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EMERGING POLICY AND PRACTICE ISSUES

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I. A HAZY PICTURE ON PROCUREMENT SPENDING: AT THE BOTTOM (YET)?

A. The Decrease Slows. Although federal procurement spending decreased again last year, the amount of the decrease, less than two percent – felt much less painful than the more daunting drops in FY 2014 (closer to four percent) and FY 2013 (that was the big drop, at just over ten percent). Of course, the cumulative decrease is far more acute in certain sectors, but the big picture was less daunting than it's been in the prior three years. If the downward trend feels increasingly familiar, it should, with this being the seventh year of the federal procurement spending decline following the weirdly stable 2008-2011 plateau.

B. Running the Numbers, Finding the Bottom (Below \$500 Billion)? Regular attendees of this conference are familiar with this chapter's coverage of the post-millennium federal procurement spending trend. The post-millennial binge (before the 2008 economic crisis) was significant not only for its longevity but for its size. To review, 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 approximately \$540 billion from Fiscal Years 2008 through 2011. In 2009, we experienced the first decrease in federal procurement spending for well over a decade, but the decreases were statistically insignificant (and it took a number of years for the data to catch up). Indeed, much of the post-2008 panic seemed either premature or an over-reaction, as, for a number of years, the only macro-level spending effect was an absence of growth or expansion. After the first statistically significant decrease in federal spending, in 2012, we finally experienced the first dramatic decline in spending and a plunge below the (oh-so-dramatic) \$500 billion threshold in 2013. Whether or not we've struck bottom, prospects for expansion appear limited, and nothing suggests that the market will again flirt with the \$500 billion threshold anytime soon.

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, cumulatively averaging 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, as discussed in past years, despite the dire warnings, the market contraction unfolded far more slowly than anyone expected.

The chart below summarizes this post-millennial procurement spending cycle. Time will tell how far the reductions will go and whether they can be sustained. As of last year, however, this chapter took a broader view of the spending picture to redefine the pie by including grant spending. In that context, the bad news can be tempered or, in other words, the overall spending decrease appears less dramatic.

NOTES

Federal Procurement and Grant Spending 2001–2015*			
Fiscal Year	Procurement Spending (in Billions of \$)	Grant Spending (in Billions of \$)	Procurement & Grant Spending (Combined, in Billions of \$)
2015	\$437.4*	\$609.1	\$1,046.5
2014	\$445.6	\$603.9	\$1,049.5
2013	\$463.3	\$523.4	\$986.7
2012	\$519.3	\$544.2	\$1,063.5
2011	\$540.0	\$571.6	\$1,111.6
2010	\$540.1	\$623.2	\$1,163.2
2009	\$540.7	\$675.6	\$1,216.3
2008	\$541.2	\$420.6	\$961.8
2007	\$469.3	\$430.2	\$899.5
2006	\$430.5	\$490.0	\$920.5
2005	\$391.2	\$441.7	\$832.9
2004	\$346.1	\$450.1	\$796.2
2003	\$318.0	\$493.7	\$811.7
2002	\$264.1	\$406.3	\$670.4
2001	\$223.0	\$330.8	\$553.8

*FY 2015 figures reflect an estimate based upon preliminary reporting.
See www.USASpending.gov.

The total procurement spending amounts reported above, for every year, 2009-2014, changed significantly compared to last year's USASpending reports. Changes to prior years tend to be less statistically significant.

C. Comparing (and Combining?) Contracts and Grants. As discussed previously, contracting experts increasingly assert that less and less distinguishes a government contract from a federal grant. Many contractors also compete for and receive grants. Consistent with the trend this chapter has reported, grant spending exceeded procurement spending last year, as it has for *thirteen of the last fifteen years*. Moreover, while grant spending fell after peaking in FY2010, grants – unlike contracts – never fell below the \$500 billion threshold and now, again, have crossed the \$600 billion threshold. Moreover, the grant decline only lasted four years before climbing again, and the FY2014 increase was significant. And, of course, the government appears to be investing additional resources in revamping the regulatory regime that applies to grants. See, generally, 2 C.F.R. 200.

D. Data Quality. As noted above, the FPDS data is constantly being updated, supplemented, changed, and, presumably, corrected. And ongoing analysis continues to cast doubt on these figures. But they still represent the most useful data set accessible in the public domain. *CRS Surveys DOD Contract Obligations, FPDS Reliability*, 57 GC ¶ 144 (“[T]he Government Accountability Office ‘has repeatedly raised concerns over the accuracy, limitations, and reliability of the data contained in the FPDS-NG database.’ See 54 GC ¶ 124; 55 GC ¶ 180; 56 GC ¶ 263. ‘Despite the limitations of FPDS, imperfect data are sometimes better than no data’ ... [and, i]f Congress and policymakers understand the

limitations, ‘FPDS data can be used to identify some broad trends and rough estimations, or to gather information about specific contracts.’”). Quite simply, generating accurate data is difficult. *DPAP, DCMA Need To Improve Cost Analysis Oversight And Documentation*, 57 GC ¶ 347 (DoD IG asserts that “DCMA still cannot reliably report on the number of cost analysis cases performed, the dollar value of contractor proposals analyzed, and the questioned costs reported[.]”). On a related note, see *GSA Transactional Data Collection Would Create Compliance Burden, Industry Group Says*, 57 GC ¶ 167 (“GSA significantly underestimates the costs of modifying information systems and data quality control that Federal Supply Schedule vendors would incur under ... GSA[’s] proposed a pilot program to require reporting of transactional data – such as unit prices, quantities sold, manufacturers and part numbers – from holders of FSS contracts, other Government-wide acquisition contracts[,] and indefinite-delivery, indefinite-quantity contracts.”); *GSA Grossly Underestimates FSS Transactional Data Reporting Burden, ABA Section Warns*, 57 GC ¶ 160; *GSA Proposes Collecting Transactional Pricing Data, Phasing Out FSS Price Reductions Clause*, 57 GC ¶ 79, 80 Fed. Reg. 11619 (March 4, 2015).

