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Emerging Policy and Practice Issues

Steven L. Schooner

George Washington University Law School, sschooner@law.gwu.edu

David Berteau

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SESSION 9

EMERGING POLICY AND PRACTICE ISSUES

Steven L. Schooner

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

David J. Berteau

Director of the Defense-Industrial Initiatives Group
Center for Strategic and International Studies
Washington D.C.

I. THE POST-MILLENNIUM PROCUREMENT SPENDING BINGE IS OVER: WILL PROCUREMENT SPENDING PLATEAU OR DECLINE?

A. The New Economic Reality (Finally). Procurement spending decreased, significantly, last year.

B. Below \$500 Billion: The Decrease in Federal Procurement Spending is a Landmark Event. Regular attendees of this conference are familiar with this chapter's coverage of the post-millennium federal procurement spending trend. Last year's decrease marks the end of an era. The post-millennial binge is significant not only for its longevity but for its size. Keep in mind that, 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. After steady increases in the middle of the decade, we reached an unprecedented plateau, where federal procurement spending stabilized at just over \$540 billion for four fiscal years, from 2008 through 2011. We now know that, *in 2009, we experienced the first decrease* in federal procurement spending for well over a decade (but it took a number of years for the data to catch up). Then, in 2013, it appears we finally experienced the first dramatic decline in spending and a plunge below the (oh-so-dramatic) \$500 billion threshold that the government exceeded from 2008 through 2012.

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 were most dramatic from 2001 through 2008, typically running at more 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 – unfolded far more slowly than anyone expected. Indeed, the recently adjusted numbers paint a picture of extraordinary spending consistency – from 2008 through 2011 – that appears as quirky as it is accidental.

The chart below summarizes the empirical evidence that the procurement spending growth cycle finally has run its course. The \$500+ billion plateau represented the high end of a robust and sustained growth curve. Now, time will tell how far the reductions will go and whether they can be sustained. It will be fascinating to see how long it takes until the government again crosses the \$500 billion threshold.

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Federal Procurement Spending 2001-2013*			
Fiscal Year	Procurement Spending (in Billions of Dollars)	Percentage Increase or (Decrease†) From Previous Year	Percentage Increase in Consumer Price Index (CPI)
2013	\$463.4*	(12)	1.7
2012	\$520.9	(4)	3.0
2011	\$541.5	0	1.5
2010	\$541.5	0	2.7
2009	\$541.0	0	0.1
2008	\$542.1	14	4.1
2007	\$469.5	10	2.5
2006	\$432.0	10	3.4
2005	\$392.1	13	3.3
2004	\$346.3	9	1.9
2003	\$318.1	21	2.4
2002	\$263.4	18	1.6
2001	\$223.1		
*FY 2013 figures reflect only an estimate based upon preliminary reporting.			
† 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 and the Table Containing History of CPI-U U.S. All Items Indexes and Annual Percent Changes From 1913 to Present, U.S. Department of Labor, Bureau of Labor Statistics, available at <http://www.bls.gov/cpi/#tables>.

C. A Band Aid Is Better Than Chaos. The (dominant, inescapable) emerging issue, looking ahead, is that the government spent less money last year and, most likely, will continue to do so for the foreseeable future. Unfortunately, throughout 2013, far too much attention was consumed by political brinksmanship, budgetary chicanery, teetering on the edge of the so-called fiscal cliff, and sequestration threats, preparations, and aftermath. See *OMB Highlights Costs of Recent Federal Shutdown*, 55 GC ¶ 368; *GAO Reviews DOD's Approach to Sequestration Spending Cuts*, 55 GC ¶ 367; *Military Brass Warn of Sequestration's Impact on Readiness*, 55 GC ¶ 365; *CR Funding, Sequestration Threaten DOD Multiyear Procurements*, 55 GC ¶ 356; *CR Funding and Sequestration Threaten Military Acquisition, Panel Warns*, 55 GC ¶ 338; *DOD Coping With Continuing FY 2014 Budget Impasse*, 55 GC ¶ 320; *Limited Options for Contractors, Protestors if Federal Shutdown Continues*, 55 GC ¶ 312; *Military Leaders Outline Risks of Continuing Sequestration*, 55 GC ¶ 293; *Sequestration and Budget Cuts Severely Damaging Military Readiness, Hagel Tells Senate Committee*, 55 GC ¶ 225; *OMB Reports Provide Early Look At FY 2014 Sequestration Cuts*, 55 GC ¶ 128; *DOD Witnesses Discuss Sequestration Budget Cuts*, 55 GC ¶ 75; *President Issues Sequestration Order*, 55 GC ¶ 65; Elizabeth Ferrel et al., *Feature Comment: Looming Fiscal Crisis Increases Pressure for Another Round of Base Closures*, 55 GC ¶ 49; *DOD Prepares for Cuts, Leaders Want Permanent Sequestration Action*, 55 GC ¶ 12; *President Signs Fiscal Cliff Legislation, Postponing Sequestration*, 55 GC ¶ 11.

At least for now, there appears to be some amount of short-term budget stability. No doubt, there is significantly less money to go around, but we'll take certainty (even short-term certainty) over chaos for the foreseeable future.

D. The Chasm Between Contracts and Grants Begins to Shrink.

Plenty of contracting experts assert that, fundamentally, not much distinguishes a government contract from a federal grant. Despite all of the attention focused upon (and burdensome oversight associated with) government contracting, grant spending continues to outpace procurement spending. Consistent with the trend we've previously reported, grant spending exceeded procurement spending last year, as it has for *eleven of the last thirteen years*. We long expected that, eventually, the oversight and regulatory community would shift its focus from procurement to grants. And, if the government is serious about reducing its debts and its annual deficits, such a shift in emphasis seemed unavoidable.

