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Emerging Policy and Practice Issues (2019)

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EMERGING POLICY AND PRACTICE ISSUES

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I. WINDS OF WAR? UNCERTAIN TIMES.

On a somber note, the New Year – and new decade – began with another (relatively modest, but still anxiety-producing) deployment of troops to the Middle East, following larger deployments during 2019. Conference attendees have become accustomed to the fact that today, federal procurement – of services, goods, construction, and research – supports and is critical to every conceivable government (and military) function. Yet mobilization (or, with a nod to Section 809 Panel Chair, David Drabkin, a manifestation of war footing) tends to draw attention to and crystallize (in the minds of policy-makers, legislators, leaders, and, of course, the media and the public) the importance of the acquisition function. See, *inter alia*, *CRS Reviews Latest Overseas DOD Contractor Numbers*, 61 GC ¶ 151 (noting that “contractor employees accounted for 50 percent or more of the total [DoD] presence during recent U.S. military operations in Iraq and Afghanistan.... [C]ontractors have outnumbered U.S. troops in Afghanistan for the past eight years. In 2018, there were more than twice as many contractors as U.S. troops in Afghanistan. These contractors provided supplies and services, including security, logistical support, weapons, equipment maintenance, intelligence communications, transportation, construction and base support operations.”); Heidi M. Peters & Sofia Plagakis, Congressional Research Service Report R44115, *Department of Defense Contractor and Troop Levels in Afghanistan and Iraq: 2007-2018* (Updated, May 10, 2019), <https://fas.org/sgp/crs/natsec/R44116.pdf>. Time will tell what impact, if any, recent events will have on defense procurement, defense spending, homeland security, etc. See, e.g., Aaron Mehta, Valerie Insinna & David B. Larter, *What Soulemani’s death might mean for the National Defense Strategy and the next budget*, DEFENSE NEWS (January 4, 2020). See also, generally, J. Alex Ward and Victoria Dalcourt Angle, *Feature Comment: Contracting In The Fog Of War*, 61 GC ¶ 120 (noting that, among other things, “if a war risk is truly outside the scope of the parties’ agreement, a cardinal change theory might be available[, but it is difficult to assert] claims for war risks where the contract shows that the contractor accepted those risks.”)

Against that backdrop, as was the case last year, we’re not particularly confident in predicting what is in store for 2020 and beyond. There’s not much precedent for governance while the impeachment process is playing out, in an election year, with the incumbent facing no meaningful competition and, thus, all but assured a major party nomination, compounded by a deeply divided legislature. The rapidly spinning news cycle remains exhausting, overwhelming, and stressful. Three years into the current administration, we *should* be fully accustomed to the vacancy and turnover rates in high level (e.g., up to, and including, cabinet level), politically-appointed leadership. (On a positive note, we currently have *both* an Administrator of the Office of Federal Procurement Policy, Michael Wooten, and a Secretary of Defense, Mark T. Esper.) Yet it seems quaint to aspire to stable leadership and staffing, reliable appropriations and program funding, 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 breeds optimism.

II. NEW ELECTRONIC TOOLS ... AND ACRONYMS: A NEW GPE, AND SAMM’S.

Although none of it was unexpected, last year prompted an unusual number of technology-based changes to some of the most fundamental ways that we do business.

A. Governmentwide Point of Entry (GPE)? RIP FedBizOpps? On November 12, the General Services Administration (GSA) announced that: “Effective [today], FBO.gov [Federal Business Opportunities] is retired, and Beta.SAM.gov is now the authoritative source for Contract Opportunities. Visit the Learning Center for videos, FAQs and other information!” Alas, the transition may not have been as smooth as GSA anticipated. For example, as of the first of the calendar year, the Federal Acquisition Regulation (FAR) 2.101 definition of Governmentwide point of entry (GPE) still pointed to FedBizOpps, www.fbo.gov, which led to the page that explained: “FBO.gov has been moved to beta.SAM.gov and is now known as Contract Opportunities. beta.SAM.gov is now the authoritative location for finding contract opportunities.” *Is anyone else troubled that the official, central, mandatory repository and access point for all things federal procurement – relied upon by government officials and contractors (domestic and foreign) was launched in beta mode and still bears a beta moniker?* As GSA explains: “The beta.SAM.gov domains contain data that has been migrated from our legacy systems. The domains support two distinct types of federal awards: acquisition and federal assistance.” FAR 2.101 also currently states that the “Single, Governmentwide point of entry,” means the one point of entry to be designated by the Administrator of OFPP that will allow the private sector to electronically access procurement opportunities Governmentwide.”

B. Goodbye DUNS, Hellos SAMMI's. Through a related yet different initiative, GSA is transitioning from its long-term, exclusive reliance on the (Dun & Bradstreet (D&B)-based) Data Universal Numbering System (DUNS) as the Unique Entity Identifier (UEI) for contractor identification and registration in the System for Award Management (SAM). Contractors (and prospective contractors) will now self-identify using the far more fun-to-say SAM Managed Identifiers (SAMMI's), with Ernst & Young initially providing the validation services. These newfangled SAMMI's, of course, should not be confused with the oh-so-coveted *Sammies* (or Samuel J. Heyman Service to America Medals), known in federal circles as the “Oscars” of government service. See, generally, <https://servicetoamericamedals.org/about/>. *Developments In Brief: GSA Begins Transition from DUNS Numbers to SAMMI*, 61 GC ¶ 93(a); <https://www.gsa.gov/about-us/newsroom/news-releases/gsa-announces-award-for-entity-validation-services>; see also, *Done with DUNS*, <https://gsa.federalschedules.com/blog/done-with-duns/>.

