Power (BBP) Legacy? Better Buying Power, which now has progressed from its unnumbered introduction through version 3.0, has likely run its course. Among other initiatives in BBP, we hope that the new administration moves quickly to jettison the independent research and development (IR&D) initiatives. See, e.g., *PSC Asks DoD to Suspend Work on Proposed IR&D Regulations*, http://www.pscouncil.org/News2/NewsReleases/2016/PSC_Ask_DoD_to_Suspend_Work_on_Proposed_IRD_regulations.aspx; *Proposed DFARS Rule Could Lead To Uniform Evaluation Of IR&D Costs*, 58 GC ¶ 407 (suggests the rulemaking was premature; and “this may be an answer looking for a problem, rather than an actual problem”; fears of misuse of IR&D costs are “overblown,” current cost accounting rules already address the concerns, and “there is no evidence that such behavior is common in the defense industry”); *DFARS Final Rule Requires IR&D ‘Technical Interchanges’*, 58 GC ¶ 406; *ABA Section Urges Withdrawal Of DFARS Proposed Rule On Future IR&D Expenses*, 58 GC ¶ 157; *Industry Urges Withdrawal Of DFARS Rule On Future IR&D Expenses*, 58 GC ¶ 134. More broadly, we will be curious to see what future, if any, there is for “should cost” analysis as currently implemented.

On a more positive note, BBP may have left behind an unexpectedly useful legacy. Early in 2016, we were intrigued to read Frank Kendall’s short article, *Better Buying Power Principles-What Are They?*, *USDAT&L MAGAZINE* (Jan-Feb 2016), <http://dau.dodlive.mil/2015/12/28/better-buying-power-principles-what-are-they/>. Kendall explained that, not surprisingly, stakeholders frequently asserted that their decisions were guided by “BPP principles.” This left Kendall perplexed, since no BBP guiding principles had even been articulated, much less published. We appreciate Kendall’s irony. But any humor here is tempered by a deep-seeded frustration that an initiative of this scale and complexity advanced so far without deriving from, or relying on, clearly articulated principles to begin with. Still, unlike many of the disconnected and all-too-often unproductive BBP initiatives, there is much to recommend in the BBP principles document. Kendall’s ten principles are:

1. Continuous improvement will be more effective than radical change.
2. Data should drive policy.
3. Critical thinking is necessary for success; fixed rules are too constraining.
4. Controlling life-cycle cost is one of our jobs; staying on budget isn’t enough.
5. People matter most; we can never be too professional or too competent.
6. Incentives work—we get what we reward.
7. Competition and the threat of competition are the most effective incentives.
8. Defense acquisition is a team sport.
9. Our technological superiority is at risk and we must respond.
10. We should have the courage to challenge bad policy.

We encourage future DoD leaders and policymakers to *begin with these principles*, rather than the overwhelming BBP 3.0 briefing slide or background documentation, as a useful rubric for considering meaningful improvements to

defense acquisition. (As an academic exercise, we challenge you to correlate the principles with the BBP initiatives. See the DoD Acquisition Performance Assessment document, below, pages 139-142. We think it's a fascinating exercise.)

IV. FROM PRINCIPLES TO OBSTACLES: PERCEPTIONS OF ACQUISITION LEADERS

Regular attendees know that this review has consistently and prominently featured the Professional Services Council *Acquisition Policy Surveys*. The PSC survey of acquisition experts and leaders historically has, for more than a decade, “probed on a[n interconnected] set of five core topics currently affecting federal acquisition: workforce, budget, communications and collaboration, access to innovation, and oversight and compliance.” The 2016 survey, true to form, is instructive, primarily because it includes the opinion of a broad and experienced cross-section of knowledgeable practitioners. *Biennial Federal Acquisition Survey Finds Oversight, Workforce Challenges*, 58 GC ¶ 221. The new administration would be well served to read the full report and consider, among other things:

