Public Contract Law Journal

PUBLISHED BY THE AMERICAN BAR ASSOCIATION
Section of Public Contract Law
in cooperation with
The George Washington University Law School

Volume 53, Number 1, Fall 2023

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The Section seeks to improve the functioning of public procurement by contributing to developments in procurement legislation and regulations; by objectively and fairly evaluating such developments; by communicating the Section's evaluations, critiques, and concerns to policy makers and government offices; and by sharing these communications with Section members and the public.

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The *Public Contract Law Journal* is published by the Section of Public Contract Law as a service to its members and associate members, and for the benefit of lawyers and laypersons involved in the practice of public contract and grant law at the federal, state, local, and international levels of government.

The *Journal* exists within the Section's legal community as a focal point for the examination of timely legal issues confronting the judiciary, the administrative tribunals, and the bar. It also seeks to solicit and present the multiplicity of views that exist within the Section. As a publication of the Section, the *Journal*'s interests mirror those of its membership.

The *Journal* is committed to the regular publication of articles that present scholarly analyses and insight into issues affecting the broad scope of public contract and grant law. It is the only law journal dedicated exclusively, yet broadly, to public contract and grant law and related areas of practice. The Editorial Board's goal is for each issue to contain high-quality articles that are topical and provocative and that reflect the many views of its diverse membership.

Public Contract Law Journal (ISSN 0033-3441 (print); ISSN 2162-8181 (digital)) is published quarterly in season by the American Bar Association Section of Public Contract Law, 321 North Clark Street, Chicago, IL 60654-7598. Section members receive the *Journal* as a benefit of membership. Attorneys who are not members of the American Bar Association and nonlawyers may contact HeinOnline.mail@wshein.com, (800) 828-7571 (or (716) 882-2600) for digital subscription options and information. Periodicals postage paid at Chicago, Illinois, and additional offices. Postmaster: Send address changes to *Public Contract Law Journal* Member Records, American Bar Association, 321 North Clark Street, Chicago, IL 60654-7598.

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SPEEDING UP SERVICES PROCUREMENTS: STRATEGIES AND TOOLS TO AWARD QUICKLY, SURVIVE PROTEST, AND EXECUTE EFFICIENTLY

*David Bodner & Per Midboe**

ABSTRACT

The government relies on support services contractors to accomplish a myriad of critical government programs—ranging from major defense weapon systems to program management for the Social Security Administration. In fiscal year 2022, the government contracted for $435 billion worth of support services. The government uses solicitations to select from this vibrant, diverse, and competitive marketplace of contractors. The terms of the solicitation are immensely important to the speed of contractor selection, the defensibility of the selection, and the business value of the resulting contract. Most of the decisions that the government makes in setting up the solicitation fall into three broad categories: (1) what contract type to choose; (2) how best to describe the government's contractor workforce needs; and (3) how best to evaluate proposals, including decisions on what proposal information to ask offerors to provide. In each of these broad categories, government source selection teams face a number of decisions about how best to balance the thoroughness of their review against the competing goals of increasing their speed to award and reducing any unnecessary work for both offerors and evaluators. This article explores these strategic decisions within Level of Effort (LOE) support services acquisitions to provide best practices and sample solicitation language designed to increase the government's speed to award, reduce its protest risk, and capture the benefits of competition.

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I. INTRODUCTION TO THE FEDERAL SERVICES MARKETPLACE

The government market for support services is very large and highly competitive. As an example, in 2021, the Navy's primary support services vehicle—the SeaPort-NxG multiple award Indefinite-Delivery-Indefinite-Quantity (IDIQ) contract—boasted 2470 unique contractors and anticipated awarding $5 billion of services work per year.[1] In fiscal year 2022, the U.S. government obligated $694 billion in contracts, and sixty-two percent of its obligations were for services.[2] The Department of Defense (DoD) spent $205 billion on services, and civilian agencies spent $230 billion.[3] Moreover, the government's need for such services spans huge sectors of the economy, from complex defense system engineering, to program management support, to administrative office support, and beyond.[4] Within this bustling, competitive marketplace, agencies want to be able to identify the right vendor quickly and get a good price for the types of support they need. In pursuing that goal, government source selection teams face a broad range of strategic choices that

1. Jane Edwards, *Navy Selects 600 Vendors for SeaPort Next Generation IDIQ via Rolling Admissions*, GOVCON Wire (July 15, 2021), https://www.govconwire.com/2021/07/navy-selects-600-vendors-for-seaport-next-generation-idiq-via-rolling-admissions [https://perma.cc/MK8U-FLKN].

2. U.S. Gov't Accountability Office, A Snapshot: Government-Wide Contracting, https://gaoinnovations.gov/Federal_Government_Contracting [https://perma.cc/2RNW-XRYD] (infographic).

3. *Id.*

4. *See, e.g.*, Dep't of the Navy, N0017821R7000, at 8–9 (Jan. 11, 2021), https://sam.gov/opp/41405bf3a115426a91b24a63adc67d52/view [https://perma.cc/7ETZ-ZHBA].

can greatly influence the speed at which they contract as well as the quality and cost of the services in performance.

In many cases, government source selection teams structure deals for these services as competitively awarded Level of Effort (LOE) contracts, which allow the government to procure services an hour at a time.[5] Beyond that commonality, however, there are a wide variety of contract types and evaluation strategies that government procurement teams employ in competing LOE services contract awards, each of which touch on a host of services-specific issues.[6] The government procurement team's strategic approach to addressing these choices and issues will greatly influence their speed of contracting, the defensibility of their awards, and the business value of the resulting contract.[7]

This article explores these strategic decision-points and provides twenty-seven specific best practices for LOE service contracting and sample solicitation language to increase the government's speed to award, reduce its protest risk, and capture the benefits of competition.

II. STRATEGIC DECISIONS IN COMPETITIVE LOE SERVICES CONTRACTING

Most of the critical strategic decisions that a government source selection team will make fall into three broad categories: (A) what contract type to choose; (B) how best to describe the government's contractor workforce needs; and (C) how best to evaluate proposals, including decisions on what proposal information to ask offerors to produce. Within each of these broad categories, source selection teams face a number of specific decisions about how to best balance the thoroughness of their review against the competing goals of increasing their speed to award and reducing any unnecessary work for both offerors and evaluators.[8] Furthermore, all of these choices impact the government's ability to defend their evaluation record.[9] As such, government source selection teams should consider each of these decisions carefully and understand how each element interrelates with the other elements of their procurement.

Importantly, this article will not delve deeply into the distinctions between Federal Acquisition Regulation (FAR) Part 15 procurements and FAR Part 16.5 "fair opportunity" task order competitions conducted under multiple

5. John Cibinic, Jr. et al., Formation of Government Contracts 1317 (2011) ("In this type of contract [level of effort], the contractor receives the compensation called for by the contract upon expenditure of the required hours of effort, regardless of whether the anticipated work is completed.").

6. *See* FAR 16, Types of Contracts.

7. *See* Department of Defense Source Selection Procedures: Defense Federal Acquisition Regulation Supplement Procedures, Guidance and Information Subpart 215.3 – Source Selection 1–3 (2016) [hereinafter DoD Source Selection Guide].

8. FAR 1.102(a)–(b).

9. *See* Inserso Corp., B-417791, 2019 CPD ¶ 370, at 7 (Comp. Gen. Nov. 4, 2019) (denying protest where solicitation ranked five lowest priced quotes and traded off against single adjectivally rated past performance evaluation factor with acceptable/unacceptable technical factor).

award IDIQs.[10] The strategic decisions that this article addresses apply to both avenues for acquiring LOE support services. As such, a detailed discussion of the differences between FAR Part 15 and FAR Part 16.5 is out of the scope of this article.[11] Furthermore, this article focuses on LOE support services acquisitions that are not primarily performance based. Although the government purchases a wide variety of services using performance-based work statements,[12] the recommendations in this article primarily apply to LOE knowledge-economy jobs, which are harder to measure through performance-based contracting tools.[13] Finally, this article does not directly

10. The Federal Acquisition Streamlining Act of 1994 (FASA) codified "fair opportunity" for multiple award contracts and task or delivery order protest jurisdiction. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243 (1994). The FAR provides for different source selection requirements for FAR 8.4 Multiple Award Schedules (MAS), FAR Part 16.5 Fair Opportunity for Multiple Award Contracts, and FAR 15 for negotiated procurements. However, while a solicitation may state that it is conducted pursuant to fair opportunity procedures, GAO can sometimes look to "the standards applicable to negotiated procurements under FAR part 15 as a guide" to assess fairness. AECOM Mgmt. Servs., Inc., B-418828.4 et al., 2021 CPD ¶ 152, at 6 (Comp. Gen. Mar. 17, 2021). (GAO looked to FAR Part 15 "discussions" standards to determine that the Government had not conducted fair "interchanges" with offerors despite the solicitation asserting that Government "interchanges" were a different procedure under FAR 16.5 than Part 15 "discussions.").

11. That said, Offerors should be aware that FAR Part 16.5 task and delivery orders issued under multiple-award IDIQ contracts are subject to minimum dollar thresholds for Government Accountability Office (GAO) protest jurisdiction and U.S. Court of Federal Claims (COFC) has essentially no protest jurisdiction over them. For GAO protest jurisdiction, the value of the underlying task or delivery order must be in excess of $25M for Department of Defense (DoD) procurements and $10M for civilian, which changes the protest risk calculus for solicitations below the applicable thresholds. 10 U.S.C. § 3406(f)(1)(B); 41 U.S.C. § 4106(f)(1)(B). The GAO views the value of a task or delivery order for purposes of determining jurisdiction "to be the amount reflected in the order as awarded." U.S. Info. Tech. Corp., B-419265, 2020 CPD ¶ 382, at 6 (Comp. Gen. Nov. 17, 2020). Congress provided the GAO with exclusive task or delivery order jurisdiction for protests exceeding the threshold values. 10 U.S.C. § 3406(f)(2). Due to the FASA bar, COFC only has jurisdiction to hear a protest "in connection with the issuance or proposed issuance of a task or delivery order except for . . . a protest on the ground that that the order increases the scope, period, or maximum value of the contract under which the order is issued." 41 U.S.C. § 4106(f); FAR 16.505(a)(10); *see also* Akira Tech., Inc. v. United States, 145 Fed. Cl. 101, 108 (2019) (denying protest that a modification should have been competed because the protest was "in connection with the issuance of task order" and therefore the court lacked jurisdiction to hear the case because the protest of the modification was barred by FASA). FAR 8.406-6 Multiple Award Schedule and FAR 15 negotiated procurements do not have minimum thresholds for protest jurisdiction.

12. Performance-based acquisition focuses on results or outcomes, rather than processes, and typically uses a performance work statement (PWS). Congress established performance-based approaches as the preferred acquisition method for acquiring most services. National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 821, 114 Stat. 1654. This was implemented at FAR 37.102(a) and states that "[p]erformance-based acquisition is the preferred method for acquisition services." *Id.*

13. Although it is possible to purchase a level of performance an hour at a time, many LOE services contracts (including some that purport to be performance-based) actually only require the contractor perform its "best efforts." *See* U.S. Gov't Accountability Off., GAO-10-39: Defense Acquisitions: Further Actions Needed to Address Weaknesses in DoD's Management of Professional and Management Support Contracts 2425 (2009) [hereinafter GAO-10-39] (noting that several task orders performance standard only required the contractor to meet staffing requirements). This largely defeats the purpose of structuring as "performance-based," since the government will still pay for the contractor efforts that did not provide the required

address the limits on contracting for personal services or inherently governmental functions.[14] While important, these are generally hard limits, not strategic decisions about how to structure the solicitation, and thus fall outside of the scope of this article.[15]

Instead, this article explores what issues a government source selection team should consider when (A) selecting a contract type, (B) describing the government's contractor workforce needs, and (C) structuring an evaluation scheme.

A. Choice of Contract Type

One of the very first strategic decisions a government source selection team will make is to determine what contract type is most appropriate for the required work.[16] This decision will have wide-ranging impacts on what types of contractor behavior the government incentivizes, how the government allocates performance risk with the contractor, and what actions the government source selection team must take to make an award under that contract type.[17] As such, this decision may well be the single greatest determinant of how successful the government will be at controlling cost and/or adapting to unforeseen situations in performance and how quickly the government can move through proposal evaluation to make award.

1. Performance Incentives of Various Contract Types

The FAR divides the spectrum of various contract types into two broad categories of risk allocation—fixed-price type contracts and cost-reimbursement type contracts.[18] Specialized contract types within each category provide a

level of performance, provided that the contractor made a reasonable effort to perform. *Id.* at 26 (noting generally the challenges of developing outcome-oriented measures, and that agencies considered the outcome of some tasks orders "to be obtaining qualified people rather than a specific result the contractor was required to achieve").

14. *See generally* FAR 37.101 (defining a "nonpersonal services contract"); FAR 37.104 (defining a "personal services contract"). *See* FAR 7.5.

15. Additionally, several commentators have already covered these important topics in some depth. *See*, *e.g.*, William Charles Moorhouse, *Expediency at the Expense of Governmental Propriety: Personal Service Contractors in the Procurement Office*, 41 Pub. Cont. L.J. 917 (2012); Kate M. Manuel, Cong. Rsch. Serv., R42325, Definitions of "Inherently Governmental Function" in Federal Procurement Law and Guidance (2014).

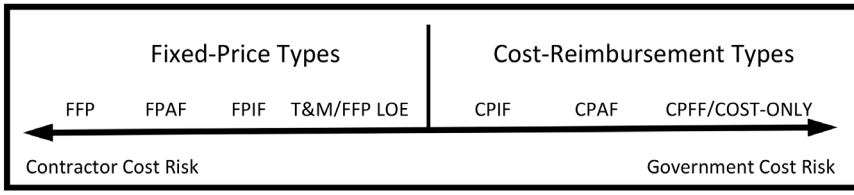
16. Recognizing the critical importance of this business decision, GAO acknowledges that "the selection of a contract type is the responsibility of the contracting agency; our role is not to substitute our judgment for the contracting agency's judgment, but instead to review whether the agency's exercise of discretion was reasonable and consistent with applicable statutes and regulations." URS Fed. Support Servs., Inc., B-407573, 2013 CPD ¶ 31, at 4 (Comp. Gen. Jan. 14, 2013).

17. *See generally* FAR 16.

18. FAR 16.101(b). Time-and-materials (T&M) and labor hour contracts are regulatory defined as not fixed-price contracts. FAR 16.600. A T&M contract provides for direct labor hours at specified fixed hourly rates that include wages, overhead, general and administrative expenses, and profit and actual cost for materials. FAR 16.601(b). A labor-hour contract is a T&M contract, except that materials are not supplied by the contractor. FAR 16.602. Nevertheless, as fixed-rate contracts, T&M and labor hour contracts function more like a fixed-price contract than a cost

wide range of risk allocation options for government source selection teams.[19] The following figure provides an overview of the contract types:

Figure 1. Overview of Contract Types with Corresponding Risk



a. Fixed Price Contracts

In fixed-price type contracts, the contractor bears all (or most) of the cost risk associated with performance, unless the contract includes some form of defined price adjustment.[20] As such, at one end of the risk allocation spectrum, the FAR contemplates a Firm-Fixed Price (FFP) contract, which leaves essentially all of the cost risk with the contractor.[21] Under an FFP contract, the contractor bears the risk that performing the work will cost more than the firm-fixed price agreed to. Therefore, even if it does cost the contractor more to perform, the government's price remains the same.[22] On the other hand, the contractor keeps the difference between its cost of performance and the government's FFP if it performs below the contract price.[23] Therefore, in a FFP contract, the contractor is incentivized to meet its obligations under the contract for the lowest cost.[24] Moreover, since the contractor bears the majority of the risk, it has the primary responsibility for determining the approach that it will use to meet the requirement; as long as the contractor meets the contract obligations, the government has few avenues to direct the contractor's performance.[25]

If this risk allocation is too heavily weighted towards the contractor, however, the government can shift some of the cost risk back to itself using other

reimbursement contract in both evaluation and performance. As such, this article generally treats labor hour contracts as a subset of T&M contracts and both alongside fixed-price type contracts.

19. *See generally* FAR 16.

20. *See, e.g.*, FAR 16.202-1 ("A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss.").

21. *Id.*

22. *Id.*

23. *Id.*

24. That said, several other marketplace factors may encourage FFP contractors to perform above minimum performance. These factors include past performance assessments and future-looking reputational issues. These counterbalancing incentives can be very motivating for contractors in a highly competitive environment where the government tracks contractor past performance and uses past performance to evaluate proposals.

25. The FAR 52.246-4(e) Inspection of Services-Fixed-Price requires that the contractor "perform the services again in conformity with the contract requirements, at no increase in contract amount … [if] … the services do not conform with contract requirements."

types of fixed-price contract types. Some of the common fixed-price alternatives for competitive LOE services contracting are Fixed Price Incentive Fee (FPIF) and Fixed Price Award Fee (FPAF).[26] In each case, the government accepts that the otherwise fixed price that it negotiated for the work will change somewhat in performance. With FPIF, the government is typically accepting that the fixed price may increase up to a ceiling if the contractor's cost of performance increases.[27] The government accepts sharing in some portion of cost increases in exchange for an opportunity to share in potential cost savings if the contractor can perform below the negotiated fixed price.[28] Similarly, in an FPAF contract, the government is accepting that it may pay an increased fee for higher quality service in performance.[29]

When agencies use the fixed-price contract types to acquire services on an hourly basis, they generally modify them into fixed-*rate* contract types. The FAR expressly acknowledges Firm-Fixed Price Level of Effort (FFP LOE)[30] and Time and Materials (T&M)[31] fixed-rate contract types, which function very similarly in performance. Under these two contract types, government source selection teams provide a maximum number of hours and a defined set of labor categories[32] for which offerors then propose fixed rates. To determine the contract price, the contractor simply multiplies the number of hours it provides for each labor category by the applicable fixed rate for that labor category and adds these results for each labor category together. Since these contract types do not contractually lock in the mix of labor categories (i.e., the labor mix) that the government will actually use in performance, and often do not contractually lock in the total hours for any specific labor category either, these contract types give the government more flexibility to adjust to changed conditions in performance as compared to a simple FFP, FPI, or FPAF contract. Since this article addresses LOE services, it will focus on fixed-rate

26. *See* FAR 16.204 (providing that a fixed price incentive contract allows for adjusting profit and contract price by a predetermined formula); FAR 16.403 (providing description, application, and limitation on fixed price incentive contact types); FAR 16.404 (providing for using award fees to motivate contractor performance when other incentives cannot be used because performance cannot be measured objectively).

27. FAR 16.403(c).

28. *Id.*

29. FAR 16.401(e).

30. Although FAR 16.207 expressly discusses FFP LOE, this same idea could be applied to FPI LOE or FPAF LOE, depending on the incentives that the Government source selection team wants to impose on the awardee. *See* FAR 1.102(d) ("In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority."). This article will focus on FFP LOE, but much of that discussion also applies to these other fixed-price contract types.

31. Interestingly, the FAR expressly defines T&M and LH contracts as neither fixed-price contracts nor cost-reimbursement contracts. FAR 16.600. Nevertheless, in terms of mechanics, T&M and LH contracts function identically to a FFP LOE contracts, as both use fixed hourly rates for a set of defined labor categories to determine the price for the hours of "best effort" work the contractor provides. *See* GAO-10-39, *supra* note 13, at 24–25.

32. *See* FAR 16.601; *see also* FAR 16.207.

contracts as the most applicable fixed-price type contracts for LOE service contracting.[33]

b. Cost-Reimbursement Contracts

Cost-reimbursement type contracts are the other broad category of contract-types that the FAR defines. In a cost-reimbursement contract, the government accepts a much larger amount of the cost risk in performance but gets more control over how the contractor will meet its needs.[34] Unlike a fixed-price type of contract, in a cost-reimbursement contract the government is responsible for the actual costs of the contractor[35] up to an established ceiling amount; moreover, the government is only entitled to receive the contractor's "best efforts" to complete the effort, rather than a defined performance outcome.[36] As with the fixed-price side of the spectrum, there are several variants of cost-reimbursement contracting. The most relevant for this article are Cost-Plus-Fixed-Fee (CPFF), Cost-Only, Cost-Plus-Award-Fee (CPAF), and Cost-Plus-Incentive-Fee (CPIF).

i. Cost-Plus-Fixed-Fee and Cost-Only Contracts

CPFF and Cost-Only contracts[37] exist at the extreme other end of the contractor risk spectrum from FFP. Under these contract types, the government accepts all of the risk of essentially any cost increase in performance;[38] the only difference between CPFF and Cost-Only is that the contractor receives a fee for its performance in CPFF. For CPFF contracts, the government negotiates a fixed fee prior to award. This fee amount, in terms of total dollars, will not

33. While the mechanics of FFP LOE and T&M contacts are very similar, there are two main differences. First, the internal Government approval authorities are different. T&M contracts require approval by the head of the contracting agency. FAR 16.601(d)(1)(ii). FFP LOE contracts merely require approval by the chief of the contracting activity, which, for many organizations, is a lower-level approval and can sometimes align with acquisition planning documentation approval. FAR 16.207-3(d). Secondly, unlike T&M contracts, the FAR does not prescribe any specific clauses for FFP LOE, so government source selection teams must more carefully select the clauses they wish to apply to FFP LOE. Nevertheless, teams may be able to repurpose the FAR's T&M clauses to cover the mechanics of FFP LOE contracts.

34. FAR 16.103(d)(1)(ii).

35. FAR 16.301-1.

36. FAR 52.216-7(a)(1), Allowable Cost and Payment, provides for the reimbursement of allowable costs as defined by FAR 31.201-2. FAR 31.201-2 provides that a cost is allowable only when the cost complies with (1) reasonableness, (2) allocability, (3) standards promulgated by the CAS Board, if applicable, otherwise, generally accepted accounting principles and practices appropriate to the circumstances, (4) terms of the contract, and (5) any limitations set forth in this subpart.

37. In drafting a solicitation, agencies may require more than just the labor; it may also have to pay for travel or incidental materials costs to accomplish the solicited effort. Travel and materials cost that are associated with a final cost objective that a contractor does not treat as direct labor are sometimes referred to as Other Direct Costs (ODCs). 3 Defense Acquisition University, Contract Pricing Reference Guides 118–19 (2014). Agencies can structure ODC CLINs as cost-only. *See also infra* Part II.C.2.b.ii(B) for a detailed discussion of evaluation strategies for cost-only ODC CLINs.

38. Nevertheless, in performance, the ODC costs that the contractor invoices must still be allocable, allowable, and reasonable to be reimbursed. FAR 52.216-7 (citing FAR 31.2).

change regardless of the costs the contractor incurs in performing the work.[39] In turn, the government agrees to pay the full cost of performance up to a stated ceiling limit,[40] at which point the contractor may cease providing the service. CPFF contacts typically provide little incentive to contractors to control cost, but also provide no incentive for exceptional performance.[41]

ii. Cost-Plus-Award-Fee and Cost-Plus-Incentive Fee Contracts

Where performance incentives are important, government source selection teams can consider CPAF and CPIF contracts.[42] These contract types still leave the government with much of the cost risk and meaningful control over the method of performance, but each uses fee increases or reductions to incentivize contractor performance in different ways.[43]

In CPAF contracts, the government typically links the contractor's fee amount to contractor performance;[44] in this way, CPAF contracts encourage contractors to spend more in performance to ensure that the quality of the performance is high enough to capture the maximum award fee.[45] This option may be an acceptable trade for the government where high-quality performance is a critical consideration, but high-quality performance can be costly.

In CPIF contracts, the government typically links the contractor's fee to its cost performance, essentially creating a limited cost-sharing structure.[46] Government teams often structure CPIF deals around five highly interrelated and critical elements: target fee; target cost of performance; maximum fee; minimum fee; and "share line," which is an expression of the cost-sharing arrangement for underruns and overruns.[47] For instance, the parties could agree to a CPIF deal with a target cost of performance of $100 million and a target fee

39. Importantly, the Government cannot enter into a cost-plus-percentage-of-cost contract because of the highly perverse incentives that it places on contractors to increase the cost of performance. 10 U.S.C. § 3322(a); 41 U.S.C. § 3905(a); FAR 16.102(c) ("The cost-plus-a-percentage -of-cost system of contracting shall not be used."). Thus, it is critical to set a fixed fee amount, as opposed to a percentage of the contractor's actual performance costs, prior to award.

40. Agencies use two distinct clauses to limit their total cost-reimbursement liabilities: Limitation of Funds (FAR 52.232-22) and Limitation of Cost (FAR 52.232-20). Both serve a similar function of limiting the Government's reimbursable liability to only the amount of funds that it has allotted (or "obligated") to the contract or the ceiling value respectively. This allotted amount often is lower than the total contract ceiling and changes as the government obligates or de-obligates funds on the contract.

41. FAR 16.306 (application of CPFF but also noting this contract type "provides the contractor only a minimum to incentive to control costs").

42. FAR 16.304; FAR 16.305; FAR 16.401; FAR 16.402.

43. FAR 16.304; FAR 16.305; FAR 16.401.

44. FAR 16.405-2 (noting "an award amount that the contractor may earn in whole or in part during performance and that is sufficient to provide motivation for excellence in the areas of cost, schedule, and technical performance").

45. FAR 16.401(e)(1)(ii) ("The likelihood of meeting acquisition objectives will be enhanced by using a contract that effectively motivates the contractor toward exceptional performance and provides the government with the flexibility to evaluate both actual performance and the conditions under which it was achieved.").

46. FAR 16.402-1.

47. U.S. Dep't of Defense, Guidance on Using Incentive and Other Contract Types 23 (2016) [hereinafter DoD Guidance on Using Incentives].

of $10 million, which is the fee the contractor would receive if it performed exactly at target cost. Further, the deal could specify that the maximum fee was $15 million and the minimum fee would be $5 million, with (for simplicity) a 50%/50% share line for both overruns and underruns. Under these terms, if the contractor actually incurred $105 million in performance cost, its actual fee would be $7.5 million, since it would share 50% of the $5 million cost overrun it experienced above its target cost. Conversely, if it only incurred $90 million in performing the requirement, the contactor would earn its maximum fee of $15 million, since it would share in 50% of the underrun below its target cost. Although this fifty-fifty cost sharing relationship exists around the target cost, it is limited by the maximum and minimum fee amounts.[48] For instance, once a contractor's overrun causes it to hit the minimum fee, there is no further cost sharing; instead, the government is responsible for the full amount of overrun costs beyond that minimum fee point, which is sometimes called the "point of total assumption."[49] As such, a CPIF contract incentivizes the offeror to provide a low-cost solution that meets the requirements, but this incentive is limited to a narrower range, since the government receives all of the underrun benefits below maximum fee performance and all of the overrun costs above minimum fee performance.[50]

c. Other Aspects of Contract Type

i. LOE contract versus completion contracts

Beyond the cost risk allocation, choosing to procure services on an LOE basis (either fixed-rate or cost-reimbursement)—as opposed to a completion basis—adds another level of complexity to the performance risk allocation between the parties.[51] While completion contracts require the contractor to perform until the task is complete, procuring services on an LOE basis permits the contractor to demand payment for merely providing the required number of hours of "best efforts," irrespective of whether that effort actually achieves any end goal or provides any value to the government.[52] This "best efforts" aspect generally necessitates greater government oversight of the contractor performance to ensure that its work is continuing to benefit the government.[53]

48. FAR 16.405-1(a).

49. DoD Guidance on Using Incentives, *supra* note 47, at 29–30.

50. *Id.* at 23.

51. *See, e.g.*, FAR 16.306(d).

52. *See* the "Limitation of Cost," FAR 52.232-20, and "Limitation of Funds," FAR 52.232-22, clauses discussing that the contractor shall use its "best efforts to perform the work" in cost reimbursement contracts; *see also* "Payments Under Time-and-Materials and Labor-Hour Contracts" clause, FAR 52.232-7(d), discussing that the contractor shall use its "best efforts to perform the work" T&M contracts; FAR 16.207-2 (discussing that for FFP LOE "payment is based on the effort expended rather than on the results achieved").

53. FAR 16.301-3(a)(4) ("Prior to award of the contract or order, adequate Government resources are available to award and manage a contract other than firm-fixed-priced (see 7.104(e)). This includes appropriate Government surveillance during performance in accordance with 1.602-2, to provide reasonable assurance that efficient methods and effective cost controls are used.").

ii. Best contract type for LOE

Putting this all together, the intersecting issues between the various contract types and LOE contracting typically result in government source selection teams focusing on the following five contract types: T&M, FFP LOE, CPIF, CPAF, and CPFF (including Cost-only).[54] The main reason for the focus on these specific contract types is that each presents substantial flexibility for the government in terms of changing the number of hours or the labor mix relatively easily during performance. The main difference between them is that the fixed-rate (T&M and FFP LOE) contract types lock-in hourly rates in competition, when the downward price pressure is highest on the contractors, while the cost-reimbursement types do not contractually lock-in hourly rates (although a CPIF contract forces the contractor to share some of the cost of underestimating its rates in performance).

Contractually locking-in hourly rates has advantages and disadvantages. On the one hand, fixed rates allow the government to capture the effects of the downward price pressure caused by competition and apply it for the life of the contract.[55] In performance, it also permits the government to adapt to unforeseen changes quickly and with a clear understanding of the precise price impacts of the change because the fixed-rates will not vary.[56] Essentially, the government only needs to determine the total number of hours and labor mix that it requires to address the changed conditions and that it can easily calculate a fixed price for that change.[57]

On the other hand, fixed rates typically incentivize the contractors to pad the proposed fixed rates somewhat to account for a variety of risks associated with the deal.[58] While competitive pressure often counterbalances this, the padding incentive can lead to a somewhat higher cost for the government, compared with cost-reimbursement type contracts.[59] Moreover, fixed rates also prevent the government from capturing any benefit when there are decreases in the cost of providing the services; such decreases, however, are generally rare, and, if significant, the government could opt to recompete the work to receive updated fixed-rate pricing.[60] Finally, fixed rates also incentivize the contractor to provide the least expensive personnel that meet all of

54. John Cibinic, Jr. & Ralph C. Nash, Jr., Formation of Government Contracts 1317 (2011).

55. FAR 16.202-1.

56. That said, if the change requires the government to negotiate hourly rates for a new labor category, these will be essentially sole source negotiations, in which the Government has less negotiation leverage and the contractor can drive a harder bargain, recognizing that the Government may have few other options to acquire these new labor categories quickly. FAR 52.243-1.

57. *See*, *e.g.*, FAR 16.601(c)(2); FAR 16.602.

58. *See*, *e.g.*, FAR 16.202-1 (addressing contractor incentives in fixed-price contracting generally).

59. In a cost-reimbursement contract, the government only pays the actual cost of the service plus fee, which eliminates the company's ability and need to pad the rate to account for risk.

60. *See*, *e.g.*, *CPI For Urban Wage Earners and Clerical Workers*, U.S. Soc. Sec. Admin., https://www.ssa.gov/oact/STATS/cpiw.html [https://perma.cc/U2LW-84B6] (last visited Sept. 18, 2023) (showing general increase in labor escalation year over year since 2013).

the given labor category's minimum qualifications, which can result in a race to the bottom of the category.[61] Agencies can minimize this particular race-to-the-bottom risk, however, by defining a greater number of more narrowly spaced labor categories in the solicitation.[62] This option limits the range of salaries that apply to any single labor category, which reduces the incentive to provide the absolute lowest.

Overall, in terms of performance incentives, the particular programmatic goals, risk tolerance, and funding will all play into the government's selection of contract type, as will the typical practices of the industrial base supporting that program. FFP and CPFF are good starting points for making comparisons between these incentives.

RECOMMENDATION: Although a broad range of potential contract types may apply to specific situations, for LOE efforts, government source selection teams should largely focus on fixed-rate or cost-reimbursement contract types. FFP LOE/T&M and CPFF are good starting points for comparing options because their mechanics are easy to understand and administer and provide meaningfully different cost risk allocations. In making a final decision, however, government teams should also consider how this choice will impact their evaluation schemes.

2. Evaluation Considerations for Various Contract Types

Although performance incentives are an important consideration in selecting a contract type, choosing a cost-reimbursement type contract will significantly complicate a procurement's proposal evaluation phase, since FAR 15.404-1(d) requires the government to conduct a cost realism analysis for all cost-reimbursement contracts.[63] Compared to a simple price reasonableness analysis for a fixed-price type effort, conducting a cost realism analysis substantially increases the volume of information the solicitation must request from offerors, the complexity of evaluating the much larger record, and the potential areas a protester could challenge in the eventual evaluation record.[64] As such, government source selection teams should carefully consider what

61. FAR 52.232-7(a)(3) ("The hourly rates shall be paid for all labor performed on the contract that meets the labor qualifications specified in the contract," providing the contractor no incentive to provide labor exceeding the labor category).

62. For example, if the government defined a Senior Engineer as having a minimum of 15 years of experience and a Junior Engineer as having a minimum of 3 years of experience, the Government would likely get a team comprised primarily of personnel at 15 years and 3 years of experience, since these would likely be the personnel with the lowest salaries for the defined labor categories. There is little incentive for the contractor to provide any personnel with 13 years of experience because they could only bill them at the same rate as someone with 3 years of experience. If, however, the government defined five labor categories that respectively had 15, 12, 9, 6, and 3 minimum years of experience, the government would receive rates for each and could much more easily acquire a person with 13 years because the salary difference between that person and the 12-year minimum for the applicable labor category is much smaller.

63. FAR 15.404-1(d).

64. In its *Annual Bid Protest Report to Congress*, GAO regularly includes "unreasonable cost or price evaluation" as one of the most prevalent grounds for sustaining protests. *See, e.g.*, U.S. Gov't Accountability Off., GAO-22-900379, GAO Bid Protest Annual Report to Congress for Fiscal Year 2021, at 1–2 (2021) [hereinafter GAO 2021 Report]. The annual reports highlight issues with cost or price realism for nine of the last ten years, but never cite issues with price reasonableness analysis.

performance advantages they hope to capture with a cost-reimbursement contract because, compared to a fixed-price effort, there are essentially no advantages to a cost-reimbursement contract in the evaluation phase.

For a fixed-price type contracts,[65] the FAR only requires agencies to perform a price reasonableness analysis to ensure the agency is not paying too high a price.[66] Generally, price reasonableness evaluations are quick and easy because "[n]ormally, competition establishes price reasonableness."[67] Where the government expects adequate price competition, the solicitation only needs to ask offerors to provide topline prices for each contract line item or labor-category rate, without asking for any additional, lower-level cost data from the offerors.[68] Although FAR 15.404-1(b)(2) provides a variety of techniques, the only required analysis is a simple top-level comparison of the prices between offerors without any further scrutiny or adjustment of the proposed prices.[69] This analysis does not require a lot of information or time from the offerors, and, in turn, the agency can quickly determine whether a proposed price is fair and reasonable.

Additionally, a price reasonableness evaluation can be very difficult to challenge in a protest. If an agency solicitation clearly sets forth how it will evaluate the total price, compares the total prices received either to each other or the historical prices, and documents this analysis, the Government Accountability Office (GAO) generally will find the agency's analysis reasonable.[70] Additionally, even when the proposed offeror's price is significantly higher than the

65. An agency is only required to perform a price reasonableness analysis for a T&M contract type as well. Iron Vine Security, LLC, B-409015, 2014 CPD ¶ 193, at 5 (Comp. Gen. Jan. 22, 2014). ("Where, as here, a solicitation anticipates award of a time-and-materials contract with fixed-price, fully-burdened labor rates, there is no requirement that an agency conduct a price or cost realism analysis, in the absence of a solicitation provision requiring such an analysis.").

66. FAR 15.404-1(a)(2) ("Price analysis shall be used when certified cost or pricing data are not required . . . ."); FAR 15.402(a)(1); URS Fed. Support Servs., Inc., B-412580 et al., 2016 CPD ¶ 116, at 7 (Comp. Gen. Mar. 31, 2016) ("As a general rule in awarding fixed-price contracts, agencies are only required to determine that prices are not unreasonably high. See FAR 15.402(a).").

67. FAR 15.305(a)(1) ("Normally, competition establishes price reasonableness. Therefore, when contracting on a firm-fixed-price or fixed-price with economic price adjustment basis, comparison of the proposed prices will usually satisfy the requirement to perform a price analysis, and a cost analysis need not be performed.").

68. *Id.*

69. American Access, Inc., B-414137 et al., 2017 CPD ¶ 78, at 6 (Comp. Gen. Feb. 28, 2017) ("[W]hile the protester argues that the agency was required to perform a 'more-in-depth analysis by comparing the total pricing for different configuration of ramps,' . . . the manner and depth of an agency's price analysis is a matter within the sound exercise of the agency's discretion, and we will not disturb such an analysis unless it lacks a reasonable basis."); MVM, Inc., B-290726 et al., 2002 CPD ¶ 167, at 6 (Comp. Gen. Sept. 23, 2002) (denying protest that the agency failed to properly evaluate for price reasonableness because the agency compared the prices of competitive range offerors to each other and finding no "legal requirement here for the agency to have done a more in-depth analysis than was undertaken here").

70. IAP World Servs., Inc., B-297084, 2005 CPD ¶ 199, at 4 (Comp. Gen. Nov. 1, 2005) (where protester's price was 34% higher than the government estimate and comparably higher than other offerors' prices, differentials were not of a magnitude that suggests that protester's price was unreasonable on its face); Grove Res. Sol., Inc., B-296228 et al., 2005 CPD ¶ 133, at 9 n.5 (Comp. Gen. July 1, 2005) (price differential of 40% between offerors did not indicate that higher price was unreasonable on its face).

other offerors' prices and the government cost estimate, GAO permits the agency to consider the price relative to the particular approach taken by the offeror.[71] Thus, price reasonableness analyses present *much lower* protest risk to the government. In fact, one of the very few strategies that can gain traction with GAO is for the protester to assert that the agency failed to perform a price *realism* analysis, which is a distinct concept from a price *reasonableness* analysis.[72] Since price realism analyses are not required for award of fixed-price type contract (or any other contract type for that matter), an agency can generally avoid this protest issue by expressly stating in the solicitation that it will not conduct a price realism analysis.[73] Overall, a simple and straightforward price reasonableness analysis provides few avenues for a protester to challenge the government's evaluation of its proposed price.

Compared to fixed-price contracts, the required evaluation landscape is very different for cost-type contracts because the government must conduct a cost realism analysis of an offeror's proposed costs before it makes an award.[74] As background, in a cost realism analysis, the agency evaluates all (or nearly all) of each offeror's proposed cost elements against available substantiating data to determine whether each of the proposed cost elements is realistic for performance.[75] Without a cost realism analysis, an offeror could propose unrealistically low cost elements to secure an award, and then, in performance, the agency would have to pay the contractor's significantly higher incurred costs under the cost-reimbursement contract. Where an offeror proposes any cost element at a value lower than the available substantiating data or fails to provide substantiating data to support a proposed cost element, the government cost realism must adjust that element upward or identify cost risk associated with that flaw.[76]

71. Prof. Analysis, Inc., B-419239 et al., 2021 CPD ¶ 50, at 9 (Comp. Gen. Jan. 8, 2021) (finding agency price reasonableness analysis reasonable where the awardee had a 43% premium over the next closest offeror); Grove Res. Sol., Inc., B-296228 et al., 2005 CPD ¶ 133, at 9 n.5 (price differential of 40% between offerors did not indicate that higher price was unreasonable on its face).

72. EFW, Inc., B-412608 et al., 2016 CPD ¶ 304, at 13–14 (Comp. Gen. Apr. 7, 2016) ("[A]s our Office has held, price reasonableness and price realism are distinct concepts . . . . The purpose of a price reasonableness review is to determine whether the prices offered are too high, as opposed to too low . . . . Conversely, a price realism review is to determine whether prices are too low, such that there may be a risk of poor performance.") (internal citations omitted).

73. This article also addresses ways to avoid accidentally triggering a price realism analysis in Part II. Contract Servs., Inc., B-407894 et al., 2013 CPD ¶ 87, at 8 (Comp. Gen. Apr. 3, 2013) (dismissing protest allegation that the agency did not perform a price realism evaluation where the solicitation stated the agency will only evaluate prices for reasonableness and balance).

74. FAR 15.404-1(d).

75. FAR 15.404-1(d)(2); LOGC2, Inc., B-416075, 2018 CPD ¶ 204, at 5 (Comp. Gen. June 5, 2018) ("Cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror"s proposed cost to determine whether the estimated proposed costs are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the offeror's technical proposal.").

76. *See* FAR 15.305(a)(1); FAR 15.404-1(d); Per David Midboe, *Sidestepping the Point-Estimate Fallacy: How to Improve the Quality of Government Procurement Decisions by Evaluating the Predictive Value of Cost Realism Analysis*, 42 Pub. Cont. L.J. 251, 254 (2013).

Cost realism analyses are extremely detailed and can implicate hundreds of individual cost elements[77] across both the prime contractor and its subcontractors within every proposal. As such, the government source selection team must carefully draft the solicitation to require all of the proposed and substantiating data that it requires from the offerors to complete this complex analysis. Collecting the data necessary to substantiate proposed cost elements can take offerors months, and, even then, it can be incomplete or inconsistent with other parts of the proposal.[78] Moreover, the government must document every aspect of this highly detailed analysis in reports that can balloon to hundreds of pages.[79] It can take the agencies months or sometimes even years to evaluate all of the data and correctly document its findings.[80] As such, a cost realism analysis vastly increases the amount of information that offerors must provide, which, in turn, vastly increases the amount of agency time and effort it takes to sift through that data, evaluate it, and document that analysis.

Furthermore, conducting a cost realism analysis substantially increases the risk of protest. Protesters regularly challenge their own adjustments,[81] the magnitude of adjustments the government made to the awardee,[82] and alleged

77. Although LOE contracts typically do not include a large number of material costs and do not require substantiation for the total number of hours because the solicitation specifies them, the number of labor cost elements involved in a LOE cost realism analysis is very high. *See* LOGC2 Inc., 2018 CPD ¶ 204, at 5–6 (denying protest that agency failed to analyze individual cost elements when the agency considered the awardee's "direct labor, indirect rates (fringe rates, overhead rates, general and administrative (G&A) rates), proposed fee . . . and the offeror's accounting system. . . ."). Each named individual has a unique salary, as does each labor category of unnamed personnel; additionally, the government must consider escalation rates across the workforce and any uncompensated overtime the offerors propose. Noblis, Inc., B-414055, 2017 CPD ¶ 33, at 10–11 (Comp. Gen. Feb. 1, 2017) (denying protest challenging agency use of standard deviation methodology and noting the agency's cost realism analysis considered labor escalation and uncompensated overtime among other cost elements). Beyond these direct labor costs, the government must consider the individual indirect rates for each offeror and each its proposed cost-reimbursement subcontractors. Furthermore, if the solicitation does not provide a government labor mix or if the offeror deviates from it, the government's cost realism must also include a realism evaluation of the proposed labor mix. Finally, for CPIF contracts or proposed CPIF subcontractors, the government should account for the share line impacts to fee of any adjustments that it makes.

78. See *infra* note 79 for a discussion of the information required to complete a cost realism analysis.

79. Facility Servs. Mgmt., Inc., B-414857.9, 2019 CPD ¶ 35, at 7 (Comp. Gen. Aug. 23, 2018) (noting the RFP limited proposal page-length to 125 pages and the offeror provided nominally 162 pages); U.S. Agency for Int'l Dev., Cost Realism Analysis Key Components Guidance and Checklist 10 (2012).

80. ICI Servs. Corp., B-418255.5 et al., 2021 CPD ¶ 342, at 2, 21 (Comp. Gen. Oct. 13, 2021) (denying cost realism protest and noting that the procurement was long and contentious stretching over two years from RFP solicitation release in April 2019 to GAO bid protest denial in October 2021).

81. *See* Trident Vantage Sys., LLC; SKER-SGT Eng'g & Sci., LLC, B-415944 et al., 2018 CPD ¶ 166, at 16 (Comp. Gen. May 1, 2018) (sustaining a protest that the agency unreasonably adjusted the protester's proposed costs because the agency documentation failed to consider the protester's substantiating documentation for innovations and efficiencies).

82. *See* Orbis Sibro, Inc., B-415714 et al., 2018 CPD ¶ 100, at 3 (Comp. Gen. Feb. 28, 2018) (sustaining a protest that the agency unreasonably adjusted the protester's proposed costs too much by including the variance between Section B and its cost worksheets in addition to adjustments to individual cost elements).

missing adjustments to the awardee's proposed cost.[83] In fact, having to conduct a cost realism analysis increases the risk of protest loss to such a degree that GAO regularly includes "flawed cost realism analysis" amongst its top four reasons for the government losing a protest;[84] this figure does not include the large number of corrective actions that also result from flawed cost realism analyses.[85] Furthermore, litigating cost realism issues can be highly complex, since it potentially involves guiding the arbiter through those hundreds of cost elements, which are scattered across dozens of disparate spreadsheets, to show that the government reasonably evaluated the offerors' submissions and properly calculated their total evaluated costs.[86] This can quickly lead to confusion for even the most skilled advocates. Thus, overall, fixed-price and fixed-rate contract types are far superior to cost-reimbursement contracts from an evaluation perspective: they are faster to award, require substantially less evaluation work, and present substantially lower protest risk.

> **RECOMMENDATION:** From an evaluation perspective, government source selection teams should favor FFP LOE or T&M contracts over cost-reimbursement type contracts. If business considerations lead the government to selecting a cost-reimbursement contract type, government source selection teams should carefully consider the cost-realism evaluation techniques and best practices discussed in this article to minimize the complication and work associated with conducting a defensible cost realism analysis.

B. Describing the Government's Contractor Workforce Needs

One of the defining features of LOE services contracting is that it involves the acquisition of people's skills for a specific duration of time.[87] Although these skills could range from engineering services to truck driving services, the fact remains that LOE services contracting deals with people and their skills, as opposed to things and their features.[88] Additionally, "[i]t is a fundamental principle of government procurement that a contracting agency['s solicitation]

83. *See* KPMG LLP, B-406409 et al., 2012 CPD ¶ 175, at 13 (Comp. Gen. May 21, 2012) (sustaining protest where agency failed to recognize discrepancies between awardee's cost and technical proposals, finding that, "[i]n short, the agency failed to provide any reasonable basis for estimating the probable costs it will incur under the contract it awarded—a prerequisite to the award of every cost-reimbursement contract by the federal government").

84. GAO 2021 Report, *supra* note 64, at 2 n.3 ("*E.g.*, DevTech Sys., Inc., B-418273.3, B-418273.4, Dec. 22, 2020, 2021 CPD ¶ 2 (finding that the agency's cost realism evaluation was unreasonable where the agency conceded that there was an error with its evaluation and where the record did not support the agency's upward adjustment of the protester's proposed costs and the agency's failure to adjust some of the awardee's proposed costs.)").

85. *See id.* at 4 (identifying the effectiveness rate for 2021 at 48%, meaning that the protester obtained "some form of relief from the agency, as reported to GAO, either as a result of voluntary agency corrective action or our Office sustaining the protest."). In Fiscal Year 2021, the sustain rate was only 15%, meaning the effectiveness rate included substantial agency voluntary corrective action. *Id.*

86. *See* Guidehouse LLP; Jacobs Tech., Inc., B-420860.1 et al., 2022 CPD ¶ 257, at 5–6 (Comp. Gen. Oct. 13, 2022).

87. *See* FAR 37.101 (defining "service contract"); *see also* FAR 16.207 (discussing "level-of-effort term" contracts).

88. *See* FAR 37.101.

must provide a common basis for competition" that allows for an "apples-to-apples" comparison of the offerors.[89]

To provide all prospective offerors with this critical "common basis for competition" within the people/skill-centric world of LOE services contracting, government agencies typically define their LOE services needs using two related, but distinct concepts: the total number of hours and labor mix.[90] Additionally, many agencies also opt to include a third concept, key personnel, to further refine their staffing requirements with respect to a subset of contractor personnel with highly specialized skills.[91] In each case, the government's choices about how to incorporate these three concepts into their solicitations will have wide-ranging impacts on the speed and defensibility of the source selection decision, as well as a meaningful impact on the business value of the resulting award.

1. Total Hours: An Essential Element of Any LOE Services Competition

Although the FAR does not independently define the term "level of effort," there is little doubt that, in applying this term, agencies consider the total number of hours on each contract line item number (CLIN) as material requirements of an LOE service contract.[92] Furthermore, GAO has acknowledged the importance of evaluating LOE service contracts using a similar labor hour baseline, finding that the Army could not reasonably compare offerors in an LOE competition without a common labor hour baseline.[93] Furthermore, offerors can exploit ambiguities in the total required level of effort to artificially reduce their proposed cost/price (by offering fewer hours) or to artificially inflate their performance value under technical or non-price evaluation factors in the competition (by claiming to get more work done). In either case, these bidding strategies limit or preclude the government's ability to evaluate the offerors on an apples-to-apples basis.[94] As such, within the LOE environment, it is critical to provide all offerors a common understanding of the total number of hours required to perform the effort.

89. *See* DRS Tech. Servs., B-411573.2, et al. 2015 CPD ¶ 363, at 10 (Comp. Gen. Nov. 9, 2015) (applying common basis for competition principle in FAR Part 16.5 task order competition).

90. See *id.* at 4.

91. Wyle Labs., Inc., B-408112.2, 2014 CPD ¶ 16, at 8 (Comp. Gen. Dec. 27, 2013).

92. *See, e.g.*, Dep't of the Navy, N00024-19-R-6316, H002 "Level of Effort—Alternate 1" (Apr. 30, 2019), https://sam.gov/opp/fb8e498f259de2a95ba6777965ffec8f/view [https://perma.cc/S76N-WP9Z] ("The total level of effort for the performance of this contract is specified in Section B."); CAR 1352.216-71 (Department of Commerce's "Level of effort (cost-plus-fixed-fee, term contract)" clause requiring the contractor to "provide the total Direct Productive Labor Hours . . . specified in Part I, Section B").

93. TRAX Int'l Corp.–Costs, B-410441.8, 2016 CPD ¶ 226, at 4 (Comp. Gen. Aug. 17, 2016) ("The Army's decision . . . was unreasonable because it resulted in offerors proposing materially different labor hour baselines. This, in turn, precluded a reasonable comparison of the offerors respective proposed staffing approaches and costs.").

94. DRS Tech. Servs., 2015 CPD ¶ 363, at 10–11 ("Thus, by failing to account for these disparities in the offerors' proposals, the RTEP's evaluation scheme did not provide for an apples-to-apples comparison, and effectively penalized offerors that proposed to provide full contract performance sooner than those offerors with a more prolonged transition period." (citing L-3 Comms. Titan Corp., B-299317 et al., 2007 CPD ¶ 66, at 11–13 (Comp. Gen. Mar. 29, 2007).)).

Specifying a total number of hours per contract period is not typically complex; it is typically as simple as stating a specific number of hours for each CLIN. For example, see Figure 2.

Figure 2. Department of Navy RFP (2019)[95]

Item	Supplies/Services	Qty	Unit
2000	Base Year Labor for Acquisition and Integrated Logistics Support of the PEO IWS Portfolio of Programs. (Fund Type - TBD) (Fund Type - TBD)	573,725.00	Labor Hours
2100	Option Year 1 Labor for Acquisition and Integrated Logistics Support of the PEO IWS Portfolio of Programs. (Fund Type - TBD) (Fund Type - TBD) Option	573,725.00	Labor Hours
2200	Option Year 2 Labor for Acquisition and Integrated Logistics Support of the PEO IWS Portfolio of Programs. (Fund Type - TBD) (Fund Type - TBD) Option	573,725.00	Labor Hours
2300	Option Year 3 Labor for Acquisition and Integrated Logistics Support of the PEO IWS Portfolio of Programs. (Fund Type - TBD) (Fund Type - TBD) Option	573,725.00	Labor Hours
2400	Option Year 4 Labor for Acquisition and Integrated Logistics Support of the PEO IWS Portfolio of Programs. (Fund Type - TBD) (Fund Type - TBD) Option	573,725.00	Labor Hours

Agencies do, however, sometimes apply variations on the theme of simply listing a total number of hours. Typically, these variations fall into two major categories: using units other than hours or providing a range of hours. In both cases, the acid test for whether the solicitation's description of the total level of effort is acceptable is whether it provides all offerors a "common basis for competition."[96]

a. Defining Level of Effort in Units Other Than Hours

In some situations, procuring agencies choose to specify their total required level of effort in units other than hours.[97] For instance, agencies often describe

95. Dep't of Navy, N00164-19-R-3503 (2019).

96. *Id.* at 22–23 ("It is a fundamental principle of government procurement that a contracting agency must provide a common basis for competition and may not disparately evaluate offerors with regard to the same requirements.").

97. Cubic Applications, Inc., B-411305 et al., 2015 CPD ¶ 218, at 2 (Comp. Gen. July 9, 2015) ("Contractors are to provide functional support required to fulfill the task order, including the required level of effort of 90 core and 19 optional full time equivalent (FTE) personnel with appropriate security clearances, as detailed in the PWS.").

their LOE requirements in terms of "Full Time Equivalents" or "FTEs."[98] Essentially, where an agency specifies its total level of effort in FTEs, it is specifying how many people it wants to show up at the jobsite for the year. Of course, this is a measure of the total effort that the government wants, but it introduces one additional complexity into the agency's procurement—the solicitation must now define how many hours per year the government expects a person to work to be an FTE. Unfortunately, the contractor community does not have any consistency about how they define how many hours per year constituting "full time." While many firms consider a year to be 1,920 hours, others use 2,080 or 1,880 as the basis for their full year.[99] These differences can materially change the total number of hours the contractors estimate (i.e., 2,080 is approximately 10.6% more hours than 1,880), which can call into question whether the solicitation provided a common basis for competition. Therefore, if the agency's solicitation specifies its required total level of effort in FTEs, it is critical that it then also provides a definition of how many hours it includes in an FTE to provide all offerors a common basis for competition.

Furthermore, agencies can also complicate their description of their total required level of effort by specifying the required total effort by team. For instance, an agency may require "1 Agile Development Team's effort for 26 sprints."[100] Although the term "hours" does not appear in this call out, this is also a measure of total effort. This alone, however, is an incomplete description of the required effort because it does not provide critical information to determine the required total level of effort; specifically, it omits the number of people on the team, the hours each team-member is required to perform per sprint, and the duration of each sprint. Without this information, one offeror could present a three-person team with full-time personnel for a four-week sprint, while another offeror could provide a twelve-person team with six full-time and three half-time personnel on a two-week sprint. In evaluating each team, the first offeror would propose a total level of effort of 443 hours, while

98. *Id.*

99. Many of these differences are tied to the contractors accounting for its employees leave and holiday benefits, but a company policy requiring uncompensated overtime can complicate who qualifies as a Full Time Equivalent too. *See* Versar, Inc., B-254464.3, 94-1 CPD ¶ 230 (Comp. Gen. Feb. 16, 1994) (sustaining protest where agency unreasonably credited offeror's direct labor hourly rates for uncompensated overtime (UCOT) where offeror proposed UCOT after employees worked 40 hour weeks, which required direct productive labor hours of 1,860 per FTE, which was similar to the solicitation requirement making it unrealistic for offeror to secure the proposed UCOT).

100. *See* U.S. Gov't Accountability Off., GAO-20-590G, GAO Agile Assessment Guide: Best Practices for Agile Adoption and Implementation 19 (2020) (noting one of the challenges in evaluating agile methods was tracking the level of effort using story points instead of the traditional estimating technique based on hours because team members were not used to that method); U.S. Dep't Of Defense, Contracting Considerations for Agile Solutions, Key Agile Concepts and Sample Work Statement Language 14 (2019) (noting that, in defining velocity as the measure of work completed in a sprint for an agile team, "each team measures level of effort, size, and complexity of work differently in terms of story points"); SNAP, Inc., B-409609 et al., 2014 CPD ¶ 187, at 11 (Comp. Gen. June 20, 2014) (solicitation required agile development teams to participate in IT development projects using various agile and lean processes).

the second would propose 665 hours—approximately fifty percent more than the first. Without team size and sprint duration data, the offerors lack a common basis for competition, and the government cannot conduct an apples-to-apples comparison of them.[101] Therefore, as with FTEs, it is critical that the agency provide sufficient data for offerors to clearly understand the total number of required hours in an LOE service contract, even if the agency chooses to specify those hours using some other units.

> **RECOMMENDATION:** Agencies should avoid unnecessarily complex descriptions of the total number of hours under the contract. If possible, the agency should specify the total required level of effort in hours, instead of complicating the solicitation with other units, which require more data points and invite mathematical errors for both contractors and the agency. Where agencies use other units, they should ensure that they provide clear conversion factors in the solicitation to translate clearly and unambiguously those other units to hours.

b. Defining Level of Effort with a Range of Hours

Some agencies' LOE services clauses contemplate some variation in the maximum number of hours required under the contract—such as providing a range of hours instead of a fixed value.[102] Although these approaches typically focus on defining what in-scope post-award hours increases are not subject to fee adjustment, they can complicate what the maximum number of hours are under the contract for proposal evaluation purposes.[103]

Where agencies use a variable hour clause, it is important that the solicitation clearly lay out an evaluation scheme that removes any ambiguity regarding the total number of hours that the offerors should propose.[104] Typically, resolving this ambiguity is fairly straightforward. For instance, the agency could include the following statement in Section L of its solicitation: "Offerors shall propose the hours listed in each contract line item listed in Section B without deviation." Moreover, the agency would also have to ensure that this statement aligns with the evaluation scheme in Section M, where it may impact both cost and non-cost/price evaluation factors. Alternatively, the agency could require all offerors to bid to some other percentage of Section B hours. The critical question is simply whether the solicitation is clear in providing a common basis for competition by specifying which set of hours the agency will use for its evaluation. That said, Section B generally takes precedence

101. Despite the discussion above, for a non-level of effort evaluation such as a performance-based or supply contract, the differences in the approaches would not prohibit a common basis of competition but rather different approaches for the same outcome.

102. *See* EPAAR 1552.211-73(c) ("The Government may require the Contractor to provide additional effort up to 110 percent of the level of effort for any period until the estimated cost for that period has been reached. However, this additional effort shall not result in any increase in the fixed fee, if any.").

103. *See* L-3 Comms. Titan Corp., B-299317 et al., 2007 CPD ¶ 66, at 21–26 (Comp. Gen. Mar. 29, 2007) (sustaining protest where the agency's evaluation scheme did not account for different levels of effort proposed for transition period and resulting cost and therefore the evaluation scheme failed to support meaningful comparison of proposals).

104. *Id.*

under the Order of Precedence clause,[105] so it is likely the best candidate to present as the government's total hour requirement for evaluation.

Overall, specifying a total required level of effort in an LOE service contract is necessary to provide a common basis for competition for all offerors and to create a common yardstick against which to evaluate all offerors on an apples-to-apples basis. It is not, however, sufficient. As the following section explains, the solicitation must go beyond simply describing how many hours it needs and must also describe the types of people/skills that it requires for those hours.

> **RECOMMENDATION:** Agencies should use caution when using a range of hours. Ideally, the agency should fix the total number of hours by contract line item in Section B, instruct all offerors to use these Section B hours in developing their proposals, and trace all evaluation schemes back to these Section B hours.

2. Labor Mix: A Powerful Tool for Providing a "Common Basis for Competition"

In addition to providing a total number of hours, GAO's "common basis" standard also demands that the solicitation contain either 1) "a sufficiently detailed description of the work . . . to allow offerors to intelligently propose" or 2) a labor mix to give them a common target to shoot at.[106] Without such guidance, one company could propose 10,000 hours of performance by Ph.D.-degreed nuclear physicists, while another could propose 10,000 hours of performance by high school seniors.[107] Regardless of which mix was more appropriate to perform the solicitation's Statement of Work (SOW), there would be substantial differences between the skills and capabilities of these two labor forces, as well as the cost of each.

Although agencies could provide this guidance with a "sufficiently detailed description of the work,"[108] many agencies choose to rely on broad SOWs in their LOE service contracting that are intentionally flexible in performance. Nevertheless, these broad SOWs are inherently open to various interpretations of how offerors should propose to staff the effort.[109] While the flexibility

105. FAR 52.215–8 (noting that the schedule takes precedence over representations and other instructions and contract clauses).

106. Global Tech. Sys., B-411230.2, 2015 CPD ¶ 335, at 20 (Comp. Gen. Sept. 9, 2015).

107. *Id.*

108. *Id.*

109. U.S. Gov't Accountability Off., GAO-10-39: Defense Acquisitions: Further Actions Needed to Address Weaknesses in DOD's Management of Professional and Management Support Contracts 18 (2009) ("While DOD identified as performance-based all but one of the task orders we reviewed, we found that almost all of the task orders had broadly defined requirements that listed various categories of services and related activities the contractor may be required to perform over the course of the order rather than expected results. The task orders we reviewed were issued from base contracts that identified the categories of support services a contractor may be required to perform. The task orders then identified a broad range of activities that the contractor may be required to perform based on the customer program office's needs. For example, the base contract for one task order identified four different categories of support services: acquisition, financial management, contracting, and administrative and human resources

of a broad SOW is often a substantial benefit to the agency in performance, the lack of a detailed description of the work to be performed limits the SOW's ability to define the agency's requirements in a way that meet GAO's "common basis" standard.[110] On the other hand, providing a government labor mix (mandatory or recommended) circumvents the difficult questions of how offerors should staff a broad SOW by giving all offerors a common starting point for bidding; it also creates a common yardstick the government can measure each of the offerors against.[111]

In fact, providing a government labor mix in a solicitation provides the agency several meaningful benefits. First, it allows the agency to sidestep the hard work of narrowly tailoring the SOW,[112] which can be quite time-consuming for complex services requirements. This decreases the agency workload and associated schedule delays during the requirements development phase of the procurement. Second, where the solicitation only provides the government labor mix "for evaluation purposes only," this strategy preserves nearly all of the post-award flexibilities the government is seeking when it drafts a broad SOW.[113] Third, where the solicitation contemplates the agency conducting a cost realism analysis, including a government labor mix in the solicitation greatly simplifies the government's cost realism evaluation of an offeror's proposed hours and labor mix cost elements.[114] Finally, providing a government labor mix is a well-tested and reliable method for meeting GAO's common

support. In turn, the task order identified several activities the contractor could perform, such as preparing acquisition-related documents, updating commanders on policies and procedures, tracking and analyzing funds, maintaining contract files, and preparing travel orders.").

110. *See* Global Tech. Sys., 2015 CPD ¶ 335, at 19 (sustaining protest that the solicitation SOW did not provide a sufficiently detailed description of the work to be performed or the goals to be achieved to allow offerors to intelligently propose a labor mix and level of effort).

111. *See* Deloitte Consulting, LLP et al., B-411884 et al., 2015 CPD ¶ 2, at 11–14 (Comp. Gen. Nov. 16, 2015) (sustaining protest where the solicitation did not provide a labor mix and the agency made unsupported assumption in attempting to evaluate the awardee's labor mix about what position would perform what hours).

112. U.S. Gov't Accountability Off., GAO-08-263: Defense of Homeland Security: Better Planning Assessment Needed to Improve Outcomes for Complex Service Acquisitions 7 (2008) ("However, our prior work and the work of others has found that implementing a performance-based approach is often more difficult for complex acquisitions because agencies begin with requirements that are less stable, making it difficult to establish measurable outcomes. OFPP has noted in policy that certain types of services, such as research and development, may not lend themselves to outcome-oriented requirements. CPO representatives also have noted that defining outcome-oriented requirements and measurable performance standards may be more challenging for certain types of services, such as research and development or professional and management support services. Further, complex service contracts, such as those for information technology, may need to have requirements and performance standards continually refined throughout the life-cycle of the acquisition for a contractor to deliver a valuable service over an extended period of time.").

113. Bell Aerospace & Tech. Corp., B-402148, 2010 CPD ¶ 37, at 7 (Comp. Gen. Jan. 25, 2010).

114. *See* CSI, Inc.; Visual Awareness Tech. & Consulting, Inc., B-407332.5 et al., 2015 CPD ¶ 35, at 10 (Comp. Gen. Jan. 12, 2015) (denying cost realism protest, noting that "a solicitation provides a cost model that specifies the labor mix and level of effort for offerors' proposals—thereby making offerors responsible for proposing costs based on their own rates, but not

basis standard in LOE service contracting, so the agency avoids the very fact-dependent and unpredictable litigation risk associated with relying on a narrowly tailored statement of work instead.[115] As such, providing a labor mix, as compared to relying on a narrowly tailored SOW, decreases proposal preparation time, decreases agency evaluation time, and reduces the overall risk of protest loss for failing to meet GAO's "common basis" standard.

a. Example of a Government-Defined Labor Mix with Labor Category Definitions

So, what does a government labor mix look like and what best practices should agencies follow when incorporating one into their solicitations? Basically, a government labor mix for each CLIN has two primary constituent elements: 1) a set of government-defined labor categories, and 2) a distribution of the required labor hours between those labor categories.[116] The following is an example of a government labor mix section in a solicitation to show the concept; the following subsections explore these concepts in more detail:

Section L.X: Government Labor Mix

The Offeror's proposed staffing shall comply with the Section B hours and the below mandatory labor mix. The Government will treat offers that fail to propose the required Section B hours as nonresponsive. If an Offeror's proposal deviates from the mandatory labor mix, the Government will adjust the Offeror's proposed labor mix to the solicitation's mandatory labor mix, provided the deviation is minor and immaterial (e.g. rounding differences in the proposal.)[117] *If the deviation is deemed material, the Government will treat such deviations as nonresponsive as well. Moreover, the Government will not make any labor mix adjustments that would result in a downward cost adjustment.*

differing technical approaches—an agency may reasonably evaluate the rates proposed for those established labor categories based on other data such as the rates proposed by other offerors.").

115. *See* Global Tech. Sys., 2015 CPD ¶ 335, at 19 (sustaining protest that the solicitation SOW did not provide a sufficiently detailed description of the work to be performed or the goals to be achieved to allow offerors to intelligently propose a labor mix and level of effort).

116. *See* PricewaterhouseCoopers Public Sector, LLP, B-413316.2 et al., 2017 CPD ¶ 12, at 5–9 (Comp. Gen. Dec. 27, 2016) (denying protest because protester elected to compete under a patently ambiguous solicitation at their own peril where the solicitation specified the hours and labor categories but did not provide any requirements (e.g., minimum education, minimum experience, responsibilities) for the mandated positions).

117. Although this sample language essentially provides a mandatory labor mix for offerors to bid to, it preserves sufficient flexibility for the government to make minor labor mix adjustments for minor proposal mistakes, miscalculations, or ambiguities, which are fairly common. Without this slight flexibility, the Government may find it necessary to evaluate such issues as deficiencies or find the offending proposal nonresponsive. *See* IBM U.S. Fed., Div. of IBM Corp.; Presidio Networked Sols., Inc., B-409806 et al., 2014 CPD ¶ 241, at 7 (Comp. Gen. Aug. 15, 2014) (sustaining protest for awardee taking exception to material terms and the SSA decision to overrule the technical evaluation determination regarding missing labor category hours was inadequately documented). Additionally, the GAO noted that "[m]aterial terms of a solicitation are those which affect the price, quantity, quality, or delivery of the goods or services being provided." *Id*. at 10.

Labor Category[118]	***CLIN 0001 Hours***	***CLIN 0002 Hours***	***CLIN 0003 Hours***
Senior Engineer	*2080*	*4160*	*4160*
Mid-Level Engineer	*8320*	*8320*	*6240*
Junior Engineer	*16640*	*20800*	*20800*
Senior Administrative Personnel	*2080*	*2080*	*2080*
Mid-Level Administrative Personnel	*0*	*0*	*0*
Junior Administrative Personnel	*2080*	*2080*	*2080*
Total Section B Hours	*31200*	*37440*	*35360*

Section L.X.1: Government Labor Category Definitions

1) Engineering Personnel (Senior, Mid-Level, and Junior)

Senior Engineers must have:

A) a high school degree, or a GED, and more than twenty (20) years of relevant experience, OR

B) a bachelor's degree in a relevant field and fifteen (15) years of relevant experience, OR

C) a master's degree in a relevant field and ten (10) years of relevant experience.

Mid-Level Engineers must have:

A) a high school degree, or a GED, and ten (10) years of relevant experience, OR

B) a bachelor's degree in a relevant field and five (5) years of relevant experience, OR

C) a master's in a relevant field.

Junior Engineers must have:

A) a high school degree, or a GED, and three (3) years of relevant experience, OR

B) a bachelor's degree in a relevant field, OR

C) a master's degree in a relevant field.

118. Where an agency elects to use Key Personnel, see infra Part II.B.2.b.iv, it should add a "Mandatory Key Personnel" line and associated hours to this list to clearly differentiate the Key Personnel positions from the non-key government-defined labor categories, while still ensuring the table tallies to a total hours in Section B.

2) Administrative Personnel (Senior, Mid-level, and Junior)

Senior Administrative Personnel must have at least eight years of relevant administrative experience.

Mid-level Administrative Personnel must have at least three years of relevant administrative experience.

Junior Administrative Personnel must have an Associate's degree, or higher, or at least one year of relevant administrative experience.

The Offeror shall provide a mapping of any labor categories it, or one of its subcontractors, proposes in the Staffing Plan to the labor categories defined above. This mapping must include a description, similar in detail to the Government labor categories, of the requirements/qualifications associated with each labor category contained in the Offeror's Staffing Plan, including labor categories proposed by subcontractors.[119]

b. Government-Defined Labor Categories

In developing a government labor mix, agencies often begin by defining the types of people that they require in terms of skills, capabilities, education, and years of experience or seniority. In other words, they begin by defining a set of government-provided labor categories.

Given that the entire purpose of providing a government labor mix is to give all offerors a common basis for competition, it is imperative that the agency include its labor category definitions in the solicitation to ensure that all of the parties are thinking about the same types of people when the government discusses, for instance, "Senior Administrative Personnel." Without an explicit definition, offerors are left to interpret what constitutes "Senior" in this context, which could lead to very different assumptions among offerors. Compounding this risk of misinterpretation is the fact that each individual contractor has its own unique set of internal labor categories definitions to classify its employees.[120] These contractor-specific labor categories may bear no resemblance to what the agency believes it needs, and there is virtually no clear standardization of these terms between offerors or within industries.[121]

119. Note that sample solicitation language throughout this article is italicized for clarity.

120. *See* Noblis, Inc., B-414055, 2017 CPD ¶ 33, at 4–5 n.1 (Comp. Gen. Feb. 1, 2017) (denying protest that awardee failed to meet minimum education and experience requirements when proposal referenced internal labor categories qualifications and a table mapping those internal labor categories, but the table did not indicate the education or qualifications of the staffing that the awardee proposed for the solicitation).

121. Within the context of Service Contract Act procurements, however, there is more labor category standardization. The U.S. Department of Labor (DOL) publishes a Service Contract Act Directory of Occupations that lists hundreds of different occupations with accompanying detailed descriptions, tasks, and skills for each, along with an identifying code for wage rate determination purposes. Dep't of Labor, Service Contract Act Directory of Occupations (5th ed. 2006). For solicitations subject to the Service Contract Act, which should be identified prior to solicitation, an agency can use the DOL Directory of Occupations and associated occupation descriptions for its solicitation labor category descriptions, rather than creating bespoke category descriptions. *Id.* This directory provides a shortcut for agencies to use already detailed and defined occupation descriptions that will apply to the solicitation, rather than spending time and effort creating new and different descriptions.

Therefore, the agency must provide a clear set of labor category definitions in its solicitation to provide offerors a common basis for competition and to allow for an apples-to-apples comparison of offerors.

As the preceding example shows, these government-defined labor categories can be simple (such as minimum years of experience) or more complex (allowing different amounts of experience for differing levels of education). Despite this range of potential complexity, several best practices apply to drafting any government labor category definition to achieve the goal of presenting a clear and unambiguous lexicon of personnel. Additionally, several strategic decisions that agencies will make in defining their labor categories will affect how easy it is to develop the government labor mix and, ultimately, how easy it will be to evaluate the offerors' staffing.

i. Overarching strategy for defining labor categories

In general, agencies should have a very strong preference for limiting themselves to a very small number of easy-to-understand and broadly defined labor categories. This approach will reduce the complexity of developing a labor mix for the agency, the complexity of proposal preparation for offerors, and the complexity of proposal evaluation for the agency evaluators. Therefore, when defining the universe of government labor categories for a procurement, agencies should consider three key strategic considerations. Specifically, agencies should 1) keep the number of labor categories as small as practicable; 2) simplify labor category definitions whenever possible; and 3) broaden labor category definitions whenever possible.

Keep the Number of Labor Categories as Small as Practicable: In an ideal case, an agency's slate of government labor categories should be as small as possible to minimize the work for all parties. Nevertheless, it must also perform its twin jobs of giving all offerors a common understanding of the requirements and giving the agency the ability to conduct an apples-to-apples evaluation of the offerors.[122]

In many cases, where the technical scope of the contract is fairly well defined, providing simple labor categories that generally align with meaningful breaks in the expected direct labor rates for the relevant industry is perfectly sufficient. For instance, in a business/financial management support contract, agencies should likely only define Senior, Mid-level, and Junior labor categories, since there is generally a steady increase in salary based on increases in seniority. There is no magic formula to this particular three-part division; instead, these divisions are a judgment call about how likely it is for an offeror to grossly misunderstand the government's needs.[123] That said, erring slightly

122. Where the Government uses a FFP LOE or T&M contract type, the government-defined labor categories can take on a third job—to provide narrower labor categories to limit the degree to which the awardee can reduce its cost in a labor category by providing personnel that merely meet its minimum requirements. This push for greater granularity post-award generally conflicts with the push for greater simplicity pre-award. *See supra* note 30 for a more detailed discussion of this strategy for FFP LOE and T&M contracts.

123. FAR 16.601.

on the side of too few labor categories is often the better bet. Having too many labor categories guarantees more complexity in verifying that all proposed personnel are properly classified, while having too few labor categories only slightly increases the risk that an offeror will misunderstand the requirement.

As the complexity of the effort grows, however, it will be important to differentiate between groups that get paid very differently. For instance, in an omnibus contract for IT engineering services, cybersecurity services, and administrative support, a simple Senior/Mid-level/Junior set of government labor categories presents a real risk of different companies interpreting the requirements differently. In fact, after taking into account competitive pricing pressure, it is likely that an offeror would propose a staffing approach that fills the Junior labor category with personnel from jobs with high salaries (such as IT engineering and cybersecurity), while filling the Senior category with personnel from jobs with lower salaries (such as administrative services).[124] This bidding strategy would satisfy a basic three-category labor mix but would result in some offerors staffing the effort in the opposite manner than the agency likely intended (i.e., with senior engineers/cybersecurity personnel and junior administrative support). As such, agencies should consider delineating jobs that have materially different direct labor rates.[125] In this example, the government may need to define five labor categories: Senior Technical, Mid-Level Technical, Junior Technical, Mid-level Administrative, and Junior Administrative. Such a set of government-defined labor categories would greatly decrease the likelihood that different offerors would interpret the government labor mix differently or opportunistically.

Agencies may also find it necessary to break out geographically specific labor categories to clearly describe their expected labor forces. Again, offerors may choose to staff Senior personnel as remote or in low cost-of-living locations, while providing Junior personnel for on-site support in higher cost-of-living areas to minimize their proposed cost. As with the job type example, this geographically diverse bidding strategy would meet a basic three-category Senior, Mid-Level, Junior labor mix, but could result in some offerors staffing the effort in the opposite manner than the agency likely intended (i.e., with senior personnel providing client-facing support and junior personnel providing offsite/remote support). Therefore, government source selection teams should consider the likely labor cost breaks for the required population of contractor personnel in drafting the government-defined labor categories.

Yet agencies should not go overboard with this subdivision approach. Agencies sometimes have dozens of overlapping labor categories, despite the fact that they all fall within the same basic skillsets and have the same general pay range.[126] For example, in a solicitation for design services, an agency may have labor categories for senior mechanical engineers, senior electrical

124. Noblis, Inc., 2017 CPD ¶ 33, at 4–5 n.1.
125. See *supra* Part II.B.2.a, for one way to implement this.
126. *See* 5 U.S.C. § 5332.

engineers, senior electronics engineers, senior systems engineers, senior logisticians, and senior test engineers. This added detail may provide marginally more technical detail about the government requirement. Nevertheless, if the personnel performing these jobs are paid roughly the same salaries and are generally available in the labor market, this additional technical detail is likely not necessary for achieving the labor mix's twin goals of describing a common basis for competition and permitting an apples-to-apples comparison of the offerors.[127] Since this number of labor categories would certainly complicate the development and evaluation of proposals without furthering the goals of providing a labor mix, this example should work to simplify its set of government labor category definitions. For example, it could consolidate all of those jobs into a single Senior Engineer labor category. Overall, determining the appropriate number of government labor categories is an important strategic decision that agencies should critically consider when developing solicitations, and, in general, agencies should aim to reduce the total number of government-defined labor categories.

Simplify Labor Category Definitions Whenever Possible: Beyond avoiding too many labor categories, agencies should also work to keep their government labor categories simple. Overly complex or unnecessarily restrictive labor category definitions increase the complexity of evaluating proposals, and the latter can increase the litigation risk associated with a solicitation.

Simplifying government labor category definitions benefits all parties. Simple definitions make it easier for companies to understand whether their proposed employees meet the requirements, and make it easier for evaluators to confirm that they do. As such, in most cases, agencies should work to limit their labor category definitions to a minimum number of years of relevant experience and a minimum level of education.

In some cases, however, personnel with higher degrees can move up in seniority more quickly, so the government can consider defining multiple ways to meet a single government labor category.[128] In such a case, agencies may want to ensure that their government labor category definitions keep people with similar salaries together by describing different avenues for personnel with bachelor's degrees versus master's degrees;[129] nevertheless, agencies should add this complication intentionally and strategically, while generally aiming to present simple, clear definitions.

Broaden Labor Category Definitions Whenever Possible: Agencies should also work diligently to keep their government labor categories broadly inclusive of various experience types and qualifications. Typically, this means that

127. DRS Tech. Servs., B-411573.2 et al., 2015 CPD ¶ 363, at 10 (Comp. Gen. Nov. 9, 2015) ("It is a fundamental principle of government procurement that a contracting agency must provide a common basis for competition and may not disparately evaluate offerors with regard to the same requirements.").

128. *See* Senior Engineer, Mid-level Engineer, and Junior Engineer labor category definitions *supra* Section II.B.2.a for an example of these multi-element definitions.

129. See the Engineer labor categories in the example *supra* Section II.B.2.a.

the government labor categories should not be too specific. In fact, unnecessary specificity presents four distinct risks to the government: it can discourage competition; it can invite pre-award protests for unduly restrictive requirements; it can complicate the evaluation phase; and it can increase the post-award protest risk of awarding to a proposal that does not clearly meet the overly specific requirement.

First, unnecessarily specific requirements can signal to industry that the government is building the requirement for a specific offeror, which drives off potential offerors. For example, instead of defining a Senior Radar Technician labor category as having "five or more years of Naval radar repair experience," agencies should consider defining the labor category more broadly to require "five or more years of military radar repair experience," provided that the skillsets necessary to work on Army or Air Force radar systems are transferable to the Naval radar repair space.[130] Broadening the inclusivity of the labor category definitions, where appropriate, generally increases the number of offerors that can bid on the work and signals to industry that the agency is seeking meaningful competition.

Second, unnecessarily specific labor categories invite offerors to protest the solicitation as unduly restrictive.[131] If "military radar repair experience" will meet the government's minimum needs, specifying "Naval radar repair experience" as a minimum requirement will, most likely, exclude several potential vendors inappropriately. If any one of these vendors challenges the requirement, the agency would find itself embroiled in heavily fact-dependent pre-award protest litigation throughout much of its proposal evaluation phase. Moreover, if the agency loses the protest, it risks having to request new or updated proposals and start its evaluations over.[132] These delays are typically very problematic for programs.

Third, unnecessary specificity also increases the complexity of evaluating proposals for the agency. For instance, an agency should avoid defining a labor category around a single type of degree or subject matter. If an agency were to state that a Senior Electrical Engineer had to "have a Bachelor of Science degree," it might well find its evaluators wrestling with the thorny theoretical

130. As with overly specific degrees or years of experience, agencies should critically examine any certification requirements that they place on any government labor categories. For instance, a Program Management Professional (PMP) certificate may or may not be a benefit for personnel performing a program management support effort, but it is almost certainly not a minimum requirement for every individual in that government labor category. There are, however, exceptions to this general rule. Particularly in IT services, the government may require a specific subset of personnel have particular certifications to access specific IT systems. Similarly, in a classified environment, possessing an appropriate security clearance is also necessary to perform the work. In these scenarios, it would be appropriate to include such certifications with a government labor category that only applied to that subset of personnel that required the certification or clearance.

131. *See* APRO Int'l, B-415149.2, 2017 CPD ¶ 368, at 4 (Comp. Gen. Nov. 29, 2017) (denying a protest that the solicitation personnel degree requirements are unduly restrictive because the record shows the terms of the solicitation were reasonably necessary to meet agency needs. Prior protest challenging personnel requirements resulted in agency corrective action.).

132. *See* FAR 33.103(f)(1); FAR 33.104(b)(1) (prohibiting an agency from awarding a contract upon a timely filed pre-award protest).

questions of whether a proposed individual's Bachelor of Arts in Electrical Engineering meets a requirement for a "Bachelor of Science" degree. In actuality, the two degrees teach the same subject matter, but different schools alternatively classify the degree as a Bachelor of Arts or a Bachelor of Science.[133] Instead, the agency should have defined its Senior Electrical Engineer labor category slightly more broadly as "having a bachelor's degree in a relevant field." Under this slightly broader definition, the agency would sidestep the evaluation confusion posed by the Bachelor of Arts title, as well as the litigation risk associated with it.

Finally, overly specific labor category definitions can complicate the government's defense of an otherwise clear awardee in a post-award protest. For instance, if the government ultimately determines that a Bachelor of Arts in Electrical Engineering meets the requirement for a Bachelor of Science, a protester may well argue that the government should have considered this non-compliant degree to be an automatic deficiency for the awardee,[134] and, therefore, the agency must reconsider its award. While a protester likely will not succeed on this argument alone,[135] defending against such arguments saps critical litigation resources, such as agency counsel time to respond. Also, addressing several of these types of labor category definition arguments can greatly increase the complexity of the government filings, which can pull the arbiter's focus away from the agency's primary narrative or other more critical issues. As such, drafting broader labor category definitions favors the government by leaving some of the hard line-drawing questions up to evaluator judgment, as opposed to a specific turn of phrase in the solicitation. Litigating issues that turn on an exercise of evaluator judgment is generally much easier and more straightforward for the agency, since GAO typically affords the evaluators broad discretion in exercising their technical judgment and a protester's "mere disagreement" with the government's judgment cannot form the basis of a successful protest.[136]

133. *See* Dewberry Crawford Grp; Partner 4 Recovery, B-415940.11 et al., 2018 CPD ¶ 298, at 11–13 (Comp. Gen. July 2, 2018) (denying protester argument that bachelor degree in industrial/organizational psychology and alternate dispute resolution met the solicitation requirements for a degree in management and law respectively); Abacus Tech. Corp.; SMS Data Prods. Grp., Inc., B-413421 et al., 2016 CPD ¶ 317, at 10–12 (Comp. Gen. Oct. 28, 2016) (denying a protest that protester's key personnel was deficient because the key personnel had a bachelor's degree in electrical engineering when the solicitation required "a bachelor's degree in Information Technology, Information Systems, or Computer Science," despite protester assertions that the electrical engineering degree is "commonly understood to be an equivalent field of study to Computer Science").

134. *See* ManTech Sys. Eng'g Corp., B-412132, 2016 CPD ¶ 37, at 6–7 (Comp. Gen. Dec. 23, 2015) (denying a protest that the agency should have assigned a deficiency instead of a significant weakness due to awardee's proposed non-key personnel lack of experience because the solicitation terms did not contemplate a detailed non-key personnel evaluation).

135. *Id.* at 8–9.

136. Metro Prods. Gov't Servs., LLC, B-416203, et al., 2018 CPD ¶ 234, at 5–6 (Comp. Gen. July 6, 2018) (denying a protester's disagreement that the agency found the awardee's proposed personnel and hours met the solicitation labor categories and requirements because its challenge constituted nothing more than mere disagreement with the agency's evaluation, which is insufficient to render the agency's evaluation unreasonable).

RECOMMENDATION: Agencies should keep its list of government labor category definitions as small as practicable, as simple as practicable, and as broad as practicable.

ii. Tactical best practices for defining each *labor category*

Beyond the general guidelines in the previous section, agencies should also consider four other specific aspects of the labor category definitions they create, as these details can increase the clarity of the government-defined labor categories and simplify the evaluation. In addition to being simple and inclusive, *each* labor category should i) have discrete minimum qualifications, ii) have no maximum qualifications, iii) have no desired attributes, and iv) exist on a continuum without gaps.[137]

Discrete Minimum Qualifications: One of the most critical best practices to achieving clear and unambiguous labor category definitions is to ensure that they have hard-sided minimums for each labor category. It should be crystal clear whether an individual qualifies or not. For instance, defining Mid-level Administrative Personnel as having "at least three years of relevant administrative experience" is hard-sided. Someone with 2.9 years of relevant experience is not Mid-level Administrative Personnel, while someone with 3.0 years of relevant experience is. Compare this to a squishier definition, such as Mid-level Administrative Personnel having "substantial relevant administrative experience." This vague statement does little to clearly indicate whether any individual qualifies as Mid-level Administrative Personnel, which undercuts its ability to communicate a common basis for competition and seriously complicates the government's ability to conduct an apples-to-apples comparison of the various offeror proposed labor mixes. As such, agencies should avoid using vague government-defined labor categories by defining them with hard-sided, discrete minimum qualifications.

Although simpler definitions are typically preferable, it is possible to have multiple minimums for any given labor category, provided those minimums are hard-sided, so that they clearly show whether or not an individual qualifies for a labor category. For instance, in the example above at Section II.B.2.a, an individual can qualify as a "Senior Engineer" in any of three conditions: "A) a high school degree, or a GED, and more than twenty (20) years of relevant experience, OR B) a bachelor's degree in a relevant field and fifteen (15) years of relevant experience, OR C) a master's degree in a relevant field and ten (10)

137. All of these four best practices are generally applicable to defining government labor categories, but most directly conflict with the Key Personnel best practices discussed in the following section. *See infra* II.B.2.b.iv. These differences in approach between key and non-key personnel are the direct result of the difference between the general rule that individual (non-key) personnel under an LOE contract are immaterial and fungible, while individual key personnel are material to the contract by definition. As discussed in full detail below, agencies should take great care in avoiding connections between their government labor categories and their key personnel position descriptions. In fact, where solicitations include Key Personnel, the agency should modify its labor mix table to include a line for "Mandatory Key Personnel," or similar, to explicitly discriminate all of the Key Personnel from any other labor categories that the agency has defined for the non-key personnel.

years of relevant experience." In each alternative, this definition provides clear minimum qualifications in terms of years of experience in conjunction with a degree. Therefore, while more complex, this example also follows the best practice of providing discrete minimums.

No Maximum Qualifications: Agencies should avoid applying any maximum qualifications to any labor category. For instance, agencies should not define Mid-level Administrative Personnel as having "between three and eight" years of experience. The risks here are two-fold for the agency. First, if the agency defines the maximums inappropriately, these maximums can introduce problematic undefined gaps between labor categories, as discussed in more detail below. Second, applying maximum qualifications for a labor category creates a situation in which offerors could be precluded from offering more senior personnel to fill relatively junior labor categories. It can also force offerors to propose staffing changes in the middle of performance to comply with the government's labor mix because its employees gain more experience through performance. For example, if an offeror proposes a Mid-Level Administrative Personnel with seven years of experience in the base year for a labor category with a maximum of eight years, then that individual will grow out of that labor category in the next performance year. Thus, the maximum qualification could force the offeror to swap out that individual in the later years of its staffing plan to comply with the government labor mix. These types of maximum qualification issues typically arise because a company does not currently employ sufficiently junior personnel to meet the government's maximum labor category requirements or because one or more of its personnel will accrue so many years of experience over the course of performing the contract than they come to exceed their labor category maximum.

The work to resolve these types of "overqualification" questions wastes valuable time and resources for both the offeror and the government; additionally, the resolutions available to the government often run counter to the government's interests in the procurement. Typically, the government values (or at least tolerates) a richer labor mix under the non-cost/price evaluation factors and can consider this value against the potentially higher cost/price impacts in its best value determination.[138] Similarly, the government typically discourages otherwise unnecessary personnel changes over the course of performance, so proposing to change out personnel as they exceed their labor category maximums generally introduces a level of risk to the staffing plan for all but the most cost-conscious government evaluators.[139] Including labor category maximums can also undercut the government's interest in having robust competition. Specifically, in practice, competitive pressures under the cost/price evaluation factor limit the instances in which an offeror would want to propose more senior, more expensive personnel to fill a more junior role. Therefore, where offerors choose to propose more senior personnel in a

138. FAR 15.304.
139. Labor Standards for Federal Service Contracts, 29 C.F.R. § 4.1b(b)–(c) (2017).

lower labor category, this choice is likely the result of the contractor lacking sufficient junior personnel available to perform the work. As such, particularly for smaller businesses, precluding the use of more senior personnel in more junior roles may seriously limit a company's ability to provide a proposal that meets the government labor mix.

Finally, where a solicitation includes maximum qualifications in a cost-reimbursement contract, agencies may also find themselves considering downward cost adjustments to adjust an offeror's richer proposed labor mix back to the more junior government labor mix. Since the purpose of cost realism is to protect the government against unsubstantiated claims of cost savings, agencies should avoid making downward cost adjustments in nearly all situations.[140]

Overall, maximum qualifications for government labor category definitions create proposal and evaluation issues that are best avoided to increase the speed of the evaluation and the overall clarity of the evaluation record. As such, agencies should define labor category minimums, but not include maximums. This results in a set of labor category definitions in which everyone who qualifies for a more senior labor category also meets the definition for each of the more junior labor categories within the same type of job. This also avoids creating any undefined gaps between government labor categories and allows offerors to assign more senior personnel to lower government labor categories, provided that, in cost-reimbursement contracts, those personnel costs are clearly traceable to their proposed cost.

No Desired Attributes: Agencies should also avoid encumbering their government labor category definitions with desired attributes. There are two primary reasons for this: first, it does not further the fundamental purpose of providing labor category definitions. If used without a clear minimum, these desired attributes are no better than the vague "substantial experience" example above. Offerors will not be able to unambiguously determine whether someone with three years of relevant experience qualifies for a labor category that "desires five years of relevant experience." Depending on the evaluators, that individual may or may not meet the requirement; this ambiguity undercuts the critical need to provide a common basis for competition.

Second, even if these desired attributes are paired with an explicit minimum, the fungible nature of non-key contractor personnel in the LOE service contracting environment means that the government will not be able to contractually lock-in these desired attributes.[141] As such, desired non-key requirements of any kind, including those tied to government labor category definitions, present evaluators with serious questions of whether to provide

140. FAR 15.305(a)(1); FAR 15.404-1(d); Midboe, *supra* note 76, at 254.

141. *Compare* Abacus Tech. Corp.; SMS Data Prods. Grp., Inc., B-413421 et al., 2016 CPD ¶ 317, at 10–11 (Comp. Gen. Oct. 28, 2016) (solicitation identifying nine key personnel positions as "essential to the performance of the contract" and requiring that failing to meet key personnel requirements as deficient), *with* Hornet Joint Venture, B-258430.3 et al., 95-1 CPD ¶ 110, at 2–3 (Comp. Gen. Feb. 22, 1995) (denying a bait and switch protest for non-key personnel as wholly without merit because the contract did not restrict the substitution of non-key personnel except with regard to qualifications).

strengths for meeting those desired attributes when the contractor is contractually permitted to provide minimally qualified personnel without the desired qualifications at award. Nevertheless, choosing not to give strength to a proposal that claims to meet a desired attribute will increase the litigation risk of awarding to another offeror.[142] Therefore, it is best to avoid this conundrum entirely by only listing desired qualifications in the solicitation for proposal elements that the government can lock in contractually at award. In other words, agencies should avoid including desired attributes in their government labor category definitions for non-key personnel.

A Continuum That Starts at Entry Level Without Gaps: Agencies should also try to have a clear continuum of labor categories within a job area from essentially entry level up through the most senior labor category (that does not include a maximum) without any gaps. This limits the instances where the government evaluators must consider how to view personnel who do not meet any of the government labor-category definitions. Of course, the agency's solicitation does not need to include each of these categories; the goal is simply to provide a continuum of labor categories that grows out of a catch-all category for personnel who do not meet more senior requirements.

In the example in Section II.B.2.a, the Junior Administrative Personnel definition meets this need for a catch-all category, although not perfectly. It describes a Junior Administrative Personnel as having "an Associate's degree, or higher, or at least one year of relevant administrative experience."[143] This definition provides a very wide aperture to capture personnel with very basic entry-level qualifications. It does not perfectly apply the best practice, because it is not a true catch-*all*, but, in the context of the labor market associated with this solicitation, this labor category definition functions as a *de facto* catch-all. Therefore, even if an offeror proposed a "Junior Engineer" with an Associate's degree and no years of experience, the government evaluators could still classify this person as a Junior Administrative Personnel. This reclassification would allow the evaluators to treat the individual's noncompliance with the Junior Engineer category as a proposed labor mix deviation (i.e., swapping the Junior Engineer hours for Junior Administrative Personnel hours) as opposed to having to find that the offeror was nonresponsive because this individual failed to meet any of the government-defined labor categories.[144] As such, including a continuum with an entry-level catch-all can help resolve questions

142. *See* STG, Inc., B-415580.4 et al., 2018 CPD ¶ 232, at 6, 9 (Comp. Gen. July 5, 2018) (denying a protest argument that since multiple preferred key personnel qualifications merited the assignment of multiple strengths because it was not unreasonable for the agency to assign a single strength instead of multiple and therefore the protester simply disagreed with the agency's rating).

143. *See supra* Part II.B.2.a.

144. Dev Tech. Grp., Inc., B-420230 et al., 2022 CPD ¶ 22, at 2–4 (Comp. Gen. Jan. 5, 2022) (denying protest challenge to agency's assessment of a negative finding to unsuccessful offeror who deviated from the solicitation suggested labor mix by proposing a more junior labor mix). See *infra* Part II.B.3 for a discussion of labor mix deviations and their impact on the responsiveness of a proposal.

of whether a proposal is deficient for proposing a non-key individual that does not meet any government labor category definition. Therefore, agencies should work to include a continuum of labor categories from entry-level up to the most senior without gaps or maximums.

> **RECOMMENDATION:** Agencies should draft each of its government labor category definitions to a) have discrete minimum qualifications, b) have no maximum qualifications, c) have no desired attributes, and d) exist on a continuum from an entry-level catch-all to the most senior without gaps.

iii. Relationship between government-defined and contractor labor categories

Government-defined labor categories do not need to align with or even resemble the various potential offerors' labor category definitions. Nevertheless, particularly for cost-reimbursement contracts, agencies should ask for a clear mapping of any proposed contractor labor categories to the government-defined labor categories for any company labor categories that the prime or its proposed subcontractors include in a proposal. This will ensure that the government evaluators can clearly understand the various contractor labor categories in the offerors' proposals and can trace the proposed labor categories to the government labor mix in the solicitation. Furthermore, many contractors rely on internal payroll screenshots marked only with contractor labor category designations to substantiate their proposed direct labor rates when proposing on cost-reimbursable contracts.[145] As such, in these types of evaluations, it is even more critical that the government evaluators can clearly trace between the various proposed contractor labor categories and the government-defined labor categories to connect the contractor's substantiating data to its proposed costs. Agency evaluators generally do not want to have to guess about such connections[146] and typically view a lack of clarity as increased risk. As such, agency solicitations should ask for a clear mapping of any proposed contractor labor categories for the prime contractors and any proposed subcontractors to the government-defined labor categories.

iv. Key personnel are different and distinct

As discussed *infra* in Section II.B.4, key personnel are a distinct concept from government-labor category definitions. Government source selection teams should avoid conflating any aspect of the government-defined labor categories with the key personnel positions. In large part, this is to avoid accidentally porting minimum requirements from the government-defined labor categories onto the key personnel positions, which would defeat the recommended

145. *See* WaveLink, Inc. v. United States, 154 Fed. Cl. 245, 257 (2021).

146. Nor should evaluators make such guesses. GAO does not always look favorably on agencies making assumptions to resolve proposal ambiguities. Affolter Contracting Co., Inc., B-410878, et al., 2015 CPD ¶ 101, at 7 (Comp. Gen. Mar. 4, 2015) (noting that agencies are not required to infer information from an inadequately detailed proposal, or to supply information that the protester elected not to provide) (citing Optimization Consulting, Inc., B-407377, et al., 2013 CPD ¶ 16, at 9 n.17 (Comp. Gen. Dec. 28, 2012). Generally, agencies should simply note the lack of traceability and, if the solicitation permits, identify a technical or cost realism risk, as appropriate.

strategy of keeping the key personnel positions defined only by "Desired Attributes." In fact, if an agency elects to use key personnel, it should explicitly and consistently describe its government-defined labor categories as its "non-key government-defined labor categories" and avoid any reference to these in its key personnel descriptions. The agency should also include a line for "Mandatory Key Personnel" in its labor mix table that is distinct from the non-key labor categories.[147] Overall, agencies should diligently avoid blurring or confusing the line between key and non-key personnel in any way.

3. Government-Defined Labor Mix

Although drafting the government-defined labor categories calls for some detailed, strategic thought, once it is done, developing and presenting the government-defined labor mix is much simpler.

Essentially, the solicitation must provide a clear connection between the government-defined labor categories and the total level of effort. The government source selection team typically provides this connection using a table listing the government-defined labor categories along with hours for each labor category that add up to the applicable Section B hours.[148] The agency develops the data in this table after considering current performance data on existing predecessor efforts, known upcoming changes in workload, and the potential for unforeseen changes in workload.[149] Although agencies should endeavor to provide a clear picture of the labor force they ultimately need, most LOE services vehicles do not lock the agency into the solicitation's labor mix during performance; instead this mix is generally for evaluation purposes only to give all offerors a common understanding of the work to allow the agency to compare offers on an apples-to-apples basis. As such, agencies should not invest substantial resources in perfecting their solicitation's labor mix if they can get a reasonably accurate (but not perfect) government labor mix more quickly and easily.

a. Methods to Present Labor Mix

Agencies use two main methods to present these tables: hours and percentages of the total hours.[150] While both methods work, presenting the hours by labor category is generally clearer than using percentages. When using percentages, offerors must make more calculations to convert the percentages to hours. These additional calculations increase the risk of a calculation error, potentially creating a situation in which the offeror is no longer bidding to

147. See discussion *supra* note 137.

148. See *supra* note 118 (example labor mix table corresponding to Section B CLINs).

149. Bureau of Lab. Statistics, Gen. Serv. Admin., Section J.1, Oasis Labor Categories and Bureau of Labor Statistics Service Occupational Classifications 1 (2023).

150. *See* PricewaterhouseCoopers Public Sector, LLP, B-413316.2, et al., 2017 CPD ¶ 12, at 5–12 (Comp. Gen. Dec. 27, 2016) (denying protest where the solicitation provided the total hours and labor categories but was ambiguous regarding the qualifications of the labor categories); Dev Tech. Grp., Inc., B-420230; et al., 2022 CPD ¶ 22, at 2 (Comp. Gen. Jan. 5, 2022) (denying protest challenge to deviation from suggested labor mix that used a percentage of total hours as a "labor category resource mix (75% Senior Staff and 25% Intermediate)").

the total hours in Section B, which would make the proposal nonresponsive and unawardable.[151] Also, if these labor mix percentages apply to multiple contract line times with different total numbers of hours, the number of hours per labor category also varies by line item, which introduces further risk of calculation errors. This is particularly true where the agency includes a list of "Mandatory Key Personnel" in contract line items with different total numbers of hours between the [contract line items] because, in general, the number of key personnel does not change year to year.[152] Nevertheless, presenting a constant percentage of an annual hours value that changes year to year will result in differing levels of key personnel support year to year, which agencies typically do not want. As such, although providing either hours or percentages of total hours to define the government labor mix will work, there is less room for miscommunications or miscalculations if the government simply provides this information in hours, as opposed to percentages of total hours.

