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Journal of Contract Management

Linking scholarly research with best practices in the contract management field

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A Critical Analysis of the *Federal Acquisition Regulation's* Adoption of Positive Law Codification Changes

BY JOHN B. WYATT III

When Shakespeare wrote "What's in a name?"[1] he undoubtedly had no idea that 400 years later the phrase would apply to changes in the names of U.S. federal government procurement statutes. The federal government has begun to change the names of various statutes and their citations to new positive law names or titles through a process called *positive law codification*. The positive law codification practice is to be applied across the entire U.S. Code (USC). At present, about half of the titles within the USC are positive law titles.[2]

Positive law codification relevant to federal government procurement is required by two statutes: *Public Law* 107-217 (revised, codified, and enacted as Title 40, USC, "Public Buildings, Property, and Works"), and *Public Law* 111-350 (revised, codified, and enacted as Title 41, USC, "Public Contracts"). *Public Law* 111-350 is the principal statute responsible for the promulgation of FAR Case 2011-018 (FAR Case).[3] The main purpose of this FAR Case was to update all references in the *Federal Acquisition Regulation* (*FAR*) and to change the *FAR* to conform to the requirements of the positive law codification process.[4]

This FAR Case implemented three types of changes throughout the *FAR* in keeping with positive law codification. These *FAR* modifications include changing citations in the USC, replacing the popular names of procurement-related acts with new titles, and changing terminology without making substantive changes to the meaning of the statutes. The FAR Case was published as a final rule in the Federal Acquisition Circular (FAC) 2005-73, with an effective date of May 29, 2013.[5]

FAC 2005-73 also added a table called "Positive law codification" to FAR Subpart 1.1, section 1.110. The table cross-references the historical former titles of the procurement acts with the new positive law names that are now contained in the revised Title 40 or 41 of the USC.[6] Table 1 (adapted from a table prepared by Defense Acquisition University) is a modified version of FAC 2005-73's table. It contains an additional notation pertaining to the *Defense Federal Acquisition Regulation Supplement* (*DFARS*), which has retained its popular name: the Truth in Negotiations Act (TINA).

To fully understand the significance of FAR Case 2011-018, FAC 2005-73, and FAR 1.110, we must examine the reasons behind the positive law codification changes to the USC.

What Is Positive Law Codification?

The scope of positive law codification is greater than merely renaming statutes. This effort is an answer to a longstanding, significant need to improve the organization of the statutory law within the USC. One of its primary objectives is to facilitate the finding of the law. Since its enactment in 1926, the USC was arranged into 50 titles, within which federal statutes were segmented by subject matter. The original 1926

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TABLE 1. HISTORICAL AND POSITIVE LAW TITLES

Historical Title of Act	Division/ Chapter/ Subchapter	New Title
Anti-Kickback Act	41 USC chapter 87	Kickbacks
Brooks Architect-Engineer Act	40 USC chapter 11	Selection of Architects and Engineers
Buy American Act	41 USC chapter 83	Buy American
Contract Disputes Act of 1978	41 USC chapter 71	Contract Disputes
Contract Work Hours and Safety Standards Act	40 USC chapter 37	Contract Work Hours and Safety Standards
Davis-Bacon Act	40 USC chapter 31, subchapter IV	Wage Rate Requirements (Construction)
Drug-Free Workplace Act	41 USC chapter 81	Drug-Free Workplace
Federal Property and Administrative Services Act of 1949, Title III	41 USC div. C of subtitle I*	Procurement
Javits-Wagner-O'Day Act	41 USC chapter 85	Committee for Purchase from People Who Are Blind or Severely Disabled
Miller Act	40 USC chapter 31, subchapter III	Bonds
Office of Federal Procurement Policy Act	41 USC div. B of subtitle I**	Office of Federal Procurement Policy
Procurement Integrity Act	41 USC chapter 21	Restrictions on Obtaining and Disclosing Certain Information
Service Contract Act of 1965	41 USC chapter 67	Service Contract Labor Standards
Truth in Negotiations Act***	41 USC chapter 35	Truthful Cost or Pricing Data
Walsh-Healey Public Contracts Act	41 USC chapter 65	Contracts for Materials, Supplies, Articles, and Equipment Exceeding $15,000

* Except sections 3302, 3501(b), 3509, 3906, 4710, and 4711
** Except sections 1704 and 2303
*** Will remain Truth in Negotiations Act in the *DFARS* per 10 USC 2306(a)[7]

USC fit into a single volume and reflected the focus and size of the body of law then in effect.[8]

However, Congress has passed many statutes since 1926. New areas of the law have emerged that were unfathomed in 1926, such as Social Security, space exploration, and environmental protection. The body of federal statutes had grown out of proportion to the original 50 titles, straining the existing structure of the USC. New statutes were pigeonholed into the existing title structure of the USC and forced to fit.[9] Many times, they didn't match—an effort akin to forcing square pegs into round holes.

A great example of this mismatch is Title 42, "Public Health and Welfare." Title 42 does contain laws on public health, but also contains laws on the space program, law enforcement, social security, energy, civil rights, and dozens of other unrelated subjects.[10] Also, the unavoidable result of adding legislation for almost 90 years was the accumulation in the USC of obsolete and redundant provisions, archaic and inconsistent language, and statutory errors.[11] Congress decided that positive law codification was the answer. Congress chose the Office of the Law Revision Counsel of the United States House of Representatives (OLRC) as the primary federal governmental entity responsible for implementing the positive law codification initiative.[12]

To explain its role to the public[13] and detail the purpose behind positive law codification, OLRC has published a positive law codification brochure[14] that summarizes the process as follows:

> Positive law codification by the Office of the Law Revision Counsel is the process of preparing and enacting a codification bill to restate existing law as a positive law title of the United States Code. The restatement conforms to the policy, intent, and purpose of Congress in the original enactments, but the organizational structure of the law is improved, obsolete provisions are eliminated, ambiguous provisions are clarified, inconsistent provisions are resolved, and technical errors are corrected.[15]

What Are the Differences Between Positive Law and Non-Positive Law Titles?

OLRC, in its brochure, provides a painstaking explanation of the differences between positive and non-positive law titles:

> A positive law title of the United States Code is—itself—a Federal statute [versus a] non-positive law title [which] is an editorial compilation of Federal statutes. For example, title 10, United States Code, "Armed Forces," is a positive law title because the title, *per se*, has been explicitly enacted. Alternatively, title 42, United States Code, "The Public Health and Welfare," is a non-positive law title [because it is merely an editorial compilation title not enacted into law]. The Federal statutes set out editorially in title 42 have been explicitly enacted, but title 42, *per se*, has not. Provisions set out in non-positive law titles of the United States Code may vary slightly from the precise language enacted into law . . . [b]y contrast, a positive law title of the United States Code constitutes the precise statutory language enacted into law.[16]

The above explanation of the differences between positive and non-positive law titles can be summarized in five rules:

1. Positive law titles are enacted by Congress and are statutes. As statutes, only Congress can amend or add to them.

2. Non-positive law titles are editorial compilation titles not enacted by Congress as statutes, and thus carry less "legal weight."

3. A non-positive law title contains numerous separately enacted statutes that were editorially arranged into the title by the editors of the USC, but the title itself was never enacted as a statute.[17]

4. When a new positive law title is enacted by Congress, it is a restatement of the existing statutes relevant to the new positive law title that were previously contained in one or more of the non-positive (editorial compilation) law titles. This positive law codification process leads to a better organization of the USC.

5. The positive law titles of existing statutes do not change either the meaning or the effect of those statutes. Only the text is repealed and restated in the new positive law title.

Why the Need to Change to Positive Law Titles?

The distinction between positive and non-positive law titles has legal and practical ramifications. The goal of the positive law codification process is to make significant overall improvements to the USC. OLRC states that positive law codification will yield a number of benefits for the courts, Congress, federal agencies, lawyers, and all who use or refer to federal statutory law. These perceived benefits include:

> **Legal evidence.** Provisions set out in non-positive law titles of the [USC] are merely *prima facie* evidence of the actual law. However, once those provisions are enacted as a positive law title of the [USC], the provisions, as set out in the [USC], constitute legal evidence of the law in all Federal and State courts.
>
> **Improved organization.** Provisions that are closely related by subject may be scattered in different places in the [USC]. Such provisions may have been enacted many years apart and incorporated into the [USC] at different times. Positive law codification [will result in a] thoughtful regrouping of provisions [yielding] a statutory product that is easier to use and that fosters a more comprehensive understanding of the law. [It makes legal research much easier.]
>
> 6. **Elimination of obsolete provisions.** Obsolete provisions are frequently identified in the course of preparing a positive law codification bill [and] the cumulative effect of removing all obsolete provisions can be profound, resulting in a much more compact and comprehensible text.
>
> 7. **Improved wording and form.** Some provisions . . . use archaic "legalese" that obscures the meaning of the text. Positive law codification . . . update[s] wording to achieve a more consistent and readable style [and] great care is taken to ensure that the restatement of existing law conforms to the policy, intent, and purpose of Congress in the original enactments.
>
> 8. **Correction of technical errors.** Positive law codification . . . correct[s] technical errors in the law, including typographical errors, misspellings, . . . punctuation and grammar problems.
>
> **Precise statutory text.** The process of positive law codification promotes public access to the precise text of Federal statutory law. Provisions set out in non-positive law titles of the [USC] may vary slightly from the precise language enacted into law.
>
> **Cleaner amendments.** Positive law codification

promotes accuracy and efficiency in the preparation of amendments. A positive law title of the [USC] constitutes the precise statutory language enacted into law. Specifying words to be struck or the place where new words are to be inserted is simplified. Understanding the impact of proposed amendments is easier. [Drafting errors are less likely.]

9. **Streamlined citations.** Statutory citations in court documents, legal academic papers, and other legal work are streamlined as a result of positive law codification.[18]

Potential Adverse Ramifications of Positive Law Codification and FAR Case 2011-018

In analyzing Table 1 on page 8, it is readily apparent that some of the positive law statutory name changes implemented under the FAR Case appear to be minor deviations from the original popular (non-positive law) names. Some statutes merely had the word "Act" deleted from their former name, with the new positive law title retaining all the other original words, such as "Buy American," "Contract Disputes,"[19] "Drug-Free Workplace," and the "Office of Federal Procurement Policy." Other Acts now have significantly different names so as to achieve the objective of renaming statutes to reflect the substance of their content.

Positive law codification and the FAR Case changed the USC and the *FAR* in other ways, beyond just renaming the Acts. This article examines some potential adverse effects, discuss one comment received during the FAR Case's formal review and comment period, and analyze various reactions to these changes from members of the federal procurement community.

Negation of Historically Familiar Acronyms and the Creation/Substitution of New Ones

Besides changing the names of Acts, the new positive law titles have negated the familiar acronyms previously associated with the Acts. Examples include *CDA* for Contract Disputes Act, *TINA* for the Truth in Negotiations Act, and *JWOD* for the Javits-Wagner-O'Day Act. If history is a teacher, new acronyms will be devised because "the main reason we use abbreviations, including acronyms, is for convenience."[20] These new acronyms could create confusion and involve a considerable learning curve before they are generally accepted. For example, the new acronym *CD*, for Contract Disputes, could be mistakenly assumed to mean "compact disc." *TCoPD* (TINA's replacement acronym) is cumbersome to say and sounds very similar to the acronym for a chronic pulmonary disease. And while *JWOD* was succinct and easily identifiable, it's now anyone's guess what acronym will arise from "The Committee for Purchase from People Who Are Blind or Severely Disabled."

A Trap for the Unwary—A Difficult Transition from "Procurement-ese" to Positive Law Titles

Federal government procurement professionals routinely use "procurement-ese" in oral and written communications with each other. This jargon consists of specialized language—terms and acronyms that have developed over time. Members of the profession assume that these terms have a generally accepted meaning and significance.

Positive law codification has changed the vernacular that so many relied on for so long. The unfortunate result will likely be confusion and miscommunication. People are creatures of habit, so they will probably use the former terms rather than the new ones. Old "procurement-ese" will die hard. For example:

> A client new to Federal contracting was requested recently to submit a "BAFO" by an agency contract specialist. Our client asked what was meant by a "BAFO," and the government representative responded "your best and final offer," and suggested that our client read the *Federal Acquisition Regulation* (*FAR*). When our client could not find any reference to a "BAFO" or a "best and final offer" our "baffled" client called us. "Best and Final Offer," or "BAFO" was a term used in the *FAR* many years ago, before the major revision to Part 15, "Contracting by Negotiation," in 1997. In a negotiated procurement, following the conclusion of discussions with offerors, the contracting officer would issue a request for best and final offers to all offerors still within the competitive range. The pre-1997 *FAR* contained an entire section that described the "best and final" process. In Federal procurement today, "BAFO" has been replaced by "final proposal revision," as referenced in FAR 15.307. However, some agencies still refer to an "FPR" as a "BAFO."[21]

As a professor teaching federal procurement courses and encouraging students to enter the contract management profession, I am greatly concerned about this ramification of positive law codification. Positive law codification could constitute a trap for emerging new contract management professionals. The simple solution is to cloak the potentially unwary with the requisite knowledge. Cal Poly Pomona University's contract management curriculum has been revised to accomplish that objective by incorporating a dual title/name strategy in course curriculum and instruction.

Students are taught, must memorize,[22] and are tested on both the former non-positive and the current positive law titles and names. Learning both names should mitigate the potential for misunderstanding and confusion during job interviews, when reading documents, or in any other circumstance where federal procurement subjects are addressed. NCMA is rewriting its certification examination questions and study materials using the same dual-title strategy, per Charles L. Woodside, NCMA's director of certification.[23]

Popular Names Still Appear on Federal Government Websites

A random sampling on August 25, 2015, of various federal government websites confirms that non-positive law titles—that is, former popular names—of the Acts also die hard. A few examples show that government personnel are still using these old popular names:

1. WDOL.gov[24] declares that the "website provides a single location for federal contracting officers to use in obtaining appropriate Service Contract Act (SCA) and Davis-Bacon Act (DBA) wage determinations (WDs) for each official contract action."[25]

2. The Wage and Hour Division's pages on the Department of Labor website repeatedly refer to the "Walsh-Healey Public Contracts Act (PCA)."[26]

3. The U.S. AbilityOne Commission mentions the Javits-Wagner-O'Day (JWOD) Act.[27]

4. DFARS Subpart 215.402—Contract Pricing (revised December 11, 2014) specifically instructs government personnel to follow the procedures at PGI 215.402 when conducting cost or price analysis, particularly with regard to acquisitions for sole source commercial items.[28] PGI 215.402, "Pricing policy," specifically references the Truth in Negotiations Act and TINA, which is especially significant as these references are retained in the *DFARS*, although the last revision date of the *DFARS* (December 11, 2014) is after the effective date of FAC 2005-73 (May 29, 2013), which implemented the FAR Case's changes.[29] Defense Acquisition University director Leonardo Manning confirms that these Truth in Negotiations Act and TINA references "remain…in the *DFARS* per 10 USC 2306(a)."[30]

These observations may appear to be a bit too critical; government personnel face a monumental task of revising all of their materials, websites, and other information to comply with the effects of positive law codification. However, it may be a wise strategy for the government to utilize dual titles/names as soon as possible to facilitate awareness, understanding, and acceptance of this new nomenclature among members of the federal acquisition community.

Positive Law Codification Changes May Impede Searching the *FAR* and Related Materials

Many federal procurement professionals routinely use online versions of the *FAR*, available at sites such as www.acquisition.gov or the Federal Acquisition Regulation Site (FARsite), http://farsite.hill.af.mil/. A federal contracting blogger noted that positive law codification may make it more difficult to search the online *FAR* and other materials and recommended a commonsense solution[31]:

> The changes that were made as a result of the FAC [2005-73] were not limited just to changes in the names of statutes and their references. As a result of law revisions, there were other changes made to terminology. For example, for all of you Competition Advocates out there, you are no longer Competition Advocates; you are now Advocates for Competition. An electronic search for "Competition Advocate" will return zero hits. You had best know that Advocates for Competition are found in FAR Subpart 6.5, the same place where you used to be able to find Competition Advocates. I mention this as a word of caution for when you do electronic searches. What you may remember as a term you used routinely, and could find easily, may no longer exist. The recommendation would be to consider keeping your own loose-leaf version of the *FAR*. . . . Out of long time habit, and a desire to know what specific changes are made in each FAC, I still maintain my loose-leaf version of the *FAR*. . . . I do not have high hopes that this recommendation will be embraced wholeheartedly by one and all.[32]

At the time I submitted this article,[33] I was able to find FAR Subpart 6.5 by running the search term "competition advocate *FAR*" within www.acquisition.gov.[34] Regardless, tagging and other subject-search issues can frustrate effective use of an online version of the *FAR* or any other online source. It is sage advice that federal procurement professionals should keep or have access to a complete updated paper version of the *FAR*, especially in light of the effect of positive law codification changes.

Legal Citations Have Also Changed

In addition to the name changes, positive law codification has also modified the organization of the USC. Statutes are now in different places. If you memorized the former citations, you must now learn new ones. For example, the Contract Disputes Act (CDA, now called "Contract Disputes"), which used to exist at 41 USC 601 *et seq.*, has a new location at 41 USC 7101 *et seq.* The Davis-Bacon Act (now "Wage Rate Requirements (Construction)") has moved from its prior statutory address at 40 USC 276a *et seq.* to its new home at 40 USC 3141 *et seq.*

Responses to the Final Rule of FAR Case 2011-018

As required by the rulemaking procedures of the statute formerly known as the Administrative Procedures Act (now "Administrative Procedure"),[35] an agency must allow ample time for persons to comment in writing on a proposed rule, with all comments being logged as part of the public record and published in the *Federal Register*.[36] No substantive changes beyond minor editing were made in response to comments received regarding the final rule of FAR Case 2011-018.

Of the three comments received, one warrants discussion. The commenter disapproved of the removal of references to the Davis-Bacon Act in the *FAR* and questioned whether there was any legislative mandate to remove such references. The response by the government was that the positive law codification of Title 40 and Title 41 had removed all references to the popular names of the relevant statutes. Further, the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DAR), the two councils authorized to generate changes to the *FAR*, had determined that the removal of references to the Davis-Bacon Act was necessary for conformity with the rest of the USC. In support of the removal of the Davis-Bacon references, the government stated that **"the old popular names [of the renamed statutes] will gradually have little meaning to the newer workforce."**[37](emphasis added). The government's response can also be interpreted as implying that the citation changes caused by positive law codification will have less or no impact on the newer workforce.

Comments on a WIFCON.com blog post and forum discussion[38] display a variety of reactions to FAR Case 2011-018 and FAC 2005-73. Vern Edwards sees advantages to positive law codification:

> The elimination of the popular names was a good thing. When many laws were first enacted they were given "popular names." But when they were codified their texts were broken up and distributed to different sections of the U.S. Code title into which they were inserted. The original laws were no longer recognizable and the popular names were useless. This has caused untold confusion. Most people today don't know that the rule about discussions in source selection (FAR 15.306(d)) came from *Pub. L.* 87-653 (1962)—the Truth in Negotiations Act (TINA). I doubt that very many C[ontracting] O[fficer]s today understand the connection between certified cost or pricing data and what they consider to be a part of a competitive process to which the requirement for certified cost or pricing data usually does not apply, but the connection was once very apparent.[39]

Other blog comments were not as complimentary of positive law codification:

> The only thing clear about this is that [government personnel] are trying to confuse us.[40]

> And they are doing [a] great job on confusing us. I hope they will have better things to do with their time rather than this.[41]

One forum commenter supports this author's concern that old "procurement-ese" dies hard:

> I would mercilessly tease the elders that continued to use the term "Best and Final Offers," or BAFOs, after the *FAR* Council revised FAR Part 15 references to "Final Proposal Revisions" in 1997. Yet, now I see their struggle, as it will take me a long time to get away from citing the name of the statute.[42]

Conclusion

Positive law codification need not be intimidating or confusing, and this article was written to inform the contract management community of the merits, underlying goals, and perceived benefits behind the process. It can be succinctly summarized as a commonsense cleanup of the USC with four objectives: (1) a new positive law title is a restatement of the existing law with no new law added; (2) the organization of the USC has been improved to facilitate ease of use and the logical arrangement of existing statutes; (3) obsolete provisions have been removed and technical errors corrected, and (4) popular names of current statutes have been removed, replaced with positive law names that reflect the substance of the statutes contained within the title. An added benefit is that the new positive law titles are themselves statutes, whereas the former non-positive law titles were only editorial compilations and not considered to be statutory law.

Regardless of the perceived benefits, two caveats exist: (1) don't rely on popular statutory names or terms, as they may not exist anymore, and (2) the previous citation references for most of the USC have changed. Always check a citation against a current updated version of the USC.

Specifically relevant to the federal government acquisition community, FAR Case 2011-018, consistent with the intent of positive law codification, implemented changes throughout the *FAR* to match the revisions under positive law codification. This author recommends that readers print out the table at FAR 1.110 and post it in a prominent place so that it is easily accessible, which will make it easier to transition to using the new terms and citations.

Like any change, there will be reluctance to adapt to and accept positive law codification. Like it or not, the new positive law titles, with their corresponding modifications in USC citations and the elimination of the popular names of procurement statutes, are here to stay. The full effect of positive law codification has not yet been realized, considering that approximately half of the titles within the USC have positive law titles and new citations.[43]

Who among federal government procurement professionals is most likely to be adversely affected by these changes? The government admits that the old popular names will not mean much to newer employees, which implies that the older members of the acquisition community may be more reluctant to embrace the new positive law vernacular. Commentator Nick Sanders apparently agrees:

> So apparently it's a new world folks, and old fogies . . . had better get out of the way to make room for the newer folks who aren't weighed-down by the anchors of the "old popular names" of public laws.[44]

No one knows how long it will take for old "procurement-ese" to fade away. Mostly because of habit, former non-positive law/popular name titles will be slow to die. As discussed above, *TINA* is a great example of a resilient term and may have a new lease on life as far as the *DFARS* is concerned. Perhaps, there will be other statutory popular names and acronyms that will nonetheless live on. The best solution when revising or creating materials, websites, and other relevant information (published by the government or not) is a dual-title strategy, in which both former popular names and current positive law titles are used. Such a strategy will facilitate the learning and acceptance of the new positive law titles while minimizing the potential for misunderstanding and confusion.

I hope that by providing a detailed explanation of the purpose behind positive law codification, FAR Case 2011-018, and the resulting revisions, the contract management community will be less reluctant to adapt to and accept these changes and will even do so proactively. Sage advice was proffered by philosopher Alan Watts, who said, "The only way to make sense out of change is to plunge into it, move with it, and join the dance."[45] That quote is particularly appropriate as federal procurement can be compared to a dance. Isn't there a "two-step"[46] in sealed bidding? Or did positive law codification render that term obsolete? Nope, it survived.[47]

ENDNOTES

1. Shakespeare, *Romeo and Juliet*, act 2, scene 2, lines 1-2. "What's in a name? That which we call a rose/ By any other name would smell as sweet."
2. U.S. House of Representatives, Office of the Law Revision Counsel, United States Code, *Positive Law Codification in the United States Code* [OLRC brochure], 2, http://uscode.house.gov/codification/positive_law_codification.pdf.
3. U.S. Office of the Federal Register, "Federal Acquisition Regulation; Positive Law Codification of Title 41" (FAR Case 2011-018), *Federal Register 77*, no. 181 (September 18, 2012), https://www.gpo.gov/fdsys/pkg/FR-2012-09-18/pdf/2012-21874.pdf.
4. *Ibid.* FAR Case 2011-018 also proposed further updates to complete the implementation of the recodification of Title 40 in the *FAR*.
5. U.S. Office of the Federal Register, "Federal Acquisition Regulation; Federal Acquisition Circular 2005–73; Introduction," *Federal Register 79*, no. 82 (April 29, 2014), https://www.gpo.gov/fdsys/pkg/FR-2014-04-29/pdf/2014-08744.pdf.
6. U.S. Office of the Federal Register, FAR Case 2011-018. This FAR Case also includes a table outlining the changes in terminology that did not involve substantive changes to the meaning of the statutes.
7. Adaptation of Leonardo Manning, "Title 41 Changes to the *FAR*," Defense Acquisition Portal, May 12, 2014, https://dap.dau.mil/career/cont/blogs/archive/2014/05/12/title-41-changes-to-the-far.aspx.
8. U.S. House of Representatives, Office of the Law Revision Counsel, United States Code, "Positive Law Codification," http://uscode.house.gov/codification/legislation.shtml.
9. Peter LeFevre, "Positive law codification will modernize U.S. Code," *Congress Blog*, September 28, 2010, http://thehill.com/blogs/congress-blog/judicial/121375-positive-law-codification-will-modernise-us-code.
10. *Ibid.*
11. *Ibid.*
12. See section 205(c)(1) of House Resolution No. 988, 93d Congress, as enacted into law by Public Law

93-554 (2 U.S.C. 285b(1)), wherein the Office of the Law Revision Counsel of the United States House of Representatives is charged by Congress:

> [t]o prepare, and submit to the Committee on the Judiciary one title at a time, a complete compilation, restatement, and revision of the general and permanent laws of the United States which conforms to the understood policy, intent, and purpose of the Congress in the original enactments, with such amendments and corrections as will remove ambiguities, contradictions, and other imperfections both of substance and of form, separately stated, with a view to the enactment of each title as positive law.

13. U.S. House of Representatives, Office of the Law Revision Counsel, United States Code, "About the United States Code and This Website," http://uscode.house.gov/about_code.xhtml. "The Office of the Law Revision Counsel of the U.S. House of Representatives prepares and publishes the United States Code pursuant to section 285b of title 2 of the Code. The Code is a consolidation and codification by subject matter of the general and permanent laws of the United States."

14. U.S. House of Representatives, Office of the Law Revision Counsel, United States Code, OLRC brochure.

15. *Ibid.*, 2.

16. *Ibid.*

17. U.S. House of Representatives, Office of the Law Revision Counsel, United States Code, "Positive Law Codification."

18. U.S. House of Representatives, Office of the Law Revision Counsel, United States Code, OLRC brochure, 4.

19. The original name of the statute was the *Contract Disputes Act of 1978*, per *Public Law* 95-563, 92 Stat. 2382 (1978).

20. dchinn1 (HubPages contributor), "Why Do We Use Acronyms and Abbreviations?" *HubPages*, April 9, 2010, http://hubpages.com/education/Why-Do-We-USe-Acronyms-and-Abbreviations.

21. Joseph Hackenbracht, "Procurement Technology Can Be 'Baffling' To Contractors New To Federal Procurement," *Federal Construction Contracting Blog*, May 16, 2007, http://federalconstruction.phslegal.com/2007/05/articles/contracting-by-negotiation/procurement-terminology-can-be-baffling-to-contractors-new-to-federal-procurement/.

22. Manning, "Title 41 Changes to the FAR." Manning recommends using the "handy table to help . . . memorize the changes."

23. Charles L. Woodside, phone call with author, August 17, 2015.

24. The Wage Determinations OnLine Program, http://www.wdol.gov/Index.aspx.WDOL.gov states that the site is "part of the Integrated Acquisition Environment, one of the E-Government initiatives in the President's Management Agenda. It is a collaborative effort of the Office of Management and Budget, Department of Labor, Department of Defense, General Services Administration, Department of Energy, and Department of Commerce."

25. *Ibid.*

26. U.S. Department of Labor, Wage and Hour Division, "Compliance Assistance—Walsh-Healey Public Contracts Act (PCA)," http://www.dol.gov/whd/govcontracts/pca.htm.

27. U.S. AbilityOne Commission, "Javits-Wagner-O'Day Act (41 USC 8501–8506)," http://www.abilityone.gov/laws,_regulations_and_policy/jwod.html.

28. U.S. Department of Defense, Defense Federal Acquisition Regulation Supplement 215.4—Contract Pricing, http://www.acq.osd.mil/dpap/dars/pgi/frameset.htm?dfarsno=215_4&pgino=PGI215_4&pgianchor=215.402&dfarsanchor=215.402.

29. *Ibid.* See "Pricing policy" (PGI 215.402):

> (1) Contracting officers must purchase supplies and services from responsible sources at fair and reasonable prices. The Truth in Negotiations Act (TINA) (10 U.S.C. 2306a and 41 U.S.C. chapter 35) requires offerors to submit certified cost or pricing data if a procurement exceeds the TINA threshold and none of the exceptions to certified cost or pricing data requirements applies. Under TINA, the contracting officer obtains accurate, complete, and current data from offerors to establish a fair and reasonable price (see FAR 15.403). TINA also allows for a price adjustment remedy if it is later found that a contractor did not provide accurate, complete, and current data.

30. Manning, "Title 41 Changes to the FAR."

31. Emptor Cautus, "FAR Eliminates Truth in Negotiations Act (TINA)," *Emptor Cautus' Blog*, The Wifcon Forums and Blogs, July 10, 2014, http://www.wifcon.com/discussion/index.php?/blog/48/entry-3054-far-eliminates-truth-in-negotiations-act-tina/.

