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Emerging Policy and Practice Issues (2018)

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EMERGING POLICY AND PRACTICE ISSUES

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I. AND NOW FOR SOMETHING COMPLETELY DIFFERENT.

Last year, we understood that 2017 was likely to be one of the least predictable years in modern memory. In that regard, 2017 did not disappoint. Unfortunately, nothing we experienced last year makes us terribly confident in predicting what is in store for 2018 and beyond. Looking ahead, we are reminded of Derek Jacobi's brilliantly delivered line (which only really makes sense in context) in the cult favorite movie, *Dead Again* (Paramount, 1991): "Well I, for one, am [v]ery interested to see [w]hat's going to happen next."

A. Facing a Deregulatory Mandate (Or, in Practice, A Regulatory Hiatus).

One of the unexpected major – but at the same time, anti-climactic – storylines for 2017 was the **dearth of new regulations**, a highly irregular occurrence, particularly following eight years of rather frenetic activity (particularly with regards to labor and other social policies). Indeed, the lion's share of the FAR-based regulatory activity in 2017 involved rescinding Obama-era labor rules. *FAR Final Rule Rescinds Implementation Of EO On Labor Law Violations*, 59 GC ¶ 351 (removing FAR implementation of EO 13673, "Fair Pay and Safe Workplaces," which, although suspended under a preliminary injunction and class deviation, required contractors to disclose certain labor-law violations to CO's making responsibility determinations. 82 Fed. Reg. 51358, 51773 (Nov. 6 & 8, 2017). NCMA's Executive Director, Michael Fischetti summed it up nicely, *In Government Contract Management Today, Less is More*, FEDERAL TIMES (November 27, 2017) (emphasis added):

In fact, there is no significant administration-expressed public policy concerning acquisition. There have been side comments about the use of time-and-materials contracts and high-visibility program negotiations (such as the F-35 and Air Force One programs), but no new policy.

There have been no new procurement rules, either (excepting two at NASA), which is the **longest time between a new administration taking office and publishing changes to procurement rules since the adoption of the FAR**. Executive Order 13771 (Jan. 30, 2017) established the so-called "Two for One" rule, whereby for every one new regulation issued, at least two prior regulations should be identified for elimination. While the ultimate effects of this policy have yet to be realized, **agencies have thus far appeared to respond by simply not issuing any new acquisition-related regulations (meaning none have been cut, either)**.

If nothing else, a period of relative stability reduces the strain on rule promulgation, implementation, training, or, more broadly, transaction costs. See also, EO 13771, *Reducing Regulation and Controlling Regulatory Costs* (Jan. 30, 2017), <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-reducing-regulation-controlling-regulatory-costs/>; Richard Pierce, *Trump's two-for-one regulation order will lead to court battles*, THE HILL (Feb. 22, 2017) <http://thehill.com/blogs/pundits-blog/the-administration/320516-trumps-two-for-one-regulation-order-will-inevitably>.

B. The New World of Continuing, Continuing Resolutions, No-Budget Budgeting, And The Absence of a Meaningful Budget Cycle.

Despite some intermittent drama, we survived both 2016 and 2017 without the unproductive and painful disruption of sequestration or a government shutdown. This positive note is undercut, however, by

NOTES

what appears to be an increasingly common Congressional practice of merely kicking the can down the street, and failing to engage in the longstanding and familiar appropriation process and schedule. Our fingers are crossed that the process doesn't melt down before the February conference (or afterwards, for that matter). As we noted last year, many, including PSC, argued that Congress could more effectively allocate its time and energy planning for the following (full) fiscal year. Then again, it's unclear if Congress has agreed upon the kind of austerity package necessary to live within the constraints of the recently passed Tax legislation. (Fortunately, the White House web site was projecting that the Tax Cuts and Jobs Act would "encourage rather than discourage investment and ... wage growth in America" resulting in GDP growth forecasts of nearly 2.5 percent for January 2018. See, e.g., Kevin Hassett, *Tax Reform: Where have we Been and Where are we Going?*). We are cognizant of the political grumbling that the odds of a shutdown are greater given the stakes in the upcoming 2018 mid-term election cycle, ... or that the President is willing to shut down the government if Congress fails to approve significant funding for the Southern Border Wall, ... or that certain Congressional leaders are willing to engage in brinksmanship to ensure a fix for Deferred Action for Childhood Arrivals (DACA, which protects the so-called DREAMers), but we hope this remains primarily posturing. Experience teaches us that none of this budget uncertainty supports the kind of stable funding that facilitates efficient, long-term investment decisions and contractual relationships.

We applaud the public complaint by Secretary of Defense Jim Mattis, who, in September, reminded Congress that "CRs impact the readiness of our forces and their equipment at a time when security threats are extraordinarily high." See, Letter to Chairman Thornberry (September 8, 2017) https://armedservices.house.gov/sites/republicans.armedservices.house.gov/files/wysiwyg_uploaded/FY%202018%20CONTINUING%20RESOLUTION%20AND%20BUDGET%20CONTROL%20ACT%20BCA%20CAP%20IMPACTS%20OSD...pdf. All too often, federal agencies bravely assert that they have learned to manage under a short-term CR. We do not doubt that those agencies' efforts *reduce* the negative impact of CRs on missions and contracts, but we also recognize that they do not *eliminate* them. Secretary Mattis' letter underscores the lack of validity for such arguments.

C. Still Holding Our Breath on Protectionism and Infrastructure.

Last year, the safe bet was the most dramatic changes we would see in 2017 would derive from: (1) a resurgence in protectionism (e.g., strengthening the Buy American Act and other domestic preference policies) and a dramatic disentanglement from regional and global trade agreements; and (2) a massive investment in infrastructure (indeed, we were heartened by the campaign promise to invest \$550B to upgrade the nation's roads, highways, bridges tunnels, railways, airports, transit systems and ports, and maybe even the electrical grid and public wireless capacity). Both seem stalled, maintaining the status quo. If – in strange karmic fashion – they merely cancel each other out, we would be disappointed by the latter, relieved by the former, and convinced that things could have been much, much worse. See, generally, Jean Heilman Grier, *Feature Comment: Trump Administration Seeks Comments On Trade Agreements And Buy American Laws*, 59 GC ¶ 266; *Administration Issues 'Buy American' Guidance*, 59 GC ¶ 219 (joint OMB-Commerce Department memorandum providing guidance on EO 13788, *Buy American*

and Hire American); *U.S. Opens More Procurement To GPA Members Than Other Countries, But Data Are Limited*, 59 GC ¶ 71.

