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EMERGING POLICY AND PRACTICE ISSUES

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I. A YEAR WE WON'T SOON FORGET

In a year dominated by a global pandemic, large-scale quarantines and dramatic economic shocks, and a contentious and polarizing Presidential election, many look towards 2021 with great optimism. Sure, a Presidential veto of the National Defense Authorization Act is an unusual event, but a prompt, New Year's Day (2021) Congressional override (the first of the Administration, delivered in its last month; 81-13 in the Senate; 322-87 in the House) rendered the action no more than an historical footnote. See, *Unclear Whether President Will Follow Through On FY 2021 NDAA Veto Threat*, 62 GC ¶ 355.

In the sphere of government contracting, our crystal ball remains cloudy, but we are confident that the one constant will be change.

A. The Novel Coronavirus COVID-19 Pandemic and Remote Work: Before 2020, few of us anticipated that a global pandemic would redefine our fundamental relationships with our physical workspace, the nature of office work, commuting, and, of course, business travel. Fortunately, we lack direct personal experience to compare 2020 to the 1918 Flu Epidemic, but it is difficult to deny the extraordinary disruption and devastation – personal, national, and global – human and economic – wrought by the virus. By 2020's end, more than 20 million coronavirus cases – and more than 350,000 coronavirus-related deaths – had been reported in the United States.

Obviously, the pandemic disrupted “business as usual.” OMB and DoD responded in a series of memos. See, generally, Margaret M. Weichert, OMB Memo M-20-18, *Managing Federal Contract Performance Issues with the Novel Coronavirus (COVID-19)*, (March 20, 2020) <https://www.acq.osd.mil/dpap/pacc/cc/docs/covid-19/M-20-18.pdf>:

[M]any Federal government contractors that ordinarily work side-by-side with the Federal workforce may currently be unable to access their Federal work sites as a result of building closures, quarantines or implementation of social distancing practices. Agencies are urged to work with their contractors, if they haven't already, to evaluate and maximize telework for contractor employees, wherever possible. Telework is an important tool for enabling continued contract performance in a manner that can meet health and safety guidelines

The Weichert memorandum also encourages the use of existing “**special emergency procurement authorities** ... designed to reduce friction for contractors, especially small businesses, and the government and enable more rapid response to the many pressing demands agencies face.” The memorandum also includes frequently asked questions (FAQ's) addressing, among other things:

- Telework;
- Contract schedules and excusable delays;
- Changes (or modifications) and equitable adjustments for costs associated with safety measures;
- Work stoppages on construction (repair) work of existing federal buildings;
- Alternatives to in-person activities (from meetings to conferences);

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- Communication and engagement between the government customer and contracting partners;
- Special emergency procurement flexibilities;
- Leveraging category management;
- Lack of justification for local firm preferences under the Stafford Act; and
- Data collection related to use of emergency procurement authorities.

We applaud the March 30, 2020 Memorandum from Kim Herrington (DoD DPC), *Managing Defense Contracts Impacts of the Novel Coronavirus*, https://www.acq.osd.mil/dpap/policy/policyvault/Managing_Contracts_under_COVID-19_Memo_DPC.pdf, which, although it largely ignored contracts for services, among other things:

- Acknowledged that the pandemic would “affect the cost, schedule, and performance of many DoD Contracts”;
- Highlighted **remedy-granting contract clauses that excuse performance delays** and entitled contractors to equitable adjustments (of schedule, contract price, or both); and
- Discussed the Coronavirus Aid, Relief, and Economic Security (**CARES**) Act, specifically Section 3610, authority and agency discretion “to modify the terms and conditions of [contracts] to **reimburse paid leave** where the contractor employees could not access work sites or telework but actions were needed to keep such employees in a ready state.” See, generally, *Congress Averts Shutdown, Extends CARES Act Paid-Leave Reimbursements*, 62 GC ¶ 282; Scott A. Schipma, Michael J. Schaengold & Daniel D. Straus, *Feature Comment: CARES Act: Changes To Government Contracting Authority*, 62 GC ¶ 92 (explaining, among other things, that “[o]pportunities for both ‘traditional’ and ‘non-traditional’ Government contractors are available.”)

Not every contractor could work remotely, but important work needed to continue even under disruptions. Federal guidance was needed here also. See USD(A&S) Ellen Lord’s Memorandum, *Defense Industrial Base Essential Critical Infrastructure Workforce* (March 20, 2020) (those “work[ing] in a **critical infrastructure** industry ... have a special responsibility to maintain [their] normal work schedule.”), which drew its authority from and expanded on the Cybersecurity and Infrastructure Agency (CISA), Christopher C. Krebs, *Memorandum on Identification of Essential Critical Infrastructure Workers During COVID-19 Response* (March 19, 2020), <https://media.defense.gov/2020/Mar/22/2002268024/-1/-1/1/DEFENSE-INDUSTRIAL-BASE-ESSENTIAL-CRITICAL-INFRASTRUCTURE-WORKFORCE-MEMO.PDF>. These two memos allowed contractor personnel to continue work despite state and local orders that otherwise would have stopped work. See, e.g., Franklin Turner, Alexander Major & Cara Wulf, *Just What The Doctor Ordered—Remedies For Federal Contractors During The COVID-19 Pandemic And Beyond*, 62 GC ¶ 116; Kara Daniels, Craig Holman, Kristen Ittig & Tom Pettit, *Feature Comment: Prepare, Communicate, Document And Segregate—A Government Contractor’s Guide To Addressing Performance Disruptions And Delays Related To COVID-19*, 62 GC ¶ 74.

DoD also issued a memo indefinitely increasing the **progress payment rate** (from 80 to 90 percent for large business concerns; from 90 to 95 per-

cent for small business concerns) pursuant to DFARS 232.501-1, 252.232-7004, FAR 52.232-16, and 52.232-16, Alternates II and III. *Class Deviation – Progress Payment Rates*, DARS Tracking Number: 2020-O0010 (March 20, 2020), <https://www.ndia.org/-/media/sites/press-media/deviation-for-change-in-progress-payments.ashx>; *Implementation of Class Deviation 2020-O0010 – Progress Payment Rates*, (April 3, 2020) (“Contractors must wait until their contracts are modified or contact the Administrative Contracting Officer before submitting requests for payments at the higher rate.”), <https://www.acq.osd.mil/dpap/policy/policyvault/USA00744-20-DPC.pdf>.

