2023

Emerging Policy and Practice Issues (2022)

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EMERGING POLICY AND PRACTICE ISSUES

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I. PLENTY OF BALLS IN THE AIR, BUT WHICH WAY IS THE WIND BLOWING?

A. A Looming Debt Ceiling Fight? Last year, we put a largely positive spin on the (sadly noteworthy) absence of a 2021 Federal Government shut down. We attempted to temper any celebrations, to the extent that last year's process, heavily dependent upon continuing resolutions (CR) and an eventual omnibus appropriations that was months late, would not be what we would describe as a meaningful *budget exercise* or *process*. Nor did we suggest optimism that, in the current, hyper-partisan environment, better solutions would arise. Despite healthy procurement (and grant) spending in 2022 (discussed at length below), the mid-term elections and the foundational commitments made by the recently installed but slim House majority suggest that 2023 may bring stormy seas. In January, the Department of Treasury warned that it commenced implementing "extraordinary measures" to avoid a potential government default as government spending approaches the statutory debt limit. Janet L. Yellen, Secretary of the Treasury, Letter to Kevin McCarthy, Speaker of the U.S. House of Representatives (January 13, 2023), https://home.treasury.gov/system/files/136/Debt-Limit-Letter-to-Congress-McCarthy-20230113.pdf. The letter lays out the stakes in stark terms:

> Presidents and Treasury Secretaries of both parties have made clear that the government must not default on any obligation of the United States.... It is ... critical that Congress act in a timely manner to increase or suspend the debt limit. Failure to meet the government's obligations would cause irreparable harm to the U.S. economy, the livelihoods of all Americans, and global financial stability.

Treasury's temporary actions delay default, possibly into the summer. But, unfortunately, this is just the beginning of the anxiety-producing fiscal struggle to come. Much as we would like to kick off this year's session with a more positive note, we can only play the hand that's dealt. Welcome to 2023. "Buckle up," and maybe consider tire chains for slippery roads ahead.

B. Regulatory Churn. Last year, we began by contrasting the ambitious regulatory agenda facing the Federal Acquisition Regulation (FAR) Council with what had felt like an extraordinary period of inaction (which, in retrospect, we should have made more of an effort to enjoy). As 2023 begins, the FAR Council confronts an even more ambitious agenda, responding to legislative mandates and, depending upon how you count, *more than two dozen* Executive Orders that will impact public procurement policy and practice, including issues related to cybersecurity; technology, goods and services provided by various Chinese firms in the supply chain; domestic content; minimum wages; climate change; and task and delivery order contracts; while recent inflationary pressures have introduced something new. See, generally, Fall 2022 Unified Agenda of Regulatory and Deregulatory Actions (including more than two dozen proposed rules under DOD/GSA/NASA (FAR), covering a diverse range of issues, in addition to others that may affect agency regulations), https://www.reginfo.gov/public/do/eAgendaMain. Fortunately, other chapters in these materials address most, if not all, of those pending developments. But it does not escape notice that the scope of issues in the Unified Agenda and elsewhere reaches far beyond what many think of as conventional procurement. See, e.g., Sandy Hoe & Emma Merrill, *Feature Comment: How Presidential Power Over Procurement Can Be A Vehicle For Social Change* ("Recent challenges to [various Executive] orders shine some light on the line between acceptable executive action relating to procurement and implementation of social policies that go well beyond what will improve the 'economy and efficiency' of the procurement system."), 64 GC ¶ 271.

Against that backdrop, one of the most frustrating aspects of the regulatory churn is that, by and large, the flurry of activity doesn't seem to be making the acquisition process easier to navigate or more efficient, calculated to reduce transaction costs or "friction," likely to increase end user customer satisfaction, or generate more meaningful insight into how much value the government obtains in light of its expenditures. Particularly given how much emphasis we hear on the need for innovation, we were struck by Vern Edwards' recent reflections that today's acquisition regime has evolved into "a cult of procedure." Vern Edwards, *The Cult of Procedure in Acquisition*, 36 NCRNL ¶ 67.

> Despite frantic calls for innovation, there are specified or presumed ways to do things…. [U]nauthorized deviations may prompt criticism or lead to trouble. Procedure can become a kind of ritual. Despite managerial calls for innovation, one must be careful to follow instructions at all times, adhere to the accepted forms passed down through the ages, and perform the rituals properly in order to appease the compliance gods….
>
> What we have in acquisition today is emphasis on compliance with standard procedures, often linked to arbitrary dollar thresholds, which makes process streamlining and improvement difficult. Instead of professional competence throughout the work force, what we have are fraught, cautious practitioners and emphasis on procedural compliance.

Vern highlights the difference between a novice cook, on the one hand, who would "read the recipe word for word, proceed slowly, measure carefully, and strive to comply" and, on the other, a chef, more inclined to "follow … instincts and improvise, relying on knowledge and experience." It's not a stretch, and it's valuable grist for the mill. Vern asks: "Why not teach the workforce concepts, principles, business objectives, and the art of process design? That way they could improvise, adapt, and develop procedures appropriate to the acquisition at hand. Why not tell Congress in no uncertain terms about the harm that they cause by writing statutory procedures…." We think he's onto something.

C. All Eyes On Inflation(ary Relief). As the effects of inflation pummel markets, consumers, and, of course, contractors, 2023 offers an *extraordinary* (sorry, we couldn't resist) case study. Quite simply, the Department of Defense (DoD) has put the acquisition workforce on notice that it "will consider," (which suggests that it might also grant, or at least negotiate) "upward adjustment to the price of an existing firm-fixed- price contract[s] to account for current economic conditions[.]" John Tenaglia, Defense Pricing and Contracting, *Managing the Effects of Inflation With Existing Contracts*, https://www.acq.osd.mil/dpap/policy/policyvault/USA001773-22-DPC.pdf; *DOD Issues FFP Contracting Guidance Addressing Inflation*, 64 GC ¶ 274(b); *President Signs FY 2023 NDAA*, 65 GC ¶ 3; *Sen. Warren Questions Inflation-Based Cost Increases*, 64 GC ¶ 303(g). Of course, the devil lies in the details, there are *a lot* of details, and the basics start with Section 822 of the National Defense Authorization Act (NDAA) for Fiscal Year 2023, H.R. 7776, which in turn, references longstanding authority found in Public Law No. 85-804, 50 USCA § 1431.