C. What's Next? The Electronic Marketplace Initiative. In tangentially related news, in 2020, we'll be watching GSA's developmental efforts regarding the electronic marketplace initiative, pursuant to Section 846 of the National Defense Authorization Act for FY 2018, Public Law No. 115-91, 41 U.S.C. § 1901 note. This topic is discussed at greater length, in Chris Yukins' materials found at Chapter 2. See also, Christopher Yukins, *Feature Comment: U.S. Government To Award Billions Of Dollars In Contracts To Open Electronic Marketplaces To Government Customers—Though Serious Questions Remain*, 61 GC ¶ 303 (“It is difficult to gauge how large these electronic marketplaces may grow. ... The new electronic marketplaces thus may ‘swallow’ a large portion of the bottom tiers of the \$550 billion federal market.”); see also *GSA Commercial Platforms Initiative*, <https://interact.gsa.gov/group/commercial-platforms-initiative>.

III. NEW LEADERSHIP AT THE OFFICE OF FEDERAL PROCUREMENT POLICY; THE ACQUISITION WORKFORCE (AND OTHER PRIORITIES).

A. Finally, An OFPP Administrator. Following an August 1 Senate confirmation vote, for the first time since September of 2016 (a gap just short

of three years), the Office of Federal Procurement Policy (OFPP) is again being led by a Senate-confirmed administrator, Michael Wooten. We applaud the administration's appointment, turning to someone with experience from Defense Acquisition University (DAU), senior service in the District of Columbia's procurement office, and, among other things, military service (as a Marine). *Developments: President Nominates OFPP Head*, 61 GC ¶ 55(c). Seen as a largely apolitical appointee, in addition to emphasizing his commitment to the acquisition workforce, Administrator Wooten has among other things, referred to initiatives intended to leverage the government's buying power (through, e.g., category management), sharing market intelligence, data (including performance assessment and artificial intelligence), cybersecurity (addressed at greater length in Chapter 16 of these materials), and seeking to innovate and generate cost efficiency. See also, Vernon J. Edwards, *At Long Last: A Nominee For Administrator Of Federal Procurement Policy*, 33 N&CR ¶ 17 (Vern suggested that, for various reasons, including his late-in-the-administration nomination and confirmation, the new Administrator could "identify some long-standing policy issues and set people to work developing a set of discussion papers that could be the foundation for future policy analyses and initiatives" or, maybe "should spend his term going around and talking to people, in the style of Steve Kelman, asking about what concerns them, soliciting input, and trying to prepare us all to talk and discuss when times are less fraught." Among other things, Ralph Nash added "the dire need for thinking about contracting for services.")

B. Focus on the Acquisition Workforce. Of course, Administrator Wooten has been clear in his interest in strengthening and supporting the acquisition workforce. There's plenty to keep him busy, and a sampling of issues (other than counting full-time-equivalents or FTE's) might include:

- **Gaps?** See, generally, *DOD Acquisition Workforce Has Gaps in Business Acumen, but Extent Is Unclear*, 61 GC ¶ 187(c); Laura Werber, et al., *An Assessment of Gaps in Business Acumen and Knowledge of Industry Within the Defense Acquisition Workforce* ("[T]he lack of standardized definitions obscures the need for knowledge related to business acumen, industry operations, and industry motivation, and while knowledge gaps appear to exist in these areas, the lack of requirements and desired proficiencies further hinders an estimation of the gaps' extent." Among other gaps, the report addresses risk management, earned value management, financial practices, supply chain management, small business, agile development, cybersecurity, knowledge of incentives that drive corporate decision-making, and "other important types of business-related knowledge: negotiation, developing and understanding requirements, and cost and price analysis."), www.rand.org/pubs/research_reports/RR2825.html. (Along those lines, on April 22, 2019, the Board of Standards Review of the American National Standards Institute (ANSI) accredited the National Contract Management Association's (NCMA's) Contract Management Standard™ (CMS™) as an American National Standard (ANS). At some point, it would be interesting to see DAU, FAI, and NCMA make a concerted effort to align their professional standards.)

- **Hiring, Recruiting, Outsourcing?** Administrator Wooten may also be interested in how agencies exploit hiring flexibilities and do (and don't) continue to outsource the procurement function. See, e.g., *DOD Should Monitor Use Of Acquisition Workforce Hiring Flexibilities*, 61 GC ¶ 248 (GAO reported that, for fiscal years 2014 through 2018, "DOD used hiring flexibilities for 90 percent of its approximately 44,000 civilian acquisition workforce hiring ac-

tions,” then raised that figure to 95 percent in FY 2018); GAO-19-509, *Defense Acquisition Workforce: DOD Increased Use of Human Capital Flexibilities but Could Improve Monitoring*, www.gao.gov/assets/710/700927.pdf; *Industry Group Suggests Limiting USAID Use Of Contractor COs*, 61 GC ¶ 243 (referencing the USAID proposal “to designate personal services contractors (PSCs) and cooperating country national (CCN) PSCs as USAID warranted contracting officers and agreement officers”); 61 GC ¶ 189(d) (“The proposed rule would amend the USAID Acquisition Regulation (AIDAR) to ‘address a shortage of U.S. direct-hire staff’ and to ‘bolster the Agency to succeed in terms of building long-term, host country technical capacity to materially assist the Missions with procurement responsibility.’”); 84 Fed. Reg. 27745 (June 14, 2019). See also, *Air Force, DOD Face Challenges Establishing New Space Agencies, Witnesses Testify*, 61 GC ¶ 114; *DOD Does Not Know Scope Of Space System Acquisition Workforce*, 61 GC ¶ 92; GAO-19-240, *Defense Space Systems: DOD Should Collect and Maintain Data on Its Space Acquisition Workforce*, (“DOD does not routinely monitor the size, mix, or location of the military and civilian workforce supporting its space-related acquisition programs.”) <https://www.gao.gov/products/GAO-19-240>.