Federal Procurement and Grant Spending 2001-2013*		
Fiscal Year	Procurement Spending (in Billions)	Grant Spending (in Billions)
2013	463.4*	\$524.3*
2012	\$520.9	\$539.5
2011	\$541.5	\$566.9
2010	\$541.5	\$614.3
2009	\$541.0	\$665.0
2008	\$542.1	\$419.7
2007	\$469.5	\$430.2
2006	\$432.0	\$490.0
2005	\$392.1	\$441.7
2004	\$346.3	\$450.1
2003	\$318.1	\$493.7
2002	\$263.4	\$406.3
2001	\$223.1	\$330.8

**FY 2013 figures reflect only an estimate based upon preliminary reporting.*

See Total Federal Spending, www.USASpending.gov.

This year, finally, the government announced a significant revamping of the regulatory regime surrounding grants. See *Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards*, 78 Fed. Reg. 78590 (Dec. 26, 2013) (amending and replacing 2 C.F.R. Chapter I, and Chapter II, Parts 200, 215, 220, 225, and 230), available at <http://www.gpo.gov/fdsys/pkg/FR-2013-12-26/pdf/2013-30465.pdf>. See also, the 35-minute webcast, *Improving Outcomes by Reducing Red Tape for Financial Assistance*, available at <https://cfo.gov/cofar/>. Weighing in at exactly 100 pages of (very) small print, this should provide significant employment opportunities for attorneys, compliance special-

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ists, and grants experts. To the extent that the new guidance “eliminate[s] numerous overlapping duplicative and conflicting provisions of guidance,” we applaud OMB.

Readers may be somewhat disoriented, however, by the seemingly contradictory goals of the regulatory initiative. The final guidance explains, on the one hand: “This reform ... will improve the integrity of the financial management and operation of Federal programs and strengthen accountability for Federal dollars by improving policies that protect against waste, fraud, and abuse.” Simultaneously, however, the government anticipates that “this reform will increase the impact and accessibility of programs by minimizing time spent complying with unnecessarily burdensome administrative requirements...” 78 Fed. Reg. 78590. The history of acquisition reform suggests that the government typically seeks *either* to increase accountability *or* increase efficiency. For example, cynics may also be intrigued to see the smooth transition, in the introductory passages, from provisions that “allow Federal agencies some additional flexibility to waive some requirements (... [and the] option to apply to OMB to waive requirements) that impede their capacity to achieve better outcomes” to touting that the “guidance will provide a backbone for sound financial management[.]” We remain skeptical that this regulatory initiative will simultaneously and seamlessly achieve both stated ends.

Consistent with DoD’s performance report (discussed below), it is encouraging to see that OMB’s initiative “includes provisions that focus on performance over compliance to provide accountability for Federal funds.” OMB included “more robust guidance to Federal agencies to measure performance in a way that will help ... improve program outcomes, share lessons learned, and spread the adoption of promising practices ... [and] provide recipients with clear performance goals, indicators, and milestones.”

Few stones appear unturned. The guidance addresses efficient use of Information Technology (IT) and shared services. Cost issues – policies on direct and indirect costs and other limitations on allowable costs – receive significant treatment. Acquisition experts who have experienced the seamless implementation and improvements associated with the Central Contractor Registry (CCR) will take comfort in learning that: “The final guidance includes provisions that set the stage for Federal agencies to manage Federal awards via standardized business process and use of consistently defined data elements.” The private sector may not be quite as convinced that “[t]his will reduce administrative burden on non-Federal entities[.]” Social policies (such as family-friendly policies) find a place in the regulatory regime as well. For example:

Provisions ... provide flexibilities that better allow non-Federal entities to ... allow their employees to balance their personal responsibilities while maintaining successful careers contributing to Federal awards.... These provisions allow for policies that ease dependent care costs when attending conferences [an issue which has, in the past, prevented] more women from maintaining careers in science.

Apparently, the scientific community's conferences have not been tainted, stigmatized, and disparaged as part of the otherwise government-wide Congressional crack-down on conferences and educational programming. Nonetheless, of course, oversight, accountability, and compliance feature prominently in the new regime.

The final guidance right-sizes the footprint of oversight and Single Audit requirements to strengthen oversight and focus audits where there is greatest risk of waste, fraud, and abuse of taxpayer dollars. It improves transparency and accountability by making single audit reports available to the public online, and encourages Federal agencies to take a more cooperative approach to audit resolution in order to more conclusively resolve underlying weaknesses in internal controls.

See also Chapter 12 (of these materials), Federally Supported Research & Development.

E. Correlating the Protest Trend? Consistent with the above-referenced plateau and reduction in federal procurement spending, it appears that, as 2013 concludes, the recent growth trend in GAO bid protests appears to have stalled (well below the all-time high seen in the early 1990's). See Chapter Six (of these materials), *Bid Protest Overview*, and *GAO Bid Protest Annual Report to Congress for Fiscal Year 2013*, GAO-14-276SP (indicating that the number of new protests declined by two percent in 2013), available at <http://www.gao.gov/products/GAO-14-276SP>. It is too early to tell if this is a blip in the trend line or a meaningful behavioral change. Also, based upon earlier research, we are not yet persuaded that the protest rate directly corresponds to the spending trend. Readers interested in these issues should also see the intriguing (and ongoing) cost-benefit research on bid protests that looks beyond the statistics posted annually by GAO. Daniel I. Gordon, *Bid Protests: The Costs Are Real, but the Benefits Outweigh Them*, 42, PUB. CONT. L. J. 489 (2013).

II. A NEW YEAR: A NEW OFPP ADMINISTRATOR?

By the time the Year in Review Conference convenes, it appears that Joe Jordan will have stepped down as Administrator for the Office of Federal Procurement Policy (OFPP). OMB informally summarized his tenure, noting that he was “a driving force behind administration procurement initiatives, including eliminating inefficiencies and buying smarter through strategic sourcing and shared services; improving contractor accountability and fighting waste, fraud, and abuse through the increased use of suspensions and debarments; stopping the excessive reimbursement for contractor executives; and making it easier for small businesses to contract with the federal government.” Jason Miller, *OFPP's Jordan leaving for the private sector*, (Dec. 20, 2013) (citing OMB Director Sylvia Burwell), available at <http://www.federalnewsradio.com/517/3529122/OFPPs-Jordan-leaving-for-the-private-sector>.