E. A Year Without Sequestration. Fortunately, despite some last minute drama, the dramatic disruption of sequestration was not repeated in 2015. That should not suggest a bright future for the kind of stable funding that facilitates efficient, long-term investment decisions. In what can only be described as a strange election cycle, budgeting is difficult to handicap. Fortunately, there appears to be bipartisan distaste for another shutdown, which should contribute to some amount of short-term budget stability, which is better than nothing.

II. 2015 HIGHLIGHT: THE USD(AT&L) LPTA MEMORANDUM

On March 4, 2015, USD(AT&L) Frank Kendall issued an important memorandum to the defense community: *Appropriate Use of Lowest Priced Technically Acceptable Source Selection Process and Associated Contract Type*. The memorandum is short (only three pages, nine substantive paragraphs), but it offers clear, direct guidance intended to rein in the (real or perceived) over-reliance on Lowest Priced Technically Acceptable (LPTA) procurement. We have recommended it to students as an excellent example of clear, persuasive, and efficient writing, and we hope that it is widely circulated and considered. Among other things, the memo explains that:

- “LPTA is the appropriate source selection process to apply only when there are well-defined requirements, the risk of unsuccessful contract performance is minimal, price is a significant factor in the source selection, and there is neither value, need, nor willingness to pay for higher performance.”
- “LPTA has a clear, but limited place in the source selection ‘best value’ continuum.... [and improper reliance on LPTA can cause DoD to] miss an opportunity to secure an innovative, cost-effective solution to meet Warfighter needs to help maintain [DoD’s] technological advantage.”
- The selection of solicitation and contract type is also important, particularly with regard to services. While fixed-price contracts

are appropriate where DoD's "requirements are firm, easily understood, and tied to clear, measureable outcomes," they too, should only be used where appropriate. Where DoD "cannot firmly predict the tasks, efforts, and required outcomes that the contractor will be expected to perform," other contracting types – including cost-reimbursement contracts and time-and-materials (T&M) contracts – make more sense.

We hope that this memorandum enjoys wide distribution and that it proves more effective in changing risk averse acquisition workforce behavior than OFPP's well-intentioned, but, in retrospect, apparently ineffective, *myth-busters* campaign.

III. TECHNOLOGY: THE RE-DESIGN OF ACQUISITION.GOV

As we expect you've noticed by now, GSA has redesigned and re-launched Acquisition.gov. The site is visually pleasing, but, we have some concerns as to the priority given to appearance as opposed to user friendliness and utility. Indeed, we are reminded that USASpending.gov was created as a mirror image site of a non-government initiative undertaken because the public was frustrated with its inability to access and manipulate data found in the Federal Procurement Data System (FPDS).

- We're curious to know how the user community (in the broadest sense) perceives the FAR Part Index on the new FAR site, <https://www.acquisition.gov/?q=browsefar>.
- To the extent that we now take for granted that the online version of the FAR is the official version (rather than running to the library to check Title 48 of the Code of Federal Regulations), we're increasingly disappointed that, as 2016 approaches, and our mobile phones and tablets contain apps that solve a mind-boggling array of previously intractable problems, no one in the Government seems inclined to provide some of the most basic services sought with regard to the FAR System. We hope that future redesigns will attempt to address, at a minimum:
 - A single function that displayed, overlaid, and reconciled the FAR and all appropriate agency regulations. In other words, for a hypothetical Army contracting action, the electronic resource would display the relevant FAR, DFARS, and AFARS regulations as a single document, with visual cues (whether font or color) to distinguish the various tiers of regulations. The standardized FAR numbering regime, dating back to its promulgation in 1984, anticipated the utility of such a function.
 - A working archival function that displayed the FAR (and if possible, the appropriate agency regulations, as noted above) at a given date. Working through arbitrarily dated Federal Acquisition Circulars (FAC's) is confusing enough, but the benefits of the online FAR – for example, the direct links within the regulation, to provisions and clauses, and to statutes – are lost when attempting to work with prior versions.

- We're also curious to know whether government employees are using the **Acquisition Gateway**, https://www.acquisition.gov/acquisition_gateway. [GSA explains that: "The Acquisition Gateway, built by GSA, helps federal government buyers from all agencies act as one acquisition community. The Acquisition Gateway is a workspace that provides accurate, useful, and unbiased advice. It helps federal acquisition professionals learn what they need to know, connect with others to collaborate and communicate, and act to accomplish their tasks effectively."]

IV. OFPP, GOVERNMENT-WIDE POLICY, INFORMATION TECHNOLOGY, CATEGORY MANAGEMENT, AND ... SMALL BUSINESS?

A. Information Technology on GAO's High Risk List. In the calendar year following the high profile (and, at times, problematic) rollout of the new HeathCare.com web site, GAO added information technology (IT) to its high-profile High Risk List, <http://www.gao.gov/highrisk/overview>. (To be fair, we sense that the new web site was merely the straw that broke the camel's back; IT procurement has bedeviled federal acquisition before, and will continue to do so in the future.) *GAO Adds IT Acquisition Management To High-Risk List*, 57 GC ¶ 46 (GAO found that "federal IT investments too frequently fail to be completed or incur cost overruns and schedule slippages while contributing little to mission-related outcomes." Moreover, "the Government has 'spent billions of dollars on failed and poorly performing IT investments which often suffered from ineffective management, such as project planning, requirements definition, and program oversight and governance.'" GAO chastised the Government for implementing less than 25 percent of GAO's *more than 730 recommendations* made over five years – yes, that's nearly 150 recommendations per year!); *Agencies Need Improved Strategic Sourcing Of IT Services*, 57 GC ¶ 341 (finding that: "DHS, NASA and the military services 'have made strides in their efforts to strategically source IT services, but none have fully incorporated leading commercial practices.'"); *House Subcommittees Eye FITARA Promises, Risks For IT Acquisition*, 57 GC ¶ 181 ("FITARA['s]success depends on agencies' implementation...."); *CRS: Agencies Moving Slowly To Cloud Computing*, 57 GC ¶ 32 (Migration to the cloud has been "impeded by federal security requirements, barriers imposed by agency culture, new network infrastructure requirements, the need for appropriate acquisition workforce expertise[,] ... funding concerns..., the Government's lengthy review processes[,] and ... stringent privacy and reliability requirements....").

