2019

Emerging Policy and Practice Issues (2018)

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SESSION 13

EMERGING POLICY AND PRACTICE ISSUES

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I.   OFF TO A ROCKY START.

In retrospect, 2018 would have been a good year to get out of the prediction market. Simply, nothing we experienced in 2017 or 2018 makes us terribly confident in predicting what is in store for 2019 and beyond. We're hard pressed to recall starting a calendar year with a similar sense of trepidation and uncertainty with regard to what to expect on Pennsylvania Avenue, from the White House to the Capitol. We're increasingly sympathetic to those who, over the last couple of years, have found the rapidly spinning news cycle exhausting, overwhelming, and stressful. It's not an environment that suggests, going forward, we should expect stable leadership and staffing, reliable appropriations and program funding, comfortable contractual relationships, and proactive, meaningful, efficient long-term reform. All of which only increases anxiety in the government contracting policy and practice spheres, because uncertainty and instability threaten or undercut, among other things, efforts to engage in effective tradeoff analyses and planning, making efficient, long-term investment decisions, maintaining healthy contractual relationships, proactively investing in hiring, developing, and training personnel (needed today and in the future), while, instead, permitting a regressive overemphasis on cost savings rather than focusing on programmatic outcomes as a principal goal of the acquisition process. None of which is a cause for optimism. On a more positive note, many agencies enjoyed an agreement on funding and full year appropriations, which led, in turn, to increases in contract obligations for FY18. (More on this below.) In addition, the backlog in security clearance background investigations finally began to decline, falling by more than 100,000 by year's end.

II.   A PARTIAL SHUTDOWN: EARLY APPROPRIATIONS SUCCESSES FAIL TO AVOID END-OF-THE-CALENDAR YEAR INSTABILITY.

In a year when the Defense Department appropriation and a number of others (Energy and Water Development; Labor, Health & Human Services, Education; Legislative Branch; Military Construction, and Veterans Affairs) were passed in a timely manner, we could be forgiven if we had not expected a(nother) government shut-down, albeit a partial one. (It had been more than a decade since DoD, and more than 15 years since the other agencies, began the fiscal year with full year appropriations.) The current impasse and (again, partial) shut-down commenced with the expiration of continuing resolutions (CR's) on December 21, 2018 – animated by the Administration's demand for (generally) $5 billion for construction of the Department of Homeland Security, Customs and Border Patrol Southern border wall and power-shift in (and surge of energy from) the Democratic-majority House of Representatives.

Time will tell how disruptive this shutdown becomes. While all signs indicate that this shut-down may achieve historical significance in terms of longevity, its impact is, at least somewhat, tempered by its limited scope. Conversely, nothing about suspending/interrupting government functions bodes well, and the impact on the public, the economy, civil servants, and, of course, contractor personnel are unfortunate and, sadly, largely avoidable. Of course, no one "wins" in a government shutdown, and federal contractors

are often the biggest losers. That's a shame, to the extent that federal contractors play an essential role in helping agencies achieve their missions and deliver services to the American people. And, of course, the longer a shutdown lasts, the greater the cost to the public, the economy, and federal agencies.

III. OPAQUE GROWTH BELOW THE RADAR: HIGH VOLUME, LOWER DOLLAR PROCUREMENTS: THE NEW THRESHOLDS AND SCHEDULE CONSOLIDATION

A. Micro-purchase and simplified acquisition thresholds. Looking back, one of last year's most dramatic policy and practice changes – in terms of impacting the broadest segment of the acquisition community and the private sector – will fly largely under the radar, … and that's the whole point. Pursuant to the 2019 National Defense Authorization Act (NDAA), Section 821, the **micro-purchase** threshold experienced a dramatic, greater-than-inflation-adjusted, bump up to $10,000 for all agencies (including DoD). *Congress Passes FY 2019 NDAA*, 60 GC ¶ 241. (Although, as the end of Calendar Year 2018 approached, the Federal Acquisition Regulation (FAR) had not yet been amended to reflect that increase, DoD raised the threshold by class deviation on August 31, 2018.) But the longstanding $2,000 cap on construction – tied to the Davis-Bacon Act, which has never been indexed – remains. The micro-purchase threshold for contingencies, emergencies, and major disasters is now $20,000 (domestic) and $30,000 (for work outside the U.S.) See *https://www.acq.osd.mil/dpap/policy/policyvault/USA002260-18-DPC.pdf.* We've come a long way since the late 1990's, when the micro-purchase authority was established, as part of the reform and streamlining movement, and dramatically expanded reliance on the Governmentwide commercial purchase card (yes, the then-nascent Government charge card). *DoD Gears Up for Simplified Micropurchases*, 40 GC ¶ 192.

Meanwhile, the **simplified acquisition threshold** increased Government-wide from $150,000 (which has been inflation adjusted) to $250,000. For contingencies, emergencies, and major disasters, the limit is now $750,000 (domestic) and $1.5 million (for work outside the U.S.), with a $500,000 threshold for humanitarian and peace-keeping procurements outside the U.S. The government has yet to take full advantage of this increase, and agencies and contractors would do well to push for reliance on this flexibility.

Experience suggests there will be problems, but they'll also largely occur below the radar screen. Arguably, that's the whole point: out of sight, out of mind. From a policy perspective, Congress is betting, and we tend to agree, that reduced transactions costs for massive numbers of transactions will more than offset any losses, higher prices, fraud, and abuse facilitated by the streamlined approach and reduced oversight associated with micro-purchases and simplified acquisitions. By analogy, see, e.g., *GSA Travel Card Program Needs Better Oversight, IG Says*, 60 GC ¶ 301 (IG found that, although cardholders were using their travel cards inappropriately, supervisors did not receive the questionable charges reports in a timely manner, and cardholders continued to make inappropriate charges undetected); *Developments In Brief(a): DOD IG Finds Incomplete Purchase Card Reports to OMB*, 60 GC ¶ 126, DODIG-2018-101, *DoD Reporting of Charge Card Misuse to OMB*, available at *media.defense.gov/2018/Apr/09/2001900779/-1/-1/1/DODIG-2018-101.PDF.* See also, *CIGIE Finds High-Risk Transactions Using Purchase Cards*, 60 GC ¶ 216 (Council of the Inspectors General on Integrity and Efficiency (CIGIE) randomly sampled 1,255 of 1.8 million transactions totaling over $941 million from 2016-2017, and found that 40 percent did not

comply with applicable policies in the following major risk categories: split transactions, sales tax transactions, transactions from unauthorized third-party merchants, and transactions from prohibited and questions merchant category codes (MCCs)), available at *www.oversight.gov/sites/default/files/oig-reports/CIGIE_Purchase_Card_Initiative_Report_July_2018.pdf*.

