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## Emerging Policy and Practice Issues (2021)

Steven L. Schooner

*George Washington University Law School, [sschooner@law.gwu.edu](mailto:sschooner@law.gwu.edu)*

David Berteau

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## **EMERGING POLICY AND PRACTICE ISSUES**

**Steven L. Schooner**

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

**David J. Berteau**

President & CEO  
The Professional Services Council

### **I. A TIME OF CHANGE: AN UNCERTAIN (BUT CERTAINLY ACTIVE) FUTURE**

**A. The Pending Regulatory Flurry?** Five years ago, in our 2017 materials, we highlighted that Michael Fischetti (then NCMA’s Executive Director) described the first full year of the prior administration as “the longest time between a new administration taking office and publishing changes to procurement rules since the adoption of the [Federal Acquisition Regulation (FAR), on April Fool’s Day, 1984].” Looking ahead, it appears that the languid pace of FAR activity is due for a change.

As if signaling the start of a race, and although little changed substantively, the housekeeping rule changes that implemented the bifurcation of “commercial items” into “commercial products” and “commercial services” sprinkled revisions throughout the FAR. See, e.g., 86 Fed. Reg. 61017 (Nov. 4, 2021) (implementing 2019 NDAA § 836); *FAR Final Rule Bifurcates “Commercial Item” Definition*, 63 GC ¶ 337(b); 86 Fed. Reg. 68441 (Dec. 2, 2021); *GSAR Final Rule Implements FAR Commercial Item Split*, 63 GC ¶ 364; see also Vernon J. Edwards, *Commercial Items: Confusion In Court*, 35 N&CR ¶ 72 (December 2021) (“If the lawyers and judges ... were confused about commercial items and services, it is no wonder. The term commercial items was misleading for more than 20 years, and the former definition of commercial items in FAR 2.101 was awful.”). Our generation’s librarians and administrative staff paused for moment to contemplate the amount of effort they were spared by the current online official FAR. (More on that, below.) Go ahead, just imagine exactly how many pages of the office’s loose-leaf paper version of the FAR would have required replacement.

As 2022 begins, the FAR Council confronts an ambitious agenda (Semiannual Regulatory Agenda, 87 Fed. Reg. 5312 (January 31, 2022)), responding to legislative mandates and Executive Orders, and attempting to promulgate rules related to, among other things:

- COVID-related safety measures, which, of course, remain hotly disputed and subject to pending litigation. See, generally, *District Courts Enjoin Contractor Vaccine Mandate*, 63 GC ¶ 368; *White House Delays Contractor Vaccine Deadline*, 63 GC ¶ 357(a); *States Sue Over Contractor Vaccine Mandate*, 63 GC ¶ 346; Scott A. Schipma, Michael J. Schaengold, & Aaron M. Levin, *Feature Comment, A Federal Contractor’s Guide To The Evolving COVID-19 Safeguard Requirements*, 63 GC ¶ 308; *White House Task Force Issues Guidance On Covid Protocols, Vaccine Mandates*, 63 GC ¶ 290; 86 Fed. Reg. 50985 (Sep. 14, 2021); *EO Requires Federal Contractors to Follow Covid Safety Protocols—President Biden September 9 issued Executive Order 14042*, 63 GC ¶ 276(a). The uncertainties associated with the mandates and the litigation challenging them continue to generate unanticipated issues, concerns, and inefficiencies.
- See also, generally, DoD IG, *Audit of the DoD Coronavirus Aid, Relief, and Economic Security Act Awards to the Defense Industrial Base*, (May 20, 2021) (finding compliance with criteria in awarding contracts with regard to Coronavirus Aid, Relief, and Economic Security (CARES) Act funding), <https://media.defense.gov/2021/May/24/2002724461/-1/-1/1/DODIG-2021-081.PDF>; *CARES Act Contracts Properly Awarded, DOD IG Finds*, 63 GC ¶ 171; GAO-21-475, *Contractor Paid Leave Reimbursements Could Provide Lessons Learned for Future Emergency Responses*, (July 2021) (indicating that the government had not yet, but “could seize an opportunity to

enhance implementation of paid leave reimbursement provisions that may be enacted as part of rapid federal responses to future emergencies”), <https://www.gao.gov/products/gao-21-475>; *GAO Reviews How Agencies, Contractors Used CARES Act Reimbursement Authority*, 63 GC ¶ 227; Anna Jean Wirth, Sydney Litterer, Elvira N. Loreda, Laura H. Baldwin, Ricardo Sanchez, *Keeping the Defense Industrial Base Afloat During COVID-19: A Review of Department of Defense and Federal Government Policies and Investments in the Defense Industrial Base* (RAND, 2021), [https://www.rand.org/pubs/research\\_reports/RRA1392-1.html](https://www.rand.org/pubs/research_reports/RRA1392-1.html).