B. Laptop and Desktop Purchasing. Given the range of issues available, OFPP has an aggressive agenda. *OFPP Head Updates Acquisition Reform Plan*, 57 GC ¶ 85 ("Progress has been made in bringing greater innovation into the acquisition system."); *OFPP Launches 'Acquisition 360' IT Vendor Survey*, 57 GC ¶ 90 ("Rung described Acquisition 360 as 'the first ever transaction-based feedback tool that allows agencies to identify strengths and weaknesses in their acquisition processes with the focus on pre-award activities, contract execution, and certain post award activities, such as debriefings.'"). One of the most concrete initiatives, however, deals with IT hardware. Last year, we discussed that one of Office of Federal Procurement Policy (OFPP)

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Administrator Anne Rung's priorities was category management. Early on, she explained that "There is a critical need for a new paradigm for purchasing that moves from managing purchases and price individually across thousands of procurement units to managing entire categories of common spend and total cost through category management ... [so] that agencies get the same competitive price and quality of performance when they are buying similar commodities under similar circumstances[.]" OFPP now hopes standardize – and, to some extent, centralize – the purchase of laptop and desktop computers. Anne Rung, OMB Memo M-16-02, *Category Management Policy 15-1: Improving the Acquisition and Management of Common Information Technology: Laptops and Desktops* (October 16, 2015), available at <https://www.whitehouse.gov/sites/default/files/omb/memoranda/2016/m-16-02.pdf>. Among other things, the ambitious memorandum explains that:

- The Federal Government spends over \$50 billion a year on hardware, software, telecommunications, IT security, and IT professional services through tens of thousands of contracts and delivery orders.... However, many agencies continue to buy and manage their IT in a fragmented and inefficient manner, in a large part due to the highly decentralized structure of major cabinet level departments, which conflicts with the goals of ... FITARA and with the principles of category management outlined ... by [OFPP].
- In FY 2014, agencies awarded more than 10,000 contracts and delivery orders for common laptops and desktops totaling about \$1.1 billion [frankly, we were expecting a much higher number], resulting in reduced buying power, inefficient duplication of contracts, and very little transparency into prices paid. Instead of ... banding together as the world's largest buyer to negotiate better prices and terms, too often [the Government] buys like thousands of small businesses, making smaller awards for the same IT products across multiple agencies, and sometimes within a single organization.
- [Accordingly,] OMB has determined that agencies must take immediate steps [including]:
 - standardize laptop and desktop configurations for common requirements;
 - reduce the number of contracts for laptops and desktops by consolidating purchasing and using a fewer number of high-performing - or best-in-class- contracts; and
 - develop and modify demand management processes to optimize price and performance.
- [E]ffective immediately [with certain exceptions], agencies are **prohibited** from issuing new solicitations for laptops and desktops, and civilian agencies **shall leverage the following existing vehicles** ...: NASA Solutions for Enterprise-Wide Procurement (SEWP), General Services Administration (GSA) IT Schedule 708, or Department of Health and Human Services (HHS), National Institutes of Health (NIH), NITAAC Chief Information Officer-Commodities and Solutions (CIO-CS)[.]

- [Saving money, exploiting economies of scale, appears to be a priority.] Agencies should focus the bulk of their acquisition of laptops and desktops on publicized buying events to maximize the Government's collective buying power.
- [A new reporting requirement has been generated, in that] effective immediately, CIOs shall ensure that at least 80% of their agency's new basic laptop and desktop requirements are satisfied with one of these standard configurations, unless an exception is consistent with an approved IT acquisition strategy or plan, as required by OMB's FITARA implementation guidance, and approved in writing by the agency CIO. ... [T]ransition plans are due by February 28, 2016, and will be collected through the Integrated Data Collection managed by OMB's Office of the Federal Chief Information Officer.
- Agencies shall develop and implement [refreshment] policies and procedures.... Generally, agency CIOs *shall* adopt a uniform refresh cycle, such as replacing 25% of inventory every year for 4 years or 20% of inventory every year for 5 years.
- [N]onetheless, *maximizing small business utilization is a key category management principle and an important component of this policy*. ... The percentage of desktop and laptop work (in dollars) awarded to small businesses in FY 2014 under the three vehicles described above was 64%, or nearly 10 percent greater than the small business participation rate for these commodities overall, and nearly 85% of the vendors on these solutions are small businesses.

We look forward to seeing how this plays out.

C. Another Busy Year In Small Business. Last year, the small business community was abuzz over was the unusual achievement of the Congressionally-mandated twenty-three percent goal for small business participation. Given how rarely the government had achieved the statutory goal, the benchmark drew more attention than the reality: that an increasingly diverse pool of small businesses were competing for – at least temporarily – a larger percentage of a steadily shrinking pie.

- The big winner this year appears to be **women-owned small businesses** (WOSB's), who appear to be gaining some amount of access to sole source awards, previously the exclusive domain of the 8(a) community (and, for a turbulent period, Alaska Native Corporations (ANC's)). *SBA Authorizes WOSB Sole-Source Contracts*, 57 GC ¶ 288 (CO's can now "award sole-source contracts [up to \$6.5 million for manufacturing, up to \$4 million for other contracts] to women-owned small businesses and economically disadvantaged WOSBs (EDWOSBs) in certain circumstances"); see also 80 Fed. Reg. 55019 (Sept. 14, 2015), *SBA Proposes Rule To Authorize WOSB Sole-Source Contracts*, 57 GC ¶ 152, 80 Fed. Reg. 24846 (May 1, 2015). Granted, the WOSB sole source authority appears far more limited what the 8(a) firms enjoy – both in terms of statutory authority and practice. To the extent

that the rule applies to “eligible ... EDWOSBs for certain Federal contracts or orders in industries in which the Small Business Administration (SBA) determines that WOSBs are underrepresented in Federal procurement[.]” the rule seems susceptible to the difficulties that ultimately gutted the small disadvantaged business (SDB) price preference following the Supreme Court’s decision in *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995). Note that the rule specifies that both “substantial underrepresentation” and “underrepresentation” must be “determined by a study using a reliable and relevant methodology.”) Stay tuned also for additional rulemaking on WOSB certification.

