

# GOVERNMENT CONTRACTING: A BRIEF OVERVIEW OF THE FIELD

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*Executive Summary: The federal government must obtain supplies, technology, and even some services from private companies; almost half of the federal government's discretionary spending goes towards contracts,<sup>1</sup> and federal spending on contracting is increasing each year by billions of dollars.<sup>2</sup> Government contracts range from carpet cleaning to billion-dollar sections of the border wall<sup>3</sup> to producing life-saving vaccines.<sup>4</sup> Fiscal Year 2021 saw the world primarily focused on how to use government power and contracts to protect its citizens from COVID-19.<sup>5</sup> Government contracts also entered the news cycle with regards to the treatment of children at the border<sup>6</sup> and a decades-long feud between two billionaires competing in the space race.<sup>7</sup> Foundational elements for the field remain, however, rooted in separation of powers and administrative law.*

### I. BACKGROUND AND FOUNDATIONS OF GOVERNMENT CONTRACTING

First, the basics: government contracts involve a private vendor contracting with the government (be it state, local, or federal) to provide goods or services.<sup>8</sup> A patchwork of laws and administrative rules govern the field of government contracting. Congress has the power to dispose of government property,<sup>9</sup> which implies a power to obtain property, and also retains the power to pay the debts of the United States<sup>10</sup> incurred by governmental acquisition of said property. As a sovereign entity, the federal government

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<sup>1</sup> U.S. GOV'T ACCOUNTABILITY OFF., CONTRACTING DATA ANALYSIS: ASSESSMENT OF GOVERNMENT-WIDE TRENDS 1 (2017).

<sup>2</sup> WatchBlog, *A Snapshot of Government-wide Contracting for FY 2019*, U.S. GOV'T ACCOUNTABILITY OFF. (May 26, 2020), <https://blog.gao.gov/2020/05/26/a-snapshot-of-government-wide-contracting-for-fy-2019-infographic>.

<sup>3</sup> James MacPherson, *US Government Awards Largest-Ever Contract for Border Wall*, FEDERALTIMES.COM (May 21, 2020), <https://www.federaltimes.com/govcon/2020/05/21/us-government-awards-largest-ever-contract-for-border-wall>.

<sup>4</sup> Press Release, Moderna, Moderna Announces Supply Agreement with U.S. Government for Initial 100 Million Doses of MRNA Vaccine Against COVID-19 (Aug. 11, 2020); Press Release, Pfizer, Pfizer and Biontech Announce an Agreement with U.S. Government for up to 600 Million doses of MRNA-Based Vaccine Candidate Against SARS-COV-2 (July 22, 2020); Press Release, Johnson & Johnson, Johnson & Johnson Announces Agreement with U.S. Government for 100 Million Doses of Investigational COVID-19 Vaccine (Aug. 5, 2020).

<sup>5</sup> Zeke Miller, *Biden Doubles U.S. Global Donation of COVID-19 Vaccine Shots*, AP NEWS (Sept. 22, 2021), <https://apnews.com/article/united-nations-general-assembly-joe-biden-pandemics-business-united-nations-e7c09c1f896d83c0ed80513082787bd3>.

<sup>6</sup> Julia Ainsley, *Whistleblowers Allege Poor Care for Migrant Kids by Contractor Specializing in Disaster Cleanup*, NBC NEWS (July 7, 2021, 4:30 AM), <https://www.nbcnews.com/politics/immigration/whistleblowers-allege-poor-care-migrant-kids-contractor-specializing-disaster-cleanup-n1273124>.

<sup>7</sup> Mark Wilson, *Government Denies Bezos' Protest of NASA Awarding Lunar Lander Contract to Musk's SpaceX*, CNBC (July 30, 2021), <https://www.cnn.com/2021/07/30/government-denies-bezos-blue-origin-protest-over-nasa-hls-contract.html>.