Additionally, if time-phasing matters to the agency, the government labor mix should reflect that time-phasing to avoid offerors proposing to front-load the effort. Proposing a front-loaded staffing profile would allow the contractor to claim it would incur all of its proposed labor costs in the earliest performance period, which would limit the effects of labor costs escalation on its proposed costs. In many cases, however, this type of front-loading is unrealistic considering how the government actually intends to utilize the services—consistently from year to year. Therefore, the government should specify the time-phasing of its needs where it connects the government-defined labor categories and to the effort required in those categories. Luckily, in general, providing this time-phasing is easy to specify for LOE service contracts, since many internal government pressures encourage agencies to contract for these services on a twelve-month cycle already.[153] In these cases, agencies typically provide a simple table that lists all of the labor categories and provides the proportion of them in each separately identified contract line item;[154] section II.B.2.a provides an example of such a time-phased table.

Additionally, government source selection teams must consider how much flexibility they want to provide offerors in bidding to the government labor mix. At the extremes, agencies could provide offerors no flexibility (i.e., any error or deviation is nonresponsive), or they could allow offerors unfettered

151. *See supra* II.B.2.a.

152. *See* Chenega Healthcare Servs., LLC v. United States, 141 Fed. Cl. 254, 260 (2019).

153. The *bona fide* needs rule requires funding severable service contracts with funds appropriated and available for the current fiscal year in which the severable services are performed and typically through the end of the fiscal year. EPA Level of Effort Contracts, B-214597, 65 Comp. Gen. 154, 157 (1985). 10 U.S.C. § 3133 provides DOD the ability to obligate funds current at the time of contract award to finance a severable service contract with a period of performance that crosses fiscal years but does not exceed one year. 41 U.S.C. § 253l provides similar authority for non-DOD agencies.

154. Although there are a number of ways to divide up the base and option hours in a contract, such hours are typically divided by time period (e.g., base year, option year 1, and option year 2) or function (administrative, testing, engineering, etc.) or both. A full discussion of how to structure Contract Line Item Numbers (CLINs) is beyond the scope of this article.

flexibility to justify a different (typically lower-cost) labor mix. Each of these extremes present risk for the government.

First, on the one hand, agencies may opt for providing no labor mix flexibility in the hopes of ensuring a level competitive playing field. This extreme inflexibility comes with some risks. With no flexibility, otherwise strong offerors that make small reasonable mistakes, such as incorrectly coding an individual as Mid-level versus Senior, become nonresponsive and unawardable. Eliminating these offerors from the competition wastes the offeror's proposal preparation costs and the evaluators' time by removing potentially valuable competitors from consideration.

On the other hand, agencies may believe that greater flexibility increases innovation in meeting the government's requirement.[155] With a high degree of flexibility, however, agencies often find that they require substantially more information from offerors to justify a divergent proposed labor mix and that often the offeror's justifications are too weak to support a finding that the proposed deviation is realistic. Instead, agencies find themselves having to make cost realism adjustments and/or identify non-cost risks associated with insufficiently justified labor mix deviations.[156] Documenting these findings is time-consuming and can increase the government's protest risk by introducing new issues for a disappointed offeror to challenge.

b. Best Practices

Instead of these two extremes, agencies should consider applying a slightly flexible government labor mix that allows for some mistakes, but generally discourages offerors from proposing or benefiting from labor mix deviations.[157] For instance, an agency could include the following language in its solicitation:

155. The assumption that flexibility breeds innovation is fairly dubious in terms of LOE services contracting. Although true performance-based contracting may allow a sheep farmer to innovatively repurpose his flock to keep the grass cut to a certain height at a lower cost than a mowing team, LOE contracting is fundamentally different. In performance-based contracting the deliverable is the performed task; in LOE services, contracting the deliverable is an hour's worth of "best efforts" irrespective of whether any task is actually performed. As such, on an LOE service contract there is less room to innovatively provide a specified number of hours. Admittedly, one approach may achieve more in those hours than another, but this effectiveness difference can be hard to evaluate and even harder to quantify as a justification for a proposed labor mix deviation towards a more junior (and presumably lower cost) mix. As such, these proposed deviations are frequently driven more by pressures to buy-in to a new market than by a capacity to bring labor-saving innovation to the government requirement.

156. In the context of a T&M or FFP LOE solicitation, the government is not required to make cost-realism adjustments. Iron Vine Sec., LLC, B-409015, 2014 CPD ¶ 193, at 7 (Comp. Gen. Jan. 22, 2014) ("Where, as here, a solicitation anticipates award of a time-and-materials contract with fixed-price, fully-burdened labor rates, there is no requirement that an agency conduct a price or cost realism analysis, in the absence of a solicitation provision requiring such an analysis."). This fact further heightens the importance of considering the impact of proposed labor mix deviations on the non-cost factors, solicitation permitting, for teams evaluating offers under T&M or FFP LOE solicitations.

157. Additionally, this slight labor mix flexibility approach compliments the best practice of having a continuum of labor categories that starts at entry level, *see supra* II.B.2.iv. Together, they permit the Government to accept an otherwise awardable proposal where the offeror misclassifies

> *The Offeror's proposed staffing shall comply with the Section B hours and the above mandatory labor mix. The Government will treat offers that fail to propose the required Section B hours as nonresponsive. If an Offeror's proposal deviates from the mandatory labor mix, the Government will adjust the Offeror's proposed labor mix to the solicitation's mandatory labor mix, provided the deviation is minor and immaterial (e.g., rounding differences in the proposal). If the deviation is deemed material, the Government will treat such deviations as non-responsive as well. Moreover, the Government will not make any labor mix adjustments that would result in a downward cost adjustment.*

Using such language, the government can maintain a clear level-playing field, while not having to remove offerors for minor errors. Moreover, this approach can discourage buy-in offers through substantial cost realism adjustments or non-cost risk findings that accompany such proposals.

> **RECOMMENDATION:** Agency solicitations should provide the government labor mix in *hours* per labor category for each LOE contract line item. Moreover, agencies should discourage labor mix deviations generally, while retaining sufficient evaluation flexibilities to deal with minor proposal flaws or miscalculations.

4. Key Personnel: A Solicitation Option with Some Benefits and Greater Risks

In procuring LOE services, many agencies elect to further refine their staffing requirements by defining a subset of personnel with highly specialized skills as key personnel. Contractually, what distinguishes these key personnel from other people on the contract is that these key individuals are material terms of the contract.[158] Key personnel are often material, and, "[i]n negotiated procurements, a proposal failing to conform to the material requirements and conditions of the solicitation should be considered unacceptable."[159] As such,

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one or more of its personnel within a labor category. This can help the Government avoid entering into discussion or removing otherwise strong proposals for minor errors in proposing to the Government labor mix.

158. *See* Greenleaf Constr. Co., Inc., B-293105.18, et al., 2006 CPD ¶ 19, at 10 (Comp. Gen. Jan. 17, 2006) (holding that change to key personnel staffing and awardee's failure to notify agency of this material change as unreasonable). *But see* Golden IT, LLC, v. United States, 157 Fed. Cl. 680, 704 n.34 (2022) (finding that "[t]he key personnel requirement is unquestionably a material one" but holding there is not a duty to notify of a key personnel unavailability after proposal submission). Additionally, many contracts include clauses that underscore the materiality of the key personnel. *See*, *e.g.*, Naval Sea Systems Command Clause C-237-H002 "SUBSTITUION OF KEY PERSONNEL" (NAVSEA) (OCT 2018) (explaining that "[t]he Contractor agrees that a partial basis for award of this contract is the list of key personnel proposed"); HSAR 3052.215-70 "Key personnel or facilities" (DEC 2003) (explaining that "[t]he personnel or facilities specified below are considered essential to the work being performed under this contract . . ."); NFS1852.235-71 "Key personnel and facilities" (MAR 1989) (explaining that "[t]he personnel and/or facilities listed below (or specified in the contract Schedule) are considered essential to the work being performed under this contract").

159. IT Objects LLC, B-418012, et al., 2020 CPD ¶ 2, at 6–7 (Comp. Gen. Jan. 2, 2020); *see also* TMPC Inc., B-419554, et al., 2021 CPD ¶ 190, at 4 (Comp. Gen. Apr. 23, 2021) (denying a protest that the agency misevaluated key personnel resume when the agency reasonably found the protester's proposal failed to meet the key personnel requirements and was therefore unacceptable).

GAO reviews key personnel under its fairly strict materiality case law, and, thus, key personnel challenges often figure prominently in protests.[160]

As such, government source selection teams should carefully weigh the costs and benefits of choosing to designate key personnel in their solicitations. Importantly, these teams should remember that, while requiring key personnel is very common,[161] this approach is a choice, not a mandatory element of LOE service contracting.

The primary benefit of requiring key personnel is that this approach allows programs to specify with much greater detail what attributes they want the contractor's leadership or top experts to have.[162] Requiring key personnel also gives the evaluators a chance before award to vet the specific personnel the agency can expect to receive in contract performance and compare their values among competitors.[163] In general, government consumers of LOE services greatly value the enhanced control that requiring key personnel gives them over what top talent they receive.[164]

Despite these benefits, including mandatory key personnel requirements in a solicitation also creates significant risks to the award decision. In particular, there are three major categories of risk that key personnel present; these situations occur when 1) the offeror proposes insufficient key personnel; 2) the offeror's proposed key personnel become unavailable before award; and 3) the offeror fails to propose an individual for a key personnel position.

In each of these areas, flaws with the key personnel create a situation in which the offeror has failed to meet a material term of the solicitation, and, thus, its proposal is unawardable.[165] As such, protesters typically seek out flaws in the awardee's key personnel because they can quickly disqualify an otherwise strong proposal from award. Nevertheless, while each flaw is related to

160. Cibinic et al., *supra* note 5, at 711 ("One of the most commonly used evaluation factors in best value procurements is the key personnel that the offeror intends to use to perform the contract."); Pioneering Evolution, LLC, B-412016, et al., 2015 CPD ¶ 385, at 9 (Comp. Gen. Dec. 8, 2015) (agency had two options when material term key personnel became unavailable: "either evaluate Pioneering's proposal as submitted, where the proposal would be rejected as technically unacceptable for failing to meet a material requirement, or reopen discussions to permit Pioneering to correct this deficiency").

161. Cibinic et al., *supra* note 5, at 711 ("One of the most commonly used evaluation factors in best value procurements is the key personnel that the offeror intends to use to perform the contract.").

162. *Id.*

163. *Id.*

164. *Id.*

165. *See* IT Objects LLC, B-418012, et al., 2020 CPD ¶ 2, at 6–7 (Comp. Gen. Jan. 2, 2020) (sustaining a protest that the awardee's proposal failed to provide a letter of commitment for a proposed key person, which was a material requirement of the solicitation); Pioneering Evolution, LLC, 2015 CPD ¶ 385, at 5 (denying a protester's request to cure key personnel unavailability through discussions because the agency had no obligation to enter into discussions. Even though the protester had an otherwise higher technical and lower price than its competitors, the protester's proposal was technically unacceptable, and the agency does not need to conduct discussions with technically unacceptable offeror). Chenega Healthcare Servs. LLC v. United States, 141 Fed. Cl. 254, 260 (2019) (holding that when key personnel become unavailable, an agency has a choice between evaluating the original proposal as submitted, or opening discussions to allow modified proposals; but decision to enter discussions is discretionary).

the materiality of the key personnel, each type of flaw requires the government to employ slightly different solicitation and evaluation approaches to avoid and overcome them.

a. Insufficient Key Personnel

The first major risk presented by the material nature of key personnel is that the government must find a proposal unacceptable if any proposed key personnel do not meet *all* of the applicable minimum requirements.[166] Despite this risk to both offerors and the government, agencies often hamstring their evaluations by burdening the key personnel positions with long lists of mandatory requirements.[167] Not only can these requirements be unduly restrictive, which drives away viable competitors and increases protest risk,[168] but they become acid tests for the awardability of a proposal.[169] Where evaluation teams do not recognize this fact and unreasonably accept key personnel who fall below the stated minimum requirements, such evaluation teams leave a

166. Insight Tech Serv., Inc., B-420133.2 et al., 2022 CPD ¶ 13, at 10 (Comp. Gen. Dec. 20, 2021) ("Our Office will sustain a protest where the agency unreasonably concludes that a proposed key person meets minimum experience requirements."); *see also* Deloitte Consulting, LLP, B-412125.2, et al., 2016 CPD ¶ 119, at 12 (Comp. Gen. Apr. 15, 2016) (sustaining protest where solicitation key personnel position required a "a minimum of 5+ years of experience leading Information Architecture teams for a large federal health system/organization," but the resume only demonstrated "less than 4 years of applicable experience" and failed to meet a minimum requirement). *But see* TekSynap Corp., B-419464, et al., 2021 CPD ¶ 130, at 8–10 (Comp. Gen. Mar. 19, 2021) (finding that while the agency had the discretion not to assign a deficiency for failing to meet the mandatory key personnel qualification, the agency was unreasonable to find only a slight weakness for failing to meet a mandatory requirement). Although the *TekSynap* decision seems to indicate that the agency could evaluate missing a mandatory key personnel requirement as less than a deficiency, GAO still clearly views this proposal error as a major weakness. *Id.* Moreover, GAO's dicta may well be limited only to situations in which the Government waives an unnecessary key personnel requirement for all offerors. *See* Morgan Bus. Consulting, LLC, B-418165.6, et al., 2021 CPD ¶ 171, at 14 (Comp. Gen. Apr. 15, 2021) (permitting waiver of key personnel material mandatory qualification requirements when the agency evaluators concluded that certain qualifications requirements associated with key personnel positions were not necessary to satisfy the agency's actual needs). If GAO's dicta is limited in that way, the Government's practical discretion to award to proposals with key personnel that do not meet minimum requirements would be extremely limited.

167. *See* Morgan Bus. Consulting, LLC, 2021 CPD ¶ 171, at 14 (permitting waiver of key personnel material mandatory qualification requirements when the agency evaluators concluded that certain qualifications requirements associated with key personnel positions were not necessary to satisfy the agency's actual needs).

168. When drafting their key personnel requirements, government source selection teams should avoid imposing unduly restrictive requirements on key personnel and carefully consider how any solicited mandatory requirements are reasonably necessary to meet the agency's needs. Sumaria Sys., Inc. B-413508.2, 2017 CPD ¶ 14, at 6 (Comp. Gen. Dec. 29, 2016). As described *supra* Part II.B.2.b.iv, with respect to drafting non-key labor categories, agencies should avoid requiring specific programmatic experience when more general experience will meet its minimum needs.

169. *See* Ambit Grp. Inc., B-420079, 2021 CPD ¶ 366, at 9 (Comp. Gen. Nov. 19, 2021) (denying a protest argument that key personnel failed to meet required attributes and determining that since the proposal was no-go on key personnel, the protester was not an interested party, and its other arguments were dismissed. The protester also unsuccessfully challenged the key personnel requirements as unduly restrictive).

powerful weapon for protesters to challenge the award.[170] Therefore, burdening key personnel with a long list of mandatory requirements can damage the procurement more than it helps.

Additionally, evaluating key personnel mandatory requirements presents evaluators with challenging line drawing problems. As described in Part II.B.2.b.i with respect to drafting non-key labor categories, agency evaluators can struggle with evaluating very specific mandatory requirements; for example, evaluators can waste a substantial amount of time determining whether a Bachelor of Arts for Electrical Engineering meets a mandatory key personnel requirement for a Bachelor of Science degree.[171] Furthermore, the evaluators must document their determination one way or another and then either choice could become the basis for a protest about the acceptability of the proposal.[172] In other words, this one close call could put the entire award decision in jeopardy based on a potentially unnecessary requirement that would not significantly impact the individual's actual performance.

Because key personnel minimum requirements create such substantial risks for both offerors and the agency, government source selection teams should actively avoid imposing *any* mandatory key personnel requirements; instead, they should seek to list only "desired attributes."[173] For instance, instead of requiring that a Program Manager have "a minimum of fifteen years of relevant experience;" the solicitation could, instead, state that "the government desires that the Program Manager have twenty years of Department of Navy engineering experience." Presenting the key personnel positions as lists of desired attributes, as opposed to lists of minimum requirements, still clearly communicates to offerors that they should bid personnel with those desired attributes but does not make providing those attributes material.[174]

170. *See* VariQ Corp., B-414650.11, et al., 2018 CPD ¶ 199, at 7 (Comp. Gen. May 30, 2018) (sustaining protest where agency unreasonably determined that awardee's proposed key personnel met mandatory requirements when resume did not mention any experience with or understanding of mandatory key personnel requirement).

171. Octo Consulting Grp., Inc., B-417135 et. Al., 2019 CPD ¶ 124, 4–7 (Comp. Gen. Mar. 18, 2019).

172. *Id.*

173. *See* NLT Mgmt. Servs., LLC, B-415936.11 et al., 2020 CPD ¶ 217, at 7 n.6 (Comp. Gen. June 19, 2020) (denying protest that awardee key personnel were unacceptable because awardee key personnel did not meet "preferred" qualifications because GAO noted "a preferred qualification is not a mandatory minimum qualification, and therefore, we find no basis to object to the agency's evaluation in this respect").

174. Generally meeting a desired or preferred attribute reflects an aspect of a proposal that is advantageous to the Government and can be assigned a strength. DoD Source Selection Guide, *supra* note 7, at 40. If multiple desired key personnel attributes are met, an agency can elect to provide a single collective strength for a key personnel resume that demonstrates multiple desired attributes or even a collective strength for multiple key personnel resumes demonstrating many desired attributes. STG, Inc., B-415580.4 et al., 2018 CPD ¶ 232, at 4–6 (Comp. Gen. July 5, 2018). Alternatively, the source selection team could provide a single strength for every single desired attribute met, but this decision about how to rate the offeror's proposal depends on the terms of the solicitation and the source selection team's discretion. *Id.* (denying a protest argument that since multiple preferred key personnel qualifications merited the assignment of multiple strengths because it was not unreasonable for the agency to assign a single strength instead of multiple and therefore the protester simply disagreed with the agency's rating).

Keeping key personnel requirements from becoming material provides agencies and the offerors several important flexibilities. First, it permits agencies to more clearly present the types of experience that they want. Since "desired attributes" are not minimum requirements, there is less risk that a solicitation asking for a higher level of qualifications or more specific experience would be unduly restrictive to competition.[175] Second, it allows offerors to propose key personnel that almost meet the desired attributes without the risk that the government must automatically reject the proposal.[176] This degree of flexibility can open the door to very talented individuals who have substantial expertise and experience in the solicitation tasking, but who would just miss a particular attribute if it were expressed as a minimum requirement. This option can expand the talent pool available to the agency in high-need, evolving fields that do not have specifically defined and robust staffing pipelines or clear well understood career paths, such as cybersecurity. Third, considering the offeror's proposed key personnel against "desired attributes" retains much more evaluation discretion for the agency to determine whether a weakness, significant weakness, or a deficiency is most appropriate for not meeting a given key personnel attribute. For instance, not having a desired technical degree might be a non-issue for a key business financial management position, even if having it would have been a strength. For another position, however, missing that same "desired" technical degree may be a weakness (e.g., for a key technical writer position) or a significant weakness (e.g., for a Program Manager position on an engineering services contract) or even a deficiency (e.g., for a Lead Radar Engineering position), depending on the risk that the missing attribute poses to the government.[177]

175. Of course, agency source selection teams must still balance this increased ability to be more specific against the signaling risk that specific desires send to potential offerors. If the Government's "desired attributes" are too specific, it may indicate to offerors that the Government is seeking a specific awardee, which will decrease competition by discouraging challengers from bidding. *See* AdaRose, Inc., B-299091.3, 2008 CPD ¶ 62, at 4–5 (Comp. Gen. Mar. 28, 2008) (denying protest that labor qualifications are unduly restrictive when the agency changed support services labor category qualifications from highly desired to required when the protester failed to rebut agency's rationale for requirement with any specificity).

176. *See* NLT Mgmt. Servs., LLC, 2020 CPD ¶ 217, at 7 n.6 (denying protest that awardee key personnel did not meet "preferred" qualifications because GAO noted "a preferred qualification is not a mandatory minimum qualification, and therefore, we find no basis to object to the agency's evaluation in this respect").

177. Specifying key personnel using only desired attributes does not preclude source selection teams from rejecting a proposal for proposing unacceptably high risk or underqualified personnel. FAR 15.001 focuses evaluation findings on the risk that an approach poses to the government by contemplating different levels of risk such as "increases the risk," "appreciably increases the risk," and "increases the risk . . . to an unacceptable level" for evaluation findings. Therefore, a solicitation without mandatory key personnel requirements can still find that a resume increases the risk of unsuccessful performance to an unacceptable level based on the solicitation tasking and resume qualification demonstrated, provided that it does not limit its discretion to do so explicitly in the solicitation. *See* Main Sail, LLC, B-412138, et al., 2016 CPD ¶ 26, at 3–8 (Comp. Gen. Jan. 29, 2016) (denying an unstated evaluation criteria protest for the Navy's assignment of a weakness based on a lack of information about Secret clearances, which was a desired qualification); *see also* Ernst & Young LLP, B-411728, et al., 2015 CPD ¶ 318, at 8–9 (Comp. Gen. Oct. 14, 2015) (denying a disparate treatment allegation where the agency appropriately recognized awardee key

Finally, evaluating key personnel against "desired attributes" decreases the overall protest risk. By keeping the key personnel attributes from being material, the government reduces the allure of key personnel challenges for protesters, since key personnel evaluation errors are not automatically quick-kill issues for the government's award decision.[178] Instead, the protester must show both an error and show that it prejudiced them, which can be challenging depending on the arrangement of offerors.[179] Furthermore, evaluating key personnel against "desired attributes" takes the risk out of most of the hard line-drawing problems, since GAO will review the evaluator's exercise of their technical judgment against its "mere disagreement" standard, which is very favorable to the government.[180]

Overall, where agency source selection teams opt to include key personnel, relying on "desired attributes," as opposed to mandatory or minimum requirements, will likely increase competition, expand the pool of potential key personnel, greatly increase agency flexibility in evaluating proposals, and greatly reduce their risk of protest loss.

RECOMMENDATION: Agencies should actively avoid specifying any minimum requirement for key personnel. Instead, government source selection teams should aim to specify their key personnel using lists of "desired attributes" to increase competition, to broaden the pool of potential key personnel, to retain more evaluation flexibility for the agency, and to decrease overall protest risk. Of course, a small subset of key personnel attributes must remain mandatory, such as security clearance

personnel with nine of twelve desired qualifications as stronger than the protester's key personnel with one of twelve).

178. *See* NLT Mgmt. Servs., LLC, 2020 CPD ¶ 217, at 7 n.6 (denying a protest that the awardee key personnel were unacceptable because the awardee key personnel did not meet "preferred" qualifications because GAO noted "a preferred qualification is not a mandatory minimum qualification, and therefore, we find no basis to object to the agency's evaluation in this respect").

179. Furthermore, with some clever strategic planning, an agency can effectively nullify the prejudice associated with some or all of a protester's potential protest grounds in its contemporaneous award decision by identifying areas in which its award decision would remain the same "even if" the agency's evaluation had been less favorable to the awardee (such as if the agency had identified an additional weakness for the non-awardee's key personnel missing a desired attribute) and contemporaneously documenting these hypothetical trade-off decisions in the Source Selection Decision Document. *See* Savantage Fin. Servs., Inc., B-400109.2, 2008 CPD ¶ 150, at 9 (Comp. Gen. July 28, 2008) (denying a cost adjustment protest because the source selection decision document noted that, even if no cost adjustments were made to the protester's proposal, they still were not in line for award rendering the protester's cost argument without the possibility of prejudice from the agency's action); Main Sail, LLC, 2016 CPD ¶ 26, at 8 (denying a cost adjustment protest and determining that there was no possibility of prejudice from agency error when the Contracting Officer determined that the awardee was still the better value without any cost adjustments to the protester's total proposed cost). Agencies can consider applying this tactic not just to cost adjustments but to technical aspects as well, such as assigned weaknesses to unsuccessful offerors or strengths to the awardees that would not affect the source selection decision and will remove prejudice from protester's arguments. Agencies can consider providing this information to unsuccessful offerors during debriefings to fully inform them of the agency's decision and try to mitigate protest risk.

180. *See* Strategic Mgmt. Sols., LLC, B-416598.3, et al., 2019 CPD ¶ 426, at 18 (Comp. Gen. Dec. 17, 2019) (denying a protest that key personnel should have received a strength for meeting preferred key personnel qualification as mere disagreement because the solicitation did not require awarding a strength for preferred qualifications and the evaluators considered the proposed key personnel qualification as a whole).

or certain IT-system access certifications, but this list should be kept to an absolute minimum and clearly distinct from the "desired attributes." The following table presents an example specification for a key Program Manager:

Figure 3. Specification for a Key Program Manager

Key Personnel Position	***Desired Attributes***	***Minimum Requirement***
Program Manager	• *Bachelor's degree in mathematics, engineering, management, or business* • *Twenty years of relevant experience supporting combat weapon systems* • *Project Management Professional (PMP) or DAWIA III in Program Management* • *Certified SCRUM Master or Project Management Institute (PMI) Agile Certified Practitioner* • *Five years of relevant experience managing a project and personnel*	*Secret Security Clearance*

b. Unavailable Key Personnel

The second major risk presented by the material nature of key personnel is that the government must find a proposal unacceptable if *any* of its otherwise acceptable key personnel become unavailable during the course of evaluations.[181] In fact, just a single key personnel departure, through no fault of the agency or the awardee, can result in a protest sustain.[182] There are two main but somewhat distinct key personnel protest grounds: (1) bait and switch; and (2) material misrepresentation.[183]

A "bait and switch" occurs when an offeror knowingly represents in its proposal that it will use specific personnel, with no intention of actually using the personnel to perform the contract.[184] The agency gives credit to the offeror's proposed personnel in the form of high technical or pass ratings, which contributes to the offeror winning the contract but, after award, the contractor notifies the agency of what the offeror knew all along: the proposed key

181. M.C. Dean, Inc., B-418553, et al., 2020 CPD ¶ 206, at 7 (Comp. Gen. June 15, 2020).

182. *See* Ashlin Mgmt. Group, B-419472.3 et al., 2021 CPD ¶ 357, at 7–14 (Comp. Gen. Nov. 4, 2021) (sustaining protest asserting awardee had actual knowledge key personnel was unavailable during corrective action period, despite the fact that awardee was unsure if resigned employee would accept offer of rehire).

183. *See* M.C. Dean, Inc., 2020 CPD ¶ 206, at 7 (sustaining protest for offeror failing to notify the government of its key personnel's unavailability and stating that "[t]he agency's argument conflates the standard for assessing whether a 'bait and switch' occurred with the requirement for offerors to notify the agency when proposed key personnel become unavailable prior to award."). *But see* Golden IT, LLC, v. United States, 157 Fed. Cl. 680, 699 n.28 (2022) ("In GAO parlance, claims of material misrepresentation are 'refer[red] to . . . as a 'bait and switch.'").

184. Greg Petkoff, et al., *Disclosure Dilemma for Government Contractors Learning before Contract Award That Proposed Key Personnel Are Not Available to Perform the Contract*, Gov't Contractor, Aug. 1, 2018, at 1.

personnel is unavailable to perform the work and the now contractor provides someone else.[185] If a protester proves a "bait and switch" allegation, GAO will sustain the protest.[186]

Material misrepresentation is similar but differs from "bait and switch" in that it does not require an intentional falsehood at the time of proposal submission. In a common case of material misrepresentation, the offeror proposes key personnel who they have a reasonable expectation would be available to perform the contract but, through no fault of the offeror, the key personnel unexpectedly become unavailable due to death, resignation, or illness. This turns into a material misrepresentation because an agency relies upon a material proposal representation that has become false after proposal submission.[187] For example, in *Greenleaf Construction Co.*, GAO found that offerors have an obligation to notify the agency during the source selection if changes arise in the availability of their proposed key personnel, even after proposal submission.[188] Moreover, GAO found that an agency only has two options in response to receiving this required notice of an offeror's key personnel unavailability: either reject the proposal as technically unacceptable for failing to meet a material requirement or reopen discussions to permit the offeror to correct the deficiency.[189]

This rule is harsh for both agencies and offerors.[190] Agency proposal evaluation can take months and, in some cases, years. With each passing day, the risk of a proposed key personnel becoming unavailable for any number of

185. T3I Sols., LLC, B-418034 et al., 2019 CPD ¶ 428, at 5 (Comp. Gen. Dec. 13, 2019); *see also* Patricio Enters. Inc., B-412738 et al., 2016 CPD ¶ 145, at 4 (Comp. Gen. May 26, 2016) (stating that the elements for a "bait and switch are (1) the awardee either knowingly or negligently represented that it would rely on the specific personnel that it did not have a reasonable basis to expect to furnish during contract performance, (2) the misrepresentation was relied on by the agency, and (3) the agency's reliance on the misrepresentation had a material effect on the evaluation results.").

186. T3I Sols., LLC, 2019 CPD ¶ 428, at 4–6 (sustaining protest).

187. *See* M. C. Dean, Inc., 2020 CPD ¶ 206, at 7 (sustaining a protest for material misrepresentation where the offeror had actual knowledge that its key personnel was unavailable to perform due to an initial denied security clearance but failed to notify the agency).

188. Greenleaf Constr. Co., Inc., B-293105.18 et al., 2006 CPD ¶ 19, at 10 (Comp. Gen. Jan. 17, 2006) (noting that it is offeror's obligation to inform procuring agency). Nevertheless, the exact rule in this area is evolving rapidly. *See* Golden IT, LLC, v. United States, 157 Fed. Cl. 680, 704 (2022) (declining to follow GAO rule that offerors are obligated to inform agencies when proposed key personnel become unavailable after proposal submission but before contract award or else risk being found to have made a material misrepresentation about the personnel's availability). While other COFC judges and GAO may accept all or part of the *Golden IT* rationale, it is still unclear how broadly the *Golden IT* rule will apply in practice. Additionally, COFC does not have jurisdiction to hear most task order protests, which is where a substantial amount of professional services are solicited. As such, this article addresses the current GAO key personnel unavailability rule, as it is the more restrictive rule for all parties.

189. Pioneering Evolution, LLC, B-412016 et al., 2015 CPD ¶ 385, at 9 (Comp. Gen. Dec. 8, 2015). *But see* Golden IT, 157 Fed. Cl. at 704 (holding that there is no obligation). Notably, COFC does not have jurisdiction to hear task orders unless the task or delivery order increases the scope, period, or maximum value of the contract under which the order was awarded, and task orders are where a substantial amount of professional services are solicited.

190. Ashlin Mgmt. Group, B-419472.3 et al., 2021 CPD ¶ 357, at 7–14 (Comp. Gen. Nov. 4, 2021) (sustaining a protest where agency awarded to an offeror whose key personnel resigned before award but the awardee did not notify agency of this change).

reasons—including death, illness, retirement, and resignation—increases. This possibility presents a huge risk for offerors that a single employee departure will cost them an award and a meaningful amount of bid and proposal costs; it also provides a perverse incentive for competitors to try to hire away individuals proposed as key personnel in a competitor's bid. Furthermore, agencies can waste huge amounts of evaluation effort preparing a record to award to one company only to have to redo large portions of that work if that prospective awardee suddenly is unawardable because it lost one of its proposed key personnel. As such, government source selection teams should seek to structure their solicitations in a way to minimize this key personnel unavailability risk.

Government source selection teams can limit the key personnel unavailability risk through two main ways: 1) by limiting the number of key personnel positions; and 2) by preemptively including solicitation language that provides evaluation procedures that allow for award to proposals with key personnel that become unavailable before award.

i. Limiting the number of key personnel reduces risk

Agencies can significantly lower the risk of a successful key personnel unavailability protests by reducing the number of key personnel positions required in the solicitation and, instead, having non-key personnel perform those hours. For instance, rather than having a Program Manager, a Deputy Program Manager, and a designated key personnel for each of four Statement of Work (SOW) tasks, an agency could simply have a single Program Manager, which would reduce the number of key personnel that could become unavailable from six to one.[191] With so few required key personnel for each proposal, there is much less chance that an offeror's proposed key personnel will become unavailable during proposal evaluation. Moreover, the agency could still solicit the exact same tasking or qualifications of a Deputy Program Manager and each of the four SOW tasks but simply as non-key personnel labor category qualifications without resumes or materiality. Nevertheless, while reducing the number of key personnel reduces the litigation risk, it can increase performance risk as the agency cannot contractually lock-in as many strong individuals at award. Despite this shift from litigation to performance risk, limiting the number of key personnel is an important technique to protect a source selection through award and protest.

RECOMMENDATION: Agencies should attempt to minimize the number of key personnel positions identified in the solicitation to the extent practicable.

ii. Provide evaluation criteria for unavailable personnel in solicitations

Another tactic an agency should employ to limit its key personnel unavailability risk is to preemptively include solicitation language that provides evaluation procedures that allow for award to proposals with key personnel who

191. Using this strategy, the agency would still specify the hours for the Deputy Program Manager and each of the four SOW tasks in one or more non-key personnel labor categories.

become unavailable before award. Although there could be several potential ways to structure such procedures in the solicitation, one approach involves focusing the agency's evaluation and source selection decision on the attributes presented on a proposed key personnel's resume, as opposed to the actual living, breathing proposed individual. For instance, the solicitation could include the following language:

> *The qualifications listed in each individual proposed key personnel resume, not the specific individual, are the materially relevant aspects of the proposed key personnel partially forming the basis of award under the clause titled [Substitution of Key Personnel]. Therefore, even if a proposed key individual becomes unavailable to the Offeror between proposal submission and award, the government will evaluate and make its award decision based on the qualifications listed on the proposed resume(s). When the government awards a task order under those circumstances, the government will require the awardee to use the qualifications listed on the relevant proposed key personnel resume as the basis for replacing the individual under the Substitution of Key Personnel clause during task order performance. The Offeror shall make no substitution of key personnel without prior notification to and concurrence of the Contracting Officer (CO).*[192]

With this language, an agency could continue to evaluate the original proposed resumes without having to find an automatic deficiency, even if it received notification that a particular proposed individual had become unavailable for a key personnel position. The only material aspects of the proposed key personnel are the attributes listed on their resumes, and by extension what those resume attributes demonstrate about the offeror's understanding of the personnel best suited to perform the work. Importantly, this language avoids inexorably tying the entire proposal validity to the question of whether that specific proposed individual remains available to perform under the contract throughout the entire evaluation phase. Overall, avoiding this unavailable key personnel issue greatly reduces the uncertainty and risk for both the government and the offerors during the proposal evaluation phase.

> **RECOMMENDATION:** Agencies should preemptively include solicitation language that provides evaluation procedures that allow for award to proposals with key personnel who become unavailable before award. Agencies should consider using the language provided above as a starting point for such procedures.

iii. Unnamed key personnel

The third major risk presented by the material nature of key personnel is that the agency must find any proposal unacceptable if it does not include a specific individual for a required key personnel position.[193] Often, a solicitation will require that offerors provide a resume for key personnel and, if the key

192. Although the Navy has used this language in numerous solicitations, the authors could not find a situation in which GAO or COFC had reviewed or provided an opinion about making the resume attributes, rather than the individual, material.

193. HumanTouch, LLC, B-419880 et al., 2021 CPD ¶ 283, at 3–4 (Comp. Gen. Aug. 16, 2021) (denying protest where the protester was found ineligible for award because they proposed key personnel for only base year of contract and agency reasonably found protester failed to satisfy material term of contract to provide a key personnel for the entirety of the contract).

personnel is not in their existing employment, a signed letter of commitment confirming their intention to serve in the position if the company wins the contract award.[194] Where an offeror fails to provide a named individual for each key personnel position, it is, in essence, asserting that it has no specific approach to meeting a material term of the solicitation. In nearly all situations, the agency should consider such a general approach to be deficient based on this lack of a proposed approach to meet a material requirement.[195] Rejecting proposals for such obvious flaws wastes time and effort for both the deficient offeror and the agency. Therefore, agency source selection teams should expressly warn offerors that failing to propose a specific individual for a key personnel position will lead the agency to reject the proposal as materially nonresponsive.

RECOMMENDATION: Government source selection teams should include solicitation language that expressly warns offerors that failing to propose a specific individual for a key personnel position will lead the government to reject the proposal as materially nonresponsive.

C. Critical Evaluation Scheme Decisions

In developing an efficient and effective evaluation scheme, government source selection teams must make strategic decisions about two distinct types of evaluation factors: non-cost/price factors and cost/price factors.[196] Non-cost/price type factors can assess a wide variety of technical, management, personnel, and past performance issues, which are largely within the government source selection team's reasonable discretion to evaluate, prioritize, or ignore.[197] As such, government source selection teams must use their reasonable judgment to strategically select non-cost/price factors to target meaningful potential discriminators between proposals.[198] The cost/price factor, in comparison, is narrower, since major aspects of it are driven by the team's choice of contract

194. In fact, GAO generally requires that agencies must evaluate specific personnel for any key personnel positions that they solicit. *See* IT Objects LLC, B-418012 et al., 2020 CPD ¶ 2, at 3, 6–7 (Comp. Gen. Jan. 2, 2020) (sustaining protest that the awardee's proposal failed to provide a letter of commitment for a proposed key person, which was a material requirement of the solicitation).

195. *See* Farmland Nat'l Beef, B-286607, 2001 CPD ¶ 31, at 8–9 (Comp. Gen. Jan. 24, 2001) (sustaining protest of awardee who proposed flexible delivery schedule rather than solicitation-required delivery schedule because it was a nonconforming proposal for a material requirement and could not form basis for award).

196. FAR 15.304(c)(1)(i) ("Price or cost to the Government shall be evaluated in every source selection . . . ."); FAR 15.304(c)(2) ("The quality of the product or service shall be addressed in every source selection through consideration of one or more non-cost evaluation factors such as past performance, compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, and prior experience . . . .").

197. Crewzers Fire Crew Transp., Inc., B-402530, 2010 CPD ¶ 117, at 3 (Comp. Gen. May 17, 2010) ("Agency acquisition officials have broad discretion in the selection of the evaluation criteria that will be used in an acquisition, and we will not object to the absence or presence of a particular evaluation criterion so long as the criteria used reasonably relate to the agency's needs in choosing a contractor or contractors that will best serve the government's interests.").

198. *Id.*

type. Nevertheless, even within this more constrained factor, government source selection teams should consider several strategic decisions and best practices when drafting a cost/price evaluation factor.

1. Non-Cost/Price Evaluation Strategies

The strategic decisions the government source selection team makes in defining the proposal's non-cost evaluation factors[199] will greatly influence the quality of the proposals they select, the speed of selection, and the defensibility of any eventual award decision. Agencies should carefully select their evaluation factors to consider no more than the amount of information necessary to make a wise business judgment and a defensible award.[200] As mentioned above, the government has broad discretion in selecting the evaluation factors,[201] but once the factors are solicited, agencies are "required to evaluate proposals based solely on the factors identified in the solicitation."[202] Therefore agencies should carefully consider how to tailor their evaluation to select the best value offeror as quickly as possible with the least work for both offerors and government evaluators.[203]

a. Target Discriminators Prior to Releasing the Solicitation; Keep It Simple (for All Parties)

Many uninitiated government evaluators layer on evaluation factor after evaluation factor to get ever more granular insights into every aspect of offerors' proposals. This forensic review strategy, however, generally does not yield a better best-value selection.[204] Instead, it merely requires more proposal information from offerors, leads to longer evaluation times, and results in more complex award documentation, while still ending up with the same awardee that the team would have selected with a much narrower set of tailored evalua-

199. This non–cost evaluation factor section primarily addresses non-cost, non-past-performance evaluation factors. Past performance evaluation factors are subject to somewhat distinct regulatory prescriptions. FAR 15.304(c)(3). Moreover, at least under the DoD Source Selection Guide, past performance evaluation factors involve somewhat different evaluation mechanics from other non-cost factors by focusing on evaluating the recency and relevancy of the demonstrated past performance record to assign an overall confidence rating instead of assigning strengths, weaknesses, significant weaknesses, and deficiencies. *See infra* Part II.C.1.d.iii for a more detailed discussion of the past-performance unique evaluation mechanics. While the mechanics are different, much of the general strategic guidance this section provides is also applicable to past performance evaluation factors, including discussion of adjectival vs. Acceptable/Unacceptable evaluation approaches. *Id.*

200. FAR 15.002(b) ("*Competitive acquisitions*. When contracting in a competitive environment, the procedures of this part are intended to minimize the complexity of the solicitation, the evaluation, and the source selection decision, while maintaining a process designed to foster an impartial and comprehensive evaluation of offerors' proposals, leading to selection of the proposal representing the best value to the Government.").

201. Crewzers Fire Crew Transp., Inc., 2010 CPD ¶ 117, at 3.

202. *See* Intercon Assoc., Inc., B-298282.2, 2006 CPD ¶ 121, at 5 (Comp. Gen. Aug. 10, 2006) (sustaining protest and stating that "[a]gencies are required to evaluate proposals based solely on the factors identified in the solicitation, and must adequately document the reasons for their evaluation conclusions").

203. FAR 15.002(b).

204. *See* FAR 15.002 ("[T]he procedures of this part are intended to minimize the complexity of the solicitation, the evaluation and the source selection decision.")

tion criteria.[205] In some cases, all of the offerors are similarly situated in certain factors, so their respective risks or benefits in those factors offset one another in the tradeoff decision and, thus, are not discriminators.[206] In other cases, the offerors are not similarly situated, but the differences in the offerors' proposed approaches do not create any meaningful difference in the magnitude of the risks or benefits each presents; again, these are not differentiators between proposals.[207] Where the government evaluates these offsetting or immaterially different aspects of the proposals, it wastes the offerors' proposal efforts and its own evaluation efforts.

Of course, figuring out where a solicitation includes a wasteful evaluation factor (or element) is easier done in retrospect, but the fact remains that government source selection teams can gain speed and shed work by critically considering where they expect to find high-value discriminators between proposals and narrowly tailoring their evaluation schemes to focus on those particular areas.[208] Nevertheless, these critical discriminators will vary widely between source selections based on the differences between program offices, industries, types of work, and the relative importance of the required tasks. For instance, one program office may find a history of strong contractor employee retention highly valuable, while another may prioritize key personnel resumes, while a third may simply want to get someone to cut the grass for a reasonable price without caring if they use mowers or goats.

Despite this broad variability, two questions provide an acid test for potential discriminators: 1) Would I pay a premium for a benefit or to avoid risk in this area? and 2) Are there likely material differences between offerors in my industrial base in this area? If yes to both, that area is a strong candidate as a discriminator. If, instead, the evaluation area is simply a box to check (such as required certifications), or there is truly only one way to complete a task given the state-of-the-art, or it is immaterial (e.g., as long as the grass gets mowed), source selection teams should consider omitting a review of that area entirely or relegating it to an Acceptable/Unacceptable criteria.

> **RECOMMENDATION**: Government source selection teams should actively work to avoid or remove any evaluation factors or elements that are unlikely to yield discriminators between proposals. For each evaluation element, the government source selection teams should ask: a) Would I pay a premium for a benefit or to avoid risk in this area; and b) Are there likely material differences between offerors in my industrial base in this area? If a factor or element fails either test, government source selection teams should consider removing it.

205. Steven W. Feldman, Government Contract Awards: Negotiations and Sealed Bidding § 6:13 (4th ed. 2022) ("First, if the RFP seeks technical proposals, announcing too few evaluation factors provides insufficient guidance for offerors and agency evaluators, and too many factors can create confusion, lengthy proposals, and protracted evaluation decisions.").

206. FAR 15.304(b) ("Evaluation factors and significant subfactors must—(1) Represent the key areas of importance and emphasis to be considered in the source selection decision; and (2) Support meaningful comparison and discrimination between and among competing proposals.").

207. *Id.*

208. *Id.*

b. Adjectival Evaluation vs. Acceptable/Unacceptable Evaluation[209]

At the same time that government source selection teams are identifying discriminators to evaluate, they must also decide how to rate them. Two of the primary methods are adjectival evaluation and Acceptable/Unacceptable evaluation.[210] Each of these methods targets different source selection goals, but both are valuable tools in developing an efficient overall non-cost evaluation scheme.

Adjectival evaluations, on the one hand, typically rely on strengths, weaknesses, and significant weaknesses and deficiencies (collectively findings) to describe a range of potential benefits or risks that an offeror's proposal presents, compared to the solicitation baseline.[211] Often, agencies condense individual findings into one of several adjectival ratings applied to the evaluation factor, such as Outstanding, Very Good, Satisfactory, Marginal, and Unsatisfactory to help identify major disparities between the offerors.[212] These adjectival ratings, however, are largely window dressing since the real trade-offs must be made at the findings level with the application of any relative weighting between different factors.[213] While the adjectival rating system helps discriminate between offerors, it generally takes more time to evaluate and document.

Acceptable/Unacceptable evaluations, on the other hand, are much easier to execute for the evaluation team. Essentially, the only question is the following: has the offeror's proposal shown a material failure to meet a government requirement or presented an unacceptable level of risk? If no, then the proposal is Acceptable.[214] As such, instead of drafting strengths, weaknesses, and significant weaknesses, the evaluators ignore these complex questions of graduated risk and simply confirm that they can live with the approach and that it complies with the solicitation.[215] Therefore, these evaluation sections are

209. The DOD Source Selection Guide uses Acceptable/Unacceptable for evaluation of factors as the pass/fail terminology for gate criteria that an offeror's proposal must meet before advancing in the proposal evaluation process. DoD Source Selection Guide, *supra* note 7, at 4, 20. For the terminology, GAO permits pass/fail or acceptable/unacceptable interchangeably for evaluation factors. CR/ZWS LLC, B-414766, 2017 CPD ¶ 288, at 2 (Comp. Gen. Sept. 13, 2017) (using a "pass/fail basis" for a technical evaluation factor.). For the purpose of this article, Acceptable/Unacceptable is used to describe an evaluation factor rating.

210. FAR 15.305(a) ("Evaluations may be conducted using any rating method or combination of methods, including color or adjectival ratings, numerical weights, and ordinal rankings. The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation shall be documented in the contract file.").

211. *See*, *e.g.*, FAR 15.001; DoD Source Selection Guide, *supra* note 7, at 24–25.

212. DoD Source Selection Guide, *supra* note 7, at 26.

213. Prot. Strategies, Inc., B-414573, 2017 CPD ¶ 348, at 6 (Comp. Gen. Nov. 9, 2017) ("Agencies are required to look behind the adjectival ratings to consider a qualitative assessment of the underlying technical differences among competing offers. In this regard, evaluation ratings, whether numerical, color, or adjectival, are merely guides for intelligent decision making, and an agency's source selection decision must rest upon a qualitative assessment of the underlying technical differences among competing offers.").

214. Nangwik Servs., LLC, B-410444, 2015 CPD ¶ 60, at 5 (Comp. Gen. Dec. 23, 2014).

215. *See* CR/ZWS LLC, B-414766, 2017 CPD ¶ 288, at 10–11 (Comp. Gen. Sept. 13, 2017) (denying a challenge that the tradeoff decision should have consider degrees of acceptability or discriminators in a pass/fail technical approach factor).

generally much shorter; often consisting of no more than a confirmation that the evaluators checked each of the Acceptable/Unacceptable elements identified in the solicitation and assigning a rating of Acceptable or Unacceptable. Deficiencies are the only type of finding the evaluators can document in this evaluation methodology, and even one deficiency leads to an Unacceptable rating.[216] As such, this evaluation method is much quicker since it does not require detailed evaluation documentation; it does not, however, allow for discrimination or trade-offs between awardable proposals on any Acceptable/Unacceptable evaluation elements or factors.[217]

Government source selection teams should also think critically about how they structure their requirements under an Acceptable/Unacceptable factor. For instance, putting desired approaches in an Acceptable/Unacceptable evaluation section would be a waste because the agency could not identify strengths for it and, thus, could not consider the benefits of the offerors stronger desired approach in its tradeoff decision.[218] As such, the offerors have no competitive incentive to provide that desired approach.[219] Therefore, agencies should primarily focus on drafting their Acceptable/Unacceptable factors to determine whether an offeror's proposal meets its minimum needs and to ensure that it does not present an unacceptable level or risk in doing so.

Both of these evaluation methodologies provide critical tools for building an overall evaluation scheme for a procurement. Adjectival (or other variable value-based) methodologies are time-consuming to evaluate but are critical for identifying proposal differences in key areas of discrimination and for providing a strong competitive incentive for offerors to propose better, lower-risk approaches. They should be reserved for areas of critical discrimination.[220] Acceptable/Unacceptable methodologies, on the other hand, are best suited to areas where the only meaningful discrimination is between offerors who can do the work and those who cannot. In these areas of negligible discrimination, agencies can decrease their evaluation workload and increase the speed

216. That said, technical evaluators can choose to document any other risks that they identify in an Acceptable/Unacceptable factor to proactively protect against a protester's argument that they should have found the issue to present an unacceptable level of risk. Where the evaluators choose to do this, they should note the risk or list of risks and state that, "even collectively, these risks do not present an unacceptable level of risk." This type of prophylactic documentation provides contemporaneous documentation that the Government identified the risk or risks as acceptable, but they are not specifically considered in any tradeoff analysis.

217. CR/ZWS LLC, 2017 CPD ¶ 288, at 11.

218. *See* Nangwik Servs., LLC, B-410444, 2015 CPD ¶ 60, at 4–5 (Comp. Gen. Dec. 23, 2014) (denying protest that the agency was required to make discriminating comparisons of advantages and disadvantages because doing so would be inconsistent with RFP's evaluation on an acceptable/unacceptable basis).

219. This, however, does not undercut the recommendations about using desired attributes for Key Personnel, since the issue there is primarily to avoid automatic deficiencies. *See supra* Part II.B.2.b.i(C). The main difference between evaluating key personnel desired attributes under Acceptable/Unacceptable factor is that the Government need not document the strengths, weaknesses, and significant weaknesses that it identifies. Instead, it can only identify deficiencies, including where a proposed key personnel presents an unacceptable level of risk, but must live with any other risks that still present an acceptable level of risk.

220. FAR 15.304(b).

of their evaluation, while still retaining a minimum check on acceptability, by using an Acceptable/Unacceptable methodology.

Ultimately, many evaluation schemes use a combination of factors—with some adjectival factors and some Acceptable/Unacceptable factors—to carefully tailor the bidding incentives that they place on offerors and to intentionally limit the evaluation workload the government wants to undertake.

RECOMMENDATION: Government source selection teams should generally favor Acceptable/Unacceptable factors and reserve adjectivally rated factors only for those areas where it expects meaningful discrimination between proposals.

c. Overall Evaluation Strategy: Keep Separately Rated Adjectival Evaluation Areas Low in Number, Narrowly Tailored, and Distinct

After identifying discriminators and considering potential evaluation methodologies, government source selection teams must eventually collect their various considerations into an overall evaluation scheme.[221] Since source selection teams should avoid unnecessary work, government source selection teams should pay careful attention to those evaluation factors, subfactors, or elements that they identify as adjectivally rated. Specifically, government source selection teams should aim to keep the separately rated adjectival evaluation areas 1) low in number; 2) narrowly tailored; and 3) distinct.

i. Keep the number of separately evaluated adjectival factors low

Having too many adjectivally rated factors or elements greatly increases the complexity of proposal drafting for the offerors and proposal evaluation for the government.[222] Moreover, having too many areas to compete in can present a confusing message to the offerors about what areas the government wants them to focus on.[223] As such, government source selection teams should minimize the number of adjectivally rated factors that they include in their overall evaluation scheme.[224]

First, for each adjectivally rated evaluation factor that the government source selection team adds, it obligates itself to conducting a thorough and judicious review of that section to identify every strength, weakness, significant weakness, and deficiency that it contains and carefully gauge the level of risk each of these findings presents.[225] Each of these findings must be drafted

221. L-3 Comms. Titan Corp., B-299317 et al., 2007 CPD ¶ 66, at 10 (Comp. Gen. Mar. 29, 2007) ("While the evaluation of proposals is primarily within the discretion of the contracting agency, an agency may not announce in the RFP that one evaluation scheme will be used, and then follow another; once offerors are informed of the criteria against which their proposals will be evaluated, the agency must adhere to those criteria in evaluating proposals and making its award decision.").

222. Feldman, *supra* note 205.

223. Cibinic et al., *supra* note 5, at 687 ("Thus, when the contract is awarded, the contractor will be obligated to meet these requirements. Since this is the case, there is no necessity to evaluate all of the key areas of importance—only the major areas need be evaluated.").

224. *Id.*

225. FAR 15.001; DoD Source Selection Guide, *supra* note 7, at 26.

to clearly document the applicable aspects of the proposal and their relation to the solicitation evaluation criteria.[226] Additionally, each finding can become the subject of a protest argument about whether the finding was reasonable,[227] whether the agency applied the finding fairly and equally between the offerors,[228] and whether the finding is adequately explained.[229] If the solicitation requires adjectival factor ratings—such as Outstanding, Good, Acceptable, Marginal, Unacceptable—evaluators must also reach a consensus on which rating applies to the findings they have made and document that decision as well.[230] This procedure generally requires a lot of work, resources, and time to develop a defensible record. As such, source selection teams should only choose to add an adjectivally rated evaluation factor, subfactor, or element after careful consideration.

Additionally, including many independently rated adjectival factors greatly complicates the government's trade-off documentation if the solicitation applies different weighting to the different adjectivally rated factors. This complication stems from the fact that the source selection authority cannot simply compare two findings against each other on equal footing solely on the basis of the applicable benefits or risks that each presents; instead, the source selection authority must also consider each of those benefits or risks with the applicable difference in factor weighting.[231] For more than a handful of findings, this difference in weighting, particularly across a large number of separately rated factors, becomes quite cumbersome and confusing.

To avoid both risks, government source selection teams should try to collect as many of their discriminators into a single adjectivally rated factor that does not have any further internal weighting. In this way, the evaluators will not waste time assigning a large number of adjectival factor ratings, and the

226. *See* Leumas Residential, LLC, B-418635, 2020 CPD ¶ 236, at 3, 9 (Comp. Gen. July 14, 2020) (sustaining protest where the agency's finding the proposal unacceptable was inadequately documented in several places, such as a deficiency for an approach to ensuring compliance with Virginia Department of Environment requirements, noting that "the record contains no contemporaneous documentation of this consideration").

227. *See* Prot. Strategies, Inc. B-414573, 2017 CPD ¶ 348, at 4–6 (Comp. Gen. Nov. 9, 2017) (sustaining protest where the agency unreasonably assigned a strength to the awardee for specifically named personnel exceeding personnel requirements when the record notes only one of the three personnel were specifically named and the record does not support why the three personnel exceeded the solicitation requirements).

228. ManTech Advanced Sys. Int'l, Inc., B416734, 2018 CPD ¶ 408, 6–8 (Comp. Gen. Nov. 27, 2018) (agency unequally evaluated quotations when both the protester and awardee did not propose retention techniques focused on cleared personnel but only the protester's quotation was evaluated as having a weakness in that area).

229. *See* Prot. Strategies, Inc., 2017 CPD ¶ 348, at 4–6 (sustaining protest where agency did not provide a reasonable explanation for its decision not to award a management approach strength to the protester for proposing extra personnel).

230. DoD Source Selection Guide, *supra* note 7, at 26, 30–31.

231. *See* BAE Sys. Tech. Sols. & Servs., Inc., B-414931, 2017 CPD ¶ 54, at 6 (Comp. Gen. Dec. 20, 2017) (sustaining protest given that "the agency had no way to assess whether the proposed employees met the minimum requirements, because the agency had no knowledge of whether the awardee was relying on experience in an 'equivalent' experience, and if so, whether the agency viewed that experience as equivalent to the solicitation requirements").

source selection authority will be able to directly compare the benefits and risks of the respective findings on the basis of their impact alone, instead of differences in factor weighting.[232]

Even if it is not feasible to collect all of the discriminators into a single factor, having fewer factors is beneficial. With fewer adjectivally rated evaluation factors, such as two, the relative order of importance is still relatively simple for the offerors to understand and cleaner for the agency to apply.[233] Moreover, if evaluators still must examine certain aspects for acceptability but do not expect those areas to be discriminators, the source selection team can also include Acceptable/Unacceptable factors alongside its small number of separately rated adjectival factors.

Consider, for example, a solicitation for LOE services using the following evaluation factors in "descending order of importance": technical approach, past performance, management plan, staffing, and total evaluated cost. Also, assume that the staffing factor has two subfactors that are listed in "descending order of importance": key personnel and staffing of non-key personnel. Such a solicitation is a recipe for confused offerors, complex evaluations, and confusing tradeoffs. For example, where should the evaluators document a concern about managing new non-key personnel? Presumably, the management plan factor and the staffing of non-key personnel subfactor could both be implicated. Because they are differently weighted, the government evaluators must carefully consider where to put this weakness and consistently apply that determination across all offerors. Depending on the evaluation team, this plan could be contentious. Moreover, this decision may have important impacts on the trade-offs since documenting the risk in the management plan will be more detrimental to the offerors than documenting it in the staffing of non-key personnel factor.[234] In fact, the proper classification of the weakness could become a whole separate protest issue beyond whether the government reasonably identified the weakness.[235] As this single, simple example shows, more factors, particularly those with different ratings, greatly complicate the technical evaluation.

Instead, the source selection team should have limited the number of evaluation factors that it would consider. For example, it could have only had

232. *See* Clay Grp., LLC, B-406647, 2012 CPD ¶ 214, at 9 (Comp. Gen. July 30, 2012).

233. The relative order of importance explains the weighting of each evaluation factor for the source selection authority to consider when making an award decision. In fact, FAR 15.304(e) directs agencies to describe weighting factors using "significantly more important," "approximately equal," and "significantly less important" terminology, although this phrasing is only mandatory in comparison to the cost/price factor. Nevertheless, FAR 15.304(e) provides a better set of weighting terminology than "descending order of importance," which is used above for simplicity. Found. Health Fed. Servs.; Humana Mil. Healthcare Servs., Inc., B-278189.3 et al., 98-2 CPD ¶ 51, at 6 (Comp. Gen. Feb. 4, 1998) ("Where the solicitation is silent as to the relative importance of the subfactors, as was the case here, . . . offerors can assume that the subfactors are approximately equal.").

234. Clay Grp., LLC, B-406647, 2012 CPD ¶ 214, at 9 (Comp. Gen. July 30, 2012).

235. *See* ProTech Corp., B-294818, 2005 CPD ¶ 73, at 8–9 (Comp. Gen. Dec. 30, 2004) (sustaining protest where agency did not afford evaluation factor weight disclosed in solicitation).

three evaluation factors, also listed in "descending order of importance":[236] technical, past performance, and total evaluated cost. Under this simpler evaluation scheme, all of the issues dealing with staffing would have a clear home and would fit unambiguously into the solicitation's weighting scheme. This avoids the evaluators' discussion about where to locate the weakness, greatly reduces the likelihood that the source selection authority would have to apply a separate rating to the finding in the trade-off documentation, and defangs any protest argument about misclassifying the weakness.

This more streamlined evaluation scheme also omits the management plan factor entirely, which is a labor saver for all. In many cases, this limiting may be appropriate where the management plans are not likely to be a discriminator between the proposals.[237] Nevertheless, completely omitting a review of the management plans may be too uncomfortable for some evaluators or some requirements; if that is the case, the source selection team should consider adding management plan[238] as an Acceptable/Unacceptable factor. This Acceptable/Unacceptable factor would not require drafting detailed adjectival evaluation findings and would not factor into the relative order of importance because each offeror is either acceptable or not.[239] In other words, it would allow the government to determine whether the offerors meet the requirements or not without much additional work or complexity.[240]

RECOMMENDATION: Government source selection teams should limit the number of separately rated evaluation factors. For instance, three evaluation factors (Technical, Past Performance, and Price) provide sufficient discrimination among offerors for the vast majority of LOE services source selections. Based on the needs of the agency, each agency can consider the appropriate relative importance to ascribe to each factor.

236. In fact, FAR 15.304(e) directs agencies to describe weighting factors using "significantly more important," "approximately equal," and "significantly less important" terminology, although this phrasing is only mandatory in comparison to the cost/price factor. Nevertheless, FAR 15.304(e) provides a better set of weighting terminology than "descending order of importance," which is used above for simplicity. Ideally, the solicitations relative order of importance language for the example above would read something like, "The Technical factor is significantly more important that the Past Performance Factor; in combination, the non-cost/price factors are significantly more important than the Cost/Price factor, but as competing proposals approach parity in the non-cost/price, the Cost/Price factor will increase in importance."

237. FAR 15.304(b).

238. Since the scope of the management plan factor may partially overlap with the technical factor, the source selection team should also consider whether the solicitation's factor descriptions are clear enough to delineate what findings are proper under the technical factor and which fall into the Acceptable/Unacceptable management plan factor.

239. Generally, the solicitation's relative order of importance language simply states that an Acceptable/Unacceptable factor is "rated as either Acceptable or Unacceptable," without providing any other language to provide it any weighting in comparison to the adjectivally rated or cost/price factors.

240. Cibinic et al., *supra* note 5, at 687 ("Thus, when the contract is awarded, the contractor will be obligated to meet these requirements. Since this is the case, there is no necessity to evaluate all of the key areas of importance—only the major areas need be evaluated.").

ii. Limit the use of subfactors and, if used, make subfactors equally weighted

Agencies should apply the same approach to subfactors as they do for evaluation factors, which is to limit the number of separately rated subfactors as well. While there is no FAR definition, the DoD source selection guide states that "[e]valuation factors and subfactors represent those specific characteristics that are tied to significant solicitation requirements and objectives having an impact on the source selection decision and which are expected to be discriminators or are required by statute/regulation."[241] Including separately weighted subfactors under a factor can result in the same risks as having too many evaluation factors: extra work, extra time, and increased protest sustain risk. However, to the extent that subfactors are necessary, an agency should strongly prefer to make those subfactors equally weighted and, in an ideal case, not separately rated. In fact, government source selection teams may find that using unrated subfactors (provided they are equally weighted within the factor) can help organize the offerors' proposals and lend structure to the evaluation documents without creating additional work, complexity, or risk.[242]

However, subfactors that each receive a rating or are weighted differently present all of the same risks as using too many evaluation factors. For instance, if the agency elected to include key personnel and staffing of non-key personnel as subfactors under the aforementioned technical approach, each receiving an adjectival rating and the key personnel subfactor as more important than the staffing of non-key personnel, this option would significantly complicate the evaluation and add risk to the award decision. The extra complexity and risk are that the agency will need to define and assign an appropriate rating to each subfactor and then would need to consider the findings and ratings within each subfactor, along with the assigned weighting in arriving at a factor-wide rating. In contrast, if key personnel and staffing of non-key personnel were equally weighted and unrated subfactors, then the agency could simply consider the merits of each finding without considering the weighting assigned to it in arriving at a factor-wide rating.

RECOMMENDATION: Government source selection teams should limit the use of subfactors. However, if subfactors are necessary, then they should be equally weighted within the factor and not separately rated.

iii. Keep all adjectival factors narrowly tailored

Agencies should also actively limit the breadth of their adjectivally rated factors. This limits the potential issues that the evaluators have to review and can allow the government to greatly reduce the amount of proposal information that it requests from offerors.

241. DoD Source Selection Guide *supra* note 7, at 20; *see* FAR 15.304.

242. Found. Health Fed. Servs.; Humana Mil. Healthcare Servs., Inc., B-278189.3 et al., 98-2 CPD ¶ 51, at 6 (Comp. Gen. Feb. 4, 1998) ("Where the solicitation is silent as to the relative importance of the subfactors, as was the case here, . . . offerors can assume that the subfactors are approximately equal.").

As a threshold matter, there is no requirement that an agency must evaluate every single SOW requirement in an offeror's proposed technical approach.[243] Even if a SOW Task area is not evaluated as part of the solicitation, that SOW task still remains and becomes part of the contract that the contractor is required to perform.[244] Therefore, agencies should narrowly tailor their adjectivally rated factors to areas that are likely to identify discriminators between offerors.

For example, on an administrative support services solicitation with 150 SOW tasks, the government should not simply define its adjectivally rated technical factor as an evaluation of the offeror's ability to successfully complete all of the required SOW tasks.[245] Invariably, this approach will lead to offerors describing each of the 150 tasks in as much detail as the page limits allow, which will require the evaluators, in turn, to read all of that detailed discussion and document any instances where the offerors exceed the requirement or propose a risky approach. This can lead to dozens of findings about largely unimportant SOW tasks and about SOW tasks where there is little room for offerors to differentiate themselves. As such, much of this effort is a waste and serves only to increase the complexity of any protest litigation. Alternatively, the government source selection could have defined its adjectivally rated factor as an evaluation of "the offerors ability to perform SOW tasks 1.2, 8.2–8.7 and 9.11." If the offeror picked tasks that were hard to perform or that had several meaningfully distinct ways of performing them, this more narrowly tailored approach would greatly limit the size of the proposal for the technical factor, it would decrease the overall evaluation workload, and it would focus the trade-off on areas that would provide meaningful discrimination between the proposals.

As this example shows, government source selection teams should narrowly tailor their evaluation factors. Nevertheless, in making these determinations, agencies must carefully balance the evaluation/litigation advantages of narrowly tailoring an evaluation factor against the technical/performance risk of awarding without confirming all aspects of an offeror's proposed approach. In the context of LOE service contracts, which are generally designed to be fairly flexible, the technical/performance risk is generally less than in contracts where the government has less control over the awardee's performance approach after award.

RECOMMENDATION: Government source selection teams should limit the scope of their adjectivally rated evaluation factor to areas that are likely to provide meaningful discrimination among offerors. Evaluating every single aspect of a solicitation is not always necessary or advisable, since contractors are bound to perform by the terms of the awarded contract.

243. FAR 15.304(b) ("Evaluation factors and significant subfactors must—(1) Represent the key areas of importance and emphasis to be considered in the source selection decision . . . .").

244. Cibinic et al., *supra* note 5, at 687 ("Thus, when the contract is awarded, the contractor will be obligated to meet these requirements. Since this is the case, there is no necessity to evaluate all of the key areas of importance—only the major areas need be evaluated.").

245. *See id.*

iv. Keep all separately evaluated factors distinct

Agencies should also actively work to keep their evaluation factors distinct from one another in terms of what issues each factor accounts for. To do this, agencies should lump potentially connected issues together into a single factor. There are two main litigation reasons for this objective: 1) overlapping issues can lead to an evaluation record that can address the same issues in multiple places, which increases the risk that GAO will view a particular set of findings as double-counting; and 2) when issues can reasonably appear in two differently weighted factors, protesters can argue that the government applied the incorrect factor weighting to their finding. Beyond these risks, having overlapping factors generally just adds pages to the proposal and causes the evaluators to evaluate the same thing twice in separate factors, while having to carefully scrutinize the two sections for inconsistencies between them.

In terms of double-counting, GAO has stated that, "[w]here [a solicitation] contains separate and independent technical evaluation factors encompassing separate subject areas, with each factor assigned separate weights under the solicitation's stated evaluation scheme, an agency may not double count, triple count, or otherwise greatly exaggerate the importance of any one listed fact."[246] As such, addressing a high-risk, very junior labor mix in a technical factor, a management factor, a staffing factor, and a transition factor would split the impact of that single labor mix proposal decision across four or more findings. While a team could likely draft these four weaknesses if they apply sufficient attention to clearly describing what aspects of the junior labor mix risk applies to which factors, this option still leads to a complex and potentially confusing record. Moreover, it is very easy for a mistake in separating these issues to look like double-counting. Instead, had the government source selection team structured its evaluation factors such that it evaluated staffing, management, and transition as part of a single technical factor,[247] then the evaluators in this example could easily choose to write a single significant weakness for the high-risk labor mix that addressed the technical, management, staffing, and transition issues in a single finding. This would remove the risk of double-counting.

Furthermore, as described in Part II.C.1, overlap between differently weighted factors is even more concerning because of the following: it requires more evaluator attention to decide where to document findings and to do so consistently; it complicates the trade-off documentation; and it opens new protest arguments about whether a finding has been properly weighted under the solicitation's description of the relative order of importance. Keeping

246. Arctic Slope Mission Servs., LLC, B-410992.5 et al., 2016 CPD ¶ 39, at 4 (Comp. Gen. Jan. 8, 2016).

247. This revised approach in this example also applies the idea of keeping the number of factors low, *see supra* Part II.C.1.c.i. By linking potentially interconnected issues together, it reduces the number of them while still avoiding overlap. Of course, Government source selection teams should not take this factor conglomeration approach too far, as they must also be judicious in ensuring that they are narrowly tailoring any adjectivally rated factors, they have to focus as much as possible on possible areas of discrimination.

evaluation factors distinct from one another further guards against these issues.

Moreover, government source selection teams should also work to keep their factors distinct where they include Acceptable/Unacceptable-rated factors alongside adjectivally rated factors. This allows the source selection team to narrowly tailor the adjectival factor to discriminators without a protester being able to argue that the government should have given it credit for an approach proposed under the topics it intended to evaluate as Acceptable/Unacceptable. For example, a source selection team could structure its solicitation with two evaluation factors: General Technical Approach (Acceptable/Unacceptable) and Technical Discriminators (Adjectival). Topically, these two factors are likely to have substantial areas of overlap. Nevertheless, if the solicitation provides a clear and discrete list of SOW areas or types of tasks that it intends to evaluate adjectivally, it could gain significant focus and speed in its evaluations. Therefore, the solicitation should include a statement similar to "The Government will evaluate the merits of the offeror's proposed technical approach in the following discrete areas on an adjectival basis, while evaluating the majority of the offeror's proposed technical approach under the General Technical Approach Factor, which is rated on an Acceptable/Unacceptable basis," followed by a discrete list of those areas that it wants to rate adjectivally. Keeping these two factors expressly and clearly discrete will provide clearer incentives to the offerors, simplify the evaluation, and limit the risk of double-counting or misclassification arguments.

RECOMMENDATION: Government source selection teams should set up each separately evaluated factor to consider discrete information to prevent issues from bleeding areas across multiple factors.

d. Other Technical Factor Issues

i. Limits on lowest-priced technically acceptable

Although DFARS 215.101-2-70 generally prohibits the Department of Defense (DoD) from using the lowest priced technically acceptable (LPTA) source selection criteria in most cases,[248] having a very limited number of adjectivally rated factors is still advantageous for the government in many of the situations in which use of LPTA is prohibited. Importantly, the GAO has permitted an evaluation scheme that closely resembled LPTA in *Inserso Corp*.[249] In this case, the Department of the Air Force solicitation provided that the agency would rank the five lowest price quotations and evaluate them

248. DFARS 215.101-2-70(a)(1) ("In accordance with section 813 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328) as amended by section 822 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91) (see 10 U.S.C. § 3241); DFARS 215.101-2-70(a)(2) ("[C]ontracting officers shall avoid, to the maximum extent practicable, using the lowest price technically acceptable source selection process in the case of a procurement that is predominately for the acquisition of—(i) Information technology services, cybersecurity services, systems engineering and technical assistance services, advanced electronic testing, or other knowledge-based professional services . . . .).

249. Inserso Corp., B-417791 et al., 2019 CPD ¶ 370, at 2, 7 (Comp. Gen. Nov. 4, 2019).

as technically acceptable or unacceptable.[250] For the technically acceptable quotes, the agency would rate them under past performance, which received a performance confidence assessment rating (substantial confidence, satisfactory confidence, no confidence, or unknown confidence), and then would trade-off between past performance and price, which were equally weighted.[251] Despite the protester's assertions that the agency used LPTA criteria by not trading off between price and technical factors, the GAO found that using a tradeoff between price and past performance as the basis of the source selection did not violate procurement law.[252] As such, in situations where LPTA is prohibited but agencies still want the speed and simplicity of LPTA, they should consider this "LPTA-lite" approach.

Moreover, while the Air Force used past performance as its adjectivally rated factor, other government source selection teams could choose other factors to use. The critical issue in selecting a good "LPTA-lite" adjectival factor is ensuring that it is simple, easy, and straightforward to evaluate. Two other potential candidates for an LPTA-lite adjectival factor in LOE service contracting are "the degree to which proposed key personnel meet or exceed the desired attributes" or narrowly tailored sample problems that address important areas of discrimination.

Of course, using an LPTA-lite evaluation structure with a single narrowly tailored adjectival factor does result in an evaluation scheme that is heavily weighted towards the cost/price factor. Specifically, with only one adjectivally rated factor, the number of discriminating findings is likely to be small, which can make justifying paying a premium, and particularly a large one, more difficult. If this is a concern, the government source selection team can mitigate this by calibrating the relative order of importance of the adjectivally rated factor against the price factor. Even then, however, it can be hard to justify paying a $15 million premium where the only difference between the two proposals is a single key personnel strength.

Nevertheless, as *Inserso* shows, agencies can still pursue an evaluation approach that is similar enough to LPTA by limiting the LOE service solicitation evaluation to a single adjectivally rated factor. Overall, if appropriately tailored to the agency's requirement, this approach can be very advantageous to award quickly, survive protest, and execute efficiently.

ii. Using sample problems

While many LOE services solicitations focus on evaluating an offeror's demonstrated approach, capabilities, understanding, and knowledge to accomplish all of the SOW tasks, sample problem factors are an alternative (or complimentary) approach that can give evaluators clearer insight into how offerors

250. *Id.* at 2.
251. *Id.*
252. *Id.* at 7.

will actually solve technical problems in performance.[253] This can reduce technical risk and, where it replaces a broader technical factor, can decrease workload and increase the speed of the award all parties. That said, drafting strong sample problems is very fact-dependent and can be challenging.

Generally, in a sample problem evaluation factor, an agency describes a hypothetical tasking in the solicitation and directs offerors to provide an example deliverable or approach in their proposals to see if the offeror can muster a proposed solution to that hypothetical tasking in a reasonable time.[254] Nevertheless, drafting these hypothetical taskings well can be challenging for government source selection teams, since they must simultaneously test a sufficient portion of the SOW to make a reasonable assessment of the offerors' ability to perform the contract, while remaining straightforward enough for offerors to be able to complete the task within proposal preparation timelines.[255]

Moreover, agencies should try to avoid using sample problems that involve tasking that it has previously paid a potential competitor (usually the incumbent) to perform under another contract, since this choice gives that offeror a substantial and potentially unfair head-start. Furthermore, sample problems should present a challenge for offerors and sufficient trade-space to allow for a variety of proposed approaches to permit offerors to differentiate themselves.[256] Adding an easy or single-approach sample problem does not demonstrate any discrimination between proposals and is, thus, a waste of time and effort for all parties.[257]

Furthermore, government source selection teams should consider what supporting or explanatory information they must provide to the offerors along with the sample problem to give all potential competitors a level playing field. For instance, while agencies may provide a set of hypothetical facts, it may inadvertently omit other important facts; in such situations, offerors may make different assumptions about these facts, which could result in them proposing unacceptable or irrelevant approaches. For example, if the government's schedule is unstated, one offeror may assume one year and another six weeks; this presumption will lead to two very different responses and both may be wrong if the government really only has four weeks. As such, leaving out critical information wastes time and effort for offerors and the government. Additionally, agencies should try to be clear about the depth of analysis or detail that they expect from an offeror's sample problem response.

253. AFARS ch. 5 (The definition of "sample task" is "a hypothetical task that is given to Offerors during source selection to evaluate their understanding of the work and their ability to perform the work. It must be a reasonable representative of the type of work that will be required. Some rates used to price the task order must be binding on the contractor for the sample to be valid.").

254. Sys. Eng'g Partners, LLC, B-412329 et al., 2016 CPD ¶ 31, at 2–3 (Comp. Gen. Jan. 20, 2016) ("[T]he RFP provided a fictitious scenario involving the development of a constellation of four CubeSat satellites for monitoring farmland.").

255. *See generally* FAR 15.3.

256. FAR 15.304(b)(2).

257. *Id.*

Finally, government source selection teams should also consider that, in an LOE services environment, a sample problem response is not binding on the offeror.[258] As such, offerors have strong incentives to describe the most technically beneficial approach without any cost/price constraints. In some cases, government source selection teams are tempted to also ask the offeror to cost-out its approach to the sample problem as a check on this incentive to respond with the (possibly unaffordable) technical-best. While this costing approach might provide some check on the incentive to propose a technical solution that the government cannot afford in performance, government source selection teams should actively avoid this strategy because it imposes a mini-cost-realism analysis for each sample problem alongside the cost-realism analysis for the actual contract pricing. As discussed, cost-realism analyses are complex, time-consuming, and high-risk;[259] adding additional cost realism analyses that are not necessarily connected to actual performance or to each other greatly increases all of these issues. Instead, the government may want to consider providing the offeror a defined subset of the contract's total hours and labor mix to expend on each sample problem. While this information increases the complexity of the evaluation somewhat, it is considerably less complex than adding one or more (potentially conflicting) cost realism analyses. Overall, the use of sample problems is very fact-specific and, while there are some potential evaluation advantages, they often require a fair amount of effort prior to releasing the solicitation to set them up effectively.

iii. Differences in evaluating past performance

Although much of the above discussion focuses on non-past-performance evaluation factors, FAR 15.304(c)(3) also requires agencies to evaluate an offeror's past performance records in most cases.[260] Although past performance evaluation factors can be rated adjectivally or on an Acceptable/Unacceptable basis, the mechanics of both approaches differ from those of the non-past performance factors described above.

Past performance is a measure of how well an offeror has performed on active and completed prior contract efforts.[261] Solicitations typically ask offerors to discuss several recent[262] prior contract efforts and to provide information about these effort to demonstrate that they are relevant evidence that

258. *See* FAR 15.201(e).

259. *See infra* Part II.C.2.

260. FAR 15.304(c)(3)(i) ("Past performance, except as set forth in paragraph (c)(3)(iii) of this section, shall be evaluated in all source selections for negotiated competitive acquisitions expected to exceed the simplified acquisition threshold."). *But see* FAR 15.304(c)(3)(iii) ("Past performance need not be evaluated if the contracting officer documents the reason past performance is not an appropriate evaluation factor for the acquisition.").

261. FAR 2.101 ("Past performance means an offeror 's or contractor's performance on active and physically completed contracts.").

262. Solicitations should explicitly define "recent"; often, Government source selection teams define a recent prior contract effort as one performed within the last three to five calendar years. Solicitations should also specify when to make this recency calculation by specifying "X calendar years from the date this solicitation is issued" or "X calendar years from the date of proposal submission."

the offeror can perform the work under the solicitation.[263] In addition to the offeror's description of these prior efforts, the government will often collect additional customer inputs about the offeror's prior work through CPARS, through customer questionnaires, or by contacting the customer directly.

Importantly, unlike other non-cost factors, the government may not assess strengths, weaknesses, significant weaknesses, or deficiencies in past performance evaluations. Instead, solicitations generally break an offeror's past performance evaluation into two steps: one addressing each of the individual prior contract efforts and the other addressing the cumulative past performance record for the offeror.[264]

In the first step of a past performance evaluation, the evaluators determine whether each prior contract effort in the offeror's proposal is 1) recent, 2) relevant (i.e., whether the submitted prior contract efforts are similar in terms of size, scope, and complexity to the effort required in the solicitation), and 3) of a certain quality (an assessment of how satisfied the customer was).[265] In general, evaluators document these assessments of each of the prior contract efforts by assessing when the work was performed, why it was (or was not) of similar size, scope, and complexity, and what ratings the customer gave the performance (if the evaluators received customer inputs).[266]

In the second step of the past performance evaluation, the evaluators consider how much confidence the cumulative past performance record provides the government that the offeror will successfully perform the solicitation's work. As with other non-cost/price factors, agencies can rate this confidence assessment either adjectivally or as Acceptable/Unacceptable, but again the evaluation mechanics are different for past performance evaluations. For example, the *DoD Source Selection Guide* suggests the following adjectival ratings for past performance confidence: Substantial Confidence, Satisfactory Confidence, Neutral Confidence,[267] Limited, Confidence, and No Confidence.[268] The major difference in the past performance adjectival scheme is the inclusion of a Neutral Confidence rating for offerors without any prior

263. A sample individual past performance contract summary form is available in the *Contract Attorney's Deskbook*. Judge Advoc. Gen. Legal Center and Sch., U.S. Army, Contract Attorney's Deskbook 2-94 (2021) (attach. 4: J-L1). This form can be used to standardize the information that the solicitation requests for each offeror to provide how the prior effort(s) are of a similar size, scope, and complexity to the required effort by using pieces of information such as contract value, type, dates, customer, full-time-equivalents, description of the work with relevancy to current SOW tasks, and many other aspects relevant to the particular evaluation.

264. DoD Source Selection Guide, *supra* note 7, at 26.

265. *Id.* Also, see relevancy ratings on DoD Source Selection Guide, *supra* note 7, at 27 (tbl. 4).

266. *See also infra* Part II.C.2.

267. FAR 15.305(a)(2)(iv) requires that offerors without a record of relevant past performance, or for whom information past performance is not available, may not be evaluated favorably or unfavorably on past performance, which is why the neutral confidence rating is available. DoD Source Selection Guide, *supra* note 7, at 29 (tbl. 5).

268. DoD Source Selection Guide, *supra* note 7, at 29 (tbl. 5).

contract efforts, which allows room for new entrants into the government marketplace.[269]

As with any other evaluation factor, government source selection teams should only use an adjectivally rated factor when it is likely to provide meaningful discrimination between the offerors. Otherwise, an agency should consider using an Acceptable/Unacceptable past performance evaluation.[270] In an Acceptable/Unacceptable past performance evaluation, the agency performs the first step as it would for any other past performance evaluation to evaluate the recency, relevancy, and quality of each of the offeror's prior contract efforts.[271] In the second step, however, the government is only selecting between a Satisfactory/Neutral Confidence rating and a No Confidence rating.[272] As above, the major benefits of an Acceptable/Unacceptable past performance factor compared to an adjectivally rated past performance factor are that they require less evaluation effort (particularly in the trade-off analysis), they present lower protest risk, and they facilitate a quicker award.

Regardless of whether agencies decide on an adjectivally rated or Acceptable/Unacceptable past performance factor, there are some other differences they should keep in mind in evaluations.

Other Information: Unlike other non-past performance evaluation factors, evaluators may look beyond the four corners of the proposal to consider past performance information that the offeror has not provided;[273] moreover, in certain situations, the evaluators must consider certain past performance information that is outside of the proposal that is "too close at hand" to ignore.[274] This is an important aspect of planning for a past performance evaluation, and government evaluators should carefully consider what past performance

269. FAR 15.305(a)(2)(iv) requires that offerors without a record of relevant past performance, or for whom information past performance is not available, may not be evaluated favorably or unfavorably on past performance, which is why the neutral confidence rating is available.

270. *See* DoD Source Selection Guide, *supra* note 7, at 21–22 (stating to consider Acceptable/ Unacceptable rating criteria if past performance is not a discriminating factor in the source selection).

271. *Id.* at 26–28. In the context of an acceptable/unacceptable evaluation, offerors without a record of relevant past performance or for whom information past performance is not available, the offeror shall be determined to have an unknown or neutral past performance, which shall be considered acceptable.

272. *Id.* at 28.

273. Often, agencies warn offerors that they may consider other sources of past performance information. For example, many solicitations contain the following or similar language: "The Government may use other information available from Government sources, to evaluate an Offeror's or subcontractors' past performance. The Government may also consider past performance information obtained from sources other than those identified by the Offeror or subcontractors, including, but not limited to, Federal, State, and local Government agencies, Better Business Bureaus, published media and electronic databases, the Government's Contractor Performance Assessment Reporting System (CPARS) data base, and/or personal knowledge. The Government reserves the right to limit or expand the number of references it decides to contact and to contact other references than those provided by the Offeror or subcontractors." *See* FAR 15.305

274. *See* Triad Int'l Maint. Corp., B-408374, 2013 CPD ¶ 208, at 5 (Comp. Gen. Sept. 5, 2013) (sustaining past performance protest where the agency failed to consider the protester's performance of the incumbent contract requirements).

information they currently have on hand to assess what information that they may be required to consider in their evaluation.

Opportunity to Respond to Adverse Past Performance: In assessing other past performance information that they have on hand, government source selection teams must also determine whether an offeror has had an opportunity to respond to any *adverse* past performance information the evaluators will consider.[275] If the offeror has not had an opportunity to respond to it, evaluators must provide the offeror such an opportunity.[276] This rule, however, has several caveats. First, it does not apply to neutral or positive past performance; the government has no obligation to communicate with the offeror about non-adverse past performance information.[277] Second, this obligation exists even if the government does not go into discussions.[278] Importantly, FAR 15.306(a)(2) specifically exempts communications that give an offeror an opportunity to respond to adverse past performance information from triggering discussions; this is important to keep in mind where agencies want to make award on initial proposals.[279] Third, in many cases, offerors have already had an adequate opportunity to respond to adverse past performance information, which limits the number of situations in which it applies.[280] For instance, when using Contractor Performance Assessment Reporting System (CPARS) data, the CPARS process gives contractors ample opportunity to respond to

275. FAR 15.306(a)(2) ("If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (*e.g.*, the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors."); FAR 15.306(b)(1)(i) ("Such communications shall address adverse past performance information to which an offeror has not had a prior opportunity to respond."); FAR 15.306(d)(3) ("At a minimum, the contracting officer must, subject to paragraphs (d)(5) and (e) of this section and 15.307(a), indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond."); *see also* Erickson Helicopters, Inc., B-409903 et al., 2014 CPD ¶ 288, at 7 n.12 (Comp. Gen. Sept. 5, 2014) (finding that records show protestor was provided an opportunity to respond to adverse performance reviews related to prior contracts via the Contractor Performance Assessment Reporting System).

276. FAR 15.306(a)(2) ("If award will be made without conducting discussions, offerors may be given the opportunity to clarify certain aspects of proposals (*e.g.*, the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors.").

277. *Id.*

278. A.G. Cullen Constr., Inc., B-284049.2, 2000 CPD ¶ 45, at 1 (Comp. Gen. Feb. 22, 2000) ("Where award is to be made without discussions, contracting officer must give an offeror an opportunity to clarify adverse past performance information to which the offeror has not previously had an opportunity to respond only where there clearly is a reason to question the validity of the past performance information . . . .").

279. FAR 15.306(a)(2); FAR 15.306(b) defines communications as "exchanges, between the Government and offerors, after receipt of proposals, leading to establishment of the competitive range." Whereas discussions occur after establishment of the competitive range and "are undertaken with the intent of allowing the offeror to revise its proposal." FAR 15.306(d).

280. Matson Navigation Co., Inc., B-416976.2 et al., 2019 CPD ¶ 69, at 6 n.5 (Comp. Gen. Jan. 24, 2019).

adverse past performance information that the customer documents.[281] Even if the offeror chooses not to respond, having that opportunity during the CPARS process is sufficient to avoid triggering the need to give the offeror another opportunity to respond.[282] Overall, evaluators must carefully consider what information they have available, and the provenance of it, to assess whether they must use past performance information and whether they must give the offeror a chance to respond to that information when the evaluators intend to consider it. Regardless of how they decide these questions, the evaluators must ensure that their evaluation documentation provides sufficient contemporaneous discussion of their analysis.[283]

Past Performance as a Potential SBA Nonresponsibility Issue: Small businesses can also present certain challenges in a past performance evaluation. Specifically, where an agency determines that a small business offeror's past performance record provides No Confidence (under an Acceptable/Unacceptable factor), GAO could consider such a finding to be "a determination of nonresponsibility" for a small business, which requires the agency to ask the Small Business Administration (SBA) for a final determination using its certificate of competency procedures.[284] In fact, GAO has sustained protests where an procuring agency fails to seek a determination from SBA using its certificate of competency procedures for a nonresponsibility determination.[285] Evaluators applying a No Confidence rating under an adjectivally rated past performance factor as opposed to Acceptable/Unacceptable factor, should ensure that its past performance findings are based on responsiveness concerns or are clearly separate and distinct from analysis of the offeror's responsibility.[286]

281. *Id.* ("With regard to acquisitions governed by FAR part 15, we have recognized that where an offeror was provided an opportunity to respond to adverse performance information during its performance of the affected contract, the agency need not provide an additional opportunity to respond during discussions.").

282. *Id.*

283. *See* Al Raha Grp. for Tech. Servs., Inc., B-411015.2 et al., 2015 CPD ¶ 134, at 21 (Comp. Gen. Apr. 22, 2015) (sustaining protest where agency's evaluation of past performance was inconsistent with the terms of the solicitation and not adequately documented).

284. The SBA's regulations specifically require a contracting officer (CO) to refer a small business concern to the SBA for a CO determination when the CO has refused to consider a small business concern for award of a contract or order "after evaluating the concern's offer on a noncomparative basis (e.g., pass/fail, go/no go, or acceptable/unacceptable) under one or more responsibility type evaluation factors (such as experience of the company or key personnel or past performance)." 13 C.F.R. § 125.5(a)(2)(ii) (2013); FAR 15.101-2(b)(1) ("If the contracting officer elects to consider past performance as an evaluation factor, it shall be evaluated in accordance with 15.305. However, the comparative assessment in 15.305(a)(2)(i) does not apply. If the contracting officer determines that a small business' past performance is not acceptable, the matter shall be referred to the Small Business Administration for a Certificate of Competency determination, in accordance with the procedures contained in subpart 19.6 and 15 U.S.C. 637(b)(7).").

285. *See* Phil Howry Co., B-291402.3 et al., 2003 CPD ¶ 33, at 4 (Comp. Gen. Feb. 6, 2003) (sustaining protest where "the agency's decision not to award the contract to PHC, based solely on its evaluation of past performance, constitutes a *de facto* nonresponsibility determination, which must be referred to the SBA under its COC procedures.").

286. *See* INTELiTEAMS, Inc., B-418123.4, 2020 CPD ¶ 397, at 9 (Comp. Gen. Dec. 9, 2020) (denying protest that agency should have received certificate of competency from SBA for small business rated as deficient under past performance factor "not because it questioned the

Overall, past performance evaluations have some distinctive mechanics and issues that government source selection teams should carefully consider in building their evaluation schemes. Despite these methodological differences, however, many of the general strategic recommendations that apply to other non-cost/price evaluation factors are equally important in structuring a past performance evaluation factors. As such, government source selection teams should also aim to structure their past performance factors as simply, clearly, and efficiently as possible.

2. Cost/Price Evaluation Strategies

As with the non-cost evaluation factors, government source selection teams should carefully consider how broadly and deeply they want to commit to evaluating the offerors' proposed prices. As discussed in depth in Section II.A.2, the most critical decision in this area is what contract type to use for the solicitation.[287] In nearly all competitive situations, a fixed-price type effort will require substantially less evaluation time and effort than a cost-reimbursement effort to reach award successfully. The primary reason for this is cost-realism, which brings substantially higher litigation risk and complexities.[288] As such, government evaluation teams should generally favor fixed-price type deals to minimize the pre-award work for all parties, to reduce the complexity of their evaluation documentation, and to improve the defensibility of their awards.[289]

Where the government opts to use a fixed-price contract type, it only needs to conduct a price reasonableness analysis, which is a simple comparative analysis of top-line proposed prices where the government receives adequate price competition. For fixed-price-contract types, the greatest solicitation risk is accidentally triggering another type of analysis—price *realism* analysis—which is not required by statute or regulation and is significantly more complicated than price reasonableness analysis.[290] For the most part, avoiding price realism involves deleting any solicitation language that requires the government to evaluate whether the offeror's proposed price is *too low* to actually allow it to perform.[291] The following section explores these concepts in more depth.

However, where a government source selection team selects a cost-reimbursement contract type, most of its strategic decisions involve

protester's ability or capacity to perform, but because the agency could not assess the protester's past performance due to its failure to provide information required by the solicitation").

287. *See supra* Part II.A.

288. GAO 2021 Report, *supra* note 64, at 2 n.3 ("*E.g.*, *DevTech Sys., Inc.*, B-418273.3, B-418273.4, Dec. 22, 2020, 2021 CPD ¶ 2 (finding that the agency's cost realism evaluation was unreasonable where the agency conceded that there was an error with its evaluation and where the record did not support the agency's upward adjustment of the protester's proposed costs and the agency's failure to adjust some of the awardee's proposed costs.)").

289. FAR 16.104(a) ("Normally, effective price competition results in realistic pricing, and a fixed-price contract is ordinarily in the Government's interest.").

290. Dust Busters Plus, LLC, B-419853.7, 2021 CPD ¶ 264, at 3 (Comp. Gen. July 26, 2021) ("As a general rule, when awarding a fixed-price contract, an agency is only required to determine whether the offered prices are fair and reasonable.").

291. *Id.*

intentionally limiting the scope of the cost realism analysis, which allows for a reduction in the cost realism data that the solicitation must require of offerors. These limits can include the following: limiting the subcontractor costs the government will evaluate in its cost realism analysis; setting a common escalation rate for direct labor costs; and removing Other Direct Costs from the government's cost realism analysis. Additionally, the government source selection team must carefully scrutinize whether the solicitation asks for all of the information that the government will need to successfully conduct its cost realism analysis of those cost elements that it plans to evaluate without going into discussions.

a. Fixed-Price: Price Reasonableness and Avoiding Price Realism

Price reasonableness evaluations offer substantial benefits for quickly awarding a competitive fixed price source selection because "[n]ormally, competition establishes price reasonableness," and, if the prices are based on adequate price competition, no additional data is needed from offerors.[292] FAR 15.404-1(b)(2) provides various techniques to ensure a fair and reasonable price, but there is a preference for the first two, which include comparing the prices received to one another or a comparison of the prices received to historical pricing information.[293] The benefits to a firm fixed price solicitation with a price reasonableness evaluation is that it can be accomplished quickly, it is simple, and the evaluation guards against paying too high a price for a contract.[294]

While a price reasonableness evaluation is generally straightforward in situations in which the government receives adequate price competition, source selection teams should take care to ensure that they meet the limited requirements placed on price reasonableness analyses.[295] In particular, agencies should avoid three major pitfalls.

First, agencies should carefully avoid asking for additional pricing information in the solicitation. In most cases, FAR 15.404-1(b)(2) permits the offerors to complete a price reasonableness analysis using only total proposed prices. Nevertheless, where an agency elects to request data from offerors to support their proposed prices, GAO has found that an agency cannot reasonably ignore additional information that it has chosen to request.[296] As such, where an agency receives information that it requested in the solicitation, it must consider the impact of that data and document the analysis of this information.

292. FAR 15.305.

293. FAR 15.404-1(b)(2); FAR 15.401-1(b)(3).

294. Crawford RealStreet Joint Venture, B-415193.2 et al., 2018 CPD ¶ 121, at 9 (Comp. Gen. Apr. 2, 2018) ("An agency's concern in making a price reasonableness determination focuses on whether the offered prices are too high, rather than too low.").

295. As a threshold matter, "[t]he manner and depth of an agency's price analysis is a matter committed to the discretion of the agency," which "GAO will not disturb" unless the evaluation is not in accordance with the solicitation or applicable statutes and regulations. Technatomy Corp., B-414672.5, 2018 CPD ¶ 353, at 12 (Comp. Gen. Oct. 10, 2018).

296. Sci. Applications Int'l Corp., B-420005 et. al., 2021 CPD ¶ 372, at 7 (Comp. Gen. Oct. 27, 2021).

Because this additional analysis is not required, it is often a waste of time and effort for both the offerors and the government.

Second, an agency must ensure that it follows its solicitation and then contemporaneously documents its analysis. For instance, if the solicitation states the government's total evaluated price will be based on the total price for all base requirements and options, the agency must evaluate and document all proposed periods of the contract and not just the base period.[297] Moreover, this same principle—that agencies must diligently follow any the solicitation's evaluation ruleset—applies to any other analyses that the agency tacks on beyond a simple comparative price reasonableness analysis. Therefore, agencies should actively avoid adding any language in fixed-price type efforts that complicates what should be a simple comparative price reasonableness analysis.

Third, the GAO has established that the mere receipt of multiple proposals does not establish fair and reasonable pricing; rather, the agency must compare the prices of the proposals received.[298] Agencies can avoid this error through proper documentation of the agency's analysis by simply showing a comparison of the offerors' respective proposed prices.

Beyond these three issues that apply to all fixed-price contracts, another issue applies to FPIF contracts. Where the government source selection team opts to use an FPIF contract, it must determine whether it intends to evaluate the probable costs that the offeror will incur between the target price and the ceiling price a *cost* realism analysis, since there is some bounded price flexibility in FPIF contracts. In general, teams should avoid conducting a cost realism on an FPIF contract and, instead, notify all offerors in the solicitation that the government will evaluate all FPIF efforts at ceiling. This is permissible because the ceiling price for a FPIF contract will be the government's maximum cost exposure under that contract type; as such, it will not bear the risk of cost increases beyond the ceiling price. This approach greatly simplifies the evaluation of FPIF contracts by avoiding all of the issues incumbent with a cost realism analysis.

> **RECOMMENDATION:** Wherever possible, government source selection teams should actively pursue price evaluation schemes that are limited to a simple, comparative price reasonableness analysis that is unencumbered by additional data or unnecessarily convoluted calculations.

b. Avoiding Price Realism

Price realism is a distinct concept from price reasonableness. While price reasonableness focuses on whether an offeror's proposed price is too high,[299] price realism focuses on whether an offeror's proposed price is too low to

297. Verdi Consulting, Inc., B-414103.2 et al., 2017 CPD ¶ 136, at 11–12 (Comp. Gen. Apr. 26, 2017).
298. *Id.* at 11.
299. *Id.*

perform.[300] Price realism is *never* required,[301] yet there are several ways that poor solicitation drafting can accidentally trigger a requirement to perform unwanted price realism. Moreover, while the FAR does not use the term "price realism," GAO frequently uses that term to describe the analysis in FAR 15.404-1(d)(3), which allows that "cost realism analysis can be used on competitive fixed-price incentive contracts or in exceptional cases, on other competitive fixed-price-type contracts."[302]

In general, price realism is an unwanted complication to an otherwise simple price reasonableness analysis. The FAR guidance on this analysis is scant, and the improper or inadvertent application of price realism analysis frequently leads to sustained protests at the GAO.[303]

Nevertheless, price realism can be an important technique for certain exceptional procurements, such as instances where the agency needs to determine if an offeror was bidding so low that it jeopardizes successful performance.[304] Nevertheless, agencies should carefully weigh the risk and benefits of requiring a price realism analysis.

i. Do not require a price realism analysis unless absolutely necessary

In the exceptional situations in which an agency intentionally decides to conduct a price realism analysis, it should clearly state that intention in the solicitation.[305] Additionally, the agency must consider that, from an evaluation mechanics perspective, the government cannot make cost adjustments to a firm-fixed price, so it must plan for conducting a cost realism analysis that results instead in performance risk findings under the non-price factors or impacts the responsibility determination.[306] GAO has stated that agencies

300. C.L. Price & Assocs., Inc., B-403476.2, 2011 CPD ¶ 16, at 3 (Comp. Gen. Jan. 7, 2011) (arguments that agency did not perform appropriate analysis to determine whether prices are too low such that there may be risk of poor performance concern price realism.)

301. Dust Busters Plus, LLC, 2021 CPD ¶ 264, at 3 ("As a general rule, when awarding a fixed-price contract, an agency is only required to determine whether the offered prices are fair and reasonable.").

302. FAR 15.404-1(d)(3).

303. *See* Alexis Bernstein, *Price Realism Analysis in Fixed-Price Contracting: Improving the Evaluation Process*, 42 Pub. Cont. L.J. 793, 795 (2013) (discussing how the confusion of price realism analysis often leads to protest).

304. While the FAR allows the use price realism on fixed price type contracts when "new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractors' proposed costs have resulted in quality or service shortfalls," FAR 15.404-1(d)(3).

305. *See* Lilly Timber Servs., B-411435.2, 2015 CPD ¶ 246, at 4 (Comp. Gen. Aug. 5, 2015) (sustaining protest where agency conducted price realism analysis but solicitation only notified offerors that evaluation would consider reasonableness of proposed price); *see also* Milani Constr., LLC, B-401942, 2010 CPD ¶ 87, at 5–7 (Comp. Gen. Dec. 22, 2009) (sustaining a protest for not providing adequate notice of price realism analysis and articulating that GAO logically believes the price realism notice should be in the price evaluation factor).