- **Acquisition Workforce.** If you are reading these materials, we do not need to convince you that successful contracting outcomes depend upon people. And for too long, the government has not paid sufficient attention to this fundamental cog in the acquisition wheel. (See also, *CRS Surveys DOD Acquisition Workforce Hiring Flexibilities*, 58 GC ¶ 431; *DOD Acquisition Workforce Grows, But Challenges Persist*, 58 GC ¶ 275 (“many observers believe that DOD still faces significant challenges in improving the performance of the workforce”); *Defense Acquisition Workforce Growth Goals Need Updating*, *GAO Says*, 58 GC ¶ 4.) Still, possibly the most positive tidbit in the PSC report is that most interviewees concluded that the government’s acquisition workforce had *not gotten worse over the last two years*. That’s not a ringing endorsement, but, after more than a quarter-century of under-investment in the federal acquisition workforce, we’re identifying it as a step in the right direction.

- With regard to specific skills, the lion’s share of respondents concluded that the workforce struggled with developing detailed requirements and scopes of work. That’s important, given that no amount of compliance training (focused on following rules) can close that skill gap.
- We were intrigued by the respondents’ perception that government acquisition personnel’s critical thinking and negotiating skills were stagnating or under-developed. At the same time, we were sympathetic with the perception that “There is simply not enough time or experienced personnel to do everything that we need ... or want to do. We need more people who are capable of critical thinking and they must be allowed time needed to [think].”
- The survey, unsurprisingly, focused on the generational divide found in most workplaces today. Respondents also noted that: “on-going retirements mean new hires do not benefit from mentoring and on-the-job training at the hands of their more experienced colleagues, [even though that is] a critical component in gaining a grasp of the full spectrum of acquisition[.]” We were encouraged by the discussion of rotational assignments, succession planning, and leadership development, all of which have received insufficient attention for decades.

NOTES

- Sadly, there's not much help on the way, as hiring remains "extremely difficult." "Even if an agency can attract qualified candidates to an acquisition position and compensate them sufficiently to compete with the private sector, the federal hiring process simply takes too long and makes it too difficult to get the right people in the right place."
- **Budget.** Not surprisingly, respondents generally agreed that budget uncertainty was now the status quo, they did not expect short-term improvements, and that "[b]udget instability exacerbates the capacity issue." Respondents noted that their strategies for dealing with budgetary uncertainty included the use of bridge contracts, greater reliance on IDIQ vehicles, and supposed cost saving mechanisms, such as Low Price Technically Acceptable (LPTA) competitions. See, generally, *Defense Secretary Calls For Budget Stability, Flexibility In Acquisition Process*, 58 GC ¶ 101 ("Congress should address sequestration to create stability in the defense budget and provide ... greater flexibility in starting acquisition programs.... [DOD] "would welcome greater flexibility in appropriations or reprogramming to initiate development of urgently needed capabilities[.]").
 - **Impediments to Communication and Collaboration.**
 - We believe that contracts – like any relationship – depend upon open and meaningful communication between the buyer and seller. Although respondents reported observing only limited progress with regard to the free flow of important information between business partners, many respondents were optimistic that things may improve in the future. (Sadly, it seems that former OFPP Administrator Daniel Gordon's Myth Busting campaign – which numerous respondents had never heard of – has had negligible impact on fundamental behavioral changes, but maybe it's just taking longer than expected. We note with approval the re-issuance of some Myth Busters – see, for example, Lesley A. Field, "Myth-busting 3": *Further Improving Industry Communication with Effective Debriefings* (January 5, 2017), available at https://www.whitehouse.gov/sites/default/files/omb/procurement/memo/myth-busting_3_further_improving_industry_communications_with_effectiv....pdf.)
 - The survey report devotes extensive coverage to a wide array of acquisition innovations – including GSA's 18F, DIUx, Innovation Laboratories, Challenges, etc. – but many respondents remained skeptical "both in the government's ability to innovate and whether the emphasis on innovation is warranted or even fully understood." Respondents indicated that the most significant inhibitors to obtaining innovative solutions to meet their needs included agency workforce skills, fear of oversight or protests, and the FAR (or agency regulations). See also *Defense Innovation Board Makes Interim Recommendations*, 58 GC ¶ 363; *Defense Secretary Unveils Defense Innovation Advisory Board*, 58 GC ¶ 77; *Experimentation, Agility Can Help Military Services Improve Acquisitions, Officials Testify*, 58 GC ¶ 10.
 - **Oversight and Compliance.** Consistent with past reports, respondents noted the substantial burden of oversight and compliance for both contractors and federal acquisition personnel. On a positive note, we were pleased that less