<sup>8</sup> GOVERNMENT CONTRACTS, LEGAL INFO. INST. [https://www.law.cornell.edu/wex/government\\_contracts](https://www.law.cornell.edu/wex/government_contracts).

<sup>9</sup> U.S. CONST. art. IV, § 3, cl. 2 (“Congress shall have [p]ower to dispose of and make all needful [r]ules and [r]egulations respecting the [t]erritory or other [p]roperty belonging to the United States.”).

<sup>10</sup> U.S. CONST. art. I, § 8. (“Congress shall have [p]ower . . . to pay the [d]ebts . . .”).

enters into business contracts, thus incurring debt.<sup>11</sup> Federal agencies have and use discretion in the day-to-day administration of contracting. Thus, federal agencies acting in official capacities contract directly for goods and services. Once the government has entered into an obligation, contract law governs and treats the agency as a party; the agency does not enjoy sovereign immunity.<sup>12</sup> Only Congress has the power of the purse,<sup>13</sup> so an agency's power to contract has limitations pursuant to Congress's edicts, including a prohibition on contracting without prior Congressional authorization under the Appropriations Clause.

Congress passes authorization and appropriation acts for each Fiscal Year (FY), detailing the specific purpose, time, and monetary limitations to which all contracts must adhere.<sup>14</sup> An agency may only incur obligations that will be performed within a specific appropriations' period as set by Congress.<sup>15</sup> The Anti-Deficiency Act<sup>16</sup> further limits agencies, prohibiting contractual obligations in advance of or in preparation for Congressionally-provided appropriations.<sup>17</sup> Additionally, agencies can only obligate current FY funds to meet current FY needs, absent a statutory exception.<sup>18</sup> The Buy American Act<sup>19</sup> further limits contracts, generally requiring the agency to procure domestic materials and products.<sup>20</sup>

#### A. *The Procurement Process*

The procurement process, which may result in a contested action, can take many forms. To simplify this explanation, this paper focuses on competitive (not sole source) procurements.<sup>21</sup> The Department of Defense is responsible for more government

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<sup>11</sup> *United States v. Tingey*, 30 U.S. 115, 122–23 (1831); *Pacific Far East Line, Inc.* ASBCA No. 7629, 63 BCA ¶ 3835.

<sup>12</sup> *Cooke v. United States*, 91 U.S. 389, 398 (1875) (explaining the federal government is treated as a party under contract law principles in disputes regarding the terms of a contract).

<sup>13</sup> U.S. CONST. ART I, § 9, cl. 7 (“No [m]oney shall be drawn from the [t]reasury, but in [c]onsequence of [a]ppropriations made by [l]aw; and a regular [s]tatement and [a]ccount of [r]eceipts and [e]xpenditures of all public [m]oney shall be published from time to time.”); *United States v. Nicoll*, 1 Paine 646 (C.C.N.Y. 1826).

<sup>14</sup> 31 U.S.C. §§ 1301, 1341, 1511–17, 1552; U.S. GOV'T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 3–9 (4th ed. 2017).

<sup>15</sup> U.S. GOV'T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2–9 (4th ed. 2016) (stating that lengths range from definite (either fiscal year or multiple-year) to indefinite (no-year)).

<sup>16</sup> 31 U.S.C. § 1341.

<sup>17</sup> *Id.* § 1341(a)(1)(B).

<sup>18</sup> We are unable to cover exceptions to the bona fide needs rule here. For more information, see generally 41 U.S.C. § 253; U.S. GOV'T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (3d ed. 2004); U.S. GOV'T ACCOUNTABILITY OFF., FUNDING OF MAINTENANCE CONTRACT EXTENDING BEYOND FISCAL YEAR (1996).

<sup>19</sup> 41 U.S.C. § 8301-8303.

<sup>20</sup> *Id.* § 8303; *Administration of the Buy American Act: Hearing Before the Subcomm. Of the H. Comm. on Gov't Operations*, 95th Cong. 38–39 (1978) (statement of J. Kenneth Fasick, Director of the Int'l Div. of GAO) (explaining the triggering conditions).