Nonetheless, we find room for hope here, given the administration's subsequent Executive Order, which directed an assessment of the defense industrial base by April 2018. See EO 13806, *Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States*, 82 Fed. Reg. 34597 (July 26, 2017) ("Modern supply chains ... are often long and the ability of the United States to manufacture or obtain goods critical to national security could be hampered by an inability to obtain various essential components, which themselves may not be directly related to national security."), <https://www.federalregister.gov/documents/2017/07/26/2017-15860/assessing-and-strengthening-the-manufacturing-and-defense-industrial-base-and-supply-chain>. This report could reinforce Buy American tendencies or, instead, refocus it on real bottlenecks. Similarly, infrastructure initiatives have been drafted and may see congressional consideration this year or in 2019.

D. No Talk of Insourcing; Outsourcing Continues Apace.

Attendees at this conference understand that the modern era growth in service contracting is not a short-term phenomenon. (Increased government reliance on contractors has increased at the federal, State, and local levels, and our experiences along these lines are mirrored around the world.) Indeed, only nine (9) years ago, after a new President waded into the public procurement space largely skeptical of service contracting and, generally, promoting an aggressive insourcing initiative, those insourcing efforts quickly stalled, and little was done to reverse the multi-decade outsourcing trend that these materials have long chronicled. See also, *'True Size' Of Federal, Contractor Workforces Has Remained Steady Over 30 Years, Report Says*, 59 GC ¶ 312 (Paul Light focuses on various factors that sustain the Government's increased reliance on contract and grant employees, including, among others: the Government's sluggish hiring process; an aging Government workforce; high promotion speed; inflated performance appraisals, easy access to private sector employees who fill jobs once held by federal employees; mission-critical skill gaps; and a sluggish presidential appointment process). Experience also suggests that surge capacity – the ability for government to increase or, perhaps more importantly, decrease contractor workloads or staffing more easily than for career civil servants – plays a significant (and, at times, preeminent) role.

Barring dramatic budget and spending restraints, we expect to see the outsourcing train quickly pick up steam. Specifically, all signs point to the current administration doing nothing to combat – and, indeed, encouraging, if not accelerating – a significant exodus of career civil servants (with certain agencies, such as the Environmental Protection Agency and State Department already leading the pack). While the current administration has not offered the type of clearly articulated outsourcing vision promoted by the latter Bush Administration (e.g., under the competitive sourcing initiative, initially spearheaded by OFPP Administrator Angela Styles), the writing on the wall is not terribly subtle. Indeed, in March, Executive Order 13781, *Comprehensive Plan for Reorganizing the Executive Branch*, 82 Fed. Reg. 13959, <https://www.federalregister.gov/documents/2017/03/16/2017-05399/comprehensive-plan-for-reorganizing-the-executive-branch>, called for agency reorganization plans that should accompany the FY2019 president's budget request (although as we write this, OMB has not confirmed a release date). At the same time, broad

NOTES

based momentum for dramatic, unfettered privatization is not yet apparent. *House Republicans Push For FAA Air Traffic Control Privatization*, 59 GC ¶ 316; 59 GC ¶ 180(e); *President's FY 2018 Budget Proposal Would Privatize Air Traffic Control, Reverse Defense Sequestration*, 59 GC ¶ 171.

We generally consider outsourcing – the common practice of government reliance on, and use of, supporting contractors – to be a fact of life (rather than a sophisticated, calculated, and carefully executed policy decision) and prefer to focus our energies on, for example, value-based contractual business relationships that permit the government to perform its functions in a cost-effective manner or defining and measuring required outcomes. For a more skeptical – and to some extent, novel – view on privatization, outsourcing, and government reliance on contractors, see Steven L. Schooner, *Feature Comment: The Well-Reasoned Case For Reversing The Outsourcing Trend: A Review Essay Of Jon Michaels' Constitutional Coup: Privatization's Threat To The American Republic*, 59 GC ¶ 319.

II. NEW LEADERSHIP, VACANCIES, REORGANIZATION, PRIORITIES, CONTINUED TRANSITIONS.

A. DoD: A New Era at AT&L.

In early August, the Senate confirmed Ellen Lord, formerly Textron Systems' CEO, to serve as the new Under Secretary of Defense for Acquisition Technology and Logistics USD(AT&L). 59 GC ¶ 251. She replaces Frank Kendall, who filled the position during a unique period of stability and inherited and evolved Ash Carter's Better Buying Power (BBP) initiative. By the time of this conference, Lord should be Under Secretary for acquisition and sustainment (A&S) – instead of AT&L, while other responsibilities are carved out under a new Under Secretary of research and engineering (R&E). *DOD Lays Out AT&L Reorganization*, 59 GC ¶ 238 (§ 901 of the FY2017 NDAA, P.L. 114-328, replaces 10 USCA §133, with new §§ 133a & 133b). Lord acknowledged a daunting to-do list on top of any reorganization aspirations, including: implementing more than a hundred acquisition reforms from the two most recent NDAs; revising the DoD 5000 instruction series, which governs major acquisition systems; and issuing new instructions for business system acquisitions. *AT&L Testifies On DOD Acquisition Reforms, Reorganization*, 59 GC ¶ 372. See also *Report to Congress: Restructuring the Department of Defense Acquisition, Technology and Logistics Organization and Chief Management Officer Organization* (August 2017), <https://www.defense.gov/Portals/1/Documents/pubs/Section-901-FY-2017-NDAA-Report.pdf>. Other interesting aspects and individuals to watch in 2018:

- Deputy Defense Secretary Patrick Shanahan will be joined by DoD's first chief management officer (CMO), John Gibson II, in a position which enjoys a bump up from a deputy position; while Kevin Fahey appears in line to serve as assistant secretary of defense for acquisition.