Despite the scope of the OMB and DoD memos, business-as-usual was also disrupted for pandemic-specific contracts. From an historical perspective, one of the most remarkable documents from this period is the whistle-blower complaint of Dr. Rick Bright, formerly a Program Lead within Department of Health and Human Services (HHS) Biomedical Advanced Research and Development Authority (BARDA) Influenza Division International Program, <https://assets.documentcloud.org/documents/6882560/Rick-Bright-Whistleblower-Complaint.pdf>. The allegations are chock full of government contracts (in addition to fiscal law) issues, including discussion of requests for proposals (RFP’s), broad agency announcements (BAA’s), contracting officers and their representatives (CO’s and COR’s), technical evaluation panels (TEP’s), independent government cost estimates (IGCE’s), source selection officials (SSA’s), task orders, failed contracts, option exercises, bid protests, procurement integrity violations, funding and appropriations, and, of course, overwhelmed contracting staff. It’s a remarkable document.

B. A New Administration. As these materials go to press, we anticipate a change of administration, on January 20, 2021, prior to the annual conference. We are optimistic that, by the time of the conference, the numerous (to this point, almost uniformly unsubstantiated and unsuccessful) legal actions and legislative efforts intended to derail the orderly transfer of power following an election will have run their course. Moreover, despite its delayed launch, inevitable controversies (for example, a military waiver requirement for the Secretary of Defense nominee; see, e.g., Dan Maurer, *The Military Waiver Requirement for Secretary of Defense Shouldn’t Substitute Individuation*, LAWFARE (December 22, 2020), <https://www.lawfareblog.com/military-waiver-requirement-secretary-defense-shouldnt-substitute-individuation>), we expect this transition to follow a more conventional path than the 2017 transition. See, generally, MICHAEL LEWIS, *THE FIFTH RISK* (2018) (a unique non-fiction account of a Presidential Transition and the initial political appointment process; in many ways, an ode to the critical importance of expertise in federal government service). Of course, the outcome of the yet-to-be-decided January 2021 Georgia Senate runoff elections, and, with it, the Senate majority, has the potential to dramatically impact this process.

1) Vacancies and Priorities. It is (currently) premature for us to speculate as to who will assume significant leadership roles in the acquisition community under the new administration. Painting with a broad brush, we expect few major surprises, instead seeing recognizable, in many cases, familiar, faces bringing significant, relevant experience to the table. At this early date, concerns remain: our profession values industry experience, which, to some, appears under-represented in the transition.

In terms of priorities, we recall that both the (first) Obama and the Trump administrations were slow to nominate administrators for the Office of Federal

Procurement Policy (OFPP), and we hope that the incoming administration bucks that trend. And, of course, time will tell what becomes of initiatives and cross-agency priorities (CAP's) under the President's Management Agenda (PMA), such as frictionless acquisition and Workforce 2025. (On the PMA and CAP's, our strong bias favors making data and priorities public and accessible. See, e.g., https://www.performance.gov/about/CAP_about.html.) See, e.g., *Sometimes Doors Open: Sometimes You Have to Open Them Yourself—A Conversations with OFPP Administrator Dr. Michael Wooten*, 61 CONT. MGMT. 12 (January 2021). The lion's share of the Section 809 Panel's ninety-eight recommendations from 2019 remain available as potential fodder for reform. Section 809 Panel, <https://section809panel.org/>. Moreover, there are innumerable suggestions for how the new administration might approach various aspects of acquisition differently. For example, in the limited context of defense supply contracting, Richard Dunn, *Feature Comment: New Administration: New Acquisition System?*, 62 GC ¶ 344, argues for “an alternative to the traditional DOD acquisition system ... based on Other Transactions [OT's], Procurement for Experimental Purposes, 10 USCA §§ 2371, 2371b and 2373, and other flexible business practices.” Dunn's proposed action items would include:

- Empowering personnel with education and training;
- Implementing congressional mandates by creating a preference for the use of OT's and other forms of innovative practices;
- Establishing a policy making a dual-use approach preferred for science and technology projects – for these, FAR-based contracting would be a last resort;
- Stimulating use of middle-tier acquisition with prototype OT's;
- Identifying defense industry segments that can embrace commercial practices; and
- Ensuring that OT action teams are not only empowered, but also insulated and protected from layers of “just say no” bureaucracy.

2) Infrastructure. In nominating Pete Buttigieg to serve as Secretary of Transportation, President-Elect Biden highlighted “ambitious plans” with regard to infrastructure. Buttigieg himself focused on “roads and bridges, ... railways and transit systems,” which, at the federal level, would more likely depend upon grant, rather than procurement, spending. (We haven't discussed infrastructure in these materials since 2019, when we bemoaned that, while the bridge disaster in Genoa, Italy, briefly brought the issue back into the public's consciousness, it had no staying power). There is potential for broad, bipartisan support for public construction projects even within a divided, polarized government. Federal contracts will come into play if the framework of infrastructure expands to include the work needed for cybersecurity, both within government and into the private sector. At press time, the consequences of espionage are still being assessed, but corrective actions would also create additional potential for bipartisan support. Modernizing legacy systems is the fastest path to greater security, and federal agencies already modernized some legacy systems under COVID-19, demonstrating a clear potential to do more.

3) Sustainable Procurement: On a related note, the incoming administration plans to reverse course and affirmatively attempt to slow climate change. Here, infrastructure investment will play a key role. See, e.g., Brad Plumer, *To Cut Emissions to Zero, U.S. Needs to Make Big Changes in Next*

10 Years, N.Y. TIMES (December 15, 2020) (“If the United States wants to get serious about tackling climate change, the country will need to build a staggering amount of new energy infrastructure in just the next 10 years, laying down steel and concrete at a pace barely being contemplated today.”), <https://www.nytimes.com/2020/12/15/climate/america-next-decade-climate.html>. Last year’s materials suggested that, as a community, we’ll need to increase our focus on sustainable procurement, discussing, among other things, sustainable development goals (SDG’s) and green public procurement. For more on this increasingly critical topic, see Steven L. Schooner & Markus Speidel, *Warming Up to Sustainable Procurement*, 60 CONT. MGMT. 32 (October 2020) (chock full of useful reference material), available at <https://www.ncmahq.org/news/magazine-details/warming-up-to-sustainable-procurement>.

See also, more generally, Michael T. Klare’s 2019 book, *ALL HELL BREAKING LOOSE: THE PENTAGON’S PERSPECTIVE ON CLIMATE CHANGE*. Klare identifies a wide range of global warming–related risks—from water, food, or energy scarcity to massive drought-, flood-, or fire-induced refugee migrations to “a whole new ocean” opened by melting of the polar ice caps, creating a new theater of military operations. He also warns of the worst-case scenario, in which the military may confront multiple emergencies – humanitarian disaster relief, support for beleaguered foreign states, and disruptions to the global supply and food chains, while military bases are out of commission due to flooding or fires or drought and troops are engaged in domestic relief operations, which leaves them ill-equipped to address conventional military threats.

