

GOVERNMENT CONTRACTING: A BRIEF OVERVIEW OF THE FIELD

Executive Summary: The federal government must obtain supplies, technology, and services from private companies. Almost half of the federal government’s discretionary spending goes towards contracts,¹ and federal spending on contracting is increasing each year by billions of dollars.² Government contracts range from carpet cleaning to major weapons systems to producing life-saving vaccines. Fiscal Year 2022 saw the Biden Administration focus on using government power and contracts to enhance federal IT and cybersecurity³ and to support small businesses.⁴ Government contracts also entered the news cycle concerning the enforceability of the 2021 vaccine mandate,⁵ inflation,⁶ and the Infrastructure Investment and Jobs Act.⁷ Foundational elements for the field remain rooted in the separation of powers and administrative law.

I. BACKGROUND AND FOUNDATIONS OF GOVERNMENT CONTRACTING

Government contracts involve a private vendor contracting with the government to provide goods or services.⁸ A patchwork of laws and administrative rules govern the field of government contracting. The power to contract is rooted in the power of Congress to dispose of government property,⁹ implying a power to obtain property and retaining the power to pay the debts of the United States¹⁰ incurred by governmental acquisition of said property. As a sovereign entity, the federal government enters business contracts, thus incurring debt.¹¹ 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;

¹ U.S. GOV’T ACCOUNTABILITY OFF., CONTRACTING DATA ANALYSIS: ASSESSMENT OF GOVERNMENT-WIDE TRENDS 1 (2017).

² 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>.

³ EXEC. ORDER NO. 14028, 86 Fed. Reg. 93 (May 17, 2021).

⁴ EXEC. ORDER NO. 14042, 86 Fed. Reg. 50,985 (Sept. 9, 2021).

⁵ *Georgia v. Biden*, 574 F.Supp.3d 1337, 1357 (S.D.Ga. 2021).

⁶ *Managing Inflation in Government Contracts*, WARD & BERRY (June 7, 2022), <https://www.wardberry.com/managing-inflation-in-government-contracts/>.

⁷ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

⁸ GOVERNMENT CONTRACTS, LEGAL INFO. INST.

https://www.law.cornell.edu/wex/government_contracts.

⁹ 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.”).

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

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

the agency does not enjoy sovereign immunity.¹² Only Congress has the power of the purse,¹³ 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.¹⁴ An agency may only incur obligations that will be performed within a specific appropriations' period as set by Congress.¹⁵ The Anti-Deficiency Act¹⁶ further limits agencies, prohibiting contractual obligations in advance of or in preparation for Congressionally-provided appropriations.¹⁷ Additionally, agencies can only obligate current FY funds to meet current FY needs, absent a statutory exception.¹⁸ The Buy American Act¹⁹ further limits contracts, generally requiring the agency to procure domestic materials and products.²⁰

A. *The Procurement Process*

The procurement process can take many forms. To simplify this explanation, this paper focuses on competitive procurements.²¹ Once an agency decides to procure goods or services and determines that the proposed action does not violate any limitations, the agency articulates

¹² *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).

¹³ 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).

¹⁴ 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).

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

¹⁶ 31 U.S.C. § 1341.

¹⁷ *Id.* § 1341(a)(1)(B).

¹⁸ 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 (3d ed. 2004); U.S. GOV'T ACCOUNTABILITY OFF., FUNDING OF MAINTENANCE CONTRACT EXTENDING BEYOND FISCAL YEAR (1996).

¹⁹ 41 U.S.C. § 8301-8303.

²⁰ *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).

²¹ 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 <https://www.whitehouse.gov/omb/management/office-federal-procurement-policy/#top> (last visited Sept. 26, 2020).

specific needs and criteria in a solicitation.²² Private parties then review the procurement needs and “bid” to fulfill the contract.²³The agency then uniformly evaluates all bids to fulfill the solicitation against the announced criteria.²⁴ Once an agency selects a prospective contractor and awards the contract, the agency will announce the winning bid.²⁵ An unsuccessful bidder can request a debrief that the agency must provide²⁶or dispute the contract award in a “bid protest.”²⁷ If an unsuccessful bidder protests a bid, the winning bidder must wait for the resolution of the protest.²⁸

Businesses can take advantage of certain programs, Acts, or initiatives to increase the chances of procurement. For instance, with the Executive Order “Ensuring the Future of America is Made in America by All of America’s Workers,”²⁹ the federal government launched an initiative in 2021 to emphasize domestic products and services in federal procurement to strengthen our national industrial base and create more American jobs.³⁰ Additionally, with the 1997 Small Business Reauthorization Act,³¹ the federal government aims to award 23% of its contracting money to small businesses. Further, some states, such as Connecticut and New York, also offer special set-aside contracts for women-and minority-owned small businesses.³²

²² 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>.

