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Emerging Policy and Practice Issues (2011)

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EMERGING POLICY AND PRACTICE ISSUES

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I. THIS YEAR, IT'S ALL ABOUT THE MONEY

A. Did We Mention There's Not Enough Money? *The* emerging issue in government contracting, looking ahead, is the money (or lack of it). As the fiscal belt tightens, the procurement landscape—what the government buys, from whom, and how—will necessarily change. The Obama administration has made clear that no stone will remain unturned in the effort to achieve savings. Everything, apparently, is on the table…. except, of course, for the muffins! *DOJ Conference Muffins Come Under Heat From IG,* 53 GC ¶ 311 (The DOJ inspector general reported that DOJ "did not always minimize costs for event planning and food and beverages at conferences[.]" Moreover, "conferences featured costly meals, refreshments [e.g., $16 for muffins and $8 for cups of coffee], and themed breaks … indicative of wasteful or extravagant spending[.]") *Developments In Brief: Those Muffins Did Not Cost $16, After All,* 53 GC ¶ 369(b) (DOJ IG issued a revised report superseding its earlier report and "determined that [its] initial conclusions concerning the itemized costs of refreshments at the … conference were incorrect and that the Department did not pay $16 per muffin.")

Given the budget uncertainties, the potential for short-term disruption is enormous. Elizabeth A. Ferrell, *Feature Comment: Implications Of Funding Shortfalls And Budget Cuts For Government Contractors,* 53 GC ¶ 167 (discussing continuing resolutions, de-scoping, stretch-outs, production breaks, terminations, (the enormous risks associated with) self-funding, and, of course, Nunn-McCurdy Implications). Ferrell paints a stark picture and offers frank advice:

> The fiscal crisis will drive agencies to take drastic action to reduce procurement spending. Contractors need to prepare for the inevitable. … [C]ontractors should assess programmatic vulnerabilities caused by changes in threats, roles and missions; changes in technology; changes in priorities; and cost and schedule growth…. [They] should understand the Government's most current assessment of a program's technology, design and production maturity, and other programmatic issues. … [They] should reexamine their portfolios, determine what makes long-term strategic sense, and develop a procurement advocacy plan…. [They] should assess their contractual vulnerabilities, including performance status…. [C]ontractors should prepare for a possible termination…. [M]ost importantly, contractors should regularly track contract funding status and identify potential limitation of costs/funds issues, since contractors that incur costs in excess of funding are at risk that those costs will never be reimbursed by the Government.

B. Is the Government Serious About Saving Money? One of the fascinating things about the government-contractor relationship is that neither the customer nor the vendor control all of the significant cost drivers. In a terrific example of this, the Postal Service Inspector General (IG) published a report stating the (blatantly) obvious proposition that, in order to achieve savings: "[t]he Postal Service should seek an exemption from the Service Contract Act [SCA] to negotiate contract rates closer to market rates[.]" *SCA Exemption, Outsourcing Could Cut Postal Service Costs,* 53 GC ¶ 375.

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Among other things, the IG "identified six contract labor categories with higher SCA rates than market rates. … SCA rates for snow removal and landscaping were 34 percent higher than market rates, cleaning/janitorial rates were 33 percent higher, and unarmed guard rates were 31 percent higher." But equally fascinating was the fact that:

> [I]n-house Postal Service labor rates significantly exceeded SCA rates. The Postal Service's cleaning/janitorial rate of $44.51 per hour was 283 percent higher than the SCA rate of $15.74, and the Postal Service rate for postal-vehicle service drivers was $47.89, or 180 percent higher than the $26.63 SCA rate.

Of course, these types of savings could make a real difference. "The Postal Service's financial outlook is poor and labor costs account for 80 percent of its costs[.]" In addition, the IG acknowledged some of the related barriers to outsourcing (both at the Postal Service and across the Government), including "current labor union agreements, concerns that new unions will be formed, workforce retention issues, fluctuations in market or economic conditions, and the potential for congressional constituency concerns." But don't hold your breath on major changes in this area.

A model based on strong Congressional leadership and bipartisan cooperation could facilitate the government's efforts to manage its fiscal, as well as any contracting, woes. See, e.g., *Senators Call On Super Committee To Lower Government Contracting Costs,* 53 GC ¶ 350 (Senators "support the administration's efforts to reduce wasteful spending in Government contracting, including the use of strategic sourcing to leverage the Government's buying power and the termination of failing [IT] contracts. They also endorse the call for agencies to stop using cost-reimbursement and non-competitive contracts. *Although it is difficult to determine cost savings from these initiatives*, as well as the push to ensure inherently governmental jobs are not filled by contractors, the senators said that the impact on the budget will be positive." (Emphasis added.) These "recommendations also include capping reimbursement of federal contractor executives.") Unfortunately, no such model exists. Bingham C. Jamison, *The Super Committee: Failure at Any Cost,* Time (December 20, 2011), available at http://battleland.blogs.time.com/2011/12/20/the-super-committee-failure-at-any-cost/ ("It comes as no surprise that the bicameral and bipartisan super committee — that 12-person debt panel charged with finding $1.2 trillion in deficit savings over the next 10 years — failed in its mandate. … One look at the members of the super committee sheds light on some troubling trends in Congress writ large, and perhaps partly explains its failure.").