fear was concentrated around the risk of prosecution, which would be a positive trend. (Granted, respondents did suggest that Inspectors General (IG) focused more on punishing supposed culprits than improving acquisitions.) Conversely, it was unnerving to be reminded that “more concern was expressed for the *pace* [of new compliance mandates] rather than their substance.” (See also our discussion, below, about cost-drivers.) Moreover, both government and industry appeared to agree on the requirements they viewed as most burdensome:

- the Congressionally-mandated inventory of services contractors, which some saw as primarily a political instrument; see also, *GAO Questions Accuracy Of DOD Service Contracts Inventory*, 58 GC ¶ 392; *DOD Services Contract Inventory Suffers From Incomplete, Inconsistent Data*, 58 GC ¶ 197.
 - overuse of Executive Orders, particularly with regard to labor and employment issues; see also, *Final FAR Rule Limits Allowable Government Contractor Employee Compensation Costs*, 58 GC ¶ 368; *DOL Final Rule Requires Contractors To Provide Paid Sick Leave*, 58 GC ¶ 354; *Industry Groups Urge Delay Of EO Targeting Labor Law Violators*, 58 GC ¶ 347; Stephen McBrady, et al., *Feature Comment: Preparing For Day-One Compliance With Fair Pay And Safe Workplaces*, 58 GC ¶ 323; *OFCCP Overhauls Sex Discrimination Guidelines*, 58 GC ¶ 224; *DOE Proposes Rule On Nondisplacement Of Qualified Workers Under Service Contracts*, 58 GC ¶ 159; *ABA Section Suggests Clarifying DOL Sick Leave Rule*, 58 GC ¶ 158; *Industry Group Calls Proposed Sick Leave Rule ‘Unreasonable,’* 58 GC ¶ 147; *Industry Group Decries Labor Law Disclosure EO*, 58 GC ¶ 90; *House Committee Okays Bill To Roll Back Executive Action On Labor Agreements*, 58 GC ¶ 25; *Industry Groups Ask White House To Halt Contractor EOs*, 57 GC ¶ 256, http://www.pscouncil.org/News2/NewsReleases/2015/Federal_Contracting_Associations_Ask_White_House_to_Halt_Contractor_Executive_Actions.aspx.
 - executive compensation reporting - again, respondents questioned the value of executive compensation reporting to agencies and to acquisition outcomes; and
 - more generally, the never ending stream of data calls – with respondents perceiving that much of the demanded data was never used.
- **Disaggregation and Uniformity?** We were surprised to see that a number of respondents favored consolidating procurement authority and systems. (We wonder if this isn’t nostalgia for April Fool’s day, 1984.) Others called for further empowering or even reinventing OFPP. (More on that, below.)

V. IN UNCHARTED WATERS (OR, A CLEAN SLATE): PRELIMINARY ISSUES TO WATCH IN THE FIRST YEAR OF THE TRUMP ADMINISTRATION

We readily admit that our government contracts-related crystal ball remains cloudy. Indeed, our sense is that your guess is as good as ours as to what comes next. Everyone seems to agree that the – now generational – government outsourcing trend will continue; the questions being not only whether it will accelerate, but more importantly: (1) whether the government

can better *define and actually measure* the results it needs, and (2) whether it can assess and understand its own costs well enough to determine when outsourcing produces real solutions that provide value for money. Otherwise, we appear to be in “wait and see” mode. Nonetheless, here’s a handful of additional issues we’ll be watching in 2017.