See, also, *DOD Falls Short In Considering Climate Risks To Contractors*, GAO Reports, 62 GC ¶ 216; GAO-20-511, *Climate Resilience: Actions Needed to Ensure DOD Considers Climate Risks to Contractors as Part of Acquisition, Supply, and Risk* (June 2020) www.gao.gov/assets/710/707817.pdf, referencing, inter alia, *U.S. Global Change Research Program, Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II* [Reidmiller, D.R., C.W. Avery, D.R. Easterling, K.E. Kunkel, K.L.M. Lewis, T.K. Maycock, and B.C. Stewart, eds.], (Washington, D.C. 2018):

[C]limate change is projected to have broad effects on multiple sectors that can affect contractor support and DOD supply chains, including disruptions to energy, water, and transportation systems....

(DOD) has not routinely assessed climate-related risks faced by its contractors as part of its acquisition and supply processes, through which DOD obtains contracted goods and services... [G]uidance did not implement DOD’s climate change directive by including consideration of climate change or extreme weather. Until DOD and the military departments include these considerations in their guidance on acquisition and supply chain processes, they risk continuing to develop acquisition strategies and managing supply chains without building climate resilience into these processes and potentially jeopardizing their missions.

II. CRACKING THE \$600B THRESHOLD? PROCUREMENT & SPEND DATA

A. Peak, Blip, Plateau, Trend? Federal procurement spending exceeded \$600 billion for FY2020. Let that sink in for just a moment. Unlike much 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.

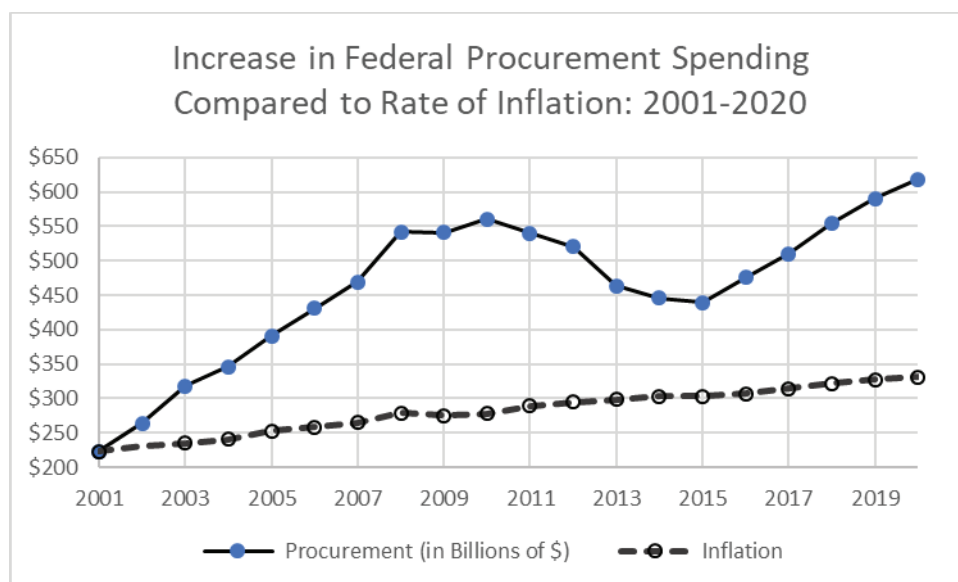
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FEDERAL PROCUREMENT AND GRANT SPENDING FY2001-2020*			
<i>(In Billions of Dollars)</i>			
Fiscal Year	<i>Procurement Spending</i>	<i>Grant Spending</i>	<i>Procurement & Grant Spending (Combined)</i>
2020	\$618.5	\$960.7	\$1,579.2
2019	\$590.0	\$764.6	\$1,354.6
2018	\$555.5	\$756.3	\$1,311.8
2017	\$510.6	\$719.2	\$1,229.8
2016	\$475.5	\$671.2	\$1,146.6
2015	\$439.8	\$619.7	\$1,059.5
2014	\$446.2	\$601.2	\$1,047.4
2013	\$463.4	\$525.0	\$988.4
2012	\$520.8	\$542.1	\$1,063.0
2011	\$539.8	\$570.2	\$1,110.0
2010	\$561.0	\$624.4	\$1,185.4
2009	\$540.6	\$671.6	\$1,212.2
2008	\$541.6	\$391.4	\$933.1
<i>2007</i>	<i>\$469.3</i>	<i>\$430.2</i>	<i>\$899.5</i>
<i>2006</i>	<i>\$430.5</i>	<i>\$490.0</i>	<i>\$920.5</i>
<i>2005</i>	<i>\$391.2</i>	<i>\$441.7</i>	<i>\$832.9</i>
<i>2004</i>	<i>\$346.1</i>	<i>\$450.1</i>	<i>\$796.2</i>
2003	\$318.0	\$493.7	\$811.7
2002	\$264.1	\$406.3	\$670.4
2001	\$223.0	\$330.8	\$553.8

* FY 2020 figures reflect an estimate based upon preliminary reporting. Also, the amounts reported above, for **every year**, 2008-2019, were revised – in some years, significantly (e.g., approaching 10 percent) – when compared to prior published *USASpending* data. Updated data is courtesy of *The Pulse*, summarized in *A Decade in Federal Discretionary Spending* (December 23, 2020), <https://thepulsegovcon.com/article/a-decade-in-federal-discretionary-spending/>.

B. No, It's Not Just Inflation. To put the scale of the growth in context, consider that (according to the U.S. Bureau of Labor Statistics CPI Inflation Calculator, https://www.bls.gov/data/inflation_calculator.htm):

- \$223 billion in 2001 would equate to \$331 billion in buying power in 2020;
- Recall that, from **2001 through 2008**, federal procurement spending dramatically outpaced inflation; indeed, \$223 billion in 2001 would equate to only \$271 billion in buying power in 2008, but federal procurement spending jumped from \$223 billion to \$541 billion.
- \$463 billion in 2013 would equate to only \$523 billion in buying power in 2020; yet federal procurement spending jumped to \$618 billion.
- \$510 billion in 2017 would equate to only \$546 billion in buying power in 2020, yet (again,) federal procurement spending jumped to \$618 billion.
- Conversely, federal procurement spending lagged inflation from **2012 through 2016**; \$520 billion in 2010 would equate to \$533 billion in buying power in 2016, yet federal procurement spending dropped to \$475 billion.