The new facts of life are that the government will spend less money for the foreseeable future—we don't yet know how much. In addition, the government's spending priorities will change. We don't yet know which programs will be cancelled, or which resources will be reallocated, but change is in the air. Yes, there have been—and there will continue to be—significant changes in leadership. New and different issues will continue to challenge acquisition professionals. But the big story looking ahead in 2012 and beyond anticipates seismic changes, and potential course corrections, after a decade-long growth trend finally reverses itself.

II. OPEN LEADERSHIP ISSUES

With the close of 2011, we applaud the service of Daniel Gordon as the Administrator of the Office of Federal Procurement Policy (OFPP). OFPP churned out a fair amount of work product before Administrator Gordon's exit. As the White House explained:

> On Dan's watch, spending on federal contracting decreased for the first time in more than a dozen years…. Dan has worked with the [GSA], buying agencies, and industry, to reform the way the government buys commodities … so that we are—finally—leveraging the federal government's purchasing power as the world's largest customer…. Dan has also helped unleash the talent and ingenuity of the federal workforce, so that innovative buying methods, such as electronic reverse auctions, are encouraged and adopted. … Dan has demonstrated a commitment to listening to the concerns of all stakeholders, launching a 'Myth-Busters' campaign to promote more open communication between the government and industry …, and developing a pathbreaking policy letter that clarifies the line between work that can be contracted out and work that is inherently governmental. … Dan has helped … strengthen… the … acquisition workforce…, the Administration's commitment to tightening oversight of contractors, …, [and] the contract management role of [CORs]….

Jack Lew, *News from OFPP*, available at http://www.whitehouse.gov/blog/2011/11/02/news-ofpp; *Gordon to Leave OFPP,* 53 GC ¶ 369(d). As we approach 2012, we are curious to see what the administration has in store—not only in terms of leadership, but in terms of policy in an election year. As of December, the media had reported that Joseph Jordan, then-serving as the SBA's associate administrator of government contracting and business development, would assume a senior advisory role in OMB. The media (promptly and consistently) speculated that the administration could nominate Jordon to replace Dan Gordon as the OFPP administrator.

III. TRENDS: FINALLY, THE END OF THE POST-MILLENIUM PROCUREMENT SPENDING BINGE

A. A New Economic Reality? This chapter's coverage of the federal procurement spending trend has steadily increased. This year is no different, but we also look further back to put the trend in context (and attempt to predict—or guess what lies ahead in—the future). It's easy to forget that, while federal procurement spending was always significant, it wasn't always *this* significant. Just consider: In Fiscal Year 2001, federal procurement spending rose to just over $223 billion. The following years, in 2002 and 2003, we witnessed 18 and 20 percent spending increases. Entering 2012, we just completed the *fourth consecutive fiscal year in which federal procurement spending exceeded $535 billion*.

It's no secret how we got here (but, again, we're here). Using adjusted figures (yes, between the Federal Procurement Data System (FPDS) and USASpending.gov, history is consistently being re-written), it appears that the annual increases in federal procurement—from 2001 through 2008—were never less than three times the rate of inflation. The experts correctly predicted that the growth rate eventually would taper; in 2009, the rate slowed and, apparently, growth finally stalled. Yet, in retrospect, the dire warnings that the current spending binge was a blip—and that procurement spending would promptly retract—were unfounded.

Now there seems to be greater consensus and empirical evidence that the procurement spending growth cycle finally has run its course. But the news is not all bad for contractors in that—at least for now—the plateau represents the high-end of a robust and sustained growth curve.

Federal Procurement Spending 2001-2011*			
Fiscal Year	Procurement Spending (in Billions of Dollars)	Percentage Increase or (Decrease) From Previous Year	*Percentage Increase or (Decrease) in Consumer Price Index (CPI)*
2011	***$535.1****	***(~1)***	*3.4**
2010	**$537.7** ($534.5)†	***(~1)***	*0.1*
2009	**$541.3** ($540.4)	***(~0)***	*(0.4)*
2008	**$541.8** ($541.3)	13.9	3.8
2007	$475.3 ($475.0)	10.5	2.8
2006	$432.0 ($429.8)	9.8	3.2
2005	$391.2	13.1	3.4
2004	$346.4 ($345.8)	8.8	2.7
2003	$318.3 ($317.7)	20.6	2.3
2002	$263.4	18.0	1.6
2001	$223.1		
**FY 2011 figures reflect preliminary reporting.*			
† Dollar figures in parenthesis reflect last year's reported numbers. Other parentheticals reflect negative numbers.			

See *www.USASpending.gov*. Annual increases in the Consumer Price Index for All Urban Consumers (CPI-U) were extracted from the annual Detailed Report Tables, U.S. Department of Labor, Bureau of Labor Statistics, *http://www.bls.gov/cpi/cpid1111.pdf*.