A. A De-Regulation Initiative? Most observers assume that the Republican-controlled Congress will – to some extent – reduce the volume of federal regulation and, closer to home, roll back at least some of the ever-increasing compliance burdens that define the federal procurement marketplace. At one point, the Trump Transition website promised “a temporary moratorium on all new regulation, canceling overarching executive orders and a thorough review to identify and eliminate unnecessary regulations that kill jobs and bloat government[.]” (Although, as of the New Year, we could no longer find the same language on the official transition website, www.GreatAgain.gov.) In our experience, this is much more difficult than anticipated, and we do not expect immediate, paradigm-shifting changes in our business practices and compliance programs. We do expect that the incoming administration will re-visit and consider rolling back the tsunami of *labor-related policies* implemented by the Obama Administration through the FAR, Executive Orders, and Presidential Memoranda. (See the discussion of oversight and compliance, above and below.)

Environmentally Friendly (Or Green) Procurement has expanded dramatically under the Obama Administration. See, generally, FAR Part 23; Executive Order 13514 of October 5, 2009, Federal Leadership in Environmental, Energy, and Economic Performance; Executive Order (EO) 13693, Planning for Federal Sustainability in the Next Decade (March 19, 2015); Presidential Memorandum of December 2, 2011, Implementation of Energy Savings Projects and Performance-Based Contracting for Energy Savings; Section 1 of Presidential Memorandum of February 21, 2012, Driving Innovation and Creating Jobs in Rural America through Biobased and Sustainable Product Procurement; USDA BioPreferred Program, <https://www.biopreferred.gov/BioPreferred/>, and a collection of related laws and rules at <https://www.biopreferred.gov/BioPreferred/faces/pages/PoliciesAndLaws.xhtml>. The Trump Administration has staked out a decidedly different tone than the Obama administration on environment-related issues. For example: “Rather than continuing the current path to undermine and block America’s fossil fuel producers, the Trump Administration will encourage the production of these resources by opening onshore and offshore leasing on federal lands and waters. We will streamline the permitting process for all energy projects, including ... projects held up by President Obama, and rescind the job-destroying executive actions under his Administration. We will end the war on coal, and rescind the coal mining lease moratorium, the excessive Interior Department stream rule, and conduct a top-down review of all anti-coal regulations.... We will eliminate the highly invasive ‘Waters of the US’ rule, and scrap the \$5 trillion dollar Obama-Clinton Climate Action Plan and the Clean Power Plan and prevent these unilateral plans from increasing monthly electric bills by double-digits without any measurable effect on Earth’s climate.” Trump Transition, <https://greatagain.gov> (see Energy Independence).

B.(1) Compliance, Overhead, and Cost-Drivers. We do hope that, regardless of any broader de-regulation initiative, DoD revisits the cost-benefit issues associated with compliance, overhead, or cost-drivers. Attendees understand that, despite its frustration with the (perceived as excessive) overhead rates that contractors charge, DoD remains largely powerless to

reduce the panoply of “cost drivers” that, in large part, derive from a never ending succession of Congressional mandates. Less than two years ago, DoD published its disappointing and largely ineffective report on the BBP-inspired initiative to address this issue. See, generally, Mark Husband & David J. Nicholls, *Eliminating Requirements Imposed on Industry Where Costs Exceed Benefits* (September 29, 2015), <http://www.acq.osd.mil/fo/docs/Eliminating-Requirements-Imposed-on-Industry-Study-Report-2015.pdf>. There was reason for optimism, when DoD poignantly observed that: “Actions that are unnecessary or of little value for acquisition directly add costs, introduce delays in delivering capability, and bar innovative new entrants. Here, we examined several specific instances of regulatory burdens or their implementation imposed on industry in order to eliminate unnecessary or unproductive actions.” Alas, despite a promising aspiration, DoD took a formalistic, rather than a pragmatic (or results-oriented) approach, and, in doing so, defeated the purpose. The report explained that:

