

GOVERNMENT CONTRACTING: A BRIEF OVERVIEW OF THE FIELD

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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 2023 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 Supreme Court’s most recent ruling on affirmative action,⁵ the enforceability of the 2021 vaccine mandate,⁶ inflation,⁷ and security assistance to Ukraine.⁸ 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.⁹ 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,¹⁰ implying a power to obtain property and retaining the power to pay the debts of the United States¹¹ incurred by governmental acquisition of said property. As a

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 2022*, U.S. GOV’T ACCOUNTABILITY OFF. (Aug. 15, 2023), <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2022>. *But see* WatchBlog, *A Snapshot of Government-wide Contracting for FY 2021*, U.S. GOV’T ACCOUNTABILITY OFF. (Aug. 25, 2022), <https://www.gao.gov/blog/snapshot-government-wide-contracting-fy-2021-interactive-dashboard> (“In Fiscal year 2021, the federal government spent about \$637 billion on contracts, a decrease of \$54 billion from FY 2020 after adjusting for inflation.”).

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); Press Release, U.S. SMALL BUS. ADMIN., Biden-Harris Administration Sets Record-Breaking \$163 Billion in Federal Procurement Opportunities to Small Businesses (July 18, 2023) <https://www.sba.gov/article/2023/07/18/biden-harris-administration-sets-record-breaking-163-billion-federal-procurement-opportunities-small>.

⁵ *Students for Fair Admissions, Inc. v. Harvard*, 143 S.Ct. 2141 (2023).

⁶ *Georgia v. Biden*, 574 F.Supp.3d 1337, 1357 (S.D.Ga. 2021).

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

⁸ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021).

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.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.¹³ Only Congress has the power of the purse,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.¹⁵ An agency may only incur obligations that will be performed within a specific appropriations' period as set by Congress.¹⁶ The Anti-Deficiency Act¹⁷ further limits agencies, prohibiting contractual obligations in advance of or in preparation for Congressionally-provided appropriations.¹⁸ Additionally, agencies can only obligate current FY funds to meet current FY needs, absent a statutory exception.¹⁹ The Buy American Act²⁰ further limits contracts, generally requiring the agency to procure domestic materials and products.²¹

A. *The Procurement Process*

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

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

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).

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]xpensures of all public [m]oney shall be published from time to time.”); *United States v. Nicoll*, 1 Paine 646 (C.C.N.Y. 1826).

¹⁵ 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).

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)).

¹⁷ 31 U.S.C. § 1341.

¹⁸ *Id.* § 1341(a)(1)(B).

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. GOV'T ACCOUNTABILITY OFF., FUNDING OF MAINTENANCE CONTRACT EXTENDING BEYOND FISCAL YEAR (1996).
²⁰ 41 U.S.C. § 8301-8303.

²¹ *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).

²² 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.²³ Private parties then review the procurement needs and “bid” to fulfill the contract.²⁴ The agency then uniformly evaluates all bids to fulfill the solicitation against the announced criteria.²⁵ Once an agency selects a prospective contractor and awards the contract, the agency will announce the winning bid.²⁶ An unsuccessful bidder can request a debrief that the agency must provide²⁷ or dispute the contract award in a “bid protest.”²⁸ If an unsuccessful bidder protests a bid, the winning bidder must wait for the resolution of the protest.²⁹

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,”³⁰ 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.³¹ Additionally, with the 1997 Small Business Reauthorization Act,³² 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.³³

B. The Dispute Process

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

²³ The pre-solicitation notices, solicitation notices, and later award notices as well 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>.

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

²⁵ Halchin, *supra* note 21, at 2.

²⁶ *Id.*

²⁷ 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).

²⁸ 10 U.S.C. § 2305.

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.*

³² SMALL BUSINESS REAUTHORIZATION ACT, Pub. L. No. 105-135, § 603, 111 Stat. 2632.

³³ For a list of states that offer these special contracts, see State Offices for Minority and Women Business Enterprises, MINORITY BUS. DEV. AGENCY, <https://www.mbda.gov/page/state-offices-minority-and-women-business-enterprises> (last visited Sept. 14, 2023).

³⁴ *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>.

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 1921³⁹ 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 Appeals⁴² 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.

³⁶ 41 U.S.C. §1101.

³⁷ Pub. L. No. 103-355, 108 Stat. 3243.