<sup>21</sup> For a full overview of the process, see L. Elain Halchin, CONG. RESEARCH SERV., OVERVIEW OF THE FEDERAL PROCUREMENT PROCESS AND RESOURCES (2012), <https://fas.org/sgp/crs/misc/RS22536.pdf>; Office of Management and Budget, THE OFFICE OF FEDERAL PROCUREMENT POLICY

contracts than any other government entity.<sup>22</sup> Once an agency decides to procure goods or services and determines that the proposed action does not violate any limitations, the agency must articulate specific needs and criteria in a solicitation.<sup>23</sup> Private parties then review the procurement need and “bid” to fulfill the contract.<sup>24</sup> The agency then uniformly evaluates all bids to fulfill the solicitation against the announced criteria.<sup>25</sup>

Once an agency selects a prospective contractor and awards the contract, the agency will announce the winning bid.<sup>26</sup> The agency must also debrief any unsuccessful bidders who request a debrief.<sup>27</sup> Regardless of requesting a debrief, the unsuccessful bidders may then dispute the contract award in a “bid protest.”<sup>28</sup> When an unsuccessful bidder protests a bid, the winning bidder must wait for resolution of the protest.<sup>29</sup> Under the 1997 Small Business Reauthorization Act,<sup>30</sup> the federal government has a goal of awarding 23% of its contracts to small businesses.<sup>31</sup> A business typically qualifies as “small” if it is a “manufacturing compan[y] with 500 employees or fewer, or a “non-manufacturing business[] with average annual receipts under \$7.5 million . . . .”<sup>32</sup> Some states, such as Connecticut and New York, also offer special set-aside contracts for women-and minority-owned small businesses.<sup>33</sup>

### B. The Dispute Process

Disputes arise out of everything from new regulations to “broadened notions of due process.”<sup>34</sup> Most federal agencies follow processes and authority of the Federal

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<https://www.whitehouse.gov/omb/management/office-federal-procurement-policy/#top> (last visited Sept. 26, 2020).

<sup>22</sup> *Federal Government Contracting: A Resource Guide*, LIBR. OF CONG. <https://guides.loc.gov/federal-government-contracting> (Aug. 1, 2014).

<sup>23</sup> The pre-solicitation notices, solicitation notices, and later award notices as well as sole-source notices are placed on the centralized website Beta.sam.gov, although advertisements may be placed elsewhere in addition to this posting. See BETA.SAM.GOV, <https://beta.sam.gov> (last visited Sept. 26, 2020) (explaining it is the official location for government contracting opportunities). See generally Halchin, *supra* note 21; U.S. GOV’T ACCOUNTABILITY OFF., PRINCIPLES OF FEDERAL APPROPRIATIONS LAW (4th ed. 2016), <https://www.gao.gov/legal/appropriations-law-decisions/red-book>.

<sup>24</sup> *Contracting Process*, CDC, <https://www.cdc.gov/contracts/process/index.html> (last visited Oct. 1, 2021).

<sup>25</sup> Halchin, *supra* note 21, at 2.

<sup>26</sup> *Id.*

<sup>27</sup> JetCo Solutions Team, *What You Need to Know About Debriefings for Government Contracting*, JetCo Solutions, <https://www.jetcosolutions.com/what-you-need-to-know-about-debriefings-for-government-contracting/> (last visited Oct. 1, 2021).

<sup>28</sup> 10 U.S.C. § 2305.

<sup>29</sup> 48 C.F.R. § 33.103 (2020).

<sup>30</sup> Small Business Reauthorization Act, Pub. L. No. 105-135, § 603, 111 Stat. 2632.

<sup>31</sup> Matthew Yglesias, *The Government Says Small Businesses get 23% of Federal Contracts. Reality Says Otherwise*, **Vox** (May 29, 2015), <https://www.vox.com/2015/5/29/8680307/small-business-contracting>.

