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, and federal spending on contracting is increasing each year by billions of dollars. Government contracts range from carpet cleaning to major weapons systems to producing life-saving vaccines. Fiscal Year 2023 saw the Biden Administration focus on using government power and contracts to enhance federal IT and cybersecurity and to support small businesses. Government contracts also entered the news cycle concerning the Supreme Court’s most recent ruling on affirmative action, the enforceability of the 2021 vaccine mandate, inflation, and security assistance to Ukraine.

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. 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, implying a power to obtain property and retaining the power to pay the debts of the United States incurred by governmental acquisition of said property. As a

9 GOVERNMENT CONTRACTS, LEGAL INFO. INST. https://www.law.cornell.edu/wex/government_contracts.
10 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.”).
11 U.S. CONST art. I, § 8. (“Congress shall have [p]ower . . . to pay the [d]ebts . . . .”).
sovereign entity, the federal government enters business contracts, thus incurring debt.\textsuperscript{12} 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.\textsuperscript{13} Only Congress has the power of the purse,\textsuperscript{14} 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.\textsuperscript{15} An agency may only incur obligations that will be performed within a specific appropriations’ period as set by Congress.\textsuperscript{16} The Anti-Deficiency Act\textsuperscript{17} further limits agencies, prohibiting contractual obligations in advance of or in preparation for Congressionally-provided appropriations.\textsuperscript{18} Additionally, agencies can only obligate current FY funds to meet current FY needs, absent a statutory exception.\textsuperscript{19} The Buy American Act\textsuperscript{20} further limits contracts, generally requiring the agency to procure domestic materials and products.\textsuperscript{21}

\textbf{A. The Procurement Process}

The procurement process can take many forms. To simplify this explanation, this paper focuses on competitive procurements.\textsuperscript{22} Once an agency decides to procure goods or services and determines that the proposed action does not violate any limitations, the agency articulates

\textsuperscript{12} United States v. Tingey, 30 U.S. 115, 122–23 (1831); Pacific Far East Line, Inc. ASBCA No. 7629, 63 BCA ¶ 3835.

\textsuperscript{13} 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).

\textsuperscript{14} 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).


\textsuperscript{16} 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)).

\textsuperscript{17} 31 U.S.C. § 1341.

\textsuperscript{18} Id. § 1341(a)(1)(B).

\textsuperscript{19} 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. U.S. Gov’t Accountability Off., Funding of Maintenance Contract Extending Beyond Fiscal Year (1996).

\textsuperscript{20} 41 U.S.C. § 8301-8303.


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

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,” 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. Additionally, with the 1997 Small Business Reauthorization Act, 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.

B. The Dispute Process

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

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25 Halchin, supra note 21, at 2.
26 Id.
29 48 C.F.R. § 33.103 (2020).
30 Executive Order 14005 - Ensuring the Future is Made in All of America by All of America’s Workers, Daily Comp. Pres. Docs. 1 (2021).
31 Id.
Administrative Service Act,\(^{35}\) the Office of Federal Procurement Policy Act,\(^{36}\) and the Federal Acquisition Streamlining Act of 1994.\(^{37}\) However, the Armed Forces and National Aeronautics and Space Administration follow the Federal Acquisition Regulation (FAR),\(^{38}\) which established the Civilian Board of Contract Appeals and the Armed Services Board of Contract Appeals.

The Budget and Accounting Act of 1921\(^{39}\) established the Government Accountability Office (GAO),\(^{40}\) an administrative body that authors decisions in bid protests and provides advisory opinions. Unsuccessful bidders may protest awards under a request for “reconsideration” at the GAO.\(^{41}\) An unfavorable GAO decision leaves a disappointed bidder with two avenues: either appeal to the Board of Contract Appeals\(^{42}\) or directly file suit in the U.S. Court of Federal Claims (COFC).\(^{43}\) The COFC’s jurisdiction over government contracts claims comes from the Tucker Act.\(^{44}\) The COFC will take a de novo look at the procurement if it is on appeal from a GAO finding.\(^{45}\) The bidder may also file protests directly in Federal District Court.\(^{46}\) Appealing bidders from either venue may file with the United States Court of Appeals for the Federal Circuit.\(^{47}\) 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.\(^{48}\) 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.\(^{49}\) In 2021, the United States

\(^{35}\) 40 U.S.C. §112.
\(^{38}\) 48 C.F.R. § 1.301 (2019).
\(^{39}\) 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).
\(^{41}\) 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).
\(^{44}\) TUCKER ACT, CH. 359, 24 Stat. 505 (1887).
\(^{45}\) 41 U.S.C. § 7104(B)(4).
\(^{48}\) 41 U.S.C. § 7103(a)(1).
experienced several significant cyberattacks, including an attack on the Colonial Pipeline, shutting down the main fuel supply line to the East Coast,\textsuperscript{50} 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.\textsuperscript{51}

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 \textit{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.\textsuperscript{52}

\textbf{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.\textsuperscript{53} 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.