- The **Veterans Administration**’s procurement practices drew plenty of attention this year. *Federal Lawmakers, Veterans Groups Back Contracting Challenge To VA*, 57 GC ¶ 280 (More than 40 members of Congress “filed an amicus brief in support of a contractor suing the Department of Veterans Affairs” in *Kingdomware Techs., Inc. v. U.S.*, 754 F.3d 923 (Fed. Cir. 2014); see also 56 GC ¶ 194. The dispute involves the VA’s “discretion to procure services through the Federal Supply Schedule once it has met its contracting goals for veteran-owned small businesses and service-disabled VOSBs.” See 57 GC ¶ 200(a). The Supreme Court agreed to hear the case, later removed it from the argument docket and ordered supplemental briefing, then re-scheduled the argument for 2016.); *VA Proposes Overhaul Of VOSB Verification Process*, 57 GC ¶ 364 (“The proposed rule ... would clarify VOSB eligibility requirements, revise definitions, reorder requirements and align provisions with other set-aside programs.”); *Bill Introduced To Improve VOSB And SDVOSB Programs*, 57 GC ¶ 363 (legislation would, among other things, “harmonize the definitions of VOSB and SDVOSB”); *House Panels Probe VA Small Business Goals Reporting*, 57 GC ¶ 197 (“Jan Frye, deputy assistant secretary and senior procurement executive ... charged that VA has circumvented the required FSS use for billions of dollars worth of medical equipment[.]”).
- The Congressionally-mandated **participation percentages** continue to attract legislative attention, dominate agency leadership priorities and, ultimately consume scarce acquisition personnel resources. *House Panel Surveys WOSB Awards, Small Business Goals*, 57 GC ¶ 368 (highlighting the positive – achieving the government-wide 23 percent small business contracting goal – but bemoaning that “the Federal Government excludes nearly 20 percent of its contracts before it figures out whether or not it met its goals.”); *Leadership Attention Needed To Overcome SBA Management Challenges, GAO Says*, 57 GC ¶ 339 (GAO suggests that: “SBA has [failed to implement] an effective human capital strategy, ... not effectively managed acquisition and information technology ... [and not addressed] deficiencies with SBA oversight of contracting programs for economically disadvantaged small businesses.”); *Government Exceeds FY 2014 Small Business Goal*, 57 GC ¶ 199 (“FY 2014 percentage [24.99 percent] is the highest since Congress established the 23-percent goal in 1997.”); *Advocacy Group Bemoans Small Business Dollars Going To Large Contrac-*

tors, 57 GC ¶ 156 (Public Citizen suggests that SBA's "claims of meeting or nearing the Government's small business contracting goals 'are misleading and rely on methodologies that conflict with federal law and regulations,'" and that the Government "relies on methodologies that present a false impression of the percentage of procurement that small businesses actually receive[.]")

- And, of course, plenty of other small business issues remain, from the adjustment of size standards to stewardship of the mentor-protégé program and the management and enforcement of large business' small business subcontracting plans. *Comprehensive Subcontracting Test Program Should Be Made Permanent, GAO Says*, 57 GC ¶ 369; *Committee Questions Whether Mentor-Protégé Benefits Flow To Protégés*, 57 GC ¶ 338 (raising "concerns that mentor-protégé programs have become too focused on providing incentives to mentors rather than ensuring protégés actually receive their designated benefits."); *SBA's FY 2016 Challenges Include Small Business Contracting Oversight, IG Says*, 57 GC ¶ 329 ("the IG's "top challenge ... revolves around weaknesses in small business contracting programs and inaccurate procurement data[.]"); *OFPP Defends Fair Pay And Safe Workplaces EO Implementation*, 57 GC ¶ 300 (Representative Richard Hanna "lamented the burdens on small businesses imposed by the administration's [thirteen executive orders (EO's)] relating to Government contracting[.]"); *Industry Coalition Suggests Changes To Proposed Small Business Subcontracting Rule*, 57 GC ¶ 263, 80 Fed. Reg. 32909 (June 10, 2015); see also, *Industry Groups Ask White House To Halt Contractor EOs*, 57 GC ¶ 256 ("[T]he Professional Services Council, the Aerospace Industries Association, the National Defense Industrial Association and the IT Alliance for Public Sector, recently ... [sought] a pause in executive orders that create new compliance requirements for Government contractors," suggesting that "these unique and costly ... regulations simply raise an already substantial barrier between the commercial and government marketplaces."); *SBA Should Clarify Proposed Mentor-Protégé Rule Changes, ABA Section Says*, 57 GC ¶ 112; *Witnesses Question Proposed Small Business Size Changes*, 57 GC ¶ 180; *House Committee Passes Small Business Contracting Reforms*, 57 GC ¶ 103; *Reform Small Business Contracting, Witnesses Urge House Subcommittee*, 57 GC ¶ 84 (Reflecting a reduction in overall federal procurement, it is not surprising that "[a]lthough the percentage of prime contracts awarded to small businesses is rising, the number of small business contract actions has fallen nearly 60 percent – almost 70 percent at [DoD] – and small businesses' share of subcontracted work has fallen nearly 2.5 percent"); *GAO Flags Poor SBA Communication With HUBZone Firms*, 57 GC ¶ 53 ("GAO found problems stemming from frequent changes to HUBZone area designations, poor recertification processes, and inadequate SBA efforts to inform firms about changes affecting eligibility."); *SBA Should Clarify Proposed Rule On Small Business Contracting, ABA Section Says*, 57 GC ¶ 70.

V. DEFENSE ACQUISITION: REFORM, REGULATION, ASSESSMENT, AND THE PURSUIT OF INNOVATION

A. Plenty of Congressional Activity; Assessing Acquisition Reform: Congress, of course, remains interested in reforming federal acquisition. Many of the recent legislative reform initiatives will be discussed in other chapters, but the jury remains out as to the impact of the changes. “[A] flurry of statutory changes and new provisions included in the FY16 National Defense Authorization Act (NDAA) ... represent the *largest single package of acquisition legislation since the landmark Federal Acquisition Streamlining Act of 1994*. ... [But, despite] calls for extensive changes to acquisition statutes, it is far less clear that these changes will result in meaningful operational change in the acquisition system....” Andrew Hunter, *CSIS 2016 Global Forecast: The Battle over How to Save Defense Acquisition*, available at https://csis.org/files/publication/151116_Hunter_Defense_Acquisition.pdf. See also *Senators, Witnesses Offer Suggestions For Reducing DOD Overhead Spending*, 57 GC ¶ 367 (“[Senator John] McCain noted that DOD currently has about 1.1 million personnel performing ‘overhead activities,’ at a ‘staggering’ cost.”)