- **Industry Exchange Programs?** We agree with those clamoring for increased government-industry exchange programs. *DBB Urges More Industry-Government Personnel Exchanges*, 61 GC ¶ 203 (DOD “would benefit from exchange programs which explore streamlined, nontraditional pathways to bring critical skills into service, expanding access to outside expertise, and devising new public-private partnerships to work with small companies, start-ups, and universities.”), *DBB FY 19-01, Defense Acquisition Industry-Government Exchange: Recommendations to reduce barriers to industry-government personnel exchanges*, <https://dbb.defense.gov/Reports/>; see also, *DOD Industry Exchange Program (IEP)* (“groundbreaking program will serve as a platform for DOD and private sector participants to (a) gain a better understanding of, and perspective on, each other’s business operations and challenges, and (b) share innovative and cost-saving practices.”), <https://asc.army.mil/web/career-development/programs/dod-iep/>.

- **A Different Perspective:** Administrator Wooten might also take to heart (with a grain of salt, of course) Vern Edwards’ unvarnished assessment of most of the current workforce initiatives. Vernon J. Edwards, *Sad Commentary: Rules, Or The Lack Thereof, Won’t Make Acquisition Agile And Innovative*, 33 N&CR ¶ 5 (emphasis added):

We do not need reform. We need a paradigm shift. The Government cannot fix acquisition and make the contracting process more agile, innovative, and responsive to mission needs by writing and revising rules, publishing slogans, and demanding ever more status and progress reports. ***It needs a smart, professionally educated, well-trained, and motivated workforce that is steeped in concepts and principles, instead of rules, and able to ply them in order to get things done....*** Create a National Acquisition Academy and educate and develop cadres of senior executives who will go out to the field and remake acquisition. Stop enacting procedurally prescriptive laws and regulations that set protest traps....

Real progress toward making acquisition more agile and innovative and responsive to our dire national security situation will begin when the bureaucratic powers see for themselves, and convince Congress, that the time has come to (1) develop a truly professional

acquisition workforce and (2) rethink their 19th century ideas about how acquisitions should be done....

C. No Shortage of Items On the Menu: The Section 809 Panel. We have now had a year to digest the extensive (and, gratifyingly, well-written and accessible) final Section 809 Panel report. (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 generated prodigious amounts of work (and ideas) related to 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>. We're confident that, if Administrator Wooten runs out of ideas or initiatives, there are plenty of thought-provoking panel recommendations (with, of course, voluminous supporting research) that Congress has not yet addressed. *Section 809 Panel Recommends Broad Reforms To DOD Acquisition System*, 61 GC ¶ 29.

D. Consider Metrics (or Performance Measurement). We continue to hope for acquisition leadership that, rather than obsessing about (often artificially) low prices, will focus on, among other things, value for money, customer satisfaction, and life cycle cost (or total cost of ownership). In other words, we hope Administrator Wooten turns the lens to *what matters* to requirements generators and agency heads, rather than *what's easy to measure* or what's emphasized by pre-existing legal regimes (such as, for example, Nunn-McCurdy breaches). See, e.g., Moshe Schwartz & Charles V. O'Connor, Congressional Research Service Report R41293, *The Nunn-McCurdy Act: Background, Analysis, and Issues for Congress* (May 12, 2016) ("The Nunn-McCurdy Act (10 U.S.C. § 2433) requires the Department of Defense (DOD) to report to Congress whenever a Major Defense Acquisition Program (MDAP) experiences cost overruns that exceed certain thresholds." One wonders as to the utility of this dominant metric when, as CRS acknowledges: "Unrealistically optimistic cost estimates [an all-too-frequent occurrence] can make future cost growth almost inevitable, setting the stage for future Nunn-McCurdy breaches."), <https://fas.org/sgp/crs/natsec/R41293.pdf>. It's a steep hill to climb (but our sense is that former DUSD(AT&L) Frank Kendall laid at least some of the groundwork with his annual performance assessments). For a cautionary note, however, see, generally, *RAND Highlights Challenges To DOD Use Of Data Analytics For Acquisition*, 61 GC ¶ 251, Philip S. Anton, et al., *Assessing the Use of Data Analytics in Department of Defense Acquisition* (RAND 2019), https://www.rand.org/pubs/research_briefs/RB10085.html. Among other things, RAND notes that, while "DoD has made progress in improving its data and analytic capabilities[, ...] data governance is maturing, and pockets of analytic capabilities exist[,... a]ttempts to apply more-advanced commercial data analytics approaches to DoD acquisition data are just beginning." Further (with emphasis added):

- Some of the biggest barriers to expanding and refining the use of data analytics in the acquisition sphere include the ***lack of data sharing because of cultural, security, and micromanagement concerns***; inconsistent data access across the DoD and for FFRDCs and support contractors; and difficulty installing modern analytic software because of security concerns.

NOTES

- **Long-term investments and strategic planning are** needed — both for data governance and for analytic capabilities — as well as concerted efforts by Congress and the DoD to address the culture of not sharing data.
- **Expectations of what data analytics can do for DoD acquisition need to be moderated.** Most of the problematic programs examined had issues stemming from strategic acquisition decisions rather than from a lack of data analytics; data analysis may or may not be equally weighted against other factors that DoD leadership must consider when making decisions.