32. *Ibid.*

33. The date of submission was August 31, 2015.

34. See FAR Subpart 6.5—Advocates for Competition.

35. 5 USC 551–559 *et seq.*, now titled "Administrative Procedure," https://www.gpo.gov/fdsys/pkg/USCODE-2011-title5/pdf/USCODE-2011-title5-partI-chap5-subchapII.pdf.

36. 5 USC 553, titled "Rule making," https://www.gpo.gov/fdsys/pkg/USCODE-2011-title5/pdf/USCODE-2011-title5-partI-chap5-subchapII.pdf, and 41 USC 1707, titled "Publication of proposed regulations," https://www.gpo.gov/fdsys/pkg/USCODE-2011-title41/pdf/USCODE-2011-title41-subtitleI-divsnB-chap17-sec1707.pdf.

37. U.S. Office of the Federal Register, "Federal Acquisition Regulation; Federal Acquisition Circular 2005–73; Introduction"; see also Nick Sanders, "It's Not Called 'TINA' Anymore," May 2, 2014, http://www.apogeeconsulting.biz/index.php?option=com_content&view=article&id=939:its-not-called-qtinaq-anymore&catid=1:latest-news&Itemid=55.

38. Emptor Cautus, "FAR Eliminates Truth in Negotiations Act (TINA)," and "FAC 2005-73, Positive Law Codifications of Title 41 USC" [forum discussion], The Wifcon Forums and Blogs, May 15, 2014, http://www.wifcon.com/discussion/index.php?/topic/2569-fac-2005-73-positive-law-codifications-of-title-41-usc/#entry22195.

39. Vern Edwards, May 15, 2014, comment on "FAC 2005-73, Positive Law Codifications of Title 41 USC" [forum discussion].

40. Cajuncharlie, July 27, 2014, comment on Emptor Cautus, "FAR Eliminates Truth in Negotiations Act (TINA)."

41. KTiana3, September 1, 2014, comment on Emptor Cautus, "FAR Eliminates Truth in Negotiations Act (TINA)."
42. Metteec, May 15, 2014, comment on "FAC 2005-73, Positive Law Codifications of Title 41 USC" [forum discussion].
43. See U.S. House of Representatives, Office of the Law Revision Counsel, United States Code, Browse the United States Code, http://uscode.house.gov/browse.xhtml, for an updated list of enacted positive law titles, which are marked with an asterisk.
44. Sanders, "It's Not Called TINA Anymore."
45. BrainyQuote, "Alan Watts quotes," http://www.brainyquote.com/quotes/authors/a/alan_watts.html.
46. Wikipedia contributors, "Country-western two-step," *Wikipedia, The Free Encyclopedia*, https://en.wikipedia.org/w/index.php?title=Country-western_two-step&oldid=768160330.
47. See FAR 14.501.

Reinventing Congressional Scoring to Eliminate Barriers to Innovative Real Property Management: Public-Private Partnerships and Swap-Lease Exchanges

BY ELIZABETH MOEHLENBROCK

Introduction

For 13 consecutive years, real property management has landed on the U.S. Government Accountability Office's (GAO's) high-risk list. The high-risk designation is based on an assessment that "the federal government continues to maintain too much excess and underutilized property" and that it "relies too heavily on leasing in situations where ownership would be more cost efficient in the long run."[1]

At the close of fiscal year (FY) 2010, the government's real property portfolio included 6,700 unutilized and 71,000 underutilized buildings that cost a combined $1.66 billion to operate that year.[2] In FY 2010, these unused and underused buildings equaled 33 percent of federally owned buildings for which utilization was reported.[3] Meanwhile, the government's leased footprint[4] has increased from roughly 9 percent of total square footage[5] in the early 2000s to a costly 17 percent in recent years.[6]

Federal excess[7] and underutilized[8] property and overreliance on leasing are intertwined.[9] As agency needs change and buildings age, agencies vacate properties or use them less heavily.[10] At the same time, agency budgets tighten and policy guidance limits feasible options,[11] attracting agencies to expensive traditional leases rather than purchases, new construction, or other options that are cheaper in the long run.[12] Over time, agencies opt for these costly traditional leases in lieu of maintaining and repairing properties and making other capital investments that require larger upfront outlays.[13] Old, neglected properties are left in the wake, adding to the excess and underutilized property inventory while increasing government reliance on traditional leasing.[14]

Because of this link between leasing and unneeded property,[15] taking steps to improve the condition of excess and underutilized property can reduce federal reliance on traditional leasing. In addition, new options for structuring lease transactions can leverage remaining traditional leases to further reduce the unneeded property inventory.

This article speaks to the use of public-private partnerships (PPPs) as a tool to recapitalize excess and underutilized

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property and proposes that "swap-lease" exchanges should be explored to further reduce unneeded property. It suggests, however, that the congressional budget scoring rules will necessarily impede either approach. To begin, the article provides background on PPPs and the proposed swap-lease exchange, including the general business case for each. After establishing these approaches as useful to real property management, the article discusses the history of the scoring rules and unpacks the problems they present to broader adoption of PPPs and prospective adoption of swap-leases. It then responds to common arguments against reforming the scoring rules and presents counterarguments in favor of change. Finally, it concludes with recommendations to address PPPs and swap-leases in the scoring rules, offering several approaches for consideration.

Background

Public-Private Partnerships

Defining PPPs

The *Federal Acquisition Regulation* (*FAR*) regulates the "acquiring by contract *with appropriated funds* of supplies or services (including construction) for the use of the Federal Government"[16] (emphasis added). Consequently, the *FAR* has historically struggled to address acquisitions that involve anything other than appropriated funds. Because the cornerstone of a PPP is some element of private financing, PPPs generally fall outside the *FAR* system. Consequently, there is no federal PPP definition,[17] and the majority of PPPs currently occurs at the state level.[18]

The *GAO Glossary on Public-Private Partnerships* describes a PPP as follows:

> Under a public-private partnership . . . a contractual arrangement is formed between public- and private-sector partners. These arrangements typically involve a government agency contracting with a private partner to renovate, construct, operate, maintain, and/or manage a facility or system, in whole or in part, that provides a public service. Under these arrangements, the agency may retain ownership of the public facility or system, but the private party generally invests its own capital to design and develop the properties. Typically, each partner shares in income resulting from the partnership.[19]

The term *public-private venture* predates the term *public-private partnership*, and at one time the terms were used interchangeably.[20] The former has since fallen out of use because it indicates formation of a legal partnership in which the government has an explicit ownership interest.[21] More recently, agencies have negotiated terms limiting the government's legal liability and expressly stating that a PPP is not a legal partnership.[22]

For purposes of this article, a PPP is more specifically defined as a contractual arrangement in which "a nonfederal entity acquires the right to use real property owned or controlled by a federal agency through a long-term lease in exchange for redeveloping or renovating that property."[23] The long-term lease under the PPP is called a *performance-based lease* because repayment of the initial private investment via future revenues (or savings) is predicated upon acceptable performance of the improvement work. Such performance-based leases also have been dubbed *leasebacks*, *enhanced use leases*, and *concession agreements*, among other terms.[24] Because the long-term lease is requisite to this definition of a PPP, this article focuses on policies pertaining to leases.

Notably, swap exchanges are considered PPPs by some definitions. For purposes of this article, however, the proposed swap-lease is considered separately. This is because it involves the exchange (and disposal) of a property rather than its performance-based lease.

History of PPPs

According to the Congressional Budget Office (CBO), a few federal agencies began experimenting with PPP predecessors (public-private ventures) in the 1990s.[25] Some of these agreements were individually authorized by Congress, a practice with more recent analogs.[26] More often, however, agencies entered into these agreements "under the aegis of broad new legal authorities that allowed them to do so without any additional congressional action."[27] Despite continued growth of federal PPP pilot projects in recent years,[28] there continues to be no federal definition of the term *public-private partnership*.[29] Agencies instead rely on various independent authorities "to lease, otherwise convey, or permit the use of federal real property."[30] Some examples of such authorities include those for independent leasing, enhanced use leasing, retention of proceeds, and conveyance and disposition of real property.[31]

Notwithstanding the lack of specific PPP legal authority at the federal level, the need for federal PPPs continues to grow.[32] A primary driver is that agencies regularly defer repairs and maintenance to balance competing budgetary priorities.[33] Since each $1 in deferred maintenance results in a long-term capital liability of $4 to $5, this practice exacerbates existing real property problems.[34] While deferred maintenance may be typical of any organization on a budget, shrinking budgets provide even fewer incentives for agencies to pursue expensive maintenance, repairs, alterations, and construction.[35]

For the U.S. General Services Administration (GSA), however, the difficulties of real property management extend beyond the shrinking budgets of recent years. In the case of the Federal Buildings Fund, the agency's main funding source for real property activities, the design of the annual appropriations process itself contributes to an inability to undertake necessary repairs and other work. [36] Financed by rents from tenant agencies occupying GSA-owned and -leased properties, the Federal Buildings Fund was designed to be revenue neutral.[37] Neutrality was to be accomplished by disbursement of all rental monies accumulating in the Fund each year.[38] Authority to make the disbursements, however, must be granted by Congress annually as part of appropriations acts.[39]

For five fiscal years (FY 2011–FY 2015), Congress granted GSA less obligational authority than the amount of rent collections accumulating in the Fund.[40] Consequently, "repairs and alterations and new construction projects are the most affected because available funds must first be used to pay leasing, operations and maintenance, and debt costs."[41] Even at the end of FY 2011, before the recent underfunding trend had much impact, GSA estimated that it needed $4.6 billion for repairs and maintenance over the next 10 years.[42] The net result is that in an era of limited fiscal resources, one of the few funds that is "in the black" still cannot pay its bills.[43]

Adding to the problem, deferred capital investments may reduce an asset's appraisal value, reducing the rents GSA may charge its tenants.[44] This has the effect of further reducing Federal Buildings Fund revenue and, by extension, the funds available for repairs, alterations, and new construction. For other real-property-holding agencies, deferred capital investments also reduce asset value, making properties more difficult to dispose of.[45] Public-private partnerships intended to renovate and modernize these neglected properties can render them "habitable" again. Bringing these properties back online avoids expensive traditional leasing alternatives and foregoes the costly, time-consuming disposal process implicated by their continued deterioration.[46]

Partnering with the private sector through PPPs brings expertise, efficiency, and innovation to these projects, in addition to private financing.[47] Oversight of the private entity's investors and bondholders incentivizes on-time, under-budget delivery.[48] Agencies can undertake repair, maintenance, and construction projects they would not otherwise be able to, lowering future operations and maintenance costs and keeping existing assets in the utilized inventory.[49] In this way, PPPs recapitalize existing properties, addressing both the excess/underutilized property inventory and, indirectly, the overreliance on traditional leasing.

Swap-Construct Exchanges and the Case for Swap-Lease Exchanges

Swap-Construct Exchanges

GSA officials have indicated maximum use of existing exchange and disposal authorities as a primary pathway to improved real property management.[50] Toward this end, GSA has recently explored the use of swap-construct exchanges, in which the federal government transfers title of nonexcess[51] property to a developer or other recipient after receiving a constructed asset or completed construction services. This authority was granted by the Consolidated Appropriations Act of 2005 and states, in pertinent part:

> Notwithstanding any other provision of law, the Administrator of General Services may convey, by sale, lease, exchange or otherwise, including through leaseback arrangements, real and related personal property, or interests therein, and retain the net proceeds of such dispositions in an account within the Federal Buildings Fund to be used for the General Services Administration's real property capital needs . . . .[52]

This Section 412 authority has been described as authorizing the exchange of real property for in-kind consideration,[53] and, more specifically, of real property for construction services.[54] It differs from other GSA disposal authorities, which generally authorize the exchange of real property for assets rather than services.[55] As of the time of publication of a July 2014 GAO report, GSA had completed two swap-construct exchanges, with intentions for three more.[56]

Section 412 bestows broad authority, but has been narrowly applied to date. According to the same 2014 GAO report, "until recently there has been limited agency interest [in] using nontraditional property disposal and acquisition approaches, such as swap-construct exchanges."[57] Factors such as limited budgetary resources and a rising number of agency needs, however, have led GSA to consider these approaches more often since 2012.[58]

Swap-construct exchanges are not without their challenges, and alternate or broader application of GSA's Section 412 authority could help address these. One issue is that "GSA often focuse[s] on identifying assets to dispose of and [gives] less attention to what it need[s] in exchange for those assets."[59] This practice leads to unclear Requests for Information (RFIs) and solicitations, which may reduce industry interest or lead to subsequent performance problems.[60] Another challenge is the time required to structure a deal using this type of exchange, which may cause "less motivated parties [to] avoid or withdraw from future exchanges."[61] GSA's first swap-construct took three years to complete; its second, five years.[62] These challenges may reduce the opportunities for swap-construct exchange, may lead to suboptimal performance outcomes that deter further adoption, and may consume limited GSA resources that would be better spent on traditional disposal and acquisition processes.[63]

Swap-Lease Exchanges

There have been numerous calls for agencies to identify their excess and underutilized properties in recent years. Unfortunately, the net result has been government competence in list-making rather than the development of viable innovations for the items on the lists. As agencies identify growing numbers of excess and underutilized properties, the options available for doing something with those properties have not kept pace.

GSA is the single agency charged by statute with the task of disposing of surplus property.[64] Barring additional resources, the more success other agencies have in identifying unneeded properties, the more difficult it becomes for GSA to do its job of real property management. In practice, it is reasonable to expect a downturn in agencies' continued identification of excess and underutilized property absent marked progress in GSA's capacity to handle these properties. New options should be explored to give GSA greater flexibility in responding to agencies' real property needs.

Employing swap-construct as a point of departure, the author proposes a new type of swap exchange in which the in-kind consideration is defined as a traditional lease. Under this "swap-lease," GSA would divest itself of real property in consideration for a lease it would otherwise enter in isolation. To incorporate the swap-lease construct into existing processes, GSA might conduct a swap-lease suitability assessment as part of its market research for new lease procurements.[65] In this way, the federal reliance on leasing could be leveraged to accomplish the disposal of unneeded property.

This article previously stated that new construction is generally less expensive than leasing.[66] However, agency needs are not always long-term enough to warrant new construction, and some amount of traditional leasing will necessarily occur.[67] An option that *leverages* the leases to accomplish property disposal warrants consideration. Precedent for in-kind consideration defined as the provision of space may be found in the Southeast Federal Center Public-Private Development Act of 2000. This act authorized and instructed GSA that "[i]n-kind consideration may include provision of space, goods or services of benefit to the United States, including . . . the provision of office, storage, or other usable space."[68]

In some ways, the envisioned swap-lease avoids the inherent business disincentives of its sister, the swap-construct exchange. As GSA stated in its Industry Day flyer published for the ongoing Federal Triangle South project: "Practically, GSA would withhold conveyance of title of the divestment property until such time that the demolition/replacement asset is completed and accepted pursuant to GSA-specified conditions."[69] Similarly, a GSA RFI for a contemplated swap-construct to dispose of the vacant Michael J. Dillon Courthouse in Buffalo, New York, stated that "the successful offeror would have to complete the construction project that will serve as the consideration for the exchange prior to obtaining title to the property."[70]

These provisions require the private partner to assume a great deal of performance risk, as it is beholden to government acceptance of the new construction before receiving anything in return. This cash-flow-unfriendly transaction structure limits competition to companies large enough and liquid enough to take on such risk. Moreover, the government pays for the risk in the price it pays for the new construction. The swap-lease, however, does not require the private entity to assume this risk. Rather, it levels the playing field by offering up two steady-state forms of consideration: a property that is ready for divestiture in an as-is condition, and a lease in a building that is ready for occupancy. In this scenario, there is no need for industry to price several months or years of uncertainty into a bid.

Keeping in mind the vast (and growing) number of excess and underutilized properties being identified,[71] inclusion of another industry sector or sectors in the disposal process benefits both the private and public sectors.[72] Companies from whom GSA seeks to lease may or may not be in the construction business (swap-construct), but they are in the real estate business (swap-lease). Opening the unneeded property inventory to a new swath of companies with aligned interests enhances competition for unneeded properties across the board, whether for swap-construct or swap-lease exchanges.

Problem

In the case of federal real property management, there is the seeming problem and then there is the underlying problem. The seeming problem is that real property management has been a GAO high-risk area since 2003.[73] GAO's most recent high-risk report states that "GSA lacks an action plan" and points out that although real property management has received recent congressional attention, none of the bills introduced in the 113th Congress was enacted.[74]

The *real* real property problem, however, is that congressional scoring rules usurp rational decision making in favor of shortsighted, binary measures. The *GAO Glossary of Terms Used in the Federal Budget Process* defines *scorekeeping* as:

> the process of estimating the budgetary effects of pending legislation and comparing them to a baseline, such as a budget resolution. . . . Scorekeeping tracks data such as budget authority, receipts, outlays, the surplus or deficit, and the public debt limit. The process allows Congress to compare the cost of proposed budget policy changes to existing law and to enforce spending and revenue levels agreed upon in the budget resolution.[75]

The *scorekeeping rules* are further defined as guidelines for use by the Office of Management and Budget (OMB), CBO, and the Committees on Budget and Appropriations in the House and the Senate.[76] For purposes of this article, an expanded GAO definition illuminates their role: "These rules are also used by OMB for determining amounts to be recognized in the budget when an agency signs a contract or enters into a lease."[77] Commonly called the *scoring rules*, they provide guidance to executive agencies when they are preparing their proposed budgets to Congress and also function as an oversight mechanism by which the scorekeepers track and monitor federal spending.[78]

In their current form, the scoring rules are the product of prior abuse. Previous flexibility in the accounting treatment of agency spending was pushed to its limit during the 1980s, when the Department of Defense (DOD) used lease-purchases to acquire noncombat ships and the Department of Energy (DOE) proposed to lease oil—a consumable commodity—for the Strategic Petroleum Reserve.[79] At the same time, the federal deficit continued to grow to then-unprecedented levels.[80]

Congress responded with a series of statutory budget controls spanning 1985 to 2002.[81] The first of these was the Balanced Budget and Emergency Deficit Control Act of 1985, also called the Gramm-Rudman-Hollings Act.[82] This legislation established a six-year timetable for the gradual reduction of the budget deficit, which was modified and extended two years later by the Balanced Budget and Emergency Deficit Control Reaffirmation Act of 1987.[83] The Budget Enforcement Act of 1990 (BEA)[84] then shifted the focus from forced deficit reduction via targets and timetables to preservation of achieved deficit reduction via procedural controls.[85] Broadly, these procedures were dubbed pay-as-you-go (PAYGO or Statutory-PAYGO).[86] The current scoring rules were born out of this act and were implemented in 1991 by OMB Circular A-11.[87] Notably, however, the BEA enforcement mechanisms that established the rules expired in FY 2002 and were effectively terminated by law in December of that year.[88]

Appendix A to OMB Circular A-11 states that budget authority and outlays will be scored according to A-11's guidelines "when a law provides the authority for an agency to enter into a contract for the purchase, lease-purchase, capital lease, or operating lease of an asset."[89] Colloquially and practically, these categories are bifurcated among operating leases and capital leases because the former are generally considered expenses, while the latter are generally considered investments equivalent to direct purchases.[90] Indeed, the scoring rules as originally issued reflected an attempt to brighten this line between expenses and investments by placing the budgetary treatment of lease-purchases "on a more equal budgetary footing" with that of capital leases, and by extension, with that of direct purchases.[91] This one-or-the-other approach to federal budgeting continues to characterize the scoring rules today.

Appendix A goes on to state that "[n]o special rules apply to scoring purchases of assets. . . . Budget authority is scored in the year in which the authority to purchase is first made available in the amount of the Government's estimated legal obligations."[92] Because swap-construct exchanges result in receipt of a constructed asset or completed construction services, this "standard" scoring for direct purchases would apply.[93] However, because swap-lease exchanges have not been completed, and because they effectively combine the disposal of an asset with a lease that may be an operating lease or a capital lease, confusion over their scoring is likely.[94] This speaks to the inflexibility of the current regime and the need for reform to render the scoring rules real property management *tools* rather than obstacles.

Appendix B of the circular defines the three categories of leases set forth in Appendix A, distinguishing an operating lease as one that meets all of the following criteria:

1. Ownership of the asset remains with the lessor during the term of the lease and is not transferred to the government at or shortly after the end of the lease term.

2. The lease does not contain a bargain-price purchase option.

3. The lease term does not exceed 75 percent of the estimated economic life of the asset.

4. The present value of the minimum lease payments over the life of the lease does not exceed 90 percent of the fair market value of the asset at the beginning of the lease term.

5. The asset is a general purpose asset rather than being for a special purpose of the government and is not built to unique specifications of the government lessee.

6. There is a private-sector market for the asset.[95]

Generally, where an operating lease includes a cancellation clause, it is scored at an amount sufficient to cover the first year's lease payment plus the costs of cancellation.[96] This is the scoring scenario referred to in this article as a *traditional lease*. For limited cases in which funds are considered self-insuring under existing authority (such as for GSA), an operating lease is scored at the annual lease payment amount.[97]

Appendix B further defines a lease-purchase as "a type of lease in which ownership of the asset is transferred to the Government at or shortly after the end of the lease term." It defines a *capital lease* as "any lease other than a lease-purchase that does not meet the criteria of an operating lease."[98]

When an agency enters into a capital lease, Appendix B, Section 1(a) requires that "budget authority will be scored in the year in which the authority is first made available in the amount of the net present value of the Government's total estimated legal obligation over the life of the contract."[99] Section 1(d) further requires that when a capital lease "contains an option to renew that can be exercised without additional legislation, it will be presumed that the option will be exercised for purposes of calculating the term of the lease and scoring budget authority."[100] This means agencies must assume that all lease options will be exercised, must obligate for the entire lifetime of the lease upfront, and must find the funds to do so within a single year's appropriation. In simple terms, this means agencies clamor to have their projects scored as operating leases rather than capital leases because they do not have the upfront funding that capital lease-scoring requires.

Analysts at CBO, however, contend that agencies instead clamor not to have their projects scored at all, and that public-private partnerships are one way to do so.[101] Toward this end, the 2015 version of Appendix B contains a section entitled "Lease-backs from public/private partnerships." The section does not define *public/private partnerships*, but instructs that they will be scored as either capital leases or direct purchases, depending on the degree of "substantial private participation."[102] Relatedly, GAO notes that "depending on how OMB scores [PPP] transactions, some of the scenarios could trigger capital lease-scoring requirements due to the implicit long-term federal need for the space."[103] The requirement to score PPPs as direct purchases or as capital leases that effectively amount to direct purchases hinders federal PPP adoption and the government's ability to accomplish real-property reform.[104]

While the public-private partnership addition to Appendix B is relatively recent, the general construct of operating lease versus capital lease has not changed substantially since the scoring rules' inception in 1991. At one time, CBO and OMB's "full funding principle" only applied to DOD's acquisition of weapon systems.[105] Over time, the expanded application of full funding principles to a procurement system based on annual appropriations has caught up with the government's ability to manage its real property.

Following are some of the arguments used to curtail the scoring debate as it relates to PPPs. These arguments are examined to establish that the issue of scoring will necessarily arise as part of any attempt to more broadly adopt PPPs or more broadly apply GSA's Section 412 authority. As CBO noted in 2003, "few budgetary precedents exist for these new business arrangements, and disagreements sometimes arise about how standard budgetary principles should be applied."[106] Over a decade later, the government continues to apply a blunt instrument created for a 1980s purpose to twenty-first century evolutions for which it is ill suited.[107]

Analysis

Arguments and Counterarguments

Antideficiency Act

A number of hurdles must be cleared before changes may be made to the scoring rules and, by extension, before PPPs and Section 412 authority may be more broadly applied. One common refrain in response to calls for reform is that changes to address PPPs would violate the Antideficiency Act (ADA).[108] To many federal ears, this sounds frightening enough to discourage further debate.[109] In reality, some of the current rules *create* potential ADA violations, and there are numerous examples of ADA exemptions and alternative treatments.

The ADA mandates that federal officers and employees cannot enter into contracts or obligations for the payment of money before an appropriation is available and cannot make an obligation in excess of the amount available in an appropriation.[110] Generally, this is the logic behind the full funding principle borne out by the scoring rules. Notably, however, CBO distinguishes the scoring rules from the statutory prohibitions and requirements of the ADA:

> Under the Anti-Deficiency Act, a federal officer can enter into a contract to purchase the hull of a Navy ship only if the officer has sufficient budget authority to cover the contract. The principle of full funding is much broader. Full funding would require the officer to obtain all of the budget authority required to complete construction of the entire ship before letting a contract for the hull. Although full funding generally has wide support in the Congress as well as from the Office of Management and Budget, it is enforced through policy rather than by legal statute. Not all agencies and committees of the Congress place the same emphasis on full funding.[111]

Before delving further into the ADA, it should be noted that there is a fundamental disconnect in applying the scoring rules to "a contract for the purchase, lease-purchase, capital lease, or operating lease of an asset" when a lease of real property does not qualify as a procurement contract.[112] This echoes the reality that the rules are guidelines that presume a degree of uncertainty from the start.

In reality, an ADA violation can be *created* where an upfront obligation is recorded for the entire term of a capital lease absent a legal liability to exercise the option periods.[113] Typically, government leases contain renewal periods, which the government may elect not to exercise.[114] Consequently, the government's legal commitment at any given time extends no longer than the base period or renewal period of the lease. Because the bona fide needs rule, or Time Statute, requires that appropriations be used only for the "payment of expenses properly incurred during the period of availability,"[115] recording these costs upfront is inconsistent with fiscal law.[116] Costs of option years are the *bona fide* needs of those option years, not of the year in which the government enters the lease (assuming it does not purchase or intend to purchase the asset). Invoking fiscal law to defend a policy that is inconsistent with fiscal law is a non sequitur.

While the ADA is a fundamental tenet of government contracting, it is not impervious to exemptions and alternative treatments. In 2014, for example, U.S. Customs and Border Protection (CBP) and GSA were authorized by law to accept donations of real property, personal property (including monetary donations), and nonpersonal services from private- and public-sector entities.[117] This donation authority smacks of direct conflict with the ADA prohibition against the acceptance of voluntary services.[118] Interestingly, the authority appears to have been granted in the spirit backing many calls for scoring rule change: with an eye toward "implementing business improvements, thoroughly and systematically analyzing . . . and exploring alternative sources of funding to bridge current and anticipated mission resource gaps."[119] It is confounding that the scoring headaches created by PPPs are so debilitating that the government foregoes them in favor of other transaction forms that more directly conflict with the ADA.

In another example, Congress has exempted the Universal Service Fund of the Federal Communications Commission (FCC) from the ADA since 2004 to help it adopt new accounting regulations implemented that year.[120] GSA has specific statutory authority to obligate funds for multiyear leases in advance of available appropriations.[121] Case law dating to 1986 exempted the Nuclear Regulatory Commission and the Saint Lawrence Seaway Development Corporation from various ADA prohibitions and restrictions.[122] A 2006 National Institutes of Health (NIH) case found that despite direct violation of capital lease-scoring rules, NIH did not violate the ADA because it had been delegated authority by GSA to enter into leases without recording the entire amount of the lease in the first year.[123]

These examples are provided neither to imply that PPPs or swap-leases violate the ADA nor that scoring-rule reform to address them necessarily requires deviations therefrom. They are provided to illuminate the fallacy of curtailing the scoring rule debate at the first mention of the ADA. They further point out that Congress has a great number of mechanisms at its disposal to address the changing needs of the federal government.

Cost

Another common argument related to broader adoption of PPPs is that alternative financing approaches do not warrant consideration because direct purchases are inherently cheaper.[124] The benchmark for this argument is usually what the cost to the government (and the broader economy) would be to purchase an asset.[125] Because the Treasury typically issues debt to finance direct purchases, the point of comparison becomes the rate at which the Treasury can borrow versus the rate at which industry can borrow to provide the private financing inherent in a PPP model.[126] By this test, the case for PPPs will fail every time. The fact that government borrows more cheaply than industry would be relevant but for the fact that doing so is infeasible under current and projected budget constraints.[127] Arguments that rely on this line of reasoning also fail to consider that the cost of borrowing is but one cost in the acquisition life cycle.[128]

In recent years, technological advancements in cost estimation coupled with the growing federal deficit have led to an increased focus on life-cycle costing.[129] The *FAR* defines *life-cycle cost* as "the total cost to the Government of acquiring, operating, supporting, and (if applicable) disposing of the items being acquired."[130] The *FAR* requires agencies to engage in decision making that accounts for long-term (life-cycle) costs.[131] The scoring rules, however, discourage prudent decision making by forcing agencies to choose between long-term investment projects that consider life-cycle costs and short-term stopgaps that do not.[132]

According to one GAO report, GSA "staff often assume or believe that a project will be affected by budget-scoring rules [and] reduce the lease term to one that they think will be scored as an operating lease versus a capital lease to avoid the higher up-front scoring associated with a capital lease."[133] The cumulative effects of this behavior echoed across the government may be staggering, but they are difficult to quantify. The net result is that a policy intended to account for life-cycle costs[134] encourages agencies to ignore them.