B. Consolidating the GSA Schedules. On a more observably dramatic note, in late November, GSA announced that it will consolidate its 24 Multiple Award Schedules (MAS) into one single Schedule for both products and services. GSA Administrator, Emily Murphy, explained that this responds to government and business partner feedbacl. "Reforming our schedules will improve customer service, make it easier for small businesses to access the schedules program, reduce duplication for all our vendors, and allows GSA's workforce to focus on delivering solutions…." *GSA Announces Transformation of Multiple Awards Schedules*, *https://www.gsa.gov/about-us/newsroom/news-releases/gsa-announces-transformation-of-multiple-awards-schedules*. See also, 60 ¶ 366(a). Federal Acquisition Service Commissioner Alan Thomas explained that the consolidation will "provide a single entry point to MAS with consistent practices applied across the program and save vendors from the burden of managing contracts on multiple schedules." At a minimum, it will be interesting to watch how the community progresses up the learning curve and, among other things, adapts its vocabulary to the new regime. (Our sense is that the familiar "Schedule 70" is as ingrained in the information technology (IT) lexicon as, say, "1102" is among government contracting professionals.) On a related note, see *GSA Needs To Refine Transactional Data Metrics For MAS Pilot*, 60 GC ¶ 230; see also *Audit of Transactional Data Reporting Pilot Evaluation Plan and Metrics*, available at *www.gsaig.gov/sites/default/files/audit-reports/A140143_2.pdf*. Readers may also be interested in *GSA Interact's* "Multiple Award Schedules" blog, at *https://interact.gsa.gov/groups/multiple-award-schedules*. See also, *MAS Vendors Need Guidance, Training On OLM Authority, Industry Group Says*, 60 GC ¶ 127 (Coalition for Government Procurement urged GSA to issue guidance and provide training on the new authority to procure order-level materials on MAS task and delivery orders); *GSAR Final Rule Allows Order-Level Materials On MAS Orders*, 60 GC ¶ 29, 83 Fed. Reg. 3275 (Jan. 24, 2018), after multiple rounds of comments to the original 2016 proposed rule, 81 Fed. Reg. 62445 (Sept. 9, 2016) (requiring, *inter* alia, three quotes for orders above the simplified acquisition threshold).

IV. NOW "ACTING": CHURNING AT THE TOP, VACANCIES, CONTINUED TRANSITIONS.

Two years into the current administration, and we're still not fully accustomed to the vacancy and turnover rates in high level (e.g., up to, and including, cabinet level), politically-appointed leadership. And nothing suggests that 2019 will bring a wave of nominations to fill critical positions with highly qualified individuals committed to serving in specific capacities for lengthy periods of time.

Still Waiting at OFPP. We would be remiss if we did not take this (now annual) opportunity to remind readers that the current Administration has not nominated a candidate to serve as Administrator of the Office of Federal Procurement Policy (OFPP). Given the number of vacancies and acting appointments generally – and, most obviously, at high(er) levels, such as Cabinet-level positions – we are no longer holding our breath. Given the longstanding, demonstrated competence of the career staff to operate without political leadership, we hesitate to elevate this to crisis level, but we

consider it disappointing and consider it a squandered opportunity. Among other things, because the OFPP Administrator is a leading face and voice for the profession, the vacancy does not bode well the perception of procurement process and the morale of the acquisition community.

Nor do we expect much focused leadership on procurement from elsewhere, such as the higher levels within the **Office of Management and Budget (OMB),** where leadership is on the move and wearing multiple hats. OMB Director Mick Mulvaney already was spending half his time simultaneously running the Consumer Financial Protection Bureau (CFPB), and the OMB's deputy director, Margaret Weichert, was tapped to also run the Office of Personnel Management (OPM). Then, in December, the President announced that Mulvaney would serve as acting White House chief of staff. Russell T. Vought was quickly elevated to acting OMB director, though an official announcement has not yet been made. Maybe the partial shutdown will offer OMB acting director Vought an opportunity to settle in his new role. Contrast this with what appears to be vigorous and knowledgeable procurement leadership elsewhere in government, including GSA, where Emily Murphy has taken significant steps (see the discussion of schedule consolidation, above).

Changing of the Guard at DoD: We assume we were not alone in failing to anticipate that the resignation of Secretary of Defense James Mattis would make way for Deputy Defense Secretary Patrick Shanahan to serve as – for now – Acting Secretary of Defense. (Of course, this is not unprecedented; the last time the deputy secretary served a lengthy period was 1989, when William Howard Taft IV held the position for two months.) Meanwhile, at **DPAC/DPAP**, Shay Assad is returning to his position as Director for Pricing and Contracting Initiatives, and Kim Herrington is currently serving as the Acting Principal Director for Defense Pricing and Contracting (DPC). In a bizarre and unrelated twist, earlier in the year, on August 21, DPAP alerted the public of a potential scam, that an individual may be impersonating Shay Assad by email and/or telephone in an attempt to obtain software/equipment/etc. Truth is stranger than fiction.

V.   **DEFENSE ACQUISITION: A FRESH START, DISAGGREGATION (OR WHEN "OTHER" BECOMES THE NORM), AND TRYING TO MAKE SENSE OF IT ALL**

A. The Section 809 Panel. By the time this conference begins, we'll have had an opportunity to see, and, hopefully, digest, the final Section 809 Panel report, scheduled for "the big reveal" in mid-January. (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.) See generally, *https://section809panel.org*. Among other things, we'll be curious to see what the 809 panel recommends with regard to reining in bid protests. *ABA Section Criticizes 809 Panel's Proposals To Limit Bid Protests*; 60 GC ¶ 167; *RAND Study Finds More DOD Protests, But No Flood Of Frivolous Protests,* 60 GC ¶ 18; Steven L. Schooner, *Bid Protests: The RAND Study Of DOD Protests At The GAO And The COFC*, 32 N&CR ¶ 10 (February 2018); Christopher Yukins

and Daniel Ramish, *Feature Comment: Section 809 And 'e-Portal' Proposals, By Cutting Bid Protests In Federal Procurement, Could Breach International Agreements And Raise New Risks Of Corruption*, 60 GC ¶ 138; *CRS Surveys Bid Protest Forum Distinctions*, 60 GC ¶ 299; David H. Carpenter & Moshe Schwartz, *Government Contract Bid Protests: Analysis of Legal Processes and Recent Developments* (R45080, November 28, 2018) ("Congress might utilize the information gained from … studies, reports, and pilot programs to inform its consideration of substantive legislative reforms to the bid protest system[, … including] implementation of certain recommendations in the RAND report or making permanent, expanding, or eliminating the pilot program that requires certain contractors to reimburse the government for the costs associated with adjudicating unsuccessful protests."), available at *crsreports.congress.gov/product/pdf/R/R45080*.

Among other things, we're curious to see if and how the 809 Panel report addresses the concern that, increasingly, the **FAR and DoD's Procedures, Guidance, and Information (PGI) don't accurately reflect practice in the field**. For example, in a recent report, GAO explained that orders under indefinite-delivery contracts comprised *roughly 40 percent* of DoD obligations in fiscal years 2015 through 2017. In that context, we find it remarkable how inadequately the Federal Acquisition Regulation (FAR) describes the process through which 40 percent of DoD's acquisition spending flows. For example, GAO notes that, despite FAR 16.500(a)'s established preference for multiple awards, "[o]f the DOD awards for the indefinite-delivery /indefinite-quantity (IDIQ) contract type during this period, about three-quarters were made to a single contractor, rather than multiple contractors." Indeed, Table 1 suggests that GAO under-stated the single-award trend; the Table's numbers of transactions indicated that single award IDIQ's represented 79 percent of all DoD IDIQ's in 2015, 78 percent in 2016, and a whopping *85 percent* in 2017. (For FY17, that's 6,242 single-award indefinite-delivery contracts (that were competed), 2,069 single-award indefinite-delivery contracts (that were not competed), and only 1,423 multiple-award indefinite-delivery contracts.) If 85 percent of DoD's IDIQ's in FY 2017 were single awards, the policy favoring multiple awards is teetering on the verge of dead letter. See, e.g., Steven L. Schooner, *Indefinite-Delivery/Indefinite-Quantity Contracts: Time To Correlate Practice And Policy?,* 32 N&CR ¶ 44 (September 2018); GAO-18-412R, *Defense Contracting: Use by the Department of Defense of Indefinite-Delivery Contracts from Fiscal Years 2015 through 2017*, (May 10, 2018), available at *https://www.gao.gov/products/GAO-18-412R*. See also, *Navy Not Preparing D&Fs For IDIQ Contracts, IG Says*, 60 GC ¶ 45 (This appears to be largely a technical/compliance failure, rather than an omission: the D&Fs reviewed were incomplete, lacking the necessary rationales.), see DODIG-2018-069, *Navy's Single Award Indefinite-Delivery Indefinite Quantity Contracts*, available at *media.defense.gov/2018/Feb/05/2001873543/-1/-1/1/DODIG-2018-069. PDF*; *Section 809 Panel Seeks To Streamline DOD Commercial Buying*, 60 GC ¶ 46 (among other things, we're pleased to see that the report says: "Rather than focusing on price and process to measures success, [DOD's] acquisition system should focus on outcomes....").