C. Defense Dominates: It's no surprise that the Department of Defense accounts for the greatest percentage of the procurement dollars. It's also interesting to see the extent to which the various agencies' procurement spend vary or remain stable over time.

Agency or Department	2020 Procurement in Billions	2016 Procurement in Billions
Department of Defense	\$379.7	\$298.6
Health & Human Services	\$40.7	\$24.0
Department of Energy	\$36.0	\$28.3
Veterans Affairs	\$33	\$22.6
Department of Homeland Security	\$19.5	\$13.5
National Aeronautics and Space Administration	\$18.8	\$17.3
General Services Administration	\$17.4	\$10.5
Department of State	\$10.5	\$8.7
Department of Agriculture	\$10.0	\$5.8
Department of Justice	\$8.3	\$7.6
Department of Transportation	\$7.8	\$7.6
Department of the Treasury	\$6.6	\$6.2
Agency for International Development	\$6.1B	\$4.6
Department of Commerce	\$5.8B	\$3.2

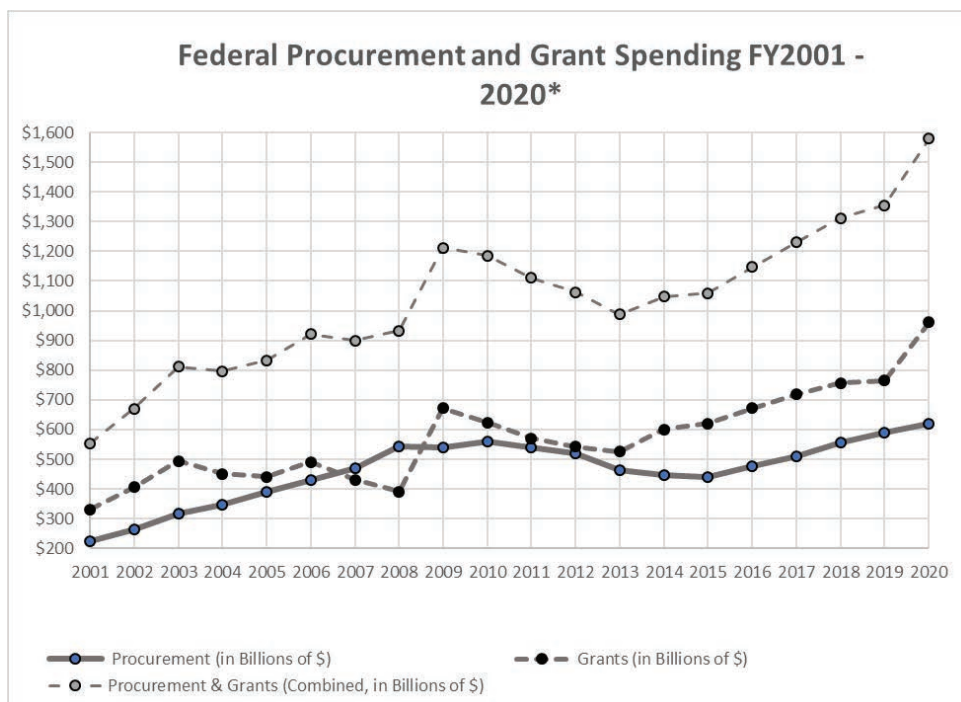
D. Grants Continue To Exceed Procurement Dollars: Grants again dramatically exceeded procurement spending, as they've done for seventeen of the last nineteen years. (Procurement dollars last exceeded grant spending in 2008.) Having said that, 2020 is unusual in the degree of the difference, with grants exceeding procurement dollars by more than fifty-five percent.

E. What Next? Currently, there is no agreement on spending levels for FY22. The budget caps, about which we have talked for a decade, have ended. That means there is no *ceiling* for either defense or civilian agency appropriations, but it also means there is no *floor*. Will concerns re-emerge about annual deficits and the federal debt? What level of spending will the

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new administration propose? What will Congress appropriate, and when? At the moment, none of this is clear.

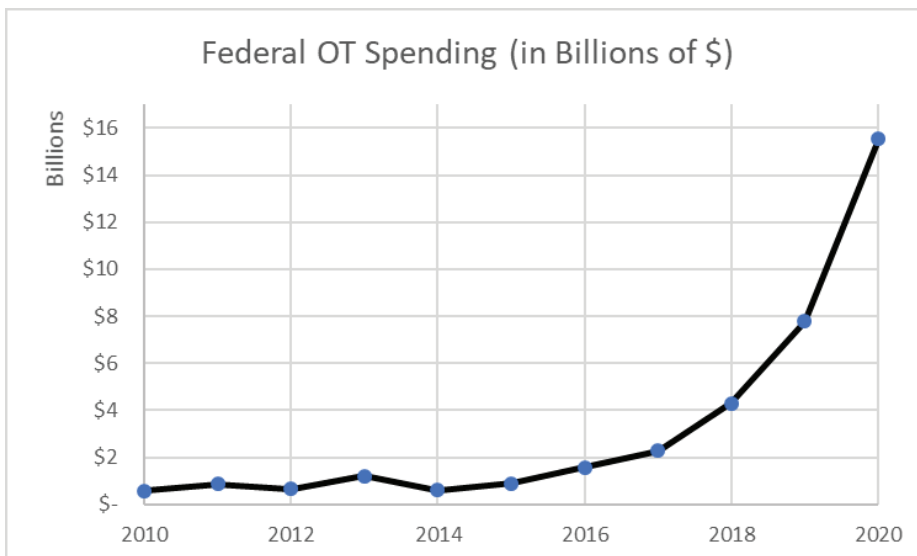
F. A Lot of Government Spending: What's particularly striking is the cumulative growth in procurement and grant dollars combined: from "only" \$553 billion in FY 2001 to *nearly triple* that amount, \$1.58 trillion, in FY 2020. While that level of government spending may appear unsustainable, we do not expect a dramatic decrease in that burn rate in 2021, as further economic stimulus may be required, and, among other things, there is pent up demand for infrastructure, investment in alternative energy solutions, etc.