306. FAR 15.404-1(d)(3) ("Cost realism analyses may also be used on competitive fixed-price incentive contracts or, in exceptional cases, on other competitive fixed-price-type contracts when new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractors' proposed costs have resulted in quality or service shortfalls. Results of the analysis may be used in performance risk assessments and responsibility

can use a variety of methods to assess the price realism of an offeror's proposal including a) analyzing pricing information proposed by the offeror; and b) comparing proposals received to one another, to previously proposed or historically paid prices, or to an independent government cost estimate (IGCE).[307] Additionally, even if the offeror's proposed prices are lower than the historical prices paid or the IGCE, agencies can reasonably determine that different quantities, performance conditions, or contract terms, etc. support a finding of technical competence or understanding despite the offeror's lower prices, but agencies must document this analysis.[308]

RECOMMENDATION: Since agencies are not required by statute or regulation to perform a price realism analysis, government source selection teams should not require a price realism analysis in their solicitations, unless absolutely necessary. In those "exceptional cases" in which an agency elects to perform a price realism analysis, the agency's solicitation should explicitly describe conducting a price realism analysis to evaluate whether an offeror's price is so low that it indicates increased performance risk or a technical misunderstanding. In these cases, the solicitation should also request all of the information necessary to support the agencies' price realism analysis, which is the same information necessary to conduct a cost realism analysis, as described in Section II.C.2.b.i.

ii. Avoid inadvertently triggering a price realism analysis

On the other hand, where the government source selection team wants to avoid price realism, it should carefully scrutinize its solicitation to remove any language that may accidentally trigger a price realism analysis. Inadvertently triggering a price realism analysis is one of the biggest protest risks for fixed-price contracts; in these cases, the agency's record almost always insufficiently documented because the agency never intended to perform a price realism analysis, and it likely lacked the detailed cost data necessary to perform such an analysis.[309] Beyond the risk of protest loss, correcting this issue can force the agency revise its solicitation or enter into discussions to get the necessary information from the offerors.

One of the ways agencies can inadvertently trigger a requirement to perform a price realism analysis is inclusion of the Professional Employee Compensation clause (FAR 52.222-46) in the solicitation.[310] This clause requires the government to compare the incumbent professional compensation to the proposed professional compensation because recompetition of services contracts may result in lower compensation that may impact performance.[311] GAO has stated, "In the context of fixed-price contracts, our Office has explained

determinations. However, proposals shall be evaluated using the criteria in the solicitation, and the offered prices *shall not be adjusted as a result of the analysis*.").

307. *See id.*

308. *See* DRS Laurel Techs., B-410330, 2014 CPD ¶ 365, at 11 (Comp. Gen. Dec. 10, 2014) (finding that analysis documented supported lower prices than the predecessor contract).

309. Arch Sys., LLC, B-415262 et al., 2017 CPD ¶ 379, at 9 (Comp. Gen. Dec. 12, 2017).

310. *Id.*

311. FAR 52.222-46(b); Bionetics Corp., B-419727, 2021 CPD ¶ 259, at 9 (Comp. Gen. July 13, 2021).

that this FAR provision anticipates an evaluation of whether an awardee understands the contract requirements, and has proposed a compensation plan appropriate for those requirements—in effect, a price realism evaluation regarding an offeror's proposed compensation."[312] GAO has consistently held that if FAR 52.222-46 is included in the solicitation and the government does not evaluate offeror's proposed information, the GAO will sustain the protest.[313] The government should aim to exclude FAR 52.222-46 from its solicitations wherever possible.

Another way the agency can inadvertently trigger a price realism analysis, without inserting a clause or specifically stating it will perform a price realism, is through the inclusion of certain terms and concepts. Generally, if the solicitation states that the agency will review prices to determine whether they are so *low* that they reflect a lack of technical understanding or provide that a proposal can be rejected for offering prices that are too low, the solicitation may accidentally trigger a requirement for the agency to conduct a price realism analysis.[314] Similarly, where a solicitation states that the agency will evaluate whether "prices demonstrate a lack of comprehension of the technical requirements," are "incompatible with the scope of effort," are "unrealistically low," or similar phrases, this language could lead the GAO to determine the solicitation requires the agency to conduct a price realism analysis.[315]

RECOMMENDATION: If an agency does not have a requirement or intend to perform a price realism analysis, it should not include FAR 52.222-46 or terms that require it to determine whether proposed prices are so low that they reflect a lack of technical understanding or increased performance/technical risk, as these statements could inadvertently trigger a price realism analysis.

312. Arch Sys., LLC, 2017 CPD ¶ 379, at 9.

313. DRS Laurel Techs., B-410330, 2014 CPD ¶ 365, at 5 (Comp. Gen. Dec. 10, 2014).

314. HP Enter. Sers., LLC, B-413888.2 et al., 2017 CPD ¶ 239, at 6 (Comp. Gen. June 21, 2017) ("As our Office has found, in the absence of an express price realism provision, we will only conclude that a solicitation contemplates a price realism evaluation where the solicitation expressly states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and where the solicitation states that a proposal can be rejected for offering low prices.").

315. Facility Servs Mgmt., Inc., B-420102.3, 2022 CPD ¶ 93, at 6–7 (Comp. Gen. Mar. 29, 2022) ("[W]e will only conclude that a solicitation contemplates a price realism evaluation where the solicitation: (1) states that the agency will review prices to determine whether they are so low that they reflect a lack of technical understanding, and (2) states that a proposal can be rejected or assessed technical risk for offering low prices."); Science Applications Int'l Corp., B-407105, et al., 2012 CPD ¶ 310, at 10 (Comp. Gen. Nov. 1, 2012) (where it established that DIA would evaluate price proposals to determine whether proposed prices were "compatible with the scope of effort, are not unbalanced, and are neither excessive nor insufficient for the effort to be accomplished," and that "[t]his may be grounds for eliminating a proposal from competition on the basis that the offeror does not understand the requirement." This also "reflects an inherent lack of technical competence or a failure to comprehend the complexity and risks required to perform RFP requirements due to submission of a proposal that is unrealistically high or low in price and/or unrealistic in terms of technical or schedule commitments. . . ."); Esegur-Empresa de Seguranca, SA, B-407947, et al., 2013 CPD ¶ 109, at 4 (Comp. Gen. Apr. 26, 2013) ("Implicit in the solicitation's reference to 'unrealistically' low prices is the presumption that the agency would actually consider whether an offeror's price is in fact unrealistic and, as a consequence, unacceptable.").

b. Cost-Reimbursement: Cost Realism Solicitation Strategies—Ask for What You Need and Limit What You Must Review

When government source selection teams choose to employ a cost reimbursement type contract, the FAR requires them to conduct a cost realism analysis.[316] The reason for this requirement is that, in a cost reimbursement contract, "an offeror's proposed estimated costs are not dispositive because, regardless of the costs proposed, the government is bound to pay the contractor its actual and allowable costs."[317] As a result, an agency must conduct a cost realism analysis "to guard [the agency] against unsupported claims of cost savings by determining whether the costs as proposed represent what the government realistically expects to pay for the proposed effort."[318]

In general, the mechanics of cost realism are easy to describe, but complex to implement. At its most basic level, a cost realism analysis compares an offeror's proposed costs against relevant, real-world substantiating data to make judgments about the accuracy of the offeror's proposed costs.[319] Despite this basic rule, cost realism analyses often involve hundreds of individual cost elements spread across numerous (potentially inconsistent) prime and subcontractor pricing spreadsheets, and individual historical records.

In general, these cost elements fall into several broad buckets: direct labor costs (which builds up from of labor hours, labor mix, direct labor rates, escalation rates, and (if proposed) uncompensated overtime rates), direct material costs, other direct costs (often incidental material and travel costs), and indirect rates.[320] In the LOE services setting, proposals may not present any direct material cost; furthermore, where the solicitation specifies total hours and a labor mix, the government need not review the proposed hours for realism, as long as they confirm the offeror bid to the solicitation's government labor mix. Nevertheless, cost realism analyses for LOE services involve the majority of these cost elements.

Despite this complexity, the FAR provides minimal prescriptive guidance for COs in setting up and conducting a cost realism analysis.[321] As such, it is critical for government source selection teams to carefully ensure that their solicitations ask for the huge amount of information that is required

316. FAR 15.404-1(d)(2) ("Cost realism analyses shall be performed on cost-reimbursement contracts to determine the probable cost of performance for each offeror.").

317. FAR 15.305(a)(1); FAR 15.404-1(d); Midboe, *supra* note 76, at 254.

318. Sys. Techs., Inc., B-404985 et al., 2011 CPD ¶ 170, at 10 (Comp. Gen. July 20, 2011) ("The end product of an agency's cost realism analysis should be a total evaluated cost of what the government realistically expects to pay for the offeror's proposal effort, as it is the agency's evaluated cost and not the offeror's proposed cost that must be the basis of the source selection determination. FAR § 15.404-1(d)(2)(i).").

319. *Id.*

320. *See* LOGC2, Inc., B-416075, 2018 CPD ¶ 204, at 5–6 (Comp. Gen. June 5, 2018) (denying protest that agency failed to analyze individual cost elements when the agency considered the awardee's "direct labor, indirect rates (fringe rates, overhead rates, general and administrative (G&A) rates), proposed fee . . . and the offeror's accounting system . . . .").

321. FAR 15.404-1(d).

to complete a cost realism analysis successfully.[322] Furthermore, government source selection teams should actively exercise the agency's discretion to simplify and document an analysis that can otherwise quickly become painfully convoluted and time-consuming.

Before addressing these best practices and options to simplify a cost realism analysis, a brief overview of the basics of cost realism law and regulation will lay the groundwork for the recommendations.

The purpose of a cost realism analysis is to guard the agency against unsupported claims of cost savings because, regardless of the costs proposed, the agency is bound to pay the contractor its actual and allowable costs.[323] The FAR defines cost realism as:

> [T]he process of independently reviewing and evaluating specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements are realistic for the work to be performed; reflect a clear understanding of the requirements; and are consistent with the unique methods of performance and materials described in the offeror's technical proposal.[324]

To conduct a cost realism analysis, the agency considers the proposed costs and technical approach of each offeror and develops what it determines is the "best estimate of the cost of any contract that is most likely to result from the offeror's proposal."[325] Many agencies refer to this as the "probable cost" or the "Total Evaluated Cost/Price." The agency arrives at this "probable cost" by adjusting each offeror's proposed cost (and sometimes fee) up to a realistic level for any cost elements that are not supported by reliable substantiating data.[326] However, regardless of any adjustments the agency makes to an offeror's proposed cost for evaluation purposes, the agency will award the contract at the offeror's proposed cost.[327]

The exact methodology the agency uses for a cost realism analysis can vary and should consider each offeror's proposed approach and costs.[328] As described above in Section II.A.2, an agency's cost realism analysis is a frequent protest grounds before the GAO.

GAO has provided a few examples of what cost realism methodologies that agencies should avoid. For instance, GAO has indicated that it is unreasonable

322. AdvanceMed Corp.; TrustSolutions. LLC, B-404910.4 et al., 2012 CPD ¶ 25, at 15–16 (Comp. Gen. Jan. 17, 2012) ("[A]n agency's cost realism analysis need not consider every element of an offeror's cost proposal, nor must the analysis achieve scientific certainty regarding the realism of an offeror's proposed costs. . . . On this record, we see no basis to question the CO's judgment or exercise of discretion here.").

323. *See*, *e.g.*, FAR 15.305(a)(1); FAR 15.404-1(d); Midboe, *supra* note 76, at 254.

324. FAR 15.404-1(d)(1).

325. FAR 15.404-1(d)(2)(i).

326. FAR 15.404-1(d)(2)(ii). Agencies should specify in the solicitation the way in which the agency will arrive at a Total Evaluated Cost/Price such as identifying the CLINs subject to a cost realism adjustment and the other CLINs that will not be adjusted but factored into the overall Total Evaluated Cost/Price.

327. FAR 15.404-1(d).

328. Booz Allen Hamilton, Inc. B-412744, et al. 2016 CPD ¶ 151, at 10 (Comp. Gen. May 26, 2016) ("When conducting a cost realism analysis, agencies are required to consider the realism of a firm's proposed costs in light of its unique technical approach.").

for an agency to limit its cost realism evaluation only to assessing fully burdened hourly rates because a cost realism analysis should consider whether the proposed direct labor rates are realistic.[329] Additionally, an agency may not "mechanically apply its own estimates for labor hours or costs—effectively normalizing cost elements of an offeror's proposal to government estimates without considering the offeror's unique technical approach."[330] Similar to other evaluation areas, a cost realism analysis will be found unreasonable where the agency fails to contemporaneously document its assessment of the realism of the awardee's proposed rates.[331] Nevertheless, GAO's guidance about what to avoid is generally not a complete guide to efficient cost realism best practices.

Additionally, the regulatory guidance on conducting a reasonable cost realism analysis is very general.[332] Neither the FAR, the Defense Federal Acquisition Regulation Supplement (DFARS), nor the DFARS Procedures, Guidance, and Information (PGI) provide practitioners with significant guidance about how to perform the cost realism analyses or what data to rely on.[333] To help fill in this void, the following sections provide clear guidance and sample solicitation language about how to conduct an efficient and defensible cost realism evaluation.

i. Explicitly ask for the data necessary to complete a cost realism analysis in the solicitation

In a cost realism analysis, there are essentially two broad categories of data an offeror must provide in its proposal: proposed costs and substantiating data.[334] In a perfect world, the offeror would support each proposed cost element with a corresponding substantiating data point that the proposal provides and clearly traces to the proposed cost. There is a wide variation in how well individual companies do in providing the required data and traceability; in fact, many are not aware of the breadth of information necessary to complete a cost realism analysis. As such, agencies should clearly identify the cost realism data that they need and exclude extraneous data that can complicate clear traceability of the data within the proposal.

329. CALNET, Inc., B-413386.2 et al., 2016 CPD ¶ 318, at 4 (Comp. Gen. Oct. 28, 2016) ("The underlying policy consideration for such a requirement is that, unless an agency evaluates the realism of the offerors' proposed direct rates of compensation (as opposed to its fully-burdened rates), the agency has no basis to determine whether or not those rates are realistic to attract and retain the types of personnel to be hired.").

330. *See* CFS-KBR Marianas Support Servs., LLC B-410486, et al., 2015 CPD ¶ 334, at 3, 4 (Comp. Gen. Jan 2, 2015) (sustaining protest that "the agency mechanically applied a government estimate to evaluate the sufficiency of the offerors' proposed staffing. . . . In particular, the record shows that the agency evaluated all proposals against an undisclosed government estimate of the number of full-time equivalent staff (FTE) that the agency considered sufficient to perform the requirements.").

331. Smartronix, Inc.; ManTech Advanced Sys. Int'l, Inc., B-411970 et al., 2015 CPD ¶ 373, at 6 (Comp. Gen. Nov. 25, 2015).

332. *See* FAR 15.404-1(d).

333. *See* DFARS 215.404-1*; see also* DFARS PGI 215.4.

334. FAR 15.404-1.

With respect to proposed costs, the government should request a full cost build-up of the offerors' proposed prices in the evaluated cost-reimbursement CLINs.[335] Frequently, government source selection teams create a proposed cost build-up template that they include in the solicitation and require the offerors to complete. Since this Excel spreadsheet will be one of the primary methods for the government evaluators to calculate adjustments to the offerors' proposed costs, the solicitation should explicitly require offerors to provide a spreadsheet that remains editable and functional if the individual cost elements are edited. The following is one approach to addressing this issue:

> *Offerors shall provide an Excel workbook that calculates its total proposed costs using the format provided in Attachment 1 [a government-developed Excel format attachment]. This spreadsheet must have all formulas visible and editable; it may not contain macros; and the spreadsheet's calculations must comply with the Offeror's proposed accounting and billing practices. If the proposed accounting and billing practices differ in any way from the Offeror's current or approved practices, the Offeror must clearly note these changes.*
>
> *Electronic copies of these tables shall be submitted in MS Excel format and shall have the ability to be edited (hours, rates, etc.) to immediately observe the impact to the Total Cost via links and formulas native to MS Excel (that is: not an embedded picture within MS Excel). If the Attachment 1 links to or draws information from another spreadsheet, this other spreadsheet must also be provided with all formulas visible and editable.*
>
> *The cost/price data shall include all major cost elements (e.g., direct labor by category/rate/hours, fringe rate and amounts, overhead rate and amounts, G&A rate and amounts, cost of money factor/rate and amount, escalation, subcontracts, etc.) and fees.*

Furthermore, the solicitation should clearly charge the offerors with linking these proposed costs to the substantiating data that they provide and the proposed technical approach. For instance, the solicitation could state:

> *The costs proposed in Attachment 1 shall be directly traceable to the staffing provided in the proposed Staffing Plan. Any inconsistency between the named individuals, labor categories, labor mix, time phasing, or individual hours provided in the proposed Staffing Plan*[336] *and the Attachment 1 may result in a cost adjustment, an assessment of performance risk, and/or a determination that the Offeror is ineligible for award.*

335. As described below, for certain relatively minor cost-reimbursement CLINs the Government may elect not to conduct a cost realism. In those situations, the solicitation should not ask for a detailed cost build-up or substantiating data for those CLINs.

336. In the LOE services environment, the staffing plan is generally the Rosetta Stone linking the technical and cost proposals. The suggested language above assumes that the solicitation contemplates a distinct Staffing Plan that does not include cost data. That approach requires the Government evaluators to ensure that the information provided in the Staffing Plan is consistent with the proposed cost build-up. *See* Abacus Tech. Corp., B-416390.6, 2019 CPD ¶ 349, at 10 (Comp. Gen. Sept. 27, 2019) (finding that the "agency's cost realism evaluation failed to properly account for the technical approach proposed by Salient" and that the challenge to the agency's cost realism analysis to "be clearly meritorious"). To avoid the risk of disconnects between two spreadsheets and to avoid this additional consistency review, Government source selection teams should consider asking for the Staffing Plan as part of the proposed cost build-up file in which the staffing plan data directly flows into the direct labor rate calculations. The non-cost evaluators can still review this consolidated staffing plan/proposed cost build-up file to review the proposed personnel and, if the evaluation team deems it appropriate, it can redact the cost data before providing it to the technical evaluation team.

Furthermore, the historical direct rates included for each named individual or labor category in Attachment 1 must match the corresponding information provided in Substantiating Cost Information section. Where the Offeror must provide company-wide highest, lowest, and average direct labor rate actuals to substantiate a direct labor cost, it shall include the average direct labor rate actual for the historical rate column on Attachment 1. If any proposed direct labor rate lower than the historical rate provided, the Offeror shall explain the reason for the reduction in the narrative.

Beyond the proposed costs, the solicitation should clearly describe the substantiating data that the government needs to complete its cost realism analysis. Doing so in the solicitation gives all offerors the opportunity to provide the exact cost substantiation requested by the agency; this has several benefits. Most critically, it can avoid a situation in which the government is forced into discussions because none of the offerors provided sufficient substantiating data to survive a protest. It also reduces the likelihood that the government will have to make adjustments to an offeror's proposed costs or identify additional cost risks for a lack of cost realism substantiating data in its proposal. Additionally, this suggested language gives all offerors a clear idea of the information the government will use to develop the offerors' respective total evaluated costs. Nevertheless, while the agency may provide an explicit list of what cost substantiation that it requires of the offerors, the solicitation should still specify that the offeror has the burden of demonstrating the realism of its proposed costs.[337]

The following recommended language clearly describes the substantiating data an agency needs to conduct a cost realism analysis of a typical LOE services proposal:

In its cost realism analysis, the agency desires to use the most relevant, reliable data available to capture the probable cost for each major cost element. Since each Offeror bears the burden of demonstrating the realism of its proposed costs, each Offeror must substantiate its proposed costs, as presented in its Attachment 1, with relevant, reliable data that demonstrates the realism of each proposed major cost element. The agency has already determined that certain types of information are necessary for its review, so each Offeror must provide the substantially all of the following information to be eligible for award:

(a) Current Named Individual Direct Rate Supporting Documentation: Offerors or major cost reimbursement subcontractors shall provide a screen-capture (or equivalent) from the employer's payroll system for each current employee, Key and non-Key, named in the Offeror's Staffing Plan. The Offeror shall fully explain all pertinent data on a sample screen capture. The Government must be able to derive the individual's direct rate (both inclusive and exclusive of the impact of uncompensated overtime, if proposed) from the screen capture information provided by the Offeror.

(b) Contingent Hire Direct Labor Rate Supporting Documentation: Offerors or major cost reimbursement subcontractors shall clearly indicate named contingent hires, key and non-key, on its staffing plan and Attachment 1. The company intending to hire a

337. Raytheon Co., B-417731, et al., 2019 CPD ¶ 350, at 5 (Comp. Gen. Oct. 3, 2019) (GAO noting that solicitation stated that "the offeror's burden to demonstrate the realism of its costs included not only providing substantiating data but also 'sufficient analysis and explanation of the relevance and reliability of that data'").

contingent hire shall provide a signed contingent hiring agreement that explicitly lists the agreed upon annual salary for the named individual and the amount of uncompensated work required. The Offeror shall fully explain all pertinent data in the contingent hire agreement. The Government must be able to derive the individual's direct rate (both inclusive and exclusive of the impact of uncompensated overtime, if proposed) from the contingent offer agreement information provided by the Offeror.[338]

(c) Unnamed Direct Labor Rate Supporting Documentation: For any proposed labor category direct labor rates that are unsupported by either a screen-capture or a contingent hiring agreement, such as "To Be Determined" positions, the Offeror or its major cost reimbursement subcontractors shall provide the current, company-wide highest, lowest, and average direct labor rate actuals for the applicable labor category.

(d) Uncompensated Overtime Supporting Documentation: If any Offeror or any subcontractors (major or minor) propose uncompensated overtime, each must comply with [Uncompensated Overtime clause]. Moreover, if any Offeror or major cost reimbursement subcontractor proposes uncompensated overtime or direct labor rates decremented for the impact of uncompensated overtime, it must substantiate the cost reductions associated with its proposed use of uncompensated effort. This substantiation must include a description of the formulas applied to calculate the decremented rate (and/or decrement factor) and some form of historical data to demonstrate that the proposed level of uncompensated overtime is realistic. Such historical data might include the company's historical average annual level of uncompensated overtime from preceding years and/or historical data demonstrating that the company's proposed decremented rates are equal to or greater than historical actual incurred decremented direct labor rates for corresponding labor categories from preceding years, after adjusting them for annual escalation. In accordance with FAR 52.237-10 Identification of Uncompensated Overtime, if uncompensated time is included in the offer or any of the supporting cost data, the uncompensated time should be clearly identified with an explanation as to why it is needed.

(e) Indirect Rate Supporting Rate Documentation: Offerors shall provide five years of actual incurred rates for each proposed indirect and G&A pool, indicating the beginning and end dates for each fiscal year. Offerors shall provide this data for itself and shall ensure that the Government receives this information for any major cost-reimbursable subcontractors. If an offeror, or any of its subcontractors, proposes to cap[339] *any of its indirect rates, it shall identify each capped rate and shall propose a legally binding and enforceable clause capping the rates, which shall be included in the resultant task order award. The offeror's legally binding and enforceable clause shall specifically identify the indirect rate category proposing to be capped and the associated rate category capped percentage. A proposed clause shall include a process for verification by the Government. NOTE: If a contractor does not have five years' worth of actual incurred indirect data for any particular proposed indirect rate, it must provide the required information dating from the origin of the company.*

(f) FPRA/FPRR Information: A list of all Forward Pricing Rate Agreements the Offeror or its major cost-reimbursable subcontractors have entered into with the Defense Contract Management Agency that apply to any of the major cost elements they propose or a statement that none apply to the proposal. This list should include contact information for the DCMA office that executed the agreement. Provide a current copy of any agreement contained on this list. Offerors should also provide contact information for

338. FAR 15.404-1.
339. FAR 52.216-7.

any office that has issued an applicable Forward-Pricing Rate Recommendation for it or major cost-reimbursement subcontractors.

(g) Subcontractor Costs: Each major cost reimbursement subcontractor shall provide all of the information required of the prime contractor under the Supporting Cost Data sections of this solicitation (i.e., a complete Attachment 1, a corresponding Cost Analysis Narrative, and all necessary Substantiating Cost Information) for those portions of the work subcontracted to them. That said, subcontractors need not submit a separate Section B pricing; instead, the subcontractor costs should match the corresponding subcontract costs in the Offeror's Attachment 1. The detailed information of subcontractors may be submitted separately to the Government if the subcontractor does not wish to provide this data to be provided to the prime Offeror. subcontractors must submit their information directly to the government via [instructions]. For cost/price summary data provided separately, subcontractors shall place the appropriate restrictive legend on their data and identify the company name, address, point of contact and solicitation number. Subcontractors are required to provide contact information for their cognizant DCAA branch office with the name and phone number of a DCAA point of contact who is familiar with their company. Failure to provide the required subcontracting data/cost may render the prime's offer ineligible for award.

The above list of substantiating information is necessary for the agency's cost realism analysis, but is not a complete list of the data that may be required to demonstrate the realism of the Offeror's proposed rates. Therefore, the agency encourages Offerors to provide additional substantiating information as necessary to demonstrate the cost realism of their proposed costs. Nevertheless, as with any substantiating data, merely providing the substantiating data, without sufficient analysis and explanation of the relevance and reliability of that data in the Cost Analysis Narrative, will not demonstrate cost realism. As discussed in the solicitation, the Cost Analysis Narrative must clearly explain the reliability of all of the substantiating cost information provided and its relevance to the Offeror's cost analysis. Providing substantiating information, without demonstrating its relevance, may indicate that the Offeror lacks an understanding of the costs involved in performing the solicitation's requirements, which would indicate performance risks. NOTE: Offerors shall not rely on any Forward Pricing Rate Proposals or Provisional Billing Rates to provide any form of cost realism substantiation. These submissions, which lack meaningful Government realism review, are insufficient to demonstrate the realism of its proposed rates.[340]

As shown in the recommended language above, the solicitation should also specify the potential actions that agency may take for missing substantiating cost information to clearly incentivize offerors to provide all of the required substantiating data.

For example, in *AECOM Management Services Inc.*, the Army's solicitation required at least one of four forms of indirect cost rate substantiation for proposed subcontractors.[341] After receipt of proposals, the Army determined that, since the subcontractor's proposal did not provide the solicitation defined

340. Agencies should try to ensure alignment between Section L instructions and Section M evaluation. In this case, it could be helpful to include a complimentary note in Section M stating: "*NOTE: The Government will not consider an Offeror's FPRPs or PBRs to be relevant cost realism substantiating data. Offerors are cautioned not to rely on these submissions, which lack meaningful Government review, as sufficient to demonstrate the realism of its proposed rates.*"

341. AECOM Mgmt. Servs., Inc., B-418467 et al., 2020 CPD ¶ 172, at 6 (Comp. Gen. May 15, 2020).

subcontractor indirect information, the prime offeror was ineligible for award.[342] GAO upheld this determination applying a well-established proposition of law that "[a]n offeror is responsible for submitting a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency."[343]

While finding an offeror ineligible for award based on missing information may not be the most advantageous approach in all procurements, specifying particular actions that the agency may take in response to an offeror's failure to provide all of the necessary substantiating data is important to incentivize offerors so the agency receives the data it needs. Having all of the appropriate substantiating data results in the government identifying fewer cost risks with and making fewer adjustments to the offerors' proposed costs. This reduces the time evaluators must spend documenting these findings and reduces the overall complexity of any cost realism protest defense.

RECOMMENDATION: Government source selection teams should ensure that their solicitations clearly require 1) a proposed cost build-up spreadsheet that evaluators can use to calculate adjustments, and 2) all of the necessary substantiating data required to support the offeror's proposed cost elements. Moreover, the solicitation should specify that the offeror has the burden of demonstrating the realism of its proposed costs and charge offerors with ensuring traceability between the proposed costs, the substantiating data they provide, and their proposed technical approach.

ii. Explicitly limit the scope of a cost realism analysis in the solicitation

Beyond asking for the right data, agencies must define, at a high level, how they will calculate the Total Evaluated Cost/Price. This is a great opportunity for agencies to limit the scope of their cost realism analyses; such limits will save offerors and evaluators critical time and effort.

Typically, agencies specify that the Total Evaluated Cost will be the sum of all or most of the evaluated costs for each of the CLINs.[344] In many cases, however, the solicitation includes a variety of contract types or evaluation schemes for different types of CLINs.[345] For instance, if the solicitation includes both FFP LOE and LOE cost-reimbursement CLINs, the solicitation should specify that the Total Evaluated Cost/Price will be the sum of the FFP LOE CLINs (evaluated at the government labor mix and hours using the applicable fixed-rates) and the government's evaluated cost resulting from its cost realism analysis for each cost-reimbursement CLIN. That said, for certain small or difficult-to-analyze CLINs, agencies should consider excluding them from the Total Evaluated Cost/Price or by using a CLIN-specific evaluation rule (such as a plug-number or evaluating FPIF CLINs at ceiling) that the agency expressly states in the solicitation. Irrespective of the combination of

342. *Id.* at 5, 7.
343. *Id.* at 8.
344. FAR 4.10.
345. *Id.*

contract-types and CLINs, the solicitation must specify how the government intends to calculate Total Evaluated Cost/Price and should provide explicit guidance for all of the CLINs.[346]

Agencies should also consider whether there are other opportunities within their cost-reimbursement CLINs to specifically limit what aspects of the proposal the agency will perform a detailed cost realism analysis. This will simplify and speed up the agency's cost realism evaluation. GAO permits such tailoring as long as the government's chosen methodology still provides a reasonable measure of confidence that the rates proposed are realistic.[347] This tailoring does not need to include all of the proposed costs; in some cases, GAO has found that an agency's cost realism was reasonable, despite the fact that it only evaluated eighty-six percent of the proposed hours.[348] Furthermore, if the government specifies a particular cost realism evaluation methodology or approach in the solicitation, a protester would need to bring a timely challenge of the terms of the solicitation before solicitation close.[349] Typically, offerors are hesitant to file a pre-award protest while they are still actively competing for the work. As such, agencies have a fair amount of flexibility in tailoring their cost realism analysis limit the scope of their cost realism analyses. Agencies should actively and aggressively pursue such limits on their cost realism analyses to save all parties time and effort, while reducing the government's overall protest risk.

In particular, five approaches to tailoring the Government's cost realism analysis are generally applicable to LOE service contracting. Specifically, agencies should 1) provide a mandatory escalation rate in the solicitation; 2) expressly exclude Other Direct Cost CLINs from the cost realism analysis by providing a plug number for these costs; 3) expressly exclude "minor"

346. Terminology may differ, but the idea is the same. The Government must compare all offerors on an apples-to-apples basis, which includes insuring that the prices they compare in an award decision are comparable. Jacobs Polar Servs.; CH2M Facility Support Servs., B-418390.2 et al., 2020 CPD ¶ 195, at 4–5 (Comp. Gen. June 12, 2020).

347. *See* AdvanceMed Corp.; TrustSolutions, LLC, B-404910.4 et al., 2012 CPD ¶ 25, at 11 (Comp. Gen. Jan. 17, 2012); Ohio KePRO, Inc., B-417836 et al., 2020 CPD ¶ 47, at 6 (Comp. Gen. Nov. 18, 2019) (finding reasonable an agency's methodology examining nine of twenty-five labor categories where five of the labor categories represented eighty-six percent of the offeror's proposed labor hours and the other four labor categories represented the highest proposed hourly rates). While this protest was sustained on other grounds, failing to document or retain evaluation materials, the GAO specifically denied the protest grounds regarding the cost realism methodology for evaluating labor rates. GAO has found that "even though there is no requirement that an agency evaluate the realism of each and every direct labor rate proposed by an offeror, the agency's methodology must be reasonably adequate and provide some measure of confidence that the rates proposed are reasonable and realistic in view of other cost information reasonably available to the agency as of the time of its evaluation." Ohio KePRO, Inc., 2020 CPD ¶ 47, at 6.

348. Ohio KePRO, Inc., 2020 CPD ¶ 47, at 6. In a separate instance the GAO has held that an agency's cost realism methodology that evaluated sixty-two percent of an offeror's direct labor categories that covered seventy-three percent of the effort was a reasonable methodology that provided a measure of confidence that the rates proposed were realistic. AdvanceMed Corp.; TrustSolutions, LLC, 2012 CPD, ¶ 25, at 15–16.

349. *See* 4 C.F.R. § 21.2(a)(1) (2018) (protests based on upon alleged improprieties in a solicitation that are apparent prior to the closing time for receipt of initial proposals must be filed before that time).

cost-reimbursement subcontractors from the cost realism analysis; 4) expressly exclude fixed-price or T&M subcontractors from the cost realism analysis; 5) expressly state that the Government will only make upward adjustments; and 6) use "even if" counterfactual trades in the award decision documents to limit the risk posed by complex cost realism issues.

a. Providing a mandatory escalation rate in the solicitation

One of the most common adjustments that the government makes in LOE cost realism analyses is to the offeror's proposed escalation rate, which is the amount of salary growth that an individual may experience each year.[350] This rate varies year to year but is generally a function of the broader labor market, as opposed to any particular action a specific company is taking.[351] Despite this fact, many agencies permit each offeror (and its individual cost-reimbursement subcontractors) to use different escalation rates, while requiring each to provide substantiating data to support those proposed escalation rates.[352] This company-specific escalation approach increases the information that the government must review from each company, and, in many cases, the government still adjusts all of the offerors using an industry-wide index, such as IHS Global Insight escalation rate projections where those rates are higher than the proposed rates.[353] Because escalation applies to each direct labor rate in most or all of the contract years, it can require detailed updating of a large number of direct labor cost formulas in both the offeror's and its subcontractors' proposed cost build-up spreadsheets. This mandate can be a substantial undertaking for the evaluators and, given the large number of formulas implicated, is prone to error.[354] Additionally, even if the government does make these adjustments correctly, clearly and efficiently demonstrating this fact in litigation could be challenging and time-consuming.

Instead of relying on this confusing approach to escalation rates, government source selection teams should instead rely on the fact that escalation rates are primarily driven by the broader labor market and set a mandatory escalation rate for all direct labor in the solicitation. With this approach, all offerors and subcontractors must price their efforts with the same escalation rate that the government would have likely adjusted them to in the previous approach. This reduces the data offerors must provide with their proposal, it saves substantial proposal evaluation effort, it reduces the number of adjustments (particularly for cost elements the companies have little control over), and it removes litigation issues.

350. Sayres & Assocs. Corp., B-418374, 2020 CPD ¶ 115, at 4 (Comp. Gen. Mar. 30, 2020).

351. *How to Use the Consumer Price Index for Escalation*, U.S. Bureau of Lab. Statistics, https://www.bls.gov/cpi/factsheets/escalation.htm [https://perma.cc/95U4-HR28] (last visited Sept. 22, 2023).

352. Westech Intern., Inc. v. United States, 79 Fed. Cl. 272, 297–98 (2007).

353. Engility Corp., B-413120.3 et al., 2017 CPD ¶ 70, at 22 (Comp. Gen. Feb. 14, 2017).

354. Constellation W., Inc. & Sev1Tech, Inc. v. United States, 125 Fed. Cl. 505, 525–26 (2015).

The following recommended language is a good starting point for solicitation language to set a mandatory escalation rate:

Escalation: Offerors shall, at a minimum, propose the escalation rates provided in the table below:

Contract Year	***Escalation Rate***
Option Year 1	*3.62%*
Option Year 2	*3.27%*
Option Year 3	*3.18%*
Option Year 4	*3.16%*

GAO has specifically upheld an application of this approach in *Logistics Management Institute*.[355] In *Logistics Management Institute*, the solicitation instructed offerors to identify the labor escalation rate for each year, identify the source of the proposed rates, and provide a comprehensive description of the methodology and calculations used to establish the proposed rates.[356] The solicitation specified a "minimum escalation factor of 2.75%" and put offerors "on notice that adjustments to the proposed escalation rates "may be made by the Government unless adequate justification is provided as to why the Offeror's escalation rates are fair and reasonable."[357] Although the protester asserted that they substantiated the lower escalation rate, the GAO denied the argument and the protest.[358] GAO specifically cited to the principle that "it is reasonable for an agency to adjust a proposed escalation rate where the solicitation indicated it would use a specified rate unless adequate justification for a different rate is provided."[359]

RECOMMENDATION: Government source selection teams should actively reduce the need for complex escalation adjustments by expressly setting the applicable escalation rate for direct labor costs in the solicitation using the language above.

b. Providing a plug number for odc clins in the solicitation

Other Direct Costs (ODCs) are another cost element that frequently appears in LOE service contracts. ODCs typically refer to costs associated with the contractor purchasing incidental materials or traveling.[360] In most cases, these costs are a small portion of the overall effort, and many COs

355. Logistics Mgmt. Inst., B-417601 et al., 2019 CPD ¶ 311, at 8–9 (Comp. Gen. Aug. 30, 2019).

356. *Id.* at 7.

357. *Id.* at 8.

358. *Id.* at 9, 17.

359. *See id.* at 9 (citing Sci. Applications Int'l Corp., B-290971 et al., 2002 CPD ¶ 184, at 19 (Comp. Gen. Oct. 16, 2002) (noting that while the protester may "be correct in its prediction about future cost escalation, it is the Navy, not [the protester], that must bear the risk if actual rates increase during performance" beyond the escalation rate identified in the solicitation).

360. Trandes Corp., B-256975 et al., 94-2 CPD ¶ 221, at 2–3 (Comp. Gen. Oct. 25, 1994).

segregate them into cost-only CLINs to avoid paying fee on them.[361] This is a sound strategy for contract performance and locks in a zero percent fee on these costs, but, if the solicitation remains silent on how to evaluate these CLINs, agencies may find it very difficult to provide all offerors a common basis for competition on these costs; in turn, this will make them extremely difficult to evaluate on an apples-to-apples basis.

Instead of remaining silent, government source selection teams should expressly exclude relatively small ODC CLINs from their detailed cost realism analyses. Instead, the solicitation should direct all offerors to bid a plug number that the solicitation provides for these CLINs; it should also expressly state that the government will not conduct detailed cost realism of the ODC CLINs where the offeror proposes the plug number.

The following recommended language is a good starting point for solicitation language providing a plug number for an ODC CLIN and accompanying evaluation language:

> *Government estimates of ODCs are provided below, which include travel and incidental material expenses only. The estimates provided below do not account for any burdens such as material handling or G&A. Each Offeror shall apply appropriate burdens in accordance with its disclosure statement. ODCs are not subject to fee.*

ODCs	***Base Year***	***Option 1***	***Option 2***	***Option 3***	***Option 4***	***Total***
Travel	*$525,000*	*$525,000*	*$525,000*	*$525,000*	*$525,000*	*$2,625,000*
Material	*$75,000*	*$75,000*	*$75,000*	*$75,000*	*$75,000*	*$375,000*
Total	*$600,000*	*$600,000*	*$600,000*	*$600,000*	*$600,000*	*$3,000,000*

> *The Offeror's proposed ODCs shall be included in Section B of the offer against each appropriate ODC CLIN. The management of travel between the Offeror and any subcontractors shall be described by the Offeror within the Cost Narrative. In order for any additional expense categories to be allowed as a direct charge under the resulting Task Order, it must be identified and described by the Prime Contractor within the Cost Narrative and be reflected in the applicable CLIN. Reimbursement for Travel will be in accordance with the Joint Travel Regulation (JTR) and solicitation clause B-231-H001 Travel Costs (NAVSEA) (OCT 2018).*

Providing a plug number in the solicitation provides a common basis for competition even though it does not provide discrimination among offerors.[362] The overriding value of this approach is that it allows the agency to move forward with the solicitation even though it does not know its ODC requirements before award. Although this approach does not provide any real discrimination against offerors on ODCs, agencies generally do not want

361. *Id.* at 4–5.

362. *See* Dewberry Crawford Grp.; Partner 4 Recovery, B-415940.10 et al., 2018 CPD ¶ 297, at 20–22 (Comp. Gen. July 2, 2018) (upholding use of plug numbers even though agency used the wrong plug number and noticed when compared proposed ODCs costs to IGCE as part of price reasonableness analysis).

their LOE support services award decisions to hinge which offeror had a bolder guess about how low the agencies ODC needs would be. In addition, although the agency does not know what ODCs are required at the time of solicitation and award, the agency can set up its contract to mitigate risk by requiring CO and/or COR's approval or require quotes before the awardee incurs ODC costs.[363]

Although the above recommended language is clear that the plug number includes all burdens, some government source selection teams want to provide additional competitive pressure on such burdens. One way to do that is to modify the recommended language to provide an ODC plug number for the direct costs, but to still require offerors to burdens that plug number, with the agency evaluating the burdens for realism. The advantages to this permutation are that the evaluated cost for the ODC CLINs might more accurately reflect the costs in performance and that it places increased competitive pressure on companies to limit the burdens that they propose to add to ODCs. Yet this approach requires the government to evaluate the realism of the proposed burdens. Although the government likely evaluated the proposed indirect rates in its cost realism analysis of any other cost-reimbursement CLINs, the evaluators must still ensure that the offerors' detailed cost build-up correctly applied the burdens and carry over any indirect rate adjustments from the LOE CLINs to the ODC CLINs. This additional evaluation work and documentation generally outweighs the potential benefits of this alternative approach.

RECOMMENDATION: Government source selection teams should actively reduce the need to evaluate the realism of hard-to-justify and generally low-dollar value ODC CLINs by providing a plug number in the solicitation for all offerors to use when bidding and expressly state that the government will not conduct detailed cost realism of the ODC CLINs where the offeror proposes the plug number.

c. Excluding "minor" cost reimbursement subcontractors from evaluation

Cost-reimbursement subcontractors are one of the greatest multipliers of work in a cost realism analysis because, in general, the government must treat each as an individual nested cost realism analysis within the greater cost realism analysis for the prime.[364] Each subcontractor comes with its own direct labor rates, hours, company labor categories, indirect rates, and fee structures. Moreover, the cost-reimbursement subcontractor must also provide substantiating data for each of these cost elements, which it typically does independent of the prime proposal to keep their business-sensitive information private.[365] Often, this results in inconsistencies and disconnects between the hours and

363. NAVSEA, § B-231-H001 (Oct. 2018) ("The travel costs to be reimbursed shall be those costs for which the Contractor has maintained appropriate documentation and which have been determined to be allowable, allocable, and reasonable by the Procuring Contracting Officer, Administrative Contracting Officer, or their duly authorized representative.").

364. Westech Intern., Inc. v. United States, 79 Fed. Cl. 272, 297–98 (2007).

365. *See* Stargates, Inc., B-419349 et al., 2021 CPD ¶ 64, at 11 (Comp. Gen. Jan. 22, 2021).

mix that the prime proposes for the subcontractor and the hours and mix that the subcontractor proposes.[366] In addition to this additional proposal work, the government evaluators must carefully analyze these proposed cost elements for realism and document their evaluation. As such, each additional cost-reimbursement subcontractor that the government must assess for cost realism adds substantial work. In some instances, particularly where a contractor proposes providing a number of individual consultant subject matter experts on a cost-reimbursement basis, the number of cost-reimbursement subcontractors can balloon to more than twenty per prime offer. This is a massive undertaking from a cost realism perspective and creates an extremely complex record to defend. As such, government source selection teams should work to avoid this outcome.

One of the strategies that government source selection teams should seriously consider to limit this complexity and workload is expressly excluding a subset of relatively small cost-reimbursement subcontractors from the scope of its cost realism analysis in the solicitation. Typically, agencies do this by defining a class of "major" cost-reimbursement subcontractors in the solicitation, which the government will review for cost realism, and a class of "minor" cost reimbursement subcontractors that it expressly excludes from its cost realism analysis.[367] The following provides a good example of these types of definitions.

> *Major subcontractors are defined as any cost-reimbursement subcontractor performing three percent*[368] *or more of the total hours under the contract; however, where otherwise minor cost-reimbursement subcontractors cumulatively perform more than ten percent of the total hours under the contract, all cost-reimbursement subcontractors are considered major subcontractors and must propose as such. All major subcontractors must also provide a complete subcontractor cost build-up spreadsheet for its portion of the effort and the same types of substantiating data required of the prime contractor in Section XX.*
>
> *All subcontractors that do not meet the definition of major subcontractor above are minor subcontractors. Minor subcontractor top-line hours and proposed costs must appear in the Prime Offeror's Attachment 1 subcontractor calculations. The hours listed there must correspond to the hours included in the Prime Offeror's Staffing Plan. Minor subcontractors, however, are not required to submit a separate subcontractor cost build-up spreadsheet for their proposed costs or provide substantiating cost realism data.*

Although there are several ways to define a "major" subcontractor, the recommended definition above has two notable features.

First, it relies on a comparison of hours, not costs, to determine which subcontractors are major. Since cost-realism analyses treat proposed costs as inherently flexible, government cost adjustments to other parts of the prime's

366. *See* Earl Indus., LLC, B-309996 et al., 2007 CPD ¶ 203, at 11 (Comp. Gen. Nov. 5, 2007) (sustaining the award of a cost reimbursement contract where the agency's cost realism assessment accepted the awardee's work allocation in its cost proposal, but that allocation was inconsistent with the firm's allocation of work in its technical proposal).

367. *See* Alphaport, Inc., B-414086 et al., 2017 CPD ¶ 69, at 3 (Comp. Gen. Feb. 10, 2017).

368. These percentages work well in many situations but are certainly malleable to meet the business needs of any particular cost-reimbursement LOE service contract environment.

proposal may change the percentage of cost that a particular subcontractor represents of the overall proposal, unless the solicitation is very specific that it is using proposed costs as the basis of that "major" subcontractor definition. This can be very confusing and hard to implement. Furthermore, to confirm that a particular minor subcontractor falls below a particular dollar threshold requires direct labor rates and indirect rates, which are precisely the types of data a major/minor subcontractor distinction is trying to avoid getting from minor subcontractors. Instead, relying on a percentage of hours makes confirming whether a particular subcontractor is major or minor simple and easy, without requiring any business sensitive information from the subcontractor.

Second, the recommended definition presents a two-part test; beyond the percentage of hours, it also looks at the cumulative population of otherwise minor cost-reimbursement subcontractors to set a maximum limit on the amount of proposed costs the government is willing to exclude from its cost realism analysis. Essentially, this second part of the test prevents an offeror from proposing eight subcontractors with each performing 9.9% of the hours, which would result in the agency only evaluating cost realism substantiation for 20.8% of the hours in the proposal. This second part of the major subcontractor definition avoids some of the more egregious gaming that can occur under simpler definitions.

Beyond defining major and minor subcontractors, solicitations should also expressly describe how they will evaluate them. The following provides recommended language for subcontractor evaluations. It addresses both the evaluation of major/minor subcontractors and fixed-price/T&M subcontractors, which this article considers in the next subsection:

> *In Section L XX, of this solicitation, the Government defines minor subcontractors; considering the small potential cost impact of variations in minor subcontractor costs, the Navy [or applicable agency] will not conduct a cost realism analysis of any Offeror's minor subcontractor costs. Nevertheless, the Navy will review these proposed costs and hours for consistency with the rest of the Offeror's proposal and may adjust minor subcontractor cost or hours for lack of consistency with the rest of the Offeror's proposal. Similarly, the Government will not conduct a cost realism analysis of any fixed price or fixed rate (e.g., Firm-Fixed Price or T&M) subcontractors, as these subcontracting arrangements do not present a meaningful cost risk in performance. The Government will evaluate any proposed Fixed-Price Incentive Fee contractors at ceiling without conducting a cost realism of those subcontract costs.*

Applying this recommended evaluation language permits the government to significantly limit its cost realism analysis even before it receives any proposals. This restraint greatly reduces the work and complexity for the offerors, proposed subcontractors, and the government evaluators. It also permits a much faster and easier to defend cost realism analysis.

> **RECOMMENDATION:** The government source selection teams should actively define a subset of "minor" cost-reimbursement subcontractors that it will exclude from its cost realism analysis. In implementing this approach, agencies should ensure that they include both a clear definition of the terms, express limits on what information is required from minor subcontractors, and provide clear evaluation language applicable to major vs. minor subcontractors.

d. Excluding fixed-price or T&M subcontractors from evaluation

Another easy way for the government source selection teams to limit the work necessary to evaluate proposed subcontractors is to expressly exclude subcontract types that are fixed or for which the government can identify a maximum government cost exposure. Most commonly, these are FFP LOE, FPIF LOE, or T&M contract types. The following provides an example of the type of Section L instruction that agencies can include in their solicitations:

> *Non-cost-reimbursement subcontractors may provide fixed rates or fixed prices for each contract year on the Offeror's Attachment 1, without breaking out direct labor and burdens, but the Offeror shall explicitly note that these costs or rates are fixed by describing the subcontract type (e.g., Firm Fixed Price or Time & Material).*

These types of instructions simply recognize that the government cannot make cost-realism adjustments to these subcontract contract types.[369] Since the government cannot adjust them and, generally, does not want to conduct a price realism on these subcontract costs, the government's solicitation should ask for very little from fixed-price or fixed-rate contracts. Moreover, even in situations in which the government could make some cost realism adjustments, such as in an FPIF contract between the target cost and the ceiling cost, the government should still consider simplifying its cost realism analysis by evaluating these subcontractors at the ceiling cost, since the government's cost exposure will not increase above this ceiling.

As described in the previous subsection, the solicitation should also include evaluation language to explain this methodology to put all offerors on notice that the government will be using it. The recommended subcontractor evaluation language in that subsection also addresses fixed-price or fixed-rate subcontractors and evaluating FPIF subcontractors at the ceiling.

> **RECOMMENDATION:** Government source selection teams should actively limit the information it requires from non-cost-reimbursement subcontractors. Further, the government's solicitation should expressly exclude these subcontractors from its cost realism analysis.

e. Expressly state that the government will only make upward adjustments

It is not the government's responsibility to correct errors in an offeror's cost proposal. Instead, GAO is clear that it is "an offeror's responsibility to submit a well-written proposal, with adequately detailed information which clearly demonstrates compliance with the solicitation requirements and allows a meaningful review by the procuring agency."[370] Furthermore, the fundamen-

369. Iron Vine Sec., LLC, B-409015, 2014 CPD ¶ 193, at 5 (Comp. Gen. Jan. 22, 2014) ("Where, as here, a solicitation anticipates award of a time-and-materials contract with fixed-price, fully-burdened labor rates, there is no requirement that an agency conduct a price or cost realism analysis, in the absence of a solicitation provision requiring such an analysis.").

370. *See* Mission 1st Grp., Inc., B-414738.9, 2019 CPD ¶ 80, at 4 (Comp. Gen. Feb. 12, 2019) (denying protest because the agency reasonably concluded that "conflicting information in the cost proposal prevented performance of a cost realism analysis").

tal purpose of cost realism is to determine whether a proposed cost is *too low*, which guards the agency against unsupported claims of cost savings.[371] As such, the government rarely makes downward adjustments to an offeror's proposed costs.[372] To further limit protest arguments that the agency should have made a downward adjustment, government source selection teams should consider expressly notifying offerors that the agency will only make upward adjustments in its cost realism analysis. This aligns with the purpose of cost realism and discourages frivolous protest grounds based on errors the protester introduced into its own proposal.

The following recommended language is a good starting point for solicitation language to notify offerors that the government will only make upward adjustments:

> *Offerors should note that the fundamental purpose of a cost realism analysis is to guard the agency against unsupported claims of cost savings by determining whether the costs as proposed represent what the government realistically expects to pay for the proposed effort. Therefore, the government will closely evaluate whether and to what degree each Offeror's proposed costs are unrealistically low. In a competitive environment, the government will not evaluate whether proposed cost elements are unrealistically high. It is the Offeror's sole responsibility to demonstrate that its proposed costs are realistic because they are substantiated by actual incurred data or are fixed/capped by contract. If an offeror or major subcontractor proposes capped costs or rates, the government will incorporate these caps into the resulting contract at award.*

This recommended language also provides guidance for offerors that choose to propose cost caps on their proposed costs or rates. Although this approach is somewhat uncommon, some companies employ it to limit the government's ability to make upward adjustments to its proposed costs.[373] Furthermore, the incorporation language permits the government to incorporate any proposed caps into the resulting contract, so that they are enforceable in performance.

> **RECOMMENDATION:** Government source selection teams should expressly notify offerors in the solicitation that it will only make upward cost realism adjustments.

371. Sys. Techs., Inc., B-404985 et al., 2011 CPD ¶ 170, at 10 (Comp. Gen. July 20, 2011) ("The end product of an agency's cost realism analysis should be a total evaluated cost of what the government realistically expects to pay for the offeror's proposal effort, as it is the agency's evaluated cost and not the offeror's proposed cost that must be the basis of the source selection determination. FAR § 15.404-1(d)(2)(i).").

372. *See* S.M. Stoller Corp., B-400937 et al., 2009 CPD ¶ 193, at 15 (Comp. Gen. Mar. 25, 2009) (noting where an offeror's proposed cost reflects its technical approach, the agency need not make a downward adjustment based on the agency's concerns that the proposed level of effort and costs are more than the agency believes is necessary to perform the work). *But see* Priority One Servs., Inc., B-288836 et al., 2002 CPD ¶ 79, at 3–4 (Comp. Gen. Dec. 17, 2001) (agencies should make downward adjustments to an offeror's evaluated cost where the proposal shows a misunderstanding of the requirements in a manner which would cause the government to incur a lower cost than that identified in the proposal).

373. *See* Affordable Eng'g Servs., Inc., B-407180.4 et al., 2015 CPD ¶ 334, at 5, 14 (Comp. Gen. Aug 21, 2015) (denying cost realism protest where the offeror proposed to cap their indirect rates and nothing called into question the effectiveness of the cap an upward adjustment was inappropriate and the agency appropriately could address it as a matter of responsibility).

iii. Using contemporaneous "even-if" statements to limit the live protestable issues

While the other five cost realism recommendations above rely on specific solicitation language to carefully define and streamline its cost realism analysis, the final recommended cost realism strategy focuses on how to reduce protest risk in agencies' source selection decision documents and trade-off analyses. In the right situations, using counterfactual trade-offs—which we term "even if" analyses—in the source selection decision document can greatly reduce the complexity and risk presented by complex adjustments or cost risks. While, depending on the arrangement of competitors, this approach may not even be available in every tradeoff decision, it is a powerful tool to limit the agency's protest risk in many situations.

Invariably, in conducting a cost realism evaluation, evaluators will have to make hard judgment calls about whether to make specific adjustments or identify specific cost risks in a cost realism analysis. Sometimes, particularly complex or questionable evaluation findings involve issues that will not have any impact on the award decision when considered against the competitive distance between the disappointed offeror and the awardee. Instead of waiting to make "no prejudice" arguments in litigation that GAO will view as mere *post hoc* rationalization,[374] agency source selection teams should consider including analysis in its source selection decision documents that finds that the government would award to the same awardee irrespective of the problematic finding.

For example, consider the following situation: The government is selecting between two offerors, one Marginal and one Outstanding[375] in the only non-cost factor. The Marginal offeror proposed at $100 million and the government's cost realism resulted in an evaluated cost of $105 million; for the Outstanding offeror, the government's cost realism resulted in an evaluated cost of $115 million. In this case, the government had determined that it is willing to pay the $10 million premium between the evaluated costs for each offeror to capture the non-cost benefits presented by the Outstanding offeror compared to the Marginal offeror. If the government would also be willing to

374. Ohio KePRO, Inc., B-417836 et al., 2019 CPD ¶ 47, at 7 (Comp. Gen. Nov. 18, 2019) ("While we consider the entire record in resolving a protest, including statements and arguments in response to a protest, in determining whether an agency's selection decision is supportable, under certain circumstances, our Office will accord lesser weight to post-hoc arguments or analyses due to concerns that judgments made 'in the heat of an adversarial process' may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process.").

375. For the sake of simplicity, this example relies on adjectival ratings to describe the difference between the hypothetical offerors. In practice, of course, the difference between the individual strengths, weaknesses, significant weaknesses, and deficiencies would actually describe this difference, since adjectival ratings "are merely guides for intelligent decision-making." Strategic Operational Sols., Inc., B-420159 et al., 2021 CPD ¶ 391, at 8 (Comp. Gen. Dec. 17, 2021) ("[E]valuation ratings are merely guides for intelligent decision-making in the procurement process; the evaluation of proposals and consideration of their relative merit should be based upon a qualitative assessment of proposals consistent with the solicitation's evaluation scheme.").

pay a $15 million premium for these same non-cost benefits, it should seriously consider contemporaneously including the following statement in its source selection decision document: "Moreover, even if the government had not made any cost adjustments and had not identified any cost realism risks in the Marginal offeror proposal (i.e., it had accepted all costs as proposed), the Government would still pay the premium between Marginal's proposed cost and Outstanding's evaluated costs to award to Outstanding based on the strength of Outstanding's non-cost advantages."[376] This contemporaneous documentation would provide a powerful limit on the Marginal's ability to challenge any of its cost adjustments or identified cost risks successfully.[377] Furthermore, if the government can get these non-prejudicial grounds dismissed, it can focus on defending any remaining non-cost findings that actually impacted the award decision.

As this relatively simple example shows, "even if" statements can be a powerful tool to disposing of complex or confusing protest grounds. Where the competitive differences between the awardee and one or more of the other offerors are great, agency source selection teams should carefully consider what issues present the highest litigation risk and work to limit their impact through contemporaneous "even if" statements in the source selection decision document.

RECOMMENDATION: Government source selection teams should strategically assess whether contemporaneous "even if" counterfactual award decisions can moot complex litigation issues. If so, they should expressly include these counterfactual decisions in their source selection decision document.

III. CONCLUSION

Competitive contracting for LOE services presents agencies with numerous strategic decisions that require agencies to balance interests and make compromises. Business realities, technological change, and developments in case law impact this balancing act and require government source selection teams to exercise thoughtful and informed business judgment to make these tough

376. Depending on the situation, this could be a more complex analysis, but should remain extremely clear about what adjustment(s) or cost risk(s) it is removing from the "even if" statement.

377. While this is a powerful strategy, placing this documentation in the source-selection decision document, which some agencies work to withhold in GAO discovery if it is irrelevant to the protest ground. In such situations, the litigators must weigh the benefits of closing out current protest grounds against the risk of opening the door to having to provide the source selection decision document to the protester, which can generate supplemental protest grounds. *See* Savantage Fin. Servs., Inc., B-400109.2, 2008 CPD ¶ 150, at 9 (Comp. Gen. July 28, 2008) (denying a cost adjustment protest because the source selection decision document noted that, even if no cost adjustments were made to the protester's proposal, they still were not in line for award rendering the protester's cost argument without the possibility of prejudice from the agency's action); Main Sail, LLC, B-412138, et. al., 2016 CPD ¶ 26, at 8 (Comp. Gen. Jan. 29, 2016) (denying a cost adjustment protest and determining that there was no possibility of prejudice from agency error when the Contracting Officer determined that the awardee was still the better value without any cost adjustments to the protester's total proposed cost).

calls. This article has explored a wide variety of those strategic decisions across three broad areas to identify how various competing interests can influence the agency's approach.

In applying these recommendations to their own procurements, agencies should actively and ruthlessly remove unnecessary complexity from their procurements and insist upon clearly articulating whatever is left. Agencies that aim for simpler source selection approaches using this timeless philosophy will generally wait less time for proposals, will evaluate them faster, and will produce clearer, easier-to-defend award decisions.

OTHER TRANSACTIONS AUTHORITY: BUSINESS NECESSITY THAT NEEDS A MINOR TUNE-UP? OR TOO FAST AND FURIOUS WITH INSUFFICIENT COMPLIANCE AND TRANSPARENCY REQUIREMENTS?

*Roza Sheffield**

ABSTRACT

As the government's spending and the use of other transactions (OTs) continue to expand, there are constant unresolved issues stemming from a lack of competition, transparency, and borderline negligent expenditure of taxpayers' money without any sufficient built-in accounting mechanisms lurking in the OTs' shadows. The OTs advocates tend to dismiss those concerns in favor of the expedited acquisition processes and the desire to acquire more and better cutting-edge technology to stay competitive in the current global near-peer military rivalry. This article will explore the underlying laws that allow the use of OTs, their purpose, and the mechanisms to prevent fraud, waste, and abuse of U.S. taxpayers' dollars while balancing the need and purpose against current business needs for OTs. Few rules usually mean more temptations for abuse of the system and fraud. This area of the law needs a compliance tune-up to run like a well-oiled machine for the government to maintain public trust.

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I. INTRODUCTION

Other Transaction Agreements (OTA or OTs) are "legally-binding instruments, other than contracts, grants, or cooperative agreements, that generally are not subject to federal laws and regulations applicable to procurement contracts."[1] OTs Authority[2] "usage has grown significantly over the past five years, with obligations increasing from $1.7 billion in 2016 to $16.5 billion in Fiscal Year 2020."[3] For perspective, the federal government spent $682.6 billion

1. Oracle Am., Inc., B-416061, 2018 CPD ¶ 180, at 1 n.1 (Comp. Gen. May 31, 2018) (The Government Accountability Office (GAO) defines OTA as "legally binding instruments, other than contracts, grants, or cooperative agreements that generally are not subject to federal laws and regulations applicable to procurement contracts.").

2. *Id.*

3. *A Snapshot of Government-Wide Contracting for FY 2020 (Infographic)*, U.S. Gov't. Accountability Off. (June 22, 2021), https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2020-infographic [https://perma.cc/W6U4-465X].

on government contracts in 2022.[4] OTs utilization continues to proliferate, showing an increase of 712% since FY 2015.[5] Fifty-seven percent of all OTA dollars between FY2015 and FY2019 went to consortiums.[6] "OT consortiums are business structures put in place by the government to more effectively execute OTs."[7] Despite the efforts to award more OTs to nontraditional contractors, large defense contractors like Lockheed Martin, Boeing, and Northrup Grumman are still among the top five vendors.[8] Traditionally, the government uses rigid procurement contracts to purchase services and goods, in addition to providing grants or entering into cooperative agreements[9] to assist.[10] However, the Department of Defense (DoD) in particular uses more agile OTs to buy prototypes[11] of cutting-edge technology to sustain the military's competitive edge in this frequently globally antagonistic environment.[12] Over the last decade, the military branches continued to expand their OTA spending on research and development projects.[13]

However, OTA flexibility comes at a cost. Because the FAR and many other procurement regulations do not generally apply, OTs can be risky, especially since "the acquisition workforce . . . may not always have the requisite

4. Justin Siken, *Small Businesses Awarded Record $159 Billion from Federal Government in 2022*, Higher Gov (Feb. 13, 2023), https://www.highergov.com/reports/small-business-trends-2022/#:~:text=%24158.7%20billion%20was%20awarded%20directly,in%20government%20contracts%20in%202022 [https://perma.cc/SX8Y-AQL9].

5. Rhys McCormick, *Department of Defense Other Transaction Authority Trends: A New R&D Funding Paradigm?*, Ctr. for Strategic & Int'l Stud. (Dec. 8, 2020), https://www.csis.org/analysis/department-defense-other-transaction-authority-trends-new-rd-funding-paradigm [https://perma.cc/WXP9-YAGS].

6. *Id.*

7. *Other Transaction Authority (OTA)*, AcqNotes (last updated June 3, 2022), https://acqnotes.com/acqnote/careerfields/other-transaction-authority-ota) [https://perma.cc/38TB-4WBQ].

8. McCormick, *supra* note 5, at 8.

9. 2 C.F.R. § 200.24 (2021) ("*Cooperative agreement* means a legal instrument of financial assistance between a Federal awarding agency or pass-through entity and a non-Federal entity.").

10. Multiple federal statutes govern when an executive agency can use a procurement contract (31 U.S.C. § 6303), grant (31 U.S.C. § 6304), or cooperative agreement (31 U.S.C. § 6305).

11. *Other Transactions for Prototypes Fact Sheet*, Def. Advanced Rsch. Projects Agency (Oct. 19, 2018), https://www.darpa.mil/attachments/SBIR-OT-Fact-Sheet-19-Oct-18.pdf [https://perma.cc/2TQV-2XJT] ("'Prototype' is defined as 'a physical or virtual model used to evaluate the technical or manufacturing feasibility or military utility of a particular technology or process, concept, end item, or system.'").

12. Crane Lopes, Historical Institutionalism and Defense Public Procurement: The Case of Other Transactions Agreements (Sept. 19, 2018) (Ph.D. dissertation, the Virginia Polytechnic Institute and State University) (on file with Virginia Polytechnic Institute and State University Libraries).

13. Jared Serbu, *Navy Seeing 'Explosion' in Use of OTA for IT, Cyber Development Work*, Fed. News Network (Nov. 19, 2020), https://federalnewsnetwork.com/on-dod/2020/11/navy-seeing-explosion-in-use-of-ota-for-it-cyber-development-work [https://perma.cc/SUU5-4WXA] ("The Navy announced it was increasing the ceiling value for its Information Warfare Research Project OTA to $500 million after having exhausted its initial $100 million ceiling in just a little over a year-and-a-half."); McCormick, *supra* note 5 ("Other Transaction Authorities (OTAs) have become a core element of the Department of Defense's (DoD) approach to technology acquisition. DoD OTA obligations increased 75 percent in the fiscal year [(FY)] 2019 and have increased 712 percent since FY 2015.").

skills and training necessary to negotiate and execute OTAs."[14] Lately, OTA processes have drawn a lot of negative attention for their lack of compliance and transparency. The Project on Government Oversight (POGO), the U.S. Government Accountability Office (GAO), and the Department of Defense Inspector General (IG) recently issued reports raising many red flags about the government's ability to track, oversee, and thus be transparent on how OTA funds are allocated and spent.[15] OTA compliance is especially important in light of the FY2021 National Defense Authorization Act (NDAA) because it addresses many areas of concern regarding government contracts, including acquisition policy and management, supply chain, and industrial base matters.[16] President Joseph Biden commented that "combating corruption [is] a core national security interest and democratic responsibility."[17] According to the Biden White House, "the fight against corruption" will be the most essential aspect of the national security strategy because corruption threatens democracy.[18]

Part II provides a review of the U.S. procurement system and how procurement rules and objectives were developed. OT authority will also be discussed in full detail, including OTs' legislative history. The compliance framework and anti-corruption ecosystem developed by Dean Jessica Tillipman[19] will set the stage for a discussion of the OTs current compliance regime and its shortcomings. Issues with transparency and oversight, particularly with consortiums, show that the government must improve its data tracking and reporting requirements regarding OTs. Judicial oversight of OTs is limited but evolving, and, depending on how a party pleads the case, courts may find they do not have jurisdiction to hear certain cases.

Finally, Part III contains recommendations primarily focused on combating oversight and transparency issues and the need for OTA contract professionals to have more robust training.

14. McCormick, *supra* note 5, at 4.

15. U.S. Gov't Accountability Off., GAO-22-105357, Other Transaction Agreements: DoD Can Improve Planning for Consortia Awards (2022); U.S. Dep't of Def., DODIG-2022-127, Audit of DoD Other Transactions and the Use of Nontraditional Contractors and Resource Sharing (2022); Scott Amey, Other Transactions: Do the Rewards Outweigh the Risks?, Project on Gov't Oversight (Mar. 15, 2019) [hereinafter 2022 Audit of Other Transactions].

16. William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, 134 Stat. 3388 (hereinafter NDAA FY-21).

17. Joseph R. Biden, Jr., *Why America Must Lead Again*, *Rescuing U.S. Foreign Policy after Trump*, Foreign Aff. (Jan. 23, 2020), https://www.foreignaffairs.com/articles/united-states/2020-01-23/why-america-must-lead-again [https://perma.cc/3ZPV-NSQQ].

18. *Fact Sheet: Establishing the Fight against Corruption as a Core U.S. National Security Interest*, White House (June 2, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/06/03/fact-sheet-establishing-the-fight-against-corruption-as-a-core-u-s-national-security-interest [https://perma.cc/32BM-HFZ5].

19. *Jessica Tillipman*, Geo. Wash. L. School, https://www.law.gwu.edu/jessica-tillipman [https://perma.cc/347R-653S] (last visited Aug. 6, 2023); *see infra* note 208.

II. BACKGROUND AND OVERVIEW OF THE U.S. PROCUREMENT SYSTEM AND OTHER TRANSACTIONS AUTHORITY

A. Federal Acquisition Regulation (FAR) Background and Purpose

1. The United States Procurement System Historical Background

A full understanding of the United States procurement system and why procurement contracts are different from commercial contracts begins with its roots and historical background. Accordingly, to understand the reasons behind many governing laws and regulations, we must look at how the U.S. procurement system and associated processes were developed. Government spending is, and has always been, tied to historical, scientific, social, and economic developments.[20] The federal procurement system and its principles[21] developed through waging wars and implementing lessons learned after those wars.[22] These lessons materialized into regulations that now cover contract formation and administration.[23]

Not surprisingly, the procurement contracts model dates back to its English roots, similar to the entire U.S. legal system.[24] The English procurement system started developing when young educated men from the middle class joined the military.[25] Clerks in the Royal Navy, modern-day equivalents of Contracting Officers, made their fortunes through kickbacks from contractors.[26] Nevertheless, in the absence of a government budget or strict regulations, their conduct was considered acceptable.[27]

England's common law and procurement system spread through the British colonies in the eighteenth century because the British Army obtained its supplies locally.[28] The Army adopted a decentralized procurement system since the colonies were geographically removed from their governing domain in London.[29] The commissary[30] and quartermaster[31] generals worked together to procure, deliver, and store local items for the Army.[32] When the United

20. Sandy Keeney, *The Foundations of Government Contracting*, 5 J. Cont. Mgmt. 7, 7 (2007).
21. *See, e.g.*, Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Pub. Procurement L. Rev. 103 (2002).
22. Christopher Yukins, *The U.S. Federal Procurement System: An Introduction*, Uphandlingsrättslig Tidskrift 69, 70 (2017).
23. *Id.*
24. Keeney, *supra* note 20, at 7.
25. *Id.* at 7–8.
26. *Id.* at 8.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Commissary*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/commissary [https://perma.cc/BE7Z-2KZ2] (last visited Aug. 2, 2023).
31. *Quartermaster*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/quartermaster [https://perma.cc/N66C-R2ZN] (Dec. 23, 2021) (A quartermaster is defined as "an army officer who provides clothing and subsistence for a body of troops.").
32. Keeney, *supra* note 20, at 8.

States adopted the British procurement system, it also embraced the decentralized aspect.[33]

The United States' procurement system's formulaic abnormalities were evident at its inception, as early as the Revolutionary War. The Continental Congress's lack of centralized power and (mutual) distrust of states made it impossible to centrally regulate commerce and have a comprehensive plan for supplying troops.[34] The American government solved wartime logistical issues through trial and error.[35] Between various committees that tried to manage the procurement system for the military, changing administrative processes every few months, and the inability to keep the personnel in the quartermaster general's office, the system remained dysfunctional.[36] Despite systematic difficulties, purchasing agent positions were in high demand.[37] Congress appointed business people as purchasing officers instead of military officers to utilize their commercial buying experience.[38] Purchasing agents were paid a percentage of the total purchase value, which disincentivized them from focusing on the value of potential goods and drove up government costs.[39] Without any compliance regulations, the government regularly awarded contracts based on nepotism and favoritism, which created issues with supplying food and weapons.[40]

Congress created the Department of the Treasury in light of failed attempts at a decentralized procurement system whereby suppliers had an option to sell to one of the highest bidders: the thirteen sovereign states, the British Army, or the federal government.[41] The Superintendent of Finance during the Revolutionary War, experienced businessman Robert Morris, immediately established the rules that became the foundation for the current federal procurement system.[42] The Department began exclusively working with those deemed "responsible bidders,"[43] who could offer the best value to the government while still carrying on such duties as logistics, delivery, and storage of the goods.[44] The new system imposed rules for dispute resolution and quality control.[45] Mr. Morris's new procurement system was not foolproof and still had corruption issues, but it was an improvement from the previous system.[46] Despite all his accomplishments, Superintendent Morris was replaced after

33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* (Purchasing agents were civilian positions appointed by Congress, with wide authority to buy, sell, insure, ship, and incur debt in the government's name.).
38. *Id.*
39. *Id.*
40. *Id.* at 9–10.
41. *Id.* at 11.
42. *Id.*
43. FAR 9.104-1 defines "responsibility" in the context of prospective contractors.
44. Keeney, *supra* note 20, at 11.
45. *Id.*
46. *Id.*

the end of the war with a three-person Board of Treasury, which continued to use the rules and regulations created by Mr. Morris.[47] However, accountability issues with purchasing agents persisted.[48]

In 1787, the U.S. Constitution established the centralized government structure and "provide[d] for the common defense and general welfare of the United States . . . to raise and support armies," and "to provide and maintain a Navy."[49] Congress initiated its first investigation into the country's ability to meet the standards articulated in the Constitution at the turn of the century, leading to another procurement system overhaul.[50] The investigation assessed the failing system and a collapsed supply chain that led to the most significant loss during the Native American uprising in 1791.[51] Finally, in 1808, Congress enacted the "Officials Not to Benefit" statute, which prohibited the long practice of profiting from procurement contracts by official government members.[52]

The Act of March 3, 1809, established formal advertisements and gave Contracting Officers complete control of the procurement process, giving them purchasing and payment authority.[53] The Act also implemented the contracting officers' formal appointment system and bond requirements.[54] During the early nineteenth century, the U.S. procurement system started functioning on settled principles of more organized solicitations, which made awards based on low prices.[55] Further, the concept that the government should be acting in good faith and subject to a dispute process when contracting with the private industry developed.[56]

A new generation of government contractors emerged in response to the new system. For example, Eli Whitney, who was trying to find business opportunities away from his failing cotton gin, offered to make muskets for the government, even though it took him eleven years to fulfill his obligation.[57] He revolutionized the industry and government procurement system by developing mass production of muskets with interchangeable parts instead of parts being made for an individual musket.[58] The Whitney contract and the War of 1812 were responsible for emerging government procurement principles

47. *Id*. at 12.
48. *Id.*
49. U.S. Const. art. 1, § 8.
50. Keeney, *supra* note 20, at 12.
51. *Id.*
52. *Id.* at 13.
53. Keeney, *supra* note 20, at 13.
54. *Id.*
55. Yukins, *supra* note 22, at 71.
56. *Id*.
57. Keeney, *supra* note 20, at 13.
58. *Id*.

like termination for default [59] and convenience concepts,[60] inspection requirements,[61] compliance with the stated contract requirements,[62] and payment after the performance.[63] Notwithstanding the above-listed developments in the procurement system, domestic manufacturers still did not have the capacity to meet the needs of the military; in fact, domestic manufacturers preferred to sell overseas because it was easier than dealing with the U.S. government.[64] Consequently, after the Revolutionary War, the U.S. government started enacting policies that promoted domestic industry's growth.[65] For example, the government started implementing what are now known as "option years" for private arms manufacturers with satisfactory performance and competitive prices.[66] However, this policy created its own issues—the government received goods that were of far lesser quality than more expensive goods, and the sellers were at the benevolence of the government to keep them in business.[67] The make-or-buy debate continued as the federal government and private industry learned to coexist and benefit from each other: the national armory system was cheaper but private companies were believed to be more

59. *See* Yukins, *supra* note 22, at 72–73; FAR 49.401; FAR 52.249-8; John Cibinic Jr., et al., Administration of Government Contracts 719 (5th ed. 2016) (Termination for default is defined as "the ultimate method of dealing with a contractor's unexcused present or prospective failure to perform in accordance with the contract specifications and schedule.").

60. *See* Yukins, *supra* note 22, at 72–73; FAR 49.1 (The government can terminate for convenience when a good or service is no longer needed, but the government has to compensate for the incurred costs but not lost profits.).

61. *See* FAR 52.246-1 (simplified acquisition for supplies and services); FAR 52.246-2 (supply); FAR 52.246-4 (services); FAR 52.246-6 (time and material and labor hour contracts); FAR 52.246-7 (research and development contracts); FAR 52.246-2(b) (standard inspection clause); Cibinic Jr., *supra* note 59, at 638 ("Inspection, either by the government or by the contractor, is the primary means of ensuring that the government receives that for which it bargained.").

62. Cibinic Jr., *supra* note 59, at 17; FAR 1.602-2 ("Contracting officers are responsible for ensuring the performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships.").

63. *See* 31 U.S.C. § 3324; Cibinic Jr., *supra* note 59, at 911, 1135 ("The three major types of payment under government contracts are payment of the contract price for completed items of work, progress payments based upon costs incurred or a percentage of completion of the work, and payments based on the performance of the work."); *see* Yukins, *supra* note 22, at 72.

64. Keeney, *supra* note 20, at 13–14.

65. Yukins, *supra* note 22, at 72 ("Over this first century of its history, the federal government often relied on its own armories, favoring 'make' over 'buy' (to paraphrase); this balance between internal production and outsourcing from contractors was driven, in part, by the government's technological dominance in the early phases of American industrialization. (For example, Harpers Ferry Armory, the scene of abolitionist John Brown's 1859 raid which helped launch the Civil War, was a U.S. government-owned gun factory.) The government's technological lead largely faded by the end of the twentieth century; by that point, the private sector was almost always well ahead of the government, and that new asymmetry—that new and durable technological lead in the private sector—helped shape the modern procurement methods discussed below." (parentheticals in original)).

66. Keeney, *supra* note 20, at 14; Stuart B. Nibley & Sheila A. Armstrong, *The Government Exercise of Options*, 13-8 Briefing Papers Collection 1, 1 (2013) ("Contracting Officers frequently include options in procurement contracts that provide the Government with the unilateral right to purchase additional supplies or services without further competition if needs subsequently arise and appropriations are provided.").

67. Keeney *supra* note 20, at 14–15.

innovative.[68] Finally, the 1815 Ordinance Department Act allowed the government to obtain patent rights and disperse them among other public or private manufacturers that do business with the government.[69] Manufacturers like Eli Whitney, who created the system of interchangeable gun parts, now faced competition because other manufacturers could produce parts.[70]

New contracting techniques continued to emerge in response to manufacturing and industrial developments. Until the 1850s, sovereign immunity limited contractors' rights. However, the 1855 Tucker Act established the Court of Claims to "render judgment upon any claim against the United States founded either upon the Constitution, or any act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States . . . ."[71] In 1860, all federal government agencies adopted the Army's 1857 regulation imposing requirements for record-keeping, accounting procedures, and advertising procedures.[72] The Civil Sundries Appropriation Act of 1861 cemented the new procurement rules, which became Revised Statute 3709 after its amendment in 1870.[73] The Armed Services Procurement Act of 1947 replaced the Revised Statute 3709.[74]

The United States Civil War again tested the federal procurement system. Competition for the same supplies, provisions, and weapons between the South and North drove prices up and quality down while exploiting the public exigency exception of the Civil Sundries Act.[75] Inefficiencies of the procurement system caused by fraud and the lack of procedural enforcement became the new reality of the Civil War, resulting in weapons that did not function, shoes that fell apart, and tools that did not perform.[76] In response to that dire situation, Congress started a year-long investigation in 1861.[77] As a result, Congress passed new compliance regulations in spite of critics' warnings that increased compliance will slow the procurement process.[78] The newly imposed requirement of filing the entire contract file in the central office with the associated contract, bids, proposals, and advertisements was met with resistance.[79] Quartermasters who preferred a more expedited method of contracting via telegraph did not support the process.[80] Additionally, contracting officers were required to authenticate the file.[81] Unfortunately, most of those

68. *Id*. at 15.
69. *Id*.
70. *Id*.
71. 28 U.S.C. § 1491(a)(1).
72. Keeney, *supra* note 20, at 15.
73. *Id.*
74. *Id.*
75. *Id.* at 16.
76. *Id*.
77. *Government Contracts; The Frauds of the Contractors, Full and Authentic Digest of the Report of the Van Wyek Investigating Committee*, N.Y. Times (Feb. 6, 1862), https://timesmachine.nytimes.com/timesmachine/1862/02/06/78677723.html?pageNumber=2 [https://perma.cc/J7AS-PU4P].
78. Keeney, *supra* note 20, at 17.
79. *Id*.
80. *Id*.
81. *Id.*

regulations were not fully embraced or enforced, except for the False Claims Act enacted in 1863.[82]

During the Civil War and World War I, the U.S. procurement system continued to develop, primarily due to the Navy's expansion to accommodate its growth in size and sophisticated fleet.[83] World War I showed that the system lacked necessary contract administration and management processes because pilots complained about aircraft quality.[84] In response, in 1916, Congress created an aircraft inspection department responsible only for aircraft contracts, which later paved the way for in-house inspection offices.[85] Because World War I yet again created an increased demand for military-needed goods, the government procurement system expanded too.[86]

Nevertheless, the end of the war showed many more cracks in the system. Many undelivered contracts had to be canceled—totaling $4 billion.[87] The United States mostly procured aircrafts between World War I and World War II.[88] Boeing was awarded its first contracts in 1921, and the newly established Air Corps in 1926 took a leading role in aircraft procurement.[89] Yet, as contractors developed more aircrafts and the federal government increased its procurement of the aircrafts, the government became increasing concerned about unreasonable profit margins.[90] As a result, the Vinson-Trammel Act was passed in 1934.[91] The Act required contractors to allow their books to be audited and plants to be inspected, if necessary, and also limited profit margins.[92]

2. Federal Acquisition Regulation

After the sudden attack on Pearl Harbor and the start of World War II, Congress passed the First War Powers Act on December 18, 1941.[93] The procurement system during World War II was better organized than during World War I, and negotiated procurements emerged, with emphasis on cost and price analysis.[94] Both the Army and the Air Corps (now the Air Force) established procurement district offices with 27,000 procurement personnel employed across the country.[95] Finally, Congress passed the Armed Services Procurement Act

82. *Id.*; *see* 31 U.S.C. § 3729 (a)(7).

83. Janet McDonnell, *A History of Defense Contract Administration*, Def. Cont. Mgmt. Agency (Mar. 5, 2020), https://www.dcma.mil/News/Article-View/Article/2100501/a-history-of-defense-contract-administration [https://perma.cc/4L2V-6S2C].

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Effect of Department of Defense Procurement on Competition and Concentration: Hearing Before the Subcommittee on Antirust and Monopoly Legislation of the S. Comm. on the Judiciary*, 90th Cong. 2 (1968), https://www.gao.gov/assets/094494.pdf [https://perma.cc/7UEU-68MV]; McDonnell, *supra* note 83.

95. *Id.*

of 1947.[96] This Act standardized procurement methods for all military departments and required formal advertising for all solicitations.[97] A unique body of law and distinct set of policies and principles developed over time to regulate special relationships between the government and contractors.[98] Congress has passed the annual NDAA for over fifty years, which continues to provide the U.S. DoD with procurement authority.[99] Finally, in 1984, the Federal Acquisition Regulation (FAR)[100] created standard contract clauses that supported the formation and administration of federal procurement contracts.[101]

The FAR was designed to combat the procurement issues raised by the 1972 Commission on Government Procurement and replace the Federal Procurement Regulations (FPR) and the Defense Acquisition Regulations (DAR).[102] The FAR is a collection of regulations, guidelines, and rules that executive agencies must follow to acquire goods and services through procurement contracts. The term "procurement" is defined in 41 U.S.C. § 111.[103] Interestingly, the terms "acquisition"[104] and "procurement" are frequently used interchangeably, and even FAR 2.101 refers back to the "acquisition" when defining the word "procurement."[105] However, the term "acquisition" is more expansive as defined in the 2003 Services Acquisition Reform Act (SARA).[106] Procurement contracts are narrower in scope and do not include

96. *Id.*

97. *Id.*

98. Yukins, *supra* note 22, at 74.

99. The Annual National Defense Authorization Acts (NDAA) are located on the U.S. Congress's website: https://www.congress.gov/search?q=%7B%22source%22%3A%22legislation%22%2C%22search%22%3A%22%5C%22national%20defense%20authorization%20act%5C%22%20fy%20%22%7D [https://perma.cc/9HDN-FHQR] (last visited Aug. 18, 2023).

100. The FAR is codified in Parts 1 through 53 of Title 48 of the Code of Federal Regulations.

101. Yukins, *supra* note 22, at 73–74; *see, e.g.*, FAR 52 (providing standard clauses).

102. Yukins, *supra* note 22, at 73–74.

103. 41 U.S.C. § 111 ("[T]he term 'procurement' includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout.").

104. In 2003, Congress passed the Services Acquisition Reform Act (SARA), Pub. L. No. 108-136, § 2, 117 Stat. 1663, at 4 (2003) ("The term 'acquisition'—'(A) means the process of acquiring, with appropriated funds, by contract for purchase or lease, property or services (including construction) that support the missions and goals of an executive agency, from the point at which the requirements of the executive agency are established in consultation with the chief acquisition officer of the executive agency; and '(B) includes—'(i) the process of acquiring property or services that are already in existence, or that must be created, developed, demonstrated, and evaluated; '(ii) the description of requirements to satisfy agency needs; '(iii) solicitation and selection of sources; '(iv) award of contracts; '(v) contract performance; '(vi) contract financing; '(vii) management and measurement of contract performance through final delivery and payment; and '(viii) technical and management functions directly related to the process of fulfilling agency requirements by contract.'").

105. FAR 2.101 (defining "*Acquisition*" as "the acquiring by contract with appropriated funds of *supplies* or services (including *construction*) by and for the use of the Federal Government through purchase or lease, whether the *supplies* or services are already in existence or must be created, developed, demonstrated, and evaluated. *Acquisition* begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, *solicitation* and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract . . . 'Procurement' (see 'acquisition')."

106. 41 U.S.C. § 403 *et seq*.

grants or cooperative agreements.[107] The FAR is codified in Part 1 through 53 of Title 48 of the Code of Federal Regulations (CFR). It applies to executive agencies but does not apply to the legislative or judicial branches.[108] The FAR does not cover grants, cooperative agreements, OT authorities, real property purchases, or employment contracts.[109] At its core, the FAR mandates transparency, fairness, and impartiality.[110] FAR 1.102 identifies the following goals: satisfy customers, maximize the use of commercial products/services, use contractors with successful past performance, promote competition, minimize administrative operating costs, conduct business with integrity, fairness, and openness, and fulfill public policy objectives.[111]

In Fiscal Year (FY) 2020, the United States spent $681 billion on government contracts.[112] To effectively manage taxpayer money, the federal procurement system contains stringent rules in the FAR to guide contract award and management processes.[113] Those rules reflect the historical experience of dealings between the government and contractors. The purpose of the FAR is to ensure that all procurement systems function in a consistent, fair, and impartial manner.[114]

B. Compliance and Procurement Contracts

1. Compliance Rules That Apply to Procurement Contracts in General

The FAR's guiding principle is to preserve the public's trust when spending taxpayers' money. In addition to statutes and regulations that control government personnels' conduct while participating in the procurement process,[115]

107. Am. Bar Assoc., The 2000 Model Procurement Code for State and Local Governments 7 (2000) (Section 1-301 defines procurement as "buying, purchasing, renting, leasing, or otherwise acquiring any supplies, services, or construction. It also includes all functions that pertain to the obtaining of any supply, service, or construction, including a description of requirements, selection and solicitation of sources, preparation and award of contract, and all phases of contract administration.").

108. Kate Manuel et al., Cong. Rsch. Serv., R42826, The Federal Acquisition Regulation (FAR): Answers to Frequently Asked Questions 3 (2015).

109. *Id.* at 5.

110. FAR 1.102(a) ("The vision for the Federal Acquisition System is to deliver on a timely basis the best value product or service to the customer while maintaining the public's trust and fulfilling public policy objectives. Participants in the acquisition process should work together as a team and should be empowered to make decisions within their area of responsibility.").

111. FAR 1.102(b).

112. Daniel Snyder, *Federal Contract Spending: Five Trends in Five Charts*, Bloomberg Gov't (Jan. 5, 2021), https://about.bgov.com/news/federal-contract-spending-five-trends-in-five-charts [https://perma.cc/68PQ-SSXY].

113. *See generally* Manuel et al., *supra* note 108; *see*, *e.g.*, FAR 5.303; FAR 14.4, FAR 9.1 (noting that many regulations govern awarding to the lowest responsive, responsible bidder, and advance notice requirements when publicizing upcoming contracts).

114. Fed. Deposit Ins. Corp., Introduction to the Federal Acquisition Regulation (FAR), 5, https://www.fdic.gov/about/diversity/sbrp/45.pdf [https://perma.cc/EGU6-X45R] (last visited Jan. 14, 2022).

115. *See*, *e.g.*, 41 U.S.C. §§ 2101–2107 (FAR 3.104 implements the Procurement Integrity Act); 18 U.S.C. § 207 (Restrictions on Former Officers, Employees, and Elected Officials of the Executive and Legislative Branches); 18 U.S.C. § 208 (governing conflicts of personal financial interest); DFARS 252.203-7000 (Requirements Relating to Compensation of Former DoD

FAR clauses and regulations that protect the government are the following: (1) the proposal process is highly formulaic and heavily regulated, with many prescriptive clauses;[116] (2) the law requires contractors to certify their proposal representations,[117] FAR 31.201-3 and 31.201-2 define price reasonableness and cost allowability,[118] while FAR 15.403-4 requires certified cost or pricing data from a prospective contractor to verify that the government is getting a fair and reasonable price;[119] (3) the Cost Accounting Standards (CAS) also ensure consistency in accounting for contracts;[120] and (4) the *Christian Doctrine* states that contracts must comply with all applicable FAR clauses, whether clauses are actually incorporated into the contract or not.[121]

2. Bid Protest System

The Competition in Contracting Act of 1984 (CICA) states that executive agencies must acquire property and services in the "most timely" and "efficient" manner.[122] CICA created "a bid protest system intended to balance the proprietary interests of industry against the public's interest in timely and cost-effective procurement."[123] The bid protest system ensures that government officials create and maintain official records associated with the formation

Officials); FAR 52.203-13 (governing code of business ethics and conduct for contractors). For whistleblower protections, see FAR 52.203-17; FAR 3.908-3; 41 U.S.C. § 4712.

116. *See*, *e.g.*, FAR 9.103 (governing present responsibility of contractors and subcontractors); FAR 52.203-13 (requiring a code of business ethics and conduct upon award of contract or subcontract over $5.5 million with a performance period of at least 120 days); FAR 3.303 (requiring government contracting officers and agencies to watch for potential antitrust violations by companies bidding on government contracts and to report collusive activity to the U.S. Attorney General and the agency responsible for contractor suspension and debarment).

117. *See*, *e.g.*, FAR 52.203-11 (Certification and Disclosure Regarding Payments to Influence Certain Federal Transactions); FAR 52.209-6 (governing debarment, suspension, and proposed Debarment); FAR 52.219-1 (Small Business Program Representations); FAR 52.222-25 (Affirmative Action Compliance); FAR 52.230-1 (Cost Accounting Standards Notices and Certification); FAR 52.203-2 (Certificate of Independent Price Determination).

118. FAR 31.201-3 ("A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs *must* be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. No presumption of reasonableness *shall* be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the *contracting officer* or the *contracting officer's representative*, the burden of proof *shall* be upon the contractor to establish that such cost is reasonable.").

119. *See* FAR 15.403-4.

120. *See* FAR 52.230-2 (requiring contractors to disclose their cost accounting practices, follow their disclosed cost accounting practices consistently for all federal contracts, comply with applicable CAS standards, and agree to price adjustments for the impact of any changes in cost accounting practices).

121. The *Christian* Doctrine is an exception to standard contract practices where all provisions of contracts must be in writing; in fact, it allows mandatory contract provisions and clauses to be read into federal contracts by operation of law. *See G.L. Christian & Assocs. v. United States*, 312 F.2d 418, 426–27 (Cl. Ct. 1963).

122. Competition in Contracting Act of 1984, 41 U.S.C. § 253.

123. Roger J. McAvoy, *Bid Protest—Balancing Public and Private Interests*, 34 A.F. L. Rev. 227, 227 (1991).

and administration of procurement contracts.[124] In fact, the bid protest system serves as an audit of the government procurement system while verifying and confirming that government officials follow and comply with all the regulations and laws.[125]

Bid protests can be filed in one of the three authorized forums: (1) the agency making award, (2) the Government Accountability Office (GAO), or (3) the U.S. Court of Federal Claims (COFC), the only federal court with jurisdiction over protests.[126] The Act authorizes COFC to review violations of statute or regulation in connection with a *procurement* or proposed procurement.[127] It is important to note that both the Federal Acquisition Streamlining Act (FASA)[128] and the Tucker Act contain the phrase "in connection with" a proposed or actual procurement. "Procurement" encompasses "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout."[129] Procedures at each forum are very different. Bid protest adjudication is a controversial topic because, on the one hand, it can slow the acquisition process,[130] but on the other hand, it makes the system more transparent.[131]

124. *Id.* at 235.

125. *Id.*

126. Corel Corp. v. United States, 165 F. Supp. 2d 12, 28 (D.D.C. 2001). *Corel Corp.* was filed in a U.S. federal district court before the Administrative Dispute Resolution Act terminated the U.S. federal district courts' bid protest jurisdiction on January 1, 2001. The case discusses the elimination of the federal district courts' jurisdiction over bid protests. *Id.*

127. 28 U.S.C. § 1491(b)(1) (emphasis added) (The court can only "render judgment on an action by an interested party objecting to a solicitation by a federal agency for bids or proposals for a proposed contract, or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement.").

128. Federal Acquisition Streamlining Act (FASA), Pub. L. No. 103-355, 108 Stat. 3243 (1994) (codified as amended in multiple sections of Titles 10 and 41 of the U.S. Code). The FASA provisions addressing jurisdiction over agency orders are codified for civilian agencies at 41 U.S.C. § 4106(f) and the Department of Defense at 10 U.S.C. § 2304c(e). The FASA codified a contracting vehicle for agencies to enter into open-ended single or multiple award task or delivery order contracts as indefinite-delivery/indefinite-quantity (ID/IQ) contracts. Major Kevin J. Wilkinson, *More Effective Procurement Response to Disasters: Maximizing the Extraordinary Flexibilities of IDIQ Contracting*, 59 A.F. L. Rev. 231, 233–34 (2007).

129. Distributed Sols., Inc. v. United States, 539 F.3d 1340, 1345 (Fed. Cir. 2008) (citing 41 U.S.C. § 403(2)); Ramcor. Servs. Grp., Inc. v. United States, 185 F.3d 1286, 1289 (Fed. Cir. 1999) ("The operative phrase 'in connection with' is very sweeping in scope."); *see also* 41 U.S.C. § 111 (defining "procurement" to include "all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout"). *But see* Cleveland Assets, L.L.C. v. United States, 883 F.3d 1378, 1382 (Fed. Cir. 2018) (narrowing the Court's § 1491(b)(1) bid protest jurisdiction to alleged violations of "procurement statute[s]").

130. *See, e.g.*, Daniel I. Gordon, *Bid Protests: The Costs Are Real, but the Benefits Outweigh Them*, 42 Pub. Cont. L. J. 489 (2013); Carol Cordell, *Drowning in Protests: Can Agencies Stem the Rising Tide?*, Fed. Times (Jul. 28, 2017), https://www.federaltimes.com/acquisition/2017/07/28/drowning-in-protests-can-agencies-stem-the-rising-tide [https://perma.cc/Q637-CCTW].

131. Yukins, *supra* note 22, at 87.

C. Other Transactions Authority Background

The GAO defines OTs as "legally-binding instruments, other than contracts, grants, or cooperative agreements, that generally are not subject to federal laws and regulations applicable to procurement contracts."[132] The agencies that have the authority for OTs use them for different purposes.[133] OTs became the preferred contracting vehicle for many "nontraditional contractors"[134] because many burdensome FAR or DFARS clauses did not apply to the OTs.[135] Even though OTs' authority only recently gained popularity and notoriety, its inception dates to the 1958 National Aeronautics and Space Administration (NASA) Space Act.[136] The Space Act created and authorized NASA to "enter into and perform such contracts, leases, cooperative agreements, or other transactions as may be necessary in the conduct of its work and on such terms as it may deem appropriate."[137] Congress passed the Space Act in response to the Soviet Union's successful launch of Sputnik on October 4, 1957.[138] OTs provided the ability for NASA to surpass the Soviet Union in the space race.[139]

OTs are popular for their flexibility and pliability to the needs of specific projects, contractors who want to participate in the projects, and the government.[140] Congress's intent for OTs[141] is to attract more nontraditional contractors to do business with the government and to speed up the process by

132. Oracle Am., Inc., B-416061, 2018 CPD ¶ 180, at 1 n.1 (Comp. Gen. May 31, 2018).

133. *Id.*

134. *See* 10 U.S.C. § 3014, https://www.acq.osd.mil/asda/ae/ada/title-10-reorganization.html (A nontraditional defense contractor is defined as "an entity that is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources . . . any contract or subcontract for the Department of Defense" (i.e., companies that do not typically have contracts with the federal government).). However, many large contractors are still benefiting by joining consortiums.).

135. H.R. Rep. No. 114-102, at 202 (2015) ("OTAs have been an effective tool for research and development contracts, particularly for innovative organizations like the Defense Advanced Research Projects Agency"); McCormick, *supra* note 5, at 2 ("Section 812 of the FY 2015 NDAA expanded the range of what types of prototypes could be perused under an OTA, while Section 815 of the FY2015 NDAA 'expanded DoD's OTA authority by making DoD's OTA authority permanent, modifying the definition of a nontraditional defense contractor, and allowing DoD to issue follow-on production contracts for OTA prototypes.'").

136. National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, § 203, 72 Stat. 426, 430 (1958); *see* H.R. Rep. No. 85-1770, at 4 (1958).

137. The Space Act § 203(b)(5); *see also* Stan Soloway, IBM Ctr. for The Bus. of Gov't, Other Transactions Authorities: After 60 Years, Hitting Their Stride or Hitting the Wall? 52 (2021), https://www.businessofgovernment.org/sites/default/files/Other%20Transactions%20Authorities.pdf [https://perma.cc/B74C-8LJ4] ("While the term 'other transactions' is included in the law, it was neither defined in the law nor discussed in any of the committee reports or other relevant congressional documents.").

138. Paul G. Dembling, *The National Aeronautics and Space Act of 1958: Revisited*, 34 J. Space L. 203, 203 (2008).

139. *See id.* at 208 ("The goal was to make and maintain this nation preeminent in outer space activities.").

140. L. Elaine Halchin, Cong. Rsch. Serv., R34760, Other Transaction (OT) Authority 2 (2011) ("By using an OT instead of a contract, an agency, and its partners, are able to develop a flexible arrangement tailored to the project and the needs of the participants.").

141. H.R. Rep. No. 114-102, at 202 (2015).

excluding OTs from traditional procurement laws and regulations.[142] OTs are "not subject to the laws, regulations, and other requirements applicable to contracts, leases, [and] cooperative agreements."[143] Currently, NASA actively uses OTs to contract with the private industry to develop the technology needed for space exploration.[144] However, NASA is not the only agency that has OTs authority. This paper will discuss mainly the DoD's OTs authority and its evolution.

1. Legislative History and Congressional Intent

The competition between the United States and the Soviet Union propelled many industrial, technological, and even legislative developments in the United States. In 1958, the same year that Congress enacted the Space Act, it also authorized DoD to engage with universities and not-for-profit organizations for research through grants and cooperative agreements.[145] The same year, Congress also created the Advanced Research Projects Agency (ARPA), now known as the Defense Advanced Research Projects Agency (DARPA), to assist DoD with research and development (R&D) projects.[146] Nevertheless, this effort alone was not enough to solve the preexisting issues with traditional procurement contracts laced with a litany of regulations.[147]

NASA was the only agency with the authority to enter into OTs for over thirty years.[148] Initially, NASA was hesitant to use OTs and continued to use traditional procurement contracts until 1960, when the American Telephone and Telegraph Co. (AT&T) needed assistance.[149] AT&T developed an active

142. *See* Richard L. Dunn, *An Alternative to Business Acquisition As Usual*, Nat'l Def. Mag. (Nov. 30, 2017), http://www.nationaldefensemagazine.org/articles/2017/11/30/an-alternative-to-acquisition-business-as-usual [https://perma.cc/AE52-RZJ8].

143. Dembling, *supra* note 138, at 211.

144. *See* Tiphany Baker Dickerson, *Patent Rights Under Space Act Agreements and Procurement Contracts: A Comparison by the Examination of NASA's Commercial Orbital Transportation Services (COTS)*, 33 J. Space L. 341, 342 (2007).