²³ *Contracting Process*, CDC, <https://www.cdc.gov/contracts/process/index.html> (last visited Oct. 1, 2021).

²⁴ Halchin, *supra* note 21, at 2.

²⁵ *Id.*

²⁶ 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).

²⁷ 10 U.S.C. § 2305.

²⁸ 48 C.F.R. § 33.103 (2020).

²⁹ *Executive Order 14005 - Ensuring the Future is Made in All of America by All of America's Workers*, Daily Comp. Pres. Docs. 1 (2021).

³⁰ *Id.*

³¹ SMALL BUSINESS REAUTHORIZATION ACT, Pub. L. No. 105-135, § 603, 111 Stat. 2632.

³² 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 (last visited Oct. 1, 2021).

B. The Dispute Process

Disputes arise out of everything from new regulations to “broadened notions of due process.”³³ Most federal agencies follow processes and authority of the Federal Property and Administrative Service Act,³⁴ the Office of Federal Procurement Policy Act,³⁵ and the Federal Acquisition Streamlining Act of 1994.³⁶ However, the Armed Forces and National Aeronautics and Space Administration follow the Federal Acquisition Regulation (FAR),³⁷ which established the Civilian Board of Contract Appeals and the Armed Services Board of Contract Appeals.

The Budget and Accounting Act of 1921³⁸ established the Government Accountability Office (GAO),³⁹ 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.⁴⁰ An unfavorable GAO decision leaves a disappointed bidder with two avenues: either appeal to the Board of Contract Appeals⁴¹ or directly file suit in the U.S. Court of Federal Claims (COFC).⁴² The COFC’s jurisdiction over government contracts claims comes from the Tucker Act.⁴³ The COFC will take a de novo look at the procurement if it is on appeal from a GAO finding.⁴⁴ The bidder may also file protests directly in Federal District Court.⁴⁵ Appealing bidders from either venue may file with the United States Court of Appeals for the Federal Circuit.⁴⁶ Awardees with claims under an awarded contract may bring said claims. The contractor must initially exhaust administrative procedures by submitting a claim to

³³ *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>.

³⁴ 40 U.S.C. §112.

³⁵ 41 U.S.C. §1101.

³⁶ Pub. L. No. 103-355, 108 Stat. 3243.

³⁷ 48 C.F.R. § 1.301 (2019).

³⁸ Pub. L. No. 67-13, 42 Stat. 20.

³⁹ *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).

⁴⁰ 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).

⁴¹ 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>.

⁴² 41 U.S.C. §§ 7104, 7107; *see also* 28 U.S.C. § 1491.

⁴³ TUCKER ACT, CH. 359, 24 Stat. 505 (1887).

⁴⁴ 41 U.S.C. § 7104(B)(4).

⁴⁵ 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>.

⁴⁶ 41 U.S.C. §7107(A)(1)(B); 28 U.S.C. §§ 1295(A)(3), (10).

the agency’s contracting officer for a written decision.⁴⁷ The contractor may then file the claim in District Court and appeal to the Federal Circuit.

II. GOVERNMENT CONTRACTS AND CYBERSECURITY COMPLIANCE

A crucial concern for government contractors in 2022 and beyond is monitoring developments concerning their cybersecurity obligations.⁴⁸ In 2021, the United States experienced several significant cyberattacks, including an attack on the Colonial Pipeline, shutting down the main fuel supply line to the East Coast,⁴⁹ and an attack on a major US information technology firm, SolarWinds, infiltrating malicious code into software downloaded by customers. While cyberattacks started in 2006, the high-profile attacks of 2021 underscore their continuing threat to the economic and national security of the United States.⁵⁰

The federal government has signaled its focus on ensuring contractors comply with cybersecurity regulations through measures such as the Department of Justice’s (DoJ) Cyber-Fraud Initiative, President Biden’s *Executive Order 14028*, and a 2022 Memorandum issued by the Department of Defense’s (DoD). With the government’s increased emphasis on compliance, federal government contractors should perform their cybersecurity requirements to avoid liability.⁵¹

A. *Executive Order 14028*

Given the seemingly exponential rise in recent cyber incidents, the Biden Administration issued an “Executive Order on Improving the Nation’s Cybersecurity” (“EO”) in May 2021.⁵² The EO desires comprehensive change to strengthen cybersecurity and triggers rulemaking and deadlines across the federal government to reach this goal. While the EO does not concern only contractors but also the private sector and federal agencies, contractors need to follow the progression of the EO as it will eventually necessitate cybersecurity obligations and requirements.