<sup>32</sup> *Basic Requirements*, Small Bus. Admin., <https://www.sba.gov/federal-contracting/contracting-guide/basic-requirements> (last visited Oct. 1, 2021).

<sup>33</sup> For a list of states that offer these special contracts, see *Office of Government Contracting & Business Development Resources*, Small Bus. Admin., [https://www.sba.gov/offices/headquarters/ogc\\_and\\_bd/resources/14309](https://www.sba.gov/offices/headquarters/ogc_and_bd/resources/14309) (last visited Oct. 1, 2021).

<sup>34</sup> *Alternatives for Resolving Government Contract Disputes*, ADMIN. CONF. OF THE U.S. (Dec. 18, 1987), <https://www.acus.gov/recommendation/alternatives-resolving-government-contract-disputes>.

Property and Administrative Service Act,<sup>35</sup> the Office of Federal Procurement Policy Act,<sup>36</sup> and the Federal Acquisition Streamlining Act of 1994.<sup>37</sup> However, the Armed Forces and National Aeronautics and Space Administration follow the Federal Acquisition Regulation (FAR),<sup>38</sup> which established the Civilian Board of Contract Appeals and the Armed Services Board of Contract Appeals.

The Budget and Accounting Act of 1921<sup>39</sup> established the Government Accountability Office (GAO),<sup>40</sup> an administrative body that authors decisions in bid protests and also provides advisory opinions. Unsuccessful bidders may protest awards under a request for “reconsideration” at the GAO.<sup>41</sup> An unfavorable GAO decision leaves a disappointed bidder with two avenues: either appeal to the Board of Contract Appeals<sup>42</sup> or directly file suit in the U.S. Court of Federal Claims (COFC).<sup>43</sup> The COFC’s jurisdiction over government contracts claims comes from the Tucker Act.<sup>44</sup> The COFC will take a *de novo* look at the procurement if it is on appeal from a GAO finding.<sup>45</sup> The bidder may also file protests directly in Federal District Court.<sup>46</sup> Appealing bidders from either venue may file with the United States Court of Appeals for the Federal Circuit.<sup>47</sup> Awardees with claims under an awarded contract may bring said claims. The contractor must initially exhaust administrative procedures by submitting a claim to the agency’s contracting officer for a written decision.<sup>48</sup> The contractor may then file the claim in District Court and appeal to the Federal Circuit.

## II. THE INTERSECTION OF GOVERNMENT CONTRACTS AND INTELLECTUAL PROPERTY

Sometimes the contracts revolve around a copyright, patent, or trademark as opposed to the production of goods or services. For example, think of all the government logos one might see on a stroll around Washington, D.C.—from federal agencies to the city government, those logos are likely protected under intellectual property rights.<sup>49</sup>

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<sup>35</sup> 40 U.S.C. §112.

<sup>36</sup> 41 U.S.C. §1101.

<sup>37</sup> Pub. L. No. 103-355, 108 Stat. 3243.

<sup>38</sup> 48 C.F.R. § 1.301 (2019).

<sup>39</sup> Pub. L. No. 67-13, 42 Stat. 20.

<sup>40</sup> *Id.* § 301, 42 Stat. at 23. When it was created, the agency was known as the General Accounting Office. The name changed (but initials remained) in 2004. U.S. Gov’t Accountability Office, *About GAO: History* <https://www.gao.gov/about/what-gao-is/history> (last visited Sept. 26, 2020).

<sup>41</sup> Or through an applicable administrative body such as the Armed Services Board of Contract Appeals, based on jurisdiction of the agency at issue. ARMED SERVICES BOARD OF CONTRACT APPEALS WELCOME, <https://www.asbca.mil> (last visited Sept. 26, 2020).

<sup>42</sup> Government Contracts Group, *Timeline of a Contract Disputes Act Claim*, MORRISON & FOERSTER (Nov. 7, 2016), <https://govcon.mofo.com/protests-litigation/timeline-of-a-contract-disputes-act-claim>.