B. Big Business, Major Players. Looking behind the data, the concentration of spending amongst the largest contracting agencies and government contractors remains significant. For example, for fiscal year 2011:

- The Defense Department accounted for 70 percent of the total procurement dollars awarded. (That's quite high, up again, ever-so-slightly from the (seemingly high) 69 percent last year.)
- The seven largest procuring agencies (DoD, Energy, HHS, GSA, NASA, VA, and DHS) accounted for just under 90 percent of the total dollars awarded.
- The 100 largest federal contractors received more than $284 billion in contracts (down from $294 billion in FY 2010) or more than half (almost 54 percent) of the total dollars awarded.
    - Conversely, the 571,437 contract actions (an increase of approximately ten percent over FY 2010) these 100 firms, as a

group, received accounted for slightly more than ten percent of the total actions.

- The top five federal contractors (Lockheed Martin, Boeing, Northrop Grumman, General Dynamics, and Raytheon—the same top five as FY 2010) received more than $102 billion (down approximately ten percent as compared to FY 2010) in contracts or more than nineteen percent (down from over twenty-one percent in FY 2010) of the total dollars awarded.
- Thirty-four firms received contract awards of more than $2 billion (exactly the same number as FY 2010).
- Seventy-one contractors (two more than in FY 2010) were awarded, individually, more than $1 billion in contracts.

C. Defense (and Homeland Security): Slicing and Dicing the Data. For some time, we have become comfortable with the Defense Department accounting for approximately two-thirds of federal procurement spending. Expectations that an insatiable, ever-morphing Department of Homeland Security (DHS) might chip away at DoD's share never transitioned to reality. And, not surprisingly, with sustained military actions in Iraq and Afghanistan, that share inched upward. This year, however, we gained additional insights into the modern-era DoD spending trend line. See, generally, the Defense-Industrial Initiatives Group, Center for Strategic & International Studies (CSIS) report, Gregory Sanders, et al., *U.S. Department of Defense Contract Spending and the Supporting Industrial Base* (May 6, 2011), available at http://csis.org/publication/defense-contract-trends-0. The report tracks DoD Contract spending over the twenty-year period, 1990-2010. Some of the trends are familiar, others less obvious.

- Procurement of **Services** grew at a much faster pace than products (supplies) or research and development (R&D).
  - There was a clear shift in priorities following the end of the Cold War. Drawing down military and civilian personnel after the Cold War necessitated an **increase in outsourcing** to continue providing many services, while spending on products decreased with the numbers of active-duty military.
  - Contract spending on **R&D** fell relative to other categories of spending throughout the late 1990s and the 2000's. Yet R&D continued to shrink as a percentage of total defense contract dollars even as the defense budget increased after 2002. Given that the ratio of investment in R&D to the rest of defense contract spending has been lower over the past 20 years than in previous decades, the benefits that will be reaped from a drawdown in the coming years may be fewer.
- The **Army's share** of the DoD procurement pie expanded, while the Navy and Air Force shares declined.
  - Army contract spending skyrocketed after 2000. During the 1990s, the Army accounted for 23-25 percent of total DoD contract spending. This share grew rapidly from 2002 through 2008, reaching 40 percent of total DoD contract

spending by 2008. Army contract spending increased by an average of more than 11.5 percent per year since 1999.

- Despite increased spending by the **Marine Corps**, **Navy** contract spending followed an opposite trend to that of the Army.
- In an unprecedented development (in the modern era), **Air Force** spending declined to the lowest of all DoD components.

- The **top five defense contractors** retained their position from 1999 to 2009. Outside of this small group, however, little evidence suggests that the defense industry is consolidating into an oligopoly dominated by a small number of incumbent firms. Specifically, there were dynamic changes in the composition of the top 20 contractors in the industry over the last 20 years.
- While **small business** appears to have increased its share of the pie, **medium-sized contractors** appear to have lost market share to both large and small contractors.
- At a macro level, DoD awarded the majority of its contract dollars on an increasingly **competitive** basis towards the end of the period studied.
- The share of contract dollars awarded using **fixed price** contracts grew at a faster rate than **cost-based** contract awards.
    - As we noted last year, through 2009, there was a disturbing and sudden rise in "combination" contracts, which obfuscated the total distribution of cost and price-based contracts. Contract spending allocated to this category seems to have mostly disappeared in 2010.
- Spending on **indefinite delivery vehicles** rose sharply in the last few years, while definitive contracts and purchase orders stagnated, then declined in 2010.
- In a separate report, CSIS produced a similar, but more modest data set for the **Department of Homeland Security (DHS)**, tracking trends for 2004-2010 (with the disclaimer that 2002-2003 mainly reflected DHS start-up costs). Defense-Industrial Initiatives Group, Center for Strategic & International Studies, *DHS Contract Spending and the Supporting Industrial Base* (July 21, 2011), available at http://csis.org/publication/dhs-contract-spending-and-supporting-industrial-base. CSIS found that DHS's contract spending was relatively stable, with the most fluctuation in FEMA following major disasters. Not surprisingly, most growth in DHS procurement occurred in services, with slower growth in products and decreases in R&D.