⁴⁷ 41 U.S.C. § 7103(a)(1).

⁴⁸ EXEC. ORDER NO. 14028, 86 Fed. Reg. 93 (May 17, 2021).

⁴⁹ Gloria Gonzalez, Ben Lefebvre & Eric Geller, ‘Jugular’ of the U.S. Fuel Pipeline System Shuts Down After Cyberattack, POLITICO (May 8, 2021), <https://www.politico.com/news/2021/05/08/colonial-pipeline-cyber-attack-485984>.

⁵⁰ CENTER FOR STRATEGIC & INT’L STUD., Significant Cyber Incidents, <https://www.csis.org/programs/strategic-technologies-program/significant-cyber-incidents>.

⁵¹ Dawn E. Wilson, Courtney Gilligan Saleski & Thomas E. Daley, *Cybersecurity Obligations for Government Contractors – Focus on them Before the Government Focuses on you*, DLA PIPER (Sept. 22, 2021), <https://www.dlapiper.com/en/us/insights/publications/2021/09/cybersecurity-obligations-for-government-contractors-focus-on-them/>.

⁵² EXEC. ORDER NO. 14028, 86 Fed. Reg. 93 (May 17, 2021).

For instance, Section 2, “Removing Barriers to Sharing Threat Information,” will create cybersecurity obligations for contractors.⁵³ The section directs the Federal Acquisition Regulation (FAR) to update its contracting language to increase information sharing and incident reporting from the private sector to the federal government.⁵⁴ With this requirement, IT and OT contractors will be obliged to collect and share with the federal government information that is “relevant to cybersecurity event prevention, detection, response, and investigation,” collaborate with federal investigations, and hold cyber incident reporting obligations.⁵⁵ As of September 30, 2022, the case is still open, with the last update being from May 22, 2022, noting that the DAR and FAR staff are resolving issues with the rule.

Section 2 also charges the FAR to standardize cybersecurity contractual requirements across Federal agencies. This change would affect all contractors because, as of now, cybersecurity requirements are agency-specific. As of September 30, 2022, this case is still open, with the last update being from June 23, 2022, noting that the FAR staff is processing a resolved draft of the rule.⁵⁶ Overall, contractors must pay attention as the contract language is modified by the Federal Acquisition Regulation (FAR).⁵⁷

B. Department of Justice

On October 6, 2021, the DoJ announced the new civil cyber-fraud initiative that “will utilize the False Claims Act to pursue cybersecurity-related fraud by government contractors.”⁵⁸ In general, the False Claims Act can impose liability on contractors or subcontractors who defraud government programs; the False Claim Act typically involves four types of fraud: (1) progress payment fraud, (2) fraud regarding nonconforming materials, (3) cost mischarging, and (4) defective pricing.⁵⁹ Now, contractors or subcontractors “who put U.S. information or systems at risk by knowingly providing deficient cybersecurity products or services, knowingly misrepresenting their cybersecurity practices or protocols, or knowingly violating obligations to monitor and report cybersecurity incidents and breaches” will be held liable.⁶⁰

In 2022, the DoJ demonstrated its commitment to pursuing government contractors that fail to follow required cybersecurity standards. On March 8, 2022, the DoJ announced that Comprehensive Health Services LLC (CHS) contracted with the government to provide medical support services in Iraq and Afghanistan and to securely maintain the health information of

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ FAR Open Cases Report, <https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf>.

⁵⁷ EXEC. ORDER NO. 14028, 86 Fed. Reg. 93 (May 17, 2021).

⁵⁸ Press Release, Dept. of Justice, Deputy Attorney General Lisa O. Monaco Announces New Civil Cyber-Fraud Initiative (Oct. 6, 2021).

⁵⁹ Joel M. Androphy, *Government Procurement Fraud and the False Claims Act*, BERG & ANDROPHY, <https://www.bafirm.com/publication/government-procurement-fraud-and-the-false-claims-act/>.