G. Additional Insights? Over the years, we've found it increasingly difficult – and, recently, nearly impossible – to obtain credible, macro-level data of the type discussed here. Although we were initially optimistic about the evolution of the Federal Data Procurement System (FPDS) and pleased with the early years of USASpending.gov, the current state of affairs is a largely impenetrable data system which requires professional assistance. It does not appear that the system redesign incorporated the concerns for outside users, including us. As noted above, this year we turned to *The Pulse*, whose team generated a user-friendly summary, chock full of informative insights. See, *The Pulse, A Decade in Federal Discretionary Spending* (December 23, 2020), <https://thepulsegovcon.com/article/a-decade-in-federal-discretionary-spending/>. In addition to the issues addressed above, the data suggests that:

- Services contracting continues to grow, accounting for 50-58 percent of procurement dollars, but it is difficult to generalize given the opaque reporting of research and development (R&D) procurement;
- Over the last three fiscal years, discretionary appropriations increased by thirty percent, and that's excluding the additional \$1.76 trillion spent in FY20 for COVID-19 requirements. Meanwhile, Defense spending grew more than 17 percent, while non-defense grew more than 15 percent;

- Last year we highlighted that reliance on other transactions (OT's) appears to be increasing. While OT's are becoming more common (and popular), that attention does not always equate to raw dollars. The volume of OT activity is increasingly (rapidly), but OT spending is still not statistically significant in the landscape of total federal discretionary spending (accounting for two percent of total Federal contract obligations in FY19, and three percent in FY20).



- The dollar-based participation rates of small versus large businesses have been relatively stable, but, of course, large businesses have earned many more dollars as the procurement volume has increased. For FY20, however, it appeared that small businesses saw no growth, while large businesses enjoyed a seven percent increase; and
- The competition data tells a complex story: “[O]ver the last six (6) years, non-competitive sole-source award values have almost doubled, but as sole sources have increased, so have competing contracts. Each component has increased in line with overall Government spending, and the breakdown of dollars won through competed vs non-competed bids has remained relatively consistent.”

H. More Data-Driven Decision Making? Might 2021 see greater government reliance on data-driven decision-making? As of June 2020, the Chief Data Officer (CDO) Council has a charter, and the CDO's are moving in the direction of identifying government-wide best practices for the use, dissemination, and generation of data. We expect this to be a slow process. GAO noted that “Officials from academia, state and local governments, and industry told us that effectively implementing data governance requires a culture change that results in a shared understanding of the importance of using data as a strategic asset.” See The Foundations for Evidence-Based Policymaking Act of 2018 (Evidence Act), Pub. L. No. 115-435, 132 Stat. 5529 (2019), Title II, The Open, Public, Electronic and Necessary Government Data Act of 2018 (OPEN Government Data Act); GAO-20-540, *DATA Act: OIGs Reported That Quality of Agency-Submitted Data Varied, and Most Recommended Improvements* (July 9, 2020), <https://www.gao.gov/products/GAO-20-540>; GAO-21-152, *Data Governance: Agencies Made Progress in Establishing Governance, but Need to Address Key Milestones* (December 16, 2020) (to be clear, procurement data features only tangentially in this report), <https://www.gao.gov/products/GAO-21-152>.

We miss DoD's data rich annual reports on the *Performance of the Defense Acquisition System*, published from 2013 through 2016, and we are hopeful that they will return, in some form, with the incoming administration. DoD has continue to publish partial updates, and the most recent updates address Nunn-McCurdy breaches, program cost performance (in the context of research, development, test, and evaluation (RDT&E)), MDAP Program Cost Performance (or, more accurately, cost growth); and program schedule growth of cycle time (or delay, measured by program start to initial operating capability (IOC)). Christopher Hastings, Katherine Houston & Brian Joseph, *Updates to Selected Analyses from the Performance of the Defense Acquisition System Series, 2019 SARs Update* (September 15, 2020), https://www.acq.osd.mil/aap/assets/docs/PDAS%202019%20Excerpts_Final%20-cleared.pdf.

USD(A&S) Ellen Lord announced the development of a “Data and Analytics Strategy which will make data available to the Acquisition community to: (1) assess the progress of our policy transformation; (2) promote transparent monitoring of the Defense Acquisition System...; and (3) inform program and portfolio decisions.” To our knowledge, the results of this initiative are not yet publicly available, in contrast to the reports cited in the previous paragraph. See DoD(A&S) *Memorandum: Data Transparency to Enable Acquisition Pathways* (June 15, 2020), <https://www.acq.osd.mil/aap/assets/docs/USA000854-20%20Signed%20Memo.pdf>.

I. Parting the Curtains on Contractor Ownership. Last year, we reported that opaque ownership, or the use of shell companies, which obscures contractor ownership, appeared to have finally caught GAO and DoD's attention and worked its way into the compliance narrative. See, generally, 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. Congress took action with Section 885 of this year's NDAA, Disclosure of beneficial owners in database for Federal agency contract and grant officers. Corporate Transparency Act, H.R. 2513, 116th Cong. (2019), amending, inter alia, 41 U.S.C § 2313(d), <https://www.congress.gov/bill/116th-congress/house-bill/2513/text>.

III. NEW PARADIGM? THE PSC BIENNIAL ACQUISITION POLICY SURVEY.

Five key themes emerged from the Professional Services Council's 2020 Biennial Acquisition Policy Survey (December 10, 2020), www.pscouncil.org/APS2020, which has long attempted to chronicle the most pressing trends and policies in government contracting, based on interviews with acquisition leaders from across the federal government.

- **The COVID-19 pandemic** catalyzed a new paradigm for business operations, and effective use of information technology (IT) proved critical, while investment in IT infrastructure paid healthy dividends. For many, the transition to telework resulted in minimal interruptions to business operations. Conversely, the efficiencies of telework were often accompanied by a new and different type of fatigue, driven by, among other things, greater availability across time bands (including lunch hours) with no breaks for travel and commuting. Unique emphasis was focused on the intelligence community, which may need to rethink how it operates classified environments including support of remote secure environments (including “electronic reading rooms,” etc.).

- **Workforce:** With an increasingly grey workforce (and pent up retirement demand), government must become more strategic in hiring, training, and retaining new procurement talent. As the acquisition marketplace becomes more flexible, conventional FAR-based training appears to stifle innovation; more skill-based training appears necessary, as learning procedures doesn't properly prepare incoming professional for a shifting acquisition paradigm. Professionals need to think critically about needs and leverage available resources, people, technology and knowledge to "avoid reinventing the wheel." And it's frustrating to hear, in 2020, after years of progress, that respondents still complain that they lack budget to hire and train contracting personnel. Moreover, demand for procurement professionals – both from "competing" agencies and the private sector – makes the existing recruiting and retention framework unsustainable for growth. In such an environment, it's difficult to simultaneously transition existing professionals into a new world without overwhelming them and hire innovative individuals into the right positions where existing limitations don't hold them back.