B. The Section 813 Panel. Meanwhile, the 813 Government-industry advisory panel, established in the FY 2016 NDAA § 813 (as amended by FY 2017 NDAA § 809(f)(1)), completed its review 10 USCA §§ 2320 and 2321, regarding rights in technical data and their implementing regulations. See, *2018 Report: Government-Industry Advisory Panel on Technical Data Rights* (November 13, 2018), available at *http://www.ndia.org/-media/Sites/NDIA/*

Policy/Documents/Final%20Section%20813%20Report. The report's analysis is built around a host of topics, including the business model, acquisition planning and requirements, source selection and post source selection, IP licensing, balancing the interests of the parties, implementation, compliance/administrative, data acquisition, and modular open systems approaches (MOSA). While the panel seemed united in agreeing that DoD acquisition professionals require more training in intellectual property right-related procurement issues, we are confident this will be addressed at greater length in Chapter 12 of these materials. See also, generally, Daniel J. Kelly, *IP Rights Under NASA and DoD "Other Transaction" Agreements - Inventions and Patents*, 18-9 BRIEFING PAPERS (August 2018); W. Jay DeVecchio, *Taking the Mystery Out of Data Rights*, 18-8 BRIEFING PAPERS (July 2018); Ralph C. Nash, *Validation of Technical Data: Statutory Changes*, 32 N&CR ¶ 49; Ralph C. Nash, *Postscript: Obtaining More Rights in Technical Data and Computer Software,* 32 N&CR ¶ 38 ("We are seeing more protests concerning the efforts of the military services to obtain sufficient information with accompanying rights to reduce the cost of sustainment of their weapon systems without violating the statutory prohibition of demanding such rights.").

On December 7, 2018, on the heels of the final 813 Panel report, Army Secretary Mark T. Esper issued Army Directive 2018-26, *Enabling Modernization Through the Management of Intellectual Property*, with a stated goal is reducing life cycle cost for Army programs, and focused on the Army buying "just enough" IP. See *https://armypubs.army.mil/epubs/DR_pubs/DR_a/pdf/web/ARN14261_AD2018_26_Final.pdf.* With the decentralization of program acquisition from the Office of the Secretary of Defense (OSD) to the Military Departments, this directive applies only to the Army. However, USD(A&S) Ellen Lord has indicated that her team is working on a DoD-wide IP policy, which has yet to be provided for review and comment.

C. DoD Progress Payments Dust-up Resolved (Or Deferred). For now, DoD's controversial (dare we say "incendiary"?) proposal to lower the progress payment rate and performance-based payment rate has been derailed. Following a September 21, 2018 letter from the chairs of the House and Senate Armed Services committees, Representative Mac Thornberry (R-TX) and Senator Jim Inhofe (R-OK), then-Deputy Secretary of Defense Patrick Shanahan called the proposal "fundamentally flawed," after which, on October 1, the proposed rule was withdrawn. See also, *Industry Decries DFARS Proposed Rule On Performance-Based Payments, Progress Payments*, 60 GC ¶ 305 (Council of Defense and Space Industry Associations (CODSIA), National Defense Industrial Association (NDIA), and Aerospace Industries Association (AIA) and the Professional Services Council (PSD) urged DOD to allow for "a more fulsome discussion" of the DFARS proposed rule); *Industry Group Opposes DFARS Performance-Based Payment Proposed Rule*, 60 GC ¶ 293; *DOD Proposes DFARS Incentive Structure For Progress Payments And Performance-Based Payments*, 60 GC ¶ 276; 83 Fed. Reg. 42831 (Aug. 24, 2018). See PSC's comments at *www.pscouncil.org/Downloads/documents/Advocacy-Policy Docs/Progress Payments 9.14.18 Public Meeting Statement (FINAL).pdf.* Stay tuned, however: in December, USD(A&S) Lord indicated that the issue may return, but that DoD would more proactively involve industry in crafting the rule.

D. Focus on PALT. Section 886 of the FY18 NDAA requires the Secretary of Defense to develop, make available for public comment, and finalize a DoD-wide definition of the term "Procurement Administrative Lead Time" or

"PALT." See DARS-2018-0005, 83 Fed. Reg. 5762 (February 9, 2018). DoD is proposing to define PALT as "the time between the date on which the initial solicitation for a contract or task order of the Department of Defense is issued and the date of the award of the contract or task order." DoD plans to use Federal Procurement Data System—Next Generation (FPDS-NG) to measure and publicly disseminate PALT data. In a March 12, 2018 letter, the Council on Defense and Space Industry Associations (CODSIA) supported harmonizing the definition of, and then tracking, PALT. CODSIA also suggested "that buying activities should have the flexibility to track PALT at an earlier stage[, which would …] not only aid buying activities in managing their acquisitions, [but also] … provide greater opportunities for the Department to reduce the time spent on such acquisitions. ... [Particularly] for complex information technology or other services acquisitions, or major systems purchases, the time between a requirements determination and solicitation may be the longer period in the acquisition lifecycle. Not only is this worth capturing and reporting, it should be a principal focus of reduction efforts." Letter available at DARS-2018-0005 *http://www.codsia.org/uploads/6/8/9/9/68991301/ codsia_comments_dars-2018-0005_-_palt_-_final_-_12_mar_18.pdf*.

E. Transparency: Every Little Bit Helps. We're also pleased to hear that USD(A&S) Lord intends to promote transparency by restricting use of "For Official Use Only" designations on various acquisition reports. (This would be a breath of fresh air amidst an administration that has consistently moved in the wrong direction on transparency.) See *https://www.executivegov. com/2019/01/ellen-lord-sets-plan-to-promote-pentagon-wide-acquisition- transparency/*.

F. 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. The wheels on this are moving slowly, but, apparently, they're still moving. Comments on DOD's proposed rule, available at 83 Fed. Reg. 62550 (December 4, 2018), are due in early February. As late as November, GAO bemoaned that the FY17 NDAA, Section 813, "mandated that DOD revise its regulations to require that eight criteria be considered when using the LPTA process. As of September 2018, DOD had not yet done so." The eight criteria (including the two added in the FY18 NDAA) that that DOD contracting officers must ensure before issuing a solicitation on an LPTA basis are:

- DOD can clearly describe the minimum requirements in terms of performance objectives, measures, and standards that will be used to determine acceptability of offers.

- DOD would realize no, or little, value from a proposal exceeding the solicitation's minimum technical requirements.

- The proposed technical approaches can be evaluated with little or no subjectivity as to the desirability of one versus the other.