⁶⁰ Press Release, Dept. of Justice, Deputy Attorney General Lisa O. Monaco Announces New Civil Cyber-Fraud Initiative (Oct. 6, 2021).

service members, diplomats, and officers.⁶¹ CHS submitted a claim to the State Department for the cost of a secure electronic medical record (EMR) system, but CHS did not consistently use the secure EMR system but would sometimes “[leave] scanned copies of some records on an internal network drive, which was accessible to non-clinical staff.” CHS had to pay \$930,000 for knowingly misrepresenting its cybersecurity practices and providing deficient cybersecurity services. Additionally, the DoJ announced a second case on July 8, 2022, in which Aerojet Rocketdyne agreed to pay \$9 Million to resolve False Claims Act allegations for misrepresenting its compliance with cybersecurity requirements in its contracts.⁶²

C. Department of Defense

To fully appreciate the government contracts landscape, a look at the agency responsible for the most contracts—the Department of Defense (DoD)—is imperative.⁶³ The DoD contracts with 222,000 companies, and these companies are targets for hackers trying to access sensitive data.⁶⁴ Compared to other agencies, the DoD has the most burdensome cybersecurity requirements in its Defense Federal Acquisition Regulation Supplement (DFARS) provisions and contract clauses. While the DoD has always had more burdensome requirements, it has recently shifted its focus to ensuring its contractors *actually* comply with them.

The DoD launched a Cybersecurity Maturity Model Certification (CMMC) framework in 2020 to address its concern that defense contractors have not adequately implemented their cybersecurity obligations.⁶⁵ In response to the evolving cybersecurity threats, the DoD revised the framework to create CMMC 2.0 in 2021.⁶⁶ The updated framework is a tiered model – comprising three levels – that requires “companies entrusted with national security information [to] implement cybersecurity standards at progressively advanced levels, depending on the type and sensitivity of the information.”⁶⁷ CMMC 2.0 allows the Department to verify the

⁶¹Press Release, Department of Justice, Medical Services Contractor Pays \$930,000 to Settle False Claims Act Allegations Relating to Medical Services Contracts at State Department and Air Force Facilities in Iraq and Afghanistan (Mar. 8, 2022).

⁶²Press Release, Department of Justice, Aerojet Rocketdyne Agrees to Pay \$9 Million to Resolve False Claims Act Allegations of Cybersecurity Violations in Federal Government Contracts (July 8, 2022).

⁶³Federal Government Contracting: A Resource Guide, LIBR. OF CONG. <https://guides.loc.gov/federal-government-contracting> (Aug. 1, 2014).

⁶⁴Bloomberg Gov’t, *Cybersecurity for Government Contractors*, (July 7, 2022), <https://about.bgov.com/brief/cybersecurity-for-government-contractors/>.

⁶⁵OFF. OF THE UNDER SEC’Y OF DEF., *Overview of the CMMC Program*, <https://www.acq.osd.mil/cmmc/about-us.html>.

⁶⁶*Id.*

⁶⁷*Id.*

implementation of cybersecurity standards by requiring companies to demonstrate compliance through either self-assessment or a third-party audit.⁶⁸

While CMMC 2.0 will not be rolled out until 2023, that does not mean contractors can sit by idly. The DoD released a memorandum in June 2022 warning contractors to start complying with their relevant cybersecurity standards or risk the DoD taking action against them.⁶⁹ The Memorandum explicitly highlights the cybersecurity obligation for DoD contractors addressed in DFARS clause 252.204-7012. This clause requires contractors to have a system in compliance with NIST Special Publication (SP) 800-171. NIST SP 800-171 notes specific requirements any non-Federal computer system must follow “in order to store, process, or transmit Controlled Unclassified Information (CUI) or provide security protection for such systems.”⁷⁰ For each requirement not yet implemented, contractors must “have a plan of action and milestones.”⁷¹ The Memorandum warns that noncompliance with DFARS clause 252.204-7012 is a material breach that can result in the termination of existing contracts or loss of future opportunities.⁷²

III. GOVERNMENT CONTRACTS IN THE NEWS

A. COVID-19 Vaccine Mandate for Federal Contractors

On September 9, 2021, President Biden issued an EO 14042 mandating that all federal contractors receive the COVID-19 vaccine.⁷³ The purpose of the order was to promote economic efficiency and safety while keeping contractors safe.⁷⁴ After going into effect on October 15, 2021, the order was immediately subject to an onslaught of lawsuits seeking to invalidate it.⁷⁵

⁶⁸ *Id.*

⁶⁹ Memorandum from Off. of the Under Sec’y of Def. on Contractual Remedies to Ensure Contractor Compliance with Defense Federal Acquisition Regulation Supplement Clause 252.204-7012, for contracts and orders not subject to Clause 252.204-7020; and Additional Considerations Regarding National Institute of Standards and Technology Special Publication 800-171 Department of Defense Assessments, (June 16, 2022).