- A dozen functions, responsibilities, and authorities were proposed for Lord's new position as USD(A&S), including:

- Serving as Chief [of] Acquisition and Sustainment;
- Supporting USD(R&E) in mission area engineering analyses;
- Developing and administering acquisition policy (for weapon systems and services);
- Serving as the Defense Acquisition Executive (DAE) and decisional authority for select major Joint programs;

- Aligning Joint/Cross-Service mission capability;
 - Combining & consolidating common procurements across the Services;
 - Promulgate policy – and monitoring and providing oversight for – for logistics, maintenance, materiel readiness, and sustainment support, including supply and transportation;
 - Develop joint weapon systems’ sustainment policy for addressing standard and rapid capability development efforts.
 - Maintaining the industrial base (and providing underlying analysis);
 - Oversee and guiding nuclear forces modernization and nuclear-related programs; and
 - Supporting human capital requirements and training.
- USD(R&E) gains cognizance over the Strategic Capabilities Office, the Defense Innovation Unit Experimental (DIUx), Defense Advanced Research Projects Agency (DARPA), the Missile Defense Agency, and a new analysis/investment strategy cell.
- We are intrigued by Lord’s aspiration to dramatically **speed acquisition lead times**. Among other things, Lord apparently aspires to: “cut the time for early lead procurement by 50 percent, with a future goal of compressing the timeline of request for proposals to contract on major defense acquisition programs from two and a half years down to about 12 months.” Aaron Mehta, *Here’s how Ellen Lord will reduce acquisition time by 50 percent*, DEFENSE NEWS (December 8, 2017); *AT&L Testifies On DOD Acquisition Reforms, Reorganization*, 59 GC ¶ 372.
- **A New, Improved DoD 5000 Alternative?** The restructuring report’s Annex D explains that DoD needs alternative pathways that offer greater speed than Major Defense Acquisition Programs (e.g., DoDI 5000.02) and Urgent/Emerging Operational Needs (e.g., DoDI 5000.71). The three-step alternate path introduces and prototypes new system ideas, often with commercial technologies or modified commercial technologies, and moves them toward limited production before committing the DoD to larger scale financial outlays.
- Step 1 would be initiated by operators defining a need or researchers identifying an opportunity through experimentation, war-gaming, technology scouting, etc.;
 - Step 2 applies additional resources to procure a limited number of units for testing, prototyping, user evaluations, operational assessments, etc.; and
 - Step 3 allows for a deliberate decision point to determine whether to invest, divest, continue modifying, or harvest the technology and move on.
- **The End of the LPTA Era?** We applaud Congressional and DoD cognizance of, focus on, and commitment to ending the scourge of over-reliance on, and misuse of, lowest price technically acceptable (LPTA) competitions. Yes, yes, there *is* a place for LPTA procurement, and DoD claims to be well on the way to finding (or re-establishing) that sweet spot. See, generally, *DOD Rarely Uses LPTA For Major Service And IT Contracts*, 59 GC ¶ 373,

NOTES

although there is, as of yet, no mandated identification of, or reporting on, actual numbers of LPTA contracts. Among other things, Section 813 of the 2017 NDAA directs DOD to “avoid using [LPTA] source selection criteria in circumstances that would deny [DoD] the benefits of cost and technical tradeoffs[,]” nor should LPTA procedures predominantly feature in procurements of IT and cybersecurity services, systems engineering, audit services, and other knowledge-based professional services. Section 813 directs GAO to report annually on DOD’s use of LPTA for contracts over \$10 million. After more than 13 months, however, DoD has not yet issued DFARS language to implement this legislation (but see the discussion of the regulatory hiatus, above). See also GAO-18-139, *Defense Contracting: DOD’s Use of Lowest Price Technically Acceptable Source Selection Procedures to Acquire Selected Services* (November 2017) www.gao.gov/assets/690/688680.pdf.

- **More Work To Do On Services?** DoD’s new leadership has its work cut out for it on managing service contracts. But that’s nothing new. GAO-17-482, *Defense Contracted Services: DOD Needs to Reassess Key Leadership Roles and Clarify Policies for Requirements Review Boards* (August 2017) <https://www.gao.gov/assets/690/686889.pdf> (To help foster strategic decision making and improvements in the acquisition of services, USD(AT&L) should, among other things, reassess the roles, responsibilities, authorities, and organizational placement of key leadership positions, including functional domain experts, senior services managers, and component level leads).

- **A Resurgence for Other Transactions (OTA’s) and Experimental Authorities?** Congress appears to have sent a strong signal that it was encouraging flexibility, creativity, innovation, and working around the existing framework for many types of projects. See, e.g., Richard L. Dunn, *PRACTITIONER’S COMMENT: OTAs And The 2018 NDAA*, 59 GC ¶ 350, discussing, among other things, NDAA:

- Section 861, Contract Authority for Advanced Development of Initial or Additional Prototype Units;
- Section 862, Methods for Entering into Research Agreements;
- Section 863, Education and Training for Transactions Other Than Contracts and Grants;
- Section 864, Other Transaction Authority for Certain Prototype Projects;
- Section 865, Amendment to the Nontraditional and Small Contractor Innovation Prototyping Program;
- Section 866, Middle Tier of Acquisition for Rapid Prototyping and Rapid Fielding;
- Section 867, Preference for Use of Other Transactions and Experimental Authority; and
- Section 868, Prototype Projects to Digitize Defense Acquisition Regulations, Policies and Guidance and Empower Users Tailoring the Acquisition Process.