“Unnecessary” and “unproductive” are the key adjectives here. ***Statute and regulation are not arbitrary but are designed to serve a purpose.*** The Department of Defense manages a huge taxpayer investment and must provide transparency for oversight to assess efficiency, fairness of the acquisition system, and compliance with broader national, social, and economic objectives. Additionally, many regulations are a response to previous acquisition failures and are intended to prevent recurrence. Attempts to save money by eliminating actions without considering these impacts/benefits are necessarily inappropriate. So, ***the central challenge of this work was to identify activities which could be eliminated with no or minimal impact on statutory or regulatory objectives.***

We disagree and, rather, read that starting point as a prospective capitulation. We think the question that needs to be asked is: ***whether the costs associated with individual statutes and regulations are worth it to the DoD customer?*** Could it be, with a more business-friendly executive and Republican-controlled Congress chomping at the bit to eliminate excess regulations, that DoD might try again? We certainly think so.

B.(2) The Elephant In The Room: Re-Assessing the Pervasive Compliance Culture In Light of “Present Circumstances.” We are now, basically, a full decade into phase in which the balance between compliance and corruption control, on the one hand, and administrative efficiency and end-user outcomes, on the other, has tilted decisively toward compliance. As noted above, acquisition personnel often find that compliance concerns take precedence over serving their customers. A bumper crop of recoveries by DOJ’s Civil Frauds Unit last year will not help in restoring the balance. “[M]ore than \$4.7 billion in settlements and judgments from civil cases involving fraud and false claims against the government in fiscal year 2016 ... [represents] the third highest annual recovery in False Claims Act history[.]” <https://www.justice.gov/opa/pr/justice-department-recovers-over-47-billion-false-claims-act-cases-fiscal-year-2016>; *DOJ Releases FY 2016 FCA Statistics*, 58 GC ¶ 443. Only careful readers will appreciate that “\$2.5 billion came from the health care industry ... [and t]he next largest recoveries came from the financial industry in the wake of the housing and mortgage fraud crisis...[, which] totaled nearly \$1.7 billion[.]” In other words, procurement fraud recoveries were relatively minor in 2016. But don’t expect Congress to internalize that message. See, generally, Robert T. Rhoad, Matthew W. Turetzky, & Ariel E. Debin, *Feature Comment: Weathering The Storm: Forecasts For FCA Enforcement In The Trump Era*, 58 GC ¶ 413; Brian Tully McLaughlin, et al.,

Substantial Increase In False Claims Act Penalties Impacts The Landscape Of Litigation, 58 GC ¶ 256 (among other things, “DOJ issued an interim final rule nearly doubling the penalty range for violations under the FCA.”); *DOD Adjusts False Claims Penalties For Inflation*, 58 GC ¶ 205.

And, of course, 2016 saw a steady stream of government contracts-related scandals. The Glenn Marine (“Fat Leonard”) Scandal won’t go away any time soon. Craig Whitlock, *Navy Repeatedly Dismissed Evidence that ‘Fat Leonard’ was Cheating the 7th Fleet*, WASHINGTON POST (December 27, 2016) (“Navy allowed the worst corruption scandal in its history to fester ... by dismissing a flood of evidence that the rotund Asian defense contractor was cheating the service out of millions of dollars and bribing officers with booze, sex and lavish dinners”). Looking ahead: “Justice Department officials say there is no end in sight to the investigation and that 200 people [including some 30 current or retired admirals] have fallen under scrutiny.” At the opposite end of the spectrum is a high-profile case in which a single contractor employee is enjoying the spotlight. Damian Paletta, *Ex-NSA Contractor Stole at Least 500 Million Pages of Records and Secrets, U.S. Says*, WALL STREET JOURNAL (October 20, 2016) (former NSA contractor Hal Martin “amassed at least 500 million pages of government records, including top-secret information about military operations, by stealing documents bit by bit over two decades”). And these are merely the tip of the iceberg.