145. *See* 10 U.S.C. § 4001; Department of Defense Reorganization Act of 1958, Pub. L. No. 85-599, 72 Stat. 520 (1958).

146. *A Select History of DARPA Innovation*, Def. Tech. Info. Ctr. , https://www.darpa.mil/Timeline/index [https://perma.cc/X8B4-8GLR] (last visited Dec. 29, 2021).

147. *See* Richard L. Dunn, *DARPA Turns to "Other Transactions*," Aerospace Am. 33, 33 (1996) (Mr. Dunn, who served as DARPA's general counsel at that time, wrote that "[c]haracteristics of the government contract system that especially impact R&D includes a preference for cost-reimbursement type contracting and a host of associated administrative and oversight mechanisms. Government-unique accounting systems, cost principles, record keeping, and certification requirements are imposed on defense R&D contractors. Contractor purchasing systems must meet government requirements that discourage strategic relationships between producers and suppliers. Various socio-economic policies that seem meritorious individually are added to the contract system and together result in lengthy contract clauses, government-unique practices, and certifications. The result is a system that Sen. Jeff Bingham (D-N.M.) says 'spends millions to save thousands.'").

148. Soloway, *supra* note 137, at 52.

149. Richard L. Dunn, *Other Transactions: Origins and Evolutions—Part 1*, Strategic Inst. for Innovation in Gov't Cont. (Aug. 8, 2018), https://strategicinstitute.org/other-transactions/ot-origins-evolution-pt1 [https://perma.cc/SKW5-A3ZW].

communications satellite but needed NASA's capability to launch it.[150] At that time, the Department of the Air Force had already invested in two active communications satellites, and NASA had one passive communications satellite. After AT&T approached NASA, the government decided to cooperate with the private industry, knowing that it had already invested in similar technology.[151] Two years later, in 1962, NASA used the Space Act OTs' authority "Launch Service Agreement" to launch Telstar I.[152] Through this process, AT&T developed and paid for the satellite and reimbursed NASA for its launch. This was the first project where a military entity (Air Force), civilian agency, and private company cooperated and created a significant scientific discovery, especially for modern communications.[153]

Even though this business model helped to launch many more commercial satellites on a reimbursable basis, the commercial industry needed more lift capacity as more satellites were developed.[154] The government was concerned with investing more money into this capability, knowing that it mainly served the private industry.[155] A Space Act OT authority was a much-needed solution to this problem.

Under an OTA, the responsibility of developing, technical monitoring, production, and financing was divided among three players—Delta's manufacturer McDonnell Douglas, NASA, and potential customer RCA.[156] This successful agreement not only created the Delta 3914 that was continuingly used for many years but also became a model transaction for upgrades and the Space Shuttle.[157]

In 1982, Space Services International performed the first private launch from Matagorda, Texas.[158] Again, multiple government and private parties were involved.[159] The private company reimbursed NASA for acquiring a rocket monitor from a former Air Force Minuteman I missile and refurbishing a similar NASA rocket monitor.[160] Two years later, Starstruck, Inc. conducted a completely privately developed vehicle launch.[161] These launches under the Space Act OTs agreement paved the way for Space X's development of a reusable Falcon 9.[162] Now, NASA uses OTs creatively in many different ways, and some do not involve exchanging money.[163] The most notable OTs are Joint

150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *See id.*
160. *Id.*
161. *Id.*
162. *Id.*
163. *Id.*

Endeavor Agreements that allow private citizens to use the Space Shuttle for the cargo and crew programs.[164]

NASA was hesitant to use its OTs authority more extensively until DARPA led the way.[165] In the late 1980s, DoD started to recognize deficiencies in its ability to acquire cutting-edge research and development projects[166] while overpaying for basic necessities.[167] The Packard Commission Report on Defense Management[168] uncovered many issues with the procurement system while also pointing out that DARPA's inability to assist with DoD developmental projects stemmed from too much red tape that consequently stifled innovation.[169] The Packard Report recommended that DAPRA expand its procurement authority beyond traditional procurement contracts.[170] During the same time, in the late 1980s and early 1990s, as the defense budget started shrinking, forty-four defense contractors consolidated into six.[171] The companies could not keep up with the high overheads imposed by traditional government practices, and they could not quickly adapt to commercial practices to survive.[172] The government also realized that most R&D was done commercially and not through government expenditures as it was done in the past.[173]

164. *Id.*

165. *Id.*

166. *See* Michael Schrage, *Computer Effort Falling Behind*, Wash. Post (Sept. 5, 1984), http://www.washingtonpost.com/archive/business/1984/09/05/computer-effort-falling-behind/2391d030-266b-469f-a18e-d8d297f57fa1 [https://perma.cc/M6V3-X2MR] (explaining the inability to procure computers in 1984).

167. Soloway, *supra* note 137, at 52 ("In addition, many companies in the technology sector lacked either the accounting systems to be eligible for government contracts or the desire to set up the type of accounting system that would make them eligible."); *see*, *e.g.*, Airon A. Mothershed, *The $435 Hammer and $600 Toilet Seat Scandals: Does Media Coverage of Procurement Scandals Lead to Procurement Reform*, 41 Pub. Cont. L.J. 855, 857 (2012) (discussing problems with the U.S. procurement system and highlighting that the DoD would pay $435 for a hammer and $600 for a toilet seat in the 1980s); David Packard, President's Blue Ribbon Comm'n on Def. Mgmt., A Quest for Excellence 44 (1986), https://s3.documentcloud.org/documents/2695411/Packard-Commission.pdf [https://perma.cc/WBX7-XEE2] [hereinafter Packard Commission Rep.] ("These problems are deeply entrenched and have developed over several decades from an increasingly bureaucratic and overly regulated process. As a result, all too many of our weapons systems cost too much, take too long to develop, and by the time they are fielded, incorporate obsolete technology.").

168. Packard Commission Rep., *supra* note 167, at 44.

169. *See id.* at xxii ("Developmental and Operational testing have been far too divorced, the latter has been undertaken too late in the cycle, and prototypes have been used and tested far too little. In their advanced developmental projects, the Services too often have duplicated each other's efforts and disfavored new ideas and systems. The Defense Advanced Research Projects Agency has not had a sufficient role in hardware experimentation and prototyping.").

170. *Id.* at xxvi (The recommendation in the report stated that "[t]o promote innovation, the role of the Defense Advanced Research Projects Agency should be expanded to include prototyping and other advanced develop merit work on joint programs and in areas not adequately emphasized by the Services.").

171. Richard L. Dunn, *Origins and Evolution of Other Transactions: Part 2*, Strategic Inst. for Innovation in Gov't Cont. (Aug. 14, 2018), https://strategicinstitute.org/other-transactions/origins-evolution-ots-pt-2 [https://perma.cc/RU9M-3HGL].

172. *Id.*

173. *See id.*

As a result, "[s]ection 251 of the National Defense Authorization Act for FY 1990 and FY 1991 expanded the OTAs from solely NASA to include [DARPA] on a two-year trial basis."[174] The authority was only for "basic, applied, and advanced research projects."[175] DARPA entered into its first OTs agreement with Gazelle Microcircuits in the spring of 1990 to develop high-speed gallium arsenide components, which became the first "dual-use" agreement between the government and a commercial company.[176] The main goal of 10 U.S.C. § 4021 was to facilitate dual use of technology, attract commercial companies to innovate, and access cutting-edge technology without traditional procurement burdens and overhead.[177] Following multiple successful OTs, Section 845 of the FY 19941 NDAA added the OTs authority for prototype projects[178] to the existing DARPA OTs' authority for research and development authorization.[179] Armed with the OTs' authority similar to NASA and now free from traditional procurement regulations, DARPA started to "serve as the central research and development organization of the Department of Defense with a primary responsibility to maintain U.S. technological superiority over potential adversaries."[180] Finally, Section 804 of the FY 1997 NDAA authorized the DoD to use OTs to acquire prototypes of weapons systems.[181]

2. Other Transactions Authority and Its Evolution

Congress's continual revisions to OTs' authority and associated statutes almost every few years demonstrates that it is still a work in progress. The OTs' authority and the definitions of prototype projects evolved within the last few decades after its initial congressional grant.[182] Multiple key features were

174. Soloway, *supra* note 137, at 52; National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 251(a), 103 Stat. 1403 (1989) ("The Secretary of Defense, in carrying out advanced research projects through the Defense Advanced Research Projects Agency, may enter into cooperative agreements and other transactions with any person, any agency or instrumentality of the United States, any unit of state or local government, any educational institution, and any other entity.").

175. 10 U.S.C. § 2371.

176. Richard L. Dunn, *Origins and Evolution of Other Transactions: Part 3*, Strategic Inst. for Innovation in Gov't Cont. (Sept. 12, 2018), https://strategicinstitute.org/other-transactions/origins-evolution-transactions-part-3 [https://perma.cc/J3J4-PDGH].

177. Richard L. Dunn, *Other Transactions Contracts: Poorly Understood, Little Used*, Nat'l Def. Mag. (May 15, 2017), https://www.nationaldefensemagazine.org/articles/2017/5/15/other-transactions-contracts-poorly-understood-little-used [https://perma.cc/45QX-7F5B].

178. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 845(a), 107 Stat. 1721, 1722 (1993) (note to 10 U.S.C. § 2371); *see* Dunn, *supra* note 149, at 34 (Even though Section 845 formally authorized DARPA to acquire prototypes, the agency was already experienced in prototype procurements.).

179. Soloway, *supra* note 137, at 52.

180. *See* Dep't of Def., Advanced Research Projects Agency (ARPA), Directive 5134.10 1 (1995), https://apps.dtic.mil/sti/tr/pdf/ADA298268.pdf [https://perma.cc/5Q3G-V2N6].

181. National Defense Authorization Act for Fiscal Year 1997, Pub. L. No. 104-201, § 804 110 Stat. 2605 (1996) (amending National Defense Authorization Act for Fiscal Year 1994 § 845(a)).

182. National Defense Authorization Act for Fiscal Year 1997, § 804; National Defense Authorization Act for Fiscal Year 2002, Pub. L. No. 107-107, § 822, 115 Stat. 1182 (2001); National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 823, 119 Stat. 3387 (2006).

added: cost-sharing requirements for traditional contractors, non-competitive follow-on production for successful OTs, a new approval system for high-dollar OTs, and education and training requirements.[183]

Section 801 of the FY 2000 NDAA added the requirement that the Comptroller General review OTs for prototype projects in excess of $5,000,000.[184] Section 803 of the FY 2001 NDAA introduced the concept of cost-sharing and the definition of a nontraditional defense contractor.[185] The determination of whether the cost-sharing is appropriate is based on the practicability standard.[186] Most dual-use projects where joint funding contributes to their successful completion are deemed "practicable" under 10 U.S.C. 4021(e)(1)(B).[187] The FY2001 NDAA extended the OTs authority until September 30, 2004.[188] A follow-on production authority was subsequently implemented in 2001.[189] Specifically, 10 U.S.C. 4022(f) allows awarding a follow-on contract without competition as long as "competitive procedures" were used during the initial source selection, and it was "successful."[190] This issue continues to be highly controversial[191] since the DoD has issued little guidance.[192] Section 823 of the FY 2006 NDAA added dollar-value threshold review level and made the Procurement Integrity Act applicable to OTs.[193]

Congress continued to revisit OTs nearly every other year in the last decade.[194] In 2008, Section 824 of NDAA for FY2009 [195] "expanded the scope of the pilot program," and the "temporary authority was extended with a

183. National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, §§ 803–804, 114 Stat. 1654A-205 (2000); § 822, 115 Stat. at 1182; § 823, 119 Stat. 3387; National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 863, 131 Stat. 1494; S. Rep. No. 115-125, at 191 (2017) ("Congress required several DoD organizations to develop, in collaboration with the Defense Acquisition University, an OT curriculum of education, training, and experiential learning for DoD personnel.").

184. National Defense Authorization Act for Fiscal Year 2000, Pub. L. No. 106-65, § 801, 113 Stat. 700 (1999).

185. § 803, 114 Stat.1654A-205.

186. *See* 10 U.S.C. § 2371(e)(1)(B) ("[T]o the extent that the Secretary [of Defense] determines practicable, the funds provided by the Government under . . . a transaction authorized by subsection (a) do not exceed the total amount provided by other parties.").

187. Richard L. Dunn, *Cost Sharing Insights—Section 2371—Other Transactions*, Strategic Inst. for Innovation in Gov't Cont. (Nov. 13, 2017), https://strategicinstitute.org/other-transactions/cost-sharing-insights-section-2371-transactions [https://perma.cc/Q3UM-YZDP].

188. *See* § 803(b), 114 Stat. 1654A-205 (codified at 32 C.F.R. pt. 3); 10 U.S.C. § 4022(f).

189. § 822, 115 Stat. 1182.

190. 10 U.S.C. § 4022(f)(2).

191. MD Helicopters, Inc., B-417379, 2019 CPD ¶ 120, at 2 (Comp. Gen. Apr. 4, 2019).

192. *Cf.* Memorandum from Off. Sec'y Def. to Secretaries Mil. Dep'ts on Definitions and Requirements for Other Transactions Under Title 10, United States Code, Section 2371b (Nov.20, 2018) (available at https://aaf.dau.edu/wp-content/uploads/2018/11/Definitions-and-Requirements-for-Other-Transactions-Under-Title-10_USC_S....pdf (last visited Jan 22, 2022 https://aaf.dau.edu/wp-content/uploads/2018/11/definitions-and-requirements-for-other-transactions-under-title-10_usc_s....pdf) (demonstrating the scarcity in guidance).

193. § 823, 119 Stat. 3387 (The Procurement Integrity Act prohibits the release of the information used during source selection.).

194. *See* sources cited *supra* notes 181–84.

195. National Defense Authorization Act for Fiscal Year 2009, Pub. L. No. 110-417, § 824, 122 Stat. 4533 (2008).

five-year sunset provision."[196] In 2010, FY2011 NDAA introduced "including all options" in dollar-value threshold review levels.[197] Section 863 of FY2013 NDAA, temporarily extended again the OT Authority that it initially granted in Section 845(i) of FY1994 NDAA.[198] In 2014, Congress yet again augmented and expanded the OTs' originally created authority by adding the "enhancing the mission effectiveness of military personnel" language while deleting the definition of "weapons or weapons systems used by the Armed Forces."[199] Also, it allowed small businesses to participate in OTs without cost-sharing requirements.[200] Congress finally made OTs' authority permanent for DoD in 2016.[201] A follow-on production was also added to the OTs' authority when "all significant participants in the transaction other than the federal government are small businesses or nontraditional contractors," in addition to the definition of nontraditional defense contractors being changed.[202]

D. Compliance and Anti-Corruption Framework and Ecosystem

Compliance is frequently characterized as an expensive and burdensome part of doing business with the government, but, nevertheless, even most commercial companies have compliance programs.[203] Many compliance regulations are imposed to ensure public trust and accountability of taxpayers' money. Moreover, compliance rules compel conduct that leads to "minimisation of costs or damages to either party whether these are associated with potentially inadvertent behavior or deliberate violations while seeking more opportunistic engagements."[204] Compliance with processes and regulations facilitates the "targeted" behavior in organizations.[205] Consequently, extensive regulatory principles eventually focused on "preventing bribery, corruption, and conflict of interest . . . ."[206]

196. Catherine L. Stevens, *An Analysis of the Department of Defense's Use of Other Transaction Authority (10 U.S.C. 2371)*, Naval Postgraduate Sch., June 2019, at 19.

197. National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 826, 124 Stat. 4270 (2011); Stevens, *supra* note 196, at 19.

198. National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, § 863, 126 Stat. 1632 (2013).

199. National Defense Authorization Act for Fiscal Year 2015, Pub. L. No. 113-291, § 812, 128 Stat. 3429 (2014); Stevens, *supra* note 196, at 19.

200. Stevens, *supra* note 196, at 19.

201. *See* 10 U.S.C. § 4022(a); National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114-92, § 815, 129 Stat. 893 (2015).

202. § 815, 129 Stat. at 895–96.

203. *See*, *e.g.*, Jessica Tillipman & Vijaya Surampudi, *The Compliance Mentorship Program: Improving Ethics and Compliance in Small Government Contractors*, 49 Pub. Cont. L.J. 217, 231–32 (2020); Sharon Finegan, *The False Claims Act and Corporate Criminal Liability: Qui Tam Actions, Corporate Integrity Agreements and the Overlap of Criminal and Civil Law*, 111 Penn. St. L. Rev. 625, 660–61 (2007).

204. Guido Governatori et al., *On Compliance of Business Processes with Business Contracts*, Brisbane, QLD 072, Austl., at 2 (2007).

205. *Id.* at 2–3.

206. Nishat Ruiter, *Understanding Implications of Compliance to Government Contracts*, 2 Int'l In-House Counsel J. 853, 854 (2009).

Dean Jessica Tillipman, Dean for Government Procurement Law Studies at the George Washington University Law School,[207] developed a government procurement anti-corruption and compliance framework, known as the U.S. Government Procurement Anti-Corruption Ecosystem.[208] These tools—such as transparency, oversight, bid challenges, ethics, civil and criminal enforcement, debarment, contractor compliance, whistleblower protections and rewards, and encouraging disclosure—help mitigate corruption and compliance issues.[209] Transparency ensures that the public is aware of how their money is being spent.[210] That is why such organizations as GAO, the Office of Inspector General, and the Department of Justice not only conduct investigations but also publish their reports. [211] They are part of the oversight process to confirm that all the necessary and applicable rules are being followed.[212]

Bid protest tools safeguard the competition process.[213] This compliance tool helps ensure that government officials obey all the applicable rules and regulations through competition challenges.[214] Domestic corruption and ethics laws govern the conduct and behavior of government officials.[215] These laws apply to all civil servants and are not just limited to procurement officials.[216] Ethics laws regulate government employees' behavior by imposing strict guidelines regarding gifts and hospitality, financial disclosures, and conflicts of interests, just to name a few.[217] Many acts of actual impropriety are strictly prohibited, and civil and criminal liability enforcement tools are used to combat egregiously unethical behavior.[218]

Contractor compliance is one of the newest additions to Tillipman's ecosystem.[219] There are many emerging global standards and expectations of companies that do business with governments, which include internal controls, ethics, and compliance programs. The internal programs are focused on self-reporting. Taxpayers rely on contractors to correctly and accurately self-certify a lot of information and data submitted to the government without

207. *Jessica Tillipman*, GW Law, https://www.law.gwu.edu/jessica-tillipman [https://perma.cc/347R-653S] (last visited July 31, 2023).

208. *McKinsey & Company's Conduct and Conflicts at the Heart of the Opioid Epidemic: Hearing Before the H. Comm. on Oversight and Reform*, 117th Cong. 117-79 (2022) (statement of Jessica Tillipman); Jessica Tillipman, *Anti-Corruption and Compliance Class/Botswana U.S.T.D.A. Virtual GPI Training Series for Botswana—Session #7 Government Procurement Risk Mitigation Ecosystem* (Mar. 11, 12, 2022) (on file with the author).

209. *McKinsey & Company's Conduct and Conflicts at the Heart of the Opioid Epidemic*, *supra* note 208, at 2.

210. *Id.*

211. *Id.* at 8.

212. *Id.*

213. *Id.* at 9.

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.* at 5.

218. *Id.*

219. Tillipman & Surampudi, *supra* note 203, at 217; *see* Tillipman, *supra* note 208 (explaining Tillipman's ecosystem).

violating the False Claims Act.[220] The purpose of shifting compliance requirements to contractors and making them play a more integral role in the process is to maximize the government's limited resources for policing every single contract. However, it can still enforce various laws and regulations through the False Claims Act. The government also enforces antitrust laws to block collusion and other anti-competitive behaviors. The government frequently facilitates many prosecutions through self-reporting and whistleblowing procedures.

III. ANALYSIS

Both the government and private industry often favor OTs because they are more flexible than conventional FAR-based contracts.[221] Increased flexibility allows the government to attract companies that have never done business with the government and, thus, acquire innovative and contemporary technology faster.[222] OTs enable contracting parties to start from scratch without any prescribed clauses and design their contractual relationships as they see it fit.[223] OTs are tailored to specific projects and companies that intend to be a part of separate agreements.[224] The risk and obligations are negotiable, and liabilities are divided among parties through mutually created clauses in the contract, making OTs attractive, especially for non-traditional government contractors.[225] However, flexibility and speed often may come at the expense of compliance, transparency, and oversight.

Nevertheless, even traditional FAR-based procurement contracts are not immune to fraud, waste, and abuse. Despite constant vigilance and built-in FAR required oversight and compliance provisions, fraud remains a persistent issue, even for traditional procurement contracts.[226] The DOE OIG's report to Congress in 2020 included many investigations related to contract fraud.[227] According to the DoD's 2019 Report to Congress, over $6.6 billion was recovered from defense-contracting fraud cases during FY2013–2017.[228] DOJ recovered over $2.2 billion in settlements and judgments under the False

220. *See* statute cited *supra* note 82.

221. Surya Gablin Gunasekara, "*Other Transaction" Authority: NASA's Dynamic Acquisition instrument for the Commercialization of Manned Spaceflight* or *Cold War Relic?*, 40 Pub. Cont. L.J. 893, 899 (2011).

222. Armani Vadiee et al., *The Federal Government's "Other Transaction" Authority*, 18.5 Briefing Papers Collection 1, 2 (2018).

223. Nancy O. Dix et al., *Fear and Loathing of Federal Contracting: Are Commercial Companies Really Afraid to Do Business with the Federal Government? Should They Be?*, 33 Pub. Cont. L.J. 5, 26 (2003).

224. Lopes, *supra* note 12, at 12–13.

225. *Id*. at 482.

226. U.S. Gov't Accountability Off., GAO-21-309, DOD Fraud Risk Management: Actions Needed to Enhance Department-Wide Approach, Focusing on Procurement Fraud Risks 1, 7 (2021) [hereinafter GAO-21-309].

227. Off. of the Inspector Gen., U.S. Dep't of Energy, Semiannual Report to Congress 4 (2020),

228. GAO-21-309, *supra* note 226, at 8.

Claims Act in the FY 22.[229] Compliance and oversight remain essential measures to ensure that taxpayers get what they paid for.

Continued issues of oversight and transparency are documented in the GAO's *DoD Financial Management Report* released on October 20, 2020.[230] Almost a year later, on September 20, 2021, the GAO published its report *DOD Fraud Risk Management: Actions Needed to Enhance Department-Wide Approach*, *Focusing on Procurement Fraud Risks* (GAO-21-309), where it "concluded that DOD needed to take additional actions to enhance its approach to procurement fraud risks."[231] In response, legislators proposed the Audit the Pentagon Act of 2021, which, if passed, would have required DoD components that fail to pass an audit to forfeit one percent of its budget.[232] Various DoD components are already cognizant of the fraud issues and have implemented different strategies to combat those shortcomings.[233]

With a more heightened focus on government contracts, contractors, and government agencies making use of these contracts may be one scandal away from Congress trimming back OTs' authority. "The head of the Section 809[234] panel says Congress will peel back the Defense Department's ability to use

229. Press Release, Dep't of Just., False Claims Act Settlements and Judgments Exceed $2 Billion in Fiscal Year 2022 (Feb. 7, 2023), https://www.justice.gov/opa/pr/false-claims-act-settlements-and-judgments-exceed-2-billion-fiscal-year-2022 [https://perma.cc/6CL2-VNCL].

230. U.S. Gov't Accountability Off., GAO-21-157, DoD Financial Management: Continued Efforts Needed to Correct Material Weakness Identified in Financial Statement Audits 5 (2020).

231. Noah Leiden & Patrick Fitzgerald, *What You Need to Know as DOD Ramp up Procurement Fraud Investigations*, Wash. Tech. (Dec. 6, 2021) https://washingtontechnology.com/opinion/2021/12/what-you-need-to-know-as-dod-ramps-up-procurement-fraud-investigations/355492 [https://perma.cc/M2YF-2ZAD].

232. Bill Chappell, *The Pentagon Has Never Passed An Audit. Some Senators Want to Change That*, NPR (May 19, 2021), https://www.npr.org/2021/05/19/997961646/the-pentagon-has-never-passed-an-audit-some-senators-want-to-change-that [https://perma.cc/RA6M-XYWQ] ("'The Pentagon and the military industrial complex have been plagued by a massive amount of waste, fraud and financial mismanagement for decades. That is absolutely unacceptable,' said Sen. Bernie Sanders, I-Vt., who co-sponsored the bill with Sen. Chuck Grassley, R-Iowa, along with Sens. Ron Wyden, D-Ore., and Mike Lee, R-Utah.").

233. *See*, *e.g.*, Wayne Amann, *Joint MOU Targets Fight against Acquisition Fraud and Corruption*, Off. Of Special Investigations: Pub. Aff. (July 9, 2021), https://www.osi.af.mil/News/Article-Display/ARTICLE/2689973/JOINT-MOU-TARGETS-FIGHT-AGAINST-ACQUISITION-FRAUD-AND-CORRUPTION [https://perma.cc/3ZLL-TWG4]. "[T]he Deputy Assistant Secretary (Contracting), Deputy General Counsel (Contractor Responsibility and Conflict Resolution), the Air Force Judge Advocate General's Director of the Civil Law Domain, and the Commander, Air Force Office of Special Investigations signed a Memorandum of Understanding [on] July 8, 2021," agreeing to recognize that acquisition fraud and corruption is the DAF's top priority and decided to join the means to fight it. "This joint agreement with our vital departmental partners will provide the critical team approach to detecting and mitigating fraud at the departmental and installation levels," said AFOSI Commander, Brig. Gen. Terry L. Bullard. "History has shown us that the more aggressively all the stakeholders in fraud prevention and detection work together, the healthier our ability to both root out fraud wherever it may be and also deter others who might be considering it." *Id.*

234. *Section 809 Panel*, Def. Tech. Info. Ctr. https://discover.dtic.mil/section-809-panel [https://perma.cc/8PK9-VVZT] (last visited Sept. 13, 2023) ("The Advisory Panel on Streamlining and Codifying Acquisition Regulations (Section 809 Panel) was created in Section 809 of the FY 2016 National Defense Authorization Act (Public Law 114-92).").

OTAs if it doesn't reign in the 'abuse' of such agreements."[235] Using Tillipman's anti-corruption and compliance framework, OTs will be analyzed based on three pillars: (1) the government's responsibility to ensure transparency and oversight, (2) bid challenge/judicial oversight, and (3) contractor compliance.

A. Government's Responsibility

1. Transparency

Congress's expansion of OTs' authority shows tolerance for risk in light of the current near-peer competitive environment when demand for cutting-edge and next-generation technology is high, but Congress expressed certain reservations.[236] Congress ties DoD's overall warfighting mission success to acquiring the technology needed through OTs.[237] However, Congress began expressing concerns with the OT's "lack of transparency," especially with follow-on projects in the DoD Appropriations Act of 2019.[238] The Act imposes more reporting requirements on the DoD to provide Congress with a yearly listing of each active OT's agreement with its budget implications and funding.[239]

The *Oracle JEDI* protest highlighted transparency issues when the protestor challenged an improper award outside a competitive process.[240] However, "[t]he problem was not with the OTA mechanism, which remains an essential element of reforming Pentagon procurement. Rather the problem was a lack of transparency with how the mechanism was employed."[241] Additionally, collecting and tracking OT awards data continue to be a significant problem.[242] Transparency is vital because not measuring the efficiency and effectiveness of the DoD's use of OTs prevents assessing it thoroughly.

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235. Justin Doubleday, *Section 809 Panel Chair Warns Against 'Abuse' of Other Transaction Agreements*, Inside Def. (Oct. 3, 2019), https://insidedefense.com/daily-news/section-809-panel-chair-warns-against-abuse-other-transaction-agreements [https://perma.cc/E3NB-LMQA].

236. S. Rep. No. 115-125, at 190 (2017) ("Making use of OTAs, and their associated flexibility may require senior leaders and Congress to tolerate more risk. . . . Such risks can, and should, be mitigated through various means from oversight to program design and acquisition strategies.").

237. *Id.* ("Encouraging and supporting the Department of Defense to use proven innovative procurement processes such as OTAs for funding agreements under the small business programs will both enhance the mission effectiveness of the Department and help accomplish the mission of the programs.").

238. Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019, Pub. L. No.115-245, § 8137, 132 Stat. 3031 (2019); Soloway, *supra* note 137, at 53.

239. § 8061, 132 Stat. at 2982 (established additional reporting requirements); H.R. Rep. No. 115-676, pt. 1, at 161–62 (2018).

240. *See generally* Oracle Am., Inc., B-416061, 2018 CPD ¶ 180, at 17–18 (Comp. Gen. May 31, 2018).

241. Tim Greeff, *How the US Can Put Its OTA Procurement Process to Best Use*, Fed. Times (Mar. 23, 2018), https://www.federaltimes.com/acquisition/2018/03/23/how-the-us-can-put-its-ota-procurement-process-to-best-use [https://perma.cc/QC8P-7D7W].

242. Moshe Schwartz & Heidi M. Peters, Cong. Rsch. Serv., R45521, Department of Defense Use of Other Transaction Authority: Background, Analysis, and Issues for Congress 10–11 (2019); U.S. Gov't Accountability Off., GAO-21-501, COVID-19 Contracting: Actions Needed to Enhance Transparency and Oversight of Selected Awards 6–7 (2021) [hereinafter GAO-21-501].

i. Accounting System

Federal government contracts "represent a substantial component of the U.S. economy."[243] To ensure that the government chooses its business partners wisely, Contracting Officers (COs) routinely make responsibility determinations.[244] COs are entrusted with investigating whether a company has the financial, technical, and organizational ability to fulfill the contract.[245] The quality of external and internal reporting is essential for both parties.[246] One of the most important ways to ensure transparency between parties is the Cost and Accounting Standards (CAS) system.[247] CAS allows the government to assess whether the government receives what it needs at a fair price.[248] CAS requirements widely used for traditional procurement contracts do not apply to OTs.[249] It is especially concerning because many OTAs are similar to cost-reimbursement contracts without typical cost principles applied to account for taxpayers' dollars.[250] However, many contractors do not wish to enter into traditional government contracts because of the stringent CAS requirements for procurement contracts under FAR Part 31.[251]

The *2018 DOD OTA Guidebook* highlights the evaluation process for price reasonableness:

243. Delphine Samuels, *Government Procurement and Changes in Firm Transparency*, 96 Acct. rev. 401, 401 (2020), https://doi.org/10.2308/tar-2018-0343 [https://perma.cc/9YF7-X5J8] ("On average, the U.S. government awards over $400 billion in contracts each year; it is the single largest buyer of goods and services in the country.").

244. FAR 9.104 (includes standards for a responsibility determination of a prospective contractor).

245. FAR 9.105-2 requires providing the documentation to justify the responsibility determinations.

246. Samuels, *supra* note 243, at 412–13. ("More generally, detailed audits of internal controls and accounting systems underlying incurred and estimated costs (e.g., billing, accounts payable, labor timekeeping, etc.) also enhance the quality of internal information processes, which are useful in producing numbers for external reporting.").

247. *Id*. at 427.

248. *See* FAR 30; *see also* Mandy Smithberg, *Testimony: Watchdog Report Makes Case for Pentagon Reforms*, Project On Gov't Oversight (Jan. 19, 2022), https://www.pogo.org/testimony/2022/01/testimony-watcoversighdog-report-makes-case-for-pentagon-reforms [https://perma.cc/DCB7-5GE2].

249. *See* Perry v. Martin Marietta Corp., 47 F.3d 1134, 1135 (Fed. Cir. 1995) ("[T]he Cost Accounting Standards (CAS) [are] a set of accounting standards for government contracts promulgated by the Cost Accounting Standards Board (CASB).") (citing FAR 30) (Cost Accounting Standards); *see* Truth in Negotiations Act, 10 U.S.C. §§ 3321–3323; *see also* 41 U.S.C. §§ 3501–3509 (renamed "Truthful Cost or Pricing Data" statute).

250. Scott Amey, *Other Transactions: Do the Rewards Outweigh the Risks?*, Project On Gov't Oversight (Mar. 15, 2019), https://www.pogo.org/report/2019/03/other-transactions-do-the-rewards-outweigh-the-risks [https://perma.cc/E9C2-2CPS]; Dave Donley, *Other Transaction Authority (OTA)—Is It Worth It?*, ReliAscent (June 12, 2018) https://www.reliascent.com/government-contracting-blog/other-transaction-authority-ota-is-it-worth-it [https://perma.cc/7UFX-F3M2].

251. Gregory J. Fike, *Measuring "Other Transaction" Authority Performance Versus Traditional Contracting Performance: A Missing Link to Further Acquisition Reform*, Army L. 7, 36 (2009) ("A 1992 congressional study found that '[the] Defense Department provisions requiring compliance with the Government Cost Accounting Standards and the Truth in Negotiations Act are serious impediments to commercial companies wishing to sell to the department.'" (quoting 1992 U.S. Congress, House of Representatives Committee on Armed Services study)).

> The Government team *shall* determine price reasonableness. The Government team may need data to establish price reasonableness, including commercial pricing data, market data, parametric data, or cost information. However, the AO should exhaust other means to establish price reasonableness before resorting to requesting cost information.[252]

Without access to the pricing data, the price reasonableness determination depends entirely on the Agreements Officer's (AO) business judgment, market research, and understanding of the project.[253] OTA allows the AO to determine what is needed to satisfy the transparency issue in place of the typical CAS requirements.[254] Cost-sharing is another significant difference and, thus, a potential issue.[255] In the traditional FAR-based procurement contracts, there are no specific cost-sharing options requirements regarding how much precisely, at a minimum, a contractor has to contribute.[256] However, 10 U.S.C. § 4022 requires conventional contractors to provide one-third of the cost of the OT system.[257] At the same time, OTA auditing barriers prohibit verifying vendors' claimed costs and, thus, their actual contribution to the project.[258] Pricing information minimizes speculation, guessing, and mistrust.[259] Arguably, any method of accounting can be acceptable as long as it meets the purpose of the contract.[260] The purpose of any accurate accounting system, including the Generally Accepted Accounting Principles (GAAP),[261] is to show "an accounting of all assets, liabilities, revenue, and expenses as well

252. Off. of the Undersecretary of Def. for Acquisition and Sustainment, U.S. Dep't of Def., Other Transaction Guide 15 (2018) (emphasis in original) [hereinafter DoD OT Guide].

253. Amey, *supra* note 250, at 3 ("[T]he Department of Defense's 'Other Transactions Guide' specifically states that price reasonableness 'must' be determined; however, it goes on to add that 'the [agreement officers] should exhaust other means to establish price reasonableness before resorting to requesting cost information [from the vendor].'").

254. *See generally* Lopes, *supra* note 12, at 46.

255. *See generally* 2022 Audit of Other Transactions.

256. *See* FAR 16.303(b) ("A cost-sharing contract may be used when the contractor agrees to absorb a portion of the costs, in the expectation of substantial compensating benefits.").

257. *See* 10 U.S.C. § 4022(d); U.S. Gov. Accountability Off., GAO/NSIAD-96-11, DoD Research: Acquiring Research by Nontraditional Means 4 (1996), https://www.gao.gov/assets/nsiad-96-11.pdf [https://perma.cc/CH7K-32RS] ("In the 72 projects we reviewed, recipients planned to contribute about $1.39 in cash or in-kind contributions for each dollar provided by DOD.").

258. Amey, *supra* note 250, at 3.

259. Aaron Gregg, *Seeking an Edge over Geopolitical Rivals, Pentagon Exploits an Obscure Regulatory Workaround*, Wash. Post (Oct. 18, 2019), https://www.washingtonpost.com/business/2019/10/18/seeking-an-edge-over-geopolitical-rivals-pentagon-exploits-an-obscure-regulatory-workaround [https://perma.cc/PJ83-EWWS] ("With an OTA contract, 'there's less transparency, less ability to assess the fairness of pricing, less control over pricing . . . we've seen them used questionably.'").

260. *See* FAR 17.

261. *US GAAP: Generally Accepted Accounting Principles*, CFA Inst., https://www.cfainstitute.org/en/advocacy/issues/gaap [https://perma.cc/45V6-SCNZ] (last visited Aug. 24, 2023) (GAAP is "a collection of commonly-followed accounting rules and standards for financial reporting. The specifications of GAAP, which is the standard adopted by the U.S. Securities and Exchange Commission (SEC), include definitions of concepts and principles, as well as industry-specific rules. The purpose of GAAP is to ensure that financial reporting is transparent and consistent from one organization to another.").

as extensive disclosures concerning the company's operations and financial condition."[262] Nevertheless, there appears to be no mechanism for evaluating contractor prices when the focus is on acquiring new technology or capability, as the government does with OTs and cost-reimbursement contracts. Conventional market research is not always valuable for deriving information on emerging technologies that do not exist on the market.

ii. Data Collection

Correctly reported OTA awards data does not exist, yet it is needed to analyze OTs' authority. In 2019, the Congressional Research Service (CRS) identified persistent issues with the lack of "authoritative data that can be used to assess OT effectiveness and better understand broader trends associated with these agreements,"[263] which were also detailed by the GAO in a 2021 report.[264] Some of the problems with OTs' transparency can be traced back to OTA regulations because the guidance is unclear and confusing. The government's workforce is insufficiently trained to use OTs and adequately document their use.[265] Without an appropriate and precise record management system that tracks OTs, the government cannot be a transparent and reliable business partner.

Despite the Federal Procurement Data System-Next Generation (FPDS-NG)[266] being used as the "primary source for tracking data on contract obligations, including other transactions for prototypes and follow-on production," the system does not provide accurate information for OTs.[267] The government collectively, including the DoD, has been attempting to remedy this issue by requiring Agreements Officers to report "organizations involved; number of transactions; amounts of payments; and purpose, description, and status of projects."[268] One of the reasons the OTs' data is not reported correctly

262. Crim. Div. of the U.S. Dep't of Just. & the Enforcement Div. of the U.S. Securities and Exchange Commission, A Resource Guide to the U.S. Foreign Corrupt Practices Act 47 (2012), https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf [https://perma.cc/CU9U-578P].

263. Schwartz & Peters, *supra* note 242, at 124.

264. GAO 21-501, *supra* note 254, at 12 ("DOD, HHS, and DHS obligated at least $12.5 billion on COVID-19-related OTAs from March 2020 through March 2021, primarily to help accelerate vaccine development and manufacturing. However, of that $12.5 billion, at least $1.6 billion was underreported because HHS misreported its OTAs as procurement contracts, while DOD and DHS did not accurately identify certain OTAs as COVID-19-related.").

265. *See generally*, Off. of the Inspector Gen., U.S. Dep't of Def., DODIG-2021-077, Audit of Other Transactions Awarded through Consortiums 7 (2021) [hereafter Audit of Other Transactions] (specifically discussing government employees' insufficient training with OTs awarded through consortiums).

266. *What's in FPDS*, Fed. Procurement Data Sys.—Next Generation https://www.fpds.gov/wiki/index.php/FPDS-NG_FAQ#TOC [https://perma.cc/93P8-DZZH] (last visited Mar. 30, 2022) (FPDS-NG is a system where all contracts with estimated value of $10,000 or more must be reported including every modification to those contracts, regardless of dollar value.).

267. Schwartz & Peters, *supra* note 242, at 11; *see also* Off. of the Undersecretary of Def. for Acquisition and Sustainment, U.S. Dep't of Def., Other Transaction Guide 26 (2023), https://www.acq.osd.mil/asda/dpc/cp/policy/docs/guidebook/TAB%20A1%20-%20DoD%20OT%20Guide%20JUL%202023_final.pdf [hereinafter DoD OT Guide]. ("The Government team must continue to report Prototype [Other Transactions] in the Federal Procurement Data System-Next Generation located at https://www.fpds.gov.").

268. Schwartz & Peters, *supra* note 242, at 18.

is because the FPDS-NG is better suited for FAR-based contract reporting than OTs.[269] Neither FPDS-NG, nor any other system, provides taxpayers with the "data about how OTAs are used, any analysis of their costs, or how effective they have been in producing cutting-edge technologies."[270] Having a system that is easy to use and agile enough to accommodate the OTs' reporting requirements will decrease transparency issues and increase public trust.

Because transparency, accountability, and the ability to measure the effectiveness of the OTs are challenging to achieve, it is also challenging to explain why, "in the top five [of OT awards recipients], are three of the world's largest defense contractors: Lockheed Martin Corp. ($350.5 million), Northrop Grumman Corp. ($271.8 million), and Boeing Co. ($259.1 million),"[271] instead of non-traditional contractors.[272] Without accurate reporting, it is hard to observe trends and analyze patterns; therefore, a certain level of speculation is required. One of the possible explanations for this less-than-desired nontraditional contracts participation is the definition of the nontraditional vendor is ambiguous.[273] Conversely, the involvement of the large traditional government contractors could be a result of the broad definition of an "entity" in 10 U.S.C. § 3014, the ability "to partner with firms who do not qualify for NDC status," and 10 U.S.C. § 4022(d)(1)(A) authority to award the OTs if "[t]here is at least one nontraditional defense contractor or nonprofit research institution participating to a significant extent in the prototype project," but "significant extent" is left for a broad interpretation.[274] That could be rational for many traditional contractors operating within consortium agreements. Without a proper reporting system and transparency, it is too challenging to achieve oversight.

2. Oversight

The 2018 National Defense Strategy (NDS) pointed out that current near-peer competition demands the speedy development of new weapons and technologies.[275] However, flexibility does not mean the absence of any respon-

269. *See* Amey, *supra* note 250, at 4 n.27 ("At best, the 'Federal Procurement Data System—Next Generation' (FPDS) includes OTA information, but that data may not be complete or updated in a timely fashion.").

270. *Id.* at 4.

271. Chris Cornillie, *A Closer Look at the Pentagon's $2 Billion a Year OTA Pipeline*, Fed. News Network (Jan. 22, 2019), https://federalnewsnetwork.com/fiscal-2019-federal-contracting-playbook/2019/01/a-closer-look-at-the-pentagons-2-billion-a-year-ota-pipeline-2 [https://perma.cc/DL2N-DZ39].

272. Amey, *supra* note 250, at 5.

273. *See* 10 U.S.C. § 3014 ("The term 'nontraditional defense contractor,' with respect to a procurement or with respect to a transaction authorized under section 2371(a) or 2371b of this title, means an entity that is not currently performing and has not performed, for at least the one-year period preceding the solicitation of sources by the Department of Defense for the procurement or transaction, any contract or subcontract for the Department of Defense that is subject to full coverage under the cost accounting standards prescribed pursuant to section 1502 of title 41 and the regulations implementing such section."); Amey, *supra* note 250, at 5.

274. Amey, *supra* note 250, at 6.

275. U.S. Dep't of Def., Summary of the 2018 National Defense Strategy of the United States 10 (2018), https://dod.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf [https://perma.cc/4LF3-TVLU] ("Delivering performance means we will shed outdated management practices and structures while integrating insights

sibility or oversight. The Project on Government Oversight (POGO), an independent organization that investigates when the government commits fraud, waste, and abuse,[276] found that this need for speed, no proper oversight, and misreporting created fruitful soil for the OTs' misuse "for questionable services-management support, custodial/janitorial services, guard services, video surveillance, background investigations, training (including ironically enough, 'other transaction training for the office of procurement operations'), and canine teams."[277] To increase congressional oversight, section 819 of the FY2020 NDAA required the Secretary of Defense to submit reports regarding "the use of other [OTA] to carry out prototype projects during the preceding fiscal year," including a detailed description of the projects' purpose, status, quantity.[278] However, this reporting requirement has not been thoroughly followed because OTs are not diligently tracked.[279] Additionally, DoD was able to escape this notification requirement of thirty days before the award[280] by using the Coronavirus Aid, Relief, and Economic Security (CARES) Act's[281] more liberal reporting standards during the Coronavirus disease (COVID-19) global pandemic.[282]

i. Consortiums[283]

Section 864 broadened the authority to award OTs to small businesses and research institutions while expanding more opportunities for follow-on production by including subawards under consortiums.[284] Consortiums are business units set up around a specific area of interest or objective, such as space or cyber.[285] A consortium usually comprises multiple companies or educational institutions, and its makeup may change every year.[286] FY2018 NDAA also

from business innovation."); Ronald O'Rourke, Cong. Rsch Serv., R43838, Renewed Great Power Competition: Implications for Defense-Issues for Congress 28 (2022).

276. *About Project on Government Oversight (POGO)*, Project on Gov't Oversight, https://www.pogo.org/about [https://perma.cc/J58R-WA7K] (last visited Aug. 24, 2023).

277. Amey, *supra* note 250, at 11.

278. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, § 819, 133 Stat. 1198, 1488–89 (2019).

279. *See generally* Off. of the Inspector Gen., U.S. Dep't of Def., DODIG-2021-077, Audit of Other Transactions Awarded Through Consortiums 7 (2021) [hereinafter 2021Audit of Other Transactions].

280. Barbara Schwemle, Cong. Rsch. Serv., IF11503, Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136): Selected Provisions on Federal Hiring (2020).

281. *Id.* (The Act provided economic assistance due to the financial impact of the COVID-19 pandemic, but Section 13006 loosened up DoD's reporting requirement of at least thirty days before prototype projects are awarded to a less stringent "as soon as practicable" requirement.).

282. GAO-21-501, *supra* note 242, at 26–27.

283. 2021 Audit of Other Transactions, *supra* note 279, at 3 (defining "a consortium as an association of two or more individuals, companies, or organizations participating in a common action or pooling resources to achieve a common goal and can range from a handful to as many as 1,000 members").

284. National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 864, 131 Stat. 1283, 1495 (2017) ("A transaction includes all individual prototype sub-projects awarded under the transaction to a consortium of United States industry and academic institutions.").

285. *See Other Transaction Authority (OTA)*, *supra* note 7.

286. *See id.*

raised the approval threshold by fifty percent for a prototype project in then 10 U.S.C. § 4022(a) and clarified OTs' approval levels.[287] DoD now fully uses its OTs' authority for research and prototype projects that were expressly awarded under section 864.[288]

OTs are frequently awarded to a consortium, which is supposed to allow all participants to have privity of contract with the government.[289] Even though OTs were supposed to facilitate the privity of contracting among all members, consortiums are set up like Indefinite Delivery-Indefinite Quantity (ID/IQ)[290] contracts or the FSS Schedule,[291] but the government is not a manager.[292] The Consortium Management Organization (CMO) conducts half of the procurement process generally performed by a CO, which creates an issue of shifting the inherent government function to the private sector without any oversight.[293] Conversely, traditional FAR-based contracts only allow prime contractors, not subcontractors, to have direct relationships with the government and therefore privity of contract.[294] Even though some acquisition practitioners are uncomfortable with OTs, OTs are associated with better team building during projects and less "red tape."[295] With the growing popularity of using consortiums for OT awards, Congress developed new requirements. Section 833 of the FY2021 NDAA directs the DoD to disclose a list of the consortia used when OTs' opportunities are announced.[296] This initiative was intended to increase transparency and create a more efficient oversight

287. *See* § 4022(a) 131 Stat. at 1307.

288. DoD OT Guide, *supra* note 267, at 40.

289. *Department of Defense Ordnance Technology Consortium*, Nat'l. Armaments Consortium, http://www.nac-dotc.org/about_d otc.html (last visited Aug. 11, 2023); *see* Energy Conversion Devices, Inc., B-260514, 95-2 CPD ¶ 121 (Comp. Gen. June 16, 1995) (discussing the award of OTA to a consortium).

290. FAR 16.501-1, -2 ("Task-order contract means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract."); Cont. & Fiscal L. Dep't., Judge Advocate Gen.'s Legal Ctr. & Sch., 2021 Contract Attorneys Deskbook 6–12 [hereinafter Deskbook] (ID/IQ contracts are often referred to as umbrella or minimum quantity contracts that "permit ordering of supplies or services as requirements materialize.").

291. Deskbook, *supra* note 290, 9–39 ("[A] FSS is a long-term indefinite delivery, indefinite-quantity (ID/IQ) multiple award contract awarded by GSA [the General Services Administration] to commercial vendors.").

292. Audit of Other Transactions, *supra* note 279, at 3 ("The [Consortium Management Organization] manages consortium membership by managing the application process and collection of the membership fees, if applicable.").

293. *A Closer Look at the Pentagon's $2 Billion a Year OTA Pipeline*, *supra* note 271 ("The total ceiling value of OTs contracts held by consortia or their management companies, such as [Advanced Technology International] or the Consortium Management Group Inc., is currently $45 billion, compared to just over $3 billion for OTAs awarded directly to contractors.").

294. Erickson Air Crane Co. v. United States, 731 F.2d 810, 813 (Fed. Cir. 1984) ("The government consents to be sued only by those with whom it has privity of contract, which it does not have with subcontractors.") (citing United States v. Johnson Controls, Inc., 713 F.2d 1541, 1550–52 (Fed. Cir. 1983)).

295. Stevens, *supra* note 196, at 68.

296. National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 833, 134 Stat. 3388, 3753.

process.[297] However, it is unclear if this directive has been implemented or followed in practice.

Consortium OTs account for about fifty percent of all OTAs in FY2021, with about twenty percent of OTs directly going to major traditional government contractors.[298] It has been noted that "$7.2 billion—more than half of the $12.5 billion [received through the CARES Act in 2020]—was awarded through a single consortium management organization, Advanced Technology International, the contracts for which could only be seen and bid on by consortium members."[299] Since a significant amount of money travel through consortium agreements, it prompted both the GAO and DoD Inspector General (IG) to look into this specific avenue of OT contracting. According to the GAO report, neither DoD nor HHS has an oversight system for consortia OTs awards.[300] Furthermore, three executive agencies collectively misreported $1.6 billion.[301] Despite the GAO's emphasis on proper reporting and transparency, "[the] DOD stated it does not believe expending resources on system changes to FPDS-NG is warranted."[302]

The government has a dangerously lack of oversight on consortiums. The government does not have access to consortium internal teaming agreements.[303] For example, the CMO collects solicitation responses, assists members with solicitations, selects members to perform the project after the base OTs agreements is awarded, and oversees projects.[304] However, the government does not oversee how the CMO functions are conducted.[305] Significantly, "[t]he cost of each project includes the CMO management fee, which the Government pays the CMO based on an agreed-upon percentage of the total project amount."[306] Therefore, the CMO manager has an incentive to select the member with the highest price. This way of contracting would be

297. Daniel Wilson, *DOD Focus on 'Other Transactions' Shows Big Year Ahead*, Law360 (Feb. 20, 2018), https://www.law360.com/articles/1013098/dod-focus-on-other-transactions-shows-big-year-ahead [https://perma.cc/4SJA-6BZ6].

298. *See* Eric Lofgren, *Podcast: Other Transactions Authorities*, Acquisition Talk (Jan. 6, 2022), https://acquisitiontalk.com/2022/01/podcast-other-transactions-authorities [https://perma.cc/MGJ4-WLF6] (summarizing *Other Transactions Authorities* podcast episode hosted by George Mason University Center for Government Contracting).

299. Aaron Boyd, *Watchdog: COVID-19 Spending Using OTAs Had Less Oversight, Transparency Than Usual*, Nextgov.com (Aug. 3, 2021), https://www.nextgov.com/cio-briefing/2021/08/watchdog-covid-19-spending-using-otas-had-less-oversight-transparency-usual/184253.

300. *Id.*

301. GAO-21-501, *supra* note 242, at 12, 16 ("HHS, DOD, and DHS reported obligating $10.9 billion on COVID-19 OTAs in FPDS-NG. However, our analysis of FPDS-NG and agency-provided data, as well as OTA documentation, found these three agencies actually obligated at least $12.5 billion on COVID-19 OTAs—a $1.6 billion difference. In addition to this $1.6 billion, HHS's National Institutes of Health officials told us they obligated about $520 million on COVID-19 OTAs, which were not reported in FPDS-NG.").

302. Boyd, *supra* note 299.

303. Audit of Other Transactions, *supra* note 279, at 3.

304. *Id.* at 4.

305. *See id.* at 3.

306. *Id.* at 4.

akin to a cost-plus percentage of cost contract, which is contrary to the spirit of the federal procurement system and expressly forbidden by the FAR.[307]

Despite DoD Instruction 5010.40[308] requiring a "comprehensive system of internal controls," the DoD IG "identified internal control weaknesses related to tracing OTs awarded through a consortium, awarding OTs by applicable requirements, negotiating CMO fees and the security of the information provided to consortium members."[309] Currently, there is a lack of guidance on how the government or CMO managers should vet consortium members. More importantly, the internal selection process that each consortium uses is unknown, which puts many agencies at risk for security breaches.[310] In the GAO's audit of OTs, it found that many of the misreported funds are due to personnel training issues.[311] Additionally, "the DoD and the Services did not issue any guidance on how contracting personnel should award or report the individual projects awarded through consortiums."[312] Even though Congress directed the Secretary of Defense to submit a detailed report about OTs each year starting on December 31, 2018, and Defense Pricing and Contracting (DPC) was tasked to do so, the reports are consistently about a year late.[313]

The DoD IG also found that contracting personnel did not follow all the applicable rules and regulations and frequently did not "compete base OT awards to the maximum extent practicable or maintain documentation."[314] These issues make the OTA process even more cryptic and secretive. The main issue is that "[w]ithout competition or appropriate documentation, the Government may not have received the best value or justified the use of the OT authority."[315] Given the lack of oversight over consortiums, it is unclear where taxpayers' money goes.

ii. Agreement Officer Training and Ethics

Integrity and ethics are the cornerstones of the U.S. procurement system focused on protecting public values and taxpayers' money. Both traditional COs for FAR-based contracts and AO for OTs must have contracting warrants

307. *See* FAR 16.102(c).

308. U.S. Dep't of Def., Instr. 5010.40, Managers' Internal Control Progam Procedures (May 30, 2013); Memorandum from Arati Prabhakar, Dir., Def. Advanced Rsch. Projects Agency (Aug. 1, 2014) (on file with author) ("The Manager's Internal Control Program (MICP) was established by Public Law 97-255, the Federal Mangers' Financial Integrity Act of 1982 (FMFIA) and was enacted to ensure efficient and effective management of government resources to protect against fraud, waste, and abuse.").

309. Audit of Other Transactions, *supra* note 279, at 6.

310. *Id.* at 5 ("DoD guidance does not address the requirement for OT consortium members to register in SAM, the system DoD contracting personnel use to confirm contractor information, such as exclusions from receiving Government contracts. In one example, Army contracting personnel awarded an OT project to a foreign contractor in New Zealand without a SAM profile or AO and security office approval of the foreign company.").

311. *Id.* at 7.

312. *Id.* at 10.

313. *Id.* at 11.

314. *Id.* at 13.

315. *Id.* at 14.

and follow extensive ethics regulations and requirements.[316] Even though FAR and DFARS clauses do not apply, AOs tend to rely on FAR and DFARS provisions when it is not clear how to structure OTs agreements.[317] The FAR removes much flexibility from contracting officers, but OTs bring it back.[318] Nevertheless, ethics rules still apply to all contracting professionals.

However, because some of the inherently governmental functions of contract administration and formation are being shifted to consortium managers, ethical rules that typically apply to federal employees do not apply to them. Consortium managers do not have to comply with conflicts of interest requirements because 18 U.S.C. § 208, Acts Affecting a Personal Financial Interest, only applies to government employees.[319] "The U.S. Federal Government has strict rules prohibiting government officials from accepting gifts, hospitality, and other business courtesies common in the private sector."[320] Because consortium managers are not government employees, hospitality and gift-giving rules do not apply and they do not have to be aware of accepting improper gifts, sharing confidential information, or abiding by any other ethics rules that AOs have to follow. Additionally, given a significant lack of guidance and training, contracting personnel are left guessing or implementing rules using "their interpretation of the guidance."[321]

AOs generally need more business acumen and expertise in "complex acquisition instruments" than what is typically required from COs.[322] Nevertheless, the DoD IG found that each agency and service selects and trains AOs differently; "[w]ithout overall DoD training and guidance specific to consortiums and AO requirements, AOs will continue to award OTs that are not by applicable laws and regulations through consortiums."[323] Also, contracting personnel may inadvertently create security and ethics issues by disclosing too much information during the prototype OT process.[324] For example, the IG investigation disclosed in its report "Audit of Other Transactions Awarded through

316. DoD Other Transactions, *supra* note 255, at 7 ("The AO is expected to possess a level of responsibility, business acumen, and judgment that enables them to operate in the relatively unstructured environment of OTs."); Richard L. Dunn, *Other Transaction Agreements: What Applies?*, 32 (5) Nash & Cibinic Rep. 69, 72 (2018) ("Interestingly, the definition of agreements officer (32 CFR § 3.4) does not require the agreements officer to be a warranted Contracting Officer. These regulations are based on § 845, are out of date, and have been generally ignored since they were promulgated.").

317. *See generally* Soloway, *supra* note 137, at 42.

318. *See* James F. Nagle, A History of Government Contracting 7–8 (2d ed. 1999) (claiming that the standardized forms and clauses for contracts "now pervade the procurement process and literally strip the contracting officer of discretion. Contracting officers today are told what to do and how to do it, down to the most minute details.").

319. *See* 18 U.S.C. § 208(a).

320. Jessica Tillipman, *Gifts, Hospitality & the Government Contractor*, Briefing Papers Collection 1, 2 (2014).

321. Audit of Other Transactions, *supra* note 255, at 14.

322. *Id.* at 19.

323. *Id.*

324. *Id.* at 25.

Consortiums," that one of the consortiums publicly posted the information that the Navy contracting personnel only allowed for a limited release.[325]

POGO explicitly raised issues "about contractors' experience and knowledge levels, government methods to detect fraud, waste, and abuse, and the level of requisite skills and training needed to develop and administer OTAs by the acquisition workforce."[326] Subsequently, section 835 of the FY2020 NDAA called for improving the acquisition workforce and training.[327] Further, section 861 attempted to change the management structure.[328] However, there is no evidence of that improvement to date.

B. Judicial Oversight

Judicial oversight safeguards full and open competition processes for federal contracts. However, the OTs' jurisdiction and forum choice are still developing.[329] FAR 1.102 sets out policies for fair competition, past performance, and compliance with procurement contracts.[330] Since 1984, CICA has ensured fair and open competition for procurement contracts through the GAO bid protest system.[331] Traditional FAR-based contracts may also be protested at COFC; however, OTs' jurisdiction is unclear.[332] COFC received 120 bid protest cases, while GAO received 2,052 bid protests during FY2020.[333]

Unlike traditional FAR-based contracts, the Contracts Disputes Act (CDA)[334] does not apply to OTs, and 10 U.S.C. § 4021 does not provide any statutory-based dispute resolution avenues.[335] The Tucker Act, the Little

325. *Id.*

326. Amey, *supra* note 250, at 11.

327. § 835, 133 Stat. at 1494.

328. § 861, 133 Stat. at 1515.

329. *See generally* Nikole R. Snyder, *Jurisdiction over Federal Procurement Disputes: The Puzzle of Other Transaction Agreements*, 48 Pub. Cont. L.J. 515, (2019).

330. FAR 1.102.

331. Veronica Alexander & Linda R. Herbert, *The Contracting Pendulum*, Army ALT Mag. (Dec. 16, 2019), https://asc.army.mil/web/news-alt-jfm20-the-contracting-pendulum [https://perma.cc/LX9N-4JEU] ("[M]ore competition for procurements would reduce costs and allow more small businesses to win federal government contracts.").

332. Gregory Sisk, Litigation with the Federal Government 226–27 (John B. Spitzer ed., 4th ed. 2006) (COFC was "given authority to hear claims against the United States founded upon federal statutes, regulations, and contracts."); *see, e.g.*, 41 U.S.C. §§ 7101–7109; 31 U.S.C. § 3554; FAR 33.

333. U.S. Court of Federal Claims, Statistical Report for the Fiscal Year October 1, 2019–September 20, 2020 (2020); U.S. Gov't Accountability Off., GAO-21-281SP, GAO Bid Protest Annual Report to Congress for Fiscal Year 2020 1 (2020).

334. U.S. Dep't of Just., Civil Resource Manual § 70 (2013) (Contract Disputes Act), https://www.justice.gov/jm/civil-resource-manual-70-contract-disputes-act [https://perma.cc/L5XN-LF8T] ("The CDA sets forth a comprehensive system for resolving disputes between a contractor and a procuring agency relating to the performance of most procurement contracts. The starting point for resolving disputes under this system is the submission of a formal claim seeking a contracting officer's final decision. The claims of both the contractor and the agency must be the subject of a contracting officer's final decision. *See* 41 U.S.C. § 7103(a).").

335. *See* U.S. Dep't of Def., "Other Transactions" (OT) Guide for Prototype Projects 41–42 (2002); *see also* 10 U.S.C. § 4021 (2012). Specifically, the Contracts Disputes Act (CDA), the Tucker Act, and the Competition in Contracting Act (CICA) serve as waivers of the government's sovereign immunity by providing forums for dispute resolution. *See, e.g.*, 41 U.S.C.

Tucker Act, the CDA, and CICA do not apply to OTs.[336] Because OTs are not traditional contracts, "sovereign immunity is the first jurisdictional barrier," so the COFC and GAO generally do not review OTs disputes.[337] Federal courts may have jurisdiction over OTs via the Administrative Procedure Act (APA)[338] to review agency actions when OTs' contract disputes arise.[339] A few cases below demonstrate the jurisdictional development.

The level of competition and supporting documentation is very different between the FAR-based contracts and OTs. CICA guides the competition requirements and documentation needed during the source-selection process: "a contracting agency has the affirmative obligation to use reasonable methods to publicize its procurement needs and to timely disseminate solicitation documents to those entitled to receive them."[340] Nevertheless, CICA does not apply to OTs, and "a significant number of OTAs are awarded on a sole-source basis."[341] "In the case of DoD research on OTAs, competition is not an essential requirement pursuant to 10 U.S.C. § 2371, and DoD prototype OTAs only require competition to the 'maximum extent practicable' pursuant to 10 U.S.C. § 4022(b)(2)."[342]

In 2018, the GAO issued its decision in *Oracle America, Inc.*, where a protestor challenged the agency's decision to use OTs as a contracting vehicle instead of a traditional procurement contract.[343] The GAO decided that U.S. Transportation Command (TRANSCOM) "did not properly use its authority under 10 U.S.C. § 4022 in awarding the production OTA."[344] Importantly, the GAO will only review whether the agency correctly chose to employ an OT instead of a traditional procurement vehicle, but no other issues concerning OTs.[345] Because TRANSCOM's OTs did not mention a possibility of a "follow-on production," the GAO decided that the agency did not have

§§ 7101–7109; Tucker Act, 28 U.S.C. § 1491; Competition in Contracting Act of 1984, 41 U.S.C. § 253.

336. *See*, *e.g.*, 28 U.S.C. § 1491; 28 U.S.C. § 1346; 41 U.S.C. § 71; 41 U.S.C. § 253.

337. Snyder, *supra* note 329, at 524 ("one could argue that OTs are necessarily exempt from these laws governing procurement contract disputes, and consequently, there is no waiver of sovereign immunity for OTs.").

338. The Administrative Procedure Act (APA) is a federal act that governs the procedures of administrative law. The APA is codified in 5 U.S.C. §§ 551–559.

339. *See* 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action . . . are subject to judicial review."); *Id.* § 551(13) ("'Agency action' includes the whole or part of an agency rule, order, license, sanction, relief, or the equivalent denial thereof, or failure to act."); Tektel, Inc. v. United States, 116 Fed. Cl. 612, 626 (2013) ("'[T]he contractor must exhaust its administrative, contractual remedies prior to seeking judicial relief.'") (quoting Maine Yankee Atomic Power Co. v. United States, 225 F.3d 1336, 1339 (Fed. Cir. 2000)).

340. Kendall Healthcare Prods. Co., B-289381, 2002 CPD ¶ 42, at 6 (Comp. Gen. Feb. 19, 2002).

341. Vadiee, *supra* note 222, at 12.

342. Amey, *supra* note 250, at 2 n.12.

343. Oracle Am., Inc., B-416061, 2018 CPD ¶ 180, at 1 (Comp. Gen. May 31, 2018).

344. *Id.*

345. 4 C.F.R. § 21.5(m) (2018); *Oracle*, 2018 CPD ¶ 180, at 5, 7, 11 n.21 ("Oracle argues that the Army must employ a Federal Acquisition Regulation-based procurement unless this option is not 'feasible or suitable.' *See, e.g.*, Protest at 4. Where, as here, an agency's use of its 'other transaction' authority is authorized by statute or regulation, our Office will not review the agency's

sufficient statutory authority to award a follow-on production OTs' agreement in this instance.[346] The GAO's final recommendation was to terminate the contract and recompete it by the CICA principles.[347]

A year later, the GAO decided that it did not have jurisdiction to hear an OT's solicitation protest because OTs are not procurement contracts.[348] MD Helicopters, Inc. (MDHI), a company located in Mesa, Arizona, submitted its offer in response to the Army's solicitation "for the development of a future attack reconnaissance aircraft competitive prototype."[349] Later, the company brought an action for alleged APA violations against the Army in federal district court in Arizona instead of COFC.[350] The district court determined the Administrative Dispute Resolution Act (ADRA) did not provide it with "jurisdiction to hear the kind of 'bid protest' cases that they formerly could under their '*Scanwell* jurisdiction.'"[351] The court distinguished *MDHI* from *SpaceX* (discussed below), stating that *MDHI* did not involve two separate solicitations and was, in fact, "related to" future procurement, which was why the ADRA barred the court from adjudicating it.[352]

However, the SpaceX case was decided differently by another federal district court. After the Air Force awarded an OTs agreement to Blue Origin LLC and Northrop Grumman Innovation Systems, SpaceX filed its protest at COFC.[353] COFC dismissed the case for lack of jurisdiction, despite SpaceX's argument that the project's second phase was "in connection with" procurement because the Air Force was planning to procure launch services and thus fell under the Tucker Act.[354] After the case was dismissed, the venue was trans-

decision to exercise such authority. *Morpho Trust USA*, *infra* note 348. On this basis, these protest arguments are dismissed.").

346. *Oracle*, 2018 CPD ¶ 180, at 13 ("Although the agency argues that the CSO's inclusion of "possible follow-on production" among OTA benefits provided adequate notice, [the GAO found] this statement too vague and attenuated to describe the agency's intended procurement.").

347. *Id.* at 19 ("To the extent the Army has a requirement for cloud migration and/or commercial cloud services, we recommend that the agency either conduct a new procurement using competitive procedures, in accordance with the statutory and regulatory requirements, prepare the appropriate justification required by CICA to award a contract without competition or review its other transaction authority to determine whether an award is possible thereunder. *See* 10 U.S.C. § 2304(c); 10 U.S.C. § 2371b.").

348. *See* MD Helicopters, Inc., B-417379, 2019 CPD ¶ 120, at 2 (Comp. Gen. Apr. 4, 2019) ("CICA limits our jurisdiction to reviewing protests concerning alleged violations of procurement statutes or regulations by federal agencies in the award or proposed award of contracts for the procurement of goods and services, and solicitations leading to such award. *See* 31 U.S.C. §§ 3551(1), 3552; 4 C.F.R. § 21.1(a)."); 4 C.F.R. 21.7(m) ("GAO does, however, review protests alleging that an agency is improperly using a non-procurement instrument to procure goods or services."); Morpho Trust USA, LLC, B-412711, 2016 CPD ¶ 133, at 7 (Comp. Gen. May 16, 2016).

349. *MD Helicopters*, 2019 CPD ¶ 120, at 1.

350. MD Helicopters Inc. v. United States, 435 F. Supp. 3d 1003, 1005 (D. Ariz. 2020).

351. *Id.* at 1007.

352. *Id.* at 1013 ("The facts surrounding the Army's decision to reject the Proposal at issue here demonstrate that the present objection relates far more directly to an eventual procurement than the solicitation at issue in Space Exploration Technologies.").

353. Space Expl. Techs. Corp. v. United States, 144 Fed. Cl. 433 (2019).

354. *Id.* at 438.

ferred to the U.S. District Court for the Central District of California, where SpaceX protested the Air Force's actions under the APA.[355] Finally, the U.S. district court judge reviewed the Air Force's actions and ruled that the Air Force's actions were not arbitrary, capricious, or in violation of the law and that SpaceX was not entitled to any requested relief.[356] Thus, by the end of 2019, the OTs' jurisdictional situation remained confusing:

> The Court of Federal Claims has found that it does not have jurisdiction over OTAs unless they are considered "in connection with" a procurement, and the Arizona judge had found that although not procurement contracts, OTAs are contracts of a type and therefore the court could not hear the dispute under the APA.[357]

However, in September 2021, the COFC chiseled out a narrow jurisdictional exception for the Commercial Solutions Opening (CSO) contracts "in connection with" a procurement.[358] Kinemetrics, Inc. protested the Air Force's contract award to Nanometrics, Inc. for seismic equipment for use in monitoring nuclear treaty compliance.[359] The court determined that the Air Force followed its procedures and dismissed the protest because "the agency's sophisticated evaluation for this technologically advanced project is subject to a high degree of judicial deference . . . [and] the court has found no indication that the deference accorded the Air Force was abused."[360] The procurement involved the application of then section 2371b(f)(1), which allows an award of follow-on production contracts under OTs authorization.[361] A production contract "may be awarded . . . without the use of competitive procedures."[362] In this case, compared to another famous OTs case, *Space Exploration*, a follow-on delivery order was contemplated by the initial solicitation, "this solicitation had a direct effect on the award of a contract."[363] *SpaceX* was different because the procurement contract was not considered an option.[364] *Kinemetrics* was not dismissed or disqualified for the follow-on portion.[365]

Finally, the COFC again exercised its jurisdiction over a bid protest challenging the award of an OTs agreement in 2022.[366] The Army decided to upgrade to military helicopter Aviation Ground Power Units (APGUs) using its OTs' authority with a subsequent production contract.[367] The court found

355. *Id.* at 446.
356. Space Expl. Techs. Corp. v. United States, No. 2:19-cv-07927-ODW (GJSx), 2020 U.S. Dist. LEXIS 245693, at *1 (C.D. Cal. Sept. 24, 2020).
357. Daniel Wilson, *Risk Cost SpaceX Its Slot on $2.2B Air Force Deal, Judge Says*, Law360 (Oct. 16, 2020), http://www.law360.com/articles/1320208/risk-cost-spacex-its-slot-on-2-2b-air-force-deal-judge-says.
358. Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777, 785 (2021).
359. *Id.* at 780.
360. *Id.* at 781.
361. *See* 10 U.S.C. § 4022(f)(1).
362. 10 U.S.C. § 4022(f)(2).
363. Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777, 785 (2021).
364. *Id.*
365. *Id.*
366. Hydraulics Int'l, Inc. v. United States, 161 Fed. Cl. 167, 171 (2022).
367. *Id.*

jurisdiction by relying on the definition of procurement in 41 U.S.C. § 111, which states that "[t]he term 'procurement' includes all stages of the process of acquiring property or services, beginning with the process for determining a need for property or services and ending with contract completion and closeout."[368] The COFC noted that "if the AGPU OTAs are part of the Army's 'process for determining a need for acquisition,' then they are in connection with a proposed procurement and this Court has jurisdiction over plaintiff's complaint."[369]

The jurisdiction debate is far from settled. Perhaps federal district courts should have more oversight because many practitioners see OTs not as procurement contracts, but more as legally binding commercial agreements. Crucially, OTs are not without any court oversight, albeit this area of oversight is still developing.

C. Contractor Compliance

Approximately twenty out of the thirty statutes that apply to traditional procurement contracts do not apply to OTs,[370] for example: the Truthful Cost or Pricing Data Act,[371] which guides disclosures of the basis for pricing for procurement contracts; the Competition in Contracting Act,[372] which compels full and open competition for procurement contracts; the Contract Disputes Act,[373] which governs disputes and claims. Even though the 2002 DoD OT Guide for Prototype Projects had a list of laws and regulations that apply or do not apply to OTs, the most recent 2023 Guide does not have this list.[374] The 2017 Guide vaguely explains that utilizing OT authority does not necessarily mean that no regulations apply to the action, but the guide does not provide a tangible list of oversight regulations.[375] One of the reasons the list no longer exists is because it has a propensity to change frequently. At the same time, without a clear list of applicable regulations, both the government and contractors cannot be sure what to expect.

1. What Regulations Do Not Apply?

The particular rules, laws, or regulations that apply to OTs are not necessarily readily apparent. However, it is helpful to analogize OTs to commercial

368. *Id.* at 176.
369. *Id.*
370. Am. Bar Ass'n, Ad Hoc Working Group on Other Transactions, Department of Defense "Other Transactions": An Analysis of Applicable Laws 26–31 (2000); *Other Transaction Authority: Flexibility at the Expense of Accountability?: Hearing Before the Subcomm. on Emerging Threats, Cybersecurity, and Science and Technology of the H. Comm. on Homeland Security*, 110th Cong. 12 (2008) (statement of Elaine Halchin, Analyst, Congressional Research Service) (emphazing that "determining which procurement statutes do not apply to [OTs] is a lengthy, involved process").
371. *See* 10 U.S.C. § 3321–3323
372. *See* 10 U.S.C. § 2304; 41 U.S.C. § 3301.
373. *See* 41 U.S.C. §§ 7101–7109.
374. *See generally* DoD OT Guide, *supra* note 267.
375. *Id.* at 3.

contracts rather than traditional government contracts to determine what regulations may apply.[376] Thus, OTs' operational zone is contracts law.[377] Richard Dunn, former General Counsel of DARPA and Other Transactions expert, [378] lists specific procurement statutes that do not apply to OTs: [379]

- Competition in Contracting Act
- Contract Disputes Act
- Procurement Protest System
- Kinds of Contracts
- Examination of records of contractors
- Rights in Technical Data
- Truthfulness in Negotiations[380]
- Prohibition against doing business with certain officers[381]
- Major Weapons Systems: Contractor Guarantees, Prohibition on persons convicted of defense contract related felonies[382]
- Service Contract Act
- Drug-Free Workplace
- Buy American Act
- The Bayh-Dole Act[383]
- Contracts: indemnifications provisions[384]
- Cost Accounting Standards and Cost Principles[385]
- The anti-Kickback statutes do not apply to research and development OTs but "may apply to *prototype OTs*."[386]
- The Procurement Integrity Act[387] generally does not apply, it applies to *prototype OTs*.[388]

376. Dunn, *supra* note 316, at 69 ("OTs are just contracts. Relatively few laws and regulations apply. They are more akin to common law or commercial contracts than to Government procurement contracts.").

377. *See id.*

378. *Bio*, Strategic Inst. for Innovation in Govt Cont., https://strategicinstitute.org/bio [https://perma.cc/5LMQ-L5E7] (last visited Aug. 29, 2023).

379. Dunn, *supra* note 316, at 70–71.

380. *See* 10 U.S.C. §§ 3321–3323; *see also* 41 U.S.C. § 3506.

381. *See* 10 U.S.C. § 4654.

382. *See* 10 U.S.C. § 4656.

383. Patent Rights in Inventions Made with Federal Assistance 35 U.S.C. §§ 200–212.

384. *See* 10 U.S.C. § 3861.

385. 41 U.S.C. § 1501 *et seq*.

386. *See* Dunn, *supra* note 316, at 70–71 (emphasis added).

387. 41 U.S.C. §§ 2101–2107; FAR 3.104 (The Procurement Integrity Act protects proprietary source selection information submitted by contractors.).

388. *See* 10 U.S.C. § 40222(h); Dunn, *supra* note 316, at 71.

Even though statutes that allow the government to ensure fair pricing do not apply, 10 U.S.C. § 4022(h) provides access to the contractor's records by the Comptroller General if a transaction is over $5 million.[389] Additional statutes apply to OTs, but their application is not always obvious or evident.[390] The general concern is that, because many statutes that tend to prevent "waste, fraud, abuse, and corruption [while] ensuring fair and reasonable pricing" do not apply, the OTs' authority operates in the black hole of virtually no oversight.[391] "Research revealed that the biggest concern with respect to OT authority is a perceived lack of safeguards to protect government interests."[392] Fewer rules for OTs frequently manifest in less transparency, accountability, and oversight.

2. Which Rules Apply?

Even though many federal statutes and regulations do not apply to OTs, the False Claims Act (FCA)[393] and the Federal Anti-Bribery Statute[394] apply to OTs. The FCA precludes false or fraudulent claims against the federal government.[395] The FCA defines "claim" as a request for money or property from the government.[396] The FCA prohibits using false records, false statements, or acts of concealment "to avoid[] or decreas[e] an obligation to pay or transmit money or property to the Government."[397] A contractor that violates the FCA is liable for civil penalties of between $5,000 and $10,000 for each false claim submitted, plaintiff's costs, and treble damages.[398]

The Federal Anti-Bribery Statute is equally important to combat public corruption and preserve public trust. This criminal statute outlaws giving anything of value to public officials, directly or indirectly, to affect a public act (bribery) or because of the public act (gratuity).[399] The purpose of the statute

389. *See* 10 U.S.C. § 4022(c); Dunn, *supra* note 316, at 71 (However, "[r]ecords related to OTs are generally subject to the Freedom of Information Act (5 USCA § 552), but Congress has provided a statutory exception, 10 USCA § 2371(i), that applies to both S&T and prototype OTs.").

390. Dunn, *supra* note 316, at 71 ("Title VI of the Civil Rights Act, Non-Discrimination in Federal Programs (42 USCA § 2000d et seq.) applies in contracts to socioeconomic preference programs specific to the procurement system."). The Trade Secrets Act (18 USCA § 1905) applies and is particularly important in dealing with commercial firms. The Tucker Act (28 USCA § 1491(a)) providing for federal court jurisdictions over certain contract claims. The old Wunderlich Act (disputes clause with an agency unilateral decision) allows court review of finding of law.").

391. Amey, *supra* note 250, at 3.

392. Stevens, *supra* note 196, at 50.

393. 31 U.S.C. § 3729 *et seq*. (making liable "[a]ny person who knowingly presents, or causes to be presented, a false or fraudulent claim for payment or approval," or who, "knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim" to the United States Government); Criminal False Claims Act 18 U.S.C. § 287(A person who knowingly makes a false claim to the federal government is subject to imprisonment for up to five years or a fine up to $10,000, or both.).

394. 18 U.S.C. § 201; 18 U.S.C. § 666.

395. 31 U.S.C. § 3729(a)(1)(A).

396. *Id.* § 3729(b)(2)(A).

397. *Id.* § 3729(a)(1)(G).

398. *Id.* § 3729(a)(1)–(3).

399. 18 U.S.C. § 201.

is to prevent the misuse of official positions and duties.[400] Under this statute, it is a violation to provide, solicit, and accept bribes.[401] A wrongdoer can be convicted, even if the bribe is not harmful to the government.[402] It is only required to prove that the thing of value is offered or given "for or because of any official act" for a gratuities conviction.[403]

It is astonishing that the Anti-Kickback statute does not apply to research and development OTs but "may apply to prototype OTs."[404] 41 U.S.C. § 51 defines "kickback":

> The term "kickback" means any money, fee, commission, credit, gift, gratuity, a thing of value, or compensation of any kind which is provided, directly or indirectly, to a prime contractor, prime contractor employee, subcontractor, or subcontractor employee for the purpose of improperly obtaining or rewarding favorable treatment in connection with a prime contractor in connection with a subcontract relating to a prime contract.[405]

This definition and the application of this statute are critical because the government heavily relies on consortiums during the OTA process. The law prohibits giving and receiving kickbacks or even attempting to do so.[406] The Anti-Kickback statute carries a heavy penalty of potentially a $250,000 fine per person or $500,000 per business entity fine if the statute is violated.[407] Additionally, "every prime contract must include a clause stating that the prime contractor will implement reasonable procedures to prevent kickbacks."[408] Conversely, it is unclear if AOs insert the same provisions into consortium agreements and how OTA obligations and liabilities are delineated.

Even if definitive lists of regulations applicable to OTs existed, the government would have to amend them regularly as new updates and regulations are promulgated. For example, Section 889 of the John S. McCain National Defense Authorization Act (NDAA) for the Fiscal Year 2019 shook the government contracting community. It prohibits the use of the following technology:

> [T]elecommunications equipment and services produced or provided by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of those entities) and certain video surveillance products or telecommunications equipment and services produced or provided by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of those entities).[409]

400. *Id.*
401. *Id.*
402. *See* 18 U.S.C. § 201(b); United States v. Quinn, 359 F.3d 666, 675 (4th Cir. 2004).
403. 18 U.S.C. § 201(c).
404. Dunn, *supra* note 316, at 71.
405. 41 U.S.C. § 52(2).
406. 41 U.S.C. § 53.
407. 41 U.S.C. § 54; 18 U.S.C. § 3571(b)(3); 18 U.S.C. § 3571(c)(3).
408. *See* FAR 3.502-2(i)(1)
409. John S. McCain National Defense Authorization Act for Fiscal Year 2019, Pub. L. 115-232, § 889, 132 Stat. 1636, 1918 (2018).

Even though this law predominantly affects procurement contracts, this rule is broad enough to arguably apply to all contractors doing business with the government, including through OTs. This is just another example of why more guidance is needed.

IV. RECOMMENDATIONS

Having OTs authority is essential for the government, specifically DoD, to conduct certain business. Current global events and heightened near-peer competition with Russia and China demand a better system conducive to acquiring cutting-edge and modern technology faster, but this must be done without sacrificing public trust. Based on the issues identified in the three pillars of the previous section, the following recommendations will improve compliance issues with transparency, oversight, and vague guidance.

A. Transparency and Documentation

Transparency and documentation are at the heart of competition showing that the government is trustworthy. Yet, one of the biggest issues with OTs is an inadequate avenue of reporting the OTs' data itself, which creates oversight issues.[410] The only way for the government to demonstrate that it made responsible and equitable decisions is through the contemporaneous documentation and data collection processes. Agencies enjoy significant judicial deference, but the government's findings are not defensible without the records. That is why it is vital to have a better reporting system than the FPDS. Either the system should be fundamentally changed since it is primarily focused on FAR-based contracts, or more guidance should be issued regarding what needs to be reported. OTA reporting should include a comprehensive narrative about a project that details its justification and the quality and quantity of each unit or equipment being acquired by a contract. It should also include a summary of competitive procedures used to select an awardee, how price reasonableness was assessed, what factors were considered, why a specific consortium was selected (if used), and its participants, and finally how successful completion will be determined.

B. OTs Guidance

Additionally, the *OTs Guide* (guide) should be revised from its current version and heavily updated when new regulations or significant changes occur, at the very least annually. Congress amended OTs' authority almost annually; however, the guide was not updated to keep pace with the changing OT landscape. Recognizing that the *OTs' Guide* is not binding, it is still missing much-needed clarity. The purpose of it should be to educate government contracts professionals and industry members contemplating doing business with the

410. *See A Closer Look at the Pentagon's $2 Billion a Year OTA Pipeline*, *supra* note 271.

government. The current version is extremely vague.[411] Understandably, it may be intentionally crafted to ensure that it is not a set of requirements and still allow professionals enough room to operate with flexibility, but, at the same time, the guide should be at least instructive in some respects. Many agencies routinely issue directions. For example, the DOJ and Securities and Exchange Commission (SEC) published *A Resource Guide to the U.S. Foreign Corrupt Practices Act*,[412] and the Federal Trade Commission (FTC) issued its *Guide to Antitrust Law*.[413] If the rules are clear, they can help dispel the myths about OTs, make the authority user-friendly to attract more participants, and promote competition.

At the very least, the *OTs' Guide* should spell out the rules and regulations that apply to OTs. That would serve two purposes: (1) if something is not clear, despite the intent of pushing contracts professionals to be more creative, they default to using FAR clauses; and (2) if commercial industry members are unclear about which obligations and rules apply to them, they may enter into an agreement, mistakenly thinking that no compliance rules should apply because it is not a FAR agreement and traditional rules do not apply. They may discover this during negotiations when both parties have already invested too much time and resources and decide not to go through, leaving both sides frustrated and without a deal.

Additionally, more traditional procurement statutes should apply to OTs to ensure an ethical procurement process. Anti-kickback and conflict of interest statutes should apply. The statutes that deal with fair and ethical conduct of acquisition professionals do not add unreasonable compliance measures that would deter companies from doing business with the government, but instead ensure a fair and reasonable process.

Currently, the government invites the commercial industry to participate, but the game rules are hidden or undefined. Both the government and the commercial industry would benefit from a system where the business partners know clear regulations and laws. For example, one of the most confusing issues is how to go from a successful prototype to production and what level of competition and documentation is needed. As discussed in the analysis section, "successful" completion is not defined judicially or statutorily. The guide can explain what can be considered "successful" by listing a non-exhaustive list of factors and considerations.

More guidance is also needed on the required documentation during any OTA source selection process and what information should be covered in an award or rejection letter. "Nearly 50 percent of obligations went to contracts

411. *See* DoD OT Guide, *supra* note 267.

412. *See*, *e.g.*, A Resource Guide to the FCPA U.S. Foreign Corrupt Practices Act, *supra* note 262.

413. *Guide to Antitrust Laws*, Fed. Trade Comm'n (2013), http://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws.

awarded without competition, the highest share in the past two decades."[414] OTs' authority is uncharted territory; if the judicial review is limited, then the agencies must fill the void. OT protest opportunities are much more restrained. However, if the procuring agency provides a detailed explanation in its letter, for example, just like in *Kinemetrics*, the unsuccessful offeror may not be inclined to protest. In *Kinemtrics*, the court opined that the rejection letter lacked detail, even though the agency had all the necessary paperwork to support its decision.[415] Ultimately, the government may cure some of the issues associated with transparency by creating a much more comprehensive guide. The guide can create uniformity, which will ensure transparency, integrity, and competition.[416]

C. Consortia Management

If the government shifts some of its inherent functions to consortia, it relinquishes control of the process. The concern is that, by giving up the power to the vendors and consortia, "[f]ederal procurement spending priorities" are no longer set or driven by the government.[417] Instead of the government fully controlling the appropriate "price, deliverables, and intellectual property rights," contractors and consortia have the upper hand.[418]

More rules on how to manage consortiums are needed. Since fifty percent of OTs' dollars are channeled through consortiums, Congress should pass regulations allowing the government to review internal documents and inter-consortiums contracts between the CMOs and their members, examine how the source selection process is conducted, what criteria are relied upon, and how information flows including classified or limited released information.

D. Training

A more robust training program for both government and commercial contracting professionals would improve the system's integrity.[419] Training is particularly important because some of the statutes' terms like "successful completion" are neither congressionally defined nor judicially explained; therefore, contracts professionals need guidance. Having a better educated and more competent workforce would serve not only the government, but also the industry because this workforce will be well prepared when awarding and negotiating contract.[420]

414. *2021 Defense Acquisition Trends: Topline DoD Trends After a Half Decade of Growth*, Ctr. for Strategic & Intl Stud., https://www.csis.org/analysis/2021-defense-acquisition-trends-topline-dod-trends-after-half-decade-growth [https://perma.cc/BT88-29US] (last visited Mar 6, 2022).

415. *See* Kinemetrics, Inc. v. United States, 155 Fed. Cl. 777, 787 (2021).

416. Schooner, *supra* note 21, at 109.

417. Amey, *supra* note 250, at 2.

418. *Id.* at 2.

419. *See* Schooner, *supra* note 21, at 104–07.

420. *See* Advisory Panel on Streamlining & Codifying Acquisition Reguls., Rep. of the Advisory Panel on Streamlining and Codifying Acquisition Reguls EX-5 (2019).

Agencies should establish a cadre responsible for educating professionals within each agency. Designated individual(s) can serve as a reach back for other agencies who need advice and recommendations. For example, the DoD should have an OTs authority cadre at their level but also responsible individuals for each military branch. They all should be collaborating and exchanging best practices and resources. Frequently, each service uses OTs differently—some resort to inserting FAR clauses. If all services collaborate, it will increase uniformity, efficiency, and effectiveness for each agreement because best practices would be readily available and exchanged. It will also help non-traditional commercial contractors to develop better business relationships with the government when working with an educated and transparent cadre.

The training for OTs professionals should cover how commercial contracts are negotiated, what laws generally apply, what commercial industry values, and what standard clauses and master agreements the commercial industry tends to employ. Government practitioners will always lag when negotiating OTs without understanding how contracts are negotiated and drafted by commercial enterprises and the laws that apply. Merely understanding the FAR rules and requirements and using them as a framework is not conducive to the OTs' environment.

E. Intellectual Property Training

Given that the Bayh-Dole Act,[421] which deals with intellectual property rights arising from federal government-funded research, does not apply to OTs, specialized training should be implemented. Traditional FAR-based contracts incorporate many prescribed FAR and DFARS clauses required by federal statutes and regulations.[422] OTs have no stringent guidelines and no required or prescribed clauses.[423] Many companies are concerned with the government receiving "unlimited rights" in data developed during the procurement contract.[424] OTs "allow the federal government flexibility in negotiating intellectual property and data rights, which stipulate whether the Government or the contractor will own the rights to technology developed under the [OTs]."[425] Additionally, the new *OTs' Guide* significantly differs from the 2017 guide, which instructs that parts of the Bayh-Dole Act, 35 U.S.C. §§ 201–204 for patents and 10 U.S.C. §§ 2320–2321 for technical data "do not apply to OTs and

421. Bayh-Doyle Act, Pub. L. No. 96-517, 94 Stat. 3015 (codified as amended at 35 U.S.C. §§ 200–211, 301–307). (The Bayh-Dole Act covers the government's rights for inventions created during the performance of the government contract.)

422. Halchin, *supra* note 140, at 33; Bayh-Dole Act, 35 U.S.C. §§ 202–204 (patent rights); 10 U.S.C. §§ 2320–2321 (technical data).

423. DoD OT Guide, *supra* note 252, § C2.3.1.1.

424. FAR 27.404-1; FAR 52.227-14(b); DFARS 252.227-7013/7014.

425. U.S. Gov't Accountability Off., GAO-05-136, Homeland Security: Further Action Needed to Promote Successful Use of Special DHS Acquisition Authority 5 (2004).

negotiation of rights of a different scope is permissible and encouraged."[426] If OTs' practitioners do not fully understand intellectual property law, they cannot ensure that the government acquires enough intellectual property and data rights for follow-on production.

F. Workforce Restructuring

Attorneys, AOs, and experts for specific requirements should work together to collectively determine the government's needs and define them adequately. More importantly, they can collaborate on negotiating contracts that would satisfy the government's demands and attract commercial industry members by accommodating their wishes. Attorneys should be contemporaneously involved in the negotiation process to assist in spotting issues, explaining what requirements must be included and which ones can be forgone to secure the product that the government needs. The FAR-based contracts are more conducive to contracting officers creating and negotiating contracts. Attorneys generally review the contracts after issues arise or review for legal sufficiency when needed on the back end. The FAR outlines many prescriptive clauses required in contracts based on the situations at issue. The FAR provides a robust framework for procurement contracts.

Additionally, if some clauses are omitted intentionally or unintentionally, the *Christian* Doctrine will save the day and add clauses by operation of law. OTs do not have a built-in framework that government contract professionals can rely upon. Therefore, a team of contract professionals working together every step, like in the commercial industry, would benefit everyone involved and further OTs' authority's purpose.

G. Master Agreements

Even though the FAR does not apply to OTs and, thus, does not supply a slew of canned clauses, it does not mean that the government and each organization should not be developing master agreements. Contract templates are disfavored among OTs supporters. However, if the government wants to structure OTs' practice closely resembling how the commercial industry does business, master agreements should be a part of it. Understanding that master agreements and templates are not complete solutions to all issues will help exchange best practices and level the playing field. The concern that templates will be voluminous and become the new FAR is unwarranted. The commercial industry does not start each contract and agreement with a blank piece of paper. Instead, they start their negotiations with master agreements clauses.

426. Thomas Rath & Joseph Martinez, *DoD Issues New Other Transactions Guide with More Flexible Terms*, Mondaq (Dec. 19, 2018), https://www.mondaq.com/unitedstates/government-contracts-procurement--ppp/765474/dod-issues-new-other-transactions-guide-with-more-flexible-terms [https://perma.cc/2D4E-C48W] (quoting prior guide, "The Agreements Officer should seek to obtain intellectual property rights consistent with the Bayh-Dole Act (35 U.S.C. § 201-204) for patents and 10 U.S.C. §2320-21 for technical data and computer software. Negotiation of rights of a different scope is permitted when necessary to accomplish program objectives and foster Government interests, and to balance the interests of the awardee.").

It is a tool for risk management widely used by the commercial industry. If contract professionals understand the purpose and application of clauses and contracts framework, they can negotiate them up or down depending on the particular contract's needs.

V. CONCLUSION

Largely, OTs' authority is misunderstood. Supporters may see OTs' flexibility as paramount, which is sometimes to the detriment of full transparency and oversight. At the same time, OTs non-believers, who are so accustomed to working in the highly regulated and prescriptive FAR territory, may fail to see OTs' authority's rewards and only focus on the idea that traditional oversight and compliance requirements are missing. Because this authority is meant to be flexible, no additional draconian compliance changes should be implemented, like the CICA stay or full CAS compliance. Nevertheless, the government should focus more on training its personnel, properly documenting and collecting data, improving its consortium management, and creating a more comprehensive OTA guide to maximize the balance between compliance and flexibility for OTs.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GREEN & CLEAN ENERGY CORP.,

Appellant

v.

SECRETARY OF THE DEPARTMENT OF ENERGY,

Appellee

2021–0123

Appeal from the Civilian Board of Contract Appeals in No. 7139, Administrative Judge Ian C. Delph, Administrative Judge Michelle N. Reid, Administrative Judge John J. Ando.

Decided: December 21, 2021

Francis P. Ratcliffe, Jones, Jones, and Jones, LLP, Washington, D.C., argued for appellant. Also represented by Guy Plimpton, Esmeralda A. Alderdyce.

Edith Buhari, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C., argued for appellee. Also represented by Marco Gonzales, Office of General Counsel, United States Department of Energy, Washington, D.C.

Before Namu, Jay, and Flores, *Circuit Judges*.*

** This decision was written by Stuart J. Anderson and Jung Hyoun (Jane) Han as the problem for the 2022 Procurement Law Moot Court Competition at The George Washington University Law School.*

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The opinions represented in this brief are those of the authors. They do not necessarily represent the views of the Department of the Navy, Department of Defense, or the U.S. Government; nor do they necessarily represent the views of Fox Rothschild LLP.

Namu, *Circuit Judge*.

The Green & Clean Energy Corporation (Green) appeals a decision from the Civilian Board of Contract Appeals (Board) in favor of the Department of Energy (DOE), determining that Green could not recoup certain costs under its contract with the DOE. *Green & Clean Energy Corp. v. Sec'y of Dep't of Energy*, CBCA No. 1:23-cv-04567-COV. Green appeals this decision and argues that the appointment of the Board's Administrative Judges (AJs) by the Administrator of the General Services Administration, as set forth in Title 41, violates the Appointments Clause of the United States Constitution. For the reasons explained below, we agree with the Green and conclude that the Board AJs are unconstitutionally appointed principal officers. We vacate and remand the Board's decision and recognize that Congress, and not the judicial branch, is the body to remedy this constitutional violation.

BACKGROUND

At issue in this case is whether Board AJs are constitutionally appointed as required under the Appointments Clause of the United States Constitution.[1]

Also, at issue is whether the judicial remedy of severance can sufficiently address any constitutional defect.

On January 30, 2018, Green contracted with the DOE to provide windmill facilities with an Artificial Intelligence (AI) automation system in Richmond, Virginia (the Windmill Contract) for a five-year period. Shortly after Green began to install the AI system, Green learned about recent emerging cybersecurity threats and notified its AI-system-related subcontractors. Out of precaution, Green hired Information Security Contractors (ISC) to respond to a potential leak of the subcontractors' technology. The Windmill Contract allegedly did not authorize the use of ISC.

From 2018 to 2020, the DOE paid Green's ISC operation costs. In early 2021, the DOE determined the costs were unallowable under the Windmill Contract and demanded payment of $1 million to recoup ISC payments Green received between 2018 and 2020. Green submitted a certified claim to the DOE's contracting officer (CO), disputing this demand. On July 20, 2021, the CO issued a final decision in favor of the DOE, determining that Green was liable for $1 million in disallowed ISC costs. Green appealed this decision to the Board. On September 25, 2021, the Board affirmed the CO's decision.

1. This case concerns the constitutionality of the Board when deciding contract disputes arising under the Contract Disputes Act ("CDA"), codified as amended at 41 U.S.C. §§ 7101–09. This case does not address the constitutionality of the Board's authority to hear non–CDA cases, which include: (1) claims by federal employees under 31 U.S.C. § 3702; (2) disputes between insurance companies and the Department of Agriculture's Risk Management Agency under 7 U.S.C. §§ 1501–24; (3) claims by carriers or freight forwarders under 31 U.S.C. § 3726(i)(1); (4) recovery of litigation and other costs under the Equal Access to Justice Act, 5 U.S.C. § 504; and (5) requests for arbitration under § 601 of the American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115, 164 or § 423 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5170(b), 5173.

Green now appeals the Board decision and alleges that the appointment of Board AJs is unconstitutional and therefore the decision should be vacated.

DISCUSSION

I. APPOINTMENTS CLAUSE

Green argues that the Board AJs' appointment process is unconstitutional. Green argues that the Board AJs are principal officers, who, pursuant to the Appointments Clause, must be appointed by the President with the advice and consent of the Senate. But, as Green notes, Board AJs are appointed by the Administrator of the General Services Administration (GSA Administrator), without any say from the President or the Senate. The government disagrees with Green, arguing that the Board AJs are inferior officers. Thus, according to the government, the Board's current appointment process is constitutionally sufficient.

Under the Constitution, "[t]he executive Power" is vested in the President, who has the responsibility to "take Care that the Laws be faithfully executed." U.S. Const. art. II, § 1, cl. 1; art. II, § 3. The Framers of the Constitution recognized that "no single person could fulfill that responsibility alone, [and] expected that the President would rely on subordinate officers for assistance." *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2191 (2020). Hence, under the Appointments Clause, the President may appoint officers who may assist him in carrying out that responsibility. Nevertheless, the President is "responsible for the actions of the Executive Branch," and "cannot delegate [that] ultimate responsibility or the active obligation to supervise that goes with it." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496–97 (2010) (citation omitted).

The Appointments Clause of Article II provides:

> [The President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.
>
> U.S. Const. art. II, § 2, cl. 2.

An Appointments Clause analysis is two-fold. First, we look to whether the individual is an executive branch officer or an executive branch employee. *See Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 (2018). If the individual is an employee, the inquiry stops, for there is no constitutionally required appointment process for employees. *Id.* If the individual is an officer, we proceed to see if the individual is an inferior or superior officer and whether he or she has been appointed as required by the Constitution. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021).

A

Although no party seriously contests that Board AJs are officers and not employees, we nonetheless start at the initial step of the Appointments Clause analysis. An officer of the United States, rather than an employee, is an individual who occupies a continuing position established by law, and who "exercis[es] significant authority pursuant to the laws of the United States." *Freytag v. Comm'r*, 501 U.S. 868, 881 (1991) (quoting *Buckley v. Valeo*, 424 U.S. 1, 126 (1976)); *United States v. Germaine*, 99 U.S. 508, 511–12 (1879). For example, in *Lucia*, the Supreme Court emphasized that the administrative law judges (ALJs) of the Securities and Exchange Commission are officers of the United States because they hold a continuing office established by law. 138 S. Ct. at 2053–55. The Court also noted that they exercise significant authority when they oversee discovery, review proceedings, and issue final written decisions containing factual findings and legal conclusions. *Id.*

Like the ALJs in *Lucia*, Board AJs are officers of the United States. Board AJs hold continuing office established by law. 41 U.S.C. § 7105(b). Board AJs also exercise significant authority. They decide appeals arising from a final CO decision and can grant the same relief that would be available to a litigant asserting a Contract Disputes Act (CDA) claim at the United States Court of Federal Claims. 41 U.S.C. § 7105(e)(1)(B), (e)(2). They also serve in "an adversary-type proceeding, make findings of fact, and interpret the law." *Boeing Petroleum Servs., Inc. v. Watkins*, 935 F.2d 1260, 1261 (Fed. Cir. 1991) (quoting S. Rep. No. 95-1118, at 26 (1978)). For these reasons, Board AJs exercise significant authority rendering them officers of the United States.