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).

⁴² 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>.

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

⁴⁴ TUCKER ACT, CH. 359, 24 Stat. 505 (1887).

⁴⁵ 41 U.S.C. § 7104(B)(4).

⁴⁶ 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>.

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

⁴⁸ 41 U.S.C. § 7103(a)(1).

⁴⁹ EXEC. ORDER NO. 14028, 86 Fed. Reg. 93 (May 17, 2021).

experienced several significant cyberattacks, including an attack on the Colonial Pipeline, shutting down the main fuel supply line to the East Coast,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.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 *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.⁵²

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 2021.⁵³ 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.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.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.⁵⁶ As of September 8, 2023, FARSEC has received a proposed FAR rule for the

⁵⁰ 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>.

⁵¹ CENTER FOR STRATEGIC & INT’S STUD., Significant Cyber Incidents, <https://www.csis.org/programs/strategic-technologies-program/significant-cyber-incidents>.

⁵² 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/>.

⁵³ EXEC. ORDER NO. 14028, 86 Fed. Reg. 93 (May 17, 2021).

⁵⁴ *Id.*

⁵⁵ *Id.*

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

⁵⁷ FAR Open Cases Report, <https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf>.

⁵⁸ *Id.*

⁵⁹ *See National Cybersecurity Strategy*, THE WHITE HOUSE, <https://www.whitehouse.gov/wp-content/uploads/2023/03/National-Cybersecurity-Strategy-2023.pdf> (last visited Sept. 14, 2023).

⁶⁰ *Id.*

⁶¹ *See Executive Order on Improving the Nation’s Cybersecurity*, THE WHITE HOUSE, <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/05/12/executive-order-on-improving-the-nations-cybersecurity> (last visited Sept. 14, 2023).

⁶² FAR Open Cases Report, <https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf>.

⁶³ EXEC. ORDER NO. 14028, 86 Fed. Reg. 93 (May 17, 2021).

⁶⁴ Press Release, Dept. of Justice, Deputy Attorney General Lisa O. Monaco Announces New Civil Cyber-Fraud Initiative (Oct. 6, 2021).

⁶⁵ 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/>.

⁶⁶ Press Release, Dept. of Justice, Deputy Attorney General Lisa O. Monaco Announces New Civil Cyber- Fraud Initiative (Oct. 6, 2021).

that it failed to satisfy certain cybersecurity controls.⁶⁷ 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.⁶⁸ 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 2017–2021.⁶⁹ Verizon provided the government with a written self-disclosure upon learning of the issues and conducted an independent investigation and compliance review.⁷⁰ 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.”⁷¹

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.⁷² The DOD contracts with 222,000 companies, and these companies are targets for hackers trying to access sensitive data.⁷³ 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.⁷⁴ In response to the evolving cybersecurity threats, the DOD revised the framework to create CMMC 2.0 in 2021.⁷⁵ 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.”⁷⁶ 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.⁷⁷

⁶⁷ Press Release, U.S. Dep’t of Just., Cooperating Federal Contractor Resolves liability for Alleged False Claims Caused by Failure to Fully Implement Cybersecurity Controls (Sept. 8, 2023).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² Federal Government Contracting: A Resource Guide, LIBR. OF CONG. <https://guides.loc.gov/federal-government-contracting> (Aug. 1, 2014).

⁷³ Bloomberg Gov’t, *Cybersecurity for Government Contractors*, (July 7, 2022), <https://about.bgov.com/brief/cybersecurity-for-government-contractors/>.

⁷⁴ OFF. OF THE UNDER SEC’Y OF DEF., *Overview of the CMMC Program*, <https://www.acq.osd.mil/cmmc/about-us.html>.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

According to the latest DOD updates, the CMMC 2.0 may not be implemented until fall 2024,⁷⁸ 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.⁷⁹ 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.”⁸⁰ For each requirement not yet implemented, contractors must “have a plan of action and milestones.”⁸¹ 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.⁸²

On May 10, 2023, NIST released Revision 3 to SP 800-171, replacing Revision 2 upon which the CMMC 2.0 is based.⁸³ 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.⁸⁴ 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.⁸⁵ The comment period for Revision 3 closed on July 14, 2023 and comments have been posted to the Computer Security Resource Center website.⁸⁶ NIST is currently adjudicating the comments and preparing the final public draft for

⁷⁸ Cate Burgan, *Pentagon Calls on Industry to Respond to Coming CMMC 2.0 Rule*, Meritalk, <https://www.meritalk.com/articles/pentagon-calls-on-industry-to-respond-to-coming-cmmc-2-0-rule/> (Sept. 8, 2023).