Before getting into the weeds, let's not lose sight of the big picture. No *right* to a contractual adjustment has been created; DoD's authority is discretionary. Indeed, many read DoD's underlying message to *discourage* pursuing relief. The provision sunsets on December 31, 2023, so, at the moment, this is a one-year proposition or opportunity (or, potentially, can of worms). And there's no relief in sight for cost-reimbursement contractors (and those contracts have ceilings); nor is this "opportunity" available to contracts with civilian agencies. Meanwhile, the FY23 NDAA (P.L. 117-263) included a 4.6 percent pay raise for military personnel, which was followed by an Executive Order decreeing a similar raise for federal civilian employees. Compare those increases to the absence of a rapid mechanism to reimburse contractors for similar cost increases: it is almost as though the government believes that contractor employees have been exempt from the same inflationary pressures that have engulfed everyone else.

Still, stepping back, this isn't something you see every day, and, in many ways, it feels unprecedented. "[W]hile this statute [which provides for extraordinary contractual relief] has been around for decades, it has not been used very frequently in recent years to justify amendment without consideration." Ralph C. Nash, *Dateline,* 36 NCRNL (November 2022):

> [S]orting that out [when to to bail out contractors] will be an arduous task—particularly for companies down the supply chain. Not only will the company have to prove that is suffering a loss on its contracts but the amount necessary barely to keep it alive. It will be fascinating to watch how this plays out as the services process requests for relief from a variety of companies.

In the same piece, Professor Nash conceded that he would "be particularly interested in how companies down the supply chain are handled." That question seemed to be answered affirmatively, by Congress in the NDAA. Which, of course, begs the question: "how is a Contracting Officer going to amend a subcontract?" Ralph C. Nash, *Amendments Without Consideration: Subcontractors Are Covered*, 37 NCRNL ¶ 7 (also contrasting the statutory standard for giving such relief, "the cost…is greater than the price," with the FAR language and observing that the statute "is strikingly more lenient than the current standard for amendments without consideration.") See FAR 50.103-2(a)(1):

> When an actual or threatened loss under a defense contract, however caused, will impair the productive ability of a contractor whose continued performance on any defense contract or whose continued operation as a source of supply is found to be essential to the national defense, the contract may be amended without consideration, but only to the extent necessary to avoid such impairment to the contractor's productive ability.

We don't disagree that "there are too many loose ends and the standard is way out of line with traditional practice." And, at some level, we agree that "[g]iving out money to wealthy companies that have had a contract where the costs have exceeded the price would be a travesty." While some will conclude that "there's no harm in asking," we fear that more will conclude it "isn't worth the candle." Ultimately, we hope that DoD applies the resources to carry out Congressional intent and provide extraordinary relief to the contractors that desperately need it to ensure their survival. On this topic alone, 2023 promises to be an interesting year.

D.Are We Still Fighting About Contract Financing? We can't help but contrast DoD's rapidly evolving efforts to address inflationary pressures with its long-running saga (or tempest in a teapot) related to contract financing. *Industry Urges Engagement On DOD Contract Financing RFI*, 64 GC ¶ 231; *Industry Group Offers Comments On DOD Contract Finance RFI*, 64 GC ¶ 223. It's hard to describe this better than "a convoluted subject with a controversial history that the department's pricing chief has likened to a 'third rail.'" Tony Bertuca, *DOD Still Wrestling With 'Third rail' Contract Financing and Impact on Industry Cash Flow*, Inside Defense (August 8, 2022) (tracing the history back to "October 2018, when DOD was forced to rescind a policy cleared by [OMB] that would have lowered progress payment rates of 80% to 50%[,]" and reminding readers that "[t]he policy was crafted by former DOD pricing chief Shay Assad, who said it would have addressed what he believed was an 'undeserved windfall' defense contractors had been receiving for years."), https://insidedefense.com/share/215626. See also *DOD Needs To Assess Contract Financing Policies' Effect On Industry*, 61 GC ¶ 202, GAO-19-406, *Contract Financing: DOD Should Comprehensively Assess How Its Policies Affect the Defense Industry*, www.gao.gov/assets/710/700064.pdf , which nicely summarized the state of play (with emphasis added).

> DOD officials acknowledged that DOD has not comprehensively analyzed how its policies affect the defense industry since 1985. Industry and economic conditions, however, have since changed, including lower interest rates and the emergence of contractors who do not typically work with DOD. In August 2018, DOD proposed introducing performance-based elements into its process for setting progress payment rates. DOD officials stated that since the proposed rule focused on incentivizing contractors' performance, they ***did not assess how it would affect defense contractor profitability or whether other financing or profit policies changes would be needed***. DOD withdrew the proposed rule in October 2018. GAO's Standards for Internal Control in the Federal Government call for organizations to monitor the effectiveness of their policies on a recurring basis. In December 2018, DOD officials acknowledged the need to do so. Until DOD conducts a comprehensive assessment and ensures they are done on a recurring basis, [DoD] ***will not be in a position to understand whether current or future contract financing policies are achieving their intended objectives***.

The 2022 Request for Information (RFI) asks a number (OK, a lot) of rather open-ended questions, such as: "How does the Defense Sector compare to relevant commercial sectors when it comes to financial health?" and: "How important is cash flow and why?" 87 Fed. Reg. 36472 (June 17, 2022), https://www.govinfo.gov/content/pkg/FR-2022-06-17/pdf/2022-13047.pdf. Against that backdrop, let's not forget that, less than three years ago, DoD policy embraced *accelerating* progress payment rates amidst the COVID pandemic to avoid defense industry and supply chain disruptions. On that score, however, the RFI clarified that: "for the purpose of understanding financial health over time, the DoD Contract Finance Study is ***not*** covering impacts of the coronavirus disease 2019 (COVID–19) pandemic. Therefore, ***unless specifically asked***, responses should ***exclude*** the period after the [COVID pandemic] presidential declaration of a national emergency…." 87 Fed. Reg. 36472 (emphasis added).