- There is a high degree of certainty that a review of technical proposals other than that of the lowest-price offeror would not identify factors that could provide other benefits to the government.

- The contracting officer has included a justification for the use of the LPTA process in the contract file.

- The lowest price reflects full life-cycle costs, including for operations and support. (We're ecstatic to see life-cycling costing gain increased visibility.)

- DOD would realize little or no additional innovation or future technological advantage by using a different methodology.
- For the acquisition of goods, the goods being purchased are predominantly expendable in nature, nontechnical, or have a short life expectancy or shelf life.

GAO also recommended that the DFARS should clarify *how* officials should apply the criteria that goods be expendable, nontechnical or short-lived, and that the lowest price reflects full life-cycle costs. "Absent additional direction, contracting officials across DOD may not understand how to consistently apply these criteria when using the LPTA process," GAO cautioned.

See *DOD Should Clarify Statutory LPTA Criteria*, 60 GC ¶ 357, GAO-19-54, *Defense Contracting: DOD Should Clarify Criteria for Using Lowest Price Technically Acceptable Process* (November 2018) ("GAO estimates that about 26 percent of [DoD's FY2017] contracts and orders valued $5 million and above … were competitively awarded using the …[LPTA] process."), available at *www.gao.gov/assets/700/695352.pdf*. See also, David Berteau, PSC Letter to Kevin Fahey (November 20, 2018), expressing serious concerns regarding DoD's continued delay of overdue and statutorily mandated regulations restricting the use of LPTA source selection criteria for DoD services contracts. While PSC acknowledges a place for LPTA, when used appropriately, "applying LPTA to complex professional or IT services where higher-level technical capabilities and innovation are often sought, and where the contracting requirements are often difficult to accurately define, is particularly ill-advised." PSC also notes that "[e]xcluding task orders from the LPTA restrictions would be inconsistent with the procurement and acquisition definitions contained in the [FAR] and with the Congressional intent behind [NDAA] Section 813." Available at *https://www.pscouncil.org/*.

G. A Resurgence for Other Transactions (OT's) and Experimental Authorities? Congress continues to signal its support for flexibility, creativity, innovation, and working around the existing framework for many types of projects. The big news last year was USD(A&S) Lord issuing a new – and dramatically different – *Other Transactions (OT) Guide*, available at *https://aaf.dau.mil/ot-guide*. (The Other Transactions Guide for Prototype Projects (version 1.2.0, January 2017) was rescinded in its entirety and replaced by this guide.) In describing the purpose of other transactions (OT's), the guide explains that:

The OT authorities were created to give DoD the flexibility necessary to adopt and incorporate business practices that reflect commercial industry standards and best practices into its award instruments. When leveraged appropriately, OTs provide the Government with access to state-of-the-art technology solutions from traditional and Non-Traditional Defense Contractors, through a multitude of potential teaming arrangements tailored to the particular project and the needs of the participants.

We appreciate the fact that the guide was "intended for two primary audiences, both the Government team, to include Project Managers, Agreements Officers (AOs), Agreements Specialists, Systems Engineers, Small Business representatives, Legal Counsel; and Government partners, to include Industry, Academia, other Federal agencies, and State and Local authorities …." The guide stakes out some boundaries early on, emphasizing that OTs are *not* FAR-based procurement contracts, grants, cooperative agreements, or Cooperative Research and Development Agreements (CRADAs). Conversely,

OT's may help DoD:

- Foster new relationships and practices involving traditional and nontraditional defense contractor (or NDCs), especially those that may not be interested in doing FAR based contracts with the Government

- Broaden the industrial base available to Government

- Support dual-use projects

- Encourage flexible, quicker, and cheaper project design and execution

- Leverage commercial industry investment in technology development and to partner with industry to ensure DoD requirements are included in future technologies and products

- Collaborate in innovative arrangements

After a brief overview, the guide proceeds in three parts: (1) Planning; (2) Publicizing, Soliciting, and Evaluating (concluding, basically, with award); and (3) Administration (or what we might call post-award contract, agreement, or relationship management). Weighing in at approximately 125 pages (in the PDF version), the online resource is informative and exhaustive, yet surprisingly accessible, containing, among other things, case studies, a glossary, and a chronological history of statutory authority. Notably missing from this list (and the guide itself) is the absence of consideration of life-cycle costs and sustainment planning for "prototypes" obtained via OT agreements; and there is no sign that DoD, other agencies, or the Congress is ready to address this significant shortcoming.

Our favorite appendix contains the *Common OT Myths and Facts*. (It should come as no surprise that the guide refutes all of the following "myths" as "false," and follows with brief explanations:

1. There is only one type of OT available to DoD.

2. The OT authorities are new and are rarely used.

3. Since an OT is termed an "agreement," it is not a contract.

4. Since CICA does not apply, competition and fairness are not considered.

5. OTs Cannot be Protested.

6. None of the federal statutes or regulations apply to OTs.

7. OTs can only be awarded through a consortium.

8. The OT authorities can only use RDT&E appropriations.

9. Anyone in DoD can award an OT.

10. OTs will always be faster to award than other contractual instruments.

See also, *DOD A&S Undersecretary Issues 'Other Transactions' Guidance*, 60 GC ¶ 365; Richard L. Dunn, *Feature Comment: DOD Other Transactions Guide—A Breath Of Fresh Air*, 60 GC ¶ 362 ("The new Guide makes it clear that it is *truly a guide* in several ways. Its lay-out and style are a complete departure from the prior Guide and cannot be mistaken for a regulation. It contains highlighted case studies, a glossary of definitions, and a collection of common misunderstandings and myths…."). We also applaud DoD's guid-

ance that requires that "Other transactions" agreements (OTAs) for prototypes must be reported in the Federal Procurement Data System (FPDS). See 60 GC ¶ 292(c); available at *www.acq.osd.mil / dpap / policy / policyvault / USA002363-18-DPC.pdf.* See also, Richard L. Dunn, *Practitioner's Comment: GAO Sustains OTA Protest*, 60 GC ¶ 195 (discussing Oracle Am., Inc., Comp. Gen. Dec. B-416061, 2018 CPD ¶ 180, finding that a *follow-on production OTA* was improper because (1) the initial prototype OT did not include a provision for a follow-on OT, and (2) the underlying prototype OT was not completed; Dunn asserts that GAO's 'business as usual' approach to OT's "is clearly wrong and harmful" to the overall reform effort. It is instructive to note, however, that DoD raised no public objection to GAO' precedent-setting decision.); Vernon J. Edwards, *Sad Commentary: Rules, Or The Lack Thereof, Won't Make Acquisition Agile And Innovative*, 33 N&CR ¶ 5; Richard L. Dunn, *Other Transaction Agreements: What Applies?,* 32 N&CR ¶ 22 Ralph C. Nash, *Other Transactions: A Preferred Technique?,* 32 N&CR ¶ 8 ("Does additional complexity produce better outcomes? It will be interesting to find out."); Armani Vadiee and Todd M. Garland, *The Federal Government's "Other Transaction" Authority*, 18-5 Briefing Papers (April 2018).

H. The State of the Industrial Base. We've previously bemoaned – throughout much of the prior administration's Better Buying Power (BBP) initiative, with its apparent prioritization of reducing contractor profits and overhead expenses, including independent research and development – the lack of attention paid to DoD's industrial base. Industrial base issues are surely to be invigorated by the 140-page report of the interagency task force established pursuant to Executive Order 13806 (82 Fed. Reg. 34597 (July 26, 2017)).

