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## Emerging Policy and Practice Issues (2009)

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**EMERGING POLICY & PRACTICE ISSUES**

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**I. NEW DECADE, NEW LEADERSHIP, OLD CHALLENGES**

**A. Credibility at OFPP.** In preparing these materials, it was surprising to realize that – most likely – this is only the second time in two decades in which the new Administrator of the Office of Federal Procurement Policy (OFPP), at the time of his/her appointment, was a familiar name to this community; nor can we recall a prior appointee who had regularly participated in this conference. Personally, we're ecstatic with the appointment and confirmation of Daniel Gordon – formerly the Acting General Counsel of the Government Accountability Office (GAO) – as OFPP Administrator. *See, generally, OFPP Nominee Will Prioritize the Acquisition Workforce*, 51 GC ¶ 398. We remain disappointed by the administration's delay in filling this critical position; but we were pleasantly surprised (nay, flabbergasted) by the Senate's pre-Thanksgiving acceleration of the process for this obviously qualified, uncontroversial candidate. We may not understand why he was willing to accept the job, but we're grateful that he did. He has got his work cut out for him.

**B. Still Waiting at GSA.** At least Dan Gordon is on the job. Martha Johnson's nomination to be the next administrator of the General Services Administration (GSA) remains on hold. Ed O'Keefe, *Key Positions Vacant as Nominees Await Senate Confirmation*, WASH. POST (Dec. 31, 2009) ("Among executive branch nominees, Martha N. Johnson [nominated in May] has waited the longest.")

**C. Continuing, Daunting Challenges.** In all fairness, the Obama Administration inherited a public procurement regime stretched to the breaking point and under siege. Four trends appear to dominate that procurement landscape:

- (1) the dismantling of the acquisition workforce: the 1990's workforce reductions rendered succession planning impossible, increased future risks associated with the pending retirement bubble, and left the government unprepared for the recent period of dramatically increased purchasing (and, of course, more on this below);
- (2) failure to acknowledge or adapt to two decades of seismic changes:
  - a. the government evolved from primarily purchasing supplies into an insatiable consumer of services, specifically including professional and personal services; and
  - b. robust "new public management" initiatives empowered government purchasers to embrace commercial practices, employ flexible contracting vehicles, and, ultimately, change business methods in an effort to maximize value for money received and customer satisfaction;
- (3) the post-millennium spending binge (more on this below); and

(4) the inevitable result: scandal and criticism (more on this below as well).

**D. The Obama Administration Procurement Agenda: Lots of Sail, Minimal Rudder?** The most remarkable trend of 2009 was the Obama administration's overall approach to procurement policy. Despite dragging its heels on installing a leadership team, the administration charted a course of what it perceived as bold action – most dramatically, touting “savings” and accountability, while permitting special interests to distract focus from value for money and customer satisfaction. Accordingly, to date, the Obama administration's procurement policies lack a cohesive theme, suggest a reactive rather than proactive approach, strongly indicate a special interest bias, and, at best, have sent mixed messages at a critical juncture. For a more optimistic, aspirational assessment, see David Nadler & Joseph Berger, *Feature Comment: President Obama Heralds Change for Government Contracting*, 51 GC ¶ 19.

**An Early Nod to Special Interests.** Faced with financial and economic crises, distracted by military action in Iraq and Afghanistan, and engaged in a high-stakes debate over the future of health care, the nascent Obama Administration – not surprisingly – did not focus its resources on establishing its procurement leadership team. Nonetheless, shortly after the inauguration, the administration issued three pro-labor Executive Orders that affect the federal procurement process. Gil A. Abramson & David W. Burgett, *Feature Comment: Executive Orders Change Labor Rules for Federal Contractors*, 51 GC ¶ 34 (“Making good on his campaign promises to help organized labor, ... President Obama signed three union-friendly executive orders pertaining to federal contractors.”); Executive Orders, *Economy in Government Contracting* (January 30, 2009), [www.whitehouse.gov/the\\_press\\_office/economy\\_in\\_government\\_contracting](http://www.whitehouse.gov/the_press_office/economy_in_government_contracting); *Nondisplacement of Qualified Workers Under Service Contracts* (January 30, 2009), [www.whitehouse.gov/the\\_press\\_office/nondisplacement\\_of\\_qualified\\_workers\\_under\\_service\\_contracts](http://www.whitehouse.gov/the_press_office/nondisplacement_of_qualified_workers_under_service_contracts); and *Notification of Employee Rights Under Federal Labor Laws* (January 30, 2009), [www.whitehouse.gov/the\\_press\\_office/notification\\_of\\_employee\\_rights\\_under\\_federal\\_labor\\_laws](http://www.whitehouse.gov/the_press_office/notification_of_employee_rights_under_federal_labor_laws). A week later, in early February, a fourth pro-labor Executive Order followed. Executive Order, *Use of Project Labor Agreements for Federal Construction Projects* (February 6, 2009), [www.whitehouse.gov/the\\_press\\_office/ExecutiveOrderUseofProjectLaborAgreementsforFederalConstructionProjects](http://www.whitehouse.gov/the_press_office/ExecutiveOrderUseofProjectLaborAgreementsforFederalConstructionProjects). This presaged a willingness to deploy the procurement process to achieve targeted wealth distribution (favoring, for example, domestic manufacturers, small businesses, and labor, implicitly at the expense of taxpayers, large businesses, foreign firms, etc.). We would have preferred the administration's initial proclamations on public procurement to focus on “value for money” and end-user “customer satisfaction.”