See also DoD’s *Other Transaction Guide for Prototype Projects* (January 2017), [https://www.acq.osd.mil/dpap/epic/ep/docs/OTA_Guide%20\(17%20Jan%202017\)%20DPAP%20signature%20FINAL.pdf](https://www.acq.osd.mil/dpap/epic/ep/docs/OTA_Guide%20(17%20Jan%202017)%20DPAP%20signature%20FINAL.pdf). For additional insights and a more cautionary note, see, e.g., Locke Bell & Anna Sturgis, *Feature Comment: DOD’s Prototype OTA Guide Offers Insight Into DOD’s Experiment*

In Regulation-Free Acquisition, 59 GC ¶ 155; Richard L. Dunn, *Practitioner's Comment*, "DOD Guide for Other Transactions for Prototypes—Fundamentally Flawed," 59 GC ¶ 19; *FAA Needs To Improve Oversight Of 'Other Transaction' Agreements*, 59 GC ¶ 290; Report Number: ZA2017098, *DOT and FAA Lack Adequate Controls Over Their Use and Management of Other Transaction Agreements* (September 2017), www.oig.dot.gov/sites/default/files/508-OTA_FinalRepot_9-11-17.pdf.

• ***DCAA Gets Help (Or Competition): The Rise of Third-Party, Qualified Private Auditors.*** We're intrigued to see that DoD (and, more broadly, government) reliance on private sector auditors appeared to get a dramatic kick start from Congress. While we are hesitant to wager that the NDAA's legislative initiative will eliminate (or, for that matter, dramatically reduce) the current audit backlog by October 1, 2020, something along these lines seemed long overdue. (The GAO report, below, indicates that, while DCAA has cut in half its backlog of contractors' incurred cost proposals, DCAA did not meet its goal of eliminating its backlog by FY 2016, nor is it likely to do so by the end of FY18.)

The road ahead, smoothed with supplemental, private sector support, nonetheless appears complicated, initially with the need to set standards for "qualified private auditors." Conversely, we see few impediments ensuring that audit firms remain free of conflicts of interests; nor do we anticipate difficulties in imposing strict nondisclosure requirement. We are also, conceptually, pleased with what appears to be a Congressional clarification of the CO's broad authority on cost-related issues, and hope that the legislation restores a more healthy balance in the CO-auditor relationship. See also, *President Signs FY 2018 NDAA*, 59 GC ¶ 380 (David Berteau opining favorably on § 803, which "permits independent, third-party auditors to help the Defense Contract Audit Agency reduce the incurred-cost backlog and mitigate the negative impact that the backlog has on the government and government contractors."). See also, more broadly, *Agencies Must Take Additional Actions To Close Contracts*, 59 GC ¶ 313; GAO-17-738, *Federal Contracting: Additional Management Attention and Action Needed to Close Contracts and Reduce Audit Backlog* (Sept. 2017), www.gao.gov/assets/690/687497.pdf (GAO reported that DoD, HHS, DHS, Justice, and State all lacked critical elements that would help track and oversee contract closeout processes—the number and type of contracts to be closed, where the contracts were in the process, and goals and performance measures).

One additional nugget in the above-referenced GAO report caught our attention, and we applaud GAO for recognizing that "closing out contracts is not the highest priority for contracting officers that are charged with awarding and administering contracts for products and services to meet mission needs." And, not surprisingly, these CO's complained that their "ability to focus attention on contract closeout was affected by resource constraints, including workforce challenges and sequestration...." GAO then proffered the perfectly reasonable proposition that contract closeout "is a critical step to ensure the government receives the goods and services it purchases at the agreed upon price and, if done in a timely manner, provides opportunities to utilize unspent funds for other needs." What GAO neglected to acknowledge, however, is the impact that DCAA's backlog has had on government claims and litigation, particularly with regards to statutes of limitations and, of course, both the government's and the private sector's access to knowledgeable personnel armed with contemporaneous knowledge of relevant events.

NOTES

- **Rising Thresholds.** The increase of two thresholds merit brief discussion.
 - The increase of the **Simplified Acquisition Threshold** (SAT, in NDAA § 812) from \$150,000 to \$250,000 seems significant – more in terms of how it will impact the higher volume of lower value procurements. (Of course, FAR 2.101 already permitted a range significantly higher thresholds, e.g., \$300,000 for purchases outside the U.S., \$750,000/\$1.5 million (in and outside the U.S.) for contingencies, etc.) We also expect that, at the margins, this will have a dramatic impact – and could prove either a curse or a windfall – for small businesses, depending upon their unique situations, markets, and customers. See also, *Micropurchase And Simplified Acquisition Thresholds Raised For Hurricane Harvey Response*, 59 GC ¶ 278.
 - While we applaud the increase in the threshold for obtaining **certified cost or pricing data** – from \$500,000 to \$1 million (in NDAA § 813) – but we think that threshold still remains far too low. We remain confident that a serious research effort quantifying the return on investment versus the transaction costs of demanding such data at such a low threshold would provide a valuable public service (and, hopefully, lead to a more pragmatic floor).
 - **The Generational Scandal: Fat Leonard Continues to Lead the Pack.** Sadly, many professionals in our field place themselves into age brackets around the defining scandals of their formative years. Dating back to the Truman Committee’s claims that Curtiss-Wright company had been supplying defective aircraft engines to the Army Air Force, high profile scandals in the modern era included everything from the Ill Wind scandal (see, e.g., Andy Pasztor’s iconic, *WHEN THE PENTAGON WAS FOR SALE*), to the Bradley Fighting Vehicle (which spawned a serious book and a funny movie, *THE PENTAGON WARS*), and even the DIVAD debacle (leading to voluntary resignation and vindication of the NASA administrator and the Quotidian defective audit/malpractice tort suit brought by General Dynamics against DCAA). Early in this millennium, we witnessed a former OFPP administrator (David Safavian) and an Air Force career civilian (Darlene Druyun) sentenced to jail time.

But nothing prepared us for the scope, scale, and sustained wreckage associated with the Fat Leonard (Glenn Marine)-Navy scandal. If you’re late to the party on this one, we recommend the fascinating Washington Post graphical meta site: <https://www.washingtonpost.com/graphics/investigations/seducing-the-seventh-fleet/>, highlighting, among other things: (1) the scope of the carnage, with *more than 440 active-duty and retired military personnel – including about 60 admirals – having come under scrutiny* for possible violations of military law or ethics rules; 18 individuals already have pleaded guilty in federal court; at least ten more face federal criminal cases in San Diego; five admirals have been disciplined or admonished by the Navy (and one already pled guilty and was sentenced to 18 months in prison); and at least five sailors have been charged under military law; and (2) some of the bribes taken by Navy personnel, including Lady Gaga and LION KING tickets, prostitutes, alcohol, cash, travel (airfare, hotel), etc. Many bemoan that the fallout will result in a “lost generation” in the Navy’s leadership ranks. See, e.g., John Cordle, “*Fat Leonard*” *Scandal Fallout Will Damage the Navy for Years*, PROCEEDINGS (December 2017) (investigation may be without parallel in complexity and scope; event will leave a black mark on the Navy for the

foreseeable future; key positions remained unfilled for long periods; Navy is experiencing gaps that will take years to fill and problems that will remain unsolved for even longer).