The performance-based lease under a PPP, however, inherently incentivizes the private entity to consider life-cycle costs.[135] While "traditional project delivery processes (i.e., design-bid-build methods) are not appropriately incentivized to focus on the long-term sustainability of the asset," the extended private partner commitment in a performance-based lease necessarily requires the partner to account for these costs.[136] It is contradictory if not imprudent to claim that government is committed to sustainability and judicious long-term decision making while inhibiting policy changes that encourage these things.

Transparency

Not only is it unwise to discourage policy changes that incentivize desired behaviors, it is still less wise to do so with knowledge that the current policy has the practical effect of encouraging opposite behaviors.[137] This renders even less tenable the assertion that the scoring rules should not encourage PPPs for reasons of transparency.[138] Whether the opposite, unwanted behaviors stem from budget pressure[139] or lack of knowledge,[140] the purpose of *policy* is to manage affairs and guide decisions.[141] At some point, accounting idealism must come to terms with behavioral reality. Policy must align with the decision makers touched by it, or behavior will render the policy ineffective. Essentially, this speaks to the difference between financial accounting and management accounting, both of which are the business of government.

Opponents of A-11 change argue that nontraditional procurement methods such as PPPs "hide" or obscure the government's long-term commitments.[142] The truth of this statement is of a financial accounting nature and is relevant to the *management* of government affairs insofar as decision making is driven by the long-term commitments[143] allegedly being hidden. In the United States, however, it is the cash-based deficit that comes to Capitol Hill to deliberate appropriations legislation, not the government's accrual-based financial statements. The scoring rules are a financial accounting construct imposed on a system that runs on a cash basis.[144] The net result is the trade of one evil (lack of control) for another evil (circumvention of control). In the final analysis, an argument taken up in the name of transparency obscures the issue it purports to solve.

Governance

The goal of transparency is that it foster impartial, predictable adherence to the rules of government. Some argue that the degree of a government's impartiality is a proxy for the overall quality of governance.[145] Indeed, "CBO is strictly nonpartisan; conducts objective, impartial analysis" and "does not make policy recommendations."[146] Hence, the scoring rules are memorialized in an OMB publication while CBO has repeatedly criticized OMB's comparatively less stringent application of its contents.[147]

Impartiality requires the ongoing weighing of alternatives in the development of government policies.[148] The case for A-11 change must be made and evaluated on the whole and relative to available alternatives, including the opportunity costs of inaction.[149] CBO holds that the "consensus among U.S. budget experts is that the advantages of recognizing costs up front outweigh the potential disadvantages."[150] It couches this assessment in a 1967 *Report of the President's Commission on Budget Concepts*, which stated that "at the margin, where boundary questions arise, decisions have been made on the basis of a net weighing of as many relevant considerations as possible."[151] Is it possible that the relevant considerations have changed since 1967?

Points of similarity between the scoring rules' full funding principles and accounting standards promulgated by industry are often noted in response to this question in an attempt to claim that the rules are a modern reflection of best practices.[152] Justifying the rigidity of federal accounting policies by focusing on the limited similarities between accounting in government and in industry is convenient but misses the point.[153] However, Financial Accounting Standards Board (FASB) practices used in industry are employed to resuscitate the scoring rules as they become increasingly outmoded. Notably, FASB's federal counterpart, the Federal Accounting Standards Advisory Board, called for comments on an exposure draft for PPP disclosure requirements, which were due in January 2015.[154] The resulting ballot draft is currently under review.[155] It remains to be seen whether the new accounting standard for PPPs will be a further reincarnation of FASB standards or if it will evidence an earnest federal undertaking to identify and understand the unique interplay between PPPs and accounting that occurs in the business of government.

Ownership

The final scoring obstacle, relative to the performance-based leases that underpin PPPs, is rooted in the concept of ownership. The basic principle underlying the bright line between capital leases and operating leases is the proper incurrence of costs as a function of ownership.[156] The upfront obligation of funds for the acquisition of capital assets reflects acquisition of ownership or rights that effectively amount to ownership.[157] That is, a lease is designated a capital lease based on an assessment that the government has crossed the "rights-that-effectively-amount-to-ownership" line. The current scoring rules assess this to occur, for example, when the lease term is equal to or greater than 75 percent of the asset's useful life or when the total present value of the lease payments is equal to or greater than 90 percent of the property value.[158]

The requirement to score PPPs as capital leases or direct purchases is misplaced because PPPs are generally defined by government *retention* of ownership.[159] Several state-level statutes establish public-sector retention of ownership as tantamount to the spirit of a PPP[160] or, at minimum, as the default arrangement.[161] The performance-based-lease scenario of a PPP diverges from the ownership scenario inherent in a capital lease or purchase. In a performance-based lease, the government leases property *it owns* to the private partner to generate the revenue stream necessary to pay back the initial investment.[162] The government may "lease back" the property, but it retains ownership thereof. Capital lease-scoring contemplates a situation in which government leasing of *private property* results in or amounts to effective ownership, i.e., a situation in which title passes from private entity to government (effectively or in reality). A performance-based lease contemplates a situation in which private leasing of *government property* results in recapitalization of the property and *no change in ownership*.[163] In these ways, the performance-based lease under a PPP is neither a capital lease nor a direct purchase. The either-or school of thought that paralyzes real-property reform must evolve to face the modern innovations capable of fixing the government's real property problems.

Precedent

Many arguments against PPPs (and, prospectively, swap-leases) have much to say about the treatment of their costs and relatively less to say about the treatment of their revenues. There is precedent, if not a requirement, within the legislative application of scorekeeping[164] to address PPP inflows as part of the scoring of leases and contracts.[165] Scoring rule changes that account for the benefits of PPPs and swap-leases as well as their costs would provide a more accurate comparison of property management options.

Existing treatments for lease-purchases also point to opportunities for change. Lease-purchases are divided between those with substantial private risk and those without substantial private risk (i.e., with greater risk to government).[166] Though both types of lease-purchase require full upfront budget authority, different treatment of their outlays indicates a willingness to apportion risk and a divergence from the "one-or-the-other" school of thought that plagues the scoring rule debate. Related concepts may have PPP applications since risk-sharing is a critical element of PPP design.[167]

Finally, there is room for discussion of PPPs and swap-leases within existing scorekeeping processes and procedures. According to the *GAO Budget Glossary*, "scorekeepers (OMB, CBO, and budget committees) have an ongoing dialogue and may revise rules, as required."[168] The scorekeeping guidelines are reviewed periodically,[169] and the *Guide to OMB Circular No. A-11* states that "normally, A-11 is fully revised annually."[170] The mechanism for an earnest federal undertaking to overhaul the scoring rules already exists. Change is long overdue.

Recommendations

Create a New Scoring Category for Performance-Based Leases

Because a performance-based lease is not properly characterized as a capital lease or as a direct purchase, a new scoring category should be created for performance-based leases under PPPs. The ADA does not preclude this option, the cost of PPPs is not inherently prohibitive, and *not* establishing a PPP-specific category may have worse effects on transparency than doing so. Overhauling the rules to keep pace with the changing needs of government is integral to good governance. The revenues (and savings) generated by performance-based leases should be accounted for within PPP scoring as part of a fuller application of existing scorekeeping definitions. Change is consistent within the framework of the scoring rules as "an ongoing dialogue." Finally, as a function of ownership, there is no other way but to create a new category because performance-based leases are not direct purchases and do not fit within the existing capital lease definition.

A new scoring category for performance-based leases would enable the government to recapitalize its underutilized property inventory, making use of existing properties and reducing the reliance on costly traditional leasing. This would give agencies an option that better aligns with the spirit of life-cycle costing, while facilitating congressional control and monitoring. CBO acknowledges that "until federal agencies have more effective tools and incentives for managing real property, strong pressure will continue for public/private ventures that—in violation of budget concepts—allow federal spending on real property outside of the budget."[171] It is axiomatic that time and energy spent identifying ways in which PPPs fall *outside* the budget would be better spent finding appropriate ways to account for them *inside* the budget.[172]

Nonetheless, the purpose of this article is to make the argument for a new scoring category for performance-based leases rather than to delineate how they should be scored, per se. To illuminate the possibilities, however, a few previously attempted approaches are discussed to illustrate why they did not move forward. Other potential approaches are submitted for consideration and debate.

At one end of the spectrum, CBO has suggested far-reaching changes to the scoring rules that would create a de facto PPP category by eliminating categories altogether.[173] This approach appears to have lost steam because the complexity of recording outlays would effectively replace the present challenges of recording budget authority.[174] Pointing to the inadequacy of the current scoring rules in preventing the abuse of operating leases, GAO has acknowledged that "applying the principle of up-front full recognition of long-term costs to all options . . . —purchases, lease-purchase or operating leases—is more likely to result in selection of the most cost-effective alternative than the current scoring rules would."[175] CBO further suggested that "[C]ongressional control might be enhanced if all leasing or public/private projects that involved private sector financing above a certain threshold, perhaps $5 million, had to be authorized individually."[176] Presumably, this has not occurred because the administrative burden and operational paralysis it would impose would outweigh the benefits of enhanced control.

Alternatively, the Clinton and Bush administrations proposed Capital Acquisition Funds (CAF) as another approach.[177] Under this method, "Congress would authorize an agency's acquisition fund to borrow money up front to purchase an asset, such as a building. Users within the agency would then pay for the asset and interest costs over time . . . smooth[ing] out capital costs in the user's budget even though the agency's total budget would reflect the capital costs up front."[178] These funds were not pursued, however, because "OMB's interest in CAFs . . . waned," and "a CAF mechanism [did] not seem to be worth the complexity and implementation challenges that it would create."[179]

Another option might be to score performance-based leases using a modified operating-capital lease approach that combines elements of both. Such an approach could draw on the operating lease construct of the first year's lease payment plus cancellation costs, using a lump sum negotiated as part of the PPP to calculate the cancellation costs.[180] Alternatively, it could draw on the capital lease construct of budget authority for the entire lease term using a larger (but not full) number of years' lease payments to calculate the "base" to which the cancellation costs would be added.[181] The number of base years could be tied, for example, to the government's risk of loss.[182] Admittedly, however, this is a general description of a general approach that is not without limitations.

Regardless of how a new scoring approach addresses performance-based leases, a GAO conclusion from 1981 still rings true: "Whatever approach is followed, it will be difficult, because of budgetary constraints, to reverse the trend toward increased leasing."[183] The fact that costly traditional leasing remains a high-risk area three decades later evidences the property paralysis that plagues the federal government.[184]

Consider "Scoring Credits" to Facilitate Swap-Lease Exchanges

Because swap-lease exchanges have not been completed, and because they effectively combine the disposal of an asset with a lease that may be an operating lease or a capital lease, discord over their scoring is likely.[185] This article establishes that antiquated scoring rules will obstruct any effort to adopt swap-leases and bemoans the stagnation imposed by delaying the debate. While the purpose of the article is not to delineate how swap-leases should be scored, per se, a few potential issues and approaches are submitted for consideration.

First, it would be reasonable to assume that there may be fewer scoring obstacles where a swap-lease involves an operating lease rather than a capital lease. However, that assumption would be based on an assessment of each construct in isolation (disposal and operating lease) and would not capture obstacles that may result from their combination. Depending on the value of the property being divested, an operating lease by nature may be insufficient consideration for exchange.[186] By the same token, the duration of an operating lease may be insufficient to warrant a transaction form that is likely to take longer than traditional alternatives.[187] Applying the swap-lease concept to the otherwise simplest form of leasing is likely to be unduly burdensome, practically infeasible, and politically untenable.

Swap-lease would be most useful where the exchanged-for lease is a capital lease. Because the exchange involves consideration in the form of the property being divested, GSA might apply (i.e., subtract) that consideration to (from) the budget authority that the capital lease would otherwise require. Effectively, the disposal property would serve as a "scoring credit" applied to the capital lease. The capital designation of the lease might remain based on the nature of the government's need, but the budget authority necessary to fund it would be reduced. This would incentivize GSA to identify properties for disposal and to more quickly dispose of the properties identified.[188] It would also encourage a more informed and thorough evaluation of whether government leasing needs are truly short-term or long-term in nature.[189]

There necessarily would be exchanges in which the fair market value of the disposal property and the value of the exchanged-for lease would not equate. In these cases, GSA could employ cash equalization as it currently does under swap-construct exchanges.[190] Additional cash received would further be subtracted from the budget authority required for the capital lease. Unlike swap-construct exchanges, swap-leases would not be limited to "exchanges of federal property of equal or greater value" based on a constraint that properties of less value "require appropriation of federal funding."[191] That is, disposal properties valued at less than the amount of the capital lease would not preclude a swap-lease because the differential could be funded with Federal Buildings Fund revenue using standard processes.[192]

The RFI for a recently proposed GSA swap-construct exchange cites "Single Project + Cash Equalization" and "Menu of Projects + Cash Equalization" as possible transaction structures. This suggests that multiple disposal properties might also be combined in exchange for a capital lease. The same scoring treatment would apply, reducing the budget authority required for the capital lease based on the amount of consideration provided by the disposal properties. Again, the concept of cash equalization could be used "to generate competitive bidding for the propert[ies]."[193]

Regardless of the specific scoring treatment for swap-leases, debate regarding the surrounding issues and possibilities is timely. As nontraditional procurement methods become more common, advance discussion of possible scoring approaches and related effects can envisage some issues and prevent some others. Correcting the government's property paralysis requires active real property management that demands ongoing, thoughtful evaluation.

Conclusion

The creation of a performance-based lease scoring category incentivizes the use of PPPs to address federal excess and underutilized property. Effort spent grumbling about how PPPs do not fit into the scoring rules would be better spent identifying a PPP-specific scoring treatment. Exploration of swap-lease exchanges under existing GSA authority suggests a new option to reduce excess property and augments GSA's capacity to assist client agencies. Scoring swap-lease exchanges as capital leases with scoring credits accelerates the disposal of unneeded property and addresses existing gaps in institutional processes related to scoring.

The scoring rules should be a tool in the government's real property management portfolio, not the driving force. When the means to an end has become the end itself, the time for rule-mongering has expired. These recommendations work to correct the property paralysis that has plagued the federal government for many years. They move real property management into the twenty-first century by positioning public-private partnerships to address underutilization and by anticipating nontraditional procurement trends that address the disposal of excess property. They acknowledge current economic constraints and equip agencies with reasonable operating flexibility. Consistent with a system that runs on annual appropriations, they promote prudent long-term decision making that ultimately results in better use of taxpayer dollars.

ENDNOTES

1. GAO-15-290, *U.S. GAO—High-Risk Series: An Update*, February 11, 2015, http://www.gao.gov/highrisk/managing_federal_property/why_did_study#t=0. The 2016 report had not yet been published as of the date of this article.

2. Federal Real Property Council, *FY2010 Federal Real Property Report: An Overview of the U.S. Federal Government's Real Property Assets*, September 2011, 6, http://www.gsa.gov/graphics/ogp/FY_2010_FRPP_Report_Final.pdf. Executive Order 13327 (February 4, 2004) created the Federal Real Property Council (FRPC) and mandated the creation of a centralized real property database. The 24 federal agencies (hereinafter CFO Act agencies) stipulated by the Chief Financial Officer and Federal Financial Reform Act (CFO Act) of 1990 (P.L. 101-576) must report their real property holdings and activity annually to the FRPC. The FRPC comprises the controller of the Office of Management and Budget (OMB); the deputy director for management, OMB; the Administrator of General Services; a senior real property officer from each CFO Act agency, and "any other full-time or part-time Federal officials or employees as deemed necessary by the Chairman of the Council" (Executive Order 13327, Sec. 4(a)).

3. *Ibid*. CFO Act agencies are required to report utilization for the asset use categories of 1) office space, 2) hospitals, 3) warehouses, 4) laboratories, 5) family housing, and 6) dormitories and barracks.

4. This includes leased buildings as well as leased structures, as reported by the CFO Act agencies to the FRPC.

5. This includes leased and owned federal buildings and structures as reported by the CFO Act agencies to the FRPC.

6. The proportion of leased space (buildings and structures) to total owned and leased space (buildings and structures) has been regularly tracked since FY 2002, when the leased footprint was 9.2%. In FY 2003 and FY 2004, it was 9.9% and 9.8%, respectively. In FY 2009, it reached a high of 19.8%, and it has ranged from 16.5% to 17.3% since FY 2010.

7. 40 USC 102 (Federal Property and Administrative Services Act of 1949, as amended, *Pub. L.* 107-217, 116 Stat 1063) defines *excess property* as "property under the control of a federal agency that the head of the agency determines is not required to meet the agency's needs or responsibilities." It defines *surplus property* as "excess property that the Administrator determines is not required to meet the needs or responsibilities of all federal agencies" (116 Stat 1064). For purposes of this article, the author follows the predominant discourse represented by the sources cited, which focuses on excess property rather than surplus property and generally does not distinguish between the two. That is, excess and surplus property are generally considered synonymous.

8. 41 CFR 101-47.801 (Federal Management Regulation) defines *underutilized* as "an entire property or portion thereof, with or without improvements: (i) Which is used only at irregular periods or intermittently by the accountable executive agency for current program purposes of that agency; or (ii) Which is used for current program purposes that can be satisfied with only a portion of the property." This section also defines property *not utilized* and property *not being put to optimum use*, which the author includes as "underutilized" in accordance with the predominant discourse represented by the sources cited. That is, all three types of property are encompassed by the term "underutilized" and no distinction is made among them for purposes of this article.

9. Excess/underutilized property and overreliance on leasing are cited as the two driving factors behind GAO's high-risk designation. See GAO-15-290, *U.S. GAO—High-Risk Series: An Update*.

10. For example, the Telework Enhancement Act of 2010 (*Pub. L.* 111-292) significantly changed executive agencies' utilization of existing office space. The Act requires all executive agencies to determine the eligibility of all employees for telework, to establish policies authorizing eligible employees to telework, and to report to Congress annually regarding employee participation and reasons for variation in participation; agency goals for increasing participation and agency progress toward goals for the preceding period; the method of agency data collection; and best practices for agency telework programs (5 USC 6502, 6506). See also GAO-14-41, *Selected Agencies Plan to Use Workforce Mobility to Reduce Space, but Most Efforts Are Too New to Have Realized Savings*, October 17, 2013.

11. See the section headed "Problem" in this article for further discussion.

12. GAO/GGD-99-49R, *General Services Administration: Comparison of Space Acquisition Alternatives—Leasing to Lease-Purchase and Leasing to Construction*, March 12, 1999, which found that construction was less expensive than leasing for all but one construction acquisition reviewed and that lease-purchase was less expensive than traditional leasing for all but one lease acquisition reviewed. See also Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, February 2003, xi, which states that "a lease-purchase is, over the life of an asset, inherently more costly to the government than a direct purchase."

13. Garrett Hatch and Kate M. Manuel, *Public-Private Partnerships for Purposes of Federal Real Property Management*, Congressional Research Service Report R43337, December 12, 2013, 5. "When comparing the benefits of investing in expensive repairs of aging buildings . . . or acquiring new space that can help the agency better fulfill its mission, agencies generally prioritize the latter."

14. Traditional leasing is distinguished from performance-based leasing, which is a product of public-private partnerships.

15. The term *unneeded property* is used to encompass both excess and underutilized property.

16. FAR 2.101, Definitions. See the definition of *acquisition*.

17. Hatch and Manuel, *Public-Private Partnerships*, 9: "Federal law does not define the term public-private

partnership or, with certain narrow exceptions, authorize agencies to enter PPPs, *per se*."

18. For example, National Conference of State Legislatures, *Public-Private Partnerships for Transportation: A Toolkit for Legislators*, October 2010. See also Emilia Istrate and Robert Puentes, *Moving Forward on Public Private Partnerships: U.S. and International Experience with PPP Units*, Brookings-Rockefeller Project on State and Metropolitan Innovation, December 2011, which references the state-level transportation industry as the foreground for PPPs in the United States.

19. U.S. Government Accounting Office, *Glossary: Public-Private Partnerships: Terms Related to Building and Facility Partnerships*, April 1999, 13.

20. *Ibid*. In the definition of *public-private partnership*, GAO states that the arrangement is "sometimes referred to as a public-private venture."

21. For example, Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, February 2003, 27-28.

22. *Pub. L.* 106-407, Southeast Federal Center Public-Private Development Act of 2000, §3(b) Terms and Conditions, which states at (6) that "—An agreement entered into under this section . . . shall provide (A) that the United States will not be liable for any action, debt, or liability of any entity created by the agreement; and (B) that such entity may not execute any instrument or document creating or evidencing any indebtedness unless such instrument or document specifically disclaims any liability of the United States under the instrument or document; and (C) shall include such other terms and conditions as the Administrator considers appropriate." See also GAO-02-46T, *Public-Private Partnerships: Factors to Consider When Deliberating Governmental Use as a Real Property Management Tool* (Statement of Bernard L. Ungar, Director, Physical Infrastructure Issues), October 1, 2001, 3, which states that one of the conditions assumed in conducting a GAO study of the benefits of real-property PPPs was that "the government would not be liable for any actions, debts, or liabilities of any person under an agreement, and the leasehold interests of the United States would be senior to any lender of the nongovernmental partner."

23. Hatch and Manuel, *Public-Private Partnerships*, 1.

24. Federal Accounting Standards Advisory Board (FASAB), unofficial memorandum, subj: Status Report: Public-Private Partnerships—Tab G, "Attachment 4, April 2012 Public-Private Partnerships Status Report (Tab H-4)/Attachment 2, Types of Public-Private Partnership Arrangements," August 10, 2012, 9–19, http://www.fasab.gov/pdffiles/tab_g_public-private_partnerships_2012aug.pdf.

25. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, 25. The primary agencies that explored PPP predecessors were DOD, the VA, and the Department of Energy.

26. For example, *Pub. L.* 106-407, Southeast Federal Center Public-Private Development Act, November 1, 2000, which authorizes the Administrator of General Services to enter into agreements such as leases, contracts, cooperative agreements, limited partnerships, joint ventures, trusts, and limited liability company agreements with private entities to provide for the acquisition, construction, rehabilitation, operation, maintenance, or use of the Southeast Federal Center property, or such other related activities as the Administrator sees fit.

27. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*. The first such examples were congressional provision of enhanced-use leasing authority to the VA in 1991 and of housing privatization authority to DoD in 1996.

28. For example, the Water Resources Reform and Development Act of 2014, § 5014; the Moving Ahead for Progress in the 21st Century (MAP-21) Act of 2012, § 1534.

29. Hatch and Manuel, *Public-Private Partnerships*, 9: "Federal law does not define the term *public-private partnership* or, with certain narrow exceptions, authorize agencies to enter PPPs, *per se*."

30. *Ibid.*, 10.

31. A number of agencies have their own statutory authorities for these activities separate from GSA. See Appendix I, GAO-11-879T, *Federal Real Property: Overreliance on Leasing Contributed to High-Risk Designation*, August 4, 2011, for a list of independent statutory leasing authorities by agency. See also Enclosure II: Selected Real Property Authorities and Retention of Proceeds Authorities for Major Real Property Holding Agencies, GAO-09-283R, *Federal Real Property: Authorities and Actions Regarding Enhanced Use Leases and Sale of Unneeded Property*, February 17, 2009, for a list of other authorities of eight of the top ten real-property-holding agencies (by value).

32. For example, U.S. House Committee on Transportation and Infrastructure Panel on Public-Private Partnerships, *Findings and Recommendations of the Special Panel on Public-Private Partnerships*, September 10, 2014, 10: "There remain billions of dollars in infrastructure needs in the United States that are in search of funding."

33. Hatch and Manuel, *Public-Private Partnerships*. See also National Research Council of the National Academies, *Investments in Federal Facilities: Asset Management Strategies for the 21st Century* (Washington, DC: 2004), which states that government organizations under budget constraints first defer or cut facilities investments such as maintenance, repairs and alterations.

34. Hatch and Manuel, *Public-Private Partnerships*.

35. For example, DOD's topline budget (base budget plus overseas contingency operations) shrank from $691 billion in FY 2010 to $575 billion in FY 2015 (United States Department of Defense Fiscal Year 2016 Budget Request Overview, Office of the Under Secretary of Defense [Comptroller] Chief Financial Officer, February 2015, 1–5, which provides historical funding figures from FY 2001 up to and including the FY 2016 budget request). More specifically, GSA's annual appropriations for real property activities decreased from $8.54 billion in FY 2010 to $7.92 billion in FY 2013. (*Pub. L.* 111-117, 123 Stat 3187; H.R. 1473—99 § 1549[a]; *Pub. L.* 112-74, 125 Stat. 911; H.R. 6020 available at http://www.gpo.gov/fdsys/pkg/BILLS-112hr6020rh/html/BILLS-112hr6020rh.htm).

36. GAO-12-646, *Federal Buildings Fund: Improved Transparency and Long-Term Plan Needed to Clarify Capital Funding Priorities*, July 2012, 4, which lists (1) Rental of Space, (2) Repairs and Alterations, (3) Construction and Acquisition of Facilities, (4) Building Operations and Maintenance,

and (5) Installation Acquisition Payments as the five obligation categories for which monies from the Federal Buildings Fund may be disbursed. The Federal Buildings Fund appropriation is GSA's first appropriation under each fiscal year's Consolidated Appropriations Act.

37. *Ibid.*, 3–4.

38. *Ibid.*, 4, stating that rent monies from GSA-owned properties were generally intended to fund repairs and alterations, operations and maintenance, and new construction, and that the Federal Buildings Fund would "disburs[e] all the funds . . . collect[ed] from federal agencies occupying the [leased] space to pay the cost of the underlying leases."

39. *Pub. L.* 92-313 86 Stat 218 (Public Buildings Amendments of 1972), which states at (f): "(1) There is hereby established in the Treasury of the United States . . . a fund into which there shall be deposited the following revenues and collections: [. . .] (2) Moneys deposited into the fund shall be available for expenditure for real property management and related activities in such amounts as are specified in annual appropriations Acts without regard to fiscal year limitations."

40. U.S. General Services Administration, *FY2016 Congressional Justification*, February 2, 2015, FBF-3, http://www.gsa.gov/portal/mediaId/205963/fileName/FY2016_CONGRESSIONAL_JUSTIFICATION.action.

41. GAO-12-646, *Federal Buildings Fund*, 6–7.

42. *Ibid.*, 16. See also GAO-01-452, *Federal Buildings: Funding Repairs and Alterations Has Been a Challenge—Expanded Financing Tools Needed*, April 2001.

43. This statement encompasses the capital investments that are foregone due to the congressional appropriations process and is not intended to mean that GSA is delinquent on actual bills due.

44. GAO-12-646, *Federal Buildings Fund*, 3, which states that GSA appraises its inventory on a five-year rotation, performing fair rent appraisals on about 20 percent of its inventory annually to determine commercially equivalent rental rates in a given location. These rates are then used as the basis for rental rates charged to tenants.

45. Hatch and Manuel, *Public-Private Partnerships*, 5: "With the acquisition of new space, agency personnel move out of older properties, rendering them even less valuable to the agency and less likely to receive needed repairs. As a result, the government holds thousands of properties it does not need and cannot afford to maintain, but which are in poor condition and therefore more difficult to dispose of."

46. 40 USC 521–528 generally describe the standard disposal process for real property.

47. U.S. House Committee on Transportation and Infrastructure Panel on Public-Private Partnerships, *Findings and Recommendations of the Special Panel on Public-Private Partnerships*.

48. *Ibid.*, 10. See also PriceWaterhouseCoopers, *Public-private Partnerships: The US perspective*, 2010, 8.

49. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, 21: "Agencies faced with the upfront costs of acquiring new capital assets—facilities and equipment—often have the option of continuing to produce goods and services using what they have, even if it is old or obsolete. Although that approach can increase the costs of producing output in the long run, it holds down budgetary costs in the short run . . . even though failure to invest in buildings ultimately leads to higher maintenance costs."

50. Norman Dong, Commissioner, Public Buildings Service, and Bill Dowd, Project Executive, Public Buildings Service, at the National Council for Public-Private Partnerships (NCPPP) Federal P3 Summit, February 12–13, 2015, Washington, DC, partial presentation available at http://www.ncppp.org/events/past-events/federal-p3-summit/presentations/.

51. GAO-14-586, *Federal Real Property: GSA Should Better Target Its Use of Swap-Construct Exchanges*, July 24, 2014, 4–5. Specifically, "properties disposed of through swap-construct are not declared excess or surplus (*often because they are still in use by federal tenants when the swap-construct is proposed and during the exchange process*)" (at 19, emphasis added). This article considers the timing of the official excess property declaration a formality that does not substantively change the status of the property as unneeded. In practice, the timing of the declaration serves as the means by which agencies avoid the long, costly "standard" disposal process, which is triggered by agency declaration of the property as excess.

52. *Pub. L.* 108-447 118 Stat 3259, § 412, commonly referred to as GSA's Section 412 authority.