**The March Memorandum.** In early March, a Presidential memorandum on “Government Contracting” described concerns with recent trends in outsourcing, cost-reimbursement contracting, and insufficient competition. The memorandum suggested (and the President's speeches stated) that remedying these perceived pathologies would generate significant

savings. The memorandum also highlighted “contracts that are wasteful, inefficient, subject to misuse[.]” See, *Office of Federal Procurement Policy Briefing Room - Presidential Memorandum on Government Contracting*, [www.whitehouse.gov/omb/procurement\\_index\\_gov\\_contracting/](http://www.whitehouse.gov/omb/procurement_index_gov_contracting/); David Nadler & Joseph Berger, *Feature Comment: Government Contracting Developments in President Obama’s First 100 Days—‘No Little Plans’*, 51 GC ¶ 143 (“President Obama has set his priorities for broad goals to be achieved through Government contracts and grants, charted a course for Government contract reform, and provided billions of dollars in new opportunities for contractors. Congress has responded to the president’s agenda with its own series of initiatives, resulting in a deluge of developments...”); James J. McCullough & William S. Speros, *Feature Comment: The Obama Administration’s Emerging Policies on Freedom of Information, Transparency and Open Government—New Benefits And Costs for Government Contractors?*, 51 GC ¶ 125 (“Government contractors likely will need to expend additional effort to protect their confidential and proprietary information; ... [this] will certainly entail increased transaction costs for contractors ..., which, in turn, will likely lead to increased contract prices for procuring agencies.”); Paul Debolt, Rob Burton & Terry Elling, *Feature Comment: President Obama Issues Memo on Government Contracting to the Heads of Executive Departments and Agencies*, 51 GC ¶ 77 (“Government must ... issue ‘tough new guidelines....’ [T]he president described the procurement system as “broken” and stated that the Government has lost the public trust. ... [C]oncerns ... highlighted by the president were fraud, massive cost overruns, contractors overseeing other contractors, and a lack of oversight and accountability.”); *OMB Issues Contracting Reform Guidance*, 51 GC ¶ 384 (“The president directed OMB and federal agencies to develop guidelines to achieve goals intended to save up to \$40 billion each year.”).

We remain unconvinced by the dramatic rhetoric promising savings; nor do we believe that the system is capable of generating credible data demonstrating or validating the promised positive results. See, e.g., Office of Management and Budget, *Acquisition and Contracting Improvement Plans and Pilots: Saving Money and Improving Government* (December 2009), [www.whitehouse.gov/omb/assets/reports/2009\\_acquisition\\_contracting\\_improvement.pdf](http://www.whitehouse.gov/omb/assets/reports/2009_acquisition_contracting_improvement.pdf) (“President Obama believes that taxpayers deserve to have their dollars spent wisely. To help instill a new sense of responsibility ... he has charged federal departments and agencies with saving \$40 billion annually by Fiscal Year (FY) 2011 through terminating unnecessary contracts, strengthening acquisition management, ending the overreliance on contractors, and reducing the use of high-risk contracts across government.”) For example, we are concerned that deferring necessary expenditures to later fiscal years may be confused with savings and that aspiration may not comport with reality. “DoD expects to get a new presidential helicopter “for a lot less money than the cancelled program would have cost had it continued.” *USD AT&L Addresses KC-X Procurement, JSF at Media Roundtable*, 51 GC ¶ 417.

**The July Memos: Less Flash, More Substance.** In late July, the administration expanded upon these policies by issuing memoranda that: (1) mandated savings and advocated reduced use of high-risk con-

tracting vehicles (such as non-competitive and/or cost-reimbursement contracts); (2) provided guidance to help agencies improve their management of the multi-sector workforce (a more constructive approach to the earlier anti-outsourcing rhetoric); and (3) injected rigor into the government's ineffective process for obtaining, managing, and employing contractor performance data. *OMB Issues Contracting Reform Guidance*, 51 GC ¶ 271; Peter R. Orszag, *Improving Government Acquisition*, Office of Management and Budget (M-09-25, July 29, 2009), [www.whitehouse.gov/omb/assets/memoranda\\_fy2009/m-09-25.pdf](http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m-09-25.pdf); Peter R. Orszag, *Managing the Multi-Sector Workforce*, Office of Management and Budget (M-09-26, July 29, 2009), [www.whitehouse.gov/omb/assets/memoranda\\_fy2009/m-09-26.pdf](http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m-09-26.pdf); Lesley A. Field, *Improving the Use of Contractor Performance Information* (July 29, 2009), Office of Federal Procurement Policy, [www.whitehouse.gov/omb/assets/procurement/improving\\_use\\_of\\_contractor\\_perf\\_info.pdf](http://www.whitehouse.gov/omb/assets/procurement/improving_use_of_contractor_perf_info.pdf).

**And Even More Executive Orders.** By October, Green Procurement had become a priority, adding layers of complexity to a broad range of acquisitions. Mary Beth Bosco, *Feature Comment: Executive Order on Environmental and Energy Performance Changes Government Acquisition of Buildings and Services*, 51 GC ¶ 363 (“[T]he policy ... shall be to ‘leverage agency acquisitions to foster markets for sustainable technologies and environmentally preferable materials, products, and services,’ and ‘design, construct, maintain, and operate high performance sustainable buildings in sustainable locations.’” The “executive order can be broken down into four mandates: (1) establishment of greenhouse-gas percentage emissions goals; (2) articulation of specific action goals; (3) designation of responsibility in the Government for implementing the order’s requirements; and (4) recommendations for siting and operation of Government buildings.”). In November, President Obama issued an executive order intended to help agencies reduce improper payments. *President Issues Executive Order To Reduce Improper Payments*, 51 GC ¶ 416 (requiring agencies to reduce payment errors and eliminate waste, fraud and abuse in federal programs while ensuring that proper beneficiaries continue to have access to federal programs and funds); 74 Fed. Reg. 62201 (November 25, 2009).