- ***The 809 Panel Endures (and Thrives)***. We're not sure what the future holds for DoD's Section 809 panel, but they remained busy, active, and, frankly, entertaining, throughout 2017. (Recall that NDAA Section 809 for Fiscal Year 2016, Pub. L. No. 114-92, 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.) Currently, in addition to an informative web page, <https://section809panel.org/>, the panel has begun producing (since August), what appears to be a monthly, topical (10-15 minute) podcast series, *Bold Bites*, which we heartily recommend. See <https://section809panel.org/media/bold-bites-podcast/>. See also, *DOD's § 809 Panel Issues Interim Report On Streamlining Regulations*, 59 GC ¶ 160; section809panel.org/wp-content/uploads/2017/05/Sec809Panel_Interim-Report_May2017_FINAL-for-web.pdf (including five main sections: adapt at the speed of a changing world, leverage the dynamic defense marketplace, allocate resources effectively, simplify acquisition, and enable the workforce).

B. A Familiar Face at GSA.

In early December, the Senate confirmed Emily Murphy as the Administrator of the General Services Administration (GSA). Murphy is no stranger to GSA, having previously served as GSA's chief acquisition officer (CAO). More recently, Murphy served as senior counsel for the House Committee for Small Business, where she worked with Mick Mulvaney, who currently serves as both the Director of Office of Management and Budget (OMB) and Acting Director of the Consumer Financial Protection Bureau (CFPB). In her December 12 opening remarks, Murphy articulated her priorities as: "[e]thical behavior, reduced duplication, increased competition, and improved transparency." She emphasized that "fixing our underlying systems will reduce barriers to entry for small and innovative contractors" and that "GSA should ... facilitate the adoption of shared services." See <https://www.gsa.gov/about-us/newsroom/speeches/speeches-by-the-administrator/opening-remarks-by-us-general-services-administrator-emily-murphy-december-12-2017>.

C. Still Waiting at OFPP.

Crickets. Just crickets.

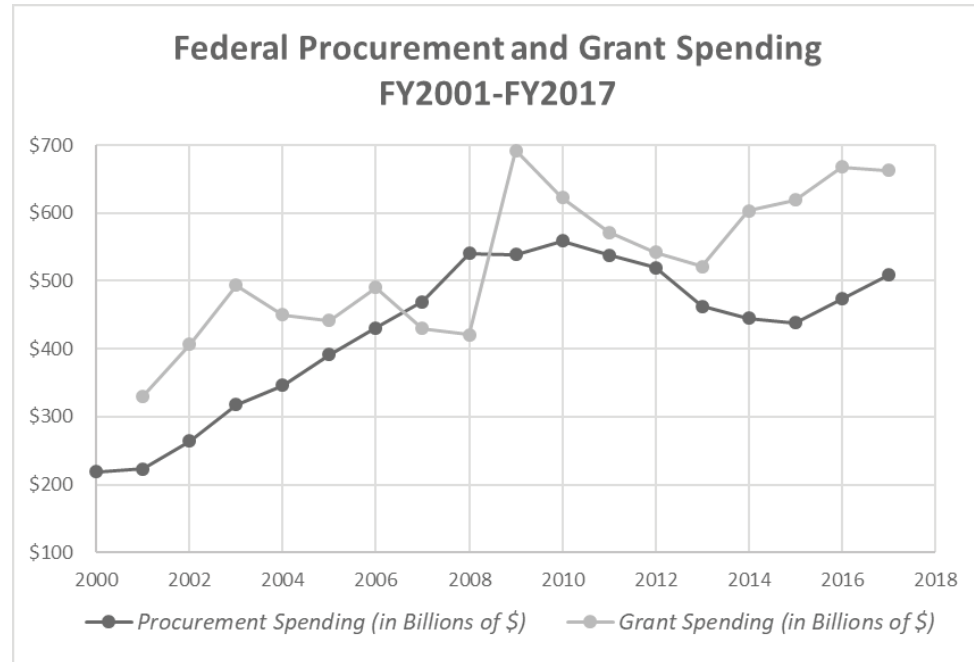
III. SPECULATING ON PROCUREMENT SPENDING: RECOVERY, BRIEF RESURGENCE ... BUT WHAT'S NEXT?

A. Good News? After the Bottom, Upward Motion.

Attendees should be cheered to learn that 2017 followed the not-insignificant procurement spending increase in 2016, which, of course, reversed what had been perceived (until recently) as a seven-year plateau-and-decline in federal procurement spending. Revised data, however, appears to dispel the familiar and widely-accepted storyline of a straight-line decline between FY2008 and FY 2015, instead isolating the decline to the FY 2010-2015 pe-

NOTES

riod. (And more on this below.) Even armed with the adjusted historical data, only the most optimistic prognosticators anticipated that federal procurement spending would again rise above the \$500 billion dollar so quickly. But here we are (with a new chart this year to spice things up).