B. Major Systems: No Shortage of Concerns and Reform Initiatives. See, for example, *House Committee Scrutinizes DOD Acquisition Cycle Times*, 57 GC ¶ 337 (GAO observes that “because of competition for limited funding and a lack of incentives for realistic cost estimates at DOD, a ‘successful’ business case is one that overstates or overpromises performance and understates cost and understates schedule[.]”); *Aircraft Carrier Program Suffers Poor Outcomes, As Predicted, GAO Says*, 57 GC ¶ 310 (GAO warned, among other things, that: “costs were underestimated and critical technologies were immature; cost “likely will exceed the program’s budget”; “tests of ... key technologies have been deferred by years”; “CVN 78 is unlikely to achieve promised aircraft launch and recovery rates as key systems are unreliable”; and “the business case for CVN 79 is also unrealistic[.]”); *DOD Needs To Integrate Enterprise-Level Weapon-Systems Portfolio Reviews*, 57 GC ¶ 277 (“DOD’s governance structure includes decision-making processes and responsibilities that are divided among its stove-piped requirements, acquisition, and budget communities and focus largely on optimizing individual investments.”); *GAO Suggests Better Planning For Air Force Space Acquisitions*, 57 GC ¶ 109 (“The current approach to technology insertion ... is not consistent with the best practice of establishing a plan prior to the start of a program that identifies specific technologies to be developed and inserted to achieve a desired end state....”); *DOD Needs Better Approach To Account For ACAT II And III Cost And Performance*, 57 GC ¶ 77 (DoD “cannot provide reliable data on the number, total cost and performance of its current acquisition category (ACAT) II and III programs [, ...] non-major programs that range from multi-billion-dollar aircraft-radar modernization programs to clothing and protective equipment programs valued at tens of millions of dollars[.]”); *CRS Surveys Nunn-McCurdy Act Breaches*, 57 GC ¶ 75 (The article reminds readers that, “[i]n 2011, [CRS’s Moshe] Schwartz testified ... that unrealistic cost estimates, unstable funding, insufficient testing early in the acquisition process, additional requirements[,] and poor contractor oversight all contribute to Nunn-McCurdy breaches. If Congress and DOD had known certain programs’ true costs at the start, ‘different decisions could have been

made, and billions of dollars spent on systems that were never fielded or prematurely cancelled could have been spent on other priorities[.]’ ... See 53 GC ¶ 113.); *DOD Needs To Streamline Milestone Decision Process For Weapon Systems*, 57 GC ¶ 59 (DoD “should eliminate levels of documentation review and information requirements that add limited value.... Programs GAO surveyed took an average of over two years to complete the documentation of information requirements for their last milestone[.]”)

C. Expectations For Improved Contingency Contracting. *Army Must Improve Oversight Of LOGCAP Task Orders, IG Says*, 57 GC ¶ 340 (Among other things, the IG found that: “of the six [contracting officer’s representatives] CORs appointed to the task order..., four had not undergone required training. ...; the procurement CO (PCO) did not develop a quality assurance surveillance plan ...; [and] on at least two of the ... sites reviewed, the contractor began work before the CORs were on site to perform contractor surveillance.”); *SIGAR Envisions Keys To Better Reconstruction Efforts*, 57 GC ¶ 286 (suggesting that: “Any future reconstruction effort must start with a clear, realistic set of objectives, and must use evidence-based policymaking-relying on measurable metrics to determine outcomes ... [and] caution[ing] against conflating political goals with development objectives[.]”); *DOD Contingency Contracting Problems Persist, IG Finds*, 57 GC ¶ 98 (identifying “nine areas with systemic problems include[ing] requirements, contract pricing, contract type, source selection, oversight and surveillance, financial management, contractor personnel, contract documentation, and property accountability...” Moreover: “The effectiveness of contractor support of U.S. contingency operations could be compromised if DoD officials fail to apply lessons learned from previous problems identified in Iraq and Afghanistan...”); *SPOT Guidance On Overseas Contractor Data Still Needs Improvement*, 57 GC ¶ 66 (“DOD does not ensure that SPOT and [Joint Asset Movement Management System] JAMMS ‘provide either contract or contractor personnel data that are consistently timely and reliable,’ GAO found, cautioning that ‘DOD has incomplete visibility into the number of contractors present in the contingency environment.’”); *SIGAR Finds Wasteful Practices, Poor Planning For Solid Waste Disposal*, 57 GC ¶ 61 (despite having “spent over \$81 million to build 23 solid waste incinerators at nine locations in Afghanistan, ... many incinerators went unused or underused because they were not completed according to contract requirements or were deficient in construction[.]”); *DOD Has Implemented Most SIGAR Recommendations*, 57 GC ¶ 27 (“SIGAR made 209 recommendations to DOD [between 2008 and mid-2014 – only three dozen each year – of which] 161 recommendations, or 77 percent, have been implemented and closed”).

D. Better Buying Power (BBP) and The Harsh Reality of Technical Superiority, Innovation, and Research and Development. Last year, we reported that USD(AT&L) Frank Kendall’s BBP 3.0 had taken a surprising (and, arguably, disappointing) turn, tilting heavily toward the micro rather than the macro, increasing the number of bullet points and reducing the size of the font on the summary Power Point slide. As a result, the early release of BBP 3.0 felt more like a catch-all or a DoD-wide acquisition improvement wish list than an aspirational guidepost. Few topics disappeared, and many appear to have been added. Seemingly lost in the late-2014 rollout, but re-emphasized in the Spring 2015

implementation plan, was the theme of “Achieving Dominant Capabilities through Technical Excellence and Innovation.” See, generally, *BBP 3.0 Implementation Directive Released*, 57 GC ¶ 120; and discussion of prior BBP initiatives at 56 GC ¶ 306(c); 54 GC ¶ 358; 52 GC ¶ 312.