53. GSA Policy and Procedure, PBS P 4065.1, subject: *Procedural Guidance for Section 412 Exchanges for In-Kind Consideration*, signed June 18, 2014 by Commissioner, Public Buildings Service, http://gsa.gov/portal/mediaId/198803/fileName/PBS_P_40651_Procedural_Guidance_for_Section_412_Exchanges_(signed_6-18-14).action.

54. GAO-14-586, *Federal Real Property*, 4. See also Office of Audits, Office of Inspector General, U.S. General Services Administration (GSA), JA-R memorandum to Commissioner, Public Buildings Service, subject: PBS Needs to Develop Policies and Procedures for Use of Section 412 Authorities, Audit Memorandum Number A130132, November 12, 2013, http://www.gsaig.gov/?LinkServID=FD2890EF-EC71-95CD-D3F7759907CB8DDB&showMeta=0.

55. For example, 40 USC 3304(a); 40 USC 3305(a)(1); 40 USC 3305(a)(2); 40 USC 543; and 40 USC 581(c)(1).

56. GAO-14-586, *Federal Real Property*, 7–17.

57. *Ibid.*, 12.

58. *Ibid.*, 12–13.

59. *Ibid.*, 23.

60. GAO-14-586, *Federal Real Property.*

61. *Ibid.*, 7.

62. *Ibid.*

63. GAO-14-586, *Federal Real Property.*

64. 40 USC 101 (Federal Property and Administrative Services Act of 1949, as amended, *Pub. L.* 107-217, 116 Stat 1063). See also 41 CFR 102-75.115 (Federal Management Regulation), stating that GSA is generally responsible for disposing of real property unless an agency has specific or

delegated authority to do so, and 41 CFR 102-75.5 (Federal Management Regulation), referring to "rare instances where GSA delegates disposal authority to a Federal agency."

65. FAR 10.001.

66. GAO/GGD-99-49R, *General Services Administration: Comparison of Space Acquisition Alternatives*.

67. *Ibid*.

68. *Pub. L.* 106-407, Southeast Federal Center Public-Private Development Act of 2000, § 3(c) 114 Stat 1759.

69. Industry Day, Federal Triangle South, January 4, 2013, Overview of Transaction Authorities, http://www.gsa.gov/portal/mediaId/158315/fileName/FTS_Authorities_Overview.action.

70. Sources Sought 02-0026-05-2014, General Services Administration, Public Buildings Service, May 14, 2014, https://www.fbo.gov/index?s=opportunity&mode=form&id=5cd0307d88a2ee7d752076156b97a62c&tab=core&_cview=1.

71. See, generally, Federal Real Property Profile (FRPP) Summary Report Library, http://www.gsa.gov/portal/content/102880.

72. GAO-14-586, *Federal Real Property*, 27. Request for Information (RFI) responses to three proposed GSA swap-construct exchanges included a developer, a firm that advises developers, a university, and a company that provided property management services.

73. GAO-15-290, *U.S. GAO—High-Risk Series: An Update*.

74. *Ibid*.

75. GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process*, September 2005, 88.

76. *Ibid*. See also GAO-01-929, *Budget Scoring: Budget Scoring Affects Some Lease Terms but Full Extent Is Uncertain*, August 2001, 4, note 8, defining the "scorekeepers" as the House and Senate Budget Committees, CBO, and OMB.

77. GAO-14-239, *Capital Financing: Alternative Approaches to Budgeting for Federal Real Property*, March 12, 2014, 7.

78. GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process*, Appendix 1, Overview of the Development and Execution of the Federal Budget.

79. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, ix.

80. OMB Historical Tables, Table 1.3—Summary of Receipts, Outlays, and Surpluses or Deficits (-) in Current Dollars, https://obamawhitehouse.archives.gov/omb/budget/Historicals. In the late 1970s, the federal deficit approached and then exceeded the World War II high from 1943. From 1980 to 1986, it continued to grow substantially. Between FY 1987 and FY 1992, the deficit waxed and waned before trending downward from FY 1993 to FY 2000. It reached its first surplus since FY 1969 in FY 1998.

81. Megan Suzanne Lynch, *Statutory Budget Controls in Effect Between 1985 and 2002*, Congressional Research Service Report R41901, July 1, 2011.

82. *Pub. L.* 99-177.

83. *Pub. L.* 100-119.

84. *Pub. L.* 101-58.

85. Lynch.

86. OMB, *The Statutory Pay-As-You-Go Act of 2010: A Description*, https://obamawhitehouse.archives.gov/omb/paygo_description/, referencing the Budget Enforcement Act of 1990 as "the first statutory PAYGO law." The current PAYGO law (*Pub. L.* 111-139, Statutory Pay-As-You-Go Act of 2010) was enacted February 12, 2010 and did not alter OMB scoring rules for the purchase, lease-purchase, capital lease, or operating lease of an asset as discussed herein.

87. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, xiii.

88. The provisions of the Budget Enforcement Act were extended twice, first through 1998 by the Omnibus Budget Reconciliation Act of 1993, then through 2002 by the Budget Enforcement Act of 1997. Upon their expiration at the end of FY 2002, *Pub. L.* 107-312 set all PAYGO balances to zero to prevent a sequester for FY 2003 and beyond. See also Lynch, *Statutory Budget Controls in Effect Between 1985 and 2002*, 12.

89. OMB, *Circular No. A-11, Preparation, Submission and Execution of the Budget*, Appendix A, Scorekeeping Guidelines, 2015, 2. Appendix A provides an overview of the scoring rules contained at Appendix B, which prescribe the specific scoring of capital leases and lease-purchases.

90. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, 11–12: "The guidelines to identify operating leases were closely modeled on those used by private firms…[where] for an operating lease, the lessee does not capitalize the costs but treats them as expenses over the term of the lease." Generally, this CBO paper discusses the scoring rules as a means to recognize the costs of capital investments at the time the federal government enters into the investment.

91. *Ibid*., xiii.

92. OMB, *Circular No. A-11*, 3.

93. GAO-14-586, *Federal Real Property*.

94. According to Norman Dong, Commissioner, Public Buildings Service, at the National Council for Public-Private Partnerships (NCPPP) Federal P3 Summit, February 12–13, 2015, Washington, D.C., GSA has not completed any swap-lease exchanges.

95. OMB, *Circular No. A-11*, Appendix B, Budgetary Treatment of Lease-Purchases and Leases of Capital Assets, 2015, 6, Section 3.

96. *Ibid*., 2, 1(a).

97. *Ibid*. See also GAO-01-929, *Budget Scoring*, 5.

98. OMB, Circular No. A-11, Appendix B, Budgetary Treatment of Lease-Purchases and Leases of Capital Assets, 2015, 6, Section 3.

99. *Ibid*., 2, 1(a).

100. *Ibid*., 3, 1(d).

101. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, 57: "Agencies facing budget constraints have an incentive to seek ways to move their investment activities outside of the federal budget, where they will not depend on Congressional appropriations. Those responsible for the integrity of the budget—and for ensuring Congressional control over federal spending—will seek to limit the agencies' ability to do so."

102. OMB, *Circular No. A-11*, 7, which defines substantial private participation and stating that a lease with this designation "will be treated as a capital lease" and that a lease that "fails to meet the test of substantial private participation . . . will be considered governmental," that is, scored as a purchase.

103. GAO-02-46T, *Public-Private Partnerships*, 4.

104. GAO-07-349, *Federal Real Property: Progress Made Toward Addressing Problems, but Underlying Obstacles Continue to Hamper Reform*, April 2007, 19: "OMB staff believe that the Congressional Budget Office scoring will play an important role in determining the shape of a permanent real property reform solution."

105. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, 8.

106. *Ibid*., 26.

107. Dorothy Robyn (former Commissioner of Public Buildings Service, GSA, and former Deputy Under Secretary of Defense for Installations and Environment, DOD), for the Brookings Institution, *Reforming Federal Property Procurement: The Case for Sensible Scoring*, April 24, 2014.

108. Generally, OMB speakers at NCPPP Federal P3 Summit, February 12–13, 2015, Washington, D.C.

109. 31 USC 1349(a), 1351. Federal officers or employees who commit a violation of the ADA are subject to administrative discipline, including suspension from duty without pay or removal from office, and agencies are required to report violations immediately to Congress and the President.

110. 31 USC 1341(a)(1).

111. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, 4.

112. 48 CFR 2.101 defines a *procurement contract* as a "mutually binding legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them." *Supplies* are defined as "all property *except land or interests in land*" (emphasis added). See also Hatch and Manuel, *Public-Private Partnerships*, 10: "Contracts whereby the federal government acquires leasehold interests in real property are excluded from the standard definition of *procurement contract*."

113. 31 USC 1501(a), which states that obligations against appropriations are recorded upon incurrence of a legal obligation to pay money. This statement assumes a traditional lease arrangement in which the base is one year, with options, and excludes a multiyear lease arrangement in which the base is multiple years.

114. FAR 17.207, Exercise of Options. See also GAO-13-14, *Federal Real Property: Improved Cost Reporting Would Help Decision Makers Weigh the Benefits of Enhanced Use Leasing*, December 2012, 19–20, voicing VA's position that "accounting for all 35 years of [enhanced use lease] costs upfront in the budget would not be technically appropriate, since VA would be determining in advance that it would prospectively receive energy under the purchase agreements for 35-year periods without recognizing VA's two-year renewal options."

115. 31 USC 1502(a), commonly called the Time Statute or *bona fide* needs rule.

116. Memorandum from Assistant Sec'y of the Army, Financial Mgt. and Comptroller, to Commander, Third Army/U.S. Army Central, subject: Funding Guidance for Contracts Involving Capital Assets, March 28, 2007, opining that the scoring rules of OMB *Circular No. A-11* are inconsistent with fiscal law and do not govern the type of appropriation that should be used to fund a capital lease.

117. Consolidated Appropriations Act of 2014, *Pub. L.* 113-76 § 559.

118. 31 USC 1342, which states, "An officer or employee of the United States Government or of the District of Columbia government may not accept voluntary services for either government or employ personal services exceeding that authorized by law except for emergencies involving the safety of human life or the protection of property."

119. U.S. Customs and Border Protection and General Services Administration, *Section 559 Donation Acceptance Authority: Proposal Evaluation Procedures and Criteria Framework*, Executive Summary, signed June 27 and July 11, 2014, by the Commissioner, Public Buildings Service, GSA, and the Commissioner, U.S. Customs and Border Protection, respectively.

120. The Consolidated Appropriations Act of 2015, *Pub. L.* 113-235 § 501, extended the exemption through December 31, 2016. See also GAO-05-546T, *Telecommunications: Application of the Antideficiency Act and Other Fiscal Controls to FCC's E-Rate Program*, April 11, 2005.

121. 40 USC 585(a)(2), which states that "the obligation of amounts for a lease under this subsection is limited to the current fiscal year for which payments are due without regard to the Antideficiency Act."

122. See, for example, B-217578, October 16, 1986 (Saint Lawrence Seaway Development Corporation has express statutory authority to determine the character and necessity of its obligations and is therefore exempt from many restrictions regarding the use of appropriated funds); B-197742, August 1, 1986 (Price-Anderson Act expressly exempts the Nuclear Regulatory Commission from the Antideficiency Act prohibition against obligations or expenditures in advance or in excess of appropriations).

123. U.S. Government Accountability Office, GAO-06-918, Report to the Chairman, Committee on Energy and Commerce, House of Representatives: *Federal Real Property: National Institutes of Health (NIH) Has Improved Its Leasing Process, but Needs to Provide Congress with Information on Some Leases*, September 8, 2006.

124. GAO/GGD-99-49R, *General Services Administration: Comparison of Space Acquisition Alternatives*.

125. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, 15, which states, for

example, that in a lease-purchase, "the effects on the economy—including the potential for crowding out private investment—[are] essentially the same as they would [be] had the Treasury issued debt to finance the asset."

126. For example, GAO-08-44, *Highway Public-Private Partnerships: More Rigorous Up-front Analysis Could Better Secure Potential Benefits and Protect the Public Interest*, February 2008, 34–35: "Public-private partnership projects are likely to have the higher cost of private finance because public sector agencies generally have access to tax-exempt debt, while private companies generally do not."

127. Congressional Budget Office, *The Budget and Economic Outlook*: 2015 to 2025, issued January 26, 2015, https://www.cbo.gov/publication/49892. Also, the Statutory Pay-As-You-Go Act of 2010 (*Pub. L.* 111-139) places additional pressure on agencies to limit the budget requests they submit to Congress in order to avoid a federal budget deficit and concomitant sequestration.

128. *Federal Accounting Standards Advisory Board (FASAB) Handbook, Version 13*, "Statement of Federal Financial Accounting Standards 42: Deferred Maintenance and Repairs: Amending Statements of Federal Financial Accounting Standards 6, 14, 29 and 32," June 2014. *Life-cycle costing* is defined as "an acquisition or procurement technique which considers operating, maintenance, and other costs in addition to the acquisition cost of assets" (5).

129. GAO-09-3SP, *GAO Cost Estimating and Assessment Guide: Best Practices for Developing and Managing Capital Program Costs*, March 2009, ii, which projects that "the nation is facing a large and growing structural deficit in the long term, primarily because the population is aging and health care costs are rising. . . . New budgetary demands and demographic trends will place serious budgetary pressures on federal discretionary spending . . . in the coming years. As resources become scarce, competition for them will increase. It is imperative, therefore, that government acquisition programs deliver as promised, not only because of their value to their users but also because every dollar spent on one program will mean one less available dollar to fund other efforts. To get better results . . . better estimates [must] be made of total program costs at completion."

130. FAR 7.101, Definitions.

131. FAR Subpart 7.4, Equipment Lease or Purchase. Section 7.401, Acquisition Considerations, discusses seven factors agencies must consider when deciding whether to lease or purchase an asset.

132. Hatch and Manuel, *Public-Private Partnerships*.

133. GAO-01-929, *Budget Scoring*, 2.

134. That is, the scoring rules were intended to encourage direct purchases on the grounds that they are less expensive over time than other forms of real property acquisition.

135. U.S. House Committee on Transportation and Infrastructure Panel on Public-Private Partnerships, *Findings and Recommendations of the Special Panel on Public-Private Partnerships*, 10: "In many long-term concession agreements, the private partner is responsible for operations and maintenance of the asset. As a result, during design and construction of the project, the private partner will consider life-cycle costs to meet these long-term goals."

136. GAO-02-46T, *Public-Private Partnerships*, 5. Typically, "developers . . . would want at least a 50-year master ground lease."

137. Generally, these behaviors are (1) using PPPs that are not fully recorded in the budget and (2) using operating leases to serve long-term space needs. Re: (1), see Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, 5, which states that "the letter of the budgetary guidelines may be being met but the underlying budget principles of up-front funding and a unified budget are nonetheless being violated—a practice that could reduce Congressional control over federal spending as well as the transparency of the budget and its ability to facilitate the cost-effective use of resources." Re: (2), see GAO-06-136T, *Federal Real Property: Reliance on Costly Leasing to Meet New Space Needs Is an Ongoing Problem*, October 6, 2005, 2: "Operating leases have become an attractive option, in part because they generally 'look cheaper' in any given year, even though they are generally more costly over time. . . . Resolving this problem has been difficult; however, change is needed because the current practice of relying on costly leasing to meet long-term space needs results in excessive costs to taxpayers and does not reflect a sensible or economically rational approach to capital asset management."

138. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, xiii: "Financing federal projects through leases and public/private ventures poses [challenges] for Congressional control over federal spending as well as for the transparency of the budget and its ability to facilitate cost-effective investment decisions."

139. *Ibid.*, referring to "the pressure that managers feel to keep the costs of constructing and rehabilitating facilities outside of their budgets."

140. GAO-01-929, *Budget Scoring*, 2: "Staff often assume or believe that a project will be affected by budget-scoring rules [and] reduce the lease term to one that they think will be scored as an operating lease versus a capital lease . . . ."

141. Definition from Merriam-Webster Dictionary: "*Policy (1a)*: prudence or wisdom in the management of affairs; *(2a)*: a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions."

142. Generally, OMB speakers at NCPPP Federal P3 Summit, February 12–13, 2015, Washington, D.C.

143. Note the inconsistency of this phrase, however, with the previous argument that these liabilities do not exist within the fiscal law definition set forth at 31 USC 1501(a).

144. GAO-15-241T, *Testimony Before the Committee on Oversight and Government Reform, House of Representatives, Federal Data Transparency: Effective Implementation of the DATA Act Would Help Address Government-wide Management Challenges and Improve Oversight*, December 3, 2014, which states that despite unmodified ("clean") audit opinions of the 2013 accrual-based financial statements of all 24 CFO Act agencies, "the federal government continues to face an unsustainable long-term fiscal path," suggesting that decision making in the U.S. is driven by the cash-based deficit rather than the government's accrual-based financial statements that record assets and liabilities.

145. Bo Rothstein, Quality of Governance Institute, as quoted and discussed by Francis Fukuyama of the Center for Global Development, *What Is Governance? Working Paper 314*, January 2013, 1–4.

146. Congressional Budget Office website, Overview, https://www.cbo.gov/about/overview.

147. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*. This CBO paper repeatedly points out scoring examples in which CBO and OMB's scoring interpretations for leases and public/private ventures differed and in which CBO assessed OMB's interpretation to be less rigorous and less consistent with the principle of full funding.

148. That is to say, insistence on any one method or course of action indicates a disregard for other options that rises to the level of partiality.

149. The Organization for Economic Cooperation and Development defines *opportunity cost* as "the opportunities foregone at the time an asset or resource is used, as distinct from the costs incurred at some time in the past to acquire the asset, or the payments which could be realized by an alternative use of a resource," http://stats.oecd.org/glossary/detail.asp?ID=1914.

150. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, 3.

151. *Ibid.*, 55.

152. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*.

153. GAO-15-241T, *Testimony Before the Committee on Oversight and Government Reform*.

154. Federal Accounting Standards Advisory Board (FASAB), *Public-Private Partnerships: Disclosure Requirements, Statement of Federal Financial Accounting Standards, Exposure Draft*, October 1, 2014, http://www.fasab.gov/pdffiles/P3-Disclosures-ED-2014.pdf. See also unofficial FASAB memorandum, August 15, 2013, subj: Project Update: Public-Private Partnerships (P3)—Tab D, 8, which contains a "draft exposure draft," http://www.fasab.gov/pdffiles/tab-d_august-2013.pdf.

155. Federal Accounting Standards Advisory Board (FASAB), *Public-Private Partnerships*, http://www.fasab.gov/projects/active-projects/public-private-partnerships/. The last meeting of the board occurred October 21–22, 2015.

156. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, viii: "Under [the current] guidelines for the budgetary treatment of leases, a long-term lease that—in effect—provides the government with ownership of an asset is scored up front with budget authority equal to the present value of all future lease payments. Such leases include both capital leases (leases in which the government consumes almost all of the services produced by an asset over its useful life) and lease-purchases (leases in which the government purchases the asset at the end of the lease term)."

157. *Ibid.*, 10. "The budget authority for a lease that fails to meet the criteria for an operating lease is scored up front . . . [because] [s]coring the budget authority up front in this way acknowledges that such leases are, in effect, a commitment to purchase an asset on the installment plan. Such leases are either lease-purchases . . . or capital leases . . . ."

158. OMB, *Circular No. A-11*, Appendix B, Budgetary Treatment of Lease-Purchases and Leases of Capital Assets, 2015, 6, Section 3.

159. National Conference of State Legislatures, *Public-Private Partnerships for Transportation*, 3: "Most definitions of PPPs include certain key characteristics, such as *ultimate public sector responsibility for and ownership of an asset*; sharing and allocation of risk among public and private entities; contribution of resources by both public and private partners; a contractual agreement; and transfer to the private sector of traditionally public responsibilities" (emphasis added). Due to the aforementioned lack of a federal definition for PPPs and the dearth of specific federal PPP authorities, most PPPs currently occur at the state level. The state-level transportation industry serves as the lowest common denominator because "the states with narrowly defined PPP eligibility have confined PPPs only to roads. Roads-limited legislation is often the result of states adopting a law related to a specific project to 'test the waters' for private involvement before defining a broad set of modes for investment." Istrate and Puentes, *Moving Forward on Public Private Partnerships*, 12.

160. For example, P.R. 2009 Act No. 29 (Puerto Rico Public-Private Partnerships Act of 2009) defines a public-private partnership as "an entity that couples the resources and efforts of the public sector with resources of the private sector by means of a joint investment that results in the benefit of both parties. Such partnerships are sought with the purpose of providing a service for citizens, as well as building or operating a facility or project that is held in high priority by the government. . . . These partnerships shall be vested in high public interest, that is, the *Commonwealth is neither relinquishing its responsibility of protecting such interest, nor waiving its rights to receive an efficient service, nor renouncing ownership of the public assets included [in] the Partnership Contract*" (emphasis added).

161. For example, MD Code, State Finance and Procurement, § 10A-101, defines public-private partnership as "a method for delivering public infrastructure assets using a long-term, performance-based agreement between a reporting agency and a private entity where appropriate risks and benefits can be allocated in a cost-effective manner between the contractual partners in which: (i) a private entity performs functions normally undertaken by the government, but the reporting agency remains ultimately accountable for the public infrastructure asset and its public function; and (ii) the State may retain ownership in the public infrastructure asset and the private entity may be given additional decision-making rights in determining how the asset is financed, developed, constructed, operated, and maintained over its life cycle."

162. Julia Paschal Davis, *Public-Private Partnerships*, 44 Procurement L. 9, 2008, 9–10.

163. United Nations Economic Commission for Europe, *Guidebook on Promoting Good Governance in Public-Private Partnerships*, 2008, 84, which lists various public-private partnership structures that allow the public sector to retain ownership of the facility.

164. The phrase *legislative application* is used to distinguish the scoring of appropriations legislation from the scoring of other legislative proposals.

165. GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process*, which defines *scorekeeping* as "the process of estimating the budgetary effects of pending legislation and comparing them to a baseline, such as a budget resolution. . . . Scorekeeping tracks data such as budget authority, receipts, outlays, the surplus or deficit, and the public debt limit. The process allows Congress to compare the cost of proposed budget policy changes to existing law and to enforce spending and revenue levels agreed upon in the budget resolution . . . ."

166. OMB, *Circular No. A-11*, Appendix B, Budgetary Treatment of Lease-Purchases and Leases of Capital Assets, 5, Section 2(d).

167. National Conference of State Legislatures, *Public-Private Partnerships for Transportation*, 3: "Most definitions of PPPs include certain key characteristics, such as ultimate public sector responsibility for and ownership of an asset; *sharing and allocation of risk among public and private entities*; contribution of resources by both public and private partners; a contractual agreement; and transfer to the private sector of traditionally public responsibilities" (emphasis added).

168. GAO-05-734SP, *A Glossary of Terms Used in the Federal Budget Process*, 89.

169. Bill Heniff Jr., *Baselines and Scorekeeping in the Federal Budget Process*, Congressional Research Service Report 7-5700, November 26, 2012, 2.

170. OMB, *Circular No. A-11*, Preparation, Submission and Execution of the Budget, Guide to OMB Circular No. A-11, 2015, xxiv.

171. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, 58.

172. See *The President's Management Agenda, Fiscal Year 2002*, created in 2001 to assess and improve federal management in five governmentwide areas, including improved financial performance, of which Federal Real Property Asset Management became part in 2004 (via Executive Order 13327). One step to a manageable government is to shift the burden of proof: "Those who propose to shift priorities or adjust funding levels are expected to demonstrate that a program or activity should be changed. It is time, instead, that program proponents bear the burden of proof to demonstrate that the programs they advocate actually accomplish their goals, and do so better than alternative ways of spending the same money" (https://www.acquisition.gov/seven_steps/library/OMBpres-mgmt-agenda2002.pdf, 7).

173. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, 51, suggests that "rather than modify the guidelines to narrow the boundaries for operating leases, eliminating the boundary and treating all leases the same might be worthwhile."

174. *Ibid.*, 51–52.

175. GAO-01-929, *Budget Scoring*, 12.

176. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, 57–58.

177. *Staff Paper Prepared for the President's Commission to Study Capital Budgeting*, https://clinton3.nara.gov/pcscb/staf_define.html. President Clinton's Commission to Study Capital Budgeting was established by Executive Order 13037 and was terminated September 30, 1999. See also OMB, *Analytical Perspectives, Budget of the United States Government, Fiscal Year 2004*, 2003, 13, where CAFs were discussed as part of the Budget and Performance Integration area of the President's Management Agenda.

178. Congressional Budget Office, *The Budgetary Treatment of Leases and Public/Private Ventures*, 58.

179. GAO-05-249, Capital Financing: Potential Benefits of Capital Acquisition Funds Can Be Achieved through Simpler Means, April 8, 2005, 10 and 41, respectively.

180. Such an approach would have to consider potential conflict with the government's right to terminate for convenience; see, generally, 48 CFR Part 49; 48 CFR 52.249-1, -2.

181. This larger "base" would more closely align with the long lease term typical of a PPP. See GAO-02-46T, *Public-Private Partnerships*, 5: Typically, "developers . . . would want at least a 50-year master ground lease."

182. Unofficial FASAB memorandum, August 15, 2013, which led to the FASAB Exposure Draft on Public-Private Partnerships, October 1, 2014; contains references to approaches used in FASAB's *Reporting Entity, Statement of Federal Financial Accounting Standards (SFFAS) 47*, December 23, 2014, that are suitable for application to the SFFAS for PPPs. SFFAS 47 discusses risk of loss at length.

183. PLRD-82-18, GSA's *Federal Buildings Fund Fails To Meet Primary Objectives*, December 11, 1981, 13.

184. GAO-15-290, *U.S. GAO—High-Risk Series: An Update*.

185. According to Norman Dong, Commissioner, Public Buildings Service, at the National Council for Public-Private Partnerships (NCPPP) Federal P3 Summit, February 12–13, 2015, Washington, D.C., GSA has not completed any swap-lease exchanges.

186. That is, operating leases serve short-term needs that are likely to be of lower value than some properties suitable for disposal.

187. GAO-14-586, *Federal Real Property*, 7, which states that GSA's first two swap-construct exchanges took three years and five years, respectively.

188. Notably, closer attention would need to be paid to the negotiation of cancellation clauses in the exchanged-for lease. This is because, in a swap-lease, the government transfers title to the disposal property at the onset of the lease rather than upon acceptance of construction services, as in a swap-construct exchange.

189. GAO-01-929, *Budget Scoring*, 2, which states that GSA "staff often assume or believe that a project will be affected by budget-scoring rules [and] reduce the lease term to one that they think will be scored as an operating lease versus a capital lease to avoid the higher up-front scoring associated with a capital lease."

190. Sources Sought 02-0026-05-2014, General Services Administration, Public Buildings Service. See also GAO-14-586, *Federal Real Property*, 5: “Swap-construct exchanges can involve swapping property and constructed assets or construction services that are of equal value or can include cash to compensate for a difference in value between the federal property and the asset or services to be received by the government.”

191. GAO-14-586, *Federal Real Property*, 5.

192. GAO-12-646, *Federal Buildings Fund*, 4, which cites Rental of Space as the first obligation category for which monies from the Federal Buildings Fund may be disbursed.

193. Sources Sought 02-0026-05-2014, General Services Administration, Public Buildings Service.

Category Management: Line Item Data Is Key

BY BENJAMIN SEARS

Introduction

On the surface, leveraging the government's buying power seems simple. The government enacts regulations, and companies are required to abide by them. If the rule is overly burdensome or the infrastructure to support the regulation is insufficient, no amount of enforcement will make it a success. A higher cost of complying with regulations is a disincentive for doing business with the government.

The government spends billions of dollars through millions of transactions every year.[1] Negotiators should be able to insist on a discount from every repeat contractor. This works in theory, and many companies do give discounts on transactions with the government. Without an acquisition mechanism to execute discounts automatically across all federal acquisitions system, however, the theory fails. Each contract is a unique business transaction. Competition is the main mechanism for determining fair prices. When each contract is competing individually, the government, that is, the contracting officer (CO)[2] is not easily able to see pricing paid by other agencies for similar items. This lack of pricing transparency becomes a real problem when trying to determine a fair and reasonable price without the aid of government wide competition. When competition is absent, the contractor feels less pressure to lower their prices. If a contractor submits a proposal and there is nothing to compare it to, the CO must rely on market research to determine if the price is reasonable. The quality of market research varies greatly from CO to CO. The basic purpose of market research is to "ensure that legitimate needs are identified and trade-offs evaluated to acquire items that meet those needs."[3]

Functional experts (e.g., the government end users) conduct market research, which is supplemented by the CO, but there is no guarantee that a CO will know what other COs in the government paid for any item or service. It's like two business partners separately buying the same product from the same vendor with one of them paying substantially more than the other because the partners were not able to communicate before completing the transactions. This happens every day in the government. If governmentwide pricing knowledge were available, even with a lack of competition, the CO would have powerful leverage in negotiations, even in sole-source transactions.