We also continue to be frustrated that neither the Executive Order nor the report addresses the business base that provides *half of all contract support* for national security, via contracts for services and solutions rather than products. The vulnerabilities in logistics, sustainment, and support services are likely to be at least as widespread as those in the component supply chain, but the lack of attention to those vulnerabilities means too little is known about them and, accordingly, too little is being done to address them. To date, neither DoD nor the White House has publicly acknowledged these problems. Notwithstanding that shortcoming, the study sets a valued benchmark and provides for needed actions. Three of the major findings animate much of what follows, and none are surprising:

- A surprising level of foreign dependence on competitor nations exists;
- Workforce challenges face employers across all sectors; and
- Many sectors continue to move critical capabilities offshore in pursuit of competitive pricing and access to foreign markets.

We found that the other major finding was potentially the most sophisticated and under-appreciated: the task force articulated that impacts and risks primarily affect "sub-tiers" of the supply chains, rather than the major (or top-tier, or name brand, or conventional) prime contractors. The report then identifies "five macro forces driving risk" into the industrial base:

1. sequestration and uncertainty of U.S. Government spending;
2. decline of U.S. manufacturing capabilities and capacity;
3. deleterious U.S. Government business and procurement practices;

4.   industrial policies of competitor nations; and

5.   diminishing U.S. STEM and trade skills.

That's a daunting list. The report then turns to "ten risk archetypes" that threaten the manufacturing and industrial base: sole source, single source, fragile source, fragile market, capacity constrained supply market, foreign dependency, diminishing manufacturing sources and material shortages, gaps in U.S.-based human capital, erosion of U.S.-based infrastructure, and product security. For better or worse, the report includes a dizzying array of recommendations – large and small – at four levels: investment, policy, regulation, and legislation. Looking at the list – with recommendations ranging from the practical (reducing the personnel security clearance backlog through more efficient processes) to the aspirational (accelerating workforce development efforts to grow domestic science, technology, engineering, mathematics (STEM), and critical trade skills) – offers a stark insight into the long-term challenges faced in maintaining, let alone enhancing, the industrial base. We also expect readers will be particularly interested in the "sector summaries," subdivided into traditional defense sectors (think aircraft, munitions, shipbuilding, nuclear, space, and "soldier systems") and "cross-cutting" sectors (such as machine tooling, materials – both raw and downstream, electronics, software, and, of course, cybersecurity). See, *Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States* (September 2018), available at *defense.gov/StrengtheningDefenseIndustrialBase*; see also, generally, *DOD Task Force Delivers EO-Mandated Defense Industrial Base Report To President*, 60 GC ¶ 316; *DOD Faces Challenges Assessing Industrial Base Risks*, 60 GC ¶ 197; GAO-18-435, *Defense Industrial Base: Integrating Existing Supplier Data and Addressing Workforce Challenges Could Improve Risk Analysis,* available at *www.gao.gov/assets/700/692458.pdf* (risks to the industrial base include, for example, suppliers' financial viability, limited capacity, foreign dependence, obsolete items, and loss of skills or equipment). See also, on a related note, *DOD Acquisitions Must Focus On Supply Chain Security, Nonprofit Says*, 60 GC ¶ 251; Chris Nissen, John Gronager, Robert Metzger & Harvey Rishikof,, *Deliver Uncompromised: A Strategy for Supply Chain Security and Resilience in Response to the Changing Character of War*, available at *www.mitre.org/sites/default/files/publications/pr-18-2417-deliver-uncompromised-MITRE-study-8AUG2018.pdf* ("DoD must make better use of its existing resources to identify, protect, detect, respond to, and recover from network and supply chain threats…. While DoD cannot control all the actions of its numerous information system and supply chain participants, it can lead by example and use its purchasing power and regulatory authority to move companies to work with DoD to enhance security through addressing threat, vulnerabilities, and consequences of its capabilities and adapt to dynamic, constantly changing threats.").

Bear in mind that the concept of "Deliver Uncompromised," described not only in the above report but also in DoD testimony before the House Armed Services Committee last June, addresses the problem with emphasizing security in evaluation criteria for contracts, whether for supply chain or services. That problem is the absence of *any* agreed-upon way of measuring such security. We know how to measure cost, schedule, and (to a less well-defined degree) performance, but no one can say with confidence how to measure security. Until we do, this will remain a tough nut to crack and a hard problem to define, much less solve.

I. Modern Tools: Ambrosia? Catnip for Defense Acquisition Geeks?

Touted as a "new digital tool suite for acquisition policy," the Digital Acquisition Prototypes, developed by MITRE for USD(A&S) are, if nothing else, eye-catching, informative, and user-friendly. We encourage readers to visit the site and engage with these interactive tools. To the extent that all defense acquisition programs require two fundamental elements to execute: an *acquisition pathway* and a *contracting strategy*, the tools are intended to, among other things assist organizations in selecting the pathway and strategy that best meet their program's needs in a way that complements and supports positive program outcomes. The specific tools are an "adaptive acquisition framework" and a "contracting cone." DAU explains that, because there are many pathways for DoD to deliver capabilities, the **Adaptive Acquisition Framework** tool, see *https://aaf.dau.mil/aaf/,* helps you select the right pathway and provides detailed guidance for each. The pathways to choose from are:

- Urgent Operational Needs
- Middle Tier of Acquisition
- Tailorable Traditional
- Acquisition of Services
- Defense Business Systems

The companion **Contracting Cone**, see *https://aaf.dau.mil/contracting-cone/,* outlines the full spectrum of available FAR and Non-FAR contract strategies. The supporting materials provide details about each strategy, to enable collaborative discussions to select the right strategy based on environment, constraints, and desired outcomes. The goal is to provide visibility into new or lesser known strategies – separated into following FAR-based and non-FAR based – and ensure that the full range of contract (and contract-like) strategies are considered.

FAR Based Strategies:

- Federal Supply Schedules – FAR Subpart 8.4
- Commercial Items – FAR Part 12
- Simplified Acquisitions – FAR Part 13
- Contracting by Negotiation – FAR Part 15
- Indefinite Delivery/Indefinite Quantity (IDIQ) – FAR Subpart 16.5
- Letter Contract (or undefinitized contractual agreement (UCA)) – FAR Section 16.603
- Agreements - written instruments of understanding containing contract clauses (not an actual contract), applying to future contracts – FAR Subpart 16.7
- Small Business – FAR Part 19
- Broad Agency Announcement (BAA) – FAR Section 35.016
- Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR)
- Defense Commercial Solutions Opening (CSO) Pilot Program

Non-FAR Based Strategies:

- Other Transactions (OT)

- Procurement for Experimental Purposes (10 USCA § 2373)

- Research and Development (R&D) Agreements, including Cooperative R&D Agreements (CRADA), Partnership Intermediary Agreements (PIA), and Technology Investment Agreements (TIA)

The *contracting cone* (*c'mon, it's fun to say - try it!*) also includes a handy (if high level and conclusory) Contract Type Matrix, which maps the contract types that are allowed for each of the major strategies outlined in the contracting cone.

J. Major System Performance Assessment: We were disappointed that DoD does not appear to have continued publication of the annual assessments of the Defense Acquisition System, which were produced during then-USD(AT&L) Frank Kendall's leadership. This year, however, thanks to GAO, we enjoyed a similarly data-rich gold mine of insights into DoD's major system acquisition performance. See, generally, *Knowledge Gaps Pose Risks To DOD Weapon Systems Portfolio*, 60 GC ¶ 145, GAO-18-360SP, *Weapon Systems Annual Assessment: Knowledge Gaps Pose Risks to Sustaining Recent Positive Trends*, available at *www.gao.gov/assets/700/691473.pdf*. Among the innumerable charts and assessments of individual programs, GAO offered a dazzling array of observations and insights. Some of our favorites included:

- GAO's broadest find appears to be that programs that implemented acquisition strategies to promote competition, including competitive award of contracts, reported decreases in total acquisition cost estimates as compared to others.