<sup>43</sup> 41 U.S.C. §§ 7104, 7107; *see also* 28 U.S.C. § 1491.

<sup>44</sup> Tucker Act, ch. 359, 24 Stat. 505 (1887).

<sup>45</sup> 41 U.S.C. § 7104(b) (4).

<sup>46</sup> U.S. GEN. ACCT. OFF., BID PROTESTS: CHARACTERISTICS OF CASES FILES IN FEDERAL COURTS 5 (2000), <https://www.gao.gov/products/GGD/OGC-00-72>.

<sup>47</sup> 41 U.S.C. §7107(a) (1) (B); 28 U.S.C. §§ 1295(a) (3), (10).

<sup>48</sup> 41 U.S.C. § 7103(a) (1).

<sup>49</sup> William R. Brees et al., *The Intersection of Intellectual Property and Government Law*, 48 STETSON L. REV. 597, 599 (2019).

Governments hire contractors to design these logos and other products.<sup>50</sup> Key to understanding how governments own and protect their intellectual property rights is understanding that ownership and inventorship are two distinct concepts.<sup>51</sup> When deciding who owns what right to the property, courts examine the contract to determine “whether an employee was hired to invent based on the implied terms of their employment.”<sup>52</sup> This confusion over ownership is why it is important for governments to not only enforce their intellectual property rights but to include specific provisions in their contracts assigning those rights.<sup>53</sup> When contracting with the federal government, however, it is important to keep in mind the government’s sovereign immunity applies to contractors working on its behalf,<sup>54</sup> and that IP infringement cases against the government will not pay as much as those against private entities.<sup>55</sup>

One important and timely issue within this sphere is the equitable distribution of COVID-19 vaccines. Moderna,<sup>56</sup> Pfizer,<sup>57</sup> and Johnson & Johnson<sup>58</sup> made respective contracts with the federal government to develop and distribute their vaccines. About 43% of the world’s population has received at least one dose of a COVID-19 vaccination, but there is growing concern among world leaders that these doses are not going to “lower-income nations.”<sup>59</sup> While the United States government aims to donate over one billion doses of vaccines by 2022,<sup>60</sup> activists are calling on the federal government to seize or waive the patents from Moderna, Pfizer, and Johnson & Johnson to allow for greater equity in vaccine distribution.<sup>61</sup> Some point to a 1980 law as a means of forcing the three big companies to share their patent with other nations.

#### A. *Bayh-Dole Act*

The Bayh-Dole Act gives the federal government the ability to “march-in” and strong arm a company that has received federal money for a project if that company

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<sup>50</sup> *Id.* at 603.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 607.

<sup>53</sup> *Id.* at 611.

<sup>54</sup> Kristen O. Riemenschneider & Nathaniel Castellano, *Five IP Consequences of Contracting With the Government*, ARNOLD & PORTER (Aug. 3, 2020)

<https://www.arnoldporter.com/en/perspectives/publications/2020/08/five-ip-consequences-of-contracting-the-government>.

<sup>55</sup> *Id.*

<sup>56</sup> Press Release, Moderna, Moderna Announces Supply Agreement with U.S. Government for Initial 100 Million Doses of MRNA Vaccine Against COVID-19 (Aug. 11, 2020).

<sup>57</sup> Press Release, Pfizer, Pfizer and Biontech Announce an Agreement with U.S. Government for up to 600 Million doses of MRNA-Based Vaccine Candidate Against SARS-COV-2 (July 22, 2020).

<sup>58</sup> Press Release, Johnson & Johnson, Johnson & Johnson Announces Agreement with U.S. Government for 100 Million Doses of Investigational COVID-19 Vaccine (Aug. 5, 2020).

<sup>59</sup> Zeke Miller, *Biden Doubles U.S. Global Donation of COVID-19 Vaccine Shots*, AP NEWS (Sept. 22, 2021), <https://apnews.com/article/united-nations-general-assembly-joe-biden-pandemics-business-united-nations-e7c09c1f896d83c0ed80513082787bd3>.