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The way to leverage real buying power, outside of federal discounts, is to know what other government agencies are paying for similar products and services. Real world examples of pricing transparency are seen in services such as Truecar, Kelley Blue Book, or the National Automobile Dealers Association (NADA).[4] These services provide automotive pricing data, such as dealer cost and purchasing information, giving the average shopper powerful negotiation leverage. The General Services Administration (GSA) is attempting to do the same with a process they call "horizontal pricing."[5] Horizontal pricing is simply pricing transparency. The key to pricing transparency is a functioning data system that provides clear and understandable metrics for acquisition decision makers. The system must be able to connect the dots of the entire purchasing process from the initial solicitation of a requirement, through the proposal process, the evaluation of offers and the eventual award of a contract or Federal Supply Schedule (FSS). Currently, tracked acquisition data is not detailed enough to empower COs with additional negotiation leverage.

The U.S. government generates data with every action it takes: every email, every policy, every communication internally and externally, and all administrative functions performed day-to-day. Current and proposed U.S. government procurement systems are generating massive amounts of underused acquisition data, data that is slipping through our fingers. Systems are in place to collect data but the government is missing its potential. GSA is proposing to strengthen its negotiation position with the Transactional Data Rule, which can exploit agency buying power in a manner that will reduce federal schedule cost. This is what GSA calls "horizontal pricing." This article evaluates the potential significance of the proposed GSA Transactional Data Reporting Clause (TDRC) and the potential pitfalls of implementing the rule. Past cost control rules, such as the Price Reduction Clause (PRC), will also be evaluated to determine their comparative effectiveness with the TDRC. The article concludes by calling for the repeal of the PRC and the implementation of the GSA TDRC with key changes. Repealing the PRC changes the government's position from blindly demanding lower prices to expertly negotiating with powerful market data.

GSA should utilize the transactional data it is attempting to gather with the TDRC. The government is essentially blind to what it is purchasing. It is either not using the data it already collects or it is not collecting the data it needs. Horizontal pricing data will give insight and negotiating leverage to those executing contract actions. The way GSA is attempting to establish transactional data, however, is flawed. Too many unknowns still exist, and further technical detail is needed before the new rule is implemented. First, the data being collected needs to be standardized.[6] Second, a centralized database for the collection of the transactional data needs to be completed.[7] Third, contractors need to be incentivized to use and support the transactional data system.[8] GSA cites these points as areas that need to be addressed but does not provide clear direction for how they will be accomplished.[9] Also, the creations of "category managers," a new group of acquisitions personnel, is unnecessary and takes the focus away from the CO. Horizontal pricing will be most powerful when implemented at the grassroots level—with the COs in the field. As it stands, the goals of GSA are good, but will fail without the examination of what is achievable in the short-term.

Current Data Systems

The government tracks many data points but sometimes tracks what is easy rather than what is useful. The GSA SmartPay II[10] system for Government Purchase Cards (GPC) and the Federal Procurement Data System (FPDS)[11] are two major procurement data tracking systems, but neither provide the level of detail or the accessibility necessary for effective leverage. Horizontal pricing structures require more than the summary data available from GSA SmartPay II or FPDS. Line-item detail is required for an apples-to-apples comparison of individual items to determine fair and reasonable pricing across the government.[12] Line-item data can describe what is being purchased, how the sale was processed, and when the transaction occurred. It can also provide key details that horizontal pricing needs: description, quantity, unit-of-measure, price, discount, and sales tax information.[13] If horizontal pricing is utilized with the implementation of the TDRC across GSA, each vendor would have to submit pricing data for each item category on the vendor's federal supply schedule.[14] To analyze the data, GSA would have to create an accessible data warehouse.[15] A data warehouse functions as a collection point for data. Without a data warehouse, contractors have nowhere to submit transactional data for GSA analysis. Currently, GSA tracks vendor pricing but cannot compare pricing for similar items from different vendors.[16]

The GSA Smart Pay II program collects GPC data contained in the "Sales Transactions and Account Holder Data Spreadsheet" available from the GSA SmartPay website.[17] The spreadsheet provides the following details:

- Program data,
- Bank data by year,
- Single year data by program,

- Spend data by program,
- Transaction data by program,
- Cardholder data by program, and
- Program spend reports.

This data is captured by the card-issuing bank and is not automatically transferred to GSA. The SmartPay system only obtains line-item level data from card-processing banks when requested.[18] This level of detail is helpful to program managers in tracking macro-level program expenditures but does little to facilitate micro-level negotiations when making a GPC purchase or awarding a contract. The system does not capture individual line-item cost, so it does not enable comparison across the government.

FPDS is designed to collect summary-level contract information to include contract amount, agency, and contractor of contracts above $3,000.[19] Like GSA Smart Pay, FPDS does not strengthen negotiating leverage using line-item level data. FPDS does not collect contract line-item data, specific contract line-item number (CLIN) information, CLIN descriptions, CLIN funding data, administrative details, or contract deliverables.[20] To obtain a level of contract detail that would enable competitive negotiations, the CO would have to request specific contracts from each contracting office across the government. The CO could comb through each line item of the contract to glean specific item pricing that could be compared to other contractor proposals, but this effort would prove far too burdensome to be beneficial and would have to be repeated hundreds of times to create a data set large enough to be useful. If a system provided the CO with contract line-item detail like the System for Award Management (SAM) provides necessary administrative data, the CO would have a one-stop shop for quickly accessing item pricing. This one-stop shop would not replace the need for contract competition, but it would add another negotiation tool for the CO. It would also facilitate better contract transparency and enable what GSA is calling horizontal pricing.

The SAM is an example of useful, centralized acquisitions data.[21] SAM consolidates four federal procurement systems: the Central Contractor Registry (CCR), the Federal Agency Registration (Fedreg), the Online Representations and Certifications Application (ORCA), and the Excluded Parties List System (EPLS).[22] SAM's purpose is to locate required administrative data such as vendor registration or contractors on the excluded parties list in a centralized database. Vendors are required to register with each system and provide required information before doing business with the government. Data is also provided by external contractors such as Dun & Bradstreet to facilitate management of the system.[23] SAM does not, however, track line-item-level data that is helpful in contract negotiations. For the TDRC to be successful, a system with similar functionality as SAM is required to collect and make available concise analysis of the data. GSA is creating the Common Acquisition Platform (CAP) to collect line-item-level data in an attempt to provide an integrated suite of knowledge to support the acquisition professional.[24]

The government currently collects large amounts of data using systems that lack interoperability, hindering the full potential of data analysis. Further complicating matters, data transmitted by vendors is not controlled by GSA. Current SmartPay contract terms do not require data to be automatically submitted to the government.[25] To fill these gaps, GSA has proposed the TDRC and CAP, laying groundwork for regulations and information technology capabilities that support the collection of detailed, line-item data.[26] GSA's ability to analyze this data will facilitate the adoption of horizontal pricing structures in the creation of FSS and governmentwide acquisition contracts (GWACs).[27]

GSA Horizontal Pricing

The term *horizontal pricing* was coined by GSA to describe price transparency between agencies and is not found in any other business literature. It arises from the Office of Federal Procurement Policy's goal of accurately tracking all categories of pricing from across the government[28] to allow price transparency across all agencies. This data will be used as leverage for negotiations and for determining a fair price when awarding an FSS or GWAC.

Horizontal pricing is a method of comparing prices for similar items from multiple vendors. The first step for implementing this method is requiring vendors to include standard manufacturer's part numbers in catalog submittals to GSA. This will allow GSA to compare pricing for similar items across all vendors and use the results to identify pricing that is not in line with the average market value. GSA can then approach those vendors to renegotiate pricing for their FSS offerings to reduce pricing variation. Initially, vendors will not be required to report pricing data; GSA will use catalog pricing already submitted. Moving forward, the implementation of TDRC will provide GSA with additional pricing data from more sources to use in its horizontal pricing analysis.[29]

A Lack of Leverage in FSS

GSA has long found it difficult to gain substantial negotiating leverage when awarding FSS to commercial companies. FSS are awarded on an open framework agreement, not the closed framework agreement typical of competitive awards. Closed framework agreements take the form of competitively awarded indefinite delivery/indefinite quantity (IDIQ) contracts. In a closed framework agreement, multiple contractors are solicited for the award of the IDIQ. After award, the contract is not open for other vendors to join. To add new vendors, the IDIQ must be recompeted.

Open framework agreements like FSS are awarded to interested vendors who can meet the requirements of the schedule class and prove their price is commercially reasonable. The vendor only has to prove the price they are offering is the same as would be offered in the open market.[30] Compared to traditional non-FSS contracts, open framework FSS lack the natural competitive pressure that pushes prices down at the time of award. When the FSS is formed, the company is not directly competing for awards, only the chance to hold an FSS. After the FSS is formed, the company can provide FSS proposals in response to customer solicitations. Challenges in price verification when forming the FSS include the government's lack of visibility into prices paid by other customers, and the inability to compare one vendor's pricing to that of other vendors.[31] GSA was able to demonstrate the value of horizontal pricing structures with the use of accurate and relevant transactional data when it created the Office Supplies 2 governmentwide strategic sourcing vehicle. Savings of about $370 million were realized, but no mechanism exists to implement vendor price transparency across GSA.[32] The TDRC is intended to allow COs and contracting personnel to leverage horizontal pricing to realize similar savings.

Proposed GSA Transactional Data Reporting

GSA needs to use the new data available through the transactional data reporting and make the data available to the acquisition workforce for use in negotiations. GSA has mistakenly tied transactional data reporting to horizontal pricing and the category management proposed by the Office of Federal Procurement Policy (OFPP).[33] Instead of changing how they award FSS, they need to change the data reporting systems, such as SmartPay and FPDS. The creation of the CAP to collect data generated by the TDRC would benefit COs across the government, but a wholesale switch to category managers would not be workable; the number of categories needed to classify each item or service would be astronomical. A group of category managers will be overwhelmed as the data available from the TDRC system grows. The government should know what it is buying, but GSA needs to carefully consider the real cost for implementing the TDRC system. Creating new rules that are unsupportable only further increases the cost of doing business with the government.

On March 4, 2015, GSA proposed the TDRC for comment. The rule would require vendors to "report transactional data from orders and prices paid by ordering activities."[34] By asking for detailed, line-item data for each transaction, GSA is attempting to fill data gaps in the current systems. This new transactional data is intended to facilitate negotiation to the smallest line-item detail. This would cover FSS and non-FSS contracts, GWACs and governmentwide IDIQ contracts.[35] The implementation would be phased in to reduce the burden on acquisition personnel and vendors. The proposed rule is open to comment, and GSA will hold a meeting to hear and address industry concerns.[36] GSA is claiming that the new clause will provide savings across the government and a reduced administrative burden for industry. GSA also claims that the implementation would have a relatively low cost. Unsurprisingly, industry views these claims with skepticism and is concerned that GSA has vastly underestimated the cost of implementation.

The initiative to better track transactional data would fundamentally shift GSA's pricing strategies. GSA proposes "managing entire category of purchases across government collaboratively," item by item, instead of letting the contractor determine pricing when the FSS is awarded. GSA initiative is in support of the OFPP memo, "Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance," published in December 2014.[37] The memo is a recommendation from the Strategic Sourcing Leadership Council (SSLC) to shift the way the government manages purchases.[38] GSA is a key partner in helping implement this new strategy. Specific details are vague, but the theory centers on "category management." GSA is a key implementation partner, and its horizontal pricing is rooted in category management theory.[39] The key tenets of the memo are well intentioned and include building stronger vendor relationships, creating better interfaces for government and industry interactions, removing barriers to innovation, reducing the burden in commercial item acquisitions, and collecting better contract data.

According to GSA, the goal of category management is to expertly manage commonly purchased goods and services with in-depth market research. GSA's proposed new CAP will enable horizontal pricing analysis through market research and the sharing of common category prices across the government. Prior to contract award, the acquisition workforce (i.e., the new category managers) will be able to perform in-depth market research with ready access to prices paid by other agencies. Access to governmentwide pricing from all GWAC and IDIQ contracts will increase leverage in negotiation and hopefully reduce the amount of duplicative contracts across the government.[40] Because of the current lack of transparency, GSA found cases where vendor pricing varied by as much as 300 percent for identical items.[41] Cross-governmental data available in the CAP increase GSA's ability to perform meaningful cost analysis when awarding schedules to industry contractors.

Using the data available in the CAP, GSA will be able to compare a vendor's pricing with other vendors selling the same or similar items. GSA's current analysis relies on a vertical pricing model, which only allows GSA to compare a vendor's pricing with pricing the vendor provides to its commercial customers.[42] The vendor only has to prove that the offered price is a fair retail price; GSA has little leverage to say otherwise. The key to the CAP providing relevant and usable data hinges on the effective implementation of GSA's TDRC. What exactly category management is, however, and how it will be accomplished is not clear. It is doubtful that GSA will be able to effectively leverage horizontal pricing based on the lack of details given for category management.

Goal of the GSA's Transactional Data Clause

Such a complex plan must be accomplished in a phased approach:

1. Standardize the data requirements,
2. Finish the CAP,
3. Implement in a way that allows companies to address technical issues, and
4. Provide incentives to encourage the adoption of the new system.

No standard for submitted data currently exists, and the CAP has not been completed and is not ready to accept industry data. Implementation of GSA's TDRC will require contractors to electronically report contract sales monthly. Reports should include data elements such as units of measure, quantity of items sold, Universal Product Code, price per unit, and total price. If these steps are not taken, companies will avoid doing business with the government. Submitting data to the CAP will be a substantial barrier to entry, especially for smaller companies.

If successfully implemented, the TDRC's most direct and achievable effects will be better pricing with accurate and relevant transactional data. When contractors provide data to a central data warehouse, it can be more directly analyzed for related products or services across a category (horizontal pricing). GSA rolled out a pilot dynamic pricing model with the creation of the Office Supplies 2 vehicle and achieved an average savings of 18 percent.[43] Before the pilot, there had been a savings on average of 13.5 percent.[44] After implementing the dynamic pricing model, GSA was able to realize a respectable of 4.5 percentage points over traditional GSA price analysis methods for an average savings of 18 percent.[45]

GSA asserts that creating a database of relevant transactional data while also providing agencies an incentive to use previously awarded contract vehicles through the proposed CAP system will reduce duplicative contract vehicles across the government. GSA is estimating that there are over 600,000 contract actions that overlap current GSA contract vehicles.[46] It theorizes that replacing the current "price reduction clause's tracking customer requirement with transactional data reporting" will reduce the vendors' annual administrative burden by 85 percent.[47] GSA needs to prove that their new system and policy will more consistently provide a better value to the end user than independent contracting methods. It has not addressed how the TDRC will actually facilitate administrative savings. The CAP designed to collect and house the data has not been completed yet, and it is unlikely that submitting data and administering the CAP would happen flawlessly on the first attempt. Any new IT system has bugs and hiccups when first released. Automating a vaguely defined process will not lessen the administrative burden. To overcome glitches, both government and industry participants will have to increase the number of work hours necessary to comply with the TDRC. This effort would be in addition to other administrative burdens, such as complying with the PRC. Compliance with existing regulations is already a substantial task for large government contractors. The claim that a TDRC-compliant system that feeds the CAP would reduce workloads for small businesses is hard to substantiate.

Without a set standard, any size company would have to provide unique data for each contract it administers, greatly increasing the administrative workload. Framing a common set of transactional data requirements would facilitate further standardization and consistency. Transactional data is currently required for nine other GSA non-FSS contracts. The requirement was directed in the solicitation without a common clause or set of criteria, however. Common data requirements would facilitate consistency and transparency across the system.[48] GSA must consider concessions to relieve the administrative burden of complying with all regulations. The PRC is a good candidate: it was designed to help control pricing on the FSS, but has been a contentious issue since its inception.[49]

Industry Response

Affected industry partners were quick to respond to GSA's proposed rule. Roger Waldron, president of the Coalition for Government Procurement,[50] approves of GSA's decision to gather comments from industry, but compared the initiative to harmful wage and price controls of the Nixon era.[51]

Waldron's concerns include the rationale regarding the "implementation of transactional reporting," increased operational burdens, claimed administrative savings, impact on small businesses and competition, limits to innovation, and difficulties clearly understanding and interpreting the new statute and regulation.[52] He gave the following specific examples of negative impacts: suppression of wages, reduced access to top-level IT employees, limits to small business growth, overly burdensome implementation, suppression of innovation, reduction of competition, and undercutting of value in a race to drive prices lower. The commentary concludes by stating that this incentive is "not in the best interest of customer agencies or the American people," but that they look forward to an open dialogue at the GSA town hall.[53]

Questions raised by industry representatives and gaps identified in the technical direction are even more telling of the issues with implementing the TDRC. Notably, the absence of a functioning online reporting system, the undefined and ambiguous role of category managers, the overlapping responsibilities of category managers and COs, the protection of proprietary data in the CAP, and the cost of implementing the new system all bring into question the ability of GSA to successfully implement the new strategy.[54] GSA initially estimated that only six hours would be required to set up a system to report to the CAP and reporting requirements could be completed in only 31 minutes each month.[55] Based on a system that has not been completed yet for reporting metrics that have not been standardized, this estimate is unrealistic. A survey of Coalition for Government Procurement members document vastly different implementation costs for large and small businesses: initial setup required an estimated 1,192 hours for large businesses and 232 hours for small businesses.[56] Monthly reporting requirements were 68 hours and 38 hours, respectively. The total estimated cost was over $800 million—30 times the GSA estimate of $24 million.[57]

Industry's response is neither surprising nor unfounded. Horizontal pricing (regardless of whether category management is implemented) gives the government significant negotiation leverage. Company data is already realized as a commodity in the commercial industry. Data is fiercely protected and sold to the highest bidder. In many companies, the ability to generate revenue from selling market data is a significant revenue stream as important as any core product or service the company provides. With the government finally collecting and leveraging overlooked data, companies are bound to find their prices pushed lower. This market pressure is not even driven by other competitors, but from the government finally seeing what it is paying for items from the same company across the board.

The removal of the PRC with the successful implementation of the TDRC would help shift responsibility of negotiation back on the government while allowing contractors the freedom to adjust to local market factors without undue administrative burden. Enacting multiple burdensome regulations that attempt to accomplish the same goal creates an environment where the cost of doing business becomes prohibitive. In open markets, competitive forces level the playing field. When new rules between the government and commercial contractors are proposed, the inherently imbalanced nature of the relationship (i.e., the sovereign position of the government) must be considered. The risk of doing business with the government must be properly managed to give all parties more equal footing. Special care must be taken to protect each party while providing for the needs of the government. The PRC was created in a time when the collection of data to enable horizontal pricing was technically impossible. The risk of ensuring that the government always receives the lowest price was placed completely on government contractors. Under the PRC, contractors are always liable for providing the government with the lowest price, regardless of legitimate local market forces. Compliance requires contractors to support a great administrative burden while navigating a cumbersome and bureaucratic process. Implementing the TDRC with the PRC in place is putting government contractors between a rock and a hard place. Correctly implemented horizontal pricing through the TDRC will be a powerful tool to push prices down. The government should go further than just replacing the current "price reduction clause's tracking customer requirement with transactional data reporting" and completely remove the PRC.[58]

Price Reduction Clause: GSAR 552.238-75 (May 2004)

Vendor pricing in FSS has been traditionally controlled by the PRC,[59] an unpopular, controversial, and often heavy-handed clause that empowers GSA to arbitrarily demand the lowest price regardless of competitive economic forces. When vendors offer lower prices to any customer for legitimate business reasons (e.g., to stay competitive), GSA mandates that the same price be extended to all government customers.[60] In response to industry's sustained and vocal discontent, GSA is considering changing the way commercial-item pricing is controlled,[61] but must do so in a way that is flexible to unique market forces. The TDRC can do this with the effective use of data, by putting the onus of determining fair pricing back on the government while allowing industry vendors to adjust to market forces without running afoul of GSA regulation.

The PRC has been around in some form since 1982. The current version, released in 2004,[62] requires the vendor to update its FSS pricing whenever the contractor:

- Revises the commercial catalog, price list, Schedule, or other document upon which the contract award was predicated to reduce prices;
- Grants more favorable discounts or terms and conditions than those contained in the commercial catalog, price list, Schedule, or other documents upon which the contract award was predicated; or
- Grants special discounts to the customer (or category of customers) that formed the basis of award, and the change disturbs the price/discount relationship of the government to the customer (or category of customers) that was the basis of award.[63]

If a vendor offers a price lower than that on their current Schedule, it is obligated to honor the lower price with all other Schedule customers. The vendor has 15 days to notify GSA and update the FSS. It is imperative that vendors have systems in place to accurately track all of their pricing and avoid inadvertently triggering the PRC, which would cause an inadvertent reduction in FSS price.[64] The company is responsible for tracking and submitting all of this data. Any price changes in the categories above must be reported. The contractor takes on a large amount of risk doing business with the government. If a pricing change is inadvertently missed, they will be liable to provide the same pricing across FSS contracts.

In recognition of industry concerns with the PRC, the GSA Multiple Award Schedule (MAS) advisory panel made several significant recommendations:

> (1) GSA eliminate the Price Reduction Clause from MAS Service contracts and adopt all Section 803 approaches, (2) Remove the Price Reduction Clause from MAS supply contracts and implement recommendations for competition and Price Transparency, (3) Implement the requirements of Section 803 for products as mandatory use for all users government wide, (4) Do not apply the PRC to acquisition of solutions, (5) Ensure procurements for solutions are subject to the same competitive forces at the order level as the same for products and services, and (6) Prices for solutions must be determined to be fair and reasonable at the order level.[65]

Vendors assert that the requirements of the PRC do not take into account the competitive landscape at the local level. Many factors come into play in determining the cost of a service or product.[66] Contractors are incentivized to use higher prices in the FSS to account for unique market factors and reduce the risk that lower prices may not be achievable in all regions.[67]

The government cannot abandon its ability to control pricing in the FSS. With the proposed GSA TDRC, however, the government can move into the twenty-first century by removing the PRC. The successful implementation of the TDRC hinges on addressing the concerns identified by private industry. The current rule does not contain enough clarity or technical direction to enable industry partners to successfully comply with the TDRC. Chief among the concerns are the clearly faulty estimates for implementing and administering the new system.

Conclusion: A Way Forward

GSA must prove that the proposed TDRC will reduce the administrative burden of vendors. The commercial sector has every reason to be skeptical of the projected savings. Industry cost estimates are 30 times higher than GSA's projections.[68] Industry experts have cautioned that "without more fully explaining what, other than lower prices, [GSA is] really after, the agency runs the risk of losing quality firms who simply can't or won't put up with added cost and the disclosure of sensitive pricing data."[69]

GSA must provide a well-planned strategy for how the data will be used and secured. Implementation of the rule cannot happen if there is no system or data warehouse to support it. A phased approach will help address industry concerns. GSA needs to show that the proposed rule will be no more intrusive for the vendor than effectively tracking their receipts is. As an example, the Federal Strategic Sourcing Initiative (FSSI) already contains a specific provision requiring vendors to report line-item data directly to GSA.[70] Incentives must be identified to encourage vendor participation. The repeal of the PRC would provide substantial incentive for supporting the proposed TDRC.

The proposed rule is not implementable in its current state; rather than inventing a new category management scheme, GSA must strengthen existing acquisition personnel and give them a data-driven negotiation tool. The government does not really know what it is buying or how much it is paying for it. Current data systems do not provide the CO any information that increases negotiation leverage. At some level, detailed line-item data is being captured in contract-writing systems across the government. These contract-writing systems, however, are not designed to provide this data in a useful way. The effort to collect line-item-level data should be completely transparent with no extra reporting requirements. Contract-writing systems could be standardized and made to communicate with each other. Every time an FSS is awarded or a contract action completed, the contract-writing system could automatically provide horizontal pricing data to whomever needs it. Just because the government has not found a way to efficiently collect this data on its own does not make it industry's responsibility to provide it. Category management as proposed in the "Transforming the Federal Marketplace" memo or the proposed GSA TDRC, which creates a system to manage large categories, will only bog down agencies and contractors in red tape and make them inefficient. GSA has in effect renamed an existing role, the cost and pricing analyst, as a category manager. Traditionally, these analysts have supported the CO, but in more recent years, the CO has been asked to perform the functions of these analysts. Instead of creating a new role of category manager, which has not been fully thought out, GSA should reinforce the necessary but disappearing role of the cost and pricing analyst. Once the PRC is eliminated and data is provided by a thoughtfully executed CAP, the government will collect the data it needs in the least burdensome way possible.

Category management is not a paradigm shift. The real game changer would be a tool that presents useful procurement data to acquisitions personnel at the lowest level. The CO could then be trusted to use the data to negotiate with, rather than force ideas on, an increasingly frustrated industry. The government needs good contractors more than good contractors need the government. Requiring a detailed, line-item receipt is not unreasonable. That receipt could then be submitted to a centralized database. Software could then sort each line item and link it to similar items. When the CO processes an acquisition for award, he or she would check the system to see what other agencies have paid for similar items. The CO could then present the information to the contractor, giving the contractor the opportunity to justify the pricing.

Only automated systems, not humans, can manage all these categories. Industry knows that it will be giving up negotiation leverage and that implementing a system is going to cost much more than the government has estimated. Providing the necessary data must be made worth their effort. The solution is to cancel the PRC and to rebalance the risk of pricing between the government and industry. The government should stop bullying industry partners into giving the government the best price. Giving the CO a powerful tool for increased leverage and removing the PRC puts the responsibility of getting a fair deal back on the government. The contractor would then be free to account for any local market factors in its proposal. Competition would be preserved, and the administrative burden of notifying GSA of a unique price change would be removed.

The kind of pricing or negotiating structure the government wants to use is insignificant. When the government has the data it needs, it can use it horizontally, vertically, sideways, or upside down. Data is data; if correctly collected, it will enable any negotiation position the government wants to make. Knowledge—of what is being paid for, across the government, by any category, from any vendor—is the real key to negotiation leverage.

ENDNOTES

1. See "FY14 SmartPay Fact Sheet," General Services Administration (GSA) Office of Charge Card Management: http://smartpay.gsa.gov/sites/default/files/downloads/FY14%20SmartPay%20Fact%20Sheet%20FINAL%20(2).pdf

2. According to the *Federal Acquisition Regulation* (*FAR*), a "*contracting officer* is a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. The term includes certain authorized representatives of the contracting officer

acting within the limits of their authority as delegated by the contracting officer" (FAR Part 2.101, "Contracting officer").

3. FAR 10.001(a).

4. See the following websites for more information: truecar.com, kbb.com, and nadaguides.com.

5. See Proposed Rules, "Use of Vertical Pricing and Movement toward Both Vertical and Horizontal Pricing in the FSS Program," 80 Fed. Reg. 42 (March 4, 2015).

6. See Proposed Rules No. 11,622, "Standardization," 80 *Fed. Reg.* 42 (March 4, 2015).

7. *Ibid.*, No. 11,621, "Overview."

8. *Ibid.*, Software Tools and Training No. 11,624.

9. *Ibid.*

10. "Statistics," GSA: https://www.smartpay.gsa.gov/content/about-gsa-smartpay#a3.

11. "FPDS-NG FAQ," GSA, https://www.fpds.gov/wiki/index.php/FPDS-NG_FAQ.

12. "Point of Sale & Transactional Data Technical Information: Transactional Data," GSA, http://www.gsa.gov/portal/mediaId/206147/fileName/PoSTDataTechnicalInfo.action.

13. Paul Recklau, PMP (program analyst at GSA's Center for Acquisition Oversight [QSAA]), in an interview with the author (March 2, 2015).

14. According to Oracle's *Database Data Warehousing Guide*, a *data warehouse* is a "database designed to enable business intelligence activities: it exists to help users understand and enhance their organization's performance. It is designed for query and analysis rather than for transaction processing, and usually contains historical data derived from transaction data, but can include data from other sources. Data warehouses separate analysis workload from transaction workload and enable an organization to consolidate data from several sources. This helps in: (1) maintaining historical records and (2) analyzing the data to gain a better understanding of the business and to improve the business." ("What Is a Data Warehouse," https://docs.oracle.com/database/121/DWHSG/concept.htm#DWHSG001.)

15. Recklau (March 2, 2015).

16. "Statistics," GSA: https://www.smartpay.gsa.gov/content/about-gsa-smartpay#a3.

17. Recklau (March 2, 2015).

18. "FPDS-NG FAQ," GSA, https://www.fpds.gov/wiki/index.php/FPDS-NG_FAQ.

19. *Ibid.*

20. See System for Award Management (SAM), GSA, https://www.sam.gov.

21. "General Information," SAM, https://www.sam.gov.

22. "Data Access," SAM, https://www.sam.gov.

23. "Common Acquisition Platform," GSA, https://www.gsa.gov/portal/category/106839.

24. Milton Vazquez (program analyst at QSAA), in an interview with the author (April, 29, 2015).

25. See Proposed Rules No. 11,621, "Lack of Transparency in Prices Previously Paid," 80 *Fed. Reg.* 42 (March 4, 2015) .

26. *Ibid.*, No. 11,623; 11,623-24, "Transitioning to Transactional Data Reporting."