Skepticism surrounding the effort runs high. "The proposed study is fatally flawed.... If the DOD proceeds with this study as planned, it will perpetuate a longstanding phenomenon—policymaking totally detached from actual facts. It's a sad way to run the largest buying operation on the planet." Ralph C. Nash, *Dateline,* 36 NCRNL (September 2022). Moreover:

> Why doesn't the DOD want to know how much profit its industry partners are making? Why doesn't Congress press for such data? Are we afraid that the results might show that some sectors, such as support service contractors or sellers of spare parts, are making very high profits? That is certainly a widespread impression, but it is based on selective and anecdotal information. Real data would

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> reveal whether such beliefs are an accurate representation of reality.

Among others, the Professional Services Council (PSC) cautions that "the current DoD Contract Finance Study needs to be broadened, deepened, and more interactive with industry partners in order to support that success." See, e.g., comments at www.regulations.gov/comment/DARS-2022-0012-0007.

E. Whither Competition? To the extent that the contract financing RFI asked "What is your view of the financial health of the Defense Industrial Base?," it's only a hop, skip, and jump to DoD's recent competition report, which generated significant interest, even if it is unlikely to lead to productive changes in policy and practice. USD(A&S), *State of Competition Within the Defense Industrial Base*, (Feb 2022) https://media.defense.gov/2022/Feb/15/2002939087/-1/-1/1/STATE-OF-COMPETITION-WITHIN-THE-DEFENSE-INDUSTRIAL-BASE.PDF; *DOD Recommends Ways To Increase Industry Competition*, 64 GC ¶ 51. The report derives from the mandate in Executive Order 14036, *Promoting Competition in the American Economy*, 86 Fed. Reg. 36987 (July 14, 2021); see also FY 2021 NDAA § 889(a)-(b). Having watched DoD drive consolidations and concentrations, beginning decades ago, ranging from nuclear submarines and aircraft carriers to space-related capacity to in-flight refueling and the Joint Strike Fighter to, most recently, the failed JEDI cloud computing debacle, it is fascinating to see DoD espouse that (emphasis added):

> [H]aving only a single source or a small number of sources for a defense need can pose mission risk and, particularly in cases where the existing dominant supplier or suppliers are influenced by an adversary nation, pose significant national security risks. For all these reasons, ***promoting competition to the maximum extent possible is a top priority for the Department***.

That's fine, but the phenomenon highlighted in the report, that, "[s]ince the 1990s, the defense sector has consolidated substantially, transitioning from 51 to 5 aerospace and defense prime contractors[,]" didn't happen in a vacuum. More broadly, broadening industrial capacity almost certainly requires increasing demand (and paying for greater quantities), offering more attractive returns on investment (rather than driving down profit rates with no regard for industry's ability to compete for investment in the financial marketplace), or reducing barriers to entry (including the daunting risks and burdens associated with defense acquisition oversight community). At the same time, we have long expressed frustration that these exercises focus on formalistic competition rather than meaningful competition, while simultaneously confusing cause and effect. See David J. Berteau, *The Problems With the Defense-Industrial Base Aren't About the Contractors*, Defense News (Feb 16, 2022), https://www.defensenews.com/opinion/commentary/2022/02/16/the-problems-with-the-defense-industrial-base-arent-about-the-contractors/, arguing, among other things, that the report:

> [f[ailed to articulate clearly the problems its recommendations are trying to fix…
>
> The real competition in national security is not within defense contracting; it is with competing global views of governance and economics. Focusing on the percentage of competitively awarded contract dollars ignores real opportunities. Instead, we need recommendations that lead to real competition, yielding better results for national security — faster and at a lower life-cycle cost.

See also, GAO-22-104154, *Defense Industrial Base: DOD Should Take Actions to Strengthen Its Risk Mitigation Approach*, (July 2022) (finding that "DOD does not yet have a consolidated and comprehensive strategy to guide its industrial base risk mitigation efforts." Moreover, DoD's "Industrial Base Policy office has struggled to provide the leadership and strategic vision needed to mitigate risks, some of which have been known for decades, such as in the shipbuilding and microelectronics sectors."), www.gao.gov/assets/gao-22-104154.pdf; *GAO Urges DOD To Address Industrial Base Risks*, 64 GC ¶ 216; *DOD Needs To Clarify Weapon System Guidance On Industrial Base Assessments*, 64 GC ¶ 177; GAO-22-105230, *Weapon Systems Annual Assessment: Challenges to Fielding Capabilities Faster Persist* (June 2022) (recommending "that DOD update its industrial base assessment instruction to define the circumstances that would constitute a known or projected problem or substantial risk that a necessary industrial capability may be lost."), www.gao.gov/assets/gao-22-105230.pdf.

F. Ratcheting Up Domestic Content. While we're discussing the health (and potential growth) of the domestic industrial base, plenty of attention surrounds the FAR Council dramatically changing the nature of the Buy American landscape (after decades of largely stable domestic content rules), effective October 25. See 87 Fed. Reg. 12780 (Mar. 7, 2022); *FAR Final Rule Raises Buy American Thresholds, Adds Fallback Threshold*, 64 GC ¶ 74. After an initial bump in domestic content, from 55 to 60 percent, we are a year away from a 2024 increase to 65 percent, followed by the even larger jump to 75 percent in 2029. Time will tell whether or how often "the fallback threshold" is deployed because agencies cannot find end-products or construction materials that meet the highest threshold at reasonable costs. Many expect that further rule-making or clarifications will follow with regard to the grace period, waivers, and commercial off the shelf (COTS) items, and end products and construction material deemed to be "critical" or made of "critical components." See also *DAU Unveils Buy American Decision Tool*, 64 GC ¶ 365(g), *DoD Decision Tool for Buy American* (intended to help government officials determine whether to add DFARS 252.225-7000 and 252.225-7001 to solicitations and contracts), www.dau.edu/tools/t/DoD-Decision-Tool-for-Buy-American.