No one said it would be easy. This year reminded us that there's always another data point demonstrating the difficulties DOD (and, more broadly, government agencies) face(s) with regard to data-driven decision-making. Consider, for example:

- DoD's experience with contractor business system reviews. *DCMA Needs To Track Contractor Business System Reviews*, 61 GC ¶ 43; GAO-19-212, *Contractor Business Systems: DOD Needs Better Information to Monitor and Assess Review Process*, www.gao.gov/assets/700/696801.pdf (“DOD currently lacks a mechanism based on relevant and reliable information, such as the number of [contractor business system] reviews that are outstanding, the risk level assigned to those systems, and the resources available to conduct such reviews...” Not surprisingly, among other things, too few reviews have been conducted “due, in part, to the need for [DoD] to reduce its backlog on completing incurred cost audits.”)

- DoD's inability to track or validate promised energy savings. *DOD Cannot Determine ESPC Savings, Benefit*, 61 GC ¶ 53; Report DODIG-2019-058, *Summary and Follow-up Report on Audits of DoD Energy Savings Performance Contracts*, (February 14, 2019) (In summarizing eight prior GAO, DoD OIG, and Army Audit Agency reports, the DOD IG found that, despite acknowledged progress, “the Government did not know whether it received contractor-claimed energy savings and whether the ESPC program was cost effective.”), <https://media.defense.gov/2019/Feb/19/2002090670/-1/-1/1/DODIG-2019-058.PDF>.

- Nor should we expect OT's (discussed at greater length below) to tell a different story. *DOD Lacks Reliable Data On OTA Use, CRS Says*, 61 GC ¶ 66 (CRS cautioned that current data “may not accurately reflect the extent to which nontraditional contractors are engaged in OT agreements. ... Other analysts ... suggested that DOD does not accurately and consistently track OTA data...”), Moshe Schwartz & Heidi M. Peters, CRS Report R45521, *Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress*, (Updated February 22, 2019) <https://fas.org/sgp/crs/natsec/R45521.pdf>.

Low hanging fruit? Maybe the best starting point is small and simple, something as easy as trying to learn from prior experience. *GAO: KC-46 Tanker Should Issue Lessons Learned For Fixed-Price Development Contracts*, 61 GC ¶ 174; GAO-19-480, *KC-46 Tanker Modernization: Aircraft Delivery Has Begun, but Deficiencies Could Affect Operations and Will Take Time to Correct*, (DoD “should ensure that the KC-46 program office disseminates insights ... [regarding the] contracting and sustainment planning experiences for consideration by acquisition programs, in particular those considering a fixed-price-type development contract or a commercial derivative aircraft.”), <https://www.gao.gov>.

[gov/products/GAO-19-480](https://www.gao.gov/products/GAO-19-480). In a different context, but poignantly reminding us of the need to learn from experiences rather than simply repeat them, see Vernon J. Edwards, A. *Ernest Fitzgerald, The C-5A, and Acquisition Innovation: What Lessons Can We Learn?*, 33 N&CR ¶ 21:

The C-5A story shows us that acquisition is not just a process governed by laws and regulations and conducted by people working in bureaucracies, and it is far more complex than mere rules and contracts. It is an intricate and dynamic political, social, and economic system of bureaucracies, individuals, personalities, world views, cultures, superstitions, mythologies, pathologies, dogmas, concepts, vague notions, principles, and policies, all circumscribed by energy fields of genius, stupidity, indifference, criminality, time, and chance. You cannot just tinker with a specification of this or that facet of the system and hope to make the system behave the way you would wish. Anyone who thinks that statutes, regulations, and the application of “sound” management practices and procedures can “fix” acquisition simply does not understand the problem.

It’s a big government; and challenges differ. At the same time, let’s be clear that DoD is well ahead of many civilian agencies on some of these topics, although some, including GSA, appear to be making investments with an eye towards more strategic decision-making. *DOE Should Improve Contractor Cost Performance Reporting, GAO Says*, 61 GC ¶ 64; GAO-19-5, *Department of Energy: Performance Evaluations Could Better Assess Management and Operating Contractor Costs*, (although, in a perverse sort of way, we are inclined to *applaud* DOE to the extent that their “reports provided less information on M&O contractors’ cost performance than on contractors’ technical and administrative performance...” Yes, cost performance matters, but shouldn’t we prioritize contract completion, customer satisfaction, and achievements such as “production progress” and “scientific discoveries?” Is comparing the *number of pages* for each type of analysis meaningful?), <https://www.gao.gov/products/GAO-19-5>. See also, *MAS Transactional Data Reporting Has Limited Use, Imposes Significant Burden, Industry Group Warns*, 61 GC ¶ 226 (among other things, “in today’s dynamic marketplace prices can change daily, and agencies using the data may make erroneous comparisons because of outdated information. These misunderstandings could slow negotiations and increase the administrative costs for contracts.... [To the extent that] TDR does not provide meaningful data related to the quality of the item[, the] system drives the Government towards decisions made on the lowest price, regardless of the other criteria that impact a buying decision.”) Coalition for Government Procurement Comments (July 29, 2019) <http://thecgp.org/images/Coalition-TDR-Final-Comments-7-29-19.pdf>. See also, *GAO Questions Post-Disaster Contract Tracking*, 61 GC ¶ 130; GAO-19-281, *2017 Disaster Contracting: Actions Needed to Improve the Use of Post-Disaster Contracts to Support Response and Recovery*, (“the full extent of post-disaster contracting related to the 2017 disasters is unknown”), <https://www.gao.gov/products/GAO-19-281>. Finally, to the extent we’re addressing data, it’s impossible not to mention one of the year’s stranger stories. *DATA Act Pilot Failed To Assess Reduction In Contractor Reporting Burden*, 61 GC ¶ 134 (Unlike grantees, “[n]o contractors participated in a voluntary pilot program for a centralized procurement data portal....[OMB] still does not have information from stakeholders that could help inform the expansion.”); GAO-19-299, *Pilot Effectively Tested Approaches for Reducing Reporting Burden for Grants but Not for Contracts*; <https://www.gao.gov/products/GAO-19-299>.