B

We now turn to step two and the core of the parties' Appointments Clause dispute, which centers on the following questions: (1) Are Board AJs inferior or principal officers of the United States? (2) If they are principal officers, are they constitutionally appointed? The Supreme Court provided that "[w]hether one is an 'inferior' officer depends on whether he has a superior." *Edmond v. United States*, 520 U.S. 651, 662 (1997). Inferior officers are "officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with Senate's advice and consent." *Id.* at 663. While there is no exclusive criterion for distinguishing between principal and inferior officers, the Supreme Court in *Edmond* highlighted three functional factors to consider when reviewing an Appointments Clause challenge: the principal officer's (1) power to review and reverse the inferior officer's decision, (2) supervision and oversight over the inferior officer, and (3) removal power. *Id.* at 664–65. The Court also looked to a definitional factor, noting that an inferior officer is an individual "with some higher ranking officer or officers below the President." *Id.* at 662.

Here, the GSA Administrator, a principal officer, in consultation with the Administrator for Federal Procurement Policy, appoints Board AJs. 41 U.S.C. § 7105(b)(2). Thus, Board AJs are technically inferior officers with a superior:

the GSA Administrator. The dissent suggests that this fact alone sufficiently renders the Board AJs inferior officers appointed in accordance with the Constitution and does not engage in *Edmond*'s three-factor functional analysis. *See Dissent* at 4. While *Edmond*'s functional analysis is not conclusive, the majority believes that such analysis is invaluable and will not set it aside.

1. Power to Review

The first *Edmond* factor looks to whether a principal officer has the power to review an inferior officer's decision. *Edmond*, 520 U.S. at 664–65. It is a significant sign of control by a principal officer if the inferior officer cannot independently "render a final decision on behalf of the United States." *Id.* at 665. If the principal officer lacks such power over the inferior, then this factor weighs in favor of a determination that the inferior is really a principal officer. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982–83 (2021). For example, in *Arthrex*, the Supreme Court determined that the Director of the United States Patent and Trademark Office (PTO), a principal officer who administratively oversees the PTO's Administrative Patent Judges (APJs) of the Patent Trial and Appeal Board (PTAB), did not have the power to review the APJs' final decision in an *inter partes* review (IPR) proceeding.[2] *Id.* at 1981. The Court determined that the PTO Director's inability to do so weighed in favor of a determination that the APJs, initially viewed as inferiors, were unconstitutionally appointed principal officers. *Id.* at 1985.

Notably, the Court explained that the Director's power to indirectly influence APJs' IPR proceedings was not sufficient review authority under *Edmond*'s framework.[3] *Id.* at 1981–82. This was because "such machinations blur the lines of accountability demanded by the Appointments Clause." *Id.* at 1982. The Court also noted that, once a panel of APJs issued an IPR decision, the only possibility of review was through a petition for rehearing, which Congress explicitly provided that only the PTAB may grant. *Id.* at 1981 (citing 35 U.S.C.§ 6(c)). The Court explained that "[i]n all the ways that matter to the parties who appear before the PTAB, the buck stops with the APJs, not with the Secretary [of Commerce] or [PTO] Director." *Id.* at 1982.

Here, we have an even clearer case than that in *Arthrex*. No principal officer has *any* review authority, direct or indirect, over the Board AJs' decisions. Here, a panel of three Board AJs hears and decides a case. CBCA, Contract Appeal Cases, Rule 1(d). Only the Board may rehear and reconsider a Board

2. An IPR proceeding is an adversarial proceeding in which a person who is not the owner of a patent can file a petition asking the PTO to "cancel" the patent based on certain invalidity grounds. *See* 35 U.S.C. § 311(a)–(b).

3. The Court recognized that the PTO Director had significant indirect influence over the APJs' IPR decisions and proceedings. For example, as the Court noted, the PTO Director can select the panel of APJs who hears a particular IPR proceeding. *Arthrex*, 141 S. Ct. at 1981. The Court also noted that the PTO Director can sit on a rehearing panel himself. *Id.* at 1981. The PTO Director also determines whether to institute an IPR proceeding. *Id.* at 1980. Also, after the fact, the Director could remove an APJ from his judicial assignment without cause and prevent that APJ from sitting on future PTAB panels. *Id.* at 1982.

decision. *Id.*, Rule 26, Rule 28. No other entity within the executive branch reviews Board decisions. That a party may appeal a final Board decision to the United States Court of Appeals for the Federal Circuit, an Article III court, is inapposite to an Appointments Clause analysis, which considers the level of review provided by a principal officer within the *executive* branch. *See Edmond v. United States*, 520 U.S. 651, 663 (1997). Therefore, because no principal officer has authority to review the Board AJs' decisions, this *Edmond* factor weighs in favor of a determination that Board AJs are principal officers.

2. Power to Supervise

The second *Edmond* factor looks to the level of supervision and oversight a principal officer has over the inferior officer. *See id* at 664. Examples of principal officer supervision over judges include a principal officer's prescription of uniform rules of procedures and the authority to formulate policies and rules for the court. *Id.*

Here, no principal officer supervises Board AJs. The GSA Administrator has no supervisory authority over the Board AJs. Additionally, the procuring agencies, whose contracts are reviewed by the Board, do not direct the Board in any way. *See* S. Rep. No. 95-1118, at 24, 26 (1978) (noting that boards of contract appeals are not representatives of the contracting agency and are not "subject to direction or control by the procuring agency management authorities"); *see also Commc'ns Res. Grp., Inc.*, GSBCA No. 11038-C, 92-2 BCA ¶ 24,769, at X.

It is not that surprising that the Board functions independently given the Board's purpose. Board AJs hear contract dispute cases from various executive civilian agencies, including cases to which the GSA is a party. 41 U.S.C. § 7105(e)(1)(B). As such, for the Board to remain neutral, it cannot be subject to supervision or control by the GSA Administrator or any executive agency. *See* S. Rep. No. 95-1118, at 26 (1978) (noting that boards of contract appeals "function as quasi-judicial bodies" that do not act as a representative of the agency, "since the agency is contesting the contractor's entitlement to relief"). To conclude, given that no principal officer supervises Board AJs, this second *Edmond* factor weighs in favor of a determination that Board AJs are principal officers.

3. Power to Remove

The third *Edmond* factor looks to the level of removal power the principal officer wields over the inferior officer. *See Edmond*, 520 U.S. at 661, 664. Removal power over an inferior is a powerful tool for control when it is unlimited. *Id.* at 664. For example, in *Arthrex* the Supreme Court determined that a for-cause removal limited a principal's control over an inferior, weighing in favor of a determination that APJs were principal officers. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1982, 1986–87 (2021). By further example, the D.C. Circuit in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty Board* noted that the principal officer's removal limitation weighed in favor of a determination

that the inferior was a superior officer. 684 F.3d 1332, 1339–40 (D.C. Cir. 2012).

In *Intercollegiate*, Copyright Royalty Judges (CRJs) sat below two levels of supervision—the Librarian, who is appointed by the President and confirmed by the Senate, and the Registrar of Copyrights, who is appointed by the Librarian and serves at his discretion. *Id.* at 1338. The CRJs issued a final determination setting the rates and terms applicable to webcasting of digitally recorded music. *Id.* at 1334. Intercollegiate appealed the CRJs' decision, and the D.C. Circuit held that the CRJs were unconstitutionally appointed principal officers because of the CRJs' "nonremovability and the finality of their decisions." *Id.* at 1339. Additionally, the D.C. Circuit noted that it was significant that the Librarian could remove CRJs "only for misconduct or neglect of duty." *Id.* at 1340.

Here, the GSA Administrator does not have unfettered removal power over Board AJs. Rather, the GSA Administrator, like the Secretary of Commerce in *Arthrex* and the Librarian in *Intercollegiate*, may remove Board AJs under limited circumstances. Specifically, Board AJs receive the same removal protections provided to other ALJs in the executive branch. 41 U.S.C. § 7105(b)(3) (providing that "[m]embers of the Civilian Board are subject to removal in the same manner as administrative law judges, as provided in section 7521 of title 5"). This means that the GSA, as the agency which houses the CBCA, may file an action before the Merit Systems Protection Board (MSPB) to remove a Board AJ for "good cause" as "established and determined by the Merit Systems Protection Board."[4] 5 U.S.C. § 7521(a)–(b) (noting that the (agency in which the administrative law judge is employed may remove the administrative law judge only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board); *see also Abrams v. SSA*, 703 F.3d 538, 543 (Fed. Cir. 2012). Thus, as in *Arthrex* and in *Intercollegiate*, we determine that the GSA's lack of unfettered removal authority over Board AJs weighs in favor of a determination that Board AJs are principal officers. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986–87 (2021); *see also Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1132, 1339–40 (D.C. Cir. 2012).

In sum, all three *Edmond* factors weigh in favor of a determination that Board AJs are principal officers. For this reason, we conclude that Board AJs are principal officers who must be appointed by the President and confirmed by the Senate pursuant to the Appointments Clause. Because Board AJs are

4. "Good cause" is not defined in 5 U.S.C. § 7521. Courts have provided limited clarity by explaining what "good cause" is not. *See Long v. SSA*, 635 F.3d 526, 533–34 (Fed. Cir. 2011) (explaining that "good cause" is not the equivalent of the good behavior standard applicable to Article III judges); *Brennan v. Dep't of Health & Hum. Servs.*, 787 F.2d 1559, 1563 (Fed. Cir. 1986) (noting that "[i]f the agency bases a charge on reasons which constitute an improper interference with the ALJ's performance of his quasi–judicial functions, the charge cannot constitute 'good cause'"). Given this lack of judicial clarity, the MSPB has filled in the gaps with its own case law interpreting "good cause," to which we defer. *Long*, 635 F.3d at 534.

not appointed in this manner, the current structure of the Board violates Article II of the United States Constitution.

II. SEVERABILITY

Having determined that the current structure of the Board is unconstitutional, we consider whether we can remedy the constitutional violation. "In exercising our power to review the constitutionality of a statute, we are compelled to act cautiously and refrain from invalidating more of the statute than is necessary." *Helman v. Dep't of Veterans Affs.*, 856 F.3d 920, 930 (Fed. Cir. 2017) (citing *Regan v. Time, Inc.*, 468 U.S. 641, 652 (1984)). In general, "when confronting a constitutional flaw in a statute, we try to limit the solution to the problem" by severing the "problematic portions while leaving the remainder intact." *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 328–29 (2006).

This approach derives from the Judiciary's "negative power to disregard an unconstitutional enactment" in resolving a legal dispute. *Mass. v. Mellon*, 262 U.S. 447, 488 (1923). In a case that presents a conflict between the Constitution and a statute, we give "full effect" to only those portions of the statute that are "not repugnant" to the Constitution, effectively severing the unconstitutional portion of the statute. *Bank of Hamilton* v. *Dudley's Lessee*, 276 U.S. 492, 526 (1829); *Free Enter. Fund*, 561 U.S. at 508. This principle explains our "normal rule that partial, rather than facial, invalidation is the required course." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985).

Severing problematic portions of the statute is appropriate when the remainder of the statute is "(1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' basic objectives in enacting the statute." *United States v. Booker*, 543 U.S. 220, 258–59 (2005) (internal citations omitted). However, facial invalidation of a statute may be appropriate when the statute is incapable of functioning independently of its unconstitutional provision or provisions. *See, e.g.*, *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) ("Congress could not have intended a constitutionally flawed provision to be severed from the remainder of the statute if the balance of the legislation is incapable of functioning independently.").

We look to the sources of the constitutional flaw to identify whether and how severance may offer a remedy. As noted in the previous section, the Board AJs' status as principal officers stems from the lack of functional control by a superior. No principal officer reviews the Board AJs' contract dispute decisions, supervises Board AJs, or can remove Board AJs at will.

Here, the government proposes two different severance remedies. Green argues that each of the government's proposals is deficient and would not cure the constitutional infirmity at issue here. Instead, Green asks us to hold the entire contract disputes adjudicatory regime at the Board unconstitutional. According to Green, any more tailored remedy would require us to make a policy decision, which falls within Congress's purview. As we discuss further below, we agree with Green.

A

The government argues that we should sever Section 7107(a)(1) of the CDA as applied to the Board, which renders a Board decision final, save for review by this Court. *See* 41 U.S.C. § 7107(a)(1). Board AJs are appointed by the GSA Administrator. 41 U.S.C. § 7105(b)(2). The Administrator, in turn, "shall . . . perform functions related to procurement and supply including contracting . . . ." 40 U.S.C.A. § 501(b)(1)(A). The government argues that, if the finality of Board decisions were severed, the GSA Administrator would have the authority to review the Board's contract disputes decisions. As the Supreme Court adopted a comparable approach in *Arthrex*, the argument merits closer scrutiny. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987–88 (2021) ("Under these circumstances, a limited remand to the Director provides an adequate opportunity for review by a principal officer."). Ultimately, however, we decline to follow it.

In *Arthrex*, the majority concluded that severance of § 6(c) of the America Invents Act (AIA) would resolve the Appointments Clause deficiency. *Id.* at 1987. Section 6(c) effectively barred the PTO Director from reviewing the PTAB's IPR decisions. *Id*. at 1986–87. With that limitation severed, the majority reasoned that the Director, with his broad authority, could "*provide for a means* of reviewing PTAB decisions." *Id.* (emphasis added). In other words, the severance of 35 U.S.C. § 6(c) freed the Director to create a procedure in which he could rehear the PTAB's IPR decisions. *Id.* The majority noted that the Director had such authority because Congress had already vested the Director (1) with the "power and duties" of the PTO (which houses the PTAB), *see* 35 U.S.C. §§ 3(a)(1), 6(a); (2) with the authority to supervise APJs, § 3(a)(2)(A); and (3) with the means of control over the institution and conduct of *inter partes* review, §§ 314(a), 316(a). *Id.* at 1986. The Supreme Court explained that review by the Director matched the "almost-universal model of adjudication in the Executive Branch" and "aligns the PTAB with the *other* adjudicative body in the PTO, the Trademark Trial and Appeal Board." *Id*. (emphasis in original).

This approach, however, is not workable here. Based on the Board's statutory scheme, it is not clear that severing the analogous provision of the CDA, which leaves Board's CDA decisions final save for appeal to this Court, would leave any power to review or to order rehearing in any principal officer of the executive branch. Here, unlike with the PTO Director, Congress has not statutorily empowered the GSA Administrator with any "power and duties" over the Board. There is also no indication in statute, regulation, or practice that the GSA Administrator has any authority over the Board, apart from appointing members.

If anything, the legislative history of the CDA indicates that Congress intended Board AJs to be independent of any executive influence. As previously noted, Congress intended that the boards of contract appeals, many of which were consolidated in the Board, be a "quasi-judicial" and independent body. S. Rep. No. 95-1118, at 26 (1978). To accomplish this function, the Board

needs some level of separation from the GSA and the other agencies whose contract disputes that the Board hears. Given the Board's role in providing this independent review of contracts awarded by the subject executive agencies, Congress likely did not want the GSA Administrator, or the head of any other executive agency for that matter, to have any authority over the Board.

So, we are left with the following question: what appointed officer would Congress vest with the power and duties to oversee the activities of the Board? This question is not rhetorical, and our role in the judiciary is not to produce an answer. Rather, the answer lies with Congress. Given the nature and purpose of the Board, it is possible that Congress would not want anyone in the Executive Branch to review these decisions. For this reason, we cannot cure the constitutional defect by severing the finality clause. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1990 (2021) (Gorsuch, J., concurring in part and dissenting in part) (arguing that severance is inappropriate where several possible remedies of a constitutional defect exist, and statutory interpretation does not resolve the matter).[5]

B

The power of removal is a powerful tool for control when unlimited. *Edmond v. United States*, 520 U.S. 651, 664 (1997). Accordingly, the government argues in the alternative that a proper remedy is to sever 41 U.S.C. § 7105(b)(3), the provision that provides Board AJs the removal protections offered ALJs under § 7521 of Title 5. The government argues that absent such explicit limitations of removal, the GSA Administrator could remove the Board AJs at will. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 509 (2010) (noting that "the traditional default rule" is that "removal is incident to the power of appointment"); *accord Myers v. United States*, 272 U.S. 52, 119 (1926) (noting that the constitutional principal that "the power of appointment carrie[s] with it the power of removal" has long been recognized . . . "as a rule of [both] constitutional and statutory construction"). The Supreme Court in *Free Enterprise Fund* and the D.C. Circuit in *Intercollegiate* adopted this approach. *Free Enter. Fund*, 561 U.S. at 509; *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1132, 1342 (D.C. Cir. 2012). Such an approach, however, is not available for us.

Simply, we cannot assure ourselves that Board AJs removable at will by the GSA Administrator are consistent with Congress's design in creating the Board. Primarily, independence is of obvious importance to officials wielding powers of an inherently judicial nature. Such is the role of a board of contract appeals. *See United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1996) (noting that a board of contract appeals, in that case the Advisory Board of Contract Appeals, acts in a "judicial capacity" when it adjudicates claims

5. As to the second *Edmond* factor, supervision over the inferior, the parties did not point to, nor are we aware of, any statute or regulation that could be severed to provide some level of supervision to the Board.

before it); *see also Boeing Petroleum Servs., Inc.*, 935 F.2d at 1261. Significantly, in *Free Enterprise*, in which the Supreme Court removed tenure protections to cure the Appointments Clause violation, the officers were involved with investigatory and enforcement powers rather than the adjudicatory powers of the kind wielded by the Board AJs. 561 U.S. at 485.

This distinction is important. A principal officer's control over an adjudicatory body, such as the Board, by the threat of removal after the fact is opaque, unknown, and would raise concerns about the due process available in such a tribunal. We will not presume that Congress would prefer a remedy that raises constitutional doubts. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems . . . ."); *see also United States v. Booker*, 543 U.S. 220, 246 (2005) (noting that severance is primarily a question of "legislative intent"); *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006) (cautioning against remedies that would require a court to navigate a "murky constitutional context").

Indeed, it stands to reason that Congress did not want Board AJs removable at will. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotations omitted) (alteration in original). Here, the CDA establishes various boards of contract appeals. Notably, in § 7105(a), Congress established the Armed Services Board of Contract Appeals (ASBCA) and left the members of that body to be removal at will. 41 U.S.C. § 7105(a); *see In re Hennen*, 38 U.S. 230, 260–61 (1839) (noting the general rule that an office with no limitation on removal is held at will). However, in § 7105(b), Congress created the Board and departed from this model, providing the Board AJs with the removal protections available to other administrative law judges in the executive branch. 41 U.S.C. § 7105(b)(1)–(3). Given Congress's deliberate decision to provide removal protections to Board AJs and not ASBCA judges, we cannot say that "the statute will function in a *manner* consistent with the intent of Congress" if we were to sever the Board's removal protections. *See Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 685 (1987) (emphasis in original). Like the Supreme Court in *Arthrex*, we decline to apply this remedy. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987 (2021).

Unlike the Supreme Court in *Arthrex*, however, we have no other remedy of severance available. In the absence of any discernable intent on the part of Congress as to how the Board should be re-constituted consistently with the Appointments Clause and unwilling to take on ourselves the legislative power of choosing a solution, we have no choice but to identify the constitutional violation, explain our reasoning, and set aside the Board decision in this case. *See id.* at 1990 (Gorsuch, J., concurring in part and dissenting in part). It is up to Congress to decide how it would remedy this constitutional violation,

whether that is to make (1) Board decisions reviewable by some principal officer, (2) Board AJs removable at will, (3) Board AJs presidentially appointed, Senate-confirmed officials, or (4) some other adjustment consistent with the Appointments Clause.

This decision will not create the dire consequences predicted by the Dissent. Appointments Clause challenges are "nonjurisdictional structural constitutional objections" that can be waived when not presented. *Freytag v. Comm'r*, 501 U.S. 868, 878–79 (1991). Thus, although Congress will be called upon to remedy the constitutional deficiency, the impact of this case upon Board decisions already made will be limited to those cases where litigants present an Appointments Clause challenge on appeal. True, our decision here will likely impede the Board from adjudicating future cases until Congress has corrected the constitutional defect identified today. Litigants, however, still may pursue CDA claims before the United States Court of Federal Claims. 41 U.S.C. § 7104(b). More importantly, the inconvenience caused by our decision is the unavoidable cost of honoring the Appointments Clause and the proper limits of our role as a court.

Accordingly, we vacate and remand the underlying decision. What further development the Board will take on remand will depend on how Congress chooses to act.

CONCLUSION

We have considered all remaining arguments but find them unpersuasive. We vacate the Board's decision and remand it to the Board for further proceedings consistent with this opinion.

VACATED AND REMANDED

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

GREEN & CLEAN ENERGY CORP.,

Appellant

v.

SECRETARY OF THE DEPARTMENT OF ENERGY,

Appellee

2021–0123

Appeal from the Civilian Board of Contract Appeals in No. 7139, Administrative Judge Ian C. Delph, Administrative Judge Elizabeth I. Hamilton, Administrative Judge Sidney A. Johnson

FLORES, *Circuit Judge*, dissenting.

Today, the majority takes a substantial step by declaring the Administrative Judges (AJs) of the Civilian Board of Contract Appeals (the Board or CBCA) unconstitutionally appointed principal officers. Not only is this step not in accordance with the law, but it also has severe repercussions. It (1) undoes a system that has been in practice for seventy years, which provides litigants with needed inexpensive, independent, and timely review of contract disputes with civilian agencies,[6] (2) disturbs seventy years of precedent, and (3) eradicates Board AJs, calling into question the constitutionality of various other administrative judges in the executive branch, whose authorities were largely unquestioned until now. Additionally, in so holding, the majority errs in two respects.

First, the majority strictly and narrowly applies the functional factors in *Edmond v. United States*, 520 U.S. 651, 664–65 (1997), which the majority acknowledges are non-exclusive. In doing so, the majority incorrectly concludes that Board AJs are principal officers of the United States and ignores the purpose of the Appointments Clause.

Second, even if there is a constitutional violation here, the majority wrongly forgoes the appropriate and tailored remedy of severance and instead unnecessarily undoes the entire fabric of the Board. Troublingly, the majority justifies its overreach by citing its deference to Congress's legislative powers. For this and other reasons set forth below, I respectfully dissent.

6. As the majority notes, the Board also provides review in a limited number of non-contract cases.

DISCUSSION

I. THE APPOINTMENTS CLAUSE

The majority errs in its Appointments Clause analysis. The majority conducts a rigid, formalistic analysis, ignoring important functional and practical considerations. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1995 (2021) (Breyer, J., concurring in part and dissenting in part); *id.* at 1998 (Thomas, J., dissenting).

A

I begin with an overview of Appointments Clause precedent. Until recently, courts have been "careful not to create a rigid test to divide principal officers—those who must be Senate confirmed—from inferior ones." *Id.* at 1999 (Thomas, J., dissenting). Rather, courts have employed a case-by-case analysis. *Id.*

This case-by-case analysis changed in *Edmond* when the Supreme Court introduced a two-part analysis for Appointments Clause challenges. The first part is a definitional standard that provides that an "inferior officer" is one who is lower ranked than a superior. *Edmond*, 520 U.S. at 662. The second part is a functional standard, which provides that the inferior officer's work must be "directed and supervised at *some* level by others who were appointed by Presidential nomination with advice and consent of the Senate." *Id.* at 663 (emphasis added). The D.C. Circuit in *Intercollegiate* and the Federal Circuit in *Arthrex* interpreted *Edmond*'s functional standard as a three-factor analysis, which looks to whether a principal officer has the power to (1) review an inferior's decision-making process, (2) supervise the inferior, and (3) remove the inferior at will. *See Arthrex, Inc. v. Smith & Nephew, Inc.*, 941 F.3d 1320, 1329–34 (Fed. Cir. 2019), *vacated*, 141 S. Ct. 1970 (2021); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1341–42 (D.C. Cir. 2012).

Notably, the *Edmond* three-factor analysis is not exclusive, such that a court may consider other functional factors, such as an office's history and purpose. *See Edmond*, 520 U.S. at 661. Appointments Clause precedent shows that a flexible, functional analysis is critical. *See, e.g.*, *Morrison v. Olson*, 487 U.S. 654, 671 (1988) (highlighting that "[w]e need not attempt to decide exactly where the line falls between the two types of officers").

Most recently, in *Arthrex*, the Supreme Court recognized *Edmond*'s three-factor analysis. The majority in *Arthrex*, however, effectively boiled down its Appointments Clause analysis to one factor: whether a principal officer has the power to review and reverse his inferior officer's adjudicative decisions. *Arthrex*, 141 S. Ct. at 1985; *see id.* at 1996 (Breyer, J., concurring in part and dissenting in part); *id.* at 2002 (Thomas, J., dissenting). As the dissenting justices noted, such a formalistic, judicially created rule has no footing in *Edmond* or the Appointments Clause precedent. *Id.* at 1996, 2002.

Today, the majority solidifies *Arthrex*'s overly formalistic approach to the Appointments Clause analysis instead of limiting that holding to the facts of

that case. Specifically, the majority rigidly applies the *Edmond* three-factor analysis, ignoring any other functional considerations and providing little to no weight to *Edmond*'s definitional standard.

B

Under the proper application of *Edmond*, I would hold that Board AJs are inferior officers. Turning first to the definitional standard, the Board AJs are inferior officers who sit below higher-ranked officials. The hierarchical path from the President to Board AJs is far. *See id.* at 1998 (Thomas, J., dissenting) (noting the Appointments Clause does not require Senate confirmation of inferior officers who are several steps below the President). The President sits at the top of the executive branch, who then appoints the GSA Administrator to oversee acquisition and management of property. 40 U.S.C. § 302; *see also* 40 U.S.C. § 581. The GSA Administrator, with consultation from the Administrator for Federal Procurement Policy, appoints Board AJs. 41 U.S.C. § 7105(b)(2). Thus, based on this hierarchy, Board AJs are inferior officers of the United States. *See Edmond*, 520 U.S. at 662.

Turning to *Edmond*'s functional standard, I iterate that there is no bright line rule for determining who is functionally a principal or inferior officer and that the *Edmond* three-factor analysis is not exclusive but merely a guide. *See Arthrex, Inc.*, 141 S. Ct. at 1985, 2002; *Edmond*, 520 U.S. at 661. Contrary to the majority's conclusion, the GSA Administrator's lack of review, supervision, and removal authority over Board AJs does not automatically render Board AJs principal officers. Rather, a functional analysis should also "take account of, and place weight on, why Congress enacted a particular statutory limitation . . . [and] also consider the practical consequences that are likely to follow from Congress' chosen scheme." *Arthrex*, 141 S. Ct. at 1995 (Breyer J., concurring in part and dissenting in part). When considering these two other important functional considerations—congressional purpose and consequences—I would hold that Board AJs are functionally inferior officers.

First, we must give weight to Congress's decision to give Board AJs independence from principal-officer review, supervision, and removal. As the majority highlights several times, Congress intended boards of contract appeals to be quasi-judicial and free from agency interference. Additionally, Congress intentionally provided contractors with a second opportunity of review of their contract claims at the Board, following a final decision from the Contracting Officer (CO). 41 U.S.C. § 7104(a). For any second review to be meaningful, the tribunal must be insulated from interference from the contracting agency. *See, e.g.*, *Bond v. United States*, 47 Fed. Cl. 641, 656 (2000). This protection provides contractors with faith in the procurement system, making contractors more willing to invest in these contracts which are necessary for the government to function.

Second, the practical consequences stemming from Congress's decision to create the Board weigh in favor of keeping the current system in place. These consequences include "informal, expeditious, and inexpensive" review

by a board of experts in this field that the contracting community has appreciated and purposefully availed itself of for many years. 41 U.S.C. § 7105(g)(1); *see, e.g.*, *Baltimore Contrs., Inc. v. United States*, No. 272-70, 1979 Ct. Cl. LEXIS 963, at *56 (Sept. 18, 1979) (discussing the importance to contractors of boards of contract appeals). Thus, to do away with the Board robs contractors and the contracting agency of an efficient and less-costly forum for contract disputes. It also robs the contractor of his right to choose where to file an appeal of a final CO decision, a right that Congress purposefully gave to the contractor.

The majority notes that contractors can still file their contract claims in the United States Court of Federal Claims, *see* Op. at 17, suggesting that this point lessens the blow of no Board review. The majority, however, overlooks the practical differences between review at the Board and the Court of Federal Claims. Litigation before the Court of Federal Claims may take longer, be more formal, and be more costly. Additionally, the judges at the Court of Federal Claims need not have government contracts experience, while the Board AJs must have at least five years of experience. *See* 41 U.S.C. § 7105(b)(2)(B). Given these differences between forums, Congress thought best to let contractors decide in which forum to file based on the facts of their case. The majority, however, overrides this congressional decision by deciding that the Board can no longer exist as currently structured.

For these reasons, I would hold that Congress's purpose in creating the Board, as well as the practical consequences stemming from this decision, outweigh any concern that Board AJs are functionally usurping principal officer authority. Rather, I would hold that Board AJs are inferior officers, in name and function.

C

The majority's conclusion also overlooks a serious practical concern. Here, the majority takes issue that no principal officer can review the Board's final decision in a Contract Disputes Act (CDA) case. However, if an inferior officer cannot make a final decision in a CDA dispute without principal officer review, then our federal procurement system could become significantly burdened.

Currently, COs make "final" decisions on contractor claims for payment throughout contract performance. FAR 33.211(a).[7] These decisions are final in so much that no other official at the agency reviews the claim. *Id.* If the contractor is dissatisfied with the CO's decision, the contractor can appeal the decision to a body outside of the agency (i.e., the appropriate board of contract appeals or the Court of Federal Claims). *See* FAR 33.211(a); 41 U.S.C. § 7104(a). The contractor need not appeal the CO's decision and may be

7. Arguably, COs, in their capacity to render final decisions on a government contract, wield significant authority to be considered an inferior officer and not a mere employee. *See Buckley v. Valeo*, 424 U.S. 1, 126 (1976).

perfectly content with it. However, under the majority's reasoning, a CO's final decision, even uncontested, would need to be subject to review by a principal officer at the agency. This extra level of review could delay contract performance, complicate the well-functioning contracts disputes process, and potentially disincentivize contractors from doing business with the government. Imagine how inconvenient it would be for all parties to the contract if the Defense Secretary would have to sign off on a CO final decision for a contractor to get paid on a Department of Defense contract.

II. SEVERANCE

If there is an Appointments Clause violation, a clear remedy exists: to sever 41 U.S.C. § 7105(b)(3), the provision that provides Board AJs the removal protections offered to all administrative law judges under § 7521 of Title 5. Absent such explicit limitations of removal, Board AJs may be removed without cause. *See In re Hennen*, 38 U.S. 230, 259 (1839). This is the narrowest viable approach to remedying the violation of the Appointments Clause.

Guiding my conclusion is *Free Enterprise Fund*, which asks: (1) once the offensive portions are severed, are the remaining provisions "incapable of functioning independently" and (2) does anything in the statute's text or historical context make it evident that Congress "would have preferred no Board at all to a Board whose members are removable at will?" *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 509 (2010) (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)). If the answer is "no" to both questions, then severance of a removal restriction is generally an appropriate remedy.

Concerning the Board, I would answer no to both questions. To understand why, look no further than the Armed Services Board of Contract Appeals (ASBCA), a board of contract appeals created by the CDA which hears cases from defense agencies and the National Aeronautics and Space Administration. 41 U.S.C. § 7105(e). The ASBCA is like the Board in many substantive respects: it hears contract disputes under the CDA, 41 U.S.C. § 7105; typically decides cases in panels of three judges, Michael J. Schaengold and Robert S. Brams, *Choice of Forum for Government Contract Claims: Court of Federal Claims vs. Board of Contract Appeals*, 17 Fed. Cir. B.J. 279, 335 (2008); and maintains a level of independence from the agencies who are parties to the CDA cases, S. Rep. No. 95–1118, at 26 (1978).[8] Notably, however, Congress did not provide ASBCA AJs with removal protections, as it did with Board AJs, and yet the ASBCA has not only functioned but thrived for over fifty years. *Compare* 41 U.S.C. § 7501(a), *with* 41 U.S.C. § 7501(b); *see also* Joel P. Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 Law & Contemp. Probs. 39, 56–57 (1964) (describing the constitution of the ASBCA in 1947). This difference shows that the CDA's review process can function with Board

8. *See, e.g.*, U.S. Gov't Accountability Off., GAO/NSIAD-85-102, The Armed Services Board of Contract Appeals Has Operated Independently (1985).

AJs free of removal protections. It also suggests that Congress would rather accept a board whose members have no statutory removal protections than no board at all.

To be clear, severance of a removal protection is not the sole possible cure for all Appointments Clause violations, but it is in this case. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987 (2021). For example, in *Arthrex*, the Supreme Court noted that severance of a removal restriction could have potentially cured the constitutional violation at issue there. *Id.* But, instead, the Court severed a provision concerning the PTO Director's ability to review the APJs' IPR decision, noting that such a remedy was better aligned with the statutory scheme. *Id.* Unlike in *Arthrex*, however, there are no other severance options that would be better aligned with the Board's statutory scheme. Thus, severance of the removal restriction contained at 41 U.S.C. § 7105(b)(3) is not only sufficient but the only viable option.

The majority, however, rejects a tailored severance remedy, claiming that it is better to invalidate the Board in its entirety. This broad approach is inconsistent with precedent. *See Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985) (noting that "partial, rather than facial, invalidation is the required course"). Equally troubling, this approach has practical consequences. In fiscal year 2020, the last year for which data have been reported, contractors filed more than 200 contract appeals under the CDA. U.S. Civilian Bd. of Cont. Appeals, Annual Report: United States Civilian Board of Contract Appeals, Fiscal Year 2020 12 (2020), https://www.cbca.gov/files/2020-CBCA-Annual-Report.pdf [https://perma.cc/QS2H-GKQF]. In these cases, the Board often decides matters critical to the interests of both government and contractors—such as whether contractors are entitled to more money for their performance, *see, e.g.*, *PJB Jackson-American, LLC v. GSA*, CBCA No. 3628, 16-1 BCA ¶ 36,248 (deciding how much compensation a contractor was entitled to for delay and extra work); and whether contractors have satisfied the terms of the contract; *see, e.g.*, *Klamath Wildlife Res. v. Dep't of Interior*, CBCA No. 3764, 16-1 BCA ¶ 36,326, at X (deciding whether a contractor had breached the terms of performance such that termination for default was warranted). These cases will have no resolution until Congress can act. We also cannot predict what effect the cessation of all activity by the Board, a dedicated forum for the resolution of contract disputes, may have on the willingness of vendors and suppliers to enter contracts with the government in the first place.

To conclude, to the extent there is a constitutional violation, the appropriate remedy is to sever the Board AJs' removal protections contained in 41 U.S.C. § 7105(b)(3). By doing so, Board AJs become inferior rather than principal officers. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 509 (2010); *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1342 (D.C. Cir. 2012).

CONCLUSION

In sum, there is no Appointments Clause violation here. Board AJs are inferior officers who need not be appointed by the President and confirmed by the Senate. Even if there were a violation, the appropriate remedy would be to sever the Board AJs' removal protections provided in 41 U.S.C. § 7105(b)(3). Because the majority errs in its Appointments Clause analysis and in rejecting the remedy of severance, I *dissent*.

No. 2021–0123

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GREEN & CLEAN ENERGY CORP.,
CLAIMANT–APPELLANT,

v.

JENNIFER GRANHOLM, SECRETARY OF THE DEPARTMENT OF ENERGY, RESPONDENT–APPELLEE.

Appeal from the Civilian Board of Contract Appeals in. No. 7139, Administrative Judge Ian C. Delph, Administrative Judge Michelle N. Reid, and Administrative Judge John J. Ando

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BRIEF FOR APPELLANT GREEN & CLEAN ENERGY CORP. ON SUA SPONTE REHEARING EN BANC

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STATEMENT OF JURISDICTION

Green & Clean Energy Corporation (Green) appealed a decision from the Civilian Board of Contract Appeals (CBCA), which found in favor of the Department of Energy (DOE) and determined that Green could not recoup certain costs under its contract with DOE. *Green & Clean Energy Corp. v. Sec'y of Dep't of Energy*, CBCA No. 1:23-cv-04567-COV. Green timely appealed that decision to the United States Court of Appeals for the Federal Circuit and argued that the CBCA's Administrative Judges (AJs) were unconstitutionally appointed principal officers. This case was argued before a panel of three judges on November 4, 2021, and a panel opinion was issued on December 21, 2021. The Court of Appeals for the Federal Circuit vacated and remanded the CBCA's decision.

A *sua sponte* request for a poll on whether to rehear this case en banc was made. A majority of the judges in regular active service voted for *sua sponte* en banc consideration. On January 17, 2022, this Court ordered en banc review pursuant to 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35(a). The order also vacated the panel opinion dated December 21, 2021, and the appeal was reinstated. This case will be reheard en banc *sua sponte* under 28 U.S.C. § 46 and Federal Rule of Appellate Procedure 35(a). The Court has jurisdiction pursuant to 28 U.S.C. § 1295(a)(10).

STATEMENT OF THE ISSUES

A. (i) In view of precedents such as *Edmond v. United States*, 520 U.S. 651, 662 (1997), and *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021), did the panel in *Green & Clean Energy Corp. v. Sec'y of Dep't of Energy*, No. 2021-0123, 2021 WL 2834763, at *1 (Fed. Cir. Dec. 21, 2021), correctly determine that the AJs of the CBCA are unconstitutionally appointed principal officers? (ii) Specifically, when conducting an Appointments Clause analysis, what

weight, if any, should the Court give to functional considerations aside from those announced in *Edmond*?

B. If the AJs of the CBCA are unconstitutionally appointed principal officers, can this constitutional violation be cured by the judicial remedy of severance and, if so, which provision should be severed? If not, what course should the Court take to address this constitutional violation?

STATEMENT OF THE CASE

Green entered into a contract (Windmill Contract) with DOE on January 30, 2018. Under the Windmill Contract, Green was required to provide an Artificial Intelligence automation system to DOE's windmill facilities in Richmond, Virginia, for a period of five years. Green received information about imminent cyber threats soon after it began contract performance. In response, Green notified its subcontractors of the threats and hired Information Security Contractors (ISC) to respond to possible leaks of the subcontractors' technology. However, the Windmill Contract did not expressly authorize the use of ISCs. From 2018 through 2020, DOE paid Green's ISC service costs.

In early 2021, DOE determined that the ISC costs were unallowable for the entire duration of the Windmill Contract. Consequently, DOE sought reimbursement from Green for $1 million to recoup the ISC costs. Green disputed this demand and submitted a certified claim to DOE's Contracting Officer (CO). On July 20, 2021, the CO agreed with DOE's determination and found that the costs were not allowable. Green appealed the CO's findings to the CBCA. Section 847 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2006 established the CBCA in 2007 to decide contract disputes between Government contractors and Executive agencies under the provisions, regulations, and rules of the Contract Disputes Act (CDA) of 1978. Pub. L. 109-163 § 847, 119 Stat. 3391 (2006) (codified at 41 U.S.C. § 7105). The CDA created agency boards to adjudicate contract deputes "to the fullest extent practicable, informal, expeditious, and inexpensive resolution of disputes." 41 U.S.C. § 607(e) (2006) (current version at 41 U.S.C. § 7105(g)). The CBCA was created by consolidating eight civilian agency boards of contract appeals into one Board. *About the Board*, U.S. Civilian Bd of Cont. Appeals, https://www.cbca.gov/board/index.html [https://perma.cc/KU66-PRBM]. The CBCA is housed in the General Services Administration (GSA). 71 Fed. Reg. 65825 (Nov. 9, 2006). Currently, the CBCA's authority expands to all Executive agencies except the Department of Defense, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Rate Commission, the Federal Aviation Administration, and the Tennessee Valley Authority. *See* 41 U.S.C. § 7105. The CBCA partially shares contracts disputes jurisdiction with the United States Court of Federal Claims under the CDA and the Tucker Act. 41 U.S.C. § 7104; 28 U.S.C. § 1491. The United States Court of Appeals for the Federal Circuit is the appellate authority for the Board. 28 U.S.C. § 1295; 41 U.S.C. § 7107(a)(1).

On September 25, 2021, the Board affirmed the CO's decision. Green appealed this decision to the United States Court of Appeals for the Federal Circuit. On December 21, 2021, the Court agreed with Green and found that CBCA AJs are unconstitutionally appointed principal officers. The Court vacated and remanded the decision recognizing that Congress, not the judicial branch, is the appropriate body to remedy the constitutional violation. A *sua sponte* request for a poll was conducted, and a majority of the judges voted for *sua sponte* en banc consideration of this case.

SUMMARY OF THE ARGUMENT

CBCA AJs are unconstitutionally appointed because they are principal officers. The Appointments Clause requires that principal officers be appointed by the President with the advice and consent of the Senate. Article II of the United States Constitution provides that the executive power shall be vested in a president, who must make sure that the laws be faithfully executed. U.S. Const. art. II, § 1, cl. 1, § 3. Based on the factors articulated by the Supreme Court in *Edmond v. United States*, CBCA AJs are principal officers. *See Edmond v. United States*, 520 U.S. 651, 663–64 (1997).

The Supreme Court in *Edmond* focused on the definitional aspect of being an inferior officer, when a person "with some higher-ranking officer or officers below the President." *Id.* at 662. The Court also highlighted three functional factors to resolve whether a person is a principal officer: (1) power to review and reverse the inferior officer's decision; (2) supervision and oversight over the inferior officer; and (3) removal power. *Id.* at 663–64. In this case, the definitional aspect of *Edmond* demonstrates that CBCA AJs are principal officers. CBCA AJs are not supervised. While the GSA Administrator appoints CBCA AJs in consultation with the Administrator for Federal Procurement Policy, the Administrator does not actually supervise CBCA AJs. *See* 41 U.S.C. § 7105(b)(2). No principal officer has the power or authority to review the CBCA's decisions. The decisions can only be appealed to the judicial branch, the United States Court of Appeals for the Federal Circuit. The Court of Appeals is an Article III judicial branch and not an executive agency; therefore, the CBCA wields its power with no executive branch oversight. *See Edmond*, 520 U.S. at 664.

Additionally, even though the GSA Administrator appoints CBCA AJs, the Administrator does not supervise or oversee them. The GSA Administrator also has limited power to remove CBCA AJs for cause only. Given all three *Edmond* factors, CBCA AJs are principal officers. Therefore, they must be appointed by the President and confirmed by the Senate in accordance with the Appointments Clause. Moreover, while the Supreme Court has "not set forth an exclusive criterion for distinguishing between principal and inferior

officers for Appointment Clause purposes," *Arthrex* refined the factors from *Edmond* and unchangeably applied them to the facts at issue. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985 (2021) (citing *Edmond*, 520 U.S. at 665). Moreover, one of the cardinal rules set out by the Supreme Court for federal courts is "'never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Brockett v. Spokane Arcades*, 472 U.S. 491, 501 (1985) (quoting *Liverpool, N.Y. & Phila. S.S. Co. v. Comm'rs of Emigration*, 113 U.S. 33, 39 (1885)). Therefore, this Court should follow established binding precedent and apply only the three articulated factors in *Edmond*.

Should this Court find that CBCA AJs are principal officers, this Court should vacate and remand the CBCA's decision. Congress must act to fashion an appropriate remedy in this case because the judicial remedy of severance is unworkable. Congress intended the CBCA to serve as a completely independent tribunal to preserve its independence and neutrality in deciding cases, and the current statutory scheme of the CBCA reflects this aim. However, the Government's proposed solutions disregard congressional intent and legislative history, and further complicate matters by creating due process concerns.

The proposals raised by Appellee fail to cure the Appointments Clause violation for several reasons. First, the GSA Administrator does not possess the authority to review CBCA decisions. While the CBCA is housed within GSA, the Administrator exercises no authority over the Board. This was by design because Congress did not want the CBCA to be subject to the procuring agencies' influence. Second, the statute as written cannot be severed in such a way as to confer review authority to the GSA Administrator. Even if there was a way, this proposed remedy would contravene congressional intent.

Attempting to fix the Appointments Clause violation by severing removal protections from CBCA AJs is inappropriate for several reasons. First, Congress has specifically spoken on this matter and has consistently maintained removal protections for CBCA AJs for decades. Second, severance of removal protections does not actually fix the constitutional violation because, if CBCA AJs are principal officers, they must be appointed by the President with the advice and consent of Congress. CBCA AJs will remain principal officers because they are neither directed nor supervised by a superior officer and they unilaterally issue final decisions that are unreviewable by a superior officer. Lastly, if CBCA AJs are removable at will, litigants are deprived of a hearing before independent arbiters. Removal protections are an important safeguard which ensures that judges operate independently. Judges must be afforded such freedom to decide each case based on its merits without fear of removal. Because only Congress can cure this constitutional violation, this Court should vacate and remand the CBCA's decision to allow Congress an opportunity to determine an appropriate remedy.

ARGUMENT

I. STANDARD OF REVIEW

Pursuant to the CDA, this Court reviews the CBCA's decisions on questions of law *de novo*. 41 U.S.C. § 7107(b)(1); *see Dai Glob. v. Adm'r of the United States Agency for Int'l Dev.*, 945 F.3d 1196, 1198 (Fed. Cir. 2019).

II. THE CBCA AJS WERE NOT CONSTITUTIONALLY APPOINTED IN VIOLATION OF THE APPOINTMENTS CLAUSE OF THE UNITED STATES CONSTITUTION, U.S. CONST. ART. II, § 2, CL. 2.

A. CBCA AJs are officers and not employees because they possess "significant authority."

CBCA AJs are unconstitutionally appointed because they are principal officers. The Appointments Clause requires that principal officers be appointed by the President with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. Article II of the United States Constitution provides that the executive power shall be vested in a president, who must make sure that the laws be faithfully executed. U.S. Const. art. II, § 1, cl. 1; art. II, § 3. The Appointments Clause of Article II also states that the President

> shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const. art. II, § 2, cl. 2.

In essence, the Appointments Clause ensures the separation of powers and protects against "one branch aggrandizing its power at the expense of another branch." *Ryder v. United States*, 515 U.S. 177, 182 (1995). The President can appoint other officials to assist him with his executive function. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2197 (2020). The Founders recognized that "no single person could fulfill that responsibility [i.e, executive power of the federal government] alone." *Id.* at 2191. Therefore, the Appointments Clause allows the President to appoint officers to aid him with performing the executive function. Nevertheless, "[t]hese lesser officers must remain accountable to the President, whose authority they wield." *Id.* at 2197.

The Appointments Clause also ensures that the President is ultimately accountable and answerable for the executive branch's actions. *See Arthrex*, 141 S. Ct. at 1979. The President always remains "responsible for the actions of the Executive Branch," and "cannot delegate [that] ultimate responsibility or the active obligation to supervise that goes with it." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 496–97 (2010). That is why "Article II grants to the President the executive power of the Government, i.e.,

the general administrative control of those executing the laws, including the power of appointment and removal of executive officers." *Myers v. United States*, 272 U.S. 52, 163–64 (1926).

Prior to determining whether CBCA AJs are principal or inferior officers, this Court must first determine whether they are "officers" or "employees." *See Lucia v. S.E.C.*, 138 S. Ct. 2044, 2051 (2018). If the analysis establishes that CBCA AJs are employees, no additional inquiry is necessary because no constitutional appointment process exists for employees. *Id.* However, if it is determined that CBCA AJs are officers, it must then be resolved whether they are principal or inferior officers appointed in accordance with the Constitution. *See Arthrex*, 141 S. Ct. at 1979.

Even though neither party contends that CBCA AJs are employees and not officers, it is still required by the Appointment Clause analysis to resolve this issue upfront before moving to the second step. To be classified as an executive branch officer rather than an employee, one needs to have a continuing position established by law and must "exercis[e] significant authority pursuant to the laws of the United States." *Buckley v. Valeo*, 424 U.S. 1, 126 (1976); *see also United States v. Germaine*, 99 U.S. 508, 511–12 (1879). The Supreme Court in *Lucia* concluded that the Securities and Exchange Commission (SEC) administrative law judges (ALJs) are executive branch officers who occupy a continuing office. 138 S. Ct. at 2053–55. The Court also found that they operate with significant authority when they conducted administrative hearings, supervised discovery, and made final legal and factual findings of the law. *Id.*

Similar to the SEC ALJs in *Lucia*, CBCA AJs are officers of the United States executive branch. Not only do they hold a continuing office, but they also exercise significant authority. 41 U.S.C. § 7105(b)(4). Section 847 of the NDAA for FY 2006 established the CBCA to hear and decide disputes between government contractors and executive agencies under the provisions, regulations, and rules of the CDA. 41 U.S.C. §§ 7101–7109. The GSA Administrator appoints CBCA AJs in accordance with 41 U.S.C. § 7105(b)(2) and at the pay level specified by statute. 5 U.S.C. § 5372a. In fact, CBCA AJs fulfill many significant and important functions:

> In general, a Board Member's duties are to: (1) manage a docket of cases; (2) hold pre–hearing conferences; (3) authorize the taking of depositions; (4) issue subpoenas; (5) decide motions, discovery requests, and evidentiary questions; (6) regulate the course of hearings, including administering oaths, questioning witnesses, determining credibility, and making findings of fact and conclusions of law, among other things; (7) make decisions and participate in decisions with other Board Members; (8) conduct mediation, arbitration, and other alternative dispute resolution proceedings to promote resolution of disputes; and (9) take any authorized action that is consistent with the goal of administering justice.

9271.1B ADM Procedures for Selection of U.S. Civilian Board of Contract Appeals Members.

Based on the CBCA AJs' duties and responsibilities, their ability to review a CO's decisions and enter final judgments in CDA actions, they are comparable

to SEC ALJs in *Lucia*. 138 S. Ct. at 2053–54. The facts in that case support the findings that Board AJs operated with "significant authority" based on the test articulated by *Freytag v. Commissioner*, 501 U.S. 868, 881 (1991). Therefore, Supreme Court precedent makes clear that CBCA AJs are "officers" of the United States because they "exercise significant authority" while occupying a continuing position. *Buckley*, 424 U.S. at 125–26.

B. CBCA AJs are principal officers based on the factors articulated in Edmond.

Based on the factors articulated by the Supreme Court in *United States v. Edmond*, CBCA AJs are principal officers. The Court established that "[w]hether one is an 'inferior' officer depends on whether he has a superior." *Edmond*, 520 U.S. at 662. Inferior officers are "officers whose work is directed and supervised at some level by others who were appointed by presidential nomination with the advice and consent of the Senate." *Id*. at 663. Essentially, the Supreme Court in *Edmond* focused on the definitional aspect of being an inferior officer in a situation, when a person "with some higher-ranking officer or officers below the President." *Id*. at 662. However, the definitional consideration is not dispositive. Rather, it is a cursory look at the supervisory relationship at issue. The Court in *Edmond* specifically highlighted three functional factors to explore the substance and resolve whether a person is a principal officer: (1) power to review and reverse the inferior officer's decision, (2) supervision and oversight over the inferior officer, and (3) removal power. *Id*. at 662–65.

In this case, despite the definitional aspect of *Edmond*, the functional factors demonstrate that CBCA AJs are principal officers. While the GSA Administrator appoints CBCA AJs in consultation with the Administrator for Federal Procurement Policy, the Administrator does not actually supervise CBCA AJs. *See* 41 U.S.C. § 7105(b)(2). The CBCA promulgates its own procedural rules over which the GSA Administrator has no ability to provide input or recommend changes. Even though in *United States v. Arthrex, Inc.* the Patent and Trademark (PTO) Director exhibited administrative control over the Patent Trial and Appeal Board (PTAB) by creating procedural rules and even sitting on the board as a member, the Supreme Court still determined that the PTO Director did not have an acceptable level of control to justify finding these officers were inferior. *See Arthrex*, 141 S. Ct. at 1976–78. The majority did not believe that administrative strings alone are sufficient to conclude that the PTAB Administrative Patent Judges (APJs) are inferior officers. *Id.* at 1978. The majority in *Arthrex* fully analyzed this issue using the functional factors from *Edmond*. *Id.* at 1980.

1. The principal officer's power to review and reverse the inferior officer's decision.

The first functional inquiry under Edmond is to determine if a person is "directed and supervised at some level," i.e., if the principal officer has the power to review and reverse the inferior officer's decision. *Edmond*, 520 U.S.

at 663. If an individual can "render a final decision on behalf of the United States," this individual is considered a principal officer. *Id.* at 665; *see also Arthrex*, 141 S. Ct. at 2002. It is important to note that *Edmond* treats this factor as an essential element of supervision for AJs. *See Edmond*, 520 U.S. at 665 ("What is significant is that the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers."). *Edmond* makes the principal officer's review and ability to correct their decisions vital to its assessment.

This case is similar to the Supreme Court's holding in *United States v. Arthrex*. The Court determined that the PTAB's APJs issued final decisions and those decisions were not reviewable by the PTO Director, a principal officer who retained administrative oversight over the PTAB. *Arthrex*, 141 S. Ct. at 1981. The Court also considered all of the indirect ways the PTO Director could affect APJs and their decisions. For example, the PTO Director could select specific APJs for a case, sit on a rehearing panel, initiate an *inter partes* review (IPR) hearing, and remove individual APJs from their judicial assignments without cause. *Id*. at 1980–85. Nevertheless, despite "such machinations [that] blur the lines of accountability demanded by the Appointments Clause," the fact that only the PTAB could grant a petition for a rehearing showed that "the buck stops with the APJs, not with the Secretary [of Commerce] or [PTO] Director." *Id*. at 1981–82 (citing 35 U.S.C.§ 6(c)). Because the PTAB wielded unreviewable authority, such power was determined to be incompatible with their appointment to an inferior office. *Id*. at 1985.

Here, the review process is even more straightforward than in *Arthrex*. Usually, a panel of three CBCA AJs reviews a case and makes final decisions based on the merits of the case and legal precedent. CBCA, Contract Appeal Cases, Rule 1(d). No principal officer has the power or authority to review the CBCA's decisions. Only the CBCA itself can decide to rehear or reconsider its own decision. CBCA, Contract Appeal Cases, Rule 26 and 28. The decisions can be appealed only to the judicial branch, the United States Court of Appeals for the Federal Circuit. The Court of Appeals is an Article III judicial branch and not an executive agency; therefore, the CBCA wields its power with no executive branch oversight. *See Edmond*, 520 U.S. at 662. Without any principal officer review, CBCA AJs are principal officers.

2. Supervision and oversight over the inferior officer.

The second factor in *Edmond* centers around whether a principal officer has the power of supervision and oversight over the inferior officer. *See id*. If a principal officer prescribes procedural rules and policies of how to conduct hearings, that demonstrates there is a significant level of oversight. *See id*. Here, even though the GSA Administrator appoints CBCA AJs, the Administrator does not supervise or oversee them. Congress specifically intended for CBCA AJs to serve independently and without the influence of any procuring agencies. *See* S. Rep. No. 95-1118, at 24, 26 (1978) (highlighting that boards of contract appeals are fully independent and not representative of procuring

agency's authority.); *see also Commc'ns Res. Grp., Inc.*, GSBCA No. 11038-C, 92-2 BCA ¶ 24,769; *Seila Law*, 140 S. Ct. at 2207 (quoting Black's Law Dictionary 838 (9th ed. 2009) defining "independent" as "[n]ot subject to the control or influence of another").

Legislative history demonstrates that Congress intended for the CBCA to maintain decisional independence, including when the Board hears cases involving GSA. S. Rep. No. 95-1118, at 24. CBCA AJs review appeals from many different civilian agencies without any supervision. To meet congressional intent, the CBCA must remain neutral regardless of each individual case or parties involved in the dispute. *See id.* at 26 (stating that boards of contract appeals "function as quasi-judicial bodies" that do not act as a representative of the agency, "since the agency is contesting the contractor's entitlement to relief"). CBCA AJs adjudicate thousands of contract disputes with billions of dollars at stake. They must be able to adjudicate impartially, even when the GSA is involved in those disputes. Even if the Board rules against GSA as a procurement entity, the GSA Administrator cannot overturn its findings. The Appointments Clause requires direct supervision that can be attributed to accountability, but, in this instance, the GSA Administrator cannot take responsibility for any of the decisions made by the CBCA, nor can they overturn its final decisions. There is no case law rendering AJs as inferior when they are not supervised. *Cf. Live365, Inc. v. Copyright Royalty Bd.*, 698 F. Supp. 2d. 25, 39 (D.C. Cir. 2010). This case should not be treated differently and must be decided in accordance with legal precedent. Therefore, given the CBCA's inherent structural independence from any principal officer within the GSA and other procurement agencies, CBCA AJs are principal officers.

3. Power to remove.

The third and final *Edmond* factor looks at the ability and power to remove inferior officers. *See Edmond*, 520 U.S. at 664. Unlimited removal power is one of the key considerations of a principal officer's control over an inferior officer. *Id.* "At-will removal ensures that 'the lowest officers, the middle grade, and the highest, will depend, as they ought, on the President, and the President on the community.'" *Collins v. Yellen*, 141 S. Ct. 1761, 1784 (2021) (quoting 1 Annals of Cong. 499 (1789) (J. Madison)). The Supreme Court in *Arthrex* and the D.C. Circuit in *Intercollegiate Broadcasting System, Inc. v. Copyright Royalty* has reaffirmed that limited for-case authority to remove significantly empowers APJs, making them principal officers. *See Arthrex*, 141 S. Ct. at 1982; *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty*, 684 F.3d 1332, 1339–40 (D.C. Cir. 2012).

"The power to remove officers" at will and without cause "is a powerful tool for control" of a principal officer. *Free Enter. Fund*, 561 U.S. at 510 (quoting *Edmond*, 520 U.S. at 665). The D.C. Circuit Court in *Intercollegiate Broadcasting System, Inc.* determined that Copyright Royalty Judges (CRJs) were unconstitutionally appointed principal officers due to their "nonremovability and the finality of their decisions." *Intercollegiate Broad. Sys., Inc.*, 684 F.3d at

1339. The Registrar of Copyrights and his supervisor the Librarian, who was appointed by the President and confirmed by the Senate, did not have untethered power over the CRJs and could remove them for "only for misconduct or neglect of duty." *Id*. at 1338, 1340. Similar to other principal officers, CRJs made final determinations about important issues in the area of their practice, such as the rates and terms of digitally recorded music webcasting. *Id.* at 1334.

Here, the GSA Administrator has limited power to remove CBCA AJs for cause. "Members of the Civilian Board are subject to removal in the same manner as administrative law judges, as provided in section 7521 of Title 5." 41 U.S.C. § 7105(b)(3). Actions can be taken "*only* for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board." 5 U.S.C. § 7521(a) (emphasis added). Adverse actions can be taken "only for such cause as will promote the efficiency of the service." 5 U.S.C. § 7513(a). The nexus requires "misconduct likely to have an adverse impact on the agency's performance of its functions." *Brown v. Dep't of Navy*, 229 F.3d 1356, 1358 (Fed. Cir. 2000), *cert. denied*, 533 U.S. 949 (2001). Thus, CBCA AJs are employed in a similar fashion to any other federal civil servant.

This case is similar to *Arthrex* and *Intercollegiate* because the AJs in those cases made important decisions but could not be easily removed from their positions. If the GSA Administrator decides to terminate a CBCA AJ, he or she must show "good cause" "established and determined by the Merit Systems Protection Board." 5 U.S.C. § 7521(a)–(b) (noting that the "agency in which the administrative law judge is employed" may remove an individual "only for good cause established and determined by the Merit Systems Protection Board on the record after opportunity for hearing before the Board" allowing thirty days' notice, an opportunity to respond, a right to counsel); *see also Abrams v. SSA*, 703 F.3d 538, 543 (Fed. Cir. 2012).

Both courts in *Arthrex* and *Intercollegiate* considered the limited ability to remove finding in favor of AJs as principal officers. *See Arthrex*, 141 S. Ct. at 1986–87; *see also Intercollegiate Broad. Sys., Inc.*, 684 F.3d at 1339–40. CBCA AJs positions are not "temporary" like in *Morrison* and they accomplish more than just "a single task." *See Morrison v. Olson*, 487 U.S. 654, 672 (1988). Because there is no functional control over this position without sufficient ability to remove at will, this lack of control shows that the Board AJs are principal officers.

After analyzing all three *Edmond* factors, it is clear that CBCA AJs are principal officers. Therefore, they must be appointed by the President and confirmed by the Senate in accordance with the Appointments Clause.

C. This Court should only focus on the functional factors outlined in Edmond *and refined in* Arthrex.

While the Supreme Court has "not set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointment Clause purposes," *Arthrex* refined the facts from *Edmond* to evaluate three factors

to be enumerated and unchangeably applied. *Edmond*, 520 U.S. at 661. The Court noted: "[T]wo of the cardinal rules governing the federal courts: '[one], never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Brockett*, 472 U.S. at 501 (quoting *United States v. Raines*, 362 U.S. 17, 21 (1960)). This Court should follow established binding precedent and apply only the three articulated factors because there is no need to make the test more expansive than this case requires in accordance with the Supreme Court's direction given in *Brockett*. 472 U.S. at 501–02.

The three factors from *Edmond* cover the most important considerations when deciding whether someone is a principal or an inferior officer. If the list continues to grow without having a comprehensive test that is easy to apply, this already ambiguous issue will remain difficult to resolve. The only reason any list or test should be supplemented is if it is outdated or does not meet its intended purpose of resolving the issue. The *Edmond* functional test is not too rigid; it is still broad enough to fully assess an individual's position and responsibility. Yet, it is not too broad that makes it impossible to analyze the issue and draw all the necessary conclusions while still easy to apply as shown in *Arthrex*. *See Arthrex*, 141 S. Ct. at 1970.

III. THE APPOINTMENTS CLAUSE VIOLATION CANNOT BE RESOLVED BY THE JUDICIAL REMEDY OF SEVERANCE.

Should this Court find that CBCA AJs are principal officers, the Appellants urge this Court to refrain from exercising the judicial remedy of severance. The solutions previously proposed by the DOE fail for several reasons, and the only workable remedy to correct the Appointments Clause violation requires congressional action. The Supreme Court has consistently reaffirmed the notion that, if a portion of a statute is unconstitutional, "the invalid part may be dropped if what is left is fully operative as a law." *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987) (quoting *Buckley*, 424 U.S. at 108). However, if "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not," the remainder of the statute must also be invalidated. *Alaska Airlines*, 480 U.S. at 684. "After finding an application or portion of a statute unconstitutional, [a court] must next ask: Would the legislature have preferred what is left of its statute to no statute at all?" *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 330 (2006). In answering this question, the court must examine legislative intent. *Id*. at 321.

While severance is the "traditional rule," *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. at 2209, a court "cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018) (citing

R.R. Ret. Bd. v. Alton R. Co., 295 U.S. 330, 362 (1935). In accordance with the constitutional system of separation of powers, "federal courts do not sit as councils of revision, empowered to rewrite legislation in accord with their own conceptions of prudent public policy." *United States v. Rutherford*, 442 U.S. 544, 555 (1979). For the reasons set forth below, this Court should hold that Green is entitled to a new hearing before properly appointed CBCA AJs. To remedy the constitutional violation, this Court should vacate and remand the CBCA's decision, and allow for Congress to fashion an appropriate remedy because the judicial remedy of severance is unworkable.

A. Severance of 41 U.S.C. § 7101(a)(1) is not a viable remedy.

1. The statutory scheme of the CBCA makes severance of 41 U.S.C. § 7101(a)(1) unworkable.

Severance of 41 U.S.C. § 7107(a)(1), which provides for the finality of the CBCA's decisions, is not a workable remedy because the statutory framework of the CBCA does not confer any power to the GSA Administrator to review final CBCA decisions. Although the CBCA is housed within the GSA, the CBCA serves as an independent tribunal. Congress has not granted any authority to the GSA Administrator to supervise, review final decisions, or otherwise exercise any authority over the CBCA. Their decisions are final, except that a contractor may appeal the decision to the United States Court of Appeals for the Federal Circuit. 41 U.S.C. § 7107(a)(1). The GSA Administrator's authority over the CBCA is limited to appointment of its members, which is conducted in consultation with the Administrator for Federal Procurement Policy. 41 U.S.C. § 7105(b)(2)(A).[1]

The remedial solution in *Arthrex* is not appropriate or achievable in this case because the structure of the PTAB and CBCA are fundamentally different. In *United States v. Arthrex, Inc.*, the Court held that APJs were principal officers because they possessed the authority to render final decisions on behalf of the United States during IPR. *Arthrex*, 141 S. Ct. at 1985. When faced with the question of whether severance would solve the dispute, the Court disagreed with the Court of Appeals for the Federal Circuit, which found that an appropriate remedy was to sever the APJs' removal protections. *Id.* at 1987. Instead, after reviewing the structure of the PTO along with governing constitutional principles, the Court elected to sever the portions of the statute in question which prevented the PTO Director from reviewing IPR

1. Further, a plain reading of 40 U.S.C. § 501(b)(1)(A) ("Services of executive agencies") demonstrates that the GSA Administrator does not have the authority to exercise supervision or oversight over the CBCA. With respect to procurement and supply: "The Administrator of General Services *shall procure and supply personal property and nonpersonal services for executive agencies* to use in the proper discharge of their responsibilities, and *perform functions related to procurement and supply including contracting*, inspection, storage, issue, property identification and classification, transportation and traffic management, management of public utility services, and repairing and converting." 40 U.S.C. § 501(b)(1)(A) (emphasis added).

decisions. Its rationale hinged on the fact that "[b]ecause Congress has vested the Director with the power and duties of the PTO . . . [t]he Director accordingly may review final PTAB decisions and, upon review, may issue decisions himself on behalf of the Board." *Id.* (internal quotations omitted).

Here, the GSA Administrator does not possess the level of authority over the CBCA as the PTO Director has over the PTAB. The PTAB is an administrative body within the PTO. Because Congress had already vested the PTO Director with the "powers and duties" over the PTO, severance allowed the PTO Director to exercise the right to review IPR decisions. *See* 35 U.S.C. § 3(a)(1). Unlike the PTO Director, the GSA Administrator neither supervises CBCA AJs, nor does the GSA Administrator possess the "means of control over the institution and conduct" of board hearings. *See Arthrex*, 141 S. Ct. at 1986. Except for appointment of CBCA AJs, Congress has not authorized the GSA Administrator any meaningful supervisory authority over the CBCA. Thus, severance of 41 U.S.C. § 7107(a)(1) would result in an unworkable scheme because the GSA Administrator cannot assume authority which he or she does not already possess as originally granted by Congress.

2. This proposed remedy runs afoul of Congressional intent.

This proposed remedy is at odds with congressional intent and legislative history. If a court determines that a law is unconstitutional, it must consider whether a remedial approach such as severance is possible. However, a court must "limit the solution to the problem, severing any problematic portions while leaving the remainder intact." *Free Enter. Fund*, 561 U.S. at 508 (internal quotations omitted). Severance is appropriate only if the remainder of the statute is (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress's basic objectives in enacting the statute. *United States v. Booker*, 543 U.S. 220, 258–59 (2005) (internal citations and quotations omitted).

Legislative history demonstrates that Congress would not have sought to empower the GSA Administrator to review CBCA decisions. The purpose of the CDA is to provide for a "fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving Government contract claims." S. Rep. No. 95-118, at 1 (1978) According to the CDA, boards of contract appeals were established to serve as independent and neutral forums and "function as quasi-judicial bodies." *Id.* at 26. The members serve as AJs in an adversary-type proceeding, and "[i]n performing this function *they do not act as a representative of the agency*, since the agency is contesting the contractor's entitlement to relief." *Id.* (emphasis added). Congress specifically provided for safeguards to ensure that the board "in conducting proceedings and deciding cases [involving boards] would not be subject to direction or control by procuring agency management authorities." *Id.* at 24. Therefore, it would be inappropriate to infer that Congress intended the GSA Administrator, the head of a procuring agency, to have any authority over the CBCA's decisions.

B. Severance of 41 U.S.C. § 7105(b)(3) is an inappropriate remedy.

1. The CBCA will not function in a manner consistent with congressional intent if removal protections are severed.

The statutory requirement of removal protections under 41 U.S.C. § 7105(b)(3) cannot be severed because such remedy is inconsistent with congressional intent. Severability requires courts to examine legislative history to determine what "Congress would have intended in light of the Court's constitutional holding." *Booker*, 543 U.S. at 246 (internal quotations omitted). In performing this analysis, courts shall not sever portions of the statute that would be consistent with "Congress' basic objectives in enacting the statute." *Id*. at 259. Thus, the relevant inquiry is whether the statute will continue to function "in a *manner* consistent with the intent of Congress." *Alaska Airlines*, 480 U.S. at 685 (emphasis in original). In determining an appropriate remedy, "a court cannot use its remedial powers to circumvent the intent of the legislature." *Ayotte*, 546 U.S. at 330 (internal quotations omitted).

Severance of removal protections would significantly alter the process that Congress envisioned for boards of contract appeals. Congress intended the boards to be "independent, quasi-judicial bod[ies] with court-like powers and authority." *Appeals of Gen. Dynamics Ordnance & Tactical Sys., Inc.*, ASBCA No. 56870, 2010 WL 3119469 (June 1, 2010). To preserve the independence of the board members as "quasi-judicial officers," the members must be selected and appointed in the same manner as ALJs. *See* S. Rep. No. 95-1118, at 24 (1978). Congress determined this method of appointment would ensure that board members are "appointed strictly on the basis of merit, and that in conducting proceedings and deciding cases they would not be subject to direction or control by procuring agency management authorities." *Id*. Thus, Congress's goal of creating a quasi-judicial board free from agency influence relies upon its independence for success. Removing the "safeguards to assure objectivity and independence" fundamentally changes the structure that Congress sought when it established the CBCA. *Id.* at 13.

A review of legislative history behind the CBCA's establishment demonstrates that Congress acted deliberately when it preserved removal protections for CBCA AJs. As part of the NDAA for FY 2006, Congress established the CBCA within the GSA to decide contract disputes between contractors and certain executive agencies. Pub. L. No. 109-163, § 847(a), 119 Stat. 3136, 3391–92 (2006). The legislation terminated other existing agency boards of contract appeals, other than the Armed Services Board of Contract Appeals (ASBCA), the Board of Contract Appeals of the Tennessee Valley Authority, and the Postal Service Board of Contract Appeals. *Id*. More importantly, the NDAA for FY 2006 provided removal protections only for members of the CBCA. *Id*. Those removal protections remain unchanged to this present day. *See* 41 U.S.C. § 7105(b)(3)

During congressional proceedings prior to the enactment of the NDAA for FY 2006, the House of Representatives considered providing the same

removal protections to both the CBCA and the ASBCA. *See* 151 Cong. Rec. H3912 (daily ed. May 25, 2005); 151 Cong. Rec. H3977 (daily ed. May 25, 2005) ("Removal.-*Members of the Defense Board and the Civilian Board* shall be subject to removal in the same manner as administrative law judges, as provided in section 7521 of title 5, United States Code.") (emphasis added); H.R. Rep. 109-89, at 394 (May 20, 2005) ("*Judges of both Boards* shall be subject to removal in the same manner as administrative law judges under section 7521 of title 5, United States Code") (emphasis added). However, Congress decided against doing so and provided only the CBCA with removal protections. Pub. L. No. 109-163, § 847(b)(2), 119 Stat. 3136, 3392 (2006).

When the CBCA was established, Congress unequivocally determined that the Board will be afforded removal protections. After considering whether to extend the same protections to the ASBCA, Congress opted against it. Had Congress intended to give both boards the same protections, it presumably would have done so. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (internal citation omitted). Given Congress's deliberate decision to provide removal protections to CBCA AJs, severance of removal protections will not allow the statute to "function in a manner consistent with the intent of Congress." *See Alaska Airlines*, 480 U.S. at 685 (emphasis in original). Lastly, severing removal protection, in contravention of congressional intent, may very lead to a statute that Congress would not have enacted at all. *Bowsher v. Synar*, 478 U.S. 714, 735 (1986) (noting that removal protections should not be severed if it "would lead to a statute that Congress would probably have refused to adopt").

2. Severance of removal protections does not cure the Appointments Clause violation.

This Court should reject the proposed remedy of severance of removal protections because it does not cure the Appointments Clause violation. The Appointments Clause requires that principal officers be appointed by the President with the advice and consent of the Senate. U.S. Const. art. II, § 2, cl. 2. An "inferior officer" not only refers to an individual who has a superior; "rather, in the context of a Clause designed to preserve political accountability relative to important Government assignments, . . . inferior officers are officers whose work is directed and supervised at some level by others who were appointed by Presidential nomination with the advice and consent of the Senate." *Edmond*, 520 U.S. at 663 (internal quotation omitted). While removal may serve as a "powerful tool for control," an inferior officer's work must also be subject to review by a principal officer. *Id.* at 664.

Severance of removal protections does not transform CBCA AJs, who are principal officers, into inferior officers. The constitutional injury in this case arises from two statutory provisions operating together—removal protections and the finality of the board's decisions. CBCA AJs will remain principal

officers because they are neither directed nor supervised by a superior officer and they unilaterally issue final decisions that are unreviewable by a superior officer. *See Arthrex*, 141 S. Ct. at 1983 ("History reinforces the conclusion that the unreviewable executive power exercised by APJs is incompatible with their status as inferior officers. Since the founding, principal officers have directed the decisions of inferior officers on matters of law as well as policy."). Further, this option has no practical impact on CBCA decisions. Removal would likely occur after decisions are rendered, meaning the GSA Administrator would have "no means of countermanding the final decision already on the books." *Id*. at 1982.

Supreme Court precedent supports the proposition that severance alone, without a meaningful principal officer review, cannot transform CBCA AJs into inferior officers. In *Free Enterprise Fund*, the Court held that the Sarbanes-Oxley Act's dual for-cause removal protection provisions for board members were invalid, but the unconstitutional provisions were severable. *Free Enter. Fund*, 561 U.S. at 508. In finding that the board members were inferior officers, the Court relied on both the at-will removal authority and the Commission's "other oversight authority," which includes issuance of rules or the imposition of sanctions. *Id*. at 486, 510. Similarly, in *Edmond*, the Court found that Coast Guard Court of Criminal Appeals judges were inferior officers because their decisions were reviewable and could be reversed by the Court of Appeals for the Armed Forces; thus, "the judges of the Court of Criminal Appeals have no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers." 520 U.S. at 665. In both cases, the Supreme Court found the requisite level of supervision and oversight existed over the officers. With respect to the CBCA, the GSA Administrator does not possess statutory authority to supervise or direct the Board in any way, nor does the GSA Administrator have the power to review or reverse CBCA decisions. Therefore, even if removal protections were excised from the statute, the CBCA's decisions would remain unreviewable and final.

3. Severance of removal protections creates constitutional due process concerns.

Severance of removal protections for CBCA AJs threatens a litigant's due process rights because they are being deprived of an independent, impartial decisionmaker. Congress recognized the need to preserve the due process rights of litigants before the CBCA. S. Rep. No. 95-118, at 12 (1978) ("The boards of contract appeals originally were intended to provide a swift, inexpensive method of resolving contract disputes. Their operations and procedures have, however, been changed over the years by the demand and requirement for due process."). Part of Congress's logic behind creating a flexible contract disputes system with alternative forums was to ensure a litigant had the ability to "choose a forum according to the needs of his particular case; that is, one where the degree of due process desired can be balanced by the time and expense considered appropriate for the case." *Id*. at 13. With respect to boards

of contract appeals, Congress explicitly provided for removal protections to ensure the independence of its members and secure the procedural due process rights of litigants.

Without removal protections, CBCA AJs' jobs become more political. Federal agency department heads, including the GSA Administrator, are political appointees who act on behalf of the President. If a CBCA AJ rules in a manner contrary to their supervisor's views, they risk losing their livelihood. This possibility hinders their ability to remain independent and neutral. *See Arthrex, Inc. v. Smith & Nephew, Inc.*, 953 F.3d 760, 788 (Fed. Cir. 2020) (Hughes, J., dissenting from denial of rehearing en banc) (noting that severance of tenure protections from APJs "paradoxically imposes the looming prospect of removal without cause on the arbiters of a process which Congress intended to help implement a 'clearer, fairer, more transparent, and more objective' patent system"). Further, Congress was acutely aware of the political and agency pressures that boards of contract appeals could face. Thus, Congress provided them with removal protections similar to ALJs. S. Rep. No. 95-1118, at 24. By setting aside Congress's vision for removal protections, it allows for policymakers to influence board decisions through the threat of removal.

The perception that the GSA Administrator may threaten to fire or fire a CBCA AJ because of their decision would undermine public confidence in the system. The overarching purpose behind the CDA is to provide a "fair, balanced, and comprehensive statutory system of legal and administrative remedies in resolving government contract claims." *Id.* at 1. Removal protections are "essential to fair performance" of a CBCA AJs' quasi-judicial role. *See Smith & Nephew, Inc.*, 953 F.3d at 771 (Dyk, J., joined by Newman, Wallach, and Hughes, JJ., dissenting). When establishing the boards of contract appeals, Congress understood removal protections were necessary to assure objectivity and independence. S. Rep. 95-1118, at 13. The independence granted to CBCA AJs ensures public trust in the essential fairness of the process because the AJs remain impartial decisionmakers. *See Nash v. Califano*, 613 F.2d 10, 16 (2d Cir. 1980) (noting that the independence granted to ALJs is designed to maintain public confidence in the essential fairness of the process by ensuring impartial decision making). However, without removal protections, CBCA AJs may become "mere tools of the agency concerned and subservient to the agency heads in making their proposed findings of fact and recommendations." *Ramspech v. Fed. Trial Exam'rs Conf.*, 345 U.S. 128, 130 (1953).

4. The Supreme Court's remedial holdings of severability in *Seila Law* and *Free Enterprise Fund* are distinguishable from this case.

The Appellees' reliance on Supreme Court precedent for the proposition that severability of removal protections is an appropriate remedy is misplaced. In *Seila Law LLC v. Consumer Financial Protection Bureau*, the Court invalidated the Consumer Financial Protection Board (CFPB) Director's removal protections but found that the provision was severable. The CFPB Director possesses broad rulemaking, enforcement, and adjudicatory authority. *Seila Law*,

140 S. Ct. at 2193. When analyzing whether Congress had previously provided tenure protections to principal officers who wield power alone rather than as members of a board or commission, the Court found no such practice existed. *Id*. at 2201–02.

In *Free Enterprise Fund v. Public Company Accounting Oversight Board*, the Court held that Congress, in creating the Public Company Accounting Oversight Board (PCAOB), violated the separation of powers doctrine by improperly insulating board members from the President's oversight. *Free Enter. Fund*, 561 U.S. at 498. The PCAOB were insulated by two layers of tenure protection: Board members could only be removed by the SEC for good cause, and the SEC Commissioners could only be removed by the President for good cause. The PCAOB possesses expansive authority to "govern an entire industry," including enforcement and policymaking. *Id*. at 485. The Court's remedy was to remove the tenure protections of the PCAOB. In doing so, the Court specifically noted that the "holding also does not address that subset of independent agency employees who serve as administrative law judges . . . [a]nd unlike members of the [PCAOB], many administrative law judges of course perform adjudicative rather than enforcement or policymaking functions." *Id*. at 507 n.10.

Seila Law and *Free Enterprise Fund* are distinguishable in many respects. First, both cases involve individuals who exercise significantly more authority, such as policymaking and enforcement, than the CBCA AJs. Second, the Court in both cases was unable to locate any legislative history to suggest that Congress intended to give individuals with such broad rulemaking authority tenure protection. *See Seila Law*, 140 S. Ct. at 2201 ("The question instead is whether to extend those precedents to the 'new situation' before us, namely an independent agency led by a single Director and vested with significant executive power . . . . We decline to do so. Such an agency has no basis in history and no place in our constitutional structure.") (internal citation omitted); *see also Free Enter. Fund*, 561 U.S. at 483. ("Congress can, under certain circumstances, create independent agencies run by principal officers appointed by the President, whom the President may not remove at will but only for good cause . . . [and w]e are asked, however, to consider a new situation not yet encountered by the Court"). Conversely, CBCA AJs are similar to ALJs given their adjudicatory function, and are afforded the same removal protections as ALJs. *See* 41 U.S.C. § 7105(b)(3). Lastly, legislative history confirms that Congress consistently preserved removal protections for CBCA AJs. Such legislative history was notably absent in both *Seila Law* and *Free Enterprise Fund*.

C. This Court should vacate and remand the CBCA's decision for a new hearing before a board of constitutionally appointed CBCA AJs.

1. The only workable solutions to the Appointments Clause violation require congressional action.

Severance is an inappropriate remedy if a constitutional violation "cannot be resolved as a matter of statutory interpretation." *Arthrex*, 141 S. Ct. at

1990 (Gorsuch, J., concurring in part and dissenting in part). "Early American courts did not presume a power to "sever" and excise portions of statutes in response to constitutional violations." *Id.* "Despite this . . . modern cases treat the severability doctrine as a 'remedy' for constitutional violations and ask which provisions of the statute must be 'excised.'" *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring). The doctrine requires courts to make "a nebulous inquiry into hypothetical congressional intent." *Booker*, 543 U.S. at 320 (Thomas, J., dissenting in part). If a court cannot locate "any actual evidence of intent, the severability doctrine invites courts to rely on their own views about what the best statute would be." *Murphy*, 138 S. Ct. at 1487 (Thomas, J., concurring).

There are limitations to a judiciary's ability to sever an unconstitutional provision. *See Booker*, 543 U.S. at 258–59 (finding that severance is appropriate when a court can "retain those portions of the Act that are (1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with Congress's basic objective in enacting the statute") (internal citations and quotations omitted). A court which is left to choose a solution based on mere speculation can have a "dramatic effect on the governing statutory scheme." *Seila Law*, 140 S. Ct. at 2224 (Thomas, J., concurring in part and dissenting in part). Thus, courts must remain vigilant as to not exceed the scope of their judicial power. *See Ayotte*, 546 U.S. at 329 ("Second, mindful that our constitutional mandate and institutional competence are limited, we restrain ourselves from rewriting state law to conform it to constitutional requirements even as we strive to salvage it.") (internal quotations omitted).

This Court cannot grant the appropriate remedy for an Appointments Clause violation. When faced with the decision to sever a portion of a statute or rule an entire statutory system unconstitutional, courts are inclined to "use a scalpel rather than a bulldozer in curing the constitutional defect." *Seila Law*, 140 S. Ct. at 2210–11. However, that is impossible in this case. If CBCA AJs are principal officers, Congress must act to either add a requirement that CBCA AJs be appointed in accordance with the Appointments Clause, empower a principal officer to review the CBCA's decisions, or devise another solution not currently authorized by law. This Court is unable to provide these sorts of remedies because it would require the court to "take a blue pencil to [this] statute." which is impermissible. *Murphy*, 138 S. Ct. at 1486 (Thomas, J., concurring).

Ultimately, it is not for a court to resolve policy disputes. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("Policy arguments are properly addressed to Congress, not this Court. It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has prescribed."). Assuming this Court finds Appellant's previous arguments related to severance unpersuasive and selects a remedy, that choice may do more harm than good. Since the passage of the CDA, Congress has not waivered about ensuring the neutrality and independence of the CBCA. It is impossible to know what alternative Congress would have opted for. Further, if Congress is dissatisfied with this Court's remedy, Congress will likely revise the statute on its own. Such a

result would only underscore the legislative nature of this Court's judgment, which more appropriately belongs to Congress. *See Arthrex*, 141 S. Ct. at 1991 (Gorsuch, J., concurring in part and dissenting in part). Therefore, this Court should defer to Congress as to the appropriate remedy.

2. The appropriate remedy for this Appointments Clause violation is a new hearing before a properly appointed Board.

If this Court determines that CBCA AJs are constitutionally deficient principal officers, the appropriate remedy is to vacate and remand this case for a new hearing before a board of constitutionally appointed AJs. The Supreme Court has acknowledged that "[o]ne who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to a decision on the merits of the question and whatever relief may be appropriate if a violation indeed occurred." *Ryder*, 515 U.S. at 182–83. Because the source of the constitutional violation flows from the Appointments Clause, "the appropriate remedy . . . is a new hearing before a properly appointed official." *Lucia*, 138 S. Ct. at 2055 (internal citations and quotations omitted). *Arthrex* is not analogous in this regard because the constitutional violation in that case was the "restraint on the review authority of the Director, rather than the appointment of APJs by the Secretary." 141 S. Ct. at 1988. The Court in that case concluded that Arthrex was entitled to a limited remand to provide the Director, a principal officer, the opportunity to review the final decision. However, Arthrex was not entitled to a new hearing before a new panel of APJs because the Court "expressly disavow[ed] the existence of an appointments violation." *Id*. at 2006 (Thomas, J., dissenting).

Appellee may argue that Congress will not act swiftly enough to implement a remedy to restore this forum of contract dispute resolution. However, Congress fully appreciates the significant role that the CBCA plays in providing an informal, expeditious, and inexpensive alternative to formal court proceedings. *See* S. Rep. No. 95-1118, at 25 (1978). Further, litigants may still pursue their appeals in the Court of Federal Claims in the interim. Speculating as to the impact this temporary suspension of hearings may have on the willingness of contractors to do business with the government is unfounded. When faced with a constitutional violation for which there is no judicial remedy, this Court must refrain from exceeding the scope of its power and lean on Congress for further action.

CONCLUSION

CBCA AJs are principal officers and must be appointed in accordance with the Appointments Clause. However, the constitutional violation cannot be remedied through severance. For these reasons, we respectfully request this Court vacate and remand this case to be heard before properly appointed CBCA AJs.

Respectfully submitted.

2021–0123

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

GREEN & CLEAN ENERGY CORP.,

Claimant-Appellant,

v.

SECRETARY OF THE DEPARTMENT OF ENERGY

Respondent-Appellee

BRIEF FOR RESPONDENT-APPELLEE ON SUA SPONTE HEARING EN BANC

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STATEMENT OF THE ISSUES

1. Whether Congress properly deemed the Civilian Board of Contract Appeals Judges as inferior officers in accordance with the Appointments Clause, U.S. Const. art. II, § 2, cl. 2?
2. Whether, if Civilian Board of Contract Appeals Judges are not properly appointed inferior officers in accordance with Appointments Clause, the defects in their appointment can be remedied by applying the judicial remedy of severance?

STATEMENT OF THE CASE

Claimant-Appellant, Green & Clean Energy Corporation, appeals the Civilian Board of Contract Appeals' (CBCA) decision in *Green and Clean Energy Corp. v. Sec'y of the Dep't of Energy*, CBCA No. 1:23-cv-04567-COV (Sept. 25, 2021) (*G&C Energy Corp. I*) denying the appellant's claim protesting the Department of Energy's (DOE) disallowance of certain unauthorized subcontract costs. A panel of this Court vacated and remanded the decision. *Green & Clean Energy Corp. v. Sec'y of Dep't of Energy*, No. 2021-0123, 2021 WL 2843763, at *1 (Fed. Cir. Dec. 21, 2021) (*G&C Energy Corp. II*). This Court *sua sponte* vacated the panel's decision and ordered rehearing en banc. Order for Rehearing *En Banc*, 2021-0123, at *2 (*G&C Energy Corp. III*).

I. THE APPELLANT'S CLAIM AND PRIOR PROCEEDINGS

On January 20, 2018, the appellant entered into a five-year contract with the DOE to provide windmill facilities with an Artificial Intelligence (AI) automation system in Richmond, Virginia. During the course of contract performance, the appellant entered into an unauthorized subcontract with Information Security Contractors (ISC) to provide cybersecurity services after the appellant learned of a potential leak at one of its AI system-related subcontractors. Between 2018 and 2020, the appellant included the costs of its subcontract with ISC in its requests for payment to the DOE. In early 2021, the DOE determined these costs were unallowable under the terms of the appellant's contract and demanded that the appellant repay the DOE $1 million for payments previously made pursuant to the unallowable subcontract.

The appellant submitted a certified claim to the DOE contracting officer (CO) disputing this demand. On July 20, 2021, the CO issued a final decision in favor of the DOE determining that the appellant was liable for the $1 million in unallowable costs. The appellant filed an appeal before the CBCA challenging the contracting officer's decision. On September 25, 2021, the CBCA affirmed the contracting officer's decision. *Green and Clean Energy Corp. v. Sec'y of the Dep't of Energy*, at 2.

The appellant filed a timely appeal of the CBCA's decision to this Court and argued that the CBCA's ruling was invalid because the administrative judges of the CBCA (Board AJs) appointment by the General Services Administrator violated the Appointments Clause of the Constitution. U.S. Const. art. II, § 2, cl. 2. The Appointments Clause challenge is the only issue raised on appeal. On December 21, 2021, a three-judge panel of this Court vacated the CBCA's decision holding that the administrative judges of the CBCA (Board AJs) "are unconstitutionally appointed principal officers" and applying the judicial remedy of severance could not cure the constitutional defect. *Green & Clean Energy Corp. v. Sec'y of Dep't of Energy*, 2021 WL 2843763, at *1.

On January 17, 2022, this Court *sua sponte* issued a rehearing en banc order, which vacated the panel opinion of December 21, 2021, and reinstated the appeal. Order for Rehearing *En Banc*, 2021-0123, at *2. The order instructed the parties to file new briefs addressing whether the panel correctly applied Supreme Court precedents like *Edmond v. United States*, 520 U.S. 651, 662 (1997), and *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1979 (2021) and what weight the Court should give to functional considerations aside from those announced in *Edmond*. *Edmond*, 520 U.S. at 2–3. The order further directed the parties to discuss, if the Board AJs are found to be unconstitutionally appointed, whether the constitutional violation can be cured by the judicial remedy of severance and, if so, which provision(s) should be severed. *Id.* at *3.

II. STATUTORY PROVISIONS PROVIDING FOR THE BOARD AJS' APPOINTMENT

Section 7105 of Title 41 to the United States Code governs the Board AJs' appointment, jurisdictional powers, and processes for adjudication. 41 U.S.C. § 7105. Section 7105 has its origins in two legislative acts of Congress: the Contract Disputes Act of 1978 and the National Defense Authorization Act for Fiscal Year 2006.

Congress passed the Contract Disputes Act (CDA) in 1978 "to provide for the resolution of claims and disputes relating to Government contracts awarded by executive agencies."

Contract Disputes Act (CDA) of 1978, Pub. L. No. 95-563, 92 Stat. 2383 (codified as amended at 41 U.S.C. §§ 7101–7109); *see also* S. Rep. No. 95-1118, at 13 (1978) ("The aim of any remedial system is to give the parties what is due them as determined by a thorough, impartial speedy and economical adjudication . . . . [T]o this end, alternative forums, each with special characteristics, should be maintained for initial resolution of disputes above the contracting officer and informal agency review level."). The CDA provided for the creation of agency boards of contract appeals, which acted as "quasi-judicial forums" with "safeguards to assure objectivity and independence." S. Rep. No. 95-1118, at 13. The Act permitted agency heads to establish boards of contract appeal "within [their] executive agency" after consulting with the Administrator of the Office of Federal Procurement Policy (the OFPP Administrator). 41 U.S.C. §§ 7105.

In 2006 Congress passed the National Defense Authorization Act for Fiscal Year 2006 (2006 NDAA) which consolidated the "myriad of small agency-specific boards of contract appeals" into a centralized system composed of a defense board, the Armed Services Board of Contract Appeals (ASBCA), and a civilian board, the Civilian Board of Contract Appeals (CBCA).[1] *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391–93 (codified as amended at 41 U.S.C. § 7105); H.R. Rep. No. 109-89, at 394 (2005). Congress explained that this "consolidation would eliminate multiple board rules, increase management efficiency, and improve access to the appeals process for businesses including small businesses." H.R. Rep. No. 109-89, at 394.

The 2006 NDAA provided that the CBCA would be housed within the General Services Administration (GSA). National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 163, sec. 847, § 42(a), 119 Stat. 3391 (codified as amended at 41 U.S.C. § 7105(b)(1)). The CBCA was formed from eight separate agency boards of contract appeals and oversees contract disputes under the CDA from all federal agencies except "the Department of Defense and its constituent agencies, the National Aeronautics and Space Administration, the United States Postal Services, the Postal Regulatory Commission, and the Tennessee Valley Authority." *About the Board*, U.S. Civilian Bd. Cont. Appeals, https://www.cbca.gov/board/index.html [https://perma.cc/S3TW-J2RG] (last visited Feb. 28, 2022).

The appointment provisions for the Board AJs are codified in section 7105(b) of title 41 of the United States Code.[2] Section 7105(b)(2)(A) provides:

> The Civilian Board consists of members appointed by the Administrator of General Services (in consultation with the Administrator for Federal Procurement Policy) from a register of applicants maintained by the Administrator of General Services, in accordance with rules issued by the Administrator of General Services (in consultation with the Administrator for Federal Procurement Policy) for establishing and maintaining a register of eligible applicants and selecting Civilian Board members. The Administrator of General Services shall appoint a member without regard to political affiliation and solely on the basis of the professional qualifications required to perform the duties and responsibilities of a Civilian Board member.

41 U.S.C. § 7105(b)(2)(A). The requirement that Board AJs be appointed "without regard to political affiliation and solely on the basis of the professional qualifications" is unique to the CBCA. *Compare* 41 U.S.C. § 7105(b)(2)(A), [391], *with* Contract Disputes Act (CDA) of 1978, Pub. L. No.

1. In early versions of the 2006 NDAA, Congress created a Defense Board of Contract Appeals (DBCA) to replace the existing ASBCA, giving the DBCA the same provisions regarding appointment and removal of Board AJs as it did for the Board AJs of the CBCA but otherwise leaving its jurisdiction intact. *See* 151 Cong. Rec. H3978 (daily ed. May 25, 2005). Ultimately Congress decided not to create the DBCA since the ASBCA already had the "consolidated jurisdiction" that the DBCA would have had. H.R. Rep. No. 109-360, at 762 (2005) (Conf. Rep.).

2. Prior versions of the 2006 NDAA provided that the Board members would be chosen solely by the OFPP Administrator, not the General Services Administrator. *See* 151 Cong. Rec. H3897 (2005).

95-563, § 8(b)(1), 92 Stat. 2383, 2385–86 (governing the appointment of the original (now defunct) agency contract appeals boards judges), *and* 5 U.S.C. § 3105 (governing the appointment of other administrative law judges). Section 7105(b)(2)(B) additionally requires that Board AJS have "at least 5 years experience in public contract law." 41 U.S.C. § 7105(b)(2)(B).

Board AJs are subject to removal via the method for other administrative law judges (ALJs) as provided in 5 U.S.C. § 7521, for good cause after a hearing by the Merit Systems Protection Board. 41 U.S.C. § 7105(b)(3).

SUMMARY OF THE ARGUMENT

The Board AJs are constitutionally appointed inferior officers because they meet the definitional requirement of being supervised at *some* level by a principal officer. Through a variety of means, the General Services Administrator in conjunction with other executive branch principal officers exercises control over the Board AJs semi-judicial activities and their decisions. Because the Board AJs are delegated only limited executive powers and jurisdictional authority to serve as agents of executive accountability, this degree of supervision is more than sufficient to satisfy the accountability demanded by the Appointments Clause. The Court should therefore defer to Congress's determination that Board AJs are inferior officers, and the CBCA's decision should be affirmed.

If the Court finds the Board AJs are not constitutionally appointed inferior officers, this defect could be remedied either by severing the Board AJs' for-cause removal protections or the provisions regarding finality of CBCA decisions under the CDA, or both if necessary. Severing the Board AJ's removal protections would grant the General Services Administrator unlimited removal power over Board AJs. This would remedy any Appointments Clause defects because it would enhance her control over the CBCA and thus the Board AJs' accountability to the Executive. The remaining provisions safeguarding the Board AJs' neutrality in their manner of appointment would preserve Congress's intent to establish an impartial Board.

Similarly, severing the provisions regarding the finality of CBCA decisions under the CDA would remedy any Appointments Clause issue because it would strengthen the accountability of Board AJs to the General Services Administrator. It is a distinct statute from the ones governing daily CBCA function, like the removal provision, so the remaining statute portions can still function. Severing this provision would also not compromise Congress's basic intent to provide for Board neutrality because, in reviewing a CBCA decision, the General Services Administrator would be required to consult with the OFPP Administrator and would be answerable to the President. By applying either of these remedies, the Board AJs' status as constitutionally appointed inferior officers would therefore be cured.

ARGUMENT

III. STANDARD OF REVIEW

Pursuant to the Contract Disputes Act (CDA), 41 U.S.C. § 7107(b)(1), this court reviews the Civilian Board of Contract Appeals' (Board or CBCA) decisions on questions of law of law *de novo*. *P.K. Mgmt. Grp., Inc. v. Sec'y of Hous. & Urb. Dev.*, 987 F.3d 1030, 1032 (Fed. Cir. 2021).

IV. CIVILIAN BOARD OF CONTRACT APPEALS JUDGES ARE INFERIOR OFFICERS WHOSE APPOINTMENT CONGRESS PROPERLY VESTED IN THE ADMINISTRATOR OF THE GENERAL SERVICES ADMINISTRATION.

The Appointments Clause empowers Congress to "vest the Appointment of such inferior Officers, as they think proper, . . . in the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. In accordance with this Clause, Congress properly vested the Administrator of the General Services Administration with the power to appoint Civilian Board of Contract Appeals judges as inferior officers.

The Appointments Clause of the Constitution divides "Officers of the United States" into two categories: officers who must be appointed by the President with "the Advice and Consent of the Senate" and inferior officers whose appointment Congress may delegate to "the President alone, . . . the Courts of Law, or . . . the Heads of Departments." U.S. Const. art. II, § 2, cl. 2. The Supreme Court has designated "principal officers" as those officers whose appointment requires "the joint participation of the President and the Senate." *Edmond v. United States*, 520 U.S. 651, 660 (1997); *see also Buckley v. Valeo*, 96 S.Ct. 612, 688 (1976).

By requiring both the President and the Senate to affirm the appointment of principal officers, the "Appointments Clause was designed to ensure public accountability for both the making of a bad appointment and the rejection of a good one." *Edmond*, 520 U.S. at 660; *see also* The Federalist No. 77 (Alexander Hamilton) ("The blame of a bad nomination would fall upon the president singly and absolutely."). This insistence on public accountability for executive officers stems from the Founders' experience with "swarms of Officers" "sent hither" to "harass" the colonists by a remote and unreachable King. The Declaration of Independence para. 12 (U.S. 1776). In granting Congress the power to delegate the appointment of inferior officers, however, the Appointments Clause also recognizes the need for "administrative convenience" when filling positions within the executive branch. *Edmond*, 520 U.S. at 660. Nevertheless, by insisting that inferior officers' work be "directed and supervised at some level by others who were appointed by Presidential nomination," the Supreme Court has ensured that the accountability demanded by the Appointments Clause applies equally to inferior officers as it does to principal officers. *Id.* at 663.

The appellant's challenge to the constitutionality of the Board AJ's appointment runs counter to this recognized accountability purpose of the Appointments Clause and rests on a flawed interpretation of the Supreme Court precedent. The constitutionality of the appointment of the Board AJs should be affirmed and the Board's decision in *Green & Clean Energy Corporation v. Secretary of the Department of Energy* should be upheld.

V. THE BOARD AJS ARE SUFFICIENTLY SUPERVISED GIVEN THEIR LIMITED DUTIES AND JURISDICTION AND ACCOUNTABILITY PURPOSE

The appellant's arguments rely on an overly narrow construction of the Supreme Court's holding in *United States v. Arthrex, Inc.* and deliberately ignore critical factors weighing in favor of the Board AJs being constitutionally appointed inferior officers. In *Arthrex*, the Court found that the appointment of administrative judges of the Patent Trial and Appeal Board (the PTAB) as inferior officers violated the Appointments Clause based on their absence of supervision, the protections against their removal by their superior, and the lack of review of their decisions by a principal officer. *See* 141 S.Ct. 1970, 1980–85 (2021). Despite the Court's explicit caution that it did "not attempt to 'set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes," the appellant's argument would turn the Court's holding in *Arthrex* into a rigid three-factor test for making that same determination. *Id.* at 1985. Such an inflexible rule not only flies in the face of the Court's recognition that "[t]he line between "inferior" and "principal" officers is one that is far from clear," it also ignores binding precedent weighing other factors in favor of inferior officer status. *Morrison v. Olson*, 487 U.S. 654, 671 (1988). These factors, as relevant here, include the extent of the challenged officer's duties and jurisdiction within the executive branch. *Id.* A careful reading of Appointments Clause jurisprudence reveals that Board AJs fall squarely within the constitutional confines of interior officers because they are sufficiently supervised by the General Services Administrator given their limited duties and jurisdiction and their important accountability function.