- As the pandemic continues, we wonder how future generations will compare the current experience to the 1918 Flu Epidemic. Obviously, the nation is far more populous today, but the level of loss remains staggering. As 2022 begins, more than 900,000 coronavirus-related deaths have been reported in the United States.
- Increasing the Buy American Act’s domestic content threshold, creating new price preferences for critical products, etc., (EO 14005, 86 Fed. Reg. 7475, January 28, 2021; and 86 Fed. Reg. 40980, July 30, 2021); *Industry Criticizes Proposed FAR Buy American Overhaul*, 63 GC ¶ 336; *Biden Administration Moves To Boost Domestic Purchasing Requirements*, 63 GC ¶ 25;
- Minimum wages (\$15 per hour) for contractor personnel (implementing EO 14026, 86 Fed. Reg. 22835, April 27, 2021, and 86 Fed. Reg. 67126, November 24, 2021, see also the Department of Labor’s resource page, *Increasing the Minimum Wage for Federal Contractors*, <https://www.dol.gov/agencies/whd/government-contracts/eo14026>);
- Climate change, sustainable procurement, and the social costs of greenhouse gasses (apparently, the public (including this chapter’s authors) submitted more than 35,000 comments in response to the Fall 2021 notice of proposed rulemaking, although a cursory review suggests that many of those comments reflected, in effect, a letter-writing campaign);
- See also, EO 14057, *Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability*, 86 Fed. Reg. 70935 (December 8, 2021) (calling for agencies to reduce (scope 1, 2, and 3) greenhouse gas emissions, achieving net-zero emissions in buildings transition to carbon pollution-free electricity and a zero-emission fleet); *EO Addresses Emissions, Promotes Clean Energy*, 64 GC ¶ 371. Section 208 specifically addresses sustainable acquisition and procurement, mandating, among other things, use of full lifecycle cost methodologies (to acknowledge externalities or environmental effects) and purchasing sustainable products and services identified and recommended by EPA. Two particularly challenging tasks include (Section 401) engaging, educating, and training the workforce, and (Section 402) incorporating environmental justice;
- See also *Agencies Plan For Climate Change Risks To Supply Chains, Procurement*, 63 GC ¶ 309 (initial, now annual climate action plans, with a focus on adaptation to, as opposed to mitigation of, climate change); and

- For additional discussion of these issues, see Steven L. Schooner & Evan Matsuda, *Sustainable Procurement: Building Vocabulary to Accelerate the Federal Procurement Conversation*, 21-10 BRIEFING PAPERS 1 (September 2021); National Contract Management Association's (NCMA's) *Climate & Sustainable Procurement Knowledge Center*, <https://www.ncmahq.org/climate>.
- Cybersecurity issues, including the Cybersecurity Maturity Model Certification (CMMC), see also DoD's CMMC 2.0 resource at <https://www.acq.osd.mil/cmmc/>, including the streamlined *Briefing Overview* (December 3, 2021) (referencing a “[t]imeline to complete all rulemaking requirements [that] will be 9 to 24 months”), <https://www.acq.osd.mil/cmmc/docs/CMMC-2.0-Overview-2021-12-03.pdf>; Alex Major & Franklin Turner, *Feature Comment: Get Back: DOD Retreats While Revealing Plans For CMMC 2.0*, 63 GC ¶ 359 (“The revised standards ... are a significant change from the initial set of standards that evolved over the past three and a half years.”); *DOD Overhauls CMMC Cybersecurity Certification Framework*, 63 GC ¶ 352.
- Section 889’s prohibitions with regard to certain technology goods and services provided by various Chinese firms (multiple rules); see generally, FAR Subpart 4.21, implementing section 889 of the 2019 NDAA;
- Small business size status representation (and recertification) with regard to affiliations (including the mentor-protégé’ program, joint ventures, etc.) and SBA’s Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Policy Directives (85 Fed. Reg. 66146, October 16, 2020, etc.), and accelerated payment dates for small business contractors and subcontractors. See also, with regard to limitations on small business subcontracting, 86 Fed. Reg. 44,234 (August 11, 2021); Franklin Turner, Alex Major, Cara Wulf, & Ethan Brown, *Feature Comment: Bueller ... Bueller ... Bueller: The FAR Council’s Day(s) Off Come To An End With The Long-Awaited Implementation Of The SBA’s 2016 Revisions To The Limitations On Subcontracting Rule*, 63 GC ¶ 263;
- Further tweaking of commercial purchasing policies, including efforts to reduce the regulatory burdens associated with contracts for commercial products, commercial services, and commercially available off-the-shelf (COTS) items contracts, and clarification of the definition of “subcontractor”; see generally FAR Part 12; and
- Disclosure mandates with regard to beneficial ownership of corporations (FAR Case 2021-2021-005); disclosures with regard to political contributions (FAR Case 2021-006); explanations to unsuccessful offerors on certain orders under task and delivery order contracts (FAR Case 2020-005), etc.

**B. Transitioning From Policy to Implementation: A Daunting Hill To Climb.** To be clear, our intent here is to highlight the scope of activity or describe the trajectory or trend, rather than provide a comprehensive list. For example, it is premature to predict whether the FAR Council will undertake rulemaking to ensure that “Government contracting and procurement opportunities should be available on an equal basis to all eligible

providers of goods and services ... [and remove] any barriers to full and equal participation in agency procurement and contracting[,]” pursuant to EO 13985, Advancing Racial Equity and Support for Underserved Communities Through the Federal Government, 86 Fed. Reg. 7009 (January 20, 2021) (among other things, revoking 13950, Combating Race and Sex Stereotyping, 85 Fed. Reg. 60683 (September 22, 2020)); OMB Memo M-21-17, *Revocation of Executive Order 13950, M-20-37, and M-20-34* (March 2, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/03/M-21-17.pdf>; *President Issues EOs On Contract Prisons, Racial Equity, Climate Change, Pandemic Supplies*, 63 GC ¶ 30; *OMB Rescinds Memos Implementing Revoked Anti-Diversity Training EO*, 63 GC ¶ 71. Of course, the challenge in every administration – and with regard to change, generally, lies in transitioning from policy to practice. Only time will tell if the FAR Council can keep pace with its ambitious schedule and, of course, how effectively agencies and contractors can implement the more significant changes.