<sup>60</sup> *Id.*

<sup>61</sup> Peter Sullivan, *Lawmakers say Biden Must do More on Global Vaccines*, THE HILL (Sept. 24, 2021, 6:00 AM), <https://thehill.com/policy/healthcare/573713-lawmakers-say-biden-must-do-more-on-global-vaccines>.

cannot produce enough of the product.<sup>62</sup> Under the Bayh-Dole Act, the government funds an innovation while the contractor ultimately holds the title and profits.<sup>63</sup> The Act’s goal is “to promote commercialization of federally funded inventions.”<sup>64</sup> However, the Act’s “march-in” rights have never been successfully utilized. The Act requires four circumstances to allow a government “march-in,”<sup>65</sup> and some specialists argue that the Act is more useful as a threat against dawdling companies than an actual enforcement mechanism.<sup>66</sup>

The Bayh-Dole Act has also been instrumental in the health field even before the COVID-19 pandemic because it allows the National Institute of Health (NIH) to issue grants under the Act to fund university research. The NIH retains a “license to practice the subject invention”<sup>67</sup> but does not earn any profit from said invention.<sup>68</sup> The universities must report to the NIH on a set schedule about the invention’s progress.<sup>69</sup>

### B. *Department of Defense*

Lastly, a government contracts memo would not be thorough without a look at the agency responsible for the most contracts—the Department of Defense (DoD).<sup>70</sup> The DoD recently solicited comments from the public on how to craft a better valuation process for IP contracts.<sup>71</sup> Ever eager to help, public commenters gave their opinions on IP evaluations and techniques and ranked the techniques on most to least beneficial. Comments came from contractors, academics, and the general public.<sup>72</sup> One enthusiastic comment from an Aerospace Industries Association of America representative claimed that IP valuations could not be ranked because “there is no ‘one-size-fits-all’ solution,” and encouraged the DoD to develop its own “organic” IP expertise.<sup>73</sup> A representative from Wind Talker Innovations, however, insisted that “valuation based on income and discounted cash flows” was the most beneficial method because it is the most common.<sup>74</sup>

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<sup>62</sup> David Woodmansee & Catherine S. Wicker, *IP’s Role in COVID-19 Tests, Treatments, and Vaccines*, BLOOMBERG L. (Apr. 9, 2020, 4:01 AM), <https://news.bloomberglaw.com/ip-law/insight-ips-role-in-covid-19-tests-treatments-and-vaccines?context=search&index=2>.

<sup>63</sup> Katharine Ku et al., *Basics of the Bayh-Dole Act: FAQs*, WILSON SONSINI (July 6, 2020), <https://www.wsgr.com/en/insights/basics-of-the-bayh-dole-act-faqs.html>.

<sup>64</sup> *Id.*

<sup>65</sup> See Milad Emamian, *Oh, When the Feds Go Marching-In*, THE REGUL. REV. (Feb. 24, 2021), <https://www.theregreview.org/2021/02/24/emamian-feds-marching-in>, for an explanation of the factors.

<sup>66</sup> *Id.*

<sup>67</sup> *Intellectual Property Policy*, NIH: GRANTS & FUNDING <https://grants.nih.gov/policy/intell-property.htm> (last visited Oct. 7, 2021).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Federal Government Contracting: A Resource Guide*, LIBR. OF CONG. <https://guides.loc.gov/federal-government-contracting> (Aug. 1, 2014).

<sup>71</sup> Request for Information Related to IP Valuation Methods and Techniques, 86 Fed. Reg. 35,076 (published Jul. 1, 2021).

<sup>72</sup> *Id.*

<sup>73</sup> Comment by John Luddy, 86 Fed. Reg. 35,076 (Sept. 17, 2021).