A. The General Services Administrator Exercises Supervision over the Board AJs in Conjunction with Other Principal Officers.

The Supreme Court begins its analysis when deciding challenges to the authority of executive branch officers based on the Appointments Clause by inquiring whether the contested officer has a superior. *See Arthrex*, 141 S. Ct. at 1980; *Edmond v. United States*, 520 U.S. 651, 662 (1997). For an officer to be considered a constitutionally appointed inferior officer, his or her work "must be 'directed and supervised at *some* level by others who were appointed by Presidential nomination with the advice and consent of the Senate.'" *Arthrex*, 141 S. Ct. at 1980 (emphasis added) (citing *Edmond*, 520 U.S. at 662). While supervision is required, it need not be "complete." *Edmond*, 520 U.S. at 664.

Rather, the Supreme Court has recognized that superiors can exercise control over inferior offices through both direct and indirect means. *See id.* at 664–65 (noting that the Judge Advocate General "exercise[d] administrative oversight" over the Court of Criminal Appeals through his ability to set policies and rules of procedure).

As appointees to an office within the General Services Administration (GSA), the Board AJs' direct superior is the Administrator of General Services. 41 U.S.C § 7105 (b)(1). The Administrator possesses ultimate appointment authority over the Board AJs in consultation with the Administrator of the Office of Federal Procurement Policy (OFPP). 41 U.S.C. § 7105(b)(1)(A). The "register of applicants" for Board AJ positions is also "maintained by the [Administrator], in accordance with rules issued by the Administrator" and the OFPP Administrator. *Id.* Thus, the "blame" for the appointment of a "bad" Board AJ falls squarely on the Administrator of General Services in accordance with the line of accountability demanded by the Appointments clause. Both the General Services Administrator and the Administrator of the OFFP are principal officers ensuring that this line of "public accountability" traces straight back to the President. *See* 40 U.S.C. § 302(a) ("The [General Services] Administrator is appointed by the President with the advice and consent of the Senate."); 41 U.S.C. § 1102(b) ("The [OFPP] Administrator is appointed by the President, by and with the advice and consent of the Senate.").

While these officers have no independent authority over specific Board decisions, both have indirect authority over the Board's decisions through their roles on the Federal Acquisition Regulation (FAR) Council where the OFPP Administrator serves as the chair and the Administrator of General Services serves as a member. *See Federal Acquisition Regulatory Council*, Acquisition.gov, https://www.acquisition.gov/far-council-members [https://perma.cc/6MK7-CMGF] (last visited Sept. 29, 2023). Through its role in amending the "policies and procedures for acquisition [used] by all executive agencies," the FAR council determines the rules that the Board AJs are required to apply when adjudicating contract disputes. FAR 1.101; *see also* FAR 33 ("prescrib[ing] policies and procedures for filing protests and for processing contract disputes and appeals"). If the Board's decisions result in outcomes the General Services or OFPP Administrators find unfavorable, either of these officers can use their positions on the FAR Council to advocate changing the rules of the game.

This degree of policy oversight is directly comparable to the control the Judge Advocate General exercised over the Court of Criminal Appeals Judges in *Edmond v. United States*. *See* 520 U.S. 651, 664 (1997). There, the Judge Advocate General could "prescribe uniform rules of procedure" for the Court and, in conjunction with other Judge Advocates, "formulate policies and procedure in regard to review of court-martial cases." *Id*. In *Edmond*, the Court held that "[t]his limitation" on the Judge Advocate General's control of the criminal appeals judges did not "render the judges of the Court of Criminal Appeals principal officers." *Id.* at 665. Although the General Services

Administrator's power over the Board AJs is not supplemented in the same way as the Judge Advocate General's with unfettered authority to remove officers from judicial assignments, this restriction on arbitrary removal is not untypical of administrative law judges. *See* Civil Service Regulations, 5 C.F.R. § 930.211 (2007) ("An agency may remove . . . an administrative law judge only for good cause established and determined by the Merit Systems Protection Board."). In *Morrison v. Olson*, the Supreme Court found that similar removal protections did not render the challenged independent counsel a principal officer.[3] 487 U.S. 654, 663 (1988) (noting that the independent counsel could "be removed from office . . . only for good cause, physical disability, [or] mental incapacity").

The General Services Administrator also exercises practical control over the Board AJs through her authority over the Board's funding. The Board's budget is submitted as a section of the GSA's yearly funding request to Congress. *See Annual Budget Requests*, U.S. General Services Administration, https://www.gsa.gov/reference/reports/budget-performance/annual-budget-requests [https://perma.cc/C3R8-8HXQ] (last visited Sept. 29, 2023). Without approval from the General Services Administrator of the CBCA's budget request, the CBCA would be unable to pay for the salaries of the Board AJs and their staff, rent, and other program costs such as travel to hear cases at other locations. By limiting the CBCA's annual budget, the General Services Administrator would effectively be able to curtail the activities of the CBCA.

Finally, although the General Services and OFPP Administrators are not the officers charged with reviewing the outcome of specific Board cases, the decisions of the Board are not unreviewable. In Contract Disputes Act (CDA) cases, a decision by the Board AJs will either affirm or reverse the decision of the Contracting Officer on the claim filed by the contractor. *See* 41 U.S.C § 7105(e)(1)(B). On the one hand, if the Board decides that the Contracting Officer was correct in denying a contractor's claim, the Board is merely affirming the decision of another executive branch official. The appellant does not contest the authority of the Contracting Officer to make such decisions or the validity of their appointment. On the other hand, if the Board decides to reverse, the decision whether to accept the Board's verdict or appeal to this Court lies with principal officers of the executive branch. *See* 41 U.S.C. § 7107(a)(1)(B) ("[I]f an agency head determines that an appeal should be taken, the agency head, with the prior approval of the Attorney General, may transmit the decision to the United States Court of Appeals for the Federal Circuit for judicial review."). Thus, what the Court found "significant" in

3. In *Free Enterprise Fund v. Public Company Accounting & Oversight Board*, the Court found that the dual "for-cause" removal protections applicable to the Public Company Accounting Oversight Board (Accounting Board) were unconstitutional. This is a separate issue from the appellant's challenge to the Board AJs' appointment. *See Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 492 (2010). The Board AJs for-cause removal protections, however, are lesser than the Accounting Board's protections requiring a finding "on the record" of willful violation of law or abuse authority.

Edmond also applies here: the Board AJs "have no power to render a final decision on behalf of the United States unless permitted to do so by other executive officers." *Edmond v. United States*, 520 U.S. 651, 665 (1997).

VI. THIS LEVEL OF SUPERVISION IS SUFFICIENT GIVEN THE BOARD AJS' LIMITED DUTIES, JURISDICTION, AND THEIR ACCOUNTABILITY PURPOSE.

The unduly restrictive test advocated by the appellant would confine this Court to examining only the three factors discussed in *Edmond* and *Arthrex*—the power of the superior officer to supervise, remove, and review the decisions of their subordinate. Under this approach, the appellant argues that the limitation on the General Services Administrator's supervisory authority to remove Board AJs without cause and reverse their decisions places Board AJ's automatically in the category of principal officers. But removability and review are only two factors that the Court has used to gauge the degree of supervision a superior officer exercises over an inferior. Contorting the holding in *Arthrex* into a categorical rule runs directly counter to the Court's explicit caution that it did "not attempt to 'set forth an exclusive criterion for distinguishing between principal and inferior officers for Appointments Clause purposes.'" *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1985 (2021) (quoting *Edmond*, 520 U.S. at 661).

Such a construction also ignores binding precedent examining other criteria that this Court can and should consider in the present case. In *Morrison v. Olson*, the Supreme Court found that an independent counsel's narrow jurisdiction and limited scope of duties were persuasive factors in concluding that she was an inferior officer. 487 U.S. 654, 671–72 (1988). The Court reached this conclusion even though the independent counsel's "independent authority" to conduct investigations was not subject to the supervision or review of her nominal superior officer *and* she could "be removed from office . . . only for good cause, physical disability, [or] mental incapacity." *Id.* at 662–63 (finding that the independent counsel's "good cause" removal protection did not impermissibly burden the President's power to control or supervise the independent counsel, as an executive official"). Similar supervisory restrictions apply here because the Board AJs, like the independent counselor in *Morrison*, are responsible for ensuring that executive branch officials are held accountable for their actions. This accountability function necessarily limits the degree of oversight that a superior, who is also an interested party to the proceedings conducted by its inferior, can properly exercise.

In this case, this degree of supervision is sufficient because the Board AJs are "empowered by the [Contract Disputes] Act to perform only certain, limited duties," and their office is limited in jurisdiction.[4] *Id.* at 671. Like

4. The CBCA has some limited jurisdiction to hear non–CDA cases. *See, e.g.*, 31 U.S.C. § 3702; 7 U.S.C. § 1501-24; 31 U.S.C. § 3726(i)(1). The appellant's challenge is limited to the CBCA's authority under the CDA. 41 U.S.C. §§ 7101–09.

the independent counsel found to be a properly appointed inferior officer in *Morrison*, the Board AJs do not wield "any authority to formulate policy for the Government or the Executive Branch, nor . . . [perform] any administrative duties outside of those necessary to operate [their] office." *Id.* at 671–72. Instead, the Contract Disputes Act, codified as amended at 41 U.S.C. §§ 7101–7109, limits the Board AJs' authority "to decid[ing] any appeal from a decision of a contracting officer of any [civilian] executive agency . . . relative to a contract made by that agency." 41 U.S.C. § 7105(e)(1)(B). Accordingly, the Board's jurisdictional authority does not extend to "adjudicating the public rights of private parties" like administrative judges in *Arthrex* whose unconstitutional appointment the Court remedied by making their decisions reviewable by a principal officer. *United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986 (2021). It is also distinct from the removable criminal appeals judges in *Edmond* who issued sentences that could result in "death, dismissal, . . . dishonorable or bad-conduct discharge, or confinement for one year or more." *Edmond v. United States*, 520 U.S. 651, 662 (1997).

While those officers required additional supervisory safeguards to guarantee their status as properly appointed inferior officers, their respective jurisdictions also gave them far greater power to affect the fundamental rights of the litigants before them. In contrast, the right of contractors to bring claims against the government only exists because Congress waived the government's sovereign immunity from suit in passing the CDA, and, before that, the Tucker Act. *See* 41 U.S.C. §§ 7101–7109; 28 U.S.C § 1491 ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded . . . upon any express or implied contract with the United States.").

Furthermore, the only parties that Board AJs have jurisdictional power over are other civilian executive agencies and government contractors who *elect* to bring their appeals to the CBCA. In appealing a contracting officer's final decision on a claim, contractors have a choice whether to bring their appeal to the CBCA or the Court of Federal Claims. *See* FAR 33.211(a)(4)(v) ("Instead of appealing to the agency board of contract appeals, [the contractor] may bring an action directly in the United States Court of Federal Claims."). This deference to contractors in forum choice stands in stark contrast to the adjudicative bodies examined in *Arthrex* and *Edmond*. In each of those cases, the appellants before the contested Boards had no option but to bring their claims before those Boards if they wanted any opportunity to be heard. *See Arthrex*, 141 S. Ct. at 1978; *see also Edmond*, 520 U.S. at 653.

These distinct limits on the Board's duties and jurisdiction are critical not simply because they align with the *Morrison* factors characterizing an inferior officer, but also, more importantly, because they serve as guarantees against the Board AJs abusing the powers of the executive branch. Under the regime mandated by the Appointments Clause, all executive officers, both principal and inferior, are accountable to the President who is in turn accountable to the people through the four-year election cycle. This chain of accountability to an

elected official ensures that the type of unchecked abuses experienced by the American colonists from "oppressive officers" appointed by the distant English king could not be perpetrated again by the newly formed Republic. *See* Andrew Croner, *Morrison, Edmond, and the Power of Appointments*, 77 Geo. Wash. L. Rev. 1002, 1004–05 (2009). Although the degree of principal officer supervision over Board AJs is necessarily limited, this does not contravene the executive accountability demanded by the Appointments Clause because the scope of Board AJs' executive power under the CDA is also limited to deciding appeals of decisions already made by contracting officers. *See* 41 U.S.C § 7105(e)(1)(B). This narrowly tailored power presents little risk of the type of abuse that the drafters of the Constitution feared and designed the Appointments Clause to contain.

In their overzealous reliance on the factors examined in *Arthrex*, the appellant also critically fails to recognize the intended purpose of the Appointments Clause: to ensure executive officer accountability. The CBCA provides government contractors an optional forum to bring their CDA claims against their government agency customers. *See* 41 U.S.C. § 7105(e)(1)(B); FAR 33.211(a)(4)(v). If contractors believe their government customer violated the terms of the contract, the CBCA will hear appeals of a contracting officer decision denying their CDA claims. *See*, *e.g.*, *Crowley Logistics, Inc., v. Dep't Homeland Sec.*, CBCA No. 6312, 20-1 BCA ¶ 37,579, at 182, 476 (finding the contractor was entitled to payment under the ratified modifications to the contract terms); *Grand Strategy, LLC v. Dep't Veterans Affs.*, CBCA No. 6795, 21-1 BCA ¶ 37,895, at 184, 040 (refusing to dismiss a contractor's complaint alleging the Veteran Affairs Administration violated the terms of a requirements contract). This jurisdiction in and of itself is an accountability measure against abuses of executive power in federal contracting. For this reason and because the CBCA's jurisdiction and duties are sufficiently limited to justify scope of its principal officer review, the Board AJs should be found to be constitutionally appointed inferior officers.

VII. THE COURT SHOULD DEFER TO CONGRESS'S CONSTITUTIONALLY ACCEPTABLE DETERMINATION THAT BOARD AJS ARE INFERIOR OFFICERS.

In advocating their narrow construction of Appointments Clause jurisprudence, the appellant would have this Court forgo a critical judicial mandate in statutory interpretation, that an "Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available." *N.L.R.B. v. Cath. Bishop Chi.*, 440 U.S. 490, 500 (1979); *see also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[T]he Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."). Here, the Appointments Clause explicitly grants Congress the power to "vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." U.S. Const.

art. II, § 2, cl. 2. By vesting the appointment authority of the Board AJs in the General Services Administrator, a head of a department, Congress implicitly designated the Board AJs as inferior officers in the 2006 NDAA consolidating the agency appeals boards into the single CBCA. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391, 3393 (codified as amended 41 U.S.C. § 7105 (b)(2)(A)). In making this designation, Congress was careful to limit the scope of the CBCA's duties and jurisdiction to that appropriate for inferior officers whose duties include issuing decisions against other federal civilian agencies. *See supra* sec. II(A)(ii). Given this constitutionally acceptable construction of the CBCA's statutory authority, the Court should respect Congress's determination that Board AJs are inferior officers.

Such a construction is vital because, through its creation of the original agency boards of contract appeal and later the CBCA, Congress sought to fulfill the maxim that "[i]t is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals." First Annual Message to Congress, Cong. Globe, 37th Cong., 2d Sess. pt. IV, app. at 2 (1862). Accordingly, the Contract Disputes Act created the agency boards of contract appeals to provide alternatives to the Court of Federal Claims and give "efficient operation of the contract disputes-resolving system." *See* S. Rep. No. 95-1118, at 13 (1978) ("Justice and efficient operation of the contract disputes-resolving system can be obtained best with a flexible system that provides alternate forums for resolution."). In consolidating the agency boards into the CBCA, Congress retained this essential purpose and charged the CBCA with "to the fullest extent practicable provid[ing] informal, expeditious, and inexpensive resolution of disputes." 41 U.S.C. § 7105(g)(1). Congress also ensured that Board AJs were uniquely qualified to handle contract dispute cases by insisting that Board AJ candidates have "at least 5 years' experience in public contract law" before being eligible for consideration for the CBCA. 41 U.S.C. § 7105(b)(2)(B). No such requirement exists for the Court of Federal Claims, contractors' sole alternative choice of forum. U.S. Const. art. II, § 2, cl. 2. A finding that the Board AJs are unconstitutionally appointed would rob contractors of this efficient, flexible, and expert system.

The Constitution is "not a suicide pact" and should not be held to tie Congress's hands in exercising their constitutionally vested powers to guard against executive branch abuses of power. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). The CBCA serves the critical purpose of providing contractors a forum for expeditious resolution of their claims against the government. Such a forum is necessary to hold civilian agencies accountable to their contracting partners and foster participation in the government marketplace. For these reasons and because Congress took care to limit the Board AJ's powers to those appropriate of inferior officers, this Court should practice appropriate judicial deference to Congress and hold that the Board AJs are properly appointed inferior officers.

VIII. IF THE COURT FINDS THAT BOARD JUDGES ARE UNCONSTITUTIONALLY APPOINTED, THE COURT CAN REMEDY ANY APPOINTMENTS CLAUSE VIOLATIONS BY SEVERING THE BOARD'S REMOVAL PROTECTIONS OR THE PROVISIONS RENDERING BOARD DECISIONS FINAL.

Any constitutional defects in the Board AJs' appointment can be remedied by severing either the Board's removal protections, 41 U.S.C. § 7105(b)(3), or the provisions shielding the Board's decisions from executive officer review. 41 U.S.C. § 7106(b)(4); 41 U.S.C. § 7107(a)(1); 41 U.S.C. § 7107(b)(2). Severing either or, if necessary, both of these protections would allow the General Services Administrator to exercise the requisite supervision over the Board AJs to render them constitutionally appointed inferior officers, in line with the judicial severance doctrine.

It is normal judicial practice to "partial[ly], rather than facial[ly], invalidat[e]" portions of a statute found to render the statute unconstitutional rather than finding the entire statute in violation of the Constitution. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985). In other words, the scalpel of severance is more suited to remedying constitutional defects in a statute than the sledgehammer of a blanket unconstitutionality ruling. Severance is permissible and appropriate when the remaining portions of the statute are "(1) constitutionally valid, (2) capable of 'functioning independently,' and (3) consistent with Congress' basic objectives in enacting the statute." *United States v. Booker*, 543 U.S. 220, 258–59 (2005). The Supreme Court has upheld "the constitutionality of some provisions . . . even though other provisions of the same statute were unconstitutional." *Regan v. Time, Inc.*, 468 U.S. 641, 653 (1984). Courts have the "negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement" of the statute. *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). This judicial practice of disregarding unconstitutional portions of a statute to preserve the statute as a whole applies equally to statutes found to be in violation of the Appointments Clause. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1986 (2021) (quoting *Ayotte v. Planned Parenthood of N. New Eng.*, 546 U.S. 320, 28–29 (2006)) ("'[W]hen confronting a constitutional flaw in a statute . . . [the Court] tr[ies] to limit the solution to the problem' by 'disregarding the problematic portions while leaving the remainder intact,'" to give "full effect" to statutory provisions that are "not repugnant" to the Constitution).

Both the removal and review proposed severance remedies satisfy these severance doctrine requirements. Severing either the Board AJs' for-cause removal protections or statutory provisions shielding their decisions from review would remedy any finding of an Appointments Clause violation by affording the Board AJ's superior officer additional supervisory powers. Both solutions would place the Board AJs in line with the factors that the Court has found characteristic of inferior officers in recent Appointments Clause cases. *See Arthrex*, 141 S. Ct. at 1981–86. Neither the provision regarding removal

nor the provisions regarding reviewability of Board decisions would render the remaining statute portions unworkable if severed. Lastly, Congress's basic intent to provide protections for Board independence would not be disrupted by severing the for-cause removal provision or the finality provisions because Congress's priority in creating the original boards and subsequently the CBCA was to create an alternative adjudicatory body for contractors to bring CDA disputes instead of the Court of Federal Claims. *See* S. Rep. No. 95-1118, at 13 (1978) ("Justice and efficient operation of the contract disputes-resolving system can be obtained best with a flexible system that provides alternate forums for resolution . . . . To this end, alternate forums . . . should be maintained for initial resolution of disputes above the Contracting Officer and informal agency review level."); *see also id*. at 24 ("These Administrative Boards . . . will offer a true alternative to a court proceeding.").

Because severance is a workable remedy in this case, the Court should sever either the removal protections or finality of CBCA decision provisions to preserve the CBCA as an alternative adjudicatory body for civilian CDA disputes as established by Congress in the 2006 National Defense Authorization Act. *See* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 847, 119 Stat. 3136, 3391–92 (codified as amended at 41 U.S.C. § 7105(b)(4)(B)(i)). If the Court decides not to employ severance as a remedy, then the CBCA would be unable to resolve current cases until a congressional act remedies the Board AJ's appointment. This would leave the Court of Federal Claims as contractors' only option to appeal claims under the CDA. *See* FAR 33.211(a)(4)(v) ("Instead of appealing to the agency board of contract appeals, [the contractor] may bring an action directly in the United States Court of Federal Claims."). This would more than double the Court of Federal Claims CDA caseload and would also deprive contractors of the adjudicatory body that, based on the numbers, they seem to prefer. *Compare* U.S. Civilian Bd. of Cont. Appeals, Annual Report: United States Civilian Board of Contract Appeals, Fiscal Year 2020 12 (2020) (showing that contractors filed 210 appeals under the CDA at the CBCA), *with* U.S. Ct. of Fed. Claims, Stat. Rep. for the Fiscal Year Oct. 1, 2019–Sept. 30 5 (showing that contractors filed 152 contract appeals under the CDA at the Court of Federal Claims). Notably, of the 364 total cases docketed by the CBCA during fiscal year 2021, only eight percent, 29 total, were appealed to the Court of Appeals for the Federal Circuit. *See* U.S. Civilian Bd. of Cont. Appeals, Annual Report: United States Civilian Board of Contract Appeals, Fiscal Year 2021 12 (2021).

If the Court decides not to employ severance as a remedy, it can neither predict how long it will take for Congress to address the constitutionality of Board AJ appointments, nor how the complete cessation of the Board's expert adjudication of contract disputes would affect contractors' willingness to contract with the government. To preserve the Civilian Board of Contract Appeals as the preferred forum for contractor disputes under the CDA, this Court should sever only the unconstitutional provisions to leave the Board intact per congressional intent and not render the statutes unworkable.

IX. THE COURT SHOULD SEVER THE BOARD'S REMOVAL PROTECTIONS BECAUSE IT WOULD CURE THE CONSTITUTIONAL DEFECT, THE STATE CAN FUNCTION WITHOUT IT, AND IT WOULD NOT VIOLATE CONGRESSIONAL INTENT.

Under the current statutory scheme, the General Services Administrator can remove Board AJs only for good cause "established and determined by the Merit Systems Protection Board" (MSPB) after a hearing before the MSPB. 41 U.S.C. § 7105(b)(3) (providing that "[m]embers of the Civilian Board are subject to removal in the same manner as administrative law judges, as provided in section 7521 of title 5."); 5 U.S.C. § 7521 (providing that action may be taken to remove a judge from their position "only for good cause established and determined by the Merit Systems Protection Board."). To remedy the Appointments Clause defect, the Court should sever the Board AJs' removal protections because doing so creates the necessary limited oversight to render the Board AJs inferior officers without violating congressional intent for an independent Board. This solution functions as a remedy because, as the Supreme Court noted in *In re Hennen*, officers with no specified removal limitations are assumed to be removable at will. *See* 38 U.S. 230, 260 (1839).

Severing the Board AJs' for-cause removal protection is appropriate and would remedy the question of the Board AJs' inferior officer status because of its nature as a "powerful tool of control" over inferior officers. *Edmond v. United States*, 520 U.S. 651, 664 (1997). It would not neutralize the congressional intent to provide independence safeguards because of the numerous protections in place regarding Board AJs' appointments. Furthermore, such an act could remedy a potential issue regarding the Board's existing dual for-cause protections.

X. SEVERING THE "FOR-CAUSE" REMOVAL PROTECTION IS CONSTITUTIONALLY VALID AND WOULD REMEDY ANY CONSTITUTIONAL ISSUES REGARDING THE BOARD AJS' STATUS AS INFERIOR OFFICERS.

The Supreme Court has found removal a "power tool for control[ling]" inferior officers. *Id.*; *see also Free Enter. Fund v. Pub. Co. Acct. & Oversight Bd.*, 561 U.S. 477, 510 (2010) (noting that the "'power to remove officers' at will and without cause 'is a powerful tool for control' over an inferior."). In *Edmond*, the Court found the combination of the Judge Advocate General's administrative supervision over judges of the Coast Guard Court of Criminal Appeals and his removal powers were enough to establish them as constitutionally appointed inferior officers. *Edmond*, 520 U.S. at 666.

In multiple Appointments Clause cases, courts have found that severing removal limitations gave principal officers sufficient control over subordinates to render the subordinates inferior officers. In *Free Enterprise Fund*, the Supreme Court found that, after severing the Public Company Accounting

Oversight Board's (PCAOB) for-cause removal protections, the PCAOB members were subsequently properly appointed inferior officers, primarily because the Securities Exchange Commission could now exercise control over PCAOB members by removing them at will. *Free Enter. Fund*, 561 U.S. at 510. The D.C. Circuit followed the *Free Enterprise Fund* approach in remedying the inferior officer status of Copyright Royalty Judges (CRJs). *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1342 (D.C. Cir. 2012). In *Intercollegiate*, the D.C. Circuit found that CRJs were unconstitutionally appointed by the Librarian of Congress because of their "nonremovability and the finality of their decisions." *Id.* at 1339. The D.C. Circuit highlighted the significance of the CRJs' superior officer only being able to remove them "for misconduct or neglect of duty." *Id.* at 1340. To eliminate the Appointments Clause violation, the D.C. Circuit chose to invalidate the CRJs' removal restrictions, noting that "[w]ith unfettered removal power, the Librarian [of Congress] will have the direct ability to 'direct,' 'supervise' and exert some 'control' over the Judges' decision." *Id.* at 1341 (citing *Edmond*, 520 U.S. at 662–64).

Although the Supreme Court in *Arthrex* decided to cure the Appointments Clause violation by subjecting the Patent Trial and Appeals Board decisions to review by the Patent and Trademark Office (PTO) Director, the Court did not preclude severance of removal protections as an equally valid solution. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987 (2021). In *Arthrex*, the Director, a principal officer, explicitly had the same "powers and duties" of the PTO and explicitly supervised the APJs "in every respect," aside from direct review of their decisions. *Id.* at 1986. The Court found that the nature of the Director's position meant severing review protections "better reflect[ed] the structure of supervision within the PTO and nature of APJs' duties." *Id.* at 1987. Having already applied the review remedy, the Court refused to speculate "whether the government is correct that at-will removal by the Secretary would cure the constitutional problem." *Id.*

Here, granting the General Services Administrator at-will removal authority is the best severance option to remedy a constitutional defect in the Board AJs appointment because it would sufficiently supplement the indirect methods of control that the Administrator and other principal officers exercise over the Board AJs. Given the indirect control that the General Services Administrator holds over the Board compared to *Arthrex*, unlimited removal power would be the better choice to remedy any concerns about Board AJs' inferior officer status. With unfettered removal power, the General Services Administrator will be able to "'direct,' supervise' and exert some 'control' over the [Board's] decision." *Intercollegiate Broad. Sys., Inc.*, 684 F.3d at 1341. This would also clarify the line of accountability from the Board AJs to the Executive because "bad" AJs could be removed at will from office without the cumbersome process of a MSPB hearing. Furthermore, while severing the provisions protecting finality of Board decisions could also let the Administrator exert control over the Board, such an action would also affect the Armed Services Board of Contract

Appeals (ASBCA). Therefore, this Court could sever the Board AJs' removal protections to remedy any constitutional concerns it may have.

XI. SEVERING THE BOARD'S FOR-CAUSE REMOVAL PROTECTIONS WOULD NOT RENDER THE STATUTE UNWORKABLE.

Severing the Board's removal protections would not implicate the workability of the CBCA statute because the removal provision is separate from the provisions regarding normal Board functions in resolving CDA issues. 41 U.S.C. § 7105(b)(3). Furthermore, the Armed Services Board of Contract Appeals, which functions largely similar to the CBCA, has no removal protections, and the appellant does not allege that the ASCBA is unable to resolve CDA claims. *Compare* 41 U.S.C. § 7105(a), *with* 41 U.S.C. § 7105(b); *see also* Joel P. Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 L. & Contemp. Probs. 39, 56–57 (1964) (describing the constitution of the ASBCA in 1947).

XII. SEVERING THE BOARD'S "FOR-CAUSE" REMOVAL PROTECTIONS WOULD NOT VIOLATE CONGRESS'S INTENT TO PROVIDE THE BOARD WITH INDEPENDENCE PROTECTIONS.

Severing the Board's for-cause removal protection would not overstep "Congress's basic objectives in enacting the statute," *United States v. Booker*, 543 U.S. 220, 258–59 (2005), because it is only one safeguard that Congress implemented to protect the Board's neutrality. This protection can be removed without nullifying Congress's intent to shelter the Board from agency interference with "additional safeguards to assure objectivity and independence." *See* S. Rep. No. 95-1118, at 13 (1978).

Congress provided numerous provisions in the manner of Board appointment to protect the independence of the Board. For example, Congress provided that the General Services Administrator must appoint Board AJs "without regard to political affiliation and *solely on the basis of the professional qualifications* required to perform the duties and responsibilities of a Civilian Board member" and in consultation with the OFPP Administrator. 41 U.S.C. § 7105(b)(2)(A) (emphasis added). Congress's insistence on appointment based only on professional qualification in addition to the requirement that Board AJs have at least five years of public contract law experience prevents the General Services Administrator from filling Board AJ positions based solely on loyalty to the GSA or other agencies. *See* 41 U.S.C. § 7105(b)(2)(B). The involvement of the OFPP Administrator in the appointment process is another important safeguard because he has no particular agency affiliations. Given OFPP's role in setting "overall direction of Government-wide procurement policies," he can serve as a neutral voice in the process. 41 U.S.C. § 1101(b)(1). The Board AJs also have a unique political neutrality guarantee because § 7105(b)(2)(A) specifically provides that they be appointed without

regard for political affiliation. *Compare* 41 U.S.C. § 7105(b)(2)(A), *with* 35 U.S.C. § 6(a). This protection not only emphasizes their role as inferior officers insulated from the politics of a Senate confirmation hearing but provides another safeguard to their objectivity and independence should accusations of political preferences come up during adjudication. Given the multiple remaining neutrality protections in Board AJs' appointment, congressional desire for the Board AJs' neutrality would still be ensured because the manner of their appointment remains a method of protecting the Board from undue outside influence. Therefore, if this Court severs § 7105(b)(3), "the statute will function in a manner consistent with the intent of Congress." *See Alaska Airlines Inc. v. Brock*, 480 U.S. 678, 685 (1987).

The Board's congressionally provided neutrality safeguards do not turn on the specifics of their removability protections. Congress notably did not provide the Armed Services Board of Contract Appeals (ASCBA) with the same for-cause removal protections that it gave to the CBCA in the 2006 NDAA. *Compare* 41 U.S.C. § 7105(a), *with* 41 U.S.C. § 7105(b). The ASBCA, which is like the CBCA in various regards, has continued to settle CDA cases for over fifty years with no charge of impaired impartiality. *Compare* 41 U.S.C. § 7105(a), *with* 41 U.S.C. § 7105(b); *see also* Joel P. Shedd, *Disputes and Appeals: The Armed Services Board of Contract Appeals*, 29 L. & Contemp. Probs. 39, 56–57 (1964) (describing the constitution of the ASBCA in 1947). Prior versions of the 2006 NDAA did call for creating a "Defense Board of Contract Appeals," which would have Defense Board AJs be subject to the same removal protections as the Civilian Board AJs. *See* 151 Cong. Rec. 3912, 3977 (2005). Given that the creation of the Boards would have involved significant expenditures and bureaucratic restructuring and that the ASCBA had the same consolidated jurisdiction as the proposed Defense Board while the Civilian Board would consolidate eight different boards, Congress did not want to waste the time or resources to create a new Defense Board. *See* Jeri Kaylene Somers, *The Board of Contract Appeals: A Historical Perspective*, 60 Am. U. L. Rev. 745, 754–56 (2011) (discussing the consolidation of the civilian boards to remedy "the administrative burden upon small businesses 'that may have to process contract disputes before the multiple agency boards.'"); *see also* H.R. Rep. No. 109-360, at 762 (2005) (Conf. Rep.) ("The ASBCA already has consolidated jurisdiction for contract appeals from the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, and the National Aeronautics and Space Administration.").

Furthermore, making the Board AJs removable at-will by the General Services Administrator would not compromise the Board's neutrality because there is little potential for the Administrator to abuse that power. The Supreme Court ruled in *United States v. Chemical Foundation* that "absen[t] of clear evidence to the contrary, courts presume that [public officers] . . . have properly discharged their official duties." *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926). Contractors would play a key role in watching

the Administrator to ensure that her actions do not go so far as to indicate "clear evidence" of improper discharging of her official duties. *Id.* At-will removal would be a "powerful tool of control" over the CBCA, and this tool applies equally to the President's at-will removal authority over the General Services Administrator. *Free Enter. Fund v. Pub. Co. Acct. & Oversight Bd.*, 561 U.S. 477, 510 (2010); 40 U.S.C. § 302(a). Any concerns that, without removal, the General Services Administrator would abuse the appointment power are unwarranted because she would be held accountable both by the President and by the contractors who would watch her actions to ensure that she does not abuse them. Thus, severing removal protections would strengthen the line of accountability between Board AJs and the President while leaving intact congressional safeguards for Board independence.

XIII. SEVERING THE BOARD AJS' "FOR-CAUSE" REMOVAL PROTECTIONS COULD REMEDY THEIR POTENTIALLY UNCONSTITUTIONAL DOUBLE LAYER OF FOR-CAUSE REMOVAL PROTECTION.

Although this issue is not before the Court at this time, severing removal protections would have the additional benefit of remedying the Board AJs' potentially unconstitutional dual "for-cause" protections. Currently, the General Services Administrator can only remove Board AJs for cause after an affirmative finding by the MSPB. 41 U.S.C. § 7105(b)(3); 5 U.S.C. § 7521. The members of the MSPB can similarly be removed by the President "only for inefficiency, neglect of duty, or malfeasance in office." 5 U.S.C. § 1202(d). The Supreme Court held in *Free Enterprise Fund v. Public Co. Accounting Oversight Board* that laws insulating inferior officers from Presidential removal authority with two levels of "for cause" removal violated Article II of the Constitution. *See* 561 U.S. 477, 484 (2010).

Severing the Board AJ's removal protections would leave them removable at will by the General Services Administrator. *See In Re Hennen*, 38 U.S. 230, 260–61 (1839). The General Services Administrator also has no specific for-cause removal protections and is therefore removable at-will by the President. *See* 40 U.S.C. § 302(a). Accordingly, the Court should sever the removal protection provision to remedy the Board AJ's dual "for cause" removal restrictions and any defects in their appointment as inferior officers under the Appointments Clause.

XIV. THE COURT COULD ALSO SEVER THE PROVISIONS REGARDING FINALITY OF BOARD DECISIONS TO MAKE BOARD DECISIONS REVIEWABLE BY THE GSA ADMINISTRATOR.

Alternatively, the Court could sever the protections regarding finality of Board decisions in place or in addition to the removability protections if it finds that neither option on its own sufficiently grants the General Services Administrator control over the Board. *See Ayotte v. Planned Parenthood of N. New Eng.*, 546

U.S. 320, 28–29 (2006). Board decisions regarding appeals of contractor claims brought under the CDA are final unless appealed to the Court of Appeals for the Federal Circuit. 41 U.S.C. § 7107(a)(1) (noting that "[t]he decision of an agency board is final, except that . . . a contractor may appeal the decision to the United States Court of Appeals for the Federal Circuit"); *see also* 41 U.S.C. §§ 7107(b)(2), 7106(b)(4). If these finality provisions were severed, then Board decisions would be reviewable by the General Services Administrator, curing the Appointments Clause issue by imposing weighty supervision by a principal officer directly accountable to the President. This solution also does not violate congressional intent or make the statute unworkable because Congress's intent was to provide alternate independent forums than the Court of Federal Claims for CDA disputes, and review by the General Services Administrator does not contradict that. *See* Contract Disputes Act of 1978, Pub. L. No. 95-563, § 14(g), 92 Stat. 2383, 2390 (codified as amended at 41 U.S.C. §§ 7101–7109).

The GSA governing statute grants the Administrator broad power to "perform functions related to procurement and supply including contracting." 40 U.S.C. § 501(b)(1)(A). Absent the finality provisions, there is no reason to think this authority would not encompass decisions of the CBCA, an office within the GSA. 41 U.S.C. § 7105(b)(1). The Supreme Court adopted a similar approach to grant principal officer review in *Arthrex* even though it was not explicitly provided for. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987 (2021). Nevertheless, the Court reasoned that given the PTO Director's broad authority, he could "*provide for a means* of reviewing PTAB decision." *Id.* (emphasis added). The Court found that "[u]nder these circumstances, a limited remand to the Director provide[d] an adequate opportunity for review by a principal officer" to remedy the Appointments Clause violation. *Id.* at 1987–88.

The legislative histories of the CDA and the 2006 NDAA creating the CBCA additionally support the conclusion that the General Services Administrator's review authority would be in consultation with the OFPP Administrator if the review provisions were severed. The original Contract Disputes Act gave the OFPP Administrator the broad authority "[a]s may be necessary or desirable . . . to issue guidelines with respect to criteria for the establishment, functions, and procedures" of the original (now defunct) agency boards in addition to the power held by department heads over their respective contract appeals boards. *See* Contract Disputes Act of 1978, Pub. L. No. 95-563, § 8(h), 92 Stat. 2383, 2387 (codified as amended at 41 U.S.C. §§ 7101–7109). Although the original boards are defunct, this statute shows congressional intent to grant power to the OFPP Administrator to influence Board decisions and temper the powers of department heads, like the General Services Administrator. This inference is further supported because a prior version of 2006 NDAA assigned the General Service Administrator's current power over the CBCA to the OFPP Administrator. *See* 151 Cong. Rec. 3978 (2005) ("The . . . Board shall consist of judges appointed by the Administrator for

Federal Procurement Policy . . . .").[5] All references to the General Services Administrator's authority over the Board indicate that the Administrator must consult with the OFPP Administrator in all stated supervisory actions regarding the Board. *See* 41 U.S.C. § 7105(b)(2)(A). Therefore, the General Services and OFPP Administrators' current broad delegation of power and the legislative history of the CBCA suggest that both Administrators would have enough combined broad authority that they could "provide for a means" of reviewing CBCA decisions. *See United States v. Arthrex, Inc.*, 141 S. Ct. 1970, 1987 (2021).

The same reasons why granting the General Services Administrator removal authority are constitutionally valid and do not render the statute unworkable apply to removing the finality provisions. Severing finality provisions would not jeopardize the statute's workability because only the finality of Board decisions would be affected. The Board's decision-making process is governed by separate statutes and would remain the same even if the General Services Administrator was granted review powers. *See* 41 U.S.C. § 7105(b)(4), (e)(1)(b), (e)(2), (f)–(g); 41 U.S.C. § 7107(a)(1). Congressional intent for Board neutrality would also remain intact because, as just explained, the General Services Administrator's review of Board decisions would likely be in consultation with the OFPP Administrator. As the executive officer charged with overall "direction of procurement policy and leadership in the development of procurement systems of the executive agencies," the OFPP Administrator lacks any direct ties to the agencies whose decisions are being appealed before the CBCA. 41 U.S.C. § 1121(a). This makes the OFPP Administrator a neutral party whose participation in the decision review process would provide a valuable safeguard against the General Services Administrator swaying Board decisions to favor the GSA. Furthermore, the reasons cited in the previous section—namely that the General Services Administrator is directly accountable to the President and there is a presumption of good faith in the Administrator's review of agency decisions—apply here as well. These safeguards also work to ensure that the neutrality of Board decisions would remain intact even with review by the General Services Administrator. The combined effect of these protections means that the statute would still be workable, constitutionally valid, and remain in line with congressional intent to safeguard Board decision neutrality.

Therefore, because either severing the removal protections or provisions regarding finality of Board decisions satisfies the requirements of the severance doctrine, the Court can sever either or both to settle any concerns regarding the constitutionality of the Board AJs' status as inferior officers. *See United States v. Booker*, 543 U.S. 220, 258–59 (2005).

5. The fact that the OFPP Administrator is not a "department head" authorized by the Appointments Clause to appoint an inferior officer, *See* U.S. Const. art. II, § 2, cl. 2., is likely why the final 2006 NDAA granted the General Services Administrator the power to appoint Board AJs. *See* 41 U.S.C. § 7105(b)(2)(A).

CONCLUSION

For these reasons, we respectfully request that the Court affirm the Board's decision. If the Court finds a constitutional violation, then the appropriate relief would be severing the removal protections under 41 U.S.C. § 7105(b)(3).

Respectfully submitted.

"SUNLIGHT REALLY IS THE BEST DISINFECTANT": HOW EMPLOYEE DEMOGRAPHIC DISCLOSURE MOTIVATES COMPANIES TO IMPROVE DIVERSITY EFFORTS

Carmen M. Palumbo[*]

ABSTRACT

Diversity is severely lacking in government contracting, specifically in leadership positions. Shareholders and the public should have access to the information needed to require accountability and demand change in order to pave a better path forward. With billions of taxpayer dollars spent on government contracts every year, government contractors need to be held to a higher standard and act as pioneers in effecting change towards greater diversity initiatives. Disclosure of the demographic makeup of government contracting companies is an essential first step in allowing the contractors to enact change from within while ensuring public confidence in the company. This Note explores the ways that the government is currently treating demographic disclosure and suggests a path forward to mandate disclosure through EEO-1 reports. The government collects EEO-1 reports, but they are kept confidential.

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I. INTRODUCTION

Nick Wakeman, a government contracts writer for *Washington Technology*, wrote about the progression of women in board positions, specifically in government contracting companies.[1] He points out, utilizing research from the Government Accountability Office (GAO), that government contracting companies have improved gender diversity on boards.[2] The GAO (pooling from

1. Nick Wakeman, *The Government Market Might Be Outpacing the Broader Market When It Comes to Placing Women on Corporate Boards, but There Are Still Challenges Ahead*, Wash. Tech. (Jan. 8, 2016), https://washingtontechnology.com/2016/01/board-duty-progress-for-women-but-hurdles-remain/356188 [https://perma.cc/LB7M-SW5K] (last visited Aug. 14, 2023).

2. *Id.*; *see also* U.S. Gov't Accountability Off., GAO-16-30, Strategies to Address Representation of Women Include Federal Disclosure Requirements (2015). ("The GAO conducted interviews with current board members and listed the reasons that were most commonly cited for the lack of women on boards: 'Board members have a tendency to rely on their personal networks to identify new board candidates,' 'Men tend to network with other men, and since more men are board members, more men will be identified as candidates,' 'unconscious bias

the top fifteen government contracting companies, such as Lockheed Martin and Raytheon) found that 18.9% of board members in government contracting companies were women.[3] Wakeman noted that, although the percentage of women on boards has gone up from 7.8% to 18.9% in the last decade, this change is still astoundingly slow progress.[4] While there has been improvement in the ratio of women represented, 18.9% is still low when considering women make up half of the 330,000,000 people that live in the United States.[5] We cannot celebrate the inadequacy of 20% female representation.[6] Diversity is important because it creates a space to develop new perspectives, fosters innovation, enhances cross culture competence, and attracts top talent; it is through these benefits that a company profits.[7] The GAO has compared the results of companies with a more diverse board with those that are lacking and has found that companies with a "broader range of perspectives represented in diverse groups require individuals to work harder to come to a consensus, which can lead to better decisions."[8] Evidence indicates that these decisions end up having "a positive impact on a company's financial performance."[9]

Despite the clear cultural and financial benefits of diversity, there is a severe and purposeful lack of data regarding diversity demographics in government contracting companies.[10] Most of the evidence that diversity is lacking in government contracting is anecdotal or from a few voluntary demographic disclosures.[11] The federal government spends over $637 billion on government contracts each year.[12] Of that pool of money, over $180 billion goes to companies who refused to turn over diversity data, and at least a "dozen

where board members may be drawn to candidates who look and sound like they do, and there is a desire that new members 'fit-in'").

3. Wakeman, *supra* note 1.

4. *Id.*

5. Julia Smirnova & Wiyi Cai, *See Where Women Outnumber Men around the World (and Why)*, Wash. Post (Aug. 19, 2015), https://www.washingtonpost.com/news/worldviews/wp/2015/08/19/see-where-women-outnumber-men-around-the-world-and-why [https://perma.cc/GBF7-MSUA] (In the U.S., there are "98.3 men for 100 women.").

6. Wakeman, *supra* note 1.

7. Brief of General Motors Corporation as Amicus Curiae Supporting Respondents at 4–9, Grutter v. Bollinger, 539 U.S. 306 (2003) [hereinafter Brief of General Motors].

8. U.S. Gov't Accountability Off., GAO-16-30, Strategies to Address Representation of Women Include Federal Disclosure Requirements at 5 (Dec. 2015).

9. *Id.*

10. J. Edward Moreno, *Labor Department Reluctant to Reveal Contractor Diversity Data*, Bloomberg L. (Oct. 20, 2022), https://news.bloomberglaw.com/daily-labor-report/labor-department-reluctant-to-reveal-contractor-diversity-data [https://perma.cc/5JDX-Y6AQ] ("Thousands of contractors collecting over $630 billion in taxpayer dollars each year keep everything from office cafeterias to the military running for the American people, but with virtually no public transparency about how they are faring at hiring and promoting women and minorities.").

11. Will Evans, *We Forced the Government to Share Corporate Diversity Data. It's Giving Companies an Out Instead.*, Reveal (Aug. 29, 2022) https://revealnews.org/article/we-forced-the-government-to-share-corporate-diversity-data-its-giving-companies-an-out-instead [https://perma.cc/QFK8-9ND8].

12. *See* Timothy DiNapoli, *A Snapshot of Government - Wide Contracting for FY 2021 (Interactive Dashboard)*, U.S. Gov't Accountability Off.: WatchBlog (Aug. 25, 2022), https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2021-interactive-dashboard [https://perma.cc/CF77-6R7W].

companies—collectively reaping more than $100 billion—that paid to settle disputes with the Department of Labor (DOL) had findings of job discrimination over the last decade."[13] The public deserves to have adequate knowledge to hold companies accountable for their lack of diversity efforts.

One method to improve diversity throughout a company is to mandate disclosure of demographic data.[14] Public disclosure of demographics (such as race, ethnicity, or gender) within a company, from board members, CEOs, and directors all the way down to service workers, serves as a vehicle for change.[15] Demographic disclosure forces companies to realize the lack of diversity and to be held accountable to fix it: "what gets measured gets managed."[16] The path to disclosure is a simple one. Companies are already required to collect demographic data on all of their employees on a yearly basis.[17] Every year, companies are mandated to fill out a chart for a Type 2 EEO-1 report, categorizing all of their employees' demographic information: ethnicity, gender, race, job category, and pay scale.[18] However, the chart contained in the EEO-1 report is currently kept confidential by a Freedom of Information Act (FOIA) exemption and is only disclosed to the public voluntarily or through extensive litigation efforts.[19]

This Note proposes that Congress should mandate the public disclosure of Type 2 EEO-1 reports and expressly override the applicable FOIA exemption.[20] Current efforts to challenge the applicability of the FOIA exemption in court have been slow to success, despite favorable verdicts.[21] Even after a federal judge decided that EEO-1 reports were not covered by the FOIA exemption, access to those very reports took years of prolonged and arduous litigation.[22] Furthermore, safeguards created by the DOL that allow

13. *See* Will Evans, *After History of Discrimination, These Federal Contractors Fought to Hide Diversity Data*, USA Today (May 5, 2023) https://www.usatoday.com/story/news/investigations/2023/05/05/how-these-federal-government-contractors-fought-to-hide-diversity-data/70183294007 [https://perma.cc/6D3R-MBZV].

14. *See* Nigel Topping, *How Does Sustainability Disclosure Drive Behavior Change*, 24 Applied Co. Fin. 45, at 2, 3 (2012) (focusing on how sustainability disclosure drives a change in the behavior of corporations, but also generally discussing how disclosure influences behavior just by educating the company and the public).

15. *Id.*

16. *Id.*

17. Notice of Request Under the Freedom of Information Act for Federal Contractors' Type 2 Consolidated EEO-1 Report Data, 87 Fed. Reg. 160 at 51,145 (Aug. 19, 2022) [hereinafter Notice of Request].

18. *Id.*

19. Christy Kiely et al., *EEO-1 Reports of Federal Contractors to Be Released by OFCCP Absent Employer Action*, Seyfarth Shaw LLP (Aug. 24, 2022), https://www.seyfarth.com/news-insights/eeo-1-reports-of-federal-contractors-to-be-released-by-ofccp-absent-employer-action.html [https://perma.cc/29KG-B76W].

20. Although explained in much greater detail *infra*, EEO-1 reports are a mandated demographic disclosure form reviewed by the U.S. Equal Employment Opportunity Commission. They are required to be completed by every company that holds over 100 employees. These forms, although compulsory, are kept confidential.

21. Evans, *supra* note 11.

22. Evans, *supra* note 13.

companies to opt out of disclosure are still in place.[23] Congress needs to enact a statute to force the hand of the DOL to mandate disclosure of government contracting companies' diversity efforts.

This Note first introduces the concept of diversity as the practice of embracing every person and their vital perspectives that they bring to corporate culture. From there, it highlights the lack of diversity data in government contracting. Further, it explains how demographic disclosure is a necessary first step to improving diversity in government contracting companies. Disclosure creates greater public awareness and provides tangible evidence that allows the public to hold contractors accountable for their lack of diversity. Building on this base, it will show how the government already views disclosure as a necessity and has attempted to establish initiatives. Other regulatory arms such as those at the Securities and Exchange Commission and Nasdaq are also moving in the direction of mandatory disclosure. Lastly, this Note explains why congressional action is necessary to achieve full public disclosure of the mandated EEO-1 report.

II. THE BENEFITS OF DIVERSITY IN THE WORKFORCE

Diversity should be embraced and promoted throughout all aspects of government contracting. These efforts need to start at the highest levels. The general purpose of having boards run a company or firm, rather than a single individual, is to open the company to embrace many perspectives and thoughts, rather than limiting the focus of the company to the viewpoints of one individual.[24] Corporations like General Motors have found that employing a diverse workforce benefits the company through improving its ability to embrace varying perspectives, foster innovation, create a better workplace culture, and ultimately contribute to the company's financial success.[25] Below, this Note will discuss the definition of diversity and why diversity is important, utilizing arguments by General Motors and attorney David Hinojosa.

A. Defining Diversity

In 2021, the White House defined diversity in an executive order on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce.[26] The executive order states: "[T]he term diversity means the practice of including the many communities, identities, races, and ethnicities, backgrounds, abilities, cultures

23. *Id.*

24. Abhilasha Gokulan, *Increasing Board Diversity: A New Perspective Based in Shareholder Primacy and Stakeholder Approach Models of Corporate Governance*, 96 N.Y.U. L. Rev. 2140, 2150–55, 2153, 2157 (2021).

25. Gokulan, *supra* note 24; *see also* Brief of General Motors, *supra* note 7, at 12–19.

26. *Executive Order on Diversity, Equity, Inclusion, and Accessibility in the Federal Workforce*, White House (Jun. 25, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce [https://perma.cc/XZ5Z-VZCB].

and beliefs of the American people, including underserved communities."[27] Diversity means understanding and embracing every person and their unique and vital perspective that they possess and bring to society.[28] A broader definition of diversity can also include the vast differences in personalities, lifestyles, and personal expression.[29]

B. General Motors and David Hinojosa's Arguments for Diversity

Although a plethora of research and writing speaks to the importance of diversity in the workforce, this Note pulls primarily from two sources. This Note narrows the scope of sources to these two authorities because of the roles that they have played in the argument for affirmative action.[30] A number of the same arguments made for affirmative action can be made for greater diversity efforts in the workforce.[31] The first source is an amicus brief written by General Motors in 2003 in support of affirmative action in law schools[32] for the case *Grutter v. Bollinger*.[33] It is a unique perspective centered on how promoting the education of diverse individuals in law schools leads to companies being able to hire a more diverse pool of people.[34] The second is an oral argument by attorney David Hinojosa who, just this past year, represented students and alumni of color in the affirmative action cases just heard by the Supreme Court.[35] General Motors and David Hinojosa list all the benefits that a diverse pool of people can bring to an environment.[36]

General Motors outlined several reasons in its brief as to why diversity is necessary in the company and therefore should be a priority in law schools, as the respondents argued.[37] Justice O'Connor wrote the groundbreaking opinion in 2003 deciding that it was lawful for the law school to consider race when admitting students.[38] When writing this opinion, she cited to the General Motors brief, writing: "These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints."[39]

27. *Id.*
28. *See* Cecil J. Thomas & Karen DeMeola, *Step One: Diversity, Equity, and Inclusion Defined*, 31 Conn. Law. 31, 31–32 (2020).
29. *Id.*
30. *See* Sherrilyn Ifill, *When Diversity Matters*, N.Y. Rev. of Books, (Jan. 19, 2023), https://www.nybooks.com/articles/2023/01/19/when-oral-arguments-matter-sherrilyn-ifill [https://perma.cc/W6XA-8KFH]; *see also* Brief of General Motors, *supra* note 7, at 12.
31. Brief of General Motors, *supra* note 7, at 11–12.
32. *Id.*
33. *Grutter v. Bollinger* has recently been overturned. Despite this unfortunate decision, the discussion of diversity throughout this case and its accompanying briefs are the foundation of this Note. The promotion of diversity is still, and will always be, a compelling state interest.
34. Brief of General Motors, *supra* note 7, at 11–12.
35. Ifill, *supra* note 30.
36. *Id.*; *see also* Brief of General Motors, *supra* note 7, at 4.
37. Brief of General Motors, *supra* note 7, at 4.
38. Grutter v. Bollinger, 539 U.S. 306, 343–44 (2003).
39. *Id.* at 330. This year, the Supreme Court overturned *Grutter v. Bollinger*.

The second source is an oral argument from David Hinojosa, an attorney who represented students and alumni of color in two consolidated affirmative action cases recently heard by the Supreme Court, where he explained the benefits of diversity.[40] In response to a question from Justice Thomas as to why diversity matters, Hinojosa stated that diversity fosters innovation, creates a space to broaden perspectives, and reduces stereotypes.[41] There are many synergies between the points that General Motors made in its amicus brief and Hinojosa made in oral argument.[42] Overall, diversity creates a space to avoid groupthink and fosters innovation by allowing new perspectives to thrive; it allows a space for cross cultural competence, lessens racial tension amongst the employees of a company, attracts top talent, and improves a company's profitability.[43]

1. Diversity Avoids Groupthink and Creates a Space That Fosters Innovation Through Embracing Perspectives

It is important that all levels of a company have access to unique perspectives and avoid a homogenous atmosphere. Groupthink, a term developed by Irving Janis, occurs when a group of individuals make decisions due to "group social pressures."[44] Companies should seek to avoid a corporate culture involved in groupthink for a myriad of reasons.[45]

First, bad decisions are often embraced due to a lack of alternative perspectives or life experiences.[46] A diverse group is able to "stimulate one another to reexamine even their most deeply held assumptions about themselves and their world."[47] Oftentimes, leaders in a company, such as board members, are picked due to proximity to the current board.[48] Instead of hiring board members from outside the elite circles, companies appoint members who are already at the highest levels of the company or similar companies.[49] In doing so, the company forgoes fresh insights from an outside perspective.[50] Hiring "outside"

40. Ifill, *supra* note 30.
41. *Id.*
42. *Id.*; *see* Brief of General Motors, *supra* note 7, at 4.
43. Brief of General Motors, *supra* note 7, at 4.
44. CFI Team, *What is Groupthink*, Corp. Fin. Inst. (Dec.12, 2022) https://corporatefinanceinstitute.com/resources/management/groupthink-decisions/#:~:text=Groupthink%20is%20a%20term%20developed,than%20by%20individuals%20acting%20independently [https://perma.cc/4F39-ANYZ].
45. *Id.*
46. *Id.*
47. Brief of General Motors, *supra* note 7, at 5 (citing Regents of University of California v. Bakke, 438 U.S. 312 (1978)).
48. *See* Christa H.S. Bouwman, *Corporate Governance Contagion Through Overlapping Directors*, Case W. Rsrv. Univ. & Wharton Fin. Inst. Ctr. 1, 3 (2009) (discussing how "familiarity" amongst directors across firms causes overlap amongst boards. Instead of hiring from outside of the "familiar" circle of directors, they hire whom they know. This causes similar corporate governance practices amongst the highest level of every company in a "contagion-like fashion.").
49. *Id.*; *see also* Martin Rowinski, *The Time for Outside Board Members Is Now*, Entrepreneur (July 19, 2022) https://www.entrepreneur.com/growing-a-business/why-outside-board-members-are-crucial-for-company-success/429785 [https://perma.cc/QVM6-MC3A].
50. Bouwman, *supra* note 48.

individuals with diverse backgrounds allows the company to grow and expand under the leadership of individuals who have experienced the problems and have tested the solutions.[51] As General Motors stated, "[O]pen-mindedness and complex thinking are skills best honed through exposure to multiple ideas and challenging debate in an educational environment."[52]

Second, creativity is often stifled when employees are so similar that they do not bring unique viewpoints.[53] In its amicus brief, General Motors quoted Justice Powell's statement in *Regents of University of California v. Bakke*: when individuals are "surrounded only by the likes of themselves," they are more likely to hold "highly parochial and limited perspectives." [54] When companies have a homogenous demographic, they miss out on the value that fresh new perspectives and approaches to problems that diverse individuals bring to the table.[55]

Lastly, groupthink instills undeserved confidence in company decisions.[56] When everyone around an individual thinks and reasons similarly, this creates a space that promotes self-assurance or pride in individual decision-making.[57] As General Motors pointed out, it takes a group of individuals with vastly different perspectives longer to come to a decision on matters than a group of individuals who think similarly.[58] Differing perspectives can create tension when individuals disagree.[59] Inevitably, though, the best decisions come after long debates and a thoughtful discussion of all possibilities.[60]

2. Diversity in the Workplace Allows a Space for Cross-Cultural Competence to Grow

Companies with diversity throughout various positions promote an understanding and acceptance of different cultures that generate better service to the vast array of individuals that they serve and employ.[61] A diverse group of board members is in the best position to craft solutions to meet the needs of every employee, customer, and community member of different ethnicities and cultures.[62] A lack of diversity among key leadership positions leads to a knowledge gap.[63] As General Motors stated, "[T]o succeed in this increasingly diverse environment, American businesses must select leaders who possess

51. *Id.*
52. Brief of General Motors, *supra* note 7, at 10.
53. Bouwman, *supra* note 48.
54. Brief of General Motors, *supra* note 7 at 10–11 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (opinion of Powell, J.))
55. Rowinski, *supra* note 49.
56. *Id.*
57. *Id.*
58. Brief of General Motors, *supra* note 7 at 12.
59. Rowinski, *supra* note 49.
60. *The Economic Imperative of Achieving Diversity*, Forbes (Apr. 27, 2010) https://www.forbes.com/2010/04/26/college-completion-diversity-thought-leaders-cooper-coleman.html?sh=18ee86ec1532 [https://perma.cc/3W58-8C8G] [hereinafter *Economic Imperative*].
61. Brief of General Motors, *supra* note 7, at 8.
62. *Economic Imperative*, *supra* note 60.
63. *Id.*

cross-cultural competence."[64] The ability of board members and managers to be able to understand and view issues from different and unique perspectives is essential to be able to work in the socially diverse world that global enterprises operate in.[65]

Some critics argue that the promotion of diversity leads to the expectation that those representing different racial, ethnic, and cultural groups are expected to think and behave the same way.[66] However, the promotion of diversity does not assume that certain minorities will all have the same perspective.[67] The ideal result is an array of different outlooks that can work together to encourage thinking beyond the normal viewpoint.[68]

3. Diverse Leaders Create Less Racial Tension Throughout a Company and Attracts Top Talent

The ability of diverse individuals, at the lowest tiers of companies, to see leaders of similar backgrounds, genders, and races as them creates a better work environment for all.[69] Far from causing racial tension, as some critics argue, diversity at top positions actually creates a culture of acceptance and showcases a pathway up the ladder.[70] Giving those in the lowest positions of a company hope and an incentive to strive for leads to a better work product.[71] Furthermore, a company that has been proven to promote and hire diverse talent through all levels consequently attracts top talent.[72]

Young top talent wants to work for and represent a company that is growing, embracing, and inclusive of all prospective employees.[73] One way to showcase this embrace is to have diversity at top-level positions.[74] As Gokulan Abhilasha stated in his piece arguing for greater board diversity in companies, "[C]ompanies that excel in this area, particularly in the boardroom, achieve a competitive advantage by '[w]in[ning] the war for talent.'"[75] When a company promotes and showcases diversity at the board member level, the company benefits from a reputation amongst its peers for inclusivity that extends to those searching for a position.[76] General Motors has stated that "the capacity

64. Brief of General Motors, *supra* note 7, at 4.
65. *Id.*
66. *Id.* at 6.
67. Brief of General Motors, *supra* note 7, at 6 (citing Metro Broad., Inc. v. FCC, 497 U.S. 579 (1990)).
68. Brief of General Motors, *supra* note 7, at 6.
69. *Id.* at 12.
70. *Id.* at 9.
71. *Id.*
72. *Id.*
73. Gokulan, *supra* note 24, at 2157.
74. *Id.*
75. *Id.* (quoting Vivian Hunt et al., McKinsey & Co., Diversity Wins: How Inclusion Matters 23 (2020), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/diversity%20and%20inclusion/diversity%20wins%20how%20inclusion%20matters/diversity-wins-how-inclusion-matters-vf.pdf [https://perma.cc/CTR5-MV97]).
76. *Id.* at 2156 (citing Gail Robinson & Kathleen Dechant, *Building a Business Case for Diversity*, 11 Acad. Mgmt. Exec. 21, 26 (1997)).

of many businesses to recruit and retain talented labor—a critical resource—therefore increasingly will depend upon the sensitivity of their managers to interracial and multicultural issues."[77] Furthermore, "companies with strong records for developing and advancing minorities and women will find it easier to recruit [and retain] members of those groups."[78]

4. Diversity Improves a Company's Profitability

As explained above, an emphasis on diversity throughout a company avoids groupthink, invites new perspectives, enhances cultural competence, and attracts top talent, which in turn improves a company's profitability.[79] The correlation between diverse leadership and improved profitability has been researched and analyzed for many years.[80] For example, a study from McKinsey and Company showed that when gender diversity was prioritized in executive teams, companies outperformed their peers by twenty percent.[81] During this study, McKinsey also tested whether having more individuals from cultural and ethnic minorities improved profitability.[82] Here, too, firms were 33% more likely to experience higher profitability than their peers.[83] Another study by McKinsey & Company, "Why Diversity Matters," surveyed more than 1,000 companies over 12 different countries and found that "companies in the top quartile for gender diversity on their executive teams were 15% more likely to experience above-average profitability than companies in the fourth quartile."[84] Diversity is good for all companies—not just to improve corporate culture, but for the overall success of the company.[85]

III. LACK OF DEMOGRAPHIC DATA FROM GOVERNMENT CONTRACTORS

Despite all the benefits of diversity, there is a lack of data surrounding the demographic makeup in government contracting.[86] No database or other means exists to check if billion-dollar companies are promoting a diverse workforce.[87] Most of the readily available evidence suggesting a lack of diversity in

77. Brief of General Motors, *supra* note 7, at 9.
78. *Id.*
79. Gokulan, *supra* note 24, at 2150, 2156–58.
80. Givelle Lamano, *Three Tips for Boosting Business Profits: How Investing in Diversity Increases Profitability*, Forbes (Dec. 20, 2021) https://www.forbes.com/sites/theyec/2021/12/20/three-tips-for-boosting-business-profits-how-investing-in-diversity-increases-profitability/?sh=7042752f66e8 [https://perma.cc/2MN2-XMWY].
81. *Id.* (citing Dame Vivian Hunt, *Delivering Through Diversity*, McKinsey & Co. (Jan. 28, 2018), https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/delivering-through-diversity [https://perma.cc/6BWY-MUZG]).
82. *Id.*
83. *Id.*
84. Dame Vivian Hunt, *Delivering Through Diversity*, McKinsey & Co. (Jan. 28, 2018), https://www.mckinsey.com/capabilities/people-and-organizational-performance/our-insights/delivering-through-diversity [https://perma.cc/6BWY-MUZG].
85. Brief of General Motors, *supra* note 7, at 10.
86. Moreno, *supra* note 10.
87. *Id.*

government contracting companies is anecdotal or from a few voluntary disclosures.[88] The leading source of information revealing this lack of diversity was the result of a yearlong court battle from Will Evans at Reveal, which will be discussed later.[89] *USA Today* conducted an analysis on the information obtained by Reveal on 19,000 different federal contractors.[90] They found that white men hold exactly 59% of executive ranks, Black females hold 1.7%, Hispanic women hold 1.5% and Asian women 2%.[91] Furthermore, they found that white men "are the only demographic group that holds a higher proportion of top positions [executive ranks] than of all other jobs" in a company."[92]

Before this recent release, the most prolific information known about diversity in government contracting came from Internet searches of biographies and pictures of board members or voluntary demographic disclosures.[93] Out of fifty board members between Lockheed Martin, Boeing, Raytheon Technologies, and General Dynamics, thirty-four are white men, sixteen are women, five are people of color, and one is Hispanic or Latino.[94] Boeing voluntarily published a *2021 Global Equity, Diversity & Inclusion Report* in which it released the total percentage of employees from racial or ethnic minority groups.[95] Boeing broke down the percentages of employees in each position according to their race/ethnicity.[96] Across all employees, 31.2% of Boeing's employees identified as being from a racial or ethnic minority.[97] In leadership positions: 79.2% "executives" were white, 8.3% Asian, 6.5% Black, 4% Hispanic, and 2% identified as mixed race.[98] Furthermore, 77% of managers were white, 7.9% Asian, 6.2% Hispanic, 6% Black, 2.9% mixed race, and 0.8% native American.[99] Climbing down the corporate ladder to positions such as "production and maintenance," the percentage of white employees to racial

88. Evans, *supra* note 11.

89. Evans, *supra* note 13.

90. *See* Jessica Guynn et al., *People of Color Were Promised Equal Opportunity. Federal Contractors Are Failing*, Reveal (Apr. 28, 2023), https://revealnews.org/article/diversity-data-top-federal-jobs [https://perma.cc/8SS3-F4H8].

91. *Id.*

92. *Id.*

93. *Board of Directors*, *Corporate Governance*, General Dynamics, https://investorrelations.gd.com/corporate-governance/board-of-directors, [https://perma.cc/KKF3-5TAW] (last visited Aug. 14, 2023); *Board of Directors*, *Leadership and Corporate Governance*, Lockheed Martin https://www.lockheedmartin.com/en-us/who-we-are/leadership-governance/board-of-directors.html [https://perma.cc/54VH-25NX] (last visited Aug. 14, 2023); *Corporate Governance*, *General Information*, *Our Company*, Boeing, https://www.boeing.com/company/general-info/corporate-governance.page [https://perma.cc/E5CK-MM52] (last visited Aug. 14, 2023); *Board of Directors*, *Corporate Governance*, Raytheon Techs., https://www.rtx.com/who-we-are/corporate-governance [https://perma.cc/XZE7-272W] (last visited Aug. 14, 2023).

94. *Id.*

95. Julie Johnsson & Jeff Green, *Boeing, in New Diversity Report, Says It Fired 65 Workers for Hateful Words or Actions*, Seattle Times (Apr. 30, 2021, 6:15 AM), https://www.seattletimes.com/business/boeing-aerospace/boeing-in-new-diversity-report-says-it-fired-65-workers-for-hateful-words-or-actions [https://perma.cc/7PFM-ZMDA].

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

and ethnic minorities evened out.[100] Sixty-four percent of male laborers were white and thirty-six percent were from racial or ethnic minorities.[101] These percentages showcase, overall, a lack of diversity, especially in leadership positions, where diversity is arguably most impactful.[102] Leaders set the tone for the company and have the ability to put in place initiatives to create a culture of acceptance in the company.[103]

IV. ENHANCED DISCLOSURE: A FIRST STEP TOWARD IMPROVING DIVERSITY

Demographic transparency is an impactful first step in the effort to improve diversity in government contracting. In a 2021 brief regarding President Biden's goal to increase equity in federal contracting, the White House noted that "there is clearly still work to be done to lower barriers to entry and increase opportunities for underrepresented" but "*data transparency is a first step*."[104] The public should have the opportunity to know companies' diversity demographics (racial, gender, sexual orientation, nationality, religion, etc.).[105] This information is especially crucial given that diversity data is largely unknown, and, as explained above, the little that is known is anecdotal or from voluntary disclosure.[106]

However, companies are reluctant to disclose their demographic makeups, ostensibly due to fear of talent being poached by other companies.[107] This is just another excuse for companies to avoid having to justify their lack of diversity efforts.[108] Greater representation is necessary; outside pressure can be the first step towards inclusionary efforts of companies.[109] Disclosure gives the public adequate knowledge and evidence to push for change. In fact, other countries have shown how successful disclosure can be in creating that meaningful change.[110]

100. Johnsson & Green, *supra* note 95.

101. *Id.*

102. *Id.*

103. Brief of General Motors, *supra* note 7, at 17 (citing Regents of University of California v. Bakke, 438 U.S. 313 (1978)).

104. *The Benefits of Increased Equity in Federal Contracting*, White House (Dec. 1, 2021), https://www.whitehouse.gov/cea/written-materials/2021/12/01/the-benefits-of-increased-equity-in-federal-contracting [https://perma.cc/3QMN-HZAA] (emphasis added).

105. Evans, *supra* note 11 (The PUSH Silicon Valley Diversity Project is a coalition fighting for more diversity, equity, and inclusion in the tech industry).

106. Evans, *supra* note 11.

107. *See* Jamillah Bowman Williams, *Why Companies Shouldn't Be Allowed to Treat Their Diversity Numbers as Trade Secrets*, Harv. Bus. Rev. (Feb. 15, 2019), https://hbr.org/2019/02/why-companies-shouldnt-be-allowed-to-treat-their-diversity-numbers-as-trade-secrets [https://perma.cc/SUN9-EQZM].

108. Evans, *supra* note 11.

109. Veronica Root Martinez & Gina-Gail S. Fletcher, *Equality Metrics*, Yale L.J. F., 869, 898–99 (2021).

110. *Diversity of Boards of Directors and Senior Management*, Gov't of Can., https://ised-isde.canada.ca/site/corporations-canada/en/business-corporations/diversity-boards-directors-and-senior-management [https://perma.cc/5QJY-9SNS] (last visited Aug. 25, 2023); *see* Ehtasham

A. Public Pressure Creates Change

Companies have increasingly found that "what gets measured gets managed."[111] Government contracting companies have the most concrete and immediate power to make changes within their own organization to promote diversity, but sometimes it takes public pressure to push companies to make the necessary change.[112] Duke Law Professors Veronica Root Martinez and Gina-Gail S. Fletcher wrote an article in the *Yale Law Journal* calling for companies to release "equity metrics."[113] They define equity metrics as "systematized corporate disclosure of the current demographic diversity of the workforce and supply chain."[114] Regular disclosure leads to tangible benefits, such as awareness and knowledge.[115] While many companies promise to make greater efforts towards enhancing diversity, without the requisite evidence to call companies out for their shortcomings, the public does not have the ability to have a meaningful voice and hold them to their word.[116]

Demographic disclosure by companies helps the public gain awareness of the lack of diversity; it offers a tangible way to recognize the issue and hold companies accountable for their deficient efforts.[117] Under a system that encourages demographic disclosure, no longer could companies promise the promotion of diversity while still maintaining a predominantly homogenous board and workforce.[118] Although public accountability cannot guarantee a change in diversity, it will certainly force a corporation to think twice about whom they hire in the future as public pressure and reactions play a role.[119] As Datamaran CEO Marjella Lecourt-Alma stated: "[W]hen we see a lack of transparency on important issues like diversity and inclusion, we . . . have to question the company's governance and culture."[120]

B. Excuses for Refusal to Disclose

Efforts by companies to keep diversity numbers hidden are extensive, indicating that these companies could have something to hide from the public.[121] The most frequently cited argument for keeping diversity demographic data

Ghauri, Mansi Mansi & Rakesh Pandey, 32 Int'l J. Hum. Res. Mgmt. 1420–23 (2021), https://www.tandfonline.com/doi/full/10.1080/09585192.2018.1539862 [https://perma.cc/LX2E-SG8G] [hereinafter Diversity of Boards of Directors and Senior Management].

111. Topping, *supra* note 14, at 45.

112. Martinez & Fletcher, *supra* note 109, at 906.

113. *Id.* at 869–915.

114. *Id.* at 869.

115. *Id.* at 899.

116. *Id.* at 877–78.

117. Topping, *supra* note 14, at 45; *see also* Martinez & Fletcher, *supra* note 109, at 898–99.

118. Martinez & Fletcher, *supra* note 109, at 877–78.

119. David M. Lynn, *The Dodd-Frank Act's Specialized Corporate Disclosure: Using the Securities Laws to Address Public Policy Issues*, 6 J. Bus. & Tech. L. 327, 339 (2011).

120. Susanne Katus, *In Corporate Diversity, the US Is Trailing Behind Europe*, Green Biz (July 27, 2020), https://www.greenbiz.com/article/corporate-diversity-us-trailing-behind-europe [https://perma.cc/E6FJ-Q4XR]

121. Williams, *supra* note 107.

confidential is that it is a "trade secret."[122] This excuse was used recently by a Washington, D.C., consulting firm called Chemonics, which stated: "[T]he company blocked releasing its own diversity data because it considers that confidential commercial information . . . ."[123] This excuse revolves around the notion that companies do not want competitors to know their diverse talent that they have and try to poach them.[124] Furthermore, companies argue that if their demographic numbers are released and are not comparable to their competitors, they risk losing business, which could impact their bottom line.[125] For example, in 2011, CNN filed FOIA requests to gain access to twenty different tech companies' demographic data.[126] Of those companies, Apple, Google, IBM, and Microsoft submitted objections stating that the "data would cause a 'competitive harm' under trade secret law."[127] Only one tech company, Intel, responded to CNN's request and offered to disclose all of its demographic data.[128] Instead of having its talent poached or losing business to competitors, Intel stated that the disclosure redounded to its benefit.[129] Intel saw the effect that transparency can have on creating a "genuine dialogue" between their company and the public to drive change.[130] Intel believes that, instead of giving into their "fears that the numbers are a poor reflection" on the company, it should look at disclosure as an opportunity to ask for advice from the community on how to improve their diversity numbers.[131]

C. Learning from the Success of Disclosure in Other Countries

Intel enjoyed the same success from disclosure enjoyed by companies in other countries with demographic disclosure requirements.[132] Canada, France, the United Kingdom, and the Netherlands, to name a few, have passed legislation to require companies to disclose their diversity metrics.[133] In October 2014, the European Parliament amended its original 2013 directive regarding disclosure of non-financial and diversity information through certain large undertakings.[134] The purpose of these undertakings was to improve the

122. *Id.*
123. Evans, *supra* note 11.
124. *Id.*
125. *Id.*
126. Williams, *supra* note 107.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. Diversity of Boards of Directors and Senior Management, *supra* note 110; Council Directive 20013/34/EU, art. 17–18, 2014, O.J. (L330) (EC) [hereinafter Council Directive 20013/34/EU]; *Diversity and Inclusion on Company Boards and Executive Management*, Fin. Conduct Auth. (Apr. 20, 2022), https://www.fca.org.uk/publications/policy-statements/ps22-3-diversity-inclusion-company-boards-executive-managment [https://perma.cc/L5EZ-CWB3]; Mansi & Pandey, *supra* note 108, at 142–23.
134. Council Directive 20013/34/EU, *supra* note 133, at art. 17–18.

transparency of companies' non-financial information.[135] Required in this non-financial information are diversity policies from each company regarding their employees demographics and educational backgrounds.[136] The amendment specifies that the company's corporate governance statement should contain this information.[137] In its reasoning for the directive, the European Union specifically stated that making the public aware of a company's lack of diversity creates indirect pressure on the company's leaders to have a more diversified board.[138] Articles reporting on the amendment state that "this information is . . . key for civil society and public authorities to assess and monitor corporate responsibility and accountability."[139]

The arguments in these articles were proven in a study in Denmark.[140] In 2006, a law required "35 employees to publicly disclose the discrepancies in pay between their male and female employees."[141] The study utilized a control group of firms that did not have to disclose their data.[142] The results were that "from 2003 to 2008 the gender pay gap at the reporting companies shrank 7% from 18.9% down to 11.5%, while the wage gap at the non-reporting firms held steady."[143] Not only did disclosure of disparities in pay equity help resolve the lack of diversity, it also promoted better hiring practices.[144]

V. INDUSTRY PRACTICES ALREADY LEANING TOWARD MORE DISCLOSURE

While the United States has not mandated public or private companies, including government contracting companies, to disclose their demographics, the Nasdaq Stock Market (Nasdaq) and the Securities and Exchange Commission (SEC) have both tried to advance diversity through listing and reporting requirements of board members.[145, 146] Nasdaq explained that it sought "to provide stakeholders with a better understanding of the company's current

135. *Id.*
136. *Id.*
137. *Id.*
138. Council Directive 20013/34/EU, *supra* note 133, art. 17–18.
139. *NGO Statement*: *The European Commission Must Take Action to Improve the Reporting Obligations of Companies on Sustainability Issues*, Frank Bold https://en.frankbold.org/publications/ngo-statement-eu-commission-must-take-action-improve-reporting-obligations-companies-su [https://perma.cc/ZL44-9JCQ] (last visited August 14, 2023).
140. Susan Kelley, *Gender Pay Shrinks When Companies Disclose Wages*, Cornell Chron. (Feb. 27, 2019), https://news.cornell.edu/stories/2019/02/gender-pay-gap-shrinks-when-companies-disclose-wages [https://perma.cc/P2QV-MZF3].
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. Press Release, Nasdaq, Nasdaq to Advance Diversity Through New Proposed Listing Requirements (Dec. 1, 2020), https://www.nasdaq.com/press-release/nasdaq-to-advance-diversity-through-new-proposed-listing-requirements-2020-12-01.
146. Although the SEC and Nasdaq are quite different—one being a private entity and the other a government agency—the similar efforts that they are both taking to promote diversity showcases the variety of reforms that are taking place.

board composition and enhance investor confidence that all listed companies are considering diversity in the context of selecting directors."[147] Furthermore, shareholders themselves have pressured companies to complete yearly demographic disclosure assessments such as racial equity audits.[148]

A. The Securities and Exchange Commission and Nasdaq: Disclosure Requirements

The SEC has received pressure from shareholders of various companies to enhance disclosure of the diversity characteristics of board members and executives among publicly traded companies.[149] Pending legislation, introduced in 2019, would require demographic disclosure of board members and executives in publicly traded companies.[150] Along the same lines, at the end of 2020, Nasdaq proposed two new listing rules: Rule 5605(f) (The Comply-or-Explain Rule) and Rule 5606.[151] Rule 5605, under its "diversity requirement," states that "each company must have, or explain why it does not have, at least two members of its board of directors who are diverse, including (i) at least one diverse director who self-identifies as female; and (ii) at least one diverse director who self-identifies as an underrepresented minority or LGBTQ+."[152] Nasdaq defines someone "diverse" as "an individual who self-identifies as: (i) female, (ii) an underrepresented minority, or (iii) LGBTQ+."[153] If companies did not meet this two-person minimum, then they would be required to offer an explanation to Nasdaq.[154] Rule 5606 would require "each company [to] . . . annually disclose, to the extent permitted by applicable law, information on each director's voluntary self-identified characteristics" and would look like a "board diversity matrix."[155] This Board Diversity Matrix would have the gender identity, the demographic background (underrepresented,

147. *Id.*

148. Ron S. Berenblat & Elisabeth R. Gonzalez-Sussman, *Racial Equity Audits: A New ESG Initiative*, Harv. L. Sch. F. on Corp. Governance (Oct. 30, 2021), https://corpgov.law.harvard.edu/2021/10/30/racial-equity-audits-a-new-esg-initiative [https://perma.cc/7E7W-Z8ZM].

149. Elad L. Roisman, *Statement on the Commission's Order Approving Exchange Rules Relating to Board Diversity*, U.S. Sec. & Exch. Comm'n (Aug. 6, 2021) https://www.sec.gov/news/public-statement/roisman-board-diversity [https://perma.cc/N7B3-LPCF] (Commissioner Roisman stating that the new rule relating to board diversity will "require each Nasdaq-listed company . . . to publicly disclose in an aggregate form . . . information on the voluntary self-identified gender and racial characteristics and LGBTQ+ status." He stated that "[t]hroughout history, there have been too many barriers preventing deserving individuals from participating fully in our economy. Not only have those individuals been denied opportunities, but society at large has missed out on the value their talents offer.").

150. Improving Corporate Governance Through Diversity Act of 2019, H.R. 5084, 116th Cong. (2019–2020).

151. No. 34-90574, SR-NASDAQ-2020-081 (Dec. 4, 2020), https://www.sec.gov/rules/sro/nasdaq/2020/34-90574-ex5.pdf [https://perma.cc/TAG7-FMNL] (last visited Aug. 14, 2023).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

LGBTQ+), and the position within the company.[156] The government should require all government contractors to follow rules similar to 5606.[157]

B. Shareholder Pressure for Greater Disclosure: Requesting Racial Equity Audits

Although both the SEC's and Nasdaq's efforts are noble, shareholders still question the lack of information and have pushed for greater disclosure regarding diversity and equity within companies.[158] One tactic that shareholders have taken is to propose racial-equity audits at shareholders meetings.[159] Racial-equity audits (REAs) are "an evaluation—usually conducted by an external law firm—of an employer's policies, procedures, and practices to identify and address systemic bias and discrimination."[160] REA's evaluate the environmental, social, and governance elements of a company.[161] Corporate governance "considers how a company governs itself and holds itself accountable taking into account the structure and diversity of a company's board of directors."[162] Although companies have pushed back against REAs, citing concern over the fact that they have no control on the information that is presented to the public, shareholders and companies alike have benefited from REAs.[163]

A great example of an REA is Meta's first REA, conducted in 2018 by Laura W. Murphy. [164] Murphy is a civil rights and civil liberties leader.[165] Among other concerns, Murphy and her team of attorneys found a " lack of representation in senior management and the number of people of color (with the exception of Asians and Asian Americans) in technical roles"; "a lack of recognition for the time [underrepresented minority ('URM')] employees spent on mentoring and recruiting other minorities to work at Meta—feedback that was particularly pronounced with resource group leaders who are also managers"; and "a lack of awareness of all the internal programs available to report racial bias and/or discrimination."[166] After this audit, shareholders were pleased with Meta's immediate response in acknowledgment of its lack of diversity among senior level positions. [167] Meta responded and stated that the overall corporate ignorance of this issue:

156. *Id.*
157. *Id.*
158. Berenblat & Gonzalez-Sussman, *supra* note 148.
159. *Id.*
160. Leah Shepherd, *Equity Audits Address Racism in the Workplace*, Soc'y for Hum. Res. Mgmt. (Aug. 9, 2022), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/racial-equity-audits-increase.aspx#:~:text=A%20racial%20equity%20audit%20is,address%20systemic%20bias%20and%20discrimination [https://perma.cc/MW6P-M8RU].
161. Berenblat & Gonzalez-Sussman, *supra* note 148.
162. *Id.*
163. *Id.*
164. Laura W. Murphy, Facebook's Civil Rights Audit—Final Report 3 (2020).
165. *Id.*
166. *Id.*
167. Meta's Civil Rights Team, Meta, Meta's Progress on Civil Rights Audit Commitments 36 (2021), https://about.fb.com/wp-content/uploads/2021/11/Metas-Progress-on-Civil-Rights-Audit-Commitments.pdf [https://perma.cc/97WW-VT3H] [hereinafter Meta Report]

> [Meta made a commitment] to have 50% of Facebook's workforce be from underrepresented communities by the end of 2024. (Facebook defines URM to include: women, people who are black, Hispanic, Native American, or Pacific Islander, people with two or more ethnicities, people with disabilities, and veterans) and over the next "five years, a commitment to have 30% more people of color, including 30% more Black people, in leadership positions."[168]

In November 2021, a year after Meta conducted its racial equity audit, it publicized a report on the progress that it had made towards its commitments thus far.[169] At the time that the report was released, 45.6% of Meta's workforce came from underrepresented communities.[170] Although it had not reached its goal (that fifty percent of its workforce belonged to an unrepresented community), this report was completed one year after the audit (2021), demonstrating that massive progress had been made toward the goal.[171] Furthermore, Meta made a statement about increasing diversity in leadership positions:

> With regard to leadership positions, Meta has similarly made progress, increasing the number of U.S.—based black and Latinx leaders at the company by 38.2 percent and 18.6 percent respectively in the first year of our five-year goal. U.S. based Black leaders at Meta now represent 4.7 percent of leadership and U.S.-based Latinx leaders represent 5.1 percent of leadership.[172]

Meta's racial equity audit is a prime example of how disclosure not only informs a company about its disparities and inequities, but also holds companies accountable and forces the company to push for change.[173] A company that discloses a lack of racial equity among senior level positions will need to account for this disparity and demonstrate willingness to change or suffer the consequences of a newly tarnished reputation.

The largest government contracting companies have already felt this shareholder pressure to conduct racial equity audits and have offered their own version of a REA.[174] In 2022, one of the largest government contracting companies, Lockheed Martin, conducted a human rights audit.[175] Lockheed conducted the audit under pressure from shareholders concerned about the makeup of the company's employees and disclosure.[176] The audit also contained a sustainability report.[177] This report was a page long, containing diversity goals and highlighting an increase in female representation (twenty-three percent of employees) and people of color (twenty-nine percent of employees) throughout the company.[178] Although this information is revealing in some respects, a company's internal audit must be treated with a critical

168. *Id.* at 68.
169. *Id.*
170. *Id.* at 36.
171. *Id.*
172. *Id.*
173. Murphy, *supra* note 164.
174. Lockheed Martin, Sustainability Report Final 2 (2021).
175. Lockheed Martin, Human Rights Report 1–21 (2022) [hereinafter Human Rights Report].
176. *Id.*
177. *Id.* at 17.
178. *Id.*

eye. Companies should not determine what diversity information is material and what to disclose. This is the key difference between the REA that Meta conducted and the report that Lockheed released.[179] In the Meta example, an unbiased third party disclosed all the information discovered—both the good and the shortcomings—to the public.[180] However, Lockheed's team might have only released the most favorable data points to showcase among its diversity numbers—the true state of the company remains unclear.[181] Lockheed's human rights report demonstrates both the necessity and the movement towards further disclosure within the government contracting industry. Although a company must respond to shareholder pressure for greater disclosure, this response should not involve cherry-picking information that portrays the company in the best light.[182]

VI. CURRENT DISCLOSURE AND REPORTING OBLIGATIONS ARE INSUFFICIENT

The government has long taken issue with federal contracting companies' lack of diversity at senior level positions.[183] The first initiative intended to combat this was Lyndon Johnson's Executive Order 11246 that remains in effect today.[184] The order requires federal contractors to take "affirmative action" to "ensure that all individuals have an equal opportunity for employment, without regard to race, color, religion, sex, or national origin."[185] Two of the requirements in the order pertain directly to disclosure: filing an annual EEO-1 report and allowing the Office of Federal Contract Compliance Program (OFCCP) access to the contractor's books and records.[186] An EEO-1 report is a breakdown of a company's demographic makeup, including the employee's race and gender.[187] The OFCCP uses this report to decide if the company needs to be audited for potential pay disparities or diversity throughout employment.[188]

A. EEO-1 Reports

EEO-1 reports are completed by all businesses in the United States that employ over 100 employees.[189] They are reviewed by the U.S. Equal Employment Opportunity Commission (EEOC).[190] The EEOC "is responsible

179. *Id.*; *see also* Murphy, *supra* note 164.
180. Murphy, *supra* note 164.
181. Human Rights Report, *supra* note 175.
182. *Id.*
183. Wakeman, *supra* note 1.
184. Exec. Order No. 11246, 65-10340 (1965).
185. *Id.*
186. *Id.*
187. *EEO-1 Component 1 Data Collection*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/data/eeo-1-data-collection [https://perma.cc/6RUX-SXFW] (last visited Aug. 14, 2023).
188. Notice of Request, *supra* note 17.
189. *Overview*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/overview [https://perma.cc/8V4J-R767] (last visited Aug. 14, 2023) [hereinafter *Overview*].
190. Notice of Request, *supra* note 17.

for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, religion, sex (including pregnancy, transgender status, and sexual orientation), national origin, age (forty or older), disability or genetic information."[191] EEO-1 reports are mandatory for all companies with 100 or more employees.[192] EEO-1 reports contain seven sections of questions for companies to answer.[193] Section A and B require information about the location of the company and which report they are filing (i.e., multi-establishment or single establishment).[194] Section C asks questions to ensure that the contractor meets all the requirements to fill out the form (for example, that the company has 100 or more employees).[195] Section D is a chart in which the company must disclose the demographic makeup of each employee in each division.[196] A sample of the chart is provided below. Horizontally, the chart has a section for "job categories" ranging from executives to service workers, a section for salary compensation across twelve salary ranges, a section for gender, and a section for "gender + ethnicity."[197] The contractor would answer it by filling in each box with the number of employees that it has within each category.[198] A Type 2 EEO-1 Report has all the information in figure one but does not contain the salary compensation band.[199]

Figure 1

191. *Overview*, *supra* note 189.

192. *EEO Data Collections*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/data/eeo-data-collections [https://perma.cc/XEP7-MVHF] (last visited Aug. 14, 2023).

193. *Employer Information Report EEO-1*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/sites/default/files/migrated_files/employers/eeo1survey/eeo1-2-2.pdf [https://perma.cc/EQC2-C3TN] (last visited Aug. 14, 2023).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

Type 2 EEO-1 reports contain the precise information that government contracting companies should disclose—reports about its makeup and other information that the public requires to hold companies accountable for any lack of diversity.[200] If the public can see the total number of diverse individuals holding positions within a company, then it has tangible evidence of the makeup of the company.[201] While these reports showcase exactly the information that would be critical for government contractors to know, they have become a concealed, compulsory requirement that has not realized its potential as a vehicle for change.[202]

B. The Office of Federal Contract Compliance Programs

OFCCP, a Department of Labor program, vows to "protect workers, promote diversity and enforce the law."[203] OFCCP holds federal government contractors responsible for "complying with the legal requirement to take affirmative action and not discriminate on the basis of race, color, sex, sexual orientation, gender identity, religion, national origin, disability, or status as a protected veteran."[204] The OFCCP has several enforcement procedures, including (1) offering compliance assistance to federal contractors, (2) obtaining conciliation agreements, (3) monitoring contractors progress fulfilling their compliance reports, (4) recommending enforcement actions to the Secretary of Labor, and (5) and deciding when a contractor should be audited.[205] The OFCCP uses EEO-1 reports from the EEOC to determine if a federal contractor should be audited.[206] During a "desk audit," the OFCCP will follow up if it finds any concerns, such as pay disparities, inconsistencies with pay policies, and "statistical analyses or other evidence that a group of workers is disproportionately concentrated in lower paying positions or pay levels within a position based on a protected characteristic."[207] If, upon further review, the OFCCP sees that the contractor has systemic issues (such as any of the aforementioned concerns), it will require the company to implement an "action-oriented program."[208] While the OFCCP seems to have the teeth to

200. *Id.*

201. Topping, *supra* note 14, at 45.

202. Kiely, *supra* note 19.

203. *About Us*, Off. of Fed. Cont. Compliance Programs https://www.dol.gov/agencies/ofccp/about [https://perma.cc/2PXL-77BT] (last visited Aug. 14, 2023).

204. *Id.*

205. *Id.*

206. *Chapter 1 Desk Audit*, Off. of Fed. Cont. Compliance Programs, https://www.dol.gov/agencies/ofccp/manual/fccm/chapter-1-desk-audit/1a-introduction [https://perma.cc/2SBX-YEQS] (last visited Aug. 14, 2023).

207. *Directive (DIR) 2022-01 Revision 1*, Off. of Fed. Cont. Compliance Programs, https://www.dol.gov/agencies/ofccp/directives/2022-01-Revision1 [https://perma.cc/ES7F-FTS6] (last visited Aug. 14, 2023).

208. *Advancing Pay Equity Through Compensation Analysis*, Off. of Fed. Cont. Compliance Programs, https://blog.dol.gov/2022/08/18/advancing-pay-equity-through-compensation-analysis#:~:text=On%20August%2018%2C%202022%2C%20OFCCP,compensation%20systems%20and%20document%20compliance [https://perma.cc/ALD6-GBRD] (last visited Aug. 14, 2023).

create change, it has not yet produced the results that would come with full disclosure of a company's employee makeup.[209]

VII. GOVERNMENT CONTRACTOR'S REQUIRED DIVERSITY DISCLOSURE: CONGRESSIONAL STATUTE TO MANDATE DISCLOSURE OF TYPE 2 EEO-1 REPORTS

The main issue with EEO-1 reports is that they are kept confidential by the EEOC under the Freedom of Information Act (FOIA), unless companies choose to voluntarily disclose the report.[210] FOIA is "a law that allows any member of the public to request copies of federal government records, including EEOC records."[211] Although this Act should encourage disclosure, companies employ a vast array of exemptions to avoid disclosure.[212] The OFCCP decided that EEO-1 reports were protected from disclosure under FOIA Exemption 4.[213] Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."[214] According to the OFCCP, an EEO-1 report is protected from disclosure due to Exemption 4 because it falls within the category of "commercial or financial information obtained from a person that is privileged or confidential."[215]

To remedy this issue, Congress should create a stand-alone statute that overrides Exemption 4 to mandate the disclosure of Type 2 EEO-1 reports in full. Congress should act for several reasons. First, it is difficult to obtain EEO-1 reports even with court orders. Second, non-government contracting companies are already taking measures to disclose diversity data, even Type 2 EEO-1 reports. Third, the disclosure of diversity data will not be impacted by the recent litigation involving affirmative action.

A. It Is Difficult to Obtain EEO-1 Reports Even with a Court Order

Over the past four years, civil rights activists, members of Congress, and government contracting scholars have made a greater push to make government contractors' EEO-1 reports public.[216] This conflict came to a head in

209. *Benefits of Increased Equity in Federal Contracting*, *supra* note 104.

210. Kiely, *supra* note 19.

211. *Freedom of Information Act*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/foia#:~:text=The%20Freedom%20of%20Information%20Act,government%20records%2C%20including%20EEOC%20records [https://perma.cc/9MNR-AENA] (last visited Aug. 14, 2023).

212. *Id.*

213. *Id.*

214. *Freedom of Information Act Reference Guide*, U.S. Equal Emp. Opportunity Comm'n (2018), https://www.eeoc.gov/foia/freedom-information-act-reference-guide [https://perma.cc/6MR3-U4XG] (last visited Aug. 14, 2023).

215. *Freedom of Information Act*, *supra* note 211.

216. Evans, *supra* note 11; Will Evans, *Congresswoman to Tech Firms: 'You're Hiding Something*,' Reveal (Dec. 11, 2017), https://revealnews.org/blog/congresswoman-to-tech-firms-youre-hiding-something [https://perma.cc/8FTD-UZEU]; Sinduja Rangarajan, *Jesse Jackson Calls Out Silicon Valley 'Empty Promises' on Diversity*, Reveal (Apr. 6, 2018) https://revealnews.org/blog/jesse-jackson-calls-out-silicon-valley-empty-promises-on-diversity [https://perma.cc/8N8P-AY8X].

December 2019, when the Center for Investigative Reporting (CIR), a nonprofit investigative news organization, and Will Evans, a reporter for *Reveal*, sued the OFCCP to gain access to a group of EEO-1 reports.[217] The OFCCP refused to release ten of the EEO-1 reports of big tech government contracting companies in Evans's FOIA request.[218]

In August 2019, Judge Kandis Westmore ruled for Evans and CIR in *Center for Investigative Reporting v. U.S. Department of Labor*.[219] Concluding that EEO-1 reports are not commercial in nature and therefore not covered by Exemption 4, Judge Westmore stated that "diversity reports merely disclose the workforce composition to ensure compliance with Executive Order 11246 which prohibits employment discrimination by federal contractors."[220] In this holding, the judge ordered the government to produce the ten remaining EEO-1 reports that the OFCCP had not released to the CIR or to Evans after the initial FOIA request.[221]

Three years after this court case, instead of requiring the disclosure of all EEO-1 Type 2 reports, OFCCP instead gave all government contracting companies thirty days to argue why the information in these reports should remain confidential.[222] The Director of the OFCCP stated in the notice that "OFCCP has reason to believe that the information requested may be protected from disclosure under the exemption" (referring to Exemption 4), but that each company would have to state why it believed its EEO-1 information qualifies under this exemption.[223] Furthermore, the notice stated that all companies from 2016 to 2022 objecting to the disclosure had to address the following five questions in their official objection:

1. What specific information from the EEO-1 Report does the contractor consider to be a trade secret or commercial or financial information?
2. What facts support the contractor's belief that this information is commercial or financial in nature?
3. Does the contractor customarily keep the requested information private or closely-held? What steps have been taken by the contractor to protect the confidentiality of the requested data, and to whom has it been disclosed?
4. Does the contractor contend that the government provided an express or implied assurance of confidentiality? If no, were there express or implied indications at the time the information was submitted that the government would publicly disclose the information?

217. Center for Investigative Reporting et al., v. U.S. Department of Labor, 424 F. Supp. 3d 771, 773 (N.D. Cal. 2019).
218. *Id.* at 775.
219. *Id.* at 780.
220. *Id.* at 776.
221. *Id.* at 780.
222. Notice of Request, *supra* note 17.
223. *Id.*

5. How would disclosure of this information harm an interest of the contractor protected by Exemption 4 (such as by causing foreseeable harm to the contractor's economic or business interests)?[224]

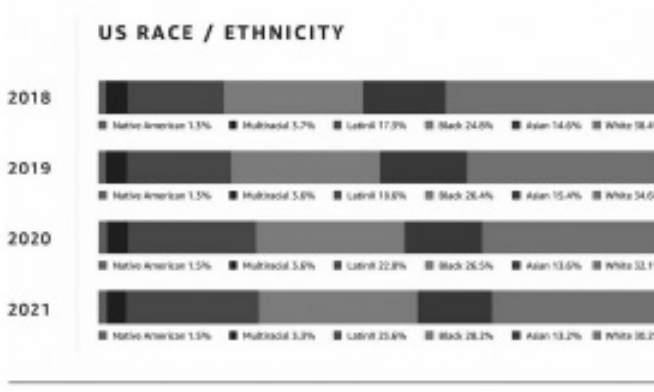
In April 2023, the OFCCP released only the EEO-1 reports of companies who did not object.[225] While this was a win for demographic data release, thousands of companies objected in time and thousands more objected after the fact and are being shielded from disclosure until further litigation is conducted.[226] Although some would say this is progress from the OFCCP towards greater transparency, it should not take extensive litigation to gain information from federal contracting companies. Furthermore, this type of information is simply not protected information that falls under FOIA Exemption 4.[227]

A congressional mandate would take the decision out of the OFCCP's hands. No longer would the EEO-1 Type 2 Report be protected by the language of the FOIA Exemption 4. There would not be an option for companies to object to the disclosure of their report due to the harm that it would create under Exemption 4.