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).

⁸⁰ CARNEGIE MELON UNIV., *NIST 800-171 Compliance Information*, (Aug. 31, 2021), <https://www.cmu.edu/iso/compliance/800-171/index.html>.

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.*

⁸³ Eleanor M. Ross & Jeffrey M. Chiow, *NIST updates guidelines for protecting sensitive unclassified information*, GREENBERG TRAURIG, LLP (June 7, 2023), <https://www.gtlaw.com/en/insights/2023/6/nist-updates-guidelines-for-protecting-sensitive-unclassified-info-implications-for-defense-contractors>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ Nat’l Inst. of Standards and Tech., Public Comments to Draft SP 800-171 Rev 3, Computer Security Resource Center (Aug. 16, 2023), <https://csrc.nist.gov/Projects/protecting-controlled-unclassified-information/sp-800-171/comments-draft-sp-800-171-r3>.

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

⁸⁷ Nat’l Inst. of Standards and Tech., Analysis of Public Comments to NIST SP 800-171 Revision 3 Initial Public Draft (Aug. 2023).

⁸⁸ *Students for Fair Admissions, Inc. v. Harvard*, 143 S.Ct. 2141, 2175 (2023).

⁸⁹ *Id.* at 2166–68.

⁹⁰ *Id.* at 2168–69.

⁹¹ *Ultima Servs. Corp. v. U.S. Dept. of Agric.*, No. 2:20-CV-00041-DCLC-CRW, 2023 WL 4633481, at *18 (E.D. Tenn. July 19, 2023).

⁹² 15 U.S.C. § 644(j).

⁹³ *Ultima Servs. Corp.*, 2023 WL 4633481, at *10–18.

⁹⁴ Advisory Board, SBA 8(a) Rebuttable Presumption of Social Disadvantage Violates Equal Protection, District Court Holds, 65 GOV’T CONTRACTOR ¶ 240 (Aug. 30, 2023).

⁹⁵ U.S. SMALL BUS. ASSOC., GUIDANCE FOR 8(A) PROGRAM PARTICIPANTS IN LIGHT OF THE U.S. DISTRICT COURT RULING (Aug. 18, 2023), <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program>.

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

⁹⁷ *Students for Fair Admissions, Inc. v. Harvard*, 143 S.Ct. 2141, 2176 (2023).

⁹⁸ *Guide for Writing a Social Disadvantage Narrative*, U.S. SMALL BUS. ASSOC., <https://sbaone.atlassian.net/wiki/spaces/CKB/pages/2768076819/Guide+for+Writing+a+Social+Disadvantage+Narrative> (last visited Sept. 14, 2023).

⁹⁹ EXEC. ORDER NO. 14,042, 86 Fed. Reg. 50,985 (Sept. 9, 2021).

¹⁰⁰ *Id.*

¹⁰¹ 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>.

¹⁰² Gen. Servs. Admin., *Update Regarding Executive Order 14042*, SAFTER FED. WORKFORCE (Oct. 14, 2022), <https://www.saferfederalworkforce.gov/contractors>.

¹⁰³ *Georgia v. Biden*, 574 F.Supp.3d 1337, 1357 (S.D.Ga. 2021).

¹⁰⁴ *Id.* at 1355.

¹⁰⁵ *Id.* at 1354.

¹⁰⁶ *Executive Order on Moving Beyond COVID-19 Vaccination Requirements for Federal Workers*, THE WHITE HOUSE, [https://www.whitehouse.gov/briefing-room/presidential-actions/2023/05/09/executive-order-on-moving-beyond-covid-19-vaccination-requirements-for-federal-workers/#:~:text=In%202021%2C%20based%20on%20the,disease%202019%20\(COVID%2D19\)](https://www.whitehouse.gov/briefing-room/presidential-actions/2023/05/09/executive-order-on-moving-beyond-covid-19-vaccination-requirements-for-federal-workers/#:~:text=In%202021%2C%20based%20on%20the,disease%202019%20(COVID%2D19)) (May 09, 2023).