⁷⁰CARNEGIE MELLON UNIV., *NIST 800-171 Compliance Information*, (Aug. 31, 2021), <https://www.cmu.edu/iso/compliance/800-171/index.html>.

⁷¹ Memorandum from Off. of the Under Sec’y of Def. on Contractual Remedies to Ensure Contractor Compliance with Defense Federal Acquisition Regulation Supplement Clause 252.204-7012, for contracts and orders not subject to Clause 252.204-7020; and Additional Considerations Regarding National Institute of Standards and Technology Special Publication 800-171 Department of Defense Assessments, (June 16, 2022).

⁷² *Id.*

⁷³ EXEC. ORDER NO. 14,042, 86 Fed. Reg. 50,985 (Sept. 9, 2021).

⁷⁴ *Id.*

⁷⁵ 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-bidens-eo-effective-oct-15-ensuring>.

Less than a year later, on August 31, 2022, the Biden Administration announced that it would no longer implement the vaccine mandate for federal contractors in new contracts or enforce it in existing contracts.⁷⁶ This new approach follows the Eleventh Circuit’s Order in *Georgia v. Biden* to overturn the nationwide injunction.⁷⁷ The court explained that while it is aware of cases where courts authorized executive orders under the Procurement Act, the “EO 14042’s directives and resulting impact radiate[d] too far beyond the purposes of the Procurement Act and the authority it grants to the President.”⁷⁸ Unlike EO 14042, the other executive orders do not involve public health, require extensive and costly administration work, or force “individuals to choose between getting medical treatment that they do not want or losing their job.”⁷⁹

B. Government Contracts and Small Businesses Prioritization

The devastating effects of COVID-19 resulted in a call for support of small businesses, with the Biden Administration prioritizing access to federal contracts for underserved small businesses.⁸⁰ Under the 1997 Small Business Reauthorization Act,⁸¹ the federal government set a goal of awarding 23% of the money spent on contracts to small businesses.⁸² A business typically qualifies as “small” if it is a “manufacturing company with 500 employees or fewer, or a “non-manufacturing business with average annual receipts under \$7.5 million....”⁸³ Over the last decade, fewer small businesses have contracted with the federal government, but the number of dollars going to small businesses has grown, even surpassing the 23% threshold.⁸⁴

For FY21, the Biden Administration expanded small business opportunities by awarding 27.2 percent federal contract dollars to small businesses – an \$8 billion increase from 2020.⁸⁵ President Biden also committed to equity in federal procurement in June 2021, announcing his goal to increase the share of contracts going to Small Disadvantaged Businesses (SDBs) by 50%

⁷⁶ Gen. Servs. Admin., *Update Regarding Executive Order 14042*, SAFER FED. WORKFORCE (Oct. 14, 2022), <https://www.saferfederalworkforce.gov/contractors/>.

⁷⁷ *Georgia v. Biden*, 574 F.Supp.3d 1337, 1357 (S.D.Ga. 2021).

⁷⁸ *Id.* at 1355.

⁷⁹ *Id.* at 1354.

⁸⁰ Press Release, U.S. Senate Comm. on Small Business & Entrepreneurship, Cardin Applauds Biden-Harris Admin. for Exceeding Small Bus. Fed. Contracting Goals (July 26, 2022).

⁸¹ Small Business Reauthorization Act, PUB. L. NO. 105-135, § 603, 111 Stat. 2632.

⁸² 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>.

⁸³ Basic Requirements, SMALL BUS. ADMIN., <https://www.sba.gov/federal-contracting/contracting-guide/basic-requirements> (last visited Oct. 1, 2021).

⁸⁴ Sarah Treuhaft, Eliza McCullough, Michelle Huang, & Tracey Ross, *Fewer and Fewer Small Businesses Are Getting Federal Contracts*, NAT’L EQUITY ATLAS (Sept. 28, 2021), <https://nationalequityatlas.org/federalcontracts>.

⁸⁵ Press Release, U.S. Small Bus. Admin, Biden-Harris Admin. Awards Record-Breaking \$154.2 Billion in Contracting to Small Bus. (July 26, 2022).

by 2025.⁸⁶ For a business to be an SBD, it must be small and 51% or more owned and controlled by one or more socially and economically disadvantaged persons.⁸⁷ President Biden is one year ahead of schedule, with SBD spending reaching 11% in FY21 for the first time in history.