IV. NUMBERS, THE BURN RATE, PROCUREMENT DATA: WHAT TO MAKE OF VARIOUS TRENDS?

A. Better Late Than Never: The Money Keeps Flowing. Although we began calendar year 2019 in (a sustained) shutdown, continuing resolutions and pre-Christmas legislation largely averted a repeat for Fiscal Year 2020. But see *Subcommittee Report Highlights Government Shutdown Costs*, 61 GC ¶ 276 (Senate Committee survey “suggests that the three most recent Government shutdowns—in fiscal years 2014, 2018 and 2019—cost taxpayers at least \$3.7 billion in back pay to furloughed workers and at least \$338 million in other costs such as lost revenue, administrative work and late fees on interest payments[.]”); *President Signs Continuing Resolution, Industry Group Offers Shutdown Guidance*, 61 GC ¶ 286; *PSC Offers Guidance to Mitigate Effects of a Government Shutdown* (September 23, 2019), https://www.pscouncil.org/a/News_Releases/2019/PSC_Offers_Guidance_to_Mitigate_Effects_of_a_Government_Shutdown.aspx. For a less gloomy (but transparently uncertain) perspective, see *Report Finds Mixed Evidence Of Harm From Continuing Resolutions On DOD Weapon Contracts*, 61 GC ¶ 21; Stephanie Young & J. Michael Gilmore, RAND, *Operating Under a Continuing Resolution: A Limited Assessment of Effects on Defense Procurement Contract Awards*, www.rand.org/content/dam/rand/pubs/research_reports/RR2200/RR2263/RAND_RR2263.pdf (“The results of our analysis are mixed. They do not provide strong evidence that CRs are causing delays and cost increases; because of their limitations, however, our results also do not provide definitive evidence that such negative effects are not occurring.”).

B. Are the Boom Years Here to Stay? Unlike most of the past decade, the procurement dollars seem to be flowing relatively freely (despite prodigious deficit spending), and procurement spending appears, once again, to be on the rise. Fiscal 2018 procurement spending, at \$559 billion, was the third consecutive annual increase, increasing by \$46.3 billion over the previous year and representing the largest number since \$562 billion in FY2010. See, e.g., Bloomberg Government, *BGOV200: Federal Industry Leaders 2019*, <https://about.bgov.com/bgov200/>. Last year’s chapter indicated our curiosity with regard to USASpending.gov’s new *DataLab* (still in Beta), and we had high hopes to the extent that it offered a broad range of eye-catching graphics and insights. (Among other things, we discussed, at length the feature: *Contract Spending Analysis: How has federal contract spending changed over time?*) Alas, that section does not appear to have been updated in the last year (and appears to have been frozen at March 31, 2018; yes, that’s 2018, not 2019). Meanwhile, consistent with past experience that most concatenated federal procurement data should be viewed with some amount of skepticism, GAO highlighted that: “The amount of foreign end products purchased could be greater than reported in FPDS-NG ... due to reporting errors and system limitations....” *GAO Finds Inconsistent Buy American Guidance, Inaccurate Procurement Data*, 61 GC ¶ 2; GAO-19-17, *Buy American Act, Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance*, <https://www.gao.gov/products/GAO-19-17>.

C. Growth Below the Radar: High Volume, Lower Dollar Procurement: Waiting for the New Micro-purchase and Simplified Acquisition Thresholds. Last year we suggested that one of the year’s most dramatic policy and practice changes – in terms of impacting the broadest segment of the acquisition community and the private sector – would fly largely under the radar, ... and that was the whole point. Pursuant to the 2019 National Defense Autho-

rization Act (NDAA), Section 821, the **micro-purchase** threshold experienced a dramatic, greater-than-inflation-adjusted, *statutory* bump, up to \$10,000 for all agencies (including DoD). *Congress Passes FY 2019 NDAA*, 60 GC ¶ 241. We noted that 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. Also, the *statutory simplified acquisition threshold* was slated to increase Government-wide from \$150,000 (which has been inflation adjusted) to \$250,000. As of the new year, however, neither the default micro-purchase nor the simplified acquisition thresholds in the Federal Acquisition Regulation (FAR 2.101) had been fully implemented (or increased). *Proposed Rule To Raise FAR Simplified Acquisition, Micro-purchase Thresholds*, 61 GC ¶ 308 (“The proposed rule would also ‘replace non-statutory, stated dollar thresholds that are intended to correspond with the MPT and SAT, with the text ‘micro-purchase threshold’ and ‘simplified acquisition threshold.’ This change ‘will ease maintenance of regulations, given the likelihood of future changes to the threshold amounts,’ the proposed rule states.”); 84 Fed. Reg. 52420 (Oct. 2, 2019); *FAR Micropurchase And Simplified Acquisition Thresholds Raised For Emergency, Cyberattack Response*, 61 GC ¶ 147.