27. See "Transforming the Marketplace: Buying as One through Category Management," Office of Federal Procurement Policy, accessed December 4, 2014, https://www.whitehouse.gov/sites/default/files/omb/procurement/memo/simplifying-federal-procurement-to-improve-performance-drive-innovation-increase-savings.pdf.

28. Recklau (March 2, 2015).

29. See Proposed Rules No. 11,622, "Use of Vertical Pricing and Movement Toward Both Vertical and Horizontal Pricing in the FSS Program," 80 *Fed. Reg.* 42 (March 4, 2015).

30. *Ibid.*, No. 11,621, "Lack of Transparency in Prices Previously Paid."

31. *Ibid.*

32. Office of Federal Procurement Policy, "Transforming the Marketplace: Buying as One through Category Management."

33. Proposed Rules No. 11,619, "Summary," 80 *Fed. Reg.* 42 (March 4, 2015).

34. *Ibid.*

35. *Ibid.*, No. 11,620.

36. Office of Federal Procurement Policy, "Transforming the Marketplace: Buying as One through Category Management."

37. *Ibid.*

38. For the purposes of this article, the terms *horizontal pricing* and *category management* can be used interchangeably.

39. Proposed Rules No. 11620, "Overview," 80 *Fed. Reg.* 42 (March 4, 2015).

40. *Ibid.*, No. 11,621, "Overview."

41. *Ibid.*, No. 11,622, "Use of Vertical Pricing and Movement Toward Both Vertical and Horizontal Pricing in the FSS Program."

42. *Ibid.*, No. 11,622, "Better pricing."

43. *Ibid.*

44. *Ibid.*

45. *Ibid.*

46. *Ibid.*, No. 11,622, "Administrative savings."

47. *Ibid.*, No. 11,622, "Standardization."

48. See "Transactional Data Proposed Rule: Summary of Coalition Comments," The Coalition for Government Procurement, http://thecgp.org/images/Transactional-Data-Comments_Summary1.pdf.

49. See Coalition for Government Procurement, an industry interest group, website, http://thecgp.org.

50. Roger Waldron, "GSA Proposed Rule Raises 'Significant Concerns' over Competition," *Federal News Radio*, http://www.federalnewsradio.com/445/3816136/GSA-proposed-rule-raises-significant-concerns-over-competition.

51. *Ibid*.

52. *Ibid*.

53. Covington & Burling LLP, "Six Open Questions about GSA's New Vision for Federal Purchasing," https://www.cov.com/~/media/files/corporate/publications/2015/03/six_open_questions_about_gsas_new_vision_for_federal_purchasing.pdf.

54. See "Transactional Data Proposed Rule: Summary of Coalition Comments," The Coalition for Government Procurement, http://thecgp.org/images/Transactional-Data-Comments_Summary1.pdf.

55. *Ibid*.

56. *Ibid*.

57. Proposed Rules No. 11,622, "Use of Vertical Pricing and Movement Toward Both Vertical and Horizontal Pricing in the FSS Program," 80 *Fed. Reg*. 42 (March 4, 2015).

58. *Ibid*.

59. See *General Services Administration Acquisition Manual* (*GSAM*)/*General Services Administration Acquisition Regulation* (*GSAR*) 552.238-75, "Price Reductions" (May 2004).

60. *See* Proposed Rules No. 11,622, "Use of Vertical Pricing and Movement Toward Both Vertical and Horizontal Pricing in the FSS Program," 80 *Fed. Reg*. 42 (March 4, 2015).

61. Thomas P. Barletta, "The Price Reduction Clause: An Overview of the Basics," http://www.steptoe.com/assets/attachments/1071.pdf.

62. GSAM/GSAR 552.238-75, "Price Reductions" (May 2004).

63. As reported by executive editor Jason Miller of Federal News Radio, industry partners have concerns with the implementation of the previous PRC. Both the government and industry partners admit there are issues with implementing the PRC and the time is right for open discussion. Under this clause, companies are required to tip their hand when negotiating a purchase or contract with separate government parties. If the company sells an item or service to an agency at a lower price than previously available, they are required to go back to previous government customers and lower their price. If the vendor fails to do so, then they are subject to corrective action from GSA. Tracking prices given to all government customs is not easy and can be overly burdensome to do perfectly ("GSA Proposes Change to Acquisition Regulation Vendors Loathe," April 18, 2015, http://www.federalnewsradio.com/65/3811760/GSA-proposes-to-change-acquisition-regulation-vendors-loathe).

64. GSA, Multiple Award Schedule (MAS) Advisory Panel, *Multiple Award Schedule Advisory Panel Final Report* (February 2010), 1214, http://www.gsa.gov/graphics/staffoffices/MAS_Panel_Final_Report_Signatures.pdf; *see also* John W. Chierichella and Jonathan S. Aronie, *GSA Schedule Handbook*, 2015 ed. (Eagan: Westlaw, 2014), 32.

65. As discussed in my interview with Paul Recklau, it should be noted, that some variations in pricing between FSS and GPC purchases can be explained by the individual terms and conditions of the specific FSS and determined by quantities ordered.

66. Rechlau (March 2, 2015).

67. See "Transactional Data Proposed Rule: Summary of Coalition Comments," The Coalition for Government Procurement, http://thecgp.org/images/Transactional-Data-Comments_Summary1.pdf.

68. Waldron, quoted in Miller, "GSA Proposes Change to Acquisition Regulation Vendors Loathe" (April 18, 2015).

69. Milton D. Vazquez (business management specialist, Office of Charge Card Management, GSA), in an interview with the author, April, 29, 2015.

Power Practices 1.0: Five Power Practices to Enhance Competition When Using Federal Supply Schedules

BY MARKESHA A. MCCANTS

Introduction

The charge to promote competition continues to replay in the federal contracting atmosphere.[1] This message has influenced contracting professionals, sparked high-level discussions among acquisition leaders, and sharpened plans for increasing competition and vendors' interest in federal contracting. Although significant progress has been made, work remains. In fact, in July 2015, the Government Accountability Office (GAO) highlighted the need to place more focus on promoting competition and addressed factors influencing the extent of competition for the Federal Supply Schedules (FSS) program.[2] This article focuses on ways to increase competition when using the FSS program[3] by providing five practical yet powerful practices.

FSS: A Purchasing Power Tool

FSS was originally known as the General Schedule of Supplies. After the creation of the General Services Administration (GSA) in 1949, Schedules transferred from the Treasury Department to GSA.[4] Today, GSA manages the FSS program under the authority contained in the Federal Property and Administrative Services Act of 1949.[5] Among other responsibilities, GSA awards a suite of multiple award, indefinite delivery/indefinite quantity (IDIQ) contracts (i.e., Schedule contracts) at prices that maximize the government's volume buying power. Agencies' buyers have another kind of significant power: their acquisition teams define their specific requirements and place orders with funding that goes directly to vendors that hold Schedules. If agencies did not place orders against Schedule contracts, the FSS program and the *Federal Acquisition Regulation* (*FAR*) Subpart 8.4 would become obsolete.

One goal of the FSS program is to provide a purchasing power tool for buyers, and FAR Subpart 8.4 acts an instruction manual. The FSS program gives buyers a streamlined, simplified process for obtaining commercial products and services. Imagine someone completing a "honey-do" list using manual tools instead of power tools. "Honey" can do the

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tasks using a screwdriver, but the process would have been different—faster and more efficient—if he or she had used a power drill instead. Although FAR Subpart 8.4 provides the framework for placing FSS orders, contracting officials or federal buyers have considerable latitude and flexibility with the techniques they employ to place these orders. The techniques buyers use will determine whether they optimize the opportunity to be more innovative, obtain the absolute best price, and attract adequate competition.

Power Practices

The term *power practices* implies that these practices will produce the desired outcome—in this case, enhancing competition. Since agencies work with specific requirements and under varying circumstances, there is no guarantee that using the power practices will automatically result in obtaining three or more quotes. However, the force behind each power practice is the fact that each practice is aligned with one of the "Guiding Principles" of the Federal Acquisition System provided in FAR Subpart 1.1. Although the power practices are more applicable for high-value and more complex buys, contracting officers can also use each practice or an abbreviation of the practices for simpler buys as well. Figure 1 below outlines the five practices.

1. Engage the vendor community as early as possible.
2. Coordinate with the competition advocate.
3. Consider extending the RFQ due date.
4. Expand reach to more vendors.
5. Conduct industry exchanges and/or other outreach activities.

FIGURE 1. POWER PRACTICES TO ENHANCE COMPETITION

These practices are essential because as shown in Figure 2 above, 35 percent of FSS competitive procurements received only one or two quotes in fiscal year 2014.[6] The goal of the power practices is to influence a shift in the numbers—that is, increasing the percentage of competitive procurements receiving three or more quotes.

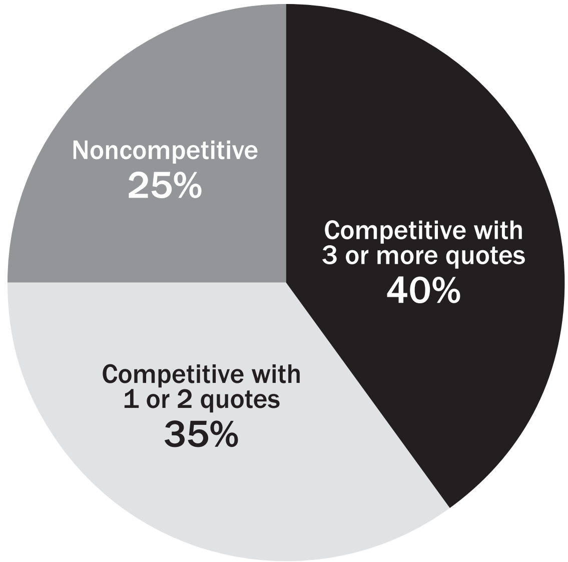

FIGURE 2. EXTENT OF COMPETITION FOR FSS PROCUREMENTS IN FISCAL YEAR 2014

Engage the Vendor Community as Early as Possible

FAR 1.102(a)(4) clearly supports the first power practice. It states: "The government must not hesitate to communicate with the commercial sector as early as possible in the acquisition cycle to help the government determine the capabilities available in the commercial marketplace." When using the FSS program, buyers can enhance communication with vendors during the acquisition planning and market research phases, as described in this article under "Conduct Industry Exchanges and/or other Outreach Activities." Better communication will help improve requirements definition in both phases and can provide an early estimate of the number of quotes that will be received in response to the request for quotations (RFQ).

One practice that is highly recommended for more complex acquisitions is issuing a request for information (RFI). An RFI should ask vendors to provide information on their capabilities, business size, and experience, and it should also dig deeper into the government's requirements by requesting vendors' feedback on aspects of the performance work statement. Buyers may ask potential vendors to:

- Identify any cost, performance, and/or Schedule risks within the performance work statement.
- Identify any ambiguities in the performance work statement and/or technical requirements that need to be clarified.
- Suggest that the government provide certain information

and/or data that would benefit the vendors when preparing their price proposals.
- Provide additional feedback, as applicable, on the performance work statement.
- Identify any areas of the performance work statement that appear to be overly restrictive.

Additionally, it is standard practice for buyers to ask potential vendors to reply to an "expression of interest" questionnaire that commonly asks: "Does your company intend to provide a quote for this requirement? Please respond yes or no." This simple question is somewhat useful by itself, but buyers can get a better sense of vendors' intentions and gain more insight into vendors' bid/no-bid analysis by asking them to classify the likelihood of their submitting a quote and explain the reasoning, as shown in Figure 3 below.

Coordinate with the Competition Advocate

According to FAR 1.102-2, "it is the policy of the [Federal Acquisition] System to promote competition in the acquisition process." Buyers should coordinate with their competition advocate to achieve the goal of obtaining adequate competition. Among the competition advocate's responsibilities are promoting the acquisition of commercial items (and challenging barriers to their acquisition) and pushing back on unduly restrictive requirements. Coordination with the competition advocate should take place early in the requirements development phase, but additional coordination may be necessary if pre-award activities indicate that adequate competition is unlikely to be obtained.

From a practical standpoint, be open to the competition advocate's strategies and ideas. The competition advocate can offer his or her expertise and influence to affect the competitive space. For example, competition advocates at some federal agencies have been very creative by establishing awards programs that recognize the work of teams who increase competition.[7] Because competition advocates commonly work across multiple programs and interacting with other competition advocates across government, coordination with competition advocate if you expect to receive less than three quotes can be very beneficial.

The following activities can provide insight into whether the buyer will receive three or more quotes, which is also good intelligence to share with competition advocate:

- Industry exchanges,
- Responses to the expression of interest question,
- Question and answer period,
- Receipt of past performance information, and
- Vendors' feedback on a draft RFQ.

For example, during the question and answer period, questions that indicate that requirements are too restrictive and/or present an unreasonable barrier to a non-incumbent may mean that the requirements need to be revisited. The contracting officer may want to release government data and information to help level the playing field or even amend the solicitation. Working through these challenges with the acquisition team and competition advocate can help the buyer arrive at the best solution.

Contracting officers should also determine whether vendors that submitted responses to the RFI are asking questions during the question and answer period. If they are not asking questions, this may indicate that they have lost interest and are no longer interested in submitting a quote. Nothing in the *FAR* prohibits a contracting officer from following up with vendors to ask whether they still anticipate submitting a quote.

Please select one of the following.	Explain the reason for your selection.
1. It is *very likely* that our firm will submit a quote. (≥ 80% confidence-level)	
2. It is *somewhat likely* that our firm will submit a quote. (approximately 60% confidence-level)	
3. It is *unlikely* that our firm will submit a quote. (≤ 25% confidence-level)	
4. Our company is *undecided* about submitting a quote at this time.	
5. Our company *does not* intend to submit a quote.	

FIGURE 3. EXPRESSION OF INTEREST QUESTIONNAIRE

Some buyers may be hesitant to take this approach and risk seeming to treat vendors unequally, but the contracting officer's responsibility is not to treat all vendors identically but to ensure that all prospective vendors are treated fairly, equitably, and impartially.[8]

Consider Extending the RFQ Due Date

FAR 1.102-2(c)(3), "the government shall exercise discretion, use sound business judgment, and comply with applicable laws and regulations in dealing with contractors and prospective contractors"—reinforces the second power practice, "Consider extending the RFQ due date." Here, the contracting officer exercises his or her discretion and makes sound business decisions regarding balancing schedule requirements against the principle of promoting competition.

Buyers are not required to issue an RFQ for a minimum of 30 days for competitive orders placed against FSS. This offers the opportunity to shave additional days off the procurement milestone schedule. However, if extending the RFQ due date could potentially yield additional quoters, it is more beneficial in the long run for buyers to prioritize increasing competition over decreasing the length of the response period on the procurement milestone schedule.

If a vendor or multiple vendors submit a formal request for an extension, that is an indicator that extending the response period could increase competition, and the contracting officer should strongly consider extending the due date. For Department of Defense (DOD) acquisitions, it is nearly impossible not to do so because DOD makes extensions mandatory through its "one-offer rule." The DOD one-offer rule is a powerful practice that helps enhance competition. It requires contracting officials to take additional steps to promote competition when only one offer is received in response to a competitive solicitation that was open for fewer than 30 days.[9] If the solicitation was initially advertised for fewer than 30 days and only one offer was received, then the contracting officer is required to cancel the solicitation and resolicit for at least an additional 30-day period. Additionally, a sound practice prior to resoliciting the requirement is to reassess the requirement for any potential barriers to competition such as overly restrictive requirements or an incumbent advantage that can be neutralized. Because of this rule, contracting officers are more likely to make business decisions that promote competition and avoid competitive one-bid outcomes. Applying these types of practices would also be beneficial to acquisitions conducted by civilian agencies.

Expand Reach to More Vendors

When conducting an FSS procurement, contracting officers have two options for disseminating the RFQ. They can either post it on eBuy[10] to allow all eligible vendors to submit a quote or send it to a subset of vendors based on the results of market research.[11] Sometimes contracting officers choose the latter because a common perception is that posting the RFQ to all vendors will result in too much competition. An example of this is described in the July 2015 GAO report "More Attention Needed to Competition and Prices." The report describes a scenario in which a contracting officer awarded a $2.4 million order for logistical and administrative support after receiving one quote. The contracting officer explained that market research revealed five vendors who were capable of performing the work. The RFQ was emailed to those five vendors and was not posted on eBuy because the buyer believed it might have received hundreds of quotes if it had been posted, and the acquisition team would not have had enough time to conduct an adequate evaluation.

Because more than 20,000 vendors take part in the FSS program and certain Schedules have thousands of vendors, other contracting officers have similar concerns. GSA Schedule 70 for Information Technology, for instance, has about 4,780 vendors. Therefore, sending the RFQ to a subset of Schedule 70 vendors based on results of market research may be appropriate, but this is not the case for all GSA Schedules. Although GSA's eBuy statistical data show that RFQs receive, on average, three quotes,[12] contracting officers have to consider their specific requirements when assessing whether they will receive adequate competition. In general, in order to increase competition, it is more effective to reach out to more potential vendors via eBuy than to send the RFQ to a limited number of vendors.

In acquisitions where less than three quotes are received, the contracting officer must document the contract file with a determination that explains that no additional vendors capable of fulfilling the requirements could be identified despite reasonable efforts to do so. Posting the RFQ to eBuy constitutes a reasonable effort because many vendors can gain access to the RFQ.

Conduct Industry Exchanges and/or other Outreach Activities

The *FAR* encourages early communications with vendors for procurements, including FSS procurements. Activities such as one-on-one meetings, pre-quote conferences, pre-solicitation meetings, and industry days are mutually beneficial for both government and industry. By conducting virtual and/or in-person communications with industry, the government has the opportunity to gain a greater understanding of vendors' capabilities and can explain or clarify its requirements, which may lead to its receiving more quotes in response to the RFQ. Industry exchanges give potential vendors the chance to:

- Ask specific questions about the government's requirements,
- Network with potential teaming partners to pursue contractor teaming arrangements and/or gauge their potential competition,
- Assess whether they want to submit a quote, and
- Submit stronger quotes and/or technical solutions based on a better understanding of the requirements.

Conclusion

Buyers are more powerful when there is an adequate number of sellers competing in the federal marketplace. Competition can motivate vendors to "sharpen their pencils" in order to win the contract or order. Since we are experiencing a push for more innovative contracting, the acquisition community has an opportunity to rethink how it currently does business and to be more creative in the strategies it uses to get the job done. For example, we see GSA leaders over the FSS pushing to collect prices-paid data, striving to make it easier for vendors to obtain a FSS contract, and working to standardize product pricing and descriptions. Of course, category management has become a top priority. The buying community should be hopeful that innovative efforts will continue to grow throughout the federal government. In the meantime, what can buyers do today to buy better? One answer is to enhance competition. Competition is the cornerstone of the acquisition system. Competition has a positive impact on several areas of any acquisition: it saves money, improves performance, results in delivery of better and more innovative solutions to accomplish a mission, and promotes accountability. By applying these power practices to FSS procurements, buyers will position their acquisitions for adequate competition and ultimately better results in support of the mission.

ENDNOTES

1. The Office of Management and Budget's memorandum, "Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation, and Increase Savings" (2014), outlined ongoing initiatives to achieve better buying in the federal government, and DOD's Better Buying Power (BBP) effort, launched in 2010, emphasized principles for more efficient, effective, and innovative contracting for its acquisitions.
2. U.S. Government Accountability Office, "Federal Supply Schedules: More Attention Needed to Competition and Prices" (July 2015), http://www.gao.gov/products/GAO-15-590.
3. Also referred to as the GSA Schedules Program and Multiple Award Schedules (MAS).
4. The Department of Veterans Affairs has the authority to solicit, negotiate, award, and administer contracts for selected Schedules.
5. Tom Petruska, "GSA Schedules Risks and Rewards" (keynote address, meeting of the Greater Johnstown National Contract Management Association, Johnstown, PA, October 18, 2012).
6. Government Accountability Office, *Federal Supply Schedules*.
7. U.S. Government Accountability Office, "Opportunities Exist to Increase Competition and Assess Reasons When Only One Offer Is Received" (July 2010), http://www.gao.gov/new.items/d10833.pdf.
8. See FAR 1.102-2(c)(3).
9. *Defense Federal Acquisition Regulation Supplement* 215.371-2, http://www.acq.osd.mil/dpap/dars/dfars/html/current/215_3.htm#215.371-2.
10. GSA eBuy (www.gsa.gov/ebuy) is an online RFQ tool used for the FSS program.
11. See FAR 8.405-2(c)(3)(iii).
12. GSA eBuy statistics, monthly e-tools snapshot, December 2015.

Benefits and Barriers to Award Term Contracts: A Cry for Regulatory Guidance

BY ILANA B. JOLSON

Introduction

From 2008 through 2015, the U.S. federal government steadily slashed agency-level spending in an attempt to control its enormous deficit.[1] In fiscal year 2014, federal agencies spent approximately $445 billion on government contracts, which is almost 18% less than the $541 billion spent in fiscal year 2008.[2] Accordingly, appropriators expect federal acquisitions professionals to do more with less. In response, the Office of Federal Procurement Policy (OFPP) has called upon federal buyers to be innovative to meet this demand.[3] While the government routinely uses profit-based incentive contracts to motivate efficient and effective contractor performance,[4] times of fiscal austerity offer a rich opportunity for contracting officers to explore non-monetary[5] techniques for doing so.

Award term contracts are an attractive technique in the universe of nonmonetary incentives. They motivate businesses by allowing them to earn additional periods of performance upon meeting preestablished targets.[6] Award terms can also be used as a negative incentive, shortening the length of an agreement when vendors miss contractual parameters.[7] Other nonmonetary incentives fall short, failing to incite excellence. Past performance evaluations,[8] for example, while mandatory,[9] may be applied narrowly and be of little importance, depending on the procurement.[10] Alternatively, agencywide supplier awards programs[11] seek to incentivize better behavior. However, a plaque and a press release do not carry the same weight as the promise of future business. Award term incentives also appeal to the government, encouraging "a long-term relationship with a well-performing contractor."[12]

Despite the allure of award term contracting, contracting officers hesitate to employ this incentive technique. In fact, many may not even know about it. Award terms are not discussed in the *Federal Acquisition Regulation* (*FAR*)[13] or traditional training courses for the acquisition workforce.[14] There is no governmentwide reporting for this technique, and lessons learned by the handful of agencies employing incentive award contracts are inadequately shared with federal buyers. Accordingly, there is a need for increased guidance and standards in the field of award term contracts.

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Without guidance on the effective use of incentive award contracts, procurement officials are left to their own devices. To implement award term contracts properly, government buyers must work through an array of statutory, regulatory, and policy hurdles, including contract length restrictions, competition requirements, and fiscal law. The technique also requires careful selection of award term determination criteria (i.e., benchmarks) and close monitoring of contract performance.[15]

This article argues that the Federal Acquisition Regulatory Council (FAR Council)[16] should implement guidance for the use of award term incentives to remove barriers and encourage their use. It provides an overview of award term contracting and its benefits, including its superiority over option terms as a means for creating successful long-term contracts. It then reviews the complex statutory and regulatory schemas that hinder the use of award terms and analyzes the rationale behind these barriers. While this article does not propose solutions for all of the hurdles it identifies, it concludes by advocating for the dissemination of standard policies to mitigate the impact of those hurdles and to enable responsible use of a valuable yet seldom-discussed procurement method.

A Brief Overview of Award Term Incentive Contracts

The U.S. Air Force was the first government agency to use award terms, in 1997, for simulation services for pilots training on the F-15C aircraft.[17] The new incentive soon gained popularity amongst government officials and contractors alike.[18] In 1999, Ken Oscar, the U.S. Army's senior procurement executive, convened a meeting, which included one-on-one discussions with Department of Defense and industry personnel, focused on improving contractor incentives.[19] At this meeting, attendees nominated and assessed the impact of approximately 25 different types of contract incentives.[20] "The clear winner was award term contracting. . . . It tied for the second-highest score in terms of impact and was considerably above average in ease of implementation."[21]

Award terms closed gaps that Oscar identified in traditional incentives, providing not only an incentive to succeed but also a disincentive for failure: a potential reduction in the contract length.[22] The first government buyers to use award terms adapted the technique from commercial purchasing practices,[23] following the passage of the Federal Acquisition Streamlining Act of 1994 (FASA).

Award terms are most effective when used for long-term performance-based acquisitions[24] and are not appropriate for all procurements.[25] Determination of award term entitlement largely parallels the award fee determination process,[26] requiring performance targets, plans, assessments, and awards when earned, at predetermined intervals throughout the contract.[27] Like incentive fee contracts, award term decisions are subject to the Contract Disputes Act and judicial review.[28]

Since 1997, the government has continued to use award terms to incentivize performance on myriad contracts for diverse services in combination with various contract types.[29] Despite the lack of governmentwide reporting, NASA had 10 active award term contracts in late 2016,[30] and there were 107 postings on the Federal Business Opportunities (FBO) website in fiscal year 2015 that mentioned award terms.[31] The postings advertised requirements such as range support services for the Air Force[32] and freight transportation services for the Department of Defense.[33] Although these examples do not represent a rigidly scientific sample, the FBO search shows that the U.S. government continues to plan and solicit award term contracts.

Pockets of acquisition professionals have expressed interest and employed award terms for more than fifteen years, yet the FAR Council has yet to promulgate regulatory guidance on their use.[34] In lieu of governmentwide direction, a few agencies have independently filled the void by issuing their own award term incentive regulations through supplemental rule-making authority.[35] In the sections that follow, the advantages of award term incentives, and their ability to achieve superior results when compared to frequently-used option terms are discussed, highlighting the government's missed opportunity. By failing to disseminate information and instruction regarding award terms, agencies remain unknowledgeable, unable, and often unwilling to capitalize on their benefits.

Award Term Incentives Help Both the Government and the Contractor

The government and contractors alike benefit from extending contracts with well-performing vendors. Award terms provide "a strong incentive for contractors to invest in a program, and manifest . . . the government's interest in long-term partnering."[36] Unlike incentive fees, which only impact short-term performance, award terms motivate long-term performance.[37] During an incentive fee contract, vendors "may consciously choose to temporarily perform at less than an optimum level to better support more profitable or important customers. . . . The contractor may choose to improve performance in the next award fee period or continue to under-perform depending on the needs of the company."[38] Conversely, performance on an award term contract directly impacts future business for the company.[39] To motivate both short-term and long-term performance, the Joint Surveillance Target Attack Radar System program included award fee incentives alongside award term incentives.[40]

There are several benefits of long-term contracts, including those covered by the *FAR* as objectives when using multiyear contracting authority. While contracts with award term incentives are not necessarily multiyear contracts,[41] the government can achieve similar positive results when successful contractors earn additional periods of performance.[42] The benefits are (1) lower costs;[43] (2) enhanced standardization;[44] (3) reduced burden in soliciting and administering contracts;[45] (4) cost savings from continuity of production or performance;[46] (5) increased stability in the contractor workforce;[47] (5) not needing to establish new quality control procedures each year;[48] (6) increasing competition by attracting firms that are unwilling or able to compete for shorter contracts (especially when there are high startup costs);[49] and (7) incentivizing contractors to invest in capital facilities, equipment, and technology to increase productivity.[50] These benefits serve the entire procurement community and warrant use of award term incentives.

Award Terms Are More Effective at Creating High-Performing Long-Term Contracts than Are Option Terms

Option terms (including hybrid "incentive options"),[51] which leave the government with substantial discretion and room for later adjustment, mitigate most institutional problems with using award terms. Options, though, are inherently uncertain for contractors and provide less motivation and fewer benefits. Generally, the government includes option years in its contracts because they afford greater flexibility, which is more palatable to government buyers. Exercising an option period is a common way to add time to a government contract.[52] Options are a unilateral right of the government to extend the contract term (or to purchase additional supplies or services) within a specified time period.[53] While both methods may be used on the same contract,[54] this will diminish the impact of the award term incentive.

The greatest benefit of option terms, compared to award terms, is flexibility for the government. If a contractor fails to meet its award term performance targets, the contract may not be extended at the end of its current period of performance. By contrast, when options exist, the government retains the right to extend performance. Additionally, agencies often avoid costly terminations for convenience[55] by simply not exercising option years. In an award term the government forfeits its discretion once a contractor meets the mutually agreed upon performance criteria. If the government no longer wishes for the contractor to continue performing, it must terminate the contract for convenience or default, at potentially substantial risk and cost.[56]

Options shift greater risk to contractors than award terms and fail to ensure above-average performance. Contractors have no entitlement to options and thus retain greater political and program risk.[57] As a result, contractors are likely to inflate their price proposals to accommodate unplanned work, the benefits from which will entice agency officials into exercising option periods,[58] and to underinvest to avoid incurring unrecoverable expenses in the event that the government does not exercise an option period.[59] While contractors strive for superior performance to earn award terms, they merely need to perform satisfactorily to receive an option period.[60] Contracting officers will generally exercise an option if this *FAR* condition is satisfied, and will not "bypass exercising of an option just because the contractor is an average (satisfactory) performer."[61]

Including both option years and award terms in the same contract reduces the incentive for a contractor to meet performance objectives, because the government may still extend the contract when the contractor misses its targets.[62] When using award term incentives, however, the government should always include an option period for the amount of time necessary to resolicit, award, and transition a requirement to a new vendor.[63] Award terms are an advantageous method of extending contract length and eliciting contractor excellence. Government buyers should consider their inclusion in contracts fulfilling long-term critical service needs.