While the FY21 saw an increase in the dollar value of small-business rewards and an emphasis on equity, the number of small businesses receiving prime contracts decreased, comporting with a multi-year trend that dates back over a decade.⁸⁸ In 2020, the federal government had contracts with 75,726 small businesses, a significant reduction compared to the 125,000 in 2010.⁸⁹ The decrease in small business contractors is often attributed to competition from more established companies, procedural headaches, statutory requirements, or the rise of category management.⁹⁰ Overall, the trend continues in FY21, with the absolute number of small businesses receiving prime contracts with the federal government decreasing by 4,285 from 2020.⁹¹

C. Infrastructure Investment and Jobs Act

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act (“IIJA”) into law.⁹² The act is a massive investment in United States infrastructure, providing \$1.2 trillion in funding to improve the United States’ roads, bridges, airports, ports, internet, pipes, and encourage sustainable energy use.⁹³ Ninety-nine percent of IIJA’s funding goes to eleven federal departments and agencies: Department of Transportation, Department of Energy, Department of Commerce, Environmental Protection Agency, Department of Interior, Department of Army, Federal Communications Commission, Department of Agriculture,

⁸⁶Stephanie Hagan, *5 Government Contracting Trends to Watch for in 2022*, WINVALE (Jan. 12, 2022), <https://info.winvale.com/blog/5-government-contracting-trends-watch-for-in-2022>.

⁸⁷ *Small Disadvantages Business*, U.S. SMALL BUS. ADMIN, <https://www.sba.gov/federal-contracting/contracting-assistance-programs/small-disadvantaged-business>.

⁸⁸Press Release, U.S. SMALL BUS. ADMIN, Biden-Harris Admin. Awards Record-Breaking \$154.2 Billion in Contracting to Small Bus. (July 26, 2022).

⁸⁹Sarah Treuhaft, Eliza McCullough, Michelle Huang & Tracey Ross, *Fewer and Fewer Small Businesses Are Getting Federal Contracts*, NAT’L EQUITY ATLAS (Sept. 28, 2021), <https://nationalequityatlas.org/federalcontracts>.

⁹⁰ *Category Management Talking Points for the Small Business Community*, GEN. SERVS. ADMIN., [https://www.gsa.gov/cdnstatic/Category_Management_Small_Business_Talking_Points_09.29.15_\(1\).pdf](https://www.gsa.gov/cdnstatic/Category_Management_Small_Business_Talking_Points_09.29.15_(1).pdf) (“Category management organizes products and services into logical groupings so the government can buy more like a single enterprise. It is a strategic and systematic approach to purchasing that is widely used in the private sector.”); Cheryl Winokur Munk, *Main Street lands record \$154 billion in federal contracts, but fewer small businesses benefit*, CNBC (July 26, 2022), <https://www.cnn.com/2022/07/26/main-street-businesses-land-record-154-billion-in-federal-contracts.html>.

⁹¹ Press Release, U.S. SMALL BUS. ADMIN, Biden-Harris Admin. Awards Record-Breaking \$154.2 Billion in Contracting to Small Bus. (July 26, 2022).

⁹² Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

⁹³ See *President Biden’s Bipartisan Infrastructure Law*, THE WHITE HOUSE (Last visited Oct. 12, 2022), <https://www.whitehouse.gov/bipartisan-infrastructure-law/> (summarizing IIJA’s provisions).

Department of Homeland Security, Department of Health and Human Services, and General Services Administration.⁹⁴ These departments and agencies are mandated by the IJJA to use this funding on over 350 existing and new programs.⁹⁵

The purpose and recipients of IJJA funding belie the fact that IJJA creates relatively few federal contracting opportunities. Out of \$1.2 trillion, only \$125 billion has been reserved for federal contracts.⁹⁶ These contracts will mainly be for energy programs (e.g. electric vehicle recharging infrastructure and improving the electrical grid), but there will also be significant contract opportunities in water infrastructure, pollution mitigation, and broadband internet.⁹⁷ Much of the IJJA funding will instead be used for formula grants, which are based on quantitative criteria, and competitive grants that will be variously available to states, the District of Columbia, territories, counties, cities/townships, and tribes.⁹⁸