**A Telling Anecdote.** The administration’s optimism suggests that the Government can have it both ways. In pursuing initiatives to stimulate a stalled economy with government spending, the administration mandated increased transparency and oversight in public procurement (and government, generally) and reiterated concerns regarding contractor compliance. (At the same time, the administration seems to favor targeted allocation of procurement benefits to special interest groups.) That is all fine, if there is some recognition of the source of the problems that lead to contractor compliance failures that underlie the accountability concerns. We found it particularly disingenuous, for example, that the administration acknowledged a profound, generational deficiency in the acquisition workforce, yet promised a massive spending (stimulus) splurge to be simultaneously accompanied by higher – previously unprecedented – levels of oversight and accountability. *OMB Issues Stimulus Implementing Guidance*, 51 GC ¶ 60.

## II. HOW LONG CAN THE UPWARD TREND CONTINUE? THE POST-MILLENNIUM, PROCUREMENT SPENDING BINGE SPANS THE DECADE

**A. The Burn Rate Keeps Burning.** Throughout the past decade, we continued to be surprised by the increased volume and rate of federal procurement spending. The experts swore that the growth would taper, and, to some extent, the growth *rate* did slow somewhat, but not for long. In retrospect, the dire warnings that the current spending increase was a blip – and that procurement spending would promptly retract – were unfounded. Has the growth cycle finally run its course?

Federal Procurement Spending 2000-2009*			
Fiscal Year	Procurement Spending (in Billions) <i>FPDS v. USASpending</i>	Percentage Increase From Previous Year	Percentage Increase in Consumer Price Index (CPI)
2009	\$409.7*		1.8
2008	\$531.2 \$529.8	>11.5	3.8
2007	\$465.6 \$463.1	12.0	2.8
2006	\$415.4 \$426.6	6.6	3.2
2005	\$389.6 \$385.9	8.9	3.4
2004	\$357.7 \$341.2	9.6	2.7
2003	\$326.4 \$297.8	18.6	2.3
2002	\$275.2 \$258.9	17.0	1.6
2001	\$235.2	7.2	2.8
2000	\$219.3		

\*FY 2009 reflects preliminary reporting.

See Federal Procurement Data System, *Trending Analysis Report*, available at [www.fpdsng.com/downloads/top\\_requests/FPDSNG5YearViewOnTotals.xls](http://www.fpdsng.com/downloads/top_requests/FPDSNG5YearViewOnTotals.xls), and *Agencies Submitting Data to FPDS-NG*, available at [www.fpdsng.com/downloads/agency\\_data\\_submit\\_list.htm](http://www.fpdsng.com/downloads/agency_data_submit_list.htm). See also, *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/cpi\\_dr.htm#2009](http://www.bls.gov/cpi/cpi_dr.htm#2009).

We recognize that this run of increases will end, and defense budgets, in particular, eventually will come down. It probably will not happen in FY 2011, but it will occur soon thereafter. Whether defense budgets start coming down next year or later is irrelevant. What's important is that neither Congress nor the DoD is ready to deal with declining defense budgets. See, generally, David J. Berteau, Statement before the House Armed Services Committee, *Resourcing the National Defense Strategy: Implications of Long-Term Defense Budget Trends* (November 18, 2009); see also David J. Berteau, *Current Issues: No. 19: Fixing the Shortfalls: Defense Budget Trends and Long Term Impact* (12/14/09), CSIS, Defense-Industrial Initiatives Group, <http://csis.org/publication/diig-current-issues-no-19-fixing-shortfalls-defense-budget-trends-and-long-term-impact>.

**B. Data Quality: Incremental Improvement.** Due in large part to the introduction of USASpending.gov, the procurement spending data that the public enjoys access to continues to improve, but it remains far from perfect.

[GAO's] William Woods ... testified that deficiencies in the current systems involve mainly poor data quality, lack of data submission and inadequate system capabilities. ... [OMB Watch's] Adam Hughes ... agreed that the current systems do not deliver accurate, timely and useful information. He called them "disjointed, antiquated, at times redundant, and extremely difficult to use." ... Vivek Kundra, OMB's federal chief information officer, testified that the Obama administration recognizes the problems with the current contractor databases, including data timeliness, accuracy and completeness, and system usability.

*Senate Subcommittee Examines Contracting Databases*, 51 GC ¶ 345. Consider, for example, that the government still lacks a means for quantifying *money actually spent* on contracts, as opposed to the amount of dollars awarded. And all of these numbers, of course, exclude grants. Although the volume of government funds dispersed annually on grants exceeds that spent through contracts, grant spending remains less transparent and subject to far lesser scrutiny. All things in time.