- DOD's 2017 portfolio grew both in number of programs (to 86) and cost (more than $1.66 trillion – we willingly concede that that's *a lot of money*).

- Programs in DOD's 2017 portfolio experienced a slight gain in buying power—meaning DOD is able to buy more goods or services for the same level of funding.

- Although the 2017 portfolio experienced more than $535 billion in cost growth over the original estimates, *most of that growth ($464 billion or 86 percent) occurred prior to 2012*.

- The 25 programs (representing 29 percent of the current portfolio) initiated since 2010 currently demonstrate better cost performance than older programs. GAO concluded that the acquisition reforms implemented that year (and later) were a driving factor behind the cost changes.

- On a less positive note, most programs did not fully demonstrate system design stability prior to conducting Critical Design Reviews; none of the programs fully demonstrated manufacturing processes that were in statistical control prior to starting production; and, for more than a third of the current programs GAO reviewed, DoD declared, or intend to declare, initial operational capability on the basis of limited (or no) initial operational test and evaluation.

In a somewhat related, but arguably broader, study, GAO offered a retrospective on some of the more recent acquisition reforms. See *GAO Surveys Acquisition Reforms Over A Decade After SARA Panel*, 60 GC ¶ 281, GAO-18-627, *Federal Acquisitions: Congress and the Executive Branch Have Taken Steps*

to Address Key Issues, but Challenges Endure (September 2018), available at *www.gao.gov/assets/700/694457.pdf.* Among other things, GAO noted that:

- Despite questions about the capacity of federal agencies to over-see contractors, agencies continue to award contracts warranting increased management attention at a steady rate.

- The federal acquisition workforce faces workload and training challenges, including workforce gaps at DOD and across agencies.

- Unrealistic requirements continue to contribute to poor DoD program outcomes; yet, from 2008 to 2017, the Army's requirements development workforce decreased by 22 percent.

- The government's primary repository for acquisition data contained some unreliable data, and the system has demonstrated limitations. (More on this, below.)

- Agencies periodically use bridge contracts that, over time, delay opportunities for competition and can place the government at risk of paying higher prices for multiple years.

K. And Don't Forget Infrastructure. Stepping back from our defense focus, one of our initial hopes for this administration was a renewal of infrastructure investment, possibly with a greater reliance on public-private partnerships (PPP'S or P3). Remember when there was talk of a massive infrastructure infusion – specifically, a 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? Obviously, that failed to materialize. Indeed, there has been little or no discussion about the ever-increasing, and cumulatively cascading, need to invest in infrastructure (other than the relentless concerns regarding cyber-security, of course). For a fleeting moment, the bridge disaster in Genoa, Italy, brought the issue back into the public's consciousness (but, again, in the current chaotic news cycle, it had no staying power). See, generally, James Glanz, et al., *Genoa Bridge Collapse: The Road to Tragedy, The New York Times has reconstructed how the disaster happened, from beginning to end*, NEW YORK TIMES (September 6, 2018) (extraordinary long-form reporting and visually appealing, accessible analysis), *https://www.nytimes.com/interactive/2018/09/06/world/europe/genoa-italy-bridge.html*; John Surico, *What Brought Down the Bridge in Italy? A deadly disaster has focused attention on the state of infrastructure built during the country's postwar boom*, ATLANTIC (August 16, 2018), *https://www.theatlantic.com/international/archive/2018/08/what-brought-down-this-bridge-in-genoa/567625/*; Ian Bogost, *More Bridges Will Collapse: Two disasters in Europe are the latest examples of the decline of infrastructure—as an idea as much as a physical thing*, ATLANTIC (August 14, 2018), *https://www.theatlantic.com/technology/archive/2018/08/the-age-of-precarious-infrastructure/567493/;* John Miller, *Restore Nonpartisan Support for Infrastructure*, TRANSPORT TOPICS (July 27, 2018) ("It's time for Congress to challenge itself to change and once again make infrastructure a nonpartisan issue."), *https://www.ttnews.com/articles/opinion-restore-nonpartisan-support-infrastructure.*

To the extent that GAO has focused on infrastructure, its analysis remains more micro than macro, more retrospective than prospective. See, e.g., *GAO: Military Should Better Track Contracts Privatizing Utility Systems*, 60 GC ¶ 282, GAO-18-558, *Defense Infrastructure: Guidance Needed to Develop Metrics and Implement Cybersecurity Requirements for Utilities Privatization*

Contracts, (since 1997, when Congress authorized privatization of utility systems at military installations, DoD has privatized nearly 600 of about 2,600 utility systems – including electric, water, wastewater, natural gas, and thermal systems – on military installations), available at *www.gao.gov/assets/700/694219.pdf*; *GAO Questions MILCON Cost Estimate Reliability*, 60 GC ¶ 105 (two of the three high-value projects GAO examined experienced a more than 30-percent increase over initial cost estimates; DOD cost estimators did not follow all the best practices (comprehensive, well-documented, accurate, and credible) associated with reliable estimating), GAO-18-101, *Defense Infrastructure: Action Needed to Increase the Reliability of Construction Cost Estimates*, available at *www.gao.gov/assets/700/690892.pdf*; and, for a specific anecdote, see, *DOD Needs Guidance To Improve Medical Infrastructure Construction Projects*, 60 GC ¶ 193, DODIG-2018-125, *The Fort Bliss Hospital Replacement Military Construction Project*, available at *media.defense.gov/2018/Jun/08/2001928750/-1/-1/1/DODIG-2018-125.PDF*.

VI. IT'S ALL ABOUT PEOPLE: HUMAN CAPITAL AND THE ACQUISITION WORKFORCE:

We continue to believe that the acquisition workforce is critically important, and we found plenty of interesting insights in this year's data-rich Federal Acquisition Institute (FAI) and OFPP 2018 Acquisition Workforce Competency Survey Report. See, *FAI, OFPP Survey Contracting Workforce Competencies, Demographics*, 60 GC ¶ 261; *2018 Acquisition Workforce Competency Survey Report*, available at *www.fai.gov/drupal/sites/default/files/2018_Acquisition_Workforce_Competency_Survey_Report.pdf*. Ultimately, while much of this is interesting – and worth discussing – there's plenty of head-scratching and disappointing stuff included as well. As for the big picture:

The *highest*-rated competencies were:

- Among FAC-C (Contracting) holders: issuing changes, awarding contracts, and competition;

- Among FAC-COR (Contracting Officer's Representative) holders: inspection and acceptance and business acumen and communication.

- Among FAC-P/PM (Program and Project Managers) holders: leadership.

The lowest proficiency ratings were:

- For FAC-C holders: negotiating forward pricing rates agreements, as well as contracting in contingency or combat settings.

- For FAC-COR holders: pre-award communication and contract negotiation.

- For FAC-P/PM holders: systems engineering.

The data represents a robust, but nonetheless, surprisingly limited, sampling of the workforce. A total of 36,836 responses (a significantly larger response rate than the FY16 survey) included 25,562 complete survey responses. As for coverage:

- The survey did *not* include the Defense Department, which represents the lion's share of the annual procurement budget;

- The highest *response rates* were the Department of Labor (almost 35%), the Small Business Administration (31%), the Department of the

Interior (29%), the Department of Education (27%), and the Department of Agriculture (27%); yet

- The agencies with the largest number of FAC responses – all with less than 27 percent reporting – were the Department of Veterans Affairs (2,568), the Department of Homeland Security (2,325), and the Department of Health and Human Services (1,912).