For instance, Section 2, “Removing Barriers to Sharing Threat Information,” will create cybersecurity obligations for contractors.\textsuperscript{54} 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.\textsuperscript{55} 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.\textsuperscript{56} As of September 8, 2023, FARSEC has received a proposed FAR rule for the


\textsuperscript{54} Id.

\textsuperscript{55} Id.

\textsuperscript{56} Id.
preparation of the FR notice.57 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 August 25, 2023, FARSEC has received a proposed FAR rule for the preparation of the FR notice.58

On March 2, 2023, the White House published the U.S. National Cybersecurity Strategy, shifting significant cybersecurity responsibilities to federal contractors, technology companies, and critical infrastructure proprietors.59 The Strategy outlines objectives and recommends executive and legislative actions that would increase cybersecurity demands on these entities.60 For instance, Section 4 requires software suppliers for federal agencies to adhere to secure software development standards and introduces liability for vendors who neglect software security.61 The initial report was due December 14, 2022, however, the date has been extended to September 20, 2023.62 Overall, contractors must pay attention as the contract language is modified by the Federal Acquisition Regulation (FAR).63

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.”64 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.65 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.66

In 2023, the DOJ continued its efforts to ensure government contractors follow required cybersecurity standards. On September 5, 2023, the DOJ announced that Verizon Business Network Services LLC, of Ashburn, Virginia agreed to pay $4,091,317 to resolve allegations

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58 Id.
60 Id.
that it failed to satisfy certain cybersecurity controls. Verizon’s Managed Trusted Internet Protocol System (MTIPS) is designed to provide federal agencies with secure connections to the public internet and other external networks. The settlement regarded allegations that MTIPS solutions failed to satisfy three security controls for Trusted Internet Connections in connection with General Services Administration contracts from 2017–2021. Verizon provided the government with a written self-disclosure upon learning of the issues and conducted an independent investigation and compliance review. Verizon also provided the government with multiple supplemental written disclosure. According to the DOJ, “Verizon cooperated with the government and took prompt and substantial remedial measures.”

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. The DOD contracts with 222,000 companies, and these companies are targets for hackers trying to access sensitive data. 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. In response to the evolving cybersecurity threats, the DOD revised the framework to create CMMC 2.0. in 2021. 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.” CMMC 2.0 allows the Department to verify the implementation of cybersecurity standards by requiring companies to demonstrate compliance through either self-assessment or a third-party audit.

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68 Id.
69 Id.
70 Id.
71 Id.
75 Id.
76 Id.
77 Id.
According to the latest DOD updates, the CMMC 2.0 may not be implemented until fall 2024, but 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. 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 National Institute of Standards and Technology’s (NIST) Special Publication (SP) 800-171, Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations. 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.” For each requirement not yet implemented, contractors must “have a plan of action and milestones.” 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.

On May 10, 2023, NIST released Revision 3 to SP 800-171, replacing Revision 2 upon which the CMMC 2.0 is based. By the time the CMMC 2.0 program starts Revision 2 will likely be outdated, and DOD may decide to revise its assessment methodologies prior to implementing the program. Revision 3 is likely to facilitate updates to the CMMC and self-assessment methodologies, but there will also likely be delays as these are developed following the finalization of Revision 3 controls. The comment period for Revision 3 closed on July 14, 2023 and comments have been posted to the Computer Security Resource Center website. NIST is currently adjudicating the comments and preparing the final public draft for

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79 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).
81 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).
82 Id.
84 Id.
85 Id.
public comment in the first quarter of FY 2024.87

III. GOVERNMENT CONTRACTS IN THE NEWS

A. Affirmative Action in Government Contracting

On June 29, 2023, the Supreme Court ruled that Harvard’s affirmative action program violated the Equal Protection Clause in Students for Fair Admissions, Inc. v. Harvard.88 The Court held that an interest in deriving the benefits of diversity is “not sufficiently coherent for purposes of strict scrutiny” and that the use of racial categories to increase diversity is not sufficiently tailored to this goal.89 The Court also discussed how the use of race-based admissions implicates race as a “negative” factor in admissions because a “benefit provided to some applicants but not to others necessarily advantages the former group at the expense of the latter.”90 This decision has had a chilling effect on the use of affirmative action in government contracting and continues to inform developments in competitive procurement.