Barriers to Use of Award Term Incentives

Award terms are entrenched in a statutory and regulatory quagmire, despite their overall benefits and enhanced effectiveness when compared to options. This highly regulated landscape can seem like a minefield to all but the most experienced government buyers. Accordingly, without proper guidance, contracting officers do not know how to use award terms and reap their benefits. The primary barriers to using award terms are limitations on contract length, competition requirements, and the availability of funds.[64] This section will review each of these hurdles and then examine the risks they impose, mitigation tactics, and their overall impact on the effectiveness of award term incentives. While none of these policy goals truly restrict the use of award terms, compliance with them is imperative.

Limitations on Contract Length

While the goal of award terms is to establish long-term contractual relationships, the length of a government contract is generally limited to five years.[65] The *FAR* imposes this limit in multiple places for various types of contracts.[66] Specifically, the *FAR* imposes a five-year limit on the ordering period of task order contracts for the acquisition of advisory and assistance services,[67] multiyear contracts,[68] contracts with options,[69] and contracts covered by the McNamara-O'Hara Service Contract Act of 1965.[70] Task order contracts may exceed five years when authorized by statute.[71] Multiyear contracting is "a special contracting method to acquire known requirements in quantities and total cost" for more than one year.[72] By definition, multiyear contracts may not exceed five years unless authorized by statute.[73] The limit on *FAR* contract length, found in §17.204(e), is five years for the base and all options for both services and supplies. This limitation does not apply to information technology contracts.[74] Finally, section 6707(d) of the Service Contract Act limits terms to five years for covered contracts and requires adjustment of wages and fringe benefits for covered service employees no less than every two years.[75]

Legal limitations on contract duration can impede the government's ability to establish and reap the benefits of long-term relationships with its contractors and lessen the value of award term incentives.[76] Contracting officers must ensure that the total duration of a contract does not exceed the legal limit placed on its length.[77] When using award term incentives, the base period of performance, all earned award terms, and any option terms must all fall within these limits. If a contractor earns an award term that exceeds the total allowable contract length when it is combined with the base period and any other options or award terms already performed, the contract creates an unlawful commitment on behalf of the government.

The *FAR* limitations on contract length include exception processes, which in practice allow many contracts to stretch beyond five years.[78] When permissible, agencies should exploit these exceptions to establish contracts exceeding five years when award terms are earned, maximizing the value of this incentive technique. Contracts can extend beyond the five-year limit for the base plus option periods when "approved in accordance with agency procedures."[79] Many agencies have circumvented this five-year restriction by using their authority to promulgate supplemental *FAR* regulations and thus establish contracts with longer durations.[80] The five-year limit on multiyear contracts appears to apply only to the multiyear portion "and could exceed the five-year limitation through the use of options or award terms."[81]

Although the benefits of award term incentives are greater when contract length can exceed five years, the technique can still motivate superior performance and enable the government to realize cost savings when contracts truly are limited to a total duration of five years. The *FAR*'s espousal of the numerous benefits associated with longer, multiyear contracts suggests that contract length restrictions remain in place as an answer to other policy concerns, such as competition and ensuring taxpayer funds are used to fulfill *bona fide* needs.

Competition Requirements

Critics may argue that award terms "lock out" other companies for an extended amount of time.[82] Additionally, they may fear that contracts with longer durations will increase the likelihood of corrupt exchanges between government officials and contractors.[83] The ultimate goal, however, is to "reassure citizens that their tax dollars are not spent wastefully."[84] This is achievable when award terms are implemented properly, with objective performance-based goals, and in conjunction with the federal government's numerous anticorruption measures.[85] Therefore, when buyers follow best practices to ensure that award term incentives are truly used as a reward for exemplary performance, competition should not be viewed as a legitimate barrier.

The Competition in Contracting Act (CICA) of 1984[86] enacted the federal competition policies that are implemented by the regulations in Part 6 of the *FAR*.[87] Contracting officers are required to provide for *full and open competition* through sealed bidding procedures, competitive proposals, a combination of competitive procedures, or other competitive procedures when fulfilling needs on behalf of the federal government.[88] This competition standard is achieved when "all responsible[89] sources are permitted to compete."[90] The competition requirement allows for the exclusion of sources under limited circumstances,[91] and CICA has "been amended or supplemented by later laws that place efficiency in agency operations or other public benefits on par with competition."[92] CICA, though, "remains the foundation for the current competition requirements."[93]

Competition is a paramount policy objective in the public sector because it enables the government to receive quality products and services on time and at a fair and reasonable price.[94] Those concerned that award term incentives are anticompetitive insist that "[a]t the very least, agency and procuring competition advocates must be increasingly vigilant toward the increased use of award-term contracts, and must be prepared to alert contracting officials if their use ever jeopardizes the government's best business interests."[95] This concern manifested in an April 2015 Court of Federal Claims case. In *Coast Professional, Inc. v. United States*,[96] the Court addressed the use of award terms in the context of a bid protest. The court held that the failure to grant an award term was not protestable under CICA,[97] but the Court of Appeals since vacated the ruling and remanded the case back to the Court of Federal Claims.[98] While the courts have not yet addressed the policy implications in this case, "the lack of competition could be challenged as being against public policy."[99]

To ensure ethical and legal implementation of award terms, from the beginning of a procurement process the government should (1) clearly state its "intention to extend the contract length based on preestablished performance metrics in the solicitation,"[100] (2) use objective award term criteria, and (3) ensure that no cardinal changes transform the scope of work.[101] Agencies must ensure competition at the onset. The government should conduct market research, involving industry early, to assess (1) whether there is enough market stability for a reasonable number of contractors to propose long-term pricing,[102] (2) proper contract length,[103] and (3) the overall suitability of award terms. Source selection officials must evaluate award term pricing during the initial competition, as required for option terms, to ensure that a best value award decision is reached in conformance with competition requirements.[104]

Establishing objective award term determination criteria in advance ensures that award terms are used to motivate contractor excellence, rather than to merely "avoid the cost and effort of a competition, or to avoid loss of efficiency and disruption during a transition if the incumbent contractor were to lose the subsequent competition."[105] The contractor's performance must be assessed, documented, and retained[106] in the contract file to justify the additional period of performance.[107]

Uncertainty is inherent in long-term contracts. It is difficult to anticipate market conditions years in advance, including technological advances that can affect both pricing and performance targets.[108] Therefore, it is imperative to include a mechanism to bilaterally renegotiate award term criteria throughout the contract.[109] The Department of Education expressly allows for bilateral changes to award term plans at any time, and allows the government to unilaterally edit award term plans if the parties fail to reach an agreement within 60 days.[110] Department of Defense program officials agreed that in some situations, contracts' incentive structures require revision to incentivize performance properly.[111]

When altering award terms, as with all other contract changes, the government must practice caution and ensure that any award terms fall within the general scope of the contract. When a cardinal change occurs, significantly altering the scope of work, the Government Accountability Office (GAO) will determine it to be anticompetitive and sustain a protest.[112] Exit provisions are necessary to prevent automatic award term extensions when marketplace changes are great enough to warrant recompetition. Therefore, award term regulations and clauses should stipulate that extensions are subject to a continuing need.[113]

In addition to alleviating concerns by ensuring proper competition at the onset, adherence to objective award term determination criteria, and prevention of scope creep, one can even argue that the prospect of a potentially longer contract with award term incentives can stimulate greater competition. When Congress enacted multiyear contracting, it expected an increase in competition, hoping that contractors would be more motivated to bid on federal procurements if they did not have to compete annually.[114] Longer-term contracts have lower transactional costs for industry[115] (and the government) than annual contracts and are potentially more lucrative, making them a better investment of bid and proposal expenses.

The second purpose of contract length limitations and competition requirements is to prevent corruption between industry and government officials.[116] The federal procurement regime, however, already has a strong, multifaceted anticorruption program in place, which greatly diminishes this concern.[117] Ideally, when outsourcing critical services, the government and its contractors enter into partnering arrangements based on a mutual "commitment to long-term goals."[118] In such scenarios, there is a "*change in attitude* from that of being adversarial and at arms-length to one based on teamwork, cooperation, and good faith performance."[119] However, "cooperative behavior should not be viewed as an invitation to hide wrongdoing."[120] Unsuccessful offerors may be quick to question the government's impartiality in evaluating a contractor's performance against the agreed-upon award term evaluation criteria. While effective oversight remains crucial when these relationships are in place, the mere addition of award terms to a contract does not give rise to corruption,[121] just as it does not negate competition.

The federal government has a comprehensive and effective set of regulations, programs, and oversight bodies to deter and uncover misconduct and fraud. The U.S. Office of Government Ethics (OGE) oversees the executive branch's prevention-based ethics program,[122] which mandates financial disclosure for acquisitions personnel.[123] The Standards of Ethical Conduct for Employees of the Executive Branch[124] and agency-level supplemental ethics regulations[125] govern the behavior of all executive branch employees. Part 3 of the FAR is exclusively dedicated to discussing improper business practices and personal conflicts of interest.[126] It requires contractors to "conduct themselves with the highest degree of integrity and honesty"[127] and, when performing larger contracts, to have a written code of business ethics and conduct.[128]

Complementing these policies, multiple oversight and compliance programs exist to identify and punish bad actors in the federal procurement system. Agencies and contractors[129] maintain internal compliance programs, reviewing and validating contract actions to ensure both accuracy and propriety. Independent Offices of Inspector General have been created to perform audits to recommend activities promoting "economy, efficiency, and effectiveness"[130] and to conduct investigations to "prevent and detect fraud and abuse."[131] GAO, mandated to investigate "how the federal government spends taxpayer dollars," carries out similar work on behalf of Congress.[132] In addition to civil and criminal remedies, the government may take nonpunitive remedial measures such as suspension and debarment, which excludes bad actors from participating in the marketplace for federal government contracts to protect public interests.[133] In light of these exhaustive measures, it is unlikely that use of award term incentives alone would encourage contractors and government officials to collude and perform their duties in bad faith.

The Federal Funding Process

The final barriers assessed here are the federal funding constraints. A contractor's *automatic entitlement* to an award term period may violate fiscal law if it improperly commits taxpayer funds or obligates unavailable funds. While the government funding process is an important mechanism through which Congress and the White House ensure taxpayers' funds are used responsibly and exert policy control over agencies, its rigidity appears to discourage award term incentives. Qualifying language endorsing the use of award terms could help alleviate this concern and should therefore be standardized across the government with a *FAR* clause specific to award terms.

The availability of funds for federal agencies is governed by the complex processes of congressional appropriations,[134] White House apportionment through the Office of Management and Budget,[135] and individual agency budget procedures.[136] Fiscal statutes and regulations restrict when and how funds can be spent. Notably, the Antideficiency Act "compels agencies to account for contractual liabilities upfront"[137] by prohibiting the use of funds that have not been appropriated.[138] Funds must be used for a proper purpose[139] and meet a bona fide need within the appropriated time limit,[140] generally one year. Exceptions apply in the case of multiyear contracts and no-year funds.[141]

Agencies can mitigate the risk of violating these fiscal statutes by including an opt-out condition stipulating that "all earned periods of performance are subject to the availability of subsequent fiscal year funding and continuation of a valid requirement."[142] Award term clauses should make clear that initial decisions by the Award Term Determining Board or Official merely constitute notice of intent, not entitlement, and that award term periods may only be added via a modification to the contract signed by a warranted contracting officer.

A final concern regarding the use of award term incentives is whether and to what extent a contractor should be compensated when it meets its contractual award term targets but funds are not available or the government no longer requires the services. Contractors are likely to argue that such a shortfall is, from the contractor's perspective, in effect a partial cancellation of the contract. When award terms are used independently from multiyear contracting authority, contracts should expressly preclude payment of cancellation charges. Cancellation terms and the government's liability vary by contract. [143] Contract awards with performance-extending incentives do not guarantee additional performance periods, and as such, contractors should not expect compensation when those performance periods do not come to fruition.

When both award term incentives and multiyear contracting authority are employed concurrently, however, further thought is required to determine if, when, and how award term periods, including reductions in period of performance by way of disincentive, should be factored into cancellation ceilings and payments. The *FAR* requires government agencies to include cancellation ceilings in all multiyear contracts that state the maximum amount a contractor may receive[144] for each year subject to cancellation.[145] The government determines cancellation ceilings by estimating reasonable startup costs for an average contractor that would be amortized throughout the multiyear contract.[146]

Agencies currently using award terms have included clause language to avoid violating and incurring cancellation charges. The Environmental Protection Agency's Award Term Incentive clause, included in its *FAR* supplement, provides a unilateral right to the government to not grant or to cancel award term incentive periods when (1) the contracting officer fails to initiate an incentive period, regardless of contractor performance;[147] (2) the contractor does not meet the required performance criteria;[148] (3) the government notifies the contractor that funds are not available for the award term period;[149] or (4) the government no longer has a need for performance at or before commencement of the award term period.[150] NASA's proposed award term regulations, pending issuance as of March 2017, include a similar clause which also allows contracting officers to not award or cancel award term periods when the contract was awarded as a small business set-aside, and the contractor is no longer a small business.[151] Both clauses continue by stating that cancellation of an award term for any of these reasons "shall not be considered either a termination for convenience or termination for default, and shall not entitle the contractor to any termination settlement *or any other compensation*."[152] (emphasis added) Cancellations are enacted via a unilateral modification, subject to the clause's authority.[153] The *Department of Education Acquisition Regulation* (*EDAR*)[154] similarly states that award terms are "contingent upon a continuing need for the supplies or services and the availability of funds"[155] and may be cancelled at no cost to the government if those conditions are not satisfied.[156] The *EDAR*'s award term clause also emphasizes that a cancellation is not a termination for convenience, and the Department of Education will not grant any equitable adjustments.[157]

While these limitations may, on occasion, nullify a contractor's entitlement after it meets all required award term criteria, they are critical to ensure an appropriate use of the incentive. As a result, allowance for no-cost cancellations when there is not adequate funding or a continued requirement to perform an earned award term should be standardized through incorporation in the *FAR*. This would assuage the fears of wary government officials who have yet to implement award term incentives. *FAR* guidance would enable contracting officers to comply with contract length limitations, competition requirements, and appropriations law when using award term incentives.

Conclusion: The Government Needs Effective Guidelines to Promote Responsible Use of Award Terms

Award terms are an attractive contract incentive, offering long-term business for contractors in exchange for exemplary long-term performance, and have been used "with some degree of success in the acquisition of services."[158] Although not appropriate for all types of contracts, they can lower the transactional costs of recompetition, promote stability, and incentivize capital investment when applied properly. Award terms better incentivize superior performance than do option years. But if an award term contract is not properly structured, "an overly zealous contracting officer might inadvertently create an entitlement for the contractor in advance of funds,"[159] circumvent federal competition policy, or exceed maximum contract length. Buyers should heed former OFPP administrator Anne Rung's call to "move away from this rules-based approach"[160] to acquisition and to instead take responsible risks. They should prevent the government's complicated and convoluted procurement system from limiting effective partnerships between industry and government.[161]

Although the government has used award term incentives for almost twenty years, it rarely discusses them. New and experienced buyers alike need to be educated on this incentive tool. Government buyers should consider award terms during acquisition planning for long-term requirements. For example, in April 2015, GAO recommended that the Centers for Medicare & Medicaid Services explore the use of award terms to enhance the performance of Medicare administrative contractors.[162]

Contracting personnel are in need of guidance on which types of services are well suited for award term incentives,[163] proper use of them, a standard award term clause, and examples of best practices in award term contracting.[164] Individual agencies and the government as a whole do not collect data on how often award terms are used and how well they work.[165] GAO recommended that the Department of Defense "collect and disseminate lessons learned or best practices regarding the use of incentives and cost-control tools."[166] As an example, GAO recommended determining whether extending credit from one award term determination period to another (rollover) is appropriate. GAO discovered that it was possible for aircraft simulator training contractors at the Air Force to earn award terms, while providing only satisfactory performance, by rolling over award term points to their next evaluation period.[167] In contrast, the Army's award term contracts for the same services only allowed for rollover points when a contractor earned more than the 100 points necessary to execute the current award term.[168] A governmentwide discussion of best practices for setting up award terms contracts is warranted.

The FAR Council should promulgate rules on the use of award terms to assuage agency and contracting officer fears and to encourage their use. This would fulfill the recommendation of a December 2011 report from the Pentagon.[169] The FAR Council should seek feedback from all stakeholders, including the government and industry, regarding the advantages and disadvantages of award term incentives. Existing guidance on incentive fees, along with individual agencies' supplemental *FAR* coverage on award terms, can be leveraged to draft this guidance. The coverage should include a sample clause, like that used by the Environmental Protection Agency or the Department of Education or proposed by NASA, and should require reviews, approvals, and reporting. Even critics who lament the use of award terms by claiming they weaken the defense industrial base and limit competition suggest creating a requirement to demonstrate benefits and "pre-determined savings thresholds, similar to those used when making decisions regarding the bundling of contracts."[170] The FAR Council should implement a pilot program[171] to ensure that award term incentives are used appropriately to incentivize superior performance and not abused to lock out competition. Finally, use of award terms "requires that the government possess the skill and ability to employ the technique effectively and monitor performance."[172] The federal acquisition workforce, including program office personnel, should be trained on this contracting method.[173]

The U.S. federal government can realize enhanced contractor performance and many other benefits through the use of award terms. But it will not capitalize on these advantages until it legitimizes and unburdens their use by promulgating regulatory guidance.

ENDNOTES

1. The federal deficit, which was $1.4 trillion in 2009, was $439 billion—2.5 percent of the economy—in fiscal year 2015. See Julie Hirschfeld Davis, "Stronger Economy Cited as U.S. Reports Lowest Budget Deficit of Obama's Tenure," *New York Times*, October 15, 2015, http://www.nytimes.com/2015/10/16/us/politics/stronger-economy-cited-as-us-reports-lowest-budget-deficit-of-obamas-tenure.html?ref=topics&_r=0.

2. USAspending.gov, *Overview of Awards by FY 2008–2017*, https://www.usaspending.gov/Pages/TextView.aspx?data=OverviewOfAwardsByFiscalYearTextView.

3. Anne E. Rung, U.S. Office of Management and Budget, "Transforming the Marketplace: Simplifying Federal Procurement to Improve Performance, Drive Innovation, and Increase Savings" (memorandum), December 4, 2014, https://obamawhitehouse.archives.gov/sites/default/files/omb/procurement/memo/simplifying-federal-procurement-to-improve-performance-drive-innovation-increase-savings.pdf. The memorandum orders a review of procurement-related regulations "that generate the greatest reporting burdens or impose unnecessary restrictions that keep new, innovative companies from entering the Federal marketplace" (5).

4. Paul A. Denett, U.S. Office of Management and Budget, "Appropriate Use of Incentive Contracts" (memorandum), December 4, 2007, http://www.ago.noaa.gov/acquisition/docs/oppp_memo_incentive_contracts_2007.pdf, describes incentives as "vital to accomplishing mission needs, minimizing waste, and maximizing value" (1).

5. *Federal Register* Vol. 81, No. 237. (proposed Dec. 9, 2016) (to be codified at 48 C.F.R. pts. 1816 and 1852) 89038 "an award term does not involve additional funds beyond the amount of the current performance period."

6. FAR 3416.470(a): "Award-term contracting is a method, based upon a predetermined plan in the contract, to extend the contract term for superior performance and to reduce the contract term for substandard or poor performance."

7. FAR 3416.470(a) defines *award terms* as a method that extends or reduces contract term, based on performance and in accordance with a predetermined contractual plan.

8. U.S. Interagency-Industry Partnership, *Seven Steps to Performance-Based Services Acquisition* (hereinafter *Seven Steps Guide*), 28, https://www.acquisition.gov/seven_steps/library/SevenSteps_execversion.pdf, lists past performance evaluations as an alternative incentive tool.

9. FAR 42.1502(b) mandates evaluation of contractor past performance for contracts and orders exceeding the simplified acquisition threshold.

10. Kate M. Manuel, CRS Report R41562, *Evaluating the "Past Performance" of Federal Contractors: Legal Requirements and Issues*, February 5, 2015, 12–13, discusses agencies' "broad discretion" in how they use past performance as an evaluation factor and the weight they assign it.

11. U.S. Interagency-Industry Partnership, *Seven Steps Guide*, 28, lists agencywide supplier award programs as a nonmonetary incentive.

12. Steven Kelman, "Use rewards to extend vendors' pacts," *Federal Computer Week*, June 13, 1999, 13, 19, https://fcw.com/articles/1999/06/13/use-rewards-to-extend-vendors-pacts.aspx. See also Michael W. Mutek, "Implementation of Public-Private Partnering," *Public Contract Law Journal* 30, No. 4 (2001): 557–84, which suggests that in a successful partnering relationship, "a long-term relationship is the incentive and reward for continued superior performance" (569).

13. FAR 1.102(d) (2015) leaves the door open to *award term* contracts as a permissible procurement strategy. The *FAR* expressly allows any "specific strategy, practice, policy or procedure . . . in the best interests of the government," so long as it does not violate any statutes or other legal authorities. As discussed in this article, the Environmental Protection Agency's supplement to the *FAR* (e.g., 48 CFR 1516.401-70) already endorses the use of award terms.

14. "Lack of knowledge and training are the biggest hurdles that must be overcome for the Navy to effectively utilize this (award term) incentive." James M. Lowther, *Award Term Incentive: How It Might Be Implemented at U.S. Naval Procurement Activities* (unpublished thesis, Naval Postgraduate School), December 2001, 51, https://calhoun.nps.edu/bitstream/handle/10945/9708/01Dec_Lowther.pdf?sequence=1&isAllowed=y.

15. U.S. Government Accountability Office, GAO-06-830, *Contract Management: Service Contract Approach to Aircraft Simulator Training Has Room for Improvement*, 2006, relays that both government and contractor personnel informed GAO that "the subjective nature of the criteria and the manner in which they are applied negate the award term as a performance incentive" (27). While this administrative effort also deters use of award terms, the concern is applicable to monetary incentives as well and is therefore not addressed in this article. Also see, generally, U.S. Government Accountability Office, GAO-06-66, *Defense Acquisitions: DOD Has Paid Billions in Award and Incentive Feeds Regardless of Acquisition Outcomes*, 2005, which found that the Department of Defense frequently pays award and incentive fees to contractors providing merely satisfactory performance.

16. For background on the FAR Council, which is responsible for directing and coordinating governmentwide procurement policy and regulatory activities, see "Federal Acquisition Regulatory Council," https://obamawhitehouse.archives.gov/omb/procurement_far_council.

17. Vernon J. Edwards, "Award-Term: The Newest Incentive," October 30, 2000, http://www.wifcon.com/anal/analaterm.htm, recalls the use of award terms on a seven-year base contract with potential to extend up to 15 years.

18. An informal survey showed "a marked increase" in FedBizOpps postings using the phrase "award term" between fiscal years 1999 through 2004. Brett Stevens and E. Cory Yoder, "Award-Term Contracts: Good for Business?" *Contract Management* Magazine 45, No. 9 (2005): 30, 31.

19. The goal of the meeting was to improve the Army's contractor incentive program; see Steven Kelman, "Army Smart to Push for Contract Results," *Federal Computer Week*, August 1, 1999, 25–26, https://fcw.com/Articles/1999/08/01/Army-smart-to-push-for-contract-results.aspx. For decades, studies have shown little evidence that profit incentives are an effective motivator. See U.S. General Accounting Office [now U.S. Government Accountability Office], GAO/NSIAD-88-36BR, *Incentive Contracts: Examination of Fixed-Price Incentive Contracts*, 1988, 2, 4, which found no "apparent relationship between the cost-sharing ration and attainment of ceiling prices" in a review of 573 fixed-price incentive contracts at the Department of Defense. This fails to support the incentive theory that "as the contractor's share ratio increases the contractor has a greater incentive to meet or underrun target costs." See also Irving N. Fisher, The Rand Corp., "A Reappraisal of Incentive Contracting Experience," Memorandum RM-5700-PR, July 1968, v–vi, https://www.rand.org/content/dam/rand/pubs/research_memoranda/2006/RM5700.pdf. The memorandum suggests that although cost overruns occurred less often and to a lesser extent under incentive contracts compared to cost-reimbursement contracts, underruns were not correlated with incentive features, including share ratios. The study instead proposes that the weapon system contracts examined were noncompetitively negotiated and likely included cost targets that were higher than expected contract costs. See also Logistics Management Institute, *An Examination of the Foundations of Incentive Contracts*, Task 66-7, May 1968, 11, http://www.dtic.mil/dtic/tr/fulltext/u2/683677.pdf, which summarizes empirical evidence from six previous studies that cast doubt on the motivational impact of profit incentives; and Edwards, "Award-Term: The Newest Incentive," detailing reports dating to the 1960s produced by researchers at Harvard University, the Rand Corporation, Logistics Management Institute, and the U.S. General Accounting Office, each of which conclude that profit incentives do not provide effective motivation for contractor performance.

20. Kelman, "Army Smart to Push for Contract Results," 25.

21. *Ibid*.

22. *Ibid*.

23. Edwards, "Award-Term: The Newest Incentive": "The commercial idea is to dangle before a contractor the prospect of a long term business relationship and the sales that come with it in order to motivate it to provide excellent service. This is something that commercial organizations generally do implicitly and informally . . . ."

24. U.S. Interagency-Industry Partnership, *Seven Steps Guide*, 28: "Award term is best applied when utilizing performance or solution-based requirements where a SOW or SOO describes the agency's required outcomes or results . . . and where the contractor has the freedom to apply its own management and best performance practices . . . ." See also FAR Subpart 37.6, which provides guidance on the use of performance-based acquisitions, and FAR 37.102(a), which states a statutory preference for performance-based acquisition of services, to be used to the maximum extent possible with few exceptions.

25. EDAR 3416.470 allows award term incentives "for acquisitions where the quality of contractor performance is of a critical or highly important nature" at the Department of Education.

26. Mutek, "Implementation of Public-Private Partnering," 579, which includes background information on award term contracts, noting that they are more comparable to an award fee than an option term. Compare FAR 16.401(e), which regulates the award fee determination process throughout the federal government, including the establishment of an award fee plan and an award fee board, and limitations, with EPAAR 1552.216-78, which provides a mandatory clause detailing the award term determination process at the Environmental Protection Agency.

27. U.S. Interagency-Industry Partnership, *Seven Steps Guide*, 27, notes that award terms, like any tool, require careful planning and measurement.

28. Although contracting officers have attempted to exclude award terms from Contract Disputes Act (CDA) coverage via contract language, they are subject to the Act; see Vernon J. Edwards, "Can Contractors Dispute Award-Fee and Award-Term Decisions: Who Ever Heard of Burnside-Ott?" *Nash & Cibinic* Report 20, No. 3 (2006): ¶15. See also *Coast Professional, Inc. v. United States*, 120 U.S. Court of Federal Claims 727, 2015, which held that the CDA is the sole resolution mechanism for determining whether award term extensions are granted; and *Coast Professional, Inc. v. United States, Financial…*, 828 F.3d 1349 U.S Court of Appeals, Federal Circuit 1353, 2016, which vacated the lower court decision and held that the Court of Federal Claims had bid protest jurisdiction when award term extensions were issued as new task orders under Federal Supply Schedule contract. See also EPAAR 1552.216-77(f), which shows that the Environmental Protection Agency's Award Term Incentive clause includes a review process, allowing contractors to request a review of an unfavorable award term incentive evaluation within 15 days after notification; and 3452.216-71, which encourages contractors to use alternate dispute resolution procedures when challenging decisions by the Award Term Review Board or Term Determining Official for Department of Education contracts.

29. Edwards, "Award-Term: The Newest Incentive," lists logistics support, laundry, aircraft maintenance, janitorial, and training services as examples.

30. *Federal Register* Vol. 81, No. 237. (proposed Dec. 9, 2016) (to be codified at 48 CFR pts. 1816 and 1852) 89039 A survey of NASA's procurement organizations showed that six out of their ten active award term contracts were with small businesses., and covered services including logistics, facilities, technical management, and information technology.

31. Search conducted at FBO.gov on October 24, 2015, for all active and archived postings containing "award term" and dated October 1, 2014–September 30, 2015.

32. Range Support Services, solicitation number FA8240-15-R-3102, allowed a potential 16-year period of performance including options and award terms.

33. Department of Defense Freight Transportation Services, solicitation number HTC711-15-R-R003, https://www.fbo.gov/index?s=opportunity&mode=form&id=d33ec84fd88f98221a813f53a6d388c2&tab=core&_cview=1, established a two-year base period with the potential for three one-year option periods and two one-year award term option periods.