### **III. ENOUGH OUTSOURCING, CONTRACTING OUT, AND PRIVATIZATION: A NEW INSOURCING TREND?**

Last year, we noted that the government's bipartisan outsourcing (or, at times, "competitive sourcing") initiative had spanned more than fifteen years (and two two-term administrations). This year, insourcing is all the rage. Deputy Defense Secretary William Lynn, at the recent Aerospace and Defense Conference in New York, conceded that DoD lacks sufficient expertise and proficiency in cost estimating, systems engineering, and program management. Lynn described "rebalancing" the federal and contractor workforces as a key element of overall acquisition reform.

The outsourcing versus insourcing debate has solidified itself as a mainstream topic of public discourse. On the one hand, we're pleased to see issues related to public procurement penetrating the public consciousness. Conversely, we remain concerned that the public does not like what it is seeing about our profession and/or industry.

It is easy to see things have gone awry and to scapegoat contractors. But contractors aren't the problem; the problem is the loss of good government....

If regular government channels are inadequate to handle the biggest challenges the nation faces, it is hard to avoid concluding that something is terribly wrong with our current national security infrastructure....

[T]here can be bad privatization and good privatization and *government can ensure that the latter prevails*. Bad privatization empowers the beltway bandits....

Allison Stanger, *ONE NATION UNDER CONTRACT: THE OUTSOURCING OF AMERICAN POWER AND THE FUTURE OF FOREIGN POLICY*, 11, 60, 133 (Yale University Press, 2009) (emphasis added).

[C]riticism about America's foreign policy being outsourced to the private sector has resurfaced with a vengeance....

Sure, government needs to be better at managing contractors. Sure, it needs to bring certain skill sets ... back into government. And sure, we could always use even more transparency on government spending. Yet ... the devil is in the details....

More importantly, the critics ... have yet to present an analysis showing how the costs of contracting outweigh the benefits. They warn of contracting run amok and the privatization of foreign policy but seemingly forget that in times of war, meeting the warfighters' needs in a timely manner is a primary task of the government, even if this costs more than we would like it to. And ... critics ... should also recognize that having a private sector that can surge in support of expeditionary operations increases the nation's ability to project power and the credibility of its deterrence.

Guy Ben-Ari, *Current Issues: No. 18: Addressing Concerns About US Foreign Policy Outsourcing (12/02/09)*, CSIS, Defense-Industrial Initiatives Group, [http://csis.org/files/publication/091202\\_DIIG\\_Current\\_issues\\_n18.pdf](http://csis.org/files/publication/091202_DIIG_Current_issues_n18.pdf).

We remain unpersuaded by much of the insourcing rhetoric. We also sense that much of the insourcing activity, particularly at DoD, is quota-driven, rather than results-oriented. No doubt, the picture will be more clear by this time next year.

#### **IV. ACQUISITION WORKFORCE: FINALLY, SOME ACTION**

Last year, we were pleased that the acquisition workforce was increasingly, and seriously, addressed—both as a matter of policy and legislation. (We apologize here for attempting to summarize the well-traveled tale that brought us to this point. The federal acquisition workforce declined dramatically due to congressionally mandated personnel reductions in the 1990's. We agree with those who assert that the government has not hired an appropriate number of new acquisition professionals in any year since the 1980's. A disproportionate share of the existing workforce is aging and, in large part, retirement-eligible; and most of that workforce was neither hired nor trained to primarily purchase services using flexible contractual vehicles. In addition, as discussed above, the volume of purchasing exploded during this decade.)

Now that the trends are not only documented, but, increasingly, acknowledged, we are starting to see meaningful action. *OFPP Nominee Will Prioritize the Acquisition Workforce*, 51 GC ¶ 398; *Treasury IG Finds Insufficient Training for Recovery Act Oversight*, 51 GC ¶ 375 (We were not surprised to see, e.g., “an internal memorandum [that] indicated that additional contracting staffing was ‘not required for execution of remain-



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ing acquisitions' under the Recovery Act. ... [A]lthough the Recovery Act increased the contracting workload, the increase was 'accommodated ... primarily by reprioritizing non-Act procurements and working additional hours.'" Sound familiar?); *Acquisition Workforce Competencies Rise As Retirement Threat Looms, FAI Survey Shows*, 51 GC ¶ 288; *Senate Subcommittee Focuses On Acquisition Workforce Reform*, 51 GC ¶ 280; *DoD Seeks Better, More Acquisition Professionals*, 51 GC ¶ 259 (DoD's Shay Assad touts 20,000 new acquisition employees by 2015; Schooner responds that the number is too low, and the movement is too slow.); *Experts Tell House Subcommittee About Federal Contracting Challenges*, 51 GC ¶ 213 (Karen Manos highlighted the Government's "overworked, under-trained and underappreciated acquisition workforce"); *DPASS and Service Update HASC Subcommittee on Acquisition Workforce*, 51 GC ¶ 150 ("[DAU] must be expanded because certification requirements have exceeded its capacity, and the joint contracting workforce must be properly sized and trained to meet contracting needs in a battlefield environment"); *DOD Needs Additional Information To Manage Acquisition Workforce, GAO Says*, 51 GC ¶ 117.

As Vern Edwards correctly articulates, the numbers game is only part of the problem:

[T]he problem is not just quantity, but also quality. It is an open secret that the current workforce is not entirely up to the job of conducting contracting operations efficiently, effectively and in compliance with the law. ... COs do not fully understand the Government's complicated rule system and rely too much on agency attorneys to tell them the rules. ...

The hiring surge is injecting many people into a system that is not ready to receive them or to develop and retain first-rate professionals. ...