## II. PROCUREMENT (AND GRANT) SPENDING & SPEND DATA

**A. Show Me the (Infrastructure) Money!** We assume we’re not alone in not holding our breath to see how the widely touted \$1.2 trillion in long overdue funds flowing from the Infrastructure Investment and Jobs Act (“Infrastructure Act”), Pub. L. No. 117–58, will impact the federal procurement marketplace. *Surely*, our community and marketplace will be reshaped by such a massive investment in roads, bridges, rail, broadband, power and grid, water (and ports), public transit, resiliency initiatives, school busses and ferries, electrical vehicle charging, etc. Alas, to the extent that it does, it will do so only indirectly. As our readers understand, the lion’s share of this money will be dispersed (primarily to the states) through grants, and little will translate directly into federal procurement contracts. See <https://www.whitehouse.gov/build/> and *Building A Better America: A Guidebook to the Bipartisan Infrastructure Law for State, Local, Tribal, and Territorial Governments, and Other Partners* (a 456-page “roadmap to the funding available under the law”), [https://www.whitehouse.gov/wp-content/uploads/2022/01/BUILDING-A-BETTER-AMERICA\\_FINAL.pdf](https://www.whitehouse.gov/wp-content/uploads/2022/01/BUILDING-A-BETTER-AMERICA_FINAL.pdf). For a broad perspective, see, e.g., Council on Foreign Relations, *Understanding the Infrastructure Investment and Jobs Act*, (January 13, 2022), <https://www.cfr.org/event/understanding-infrastructure-investment-and-jobs-act>. Still, last year, as noted below, grants again dramatically exceeded procurement spending, as they’ve done for eighteen of the last twenty years. (Procurement dollars last exceeded grant spending in 2008.) Having said that, the gap appears to be widening and, over the next decade, the trendlines may diverge far more dramatically. However, actual appropriations for these initiatives have not yet been enacted, and the possibility of more Continuing Resolutions (CR’s) adds delay, further muddying the waters.

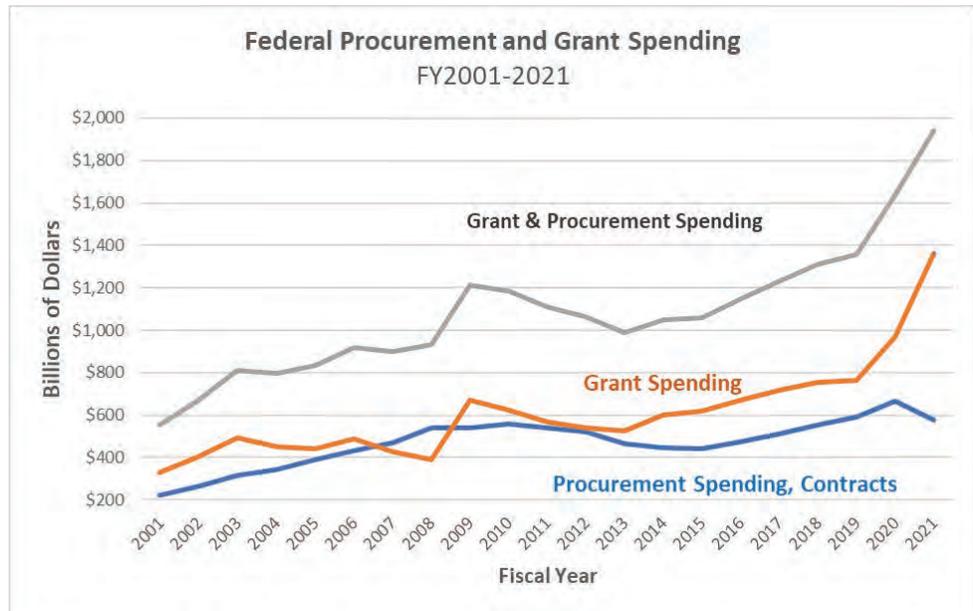
**B. Whither The Budgeting Enterprise.** On a positive note, the Federal Government did not shut down in 2021 as a result of Congress’ unwillingness to deal with budgets consistent with the pre-existing scheme for doing so. Conversely, it’s difficult to call the current process, heavily dependent upon continuing resolutions (CR) a meaningful *budget process*. We are not optimistic that, in the current, hyper-partisan environment, this process will quickly sort itself out. As one of us (OK, David) remarked (after noting that we’ve begun the fiscal year under a CR in eleven of the last twelve years), this is not the way to run the federal government. See, generally, *Congress*