While offering little business for federal contractors, IJJA has changed the procurement requirements to which they must adhere. The IJJA contained a “sense of Congress” resolution that the FAR should be amended to increase the domestic content requirements of domestic end products and domestic construction materials to 75%.⁹⁹ Accordingly, the Federal Acquisition Regulatory Council decided on March 7, 2022 that the existing 55% domestic content threshold would increase to 60% on October 25, 2022, to 65% in 2024, and to 75% in 2029.¹⁰⁰ Should agencies “determine[] that there are no end products or construction materials that meet the new domestic content threshold or such products are of unreasonable cost,” contractors may operate under the “fallback threshold” of 55%. This fallback threshold is only available through 2030.¹⁰¹ The IJJA has made it inevitable that contractors will need to provide and use an increasingly

⁹⁴ Deniece Peterson, *The Infrastructure Bill is Law. So How Can Contractors Find Opportunities?*, GOVWIN, <https://sameneews.org/how-to-find-government-contracts-from-the-federal-infrastructure-bill/https://iq.govwin.com/neo/marketAnalysis/view/The-Infrastructure-Bill-is-Law-So-How-Can-Contractors-Find-Opportunities/6266?researchTypeId=1&researchMarket=>.

⁹⁵ Brian S. Gocial, *New White House Guidance Details Infrastructure Spending Priorities*, GOV’T CONTS. NAVIGATOR (Feb. 14, 2022), <https://governmentcontractsnavigator.com/category/state-and-local-procurement/>

⁹⁶ Tom Temin, *You might have thought the infrastructure bill had lots of procurement money. Think again.*, FED. NEWS NETWORK (Jan. 3, 2022), <https://federalnewsnetwork.com/contracting/2022/01/you-might-have-thought-the-infrastructure-bill-had-lots-of-procurement-money-think-again/>.

⁹⁷ *Id.*

⁹⁸ *See Infrastructure Investment and Jobs Act (IJJA) Implementation Resources*, GOV’T FIN. OFFS. ASS’N (Last visited Oct. 12, 2022), <https://www.gfoa.org/the-infrastructure-investment-and-jobs-act-ijja-was> (describing a sampling of grants available under the IJJA).

⁹⁹ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, § 70921 (2021). Here, domestic end products refers to products that are the result of a process and are “manufactured in the United States.” *See* 48 CFR § 25.003 (2022). The type of “domestic construction materials” that is relevant here are those “manufactured in the United States.” *See* 48 CFR § 52.225-11 (2022).

¹⁰⁰ Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements, 87 Fed. Reg. 12780, 12781 (Mar. 7, 2022).

¹⁰¹ *See* Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements, 87 Fed. Reg. 12780, 12781 (Mar. 7, 2022) (providing that the fallback threshold is in effect only “until one year after the increase of the domestic content threshold to 75 percent”).

greater proportion of products made in the United States. As the implementation of IJJA is scrutinized for waste and fraud, the government contracts that are made pursuant to it will continue to be relevant.¹⁰²

D. Contractor Unionization

On September 2, 2022, the General Services Administration (GSA) promulgated a rule allowing union organizing activities that target federal contractors on GSA property.¹⁰³ Federal employees on government property have been reachable by organizing efforts since the passage of the Federal Service Labor-Management Relations Statute in 1978.¹⁰⁴ However, identical organizing outreach was prohibited for federal contractors under the ban on solicitation, vending merchandise, advertising, or collecting debts on government property.¹⁰⁵ The new GSA rule amended the Code of Federal Regulations to exempt union organizing activities from that ban. The change enacted the recommendation of the White House Task Force on Worker Organizing and Empowerment.¹⁰⁶ The new GSA policy is the progeny of President Biden's efforts to encourage unionization, but its efficacy as applied to federal contractors remains to be seen.¹⁰⁷

E. Inflation's Impact

In June 2022, the United States inflation rate soared to 9.1%—the highest inflation rate in forty years.¹⁰⁸ Increasing prices exacts a toll on every sector of the economy, including federal contractors. Inflation has caused at least one DoD contractor to request cancellation of a long-

¹⁰² See Memorandum from Eric J. Soskin, Dep't Transp. Inspector General, to Peter P.M. Buttigieg, Dep't Transp. Secretary (Oct. 5, 2022), <https://www.oig.dot.gov/sites/default/files/OIG%20Correspondence%20-%20Challenges%20Facing%20DOT%20in%20Implementing%20IJJA.pdf> (highlighting concerns about waste and fraud as the Department of Transportation implements IJJA).

¹⁰³ Federal Management Regulation; Soliciting Union Memberships Among Contractors in GSA-Controlled Buildings, 87 Fed. Reg. 54166 (Sept. 2, 2022).

¹⁰⁴ See 5 U.S.C. §§ 7101-7135 (codifying the Federal Service Labor-Management Relations Statute).