1. The Focus on Technical Superiority. The April 9, 2015 *Better Buying Power Fact Sheet* explains: “BBP 3.0 focuses attention on the overriding concern **that our nation’s technological superiority is at risk**. Our technological superiority is dependent on the effectiveness of our R&D efforts Innovation increasingly comes from the commercial sector and from overseas.” These sentiments have been broadly echoed. *DARPA Technology Transition Needs More Reliable Performance Reporting*, 57 GC ¶ 389 (DARPA “does not consistently assess new technology transition outcomes from research environment to military users ... [so] GAO is unable to reliably report on transition performance across DARPA’s portfolio[.]”). As an aside, we were disappointed to learn of the demise of DARPA and Boston Dynamics’ robotic animal initiative. See, generally, Keith Wagstaff, *Robot Mule Put Out to Pasture by Marine Corps*, NBC NEWS (discussing the LS3 (Legged Squad Support Systems), called everything from a dog to a mule, which “could run for 24 hours straight on a 20-mile mission across rough terrain[.]” but proved too loud for its planned mission); *‘Significant Change’ Needed For ‘Significant Challenges’ Facing DOD, Gansler Testifies*, 57 GC ¶ 389 (former USD(AT&L) Gansler advocated “reversing the congressional and DOD cuts ‘in the share of the budgets going to R&D’ so that DOD can ‘achieve technological leadership in the 21st century.’”); *CRS Surveys Administration’s R&D Funding Priorities*, 57 GC ¶ 91 (Despite the projected 5.5 percent increase in R&D funding from FY 2015 to 2016, “Congress is ... facing ‘a period of intense pressure on discretionary spending,’ which will influence the growth rate and the allocation of federal R&D funding. Further, sequestration and the use of continuing resolutions ‘can affect agencies’ execution of their R&D budgets, including the delay or cancellation of planned R&D activities and acquisition of R&D-related equipment,...”)

Unfortunately, the BBP 3.0 fact sheet has been far less widely distributed than the (extremely dense) Better Buying Power briefing slide. Moreover, if that indeed is was DoD’s intent, we fear it remains lost in the implementation and translation. A visit to the Better Buying Power home page, bbp.dau.mil, and the question: “What Is Better Buying Power?” leads to the explanation: “AT&L has identified 36 Initiatives grouped under seven Focus Areas to **restore affordability** in defense procurement and **improve defense industry productivity**.” The seven focus areas include:

- Achieve Affordable Programs
- Control Costs Throughout the Product Lifecycle
- Incentivize Productivity & Innovation in Industry and Government
- Eliminate Unproductive Processes and Bureaucracy
- Promote Effective Competition
- Improve Tradecraft in Acquisition of Services
- Improve the Professionalism of the Total Acquisition Workforce

We cannot be the only ones that are struggling to see the pre-eminence of the pursuit of technical superiority on this list of focus areas. To the extent that we concede that innovation is part of one of the seven areas (Incentivize Productivity & Innovation in Industry and Government), it's worth looking at the initiatives specified under that focus area:

- Align profitability more tightly with Department goals
- Employ appropriate contract types
- Increase use of Fixed Price Incentive contracts in Low Rate Initial Production
- Better define value in “best value” competitions
- When LPTA is used, define Technically Acceptable to ensure needed quality
- Institute a superior supplier incentive program
- Increase use of Performance-based Logistics
- Reduce DCAA Audits backlog without compromising effectiveness
- Expand programs to leverage industry's IR&D

Indeed, other than leveraging the private sector's IR&D, it's unclear what emphasis, if any, DoD is placing on maintaining technical superiority. That seems like a significant oversight.

2. An Interesting Anecdote on Innovation: Given DoD's, and, indeed, the government's interest in innovation, consider David McCullough's *THE WRIGHT BROTHERS* (2015). The book is an entertaining and informative examination of one of the most iconic and, arguably, significant moments in paradigm shifting innovation and, more broadly, research and development. Filled with tidbits about the Wright family and, among other things, their bicycle business, the book offers bountiful ammunition for the theory that small businesses (and individuals) – as opposed to large, sophisticated, bureaucratic businesses and institutions – are the most fruitful sources of innovation.

- The Wright Brothers were consistently **rebuffed by the Federal Government** (even, apparently, with attempted Congressional intervention) and, accordingly, secured their initial investment and sales abroad.
- On both sides of the Atlantic, governments insisted upon **flying prototypes**, only investing after extensive, highly public demonstrations. We are not holding our breath on a resurgence in what we continue to believe is the correct, conservative, and efficient approach, but hope spring eternal. See, by way of contrast, *Boeing, Lockheed Protest Air Force Bomber Award At GAO*, 57 GC ¶ 357 (“Boeing and Lockheed [asserted] the Air Force's cost evaluation ‘did not properly reward the contractors’ proposals to break the upward-spiraling historical cost curves of defense acquisitions, or properly evaluate the relative or comparative risk of the competitors’ ability to perform, as required by the solicitation.”). Of course, plenty of ink also has been spilled with regard to the evolution of the Joint Strike Fighter. *AT&L Praises*

Marine Corps' F-35B IOC Declaration, 57 GC ¶ 243 (“The Marine Corps’ variant of the JSF, the F-35B Lightning II aircraft, reached IOC [initial operational capability], with a squadron of 10 F-35Bs based in Arizona ready for deployment.”); *GAO Still Finding JSF Development Problems*, 57 GC ¶ 117 (“According to GAO..., (a) a major part of the airframe severed after about 9,000 hours of durability testing, and led to fracturing of another part; (b) an engine caught fire during takeoff...; and (c) the program experienced about 90-percent growth in mission system software test points for the year, twice the 45-percent allowance for 2014 under the test plan.”), see also GAO-15-364.