<sup>74</sup> Comment by Wind Talker Innovations, 86 Fed. Reg. 35,076 (Sept. 17, 2021).

Armed with the public’s responses, the DoD aims to reap the benefits of further IP contracts that it feels it is missing out on.<sup>75</sup>

### III. GOVERNMENT CONTRACTS IN THE NEWS

#### A. *Migrant Youth Shelter Concerns*

Over the spring and summer of 2021, concerns grew about the conditions at youth shelters for unaccompanied minors crossing the border. The allegations of cruelty center on a migrant shelter in Fort Bliss, Texas, which houses around 5,000 children.<sup>76</sup> The Department of Health and Human Services (HHS) maintains the emergency shelters’ upkeep through a series of federal contracts with “nonprofit groups and faith-based organizations.”<sup>77</sup> A whistleblower complaint in July alleged that children at Fort Bliss were in the care of people who could not speak Spanish and were neglecting their charges’ medical needs.<sup>78</sup> According to the complaint, the children lived in filthy conditions where the contractors monitored them but rarely approached to offer any human contact.<sup>79</sup> The contractors worked for Servpro, a disaster relief company, which said that it had no knowledge of the contract between HHS and its independent franchisee until after it was made and that workers at the shelter could not provide services under the Servpro name.<sup>80</sup> It is unclear how HHS made the contract with the franchisee,<sup>81</sup> and the HHS’s investigation<sup>82</sup> into the Fort Bliss conditions is ongoing.<sup>83</sup>

#### B. *COVID-19 Vaccine Mandate for Federal Contractors*

On September 9, 2021, President Biden issued an executive order mandating that all federal contractors receive the COVID-19 vaccine.<sup>84</sup> The order’s purpose is to promote economic efficiency and safety while keeping contractors safe.<sup>85</sup> The executive order goes into effect on October 15, 2021, at which time agencies will set forth guidelines to

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<sup>75</sup> Request for Information Related to IP Valuation Methods and Techniques, 86 Fed. Reg. 35,076 (published Jul. 1, 2021).

<sup>76</sup> Julia Ainsley, *Whistleblowers Allege Poor Care for Migrant Kids by Contractor Specializing in Disaster Cleanup*, NBC NEWS (July 7, 2021, 4:30 AM), <https://www.nbcnews.com/politics/immigration/whistleblowers-allege-poor-care-migrant-kids-contractor-specializing-disaster-cleanup-n1273124>.

<sup>77</sup> Nick Miroff, *Biden Administration Spending \$60 Million per Week to Shelter Unaccompanied Minors*, WASH. POST (April 8, 2021, 3:36 PM), [https://www.washingtonpost.com/national/border-shelters-cost/2021/04/08/c54eec3a-97bd-11eb-8e42-3906c09073f9\\_story.html](https://www.washingtonpost.com/national/border-shelters-cost/2021/04/08/c54eec3a-97bd-11eb-8e42-3906c09073f9_story.html).

<sup>78</sup> Ainsley, *supra* note 76.

<sup>79</sup> *Id.*

<sup>80</sup> Lauren Villagran, *‘A Horrible Mess’: Contractor Issues Add to Turmoil at Fort Bliss Migrant Children Shelter*, EL PASO TIMES (June 25, 2021, 12:52 PM), <https://www.elpasotimes.com/story/news/2021/06/25/fort-bliss-migrant-children-intake-shelter-deplorable-conditions-sources-allege/5324736001>.

<sup>81</sup> Ainsley, *supra* note 76.

<sup>82</sup> Villagran, *supra* note 80.

<sup>83</sup> *Id.*

<sup>84</sup> Exec. Order No. 14,042, 86 Fed. Reg. 50,985 (Sept. 9, 2021).