D. More Other Transactions Activity? Although they still do not account for a statistically significant percentage of federal procurement dollars, reliance on other transactions appears to be increasing. From FY 2016 through 2018, the “total number of new prototype other transactions increased five-fold from 34 to 173[,]” and “obligations made on prototype other transactions nearly tripled from \$1.4 billion to \$3.7 billion.” One of many unique nuggets that the report unearthed was that: “The Army was responsible for over two-thirds of the new awards and actions made from fiscal years 2016 through 2018—valued at nearly \$5.3 billion—but some of these were awarded on behalf of other DOD components, such as the Air Force, Navy, and Defense Innovation Unit.” *GAO-20-84, Defense Acquisitions: DOD’s Use of Other Transactions for Prototype Projects Has Increased* (November 22, 2019); *DOD’s Other Transactions Usage Has Significantly Increased, GAO Finds*, 61 GC ¶ 356. Of course, that doesn’t mean that OT practice has been standardized or optimized; it’s still evolving. Richard Dunn, *Feature Comment: Thirty Years of Other Transactions*, 61 GC ¶ 347 (“[A]n alternative acquisition system based on OTs is overdue. It is time to create the new system, not merely view OTs as ‘just another tool.’ Let the two systems [OT’s and the traditional acquisition system] operate in parallel and make judgments once adequate comparative data have been gathered and analyzed.”). See also, Ralph C. Nash, *Protesting Other Transactions: District Court Jurisdiction*, 33 N&CR ¶ 39 (asserting that “competitors for OT contracts should have some place to go to ensure that the agency has followed the rules and treated the offerors fairly. Until Congress decides otherwise, that is now the district court.”); Ralph C. Nash, *Postscript: Other Transactions*, 33 N&CR ¶ 1 (“While OT contracts are the current solution to many problems, there is still a lot to be learned. Thus, the entire process is a laboratory project.”).

E. Fewer Bid Protests? The volume of GAO bid protests again declined in FY 2019, and the single-year decrease was far more significant (at sixteen percent) than typical fluctuations (in either direction, of under ten percent). The number of protests filed, 2,198, is markedly down from the recent high of 2,789 in FY 2016 (and, of course, a far cry from the 1993 of peak of more than 3,300 protests). *GAO Bid Protest Sustain Rate Drops Again As Number Of Cases Filed Drops In FY 2019*, 61 GC ¶ 328; *GAO-20-220SP, GAO Bid Protest*

Annual Report to Congress for Fiscal Year 2019 (November 5, 2019) (“[T]he most prevalent reasons for sustaining protests during the 2019 fiscal year were: (1) unreasonable technical evaluation; (2) inadequate documentation of the record; (3) flawed selection decision; (4) unequal treatment; and (5) unreasonable cost or price evaluation.”); Jerald S. Howe, Jr., James J. McCullough, Michael J. Anstett & Anayansi Rodriguez, *Feature Comment: An Analysis Of GAO’s 2018 Bid Protest Statistics—Regression Toward The Mean*, 61 GC ¶ 35 (analyzing the prior year’s statistics). See also, the materials at Chapter 10, as well as Christopher R. Yukins, *Feature Comment: Administrative Conference Of The United States Launches Study Of Agency-Level Bid Protests*, 61 GC ¶ 239 (“The goal will be to develop recommendations regarding key aspects of agency-level bid protests, recommendations which the Administrative Conference can put forward to make agency-level protests a more vital, efficient part of the federal procurement system.”).

F. Less Suspension and Debarment Activity? Following a trend begun in FY 2014, the total number of contractor suspension or debarment actions declined, (for a total of 480 suspensions, 1,542 proposed debarments, and 1,334 debarments). The Interagency Suspension and Debarment Committee (ISDC) reminds readers, however, that this activity is nearly double that reported in FY 2009, and that these numbers do not reflect the full scope of relevant activities, including “proactive engagements” by entities and individuals. *ISDC FY 2018 Report On Suspensions, Debarments Shows Continued Downward Trend*, 61 GC ¶ 329. (Note that the link to the official report was broken during the beta-SAM launch/conversion, discussed, *supra*.)

G. Looking Behind the Curtain: Contractor Ownership. Opaque ownership, or the use of shell companies, which obscures contractor ownership, appears to have finally caught GAO and DoD’s attention and worked its way into the compliance narrative. Related concerns range from displacement of small or disadvantaged firms, potentially disguised conflicts of interest, to foreign influence and control. GAO reported that “[DOD] faces several types of financial and nonfinancial fraud and national security risks posed by contractors with opaque ownership.” In other words, currently, “it [is] difficult for DOD to determine which entities and individuals ultimately own or control its contractors[.]” GAO-20-106, *Defense Procurement: Ongoing DOD Fraud Risk Assessment Efforts Should Include Contractor Ownership* (November 2019, public version of the more sensitive report to DoD), <https://www.gao.gov/products/GAO-20-106>; *DoD Needs to Assess Contractor Ownership Fraud*, 61 GC ¶ 355. See also, *Proposed Rules Would Overhaul, Expand CFIUS Authority*, 61 GC ¶ 279 (to comprehensively implement the Foreign Investment Risk Review Modernization Act of 2018 (FIRRMA) and to better address national security concerns); *GAO Weighs DOD Offshoring Risks And Benefits*, 61 GC ¶ 267; GAO-19-516, *Defense Supplier Base: Challenges and Policy Considerations Regarding Offshoring and Foreign Investment Risks*, www.gao.gov/assets/710/701170.pdf.