More broadly, see *CRS Surveys Potential Impacts Of WTO GPA Withdrawal, Changes*, 64 GC ¶ 38, Congressional Research Service No. IF11651, *WTO Agreement on Government Procurement (GPA)* ("[G]lobal supply chains … support … U.S. government contracts, including networks of suppliers and manufacturing facilities in the territories of other GPA parties. Even when manufactured [domestically], many of the products that U.S. suppliers deliver to federal and state entities may have inputs from other GPA parties.… [W]ithdrawal from the GPA … could potentially require U.S. businesses to restructure their supply chains … to comply with domestic sourcing laws. Moreover, as countries compete to set global standards (e.g., 5G technology), U.S. firms unable to bid for government contracts in GPA parties' markets may find themselves at a disadvantage, ceding opportunities to competitors from other countries.") https://crsreports.congress.gov/product/pdf/IF/IF11651; Cara Wulf, *Feature Comment: Les Misérables—Contractors And Agencies Struggle To Navigate Build America, Buy America Requirements One Year Later*, 64 GC ¶ 355 (discussing, among other things, domestic preferences related to infrastructure and construction materials and suggesting that "contractors remain somewhat misérable as they attempt to prepare for the huge influx of infrastructure dollars to come as a result of the IIJA, and manage ongoing projects that are now suddenly subject to new, onerous domestic preference requirements that have yet to be fully understood by agencies.").

II. PROCUREMENT (AND GRANT) SPENDING & SPEND DATA

Not Quite What We Observed: A Robust Spending Picture. For three years running, Federal procurement spending has comfortably exceeded $600 billion. Last year, however, we tentatively reported a significantly larger drop (for FY2021) than expected. In retrospect, the dip, from the all-time FY2020 high, proved somewhere between premature and inaccurate. *Indeed, this year, we're updating the FY2021 procurement spend figure by more than ten percent, from $578.6 to more than $637 billion.* Against that backdrop, we won't be surprised if – at this point next year – the data suggests that FY2022 approached or exceeded the all-time high for procurement spending. Meanwhile, of course, procurement spending continues to be dwarfed by the continued growth, nay, expansion of grant spending. (In a relative sense, however, the disparity is not as great as in FY2021, where grant spending literally doubled procurement spending. Conversely, nothing suggests we're headed back to some sort of equilibrium, which was relatively common until only a decade ago.)

Federal Procurement and Grant Spending FY2001-2022* *(In Billions of Dollars)*			
Fiscal Year	***Procurement Spending***	***Grant Spending***	***Procurement & Grant Spending*** (Combined)
2022	$644.3	$1,133.1	$1,777.5
2021	$637.0	$1,369.9	$2007.0
2020	$670.4	$971.9	$1,642.3
2019	$590.4	**$765.5**	**$1,355.9**
2018	$555.8	$757.0	$1,312.8
2017	$510.5	$719.8	$1,230.3
2016	$475.1	*$675.9*	$1,151.0
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
2007	*$469.3*	*$430.2*	*$899.5*
2006	*$430.5*	*$490.0*	*$920.5*
2005	*$391.2*	*$441.7*	*$832.9*
2004	*$346.1*	$450.1	$796.2
2003	$318.0	$493.7	$811.7
2002	$264.1	$406.3	$670.4
2001	$223.0	$330.8	$553.8

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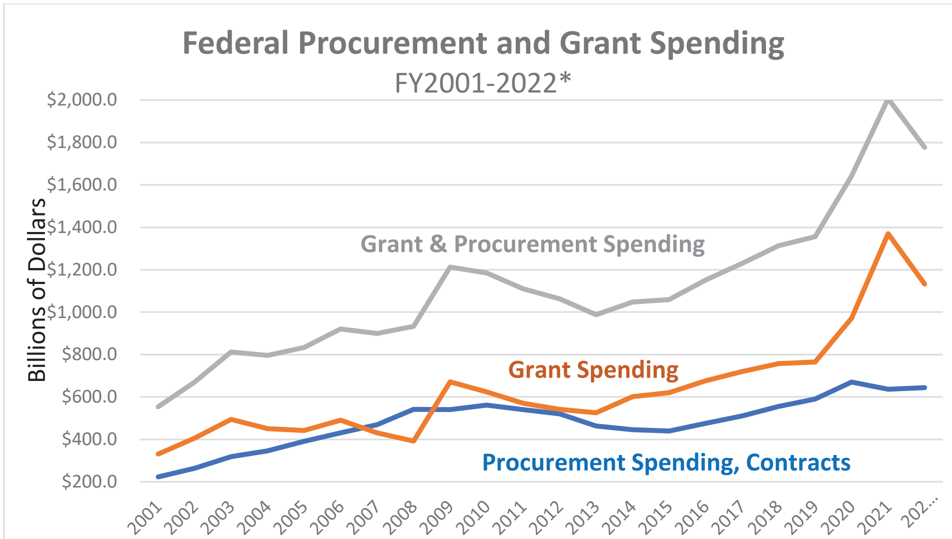
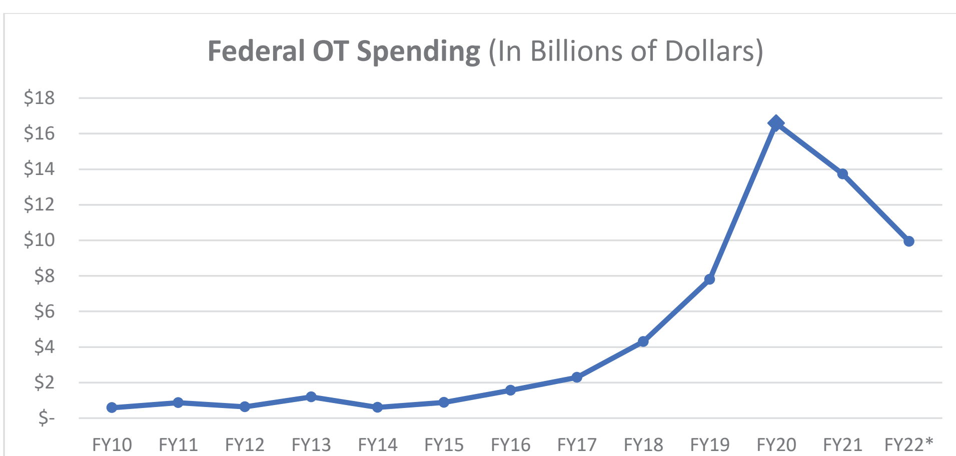
* FY 2022 figures reflect an estimate based upon preliminary reporting as of December 19, 2022. The amounts reported above, particularly for FY's 2019-2021, were adjusted from data previously published in *USASpending*.gov. Updated data is courtesy of the market intelligence gurus, Amber Hart and Lisa Shea Mundt, at ***The Pulse™***, https://thepulsegovcon.com.