At the same time, the incoming administration – specifically, the President and his family business partners – has raised more questions than it has answered with regard to what the community might expect in terms of the new administration’s compliance culture. Transparency advocates remain flummoxed that President Trump became the first modern-era major-party presidential nominee to refuse to release his or her tax returns. A vast web of personal (and family) business interests, and the inclusion of his children (and primary business partners) as active participants in the transition team led to a steady drum beat of calls for divestiture, creation of a blind trust, and other solutions. See, e.g., Alina Seluyk, NPR, *ALL THINGS CONSIDERED, U.S. Ethics Chief Was Behind Those Tweets About Trump, Records Show* (December 30, 2016) (referencing, among others, tweets that read: “As we discussed with your counsel, divestiture is the way to resolve these conflicts[.]”). Cross-marketing of hotel properties during the campaign, and the enthusiasm of foreign states to host event at Trump hotels, have raised the public’s interest in the little known (and hard to pronounce) Emoluments Clause of the U.S. Constitution. U.S. Constitution, Article II, § 1, cl. 8. Closer to home, at the time this goes to press, we are immensely curious as to whether a President will continue to hold and benefit from a high-profile hotel contract with the General Services Administration (GSA) in the Post Office Pavilion. See, generally, Steven L. Schooner & Daniel I. Gordon, *GSA’s Trump Hotel Lease Debacle*, GOVERNMENT EXECUTIVE, <http://www.govexec.com/excellence/promising-practices/2016/11/gsas-trump-hotel-lease-debacle> (noting, among other things, that the contract states that “No ... elected official of the Government of the United States ... shall be admitted to any share or part of this Lease, or to any benefit that may arise therefrom...”; the contract requires extensive annual financial disclosures and rent adjustment negotiations; the President appoints the GSA Administrator; etc.); Representative Elijah Cummings, et al., *Letter to GSA Administrator Denise Turner Roth* (December 14, 2016); Senators Elizabeth Warren & Tom Carper, *Letter to GSA Administrator Denise Turner Roth* (December 1, 2016); Representative Elijah Cummings, et al., *Letter to GSA Administrator Denise Turner Roth* (November 30, 2016).

C. Re-Calibration of International Trade and Domestic Preferences. Trade featured prominently in the campaign, and time will tell if the U.S. will, in fact, relinquish its global leadership as an advocate for free trade. See, generally, FAR Part 25; *GAO Compares Free Trade Agreements*, 58 GC ¶ 356. While there is a healthy appetite for domestic preferences (which, of course, means closing markets), the long-standing trade bargain depends upon reciprocity. Our sense is that the U.S. consumers desire (and, indeed, are addicted to) access to global goods at reasonable prices, and U.S. manufacturers desire the greatest access to export markets. Moreover, our sense is that, increasingly, the supply chain is truly global.

D. A Pro-Business Administration? Not So Fast. The incoming President prides himself as a successful businessman and entrepreneur, and the Republican-controlled Congress is historically deferential to private enterprise. Does all of this signal a more business-like, or at least business-friendly, atmosphere? Contrary to expectations, the post-election transition period was animated with tweets and public statements from the transition team suggesting that the President might become unusually critical of, and uniquely active – or interventionist – with regard to, major acquisition programs, contracts, and other actions involving government contractors. Damian Paletta & Daniel Nasaw, *Donald Trump Says He Will Personally Negotiate Air Force One Price With Boeing*, WALL STREET JOURNAL (December 7, 2016); John D. McKinnon & Andrew Tangel, *Trump Steps Up Criticism of Corporate America*, WALL STREET JOURNAL (December 12, 2016) (“Mr. Trump also fired new jabs at corporations that benefit from lucrative government contracts ... [and] called for new rules to bar government officials from negotiating lucrative contracts with companies, and later accepting jobs with them.”); Doug Cameron & Damian Paletta, *Donald Trump’s Tweet Sets Up Jet Dogfight*, WALL STREET JOURNAL (December 23, 2016) (“President-elect suggests a Boeing plane could be used as substitute for Lockheed’s F-35 combat jet”); Ben DiPietro, *Trump Poses New Reputation Concerns for Companies*, WALL STREET JOURNAL (December 27, 2016) (“discussing risk mitigation strategies after President Elect Trump singled out individual companies for criticism and the effect that has had on their stock prices”).