34. FAR Subpart 16.4 regulates incentive-type contracts but solely covers fee-based incentives.

35. EDAR 3416.470 contains the *EDAR's* coverage of award terms. EPAAR 1516.401-70 contains the Environmental Protection Agency's acquisition regulations. See *Federal Register* Vol. 81, No. 237. (proposed Dec. 9, 2016) (to be codified at 48 CFR pts. 1816 and 1852) 89038-89041 proposing to amend NASA's *FAR* supplement to cover award terms.

36. Mutek, "Implementation of Public-Private Partnering," 584.

37. See U.S. Air Force, *Air Force Guide Award Term/Incentive Options*, version 1.0, January 2003, 2, https://dap.dau.mil/policy/Documents/Policy/award.term.doc (hereinafter Air Force Guide) for a discussion of key advantages of non-cost incentives.

38. *Ibid.*

39. *Ibid.* "Non-cost incentives reward contractors with the opportunity for increased future business."

40. U.S. Government Accountability Office, GAO-12-558, *Defense Acquisitions: Further Action Needed to Improve DOD's Insight and Management of Long-term Maintenance Contracts*, 2012, 22, which discusses the incentive structures of reviewed contracts.

41. See the section headed "Limitations on Contract Length" in this article for further discussion.

42. See *Federal Register* Vol. 81, No. 237. (proposed Dec. 9, 2016) (to be codified at 48 CFR pts. 1816 and 1852) 89038 listing the following benefits when award terms create a long-term relationship between the government and contractors: more stable business relationships, motiving excellent performance, fostering contractor investment in capital, increased competition through more desirable awards, and reduced administrative costs and disruptions.

43. FAR 17.105-2(a). See also GAO/NSIAD-88-5, *DOD Procurement: Multiyear and Annual Contract Costs*, 1987, which discusses GAO's 1987 analysis of unit prices paid under 11 multiyear Department of Defense contracts that had been previously purchased under annual contracts. On average, unit prices dropped 7.8% from the prior year and 9.9% from the average of the two prior years.

44. FAR 17.105-2(b) (2015).

45. FAR 17.105-2(c).

46. FAR 17.105-2(d) ("avoiding annual startup costs, preproduction testing costs, make-ready expenses, and phase-out costs.").

47. FAR 17.105-2(e).

48. FAR 17.105-2(f).

49. FAR 17.105-2(g).

50. FAR 17.105-2(h). See also Keith D. Coleman, "Evolution of the Multiyear Rule Requires Removal of the Five-year Term Limitation," *Public Contract Law Journal* 35, No. 4 (2006): 621–38, which discusses GAO's studies on multiyear contracting authority; and GAO/NSIAD-88-5, 1–2, 17, which investigated the impact of multiyear contracting on prime and subcontractors' investment in manufacturing equipment. Two of six contractors interviewed stated that they would not have incurred their capital investments, totaling $76 million, absent their multiyear contracts. Contractors and subcontractors said that they purchased more technologically advanced equipment sooner because of multiyear contracting.

51. Edwards, "Award-Term: The Newest Incentive." Incentive options have been used to combine options with performance targets. While the targets are similar to those required in incentive fee and award term contracts, contractors are not automatically entitled to the option period when it meets or surpasses its targets; the government may still choose not to extend the contract. See also U.S. Air Force, *Air Force Guide*, 6, which explains, conversely, that if a contractor fails to meet incentive option criteria, called here an "award term option," the contract reaches an "irrevocable re-competition point or off-ramp" and the government may not award the incentive option; and GAO-12-558, 23, which discusses the Air Force's use of incentive options for its KC-10 program to mitigate the risk of earning an incentive despite unsatisfactory performance and to increase government flexibility.

52. FAR Subpart 17.2 provides guidance on the government's use of options.

53. FAR 2.101 defines *option*.

54. EDAR 3416.470(f)(3) explains that when executed, award term periods push back option periods to a later period of performance.

55. FAR Part 39 explains the process and cost considerations when terminating a contract at the convenience of the government.

56. Edwards, "Award-Term: The Newest Incentive," distinguishes a key difference between true award terms and performance-dependent options.

57. Mutek, "Implementation of Public-Private Partnering," 579, explains that options present risk for contractors.

58. Coleman, *Evolution of the Multiyear Rule*, 630, summarizes GAO's findings and explains that multiyear contracts address this issue. See also S. Rep. 90-1313, 90th Cong., 2nd sess., June 24, 1968, which relays Congress's belief that single-year

contracts coupled with options are “relatively ineffective” because proposals must “cover all their costs in the first year”; and U.S. General Accounting Office, GAO/NSIAD-88-125, *Procurement: Multiyear Contracting and Its Impact on Investment Decisions*, 1988, 14, which discusses that uncertainty of options also causes uncertainty of contractor profits.

59. Coleman, *Evolution of the Multiyear Rule*, 630, explains underinvestment as a method to prevent unrecoverable expenses when vendors do not receive options or follow-on contracts. See also GAO/NSIAD-88-125, 14, which found that the uncertainty of one-year contracts, even with option terms, caused defense contractors to underinvest.

60. FAR 17.207(c)(7) sets the standard for exercising options at acceptable performance. See also *Federal Register* Vol. 81, No. 237. (proposed Dec. 9, 2016) (to be codified at 48 CFR pts. 1816 and 1852) 89038 explaining that “the key difference is that an option may be exercised when the contractor’s performance is acceptable, while earning an award term requires sustained excellent performance.”

61. U.S. Air Force, *Air Force Guide*, 2.

62. FAR 17.207(c) requires consideration of seven factors before exercising an option, none of which include performance targets.

63. U.S. Air Force, *Air Force Guide*, 4, cautions buyers to allow for lead time when structuring award term contracts for new acquisitions. See also FAR 52.217-8, which allows an extension of up to six months for service contracts. This clause is commonly used to extend contracts when requirements are being recompeted.

64. See, for example, FAR 17.204(e), restricting contract length to five years; FAR 6.102, enumerating the only acceptable competitive procedures providing for full and open competition; and 31 USC 1341, 1517, prohibiting obligations of funds in excess of appropriations.

65. Coleman, *Evolution of the Multiyear Rule*, 629, explains that the multiyear and option term limitation was originally created to coincide with the Department of Defense’s Five-Year Defense Plan, an annual budget requirement summarizing its planned procurements for Congress. Also see, generally, Vernon J. Edwards, “The Five-Year Limit on Government Contracts: Reality or Myth?” March 2003, http://www.wifcon.com/anal/analfiveyear.htm, which identifies the four different five-year contract length limits listed in the *FAR*.

66. Edwards, “The Five-Year Limit on Government Contracts,” provides an in-depth review of *FAR*-based contract limitations as they pertain to award term incentives.

67. FAR 16.505(c)(1) includes all options and modifications in its restriction and allows for a noncompetitive extension of up to six months when necessary to ensure continuity of services while a follow-on contract is competed.

68. FAR 17.104(a).

69. FAR 17.204(e).

70. FAR 22.1002-1; also see 41 USC 6701–6707, which require contractors to pay minimum wages based on labor category and locality to their employees who perform services on behalf of the federal government.

71. See FAR 16.505(c)(2)(i), which allows limited exceptions to the restriction.

72. FAR 17.104(a).

73. *Ibid.*, defining *multiyear contracting authority* and noting that the method can be used even if all funds are not available to be obligated at the time of the award.

74. FAR 17.204(e).

75. See 41 USC 6707(d), which requires wage rates to be updated at least every two years to preserve the Service Contract Act’s purpose of ensuring minimum wages in accordance with market conditions for contractor employees performing services on behalf of the federal government.

76. See Edwards, “The Five-Year Limit on Government Contracts,” for a review of the *FAR*’s restrictions on contract length.

77. *Federal Register* Vol. 81, No. 237. (proposed Dec. 9, 2016) (to be codified at 48 CFR pts. 1816 and 1852) 89040 NASA’s proposed award term regulations explicitly state that award term contracts must comply with overall contract length restrictions in the *FAR* and NASA’s *FAR* supplement.

78. See, for example, FAR 17.204(e), which allows longer contracts when agency procedures indicate so. See also 29 CFR 4.145, which states that the Department of Labor’s implementing regulations for the Service Contract Act treat option periods as a “wholly new contract” with respect to the Act’s application. Thus, the Service Contract Act itself does not truly limit contract duration. The Department of Labor also applies this interpretation to multiyear service contracts that are not subject to the annual appropriations process, including concession contracts, operations and maintenance contracts with “no year money,” and contracts awarded by nonappropriated government instrumentalities. These contracts are treated as “wholly new contracts” at the end of the second and fourth year and so forth under the Service Contract Act.

79. FAR 17.204(e). See also Coleman, *Evolution of the Multiyear Rule*, 632–33, which explains that this exception was created in 1989 for Department of Defense agencies following a GAO decision against the department and was later extended to civilian agencies.

80. Edwards, “The Five-Year Limit on Government Contracts,” cites the Department of Agriculture’s, the Department of State’s, and the Environmental Protection Agency’s *FAR* supplements.

81. *Ibid.*

82. Mutek, “Implementation of Public-Private Partnering,” 578, which argues that although award term periods are tied to performance, they limit competition “for a period of time.”

83. This concern echoes some of the same criticisms levied against repeated incumbency on contracts. See, for example, Edwards, “Award-Term: The Newest Incentive,” which suggests that parties may “conduct business on a personal basis instead of a proper professional basis” as they work together for longer durations.

84. Kate M. Manuel, CRS Report R40516, *Competition in Federal Contracting: An Overview of the Legal Requirements*, June 30, 2011, 3.

85. Indeed, anticorruption measures in public procurement are effective tools that can ensure ethical administration of award term contracts. See, for example, 41 USC 2101–2107, which codify the Procurement Integrity Act, requiring procurement officials to disclose employment discussions with contractors; and FAR Subpart 3.11, prohibiting contractors from performing acquisition duties when a personal conflict of interest exists.

86. Enacted under the Deficit Reduction Act of 1984, *Public Law* 98-369 (1984), 98 Stat. 1175, §§ 2701–2753.

87. FAR Part 6 discusses full and open competition, full and open competition after exclusion of sources, and other than full and open competition.

88. FAR 6.101–6.102 conveys the federal government's competition policy for federal contracting.

89. FAR Subpart 9.1 provides responsibility standards for government contractors.

90. FAR 2.101.

91. FAR 6.202 allows for the exclusion of sources when in the best interest of the government to maintain an alternative source. This is permitted for the following purposes: (1) to maintain competition; (2) to ensure availability during a national emergency or during an industrial mobilization; (3) to establish or maintain a capability needed for national defense and provided by an educational institution, a non-profit organization, or a federally funded research and development center; (4) to ensure continuous availability; (5) to meet projected needs based on historically high demand; or (6) to provide critical medical, safety, or emergency supplies. See also FAR 6.203–6.208, which allow exceptions in accordance with statutes requiring set-asides for small businesses, described further in FAR Part 19; and FAR 6.302, which provides seven circumstances in which the government's contracting needs may be fulfilled using other than full and open competition: (1) when there is only one responsible source; (2) when unusual and compelling urgency exists; (3) when providing industrial mobilization; engineering, developmental, or research capability; or for expert services; (4) when precluded by an international agreement; (5) when authorized by statute; (6) when needed for national security purposes; and (7) when determined by an agency head and justified to Congress that full and open competition is not in the public interest for a particular procurement.

92. Manuel, CRS Report R40516, *Competition in Federal Contracting*.

93. *Ibid*.

94. Stevens and Yoder, "Award-Term Contracts: Good for Business?" 33–34, suggests that the use of award terms is equivalent to a lack of full and open competition. See also Manuel, CRS Report R40516, *Competition in Federal Contracting*: "Proponents of competition note that when multiple offerors compete for the government's business, the government can acquire higher quality goods and services at lower prices than it would acquire if it awarded contracts without competition" (2).

95. Stevens and Yoder, "Award-Term Contracts: Good for Business?" 35, which offers a concluding recommendation for limited use of award term contracts.

96. See *Coast Professional, Inc. v. United States*, 120 U.S. Court of Federal Claims 727, 2015: "To otherwise treat the award-term extensions as new contracts elevates form over substance, essentially creating a potential flock of claims unenvisioned by this court's bid protest jurisdiction."

97. *Ibid*.

98. See *Coast Professional, Inc. v. United States*, Financial…, 828 F.3d 1349 U.S Court of Appeals, Federal Circuit 1353, 2016: The appellate court held that an award term extension could not be treated as option and governed by the Contract Disputes Act because the because the initial award stated that terms extensions "will be executed in the form of a new task order issued by the contracting officer under the contractor's then current GSA Schedule contract."

99. Mutek, "Implementation of Public-Private Partnering," 579.

100. *Ibid*.: "Companies would have diminished ability to protest" if solicitations clearly discuss award term provisions and clauses. See also Lowther, *Award Term Incentive*, 14: "Award term use is consistent with CICA because the same rules that apply to the exercise of options apply to award terms. As long as the request for proposal (RFP) states the maximum length of the contract, including all prospective award terms, includes separate line items for each prospective award term and requires each prospective award term to be priced, CICA requirements are being met."

101. Implementation of these measures will keep contracts within the letter and spirit of CICA by promoting best value while blocking abuses. See, for example, 10 USC 2304.

102. U.S. Air Force, *Air Force Guide*, 8, suggests that the "ability to obtain a proposals from a reasonable number of offerors" shows meaningful competition.

103. Coleman, *Evolution of the Multiyear Rule*, 637: "The marketplace will prevent contracting officials from proposing" an excessive contract term.

104. U.S. Air Force, *Air Force Guide*, 8, instructs buyers that all incentive-based options must be evaluated during the initial competition to comply with CICA. See also EDAR 3416.470(e)(3), which requires all potential award term periods to be priced, evaluated, and considered during the contract selection process for all Department of Education contracts. See also *Federal Register* Vol. 81, No. 237. (proposed Dec. 9, 2016) (to be codified at 48 CFR pts. 1816 and 1852) 89040 in which NASA's proposed award term regulations require potential award term periods to be "priced, evaluated, and considered in the initial contract selection process in order to be valid."

105. Mutek, "Implementation of Public-Private Partnering," 579–580.

106. The requirement to capture performance information is aligned with the government's source selection procedures, which require evaluation of past performance for all negotiated competitive acquisitions over the simplified acquisition threshold, as promulgated in FAR 15.304(c)(3)(i).

107. Mutek, "Implementation of Public-Private Partnering," 579, which highlights that agencies must accurately evaluate contractor performance, justify award term determinations, and retain those justifications when administering award term contracts.

108. The *FAR* similarly prescribes price adjustments for fixed-price contracts when market conditions are expected to change. See, for example, FAR 16.203-4(c)(1), which prescribes the Economic Price Adjustment—Labor and Material clause.

109. See, for example, FAR 43.103(a)(3), providing contracting officials and contractors with authority to enter into bilateral modifications that "reflect other agreements of the parties modifying the terms of [the] contract." Research also suggests that parties in a long-term partnering arrangement benefit from the flexibility of "white spaces" in contracts. This introduces risk that the parties will rely on their business relationship and trust rather than on the terms of their contract, allowing one party to take advantage of the other. However, these arrangements also create the risk of relational sanctions when conflicts arise, suggesting that contractors would be less likely to file claims or disputes against the government when in a partnering relationship. See also Mutek, "Implementation of Public-Private Partnering," 582–583. The theory of relational sanctions is based on research findings that many business exchanges do not include planning for contingencies, performance issues, and legal sanctions. When disputes do arise, even when contractual terms exist, the parties prefer to negotiate a settlement without regard to contractual and legal remedies. See also Stewart Macaulay, "Non-Contractual Relations in Business: A Preliminary Study," *American Sociological Review* 28, no. 1 (February 1963): 9–11.

110. EDAR 3452.216-71(c) provides a sample required clause for all award term contracts at the Department of Education. See also *Federal Register* Vol. 81, No. 237. (proposed Dec. 9, 2016) (to be codified at 48 CFR pts. 1816 and 1852) 89040 NASA's proposed award term clause allows for unilateral revisions to Award Term Plans. While the clause requires consultation with the contractor prior to issuing revisions, it does not require the contractor's consent. Remarkably, the rule has received little attention. See https://www.regulations.gov/document?D=NASA_FRDOC_0001-0372: Only one comment was submitted during the comment period, and it is nonpublic. It is unclear at this point how industry may view unilateral modifications to award term plans. However if the government's right to unilaterally modify contracts in other contexts proves instructive, industry may have mixed feelings if the regulation is adopted as proposed. See for example, *DynPort Vaccine Co., LLC.* (ASBCA No. 60119) (Sep. 30, 2015), 3, in which DynPort appealed the government's issuance of seven unilateral contract modifications requiring the performance of no-cost corrective work under a cost-reimbursement, cost-sharing, award-fee, research and development type contract. See also *DynPort Vaccine Co., LLC.* (ASBCA No. 59298, 60119) (Mar. 24, 2016) The contractor's appeal was eventually withdrawn following a settlement resulting from alternative dispute resolution proceedings.

111. GAO-12-558, 21, discusses GAO's finding that DOD contracts extending beyond five years frequently used incentives to motivate contractors to perform well and control costs.

112. John Cibinic, Jr., Ralph C. Nash, Jr., and James F. Nagle, *Administration of Government Contracts*, 4th ed. (Riverwoods, IL: CCH), 2006, provides background on cardinal changes and the meaning of "within the general scope," and states that "when competitors protest the government's issuance of changes in lieu of using new procurement procedures, the test is whether the proposed change is within the scope of the competition" (6.B.1).

113. Award terms clauses should be written to preclude the government from recompeting a contract instead of awarding an earned award term extension for substantially the same requirement. In order to cancel an award term using this stipulation, there must no longer be a need for the requirement altogether, or the scope of work must be substantially changed to an extent that warrants a new competition.

114. Coleman, *Evolution of the Multiyear Rule*, 626, explains that this hope was based on contractors' ability to reduce upfront expenses and to "spread costs over the life of the contract" in multiyear contracts. GAO subsequently studied the Department of Defense's use of multiyear contracting authority and found that it did not substantially impact the extent of subcontracting competition. See also GAO/NSIAD-88-125, 1.

115. See FAR 17.105.2, which cites lower costs and reduced administrative burden as objectives of multiyear contracting.

116. Manuel, CRS Report R40516, *Competition in Federal Contracting*, explains competition proponents' claim that it "helps to curb fraud because it allows for periodic changes in the vendors from which the government acquires goods and services, thereby limiting opportunities for government employees to enter into collusive agreements with their regular suppliers" (2).

117. See, generally, FAR Part 3, which promulgates rules against improper business practices and conflicts of interest.

118. Mutek, "Implementation of Public-Private Partnering," 561, which defines *public-private partnership* as a "nontraditional contractual relationship resulting from a best-value source selection that seeks to enhance the business relationship through mechanisms for senior management support, a culture that values cooperation, and a commitment to long-term goals."

119. Rene Rendon, "Outsourcing Base Operations Support Functions," *Program Management* (January–February 2001): 19.

120. Mutek, "Implementation of Public-Private Partnering," 570.

121. There is a general presumption of good faith for government agencies when entering into contracts. See *Conax Florida Corp. v. United States*, 641 F. Supp. 408 (D.D.C. 1986), which held that a protester cannot overturn a source selection decision, even after establishing a degree of bias, unless it shows that the decision was unreasonable. The decision was affirmed by 824 F.2d 1124 (D.C. Cir. 1987). See also *Arrowhead Metals, Ltd., v. United States*, 8 Cl. Ct. 703, 712 (1985), which required "well-nigh irrefragable proof" for claims of bias. Moreover, innovation alone does not give rise to corruption when competition and other safeguards are in place. See John Cibinic, Jr., Ralph C. Nash, Jr., and Christopher R. Yukins, *Formation of Government Contracts*, 4th ed. (Riverwoods, IL: CCH), 6.IX.A.3, which notes that a high burden of proof is required when alleging bias. Thus, policymakers and other procurement officials should employ the same presumption of good faith when considering use of innovative contracting techniques.

122. U.S. Office of Government Ethics, "Mission Responsibilities," https://www.oge.gov/Web/oge.nsf/Resources/Mission++Responsibilities, describes its mission as "provid[ing] overall leadership and

oversight of the executive branch ethics program designed to prevent and resolve conflicts of interest."

123. "Certain executive branch employees whose duties involve the exercise of discretion in sensitive areas" are required to "file confidential financial disclosure reports." U.S. Office of Government Ethics, "Confidential Financial Disclosure," https://www.oge.gov/Web/oge.nsf/Confidential%20Financial%20Disclosure.

124. U.S. Office of Government Ethics, "Laws and Regulations," https://www.oge.gov/web/oge.nsf/Laws+and+Regulations/, covers areas including gifts from outside sources and between employees, financial conflicts of interest, impartiality, seeking outside employment, and misusing an official position, codified at 5 CFR 2635.

125. U.S. Office of Government Ethics, "Agency Supplemental Regulations," https://www.oge.gov/web/oge.nsf/Agency%20Supplemental%20Regulations, lists forty-nine executive agencies that have supplemental ethics regulations published in the agency's own chapter of Title 5 of the CFR.

126. FAR Part 3 covers standards of conduct and improper practices, including contractor gratuities to government personnel, suspected antitrust violations, kickbacks, and unreasonable subcontracting restrictions.

127. FAR 3.1002(a).

128. FAR 3.1004(a) requires businesses to have a code of business ethics and conduct when performing a contract valued above $5.5 million over a period of 120 days or more.

129. FAR 52.203-13(c) requires contractors to have an internal control system to detect criminal conduct, evaluate the effectiveness of their ongoing business ethics awareness and compliance programs, and assess the risk of criminal conduct.

130. 5 USC App 3 § 2(2)(A).

131. 5 USC App 3 § 2(2)(B).

132. U.S. Government Accountability Office, "About GAO," http://www.gao.gov/about/index.html.

133. FAR Subpart 9.4 provides regulations for the government's suspension and debarment program.

134. See, generally, Jessica Tollestrup, CRS Report 7-5700, *The Congressional Appropriations Process: An Introduction*, November 14, 2014, which provides an overview of the annual appropriations cycle, types of appropriation measures, and budget reinforcement.

135. 31 USC 1511(a), 1512, and 1513 establish executive branch apportionment.

136. 31 USC 1514 requires administrative controls at the agency level for apportioned funds.

137. Coleman, *Evolution of the Multiyear Rule*, 623.

138. 31 USC 1341 and 1517 include in their prohibition the use of funds *before* an appropriation has been made and when funds are required to be sequestered.

139. 31 USC 1301(a).

140. 31 USC 1502(a) mandates that expenses be incurred during the same period in which funds are available.

141. U.S. Government Accountability Office, GAO-04-261SP, *Principles of Federal Appropriations Law*, 3rd ed., vol. January 1, 2004, http://www.gao.gov/special.pubs/d04261sp.pdf, relays the allowability of entering into multiyear contracts for requirements longer than one fiscal year, using no-year funds, multiple year funds, or other statutory authority for the entire term of the contract.

142. U.S. Air Force, *Air Force Guide*, 9.

143. FAR 17.104(b): "The extent to which cancellation terms are used . . . will depend on the unique circumstances of each contract." See also FAR 17.106-1(e): "If cancellation occurs, the government's liability will be determined by the terms of the applicable contract."

144. FAR 17.103 applies the requirement to all cancellations, which occur when a contracting officer notifies a vendor that funds are not available for a subsequent program year or when a contracting officer fails to notify a vendor that funds are available for the next year's requirement.

145. FAR 17.106-1(c): "All program years except the first are subject to cancellation."

146. FAR 17.106-1(c)(2) allows "reasonable preproduction or startup, labor learning, and other nonrecurring costs" such as "plant or equipment relocation or rearrangement, special tooling and special test equipment, preproduction engineering, initial rework, initial spoilage, pilot runs, allocable portions of the costs of facilities to be acquired or established for the conduct of the work, costs incurred for the assembly, training, and transportation to and from the job site of a specialized work force, and unrealized labor learning."

147. EPAAR 1552.216-77(c)(i).

148. EPAAR 1552.216-77(c)(ii).

149. EPAAR 1552.216-77(c)(iii).

150. EPAAR 1552.216-77(c)(iv).

151. *Federal Register* Vol. 81, No. 237. (proposed Dec. 9, 2016) (to be codified at 48 CFR pts. 1816 and 1852) 89040.

152. EPAAR 1552.216-77(d). *Federal Register* Vol. 81, No. 237. (proposed Dec. 9, 2016) (to be codified at 48 CFR pts. 1816 and 1852) 89040.

153. *Ibid*.

154. EDAR 3401.

155. EDAR 3416.470(f)(1).

156. *Ibid*.

157. EDAR 3452.216-71(f): "Award terms that have not begun may be cancelled (rather than terminated), should the need for the items or services no longer exist. No equitable adjustments to the contract price are applicable, as this is not the same procedure as a termination for convenience."

158. Jordana Mishory, "Kendall: FAR, DFARS Updates Needed for Service Acquisition Guidance," *Inside the Army* 24.2,

January 16, 2012, recommends the creation of new guidance for award terms with both fixed-price and cost-reimbursement contracts for recurring service requirements.

159. Stevens and Yoder, "Award-Term Contracts: Good for Business?" describes how award terms "convey the right" of a contractor to perform for additional time when metrics are met (32).

160. Jill R. Aitoro, "What OFPP's Anne Rung finds 'mind-numbingly frustrating,'" *Federal Times*, October 27, 2015, http://www.federaltimes.com/story/government/acquisition/policy/2015/10/26/rung-frustrated/74629350/.

161. *Ibid.*, relaying remarks made during the American Council for Technology—Industry Advisory Council's 2015 Executive Leadership Conference.

162. U.S. Government Accountability Office, GAO-15-372, *Medicare Administrative Contractors: CMS Should Consider Whether Alternative Approaches Could Enhance Contractor Performance*, 2015, 24, cites award terms' potential to provide greater motivation than currently used option periods. See Attachment B DRAFT Section B_M of an AB MAC RFP, posted on FBO.gov via Solicitation Number: MAC_RFI on Aug. 5, 2016, 16, 65. CMS' draft request for proposal includes option periods and renewal periods that may be executed when in the best interest of the government, but does not include award term incentives.

163. *Federal Register* Vol. 81, No. 237. (proposed Dec. 9, 2016) (to be codified at 48 CFR pts. 1816 and 1852) 89040 NASA's proposed rule limits the agency's authority to award term contracts to acquisitions for services exceeding $20 million, or those "authorized in exceptional situations such as contract requirements having direct health or safety impacts, where the judgmental assessment of the quality of contractor performance is critical." 89039 It also requires consideration of "market stability, the potential changes and advancements in technology, and flexibility to change direction with mission changes" when determining when to use award terms.

164. See, for example, *Coast Professional, Inc. v. United States, Financial...*, 828 F.3d 1349 U.S Court of Appeals, Federal Circuit 1353, 2016: in which the initial award stated award term extension periods would be executed as new task orders, allowing a contract holder that did not receive an extension to protest the award term extensions of other contractors. If the initial contracts had been differently structured in this case, the award term extension decisions would be considered contract administration matter not subject to protest.

165. Kimberly Palmer, "Cheap Rewards," *Government Executive* 37, no. 13 (August 1, 2005): 22, relays critics' concerns that award terms are being used without sufficient oversight.

166. GAO-12-558 found that DOD did not maintain information on incentive approaches for long-term maintenance contracts across different programs (28).

167. U.S. Government Accountability Office, GAO-06-830, 27: "A contractor with only satisfactory performance in each of five rating areas can receive up to 51 points each year; thus, within 2 years, it can accumulate the 100 points needed for a 1-year contract extension."

168. *Ibid*. A contractor with unsatisfactory performance is prohibited from accumulating enough points to trigger an award term extension period.

169. Mishory, "Kendall: FAR, DFARS Updates Needed" reports Department of Defense recommendations for *FAR* revisions in areas including "service contracting, contracting by negotiation, contract type, and patents, data and copyrights." *Inside the Pentagon's Inside the Army* 24.2 (Jan 16, 2012).

170. Stevens and Yoder, "Award-Term Contracts: Good for Business?" 34.

171. See, for example, *Federal Acquisition Circular* 2005-83, 80 *Fed. Reg.* 38292, 38293 (July 2, 2015), which grants permanent status to the *FAR*'s test program that allowed the use of simplified procedures for purchasing commercial items greater than the simplified acquisition threshold but not exceeding $6.5 million.

172. Mutek, "Implementation of Public-Private Partnering," 580. See also Edwards, "Award-Term: The Newest Incentive": "The effective use of an award-term incentive demands a high level of contracting knowledge and skill . . . ."

173. For successful execution of award term contracts, it is not enough for an innovative procuring contracting officer and program officials to be trained in the technique. Contracts must have clear terms and conditions that allow for a smooth transition when government and contractor employee turnover occurs. See Edwards, "Award-Term: The Newest Incentive," reminding acquisition planners that they should be "thinking and writing for people who will not have been a part of the original negotiation."