Here's the same information, presented in graph form:



B. Other Transactions Losing Momentum? In previous years' materials, we highlighted that, consistent with increased popularity, attention, and emphasis, reliance on other transactions (OTs) appeared to be increasing rather dramatically. True, although FY20 represented a peak, with nearly $16.6 billion in OTs, that still was not statistically significant in the landscape of total federal discretionary spending. (Yes, it suggested growth, but was not that much *in total*.) We did not expect, however, that after OT spending dropped, slightly, from FY20 to $13.7 billion in FY21 (which, at the time, still represented a three-year average of OT spending in the two-to-three percent range), it would drop back under $10 billion in FY22 (keeping in mind that these are preliminary numbers). While a one-year drop is a blip, last year suggests a reversal of the prior trend, but, again, we're curious to see what future years bring.



The tension between the underlying flexibility that makes OTs attractive and the oversight community's anxiety with regard to that flexibility continues apace. Given how little money is at stake, or, in other words, what a small percentage of contractual activity OTs account for, something seems amiss. See, e.g., *DOD Needs Additional Policies To Oversee Other Transactions, IG Suggests*, 64 GC ¶ 278; DODIG-2022-127, *Audit of DoD Other Transactions and the Use of Nontraditional Contractors and Resource Sharing* (Sept. 8, 2022) (expressing concerns with regard to nontraditional defense contractor (NDC) status), https://media.defense.gov/2022/Sep/12/2003074178/-1/-1/1/DODIG-2022-127.PDF; *DOD Needs To Improve Tracking Of All OT Types*, 64 GC ¶ 156 (recommending that DoD develop policies on tracking OTs, work with GSA on data system changes necessary to account for all OT types, and determine whether additional guidance is needed on use of OT authority and use of § 2373 to award experimental purpose OTs), DODIG-2022-094, *Management Advisory: Tracking of Follow-On Production Other Transaction Agreements and Tracking and Awarding of Experimental Purpose Other Transactions* (May 11, 2022), https://media.defense.gov/2022/May/13/2002996685/-1/-1/1/DODIG-2022-094.PDF; *DOD IG Suggests Improving DOTC Other Transaction Award,* 64 GC ¶ 86, DODIG-2022-073, *Audit of DoD Hotline Allegations Concerning the DoD Ordnance Technology Consortium Award Process*, https://media.defense.gov/2022/Mar/23/2002961556/-1/-1/1/DODIG-2022-073.PDF; Richard L. Dunn, *Feature Comment, New Life And A New Number For Research Other Transactions*, 64 GC ¶ 63, ("For those prepared to use them, research OTs open a new world of possibilities."). See also NDAA Section 842 (authority for other-than-competitive follow-on production contracts, etc.); 843 (clarifying the definition of a prototype project for a limited pilot program); Richard L. Dunn, *Feature Comment, Space Development Agency: Why Was Using An OT The Second Choice?*, 63 GC ¶ 366 (bemoaning "a profound lack of OT education and understanding of just how different OTs can and should be from the limitations and concepts of FAR contracting.").

C. A Mixed, But Largely Positive, Message for Small Businesses. While it does not appear that small businesses gained a significant *share* of the federal procurement pie, on a percentage basis, preliminary data does suggest that total contract awards to small businesses, at nearly $145 billion, were close to the all-time high (of more than $146 billion in FY20). Granted, the Small Business Administration (SBA) touted a somewhat higher number for FY21. Release Number 22-61, *Biden-Harris Administration Awards Record-Breaking $154.2 Billion in Contracting to Small Businesses* (July 26, 2022) (SBA acknowledges that "in accordance with federal law, SBA provided double credit, for Scorecard purposes only, for [certain] prime contract awards" and included some Department of Energy first-tier subcontracts), https://www.sba.gov/article/2022/jul/26/biden-harris-administration-awards-record-breaking-1542-billion-contracting-small-businesses; *Government Again Exceeds Small Business Contract Goal In FY 2021*, 64 GC ¶ 228 (Eleven agencies received scorecard grades of A+, including SBA, EPA, GSA, NSF, Commerce, Homeland Security, Interior, Labor, and State. Health and Human Services and Treasury received B's; Housing and Urban Development received a C. DoD received an A, met its SDB, SDVOSB, and subcontracting goals, but missed its WOSB and HUBZone goals.) In any event, history suggests these numbers will gravitate upwards with time, so we would not be surprised in FY 2022 marks a high-water point.

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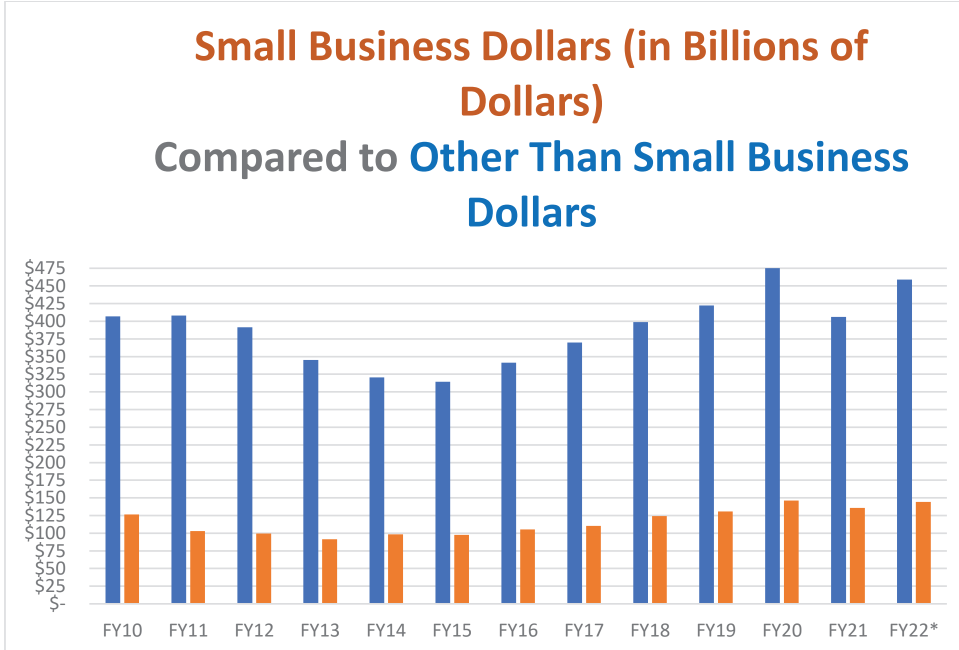