D. Grants: Follow The Money. For now, it remains little known that, despite all of the attention focused upon government contracting, grant spending outpaced procurement spending by more than fifteen percent over the last decade. While FY 2011 may have been a virtual tie, grant spending exceeded procurement spending for nine of the last eleven years. We have not yet analyzed the extraordinary (12 percent) short-term dip in grant spending in 2007 and 2008, but that pales in comparison to the (post-crash, stimulus package-infused) ***58 percent increase in grant spending in 2009***. We will not be surprised to learn, down the road, that the wild fluctuations in grant spending derive, in part, from inaccurate reporting (more on this below); for now these are the best numbers available. As a taxpayer, one might hope or expect that, eventually, the oversight and regulatory community shifts its focus from procurement to grants. If the government is serious about reducing its debts and its annual deficits, this seems unavoidable.

Federal Procurement and Grant Spending 2001-2011*		
Fiscal Year	Procurement Spending (in Billions)	Grant Spending (in Billions)
2011	$535.1*	**$545.2***
2010	$537.7	**$612.7**
2009	$541.3	**$664.8**
2008	**$541.8**	$418.8
2007	**$475.3**	$429.9
2006	$432.0	**$490.0**
2005	$391.2	**$441.6**
2004	$346.4	**$450.1**
2003	$318.3	**$493.7**
2002	$263.4	**$406.3**
2001	$223.1	**$330.8**
**FY 2011 reflects preliminary reporting.*		

Total Federal Spending, *www.USASpending.gov*.

E. Data Quality: As we've noted in the past, the procurement spending data available to the public continues to improve, but plenty of room for improvement remains. We were encouraged that, on *USASpending.gov*, the retrospective adjustments to the previously published spending data changed far less this year than last. (Re-writing history, when it improves accuracy, is not a bad thing.) Also, if you are a visual learner (or if you like colorful, moving pictures, cartoons, etc.), you will enjoy the Graph View option for displaying trends related to, among others, "Prime Award Spend Data" from 2000 to the present. We particularly recommend the bubble view (as opposed to the more sedate bar and line graph options). We encourage you to experiment with the various options which permit you to manipulate the graphs according to time, type of transaction, amount of transaction, place of performance, etc.

IV. THE ONGOING DEBATE: OUTSOURCING-INSOURCING

Last year, we discussed the swinging pendulum that reflects the outsourcing-insourcing trend of the moment, and that discussion continues. *PSC Opposes 'Insourcing' Language In Appropriations Bill,* 53 GC ¶ 407 (PSC opposes "arbitrary, anti-business language" that would force the Government to "arbitrarily insource work currently performed through partnerships between the public and private sectors even though current law and … guidance deem this work perfectly suitable for private sector performance based on agency determinations."); *Obama*

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Administration Opposes Restriction On Contracting Out Closely Associated Functions, 53 GC ¶ 387 (administration opposes [appropriations] language … that would require civilian agencies to ensure that services contracts "exclude to the maximum extent practicable functions that are closely associated with inherently governmental functions"); *OFPP Issues Guidance On Inherently Governmental Functions,* 53 GC ¶ 303; OMB, OFPP Policy Letter 11–01, *Performance of Inherently Governmental and Critical Functions,* 76 Fed. Reg. 56227 (Sept. 12, 2011), available at http://www.gpo.gov/fdsys/pkg/FR-2011-09-12/pdf/2011-23165.pdf; *House Republicans Seek Public-Private Competitions,* 53 GC ¶ 240 ("Twenty-one House Republicans recently called for greater use of [OMB] Circular A-76 public-private competitions"); *OFPP's Inherently Governmental Definition Poses Questions, CRS Finds,* 53 GC ¶ 17 ("[T]hree key concerns for Congress are: (1) the relationship between the proposed policy letter and other executive branch authorities, (2) whether the proposed policy letter would necessarily result in changes in agencies' use of contractors for particular functions[,] and (3) the potential demands on the acquisition workforce. Especially relevant to Government contractors is whether the proposed policy letter's potential treatment of specific functions, such as the provision of security by contractors, would result in changes to agencies' contractor use.")

The battleground appears to increasingly focus on cost comparison between federal and contractor performance of services. It is premature to tell whether this is a meaningful debate or a side show. As we have discussed previously, the lion's share of the government's modern-era reliance on service contractors by-passed any meaningful cost comparison. Rather, most of the increase derived from an explosion of demand for government services without a corresponding increase (and, periodically, decreases) in the federal workforce (and military). Steven L. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors? Minimum Standards for Responsible Governance*, 6 J. Cont. Mgmt. 9 (Summer 2008); Steven L. Schooner, *Competitive Sourcing Policy: More Sail Than Rudder*, 33 Pub. Cont. L. J. 263 (2004). Of course, that does not make the cost-comparison debate any less interesting.