As of July 2023, the District Court for the Eastern District of Tennessee has already enjoined the Department of Agriculture (USDA) and Small Business Administration (SBA) from using a “rebuttable presumption” of social disadvantage in awarding government contracts on a preferred basis to businesses owned by minority individuals.91 While the court found that USDA and SBA had the statutory authority to impose a “rebuttable presumption” under section 8(a) of the Small Business Act,92 the policy failed to meet strict scrutiny in light of the Students for Fair Admissions decision.93 To comply with the decision, SBA temporarily suspended 8(a) applications,94 and on August 18, it issued an interim guidance requiring a “social disadvantage narrative” for all 8(a) participants who relied on the “rebuttable presumption” to establish an individual’s social disadvantage.95

While the Ultima decision only addressed the “rebuttable presumption” policy of the Small Business Act, the concepts of social and economic disadvantage are used as factors in awarding various federal grants, loans, and programs.96 It is yet to be seen how most agencies will respond to the Students for Fair Admissions ruling, but in incorporating a new “social

89 Id. at 2166–68.
90 Id. at 2168–69.
96 E.g., 49 C.F.R § 26.1.
disadvantage narrative,” it seems the SBA is relying on the majority’s promise to allow consideration of how race has affected an applicant’s life.97 The SBA’s guide for writing a “social disadvantage narrative” instructs applicants to indicate the identity that forms the basis of their social disadvantage and two “incidents of bias to establish chronic and substantial social disadvantage.”98 Only time will tell if other agencies follow.

B. COVID-19 Vaccine Mandate for Federal Contractors

On September 9, 2021, President Biden issued EO 14042 mandating that all federal contractors receive the COVID-19 vaccine.99 The purpose of the order was to promote economic efficiency and safety while keeping contractors safe.100 After going into effect on October 15, 2021, the order was immediately subject to an onslaught of lawsuits seeking to invalidate it.101

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.102 This approach followed the Eleventh Circuit’s Order in Georgia v. Biden to overturn the nationwide injunction.103 The court explained that while it was 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.”104 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.”105

On May 9, 2023, President Biden issued an EO revoking EO 14042.106 On May 12, the federal government officially stopped enforcing the vaccine mandate and any contractual

100 Id.
104 Id. at 1355.
105 Id. at 1354.
clauses implementing EO 14042. Agencies were required to rescind any deviations, policies, or other guidance premised on EO 14042, and the FAR Council revoked its 2021 guidance regarding deviations to the FAR to implement Executive Order 14042.

C. 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. Under the 1997 Small Business Reauthorization Act, the federal government set a goal of awarding 23% of the money spent on contracts to small businesses. 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…. The FY 2022 saw the continued decrease in the number of small-business vendors receiving prime contracts with the federal government, a multi-year trend that has spanned the last decade. However, there was still a significant increase in the number of dollars going to small businesses, even surpassing the 23% threshold.

For FY 2022, the Biden Administration expanded small business opportunities by awarding an all-time high 26.5 percent of federal contract dollars to small businesses — an $8.7 billion increase from 2021. President Biden, also continued his commitment to equity in federal procurement in February 2023, announcing several new initiatives to increase the share of contracts going to new entrants to the federal contracting space. This includes a new “supplier base dashboard” to track the “diversity and resilience in each agency’s supplier base,” and a “procurement equity tool” to identify entities interested in participating in procurement competitions.

108 Id.
114 Id.
115 Id.
116 Memorandum from the Deputy Dir. for Mgmt. on Creating a More Diverse and Resilient Federal Marketplace through Increased Participation of New and Recent Entrants M-23-11 (Feb. 17, 2023).
117 Id.
FY22 also saw the Biden-Harris administration continue its commitment to Small Disadvantaged Businesses (SDB). 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.118 For the second consecutive year, SBD spending exceeded its 11% goal, the second time in history.