On the one hand, questioning, re-evaluating, and even terminating major system investments are critical executive functions. We are reminded that, among other things, the Presidential helicopter program was reined in, down-scaled, cancelled, or (pick your preferred description,) restarted during the Obama administration, prompted by President Obama’s statement on national television that he thought the helicopter he had was “good enough.” By 2009, the Army’s Future Combat System (FCS) breathed its last. And the conference’s more experienced generation will remember that, in 1991, during George Bush’s Presidency, then-Secretary of Defense Dick Cheney cancelled (or directed the cancellation of) the future of Naval aviation, the A-12 stealth attack aircraft program (which, in turn, generated a lengthy (more than two decade) and historic level of largely unproductive litigation activity and appellate review).

On the other hand, the President rarely becomes personally involved in individual acquisition decisions. Moreover, our system is designed with concentrated authority residing with the contracting officer. See, generally, FAR Subpart 1.6. Moreover, the regulations assume that “contracting officers should be allowed wide latitude to exercise business judgment.” FAR 1.602-2. And, of course, the courts periodically have expressed concern when that authority is not exercised as a result of, among other things, political pressure. See, generally, *McDonnell Douglas Corp. & General Dynamics Corp. v.*

United States, 182 F.3d 1319 (Fed. Cir. 1999) (“level of discretion that must be exercised by the government before terminating a contract for default is a question of law, which we review *de novo*”), *reversing McDonnell Douglas Corp. v. United States*, 35 Fed. Cl. 358 (1996); *Darwin Constr. Co. v. United States*, 811 F.2d 593 (Fed. Cir. 1987); *Schlesinger v. United States*, 182 Ct. Cl. 571, 390 F.2d 702 (Cl. Ct. 1968) (“neither the contracting officer nor anyone else in the Navy exercised independent judgment in terminating the contract for default”; and “the contractor’s ‘bare’ or ‘technical’ default ‘served only as a useful pretext for the taking of action felt to be necessary on other grounds unrelated to the [contractor’s] performance....’”)

E. Wild Card: Public-Private Partnerships? The Trump Transition Team web page explains that: “the Trump Administration seeks to invest \$550 billion to ensure we can export our goods and move our people faster and safer. We will harness technology and make smarter decisions on how we build and utilize our infrastructure. Our roads, bridges, airports, transit systems and ports will be the envy of the world and enhance the lives of all Americans. We will build the roads, highways, bridges, tunnels, airports, and railways of tomorrow.” See <https://greatagain.gov> (see *Transportation & Infrastructure* page). In a vacuum, we encourage this kind of investment in infrastructure. We have reservations, however, given there appears no momentum to fund or actually pay for these critical investments. The Republican-controlled House of Representatives has expressed a lack of support for stimulus spending. The President elect suggested that the funding might come from bonds and later indicated that the administration would rely on “public-private partnerships, and private investments through tax incentives[.]” See, generally, Naomi Jagoda, *Questions Hang over Trump Plan on Infrastructure*, THE HILL (December 26, 2016). We find this approach intriguing, particularly to the extent that the U.S. federal government lags well behind most of the world and, indeed, many of the States in the U.S., in experimenting with and relying on public-private partnerships. See, generally, *Public-Private Partnerships Not Widely Used By Agencies*, GAO Finds, 58 CG ¶ 315, GAO-16-776R, *Federal Real Property: Public-Private Partnerships Have a Limited Role in Disposal and Management of Unneeded Property*, available at www.gao.gov/assets/680/679352.pdf; *Witnesses Promote Public-Private Competition At House Oversight Subcommittee Hearing*, 58 GC ¶ 250; World Bank Group, *Public-Private-Partnership in Infrastructure Resource Center*, at <http://ppp.worldbank.org/public-private-partnership/overview/what-are-public-private-partnerships>; Federal Highway Administration, *Public Private Partnerships*, <http://www.fhwa.dot.gov/ipd/p3/> (including an interactive map of P3 concessions in the U.S.); National Council for Public-Private Partnerships, <http://www.ncppp.org/>.