Jordan “will be joining FedBid as President of Public Sector ... [to] help grow and manage FedBid's Federal Buyer base, while driving additional growth in the State, Local and Education (SLED) sectors. Jordan

will also assist with the company's recent private sector launch, a move to open commercial businesses of all sizes to buy commodity goods and simple services in the online marketplace." FedBid Press Release, *FedBid Announces Hire of White House Procurement Policy Chief Joseph Jordan*, (Dec. 20, 2013), available at <http://finance.yahoo.com/news/fedbid-announces-hire-white-house-184600163.html>. Apparently, Lesley Field, the deputy administrator, will once again serve as acting administrator for an indefinite period.

III. DEFENSE TRENDS

A. Change at the Top. Deputy Secretary of Defense Ashton (Ash) B. Carter, formerly USD (AT&L), announced he would step down at the end of 2013. Many will remember Carter as the driving force behind the original Better Buying Power (BBP) initiative. See, e.g., <http://bbp.dau.mil/>. His parting gift appears to be an interim revised DOD 5000 series document, with a mandate that a revised document be prepared in 180 days. See http://www.dtic.mil/whs/directives/corres/pdf/500002_interim.pdf. USD(AT&L) Frank Kendall's summary of the document explains that it was intended to implement post-2008 statutes and regulations, integrate certain BPP initiatives (such as "should cost analysis") into the document, reinforce the importance and primacy of the program managers (PM's) and the program executive officers (PEO's), increase readability, and make the document more helpful to relevant acquisition professionals. USD(AT&L) Memorandum for the Acquisition Workforce, *The New Department of Defense Instruction 5000.02* (Dec. 02, 2013), http://www.acq.osd.mil/docs/2013_12_03%20Signed%20Kendall%20Distro%20Memo.pdf. See also, USD(AT&L) Memorandum, *Implementation Directive for Better Buying Power 2.0 - Achieving Greater Efficiency and Productivity in Defense Spending* (Apr. 24, 2013), <http://image.exct.net/lib/fefd167774640c/d/1/USD.ATL.BBP%202.0%20Implementation%20Directive%2024%20Apr%2013.pdf>.

We are heartened by the refinement of the message as BBP evolves. USD(AT&L) Kendall appears to have fundamentally changed the tone of BBP and, in so doing, increased the prospects for incremental improvement. Among other things, BBP 2.0 emphasized that:

- The first responsibility of the acquisition workforce is to think....
- [Q]ualified people are essential to successful outcomes[,] and professionalism ... drives results more than any policy change.
- [A]cquisition fundamentals work.... [B]asics would include ... effective incentives to industry[,] ... understanding and active management of technical risk[,] ... demonstrated progress before major commitments; ... and .. using the right contract type of the job.

B. Information Is Power: Watching the Trends. While the government dutifully plugs data into its mandatory databases, such as FPDS, we continue to be interested in analysis of more sophisticated data that

provides better, more accessible insights into how the federal government's procurement dollars are spent. A number of additional reports and studies build upon data we have previously reported. *See, e.g.,* David J. Berteau, Gregory Sanders, Jesse Ellman & Rhys McCormick, *U.S. Department of Defense Contract Spending and the Supporting Industrial Base, 2000– 2012*, A Report of the CSIS National Security Program on Industry and Resources (December 2013), available at http://csis.org/files/publication/131207_Sanders_DODContractSpending_Web.pdf. Highlights include:

- The overall DoD budget began to drop in 2011, but 2012 marked the third year of decline for DoD service contract obligations and the fourth year for all other contracts. This decline leaves contract obligations at 55 percent of total DoD outlays, well below the 62 percent share in 2000 and the 69 percent share in 2008. Nonetheless, in 2012 constant dollar terms, the \$361 billion spent on contracts in FY2012 exceeds the defense contract obligations from any year between 2000 and 2006.
- The changes over recent years have not been evenly distributed.
 - The Army's share of DoD contract obligations rose from 28 percent in 2000 to a peak of 40 percent in 2008, as Iraq and Afghanistan drove spending priorities. With the draw down, Army contract obligations declined at nearly three times the overall DoD rate, leaving the Army with a 30 percent share in 2012.
 - The Defense Logistics Agency (DLA) and the category of "Other DoD" components (which includes all contracting entities within DoD that are not covered by the other four component categories, such as the Missile Defense Agency (MDA), TRICARE, and US Transportation Command (US-TRANSCOM)) also rose and have retained a notably higher share of contract obligations even during drawdown.
 - The Navy's share of DoD obligations fell through 2005 and stayed somewhat steady, although 2012 saw a sharp (11 percent) decline from 2011.
 - The Air Force share grew by 5 percent from 2011 to 2012, after losing share over the previous 10 years.
- Product purchasing rose from 46 percent in 2000 to a high of 51 percent in 2008, before falling back to 45 percent by 2010.
- The share of defense contract obligations awarded for Services hovered between 39 percent and 42 percent between 2000 and 2008, but rose to a high of 44 percent in 2010.
 - R&D, which accounted for a high of 15 percent of defense contract obligations in 2002, has declined steadily since, to a low of 10 percent in 2011 and 2012.
- The share of defense contract obligations awarded without competition rose from 38 percent in 2000 to 42 percent in 2012. The share of defense contract obligations awarded after competition with two offers has declined steadily, from 25 percent in 2000 to

14 percent in 2012, due in large part to an increase in the number of competitive offers. Overall, the share of contract obligations awarded after competition with three or more offers has risen from 25 percent in 2000 to 34 percent in 2012, with the vast majority of that rise attributable to cases with five or more offers.