*Avoids Shutdown, Industry Group Supports Bill To End Shutdown Risk, 63 GC ¶ 294. And stay tuned for developments in early 2022.*

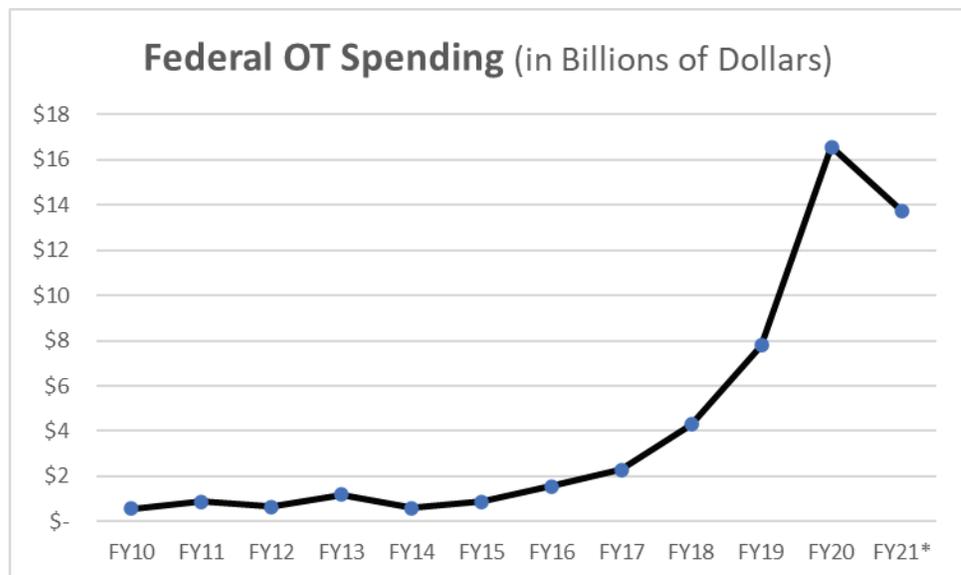
**C. Peak, Blip, Plateau, Trend?** In last year's chapter, the big news was that Federal procurement spending exceeded \$600 billion for FY2020. (Again, wow!) Moreover, the peak – \$668 billion – ultimately exceeded the estimate we tentatively reported (last year). In 2021, although federal procurement spending dipped below \$600 billion, it remained one of the highest totals, ever. All of which is dwarfed by the continued growth, nay, expansion of grant spending.

<b>FEDERAL PROCUREMENT AND GRANT SPENDING FY2001-2021*</b> <i>(In Billions of Dollars)</i>			
Fiscal Year	<i>Procurement Spending</i>	<i>Grant Spending</i>	<i>Procurement &amp; Grant Spending (Combined)</i>
<b>2021</b>	<b>\$578.6</b>	<b>\$1,363.5</b>	<b>\$1,942.1</b>
<b>2020</b>	<b>\$668.4</b>	<b>\$971.3</b>	<b>\$1,639.6</b>
<b>2019</b>	<b>\$590.2</b>	<b>\$765.1</b>	<b>\$1,355.3</b>
2018	\$555.5	<b>\$756.3</b>	<b>\$1,311.8</b>
2017	\$510.6	<b>\$719.2</b>	<b>\$1,229.8</b>
2016	\$475.5	<b>\$671.2</b>	\$1,146.6
2015	\$439.8	<b>\$619.7</b>	\$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
<b>2010</b>	<b>\$561.0</b>	\$624.4	\$1,185.4
<b>2009</b>	\$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>
2004	\$346.1	\$450.1	\$796.2
2003	\$318.0	\$493.7	\$811.7
2002	\$264.1	\$406.3	\$670.4
2001	\$223.0	\$330.8	\$553.8

\* FY 2021 figures reflect an estimate based upon preliminary reporting. The amounts reported above, for 2019-2020, were adjusted from data previously published in *USASpending.gov*. Updated data is courtesy of the market intelligence gurus, Amber Hart and Lisa Shea Mundt, at *The Pulse*, <https://thepulsegovcon.com>.



**D. A Step Back for Other Transactions?** In last year’s materials, we highlighted that, consistent with increased popularity, attention, and emphasis, reliance on other transactions (OT’s) appeared to be increasing rather dramatically. Although FY20 represented a peak, with \$16.5 billion in OT’s, that still was not statistically significant in the landscape of total federal discretionary spending. With OT spending slightly down from FY20 to \$13.7 billion in FY21, we now have a three-year average of OT spending in the two-to-three percent range. (Yes, that suggests growth, but it’s still not that much in total.) Importantly, however, it was not feasible to separate OT spending for COVID-19 from other purposes, making it harder to predict real trends in OT usage. See also, GAO-21-501, *COVID-19 Contracting: Actions Needed to Enhance Transparency and Oversight of Selected Awards*, [www.gao.gov/assets/gao-21-501.pdf](http://www.gao.gov/assets/gao-21-501.pdf); *Pandemic-Related OTA Awards Need Enhanced Transparency*, GAO Finds, 63 GC ¶ 237.