- The Wright brothers experience was consistent with modern empirical research that suggests that breakthrough solutions are most likely to come from **perspectives outside the scientific discipline** of the problem at issue. The Wright Brothers – neither of whom attended college – dabbled in printing, and did quite well for themselves in the nascent bicycle industry, before setting their sights on flight. The brothers appear to have been grinders (or tireless workers), masters of observation (of birds), exhaustive researchers and experimenters (relying, in large part, on trial and error), and as organized as they were methodical (to which McCullough attributes their consistent success in their frequent patent litigation).
- High profile **contests and prizes** featured prominently in the early evolution of the aviation industry. It is difficult to avoid comparing the early Michelin and Orteig prizes (the former won by Wilber Wright in 1908; the latter captured in 1927 by Charles Lindbergh in the Spirit of St. Louis) with the more modern Xprize, the UK’s 300th-anniversary Longitude Prize, and the burgeoning government initiative that underlies Challenge.gov. See also, generally, Steven L. Schooner & Nathaniel E. Castellano, *Eyes on the Prize, Head in the Sand: Filling the Due Process Vacuum in Federally Administered Contests*, 24 FEDERAL CIRCUIT BAR JOURNAL 391 (2015); Paul Gottlieb and Leonard Rawicz, *Federal Inducement Prizes*, 15-9 BRIEFING PAPERS 1 (August 2015) (“[I]nducement prizes have specific limitations and are not effective for many technological problems[,] but if properly designed may produce extraordinary results.”).
- The Wright brothers understood – and fully accepted – the **risks** of their work. For example, the brothers never flew together and witnessed the deaths of many of their contemporaries and competitors. Managing risk, rather than simply avoiding risk, is critical in innovation.

E. DoD Continues Its Effort to Analyze Metrics. For the last two years, these materials suggested that some of the most thought-provoking reading was found in DoD’s nascent performance, outcome, or metrics, initiative. *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; *AT&L Releases Second Annual DOD Acquisition Assessment*, 56 GC ¶ 208; Office of the Under Secretary

of Defense, Acquisition, Technology and Logistics, *Performance of the Defense Acquisition System: 2014 Annual Report*, available at <http://bbp.dau.mil/docs/Performance-of-Defense-Acquisition-System-2014.pdf>; and now, *AT&L's Third DOD Acquisition Assessment Scrutinizes Subcontractor Margins, Program Baselines*, 57 GC ¶ 309. See also, 56 GC ¶ 208, 55 GC ¶ 214 (for discussion of the prior reports). As expected, the new report is chock-full of intriguing observations and conclusions, including.

- Consistent with the stated (but, arguably, suppressed) BBP 3.0 theme, discussed above, the report suggests that: “[I]n some areas[, DoD] may not be pushing the state-of-the-art enough in terms of technical performance. This **endangers our military technical superiority**. Simply delivering what was initially required on cost and schedule can lead to failure in achieving our evolving national security mission—the reason defense acquisition exists in the first place.... The confluence of a number of results appears to support concern that we may be slowing our investment in technical advanced systems....
- “Tight budgets may motivate **overly optimistic baselines and higher cost-related growth**.... [Analysis shows] a very strong correlation between high acquisition cost growth for programs and tight budgetary environments (like the one at present) during program baselining. ... [I]t should give us all pause that acquisition unit cost growth on such programs is consistently 3-times higher (about 30 percent versus 10 percent) than that for programs started when budgets are not as constrained.
- Since 2001, **first-tier subcontractors earned higher margins** than their associated prime contractors on the same program (at the median, about 2 percentage points higher in development and about 7 percentage points higher in production). ... [The differences] illustrate why the DoD has been working ... to motivate prime contractors to control subcontractor prices and ensure that profitability is aligned with performance—especially in production where the difference in margins is large. [DoD is] also concerned that higher subcontract margins may be motivating companies to bid on fewer prime contracts and thus reduce competition at that level. This information will be used to inform contract negotiations.
- Not all **acquisition reform** attempts have been beneficial.

We encourage the acquisition, oversight, budgeting, and planning communities to applaud and support DoD’s efforts. We also encourage DoD 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 more meaningful measures such as *life cycle cost*, *bang for the buck*, *value for money spent*, and *customer satisfaction obtained* would be a step in the right direction. Along those lines, a recent anecdote demonstrating that titles (or words) and metrics (what you measure) matters, see *Suspension And Debarment Programs Continue To Improve, ISDC Reports*,

57 GC ¶ 108 (“In fiscal year 2014, agencies improved their suspension and debarment (S&D) programs, and the numbers of S&D actions continued to increase, the Interagency Suspension and Debarment Committee (ISDC) has reported. ... [Yet, t]he ISDC emphasized that the overall numbers of S&D actions are not metrics of success.”)

F. Consolidation of the Industrial Base. As defense procurement spending contracts (see above), DoD faces increasing pressure to work with private industry to facilitate consolidation. Particularly to the extent that DoD is increasingly loath to pay for excess capacity, consolidation seems unavoidable. We’ve been through this before, and it’s a painful, painstaking process. For now, however, DoD seems to have backed itself into a corner. *Defense Secretary Cautions Against Further Consolidation Among Large Primes*, 57 GC ¶ 314 (SecDef Ash Carter stated the desire “to avoid excessive consolidation in the defense industry, to the point where we [do] not have multiple vendors who could compete with one another on many programs.” USD(AT&L) Frank Kendall added that: “With size comes power, and the department’s experience with large defense contractors is that they are not hesitant to use this power for corporate advantage.”)

G. Reducing Cost Drivers: A Tepid Start. Despite frustration with the (perceived as excessive) overhead rates that contractors charge, DoD remains largely powerless to reduce the panoply of “cost drivers” that, in large part, derive from a never ending succession of Congressional mandates. Nonetheless, many observers were curious to see how the report of the BBP-inspired initiative to address this issue. The initial results are now available, and, despite the volume of the report, little progress was obtained. See, generally, Mark Husband & David J. Nicholls, *Eliminating Requirements Imposed on Industry Where Costs Exceed Benefits* (September 29, 2015), <http://www.acq.osd.mil/fo/docs/Eliminating-Requirements-Imposed-on-Industry-Study-Report-2015.pdf>. For a timely anecdote on this topic, see, for example, *Navy Should Improve Berry Amendment, Buy American Compliance*, 57 GC ¶ 268 (“Officials omitted required clauses or failed to assess compliance because they were unaware of the requirements, made administrative errors or used a faulty clause matrix.”).