More broadly, acquisition workforce issues remain a systemic concern. *NASA Needs To Monitor Acquisition Workforce Performance, COR Certifications*, 62 GC ¶ 308; IG-21-002, *NASA's Management of Its Acquisition Workforce*, oig.nasa.gov/docs/IG-21-002.pdf; *DHS Faces Challenges With Acquisition Management, FEMA Contracting, IT Operations*, 62 GC ¶ 334; OIG-21-07, *Major Management and Performance Challenges Facing the Department of Homeland Security*, www.oig.dhs.gov/sites/default/files/assets/2020-11/OIG-21-07-Nov20.pdf; *NASA's Challenges Include Contract Oversight, Project Management*, 62 GC ¶ 336; *2020 Report on NASA's Top Management and Performance Challenges*, oig.nasa.gov/docs/MC-2020.pdf; *NASA Needs To Monitor Acquisition Workforce Performance, COR Certifications*, 62 GC ¶ 308; IG-21-002, *NASA's Management of Its Acquisition Workforce*, oig.nasa.gov/docs/IG-21-002.pdf; Mike Schaengold, Melissa Prusock & Danielle Muenzfeld, *Feature Comment: The FY 2020 National Defense Authorization Act's Substantial Impact On Federal Procurement Law—Part II*, 62 GC ¶ 14 (discussing NDAA Section 861, Defense Acquisition Workforce Certification, Education and Career Fields).

- **Budget:** More continuing resolutions are expected, and, apparently, the contracting community is prepared. The survey highlighted a surprising disconnect between pessimism and acceptance. On the one hand, most respondents perceived that budget challenges had become worse over the last two years: forty percent expect budget challenges to continue to intensify, and only twenty percent expect them to improve. Yet respondents consistently indicated that they've grown accustomed to this state of affairs: there's never enough funding, operating under continuing resolutions is a challenge, but, for better or worse, procurement officials have become **used to operating with volatile budgets**.

- **Data: A Tale of Two Cities:** There's not much debate that data management strategies are critical considerations in acquisition policymaking, and the need for effective data management is here to stay. The survey predicts significant increase in agency budget requests for IT to facilitate data management. Unfortunately, the survey reinforces that **data reporting represents a significant compliance burden for industry**, and it's not clear that the government is reaping significant return on that investment (which it pays for, directly or indirectly). Indeed, "it's not about more data, it's about having the right data, and having the right data takes the right people." Respondents fret that, throughout the government, there is insufficient top-level understanding of how data can and should be used. To make

matters worse, data often exists in agency “silos” and are not frequently or effectively shared across government entities. Moreover, there was broad and shared concern about the government’s ability to keep data sufficiently secure from foreign adversaries. While DoD’s Cybersecurity Maturity Model Certification (CMMC) is a good first step, most believe it is insufficient.

° It’s difficult to think of a more important policy and practice issue than cybersecurity, nor one where the solution remains a work in progress. *ABA Section, Industry, Universities Push Back On DFARS CMMC Cybersecurity Interim Rule*, 62 GC ¶ 357 (calling for more clarity and streamlining); *JCWA Concept Should Use Defined Interoperability Goals For Cyber Systems*, 62 GC ¶ 346, discussing GAO-21-68, *Defense Acquisitions: Joint Cyber Warfighting Architecture Would Benefit from Defined Goals and Governance*, www.gao.gov/assets/720/710760.pdf; *DPC Issues Guidance on DFARS CMMC Cybersecurity Rule*, 62 GC ¶ 349(b); 62 GC ¶ 347(c); *DFARS Interim Rule Implements CMMC Cybersecurity Model*, 62 GC ¶ 283; <https://www.acq.osd.mil/dpap/policy/policyvault/USA002524-20-DPC.pdf>; Alexander Major & Franklin Turner, *Feature Comment, “They’re Here:” New Cybersecurity Rules And Requirements Arrive To Haunt Defense Contractors*, 62 GC ¶ 287; *DOD Cyber Certifying Body Begins Background Checks, Training*, 62 GC ¶ 265(c); Alex Major, Ethan Brown & Morgan Jones, *Feature Comment: Be Sure To Drink Your Ovaltine—The DOD Cybersecurity Decoder Pin For Federal Encryption Standards*, 62 GC ¶ 47 (“With the penalties for contractors with noncompliant IT systems increasing exponentially, it’s worth a lifetime’s supply of *Ovaltine* for contractors to get serious about federal encryption standards, find the tools necessary to meet their contractual obligations, and, of course, not shoot their eye out.”); *A&S Issues Final Cybersecurity Model Certification*, 62 GC ¶ 38(a). See, generally, OSD(A&S) Cybersecurity Maturity Model Certification, <https://www.acq.osd.mil/cmmc/> (including a helpful FAQ’s page).

° It’s impossible to discuss data without mentioning GAO’s report highlighting its skepticism with regard to DoD’s “cost saving efforts.” GAO concluded: “DOD’s reported savings [in this case] of \$37 billion ... were not always well documented.... Specifically: DOD had limited information on the analysis underlying its savings estimates, including (1) economic assumptions, (2) alternative options, and (3) any costs of taking the actions to realize savings, such as opportunity costs. Therefore, GAO was unable to determine the quality of the analysis that led to DOD’s savings decisions.” *DOD’s Cost Savings Efforts For Key Business Operations Not Well-Documented, GAO Finds*, 62 GC ¶ 326; GAO-21-74, *Defense Reform: DOD Has Made Progress, but Needs to Further Refine and Formalize Its Reform Efforts*, www.gao.gov/assets/720/710527.pdf.

- **Communication:** The survey suggested broad interest in initiatives that promote greater communication – maintaining a healthy dialogue – between industry and government. There’s not much dispute that miscommunication between the government and industry inhibits successful acquisitions outcomes. Of course, in order to succeed, industry-government dialogue must be **honest, open, early and frequent** to keep pace with accelerated communications innovation in the procurement industry. On an extremely positive and optimistic note, “83 percent of respondents said that communication and collaboration between government and industry improved in the last two years and 67 percent of respondents indicated that they believe communication and collaboration will continue to improve.”

The survey also highlighted government frustration with frivolous protests. Government officials bemoaned:

[L]egitimate protests ... should prevail; but every major acquisition we do now gets protested. It slows the timeline and stops progress in its tracks. Innovations don't happen. We spend significant time [attempting ...] to mitigate risks of protests. ...

Protest process-defenders will point out their own successes[,] but don't point out how much it freezes communication and highlights the wrong things. There are pilot programs to take fear away and better communication initiatives underway to understand why a win/loss decision was made. We want to ramp up and mandate these communication programs throughout the agency.