**E. Some Observations on Defense Spending.** Following the withdrawal from Afghanistan, and with the nation’s focus turning to domestic infrastructure (more on that below), could we have seen the peak of defense procurement spending? If so, there’s a long way down from the recent, lofty peaks. See also Won Joon Jang, Gregory Sanders & Alexander Holderness, *2021 Defense Acquisition Trends: Topline DoD Trends after a Half Decade of Growth* (CSIS, December 2, 2021) (“Defense contract obligations grew to \$421.3 billion in fiscal year (FY) 2020, a dramatic 41 percent increase since Department of Defense (DoD) contract spending bottomed out in FY 2015 due to budget caps and reduced overseas deployments.”), <https://www.csis.org/analysis/2021-defense-acquisition-trends-topline-dod-trends-after-half-decade-growth>. Looking ahead, the CSIS report suggests that:

FY 2020 may prove to be a peak year for defense contract obligations.... [K]ey questions to ask going forward:

Will the high rate of spending on products be sustained, or will the new administration’s concerns about legacy platforms change buying patterns?

Will the Air Force and Navy follow in the Army’s footsteps by increasing use of OTA contracts?

Will the Biden-Harris administration’s skepticism regarding defense consolidation translate into changes to vendor size, count, and competition?

And, in a time of renewed attention to supply chains and a consolidating industrial base, what will be the role for commercial industry and allied industrial bases?

For broader context, DoD reported that, for FY 2020, its “contract obligations and payroll spending” represented approximately **\$1,803 per U.S. resident**. (Nope, that’s not a typo.) See *Defense Spending By State, Fiscal Year 2020*, <https://oldcc.gov/dsbs-fy2020>; *DOD Surveys FY 2020 Top Contractors And States*, 63 GC ¶ 325. Some other interesting data that caught our eyes, also from the DoD State-By-State survey:

Defense Spending (By State)		
Rank	State	Billions
1	Texas	\$83.0
2	Virginia	\$64.3
3	California	\$61.0
4	Maryland	\$30.4
5	Florida	\$29.1
6	Connecticut	\$23.6
7	Arizona	\$20.2
8	Massachusetts	\$18.6
9	Pennsylvania	\$17.8
10	<b>Georgia</b>	\$15.8

To clarify, these figures included both prime- and sub-award contract data (which, of course suggests the potential for some double counting), but also included defense personnel and payroll figures.

- Those ten states accounted for more than 62 percent of total defense spending; and
- Virginia was the only state in which defense spending accounted for more than ten percent of GDP (at 11.3 percent).

## NOTES

Not surprisingly, the figures are similar (but lower) with regard to contracting dollars.

Defense Contracting (By State)		
Rank	State	Billions
1	Texas	\$71.2
2	Virginia	\$44.8
3	California	\$44.0
4	Connecticut	\$22.8
5	Maryland	\$22.4
6	Florida	\$21.0
7	Arizona	\$17.9
8	Massachusetts	\$17.4
9	Pennsylvania	\$14.8
10	Missouri	\$13.3

As for the leading contractors, there were few surprises, with the top ten including: Lockheed Martin, General Dynamic, Boeing, Raytheon, Northrop Grumman, L3 Harris Technologies, Huntington Ingalls, BAE Systems, United Technologies, and Humana.

**F. An Attractive (Macro) Picture for Small Business.** In July, the Small Business Administration (SBA) announced a record fiscal year haul of \$145.7 billion in prime contracts (and \$82.8 billion in subcontracts) for small businesses. Although the percentage of dollars (26.01 percent) was slightly *lower* than in FY19 (26.5 percent), the total dollar figure represented a significant increase over reported prime contract awards in FY19 (\$132.9 billion), FY18 (\$120.8 billion), FY17 (\$105 billion), and FY16 (\$99.7 billion), and – for small businesses – continues an encouraging trendline. Although SBA celebrated the total numbers and percentages, SBA conceded that concentration had occurred, with a decrease in the total number of small businesses receiving prime contracts. Part of this is because increased awards push many small businesses above the dollar thresholds, effectively punishing growth. Moreover, it may be hard for the administration to increase small business contract spending in every set-aside category. For example, while the government “exceeded the service-disabled veteran-owned small business and small disadvantaged business” goals, it “fell short of meeting the goals ... for women-owned small businesses and HUBZone small businesses.” SBA Release 21-59, *Federal Government Awards Record-Breaking \$145.7 Billion in Contracting to Small Businesses*, (July 28, 2021), <https://www.sba.gov/article/2021/jul/28/federal-government-awards-record-breaking-1457-billion-contracting-small-businesses> and [https://www.sba.gov/sites/default/files/2021-01/FY21%20Final%20Goals%20Spreadsheet 508.pdf](https://www.sba.gov/sites/default/files/2021-01/FY21%20Final%20Goals%20Spreadsheet%20508.pdf); see also *Government Surpasses Small Business Contracting Goal In FY 2020*, 63 GC ¶ 236.