DoD poignantly observed that: “Actions that are unnecessary or of little value for acquisition directly add costs, introduce delays in delivering capability, and bar innovative new entrants. Here, we examined several specific instances of regulatory burdens or their implementation imposed on industry in order to eliminate unnecessary or unproductive actions.” That seemed rather promising. DoD, however, appears to have taken a formalistic, rather than a pragmatic (or results-oriented) approach, and, in doing so, defeated the purpose.

“Unnecessary” and “unproductive” are the key adjectives here. ***Statute and regulation are not arbitrary but are designed to serve a purpose.*** The Department of Defense manages a huge taxpayer investment and must provide transparency for oversight to assess efficiency, fairness of the acquisition system, and compliance with broader national, social, and economic objectives. Additionally, many regulations are a response to previous acquisition failures and are intended to prevent

recurrence. Attempts to save money by eliminating actions without considering these impacts/benefits are necessarily inappropriate. So, ***the central challenge of this work was to identify activities which could be eliminated with no or minimal impact on statutory or regulatory objectives.***

We disagree and, rather, read that starting point as a prospective capitulation. We think the question that needs to be asked is: ***whether the costs associated with individual statutes and regulations are worth it to the DoD customer?*** It's time to go back to the drawing board.

Fortunately, DoD concedes that: "There are many areas where the details of implementation are creating unnecessary or unproductive work." Alas, "just as such burdens were not created in a single step, decreasing them will also be an incremental, continuous improvement process." Our sense is that DoD will need to be far more aggressive the next time around if it hopes to maintain the status quo – merely reducing burdens at a rate similar to that which Congress adds them – let alone significantly reducing burdens that inject inefficiency into the procurement process, inflate contractors' overhead, erect barrier to entry against commercial firms and new entrants, and frustrate the DoD customer.

VI. THINKING BROADLY: THE ACQUISITION WORKFORCE, THE BUDGET, AND GOOD DECISION-MAKING.

Early in 2015, the Professional Services Council released its biennial 2014 Acquisition Policy Survey. (As always, these targeted surveys are not large enough to be statistically precise, but we have found them to be informative, thoughtful, consistently on point, and, accordingly, well received.) See also *Acquisition Survey Points To Persisting Budget Instability, Workforce Skill Gaps*, 57 GC ¶ 48. Like its predecessors, this report makes a number of significant observations.

- The skills of the ***acquisition workforce*** ... continue to be a primary concern. The overwhelming majority of respondents continued to cite significant weaknesses in critical skills areas including business acumen, negotiating skills, and conducting complex information technology acquisitions. ... [N]o respondent ranked workforce business acumen as being excellent; and only 20 percent rated it as "good." ... [W]hile over two-thirds of respondents said they believe negotiating skills are important or extremely important in acquisition, only a small fraction said they believe their workforce has adequate negotiating skills....
- [The acquisition workforce concerns are] exacerbated by the now-evident generation gap[.] The expected retirement wave is now underway and the anticipated "bathtub" (the gap between senior leaders and the next layer down) is equally evident ... causing an increased rate of ***experience and knowledge loss***.
- [T]he budget [and lack of certainty about funding were again identified as] the top barrier to optimal performance. ... ***Budget instability*** restricts spending on training and the hiring of needed resources. Not knowing programmatic funding levels precludes effective tradeoff analyses and planning. Programs

place an overemphasis on cost savings as opposed to programmatic outcomes as a principal goal of the acquisition process. This then naturally translates into a similarly narrow oversight perspective on cost elements, often at the expense of a more holistic view which, when combined with an already punitive oversight environment in which collaboration is not encouraged, ultimately has a chilling effect on the process as a whole....

- There appeared to be little agreement on the ***role of tradeoff analyses*** or business case assessments to achieve innovation, and similarly little connection to the type of acquisition strategy or vehicle employed. ... [LPTA] continues to be an area of substantial disconnect between the government acquisition community and its industry partners. Anecdotally, and unconnected to this survey, there is evidence of growing concern among agency “customers” about the mission and performance impacts being felt by the over-use or misapplication of LPTA strategies. [Bear in mind that the survey preceded the release of the Kendall LPTA memorandum, discussed above.]
- [Despite] the [acknowledged] need for oversight/compliance,... the extent of activity in this area [remains] a significant burden. ... [Respondents] identified ***ongoing problems with burdensome oversight and compliance demands*** related to small business goal achievement, IG audits (and, for defense agencies, DCAA audits), GAO activity, and budget requirements. The sheer volume of regular data calls, ill-defined data calls, and ad-hoc data calls combine to weigh on an agency’s procurement office. Additionally, auditors can lack functional knowledge of acquisitions, which distracts procurement staff as they educate the auditors regarding acquisitions.

VII. A BLAST FROM THE PAST: CHARGE CARD MANAGEMENT

While it’s not a surprise, it helps to be reminded that even the most basic organization and oversight requires consistent attention and vigilance. *GSA Charge And Travel Card Program Risk Rises*, 57 GC ¶ 313 (It’s nice to know that, at a minimum, “GSA runs monthly queries of transactions for questionable terms – such as ‘casino,’ ‘movies’ or ‘adult.’”); *IGs Find Varying Compliance With Charge Card Usage Rules*, 57 GC ¶ 254 (Among other things, the IG found that, while “DHS has established internal controls for both purchase and travel cards, ... it has not ensured that its components follow departmental rules[.]” The IG also analyzed DHS purchase card transactions at Starbucks, resulting in the startling conclusion that these transactions “may give the appearance that cardholders are not seeking lower priced options based on personal preference.”); *Senate Committee, IGs Tackle Purchase Card Abuse*, 57 GC ¶ 210, www.epa.gov/oig/reports/2015/20150629-15-N-0171.pdf; www.nsf.gov/oig/_pdf/15-2-008-travel-card.pdf; *DOD Travel Cards Used At Casinos, Adult-Entertainment Establishments*, 57 GC ¶ 163 (Over a one-year period, “2,636 DOD travel cardholders had 4,437 transactions worth \$952,258 that were likely for personal use at casinos and 900 transactions worth \$96,576 by 646 cardholders at adult-entertainment establishments.”).