The critical document in this context is the OSD Directive-Type Memorandum (DTM) 09-007, *Estimating and Comparing the Full Costs of Civilian and Military Manpower and Contract Support*, (January 29, 2010; changed September 2, 2011) ("It is DoD policy that Defense officials are aware of the full costs of manpower and have a thorough understanding of the implications of those costs to [DoD] and, on a broader scale, to the Federal Government when developing national security policies and making program commitments. "), available at http://www.dtic.mil/whs/directives/corres/pdf/DTM-09-007.pdf. But see, generally, Defense-Industrial Initiatives Group, Center for Strategic & International Studies, *DoD Workforce Cost Realism Assessment* (May 2011), available at http://csis.org/files/publication/110517_Berteau_DoDWorkforceCost_Web.pdf. "[T]he procedures laid out in the DTM for calculating the government's costs for performing a service have several significant gaps [which] raise questions about the validity of any analysis generated on the basis of the DTM guidance." The DTM, among other things:

- Lacks the ability to calculate fully burdened government wide costs;
- Fails to account for the full cost of DoD-owned capital but includes those costs for contractors;
- Fails to account for taxes forgone by the U.S. Treasury or state or local governments;
- Fails to account for the inherent risk of cost growth among public producers;
- Overlooks the cumulative effect of multiple insourcing decisions;
- Overlooks the imputed costs of insuring and indemnifying in-house producers;
- Fails to account for non-cost factors, such as varying workload stability; and
- Fails to utilize a detailed standard of work as a basis for cost estimation.

CSIS's "objective for creating [a separate] Cost Estimation Methodology is to account for the fully burdened costs to government [which] will create a level playing field between the public and the private sector, remov[e] any inherent competitive advantage for both sides, and enable[e] DoD to harness the cost saving power of competition."

V. INFORMATION TECHNOLOGY: A NEW APPROACH?

Late in 2010, both OMB and the Defense Department published significant policy documents suggesting dramatic changes to the government's approach to purchasing and managing information technology hardware and services. *OMB, DOD Chart New IT Paths,* 53 GC ¶ 2; *OMB Roadmap Improving IT Management, But More Should Be Done, Witnesses Say,* 53 GC ¶ 127 ("Dashboard data were not always accurate and were not consistent with agency cost and schedule performance data."). Not surprisingly, 2011 saw the government produce a significant body of literature in this arena.

A. The Role of the CIO.

• OMB Memo M-11-29, Chief Information Officer Authorities (August 8, 2011). Of course, the memo reinforces the message that "[t]oo many Federal IT projects have run over budget, fallen behind schedule, or failed to deliver promised functionality, hampering agency missions and wasting taxpayer dollars." Accordingly, the government "is changing the role of Agency Chief Information Officers (CIOs) away from just policymaking and infrastructure maintenance, to encompass true portfolio management for all IT." The memo emphasizes four main areas in which CIO's should have a "lead role:" Governance, Commodity IT ("eliminating duplication and rationaliz[ing] their agency's IT investments"); Program Management; and Information Security.

• GAO, *Federal Chief Information Officers: Opportunities Exist to Improve Role in Information Technology Management*, GAO-11-634 (Sep-

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tember 2011) ("[A]gency CIOs currently are not consistently responsible for all of the 13 areas assigned by statute or identified as critical to effective IT management. While the majority of CIOs are primarily responsible for key IT management areas, they are less likely to have primary responsibility for information management duties.")

B. Cloud Computing.

• Vivek Kundra, Office of Management and Budget (OMB), *Federal Cloud Computing Strategy* (February 8, 2011) ("Cloud computing offers the government an opportunity to be more efficient, agile, and innovative through more effective use of IT investments, and by applying innovations developed in the private sector.") This Strategy is designed to:

- Articulate the benefits, considerations, and trade-offs of cloud computing;
- Provide a decision framework and case examples to support agencies in migrating towards cloud computing;
- Highlight cloud computing implementation resources; and
- Identify Federal Government activities and roles and responsibilities for catalyzing cloud adoption.

"Each agency will re-evaluate its technology sourcing strategy to include consideration and application of cloud computing solutions as part of the budget process. Consistent with the Cloud First policy, agencies will modify their IT portfolios to fully take advantage of the benefits of cloud computing in order to maximize capacity utilization, improve IT flexibility and responsiveness, and minimize cost."

• GSA has taken aggressive steps towards becoming the government's provider of cloud-related needs. "(GSA) Cloud Information Technology (IT) Services help federal agencies identify and acquire the right cloud computing solution to meet their IT needs. GSA's Cloud IT Services provide convenient, on-demand access to a shared pool of computing resources that can be rapidly and easily configured, provisioned, and released. These solutions are delivered through the Internet on a pay-per-use or subscription basis in three service models: Infrastructure as a Service (IaaS)..., Platform as a Service (PaaS)..., [and] Software as a Service (SaaS)[.]" See GSA's *Cloud Computing Brochure* (and other resources), available at Cloud IT Services, http://www.gsa.gov/portal/content/190333.

• See also, National Institute of Standards and Technology, U.S. Department of Commerce, Special Publication 500-293 (Draft), *US Government Cloud Computing Technology Roadmap* (Volumes I and II) (November 2011); National Institute of Standards and Technology (NIST), *DRAFT Cloud Computing Synopsis and Recommendations* (May 2011); GAO, *Information Security: Additional Guidance Needed to Address Cloud Computing Concerns*, GAO-12-130T, October 6, 2011.