**G. As For Access to the Raw Data....** The evolution of the General Services Administration’s (GSA’s) Integrated Award Environment (IAE), including the System of Award Management (SAM) and its subsidiary functions, including the Federal Procurement Data System (FPDS), continues to evolve. See, generally, <https://www.gsa.gov/about-us/organization/federal-acquisition-service/office-of-systems-management/integrated-award-environment-iae>; GSA, *SAM.gov Update*, (“Integrating beta.SAM.gov and SAM.gov on May 24th was certainly the biggest change we made this year, but did you know we’ve continued to deliver incremental improvements over the past few

months?”), <https://www.gsa.gov/about-us/organization/federal-acquisition-service/office-of-systems-management/integrated-award-environment-iae/iae-systems-information-kit/samgov-update>. We continue to bemoan that these changes are not sufficiently user-based or user-driven, and we’ve heard more frustration than satisfaction from experts willing to serve as beta testers. On that note, we encourage you consider trying it yourself. *Register to be a tester on SAM.gov!*, <https://www.eventbrite.com/e/samgov-tester-sign-up-tickets-162431622355>.

**H. Slicing and Dicing the Data.** Interesting as the raw data may be, we remain skeptical of the utility of measuring and focusing (too much) on **Procurement Administrative Lead Time (PALT)**. We are beginning to see agencies attempt to collect and discuss PALT data, and we look forward to hearing lessons learned and best practices from agencies who have leveraged this (yet to be) concatenated data from information to policy or practice or customer service improvements or enhancements. See, generally, Section 878 of the NDAA for 2019, 85 Fed. Reg. 3428 (January 21, 2020); OFPP Memorandum, *Reducing Procurement Administrative Lead Time Using Modern Business Practices* (January 14, 2021), <https://www.whitehouse.gov/wp-content/uploads/2021/01/OFPPPALTMemorandum-01-14-2021.pdf>; see also Procedures, Guidance and Information (PGI) 204.70 and DoD’s Procurement Toolbox, <https://dodprocurementtoolbox.com/site-pages/palt>. Similarly, one wonders when **transactional data** will run its course. See, e.g., GSA OIG, *GSA’s Transactional Data Reporting Pilot Is Not Used to Affect Pricing Decisions*, (June 24, 2021), <https://www.gsaig.gov/content/gsas-transactional-data-reporting-pilot-not-used-affect-pricing-decisions>; *MAS Transactional Data Reporting Pilot Has Not Met Goals, GSA IG Finds*, 63 GC ¶ 205; Ralph C. Nash, *Transactional Data Reporting: A Lost Cause?*, 35 N&CR ¶ 44 (August 2021) (“this seems to be one of those bright ideas that has failed in the implementation process”). Also, we remain on the lookout for (not just numbers but) *meaningful* data related to DoD’s reliance on **Lowest Price Technically Acceptable (LPTA)** competitions. See, e.g., Congressional Research Service, *Defense Primer: Lowest Price Technically Acceptable Contracts* (Updated, December 15, 2021) (Congress has expressed concern regarding the misuse of LPTA for source selection and has been “concerned that an overarching bias towards reducing prices paid by [DOD] to the exclusion of other factors could result in DOD buying low cost products that have the potential to negatively impact the safety of U.S. military personnel.”) referencing Section 806 of the FY2020 NDAA and collection of LPTA data in the FPDS, <https://sgp.fas.org/crs/natsec/IF10968.pdf>; see also, 86 Fed. Reg. 3679 (January 14, 2021).

### III. IT’S STILL ALL ABOUT PEOPLE

**A. The Acquisition Workforce.** As always, we fret over the staffing, development, funding, and appreciation of the acquisition workforce. Big changes are afoot with regard to longstanding regime created by the Defense Acquisition Workforce Improvement Act (DAWIA). See, *Empowering the Workforce: Back to Basics*, <https://www.dau.edu/back-to-basics>. DoD is

modernizing its implementation of the Defense Acquisition Workforce Improvement Act (DAWIA) to a 21st Century talent management framework. The initiative significantly streamlines the certification construct and re-focuses training resources....

For more than thirty years, training was a one-size-fits-all approach and delivered early in an individual’s career. Now, DoD is rethinking training to foster a culture of lifelong learning for current and

future acquisition professionals....

The Back-to-Basics initiative streamlines career fields into functional areas, compresses a three-level certification model into a one- or two-tier framework, and moves away from a front-loaded training model to life-long learning paradigm.

See, generally, *Special Issue: Empowering the Workforce*, DEFENSE ACQUISITION (Early Release, March-April 2022), <https://www.dau.edu/library/defense-atl/p/Defense-Acquisition-Magazine-Mar-Apr-2022>; Vernon J. Edwards, *DOD's Back-to-Basics Program: A Surrender?*, 35 N&CR ¶ 18 (March 2021) (fretting that: "The training was not all that good before Back-to-Basics; now it will be cut by 75%."); Vernon J. Edwards, *Acquisition Education and Training: A Scandal*, 35 N&CR ¶ 6 (January 2021) (bemoaning "[t]he current state of affairs, in which working-level [procurement professionals ...] cannot access readily usable and up-to-date editions of helpful textbooks and handbooks ... [as a] failure of acquisition leadership and management[, ...] the skeletal Federal Acquisition Institute and the nearly moribund [Defense Acquisition University]").

**B. New Faces, But Not Enough of Them.** Last year, with the start of the new administration, it was too early to speculate as to who would assume significant leadership roles in the acquisition community under the new administration. A year later, as the pace at which positions are being filled remains modest, it is difficult to draw broad conclusions.