- Between 2011 and 2012, contract obligations awarded without competition declined more slowly than overall defense (-2 percent), rising as a share of overall defense contract obligations from 41 percent to 42 percent. In that year, the share of competed contract dollars awarded after a single offer declined sharply (-22 percent), in line with current policy guidance, falling from 10 percent of contract obligations to 8 percent. Both competition with two offers (-9 percent) and competition with three or four offers (-14 percent) declined more rapidly than did overall defense. Competition with five or more offers actually saw growth (5 percent) even as overall defense declined, rising as a share of overall defense from 19 percent to 21 percent.
- The rise of indefinite delivery contracts coincided with a move to larger contracts. The share of defense contract obligations awarded in contracts of less than \$1 million has gradually declined, from 20 percent in 2000 to 14 percent in 2012. The share of obligations awarded for contracts between \$1 million and \$25 million declined from 37 percent in 2000 to 31 percent in 2008, and fluctuated between 32 percent and 34 percent since then. The share awarded for contracts between \$25 million and \$500 million have fluctuated between 30 percent and 35 percent throughout the period. Contracts of \$500 million and greater grew from an 11 percent share in 2000 to a 22 percent share of contract obligations by 2012, even seeing slight growth (3 percent) in real terms from 2011 to 2012, despite declines in overall DoD contract obligations.
- When comparing the top 20 vendors in 2002 and 2012, there has been a moderate broadening of the defense industrial base. In 2002, the top 5 defense vendors accounted for 34 percent of total defense contract obligations versus 27 percent in 2012. Similarly, the top 20 accounted for 47 percent of total defense contract obligations in 2002, compared to 43 percent in 2012.
 - The top 5 defense vendors remained unchanged between 2002 and 2012, although their order has shifted.
 - The most notable additions to the top 20 in 2012 were the three fuel supply-related vendors: Royal Dutch Shell, Supreme Group, and BP.

C. The Defense Department Considers Metrics. As much as we are intrigued by this type of number-crunching, arguably, the most thought-provoking reading of the year comes out of DoD's performance, outcome, or metrics initiative. Plenty of readers will be disappointed with the often-vanilla presentation. But the report is frank, well organized, clear (and surprisingly free of obfuscation), and chock-full of intriguing observations and conclusions. Some highlights include:

- Analysis of historical Major Defense Acquisition Program (MDAP) contracts revealed no statistical correlation between the use of contract type (e.g., cost-plus and fixed-price types) and lower cost or schedule growth. In other words, ***the type of contract used in each case did not result in a statistically significant difference in cost growth.***
- The Army has both the largest number of canceled programs and the largest percentage of sunk RDT&E costs.... The majority of the Army's sunk funding ... was due to the cancellation of the Future Combat System (FCS); however, every year from 1996 to 2010, the Army spent more than \$1 billion annually on programs that ultimately were canceled.
- Undefined contract actions (UCAs) had a measurable increase on total contract cost growth and also on cycle time in development.
- The time required to acquire next-generation capabilities is often longer than the strategic threat and technology cycles these capabilities are meant to address.
- Acquisition is about risk management—not certainties. ... [I]t is important to remember that developing technologically superior military capability is not a risk-free endeavor...
- Intelligent acquisition is key.
- Programs with bad starts often continue to have problems.
- Performance relative to original baselines does not guarantee lowest end cost to the taxpayers.
- Performance across all MDAPs at the program level is highly skewed, with a few outliers with extremely high cost growth, a large population with moderate cost growth, and a small number with negative or negligible cost growth.
- Affordability will be a major challenge in the next few years.

AT&L Issues First Defense Acquisition System Performance Report, 55 GC ¶ 214, available at http://bbp.dau.mil/doc/Report_on_the_Performance_of_the_Def_Acq_System.pdf.

It is very early in the process, and it is difficult to anticipate the depth of DoD's commitment to this initiative. But we applaud DoD's effort to evolve past a fascination with our longstanding, generally unhelpful, and popular-primarily-because-they're-easy-to-measure metrics (price, schedule, performance specifications) associated with the award – rather than the outcome – of the contract. Specifically, increased attention to quantifying *value for money spent* and *customer satisfaction obtained* would be a step in the right direction.

D. Difficult Times Require Critical Thinking. We applaud BAE's CEO, Linda Hudson, for organizing and giving voice to at least some of the private sector's anxiety about its business partner. Among other things, she articulated that:

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[L]ike others doing business with the Government, we have been blown by budget winds into three fiscal cliffs in barely more than a year and a half...

[There] is a howling gale of contradictions between the nation's long-term fiscal direction and the realities of an increasingly unstable and dangerous world....

[T]he [Pentagon's] procurement system is not just failing to partner with industry. Often, it is downright hostile to us....

We are in danger of being swept over by a rising, increasingly expensive and exhausting wave of regulations and disclosure requirements unrelated to our mission.

Linda Hudson, *Feature Comment: The Perfect Storm for Defense*, 55 GC ¶ 119. We wish that more business executives would be as frank and clear. *See also*, Loren Thompson, *Five Reasons Defense Companies Need to Start Getting Out of Defense*, FORBES (Sept. 23, 2013) (discussing changes in threats, politics, budgets, economics, and opinions), available at <http://www.forbes.com/sites/lorenthompson/2013/09/23/five-reasons-defense-companies-need-to-start-getting-out-of-defense/>. And, of course, the House Armed Services Committee recently launched “a long-term effort to reform the Department of Defense including a hard look at acquisition” with two October hearings. *See, e.g.*, <http://armedservices.house.gov/index.cfm/durable-defense-reform>.

IV. THE ACQUISITION WORKFORCE: ANOTHER LOST YEAR

There is little point in lamenting the derailing of any serious effort to restock the depleted and graying acquisition workforce. Moreover, in 2013, rather than commit additional funds or energy to training, this year's focus was on reducing duplicative (or, arguably, increasing efficiency) expenditures on training. *See generally*, Joseph G. Jordan, Memorandum for Chief Acquisition Officers and Senior Procurement Executives, *Increasing Efficiencies in the Training, Development, and Management of the Acquisition Workforce* (Sept. 3, 2013) (tasking the Federal Acquisition Institute (FAI) to lead acquisition workforce initiatives that will: (1) reduce duplication of workforce management information systems, and (2) leverage scarce training resources across agencies), available at <http://www.whitehouse.gov/sites/default/files/omb/procurement/memo/increasing-efficiencies-in-the-training-development-and-management-of-the-acquisition-workforce.pdf>. *See also*, *IGs Challenged to Maintain Budgets, Retain Skilled Workforce, Survey Shows*, 55 GC ¶ 296; *State Has Not Accomplished Key Goals of Procurement Services*, 55 GC ¶ 190 (a significant chunk of the one-percent fee subsidized other activities that operated at a loss rather than the three acquisition-related goals: performance measurement, customer service, and continuous improvement); *As DOD Workforce Shrinks, Effort to Determine Appropriate Mix Lags*, GAO Reports, 55 GC ¶ 182 (which, among other things, pounds the drum for more data on contractor FTE's); *Tricare Acquisition Workforce Needs Better Oversight, DOD IG Says*, 55 GC ¶ 146; *Agencies Have Limited Insight Into Costs, Benefits of Acquisition Workforce Training*, 55 GC ¶ 127, www.gao.gov/assets/660/653437.