Now that spending is no longer falling, can we assume that the last two years indicate a trend in the other direction? We are not yet convinced. For now, the chart (above) and the table (below) summarize the post-millennial procurement spending cycle. At 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 2017 overall spending layouts – combining contracts and grants – appear quite robust, indeed, presenting the second highest total in this century (although, of course, these numbers have *not* been adjusted for inflation).

| FEDERAL PROCUREMENT AND GRANT SPENDING FY2001-2017* (In Billions of Dollars) | | | |
|--|-----------------------------|-----------------------|--|
| Fiscal Year | <i>Procurement Spending</i> | <i>Grant Spending</i> | <i>Procurement & Grant Spending (Combined)</i> |
| 2017 | \$508.7* | \$662.7* | \$1,171.4* |
| 2016 | \$473.7 | \$668.2 | \$1,141.9 |
| 2015 | \$438.2 | \$618.9 | \$1,057.1 |
| 2014 | \$444.9 | \$603.6 | \$1,048.5 |
| 2013 | \$462.6 | \$521.7 | \$984.3 |
| 2012 | \$519.7 | \$542.2 | \$1,061.9 |
| 2011 | \$538.1 | \$571.7 | \$1,109.8 |
| 2010 | \$559.0 | \$622.8 | \$1,181.4 |
| 2009 | \$539.2 | \$692.2 | \$1,231.5 |
| 2008 | \$540.2 | \$420.7 | \$960.9 |

| | | | |
|------|---------|----------------|---------|
| 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 2017 figures reflect an estimate based upon preliminary reporting. See www.USASpending.gov.*

*Also, the total procurement spending amounts reported above, for **every year**, 2008-2016, were revised – in some years, significantly (e.g., approaching 10 percent) – when compared to last year’s USASpending data.*

B. The Post-Millennial Trend Line, Extrapolations and Observations.

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 (and amend and clarify), particularly in light of the constantly revised data:

- In Fiscal Year 2001, federal procurement spending rose, from \$219 billion to just over \$223 billion. The following years, in 2002 and 2003, we witnessed 18-20 percent spending increases. (Yup, *federal procurement expanded from \$219B to \$318B over three years!*)

- After steady increases in the middle of the decade, we reached a four-year (or, if your prefer, five-year) plateau of sorts, where federal procurement spending stabilized in the \$538-559 billion range from Fiscal Years 2008 through 2011 (or, in the alternative, the \$520-559 billion range from Fiscal Years 2008 through 2012).

- The revised data now suggests that **FY2010, rather than FY2008**, marked the high point of the spending binge. (But what a binge it was: *from \$219B in FY2000 to \$559B in FY2010!*)
- In 2009, we experienced the first decrease in federal procurement spending for well over a decade (but, in retrospect, that seems less significant to the extent that it was immediately reversed by a brief jump to the all-time peak of \$559 billion in FY 2010).
- An interesting historical anomaly here is that the FY09 explosion in grant spending – a *one-year increase of 65 percent* – led to FY09 being the peak year for federal expenditures (including both grants and contracts).

- The post-2008 fluctuations and decreases were statistically insignificant (and it took a number of years for the data to catch up) and now, in retrospect, appear to have, instead, been more of a plateau. 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 FY12, we finally experienced the first sustained, dramatic decline in spending and, then, a plunge below the (oh-so-dramatic) \$500 billion threshold in 2013. But, again, that decline was dramatic: by the time we reached bot-

NOTES

tom (two years later), at \$434B, annual federal procurement spending had dropped *more than \$120 billion* below the 2008-2011 plateau. (Last year, we reported this as a \$100B drop, but revised data demonstrated it was even more severe!) In reality, most of the spending generated from the Budget Control Act of 2011 (which paved the way for sequestration) was directed at contract spending, not on military or civilian pay

- The *last two years saw a sixteen percent increase* in procurement spending (more than erasing two years' worth of dramatic decreases), bringing the number back into the range of the FY2013 spending level. This increase was experienced at both defense and non-defense agencies, and we expect final FY2017 data to be in line with this trend. The reality is that, for both defense and non-defense funding through FY2017, the Budget Control Act (BCA) caps were as much the funding floor as they were the ceiling. That may no longer be true, based on expectations for further non-defense cuts in the President's FY2019 budget.

- *Get ready for some more movement.* To the extent that both Congress and the economics community are projecting a deficit in the *\$1.5 trillion* range over the next decade (as a result of the recent tax legislation), something will have to give. Of course, the big question – and one we're not yet prepared to answer – is *when?*

- *It's worth paying attend to grants!* Consistent with the trend this chapter has previously reported, in 2017, grant spending exceeded procurement spending, as it has for *fifteen of the last seventeen years*. And the gap appeared to be widening (although it appears to have contracted last year). Still, since FY2014 (or over the last four years), the government expended a third as many more dollars through grants than through contracts.

- Of course, since December 2014, with OMB's implementation of the *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, 2 CFR 200 (commonly called the "Uniform Guidance"), the lines (and similarities) between contracts and grants – as well as their oversight regimes – continue to ebb, flow, and, at times, blur.
- Belatedly, but not surprisingly, agencies are increasingly acknowledging that the same challenges that bedevil contract administration, post-award management, and oversight manifest themselves with regard to agency grants. See the discussions of contract data quality and contract management, below.
- A number of grants management-related requirements were eliminated pursuant to the Presidential Management Agenda regulation reduction initiative. See, Mick Mulvaney, OMB Memorandum M-17-26, *Reducing Burden for Federal Agencies by Rescinding and Modifying OMB Memoranda* (June 15, 2017), available at <https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/memoranda/2017/M-17-26.pdf>. The memorandum, inter alia, disbanded the Council on Financial Assistance Reform (COFAR) and eliminated: M-12-01, *Creation of the Council on Financial Assistance Reform* (October 2011); M-14-17, *Metrics for Uniform Guidance* (2 C.F.R. 200) (September 2014); and Controller Alert, *Catalog of Federal Domestic Assistance Numbering Schematic* (December 2016).