F. Also, Keep Your Eye On.... We are intrigued that, after the election, the market value of *private prison contractor stocks* rose. John Burnett, *Will The Private Prison Business See A Trump Bump?*, NPR: ALL THINGS CONSIDERED (January 4, 2017) (noting that “the week after Election Day, stocks of GEO and CoreCivic, the two biggest for-profit detention companies, shot up more than 20 and 40 percent, respectively”). “Detention is an inherent part of the machinery of deportation, and ... we’re looking ahead at massive expansion of our detention system[; ... and] what we’ve seen over the last decade is that when the detention system grows that’s mainly through the use of private prison companies.” Keep in mind that, earlier this year, DOJ publicly declared that it was ending its reliance on private prisons and putting “the Department of Justice on a path to ensure that all federal inmates are ultimately housed at bureau facilities.” Deputy Attorney General Sally

Q. Yates, *Reducing our Use of Private Prisons* (August 18, 2016), available at <https://www.justice.gov/opa/blog/phasing-out-our-use-private-prisons>.

VI. WHAT NEXT AT OFPP?

As we go to press, we had heard nothing with regard to the future of the Office of Federal Procurement Policy (OFPP), nor do we expect that to garner significant attention early in the new administration. The only early clue is that the Trump transition team announced that Mick Mulvaney, a Republican Representative from South Carolina, would be nominated to serve as Director of OMB (the Office of Management and Budget). Mulvaney's initial statement suggested that: "The Trump administration will restore budgetary and fiscal sanity back in Washington after eight years of an out-of-control, tax and spend financial agenda, and will work with Congress to create policies that will be friendly to American workers and businesses[.]" Otherwise, Mulvaney "does not have a long record on IT issues, but his time in Congress suggests an interest in cutting spending, outsourcing to the private sector and shrinking the federal workforce by attrition." Chase Gunter, *Mulvaney's Record Shows Tilt Toward Outsourcing, Cutting Federal Workforce*, FEDERAL COMPUTER WEEK (December 19, 2016), <https://fcw.com/articles/2016/12/19/mulvaney-omb-gunter.aspx>.

We are optimistic that the new administration will seek to identify an experienced and forceful leader who, among other things, will support *investment* in the government *acquisition workforce*. (Such a leader, for example, must persuasively oppose freezing the acquisition workforce at its current level.) We hope to see a reinvigorated Office of Federal Procurement Policy responsible for more than managing the promulgation and implementation of collateral and compliance based rules, mandates, and record generation initiatives. Frankly, we think that the government's approach to category management needs to be refocused on providing real benefits to buying agencies. (We also wonder whether GSA, rather than OFPP, might not be a more appropriate champion for the category management movement.) *OFPP Proposes OMB Circular For Category Management*, 58 GC ¶ 365; 81 Fed. Reg. 69860 (Oct. 7, 2016); *OFPP Appoints 'Category Managers' To Lead Procurement Streamlining Initiative*, 58 GC ¶ 75.

Ultimately, we would love to see OFPP leading a government-wide conversation on, among other things:

- achieving outcomes rather than focusing on processes,
- how the government can obtain value for its money,
- generating customer satisfaction for end users and agency leadership,
- building productive and efficient relationships and lines of communications between government customers and private sector institutions;
- reducing transaction costs and increasing purchasing speed,
- ensuring the highest standards of quality control,
- maintaining and sustaining critical aspects of the industrial base, and
- bringing common sense to the federal marketplace.

Hope springs eternal.