D. Some Observations on Defense Spending. Last year, we agreed with the narrative that, following the withdrawal from Afghanistan, and with the nation's focus turning to domestic infrastructure, we might have seen the peak of defense procurement spending. (You may recall that the FY21 defense procurement figure was the lowest since 2017, and nearly 20 percent below the FY20 peak.) While there are some signs of slowing, nothing currently suggests such a dramatic downturn. In other words, even the preliminary figures for FY22 exceed the FY18 figure and appear likely to match, if not exceed, FY19's defense procurement spend of nearly $384 billion (which, again, was only surpassed by FY20).

DoD's FY23 budget proposal reflected 4.4 percent inflation projections and incorporated little spending in direct response to the Russian invasion of Ukraine or the rising threats from China. In part because of that, final authorization and appropriation levels added roughly $45 billion above the President's request. The passage of the FY23 Continuing Appropriations Act, coming as it did late in December, has delayed the likely submission to Congress of the President's FY24 budget, but it already promises to be a debate magnet. House Republicans have stated that the price of a debt ceiling extension will include spending reductions and that DoD is not exempt from consideration. We find ourselves unable, at this point, to predict the starting point, let alone the end point, on FY24 defense spending levels.

1. Sharing the Wealth, or Geographic Distribution. We're still not sure what to make of it, but we remain intrigued by DoD's effort to report the geographic distribution of its largess. For FY2021, DoD reported that its "contract obligations and payroll spending" fell to a mere $1,684 per U.S. resident, down from ***$1,803 in FY 2020.*** See *Defense Spending By State, Fiscal Year 2021*, https://oldcc.gov/dsbs-fy2021; *DOD Surveys FY 2020 Top Contractors And States*, 64 GC ¶ 327. One fun feature of the (lengthy) report is the colorful heat mapping of spending centers. Other interesting data included some surprising fluctuations between States:

Defense Spending (By State) FY2021				
Rank	FY20 Rank	State	FY20 +/-	**Billions**
1	2	Virginia	$1.6	$62.7
2	3	California	($3.6)	$57.4
3	1	Texas	($35.7)	$47.3
4	N/A	New York	-	$30.9
5	5	Florida	$1	$30.1
6	4	Maryland	($4)	$26.3
7	8	Massachusetts	$2.7	$21.3
8	6	Connecticut	($4.3)	$19.3
9	N/A	Washington	-	$19.1
10	9	Pennsylvania	($1.3)	$16.5

It's no surprise but, for better or worse, DoD spreads its spend rather broadly. Again, this year, Virginia was the only state in which defense spending accounted for more than ten percent of GDP (at 10.2 percent, down from 11.3 percent in FY20). Not surprisingly, the figures for Defense spending across States are similar (but lower, and in some surprising ways, different) with regard to *contracting dollars*.

Defense Contracting (By State) FY2021			
Rank	**FY20 Rank**	**State**	**Billions**
1	2	Virginia	$42.6
2	3	California	$40.2
3	1	Texas	$35.1
4	-	New York	$27.9
5	6	Florida	$21.7
6	8	Massachusetts	$20.1
7	4	Connecticut	$18.4
8	5	Maryland	$17.9
9	9	Pennsylvania	13.4
10	7	Arizona	$17.9

As for the **leading contractors**, there were few surprises, with the top ten including: Lockheed Martin, Boeing (up from 3 from the prior year), Raytheon (up from 4), General Dynamics, Northrop Grumman, Pfizer (not in the top 10 the prior year), L3 Harris Technologies, Humana, Huntington Ingalls, and Moderna (not in the top 10 the prior year).

We're intrigued that this report suggests that, across DoD, **supplies and equipment** accounted for 53 percent of the contract dollars, with services accounting only for 36 percent. That does not correlate with what we see (or have seen) in other databases, such as *USASpending.gov*, for more than a decade.

2. The Bigger Picture: Procurement Supports The Mission. Although, to some extent, this drifts outside of the procurement portfolio or, in this context, defense acquisition, it's interesting to see how many of the issues we address here contribute to the Defense Department's primary challenges. See e.g., *Fiscal Year 2023 Top DOD Management Challenges*, https://media.defense.gov/2022/Nov/16/2003115791/-1/-1/1/MANAGEMENT%20CHALLENGES%20FY2023.PDF; *IG Releases Top FY 2023 DOD Manage-*

ment Challenges, 64 No. GC ¶ 363. The leading challenges (with the caveat that "The numerical designators for each challenge do not represent order of significance or severity" plus some *key areas of focus*) are:

Building Enduring Advantages for **Strategic Competition** *(continuing to build partnerships, balancing ongoing operations with sustainment and modernization, developing and fielding new capabilities at a faster rate);*

Strengthening Cyberspace Operations and Securing Systems, Networks, and Data *(strengthening cyber capabilities, improving cyber hygiene, and modernizing systems and software*);

Maintaining Superiority Through a **Resilient Defense Industrial Base** (*effectively using existing acquisition flexibilities, mitigating the effects of providing stockpiled weapons and supplies to Ukraine, and expanding the domestic and partner capacity for critical materials, such as microchips and minerals);*

Improving **Financial Management and Budgeting** *(lack of swift and aggressive changes to accounting and financial management processes, inability to improve internal controls and implement corrective actions in a timely manner, and continued use of legacy systems that do not comply with Federal requirements);*

Adapting to **Climate Change**, Accelerating Resilience, and Protecting the Environment *(expanding climate literacy and training, integrating climate effects into operations, and addressing installations' maintenance and improvement backlog);*