[T]he Government's primary approach to workforce revitalization, which is to overwhelm the workload problem with numbers, will result in needlessly higher labor and training costs, suboptimal worker performance and suboptimal retention rates among the best new hires.

FAI and DAU must be revitalized. They need new management and more money. ...The quality of the educational institutions should reflect the quality of the new hires, who have more formal education than the current generation. The new educational programs must be intellectually sophisticated and professionally rigorous....

*Vernon J. Edwards, Feature Comment: Throwing People at the Problem – Massive Hiring Will Not Revitalize the Acquisition Workforce*, 51 GC ¶ 288. We share Vern's concern that new personnel must be properly trained, allocated, mentored, incentivized, and, over time, developed. We also are curious to see if results stem from the nascent Strategic Partnership on Acquisition Recruitment Coalition (SPARC), comprised of representatives from the OFPP, the Chief Acquisition Officers Council, the Federal Acqui-

sition Institute (FAI), the Defense Acquisition University (DAU), and the National Contract Management Association (NCMA). We are optimistic that the partnership can persuade institutions of higher learning to expand their curriculum to include procurement-related coursework. We are also encouraged, on this score, by the Acquisition Workforce Improvement Act of 2009 (“[t]o improve the acquisition workforce through the establishment of an acquisition management fellows program), introduced by Senators Susan Collins (R-Maine), Claire McCaskill (D-Mo.), and Bob Bennett (R-Utah) shortly before this chapter was completed.

## V. MAJOR SYSTEMS: MAJOR CHANGE?

**A. The Tanker Procurement: A *Continuing* Major System Acquisition Case Study.** Last year, we noted that the Obama administration would inherit one of the hottest potatoes imaginable—the future of in-flight refueling for the Air Force. This incredibly important, high-profile procurement has attracted (and, frankly, merited) extraordinary attention. Alas, we are not optimistic about the current request for proposals. Indeed, we think Ralph Nash got it right:

[We previously] criticized the Air Force for structuring the procurement ... as a paper competition when it could have used the money to buy prototypes and conduct a fly-off to determine which prototype was better. ... Now the Air Force is starting over again and guess what[?] ... conducting a better paper competition!

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[T]his is the wrong way to procure an aircraft that is based on an aircraft that already exists. The right way to do it is to give each company half of the development funds to build prototypes and conduct a fly-off to see which prototype is the best plane. At the same time the fly-off is being conducted, the companies could submit firm prices based on the data that have been gathered building the prototypes – giving some assurance that the prices were realistic. Further, the millions of dollars of company money spent on preparing proposals and participating in the paper competition could be used to design and build the prototypes.

Ralph C. Nash, *Dateline*, 23 N&CR (November 2009). We will go one better. Why not give the two major players funds to provide *two* prototypes each – one large, one smaller. Then deploy the *four* tankers – for a year or even longer – and let the end users weigh in. Imagine an outcome where both pricing and technical performance are based on experience! Not to belabor the point, but DoD’s latest guidance seems to agree. See, Ashton B. Carter, DUSD(AT&L), *Directive-Type Memorandum (DTM) 09-027 - Implementation of the Weapon Systems Acquisition Reform Act of 2009* (December 4, 2009), directing that:

Program acquisition strategies for Major Defense Acquisition Programs (MDAPs) shall describe the measures taken to ensure competition or the option of competition, at both the prime and

subcontract level throughout the program life cycle. Measures may include, if cost-effective: **competitive prototyping; dual-sourcing** ....

Is that: “do as I say, not as I do?” Or is it a concession that doing the right thing is rarely “cost-effective” in the short-run? See, generally, *Northrop Threatens To Quit KC-X Procurement, Seeks Favorable Terms*, 51 GC ¶ 425; *USD AT&L Addresses KC-X Procurement, JSF at Media Roundtable*, 51 GC ¶ 417 (“DoD knows ‘very well what aircraft the warfighter wants, [and] what kind of requirements there are,’ which allowed for a ‘crystal-clear’ draft RFP. ... [T]he source selection strategy is ‘much less subjective’”).

**B. A Less Detailed, More Proactive Agenda.** One of us recently offered what we perceive as five key elements, which, if present, would lead to improvement in defense acquisition and permit the government to expect better performance at more predictable and stable prices.

1. Restoring DoD’s acquisition workforce capability is critical; of course, this will take sustained effort over time.
2. Competition is critical; we need to foster more of it.
3. Programs need clear requirements, better cost estimates, and more mature technology.
4. Requirements should not be locked in. Contract solicitations and negotiations need to focus more on tradeoffs of requirements, cost, and schedule. Secretary Gates’ 75% solution, achieved faster and at less cost, demands flexible requirements. Achieving success also demands stronger negotiating teams on the government side, as well as a willingness to avoid taking the easy way out by picking companies who “buy in” to contract award.
5. It will take more time up front (for requirements, cost estimating, technology maturity, and negotiations) to do this better, but that will pay off in the long run.

David J. Berteau, Statement before the House Armed Services Committee, *If These Are Such Good Ideas, Why Are They So Hard To Implement?* (April 30, 2009); see also Business Executives for National Security, *Getting to Best: Reforming the Defense Acquisition Enterprise* (July 2009), [www.bens.org/our-work/policy-agenda/defense-acquisition-new.html](http://www.bens.org/our-work/policy-agenda/defense-acquisition-new.html) ([A] recent effort counted ... some 262 relevant studies, reports, and publications ... developed and presented on this issue since the landmark Goldwater-Nichols legislation of 1986. ... [A]ll of them urged significant reform to the nation’s defense acquisition system. Looking even further back, ... the Hoover study of 1949, the Fitzhugh Commission of 1970, the DeLauer panel of 1978, and the Packard report of 1986 (which led to the Goldwater-Nichols reforms), all ... made similar pleas.)