pdfwww.gao.gov/assets/660/653437.pdf (“The shortage of trained acquisition personnel hinders agencies from managing and overseeing acquisition programs and contracts that have become more expensive and increasingly complex[.]” Nonetheless, “[12] of the 23 agencies ‘did not have insight into whether their acquisition workforce training investment is improving individual skills or agency performance,’ including seven that did not have any metrics.”); *DOT Can Improve Acquisition Workforce Data Collection, Management*, 55 GC ¶ 31; *Acquisition Workforce in “Unabated Crisis,” Survey Says*, 55 GC ¶ 5. It is difficult to be optimistic about major investment in the acquisition workforce in light of the current economic realities. But we join those who identify inadequacy of the government’s approach to investing in its acquisition workforce:

It is time to fundamentally rethink and revise current human capital strategies, including planning, development, performance management, and, in some cases, structures. It must be recognized that whatever has been done for the last two decades simply is not delivering the desired results, and future-focused human capital initiatives must not be based on present or past presumptions. ...

Collaboration must become a central component of government operations, internally and externally. ... [A]ll participants, inside and outside of government, must be working toward and evaluated against a set of common performance and mission measures.

Professional Services Council, Report of the 2013 PSC Leadership Commission, *From Crisis to Opportunity Creating a New Era of Government Efficiency, Innovation and Performance* (2013), available at http://www.pscouncil.org/c/p/2013_Commission_Report/The_2013_PSC_Leadership_Commission_Report.aspx.

V. CYBERSECURITY: THE EVOLVING WILD CARD

In November, after a lengthy process, DOD promulgated the new cybersecurity rule. See 78 Fed. Reg. 69273 (Nov. 18, 2013) (“This final rule addresses safeguarding requirements that cover only unclassified controlled technical information and reporting the compromise of unclassified controlled technical information.”). See, e.g., Andy Irwin et al., *Feature Comment: DOD Amends DFARS To Bolster Cybersecurity of Unclassified Contractor Systems, Answering Some Questions and Raising Others*, 55 GC ¶ 383:

Contractors “subject to the final rule (as implemented by a contract clause) will have to observe three requirements: (1) adopting and implementing certain NIST IT security standards; (2) mandatory reporting of cybersecurity incidents to DOD; and (3) flowing these requirements to subcontractors, and perhaps reporting a subcontractor’s cyber incidents to DOD....

The rule ... requires contractors that enter into a Government contract containing the new cybersecurity clause to implement

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certain NIST information systems security procedures in their project, enterprise or company-wide unclassified IT system. ... [T]he standards specified by the rule cover 14 areas of information security ... [including] access control, awareness and training, accountability, configuration management, contingency planning, identification and authentication, incident response, maintenance, media protection, physical and environmental protection, program management, risk assessment, system and communications protection, and system and information integrity....

[T]he new rule also contains a reporting requirement. Contractors subject to the rule must report within 72 hours to DOD, via an internet portal, if there is a cyber incident that affects covered controlled technical information. The exact scope of this reporting requirement is not clear....

See also, Brian E. Finch & Justin A. Chiarodo, Feature Comment: 10 Things Government Contractors Should Know About Cybersecurity Compliance, 55 GC ¶ 364, which provide a helpful outline rubric:

1. Cyber threats are as great as ever. ... The Defense Science Board recently documented a number of breached systems, and the list is breathtaking.... The Edward Snowden/National Security Agency scandal is perhaps the best example.... [T]hese attacks show no signs of slowing down, and, in fact, they are likely to get worse.... Government contractors are particularly vulnerable in this environment, given the types of information they have access to and maintain.
2. The Federal Information Security Management Act of 2002 (FISMA), 44 USCA § 3544, remains the key statute underlying federal cybersecurity regulations for Government contractors.
3. FISMA is only one of many laws that impact cybersecurity compliance.... A June 2013 report by the Congressional Research Service identified more than 50 statutes addressing ... cybersecurity, either directly or indirectly, and more legislation in the pipeline. See “Federal Laws Relating to Cybersecurity: Overview and Discussion of Proposed Revisions” (CRS 7-5700)....
4. Efforts to standardize approaches in federal procurement remain works in progress.
5. What remains for contractors is a piecemeal approach.
6. Read your solicitations and contracts. ... Government contractors should carefully review solicitations on which they bid and contracts that they are awarded.
7. Know that fingers will likely point to you when it comes to accountability.
8. Be mindful of the risks. ... [Among other things,] ensure that regulatory requirements are properly included and that risk

and indemnity issues related to cybersecurity are appropriately addressed[.]

9. Consider risk transfer.... [C]ontractors should plan as though cybersecurity will be at their expense....

10. Develop – and review – your cybersecurity plan.... [F]ormalize and centralize cybersecurity oversight, with a plan addressing regulatory compliance, crisis management, investigations, reporting, risk assessment, technology, contract management and public relations....

See also, East Asia Accounts for Half of Unauthorized Attempts to Access Classified Technologies, DSS Reports, 55 GC ¶ 234; ABA Section Recommends Flexible Cybersecurity Contracting Standards, 55 GC ¶ 210; David Z. Bodenheimer & Elliott R. Golding, Feature Comment: Regulating Cybersecurity On a Piecemeal Basis—Can the Executive Order Harmonize the Cyber Law Patchwork?, 55 GC ¶ 198; Industry Group Suggests Consistent Approach in Developing Cybersecurity Measures, 55 GC ¶ 124; Mary Beth Bosco & Norma Krayem, Feature Comment: Cybersecurity 101 For Government Contractors, 55 GC ¶ 100.