- **Still Waiting at OFPP, OMB.** In August, nominated Biniam Gebre to serve as the Administrator for Federal Procurement Policy (OFPP). It is unclear what progress has been made since (and Gebre remains on the *Accenture* website). He previously served as Acting Assistant Secretary and Commissioner of the Federal Housing Administration and as a partner with McKinsey & Co. Of course, this may have to wait until the Director of the Office of Management and Budget (OMB) is in place (but, of course, that is pure speculation). Deputy Director Shalanda Young was nominated to serve as Director in November, after Neera Tanden's nomination was withdrawn. Nani A. Coloretti was nominated to serve as Deputy Director. In addition, OMB's Office of Information and Regulatory Affairs (OIRA) lacks a nominee, and the Acting OIRA Administrator, Sharon Block, who previously served as Associate Administrator, plans to leave soon. It is difficult to reconcile the lack of progress on this nomination, given the pace of proposed and anticipated regulatory reform we discussed above.

- **Stability at GSA?** Robin Carnahan, no stranger to this community, having led the State and Local Government Practice at GSA's 18F, currently serves as the Administrator of the General Services Administration (GSA). Among other things, she has focused on efforts to improve customer experience and government services for the American people. *Statement by GSA Administrator Carnahan on President Biden's Executive Order on Improving Customer Experience and Government Services for the American People* (December 13, 2021), <https://www.gsa.gov/about-us/newsroom/news-releases/statement-by-gsa-administrator-carnahan-on-president-bidens-executive-order-on-improving-customer-experience-and-government-services-for-the-american-people-12132021>. See also, *Performance.gov*, <https://www.performance.gov/cx/>, which explains that it is "a window into the performance of the Federal Government[, with a ...] mission is to make this information easy to find and understand, so that you can follow what your government is doing

about the issues essential to your family, community, or business.”

- **Incremental Progress at DoD.** In November, William LaPlante was nominated to serve as Under Secretary for Acquisition and Sustainment (USD(A&S)). Currently at Draper Laboratory, and formerly at MITRE, he also brings experience having served as Assistant Secretary of the Air Force for Acquisition, Technology and Logistics. In a setback to the acquisition innovation community, the administration’s initial nominee, Michael Brown, who continues to serve as the Director of the Defense Innovation Unit (DIU), requested that his nomination be withdrawn in July. Gregory M. Kausner, a career executive, is currently performing the duties of USD(A&S). Frank Kendall, who formerly served as USD(ATL), under its prior organizational alignment, and is frequently associated with DoD’s so-called Better Buying Power (BBP) initiative and principles, currently serves as the Secretary of the Air Force, but none of the Military Departments have a confirmed Service Acquisition Executive.

**C. What of The Great Resignation?** More broadly, there’s every reason to expect that the future will include a fair amount of handwringing when it comes to government staffing. We’re now in third decade of the great outsourcing effort (best summarized by Paul Light’s *THE GOVERNMENT-INDUSTRIAL COMPLEX: THE TRUE SIZE OF THE FEDERAL GOVERNMENT, 1984-2018* (Oxford, 2019)), and, for many years, we’ve also anxiously watched and bemoaned the greying (and increased retirement eligibility) of the government workforce. At least in this context, we can’t say that we didn’t see “The Big Quit” or “The Great Resignation” coming. See, e.g., Abby Vesoluis, *Why Literally Millions of Americans Are Quitting Their Jobs*, TIME (October 13, 2021), <https://time.com/6106322/the-great-resignation-jobs/>. One of the most penny-wise-and-pound-foolish government-specific examples has been the understaffing at the Internal Revenue Service (IRS), which “has fewer auditors than at any time since World War II. Faced with resource constraints, it is no surprise that the agency is not able to appropriately focus scrutiny on complex returns, where noncompliance is greatest.” Timothy F. Geithner, Jacob J. Lew, Henry M. Paulson Jr., Robert E. Rubin and Lawrence H. Summers, *Guest Essay: We Ran the Treasury Department. This Is How to Fix Tax Evasion*, N.Y. TIMES (June 9, 2021), <https://www.nytimes.com/2021/06/09/opinion/politics/irs-tax-evasion-geithner-lew-paulson-summers-rubin.html>.

**D. Out of Afghanistan.** We have long bemoaned the U.S. government’s breach of its promise to contractor personnel who supported our troops and other missions 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. Although our formal engagement in Afghanistan ended on September 11, 2021, much work remains to be done. See also, PSC, ISOA & NDIA letter to Secretary Blinken, Secretary Austin, and Ambassador Power (May 13, 2021) (requesting help in addressing the significant impacts of the decision to withdraw on contracting partners who have supported our nation’s Afghanistan policy), <https://www.ndia.org/-/media/sites/press-media/psc-afghanistan-drawdown-letter-to-usg-officials-13may2021-signed.ashx>; PSC letter (July 21, 2021) ((addressing, among other things, the lack of official information pertaining to Special Immigrant Visas (SIVs)), <file:///C:/Users/sscho/Downloads/PSC%20-%20Afghanistan%20Letter%20to%20USG%20Officials.pdf>. Moreover, we appreciate the rare reminders of the extent of mission’s reliance on contracts. See, e.g., Mark Cancian, *In Afghanistan*,

*Contractors Were Unsung Heroes Of US Efforts*, BREAKING DEFENSE (August 30, 2021), <https://breakingdefense.com/2021/08/in-afghanistan-contractors-were-unsung-heroes-of-us-efforts/>

The truth is that military forces in Afghanistan (and elsewhere) could not have operated without the services that contractors performed. And contractors have performed: They supported the troops during the long years of war in Afghanistan and stayed on the job under fire right up to the final collapse. As the Middle East wars wind down, the accomplishments and sacrifices of these contractors deserve recognition.