It may be premature to conclude that major change has come to the major systems acquisition regime, despite the good intentions behind the Weapons Systems Acquisitions Reform Act (WSARA). *President Signs Weapon Systems Acquisition Reform Act*, 51 GC ¶ 184; *HASC Marks Up Weapons Acquisition Reform Act*, 51 GC ¶ 152; *House Budget Committee Reviews DOD Weapon System Procurement*, 51 GC ¶ 96; *SASC Considers*

*New Weapon Acquisition Bill*, 51 GC ¶ 80; *Systemic Problems Continue to Dog Weapons Acquisitions, GAO Says*, 51 GC ¶ 61; Vernon J. Edwards & Ralph C. Nash, *The Weapon Systems Acquisition Reform Act of 2009: An Empty Vessel*, 23 N&CR ¶ 38 (“Frustrated by program outcomes and its own impotence, and self-deluded or dishonest about its own contributions to the problems, Congress scans Government Accountability Office and agency Inspector General reports, holds hearings, pontificates, lectures, chastises, and then enacts legislation.”).

**C. Intriguing Anecdotes.** We hope that poignant lessons learned from prior programs are not ignored.

[T]he A-12 default termination provides a fascinating example of the exceedingly high risk that is imposed on a contractor that signs a fixed-price contract to develop a new weapon system.... Contractors should adopt the Nancy Reagan solution—just say no.

Ralph C. Nash, *Fixed-Price Research and Development Contracts: A Risk Too High*, 23 N&CR ¶ 39; *Report Parses Coast Guard’s Deepwater Acquisition For Lessons*, 51 GC ¶ 14 (Deepwater ... offered the Coast Guard a political opportunity to gain greater interoperability with the Navy while serving as a pilot for other programs. ... [A]fter a period of downsizing and retrenchment, the project offered the Coast Guard a chance to ‘serve as a model for engaging industry as a partner in lowering overall contracting costs by transferring more contract management responsibilities to the vendor.’ ... Deepwater ‘catapulted the Coast Guard to the forefront of contracting and systems engineering practice and ... exposed the Coast Guard ... to significant risk.’”); Trevor L. Brown, David M. Van Slyke & Matthew Potoski, *The Challenge of Contracting for Large Complex Projects: A Case Study of the Coast Guard’s Deepwater Program*, [www.businessof-government.org/pdfs/BrownReport.pdf](http://www.businessof-government.org/pdfs/BrownReport.pdf).

**D. OCI’s: Reversing the “Last Supper.”** We are not alone in wondering whether Northrop Grumman’s sale of TASC, a government consulting division, to comply with the WSARA’s new organizational conflict of interest (OCI) requirements is an isolated incident or a harbinger. Northrop CEO Ronald Sugar explained that the sale “reflects Northrop Grumman’s desire to align quickly” with the new WSARA OCI standards. DoD has until March 2010 to propose rules governing how contractors that provide advisory services and develop weapon systems should deal with such conflicts. See, generally, *Industry and Watchdog Organizations Comment on DOD OCI Requirements*, 51 GC ¶ 426; Ralph C. Nash, *Postscript(s) II and III: Organizational Conflicts of Interest*, 23 N&CR ¶¶ 65, 60 (“The ... statutes ... make no allowance for firewalls between a division of a company providing support services and a division producing products or performing contract work. They ... seem to assume that there should be an absolute ban on divisions of the same company performing these two types of effort. This will be the most difficult issue when the statutes are implemented.”). At a DoD public meeting to discuss OCIs, the Professional Services Council’s Alan Chvotkin, called for “a balanced approach that recognizes the symbiotic partnership that must exist for success.” We concur.

**VI. CONTINGENCY CONTRACTING: IRAQ, AFGHANISTAN, AND PRIVATE SECURITY**

The fundamental issue facing [DoD] “after more than eight years of war is that it still does not have a coherent system for addressing the urgent needs of operational commanders in the field....” The procurement system “simply is not agile enough to enable commanders to respond quickly, and in the most effective way possible, to the demands for countering” unanticipated battlefield developments such as the use of improvised explosive devices (IEDs). The enemy “employs easily obtainable, off-the-shelf technology to undermine the effectiveness of U.S. military operations....” “Yet DoD has made no permanent institutional changes in its acquisition, programmatic and budgetary systems to account for the growing sophistication and flexibility of the threat.”

Dov Zakheim, former defense undersecretary (comptroller), October 8, 2009 testimony before the House Armed Services Committee. *Defense Acquisition Reform Panel Acknowledges Success, Considers Rapid Acquisition*, 51 GC ¶ 392.

Three traits define post-9/11 war-time field contracts: they are located in Iraq (55% of overall); they are undertaken by the U.S. Army (70% of overall); and they are for providing logistics and infrastructure (69% of identified services). Since 2005 Afghanistan, which has a higher ratio of civilian spending, is receiving more dollars but even after three years of steady growth that theater only obtained 24% of 2008 field contracts. Policy changes [such as the recent legislative] mandate that core aspects of interrogation of the military’s prisoners be handled by government personnel, may decrease reliance on contractors in specific areas. However, the broader dependence on logistics contractors is unlikely to change absent a major reduction in demand for field services.