We take that perspective with a grain of salt. GAO's most recent report confirms the long-running trend of fewer and fewer protests. The volume of GAO bid protests again declined in FY 2020, although the single-year decrease was far less significant than the dramatic drop in FY 2019. The number of protests filed, 2,149, is more than 20 percent fewer than the recent high of 2,789 in FY 2016 – and, of course, a far cry from the 1993 peak of more than 3,300 protests. See, generally, B-158766, *GAO Bid Protest Annual Report to Congress for Fiscal Year 2020* (December 23, 2020), <https://www.gao.gov/assets/720/711556.pdf>. Despite these data, however, many significant (and often high-profile) awards continue to be delayed by protests and court proceedings. Agency officials continue to allocate limited resources in the pursuit of making their contract awards “protest proof.” No one in the business believes that protests are irrelevant, and more research would be useful.

IV. A 2021 WISHLIST:

Unlike the Section 809 Panel, which went BIG and, it increasingly appears, may not have received most of its wishes, we'd like to offer some modest requests for 2021.

A. Repeal of Executive Order (EO's) 13950, Combating Race and Sex Stereotyping. All signs point to the incoming administration having its hands full repealing controversial, and, in many cases, toxic and harmful EO's, policies, and regulations (and regulatory surrogates). This one tops of our list: Executive Order 13950, Combating Race and Sex Stereotyping, 85 Fed. Reg. 60683 (September 28, 2020), <https://www.federalregister.gov/documents/2020/09/28/2020-21534/combating-race-and-sex-stereotyping>; *Civil Rights, LGBTQ Advocacy Groups Challenge Constitutionality of Anti-diversity Training EO*, 62 GC ¶ 320(e); *OFCCP Issues RFI on EO Targeting Diversity Training as Businesses Urge Withdrawal*, 62 GC ¶ 303(d); 85 Fed. Reg. 67375 (Oct. 22, 2020); *OFCCP Answers FAQ on EO Targeting Diversity Training*, 62 GC ¶ 296(g); *Executive Order Targets Diversity Training*, 62 GC ¶ 274(b). Fortunately, at least one federal district court already entered a nationwide preliminary injunction barring the EO's enforcement. *Santa Cruz Lesbian and Gay Cmty. Ctr., et al. v. Trump*, No. 5:20-cv-07741-BLF (N.D. Cal. Dec. 23, 2020) (finding, among other things, with regard to grantees, “[t]he Government’s intent to restrict the free speech rights of federal grantees, even in circumstances where the speech in question has nothing to do with the purposes of the grant...”), https://www.jacksonlewis.com/sites/default/files/docs/NDCalif_SantaCruz.pdf. Unfortunately, the Office of Federal Contract Compliance Programs (OFCCP) maintains a hotline to receive complaints, and a clause implementing the EO's requirements has been inserted into new federal contracts. See OFCCP, *Executive Order 13950 - Combating Race and Sex Stereotyping* (containing nine FAQ's and currently acknowledging that “a preliminary injunction prohibit[s] OFCCP from implementing, enforcing, or effectuating Section 4 of [EO] 13950 ‘in any manner against any recipient of

federal funding by way of contract [or] subcontract....”), <https://www.dol.gov/agencies/ofccp/faqs/executive-order-13950>. Several class deviations have been issued to implement Section 4, including DoD Class Deviation—Combating Race and Sex Stereotyping (November 20, 2020), <https://www.acq.osd.mil/dpap/policy/policyvault/USA002235-20-DPC.pdf>, and NASA Procurement Class Deviation 20-09 (November 20, 2020), <https://www.hq.nasa.gov/office/procurement/regs/pcd/pcd20-09.pdf>, adding the EO language to solicitations and awards since November 21. Agency Inspectors General continue to report compliance with the EO. Any action by the new administration to reverse the EO will need also to address these additional contract-related elements.

B. An End to the Service Contracts Inventory? Looking ahead, we’d like to see policymakers correlate their efforts to engage in data-driven analytics with, well, *meaningful* data. One of favorite examples of a burdensome data requirement in search of a purpose is the Service Contracts Inventory. If, after nearly a decade, no one has figured out a use for the data, maybe we should stop collecting it. See, generally, *Data Collection and Inventory for Services Contracts* (DFARS Case 2018-D063), 85 Fed. Reg. 34569 (June 5, 2020); *DPC Shifts Contract Services Inventory Reporting to SAM*, 62 GC ¶ 303(f); *Industry, Nonprofit Groups Criticize DFARS Proposed Rule On Services Inventory Data*, 62 GC ¶ 234; *DFARS Proposed Rule on Services Contract Inventory Reporting Requirements*, 62 GC ¶ 169(c). Even GAO has consistently (1) questioned the accuracy of contract services inventories and (2) found that agencies make limited use of the inventories in management decision-making. *DOD Still Not Using Service Contracts Inventory To Inform Decision-Making*, 60 GC ¶ 115, GAO-18-330, *DOD Contracted Services: Long-Standing Issues Remain about Using Inventory for Management Decisions*, www.gao.gov/assets/700/690954.pdf, explaining that:

Military departments generally have not developed plans to use the inventory for workforce and budget decisions, as statutorily required. This is consistent with what GAO found in November 2014 and October 2016.....

As noted previously, in November 2014 ... ***no single office or individual at the military departments was responsible for leading or coordinating efforts between the various functional areas to develop a plan to use the inventory to inform management decisions.*** ... As of January 2018, the Army and Navy still had not named accountable officials responsible for developing plans and enforcement mechanisms to use the inventory for workforce and budget decisions, according to officials at those departments. Navy officials said they have not reached agreement on the appropriate managerial level of an accountable official....

GAO Questions Accuracy Of DOD Service Contracts Inventory, 58 GC ¶ 392; *DOD Contracted Services Inventory Provides Limited Information, GAO Finds*, 56 GC ¶ 386. And, of course, the Professional Services Council has urged Congress to scrap the inventories because they provide limited value for significant effort. *Industry Recommends Revisions To Senate Defense Authorization Act*, 59 GC ¶ 254 (inventory “has produced limited value for the significant amount of effort required of contractors and related work required of agencies.”); 57 GC ¶ 361. See also, *DOD Services Contract Inventory Suffers From Incomplete, Inconsistent Data*, 58 GC ¶ 197, citing DODIG-2016-092, *Independent Auditor’s Report on Agreed-Upon Procedures for DoD Compliance With Service Contract Inventory Compilation and Certification Requirements for FY 2014*, www.dodig.mil/pubs/documents/DODIG-2016-092.pdf.