See also, Congressional Research Service, R46879, *U.S. Military Withdrawal and Taliban Takeover in Afghanistan: Frequently Asked Questions*, <https://crsreports.congress.gov/product/pdf/R/R46879>, *CRS Surveys DOD, Contractor Withdrawal From Afghanistan*, 63 GC ¶ 255; Special Inspector General for Afghanistan Reconstruction, SIGAR-21-46-LL, *What We Need to Learn: Lessons from Twenty Years of Afghanistan Reconstruction*, [www.sigar.mil/pdf/lessonslearned/SIGAR-21-46-LL.pdf](http://www.sigar.mil/pdf/lessonslearned/SIGAR-21-46-LL.pdf), *SIGAR Surveys Two Decades Of Oversight, Sustainability Problems In Afghanistan*, 63 GC ¶ 251; Congressional Research Service R44116, *Department of Defense Contractor and Troop Levels in Afghanistan and Iraq: 2007-2020*, [crsreports.congress.gov/product/pdf/R/R44116](https://crsreports.congress.gov/product/pdf/R/R44116); *CRS Surveys Decrease In DOD Contractor Personnel In Afghanistan, Iraq*, 63 GC ¶ 61

#### IV. POTPOURRI, VARIOUS AND SUNDRY ITEMS

**A. The JEDI Saga Ends, Or Does It?** This chapter would seem incomplete without at least a passing reference to the long running saga of DoD's Joint Enterprise Defense Infrastructure (JEDI) cloud computing solicitation, contract, conflicts of interest, litigation, and appeals. *Following Up ... Supreme Court Denies Certiorari In JEDI Protest*, 63 GC ¶ 305 (denying, without comment, *Oracle Am., Inc. v. U.S.*, 975 F.3d 1279 (Fed. Cir. 2020)); *DOD Issues JWCC Solicitation to Four Firms for JEDI Replacement*, 63 GC ¶ 374(b) (adding Google and Oracle); *DOD Cancels JEDI Cloud Procurement, Launches JWCC*, 63 GC ¶ 203 (discussing initial solicitation for a Joint Warfighter Cloud Capability (JWCC), anticipating two indefinite delivery-indefinite quantity (ID/IQ) contracts, one each to AWS and Microsoft). See also, Vernon J. Edwards, *The Sad and Dangerous State of Our Acquisition System: A Ponderous Competition Process And Workforce Problems*, 35 N&CR ¶ 36 (June 2021) (“[R]ules are not the only problem. Agencies have created a workforce that is not ready for prime time. They demand agility from persons who have received small and low-quality education and training. They demand innovation from persons who have not been taught the fundamental concepts and principles of their business....”). The trajectory appears to suggest the establishment of a large-scale DoD multiple-award ID/IQ (or task order) regime for a broad range of cloud computing services and capabilities that many advocated for throughout the JEDI winner-take-all saga.

**B. JEDI (Or Mandalorian) Spin-Offs?** Without drifting too far afield, we concede we are intrigued by Oracle's acquisition of Cerner. Oracle Press Release (December 20, 2021), <https://www.oracle.com/news/announcement/oracle-buys-cerner-2021-12-20/>. The announcement of that acquisition came in the same month that the Department of Veterans Affairs (VA) – which is introducing and deploying the Cerner Millennium system in dozens of medical centers – touted its plan to reimagine its approach and move forward with its systemwide Electronic Health Record Modernization (EHRM) program.

Meanwhile, while it is unlikely to achieve JEDI's iconic status, the moving target set by CIO-SP4 continues to fascinate and flummox. In January, the Department of Health & Human Services (HHS) National Institute of Health Information Technology Acquisition and Assessment Center (NITAAC) issued amendments 14 and 15 to the ongoing Chief Information Officer-Solutions and Partners 4 (CIO-SP4) Government-Wide Acquisition Contract (GWAC) solicitation. (The current version of the solicitation runs 175 pages, and, "[o]fferors are strongly encouraged to review all the Amendments and corresponding documents in their entirety.") Nonetheless, NITAAC "fully expect[s] and intend[s that] CIO-SP4 will be awarded in a timely manner." See, *CIO-SP4 Updates*, <https://nitaac.nih.gov/gwacs/cio-sp4>; See also, *Computer World Services Corporation*, B-419956.18 et al., (sustaining a protest that the request for proposals (RFP) was unduly restrictive). Some of the prior protests had been addressed with prior solicitation amendments. Revised proposals are now due in February (again, apparently, only firms who submitted proposals in August are eligible).

**C. And...** No doubt, by the time the Year in Review Conference actually rolls around, we'll have more items to share. We look forward to learning the direction in which these and other issues emerge.



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610 Opperman Drive

Eagan, MN 55123

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