VI. NOW IS THE WINTER OF OUR DISCONTENT: LESS SPENDING, MORE CRITIQUE AND CRITICISM (AND ALAS, PLENTIFUL FUEL FOR THE FIRE)

Granted, it's no wonder that government procurement, contractors, or doing business with the government failed to gain ground in the court of public opinion last year.

- Allegations and finger-pointing highlight contractor involvement in the poorly managed implementation of the Affordable Care Act regime. *See, e.g., Jerry Markon & Alice Crites, HealthCare.gov contract: Politics not a factor, but neither were firm's ties to failed projects, WASH. POST (Dec. 22, 2013)* (“CGI Federal ... won the job because of what federal officials deemed a ‘technically superior’ proposal.... [But n]ot considered in the 2011 selection process was the history of numerous executives ..., who had come from another company that had mishandled at least 20 other government information technology projects more than a decade ago.”), *available at http://www.washingtonpost.com/politics/healthcaregov-contract-politics-not-a-factor-but-neither-were-firms-ties-to-failed-projects/2013/12/22/61728fca-6753-11e3-a0b9-249bbb34602c_story.html?hpid=z1*; Lydia Depillis, *Meet CGI Federal, the company behind the botched launch of HealthCare.gov*, WONKBLOG (Oct. 16, 2013) (“CGI Federal is a relative newbie on the U.S. government IT contracting scene. It bought ... American Management Systems in 2004, but only started ramping up business after 2008, and accelerated in 2010 with the \$1.1 billion acquisition of ... IT contractor Stanley Inc.”), *available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/10/16/meet-cgi-federal-the-company-behind-the-botched-launch-of-healthcare-gov/>*. *See also, Robert Pear Sharon, From the Start, Signs of Trouble at Health Portal, NY TIMES (Oct. 12, 2013), available at <http://www.nytimes.com/2013/10/13/us/politics/from-the-start-signs-of-trouble-at-health>*

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portal.html?pagewanted=all&smid=tw-share&_r=1, noting, among other things:

[T]he government was so slow in issuing specifications that the firm did not start writing software code until this spring.... As late as the last week of September, officials were still changing features of the Web site ... and debating whether consumers should be required to register and create password-protected accounts before they could shop for health plans. ... One highly unusual decision... proved critical: the Medicare and Medicaid agency assumed the role of project quarterback, responsible for making sure each separately designed database and piece of software worked with the others, instead of assigning that task to a lead contractor. Some people ... seriously doubted that the agency had the in-house capability to handle such a mammoth technical task of software engineering while simultaneously supervising 55 contractors. An internal ... progress report ... identified a lack of employees 'to manage the multiple activities and contractors happening concurrently' as a 'major risk' to the whole project.

- Bubbling beneath the surface of the story involving 2013's dramatic security breach is the issue of limiting or better controlling contractor access to classified information. Tracy Connor, *Growth of intel outsourcing no secret, but now Congress taking notice*, NBC NEWS (June 15, 2013) ("A growing chorus on Capitol Hill is questioning whether U.S. intelligence agencies are farming out too much work to private contractors like Edward Snowden, the Booz Allen Hamilton systems analyst who has claimed credit leaking classified details about surveillance programs."), available at http://usnews.nbcnews.com/_news/2013/06/15/18940842-growth-of-intel-outsourcing-no-secret-but-now-congress-taking-notice?lite. ; Jordan Weissmann, *Edward Snowden: Exhibit A for How Washington Blows Money on Contractors*, ATLANTIC (June 10, 2013) ("maybe Snowden really was just worth his \$200,000 salary – he did have a security clearance ... and had worked for the CIA and for Dell as an NSA contractor. Or maybe the government contracting just lends itself to absurd paycales."), available at <http://www.theatlantic.com/business/archive/2013/06/edward-snowden-exhibit-a-for-how-washington-blows-money-on-contractors/276714/>; Robert O'Harrow Jr., *The outsourcing of U.S. intelligence raises risks among the benefits*, WASH. POST (June 9, 2013) ("Edward Snowden, the 29-year-old ... source ... has worked at Booz Allen Hamilton and other intelligence contractors. Before entering the private sector, he says he held a series of technical jobs at the Central Intelligence Agency."), available at http://www.washingtonpost.com/world/national-security/the-outsourcing-of-us-intelligence-raises-risks-among-the-benefits/2013/06/09/eba2d314-d14c-11e2-9f1a-1a7cdee20287_story.html?hpid=z1. On a related note, see Sean Reilly, *Background check contractor at risk of suspension, experts say: USIS faces fraud claims in lawsuit*, FEDERAL TIMES (Nov. 3, 2013) (discussing False Claims Act lawsuit filed against USIS, which "performs almost two-thirds of the background checks for security clearances that are extended to millions of federal employees and contractors.... The ... [relator] alleges that USIS system-

atically submitted background investigations ... that were incomplete or not properly reviewed...”), available at <http://www.federaltimes.com/article/20131103/PERSONNEL01/311030001/Background-check-contractor-risk-suspension-experts-say>.