Moreover, if there's a fundamental flaw in the data, it's that respondents self-rated their own level of proficiency. (But, hey, it is what it is: a survey.) More troubling was the observation that *a plurality of FAC holders dedicates 0–25% of their time to acquisition-related activities.* (Frankly, we're not terribly interested in knowing the competence level of the folks who aren't doing the work. Although, hypothetically, it's nice to know that there is depth on the bench, in case we need to call on it at some point.) The demographic information was also interesting:

- The most common paygrade, the GS-13 level, represents 28.7% of FAC holders, yet the most common category of years of acquisition experience was only 6–10 years. (Does this mean that the more senior acquisition professionals were too busy, or too jaded, to complete the survey?)

- The most common age category among FAC holders was 51–55 years, with millennials accounting for 11.3% of the acquisition workforce. (Again, given the response rate, we're hesitant to conclude that we're working with a representative sample of the actual workforce.)

In addition, earlier in the year, GAO concluded that DoD could do more to optimize the **program management** career field and community.

> The military services recognize that they need skilled program managers to develop acquisition programs and have taken steps to develop that top-notch talent. ...
>
> Yet, [despite a solid training regimen, establishment of professional standards, and sharing of lessons learned] when compared to leading practices, we found that several practices used by the military services for training, mentoring, retaining, and selecting people for program manager positions could be improved....
>
> In nearly all cases, the military services could improve their practices by learning from ideas and initiatives being used by another military service or by commercial companies and ensuring that civilian and military personnel have similar opportunities to develop.

GAO-18-217, *Defense Acquisition Workforce: Opportunities Exist to Improve Practices for Developing Program Managers* (February 2018), available at *www.gao.gov/assets/700/690094.pdf*; *DOD Can Improve Development Of Acquisition Program Managers*, 60 GC ¶ 59 (among other things, GAO said the Air Force could improve its retention and selection practices; the Army could improve training, mentoring, and retention; and the Navy, which merited special attention, has "practices that do not extensively align with leading practices in each of the areas of training, mentoring, retaining, and selecting program managers").

VII. PROCUREMENT DATA: BETTER GRAPHICS, SAME DATA?

A. Data Crunching the Federal Procurement Spend. In a break from (longstanding) tradition, the Chapter does not offer a detailed report of

last fiscal year's procurement and grant spending. We expect that, as more fulsome data becomes available, FY2018 will reflect mixed results, initially slowed by continuing resolutions (CR's) and uncertainty, with a frantic rush at the end of the fiscal year (FY), but, overall, less spending than in FY2017. FY2019, of course, is off to an uneven start with many agencies fully funded, while others are bogged down by appropriations paralysis.

B. Test Driving the New "Data Lab." We were intrigued by USASpending.gov's new *DataLab* (still in Beta), which offers a broad range of eye-catching graphics and insights. For example, the DataLab graphically illustrates that, in FY 2017, over 60 percent of federal contract dollars were competitively awarded through 21,858,521 competitive actions (representing $320 billion), as compared to 925,888 non-competitive actions (representing $190 billion). (If we understand the data, that suggests that *noncompetitive procurements tend to be significantly larger* than their competitive siblings. We also assume, of course, that the data excludes, among other things, millions of micro-purchase transactions.)

For our purposes, there was much of interest in the section: *Contract Spending Analysis: How has federal contract spending changed over time?*, see *https://datalab.usaspending.gov/contracts-over-time.html*. The DataLab shows, over the past ten years:

- a slow increase from $470B in federal procurement spending in FY 2007, to a peak of $560B in FY2010;

- a steady decrease from FY2011 to a low of $440B in FY 2015;

- an short-term upward trend, with FY 2016 at $470B and FY 2017 at $510B; and, unfortunately

- only partial data (a round $200B) for FY 2018 (as of March 31, excluding, of course, the end-of-year binge in August and September 2018).

One of the most entertaining graphics reflects the distribution of contracts awarded over the course of the fiscal year.

- While no one should be surprised that the last two weeks of September are the highest (and represent significant outliers on the chart), the chart also indicates that "spending tended to rise and fall on a monthly cadence, with roughly one small peak and one small drop per month." Frankly, we have no idea what to make of this. And, while we're not surprised that the last week of December and the first week of January represent the two *least* active weeks of the year, we can't explain why the first week of April is the *most* active week outside the month of September.

- Moreover, "the end-of-year spikes consistently occurred across the decade, and … [o]n average[,] September spikes accounted for between 6-8 percent of the annual spending in a fiscal year."

- At the same time, we thought it made perfect sense that "[m]odifications … displayed less variance and did not spike as drastically at the end of each fiscal year. This suggests that new contracts—not modifications—drove the spikes at the end of each fiscal year."

- The data suggests that "Facilities, Equipment, and Construction [contracts] displayed about 3.5 times the level of variance over the decade as total contract spending, and over 50 times the variance of spending on

Weapons and Ammunition … [which] *did not spike at the end of the fiscal year*." [Emphasis added.]

- "[R]esearch and development [R&D] spending was less variable and less impacted by continuing resolutions…." The DataLab team ruminated that, "[a]s one of the smallest categories of spending, it is possible that this type of contract is partially sheltered from the timing of congressional appropriations."

- Given current events, it's worth noting that "the passage of a continuing resolution *increased total contract spending by 25 percent in the same week*, all else held equal. [Conversely,] passage of new appropriations resulted in a *decrease in total contract spending of 30 percent in the same week*, all else held equal…. [Of course, that makes sense, because, i]f agencies are unable to issue new contracts because adequate funds are not available under continuing resolutions, *needs accumulate, and then are satisfied once funding is available*." [Emphasis added.]

C. Consume Your Data With A Grain of Salt. Despite the splendid graphical presentations provided by the Department of Treasury on the *USASpending.gov* website, concerns remain with the accuracy and currency of the underlying data in the Federal Procurement Data System (FPDS). *Agencies Underreported Federal IT Acquisitions, Did Not Obtain Required CIO Approval, GAO Finds*, 60 GC ¶ 10 ("most agencies did not identify all of their information technology contracts, and eight *failed to identify over 40 percent* of their IT contract obligations" (emphasis added)); GAO-18-42, *Information Technology: Agencies Need to Involve Chief Information Officers in Reviewing Billions of Dollars in Acquisitions*, available at *www.gao.gov/ assets/690/689346.pdf; Inaccurate Procurement Data Undermine SBA's Contract Reporting, IG Says*, 60 GC ¶ 328, *www.sba.gov/sites/default/files/ oig/SBA-OIG-Report-19-01.pdf*; *SBA Small Business Procurement Scorecard Methodology Needs Further Revisions*, 60 GC ¶ 310; GAO-18-672, *Small Business Administration: Actions Needed to Improve Confidence in Small Business Procurement Scorecard* (September 2018) (GAO recommended that SBA design and implement a comprehensive evaluation to assess scorecard revisions, and institute a process for reviewing scorecards for accuracy prior to publication and a mechanism for disclosing corrected information.), available at *www.gao.gov/assets/700/694777.pdf*; *POGO Offers Recommendations to Improve USAspending.gov, https://www.pogo.org/letter/2018/06/pogo- offers-recommendations-to-improve-usaspendinggov/* (8 of 97 agencies are late (including DoD, almost a year behind) in reporting DATA Act spending information; other government programs have submitted very few spending records or none), see also *https://about.bgov.com/blog/federal-spending- site-still-lacks-data-revamp-report-says/*. Nor is the data set keeping up with the rapidly evolving global open data standards. See GAO-19-72, *Open Data: Treasury Could Better Align USAspending.gov with Key Practices and Search Requirements* (December 2018), available at *https://www.gao.gov/ assets/700/696023.pdf*.