C. Cybersecurity and Related Issues.

See, generally, *Department of Defense Strategy for Operating in Cyberspace* (July 2011), setting forth Five Strategic Initiatives:

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- Treat cyberspace as an operational domain to organize, train, and equip so that DoD can take full advantage of cyberspace's potential;
- Employ new defense operating concepts to protect DoD networks and systems;
- Partner with other U.S. government departments and agencies and the private sector to enable a whole-of-government cybersecurity Strategy;
- Build robust relationships with U.S. allies and international partners to strengthen collective cybersecurity; and
- Leverage the nation's ingenuity through an exceptional cyber workforce and rapid technological innovation.

See also, GAO, *Cybersecurity: Continued Attention Needed to Protect Our Nation's Critical Infrastructure*, GAO-11-865T, July 26, 2011; GAO, *Cybersecurity: Continued Attention Needed to Protect Our Nation's Critical Infrastructure and Federal Information Systems*, GAO-11-463T, March 16, 2011 ("Once again, we identified protecting the federal government's information systems and the nation's cyber critical infrastructure as a governmentwide high-risk area. We have designated federal information security as a high-risk area since 1997; in 2003, we expanded this high-risk area to include protecting systems supporting our nation's critical infrastructure, referred to as cyber critical infrastructure protection or cyber CIP."). *Cyber Pilot May Expand To More Contractor Networks, DOD Says,* 53 GC ¶ 276 (Through its Defense Industrial Base (DIB) Cyber Pilot program, DoD shares "classified threat intelligence … with defense contractors or their commercial internet service providers along with the know-how to employ it in network defense[.]"); *Developments In Brief: Cyber Pilot to Help DOD, Industry Face Threats, Deputy Secretary Says,* 53 GC ¶ 216(b).

VI. A NEW ERA AT DOD: OF REDUCTIONS, PRIORITIES, AND THE DOD EFFICIENCY AND PRODUCTIVITY INTIATIVE

From a policy perspective, 2011 was less eventful than 2010, at least in terms of the Defense Department's initiatives to squeeze savings, efficiencies, and productivity out of the acquisition regime. The new leadership—primarily former CIA director, now Secretary of Defense, Leon Panetta—will not drive change as much as the realities and constraints of the federal budget. *Developments In Brief: Senate Confirms Deputy Defense Secretary,* 53 GC ¶ 320(d) (Dr. Carter confirmed as the Deputy Defense Secretary); *Defense Secretary Warns against Broad Cuts,* 53 GC ¶ 216(c) (outgoing [SecDef] Robert Gates [stated] that "we must not repeat the mistakes of the past, where budget targets were met mostly by taking a percentage off the top of everything."). Nonetheless, the volume and pace of activity have been high, and the scope and breadth of the initiatives are broad. *Defense Secretary Says DOD Must Remain Agile Despite Budget Cuts,* 53 GC ¶ 338 (Secretary Panetta warned: "If the congressional deficit-reduction 'super committee' fails to agree on budget cuts, so-called sequestration 'would force defense cuts that would do catastrophic damage to our military and its ability to protect the country[.]'"); *In 'New Era' DOD*

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Will Work With Industry To Get 'More Without More', 53 GC ¶ 52 ("Carter unveiled seven guideposts DOD will follow in considering its new industrial structure."). We expect dramatic pronouncements about the future of Defense spending early in 2012 (and throughout the campaign season).

A. Defense Industrial Base and Business Board.

If DoD procurement spending stagnates or, as is more likely, decreases, attention will continue to turn to the DoD industrial base. On November 18, the House Defense Industrial Base Panel ranged far and wide in its hearings, as shown by the statements from The Honorable Jacques S. Gansler, Professor and Roger C. Lipitz Chair, University of Maryland and David Berteau, CSIS, available at http://csis.org/files/111118_tsBerteau.pdf; see also, http://armedservices.house.gov/index.cfm/2011/11/creating-a-21st-century-defense-industry. There are no easy solutions to the challenges facing the defense industry, but a number of key steps can be taken to sustain and retain a healthy industry.

- We need a clearer articulation of our future national security strategy, one that can permit better prioritization of budget and force structure needs and guide reductions.
- We need a change in incentives, both in DoD and in industry.
- The government needs to have a better idea of which elements of the industrial base are most vulnerable and a better way of including that information in budget decisions.
- As technology development continues to occur outside the U.S., we need an export control regime that recognizes the global origin of innovation.