- Only in a busy year like 2013, could “Fat Leonard,” Glenn Marine, and the Navy’s sensational contracting scandal rank third (at best) in terms of media interest. Christopher Drew & Danielle Ivory, *In Navy Billing Scandal, a Third Company Puts an Executive on Leave*, NY TIMES (Dec. 19, 2013) (“Multinational Logistic Services, known as MLS, is the Navy’s largest ship supply company, with \$346 million in contracts for ports in Africa, the Mediterranean, Central America and the Pacific.”) available at http://www.nytimes.com/2013/12/20/us/in-navy-billing-scandal-a-third-company-puts-an-executive-on-leave.html?smid=fb-share&_r=0; Christopher Drew & Danielle Ivory, *Navy Was Warned of Contractor at Center of Bribery Inquiry*, NY TIMES (Nov. 20, 2013) (“Emails obtained by criminal investigators show that from 2009 to early 2011, several ship crews and contracting officials filed complaints about ... ‘gold-plated’ fees for fuel, port security and other services.”) available at <http://www.nytimes.com/2013/11/21/us/navy-was-warned-of-contractor-in-bribery-scandal.html>; Craig Whitlock, *Two admirals face probe in Navy bribery scheme*, WASH. POST (Nov. 8, 2013) (“Vice Adm. Ted ‘Twig’ Branch, the service’s top intelligence officer, and Rear Adm. Bruce F. Loveless, the Navy’s director of intelligence operations, were placed on leave ... and their access to classified material was suspended[.]”), available at http://www.washingtonpost.com/world/national-security/two-admirals-face-probe-in-navy-bribery-scheme/2013/11/08/d2dc063a-48d8-11e3-bf0c-cebf37c6f484_story.html; Craig Whitlock, *Senior officer, NCIS agent are among those arrested in Navy bribery scandal*, WASH. POST (Oct. 19, 2013) (Glen Marine “targeted Navy personnel serving in Asia and plied them with prostitutes, cash, luxury hotel rooms, plane tickets and ... tickets to a Lady Gaga concert in Thailand.”), available at http://www.washingtonpost.com/world/national-security/senior-officer-ncis-agent-are-among-those-arrested-in-navy-bribery-scandal/2013/10/19/e9a1e9b6-3753-11e3-bda2-e637e3241dc8_story.html. See also, *Inchcape Shipping Services Holding, Ltd.*, B-402687.10, B-402687.11 (Dec 9, 2013) (protest of post-suspension procurements), <http://www.gao.gov/assets/660/659645.pdf>.

- We are somewhat fatigued by the ever-increasing Congressional drumbeat demanding automatic suspension and debarment of contractors or, in the alternative, a government-wide commitment to refusing to do business with a larger slice of the private sector. The clear message from Congress is that it wants more heads to roll – *scalp counting matters!* – and, that cannot be good news for contractors or government customers in the long term. *Industry, Watchdog Groups Take Opposing Tack on Proposed SUSPEND Act*, 55 GC ¶ 358; *House Oversight Committee Passes Suspension and Debarment Overhaul*, 55 GC ¶ 351; Todd Canni & Jason Carey, *Feature Comment: Contractors Beware – COFC Endorses Clandestine Debarment System*, 55 GC ¶ 251; *Persistent S&D Weaknesses Remain, Witnesses Tell Committee*, 55 GC ¶ 188; *House Oversight Chair Ponders Centralizing Suspension and Debarment Functions*, 55 GC ¶ 54.

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- Lenny Bernstein, *Workers turned EPA warehouse in Landover into personal rec rooms, audit finds*, WASH. POST (June 5, 2013), available at http://www.washingtonpost.com/national/health-science/workers-turned-epa-warehouse-in-landover-into-personal-rec-rooms-audit-finds/2013/06/05/ed5514fc-ce17-11e2-8845-d970ccb04497_story.html. “In [a Landover EPA warehouse, employees of Apex Logistics] ... created personal rec rooms with televisions, radios, chairs and couches ... photos, calendars and pinups ... books, magazines and videos ... a refrigerator and ... a microwave ... [and] a 30-by-45-foot athletic center, cobbled together from ‘surplus’ EPA gym equipment and ... a music system provided via ‘other agency inventory items....”

- Department of Justice, *Press Release, Security Contractors Plead Guilty in Virginia to Illegally Obtaining \$31 Million from Contracts Intended for Disadvantaged Small Businesses*, (Mar 18, 2013), available at <http://www.justice.gov/opa/pr/2013/March/13-crm-323.html>. Among other things:

Hedman admitted that in 2003 he created a shell company... to ensure he could continue to gain access to 8(a) contracting preferences.... Hedman selected an employee, Dawn Hamilton ... to serve as a figurehead owner based on her Portuguese heritage and history of social disadvantage, when in reality the new company would be managed by Hedman.... [T]hey falsely claimed that Hamilton formed and founded the company and that she was the only member of the company’s management. They continued to mislead the SBA through 2012, even lying to the SBA to overcome a protest filed by another company accusing Hedman’s former company and the shell company of being inappropriately affiliated.

- Stephanie Mencimer, *The War of Rape: What happened to Jamie Leigh Jones in Iraq?*, *Washington Monthly* (November/December 2013), available at http://www.washingtonmonthly.com/magazine/november_december_2013/features/the_war_of_rape047355.php?page=all. In 2007, Jamie Leigh Jones appeared on television and before Congress detailing how, as an inexperienced 20-year-old, she had been raped in the Green Zone while working as a Kellogg, Brown & Root (KBR) contractor. After a lengthy trial, the jury awarded her no damages against KBR, and the judge subsequently ordered Jones to pay KBR \$145,000 for its legal costs. Among other things, the author details that Jones: (1) had an extensive history of depression, hypochondria, and/or psychosomatic symptoms; and (2) that, at “Camp Hope Army hospital in 2005, it was the fourth time in five years that she had told a medical professional that she’d been raped[.]” The author bemoans that: “The media, which had played such a major role in publicizing Jones’s story, all but ignored the grand finale. ... The verdict represented an epic media failure, and one that could have been avoided if reporters ... had heeded some of the early warning signs....”

- We would be remiss if – unlike the nation’s media sources – we failed to report that, as of the close of 2013, more than 3,000 contractor personnel have died supporting the U.S. Government’s efforts in Iraq and

Afghanistan (and the total exceeds 3,150 once deaths in Kuwait are included). In addition, more than 80,000 contractor personnel have suffered injuries. *Defense Base Act Case Summary by Nation*, <http://www.dol.gov/owcp/dlhwc/dbaallnation.htm>. See also, Jabeen Bhatti, *Interpreters wait for promise of life in USA*, USA TODAY (Oct. 19, 2013) (“The United States has long been aware of the danger [interpreters] put themselves in by helping the Americans. So it created a special visa for them to come to work and live in the USA once their assignment was up.... [Yet, with these programs expired (or expiring),] of the 25,000 visas allocated by law to Iraqis ..., fewer than 6,000 have been issued since 2008 ... [and of] the 8,750 available for Afghans, fewer than 1,200 have been granted.”), available at <http://www.usatoday.com/story/news/world/2013/10/19/afghanistan-iraq-interpreters/2958153/>.