C. The Future of Procurement Data: Something Better? A Global Standard?

Last year, we highlighted the evolving global conversation on open contracting data and bemoaned that the United States, historically a leader on procurement transparency, is not driving the train on this and, arguably, is lagging behind. As the annual process of chronicling revisions to previously-reported data reminds us, most of the federal government's procurement data must be taken (and dispensed) with a grain of salt. This year we have more information, but not much of it is encouraging. See, e.g., *DATA Act Reporting Not Always Complete Or Accurate, GAO Finds*, 59 GC ¶ 348, GAO-18-138, *DATA ACT: OMB, Treasury, and Agencies Need to Improve Completeness and Accuracy of Spending Data and Disclose Limitations* (November 2017). Among other things, GAO found:

- Much more needs to be done if the DATA Act's promise of improving the accuracy and transparency of federal spending data is to be fully realized. In particular, we need better and more complete data on **subcontracts** as well as better linking of contract obligations to the appropriations accounts from which funds flow.
- Based on a projectable sample representing (more than 90 percent) of all Beta.USASpending.gov records, data accuracy—measured as consistency between reported data and authoritative agency sources—differed sharply between budgetary and award records. Between **56 to 75 percent of the newly-required budgetary records** were fully consistent with agency sources. In contrast, only between **0 to 1 percent of award records** were fully consistent.
- With regard to contract awards, while the primary flaw in the data related to *Primary Place of Performance* (and this apparently derives from an FPDS-NG inconsistency with USASpending.Gov), GAO also estimated that the *Award Description* data element contains inconsistent information in 49-60 percent of awards contained in the database.
- Treasury does not sufficiently identify or disclose known limitations and error sources affecting data quality (e.g., in its FAQ or banner). Increased transparency about known data quality issues would help users make more informed decisions about how to interpret the data.

And, of course, the same problems pervade the grants process. Kenneth J. Allen, *Feature Comment: A Report From The Grant Front*, 59 GC ¶ 282 (full implementation of the DATA Act is not quite on schedule, and given the enormity of the task, no one is really surprised).

For more on this topic, see generally, 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 as a single point of entry site – e.g., our www.acquisition.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. You can read more about the U.S. Government's *Open Data* initiative at: www.data.gov and <https://project-open-data.cio.gov/>. See also the Sunlight

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Foundation's *Open Data Policy Guidelines*, at <https://sunlightfoundation.com/opendataguidelines/>. And, of course, these issues correspond with a widening public and oversight community frustration with reduced federal government transparency, particularly (but by no means exclusively) with regard to agency web pages and historical government publications, policy documents, and other information.

IV. RAND'S REPORT ON DOD PROTESTS AT THE GOVERNMENT ACCOUNTABILITY OFFICE (GAO)

In the FY17 NDAA, Congress called for a “comprehensive study on the prevalence and impact of bid protests on DoD acquisitions” and systematic collection and analysis of information on bid protests and their associated contracting outcomes. As a general rule, we welcome these types of research efforts, particularly to the extent they facilitate decision-making based on data and facts rather than anecdotes and urban myths. By now the RAND report – which we strongly recommend – should be widely circulated. Mark V. Arena, et al., *Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends, and Drivers* (December 2017), https://www.rand.org/pubs/research_reports/RR2356.html. A few passages caught our attention, but these are just the tip of the iceberg:

- ***Perception and Perspective:*** No one should be surprised that perspectives on the bid protest system varied greatly between DoD personnel and the private sector. DoD personnel expressed a general dissatisfaction[, ... perceiving] that contractors have an unfair advantage in the contracting process by potentially impeding timely awards with bid protests [... and] that the federal government allowed too many “weak” allegations in a protest and that contractors had too much time to protest, delaying procurements. In contrast, private-sector representatives strongly supported the bid protest regime because they viewed it as providing transparency to the contracting process and holding the government accountable for following the law and its own solicitation procedures.

- ***Protests Remain Relatively Rare:*** RAND found a steady increase in bid protest actions at GAO between FY 2008 and FY 2016; indeed, protest activity for both DoD and non-DoD agencies approximately doubled, and that growth appeared indifferent to changes in DoD spending and contracting. Overall, the number of DOD contracts and contract spending declined from FY 2008 to FY 2016, a trend counter to DoD bid protest volume. Still, ***the overall percentage of contracts protested is very small***—less than 0.3 percent.

- ***Not All Protests Are Vexatious or Predatory.*** The stability of the bid protest effectiveness rate over time—despite the increase in protest numbers—suggests that firms are not likely to protest without merit.

- ***No, Virginia, DoD Doesn't Develop Requests for Proposals Primarily Around Protest Avoidance.*** The RAND team specifically asked DoD personnel to what extent the specter of a bid protest influenced acquisition decisions in terms of how requests for proposals (RFPs) were structured and evaluated. The short answer was that DoD, generally, and its CO's, specifically, did not consider the prospect of receiving a bid protest to be a top priority as they developed their RFPs. Rather – and this should surprise no one reading these materials – the RFP structure and evaluation mechanisms derive primarily from Congressional mandates (e.g., the Competition in Contracting

Act, the Federal Acquisition Streamlining Act, the Small Business Act, the Buy American Act, and, of course, the steady stream of NDAA provisions).

- **Meaningful Debriefings Deter Protests:** RAND recommended that DoD adopt a debriefing process similar to the Air Force's extended briefing process. Their research suggested that the worst debriefings were characterized as being skimpy, adversarial, and evasive or as failing to provide required reasonable responses to relevant questions. As a result – in desperation – unsuccessful offerors protest to obtain government documents that delineate the rationale for the contract award. The RAND team concluded that, frequently, too little information and evasive/adversarial debriefings will lead to a bid protest.

- **Is There a Place for a Small Claims Model (or, like the Boards of Contract Appeals, Accelerated or Expedited Review)?** RAND found surprising that roughly eight percent of GAO protest actions and nearly four percent of protest cases at the U.S. Court of Federal Claims (COFC) concerned procurements with a declared value under \$0.1 million (\$100,000). For RAND, that raised an interesting policy question: whether the costs to the government to adjudicate these protests exceed the value of the procurements themselves and thus are not cost-effective? Accordingly, RAND recommended that streamlined processes be considered for protests under \$0.1 million (or some other suitably low value)—perhaps employing processes analogous to how traffic tickets are adjudicated in traffic court or how cases are handled in small-claims court.

We'll also be watching the fallout from Section 827 of the FY2018 NDAA, which creates a DOD pilot program to determine if the Department should implement a **"loser pay" fee** for GAO bid protest. Not only could this provision make it harder to hold DoD accountable for following the law and procurement procedures, but it also raises the question of how DoD will determine what costs the loser must pay, as well as the analytical basis for those costs (given that the federal government has no CAS-compliant means to determine fully-burdened costs).