B. Recent Disclosure Initiatives Outside of Government Contracting

Outside of government contracting, there have been many initiatives to increase disclosure.[228] Some companies have even released Type 2 EEO-1 reports on their own volition.[229] Recently, there has been momentum amongst the corporate world to disclose diversity data.[230] As previously discussed, Nasdaq and the SEC have created listing and reporting requirements regarding board member diversity.[231] Furthermore, shareholders of companies have taken it upon themselves to push companies to conduct racial-equity audits to learn more about a company's makeup before investing.[232] For example, Meta saw success in releasing its racial-equity audit and getting critical feedback from the public.[233]

224. Notice of Request, *supra* note 17.
225. Guynn et al., *supra* note 90.
226. *Id.*
227. *Freedom of Information Act*, *supra* note 211.
228. No. 34-90574, *supra* note 151; *see also* David A. Bell et al. *SEC Adopts Nasdaq Rules on Board Diversity*, Harv. L. Sch. F. on Corp. Governance (Aug. 19, 2020), https://corpgov.law.harvard.edu/2021/08/19/sec-adopts-nasdaq-rules-on-board-diversity [https://perma.cc/65QH-FV2W].
229. *See*, *e.g.*, *Reporting U.S. EEO-1 Reports*, *Paypal EEO-1 Report for 2021*, Paypal https://about.pypl.com/values-in-action/reporting/default.aspx [https://perma.cc/L7S7-QPRG] (last visited August 14, 2023) [hereinafter *Paypal EEO-1 Report for 2021*]; *see also Our Workforce Data*, Amazon, https://www.aboutamazon.com/news/workplace/our-workforce-data [https://perma.cc/7YF9-BUCX] (last visited August 14, 2023) [hereinafter *Our Workforce Data*].
230. No. 34-90574, *supra* note 151; *see also* Bell et al., *supra* note 228.
231. *Id.*
232. Berenblat & Gonzalez-Sussman, *supra* note 145.
233. Meta Report, *supra* note 167.



Two well-known companies that have taken initiatives to increase disclosure are Paypal and Amazon.[234] These are two of the first companies to publicly release their EEO-1 reports voluntarily.[235] Each company posted this information on its respective website; Amazon in particular has a tab on their website listed "Our Workforce Data" where all of its EEO-1 data is visible.[236] Amazon utilizes a separate chart (like the one above showing the makeup of the entire company) to showcase the demographic makeup of each level of the workforce; there is a separate chart for corporate employees, people managers, and senior leaders.[237] This report provides the necessary information that is pertinent for the public to know, such as pay, job category, gender, ethnicity, and race.[238]

In addition, Lockheed Martin, one of the largest government contractors, has seen this trend of voluntary demographic disclosure and has released a "human rights report."[239]

Contained in this human rights report was a document called the "2022 Proxy Statement," which listed the "Corporate Governance Highlights" of Lockheed Martin.[240] The document highlighted thirty-eight percent gender and ethnic diversity throughout the company, including four female directors and one African American director.[241] This Proxy Statement is evidence that the company understands that its shareholders want more disclosure and that the company's demographic makeup should be the focus of this disclosure.[242]

234. *Paypal EEO-1 Report for 2021*, *supra* note 229; *see Our Workforce Data*, *supra* note 229.
235. *Id.*
236. *Our Workforce Data*, *supra* note 229.
237. *Id.*
238. Kiely, *supra* note 19.
239. Human Rights Report, *supra* note 175.
240. Lockheed Martin, Proxy Statement (2022), https://www.lockheedmartin.com/content/dam/lockheed-martin/eo/documents/annual-reports/2022-proxy-statement.pdf?_gl=1*knma3h*_ga*MTU4NTkwMDI4Ni4xNjUwNDgwODYz*_ga_RN6SVSR76N*MTY1OTk4MjI0Mi4xNTMuMS4xNjU5OTg2Njk3LjA.&_ga=2.170710304.125419238.1659966555-1585900286.1650480863 [https://perma.cc/U7PU-E9YW]).
241. *Id.*
242. *Id.*

C. *Mandating Disclosure Would Still Be Permissible Under Recent Supreme Court Affirmative Action Jurisprudence*

A congressional statute mandating the disclosure of EEO-1 reports would not be affected by the recent litigation involving affirmative action or any other government diversity initiative. Simply requiring companies to disclose demographic data would not be vulnerable to a constitutional challenge. The recent Supreme Court case *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* is an example of government diversity initiatives facing constitutional challenges.[243] It was a consolidated case about affirmative action at colleges and universities.[244] The term "affirmative action" refers to "positive steps to increase the representation of women and minorities in areas of employment, education, and culture from which they have been historically excluded."[245] In *Students for Fair Admissions*, the Supreme Court considered whether to allow universities to consider an applicant's race in college admissions.[246] The plaintiffs claimed affirmative action discriminates against applicants on the basis of race, in violation of the Civil Rights Act of 1964.[247] Ultimately, the Court found in favor of the plaintiffs and rejected the use of race as an admissions factor "[b]ecause Harvard's and UNC's admissions programs lack sufficiently focused and measurable objectives warranting the use of race, unavoidably employ race in a negative manner, involve racial stereotyping, and lack meaningful end points,[and] those admissions programs cannot be reconciled with the guarantees of the Equal Protection Clause."[248]

Within the context of this Note, court-ordered limits or restrictions on government enforced diversity initiatives will not affect disclosure requirements. The Supreme Court, in the case above, decided that universities could not be able to consider race in college admissions, but this ruling will not affect a disclosure statute.[249] Rather, the Court's decision that affirmative action is unconstitutional likely means that government-mandated diversity quotas in companies or mandatory diversity consideration in hiring is also unconstitutional.[250] This is because both affirmative action and mandatory quotas force the hand of the school or company to actively take measures to

243. Students for Fair Admissions, Inc. v. President and Fellows of Harvard College, 143 S. Ct. 2141, 2176 (2023).

244. *Id.*

245. Robert Fullinwider, *Affirmative Action*, Stan. Encyclopedia of Phil. (Dec. 28, 2001), https://plato.stanford.edu/archives/sum2018/entries/affirmative-action [https://perma.cc/9JUF-VXPJ].

246. *Students for Fair Admission, Inc.*, 143 S. Ct. at 2147.

247. *Id.* at 2157.

248. *Id.* at 2147.

249. *Id.* at 2176.

250. *See* Griffith Erin, *California Law Requiring Board Diversity Is Struck Down*, N.Y Times (Apr. 2, 2022), https://www.nytimes.com/2022/04/03/business/california-board-diversity-law.html [https://perma.cc/G3PB-UY56] (discussing passed efforts for diversity in corporations through mandatory quota laws and focusing on a California 2020 legislation that required companies headquartered in the state to have at least one board member who is a racial minority or LGBTQ+).

increase diversity.[251] Requiring diversity disclosure, however, is distinct. Mandating the disclosure of Type 2 EEO-1 reports asks a company to share information but does not require it to take additional active measures to promote or enhance diversity.[252] Disclosure measures are shielded from any effect of the recent affirmative action cases or any future limits on governmental diversity initiatives.[253]

Disclosing EEO-1 reports exposes companies to public accountability without requiring these companies to comply with quotas, held by the Supreme Court to be unconstitutional. If there is enough outrage by the public due to a lack of diversity within companies, these companies will likely decide on their own to make changes.

VIII. CONCLUSION

With $637 billion of taxpayer dollars spent on government contracts per year, these companies should serve as pioneers for diversity initiatives.[254] Government contracting companies have ignored calls for diversity, specifically in leadership positions, rather than leveraging their market power to pioneer disclosure reform.[255] A crucial way to increase diversity at companies is by mandating disclosure of demographic data.[256] This disclosure is relatively easy, considering that these companies are already required to track demographic information and that companies like Paypal and Amazon have demonstrated that disclosure is not only possible but not burdensome to business.[257] Type 2 EEO-1 reports are mandatory and contain all the information that the public should know about a company's demographics, including job categories, race, ethnicity, and gender.[258] Currently, these reports are confidential unless they are voluntarily disclosed or mandated for release as in a lawsuit.[259] A congressional statute that overrides the FOIA exemption currently allowing EEO-1 reports to stay confidential is the best path for release of diversity demographics of government contractors to the public. Although there is no quick fix to the issue of diversity in government contracting, disclosure is a necessary first step.

251. *Students for Fair Admission, Inc.*, 143 S. Ct. at 2147.
252. *Id.*
253. *Id.*
254. DiNapoli, *supra* note 12.
255. Johnsson & Green, *supra* note 95.
256. Topping, *supra* note 14, at 45; *see also* Martinez & Fletcher, supra note 107, at 889.
257. *See Paypal EEO-1 Report for 2021*, *supra* note 229; *see also Our Workforce Data*, *supra* note 229.
258. *Employer Information Report*, *supra* note 193.
259. *Freedom of Information Act*, *supra* note 211.

GAO V. COFC, CONFLICTING ADJUDICATORY APPROACHES TO KEY PERSONNEL ABSENCES: RESOLVING THE CIRCUIT SPLIT BY STRIKING A FAIR BARGAIN

Jacob Green[*]

ABSTRACT

The circuit split between the Court of Federal Claims (COFC) and the Government Accountability Office (GAO) in the resolution of bid protests that involve key personnel absences that occur after the deadline to submit proposals has expired must be resolved. GAO's approach to the issue imposes a disclosure duty on contractors that clashes with a recent COFC opinion finding that no such duty exists. Allowing this split to linger harms both contractors and the government, who find themselves unsure of how to proceed after the disparate rulings. Compounding the dilemma is the impact of the Great Resignation, as employees from the entire economy, including government contractors, have become more mobile than ever in search of better employment opportunities.

To resolve the conflicting authority, three changes should be made. First, the Federal Acquisition Regulation (FAR) should be revised to include the GAO duty to disclose. Second, solicitation policy should include preferences to state key personnel requirements as performance specifications. Finally, departing employees should be permitted to sign letters of commitment to perform the contracts being completed before leaving their former employer. This solution accounts for the concerns of contractors, ensures that the government obtains what it bargains for, and restores efficiency to the system by avoiding drawn-out bid protests that drain contractors' funds and public resources.

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I. INTRODUCTION

The Court of Federal Claims (COFC) and the Government Accountability Office (GAO) agree on most issues in government contracts law. When the two tribunals differ in their resolutions of a legal issue, offerors and officials from the procuring agency are left in an uncertain landscape with tough choices on how to proceed. One issue that GAO and COFC disagree on is what steps must be taken by an offeror who learns that one of the proposed key personnel in its proposal has become unavailable to perform the contract after the proposal deadline has passed. GAO has long declared that this absence must be reported to the procuring agency, who is then free to proceed as it sees fit.[1] COFC followed along until early 2022, when an opinion cut in the opposite direction.[2] The Great Resignation has only exacerbated the impact of this disagreement on the procurement industry.[3] With so many employees resigning to search for better employment opportunities, more key personnel have become unavailable to perform a contract if their former employer wins the award.

1. Greenleaf Const. Co., Inc., B-293105.19 et al., 2006 CPD ¶ 19 (Comp. Gen. Jan. 17, 2006).
2. Golden IT, LLC v. United States, 157 Fed. Cl. 680 (2022).
3. Eric Chewning et al., *Debugging the Software Talent Gap in Aerospace and Defense*, McKinsey & Co. (July 18, 2022), https://www.mckinsey.com/industries/aerospace-and-defense/our-insights/debugging-the-software-talent-gap-in-aerospace-and-defense [https://perma.cc/W6KX-XRBS].

The GAO's rule can lead to harsh results for faultless contractors, but, ultimately, the duty to disclose a key personnel absence must be written into the Federal Acquisition Regulation (FAR). The new regulation should include procedural safeguards to alleviate the potential unfairness towards contractors while ensuring that the government can receive the best value from a procurement. Solicitations involving key personnel should also be revised to state the requirement as a performance specification, and departing employees should be permitted to sign letters of commitment to the contract if their former employer wins the award. This solution protects the interests of both contracting parties, and the new legal standard would eliminate the uncertainty that contractors and agency officials have faced when it comes to key personnel absences moving forward.

This Note will first examine the economic impact of the Great Resignation on private employees, the government, and specifically government contractors. Next, the precedents established by GAO and COFC will be analyzed, in addition to the interplay between the tribunals as forums for bid protest litigation. Finally, this Note proposes a solution to the ongoing circuit split that revises the FAR and enforces the GAO's duty to disclose key absences, but also creates new procedural safeguards; suggests that solicitations only seek individually named key personnel when that level of detail is essential to the government's needs; and permits departing key personnel to sign letters of commitment to perform the contract to completion for if their former employer wins the award.

II. THE BACKGROUND

President Joe Biden declared the end of the COVID-19 pandemic during an interview with *60 Minutes* that aired September 18, 2022.[4] Despite the President's statement, the national and public health emergency declarations remained in effect until May 11, 2023, and the impact of the pandemic lingers.[5] One economic impact is the Great Resignation, which has not only created new opportunities for workers but also new problems for businesses, including government contractors.

A. The Great Resignation

The COVID-19 pandemic has led to enormous changes across society.[6] One phenomenon to accompany the pandemic has been referred to as the "Great

4. Adam Cancryn & Krista Mahr, *Biden Declared the Pandemic 'Over.' His Covid Team Says It's More Complicated*, Politico (Sept. 19, 2022), https://www.politico.com/news/2022/09/19/biden-pandemic-over-covid-team-response-00057649 [https://perma.cc/N2MH-V2GN].

5. Cecelia Smith-Schoenwalder, *Biden Administration Announces Plan to End COVID-19 Emergency Declarations*, U.S. News & World Rep. (Jan. 30, 2023), https://www.usnews.com/news/national-news/articles/2023-01-30/biden-administration-announces-plan-to-end-covid-19-emergency-declarations [https://perma.cc/PW33-897Y].

6. *How the COVID-19 Pandemic Changed Society*, Univ. of Ala. at Birmingham News (Mar. 14, 2022), https://www.uab.edu/news/youcanuse/item/12697-how-the-covid-19-pandemic-changed

Resignation" by Professor Anthony Klotz of Texas A&M University's Mays Business School.[7] The Great Resignation has seen millions of employees resigning from their jobs to seek more favorable employment opportunities, including a peak of 4.5 million resignations over the course of March 2022.[8] According to Pew Research Center, the top reasons for these departures have been "low pay, a lack of opportunities for advancement and feeling disrespected at work."[9] Pew also found that those workers who resigned and found a new position were "more likely than not to say their current job has better pay, more opportunities for advancement and more work-life balance and flexibility."[10]

Although state and local governments have struggled with the effects of the Great Resignation, the federal government's workforce has largely remained immune to these changes.[11] The age group most likely to leave federal employment was individuals sixty years old and older, with 16.7% leaving federal employment in 2021, "indicating the totally normal phenomenon known as retirement."[12] For other age ranges, turnover rates were low, such as 4.4% for those between thirty to thirty-nine years old, 2.8% for those between forty to forty-nine years old, and 4.9% for those fifty to fifty-nine years old.[13] These statistics led columnist Tom Temin to conclude: "[P]eople aren't quitting the government in droves. They're not even departing at any rate as to cause concern about staffing levels."[14] This shows that the greatest turnover has been occurring naturally among federal employees, rather than in response to the Great Resignation.

Government contractors, on the other hand, have not been immune to these changes and have felt the impact of the Great Resignation like other private entities.[15] Aerospace and Defense (A&D) firms have seen especially harsh

-society#:~:text=COVID%2D19%20changed%20the%20way,to%20the%20COVID%2D19%20pandemic [https://perma.cc/QY6G-9XGQ].

7. Michelle Fox, *The Great Resignation Has Changed the Workplace for Good. 'We're Not Going Back,' Says the Expert Who Coined the Term*, CNBC (May 10, 2022), https://www.cnbc.com/2022/05/10/-the-great-resignation-has-changed-the-workplace-for-good-.html [https://perma.cc/XCK3-BXJU].

8. *Id.*

9. Kim Parker & Juliana Menasce Horowitz, *Majority of Workers Who Quit a Job in 2021 Cite Low Pay, No Opportunities for Advancement, Feeling Disrespected*, Pew Rsch. Ctr. (Mar. 9, 2022), https://www.pewresearch.org/fact-tank/2022/03/09/majority-of-workers-who-quit-a-job-in-2021-cite-low-pay-no-opportunities-for-advancement-feeling-disrespected [https://perma.cc/J7DX-SUB5].

10. *Id.*

11. Tom Temin, *Great Resignation? Nah, Federal Employees Generally Stick Around*, Fed. News Network (Oct. 20, 2022), https://federalnewsnetwork.com/tom-temin-commentary/2022/10/great-resignation-nah-federal-employees-generally-stick-around [https://perma.cc/J47Z-4N87].

12. *Id.*

13. *Id.*

14. *Id.*

15. Joe Gould & Stephen Losey, *Amid Hiring Boom, Defense Firms Say Labor Shortage Is Dragging Them Down*, Def. News (Aug. 5, 2022), https://www.defensenews.com/industry/2022/08/05/amid-hiring-boom-defense-firms-say-labor-shortage-is-dragging-them-down/ [https://perma.cc/GSD4-F4NQ].

effects, with the consulting firm McKinsey reporting that in 2021 forty-six percent of employees in the A&D industry "were at least somewhat likely to leave their jobs in the next three to six months."[16] McKinsey also noted that the turnover rate among these employees was likely to remain high because the A&D industry's drawback, its "organizational health ratings," were precisely what is causing resignations across the private sector, which means that unless A&D firms embrace change, their employment shortfalls will likely remain problematic.[17]

For example, in response to "labor shortages and COVID-19-related absenteeism," major government contractor Northrop Grumman has been forced to turn to "less skilled workers it has been training itself" to maintain production capabilities at one of its manufacturing plants in California that produces parts for the F-35 fighter jet.[18] Other major contractors such as Raytheon and Lockheed Martin also cite labor shortages in addition to supply chain disruptions as major challenges facing the A&D industry moving forward.[19]

The National Defense Industrial Association has been quick to point out that some of the workforce troubles across the A&D sector predate the COVID-19 pandemic and the Great Resignation, as skilled workers were in high demand and short supply before these events led to further issues.[20] Regardless of the source of these workforce shortages, the trend shows employees on the move and labor shortages across the industry. This is especially problematic with the demand for armaments sky high amid the ongoing war in Ukraine that shows no signs of slowing down.[21] Greg Hayes, Raytheon Chief Executive, commented that "[t]he only thing that's going to solve labor availability—I hate to say this—is a slowdown in the economy because right now there just simply aren't enough people in the workforce for all of our suppliers."[22]

Even before the Great Resignation, but especially in light of the changes stemming from it, government contractors faced challenges in successfully performing contracts.[23] The Great Resignation has exacerbated the staffing struggles of many contractors, meaning that they need to pay close attention to the current split between GAO and COFC when it comes to informing the government of departures of key personnel during the pre-award acquisition process.

16. Chewning et al., *supra* note 3.
17. *Id.*
18. Gould & Losey, *supra* note 15.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *See* Chewning et al., *supra* note 3.

III. GAO AND COFC AS BID PROTEST FORUMS (AMONG OTHERS)

Over the course of a competition for a contract, a range of alleged improprieties can cause an offeror to seek redress.[24] Before an award is made, the offeror can alert the Contracting Officer (CO) to the alleged issues so the CO can amend the solicitation or seek a formal bid protest to correct the error.[25] Through these actions, the offeror will seek to fix any errors that they have identified to "help ensure a fair, competitive process" that "can lead to [the] contractor winning the award."[26] After a contract award has been made, disappointed offerors must file a bid protest to address the issues they believe existed with the awarding of the contract.[27] These disappointed offerors may protest in a number of venues, including at GAO, at COFC, and at the agency who is responsible for the procurement.[28]

With a variety of potential protest venues, there arises the possibility that these tribunals will disagree with each other on how to resolve a legal issue. When federal courts of appeals disagree with one another on how to resolve certain issues, this disagreement is known as a "circuit split."[29] A similar dynamic exists when GAO and COFC arrive at conflicting resolutions of a legal issue. While the term "circuit split" refers specifically to the federal courts of appeals, this Note will refer to the disagreement between GAO and COFC as a "circuit split" to highlight how the relationship between GAO and COFC mirrors the relationship between federal courts of appeals. For example, neither tribunal is bound by the decisions of the other, much like how judges in the First Circuit are not bound by the precedent established by the

24. *See Bid Protest Primer*, Bid Protest Wkly. Dig., https://www.bidprotestweekly.com/bid-protestprimer/#:~:text=Some%20common%20reasons%20for%20filing%20such%20a%20protest%20include%20deviation,or%20organizational%20conflicts%20of%20interest [https://perma.cc/752A-4Q77] (last visited Apr. 8, 2023) ("Some common reasons for filing such a protest include deviation from stated evaluation criteria, relaxation of solicitation requirements, lack of meaningful discussions or unequal discussions, arbitrary technical/price/past performance evaluations, or organizational conflicts of interest.").

25. *See* FAR 33.103(b); Reggie Jones & David Timm, *Pre-Award Bid Protests: What You Need to Know*, Fox Rothschild LLP (May 20, 2021), https://www.foxrothschild.com/events/pre-award-bid-protests-what-you-need-to-know [https://perma.cc/SU8V-PVUE].

26. Jones & Timm, *supra* note 25.

27. Mary Pat Buckenmeyer, *Bid Protest—What Is a Post-Award Protest?*, Dunlap Bennet & Ludwig, https://www.dbllawyers.com/bid-protests-what-is-a-post-award-protest [https://perma.cc/V79R-JA63] (last visited Apr. 8, 2023) ("A post-award protest, in its simplest of terms, is a written objection to the award of a contract.").

28. *See generally* 31 U.S.C. § 3552; FAR 33.104; 28 U.S.C. § 1491(b); FAR 33.105; Exec. Order No. 12,979, Agency Procurement Protests, 60 Fed. Reg. 55171 (Oct. 25, 1995); FAR 33.103; *see also Bid Protest Primer*, *supra* note 24 ("There are three venues available for a bid protest: the deciding agency itself, the Government Accountability Office (GAO), and the U.S. Court of Federal Claims.").

29. *Circuit Split*, Cornell L. Sch.: Legal Info. Inst., https://www.law.cornell.edu/wex/circuit_split [https://perma.cc/YBT6-W27H] (last visited Aug. 27, 2023) ("Circuit split arises when two or more circuits in the U.S. Court of Appeals reach different decisions on the same legal issue. This disagreement means federal law is applied differently in different parts of the country, so that similarly situated litigants receive different treatment across jurisdictions.").

Second Circuit.[30] In fact, COFC judges are not even bound by the decisions of their fellow COFC judges.[31] They are bound by the precedent established by the Federal Circuit and Supreme Court of the United States and also "give careful consideration to prior COFC decisions."[32] But with fourteen judges and nine senior judges currently active at COFC, a broad spectrum of opinions are to be expected.[33] It is also important to note the relationship between GAO and the Federal Circuit. While COFC is bound by the Federal Circuit, GAO is not formally bound by the Federal Circuit, though it will generally follow Federal Circuit precedent.[34] This relationship makes venue selection an important aspect of certain bid protests where such circuit splits exist.

Currently, a circuit splits exits between GAO and COFC over the duty imposed on a contractor who has already submitted its proposal for the competition, but later learns that one of its key personnel will not be able to perform the contract. GAO precedent requires the contractor to report this absence to the procuring agency, even if the deadline for proposal submissions has passed, while a recent COFC opinion held the exact opposite, leading to the circuit split that this Note will describe. Based on this circuit split, this Note offers a solution to that reestablishes uniformity in procurement law and avoids the costly and unnecessary litigation that could result from the split.[35]

A. GAO's Rule: Contractors Owe a Duty to Disclose Key Personnel Absences to the Procuring Agency, Even After the Proposal Submission Deadline Has Passed

GAO's rule requires that a contractor inform the procuring agency when one of its key personnel becomes unavailable to perform the contract, even after the offeror has submitted its proposal and the proposal submission deadline has passed.[36] Many commentators believe that the GAO approach should be abandoned, with some referring to the rule as "strange, ill-considered, and

30. DNC Parks & Resorts at Yosemite, Inc., B-410998, 2015 CPD ¶ 127, at 7 (Comp. Gen. Apr. 14, 2015) ("[O]ur Office is not bound by decisions of the Court of Federal Claims."); Kingdomware Techs.—Recon., B-407232.2, 2012 CPD ¶ 351, at 3 (Comp. Gen. Dec. 13, 2012); *see also* Frank S. Murray Jr. & David T. Ralston Jr., *Government Contracts: COFC Bid Protests*, Prac. L. Com. Transactions, https://1.next.westlaw.com/1-583-9427?__lrTS=20230408211205969&transitionType=Default&contextData=%28sc.Default%29 [https://perma.cc/67X9-TWFH] (last visited Apr. 8, 2023) ("The COFC is also not bound by GAO decisions that may have considered an issue directly on point or even a GAO protest decision involving the same procurement before the COFC.").

31. Buser v. United States, 85 Fed. Cl. 248, 259 n.12 (2009) ("The court is not bound by other decisions in the Court of Federal Claims.").

32. Murray & Ralston, *supra* note 30.

33. *Judges—Biographies*, U.S. Ct. of Fed. Claims, https://www.uscfc.uscourts.gov/judicial-officers [https://perma.cc/7R5Y-H3DE] (last visited Apr. 8, 2023).

34. Michael J. Schaengold et al., *Choice of Forum for Federal Government Contract Bid Protests*, 18 Fed. Cir. Bar J. 243, 253 (2009) ("While the GAO is not bound by the decisions of the COFC or the Federal Circuit, the GAO typically will adjust its precedent to follow decisions of the Federal Circuit and will sometimes follow persuasive decisions of the COFC. Absent unusual circumstances, the GAO will typically follow its own precedent.").

35. Golden IT, LLC v. United States, 157 Fed. Cl. 680 (2022); Greenleaf Const. Co., Inc., B-293105.19 et al., 2006 CPD ¶ 19 (Comp. Gen. Jan. 17, 2006).

36. *See* Greenleaf Const. Co., Inc., 2006 CPD ¶ 19, at 9.

unfair," or even "arbitrary, unduly burdensome to contractors and based on shaky precedent."[37] In forming this rule, GAO relied upon two of its existing doctrines, one that rejected bait and switch tactics, which occur when a contractor "proposes to perform a contract with particular personnel or resources that it intends to substitute after award."[38] The other doctrine states that "offerors have an obligation to notify agencies of impending corporate transactions that will affect proposed performance—and that upon receiving such notification, agencies must consider it."[39] In *Greenleaf Construction Co., Inc.* (*Greenleaf*), the two precedents were merged and the duty to disclose key personnel absence rule was formally established.[40]

Greenleaf's sustained bid protest involved the award of an Indefinite Delivery Indefinite Quantity (IDIQ) contract to Chapman Law Firm Company (CLF) by the Department of Housing and Urban Development (HUD) for single-family home management and marketing (M&M) services.[41] Greenleaf sought to overturn the award because "CLF's proposal misrepresented the resources and staff CLF intended to use to perform the contract."[42] In response to HUD concerns, during discussions over CLF's staffing and lack of M&M experience, CLF submitted two key personnel, Mr. and Ms. A, in its new proposal.[43] HUD's Technical Evaluation Panel thought highly of these two individuals, evaluating their addition as a "strength" that made CLF's staffing plan superior to Greenleaf's, "because, unlike for Greenleaf, all key CLF personnel were clearly qualified for their positions."[44] Despite CLF' staffing plan, Greenleaf's overall technical approach was still rated "marginally superior" to CLF's.[45] Thereafter, Mr. and Ms. A fell out with Mr. Chapman, the owner of CLF, and informed him they would not perform if CLF was awarded the contract.[46] CLF had already submitted its proposal, but a decision would not be made by HUD on the contract's award for another two months.[47] Over those two months CLF never informed HUD of the absence of Mr. and Ms. A.[48]

GAO found that the absence of Mr. and Ms. A "was a material change in the awardee's proposed staffing."[49] This material change occurred after the

37. Vernon J. Edwards, *Key Personnel Substitutions After Proposal Submission: An Unfair Rule*, 31 Nash & Cibinic Rep. 59, Nov. 2017, at 2; Greg Petkoff et al., *Disclosure Dilemma for Government Contractors Learning Before Contract Award That Proposed Key Personnel Are Not Available to Perform the Contract*, 60 Gov't Contractor ¶ 228, Aug. 1, 2018, at 5.

38. Rob Sneckenberg et al., *COFC Rejects GAO's Key Personnel Notification Rule*, 64 Gov't Contractor ¶ 49, Feb. 23, 2022, at 1.

39. *Id.*

40. *Greenleaf Const. Co., Inc.*, 2006 CPD ¶ 19, at 9; Sneckenberg et al., *supra* note 38, at 2.

41. *Greenleaf Const. Co., Inc.*, 2006 CPD ¶ 19, at 1–3.

42. *Id.* at 4.

43. *Id.*

44. *Id.* at 5

45. *Id.*

46. *Id.* at 6–8.

47. *Id.* at 8.

48. *Id.*

49. *Id.* at 10

deadline for proposal submissions and two months before the contract was ultimately awarded.[50] GAO held that "[u]nder these circumstances, CLF was required to advise the agency of the material change."[51] In sustaining this protest ground, GAO focused on the fact that, due to the key personnel absences of Mr. and Ms. A, the agency was unable to reasonably select CLF for the contract award because the agency would not be accurately evaluating the offeror's ability to perform the contract.[52] Moreover, CLF was "required" to tell the agency of these changes and its failure to do so threatened the integrity of the procurement.[53]

B. COFC's Rule: Contractors Owe Agency No Duty to Disclose Key Personnel Absences

GAO has consistently applied the same precedent, and the next section of this Note will discuss how it has doubled down and possibly even expanded the disclosure rule, rejecting the approach of Judge Solomson in *Golden IT, LLC v. United States* (*Golden IT*). In *Golden IT*, the Geography Division of the United States Census Bureau (Census) sought a contractor to provide IT support for the vast amounts of data collected to compile the census through a Blanket Purchasing Agreement (BPA).[54] Census posted its RFQ that required that

> quotes include two parts, which were to be submitted simultaneously: "Technical" (referred to as either "Part 1" or "Volume 1") and "Price" (referred to as either "Part 2" or "Volume 2"). AR 1311. 7 The Technical Part was comprised of three evaluation factors: "Management Approach for Master BPA" ("Factor 1"); "Similar Experience and Past Performance" ("Factor 2"); and "Call Order 0001 — Technical" ("Factor 3"). AR 1311. Factor 2, in turn, had two subfactors: "Similar Experience" ("Subfactor 2A") and "Past Performance" ("Subfactor 2B"). Id. Factor 3 also had two subfactors: "Technical Approach for Call Order 0001" ("Subfactor 3A") and "Call Order 0001 Key Personnel" ("Subfactor 3B"). Id. Following a series of RFQ amendments, Census issued a revised, conformed Solicitation on May 14, 2021. AR 2858–59. Quotes were due on May 20, 2021. AR 2757–58.[55]

The BPA was awarded to Spatial Front, Inc. (SFI), leading Golden IT, LLC (Golden), who was one of the four finalists competing for the BPA, to file its protest at COFC.[56] Golden made several arguments, most importantly that Census's evaluation of Factor 3 was "'unreasonable, arbitrary, capricious, and otherwise contrary to law'" because one of SFI's key personnel, Mr. JH, had "'taken a position with [another company] before Spatial Front submitted its quote and four months before Spatial Front received an award.'"[57] Golden knew Mr. JH had left SFI to take a position with a new company based on

50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* ("To allow such an award to stand would call into question the integrity of the competition.").
54. Golden IT, LLC v. United States, 157 Fed. Cl. 680, 684–85 (2022).
55. *Id.* at 685.
56. *Id.*
57. *Id.* at 686.

viewing his LinkedIn account, and Judge Solomson granted Golden's motion to supplement the administrative record with the relevant LinkedIn information.[58] Mr. JH was still working at SFI on May 20, 2021, when SFI submitted its quote, but left SFI and began working elsewhere "by May 31, 2021, at the latest."[59]

Judge Solomson also found that, although the record showed that the solicitation stated that the "'availability and commitment of Key Personnel is important to the Government,'" the solicitation did not require "any documentation, such as letters of commitment, assuring the continued availability of key personnel."[60] The CO determined that Mr. JH represented a significant strength as the Information Specialist/Knowledge Engineer in SFI's quote.[61] In awarding the BPA to SFI, the CO found SFI's superior technical approach, which included its significant strength for key personnel, justified awarding to SFI, even though their approach cost $1,299,705.60 more than Golden's.[62]

Ultimately, Judge Solomson found that Golden was not entitled to relief and that Census had acted appropriately in selecting SFI for the award of the BPA.[63] Judge Solomson determined that, if SFI had known Mr. JH would leave the company at the time they submitted their quote, then they would have submitted a quote containing a material misrepresentation, but that the record lacked any indication that SFI knew of Mr. JH's impending departure.[64]

Most importantly, Judge Solomson directly engaged with and rejected GAO's disclosure rule. He stated that "the Court is unable to locate the basis for the GAO's rule" and that the rule "strikes the Court, candidly, as without legal basis and 'unfair.'"[65] He continued, noting that "the Court will not conjure up a rule" that was "untethered from a statute, regulation, or Federal Circuit decision."[66]

C. GAO Doubled Down, and Possibly Expanded, Its Own Disclosure Duty Precedent

Following COFC's ruling in *Golden IT*, GAO had an opportunity to revisit its key personnel absences precedent in *Sehlke Consulting, LLC* (*Sehlke*).[67] In the sustained protest, Sehlke argued that the awardee's proposal was technically unacceptable "because one of its proposed key personnel became unavailable to perform on the resulting contract prior to the agency completing its evaluation and award decision."[68] The solicitation stated that the

58. *Id.* at 686, 688.
59. *Id.* at 692.
60. *Id.* at 690.
61. *Id.* at 692.
62. *Id.*
63. *Id.* at 699.
64. *Id.* at 700–03.
65. *Id.* at 703 (quoting Edwards, *supra* note 37, at 2).
66. *Id.* at 704.
67. Sehlke Consulting, LLC, B-420538, 2022 CPD ¶ 119 (Comp. Gen. May 18, 2022).
68. *Id.* at 1.

> award was to be made on a best-value tradeoff basis with non-cost and cost factors to be given equal weight. The non-cost factor included five constituent "items," which are listed in descending order of importance: (1) management; (2) past performance; (3) organizational conflict of interest; (4) intellectual property; and (5) security . . . . The management item was further divided into four factors: (a) key personnel; (b) staffing; (c) management approach; and (d) transition approach. The key personnel factor was slightly more important than the staffing and management approaches factors, which in turn were slightly more important than the transition approach factor.[69]

These evaluation factors highlight the great emphasis placed on the key personnel that each offeror put forward in their proposals. After proposals were submitted, but before a source selection decision was made, the eventual awardee, KPMG, notified the Department of Defense's National Reconnaissance Office (NRO) that one of its key personnel was retiring.[70] NRO still awarded the contract to KPMG, despite knowing that a key employee would not be present to perform the contract, citing the fact that at the time of the source selection decision, the employee was still with the company.[71]

Instead of following COFC's new direction, GAO directly dismissed *Golden IT* and reiterated its rules requiring disclosure and appropriate agency action in response to the disclosure of the absence of key personnel.[72] In a footnote, GAO stated that, "as an initial matter, our Office is not bound by decisions of the Court of Federal Claims" and that, "in any event, the facts of that case are materially distinguishable from the facts at issue here."[73] The facts are distinguishable between *Sehlke* and *Golden IT*, as the agency in *Sehlke* knew that the key personnel would be unavailable to perform, whereas in *Golden IT*, it was not proven that the parties knew that the key employee would soon depart. Regardless, GAO was asked by the agency and the intervenor to rely upon the legal conclusion from *Golden IT* and instead rejected Judge Solomson's conclusion that there was no duty to disclose.[74] Attorneys from Crowell & Moring LLP commented on the new ruling in a blog post. They noted that *Sehlke* . . . "signals GAO's continued willingness to sustain bid protests when key personnel become unavailable after proposal submission. In fact, it arguably extends the doctrine, as even prospective unavailability can now be problematic."[75]

69. *Id.* at 2.
70. *Id.* at 1.
71. *Id.* at 3–4.
72. *Id.*
73. *Id.* at 9–10 n.8.
74. *Id.*
75. Amy Laderberg O'Sullivan et al., *GAO Finds Key Person 'Unavailable' Despite Still Being Employed on Date of Award*, Gov't Contracts Legal F. (June 17, 2022), https://www.governmentcontractslegalforum.com/2022/06/articles/bid-protest/gao-finds-key-person-unavailable-despite-still-being-employed-on-date-of-award [https://perma.cc/FS2T-LMCQ].

IV. THE PROBLEMS RAISED BY THE LINGERING CIRCUIT SPLIT

This circuit split creates the prospect of a reverse protest.[76] During a reverse protest, a protester that first filed their protest at either GAO or the procuring agency can likely proceed to file a protest at COFC if GAO or the procuring agency does not rule in their favor or offer the requested relief.[77] For example, in the following scenario (Scenario One), assume a competition is down to two competitors, A and B, and A is awarded the contract, but later learns that a member of the key personnel it submitted is leaving to join another company. Under GAO precedent, A has an affirmative duty to inform the procuring agency of the absence. This means that if B learns of the unavailability of A's key personnel, B could successfully bring its bid protest at the GAO. If GAO sustains the protest and the procuring agency follows the GAO recommendation, A may then file a bid protest at COFC alleging that, by following the GAO recommendation, the procuring agency acted unreasonably, with COFC reviewing the case. As the twenty-four active COFC judges are not required to follow Judge Solomson's ruling in *Golden IT*, the resolution of the case may be decided merely by the judge it is assigned to, rather than by a coherent body of law.[78] If that judge follows Judge Solomson's decision in *Golden IT*, A will be able to keep its contract award. If the judge declines to follow Judge Solomson, however, the award will likely be set aside. In either instance, the ultimate ruling will be issued after extensive litigation across two tribunals. This process will be costly to both the contractors seeking relief and require government resources to defend the agency's actions. This result wastes time, in addition to private and public money that would be better spent elsewhere.

Another scenario (Scenario Two) could involve B, from above, first filing its protest at COFC, with a ruling in favor of A because COFC elected to follow Judge Solomson's approach. Although COFC does expedite bid protest cases, the case is unlikely to be resolved within the ten days necessary to be timely at GAO. At that point, it is likely too late for the protester to file a protest at GAO or the procuring agency where more favorable precedent should govern the protest. While this problem seems less likely to occur, and could be an error made by the protester in choosing its forum, the fact that B may have won at COFC on these protest grounds highlights the uncertainty surrounding this issue and the importance of quickly identifying a workable solution.

Scenario Two also raises the controversial issue of forum shopping.[79] Forum shopping is when "'the parties attempting to bring the case in a forum that will be advantageous to them' or 'the act of seeking the most advantageous

76. Sneckenberg et al., *supra* note 38, at 4.

77. David H. Carpenter, Cong. Research Serv., R45080, Government Contract Bid Protests: Analysis of Legal Processes and Recent Developments (Nov. 28, 2018).

78. *Judges—Biographies*, *supra* note 33.

79. Markus Petsche, *What's Wrong with Forum Shopping—An Attempt to Identify and Assess the Real Issues of a Controversial Practice*, 45 Int'l L. 1005, 1006 (2011).

venue in which to try a case.'"[80] Outside of the government contracts context, there are diverse opinions about the role of forum shopping in shaping the legal system with three primary groups of thought.[81] The dominant point of view is that forum shopping is something to be avoided in favor of uniformity and should be eliminated from practice whenever possible.[82] However, others disagree and instead favor forum shopping as a useful tool for strategic attorneys to help their clients.[83] The third and final group passes judgment on the doctrine on a case-by-case basis, labeling the specific instance of forum shopping as a positive or negative depending on the specific facts of the case, rather than on a *per se* basis.[84]

Here, the chief problem with forum shopping is that the state of the law leaves outcomes uncertain. When no coherent body of the law provides clarity for the parties, the exact obligations of the contractor will lead to disputes. Stephen Bacon, a government contracts attorney at Rogers Joseph O'Donnell, recognizes the hardships created by the uncertainty. He recommends that contractors implement incentives into the contracts of their key personnel that would entice them to remain employed with the company while the procuring agency reviews proposals and selects the winning contractor.[85] This is practical advice to avoid the problem, but, if a key employee decides to leave the company, or even just retires or falls ill, the problem remains, what should the contractor do? They could inform the agency and potentially lose out on the opportunity to compete for the contract award, or they could rely on *Golden IT* before COFC to claim they owe no affirmative duty to inform the agency of the absence.[86] Bacon describes this dilemma as "a difficult choice with no clear legal answer."[87]

In the context of the Great Resignation, this dilemma is unlikely to be resolved with time, and instead may become more acute for contractors and agency personnel.[88] In addition, contractors have increasing access to information regarding their competitor's employees via LinkedIn, giving B in the above hypothetical scenarios a greater possibility of finding out about the unavailability of A's key personnel and initiating a bid protest to correct the defect. This possibility would mean an uptick litigation that slows down procurements, without cutting into the problem underlying the protest ground. Government personnel working for the procuring agencies will also have access to this publicly available information, which means that A is less likely to avoid the

80. *Id.* at 1007–08.
81. *Id.* 1006–07.
82. *Id.*
83. *Id.* at 1007.
84. *Id.*
85. Stephen Bacon, *The Key Personnel Conundrum: Bid Protest Risk and Uncertainty over Key Personnel Are Rising Just as the Great Resignation Hits*, Cont. Mgmt. Mag., Sept. 2022, at 54, 57.
86. *Id.* at 56.
87. *Id.*
88. *Id.* ("In recent years, a historic number of employees have resigned from their jobs in a phenomenon known as the Great Resignation. This broader economic trend makes it more likely that pending proposals will be impacted by ill-timed key personnel resignations.").

detection of its key personnel absence, either by the procuring agency or its watchful competitors. Regardless, A lacks clear guidance as to whether its failure to disclose the absence is material, since COFC may hold they did not have a duty to disclose at all. Both the agency and A's competitors' access to often public employment information emphasize the need to resolve the circuit split between GAO and COFC quickly, rather than allowing the problem to linger and constrain the procurement system.

Ultimately, the circuit split harms both the procuring agency and offerors competing for government contract awards. Both parties must remain diligent about the issue of key personnel becoming unavailable to perform the contract after proposals have been submitted. This diligence will be rewarded at GAO if an awardee's competition discovers a key employee has become unavailable. But the awardee may prevail in the end and keep their award after COFC's review of the procurement, as occurred in the reverse protest from hypothetical Scenario One. In the end, both sides will be forced to spend money to litigate this unsettled area of government contracts law, leading to delays in the procurement process that defeat the purpose of a procurement system—ensuring the government receives what it set out to buy in the first place.[89]

V. RESOLVING THE CIRCUIT SPLIT

This section will discuss three solutions to the issues caused by key personnel absences. The first solution is to revise the FAR, establishing a regulatory framework for GAO's disclosure duty with additional measures to protect government contractors when one of their key employees inevitably departs. The second solution is to reimagine how agencies use their solicitations. The solicitation must still convey the requirements the government seeks, but without unnecessarily burdening potential offerors and the awardee whenever possible. Finally, the issue can be avoided all together if the departing employee is willing to perform the contract if their former employer is awarded it.

A. Revise the FAR to Include GAO's Disclosure Duty in the Federal Procurement Regulatory Scheme and Add Procedural Safeguards That Protect Complying Government Contractors

When federal courts of appeals face a circuit split, the issue will linger until the Supreme Court grants certiorari to definitively rule on the issue, settling the dispute.[90] While this solution could play out in the government contracts

89. *See* Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law*, 11 Pub. Procurement L. Rev. 103 (Nov. 13, 2012).

90. *See*, *e.g.*, Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund, 575 U.S. 175 (2015) (resolving a circuit split between the Sixth Circuit's interpretation of the Securities Act of 1933 and the interpretation by the Second, Third, and Ninth Circuits in favor of the Second, Third, and Ninth Circuit's interpretation); *Resolving Circuit Splits*, Cornell L. Sch.: Legal Info. Inst., https://www.law.cornell.edu/supct/cert/supreme_court_2014-2015_term_highlights/part_one/resolving_circuit_splits [https://perma.cc/5XET-SJEP] (last visited Apr. 8, 2023).

context, too, with either the Federal Circuit or even the Supreme Court ruling on the issue of what a contractor must do when their key personnel become unavailable, GAO would not be formally bound by that ruling, and the split may linger.[91] While it is unlikely that GAO would reject the Federal Circuit or Supreme Court's ruling, waiting for the right case to land on these appellate courts' dockets may take years while the issue continues to plague federal procurement.[92] In theory, GAO could also alter its own approach and ignore its duty to disclose precedents, or Judge Solomson and COFC could return to follow GAO's lead instead of creating their own rule, but these are both also unlikely to occur and would likely take considerable time, all the while leaving the state of procurement law unsettled.[93]

Instead of waiting for a higher court to intervene, or one of the two tribunals to reverse itself in favor of the other's solution, the best resolution of this issue is for the Federal Acquisition Regulatory Council (FAR Council) to revise the FAR to solve the circuit split. The multi-pronged solution this Note proposes favors the GAO's duty to disclose the absence of key personnel, but with important alterations to alleviate the hardships facing a contractor who has lost its key employee after the deadline for submitting proposals has expired. The GAO rule, though seemingly harsh, accomplishes one of the important goals of a procurement system—"customer satisfaction."[94] If the procurement ends before the procuring agency can obtain the products or services that it set out to obtain, then the procurement has failed. It may be unreasonable to permit an offeror to maintain its contract award, despite the departure of the key personnel that the agency evaluated in the proposal and relied upon to perform the contract, even if it is not the contractor's fault that they lack the appropriate staff. This result also undermines the procurement and leaves the government without the products or services it specifically bargained for.

While it is crucial that the government receive value in exchange for the public funds that it spends on procurements, it is also important to cultivate competition as part of a healthy procurement system.[95] This Note's solution seeks to ensure that the procuring agency receives the value it sets out to acquire without placing undue burdens on the offerors competing for the award. While procurement goals in general often contradict each other, by proposing a solution that allows the government to receive the highest quality

91. Schaengold et al., *supra* note 34, at 253.

92. *Id.*

93. *See* Sehlke Consulting, LLC, B-420538, 2022 CPD ¶ 119, at 9–10 n.8 (Comp. Gen. May 18, 2022) (rejecting Judge Solomson's ruling in *Golden IT* in favor of GAO's precedent).

94. Schooner, *supra* note 89, at 106 (listing objectives of a procurement system as "(1) competition; (2) integrity; (3) transparency; (4) efficiency; (5) customer satisfaction; (6) best value; (7) wealth distribution; (8) risk avoidance; and (9) uniformity.").

95. *Id.* at 105.

services and products without eliminating offerors from competition for key personnel departures, these two goals can be balanced.[96]

The FAR should be revised to explicitly require that offerors alert the procuring agency when their proposed key personnel become unavailable to perform the contract. If the proposal deadline has not yet passed, the offeror can simply revise and resubmit its proposal. When the proposal submission deadline has passed, the FAR should mandate that the CO allow the offeror affected to correct its proposal, if the offeror is able to, by replacing its departing key personnel with a new qualified individual who will be able to perform the contract.

One potential mechanism for this correction is through a substitution procedure as envisioned by Vernon J. Edwards, researcher, writer, and lecturer in federal contracting.[97] This substitution provision would read:

> SUBSTITUTION OF PROPOSED KEY PERSONNEL
>
> (a) If, after submission of proposals, but before contract award, an offeror learns that any of its proposed key personnel are no longer available for contract performance, the contracting officer will permit the offeror to substitute another person, provided that the government finds that the person previously proposed would have been acceptable in accordance with the evaluation factors.
>
> (b) An offeror will not be permitted to improve the evaluation of its proposal through substitution of proposed key personnel. Depending on the substitute's résumé, he or she will receive either the same evaluation as the person previously proposed or a lower evaluation, as appropriate in accordance with the evaluation factors for award. Under no circumstances will the substitute receive a better evaluation than the person previously proposed, regardless of the content of his or her résumé.
>
> (c) An offeror seeking to make such a substitution before award must notify the Contracting Officer in writing by submitting a brief explanation, accompanied by the substitute's résumé prepared in accordance with Section L of this solicitation.
>
> (d) Substitutions made before contract award in accordance with this procedure shall not be considered proposal revisions. Acceptance of any such substitution by the Government shall not constitute discussions as described in FAR 15.306 and FAR 52.215-1 and shall not require the Contracting Officer to make a competitive range determination. Such substitutions shall not be considered late proposal submissions as described in FAR 52.215-1. After contract award, key personnel substitutions shall be processed in accordance with the contract Key Personnel clause.[98]

While this substitution scheme offers a step in the right direction, its drawbacks prevent it from becoming implementable. One issue is that the agency would first need to evaluate the initially proposed employee. This step takes time that would be best spent evaluating the replacement employee. The

96. *Id.* at 103 ("Unfortunately, it is difficult to articulate objectives for a procurement system. There are many options, and most are contradictory.").

97. Edwards, *supra* note 37, at 2–4.

98. *Id.* at 2–3.

ability of the original employee no longer has any impact on the procurement since the original employee will not be involved in its performance even if the company is awarded the contract. In addition, the scheme does not allow the procuring agency to receive the best possible value, because "under no circumstance" will the new employee receive a higher evaluation than the original.[99] Cumulatively, these defects waste time and harm the government's ability to procure the quality that it seeks, making the proposed solution unworkable.

Instead, this Note proposes that when identified key personnel become unavailable after the deadline for proposal submissions, the offeror must first alert the CO in writing of the absence. Maintaining this affirmative duty is important because it will allow the CO to intervene, and because it provides the government with important information that will allow the procuring agency to make an informed source selection. Next, the CO would be required to open, or re-open, discussions depending on the earlier stages of the procurement. By turning to discussions, the offeror can correct its defective or non-responsive proposal by replacing its departing employee with a new one if it is able to. This replacement employee will be scored as they are, uncapped by the performance value of the original employee submitted with the proposal, unlike in Vernon J. Edward's proposed solution.[100]

The new language in the solicitation would read:

> Unavailability of Key Personnel Prior to Contract Award, but After the Submission Deadline Has Expired
>
> a) If an Offeror knows or should have known that one or more of its proposed key personnel will not be available to perform the contract during the period between the proposal submissions deadline and the awarding of the contract, the Offeror shall notify the Contracting Officer in writing of the unavailability of its previously proposed key personnel and explain the circumstances of the employee's departure.
>
> b) The Contracting Officer will then determine if the absence is justified and submit a written determination to the Offeror. An absence will be presumed to be justified; however, circumstances that would defeat this presumption include: a Contracting Officer's determination that the original employee never intended to perform the contract, bad faith acts of an Offeror, or any other circumstances the Contracting Officer deems unreasonable.
>
> c) If the Contracting Officer determines that the absence is justified, the Contracting Officer shall next establish a competitive range and open discussions with all qualifying offerors. The scope of the discussions shall be limited to the issue of Key Personnel, and no other revisions will be accepted by the Agency. Discussions shall be held on an accelerated basis to avoid undue delay to the procurement.
>
> d) If a key personnel absence occurs after contract award, the Contracting Officer and Contractor shall follow the procedures in Section H of the Contract, Substitution of Key Personnel.

99. Edwards, *supra* note 37, at 3.
100. *Id.* at 2.

This format will optimize customer satisfaction and maintain higher levels of competition. The end user will be happier with their selection because the best offer can be selected, instead of limiting the scoring of the key personnel to the value of the departing individual. Competition is also improved because the offeror facing the staffing problem will be allowed to reenter the competition and replace its key personnel with another qualified individual, as opposed to the current GAO rule that provides the CO with the requisite discretion to dismiss that offeror without the opportunity to fix their non-responsive proposal.[101]

Competition will also be fair and equal because this exchange has been made through the normal discussions process of a negotiated procurement.[102] The use of discussions means that all offerors will be given the opportunity to revise their proposals if they so choose.[103] It is important to recognize that extending discussions may add time to the procurement process, but the CO will maintain their discretion to narrow the competitive range as they see fit,[104] and the scope of the discussions will be limited to key personnel. Ultimately, the time used by the discussions process is not nearly as wasteful or long-lasting as the time taken up by a reverse protest laid out in scenario one above.

One advantage of this regulatory approach is that it undermines a valid critique of the GAO rule—that it is judicially created as opposed to an application of existing procurement statutes and regulations.[105] Judge Solomson wrote in *Golden IT* that the GAO rule struck "the Court, candidly, as without legal basis."[106] Vernon Edwards in his article critiquing the GAO rule, referred to the rule as "GAO *diktat*" and was critical of its existence "without publication in the Federal Register and an opportunity for public comment."[107] With this FAR revision, the new rule would become part of the controlling regulations and would ease the concerns of those who saw no basis for the GAO rule in the existing statutory or regulatory scheme.

B. Creating Further Clarity Through the Solicitation

While this Note's primary recommendation is to amend the FAR to root the GAO's duty in the controlling regulations, the solicitation is also key to resolving the issue by letting offerors know what rules apply to the specific procurement. As a broad policy change, procuring agencies should phrase key personnel requirements in the solicitation to favor stated experience criteria as opposed to individually named employees. For example, instead of

101. Greenleaf Const. Co., Inc., B-293105.19 et al., 2006 CPD ¶ 19 (Comp. Gen. Jan. 17, 2006).
102. *See* FAR 15.306(e).
103. Edwards, *supra* note 37, at 2.
104. FAR 52.215 (f)(4).
105. *See* Golden IT, LLC v. United States, 157 Fed. Cl. 680, 704 (2022); Edwards, *supra* note 37.
106. *Golden IT, LLC*, 157 Fed. Cl. at 704.
107. Edwards, *supra* note 37, at 2.

requiring an employee's name and resume to be submitted with the proposal, the contractor would certify that they have someone who meets the stated requirements. This change would allow the winning contractor more latitude to insert the key employee who will perform the contract.

This switch would mirror the distinction between a Statement of Work (SOW), also called a design specification, and a Performance Work Statement (PWS), also called a performance specification. The FAR does not define a SOW, but it is understood as when the procuring agency specifies step-by-step instructions for how a contractor is supposed to perform the work required by the contract.[108] In comparison, a PWS is defined in the FAR as "a statement of work for performance-based acquisitions that describes the required results in clear, specific and objective terms with measurable outcomes."[109] Instead of specifying the work process, the PWS describes the end result that the agency seeks. The FAR also shows a preference for the PWS as shown by FAR 37.602, which specifies that COs should use a PWS to the "maximum extent practicable."[110] The change that this Note proposes mirrors this preference. Instead of requiring resumes and names of key personnel, to the maximum extent practicable, the requirement should be stated in broad terms that show the end result that the agency is seeking. Examples would include five-plus years of management experience or an advanced degree in engineering, as opposed to requiring a named individual and their resume.

C. Commitment Contracts Signed by the Departing Employee

Another option that would ease the burden on offerors is to allow a departing employee to sign a contract that commits them to perform the government contract being competed for if the company they are leaving is selected for the contract award. Not all departing employees will be willing to commit to a project with their former employer, but some might, depending on their individual circumstances and obligations to new employers. These commitment letters would bind the employee to the contract to ensure their performance and effectively negate the issue caused by their departure.

VI. CONCLUSION

The COVID-19 pandemic disrupted every aspect of society and continues to impact the daily lives of many people around the globe, including in the United States.[111] The pandemic also brought about sweeping economic changes like the Great Resignation, as employees across sectors sought better employment

108. *Design Versus Performance Specifications*, Cohen Seglias Pallas Greenhall & Furman PC (June 21, 2018), https://www.cohenseglias.com/contracting-database/design-versus-performance-specifications [https://perma.cc/PS2N-278X] ("Design specifications state explicitly how a contract is to be performed and permit no deviation.").

109. FAR 2.101.

110. FAR 37.602.

111. *How the COVID-19 Pandemic Changed Society*, *supra* note 6.

opportunities. Amid this shift of personnel, COFC released an opinion clashing with a long-standing and much maligned GAO precedent that required offerors to disclose key personnel absences to the procuring agency even after the proposal submission deadline had expired.[112] The resulting circuit split must be addressed, and quickly, to avoid costly litigation and confusion.

This Note has proposed three solutions that would eliminate the circuit split. First, and most importantly, the FAR must be amended to include the GAO's rule but with additional procedural safeguards that protect a contractor from being removed from the competition solely because of a key personnel absence. Second, agency solicitations should be written with a strong preference for performance solicitations. Finally, departing key personnel should be permitted, though not required, to sign letters of commitment that bind them to the contract if their former employer wins the award. These solutions fairly and efficiently return government procurement law to a level ground and helps avoid costly and time-consuming litigation that will only worsen as government contractors continue to feel the impact of the Great Resignation.

112. Golden IT, LLC v. United States, 157 Fed. Cl. 680 (2022).

PRIORITIZING THE PEOPLE IN THE PROCUREMENT OF ELECTION INFRASTRUCTURE

*Dennis Mema**

ABSTRACT

The continuous and successful holding of elections stands as one of the foundational pillars of American democracy. In the two decades since the passage of the Help America Vote Act (HAVA), federal, state, and local actors have worked in tandem to improve election administration, and, through funding provided by Congress to the U.S. Election Assistance Commission (EAC), states have been given the means to implement federal best practices. However, there exists a glaring gap wherein many states have diverged from both federal best practices and the behavior of other states—the procurement of election infrastructure such as ballots, voting machines, and tabulators. The procurement processes of some states impose inefficiencies or otherwise negatively impact the administration of elections, while the processes present in others can much more effectively facilitate the resolution of these issues. These processes can have a direct impact on voting rights and the security of election administration. Congress should create a federally implemented procurement standard within HAVA that states must meet in order to receive additional EAC funding; by doing so, the interests of all American voters may be protected at the highest level.

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I. INTRODUCTION

We are at a time of unprecedented public doubt in the administration and security of our democracy. A 2022 study found that over sixty percent of Americans "believe[] that U.S. democracy is in crisis and at risk of falling."[1] Despite continued efforts of election officials across the country to improve the administration of elections, there must be reforms at every level of the process to bolster both the perceived strength of our electoral system and its actual robustness in the face of mounting threats from domestic and foreign actors looking to sow discord.[2]

To this end, a realignment of the procurement processes to secure voting equipment, ballots, and other aspects of election infrastructure can serve as the foundation needed for running elections securely and efficiently in the modern era.[3] As they stand, procurements for election-related goods and services are conducted at the state and local levels, with some recommendations and assistance from the U.S. Election Assistance Commission (EAC).[4] However, the systems currently in place do not reflect the ever-changing landscape

1. Gabriel Sanchez & Keesha Middlemass, *Misinformation Is Eroding the Public's Confidence in Democracy*, Brookings Inst. (July 26, 2022), https://www.brookings.edu/blog/fixgov/2022/07/26/misinformation-is-eroding-the-publics-confidence-in-democracy [https://perma.cc/QE39-JLV4]; Nat'l Counterintel. & Sec. Ctr., Foreign Threats to U.S. Elections, https://www.dni.gov/files/ODNI/documents/DNI_NCSC_Elections_Brochure_Final.pdf [https://perma.cc/B5BL-PFVH] (last visited July 3, 2023).

2. Claire DeSol, *2020 Was a Banner Year for U.S. Election Administration*, MIT Elections Performance Index (Mar. 10, 2022), https://elections-blog.mit.edu/articles/2020-was-banner-year-us-election-administration [https://perma.cc/9ERF-F32G].

3. Before the logistical planning for an election can begin, voting machines must be purchased and certified. *See* U.S. Election Assistance Comm'n, Election Management Guidelines, https://www.eac.gov/sites/default/files/electionofficials/EMG/EAC_Election_Management_Guidelines_508.pdf [https://perma.cc/T34H-SAAQ] (last visited July 3, 2023).

4. U.S. Election Assistance Comm'n, Clearinghouse Resources for Election Officials: Procurement and Implementation, https://www.eac.gov/election-officials/procurement-and-implementation [https://perma.cc/2ZAK-9Y65] (last visited July 3, 2023).

of threats to American democracy and the need for every element of our electoral system to emphasize voting rights and election security.[5]

In Part I, this Note discusses the impacts of inequality in voting equipment and administration, compares a selection of state-level procurements with federal procurement standards, and explores the formation and purview of the EAC and its funding mechanisms. In light of this backdrop, Part II of this Note argues that, in future appropriations of funds to the EAC, Congress must use its constitutional power under the Spending Clause to amend Title III of the Help America Vote Act (HAVA) by adding conditions to future EAC funding based on the adoption of federal procurement procedures with an increased focus on voting rights and security and integrity.[6] In addition, the advancement of election-related policy priorities through the implementation of federal guidance for state-level procurements furthers broader federal procurement priorities by improving uniformity and transparency in government contracting.[7] These goals reflect the policy priorities of the Biden administration and ensure that the strengthening of our democracy exists as a cornerstone in all government action, including at the formative stages of any government procurement.[8]

II. BACKGROUND

A. The Impact of Low Voter Confidence and Unequal Voting Equipment

It is difficult to find a more prescient example of election infrastructure and administration playing a defining role in the confidence (or lack thereof) of voters than the "butterfly ballots" used during the 2000 presidential election. The now-infamous ballot design, used in Palm Beach County, Florida, has been linked to public doubt about the election's final results, its procedural administration, and the Supreme Court as an institution.[9] The "butterfly ballot,"

5. *See Funding Election Security*, Brennan Ctr., https://www.brennancenter.org/issues/defend-our-elections/election-security/funding-election-security [https://perma.cc/ZKG6-3KF6] (last visited July 13, 2023); *see also* Danielle Root et al., *Election Security in All 50 States: Defending America's Elections*, Ctr. for Am. Progress (Feb. 12, 2018), https://www.americanprogress.org/article/election-security-50-states [https://perma.cc/CP2S-6LJ7].

6. Richard L. Hasen, *Beyond the Margin of Litigation: Reforming U.S. Election Administration to Avoid Electoral Meltdown*, 62 Wash. & Lee L. Rev. 937, 952 (2005).

7. *See* FAR 1.102; FAR 1.102-1.

8. *See* Susan E. Rice, *How the Biden-Harris Administration Is Continuing to Promote Voting Access*, White House Briefing Room Blog (Sept. 20, 2022), https://www.whitehouse.gov/briefing-room/blog/2022/09/20/how-the-biden-harris-administration-is-continuing-to-promote-voting-access [https://perma.cc/D78C-T62A]. For discussion outside the realm of contract formation, and in areas such as election-related trade secrets and candidates' rights of action in the context of procurement, see Jennifer Nou, *Privatizing Democracy: Promoting Election Integrity Through Procurement Contracts*, 118 Yale L. J. 744, 751 (2009) (advocating for procurement contract specifications that require "bidders . . . [to] provide the technology and access with which to verify votes cast . . . [and to allow] candidates to sue state election officials and private manufacturers . . . to disclose underlying source code and to verify election results").

9. Jonathan Wand et al., *The Butterfly Did It: The Aberrant Vote for Buchanan in Palm Beach County, Florida*, 95 Am. Pol. Sci. Rev. 793, 793 (2001); Michael W. Sances et al., *Partisanship*

as it is now known, was a unique ballot-design that utilized the Votomatic, a punch-card-based voting machine commonly used in polling places across the United States for decades.[10] The design, conceived of by the Palm Beach County Supervisor of Elections, was purportedly an effort to increase the readability of the ballot, but instead resulted in thousands of statistically unexpected votes going to a third-party candidate.[11] The ballot design was considered by some experts to be the main cause of this controversy due to a confusing layout, along with an inability to ascertain voter intent during the recount.[12]

The aftermath of the 2000 election scarred the public's confidence in the administration of elections across the country, which has arguably worsened based on partisan lines in the two decades since.[13] Although empirical evidence is mixed as to whether changes in the administrative processes of elections have a direct causational relationship with voter confidence, voters' attitudes are nonetheless inextricably linked with their experience of the voting process.[14] Ensuring that this process runs as smoothly as possible will have

and Confidence in the Vote Count: Evidence from U.S. National Elections Since 2000, 40 Electoral Stud. 176, 179 (2015); *see also The Florida Recount Controversy from the Public's Perspective: 25 Insights*, Gallup News Serv. (Dec. 22, 2000), https://news.gallup.com/poll/2176/florida-recount-controversy-from-publics-perspective-insights.aspx [https://perma.cc/4ZB8-VYNM] (conducting a series of polls and concluding that "about half of all Americans did not necessarily believe that Bush had won," one third of Americans believed the Supreme Court's decision caused them to lose confidence in the Court, and "most [Americans] did believe the country was facing at least a serious problem.").

10. Wand et al., *supra* note 9, at 794; *Voting Equipment Database: ES&S Votomatic*, Verified Voting, https://verifiedvoting.org/election-system/ess-votomatic [https://perma.cc/Z9LC-T8CE] (last visited July 4, 2023).

11. Wand, *supra* note 9, at 794 n.5, 795. *But see* Mark C. Alexander, *Don't Blame the Butterfly Ballot: Voter Confusion in Presidential Politics*, 13.1 Stan. L & Pol'y. Rev. 121, 121–22 (2002) (arguing that voter confusion began earlier than election day, wherein "many votes . . . were decided based on misunderstood and distorted information").

12. *See* Wand, *supra* note 9, at 803 (conducting a statistical analysis and determining that "[t]he evidence is very strong" that "[t]he butterfly ballot was pivotal in the 2000 presidential race"). Although this issue relates to the well-known fiasco of "hanging chads" in Florida, see Ron Elving, *The Florida Recount of 2000: A Nightmare That Goes on Haunting*, NPR (Nov. 12, 2018), https://www.npr.org/2018/11/12/666812854/the-florida-recount-of-2000-a-nightmare-that-goes-on-haunting [https://perma.cc/R7FU-6YYJ], the key concern addressed in this Note is the way that this process came to be. Specifically, these ballots were an internally conceived-of design and were chosen without a competitive procurement process, which ultimately resulted in mayhem. There is an entire field of study dedicated to ballot design and ensuring voter intent, which extends beyond the scope of this Note. For examples of this work, see *Field Guides to Ensuring Voter Intent*, Ctr. for Civic Design, https://civicdesign.org/fieldguides [https://perma.cc/T42X-XAKD] (last visited July 3, 2023).

13. Ray Martinez III, Commissioner, Election Assistance Comm'n, Address at the Princeton University Policy Research Institute for the Region: Prudent Steps Toward Improving Voter Confidence (Apr. 7, 2006); *Voter Confidence*, MIT Election Data + Science Lab (Apr. 2, 2021), https://electionlab.mit.edu/research/voter-confidence [https://perma.cc/J9AZ-9T6T] (indicating a steep decline in Republican voter confidence following the 2000 presidential election).

14. *Compare* Lonna Rae Atkeson et al., *Voter Confidence: How to Measure It and How It Differs from Government Support*, 14 Election L. J.: Rules, Pol., & Pol'y 207, 207 (2015) (finding little evidence that election administration reforms directly affect voter confidence), *with* Lonna Rae Atkeson et al., *The Effect of Election Administration on Voter Confidence: A Local Matter?*, 40 PS:

positive effects on a voter's confidence in the overall system.[15] In addition, differences in voting technology itself have been shown to have a more direct impact on both voter confidence and even election outcomes.[16] By implementing robust procurement systems to ensure that ballot access, election security, and election integrity are early determinative cornerstones of any election-related procurement, these statistically significant inequities may be eliminated entirely.[17]

In terms of election security and integrity, risks vary greatly depending on the type of election infrastructure used by a particular jurisdiction and the processes behind their use.[18] The simplest example can be found in an integrity-focused comparison between paper and electronic ballots. Direct recording electronic (DRE) voting machines, used in jurisdictions containing over twenty-five million voters as of 2022, maintain no verifiable paper trail for the purposes of ensuring that votes were cast as intended.[19] In contrast, many security experts consider paper ballots to be the most secure voting technology, as they are easily traceable and leave a physical artifact of voter intent in the event of an audit.[20] Modernizing and standardizing election-related procurement standards may also ensure that there are not massive time-lapses between updates in voting machines and related equipment, which has resulted in the antiquity of millions of voting machines around the country.[21]

Pol. Sci. & Pol. 655, 658–59 (2007) (finding that voter attitudes about their election experience directly impact their confidence in the system as a whole).

15. *See Effect of Election Administration*, *supra* note 14, at 658–59.

16. Michael Ritter, *Exploring Voting Equipment and Inequality in the 2016 U.S. General Election*, MIT Election Lab (Sept. 14, 2020), https://medium.com/@MITelectionlab/exploring-voting-equipment-and-inequality-in-the-2016-u-s-general-election-part-1-f45da35aa145 [https://perma.cc/BYE5-U7R3]; David Card & Enrico Moretti, *Does Voting Technology Affect Election Outcomes? Touchscreen Voting and the 2004 Presidential Election*, 89 Rev. Econ. & Stat. 660, 662 (2007) (using a statistical analysis to find that touchscreen voting technology had a 1.4% impact on vote share—"enough to have affected the final outcome of the election").

17. *See* Ritter, *supra* note 16; *see also* Card & Moretti, *supra* note 16, at 662.

18. *See* David Brancaccio et al., *Why Upgrading Voting Machines Is Important for Election Integrity*, Marketplace (Oct. 30, 2020), https://www.marketplace.org/2020/10/30/why-upgrading-voting-machines-is-important-for-election-integrity [https://perma.cc/4ATK-ZPRF].

19. Turquoise Baker & Lawrence Norden, *Voting Machines at Risk in 2022*, Brennan Ctr. (Mar. 1, 2022), https://www.brennancenter.org/our-work/research-reports/voting-machines-risk-2022 [https://perma.cc/P8DR-WY3J]. *But see* Eric A. Fischer & Kevin J. Coleman, Cong. Rsch. Serv., RL33190, The Direct Recording Electronic Voting Machine (DRE) Controversy: FAQs and Misperceptions 3–4 (2007) ("[DRE Proponents] claim that following appropriate security and audit procedures is sufficient to prevent successful tampering and that modern DREs, when properly managed, have less risk of losing votes through malfunction than any other voting system.").

20. *See* Raj Karan Gambhir & Jack Karsten, *Why Paper Is Considered State-of-the-Art Voting Technology*, Brookings Inst. (Aug. 14, 2019), https://www.brookings.edu/blog/techtank/2019/08/14/why-paper-is-considered-state-of-the-art-voting-technology [https://perma.cc/N4P4-G43K]; *see also* Derek Tisler & Turquoise Baker, *Paper Ballots Helped Secure the 2020 Election—What Will 2022 Look Like?*, Brennan Ctr. (May 10, 2022), https://www.brennancenter.org/our-work/analysis-opinion/paper-ballots-helped-secure-2020-election-what-will-2022-look [https://perma.cc/823J-LB6G].

21. Baker & Norden, *supra* note 19 ("Outdated machines suffer frequent breakdowns and create long lines at polling places. They are also more susceptible to error and fraud, risking public

B. State-Level Procurement Procedures

Elections in the United States are, by design, hyper-decentralized. The Constitution itself dictates that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . ."[22] States and local subdivisions of government control nearly every element of the election administration process, varying greatly in their individual methods to "establish boundaries for electoral districts, to register voters, to administer elections, to report election results, and to otherwise regulate the electoral process."[23] This decentralization results in a total of "nearly 13,000 electoral districts in the United States," comprised of towns, counties, and other election jurisdictions, which poses serious challenges for many proposed nationwide solutions to voting- and election-related problems.[24] There has long been debate over the efficacy of this level of decentralization, both in the context of elections and the broader notion of decentralized governance, but the truth remains that states can and will administer elections as they so choose, including through the purchase of voting equipment.[25] Fortunately, in the context of procurement and federal funding, HAVA specifically dictates that each state's "chief election official" shall handle statewide coordination with the federal government and the Administrator of General Services for payments under HAVA.[26] This increased centralization somewhat simplifies the task of creating and implementing federal standards.

This Note leverages a small selection of states' current procurement procedures for election equipment to highlight both positive and negative aspects

confidence in elections . . . . [O]ld software is riskier, because new methods of attack are constantly being developed, and older software is likely to be vulnerable.").

22. U.S. Const. art. 1, § 4, cl. 1; *see also* Hasen, *supra* note 6, at 944, 952.

23. *See* Cong. Rsch. Serv., RL30747, Congressional Authority to Direct How States Administer Elections 1 (2014).

24. Hasen, *supra* note 6, at 944, 952 (discussing the negative implications of "America's "hyper-federalized" system of election administration") (footnote omitted).

25. *Compare* Hasen, *supra* note 6, at 944, 952, *and* Michael A. Livermore, *The Perils of Experimentation*, 126 Yale L.J. 636 (2017) (discussing the need for policymakers to balance decentralization with costs, benefits, and information production), *with* Chris Good, *When It Comes to Election Cybersecurity, Decentralized System Is Viewed as Both Blessing and Curse*, ABC News (Oct 31, 2018) https://abcnews.go.com/Politics/election-cybersecurity-decentralized-system-viewed-blessing-curse/story?id=58877082 [https://perma.cc/5HPM-NGTX] (noting that mass-decentralization of elections in the U.S. creates increased complexity for a potential large-scale cybersecurity exploit); *see also* R. Sam Garrett, Cong. Rsch. Serv., R45302, Federal Role in U.S. Campaigns and Elections: An Overview 5 (2018). For additional discourse in the ongoing debate over the centralization of election administration, see Symposium, *Electoral Federalism: Centralized or Decentralized Elections?*, Const. Conversations (2022), https://constitutionalconversations.substack.com/p/electoral-federalism-centralized?utm_source=twitter&sd=pf [https://perma.cc/WJ3G-3MV2].

26. Help America Vote Act of 2002, Pub. L. No. 107-252, § 101, 116 Stat. 1666, 1669 (2002) (codified at 52 U.S.C. § 20901).

of their respective processes as well as to inform the subsequent discussion about a need for federal guidelines and standardization.[27]

1. Michigan

On January 24, 2017, as part of Michigan's effort to procure their "next-generation" of voting infrastructure, the State Administrative Board approved the use of three vendors to replace voting systems across the state and empowered counties with the freedom to enter into individual ten-year contracts with these vendors.[28] The contracts would encompass hardware, firmware, software, service and maintenance, training of local election officials, and replacement components through an outright purchase by counties in conjunction with federal HAVA funding.[29] The original request for proposals (RFP), published in January 2016, aimed to establish an multi-award contract with a maximum price of approximately eighty-two million dollars, which appears similar to federal multiple-award indefinite-delivery-indefinite-quantity (IDIQ) contracts.[30] However, unlike federal IDIQ contracts, the solicitation (Michigan Solicitation) offered no promise of a stated minimum purchase.[31] As a result, it more closely reflects a form of blanket purchase agreement (BPA) under Federal Acquisition Regulation (FAR) 8.405-3, or basic ordering agreement (BOA), neither of which is considered as legally binding contracts due to a lack of consideration.[32] This lack of consideration and binding status results in a lack of legal liability and remedies from the government's lack of affirmative

27. The states of Michigan, Colorado, and Arkansas were chosen based on the public accessibility of election-related solicitations and procurement policies and represent both a geographic and political range.

28. *Voting System Purchase Resources and Instructions for Michigan's Election Officials*, Mich. Dep't of State, https://www.michigan.gov/sos/elections/admin-info/voting-system-purchase [https://perma.cc/PSA2-HZYT] (last visited July 4, 2023); *see also* Press Release, Secretary of State Rush Johnson, Secretary Johnson Announces Next-Generation Voting Equipment (Jan. 24, 2017), https://www.michigan.gov/sos/-/media/Project/Websites/sos/Elections/Voting-system-purchase/SecJohnsonAnnounce.pdf?rev=f42ce9fefd20445eb0e3e4718ef700d1&hash=84EE0CCB12E36D0C7C9CD1FFDEE9A399 [https://perma.cc/YU87-HLNV].

29. Memorandum from Sue Cieciwa, Buyer Specialist, Dep't of Tech., Mgmt. and Budget Procurement, Commodities Division, to Sharon Walenga-Maynard, Sourcing Director (Dec. 13, 2016), https://legistarweb-production.s3.amazonaws.com/uploads/attachment/pdf/76787/JEC.pdf [https://perma.cc/7CGB-JL8H]; *see also* Press Release, Secretary of State Rush Johnson, *supra* note 28, at 2.

30. Memorandum from Sue Cieceiwa to Sharon Walenga-Maynard, *supra* note 29, at 1–2; *see* FAR 16.5 ("establishes a preference for making multiple awards of indefinite-quantity contracts). IDIQ contracts involve an indefinite amount of work over a pre-determined period wherein the government will place orders for supplies or services between a contractually specified minimum and maximum amount. *See Indefinite Delivery, Indefinite Quantity Contracts*, U.S. Gen. Serv. Admin., https://www.gsa.gov/small-business/register-your-business/explore-business-models/indefinite-delivery-indefinite-quantity-contracts [https://perma.cc/EF6E-JYAR] (last visited July 4, 2023).

31. FAR 16.504(a)(1) (requiring "the government to order . . . at least a stated minimum quantity of supplies or services . . . not to exceed the stated maximum").

32. *Federal Supply Schedules—Blanket Purchase Agreements*, Def. Acquisition Univ., https://aaf.dau.edu/aaf/contracting-cone/federal-supply-schedules/bpa [https://perma.cc/XJ9C-PR7L] (last visited July 16, 2023); FAR 16.703; *GSA Multiple Award Schedule: Blanket Purchase Agreements*, U.S. Gen. Serv. Admin., https://www.gsa.gov/buy-through-us/purchasing-programs/gsa

obligation.[33] The similarity between the Michigan solicitation and federal BPAs is further demonstrated by public information regarding the contract's administration, such as a state-published timeline for local purchasing of the voting systems, which notes that counties must file "Initial Purchase Plans" with the Michigan Board of Elections prior to an eventual "Purchase Order."[34]

A Joint Evaluation Committee, consisting of state and local election administrators, as well as state procurement specialists, evaluated the proposals and presented a source selection recommendation.[35] The Michigan Solicitation planned to evaluate proposals in four steps: (1) mandatory minimum requirements, (2) technical evaluation, (3) state certification testing, and (4) pricing.[36] The mandatory minimum requirements, a pass/fail phase of the evaluation, related to whether a prospective vendor's voting systems had been tested and certified by the EAC, or by a federally accredited equivalent, such as the Voting System Test Laboratory.[37] The subsequent technical evaluation mirrored typical federal-level technical evaluations of proposals by laying out factors and significant subfactors as well as their quantitative weights.[38] The technical requirements of prospective vendors included in-place security practices and safeguards as well as audit capacity.[39] The proposals that received over a certain threshold score in the technical rating were then subject to state certification testing on a pass/fail basis.[40] Following this determination, the Michigan Solicitation called for a price evaluation, wherein "[the] State is not obligated

-multiple-award-schedule/schedule-features/blanket-purchase-agreements [https://perma.cc/PXE4-HWXF] (last visited July 4, 2023).

33. Library of Cong., B-318046, 2009 WL 1978719, at *3–6 (Comp. Gen. July 7, 2009).

34. *Voting System Purchase Process*, Mich. Sec. of State. (Feb. 2017), https://www.michigan.gov/sos/-/media/Project/Websites/sos/Elections/Voting-system-purchase/VSPFlowchart.pdf?rev=14001a7d5a8f4e03b898209aa7e8267f&hash=1170FC8276D571C591113796F2027B36 [https://perma.cc/WZ8C-VWLC].

35. Joint Evaluation Committees are used when included in a solicitation and serve at the request of the contracting officer, known as the Solicitation Manager in Michigan, for that procurement. *See* Mich. Procurement Pol. Manual 8.3.2 (2021), https://www.michigan.gov/-/media/Project/Websites/dtmb/Procurement/documents/MPPM/Chapter_8.pdf?rev=d48e5616ef8b445d8b6c463afe47e903 [https://perma.cc/E2AE-9JSP]; *see also* Memorandum from Sue Cieceiwa to Sharon Walenga-Maynard, *supra* note 29, at 1.

36. Memorandum from Sue Cieceiwa to Sharon Walenga-Maynard, *supra* note 29, at 2–3. For additional context into the evaluation conducted in this procurement, see Mich. Dep't of Tech., Mgmt., & Budget, RFP No. 007116B0007029 (Jan. 2017), https://www.michigan.gov/-/media/Project/Websites/sos/05holland/VendorComparison.pdf?rev=b8c1606c9b9042368d68e1b56709c845 [https://perma.cc/QR3N-MR3P].

37. Memorandum from Sue Cieceiwa to Sharon Walenga-Maynard, *supra* note 29, at 2.

38. *See id.*; *see* FAR 15.305(a)(3)(ii).

39. *See supra* note 29, at 3–4; Mich. Dep't of Tech., Mgmt., & Budget, RFP No. 007116B0007029 (Jan. 2017), https://www.michigan.gov/-/media/Project/Websites/sos/05holland/VendorComparison.pdf?rev=b8c1606c9b9042368d68e1b56709c845 [https://perma.cc/CT4H-X8BA]; *see also* U.S. Election Assistance Comm'n, Election Audits Across the United States 2–3 (Oct. 6, 2021), https://www.eac.gov/sites/default/files/bestpractices/Election_Audits_Across_the_United_States.pdf [https://perma.cc/UA9P-QHUA] (Post-election audits are a process to "ensure voting systems operate accurately, that election officials comply with regulations or internal policies, and identify and resolve discrepancies in an effort to promote voter confidence in the election administration process.").

40. Memorandum from Sue Cieceiwa to Sharon Walenga-Maynard, *supra* note 29, at 2–3.

to accept the lowest price proposal."[41] The final negotiated price estimates between each contractor ranged over thirty million dollars, emphasizing Michigan's focus on technical factors in their evaluations.[42] The resulting contract, comprised of three vendors, allowed for individual counties to negotiate with each of the vendors and submit purchase orders following negotiations.[43]

In sum, Michigan's practices and procedures regarding election-related procurements represent a robust base from which to build, such as the opportunity for individual counties to select an approved vendor best suited to their individual needs, election security, and verifiability requirements,[44] and include several model practices that can, and should, be utilized beyond its borders.

2. Colorado

The state of Colorado similarly maintains a robust process for the procurement of election-related infrastructure, which is conducted at the county level with oversight by the Secretary of State.[45] During a recent, nearly three-year-long, search for a new uniform voting system to be used statewide, the Colorado Legislature created and empowered a specialized committee, known as the Pilot Election Review Committee (PERC), to make manufacturer recommendations to the Secretary of State.[46] PERC consisted of a broad range of election experts, including advocates for disability rights and public participation, as well as representatives of multiple levels of government, that "evaluated four different voting systems piloted in eight Colorado counties" and eventually decided on Dominion Voting Systems.[47] This piloting program reflects a similar practice often used in "major systems" acquisitions by the Department of Defense pursuant to DFARS 207.106, wherein competitive prototyping is often utilized to maximize competition and cost-efficiency for the government's benefit.[48]

41. *Id.* at 3.

42. *Id.* at 19.

43. *Voting System Purchase Resources and Instructions for Michigan's Election Officials*, Mich. Dep't of State, https://www.michigan.gov/sos/elections/admin-info/voting-system-purchase [https://perma.cc/PSA2-HZYT] (last visited July 4, 2023).

44. *See* Memorandum from Sue Cieceiwa to Sharon Walenga-Maynard, *supra* note 29, at 2.

45. Colo. Dep't of State, CDOS-UVS-2013-01 1 (Oct. 1, 2013), https://www.eac.gov/sites/default/files/eac_assets/1/28/Colorado%20Uniform%20Voting%20System%20RFP%202013_10_01.pdf [https://perma.cc/3XUS-5RDR] [hereinafter Colo. Uniform Voting Procurement].

46. *See* Mike McKibbin, *Denver Finalizes Nearly $1M Voting System Purchase*, Colorado Politics (Sept. 30, 2016), https://www.coloradopolitics.com/news/denver-finalizes-nearly-1m-voting-system-purchase/article_b19899cb-a19f-5b3d-8316-9a902dc78ace.html [https://perma.cc/6V8Y-7PJU]; *see also* Press Release, Wayne Williams, Secretary of State, State of Colorado, Secretary of State Wayne Williams Looks to Dominion After Nearly Three Years of Study on Voting Systems (Dec. 22, 2015), https://www.sos.state.co.us/pubs/newsRoom/pressReleases/2015/PR20151222Dominion.html [https://perma.cc/XX5D-LV6M].

47. Colo. Dep't of State: Pilot Election Rev. Comm., Notice of Meeting (Dec. 14, 2015), https://www.coloradosos.gov/pubs/elections/VotingSystems/committees/20151217committeeMeeting.html [https://perma.cc/MQ64-N2TB]; *see* Williams, Press Release, *supra* note 46.

48. *See* DFARS 207.106; 10 U.S.C. § 4022(b); *see also Major Capability Acquisition: Prototype Contracts*, Def. Acquisition Univ., https://aaf.dau.edu/aaf/mca/prototype-contracts [https://perma.cc/RV2P-6PL9] (last visited July 4, 2023).

The contractors chosen to participate in this pilot process were selected using a more traditional RFP solicitation issued by the Secretary of State.[49] The evaluation panel for these proposals consisted of a variety of relevant professionals and decisionmakers, including information technology experts as well as county and state legislators.[50]

The evaluation of proposals under Colorado's solicitation involved multiple phases, which differ from those used in Michigan.[51] The first phase was a preliminary administrative evaluation: a pass/fail phase which ensures the format of the proposal itself comports with the state's preferences.[52] This initial process is more rudimentary than determinations of responsiveness in the sealed bidding process under FAR 14.301, or technical acceptability under FAR 15.101-2, as it does not yet reach the material requirements of the solicitation.[53] The next phase, the business proposal, held a seventy-five percent weight, and granted a numerical score to each proposal based on "the clarity and conciseness of the information presented, and how well it meets the requirements as defined in each section."[54] This proposal included requirements for information traditionally reserved for contractor responsibility determinations under federal negotiated procurements, such as company financial status, prior proposals, and business experience.[55] Requirements also included security measures within each voting system in use by each prospective vendor as well as the capacity to audit election results.[56] Notably, business proposals submitted by prospective vendors made no mention of the anticipated price or cost, which instead was required to be included and submitted separately in a cost proposal.[57]

Following the evaluation and scoring of business proposals, the cost evaluation phase, scored numerically and weighted at twenty-five percent, looked to the cost proposal from each contractor, but without explicit mention of cost or price realism as are often utilized in federal procurements.[58] At this point, a competitive range was established based on the numerical points granted to each proposal, and, at the discretion of the Department of State, oral

49. Colo. Uniform Voting Procurement, *supra* note 45, at 1; Colo. Dep't of State, The Path Forward to a Uniform Voting System 1 (2015), https://www.coloradosos.gov/pubs/elections/VotingSystems/files/2015/UVSOverview1.pdf [https://perma.cc/5A4P-B7WH].

50. Colo. Uniform Voting Procurement, *supra* note 45, at 36; *see also* Colo. Dep't of State, CDOS-CF-08-01 35–36 (June 6, 2008), https://www.sos.state.co.us/pubs/elections/CampaignFinance/files/colorado_campaign_finance_RFP_2008-06-06.pdf [https://perma.cc/99C3-PQ2T].

51. Colo. Uniform Voting Procurement, *supra* note 45, at 35.

52. *Id.* at 36.

53. *Id.*

54. *Id.*

55. *Id.* at 22–24.

56. *Id.* at 18, 29–30, B-38–41, B-43–44.

57. *Id.* at 22, 32. For an example of a business proposal submitted pursuant to this solicitation, see *Business Proposal for RFP # CDOS-UVS-2013-01*, Dominion Voting (2013), https://www.sos.state.co.us/pubs/elections/VotingSystems/RFI/proposals/DominionVotingSystemsColoradoUVSProposal.pdf [https://perma.cc/RH4V-CR2E].

58. FAR 15.404-1; Colo. Uniform Voting Procurement, *supra* note 45, at 37.

presentations and demonstrations could have occurred.[59] During the final phase, the original scores were reevaluated, and adjustments to point totals in accordance with a demonstration or presentation were made.[60] Subsequently, a notice of intent to award was publicly posted.[61] This evaluation and source selection scheme is more complex than other recent Colorado Department of State solicitations regarding elections due to its significance, illustrated by its usage of a piloting process and delegation to PERC for the purpose of making specialized recommendations to the state.[62]

3. Arkansas

In 2015, the Arkansas Secretary of State, empowered by state law to select and procure voting machines for the state, issued an RFP in search of a statewide integrated voting system for a five-year lease (Arkansas Solicitation).[63] The Arkansas Solicitation, in stark contrast with that of Michigan or Colorado, offered minimal guidance to prospective vendors with respect to what criteria were to be used to judge proposals as well as who would be doing the evaluating.[64] Aside from laying out the requirements for proposals, which, notably, did not include any mention of cybersecurity or auditing capability, the solicitation only noted that the "[Secretary of State] reserves the right . . . to award the bid to best serve the interest of the [Secretary]."[65] This solicitation diverges sharply from FAR regulations dealing with RFPs, which require the inclusion of "factors and significant subfactors that will be used to evaluate [a] proposal and their relative importance."[66] This lack of evaluation criteria, if present in a federal procurement, has long been grounds for a successful protest by a prospective bidder due to an effectively arbitrary selection process.[67] The Arkansas Solicitation further noted: "All decisions by the [Secretary of State] are final. Bidders should understand that the [Secretary of State] is not under Arkansas Procurement law in terms of its Request for Proposal

59. *Id.*
60. *Id.*
61. *Id.* at 38.
62. *See* Colo. Dep't of State, CDOS-CF-08-01 1, 36–38 (June 6, 2008), https://www.sos.state.co.us/pubs/elections/CampaignFinance/files/colorado_campaign_finance_RFP_2008-06-06.pdf [https://perma.cc/7LL2-D7VL] (procuring a "commercial off-the-shelf software to replace existing . . . system"); *see also* Colo. Dep't of State, RFP-SPCO-AR-23-0418–19 (Dec. 14, 2022) (procuring a system for campaign and lobbying disclosures through a negotiated procurement) (on file with author).
63. *See* Ark. Code Ann. § 7-5-301 (2020); Ark. Sec. of State, Request for Proposal for Statewide Integrated Voting System 5, 12 (Apr. 15, 2015), https://www.eac.gov/sites/default/files/eac_assets/1/28/State%20of%20Arkansas%20RFP-RFQ%20Elections%20Integrated%20Voting%20System.pdf [https://perma.cc/4U3H-M8P7] [hereinafter Ark. Request for Proposal].
64. Ark. Request for Proposal, *supra* note 63, at 13.
65. *Id.*
66. FAR 15.203(a)(4).
67. *See* Randolph Engineering, B-192375, 1979 WL 12366, at *2 (Comp. Gen. June 28, 1979); CACI, Inc.-Federal, B-42041 et al., 2022 WL 1102585, at *1, 4–6 (Comp. Gen. Apr. 7, 2022).

procedures. This Request for Proposal is under the procedures of the Office of the Arkansas Secretary of State only."[68]

The apparent inability for unsuccessful vendors to file any form of protest pursuant to this solicitation, as indicated by decisions being "final," provides an additional level of distinction from common federal-level acquisition practices.[69] Under Government Accountability Office (GAO)[70] and FAR regulations, interested parties in a procurement have a right to file protests both pre- and post-award, subject to timeliness and other requirements.[71] In fact, a very similar version of this right to protest currently exists under Arkansas procurement law; however, as noted in the Arkansas Solicitation, these rights did not apply to procurements conducted under the authority of the Secretary of State.[72]

As a constitutional office of Arkansas, the Secretary of State Executive Office is considered an "exempt agency" under state procurement law and is, therefore, not subject to its regulations.[73] Potentially relevant to the administration of elections, one of the few state procurement laws from which the Secretary is not exempt is denoted in section 19-11-203(30)(B) of the Arkansas Annotated Code, which subjects otherwise exempt agencies to Amendment 54 of the Arkansas Constitution.[74] Amendment 54 requires that all "printing, stationery, and supplies" contracts by the state General Assembly and other state departments be awarded to the "lowest responsible bidder."[75] This amendment, as interpreted by the Arkansas Supreme Court, requires the use of competitive bidding when contracting with commercial printers.[76] Were the Secretary to contract specifically for the printing of ballots, as is common in many states, [77] it is therefore unclear as to whether they would be bound by the amendment. If so, Amendment 54 would both not allow the use of

68. Ark. Request for Proposal, *supra* note 63, at 13.

69. *Id.*; *see also* Daniel I. Gordon, *Bid Protests: The Costs Are Real, but the Benefits Outweigh Them*, 42 Pub. Cont. L.J., 489, 501–10 (2013) (concluding that "whatever costs protests impose on the procurement system are outweighed, at least in the author's view, by the benefits that protests bring, in terms of transparency, accountability, education, and protection of the integrity of the U.S. federal acquisition"); Meryl Grenadier, *The Benefits of Bid Protests*, Project on Gov't Oversight (Apr. 12, 2013), https://www.pogo.org/analysis/2013/04/benefits-of-bid-protests [https://perma.cc/68NU-5BNH].

70. The GAO serves as an independent forum for adjudicating government contract protests. *See Bid Protests*, U.S. Gov. Accountability Off., https://www.gao.gov/legal/bid-protests [https://perma.cc/FTR2-W85B] (last visited July 20, 2023).

71. 4 C.F.R. § 21.1(a) (2018); *see also* FAR 33.1.

72. Ark. Code Ann. § 19-11-244(a)(1).

73. *Id.* § 19-11-105(a)(2); *see also Arkansas Constitutional Offices*, Ark. Sec. of State, https://www.sos.arkansas.gov/state-capitol/arkansas-constitutional-offices [https://perma.cc/36JM-U9UJ] (last visited July 4, 2023) (listing all constitutional offices in the state of Arkansas).

74. Ark. Code Ann. § 19-11-203(30)(B).

75. Ark. Const. amend. LIV, § 1; *see also* Ark. Code Ann. § 19-11-204(12) (defining "responsible bidder" for the purposes of competitive sealed bidding).

76. *See* Gatzke v. Weiss, 289 S.W.3d 455, 461 (Ark. 2008).

77. *See* N.Y. Bd. of Elections, EPIN #: 00320232026, https://vote.nyc/sites/default/files/pdf/contracts/RFP-ABSENTEE-BALLOT-PRINTING-MARCH-31-2021-LATEST.pdf [https://perma.cc/4GPQ-QFES] (solicitation for the purposes of ballot printing and mailing); Kan. City Dep't of Procurement & Contract Compliance, RFP 27589 (Jan. 11, 2018), https://

negotiated procurements and completely restrict the ability of the Secretary to consider any factors other than price in their evaluation.[78] In the context of pursuing a procurement system designed to improve election administration, the inability to consider these factors when contracting for the ballots themselves creates a conflict.

A more recent solicitation issued by the Arkansas Secretary of State in January 2022 for an "Online Integrated and Searchable Campaign Finance Filing and Reporting System" incorporated far more detail than their 2015 solicitation, including a series of point values for each requirement for the purposes of evaluation.[79] This solicitation also mentioned the Secretary's "exempt" status under most Arkansas procurement laws, but went further than the previous solicitation by noting that "it is the intent of the [Secretary of State] to . . . ensure the selection of the most responsive and responsible vendor who shall accomplish the requisite scope of work in an efficient and transparent manner."[80] This language reflected the much more standard nature of the rest of the solicitation in terms of its requirements and evaluation criteria. However, as a campaign finance procurement, the solicitation itself was only tangentially related to the administration of elections, unlike the prior request for proposals, and therefore does not represent the latest procurement in that field.[81]

In sum, the most recent election-related procurement in Arkansas represented a drastic departure from federal standards, as well as the practices of other states, such as Michigan and Colorado, through its lack of transparent evaluation criteria and constitutional concerns. In the following discussion, the role of the EAC as it relates to these and other states' election administration practices will be explored and linked with current federal policies on election administration and procurement.

C. HAVA, the EAC, and Its Role in State Election Administration

1. History of the Election Assistance Commission

The EAC was established as an independent federal agency and the national clearinghouse for federal elections pursuant to the passage of the Help America Vote Act (HAVA) "as part of Congress's response to administrative issues

purchasing.wycokck.org/eProcurement/bids/R27589/RFP%2027589%20Ballot%20Printing%20FINAL.pdf [https://perma.cc/7EEV-L4X9] (same).

78. Ark Const. amend. LIV, § 1.

79. Ark. Sec. of State, RFP # 2022-1 13 (Jan. 9, 2022), https://www.sos.arkansas.gov/uploads/CCE_System_RFP_2022-1_January_9,_2022.pdf [https://perma.cc/QJ6F-D4MM]. It may also be relevant to note that this is a new Secretary of State, elected in 2019. *See Office of Secretary of State*, Encyclopedia of Arkansas, https://encyclopediaofarkansas.net/entries/office-of-secretary-of-state-5723 [https://perma.cc/NW35-D8WE] (last visited July 15, 2023).

80. Ark. Sec. of State, RFP # 2022-1 3 (Jan. 9, 2022), https://www.sos.arkansas.gov/uploads/CCE_System_RFP_2022-1_January_9,_2022.pdf [https://perma.cc/QJ6F-D4MM].

81. *Compare id.* (procuring a campaign finance-related platform), *with* Ark. Code Ann. § 7-5-301 (2020); Ark. Request for Proposal, *supra* note 63, at 5, 13 (procuring election administration-related products and services).

with the 2000 elections."[82] The concept of a federal clearinghouse for the sharing of election administration-related information originally dates back to the Federal Election Campaign Act of 1971, which established the National Clearinghouse for Information on the Administration of Elections within the General Accounting Office (Clearinghouse).[83] The purpose of this office was to combat the ongoing inefficiencies caused by a lack of comprehensive practice and procedure sharing amongst election administrators.[84] The Clearinghouse was subsequently transferred to the Federal Election Commission (FEC) as the FEC Office of Election Administration.[85] Pursuant to the passage of HAVA, these functions, along with underlying personnel, records, and contracts, were finally reassigned to the newly established EAC.[86]

As the national clearinghouse for federal elections, the EAC is charged with a number of duties related to the promotion of effective election administration.[87] The EAC's purview includes but is not limited to (1) providing technical and security expertise to state and localities; (2) establishing minimum election administration standards; (3) testing and certifying voting equipment; and (4) directly assisting in state and local election administration through trainings, payments, and grants.[88] These duties exemplify the broader legislative purpose behind HAVA, as explained by the United States House Committee on House Administration in their favorable report of the bill:

> [HAVA will] establish a program to provide funds to States to replace punch card voting systems . . ., establish the [EAC] to assist in the administration of Federal elections and to otherwise provide assistance with the administration of certain Federal election laws and programs, . . . [and] establish minimum election administration standards for States and units of local government with responsibility for the administration of Federal elections . . . .[89]

2. Distribution of Funding

The overwhelming majority of the EAC's funding was appropriated in the initial passage of HAVA, with additional congressional appropriations occurring in calendar years 2018, 2020, 2022, and 2023.[90] This funding is separated into two major categories: 1) HAVA Operational Grants, a now-expired provision providing funding to states replacing outdated voting machines; and

82. 52 U.S.C. § 20921; Karen Shanton, Cong. Rsch. Serv., R45770, The U.S. Election Assistance Commission: Overview and Selected Issues for Congress 3 (2019).

83. 2 U.S.C. § 438(a).

84. *About the EAC: Help America Vote Act*, U.S. Election Assistance Comm'n, https://www.eac.gov/about_the_eac/help_america_vote_act.aspx [https://perma.cc/SVZ9-AAVZ] (last visited July 4, 2023).

85. *Id.*

86. 52 U.S.C. §§ 21131–21133.

87. 52 U.S.C. § 20922.

88. *See id.*

89. H.R. Rep. No. 107-329, at 1 (2001).

90. *See Election Sec. Funds*, U.S. Election Assistance Comm'n, https://web.archive.org/web/20230315015937/https://www.eac.gov/payments-and-grants/election-security-funds [https://perma.cc/3W5K-LMGR] (last visited July 4, 2023).

2) Discretionary Grants, which have continued to be used in the years following the EAC's initial funding.[91] It had been argued that, due to the infrequent appropriation of funds to the EAC, the agency's legislative mandate has come to pass and the agency no longer serves a purpose.[92] In fact, as recently as 2017, there have been legislative efforts in Congress to repeal the EAC in its entirety.[93] However, more recent appropriations by Congress to the EAC have rendered this argument outdated.

In 2018, Congress indicated their support for the continued operation of the EAC by appropriating $380 million in funding for the purposes of improving election security in the aftermath of questions regarding the integrity of the 2016 presidential election.[94] Two years later, Congress appropriated an additional $400 million in emergency funds to the EAC in the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 to help alleviate coronavirus-related costs incurred by states in their administration of that year's federal election.[95] This appropriation was strictly and specifically conditioned on costs incurred "to prevent, prepare for, and respond to coronavirus, domestically or internationally, for the 2020 Federal election cycle" with a mandatory twenty percent state match to be made "available within two years of receiving the funds."[96] This matching share provision, as articulated by the GAO Red Book, mandates that even the matching funds provided by the state or localities be exclusively used for the authorized purpose of the overall grant.[97] The Consolidated Appropriations Act of 2022, passed by Congress in March 2022, allocated an additional seventy-five million dollars to the EAC for the purposes of "improv[ing] the administration of elections for Federal office, including to enhance election technology and make election security improvements."[98]

Each of the appropriations to the EAC by Congress was subject to specific and unique conditions that dictated the release of any EAC funding to

91. *Payments & Grants*, U.S. Election Assistance Comm'n, https://web.archive.org/web/20230315015937/https://www.eac.gov/payments-and-grants/payments-grants [https://perma.cc/5XTQ-LJAK] (last visited July 4, 2023).