V. THE FUTURE OF SMALL BUSINESS CONTRACTING: TIME TO DISCUSS SME CONTRACTING?

A. A middle ground? GAO raised a number of fascinating questions regarding the efficacy and future of small business procurement when it concluded (consistent with what many assumed,) that “a very small percentage of the small businesses that were awarded set-aside contracts in fiscal year 2008 grew to midsized in subsequent years and continued to receive any

type of contract.” *Few Small Contractors Grow Into Mid-Sized Firms And Continue Receiving Contracts*, GAO Finds, 61 GC ¶ 283; GAO-19-523, *Federal Contracting: Awards to Mid-Sized Businesses and Options for Increasing Their Opportunities*, www.gao.gov/assets/710/700999.pdf. For the most part, GAO seemed uninterested in the rest of the world’s procurement experience, where most other countries long have focused on SME’s (small and medium sized enterprises) rather than the US-system’s polar or rigidly binary universe of small and other-than-small. See, generally, Organization for Economic Cooperation and Development (OECD), *SMEs in Public Procurement: Practices and Strategies for Shared Benefits* (October 2018), <https://www.oecd.org/publications/smes-in-public-procurement-9789264307476-en.htm>. See also, Franklin C. Turner, Alexander W. Major & Cara A. Wulf., *Feature Comment: New Year, New Rules—Changes Are Coming To The FAR’s Small Business Subcontracting Limits And Nonmanufacturer Rule*, 61 GC ¶ 20 (“[S]ince the passage of the 2013 NDAA, contractors and Government personnel alike have struggled to comply with an amalgam of inconsistent rules regarding the extent to which a small business may subcontract work under a federal small business set-aside contract.”)

B. What’s the Goal, Anyway? Just meeting the goal? Although small business programs generally enjoy bipartisan support, small business advocates raise various procedural and eligibility complaints, while others more broadly question “the programs’ effectiveness, in terms of both promoting small business opportunities to win federal contracts and a more diversified, robust economy.” We remain skeptical that “the relative success or failure of federal efforts to enhance small business contracting opportunities [can best be assessed simply by determining] whether the federal government and individual federal agencies meet the [seemingly arbitrary] procurement goals in the annual Small Business Goaling Report.” *CRS Surveys Criticism Of Small Business Programs, SBA Goals*, 61 GC ¶ 80; CRS Report R45576, *An Overview of Small Business Contracting* (July 3, 2019) <https://crsreports.congress.gov/product/pdf/R/R45576>. Still, it’s better (for most contracting professionals) when the government meets (rather than fails to meet) the Congressionally-mandated goals. *Government Meets FY 2018 Small Business Goal With Record Sum*, 61 GC ¶ 205 (“After failing to meet the Government-wide 23-percent goal for eight years, the Government has now met the goal in FYs 2013-2018.” Alas, not all was roses. “The Government missed its five- and three-percent goals for women-owned small businesses and Historically Underutilized Business Zone firms[.]”)

VI. THE LPTA SAGA ENDURES.

The primary STAR WARS big screen triple-trilogy story-arc, which spanned an entire generation, may have run its course and reached its conclusion (or not), but DoD continues to keep the debate alive with regard to proper use of Lowest Price Technically Acceptable (LPTA) procurement in FAR and DFARS Part 15. *ABA Section, PSC Calls for Harmonization of FAR, DFARS, LPTA Restrictions*, 61 GC ¶ 359 (also discussing comments from Women Impacting Public Policy (WIPP) and the Project on Government Oversight (POGO)). *FAR Rule On LPTA Process Will Not Be Enacted in Statutory Timeframe*, 61 GC ¶ 296 (“GAO found that DOD components used the LPTA process for about 25 percent of competitive contracts and orders valued at \$5 million or more in FY 2018[, while o]nly seven percent of civilian agency contracts used the LPTA process.”); GAO-19-691, *Federal Contracting: Information on Agencies’ Use of the Lowest Price Technically Acceptable Process*, www.gao.gov/assets/710/701773.pdf; *Proposed FAR Rule Would Limit LPTA Use By*

Civilian Agencies, 61 GC ¶ 298 (seeking to avoid, “to the maximum extent practicable, LPTA use for procuring certain knowledge-based services and supplies”); 84 Fed. Reg. 52425 (Oct. 2, 2019); *DOD Should Harmonize LPTA Restrictions With FAR Council, Industry Group Says*, 61 GC ¶ 38 (PSC advocates for application of the restrictions on LPTA use to services contracts government-wide).

VII. A BLEAK HORIZON SUGGESTS A BRIGHT FUTURE FOR SUSTAINABLE PROCUREMENT.

The history of the federal government’s environmentally preferable or green procurement policies has been a rocky one, and, despite sporadic initiatives (including, most recently, Obama administration Executive Orders), still does not appear to feature prominently on the current procurement landscape. See, generally, FAR Part 23. With the new year, Australia’s experience – unprecedented wild fires (across an area basically the size of the continental United States), military reserve deployments for firefighting, population displacements, soot contamination of air and water, temperatures rising to 120 degrees Fahrenheit, and extinction-level threats to various species – potentially offers a sobering harbinger for the future of climate change. While we do not expect dramatic progress on initiatives to address these issues in 2020 (either here in the US or globally), it is only a matter of time until government(s) will need to exert leadership in this arena. At a minimum, we expect (again, at some point in the future) greater consideration of externalities (for example, emissions) as part of value for money or life cycle cost analysis in greater numbers of procurements. Outside the U.S., momentum is (slowly, laboriously) building around the need for more *sustainable procurement*, with the Organization of Economic Cooperation and Development (OECD) leading the organizational and thematic discussion with an eye towards seeking “policy coherence” on these issues. (Keep in mind that this sustainability agenda is much broader than “green procurement,” including many topics we typically consider social and economic policies, such as gender equality, but also many topics we consider “compliance-related,” such as bribery (and foreign corrupt practices), human trafficking, and money laundering. “The Sustainable Development Goals (SDGs) are broad and ambitious, calling on all countries – be they upper, middle or low income – to make tangible improvements to the lives of their citizens. The goals encompass social, environmental and economic aspects.”) <http://www.oecd.org/dac/sustainable-development-goals.htm>; *Green Public Procurement*, <https://www.oecd.org/gov/public-procurement/green/>. If you want to get ahead of the information curve, consider, among innumerable other options, Jason J. Czarnecki, *Green Public Procurement: Legal Instruments for Promoting Environmental Interests in the United States and the European Union* (Dissertation, Uppsala Universitet, 2019); International Monetary Fund, *The Economics of Climate, FINANCE AND DEVELOPMENT* (December 2019) (“Simply put, climate is the biggest risk the world faces. What can we do to move from talk to action?”), <https://www.imf.org/external/pubs/ft/fandd/2019/12/pdf/fd1219.pdf>; or DAVID WALLACE-WELLS, *THE UNINHABITABLE EARTH: LIFE AFTER Warming* (2019).