For more than a decade, this data collection has proceeded on two flawed theories: (1) the number of contractor personnel should be (frankly, arbitrarily) reduced, and (2) the value of services contracts is based on inputs rather than outcomes or results. Neither theory is valid. As GAO explained:

In April 2009, the Secretary of Defense announced his intent to reduce the department's reliance on contractors. In 2008, Congress required DOD to compile and review an annual inventory of the number of contractor employees working under service contracts and the functions and activities they performed. The fiscal year 2010 National Defense Authorization Act directed GAO to report annually on these inventories.

GAO-11-192, *Defense Acquisitions: Further Action Needed to Better Implement Requirements for Conducting Inventory of Service Contract Activities*, <https://www.gao.gov/products/GAO-11-192>. We welcome a discussion about reducing requirements, increasing the size of the military or civilian workforce, or rebalancing the composition of the blended workforce. But, absent those discussions, let's stop collecting data that no one is using or, for that matter, should be using. Instead, let's focus efforts on collecting data on results and outcomes.

C. Recharging the Afghanistan (and Iraq) Visa Waiver Program of Special Immigration Visas. We have long bemoaned the U.S. government's breach of its promise to contractor personnel who supported our troops in Afghanistan and Iraq. For example, interpreters, without whom the military could not achieve its mission, have consistently been identified – due to their visibility working alongside military personnel – and targeted. Last year, only four percent of the 4,000 slots potentially available for Iraqi refugees who, among other things, supported American troops, were filled, “the lowest percentage of the four categories of refugees the administration authorized for resettlement....” See, generally, Zolan Kanno-Youngs, *Refugees Who Assisted the U.S. Military Find the Door to America Slammed Shut*, N.Y. TIMES (November 16, 2020) (The U.S. welcomed “[m]ore than 9,800 Iraqis ... in 2016[, ...] by the 2019 fiscal year, that was down to 465.”), <https://www.nytimes.com/2020/10/18/us/politics/trump-refugees-iraq-afghanistan.html>.

D. A Clear and Simple Solution for Section 889 Compliance. Significant energy and justifiable anxiety consumed 2020's efforts to implement Section 889 of the 2019 NDAA, through which Congress imposed prohibitions and funding restrictions on the procurement and use of Chinese telecommunications equipment and services tied to Huawei Technologies Co. or ZTE Corp. or their subsidiaries or affiliates. The contracting and grants community would benefit from, among other things, clear definitions and simple, easy to implement guidance, and most agree that a phased-in approach would soften the blow or ameliorate the compliance risks. Others seek more flexible waiver options and alternatives to lessen the compliance burdens and risk perceived by small businesses. See, e.g., *Industry Groups Urge Overhaul Of Section 889 Telecommunications Equipment Ban*, 62 GC ¶ 266 (interim rule should be extensively revised and clarified); *FAR Interim Rule Further Implements Telecommunications Ban*, 62 GC ¶ 251(a); *DOD Gets Temporary Waiver of Section 889 Telecommunications Ban*, 62 GC ¶ 240(b); *DPC Issues Guidance on Huawei, ZTE Telecommunications Ban*, 62 GC ¶ 218(f), *Implementation of the Section 889(a)(1)(B) Prohibition on Contracting with Entities Using Certain Telecommunications and Video Surveillance Services or Equipment* (July 23, 2020) (facilitating implementation of interim FAR rule 2019-009), www.acq.osd.mil/dpap/policy/policyvault/USA001557-20-DPC.pdf; *FAR Interim Final*

Rule Implements Huawei, ZTE Contracting Ban, 62 GC ¶ 203; Amy Conant Hoang & David Y. Yang, *Feature Comment: Don't Overlook 889(b): The Chinese Telecom Prohibition's Implications For Federal Grant Recipients*, 62 GC ¶ 269 (focusing on the restrictions placed on grant recipients); see also, 85 Fed. Reg. 49506 (Aug. 13, 2020); 85 Fed. Reg. 3766 (Jan. 22, 2020); USAID, *Section 889 Frequently Asked Questions (FAQs) for Contractors and Recipients of USAID Awards* (Sept. 18, 2020), www.usaid.gov/sites/default/files/documents/Partner_FAQs_09-18-2020.pdf.

E. An End to the JEDI Cloud Computing Saga? Although it has generated significant legal fees for protest lawyers, entertaining news for the community, and even a head-scratching IG report since it captured our interest in the Fall of 2017, we think that 2021 might see the end of the DoD's JEDI cloud computing procurement-and-protest saga. Still, there was plenty of JEDI-watching of note in 2020. *DOD Reaffirms JEDI Award*, 62 GC ¶ 255(b) (after which, on October 23, 2020, Amazon Web Services filed an amended complaint alleging, among other things: "Faced with President Trump's years-long campaign against awarding the JEDI Contract to AWS, the specter of retribution has caused DoD procurement officials to reaffirm this fundamentally flawed award that was demonstrably crafted to reach a pre-determined and politically acceptable outcome."); *Fed. Cir. Rejects JEDI Procurement Protest*, 62 GC ¶ 257, *Oracle Am., Inc. v. U.S.*, 2020 WL 5223521 (Fed. Cir. Sept. 2, 2020) (Among other things, Oracle did not meet a contract requirement, and, with regard to the conflicts of interest, although improper conduct occurred, it did not taint the procurement.) See also, Steven L. Schooner, *Postscript II: Enhanced Debriefings*, 34 NCRNL ¶ 26 ("At 313 pages, and chock-full of conclusions that I expect will satisfy no one, [the IG Report is] an extraordinary read."); DODIG-2020-079, *Report on the Joint Enterprise Defense Infrastructure (JEDI) Cloud Procurement*, <https://www.dodig.mil/reports.html/Article/2150471/report-on-the-joint-enterprise-defense-infrastructure-jedi-cloud-procurement-do/>; Vernon J. Edwards, *The JEDI Acquisition: Innovation Rejected*, 34 NCRNL ¶ 25 ("The JEDI acquisition team essentially discarded key advantages of the commercial item and single-award task order contract acquisition innovations authorized by Congress. We wonder why somebody in DOD didn't ask them: Why the heck are you doing those things?") But, of course, there's much more. *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), 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.

Final thoughts. Every incoming administration focuses on ways to improve federal acquisition and procurement. We hope this one will focus on getting better results – in terms of outcomes, such as customer satisfaction and value for money – from procurement. We look forward to letting you know how they've done at this time next year.