This is as good a place as any, along this tortured path, to mention that the public comment period for the proposed FAR rule on **disclosure of GHG emissions** has been extended until February 13, 2023. See *Notice of Proposed Rule: Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk*, 87 Fed. Reg. 68312 (Nov. 14, 2022); which derives from the May 2021 Executive Order 14030. Among other things, the rule would require (significant or major) contractors to complete and disclose a Greenhouse Gas (GHG) inventory and, going forward, complete annual climate disclosures. Moreover, ***proposed changes to FAR Part 9 would make this a responsibility prerequisite***. Also, keep in mind that we have yet to see the proposed rule from FAR Cases 2021-016, Minimizing the Risk of Climate Change in Federal Acquisitions and 2022-006, Sustainable Procurement (which may (or may not) prove to be more comprehensive). See also *FAR Proposed Rule Would Require Disclosure Of Greenhouse Gas Emissions*, 64 GC ¶ 342; *Industry Comments On Climate Change Risks In Procurement*, 64 GC ¶ 27; Nathaniel Green & Christopher Yukins, *The Inflation Reduction Act: A New Role For Green Procurement?*, 64 GC ¶ 260 (discussing the 2022 Inflation Reduction Act of 2022 (IRA), H.R. 5376, now P.L. 117-169, and suggesting that "a wide range of economic incentives, including procurement preferences, are now available for unprecedented growth in these industries, with federal procurement potentially poised to make an important contribution to the development of domestic supply chains.")

There's a lot of related activity outside of the formal regulatory process, including the creation of GSA's Acquisition Policy Federal Advisory Committee (the GAP FAC), with an "initial focus … on driving regulatory, policy, and process changes required to embed climate and sustainability considerations in Federal acquisition." See https://www.gsa.gov/policy-regulations/policy/

acquisition-policy/gsa-acquisition-policy-federal-advisory-committee.

And, since we're focusing on evolving issues and trends, it's difficult to ignore the employment and career development aspect of climate change adaptation and mitigation. Erica Sweeney, *The Green Job Market is Growing*, Business Insider (Feb 24, 2022) ("The demand for green jobs is being driven by governments and companies making commitments to reduce carbon emissions or achieve other sustainability goals.... [And o]ther sectors not traditionally thought of as green, like the financial or tech industries, are increasingly seeking workers with green skills."), https://www.businessinsider.com/sustainability-careers-green-job-market-skills-required-2022-2.

Protecting the **Health and Wellness** of Service Members and Their Families *(adverse impact of the pandemic on health care providers and beneficiaries, the stigma associated with receiving care for conditions such as mental illness, and inadequate resources for women's health needs including during deployment);*

Recruiting and Retaining a **Diverse Workforce** *(competition for talent, decreasing interest in military service, smaller pool of qualified candidates, inadequate talent management, and lack of complete and accurate data to measure diversity and inclusion); and*

Accelerating the Transformation to a **Data-Centric Organization** *(ability to overcome cultural barriers, effectively implement its data strategy, and adopt innovation and best practices).*

3. Finding Middle Ground on Undefinitized Contractual Actions (UCA)? There's been a healthy volume of pushback against DoD's proposed UCA rule. (OK, OK, we enjoy discussing this topic using the common Air Force pronunciation, OOO-ka.) *Industry Groups Urge Withdrawal Of DFARS Proposed Rule On Undefinitized Contracts*, 65 GC ¶ 4; 87 Fed. Reg. 65507 (Oct. 28, 2022) (describing PSC, AIA, and Chamber of Commerce opposition); *DFARS Proposed Rule Refines Management of Undefinitized Contract Action*s, 64 ¶ 330(e) (based upon DoD IG recommendations). As the polarized debate plays out, look back to FAR 16.603-2 (emphasis added): "A letter contract may be used when (1) the Government's interests demand that the contractor be given a binding commitment so that work can start immediately and (2) negotiating a definitive contract is not possible in sufficient time to meet the requirement. However, a letter contract should be as complete and definite as feasible *under the circumstances*." See also DFARS 217.7403. Sometimes it may be more important to recognize the tradeoffs tolerated in a crisis, rather than bemoaning the spilled milk after the storm has passed.

III. IT'S STILL ALL ABOUT PEOPLE: THE ACQUISITION WORKFORCE ... AND BEYOND

Year in and year out, we fret over the staffing, development, promotion, retention, funding, and appreciation of the acquisition workforce. Last year, we noted that changes were afoot with regard to the longstanding Defense Acquisition Workforce Improvement Act (DAWIA) regime. See, *Empowering the Workforce: Back to Basics*, https://www.dau.edu/back-to-basics. Those efforts are now accelerating … and spreading.

A. Back to Basics for the DoD Acquisition Workforce? We were fascinated by the (data in and the) findings of the RAND report on DoD's acquisition workforce. See *RAND Examines DOD's Civilian Acquisition Work-*

force Growth, Changes, 64 No. GC ¶ 362; *Department of Defense Acquisition Workforce Analyses—Update Through Fiscal Year 2021,* https://www.rand.org/pubs/research_reports/RRA758-2.html.

Half-Again Growth? Between FY 2006 and FY 2021, the DoD acquisition workforce grew from 128,187 to 185,864. Civilian professionals accounted for nearly all of the more than 50,000 additions; there was minimal fluctuation (only 14,000-16,000) among uniform or military personnel.

Fits and Starts? It is hard not to be frustrated by the inconsistencies reported in the talent pipeline, with more than 15,000 individuals added in five years (2009, 2010, 2018, 2019, and 2020), fewer than 10,000 individuals added in another five (2006, 2007, 2012, 2013, 2014), and between 10,000 and 15,000 added in five years (2008, 2011, 2015, 2016, and 2017). Conversely, we're encouraged by the more recent trend.

A Highly Educated Group: As of FY 2021, fully 85 percent of the civilian acquisition workforce had at least a bachelor's degree, and (to us, a stunning) 39 percent held a master's degree or higher. Both figures were significantly higher than the overall DoD civilian workforce.