¹⁰⁵ 41 C.F.R. pt. 102-74 (2022).

¹⁰⁶ Federal Management Regulation; Soliciting Union Memberships Among Contractors in GSA-Controlled Buildings, 87 Fed. Reg. 54166, 54166 (Sept. 2, 2022).

¹⁰⁷ Worker Organizing and Empowerment, 86 Fed. Reg. 22829 (Apr. 26, 2021) (Executive Order 14025, which sought to encourage unionization, created the White House Task Force on Worker Organizing and Empowerment, whose recommendations were later codified by the GSA's final rule exempting organizing activities from the ban on solicitation, vending, advertising, and collecting debt on government property).

¹⁰⁸ *U.S. inflation reached a new 40-year high in June of 9.1 percent*, POLITICO (July 13, 2022), <https://www.politico.com/news/2022/07/13/us-inflation-new-40-year-high-june-00045541#:~:text=Year%20Dover%20year%20inflation%20hits,largest%20annual%20increase%20since%201981> (stating that the U.S. experienced the largest twelve-month increase in inflation since 1981).

term contract.¹⁰⁹ Contractors may pursue a Request for Equitable Adjustment to increase their compensation, but the government is not obligated to grant the request when it is motivated by inflation or other macroeconomic conditions.¹¹⁰ Inflation particularly afflicts contractors when they are under fixed-price contracts. Fixed-price contracts set a maximum price for a contract, with contractors being responsible for any unforeseen costs.¹¹¹ Under the Biden administration, NASA has embraced competitive fixed-price contracts and turned away from the “plague” of “cost plus contracts” that historically obligated it to pay the contract price and additional expenses.¹¹² While fixed-price contracts reduce costs for the government, it leaves contractors responsible for inflation-related cost increases. In light of this risk, DoD and NASA have encouraged the inclusion of Economic Price Adjustment clauses in certain fixed-price contracts when necessary to fulfill contract objectives.¹¹³ These clauses allow adjustment of the contract price due to increased supply, labor, and material costs.¹¹⁴ Inflation has come down since its June peak to 8.2% in September.¹¹⁵ Yet, as long as inflation plagues the economy, the government and federal contractors will have to tackle which parties should bear the risk of the resulting increased costs.

¹⁰⁹ Bryant Harris, *Pentagon says inflation has made one company request to cancel a long-term contract*, DEF. NEWS (May 4, 2022), <https://www.defensenews.com/pentagon/2022/05/04/pentagon-says-inflation-has-made-one-company-request-to-cancel-a-long-term-contract/>.

¹¹⁰ *Managing Inflation in Government Contracts*, WARD & BERRY (June 7, 2022), <https://www.wardberry.com/managing-inflation-in-government-contracts/>.

¹¹¹ Michael Sheetz, *NASA chief says competition is making space exploration cheaper, in dramatic shift on contracts*, CNBC (May 3, 2022), <https://www.cnbc.com/2022/05/03/nasas-nelson-competitive-contracts-are-making-space-exploration-cheaper.html>.

¹¹² *See id.* (explaining how recent competitive fixed-price contracts with SpaceX cost much less than the cost plus contracts like that which led to the Space Launch System for future moon missions being billions over budget).

¹¹³ *See* Memorandum from Karla Smith Jackson, NASA Assistant Administrator for Procurement (July 15, 2022), <https://www.hq.nasa.gov/office/procurement/other/NASA-Guidance-on-Inflation-and-Economic-Price-Adjustment.pdf> (outlining best practices for Economic Price Adjustment clauses, stating, “These unprecedented times may require use of appropriate contracting flexibilities to ensure the Government and our industry partners can meet their obligations under contracts.”); Memorandum from John M. Tenaglia, Dep’t Def. Principal Director of Defense Pricing and Contracting (May 25, 2022), <https://www.acq.osd.mil/dpap/policy/policyvault/USA000999-22-DPC.pdf> (detailing the appropriate inclusion of Economic Price Adjustment clauses, including the division of risk among the parties and the types of contracts that are eligible).

¹¹⁴ FAR 16.203-4 (2022) (outlining the requirements to include Economic Price Adjustment clauses on the basis of “standard supplies,” “semi-standard supplies,” and “actual cost of labor and materials”).

¹¹⁵ *Inflation holds grip on the U.S. economy as September rate hits 8.2%*, NBC NEWS (Oct. 13, 2022, 8:37 AM EDT), <https://www.nbcnews.com/business/economy/inflation-rate-september-2022-cost-of-food-gas-rent-consumer-prices-rcna51958>.