<sup>85</sup> *Id.*

execute the order.<sup>86</sup> President Biden stipulates that the vaccine mandate will also apply to subcontractors.<sup>87</sup> “Tens of millions” of workers<sup>88</sup> will be impacted by the mandate, including those currently working on covered contracts from home.<sup>89</sup> All current contractors must be fully vaccinated by December 8, 2021,<sup>90</sup> and all future contractors must be vaccinated before they begin work on a government contract.<sup>91</sup>

### C. Government Contract Disputes—in Space!

In July 2021, GAO denied Jeff Bezos’s protest that The National Aeronautics and Space Administration (NASA) should not have awarded Elon Musk’s SpaceX company a roughly \$3 billion contract.<sup>92</sup> Bezos was upset that NASA awarded this lucrative deal solely to SpaceX when two other companies (Blue Origin and Dynetics, both owned by Bezos) were under consideration for the contract.<sup>93</sup> NASA had previously awarded all three of the companies a 2020 contract to begin developing the concepts, but decided to only award SpaceX a second contract, despite expectations that the agency would give contracts to two companies.<sup>94</sup> NASA justified its decision by citing SpaceX’s significantly lower cost in comparison to Blue Origin and Dynetics, but Bezos’s companies argued that NASA “improperly” awarded the contract.<sup>95</sup> GAO found that NASA had properly awarded the contract because NASA clearly stipulated that the number of awards depended on the amount of funding available for the program.<sup>96</sup> Given the history of animosity between Bezos and Musk,<sup>97</sup> and their continued involvement in the space race, it is safe to say that lawsuits of this nature will continue.

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<sup>86</sup> Johnnie P. Barnes & Whitney Bly Edwards, *Considerations for Federal Contractors on President Biden’s EO, Effective Oct. 15, Enduring Adequate COVID-19 Safety Protocols*, NAT. L. REV. (Sept. 20, 2021), <https://www.natlawreview.com/article/considerations-federal-contractors-president-biden-s-eo-effective-oct-15-ensuring>.

<sup>87</sup> Exec. Order No. 14,042.

<sup>88</sup> David Shepardson and Tom Hals, *White House says Millions of Government Contractors Must be Vaccinated by Dec. 8*, REUTERS (Sept. 24, 2021), <https://www.reuters.com/world/us/exclusive-white-house-wants-millions-government-contractors-vaccinated-by-dec-8-2021-09-24>.

<sup>89</sup> Jason Miller, *New Guidance on COVID-19 Workplace Safety for Federal Contractors*, WHITE HOUSE (Sept. 24, 2021), <https://www.whitehouse.gov/omb/briefing-room/2021/09/24/new-guidance-on-covid-19-workplace-safety-for-federal-contractors>.

<sup>90</sup> *Id.*

<sup>91</sup> Shepardson & Hals, *supra* note 88.

<sup>92</sup> Mark Wilson, *Government Denies Bezos’ Protest of NASA Awarding Lunar Lander Contract to Musk’s SpaceX*, CNBC (July 30, 2021), <https://www.cnbc.com/2021/07/30/government-denies-bezos-blue-origin-protest-over-nasa-hls-contract.html>.

<sup>93</sup> Michael Sheetz, *Elon Musk’s SpaceX Beats Bezos’ Blue Origin in NASA Contest to Build Astronaut Lunar Lander*, CNBC (Apr. 12, 2021), <https://www.cnbc.com/2021/04/16/spacex-sole-winner-in-nasas-hls-moon-lander-program-report.html>.

<sup>94</sup> *Id.*

<sup>95</sup> Press Release, Gov’t Accountability Off., Statement on Blue Origin-Dynetics Decision (July 30, 2021).

<sup>96</sup> *Id.*

<sup>97</sup> Avery Hartmans, *Elon Musk Said Jeff Bezos Retired from the Helm of Amazon ‘to Pursue Full-Time Job Filing Lawsuits Against SpaceX.’ It’s the Latest in a 15-Year Feud Between 2 of the World’s Richest Men*, INSIDER (Aug. 29, 2021, 11:01 AM), <https://www.businessinsider.com/jeff-bezos-elon-musk-rivalry-history-timeline-2020-7>.