Stable, But Skewing Younger? RAND identified strong retention throughout the civilian acquisition workforce, with a separation rate (in the 5-6 percent range) much lower than otherwise experienced by DoD civilians. We've discussed pending retirements in this chapter for years, so we're not surprised to see, in 2021, a larger cadre (42 percent of the workforce, up from 28 percent in 2008) more than fifteen (15) years away from retirement. Consistent with that, six (6) percent (from just under, to just over a third) of the workforce was under 40 in 2021. We were somewhat surprised by the diversity findings: 69 percent of the workforce was male, and 73 percent was white. On that score, little has changed since FY 2011, and that the gender imbalance appears likely to persist.

Contrast these Findings with GAO's Concerns Regarding the Department of Veterans Affairs Acquisition Workforce. GAO found that VA lacks "accurate counts of contracting officers, contracting officer representatives, and program/project managers; where they are located; and certifications. VA's insight into its workforce is hindered by inaccurate, outdated data...." GAO also highlighted the lack of clarity surrounding the role of Heads of Contracting Activities (HCA's). "One HCA said they almost never interacted with acquisition workforce staff in their organization." And, even conceding the potential flaws in the survey, it's concerning that "less than 50 percent of acquisition workforce employees were satisfied with the clarity of the HCAs' communication." *VA Lacks Complete Data On Acquisition Workforce*, 64 GC ¶ 293, GAO-22-105031, *VA Acquisition Management: Actions Needed to Better Manage the Acquisition Workforce*, www.gao.gov/assets/gao-22-105031.pdf.

B. But What Does *Back to Basics* (BtB) Mean? RAND described the BtB initiative as consolidating (from fourteen (14) to six (6)) acquisition career fields and developing cross-cutting knowledge areas and associated certification structures. The report suggested this could "hold the potential for creating a more targeted set of job requirements and more-nimble learning opportunities to support the workforce in meeting those requirements." At the same time, RAND bemoaned that BtB reduced the learning hours required for certification and increased the amount of time that workers have to achieve certification requirements (or, in other words, gave DoD flexibility on minimum standards that no doubt will be fully exploited). For more information, see Defense Acquisition University (DAU)'s *Empowering the Workforce: Back to Basics* (with emphasis on significantly streamlining the certification framework and re-focusing training resources; replacing "career fields" with "functional areas," compressing a three-level certification model into a one- or two-tier framework, and requiring less front-loaded training while adopting a "life-long learning paradigm"), https://www.dau.edu/back-to-basics.

C. Greater DoD (and DAU) and Civilian (and FAI) Alignment in Professional Development. We were heartened to see the recent OFPP announcement aligning the civilian acquisition workforce certification regime with the (evolving) DoD regime. As of 2023, "OFPP is transitioning the legacy FAC-C to the FAC-C (Professional), which will promote parity and mobility with DoD." Leslie A. Field, Deputy Administrator for Federal Procurement Policy, OFPP Memorandum, *Federal Acquisition Certification in Contracting (FAC-C) Modernization* (January 19, 2023), https://federalnewsnetwork.com/wp-content/uploads/2023/01/FAC-C-Modernization-Memorandum-19-Jan-2023.pdf. Among other things: "The FAC-C (Professional) is based on the contracting common competencies in the new DoD Contracting Competency Model … [which, in turn] is based on the National Contract Management Association's (NCMA) Contract Management Standard™ Publication, an American National Standards Institute (ANSI) accredited publication (reference ANSI/NCMA ASD 1-2019), which satisfies section 861 of the Fiscal Year 2020 National Defense Authorization Act. A benefit of this new competency model is that it represents both the buyer and seller perspectives, which will foster increased mobility across DoD, civilian agencies, and industry." This seems like great news, long overdue.

D. New Faces, But (Still) Not Enough of Them. Having reached the midpoint of this administration, it's hard not to be frustrated with the vacancies in significant leadership roles in the acquisition community.

Still Waiting at OFPP, OMB. After waiting until August of 2021 to nominate Biniam Gebre to serve as the Administrator for Federal Procurement Policy (OFPP), within the Office of Management and Budget (OMB), nearly another year passed until June, when that stalled appointment was withdrawn (after "the nominee chose to forgo the confirmation process"). Since then, crickets. We remain flummoxed by the administration's apparent lack of attention here, not can we reconcile the lack of progress here, given the alleged importance of using the federal procurement process as a catalyst for administration initiatives and the corresponding pace of proposed and anticipated regulatory reform discussed above. We recently saw more progress with the December confirmation of Richard Revesz as the Administrator for Office of Information and Regulatory Affairs (OIRA). Revesz is a widely recognized academic and "voice[] in the fields of environmental and regulatory law and policy." *President Biden Announces Key Nominees* (Sept. 2, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/02/president-biden-announces-key-nominees-30/. Also, Shalanda Young was confirmed as the Director of the Office of Management and Budget (OMB), and Nani A. Coloretti was confirmed to serve as Deputy Director.

Lonely at the Top at DoD? In April, the Senate confirmed William LaPlante to be Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), after his November 2021 nomination. 63 GC ¶ 361(3). Meanwhile, career officials (or, in one instance, another confirmed leader) are performing the duties of other A&S positions, including Deputy Under Secretary of Defense for Acquisition & Sustainment, (PTDO DUSD(A&S)); Assistant Secretary of Defense for Acquisition (ASD(A)); Principal Deputy Assistant Secretary of Defense for Acquisition (PDASD(A)); Assistant Secretary of Defense for Industrial Base Policy, and the Assistant Secretary of the Navy for Research, Development, and Acquisition (ASN(RDA)). Three of these positions had nominees clear the Senate Armed Services Committee but not result in confirmation. All three nominees were immediately renominated on January 3, 2023, with the seating of the 118th Congress. Perhaps this indicates greater support from the White House for filling these vital positions; perhaps the Senate will promptly confirm them.

What Does the Future Hold? Given the explosive growth of sports betting (valued, globally, at $76.75 billion in 2021 and projected to grow at a compound annual growth rate (CAGR) of more than ten percent through 2030), we are inclined to suggest a potential wager on who might fill the OFPP vacancy and when. Alas, in a horse race – or for that matter – most sporting events, don't you at least need a competitor? We hope to be singing a different song at this point next year.