92. *Hearing on Election Assistance Commission Nominations Before the S. Comm. on Rules and Admin.*, 113th Cong. 44 (2013) (statement of Senator Pat Roberts, Ranking Member) (noting that "the [EAC] has fulfilled its purpose and should be eliminated").

93. *See*, *e.g.*, H.R. 634, 115th Cong. (2017); H.R. 1994, 113th Cong. (2013); H.R. 260, 113th Cong. (2013); H.R. Rep. No. 113-293, at 1–2 (2013) (noting that, "[w]ithout [a flow of election administration funds to states], the EAC is a bureaucracy in search of a mission").

94. Consolidated Appropriations Act of 2018, Pub. L. No. 115-141, 132 Stat. 561 (2018); *see* Shanton, *supra* note 82, at 5.

95. Commission in the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, 15 U.S.C. §§ 9001–9141 (2020).

96. Letter from Mona Harrington, Acting Executive Officer, Election Assistance Comm'n, to Chief State Election Officers 1 (Apr. 6, 2020) https://sos.nh.gov/media/dnkl2pqv/cares-award-instructions.pdf [https://perma.cc/W3M7-NYBS].

97. The Red Book is a publication that serves as a basic reference work for federal appropriations law. *See* U.S. Gov't Accountability Off., GAO-06-382SP, Principles of Federal Appropriations Law 10-93, 10-94, 10-95 (3d ed. 2006), https://www.gao.gov/assets/gao-06-382sp.pdf [https://perma.cc/79AY-T552].

98. Consolidated Appropriations Act of 2022, Pub. L. No. 117-103, 136 Stat. 268 (2022).

states.[99] Specifically, under 2 C.F.R. 200.400 Subpart E, the EAC noted that, "to be allowable under a grant, costs must be necessary, reasonable, and allocable to the grant."[100] Allowable costs are "necessary and reasonable for the proper and efficient performance" of the activities covered by the grant; in the context of election administration during the pandemic, such costs included meeting the increased demand for mail-in ballots in response to the COVID-19 virus.[101] Costs are reasonable if they "do not exceed what a prudent person would pay under the circumstances" and can be determined utilizing any relevant factors.[102] Allocable costs are "directly related to the objectives and activities planned under the grant and included in the approved budget" and include "increased physical security for federal elections."[103] The definitions of reasonability and allocability used by the Commission to disburse grant funds reflect those used in the FAR in terms of government contracting cost principles.[104]

When applying for grants being distributed by the EAC, states must submit a formal request, asking for a specific amount of money, and pledge that they will use the funds provided "for activities consistent with the laws described in section 906 of HAVA and will not use the funds in a manner that is inconsistent with the requirements of Title III of HAVA."[105] Section 906 of HAVA includes a list of federal election laws passed, such as the Voting Rights Act, National Voter Registration Act, and the Americans with Disabilities Act, among others.[106] Title III of HAVA sets out both requirements and voluntary guidance to states regarding election technology and administration.[107] Requirements range from mandates that all voting systems purchased with HAVA funding have post-election auditing mechanisms, to requirements that state and local election officials publicly post voting information on Election Day.[108]

99. *2020 CARES Act Grants*, Election Assistance Comm'n, https://web.archive.org/web/20230307010414/https://www.eac.gov/payments-and-grants/2020-cares-act-grants [https://perma.cc/BSQ2-6ZMG] (last visited July 8, 2023).

100. U.S. Election Assistance Comm'n, Guidance on Use of HAVA Funds for Expenses Related to COVID-19 1 (2020), https://www.eac.gov/sites/default/files/paymentgrants/cares/FAQ-Guidance/Guidance%20on%20Use%20of%20HAVA%20Funds%20for%20Expenses%20Related%20to%20COVID-19.pdf [https://perma.cc/KM4V-77T4].

101. *Id.*

102. *Id.* at 2.

103. *Id.* at 1–2.

104. *See* FAR 31.201-3 (determining reasonableness based on the "ordinary and necessary" cost for performance); *see also* FAR 31.201-4 (determining allocability based on whether the cost was "incurred specifically for the contract," among other additional factors).

105. *See* U.S. Election Assistance Comm'n, Template for State Requests for Security Funds 1 (2023), https://www.eac.gov/sites/default/files/Grants/FY23_Hava_App_Packet/Template%20-%20FY23%20State%20Request%20and%20Certification.pdf [https://perma.cc/7R69-AQEU].

106. 52 U.S.C. § 21145; Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965); National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (1993); Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (1990).

107. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666, 1704–1715 (2002) (codified at 52 U.S.C. § 20901).

108. 52 U.S.C. §§ 21081–21082.

In future appropriations to the Commission, this Note proposes that appropriations by Congress must include an amendment under Title III of HAVA adding a new subset of requirements guiding the procurement of election infrastructure, creating a meaningful incentive for states and localities to improve their processes.

3. EAC Guidance to States and Localities

The EAC currently provides several resources to state and local election officials for the purposes of guiding and improving their administration of elections.[109] The main example is the EAC's Voluntary Voting Systems Guidelines Version 2.0 (VVSG 2.0), released in early 2021, which establishes extensive technical guidelines for voting systems and baselines for states to use when assessing the functionality, security, and accessibility of their voting systems.[110] VVSG 2.0 is the fifth iteration of the agency's guidelines on this topic and was released following a multi-year effort by the EAC's Technical Guidelines Development Committee, chaired by a member of the National Institute of Standards and Technologies and comprised of various governmental and non-governmental experts on election infrastructure, accessibility, cybersecurity, and other topics.[111] While VVSG 2.0 and other EAC guidelines are used to some extent by a majority of states, due to their inherently voluntary nature, only "11 states and Washington, D.C., require full EAC certification of voting equipment in statute or rule," with 12 states using only state-specific certification standards.[112]

In stark contrast to the 300-plus page technical guidelines for voting systems, the EAC's agency guidance on the procurement of election-related systems consists of two EAC Tip Sheets comprised of a general government procurement process overview.[113] The VVSG 2.0 makes brief mention of procurement, requiring that voting system software be "obtained from a trusted distribution repository" and that such software be obtained commercially.[114] However, there is minimal additional guidance or recommendations publicly

109. *See Clearinghouse Resources f or Election Officials*, U.S. Election Assistance Comm'n, https://web.archive.org/web/20230315015937/https://www.eac.gov/election-officials [https://perma.cc/QV9A-FQER] (last visited July 4, 2023).

110. U.S. Election Assistance Comm'n, Voluntary Voting System Guidelines VVSG 2.0 5–6 (2021), https://www.eac.gov/sites/default/files/TestingCertification/Voluntary_Voting_System_Guidelines_Version_2_0.pdf [https://perma.cc/2TLS-WPTJ].

111. *Id.* at 4, 9.

112. Saige Draeger, *Voting System Standards, Testing and Certification*, Nat. Conf. of State Legis. (June 30, 2022), https://www.ncsl.org/state-legislatures-news/details/election-assistance-commission-updates-voluntary-voting-system-guidelines [https://perma.cc/WXV4-CFAE]; *see also* U.S. Election Assistance Comm'n, *supra* note 110, at 5 ("HAVA directs the EAC to adopt voluntary voting system guidelines, and to provide for the testing, certification, decertification, and recertification of voting system hardware and software.").

113. *Clearinghouse Resources for Election Officials: Procurement and Implementation*, U.S. Election Assistance Comm'n, https://www.eac.gov/election-officials/procurement-and-implementation [https://perma.cc/2ZAK-9Y65] (last visited July 4, 2023).

114. U.S. Election Assistance Comm'n, *supra* note 110, at 100.

provided to state and local election administrators.[115] The EAC does publish a non-comprehensive list of recent procurements by states and localities as a "courtesy to election officials," but disclaims that the agency does not endorse any of the procurements.[116]

D. Advancing Federal Policy Goals

At the federal level, procurements are most frequently conducted with a focus on the anticipated price of the product or service.[117] The same often goes for state procurements utilizing federal dollars, which occasionally utilize aspects of the FAR.[118] To this end, ongoing lobbying efforts seek to further compel states to adopt the FAR as the basis for their procurement procedures to increase uniformity across the country.[119] Achieving such uniformity, at least on a federal level, is another major guiding principle of the FAR.[120] While this Note does argue for a departure from typical FAR policy objectives, such as entirely setting aside any emphasis on cost, it relies on the discretion granted to contracting officers and agencies to place an outsized value on technical factors in evaluating proposals and utilizing procurement as a tool for furthering non-procurement-related public policy goals.[121] As explained by the Office of Management and Budget's Deputy Director for Management, the federal government's "purchasing power makes Federal procurement a powerful tool" in the advancement of policy goals, such as the resolution of economic inequity.[122] Considering the Biden administration's continued multifaceted efforts toward the improvement of voting rights, the utilization of federal procurement is yet another tool in this effort.[123]

The most direct way to effectuate policy through procurement, aside from reservations, is through the evaluation of proposals in accordance with

115. U.S. Election Assistance Comm'n, *supra* note 110.

116. *Voting Technology Procurement*, U.S. Election Assistance Comm'n, https://web.archive.org/web/20230315015937/https://www.eac.gov/voting-equipment/voting-technology-procurement [https://perma.cc/KA5M-GW34] (last visited July 4, 2023).

117. FAR 1.102(b)(1)–102(b)(2) (noting that "satisfying the customer in terms of cost" and "minimiz[ing] administrative operating costs" are two of the FAR's guiding principles).

118. *Federal Acquisition Regulation (FAR) Use by State and Local Governments*, Am. Council of Eng'g Cos., https://web.archive.org/web/20210411005749/https://www.acec.org/advocacy/key-issues/far-use [https://perma.cc/AWF9-CFBZ] (last visited July 4, 2023).

119. *Id.*

120. FAR 1.102(b)(2).

121. *See* Exec. Order No. 13985, 86 Fed. Reg. 7009, 7009–10 (Jan. 20, 2021) (directing that the federal government "pursue a comprehensive approach to advancing equity for all", including "potential barriers that underserved . . . individuals may face in taking advantage of agency procurement and contracting opportunities").

122. Memorandum on Advancing Equality in Federal Procurement, M-22-03 1 (Dec. 2, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/12/M-22-03.pdf [https://perma.cc/PF53-G8E6].

123. *See* Rice, *supra* note 8; *see also* Press Release, White House Briefing Room, FACT SHEET: The Biden-Harris Administration Continues to Promote Access to Voting (Mar. 3, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/05/fact-sheet-the-biden-harris-administration-continues-to-promote-access-to-voting [https://perma.cc/L37Q-X3BR].

specific goals.[124] To this end, an evaluation methodology based on the technical specifications of a vendor's proposal, rather than solely the cost, will put the interests of the voters at the forefront. In *Sevatec, Inc.*, the GAO upheld the usage of "highest technically rated offerors with a fair and reasonable price" as the basis for award in a request for proposals for a multiple-award IDIQ contract.[125] The GAO found that the "best-value continuum," found in FAR 15.101, granted the contracting officer the discretion to award the highest technically-rated offeror.[126] The Court of Federal Claims decided similarly on a protest dealing with the same evaluation scheme a few years prior, finding that "because the Solicitation [called for] Highest Technically Rated Offerors with Fair and Reasonable Pricing," the agency's actions in declining to consider price were proper.[127]

Although the procurements at the heart of this Note focus on the state and local levels, understanding the outer limits of the FAR as it relates to evaluation schemes serves as a useful tool when discussing additional conditions placed on states regarding their proposal evaluations in election-related procurements.

III. ANALYSIS

A. Constitutionality of EAC Action and Authority

Although the individual states and territories of the United States serve in a primary role for the administration and security of elections, the Constitution provides ample room for Congress and administrative agencies such as the EAC to retain involvement in the electoral process.[128] Although theoretical outer bounds exist to the limits of the federal government's authority to act regarding election administration, courts have found that Congress has rarely approached this limit and has always acted within the purview of its constitutional authority.[129]

124. FAR 19.202-1 ("Small business concerns shall be afforded an equitable opportunity to compete for all contracts that they can perform to the extent consistent with the government's interest."); *see* FAR 19.14 (implementing the Service-Disabled Veteran-Owned Small Business Procurement Program); FAR 15.304(c), (d) ("[The] evaluation factors and significant subfactors that apply to an acquisition and their relative importance, are within the broad discretion of agency acquisition officials," provided they are "stated clearly in the solicitation.").

125. Sevatec, Inc., B-413559.3 et al., 2017 WL 106133, at *5–9 (Comp. Gen. Jan. 11, 2017).

126. *Id.*

127. Octo Consulting Group, Inc. v. United States, 117 Fed. Cl. 334, 354, 361 (2014) (finding that "procurement officials have an even greater degree of discretion when it comes to best-value determinations, as compared to deciding on price alone").

128. U.S. Const., art. I, § 4, cl. 1; *see* ACORN v. Edgar, 56 F.3d 791, 794 (7th Cir. 1995) (dismissing Tenth Amendment concerns over federal oversight in election administration, noting that the Constitution's Elections Clause, Art. I, §4, cl. 1, "is broadly worded and has been broadly interpreted"); *see also* Cong. Rsch. Serv., RL30747, Congressional Authority to Direct How States Administer Elections 14–15 (Dec. 4, 2014).

129. *See ACORN*, 56 F.3d at 796 (noting that if Congress "used the power granted in Article I, Section 4 to *destroy state government* . . . it could no longer be [constitutional]") (emphasis added); *see also* U.S. Gov't Accountability Off., GAO-01-470, The Scope of Congressional

With regard to election security specifically, a number of agencies beyond the EAC are legislatively delegated authority over elections, including the Department of Homeland Security's Cybersecurity and Infrastructure Agency and the Department of Justice.[130] These agencies have worked collaboratively with one another, and with state and local governments and officials, to improve and safeguard the democratic process.[131] In 2017, when announcing the classification of election infrastructure as "critical infrastructure," then-Secretary of the Department of Homeland Security Jeh Johnson reiterated the continued role that states and localities play in strengthening election security.[132] This classification prioritized elections under the National Infrastructure Protection Plan and allowed for better communication between federal and state actors regarding cybersecurity.[133] The plan's vision is to achieve a "[n]ation in which physical and cyber critical infrastructure remain secure and resilient, with vulnerabilities reduced, consequences minimized, threats identified and disrupted, and response and recovery hastened."[134] This designation was accompanied by the $350,000,000 appropriation to the EAC by Congress in 2018 for the purposes of improving election security, with specific measures to be determined by the Commission.[135]

1. Leveraging Discretionary Funding

It has long been recognized as a constitutional power of Congress to utilize discretionary funding pursuant to the Spending Clause as a "carrot" to incentivize action or inaction by states and other entities.[136] The Spending

Authority in Election Administration 4 (2001) (citing *Ex Parte* Siebold, 100 U.S. 371, 388 (1879) (holding that Congress may impose penalties for state election law violations)).

130. *See* Shanton, *supra* note 82, at 20–21; Press Release, Department of Justice: Office of Public Affairs, Justice Department Releases Information on Efforts to Protect the Right to Vote, Prosecute Election Fraud and Secure Elections (Oct. 26, 2022), https://www.justice.gov/opa/pr/justice-department-releases-information-efforts-protect-right-vote-prosecute-election-fraud [https://perma.cc/C9TG-UHD5].

131. Election Security, U.S. Dep't of Homeland Sec., https://www.dhs.gov/topics/election-security [https://perma.cc/9ELY-8UGQ] (last visited July 4, 2023); Press Release, *supra* note 130.

132. Press Release, Department of Homeland Security, Statement by Secretary Jeh Johnson on the Designation of Election Infrastructure as a Critical Infrastructure Subsector (Jan. 6, 2017), https://www.dhs.gov/news/2017/01/06/statement-secretary-johnson-designation-election-infrastructure-critical [https://perma.cc/49JX-FM6T]; *see also National Infrastructure Protection Plan and Resources*, Cybersecurity & Infrastructure Sec. Agency, https://www.cisa.gov/national-infrastructure-protection-plan [https://perma.cc/FG2R-CLFM] (last visited July 3, 2023).

133. Statement by Secretary Jeh Johnson, *supra* note 132; *see National Infrastructure Protection Plan and Resources*, *supra* note 132.

134. *National Infrastructure Protection Plan and Resources*, supra note 132.

135. Press Release, Election Assistance Comm'n, U.S. Election Assistance Commission to Administer $380 Million in 2018 HAVA Election Security Funds (Mar. 29, 2018), https://www.eac.gov/news/2018/03/29/us-election-assistance-commission-administer-380-million-2018-hava-election#:~:text=Election%20Security%20Funds-,U.S.%20Election%20Assistance%20Commission%20to%20Administer%20%24380,2018%20HAVA%20Election%20Security%20Funds&text=Silver%20Spring%2C%20Md.,Consolidated%20Appropriations%20Act%20of%202018 [https://perma.cc/M6K6-7Q52].

136. U.S. Const., art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ."); *see also* South Dakota v. Dole, 483 U.S. 203, 213–14 (1987).

Clause and the Supreme Court's accompanying jurisprudence highlight the federal government's ability to place conditions on funding, so long as the conditions are "unambiguously established," directly related to the purpose of the funding, not violative of other constitutional provisions, and do "not cross the line from enticement to impermissible coercion."[137] As explained by Chief Justice Roberts in *NFIB v. Sebelius*, impermissible coercion would mean that states would be left with "no real option but to acquiesce" to the federal government's conditions.[138] However, Roberts did not discount the authority afforded to Congress under the Spending Clause, noting that "Congress may attach appropriate conditions to federal taxing and spending programs to preserve its control over the use of federal funds."[139] In the context of internal agency actions, any conditions imposed on the distribution of federal funding must remain within the bounds of that agency's statutory mandate, and in accordance with congressional intent according to the legislative history.[140]

In the case of elections and future appropriations under HAVA by Congress to the EAC, it is unlikely that additional conditions placed on grants would impose restrictions to the point of impermissible coercion. As with prior appropriations, states must apply to receive the grants and consent to certain actions regarding both the use of the grant money pursuant to the relevant requirements in HAVA as previously discussed.[141] These requirements have evidently not proved untenable, as in both the 2018 and 2020 appropriations, Congress-imposed additional conditions on funding went unchallenged.[142] Such conditions avoid any judicially imposed limitations because they come directly from Congress through a statutory amendment, as opposed to an internal EAC decision, and go to the core of HAVA's purpose.[143]

137. Brian T. Yeh, Cong. Rsch. Serv., R44797, The Federal Government's Authority to Impose Conditions on Grant Funds 2 (2017).

138. *See* Nat'l Fed. Of Indep. Bus. v. Sebelius, 567 U.S. 519, 523 (2012) (holding that the federal government's plan to require states to expand Medicaid eligibility or lose all Medicaid funding was impermissibly coercive).

139. *Id.* at 579.

140. *See* Colorado v. U.S. Dep't of Just., 455 F. Supp. 3d 1034, 1047 (D. Colo. 2020) (holding that it was improper for the Attorney General to impose immigration-related conditions on certain grants when Congress explicitly rejected such conditions in the statute); *see also* New York v. United States, 505 U.S. 144, 167 (1992).

141. *See* U.S. Election Assistance Comm'n, Template for State Requests for Security Funds 1 (2023), https://www.eac.gov/sites/default/files/Grants/FY23_Hava_App_Packet/Template%20-%20FY23%20State%20Request%20and%20Certification.pdf [https://perma.cc/7R69-AQEU].

142. *Grants Management and Oversight*, U.S. Election Assistance Comm'n, https://web.archive.org/web/20230315015937/https://www.eac.gov/payments-and-grants/grants-management-and-oversight [https://perma.cc/KYP9-KVFQ] (last visited July 22, 2023). *But see NASS Resolution on Principles for Federal Assistance in Funding of Elections*, Nat. Ass'n of Secretaries of State (Feb. 4, 2019), https://www.nass.org/node/1557 [https://perma.cc/7GZB-AP8Y] (calling on Congress to "recognize the authority of states in administering elections . . . [and noting that] funding provided under [HAVA] is *not* subject to [EAC] rules, regulations, or requirements . . .").

143. *See Colorado*, 455 F. Supp. 3d at 1054; *see also New York*, 505 U.S. at 167 ("Such conditions must (among other requirements) bear some relationship to the purpose of the federal spending . . . .").

B. State Level Procurements for Voting Equipment Are Inconsistent and Ineffectual

Procurement methods across the country vary, which creates potential issues for prospective vendors, state and local governments, and voters. Given the EAC's statutory mandate under HAVA to oversee the administration of federal elections, in conjunction with Congress's constitutional authority to regulate state election administration, a standardization of these practices can and should be pursued at a federal level.[144]

In Arkansas, the state's RFP and process for their statewide voting system procurement were criticized by both state legislators and competing election technology companies due to transparency issues and the cryptic nature of the Arkansas solicitation's requirements.[145] One competitor's executive noted that "the [solicitation's] requirements . . . seem to be written for a very specific solution, rather than an open competition of modern solutions from multiple providers."[146] The procurement process was thrown further into controversy due to potential conflicts of interest, as the front-running offeror, Election Systems & Software, had retained a consulting firm during the process that employed a recent chief deputy of the Arkansas Secretary of State.[147] In discussing the standards for their procurement, an Arkansas Secretary of State spokesperson noted that "[w]e aren't subject to state procurement requirements as a constitutional office, so most of this process is at our discretion, which is where that authority comes from."[148] Were the Secretary of State bound to procedural requirements under HAVA in exchange for the future disbursement of EAC funding, many of these controversies could have been avoided. By applying standards for a competitive FAR Part 15 negotiated procurement, Arkansas's election procurement could have gone quite differently: requirements would have been far more detailed, and due to the FAR's competition requirements, there would have been additional competition opportunities beyond a process resulting in a sole-source procurement.[149] By going further and applying the additional changes proposed in this Note for evaluation criteria and source selection, the process would have been improved by including a cross-sectional panel of election administrators, voting rights experts, and election security and cybersecurity professionals to make the decision in the best interests of the voters.[150]

144. *Payments and Grants*, *supra* note 91; U.S. Gov't Accountability Off., GAO01-470, Elections: The Scope of Congressional Authority in Election Administration 4–5 (2001) ("The Elections Clause is broadly worded and has been broadly interpreted by the courts.").

145. Michael R. Wickline, *Voting Equipment OK'd for State Bid*, Ark. Democrat (Apr. 30, 2015), https://www.arkansasonline.com/news/2015/apr/30/voting-equipment-ok-d-for-state-bid-201 [https://perma.cc/W7E4-Z39T].

146. *Id.*

147. *Id.*

148. Wickline, *supra* note 145.

149. *See id.*; *see* FAR 15.203(a); *see also* FAR 1.102(b) ("The Federal Acquisition System will . . . satisfy the customer by . . . promoting competition . . . .").

150. *See* FAR 15.203(a); *see also* Ark. Request for Proposal, *supra* note 63, at 13 ("SOS reserves the right . . . to award the bid to best serve the interest of the SOS.").

Beyond the procurement procedures in states directly analyzed in this Note, other states across the country have either recognized internal weaknesses in their procurements of voting equipment or otherwise maintain processes that contribute to nationwide non-uniformity and ineffectuality. In New York, an audit conducted by the state comptroller found a variety of deficiencies in local election boards' procurement of paper ballots, stemming from a lack of "sufficient guidance" on best practices.[151] The comptroller estimated that the use of competitive bidding and better projections of the requirements could have saved approximately $10,000,000 during the audit period.[152] In Pennsylvania, the Philadelphia City Controller conducted a similar investigation into the city's procurement processes and exposed how poorly and corruptly procurements had been conducted.[153] Prospective vendors were continuously engaging with local decisionmakers in the leadup to the procurement, creating significant conflicts of interest, and the procurement itself was found to be deeply flawed;[154] it was found to have been rushed, there was pressure to select a specific vendor, and there was a lack of transparency in the process.[155] Many of these issues could have been avoided were Philadelphia subject to detailed federal procurement guidelines requiring impartiality of contracting officers and source selection authorities, which may form the basis of a protest if any of these duties were breached.[156]

Other states' practices fail to properly value the technical aspects of contractor proposals and even the procurement process in its entirety. In Bay County, Florida, a procurement for election equipment and technology was conducted via sealed bidding, with the award granted to the bidder with the lowest price, preventing the use of any technical evaluation beyond a determination of responsiveness.[157] Connecticut's recent statewide invitation for bids for a voter accessibility-related procurement followed a similar format.[158] A priority was placed on "microbusinesses," mirroring federal small business

151. N.Y. Office of the State Comptroller, Localities' Procurement of Paper Ballots 1 (2013), https://www.osc.state.ny.us/files/state-agencies/audits/pdf/sga-2015-13s36.pdf [https://perma.cc/6N7A-R6ER].

152. *Id.* at 5.

153. Phila. City Controller, Voting Technology Procurement Investigation 1–2 (Sept. 25, 2019), https://controller.phila.gov/wp-content/uploads/2019/09/VOTING-TECHNOLOGY-PROCUREMENT-INVESTIGATION-PUBLIC.pdf [https://perma.cc/BX8T-B86E].

154. *Id.* at 20, 22–24.

155. *Id.* at 22–25.

156. *See* FAR 3.101-1 ("Government business shall be conducted . . . with *complete impartiality and with preferential treatment for none*.") (emphasis added); FAR 1.102-2 ("Government acquisition personnel are [encouraged to communicate] with industr[ial players] . . . so long as those exchanges . . . do not promote an unfair competitive advantage to particular firms."); *see also* FAR 33.103 ("protests to the agency"); FAR 3.11 ("Preventing Personal Conflicts of Interest").

157. Bay County Board of County Commissioners, ITB No. 15-13, 3 (Feb. 26, 2015), https://www.eac.gov/sites/default/files/eac_assets/1/28/Bay%20County%20ITB%20for%20Election%20Equipment%20and%20Software.pdf [https://perma.cc/DR8S-J7VD].

158. Conn. Dep't of Admin. Serv., ITB #12PSX0377 1, 7 (Nov. 16, 2012), https://www.eac.gov/sites/default/files/eac_assets/1/28/Connecticut1%20-%2011.16.12%20-%20Invitation%20to%20Bid%20-%20Maintain%20Voting%20Acessibility%20System.pdf [https://perma.cc/RKG7-YL3C].

priorities, but nonetheless focused almost entirely on cost as the government's evaluation scheme.[159] In each of these instances, the method of contracting chosen had a direct link to the evaluation of technical factors, or lack thereof. Since Florida's "butterfly ballots" in the 2000 presidential election, no competitive procurement has been conducted for the ballot design that some argue swayed the result of the election.[160] Instead, Palm Beach County and the American electorate took a chance on a self-designed and untested ballot design that resulted in thousands of errantly casted votes.[161]

C. New Procurement Guidelines for EAC Appropriations

The next time that Congress authorizes funds for the EAC to distribute to states, there must be additional conditions on this funding requiring a renewed focus on voting rights, election security, and alignment with federal procurement best-practices. To achieve this goal, Congress can simply add an additional subsection under Title III of HAVA, which sets forth requirements for states to meet to be eligible for grant distribution by the EAC. By amending Title III, Congress can standardize election-related procurement practices for states requesting discretionary federal funding, refining an otherwise disjointed process.[162]

Broadly, the amendment to Title III must include a requirement that states and localities utilize competitive negotiated procurements under FAR Part 15, therein pledging use of full and open competition to the maximum extent practicable.[163] Beyond this general mandate, which in and of itself would improve existing state processes, adding specific required evaluation criteria that place value on the enhancement of ballot access and election security would further improve the election process. In addition to utilizing a cross-sectional panel of experts as a source selection authority, these changes would ensure that these values are reflected in every stage of the electoral and procurement processes.

More specifically, all procurements for election infrastructure by states should be conducted per a "highest technically rated offerors with a fair and reasonable price" evaluation scheme. This evaluation process would place a much-needed emphasis on the technical elements of offerors' proposals, while still ensuring that price is not entirely disregarded in the process to avoid grounds for protest.[164]

159. *Id.* at 7; *see also* FAR 19.

160. Wand, *supra* note 9, at 794, 803 ("Was the butterfly ballot pivotal in the 2000 presidential race? The evidence is very strong that it was . . . . Al Gore would have won a majority of the . . . votes in Florida."); *see also* FAR 1.102-2 (The [Federal Procurement] System should . . . encourage innovation and local adaptation where uniformity is not essential.").

161. Wand, *supra* note 9, at 794, n.5, 795 ("Buchanan[, a third party candidate in the 2000 presidential race,] received about 2,800 more votes than were to be expected . . . .").

162. S*ee supra* Part II.B, III.C.

163. *See* FAR 15; *see also* FAR 6.1 (prescribing "the policy and procedures that are to be used to promote and provide for full and open competition").

164. *See* Sevatec, Inc., B-413559.3 et al., 2017 WL 106133, at *6 (Jan. 11, 2017) (holding that the use of a "highest technically rated offeror with a fair and reasonable price" is permissible for negotiated procurements under FAR part 15); *see also* Sumaria Systems, Inc., B-418796, 2020 WL

In addition, the evaluation of each solicitation should include factors related to prospective contractors' approaches to cybersecurity as well as evaluations of the voting access-related consequences of any proposed system. Cybersecurity is particularly crucial, given past and present domestic and global cyber threats to our electoral system.[165] Ensuring that the many moving parts of an election are accounted for in terms of their hardware and software security extends to the procedures used by local and state-level governments to procure this infrastructure.[166] In 2019, the Brennan Center released a cybersecurity guide for the most crucial aspects of the election procurement and administration process; key areas included source code disclosure, regular penetration testing, and foreign nexus disclosure, among others.[167] An example of a solicitation including this sort of evaluation can be found in Colorado's 2013 statewide voting system procurement, where questions asked of all offerors included, "What independent security audits has your proposed system received," and "How does your system prevent unauthorized . . . applications from running?"[168] Another determinative aspect of their procurement was a requirement that "no element of this RFP and resulting contract [including subcontractors] will be completed in whole or part outside of the United States of America."[169] The other mandatory factor to include is an evaluation of any potential changes to voting rights and accessibility as a result of changes to voting technology, the voter registration processes, or ballot design, which all have an impact on the voting rights of Americans.[170]

Finally, during the source selection phase of a procurement, a multidisciplinary panel of experts, including election security and voting rights experts, must be utilized to make the final award recommendation to the contracting officer. Such an evaluation panel, already utilized to an extent in states such as Michigan and Colorado, would ensure that the interests of the disenfranchised

5544560, at *1, *7 (Comp. Gen. Sept. 9, 2020) (extending the doctrine of 'highest technically rated offeror with a fair and reasonable price' to task orders under FAR subpart 16.5); *see also* KPMG LLP, B-420949, 2022 WL 16921986, at *9 (Nov. 7, 2022) ("When conducting a tradeoff, an agency may not so minimize the impact of price as to make it a nominal evaluation factor because the essence of the tradeoff process is an evaluation of price in relation to the perceived benefits of an offeror's proposal.").

165. *See* Nat. Counterintel. & Sec. Ctr., Foreign Threats to U.S. Elections: Election Security Information Needs 2 (2020), https://www.dni.gov/files/ODNI/documents/DNI_NCSC_Elections_Brochure_Final.pdf. [https://perma.cc/B5BL-PFVH].

166. *See* Christopher Deluzio, Brennan Ctr., A Procurement Guide for Better Election Cybersecurity 1–2 (Mar. 22, 2019), https://www.brennancenter.org/our-work/policy-solutions/procurement-guide-better-election-cybersecurity [https://perma.cc/CJ9S-J99W].

167. *Id.* at 2, 7, 9.

168. Colo. Uniform Voting Procurement, *supra* note 45, at 29–30; *see also* Deluzio, *supra* note 166, at 2.

169. Colo. Uniform Voting Procurement, *supra* note 45, at 13.

170. *See Election Administration Project*, Brennan Ctr., https://www.brennancenter.org/issues/ensure-every-american-can-vote/voting-reform/election-administration [https://perma.cc/F5GQ-YN5R] (last visited July 4, 2023).

and the security of our electoral system are directly at the table during the final stages of a procurement.[171]

The cumulative effect of these large- and small-scale changes to state procurements of voting technology will improve the uniformity of state procurement practices and ensure that voters from any given state can maintain a similar sense of assurance that their vote was not simply cast on the cheapest ballot, being processed through the cheapest machine, that the government could buy. A procurement approach focused on awarding to the lowest bidder is not inherently bad, as it is often more streamlined and cost-efficient, often requiring "little subjective analysis."[172] However, this approach fails to value higher levels of quality, therefore failing to reflect the government's goals with regard to election infrastructure.[173]

IV. CONCLUSION

In conclusion, state-level procurement practices for election infrastructure vary significantly between states, and many individual processes do not place any qualitative or quantitative value on the policy objectives of expanding voting rights and improving election security. Given Congress's and the EAC's authority to prescribe election administration-related requirements for discretionary federal funding to states, it would be in the best interests of the American voters to ensure that any future appropriation of funds to the EAC require states to implement certain practices regarding the procurement of election infrastructure. These practices reflect both federal procurement regulations and policy preferences both in the field of government procurement and beyond. By amending Title III of HAVA and adding additional statutory requirements for states to follow, Congress can exert its constitutional authority over the administration of elections and empower the EAC to administer funding to states in a way that improves state and local election administration procedures as well as nationwide efficiency and uniformity in procurement.

171. *See* Colo. Uniform Voting Procurement, *supra* note 45, at 36; Memorandum from Sue Cieceiwa to Sharon Walenga-Maynard, *supra* note 29, at 1.

172. Heidi M. Peters & Alexandra G. Neenan, Cong. Rsch. Serv., IF10968, Defense Primer: Lowest Price Technically Acceptable Contracts 1 (2023).

173. *Id.*

LESSONS FROM ANTIQUITY: WHAT THE UNITED STATES CAN LEARN FROM ANCIENT ROME'S OVERRELIANCE ON GOVERNMENT CONTRACTORS

*Jaden Taylor**

ABSTRACT

The United States has grappled with defining the appropriate limits of government contracting throughout its history. However, this problem is not exclusive to the United States. Nearly two thousand years earlier, the ancient Roman Republic struggled with the same problem. In Rome, the Republic's inability to define the appropriate limits of government contracting burdened Rome's procurement system with inefficiency, conflicts of interest, and unaccountability. To avoid repeating the mistakes of former empires, the United States should make a comprehensive policy decision to define the appropriate limits for government contracting. Using a comparative analysis of current trends in the American defense procurement system and the Roman publicani, *ancient Roman government contractors, this Note argues that the United States is currently following the same trends that contributed to Rome's decline. The United States still has time to redefine the limits of government contracting, but if it does not, history may repeat itself.*

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I. INTRODUCTION

A global power is embattled with the financial stringencies of war. Numerous foreign wars have depleted the state's finances and burdened supply chains. The state is left with a zero-sum choice: capitulate to the demands of a leading government contracting firm or lose its war of attrition. The influence that government contractors have on the outcome of war is a familiar problem.[1] However, the situation described above is not from recent history. In fact, it is not even from this millennium. It is from the ancient Roman Republic in 215 B.C.[2] The unsettling similarities between government contracting issues today and those over 2,000 years ago begs the question: how has government overreliance on contractors remained a constant throughout history?

As with many of Western civilization's foundational principles, the United States' modern system of government procurement traces its roots back to ancient Rome.[3] The Roman *publicani* were ancient Roman government contractors who belonged to the *Equites*—an upper class of Roman citizens.[4] The

1. *See, e.g.*, Deborah D. Avant & Renée de Nevers, *Military Contractors & the American Way of War*, 140 Daedalus 88, 88–89 (2011); *Corporate Power, Profiteering, and the "Camo Economy,"* Brown Univ. (Sept. 2021), https://watson.brown.edu/costsofwar/costs/social/corporate [https://perma.cc/EYD9-CAP3]; *Privatizing War: The Impact of Private Military Companies on the Protection of Civilians*, Ctr. for Civilians in Conflict, https://civiliansinconflict.org/publications/policy/privatizing-war-the-impact-of-private-military-companies-on-the-protection-of-civilians [https://perma.cc/PX96-TBGB] (last visited July 8, 2023).

2. *See* Ernst Badian, Publicans and Sinners: Private Enterprise in the Service of the Roman Republic 16–17 (1972).

3. *See* Dinesh Varadharajan, *The Evolution of Procurement: Where It Was and Where It Is Going*, Spiceworks (July 29, 2020), https://www.spiceworks.com/supplychain/procurement/guest-article/the-evolution-of-procurement-where-it-was-and-where-it-is-going [https://perma.cc/VEU6-GAXP].

4. *Who Were the Publicans?*, Christ.org, https://christ.org/history-rituals/who-were-the-publicans [https://perma.cc/P293-G3Y3] (last visited July 8, 2023). Jona Lendering describes the Equites as "members of the elite of the Roman republic. Under the empire, they were 'second tier', after the senators." Jona Lendering, *Eques*, Livius (Jan. 4, 2020), https://www.livius.org/articles/concept/eques [https://perma.cc/S2EA-2KSV].

publicani fulfilled various economic functions of the state, such as collecting taxes, furnishing the Roman military with supplies, and constructing public buildings by bidding on contracts at auctions.[5] Rome failed to appropriately define the limits of contracting—allowing the *publicani* to perform contracts fundamental to Rome's sovereignty.[6] As the profits of the *publicani* increased, their power and political influence grew, making the state more reliant on them—a trend increasingly seen in the United States' procurement system.[7] The *publicani* were so necessary to the administration of the Roman state that they carried out what would now be considered to be inherently governmental functions, such as tax collection.[8]

Similar to ancient Rome, the United States struggles with defining the proper relationship between contractors and the government. The United States' failure to appropriately define the limits of government contracting has similarly created overreliance on government contractors. The United States' increasing reliance on a dwindling number of large government contractors allows the interests of large government contracting firms to influence defense policy and the disbursement of federal funds.[9] For example, government contracting firms have been among the largest recipients of government assistance, receiving billions of dollars in federal stimulus payments following both the 2008 recession and the COVID-19 pandemic.[10] More recently, as the United States' economy is exhibiting recessionary behaviors, defense contractors have seen surges in their stock prices by up to forty percent due to the dramatic increase in NATO arms sales to Ukraine.[11]

5. *Who Were the Publicans?*, *supra* note 4.

6. The Roman Historian Polybius explains how private contracting pervaded nearly every aspect of the Roman economy. "[C]ontracts, too numerous to count, are given out by the censors in all parts of Italy for the repairs or construction of public buildings; there is also the collection of revenue from many rivers, harbours, gardens, mines, and land—everything, in a word, that comes under the control of the Roman government." For further reading see Polybius, Histories, Book 6.17.

7. *See* Badian, *supra* note 2, at 14; Steven L. Schooner & Daniel S. Greenspahn, *Too Dependent on Contractors?*, 8 J. Cont. Mgmt. 9, 10 (2008); Janet Nguyen, *The U.S. government Is Becoming More Dependent on Contract Workers*, Marketplace (Jan. 17, 2019), https://www.marketplace.org/2019/01/17/rise-federal-contractors [https://perma.cc/2CYQ-S7GV].

8. *See* FAR 7.503(c)(17).

9. *See*, *e.g.*, Dan Auble, *Capitalizing on Conflict: How Defense Contractors and Foreign Nations Lobby for Arms Sales*, Opensecrets (Feb. 25, 2021), https://www.opensecrets.org/news/reports/capitalizing-on-conflict/defense-contractors [https://perma.cc/34PF-UAY5]; Eric Lipton et al., *Military Spending Surges, Creating New Boom for Arms Makers*, N.Y. Times (Dec. 18, 2022), https://www.nytimes.com/2022/12/18/us/politics/defense-contractors-ukraine-russia.html [https://perma.cc/P8QK-QQL4]; Jonathan Alan King, *Defense Contractors Are Using Tax Dollars to Profit Off War in Ukraine*, Truthout (June 7, 2022), https://truthout.org/articles/defense-contractors-are-using-tax-dollars-to-profit-off-war-in-ukraine [https://perma.cc/AB2V-RNFW].

10. *See Government Contractors May Be Biggest Stimulus Winners*, Security Newswire (Feb. 9, 2009), https://www.securitymagazine.com/articles/79702-government-contractors-may-be-biggest-stimulus-winners-1 [https://perma.cc/W3N4-K6C9]; Karl Evers-Hillstrom, *Which Industries Won the Coronavirus Stimulus Lobbying Battle?*, Opensecrets (Mar. 26, 2020), https://www.opensecrets.org/news/2020/03/coronavirus-stimulus-lobbying-battle [https://perma.cc/KR5J-7AHM].

11. *See* Andre Damon, *Defense Contractor Shares Surge as US Doubles NATO Arms Sales*, World Socialist Web Site (Dec. 29, 2002), https://www.wsws.org/en/articles/2022/12/30/glzw-d30.html [https://perma.cc/4EZY-G9S7].

This Note argues that the United States must make a comprehensive policy decision about the limits of government contracting, or the United States risks becoming so reliant on contractors that it will contract out its sovereignty. By identifying historical trends, this Note highlights the potential consequences of not addressing this problem. Using a comparative analysis of the Roman *publicani* and modern trends in the United States' defense procurement, this Note explores aspects of the Roman contracting system that contributed to the weakening of the Roman state that still exist in the United States' procurement system. The United States should define the appropriate legal boundaries of government contracting to avoid following the mistakes of a former empire.

Section II of this Note provides background on the responsibilities of the *publicani* by focusing on their two main categories of contracts—*ultro tributa*, or military supply contracts, and tax farming contracts. This section shows that Rome's inability to clearly define the appropriate limits of contracting allowed the *publicani* to amass extreme amounts of wealth. As the *publicani* became increasingly wealthy and politically influential, their actions introduced inefficiency, corruption, and conflicts of interest into the Roman procurement system.

Section III of this Note explains how the United States struggles to define the appropriate boundaries of government contracting by analyzing inherently governmental functions—functions so fundamental to a state's sovereignty that they must be performed by the government. The United States has struggled with appropriately defining the boundaries of governmental power since its founding.[12] However, the executive and judicial branches still have not adequately limited the roles of government contractors. If the United States cannot define functions that are intrinsically connected to its sovereignty, then the United States does not understand the appropriate relationship between government contractors and the government.

Section IV of this Note explores how the United States' failure to define the legal boundaries of contracting has led to an overreliance on government contractors. Section V explores similarities between the United States' relationship with government contractors and ancient Rome's relationship with the *publicani*. Overreliance on government contractors has burdened both systems with inefficiency and conflicts of interest, and has restricted the government's ability to hold government contractors accountable for misbehavior. Section VI explains that, given these similarities, the United States must reexamine the appropriate limits of government contracting, or its procurement system will continue to follow trends that led to Rome's decline.

12. *See* U.S. Gov't. Accountability Off., GAO/GGD-92-11, Government Contractors: Are Service Contractors Performing Inherently Governmental Functions? 2 (1991) [hereinafter GAO/GGD-92-11].

II. THE *PUBLICANI*

The *publicani* were ancient Roman government contractors.[13] *Publicani*, derived from the Latin word *publicum*, means "all that belongs to the state."[14] The *publicani* performed a variety of contracts integral to the Roman state, such as constructing public buildings, supplying the Roman military, and collecting taxes from the Roman provinces.[15] As the *publicani* became increasingly wealthy, they began to exert direct influence over the Roman Senate, which introduced inefficiency and corruption into the Roman procurement system.[16] The following two subsections analyze two categories of contracts performed by the *publicani—ultro tributa*, or military supply contracts, and tax farming contracts. These subsections highlight the harmful consequences ancient Rome faced by becoming too dependent on private contractors.

A. Ultro Tributa

The *publicani* performed a variety of contracts for the Roman state, but began to amass increasing amounts of wealth as Rome's continued expansion demanded more supplies for the Roman military.[17] The earliest evidence of the *publicani* performing contracts for the Roman state was the construction of temples in 493 B.C.[18] As Rome evolved from its agrarian roots to a global empire, the *publicani* began performing contracts for the increasingly prominent Roman military.[19] As far back as 390 B.C., the *publicani* bid on contracts for feeding the sacred geese of the capital.[20] The sacred geese of the capitol were an important military symbol because they were said to have raised the alarm when the Gauls invaded Rome in 390 B.C.[21]

The military supply contracts awarded to the *publicani* mirror those awarded to defense contractors in the modern American defense procurement system. Contractors like Boeing, Lockheed Martin, and Raytheon regularly receive billion-dollar contracts to supply the United States military.[22] In Rome, these

13. *Publican*, Britannica, https://www.britannica.com/topic/publican [https://perma.cc/CEG4-CZAF] (lasted visited July 8, 2023).

14. Lucia Carbone, *How Bad Were the Publicans?*, Am. Numismatic Soc'y 7, 8 (2020).

15. *Publican*, *supra* note 13.

16. Badian, *supra* note 2, at 14; Paul Jarvis, *The Politics of Fraud: A Seruilius Casca in Livy*, Univ. of Tasmania, at 3 (2010).

17. *See* Badian, *supra* note 2, at 24–25.

18. *See* Ulrike Malmendier, *Publicani*, Encyclopedia of Ancient Hist., Oct. 26, 2012, at 1.

19. Malmendier, *supra* note 18, at 1. By this point in history, it is hard to overstate the importance of the Roman military as a tool to manage Roman society. To quote Edward Gibbon's eternal work *The Decline and Fall of the Roman Empire*, "The terror of the Roman arms added weight and dignity to the moderation of the emperors. They preserved peace by a constant preparation for war." *See* 1 Edward Gibbon, The Decline and Fall of the Roman Empire 12 (1737–1794).

20. Badian, *supra* note 2, at 16.

21. *Id.*

22. *See* Samuel Stebbins & Michael B. Sauter, *These 30 Companies, Including Boeing, Get the Most Money from the Federal Government*, USA Today (Mar. 27, 2019), https://www.usatoday.com/story/money/business/2019/03/27/lockheed-martin-boeing-get-most-money-federal-government/39232293 [https://perma.cc/4SG6-XNBX]. In 2023, the Department of Defense is projected to spend $19.6 billion on construction, $32 billion on aircrafts, and $20.6 billion on ships

contracts were called *ultro tributa*.[23] A military supply contract was a simple transaction where the state would pay the *publicani* upfront, and they would deliver supplies such as grain or weaponry to the Roman legions—a unit of the Roman military.[24]

As the Roman military demanded more supplies to support its war efforts, the *publicani* used *ultro tributa* to secure personal benefits.[25] The earliest surviving account of a military supply contract is from 215 B.C., during the Second Punic War.[26] With Hannibal's Italian campaign raging across the country and depleting Rome's finances, the Senate arranged for nineteen *publicani* to provide much needed military supplies on credit.[27] For their services, the *publicani* demanded exemption from military service and insurance on the ships on which they would deliver the supplies.[28] Given the government's financial hardships, the *Praetor*[29] was forced to accept these terms.[30] It is difficult to overstate the significance of this concession. Exemption from military service was traditionally reserved for Senators and Priests—members of the highest echelons of the Roman social hierarchy.[31] In performance of the contract, two of the *publicani*, Marcus Postumius and Titus Pomponius, committed insurance fraud by putting supplies on ships bound to sink and by making up "imaginary shipwrecks" altogether.[32] Even after their fraud was discovered, the Senate was reluctant to prosecute the *publicani* because they did not want to offend the suppliers on whom their war effort depended.[33]

Rome's overreliance on the *publicani* allowed private contractors to exploit the Roman state at a time of crisis. The extent of this overreliance was a function of Rome's failure to understand the appropriate limits of contracting—a dangerous trend that mirrors current developments in the United States' procurement system. By failing to limit the responsibilities of government contractors, Rome fostered a system of dependence that restricted its ability to adequately hold the *publicani* accountable. When a government cannot

and submarines. *See 2022–2023 Defense Budget Breakdown*, Bloomberg Gov't, https://about.bgov.com/defense-budget-breakdown [https://perma.cc/W4JU-SGZT] (last visited July 8, 2023).

23. Badian, *supra* note 2, at 24.

24. *See* Kyle McLeister, Publicani in the Principate 4 (Aug. 2016) (Ph.D. thesis, McMaster University) (on file at http://hdl.handle.net/11375/20273) [https://perma.cc/8NFG-K4R8].

25. Badian, *supra* note 2, at 17.

26. *Id.* at 16.

27. Jarvis, *supra* note 16, at 3.

28. *Id.*

29. A Praetor was just below the consul in Rome's social hierarchy and performed various administrative, judicial, and military tasks for the Roman state. *Praetor*, Merriam-Webster Dictionary Online, https://www.merriam-webster.com/dictionary/praetor [https://perma.cc/9MVC-76XB] (lasted visited July 22, 2023).

30. Badian, *supra* note 2, at 17.

31. Malmendier, *supra* note 18, at 1.

32. Jarvis, *supra* note 16, at 3.

33. After a mob of contractors prevented two Tribunes from holding the *publicani* accountable for their actions in the public assembly, the Senate eventually punished all wrongdoers. Badian, *supra* note 2, at 18.

appropriately hold contractors accountable, instances of fraud and inefficiency subvert the sovereignty and internal capacity of the state.

Ernst Badian, author of one of the authoritative works on the *publicani*, argues that the fraud from the Second Punic War in 215 B.C. was an exceptional occurrence given the lack of other recorded instances of military supply contracts being mishandled.[34] While this may be true, the perceived frequency of fraud is not as important as the fact that the Roman state fostered a system of dependence on the *publicani*. A procurement system that fails to adequately prevent private contractors from performing sovereign powers exposes the state to exploitation. While necessary to sustain Rome's obsession with warfare, this system allowed contractors to indirectly control the Roman state—a proposition Badian himself agrees with.[35]

As Rome became involved in military conflicts on several frontiers, the task of supplying the Roman military became a Herculean enterprise vital to the Empire's continued expansion.[36] The importance of sustaining Rome's military elevated the *publicani* to a newfound position of wealth and influence.[37] This is similar to the American experience—as the United States has expanded its influence across the globe, its military spending has skyrocketed.[38] In fiscal year (FY) 2022, the United States government awarded $136 billion to defense contractors for the procurement of weapons systems.[39] This massive amount of money has allowed defense contracting firms to exert influence over the United States government through lobbying and campaign contributions.[40] In 2020 alone, the five biggest defense contractors spent a combined $60 million to influence United States policy through their lobbying efforts.[41]

Although the United States' reluctance to prosecute government contracting firms has not reached Rome's leniency towards the *publicani*, there are similarities. From 1983 to 1990, twenty-five of the top one hundred largest defense contractors were found guilty of fraud, yet none of them was banned from government contracting.[42] It is difficult for the United States to debar

34. *Id.* at 16.
35. *Id.* at 14.
36. McLeister, *supra* note 24, at 50–52.
37. Badian, *supra* note 2, at 22.
38. *U.S. Military Spending/Defense Budget 1960–2023*, Macrotrends, https://www.macrotrends.net/countries/USA/united-states/military-spending-defense-budget[https://perma.cc/EC7R-B5NF] (lasted visited July 22, 2023).
39. *Budget Basics National Defense*, Peter G. Peterson Found. (Apr. 28, 2023), https://www.pgpf.org/budget-basics/budget-explainer-national-defense#:~:text=Procurement%20of%20weapons%20and%20systems,development%20of%20weapons%20and%20equipment [https://perma.cc/ZM84-876Y].
40. Stephen Losey, *This Is How the Biggest Arms Manufacturers Steer Millions to Influence US Policy*, Military.com (Mar. 7, 2021), https://www.military.com/daily-news/2021/03/07/how-biggest-arms-manufacturers-steer-millions-influence-us-policy.html [https://perma.cc/2LCF-LUWH].
41. *Id.*
42. *See* Richard Stevenson, *Many Are Caught but Few Suffer for U.S. Military Contract Fraud*, N.Y. Times (Nov. 12, 1990), https://www.nytimes.com/1990/11/12/us/many-are-caught-but-few-suffer-for-us-military-contract-fraud.html [https://perma.cc/5C8V-PSQ4].

these large contracting firms because they employ thousands of Americans and their weapons systems are integral to the United States' national defense.[43] In addition, the consolidation of large defense contracting firms has made it even more difficult for the United States to adequately deter contractor misconduct.[44] Consolidation among defense contractors can prevent adequate deterrence because the enormous scale and set-up costs for certain federal projects restricts the field of contractors available to effectively perform large contracts.[45] For example, BAE Systems paid $400 million dollars in criminal fines after admitting to making false statements regarding its compliance with the Foreign Corrupt Practices Act (FCPA).[46] However, due to BAE's "indispensable partnership with American agencies as the fifth largest provider of defense materials to the United States Government" the company received at least 13,000 contracts totaling $6 billion a year after admitting to FCPA violations.[47]

B. Tax Farming Contracts

In addition to military supply contracts, the *publicani* also received numerous tax farming contracts from the Roman state. Tax farming is a system where the state auctions the right to collect taxes to private parties.[48] Tax farming contracts quickly became the most important contracts performed by the *publicani* as successive Roman conquests expanded its territorial boundaries and eligible tax base.[49] The privatization of tax collection first started in the second century B.C., when Gaius Gracchus auctioned the right to collect taxes from Asia.[50] The *publicani* bid at auctions offered by censors, Roman magistrates tasked with tendering projects financed by the state,[51] for the right to collect taxes for performance periods of five years.[52] The *publicani* were required to pay a portion of the contract price up front and internalize the risk of the contract.[53] Therefore, their profits were the amount of taxes that they collected

43. *Id.*

44. C. Todd Lopez, *DoD Report: Consolidation of Defense Industrial Base Poses Risks to National Security*, U.S. Dep't of Def. (Feb. 16, 2022), https://www.defense.gov/News/News-Stories/Article/Article/2937898/dod-report-consolidation-of-defense-industrial-base-poses-risks-to-national-sec [https://perma.cc/7JE9-N525]; Ron Nixon, *Size Protects Government Contractors That Stray*, N.Y. Times (Dec. 17, 2010), https://www.nytimes.com/2010/12/18/us/politics/18contractor.html [https://perma.cc/4XMZ-AKWQ].

45. Drury D. Stevenson & Nicholas J Wagoner, *FCPA Sanctions: Too Big to Debar*, 80 Fordham L. Rev. 775, 810 (2011).

46. *Id.* at 800.

47. *Id.* at 801.

48. Peter Stella, *Tax Farming: A Radical Solution for Developing Country Tax Problems?*, 40 Staff Papers (Int'l Monetary Fund) 217, 217 (1993).

49. McLeister, *supra* note 24, at 13.

50. *See* Gwyneth McGregor, *Taxation in the Ancient World Part II*, 4 Can. Tax J. 336, 336 (1956); McLeister, *supra* note 24, at 76.

51. *Censor*, Livius (Sept. 15, 2020), https://www.livius.org/articles/concept/censor [https://perma.cc/W59E-EB59].

52. Badian, *supra* note 2, at 63.

53. *Roman Taxes*, United Nations of Roma Victrix, https://www.unrv.com/economy/roman-taxes.php [https://perma.cc/CTA4-S9ZK] (last visited July 9, 2023).

in excess of the price of the contract.[54] Since the *publicani* had to finance part of these massive contracts at the outset, they formed *societas publicanorum*—an early form of a corporation.[55] This allowed them to aggregate their individual assets and make successful bids.[56] Tax-farming contracts were extremely profitable and elevated the *publicani* to a position of extreme wealth.[57] The increasing wealth of the *publicani* allowed them to yield unmeasured power over their respective tax base and the Roman state as a whole.[58]

Although the *publicani* served an important function by alleviating the administrative burden associated with collecting taxes, the incentives created by tax-farming contracts made these contracts vulnerable to exploitation.[59] Since the profits of the *publicani* were determined by the amount of taxes they collected above the amount they paid for the contract, the *publicani* were incentivized to extract as much money from the taxpayers as possible.[60] While in a different context, this arrangement is similar to the incentives offered to modern contractors through "cost-plus" contracts.[61] In these contracts, contractors are reimbursed for the costs of the work that they perform, regardless of efficiency, which can promote wasteful spending.[62] A former Halliburton employee claimed that when the company supplied the United States with weapons during the Iraq war, it made "no effort to find low-price vendors because of its cost-plus arrangement with the federal government."[63]

Eventually, the *publicani* resorted to violence to extract more taxes than were legally required to be paid by residents of the Roman provinces.[64] This abusive dynamic prompted the Roman historian Titus Livius (Livy) to state that "where there was a contractor, there either the ownership by the state lapsed, or no freedom was left to the allied people."[65] The most egregious example of abuse arises from a story about Nicomedes III of Bithynia. When the Senate called on him to contribute forces to Rome's war effort against

54. *Id.*

55. *See* Stoyan Ivanov, Companies of Publicans 18–27 (2021) (Ph.D thesis, Sofia University); Adam Melita, *Much Ado About $26 Million: Implications of Privatizing the Collection of Delinquent Federal Taxes*, 16 Va. Tax Rev. 699, 701–02 (1997). Building contracts, *ultro triubta*, and tax farming contracts were extremely large financial investments. For example, "[t]he contract for building the Marcian aqueduct, as early as the middle of the second century, was of about the same value as the total fortune of the man who claimed to be Rome's leading millionaire a century later!" Badian, *supra* note 2, at 68.

56. *See* Melita, *supra* note 55, at 701–02.

57. *Roman Taxes*, *supra* note 53.

58. Badian, *supra* note 2, at 14.

59. McLeister, *supra* note 24, at 246.

60. *Id*.

61. *See* I'Ashea Myles-Dihigo, *Cost-Plus Contract Agreement and the Disorganized Contractor*, Am. Bar Ass'n (Apr. 1, 2018), https://www.americanbar.org/groups/construction_industry/publications/under_construction/2018/spring/cost-plus-contract-agreement [https://perma.cc/ESR8-MBGK].

62. *Id.*

63. Jocelyn M. Johnston et al., *The Challenges of Contracting and Accountability Across the Federal System: From Ambulances to Space Shuttles*, 34 Publius 155, 158 (2004).

64. McLeister, *supra* note 24, at 234–35.

65. Titus Livius, The History of Rome, Book 45 ch. 18, (Alfred C. Schlesinger trans.).

the Germans in 104 B.C., he responded that "he had not enough manpower left: most of his subjects had been sold off into slavery by the *publicani*!"[66] The exploits of the *publicani* were not limited to the common provincial taxpayer. Once the Senatorial elite noticed the exorbitant profits tax-farming produced, they sought to profit from the efforts of the *publicani* by becoming shareholders in the various *societas publicanorum*.[67] Cicero, Roman senator and later consul, admitted in a letter that he "indulg[ed], compliment[ed], and honour[ed]" the *publicani* to benefit from their increasing wealth.[68] As the interests of the Senate and the *publicani* further aligned, appeasement turned into outright control. Cicero once complained:

> If we oppose them, we shall alienate from ourselves and from the Republic an order which has done us most excellent service, and which has been brought into sympathy with the Republic by our means; if, on the other hand, we comply with them in every case, we shall allow the complete ruin of those whose interests, to say nothing of their preservation, we are bound to consult.[69]

The Roman Senate's alignment of interests with the *publicani* is like a conflict of interest that the United States' numerous conflict-of-interest laws are designed to prevent.[70] These laws prohibit public officials from benefiting from their official acts.[71] However, defense contractors spend massive amounts of money on lobbying and campaign contributions to influence politicians.[72] The alignment of interests between defense contractors and modern-day politicians has created multiple ethical concerns that mirror the actions of Roman senators and the *publicani*. A 2021 report found that over fifteen politicians seated on committees that control U.S. military policy have financial interests in defense contracting corporations that amount to nearly $1 million.[73] Last year, the House Armed Services Committee approved a bipartisan amendment to the National Defense Authorization Act (NDAA), which allocated more than $30 billion to the defense budget.[74] Several committee members

66. Badian, *supra* note 2, at 87.

67. *Id.* at 111.

68. Letter from M. Tullius Cicero to Atticus (Evelyn S. Shuckburgh trans.) (on file with Tufts University), http://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0022%3Atext%3DA%3Abook%3D6%3Aletter%3D1) [https://perma.cc/CJB9-KLD4].

69. Letter from M. Tullius Cicero to Quintus (Evelyn S. Shuckburgh trans.) (on file with Tufts University), https://www.perseus.tufts.edu/hopper/text?doc=Perseus%3Atext%3A1999.02.0022%3Atext%3DQ+FR%3Abook%3D1%3Aletter%3D1) [https://perma.cc/9GNM-G5LG].

70. *See* 18 U.S.C. § 208.

71. *See*, *e.g.*, 18 U.S.C. §§ 201–209.

72. Losey, *supra* note 40.

73. Warren Rojas et al., *At Least 15 Lawmakers Who Shape US Defense Policy Have Investments in Military Contractors*, Bus. Insider (Dec. 13, 2021), https://www.businessinsider.com/congress-members-are-trading-defense-stocks-while-shaping-military-policy-2021-12 [https://perma.cc/4JXV-ERCF].

74. Dylan Hedtler-Gaudette & Nathan Siegel, *Representatives Are Too Invested in Defense Contractors*, Project on Gov't Oversight (Aug. 4, 2022), https://www.pogo.org/analysis/2022/08/representatives-are-too-invested-in-defense-contractors [https://perma.cc/W9T7-VT2Q].

who voted in favor of the amendment had financial ties to companies in the defense industry.[75]

During Rome's transition from Republic to Principate, it became increasingly clear that the abuse and corruption produced by tax-farming contracts had reached an unsustainable level.[76] Rome's first emperor, Caesar Augustus, put an end to the practice of tax farming by transitioning to a system of direct taxation consisting of fixed property taxes and poll taxes.[77] Although it was impossible to ensure that every person's income was taxed under this system, additional income was now reinvested in local communities instead of being extorted by the *publicani*.[78] Even with a decrease in the tax base, this system rid the empire of the inefficient exploitation of the *publicani* and ushered in a period of economic development.[79]

III. THE UNITED STATES' INABILITY TO UNDERSTAND THE APPROPRIATE RELATIONSHIP BETWEEN THE GOVERNMENT AND CONTRACTORS

Although over two thousand years have passed since the *publicani* facilitated Rome's dependency on government contracting, the United States faces the same problem. In the *Federalist Papers*, the Framers of the Constitution debated which functions should be performed by the federal government.[80] More than 200 years later, these debates continue.[81] The exact reasons for why the United States has struggled with defining the legal boundaries of contractors is beyond the scope of this Note.[82] However, by blurring distinctions between contractors and government actors, the United States has created a procurement system that has failed to prevent contractors from encroaching on its sovereignty—similar to Rome's experience with the *publicani*. The extent of this misunderstanding is best exemplified by an analysis of the United States' issues with defining inherently governmental functions. If a sovereign cannot define functions that only it should perform, then it does not understand the appropriate boundaries of government contracting.

The changing definitions of inherently governmental functions demonstrates the United States' difficulties with articulating the proper limits of government contracting. When clear limits regarding what can and cannot be contracted out are not defined, contractors can increasingly perform functions

75. *Id.*

76. There were increasing complaints from provincials "for excessive assessments and large, unpayable debts." *Roman Taxes*, *supra* note 53.

77. *See* Frank S. Alexander, *Tax Liens, Tax Sales, and Due Process*, 75 Ind. L. J. 748, 758 (2000).

78. *Roman Taxes*, *supra* note 53.

79. *Id.*

80. *See* GAO/GGD-92-11, *supra* note 12, at 2.

81. *See*, *e.g.*, Anthony LaPlaca, *Settling the Inherently Governmental Functions Debate Once and For All: The Need for Comprehensive Legislation of Private Security Contractors in Afghanistan*, 41 Pub. Cont. L.J. 745 (2012).

82. For one possible explanation, see Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model*, 40 Pub. Cont. L.J. 63, 63 (2010) (analyzing the complexities of procurement through the principal-agent model).

that should be reserved for the state. As was the Roman experience with the *publicani*, an absence of clear limits can foster a system of dependency which can produce inefficiency and corruption.

Subsection A provides a brief overview of the origins of the United States grappling with the benefits and drawbacks of government contracting. Subsection B examines the changing definition of inherently governmental functions to show how the Executive has, and continues, to struggle with adequately defining functions prohibited from being contracted out. Subsection C shows how the Executive's inability to define the appropriate boundaries of government contracting has bled into the judicial sphere and further complicated attempts at resolving the problem.

The Federal Acquisition Regulation (FAR) 7.503(a) restricts the government from contracting out the performance of inherently governmental functions.[83] An inherently governmental function is a function so intrinsically linked to the public welfare that it must be performed by the government.[84] The policy rationale for deeming certain functions inherently governmental is simple: contractors are profit-driven corporations that seek to maximize their margins, and, for certain functions, the government's interest in safeguarding public welfare is more important than striving for efficiency.[85] Although these aims are not always mutually exclusive, certain fundamental functions must exclude private sector involvement to guard against abuse and delegations of sovereignty. FAR 7.503(c) provides a non-exhaustive list of twenty functions that the United States government believes that only it can perform to protect the United States populace, such as collecting taxes and commanding military forces.[86]

A. The Origins of Overreliance

Although debates over the proper limits of government authority have existed since the United States' founding, the problem of excluding private sector involvement in fundamental acts of governance was first recognized by the Supreme Court in the 1930s.[87] In *A.L.A. Schechter Poultry Corp. v. United States*, the Supreme Court struck down legislation for being unconstitutional because it would have ultimately allowed private organizations to legislate rules for their respective industries.[88] These rules would be binding and allow private organizations to legislate in place of the government—a function that is inherently governmental.[89] Similarly, in *Carter v. Carter Coal Co.*, the Supreme

83. FAR 7.503(a).
84. FAR 2.101.
85. *Inherently Governmental Functions*, Def. Acquisition Univ., https://www.dau.edu/acquipedia/pages/ArticleContent.aspx?itemid=298 [https://perma.cc/5Y4B-T752] (last visited July 23, 2023).
86. FAR 7.503(c).
87. *See* Thomas J. Laubacher, *Mission Simplifying Inherently Governmental Functions*, 46 Pub. Cont. L.J. 791, 799 (2017).
88. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 537 (1935).
89. *Id.*

Court held legislation unconstitutional because it would have allowed the maximum working hours to be determined by private actors instead of Congress.[90] While *A.L.A. Schechter* and *Carter Coal* are normally cited for their labor law implications, broadly speaking, they dealt with the issue of contracting out inherently governmental functions.

A few years after the Court began to grapple with the issue of impermissible outsourcing of government functions to the private sector, the United States shifted its procurement system to rely more heavily on government contractors. During World War II, the government mobilized the private sector to assist in its war effort after realizing "[p]rivate industry was more agile, often had better resources, and could assume more risks than the federal government."[91] This sentiment allowed government contracts to become a "permanent fixture in post war America."[92] Eventually, this growing sentiment was formalized into policy in 1966 with the issuance of the Office of Management and Budget's (OMB) Circular A-76.[93] OMB Circular A-76 defines inherently governmental functions and outlines a process to determine when it is appropriate for the federal government to contract with private companies for the performance of federal government functions.[94]

B. The Executive Branch's Inability to Define Inherently Governmental Functions

Circular A-76 has gone through many revisions. Regardless of version, the Executive Branch has been unable to adequately define "inherently governmental functions." The current form of Circular A-76 provides that, "whenever possible, and to achieve greater efficiency and productivity, the federal government should conduct competitions between public agencies and the private sector to determine who should perform the work."[95] In its original 1966 form, the OMB Circular A-76 was a policy directive stating that the government would contract out "commercial activities" to private-sector companies.[96] Unlike an inherently governmental function, a commercial activity is open to competition and "provides a product or service that could be obtained from a commercial source."[97]

90. *See* Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

91. Laubacher, *supra* note 87, at 797. After the benefits of government contracting were highlighted during the war, President Eisenhower advocated for a system that relied more on contractors to procure goods and services instead of further expanding the government's ability to perform these services in-house. *See* Evan Sills, *Mission "Critical Function": Improving Outsourcing Decisions Within the Intelligence Community*, 41 Pub. Cont. L.J. 1007, 1010–11 (2012).

92. Daniel Guttman, *Public Purpose and Private Service: The Twentieth Century Culture of Contracting Out and the Evolving Law of Diffused Sovereignty*, 52 Admin. L. Rev. 859, 864 (2000).

93. Valerie Ann Bailey Grasso, Cong. Rsch. Serv., R40854, Circular A-76 and the Moratorium on DoD Competitions: Background and Issues for Congress 1 (2013).

94. *Id.*

95. Grasso, *supra* note 93, at 1.

96. *Id.*

97. Office of Mgmt. & Budget, Exec. Off. of the President, OMB Circular A-76, Performance of Commercial Activities § 6 (1999) [hereinafter OMB Circular A-76].

Circular A-76's definition of an "inherently governmental function" was revised numerous times over the years, starting in 1979. The 1979 version of Circular A-76 changed the focus from commercial activities to inherently governmental functions, which were defined as functions that must be performed by the government "due to a special relationship in executing governmental responsibilities."[98] A subsequent revision in 1983 of Circular A-76 defined an "inherently governmental function" as "a function which is so intimately related to the public interest" that its performance should be exclusively undertaken by the government.[99] Additionally, these functions "include those activities which require either the exercise of discretion in applying Government authority or the use of value judgment in making decisions for the Government."[100] Although this revision represented only a minor alteration in language, it shifted the focus from exercising actions for the government to actions affecting the public.[101] Even after the 1983 revision, agency heads and contractors complained that the program was difficult to implement because of the confusion surrounding the ambiguous definition of a "governmental function."[102]

Over the next twenty years, the OMB revisited the concept of "inherently governmental functions" three times in a separate 1992 policy letter and their revisions of Circular A-76 in 1999 and 2003.[103] The 1992 policy letter was in response to agencies' long-held confusion about the ambiguous definition of an inherently governmental function.[104] It sought to avoid the "unacceptable transfer of official responsibility to Government contractors."[105] The 1992 policy letter defined "inherently governmental functions" largely the same as the 1983 version of Circular A-76, but added that inherently governmental functions require exercising *substantial* discretion of governmental authority.[106] Although this revision only added one word, the category of functions that require exercising *substantial* governmental authority is arguably much narrower than functions that require the exercise of governmental authority. The 1992 policy letter also established a totality of circumstances test to determine if a function was inherently governmental.[107]

98. Acquiring of Commerical or Industrial Products and Services Needed by the Government, 44 Fed. Reg. 20,556, 20,558 (Apr. 5, 1979).

99. Issuance of OMB Circular No. A-76 (Revised) "Performance of Commercial Activities," 48 Fed. Reg. 37,114 (Aug. 16, 1983).

100. *Id.*

101. Laubacher, *supra* note 87, at 802.

102. Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. 45,096, 45,096 (Sept. 30, 1992).

103. Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. at 45,096; OMB Circular A-76, *supra* note 97; Office Of Mgmt. & Budget, Exec. Office of the President, Revised Circular No. A-76, Performance of Commercial Activities (2003) [hereinafter Revised Circular No. A-76].

104. Laubacher, *supra* note 87, at 803.

105. Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. at 45,100.

106. *See* Laubacher, *supra* note 87 at 805; Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. at 45,101.

107. Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. at 45,101.

Under the 1999 revision, *substantial* discretion in applying government authority returned to simply discretion in applying government authority for the definition of an "inherently governmental function."[108] The 2003 revision of Circular A-76 maintained a similar definition of "inherently governmental functions" as previous revisions but removed any reference to value judgements and reverted to *substantial* discretion.[109] In less than forty years, the basis for determining if something was an inherently governmental function changed from if it was a commercial activity; to if there was a special relationship in exercising governmental functions; to if it were intimately related to the public interest; to if the function required substantial discretion in applying government authority under the totality of circumstances; to if the function required discretion in applying government authority or the use of value judgements; to if the function was intimately related to public interest and required the exercise of substantial discretion but not value judgments.[110]

Even after all of these changes, ambiguity remained. In a 2009 memorandum, President Obama called for a reexamination of the definition of "inherently governmental functions" to get rid of its long-standing ambiguities:

> The line between inherently governmental activities that should not be outsourced and commercial activities that may be subject to private sector competition has been blurred and inadequately defined. As a result, contractors may be performing inherently governmental functions. Agencies and departments must operate under clear rules prescribing when outsourcing is and is not appropriate.[111]

The 2009 memorandum set out to clarify when outsourcing was permissible because "[e]xcessive reliance" on contractors "creates a risk that taxpayer funds will be spent on contracts that are wasteful, inefficient, subject to misuse, or otherwise not well designed to serve the needs of the Federal Government or the interests of the American taxpayer."[112] In 2011, almost twenty years after issuing its first policy letter, OMB issued another policy letter addressing President Obama's memorandum.[113] It stated that inherently governmental functions are so "intimately related to the public interest as to mandate performance by Federal employees."[114] The culmination of nearly fifty years of policy revisions reverted the definition of an "inherently

108. OMB Circular A-76, *supra* note 97.

109. Revised Circular No. A-76, *supra* note 103.

110. *See*, *e.g.*, Grasso, *supra* note 93, at 1; Acquiring of Commerical or Industrial Products and Services Needed by the Government, 44 Fed. Reg. at 20,558; Issuance of OMB Circular No. A-76 (Revised) "Performance of Commercial Activities," 48 Fed. Reg. at 37,114; Policy Letter on Inherently Governmental Functions, 57 Fed. Reg. at 45,101; OMB Circular A-76, *supra* note 97; Revised Circular No. A-76, *supra* note 103.

111. Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 9,755, 9,755–56 (Mar. 4, 2009).

112. *Id.*

113. Publication of the Office of Federal Procurement (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56,227, 56,227 (Sept. 12, 2011).

114. *Id.*

governmental function" to the ambiguous definition outlined in the 1983 version of Circular A-76.[115]

C. Statutory Definitions and Executive Misguidance over Inherently Governmental Functions

Since 1966, the definition of "inherently governmental functions" has changed, expanded, contracted, and reverted.[116] After several revisions of Circular A-76 and multiple policy directives, the United States government is still left with an ambiguous definition of "inherently governmental functions."[117] If the government cannot determine which functions are so fundamental to its existence that it must perform them, then it does not have a grasp on the appropriate roles of contractors. Misunderstanding the purpose of inherently governmental functions leads to confusion over what contracts can be given to contractors and what contracts must be performed in-house. This confusion has bled into the judicial branch which has made resolution of inherently governmental function issues inconsistent and unnecessarily complicated.

After grappling with this problem for nearly a century, courts still struggle to determine what constitutes an inherently governmental function. This issue persists, in part, because the courts do not have a common law definition of "inherently governmental functions."[118] Therefore, courts are forced to adopt the definition from the source of the authority that is the subject of the litigation.[119] While the government has since adopted similar definitions of "inherently governmental functions" in the FAR and OMB Circular A-76, there are still noticeable differences that can receive incongruous judicial treatment.[120] The FAR discusses functions that "approach being" inherently governmental functions.[121] However, OMB's latest policy letter refers to this type of function as a function that is "closely associated with the performance of inherently governmental functions."[122] Although these definitions are attempting to address the same issue, it is arguable that the class of functions that are approaching "inherently governmental" is smaller than the class of functions associated with the performance of inherently governmental functions.[123] The Congressional Research Service explained the implications of this difference in a report issued after the Obama administration's policy letter:

> [S]erving as an interpreter during an interrogation of an enemy prisoner of war could potentially constitute a function approaching inherently governmental. It

115. Laubacher, *supra* note 87, at 810.
116. *See supra* Part III.B.
117. *Id.*
118. Kate M. Manuel, Cong. Rsch. Serv., R42325, Definitions of "Inherently Governmental Function" in Federal Procurement Law and Guidance 19 (Dec. 23, 2014).
119. *Id.*
120. *Id.* at 20.
121. L. Elaine Halchin et al., Cong. Rsch. Serv., R41209, Inherently Governmental Functions and Other Work Reserved for Performance by Federal Government Employees: The Obama Administration's Proposed Policy Letter 11 (Oct. 1, 2010).
122. *Id.*
123. *Id.*

> is less clear that transcribing a recording of that interrogation approaches being inherently governmental. However, transcription could potentially be a function closely associated with the performance of an inherently governmental function.[124]

Furthermore, if a federal court determines that a function is "inherently governmental" on constitutional grounds, this "would not necessarily preclude the executive branch from contracting out this function under the FAIR Act, OMB Circular A-76, the FAR, or OFPP Policy Letter 11-01."[125] In summation, the federal judiciary struggles with deciding whether a function is inherently governmental or is able to be contracted out, similar to the executive branch. This lack of understanding has produced a persistent sense of confusion when discussing the proper limits of government contracting. Offering a solution for issues with the government's treatment of inherently governmental functions is beyond the scope of this Note.[126] However, the government's inability to determine if a function is intrinsically linked to its governing power encapsulates the bigger problem of the federal government not understanding the appropriate legal boundaries of government contractors. This lack of understanding has led to overreliance on government contractors.

IV. THE UNITED STATES' CONFUSION OVER THE APPROPRIATE LIMITS OF CONTRACTING HAS LED TO AN OVERRELIANCE ON GOVERNMENT CONTRACTING

Due in part to the confusion caused by the varying definitions of "inherently governmental functions," the United States' overreliance on government contractors has bled into its military operations. While the United States was at war in Afghanistan, the number of contractors increased from 2.8 million to 4.9 million.[127] For certain phases of the war, more contractors served in Iraq and Afghanistan than the United States' own military personnel.[128] This trend continued and as recent as 2015 more than forty percent of the United States Government's workforce, amounting to 3.7 million people, consisted of government contractors.[129] It was not always like this. During the Gulf War, United States military personnel outnumbered contractors by a ratio of fifty-five to one.[130] However, shortly after the invasion of Iraq, the number of government contractors quickly eclipsed the number of United States military personnel.[131] The United States government's reliance on contractors

124. *Id.*

125. Manuel, *supra* note 118, at 20.

126. For a proposed solution to this problem, see Laubacher, *supra* note 87.

127. Nguyen, *supra* note 7.

128. Steven L. Schooner & Collin D. Swan, *Suing the Government as a 'Joint Employer'—Evolving Pathologies of the Blended Workforce*, 52 Gov't Contractor 1, 2 (2010).

129. Neil Gordon, *Contractors and the True Size of Government*, Project on Gov't Oversight (Oct. 5, 2017), https://www.pogo.org/analysis/2017/10/contractors-and-true-size-of-government [https://perma.cc/6BLV-5Z6E].

130. Raymond Lu et al., *Inherently Governmental Functions and the Role of Private Military Contractors*, Allard K. Lowenstein Int'l Human Rts. Clinic 1, 4.

131. *Id.*

is so extensive that, not only does the government spend massive sums of money on contracts, but it also contracts out the monitoring of these contracts.[132] A Government Accountability Office (GAO) report released shortly after the conclusion of the Iraq war found that the Department of Defense and Department of State entered into contracts "haphazardly without checking for potential conflicts of interest or ensuring adequate oversight."[133] If the government cannot provide clear direction on what contracts are prohibited from performance by the private sector, it is even less likely that a contractor overseeing the performance of contracts would recognize that an inherently governmental function is being impermissibly performed.

Several studies have highlighted the prevalence of private contractors performing functions that should be performed by the United States government. In a 2009 review by the GAO of contracts from the Department of Transportation, Department of Energy, and Environmental Protection Agency, the GAO found that 28 of the 108 randomly selected contracts required the performance of inherently governmental functions by a private contractor.[134] If that ratio is representative, over 1.4 million contracts out of the 5.6 million contracts awarded in FY2021 contained the performance of inherently governmental functions by private contractors.[135] A different study found more than 4,200 contractors who are performing inherently governmental functions or unauthorized services in the United States Army alone.[136] These contracts can contain important governmental functions that can diminish the sovereignty of the United States if mismanaged by a private sector contractor.

V. SIMILAR TRENDS BETWEEN THE *PUBLICANI* AND THE MODERN AMERICAN PROCUREMENT SYSTEM

By failing to limit the role of contractors, America's procurement system shows signs of inefficiency, corruption, and unaccountability. The following three subsections will analyze several specific trends exhibited by the modern American procurement system and compare it to trends ushered in by the *publicani*. It is important to reiterate that contracting out certain functions is necessary to run the United States government. This Note is not proposing that the United States should perform all functions in-house—that would be logistically impossible and require a fortune equal to Augustus Caesar's.

132. *GAO: Contractors Overseeing Other Contractors in a Contingency Environment Problematic*, Ctr. for Effective Gov't (Apr. 20, 2010), https://www.foreffectivegov.org/node/10938 [https://perma.cc/MV9S-CX37].

133. *Id.*

134. *See* GAO/GGD-92-11, *supra* note 12, at 37.

135. *Spending by Prime Award*, USASpending.gov, https://www.usaspending.gov/search/?hash=7b99e40756284e30060c52ae22363234 [https://perma.cc/E38S-AEB2] (last visited July 23, 2023).

136. Robert Brodsky, *GAO: Army Contractors Performing Inherently Governmental Functions*, Gov't Exec. (Jan. 19, 2011), https://www.govexec.com/oversight/2011/01/gao-army-contractors-performing-inherently-governmental-functions/33120 [https://perma.cc/KF69-JJWC].

However, becoming too dependent on government contractors can produce inefficiency, corruption, and unaccountability, which, in Rome's experience with the *publicani*, contributed to the weakening of the Roman state.

A. Inefficiency and Compromised Missions

In the Iraq and Afghanistan wars, the Department of Defense and the Department of State contracted with private military contractors (PMCs) to perform various security missions for U.S. diplomats and personnel.[137] Since the conclusion of the war, reports have been released detailing instances of private contractors raiding villages and indiscriminately killing civilians.[138] While the United States' failure to pacify the region depended on a multiplicity of factors, horrific acts of violence by PMCs made the United States' goal of peace demonstrably more difficult to achieve: soldiers must establish trust with the local population and show them that they are a better alternative than the current regime to successfully conduct counterinsurgency.[139] It was nearly impossible to establish the requisite amount of trust when PMCs, acting under the guise of the United States military, committed heinous acts that turned the population against the United States.[140]

Similarly, the *publicani* misbehaved under the guise of the Roman state in their capacity as tax collectors. By using violence to extort more taxes than were required under law, the *publicani* were viewed as excessively greedy, wicked actors, which garnered hostility towards Rome's tax collection system.[141] As discussed, the *publicani* focused their exploitation on the provincial taxpayers in Asia because it was Rome's wealthiest province.[142] Disdain for the Roman tax collectors prompted Mithridates VI of Pontus, a king in the northern mountains of Asia minor, to indiscriminately kill Romans in the region.[143] The level of animosity was so high that, during the Mithridatic Wars, 80,000 to 150,000 Romans were slaughtered in a response to the actions of the *publicani*.[144] Once Rome realized the rampant exploitation and mistrust within its

137. Omar Qureshi, *Private Military Contractors Undermine the Success of the American Military Abroad*, Johns Hopkins Univ. Newsletter (Feb. 24, 2011), https://www.jhunewsletter.com/article/2011/02/private-military-contractors-undermine-the-success-of-the-american-military-abroad-23956 [https://perma.cc/R6EE-ZTK8].

138. *Id.*

139. *Id.*

140. This Note does not assert that all or even the majorities of PMCs engaged in this behavior. However, even one major incident is enough to tarnish the United States' reputation among the local population. *Id.*

141. Benjamin Leonard, *Filling the Coffers*, Archaeological Inst. of America, https://www.archaeology.org/issues/422-2105/features/9596-rome-tax-collection [https://perma.cc/38V8-5FHQ] (last visited Aug. 30, 2023).

142. McLeister, *supra* note 24, at 76.

143. *Mithridatic Wars*, Heritage Hist., https://www.heritage-history.com/index.php?c=resources&s=war-dir&f=wars_mithridatic [https://perma.cc/H2UZ-UZXW] (last visited July 23, 2023); Carbone, *supra* note 14, at 8.

144. Carbone, *supra* note 14, at 8.

tax collection system, it excluded the *publicani* from collecting taxes, ushering in a period of economic development.[145]

Furthermore, overreliance on contractors has injected inefficiency into the United States' procurement system. There have been numerous reports of weapons systems from large contracting firms being "overpriced, delivered behind schedule, and . . . fail[ing] to have the capabilities advertised."[146] TransDigm, a weapons systems parts manufacturer, was caught receiving profits of 9400% for the production of a singular half-inch metal pin.[147] Another military contractor was criticized "for charging a 4436% markup on an engine part."[148] Retired executive vice president of Raytheon, Shay Assad, claimed that "[f]or many of these weapons that are being sent over to Ukraine right now there's only one supplier. And the companies know it," incentivizing them to engage in price-gouging and inefficient behavior.[149] This is not to say that all government contractors are bad actors. In fact, most contractors are likely commited to their mission of assisting the United States government. However, when the United States fails to limit the role of contracting and hold contractors accountable for misbehavior, its procurement system suffers from increased inefficiency and unaccountability.

When the *publicani* were caught committing insurance fraud by making up imaginary shipwrecks, they, too, were behaving inefficiently to advance their own self-interests.[150] Similar to the United States' contractors, the *publicani* did not behave inefficiently to purposefully harm the Roman state. Instead, the incentives of a system without appropriate limits on contracting encourages contractors to extract profits however possible—even at the expense of the state. These similarities, albeit in different contexts, show that, when a government becomes overly dependent on government contractors, normally through misunderstanding the appropriate legal boundaries of contracting, such dependence can have a detrimental effect on the state's sovereignty and internal capacity.

B. Conflicts of Interest and Corruption

Additional issues with the United States procurement system include corruption and conflicts of interest between the government and private contractors.

145. *Roman Taxes*, *supra* note 53.

146. Mandy Smithberger, *Never the Pentagon: How the Military-Industrial Complex Gets Away with Murder in Contract After Contract*, Project on Gov't Oversight (Jan. 21, 2020), https://www.pogo.org/analysis/2020/01/never-the-pentagon [https://perma.cc/RWN3-KPT9].

147. TransDigm was later forced to pay the Department of Defense $16 Million for overcharges, but the fact that this level of inefficiency and corruption were allowed to occur in the current system highlights the drawbacks of becoming too dependent on government contractors. *Id.*

148. Jeremy Mohler, *Government "Waste" Is Often Corporate Inefficiency in Disguise*, Medium.com (June 6, 2019), https://medium.com/in-the-public-interest/government-waste-is-often-corporate-inefficiency-in-disguise-99cc02ac01af [https://perma.cc/JHV9-CMBB].

149. Aliza Chasan, *How the Pentagon Falls Victim to Price Gouging by Military Contractors*, CBS News (May 21, 2023), https://www.cbsnews.com/news/pentagon-budget-price-gouging-military-contractors-60-minutes-2023-05-21 [https://perma.cc/H9XK-ZLAT].

150. Jarvis, *supra* note 16, at 1.

One of the most glaring instances of corruption arose from a contracting official in the United States Air Force. From 1993 to 2002, Darleen Druyun served as one of the Air Force's main acquisition officials.[151] During her time as the Air Force's lead contractor, Druyun awarded a four billion dollar contract to upgrade Boeing's C-130 aircraft, shared private bidding information of Boeing's competitor to the company, and awarded Boeing $100 million in excess payments for the upgrade of NATO's Airborne Warning And Control System aircraft.[152] To compensate her for her preferential treatment of the company, Druyun secured employment for her daughter and son-in-law at Boeing and received a $250,000 yearly salary from the company while still working for the Air Force.[153]

More recently, former President Donald Trump was scrutinized for conflicts of interest pertaining to the Trump International Hotel.[154] Trump International's previous location at the Old Post Office Building in Washington, D.C., was significant because its close proximity to the White House made it a prime destination for persons trying to influence the former President.[155] Over the course of Trump's presidency, public officials from a variety of foreign countries, including Malaysia, Saudi Arabia, Qatar, the United Arab Emirates, Turkey, and the People's Republic of China, spent over $750,000 at the hotel during "sensitive times for those countries' relations with the United States."[156]

In Rome, the procurement system was ripe with corruption. As the *publicani* amassed increasing amounts of wealth, corruption and conflicts of interest became commonplace. Senators and other high-ranking government officials became stakeholders in the various *societas publicanorum* to profit from the exorbitant contracts that they were tasked with auctioning off to the *publicani*.[157] Cicero initially lauded praise on the *publicani* for their increasing wealth and status, but eventually came to regret the amount of influence that the Senate had ceded to the *publicani*.[158] As the interests of the Roman Senate and the *publicani* further aligned, the interests of the *publicani* began to predominate over the interests of the Roman state.[159] Eventually, the growing political influence of the *publicani* allowed them to steer Rome's foreign policy.[160] The *publicani*

151. Deborah Kidwell, *OSI's $615M Fraud Recovery*, Off. of Special Investigations (July 30, 2020), https://www.osi.af.mil/News/Features/Display/Article/2293570/osis-615m-fraud-recovery [https://perma.cc/3MYT-ZGYT].

152. *Id.*

153. *Id.*

154. Dustin Jones, *Foreign Officials Spent More Than $750,000 at Trump's D.C. Hotel, New Documents Show*, NPR (Nov. 15, 2022), https://www.npr.org/2022/11/14/1136682162/foreign-officials-750-000-dollars-trump-hotel-dc [https://perma.cc/AK7E-K86G].

155. *Id.*

156. *Id.*

157. Badian, *supra* note 2, at 111.

158. Letter from Cicero to Atticus, *supra* note 68; Letter from Cicero to Quintus, *supra* note 69.

159. Badian, *supra* note 2, at 14.

160. Timothy Edward Schaefer, The Second Punic War: The Turning Point of An Empire 13 (2015) (Honors Thesis, University of Dayton) (on file with https://ecommons.udayton.edu/cgi/viewcontent.cgi?article=1064&context=uhp_theses).

began to advocate for more territorial expansion not because it benefited the state, but because it preserved their lucrative *ultro tributa*.[161]

C. *Restricting the Government's Ability to Hold Government Contractors Accountable for Misbehavior*

When a procurement system involves this extent of dependency on government contractors, the government's ability to adequately hold contractors accountable for misbehavior is restricted. Since 1990, the Project on Government Oversight has examined forty-three government contracting companies for misconduct.[162] Sixteen out of the forty-three contractors have been convicted of twenty-eight criminal violations, but only one of the forty-three contractors faced disciplinary action.[163] Other sources agree that it is difficult to hold contractors accountable because "officials rely on contractors to get work done and that dependence can interfere with oversight."[164] Among contractors, large contractors are less likely to be held accountable because they have more financial resources at their disposal, but also because the United States depends on these big firms to supply its armies abroad.[165]

The exact same hesitancy to discipline suppliers for wrongdoing occurred in Rome. For example, after Marcus Postumius and Titus Pomponius committed insurance fraud by placing supplies on unseaworthy ships bound to sink, the Roman Senate initially refused to punish the two *publicani*.[166] The Roman government was fearful of disrupting supply chains and losing the Second Punic War. While the United States has legal mechanisms in place to force performance by a government contractor in wartime, the United States' overdependence on a dwindling number of contractors is susceptible to issues including supply chain issues, a cyberattack, or numerous other unforeseeable reasons that would impede performance.[167] Therefore, although not as vulnerable as the Roman Republic, the United States' overreliance on government contractors can still jeopardize the internal capacity of the state.

When the consolidation of large government contracting firms restricts available sources for procurement, the United States can become dependent on a few private corporations. This consolidation, in turn, limits the government's

161. *Id.*

162. Scott Amey, *Federal Contractor Misconduct: Failures of the Suspension and Debarment System*, Project on Gov't Oversight (May 10, 2002), https://www.pogo.org/report/2002/05/federal-contractor-misconduct-failures-of-suspension-and-debarment-system [https://perma.cc/M7GB-C2YF].

163. General Electric faced a minor five-day suspension from contracting with the government after pleading guilty to a criminal violation. *Id.*

164. Susan Sterett, *INSIGHT: Why It's Hard to Hold Contractors Accountable for Suffering*, Austin American-Statesman (July 31, 2018), https://www.statesman.com/story/news/2018/07/31/insight-why-its-hard-to-hold-contractors-accountable-for-suffering/10130293007 [https://perma.cc/DSR3-LTC4].

165. *See* Stevenson, *supra* note 42.

166. Badian, *supra* note 2, at 18.

167. *See*, *e.g.*, Kate M. Manuel & Rodney M. Perry, Cong. Rsch. Serv., R44202, Selected Legal Mechanism Whereby the Government Can Hold Contractors Accountable for Failure to Perform or Other Misconduct (Sept. 23, 2015).

ability to hold these contracting firms accountable for engaging in inefficient, monopolistic behavior, price-gouging, and corruption. This Note does not claim that large government contractors are particularly wicked actors, nor does it take the position that awarding contracts to contractors who have misbehaved is morally wrong. However, it does signal the similarities between the *publicani* and modern government contractors that, while potentially justified in the United States' procurement system, contributed to the decline of the Roman Republic.[168]

VI. THE IMPLICATIONS OF OVERRELIANCE

Although two thousand years separate the Roman Empire from the United States today, the similarities between the actions of the *publicani* and United States contractors are concerning. Both governments cultivated procurement systems that fostered dependency on government contractors because these governments failed to understand the appropriate legal boundaries of government contracting. In Rome, overreliance on the *publicani* elevated them to a position of extreme wealth, which allowed them to exert an immense amount of influence over the politics of the Roman Republic.[169] After defeating Hannibal and emerging victorious from the Second Punic Wars, Rome faced no serious external threats for a century.[170] For the *publicani*, this was not a welcome development. If Rome was not at war, the demand for *ultro tributa* contracts plummeted—eliminating one of the main streams of income for the *publicani*.[171] In response, the *publicani* demanded foreign policy initiatives that would promote expansion and thus preserve their lucrative military supply contracts.[172]

In the United States, overreliance on defense contractors has allowed large contracting firms to lobby for policies that protect their profits, which may not always be perfectly aligned with the best interests of the country. From 2001 to 2021, Congress allocated $2.02 trillion to the top five defense contractors to sustain the war effort in Afghanistan.[173] To receive these massive contracts, the top five defense contractors spent over $1.1 billion on lobbying policymakers.[174] Financially, this was a great investment for the defense contractors because, for every $1 they spent on lobbying, they received $1,813 from the Pentagon to perform their contracts.[175] While the United

168. For potential reasons that increased debarment is counterintuitive to the aims of the United States' procurement system, see Jessica Tillipman, *A House of Cards Falls: Why 'Too Big to Debar' Is All Slogan and Little Substance*, 80 Fordham L. Rev. Res Gestae 49 (2012).

169. Badian, *supra* note 2, at 14.

170. Schaefer, *supra* note 160, at 13–14.

171. *Id.*

172. *Id.*

173. Eli Clifton, *Top Defense Firms Spend $1B on Lobbying During Afghan War, See $2T Return*, Responsible Statecraft (July 24, 2023), https://responsiblestatecraft.org/2021/09/02/top-defense-firms-see-2t-return-on-1b-investment-in-afghan-war [https://perma.cc/HU4Y-627J].

174. *Id.*

175. *Id.*

States ultimately failed in its mission to install a friendly government during the Afghanistan war, many defense contractors were victorious by securing numerous lucrative defense contracts—a development that caused their stock price to increase tenfold over the course of the war.[176] This Note emphatically disagrees with the claim that defense contractors solely lobby for defense contracts to prolong wars and, in turn, receive future contracts. However, when highly influential defense contracting firms operate in a profit-maximization procurement system that does not properly limit the role of contractors, they are incentivized to act in their own self-interest which is not always perfectly aligned with the interests of the state. The point of this comparison is not to vilify government contractors. As discussed, government contractors are integral to the country's national defense, employ thousands of Americans, and are necessary to keep the government functioning. Instead, this comparison simply presents historical evidence that, when a state fails to properly limit its dependence on government contractors, opportunities may arise for the advancement of policies that are not in the best interests of the state.

In Rome, as discontent over foreign policy grew, the *populares*, a political party who shared in the *publicani* ambitions to propagate perpetual territorial expansion, instigated mob violence and began murdering political officials who disagreed with their policies.[177] This open display of brutal political violence had never occurred in Rome and triggered one of the most chaotic periods of Roman history.[178] The Republic suffered a period of three successive civil wars due to the actions of the *populares*.[179] These actions eventually ended with the downfall of the Republic when Octavian, later named Augustus Caesar, was named Rome's first emperor in 27 B.C.[180]

While this Note does not suggest that America's relationship with government contractors will manifest in a civil war, the history of the Roman Republic is a warning sign for the United States, which is already exhibiting many of the concerning trends ushered in by the *publicani*. The United

176. *See* Dion Nissenbaum et al., *Who Won in Afghanistan? Private Contractors*, Wall St. J. (Dec. 31, 2021), https://www.wsj.com/articles/who-won-in-afghanistan-private-contractors-troops-withdrawal-war-pentagon-11640988154 [https://perma.cc/S74T-ULB2]. For the top five contractors $10,000 of stock purchased in 2001 would be worth $97,294.80. For the S&P 500, $10,000 of stock purchased in 2001 would be worth $61,616.06 as of August 16, 2021. *See* Jon Schwarz, *$10,000 Invested in Defense Stocks When Afghanistan War Began Now Worth Almost $100,000*, Intercept (Aug. 16 2021), https://theintercept.com/2021/08/16/afghanistan-war-defense-stocks [https://perma.cc/Y8YX-4YLW].

177. Schaefer, *supra* note 160, at 14.

178. *Id*.

179. Evan Andrews, *6 Civil Wars That Transformed Ancient Rome*, History.com (Aug. 28, 2015), https://www.history.com/news/6-civil-wars-that-transformed-ancient-rome [https://perma.cc/74S5-HYMM]; Schaefer, *supra* note 160, at 14.

180. *See* Andrews, *supra* note 179; Schaefer, *supra* note 160, at 14–15. This trend of violence led to a series of three civil wars: the Marian-Sullan wars, Julius Caesar's civil war against Pompey, and the civil war between Mark Antony and Octavian. The result of over half a century of violence led to the overthrow of the Roman Republic when Octavian (later Caesar Augustus) was named Rome's first emperor in 27 B.C. *Julius Caesar*, History.com (Oct. 27, 2009), https://www.history.com/topics/ancient-rome/julius-caesar [https://perma.cc/8NWN-9WUB].

States must reexamine its relationship with contractors and make comprehensive policy decisions about the legal boundaries of government contracting, or it risks becoming so dependent on contractors that they could influence national policy. Overall, issues with defining the appropriate roles of government contractors have existed for thousands of years. This problem is difficult, but the United States must attempt a complete reexamination of the roles of contractors in the government. For Rome, the involvement of the *publicani* led to the death of the Republic. For the United States, it is already exacerbating trends that diminish the internal capacity of the state and delegate sovereignty to private actors.

VII. CONCLUSION

From the executive branch constantly changing its definition of "inherently governmental functions," to the judicial branch's inability to create a consistent approach to resolve such issues, the United States has demonstrated that it does not understand the appropriate legal boundaries of government contractors. This misunderstanding has created a system of overreliance on government contractors with thousands of contractors performing functions that are essential to the United States' sovereignty. Dependency on government contractors is dangerous because private corporations have different incentives, mainly wealth maximization, than the government trying to maximize public welfare. The United States' trend of overreliance on government contractors has resulted in inefficiency, corruption, and restricted the government's ability to hold contractors accountable for misbehavior. Similarly, Rome did not understand the appropriate role of contractors because the *publicani* performed functions that were essential to Rome's sovereignty. Rome's overreliance on the *publicani* led to exploitation of the Roman population, diminished capacity of the state, and ushered in one of the most violent periods in Roman history. The United States must make a comprehensive policy decision about the boundaries of contracting. If the United States does not reexamine its relationship with government contractors, Winston Churchill's immortal quote that "those that fail to learn from history are doomed to repeat it" may be vindicated before our eyes.[181]

181. *Winston Churchill Quotes*, Quote.org, https://quote.org/quote/those-who-fail-to-learn-from-history-645821 [https://perma.cc/4B45-287H] (last visited Sept. 1, 2023).