- More than two decades of litigation (in the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit, and the U.S. Supreme Court), cumulative fatigue, or economic efficiency, appear to have produced a settlement in the A-12 litigation (originally filed in June of 1991, following the January 1991 contract termination). Conceptually, pending Congressional approval, Boeing (formerly McDonnell Douglas) and General Dynamics each would provide the Navy the equivalent of \$198 million in design, production, and delivery costs on existing programs (for a total of just under \$400 million). David Alexander, *After two decades, U.S. Navy near deal to settle ‘Flying Dorito’ suit*, REUTERS (Aug. 2, 2013), available at <http://www.reuters.com/article/2013/08/02/usa-defense-flyingdorito-idUSL1N0G31T620130802>; Jen DiMascio, *Administration Seeks Authority For U.S. Navy To Receive A-12 Settlement*, AVIATION WEEK (May 21, 2013), available at http://www.aviationweek.com/Article.aspx?id=/article-xml/awx_05_21_2013_p0-580920.xml.

- David Francis, *Pentagon’s Failure to Audit Contracts Wastes Billions*, FISCAL TIMES (May 21, 2013) (“To put the 24,000-case logjam in context, the agency conducted 7,390 audits in 2011 (the last year data is available). Using that rate, DCAA would not clear its current backlog until at least 2016. That’s not counting any new cases that the agency must audit.”), available at: <http://www.thefiscaltimes.com/Articles/2013/05/21/Pentagons-Failure-to-Audit-Contracts-Wastes-Billions#page1>.

Lest we end on an optimistic note, 2013 offered plentiful critique – from GAO, the Inspectors General, and the oversight community – across a broad range of issues. See also, among others, *Commerce Needs to Improve T&M/LH Contract Award, Administration*, 55 GC ¶ 373; *Navy Needs Updated Policy to Address Shipbuilding Deficiencies, GAO Says*, 55 GC ¶ 375; *IG Questions NASA’s Award-Fee Contract Use*, 55 GC ¶ 374; *IG Catalogs SBA’s Most Serious Management Challenges*, 55 GC ¶ 359; *FPS Contract Guard Program Oversight Continues to Fall Short, GAO Finds*, 55 GC ¶ 348; *CRS Examines Improper Payment Recovery Efforts*, 55 GC ¶ 340; *IG Questions DCAA Audit of Contractor Business System*, 55 GC ¶ 339; *VA Needs Better Oversight or Training Conference Spending, IG Reports*, 55 GC ¶ 323; *DOE IG Finds Poor Financial Management in Alternative Energy Program*, 55 GC ¶ 322; *DOD Insourcing Cost Comparison Guidance Does Not Include All Costs, GAO Finds*, 55 GC ¶ 314; *Postal Service*

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Noncompetitive Purchases Lack Documentation, IG Reports, 55 GC ¶ 313; DARPA Did Not Consistently Follow Requirements for BAA Contracts, IG Says, 55 GC ¶ 287; National Lab Needs to Improve T&M Subcontract Market Research, Price Analysis, 55 GC ¶ 262; Army Not Complying With FAR Cost-Reimbursement Rules, IG Finds, 55 GC ¶ 278; Navy Not Following Software Licensing Best Practices, 55 GC ¶ 260; DOT Still Using Cost-Reimbursement Contracts Despite FAR Requirements, IG Says, 55 GC ¶ 254; DOT SmartPay Card Controls Not Always Followed, IG Says, 55 GC ¶ 243; DOD Efforts to Improve Service Contracts Lack Assessment Processes, GAO Reports, 55 GC ¶ 215; IRS Purchase Card Program Needs Stronger Internal Controls, Tax IG Says, 55 GC ¶ 207; FAS Managers Interfering With COs' Contract Administration, GSA IG Finds, 55 GC ¶ 179; DOD Continues to Struggle to Modernize Business Systems, 55 GC ¶ 172; Commercial Procurement Practices Could Improve Services Contracting GAO Says, 55 GC ¶ 169; IG Finds IRS Did Not Comply With FAR Revisions Addressing Cost-Reimbursement Contracts, 55 GC ¶ 155; GAO Finds VA Construction Delays, Cost Overruns, 55 GC ¶ 153; MDA Acquisition Would Benefit from Best Practices, GAO Says, 55 GC ¶ 145; Poor EPA Superfund Site Planning Delayed Toxicity Assessment, 55 GC ¶ 139; NSF Early Acquisition Planning Needs Additional Guidance, GAO Says, 55 GC ¶ 111; DOD Major IT Acquisitions Fell Short of Targets, GAO Finds, 55 GC ¶ 110; DOD Competition Rate Continues to Drop, GAO Finds, 55 GC ¶ 109 (noting a five-year decline from 62.6 to 57.1 percent, and recognizing the impact of budgetary uncertainty on acquisition planning); IG Finds DOE Approved Above Market Rate Contractor Executive Salaries, 55 GC ¶ 102; IG Finds Flaws With Air Force Use, Documentation of Cost-Reimbursable Contracts, 55 GC ¶ 101; MAS Pre-Award Audits Raise Several Concerns, GSA IG Reports, 55 GC ¶ 86; Most DCAA FY 2010 Audits in IG's Sample Lacked Professional Judgment, 55 GC ¶ 84 (although no effort has been made by the IGs to quantify any potential impact of DCAA's shortcomings on contractors or business transactions); CSB Finds Acquisition Regulations For Fireworks Disposal Fall Short, 55 GC ¶ 77 (demonstrating that no issue is too arcane to mandate government-wide policy guidance in the FAR, CSB recommended increased FAR responsibility standards for prospective contractors and subcontractors handling explosive and hazardous materials); Nonprofits Decry Wasteful Government Programs, 55 GC ¶ 43.

Fortunately, there will plenty for us to discuss in 2014.