See also, *GAO Bid Protest Sustain Rate Drops In FY 2017*, 59 GC ¶ 355 (FY 2017 filings declined to 2,596, down seven percent from 2,789 in FY 2016, and down slightly from 2,639 in FY 2015; much closer to the FY 2014 number of 2,561).

V. CYBERSECURITY WILL REMAIN ON EVERYONE'S MIND

Kudos to the *Government Contacts Year In Review Conference* Team for carving out cybersecurity as a regular topic at this conference (tomorrow morning). The general issue reminds us that allocating contractual responsibility alone rarely serves all of the government's needs. The one thing that's become increasingly clear in this space, other than the need for ongoing, consistent vigilance, is that the government and the private sector are all in this together. Moreover, it's not just a challenging, complicated topic, but its status as a moving target without clear, easy-to-implement government guidance keeps the anxiety level high. See, e.g., *House Passes DHS Cybersecurity Overhaul*, 59 GC ¶ 385 (re-designating the Department of Homeland Security's National Protection and Programs Directorate as the Cybersecurity and Infrastructure Security Agency (CISA)); Franklin C. Turner & Alexander W. Major, *Feature Comment: Lurking In The NIST—Why Federal Contractors May Be Misreading Their Cybersecurity Safeguard-*

NOTES

ing Requirements, 59 GC ¶ 306; *DPAP Issues Guidance On Implementing NIST Cybersecurity Standards*, 59 GC ¶ 301; *DSB Makes Suggestions To Improve DOD Cybersecurity*, 59 GC ¶ 12 (and the *DSB Task Force Report on Cyber Defense Management* is available at www.acq.osd.mil/dsb/reports/Cyber_Defense_Management.pdf). Practitioners would also be well-served by considering the year-long series, John Chierichella & Townsend Bourne, *Feature Comment: Achieving Cyber-Fitness In 2017: Part 6—Potential Liabilities And Putting It All Together*, 59 GC ¶ 363; *Part 5-Cyber Incident Reporting And Response*, 59 GC ¶ 275; *Part 4-Subcontracts, Joint Ventures And Teaming Agreements*, 59 GC ¶ 177; *Part 3-Proving Compliance And The Role Of Third-Party Auditors*, 59 GC ¶ 87; *Part 2-Looking Beyond The FAR And DFARS-Other Safeguarding And Reporting Requirements*, 59 GC ¶ 43; and *Part 1-Planning For Compliance*, 59 GC ¶ 25 (For many Government contractors, ... the focus in 2017 [was] cybersecurity in general, and specifically compliance with [DoD's] final rule for safeguarding covered defense information before the December 31 deadline. See 81 Fed. Reg. 72986... [Looking ahead,] Contractors that become familiar with the applicable cybersecurity requirements, develop a robust cybersecurity program, and regularly exercise and test their cybersecurity controls are better positioned to take advantage of safe harbor provisions and avoid common compliance pitfalls.).

The main topic here is **DFARS compliance**, which Under Secretary Lord has said means having a plan (there was a DFARS class deviation issued on this in December. See, <https://www.acq.osd.mil/dpap/policy/policyvault/USA003939-17-DPAP.pdf>. DoD reports that it recognizes the cost and complexity for contractors in meeting NIST regulations. During her December 7 Senate testimony regarding cybersecurity compliance with January 1, 2018, deadlines, Under Secretary Lord stated: “We said that clearly the only requirement for this year is to lay out what your plan is.” Contractors know, however, that eventually DoD will need to be able to determine “compliance” more clearly than whether a “plan” exists.

VI. THE ELEPHANT IN THE ROOM: AFTER THE BARGAIN, YOU NEED TO MANAGE THE CONTRACT (OR THE GRANT, OR, ULTIMATELY, THE BUSINESS RELATIONSHIP)

This year, we were pleased to see several Inspectors General acknowledge the dirty little secret that undermines so many of the government's procurement policies and aspirations. No matter how much attention the government heaps upon the contract formation stage – planning, generating requirements, publicizing, soliciting, competing, evaluating, negotiating, drafting and awarding contracts – inadequate post-award contract management, administration, and oversight resources frequently imperil anticipated outcomes in government contracts. Some highlights (and, sadly, recurrent themes) from the reports include:

- DoD contracting officers do not always appoint contracting officer's representatives (CORs), appointed CORs are not always adequately trained, contracting officials do not always develop adequate quality assurance surveillance plans or never developed them at all, quality assurance surveillance plans do not reflect current contract requirements, and CORs do not always maintain supporting documentation. Moreover, not all CORs follow the oversight procedures established in the quality assurance surveillance plans to monitor contractor performance.

- At the State Department, grants management practices did not comply with Department requirements, and inadequacies appeared regarding the monitoring and documentation of contractor performance pertaining to contracts and foreign assistance programs. The IG pointed to staffing shortages, poor training, high turnover, and competing priorities, as well as CORs serving without proper training or proper designations.

- At the Department of Justice (DOJ), human capital constraints, decentralized contracting functions, and a lack of adequate monitoring frameworks, such as training and formal policies, often impede the Department's oversight of contractors. The IG astutely observed that this oversight challenge should be of particular concern to DOJ, given that, in FY2017, more than a quarter (27 percent) of DOJ's contracts were time and material (T&M) and labor-hour contract awards, used only when it is impossible to estimate accurately and considered to be high risk contract types, because they provide no incentive for the contractor to control cost.

This problem is neither new nor novel, but we applaud the attention being paid to the problem and encourage agencies to attempt to address these concerns by investing in, and allocating, appropriate resources to this important government function. See, generally, *Contract Management Still A Key Challenge, Agency IGs Report*, 59 GC ¶ 367, citing DoD IG, *Top DoD Management Challenges Fiscal Year 2018*, media.defense.gov/2017/Nov/20/2001846364/-1/-1/1/FY%202018%20MANAGEMENT%20CHALLENGES_11172017.PDF (pages 21-23); oig.state.gov/system/files/fy_2017_department_management_challenges_-_508_version_for_publication.pdf (pages 8-12); and oig.justice.gov/challenges/2017.pdf (pages 21-23).