What remains unclear at year end is whether the panel's life will be extended and whether it will develop legislation for the coming year. *House Defense Industrial Base Panel Holds Initial Hearing*, 53 GC ¶ 359 ("Rep. Rick Larsen (D-Wash.), panel ranking member, said 'DOD must continue ... building a strategic, dynamic contracting process' to ensure that 'those who have great products do not fall by the wayside,' and one way to do so is to grow the defense industrial base.") Barry Watts, senior fellow at the Center for Strategic and Budgetary Assessments (CSBA) explained that "the prospects for the continued success of for-profit defense firms in providing ... superior weaponry and equipment—especially at affordable costs—may be at risk" unless both the defense industrial base and the Government's business practices "undergo fundamental restructuring." CSIS's Pierre Chao cautioned against a "one-size-fits-all mentality" when promulgating a defense industrial policy. Instead, he suggested viewing the industry as three constituent parts: (a) emerging technologies and companies, including those involving mobile applications, cyberspace, and directed energy; (b) core market, including major defense contractors like Boeing and Lockheed; and (c) legacy businesses, which include ship, aircraft and tank builders and space launch operations. See also, *Developments in Brief: HASC Establishes Bipartisan Defense Business Panel*, 53 GC ¶ 302(b) (The Panel, led by Reps. Bill Shuster (R-Penn.) and Rick Larsen (D-Wash.), "is tasked with examining the current defense business environment and identifying contracting and regulatory issues facing the defense industry. It will also look at the use of incentives and mandates to meet established goals, structural challenges facing various sectors within the industrial base, impact of the current fiscal environment on industry, opportunities to reduce barriers to entry, and how [DoD] can encourage expansion of the industrial base and foster the transition of technology.")

B. The Tanker Procurement: An Interim Conclusion to a Never-Ending Major System Acquisition Case Study.

The Obama administration inherited one of the hottest potatoes imaginable—the future of in-flight refueling for the Air Force. This incredibly important, high-profile procurement attracted (and, frankly, merited) extraordinary attention. In 2011, the Air Force finally awarded a contract that did not result in a successful protest. *And The Award For Best-Value Tanker Goes To ...,* 53 GC ¶ 71 ("The Air Force … awarded the KC-X contract to the Boeing Co., in the Department of Defense's third attempt to begin replacing the aging fleet of Eisenhower-era KC-135 aerial refueling tankers. Boeing's aircraft is designated the KC-46A. The fixed-price incentive-firm contract for engineering and manufacturing development is worth over $3.5 billion, and calls for 18 aircraft by 2017. The overall program is valued at $30 billion plus options.") What initially appeared to be one of the most dramatic inadvertent disclosures of proprietary information of the modern era, while embarrassing, proved neither significant nor fatal. *SASC Probes KC-X Data Leak,* 53 GC ¶ 37 (In December 2010, "DOD sent the Boeing Co. and European Aeronautic Defence and Space Co. (EADS) a limited amount of identical information about each other's offer following a November 2010 accidental disclosure to EADS." The disclosure "was accidental and did not violate the Procurement Integrity Act.")

By the summer, however, "Boeing … projected … [that it would] exceed its cost ceiling by as much as $300 million—about 6 percent—on the initial contract to develop and build Air Force aerial-refueling tankers, according to government officials." Tony Capaccio, *Boeing projected to face $300 million overrun on tanker contract*, Seattle Times at http://seattletimes.nwsource.com/html/businesstechnology/2015420023_tanker25.html. Then USD(AT&L) Ash Carter promptly explained: "It's not our problem because it's a fixed contract and it was written with protections for the taxpayer[.]" Colin Clark, *Boeing's $300M Tanker Overrun Not Pentagon's Problem: Ash Carter*, available at http://defense.aol.com/2011/07/15/boeings-300m-tanker-overrun-not-pentagons-problem-ash-carter/. Time will tell whether (1) it is, in fact, DoD's problem or not and (2) whether a slavish resurgence in fixed-price contracting coupled with strict enforcement best serves the government's long-term interests.

C. Boeing and Airbus: Another Arena.

On a tangentially related note, the ongoing US-EU trade battle involving state support for large-scale aircraft development continues to play out before the World Trade Organization (WTO). *Developments In Brief: WTO Panel Rules Boeing Subsidies Illegal,* GC ¶ 321(b) (In a parallel dispute targeting subsidies to Airbus, a WTO panel ruled in June that

EU member states' subsidies to Airbus violated WTO law. See also 52 GC ¶ 228.); *Boeing Subsidies Violate WTO Law, Panel Holds,* 53 GC ¶ 122 (WTO "dispute-settlement panel … held that certain U.S. federal taxation schemes, [DoD] and NASA research and development (R&D) funding, and state tax and non-tax incentives to the Boeing Co. were illegal subsidies under WTO law").

D. And, Yes, the A-12.

Last year, we mentioned that the Supreme Court granted *certiorari* in the A-12 litigation (originally filed in the COFC in June of 1991), *McDonnell Douglas Corp. & General Dynamics Corp. v. United States*. The U.S Court of Appeals for the Federal Circuit described this litigation as the American version of *Jarndyce and Jarndyce,* the fictional court case in the Charles Dickens novel BLEAK HOUSE. ("This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means.") The oral argument in this case was not the Court's finest hour. *Developments In Brief: Supreme Court Hears Arguments on State Secrets Privilege in A-12 Case,* 53 GC ¶ 29(a). Now, following the Supreme Court's decision, the case is headed back to the trial court. *State Secrets Privilege Bars Litigation Of Superior Knowledge Theory In A-12 Case,* 53 GC ¶ 177 ("The U.S. Supreme Court … held that the state secrets defense precludes a civil action if full litigation would lead to the disclosure of state secrets. …[I]n such a situation, the dispute is nonjusticiable, and the appropriate judicial action is to leave the parties 'where we found them on the day they filed suit,' causing both parties to be without a judicial remedy. For now, the decision is a partial victory for both sides.").