VIII. A STRANGE DATAPOINT IN THE EVOLUTION OF ENHANCED DEBRIEFINGS.

One of the issues we didn’t see coming in 2019 was a slice of the (most recent) protest of DoD’s JEDI cloud computing procurement, brought by disappointed offeror Amazon Web Services (now proceeding in the U.S. Court of

Federal Claims, raising issues largely unrelated to the prior GAO and COFC protests previously brought by Oracle). Part of that protest complains about the manner in which DoD conducted Amazon's post-award debriefing. Among other things, the (redacted) complaint alleges:

Despite the significance of the JEDI procurement - which had been years in the making and had a potential ceiling of \$10 billion - on the same day DOD announced its award decision, **DoD provided AWS a written debriefing** ... and advised AWS that it had two business days to submit written questions based on the debriefing, **foreclosing the opportunity for AWS to request and receive an in-person debriefing....**

DoD [then] failed to provide reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulation, and other applicable authorities were followed, ... In fact, **DoD did not provide a substantive response to a single one of the 265 questions that AWS timely submitted**, leaving AWS in the dark about DoD's explanations for the substantive issues for which AWS raised concern in the debriefing questions.

See (redacted) complaint, *Amazon Web Services, Inc. v. U.S.*, Case 1:19-cv-01796-PEC (Filed December 9, 2019) Section G, pages 89, et seq. (emphasis added); Jared Serbu, *Why DoD may have given Amazon every reason to protest JEDI*, FEDERAL NEWS NETWORK (December 18, 2019). See also, *Amazon Files Protest With COFC Against DOD JEDI Cloud Award*, 61 GC ¶ 340. Granted, at this point, these are mere allegations, but it sounds like the debriefing following DoD's high-value, high-profile procurement is more likely to serve as a lesson learned or case study than a model for other DoD contracting officials, particularly in light of increased expectations associated with "enhanced debriefings." We are reminded of the first recommendation from the 2018 RAND Bid Protest report:

A major concern from the private sector is the quality of post-award debriefings. The consensus among companies is that the quality and number of post-award debriefings vary significantly. The worst debriefings were characterized as being skimpy, adversarial, and evasive or as failing to provide required reasonable responses to relevant questions. In desperation, unsuccessful offerors may submit a bid protest to obtain government documents that delineate the rationale for the contract award... [I]n most cases, too little information and evasive/adversarial debriefings will lead to a bid protest. Our recommendation is to consider having DoD adopt a debriefing process similar to the U.S. Air Force's extended briefing process.

Mark V. Arena, et al., RAND, *Assessing Bid Protests of U.S. Department of Defense Procurements: Identifying Issues, Trends, and Drivers*, https://www.rand.org/pubs/research_reports/RR2356.html; see also, DoD Class-Deviation 2018-O011, *Enhanced Postaward Debriefing Rights* (March 22, 2018), <https://www.acq.osd.mil/dpap/policy/policyvault/USA000563-18-DPAP.pdf>; Joseph R. Berger, *Feature Comment: Developments Affecting DOD Bid Protests*, 61 GC ¶ 113 ("With new debriefing procedures and other potential future improvements, DOD may be leading the way toward better debriefings Government-wide.... Unsuccessful offerors on contracts with DOD can use the newly adopted procedures to obtain valuable and necessary information to help them better understand the agency's reasoning and decision, why they lost

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the competition and how they can improve their proposals, and whether there is a valid basis for a bid protest.”) More broadly, DoD’s JEDI cloud computing procurement-and-protest saga continues, in an extraordinary example of a procurement where, among other things, two major competitors both alleged (at different stages of the process) the existence of dramatic, facially compelling, case study-worthy conflicts of interest. See, e.g., *Developments: DOD Awards JEDI Cloud Contract to Microsoft, Bypassing Amazon, Oracle*, 61 GC ¶ 324(d); *New Defense Secretary To Review JEDI Procurement*, 61 GC ¶ 232; *Oracle Was Not Prejudiced By Alleged Errors In JEDI Procurement, COFC Holds*, 61 GC ¶ 230; *Oracle Am., Inc. v. U.S.*, 2019 WL 3385953 (Fed. Cl. July 19, 2019) (currently on appeal, 61 GC ¶ 268(f)), but see, Ralph C. Nash, *Hiring A Member of the Source Selection Team: Not A Recommended Practice*, 33 N&CR ¶ 54 (“If you asked any knowledgeable person whether a company should hire a member of the Government source selection team in the middle of a competition, you would get a resounding NO!”); *Comp. Gen. Denies Oracle Protest Of Single-Award Approach For JEDI Cloud IDIQ*, 61 GC ¶ 8; *Oracle Am., Inc., Comp. Gen. Dec. B-416657 et al.*, 2018 CPD ¶ 391.