While the FY22 saw an increase in the dollar value of small-business rewards and an emphasis on equity, the number of small businesses receiving prime contracts has continued to decrease.119 In 2022, the federal government had contracts with 62,670 small businesses, a significant reduction compared to the 125,000 in 2010.120 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.121 Overall, the trend continues in FY22, with the absolute number of small businesses receiving prime contracts with the federal government decreasing by 2,758, over four percent, from 2021.122

D. Security Assistance to Ukraine

The United States has been a leading provider of security assistance to Ukraine since Russia launched its renewed invasion in 2022.123 Already, the Biden Administration has committed more than $43 billion in security assistance since February 2022.124 This amount includes $18 billion for the DOD’s Ukraine Security Assistance Initiative (USAI).125 Under the USAI, the United States purchases weapons from partners and defense contractors to then be

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121 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 (“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.cnbc.com/2022/07/26/main-street-businesses-land-record-154-billion-in-federal-contracts.html.
124 Id.
125 Id.
delivered to Ukraine as opposed to pulling weapons directly from Pentagon stocks. The Biden Administration and the DOD have maintained commitment to providing long-term support to Ukraine through the USAI in FY 2023. On May 9, 2023, the Biden administration pledged $1.2 billion in long-term military assistance to Ukraine under the USAI, and on August 10, the Administration submitted a request for $24 billion in FY 2024 supplemental funding for Ukraine, including $5 billion for USAI, to Congress. On September 7, the DOD announced a new security package through USAI to support Ukraine’s “air defenses, artillery munitions, and other capabilities.” This announcement marks the start of a contracting process with industry and partners to provide additional support to Ukraine.

E. 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. Federal employees on government property have been reachable by organizing efforts since the passage of the Federal Service Labor-Management Relations Statute in 1978. However, identical organizing outreach was prohibited for federal contractors under the ban on solicitation, vending merchandise, advertising, or collecting debts on government property. 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. The new GSA policy is the progeny of President Biden’s efforts to encourage unionization. By March 2023, the number of Federal Government employees in a union increased by nearly 20% following President Biden’s

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131 Id.
136 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).
approval of over 70 Task Force recommendations in February 2022. To further advance these Task Force recommendation, the White House issued an update on the implementation of approved actions on March 17, 2023 under the White House Task Force on Worker Organization and Empowerment. This update includes (1) ensuring a strong job quality standard for federal grant funding; (2) providing information about a workers’ organizing rights through the “Know Your Rights” campaign; and (3) removing impediments to the exercise of the worker rights on federal property and in federally controlled spaces.

F. Inflation’s Impact

In June 2022, the United States inflation rate soared to 9.1%—the highest inflation rate in forty years. By May 2023, it has decreased to 4% and further to 3.2% by July 2023. However, despite this recent decline from record highs, inflation rates remain unusually high, causing a continuation of the inflation-related problems facing government contracts since 2021. 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-term contract. 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. 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. 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

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138 Id.
139 Id.
142 Id.
143 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/.
145 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.
expenses. 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. These clauses allow adjustment of the contract price due to increased supply, labor, and material costs. The inflation rate has come down significantly in the recent year. 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.

On December 23, 2022, President Biden signed the FY2023 National Defense Authorization (NDAA) into law, providing potential relief for government contractors collaborating with the Department of Defense (DOD).

Section 822, titled "Modification of Contracts to Provide Extraordinary Relief Due to Inflation Impacts," of FY2023 empowers the DOD to amend or modify eligible contracts if economic inflation alone causes the prime contractor's cost to exceed the contract price. This gives the Secretary of Defense the authority to adjust the price of a firm-fixed-price (FFP) contract when inflation drives the actual cost above the contracted amount. This authority also extends to subcontract, allowing prime contractors to request contract amendments when covered subcontractors' costs rise due to inflation.

Additionally, section 822 amended Public Law 85-804 within the FY2023 NDAA to increase funding authority regarding inflation as well as streamline government approvals and notice requirements in accordance with this “extraordinary authority.” The DOD now has the ability to provide equitable adjustments to contractors for inflation-related costs.

Lastly, Section 822 raised the threshold for secretarial-level approvals, increasing

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146 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).


148 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”).


152 50 U.S.C. § 1431(c)(2).

153 Id.


$50,000 modifications to $500,000 modifications and $25,000,000 to $150,000,000.\textsuperscript{157} However, the relief provided under Section 822 is temporary, and it is set to expire on December 31, 2023, which the government contractors must closely review.\textsuperscript{158}

\textsuperscript{157} Id.
\textsuperscript{158} Id.; see also Lyka, FY23 NDAA: Inflation Relief for DOD Contractors, PETER WITTS (Mar. 20, 2023), https://wittscpa.com/fy23-ndaa-inflation-relief-for-DOD-contractors.