VII. ACQUISITION WORKFORCE

We applauded both the message and the delivery of that message by outgoing OFPP Administrator Gordon. *Gordon to Leave OFPP,* 53 GC ¶ 369(d). And we were pleased that the acquisition workforce was increasingly, and seriously, addressed—both as a matter of policy and legislation. Alas, we fear that much work is required, and budgetary pressure likely will swing the pendulum in the opposite direction. *Bills Seek To Improve Acquisition Workforce Training,* 53 GC ¶ 133; *Industry Group Makes Legislative Recommendations,* 53 GC ¶ 99 (The Acquisition Reform Working Group (ARWG) "support[s] the efforts to rebuild the acquisition workforce. Many of the problems with defense and other agency acquisitions today are the result of severe strains on the acquisition workforce 'rather than a lack of appropriate rules and regulations[.]'") For example, GAO found that DCMA "faces an uphill climb as it tries to rebuild its workforce after undergoing significant shifts in its workforce, structure, and policies and procedures over the past 10 years[.]" *DCMA Faces Challenges Rebuilding Workforce, GAO Finds*, 53 GC ¶ 374. Despite recent progress: "DCMA remains 'in a state of transition, recovering from years of workforce downsizing that raised serious concerns about its ability to effectively meet its missions.' Uncertainty also remains about 'whether funding will be available to retain personnel hired using the Defense Acquisition Workforce Development Fund,' a source of funding for an increasing number of new DCMA employees."

Unfortunately, focus on the officially designated acquisition workforce is not enough. *DOD Should Better Track, Train Non-DAWIA Acquisition Personnel, GAO Says,* 53 GC ¶ 318 (GAO reviewed 29 DoD services acquisitions and found that fewer than half of the 430 personnel involved were covered by the Defense Acquisition Workforce Improvement Act (DAWIA), which standardized education, experience and training requirements for the DOD acquisition workforce. "GAO found that non-DAWIA personnel perform functions at all stages of the services acquisition life-cycle … as program managers, [CORs], requirement officials, auditors, legal advisors, technical experts and financial managers.").

VIII. TILTING AT WINDMILLS: CONTRACTOR FATALITIES AND PUBLIC PERCEPTION, REDUX

By the end of 2011, more than 2,700 contractors had died in Iraq, Afghanistan, and Kuwait. We continue to be frustrated that these extraordinarily high contractor fatalities (and injuries) remained almost entirely outside the public's consciousness. Among other things, we believe that, in a representative democracy, public awareness of the human cost of our nation's security and foreign policies is critical. A significant body of research suggests that the public is at least somewhat sensitive to military casualties, and we continue to wonder what impacts, if any, derive from a significant substitution of contractor deaths for military fatalities. See, generally, Steven L. Schooner & Collin D. Swan, *Dead Contractors: The Un-Examined Effect of Surrogates on the Public's Casualty Sensitivity*, 5 J. of Nat'l Sec. L. & Pol'y ___ (forthcoming 2012), available at http://ssrn.com/abstract=1826242.

The Labor Department continues to earn kudos for transparency for posting on the Internet the data it generates based upon claims filed under the Defense Base Act and the War Hazards Compensation Act, which make contractor employees eligible for worker's compensation benefits pursuant to the Longshore and Harbor Workers' Compensation Act. See generally *www.dol.gov/owcp/dlhwc/lsdbareports.htm*. We also heartily applaud the Congressionally-mandated Commission on Wartime Contracting (CWC) for breaking new ground, bucking the trend of both Republican and Democratic administrations, and acknowledging that contractor sacrifice merits the public's attention.

> The extensive use of contractors obscures the full human cost of war. The full cost includes all casualties, and to neglect contractor deaths hides the political risks of conducting overseas contingency operations. In particular, significant contractor deaths and injuries have largely remained uncounted and unpublicized by the U.S. government and the media….
>
> The recent withdrawal of combat units from Iraq and the surge in Afghanistan have resulted in increased contractor casualties. Between June 2009 and March 2011, contractor deaths, including local- and third-country nationals, exceeded the military's in both countries. Moreover, contractor deaths are undoubtedly higher than the reported total because federal

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> statistics are based on filed insurance claims, and many foreign contractors' employees may be unaware of their insurance rights and therefore unlikely to file for compensation.

Commission on Wartime Contracting, *Final Report to Congress: Transforming Wartime Contracting: Controlling Costs, Reducing Risks* at 30-31 (August 2011) (footnotes and citations omitted), available at http://www.wartimecontracting.gov/docs/CWC_FinalReport-lowres.pdf. See also, David Isenberg, *Contratistas Desaparecidos*, HUFFINGTON POST (October 10, 2011) ("While … I have frequently been critical of [private military security] use as a policy I am absolutely disgusted by the way their ultimate sacrifice has been airbrushed out of the official record.").