Meanwhile, the **service contract inventory exercise** continues, apparently satisfying no one. *DOD Still Not Using Service Contracts Inventory To Inform Decision-Making*, 60 GC ¶ 115 (GAO noted that military services generally have no plans to use the contract services inventory to inform management and budget decisions, although 10 USCA § 2330a(e), requires them to do so), GAO-18-330, *DOD Contracted Services: Long-Standing Issues*

Remain about Using Inventory for Management Decisions, available at *www.gao.gov/assets/700/690954.pdf*. In addition to others, PSC has advocated eliminating the inventories because, among other things, service contract inventory reporting has produced limited value for the significant amount of effort required of contractors and related work required of agencies. See 59 GC ¶ 254.

D. Comparing the Costs of Contractor and Government Personnel. On a related note, we now have more data that reminds us that no one has (yet) proven that contractors are more (or less) expensive than government personnel, in large part because no one has created a reliable, verifiable algorithm or tool to, in effect, compare apples to oranges. DOD noted that, although the results were not generalizable across DoD, "for the 21,000 federal civilians and service contractors compared, neither federal civilians nor service contractors were predominately more or less expensive, with the costs being dependent upon the function being performed, location, and level of expertise." That conclusion should surprise no one. GAO subsequently assessed DOD's report and determined that DoD's analysis addressed most of the elements in Congress' request for the assessment. *DOD Workforce Cost Comparison Report Addresses Congressional Request, GAO Finds*, 60 GC ¶ 140; GAO-18-399, *Civilian and Contractor Workforces: DOD's Cost Comparisons Addressed Most Report Elements but Excluded Some Costs* (April 2018), available at *www.gao.gov/assets/700/691305.pdf*.

VIII. OPTIMISM AMID ADVERSITY? STORM CLOUDS OR SILVER LINING?

Regular attendees know that this review has consistently and prominently featured the Professional Services Council *Acquisition Policy Surveys* of acquisition experts and leaders, which, for more than fifteen years, have collected "opinions and insights from federal government acquisition leaders on the current state of the acquisition profession, the impact of policy initiatives, noteworthy trends, and future challenges and opportunities." The 2018 survey, true to form, is instructive, primarily because it includes the opinion of a broad and experienced cross-section of knowledgeable practitioners (from both the government and the private sector). *Optimism Amid Adversity, The 9th Biennial Professional Services Council Acquisition Policy Survey* (July 2018), available from PSC, at *https://www.pscouncil.org/__p/cr/r/2016AcquisitionPolicySurvey.aspx*. Some of the key findings include:

Budget. Even *before* the most recent counter-productive (yet, admittedly, only partial) government shut-down, far more than half of those surveyed expressed concern that budget conditions had deteriorated since 2016 (which, incidentally, marks the most precipitous decline since PSC began the survey). Respondents also bemoaned the inability to plan, with continuing resolutions (CRs), government shutdowns, and shifting spending caps injecting volatility into the budget cycle and, of course, compressing acquisition timelines.

Acquisition Workforce. If you are reading these materials, we do not need to convince you that successful contracting outcomes depend upon people. Unfortunately, respondents identified certain skill areas that continue to be lacking across the workforce, including developing requirements, buying "as a service," negotiation, and critical thinking. Moreover, it's no surprise that, since 2016, hiring challenges have increased and are exacerbated by, among other things, budget instability and hiring freezes, which, of course, cumula-

tively make it difficult to keep up with the pace and volume of change (and, of course, stifle innovation, but more on that, below).

Innovation. Respondents expressed concern that innovation is not well understood and was stifled by, among other things, fear of oversight (or protests). Although respondents were optimistic about other transactions (see above) and innovation laboratories, many still feared that the burdensome regulatory environment dissuaded to many innovative companies from doing business with the government.

Oversight and compliance. Consistent with prior surveys, respondents pointed to the cumulative impact of frequently changing policies as detrimental to acquisition outcomes. High on the irritation and frustration scale were labor-related requirements, audits, and Cost Accounting Standards (CAS) compliance. Those surveyed found GAO audits and OMB guidance generally valuable and, while they were divided on whether past performance was useful, they tended to agree that congressional oversight was less valuable.

Communication and collaboration. A longstanding source of frustration - think back to the Dan Gordon-era OFPP *myth-busters campaign* – provided a source of optimism and potential improvements – particularly with regard to enhanced debriefings and reverse industry days (RID's). Nonetheless, failure to communicate still, too often, impeded the achievement of successful acquisition outcomes (and created barriers to entry).

IX.   LAUGHTER THE BEST MEDICINE?

In case you missed it, we're recommending you make time for our favorite (short) document of the year. See Defense Innovation Board (DIB): *DIB Guide: Detecting Agile BS* (Version 0.4, last modified 3 Oct 2018 – WORKING DOCUMENT//DRAFT), available at *https://media.defense.gov/2018/ Oct/09/2002049591/-1/-1/0/DIB_DETECTING_AGILE_BS_2018.10.05. PDF*. Beginning from the premise that: "Agile is a buzzword of software development, and so all DoD software development projects are, almost by default, now declared to be "agile[,]" the document is rich with valuable insights, recommendations, and quips, such as:

> *Key flags that a project is not really agile* [include]: Nobody on the software development team is talking with and observing the users of the software in action; we mean the actual users of the actual code. (The Program Executive Office (PEO) does not count as an actual user, nor does the commanding officer, unless she uses the code.)   A footnote elaborates that "Acceptable substitutes for talking to users: Observing users working, putting prototypes in front of them for feedback, and other aspects of user research that involve less talking." . . . .

> *Questions for Program Management* [include]: How many programmers are part of the organizations that owns the budget and milestones for the program? (*Wrong answers: "we don't know,"* "zero," "it depends on how you define a programmer")

See also, Kevin McCaney, *Defense Innovation Board Issues Guide to 'Detecting Agile BS': Industry experts advise government agencies to weed out the fakes*, (October 19, 2018), at *https://www.governmentciomedia.com/ defense-innovation-board-issues-guide-detecting-agile-bs* (The document "aims to help Department of Defense officials separate the bona fide from the buzz.... *Among the guide's red flags that the agile claim is not authentic*

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is that users are kept out of the loop.... For the DIB, the problem isn't with agile, it's with those who say they're using an agile approach in order to score points with the people holding the purse strings, but aren't delivering the goods."). See also, *DOD IG Questions Air Force's Agile Software Development For F-22 Modernization*, 60 GC ¶ 116, DODIG-2018-089, *Contracting Strategy for F-22 Modernization* ("Agile has historically only been used for software development and has not previously been used for hardware development on DoD weapon systems.... The use of agile across DoD is increasing, and it is imperative that DoD address the use of methodologies like agile by updating acquisition guidance." IG also noted that a contracting strategy for scaled agile framework was not identified; nor was there sufficient DoD policy for implementing agile software development methods), available at *media. defense.gov/2018/Mar/26/2001894248/-1/-1/1/DODIG-2018-089.PDF*.