Gregory Sanders, *Current Issues: No. 17: Contracting for Operations in Iraq and Afghanistan* (11/05/2009), CSIS, Defense-Industrial Initiatives Group, [http://csis.org/files/publication/091105\\_DIIG\\_Current\\_Issues\\_n17.pdf](http://csis.org/files/publication/091105_DIIG_Current_Issues_n17.pdf).

The most intriguing question, at a macro level, is whether the Afghanistan experience will demonstrate that, institutionally, the government learned from, or simply repeated, its Iraq experience. See, generally, *State’s Reliance on Security Contractors Continues to Grow, GAO Says*, 51 GC ¶ 428; *DOD IG Focuses on Force Protection, Fuel Procurement in Contingency Operations*, 51 GC ¶ 427; *DOD IG Recommends Better Management of Commercial Vehicle Acquisitions in Iraq*, 51 GC ¶ 419; *Contracting Committee Mulls Federal Jurisdiction Over Foreign Contractors*, 51 GC ¶ 405; *CWC Revisits DCMA, DCAA And Contractor Business Systems*, 51 GC ¶ 399; *SIGIR Recommends Better DOD Management of Iraq Development Fund*, 51 GC ¶ 392; *DOD IG Finds LOGCAP Transition Planning Weaknesses*, 51 GC ¶ 344; *CWC Focuses on State Department Contractor Employee Misconduct*, 51 GC ¶ 328; *ABA Recommends Uniform PSC Rules*,

51 GC ¶ 314; *CWC Scrutinized Translation Contract*, 51 GC ¶ 299; *CWC Assesses Contractor Business Systems*, 51 GC ¶ 298; *New Rapid Response Acquisition Agency Needed*, *DSB Task Force Says*, 51 GC ¶ 246; *Army Contracts for NTVs Used in Afghanistan Need More Oversight*, 51 GC ¶ 215; *CWC Testifies on the Path Forward in Iraq, Afghanistan*, 51 GC ¶ 205; *House Bill to Reform PSC Oversight Introduced*, 51 GC ¶ 161; *LOG-CAP IV Still Faces Challenges*, *CWC Finds*, 51 GC ¶ 161; *DCMA Should Tighten CAS*, *FAR Controls for Iraq Reconstruction*, *IG Finds*, 51 GC ¶ 138; *Commission on Wartime Contracting Holds First Hearing*, 51 GC ¶ 41; Ralph C. Nash, *Postscript: Contractor's Tort Liability for Battlefield Conduct*, 23 N&CR ¶ 57.

**Incremental Progress: Transparency Into Contractor Fatalities and Injuries.** Last year, we expressed frustration that contractor fatalities (and injuries) remained generally outside the public's consciousness. We believe that, in a representative democracy, public awareness of the human cost of our nation's security and foreign policies is critical. We are encouraged that the government has begun to at least keep track. GAO's John Hutton explained: "Reliable, meaningful data on contractors and the services they provide are necessary to inform agency decisions on when and how to effectively use contractors, provide support services to contractors, and ensure that contractors are properly managed and overseen[.]" And, while we might be disappointed with the Synchronized Predeployment and Operational Tracker (SPOT) database concept and implementation, we commend the Labor Department for a giant step towards transparency. See, generally, [www.dol.gov/owcp/dlhwc/ladbareports.htm](http://www.dol.gov/owcp/dlhwc/ladbareports.htm). The Labor Department recently began 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. *Remember Them, Too: Don't Contractors Count When We Calculate the Costs of War?* WASHINGTON POST A21 (May 25, 2009); *DOD, State, USAID Need Timeframe for SPOT Database*, 51 GC ¶ 392; *Government Continues to Implement Contractor Database in Iraq, Afghanistan*, 51 GC ¶ 118 ("DOD has entered around 70 percent of its contractor population").

## VII. THE TOXIC ENVIRONMENT

Last year, we reprinted a seemingly incendiary quote suggesting that it had "become almost impossible to open a newspaper and not read of some well-connected and obscenely compensated contractor foisting a colossal botch on the taxpayer." Thomas Frank, *Government by Contractor Is a Disgrace*, WALL ST. J. (Nov. 25, 2008). We noted that this public perception is widely accepted and, in large part, seems to have been embraced by the incoming administration. We find this caricature not conducive to meaningful discourse, and we continue to wait for the administration to soften its stance. At a recent not-for-attribution discussion, a retired senior official noted that: "Contractor fraud, waste, and abuse is to the left what 'welfare queens' are to the right." That seems no less apt than Jack Gansler's popular new moniker for the current environment: the "Global War on Contractors."

## NOTES

A casual observer should be forgiven for concluding that procurement policy today is being driven primarily by the inspector general and audit community. *DPAPSS Addresses DCAA Criticism*, 51 GC ¶ 364; *Congress, GAO Call for Reform at DCAA*, 51 GC ¶ 333; *Industry Questions DCAA Approach to Audit of Compliance With Mandatory Disclosure Rule*, 51 GC ¶ 234; *Experts Tell House Subcommittee About Federal Contracting Challenges*, 51 GC ¶ 213 (Karen Manos noted that DCAA “has adopted aggressive new audit policies that are wreaking havoc on the Government procurement world.” DCAA has strayed from its primary mission, “and appears to be focusing its efforts on ‘systems’ audits that are time-consuming and disruptive and often have little if anything to do with actually protecting the Government against unallowable costs[.]”); *IGs Offer Suggestions For Increased Contractor Oversight*, 51 GC ¶ 145; *GAO Finds Weaknesses In DOD Professional and Management Support Contracts*, 51 GC ¶ 415; *Many Contractors Had Acceptable Ethics Programs Before New FAR Requirements, GAO Finds*, 51 GC ¶ 346; *Cutting Contracting Waste Would Save Tax Dollars, Obama Tells VFW*, 51 GC ¶ 308; Robert L. Vogel, *Feature Comment: The 2009 Amendments to the FCA*, 51 GC ¶ 342 (The Fraud Enforcement and Recovery Act of 2009 (FERA) “expanded the substantive liability provisions of the Act to cover situations that were not [previously] covered ... [and] expanded the Government’s ability to use powerful civil discovery devices, civil investigative demands (CIDs), before deciding whether to initiate a lawsuit under the FCA or to intervene in a qui tam lawsuit...”); Laura Laemmie-Weidenfeld & Michael Schaengold, *Feature Comment: The Impact of the Fraud Enforcement and Recovery Act of 2009 On the Civil False Claims Act*, 51 GC ¶ 224; *New Legislation Aims to Toughen FCA, Anti-Fraud Laws*, 51 GC ¶ 151; Steven L. Briggerman, *False Claims Act Amendments: A Major Expansion in the Scope of the Act*, 23 N&CR ¶ 58; *Agencies Face Challenges Implementing Recovery Act Provisions, IGS Say*, 51 GC ¶ 145; Ralph C. Nash, *Suspension and Debarment: Protecting the Government By Denying Due Process to Contractors*, 23 N&CR ¶ 36, discussing, Todd J. Canni, *Shoot First, Ask Questions Later: An Examination and Critique of Suspension and Debarment Practice Under the FAR, Including a Discussion of the Mandatory Disclosure Rule, the IBM Suspension, and Other Noteworthy Developments*, 38 PUB. CONT. L.J. 547 (2009); Steven L. Briggerman, *The Demise of Voluntary Government Contract Compliance and Disclosure Programs: The New Requirement*, 23 N&CR ¶ 11.

Particularly given the perceived failure of the free market in the financial and mortgage industries, contractors increasingly are vilified, and resources are shifted from pursuing value-based outcomes to creating compliance and risk avoidance regimes. That may be understandable, but, at a macro level, it is an inefficient over-reaction. The United States enjoys one of the world’s best public procurement regimes. Government customers enjoy excellent value for taxpayer money. Contractors provide extraordinary levels of support, particularly in extreme conditions such as in Iraq and Afghanistan.

Quite simply, there are significant costs associated with sophisticated rule-based procurement regimes, their resulting compliance programs, and the audit, oversight, and prosecutorial functions required to validate and sustain them. While a successful procurement regime depends upon high

standards of integrity and compliance, a pervasive “corruption control” focus not only stifles creativity and encourages mechanical rule adherence, but encourages timidity and risk-averse behavior. Steve Kelman hits close to the mark in fretting that public managers (or procurement professionals) over the next decade:

[r]ather than transforming, learning, and challenging themselves ... could be preoccupied with ‘ferreting’ out waste, fraud and abuse, ... ‘exposing mismanagement’, ... ‘complying with rules and procedures’ ... in a mode of ‘hunkering down’ and ‘keeping out of trouble[.]’

Donald Kettl & Steven Kelman, *Reflections on 21st Century Government Management*, IBM Center for the Business of Government, [www.businessofgovernment.org/pdfs/KettlKelmanReport.pdf](http://www.businessofgovernment.org/pdfs/KettlKelmanReport.pdf). That can’t be the procurement regime our government aspires to foster.

## **VIII. PROFESSIONALISM, ETHICS, AND COMMON SENSE**

We remain surprised, disappointed, and, ultimately flummoxed by the increasing message that government acquisition professionals have heard from their leadership and ethics advisors: specifically, that participation – and even membership – in relevant professional development organizations may run afoul of government ethics rules. This advice is not only wrong, but wrong-headed. And the timing – as the government attempts to recruit the next generation of acquisition professionals – could not be worse. Fortunately, the National Contract Management Association (NCMA) sought advice of the Office of Government Ethics (OGE) and DoD’s director of standards of conduct (SOCO). The result is an *Open Letter to Government Employees: Becoming Engaged with NCMA Enhances Professionalism and Mission Success* (November 7, 2009), available at [www.ncmahq.org/News/CMNewsDetail.cfm?ItemNumber=6293](http://www.ncmahq.org/News/CMNewsDetail.cfm?ItemNumber=6293). (“NCMA ... provide[s] a ... neutral environment where professionals from government and industry can come together to discuss, analyze, and advance the state of the contract management profession.”) Hopefully, this effort will remove doubt that government employees may (1) become members of NCMA; (2) attend and participate in educational NCMA conferences, workshops, or meetings; (3) participate in the management of NCMA at the local or national level; (4) present an educational briefing to an NCMA conference, workshop, or meeting, (5) “use ... government e-mail for simple communications ([although] not ... endorsement[s]) to forward announcements of NCMA educational events since such announcements serve the common interests of government acquisition professionals in a manner that is consistent with DOD Joint Ethics Regulation paragraph 3-208[.]” and (6) accept cash awards under awards programs administered by NCMA. Of course: “OGE went on to say that there may indeed be circumstances where it would be wise for individual employees to seek legal advice regarding unique circumstances applicable to their particular professional responsibilities.”