clauses implementing EO 14042.¹⁰⁷ 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 14042.¹⁰⁸

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.¹⁰⁹ Under the 1997 Small Business Reauthorization Act,¹¹⁰ the federal government set a goal of awarding 23% of the money spent on contracts to small businesses.¹¹¹ 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....”¹¹² 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.¹¹³ However, there was still a significant increase in the number of dollars going to small businesses, even surpassing the 23% threshold.¹¹⁴

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 2021.¹¹⁵ 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.¹¹⁶ 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.¹¹⁷

¹⁰⁷ *For Federal Contractors*, SAFTER FED. WORKFORCE, <https://www.saferfederalworkforce.gov/contractors/> (last visited Sept. 14, 2023).

¹⁰⁸ *Id.*

¹⁰⁹ 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).

¹¹⁰ Small Business Reauthorization Act, PUB. L. NO. 105-135, § 603, 111 Stat. 2632.

¹¹¹ 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>.

¹¹² Basic Requirements, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/federal-contracting/contracting-guide/basic-requirements> (last visited Oct. 1, 2021).

¹¹³ Press Release, U.S. SMALL BUS. ADMIN., Biden-Harris Administration Sets Record-Breaking \$163 Billion in Federal Procurement Opportunities to Small Businesses (July 18, 2023),

[https://www.sba.gov/article/2023/07/18/biden-harris-administration-sets-record-breaking-163-billion-federal-procurement-opportunities-small#:~:text=Historically%20Underutilized%20Business%20Zone%20\(HUBZone,category%20in%20the%20program%27s%20history](https://www.sba.gov/article/2023/07/18/biden-harris-administration-sets-record-breaking-163-billion-federal-procurement-opportunities-small#:~:text=Historically%20Underutilized%20Business%20Zone%20(HUBZone,category%20in%20the%20program%27s%20history).

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 SDB, 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, SDB 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

¹¹⁸ *Small Disadvantaged Business*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/federal-contracting/contracting-assistance-programs/small-disadvantaged-business>.

¹¹⁹ Press Release, U.S. SMALL BUS. ADMIN., Biden-Harris Administration Sets Record-Breaking \$163 Billion in Federal Procurement Opportunities to Small Businesses, [https://www.sba.gov/article/2023/07/18/biden-harris-administration-sets-record-breaking-163-billion-federal-procurement-opportunities-small#:~:text=Historically%20Underutilized%20Business%20Zone%20\(HUBZone,category%20in%20the%20program%27s%20history](https://www.sba.gov/article/2023/07/18/biden-harris-administration-sets-record-breaking-163-billion-federal-procurement-opportunities-small#:~:text=Historically%20Underutilized%20Business%20Zone%20(HUBZone,category%20in%20the%20program%27s%20history) (July 18, 2023).

¹²⁰ FY2022 Small Business Procurement Scorecard, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/agency-scorecards/scorecard.html?agency=GW&year=2022> (last visited Sept. 15, 2023).

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](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>.

¹²² *FY2022 Small Business Procurement Scorecard*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/agency-scorecards/scorecard.html?agency=GW&year=2022> (last visited Sept. 15, 2023).

¹²³ *U.S. Security Assistance to Ukraine*, CONG. RSCH. SERV., <https://crsreports.congress.gov/product/pdf/IF/IF12040> (Aug. 25, 2023).

¹²⁴ *Id.*

¹²⁵ *Id.*

delivered to Ukraine as opposed to pulling weapons directly from Pentagon stocks.¹²⁶ Procurement packages also include training, equipment, and advisory efforts.¹²⁷

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,¹²⁸ 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.¹²⁹ On September 7, the DOD announced a new security package through USAI to support Ukraine’s “air defenses, artillery munitions, and other capabilities.”¹³⁰ This announcement marks the start of a contracting process with industry and partners to provide additional support to Ukraine.¹³¹

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.¹³² Federal employees on government property have been reachable by organizing efforts since the passage of the Federal Service Labor-Management Relations Statute in 1978.¹³³ However, identical organizing outreach was prohibited for federal contractors under the ban on solicitation, vending merchandise, advertising, or collecting debts on government property.¹³⁴ 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.¹³⁵ The new GSA policy is the progeny of President Biden’s efforts to encourage unionization.¹³⁶ By March 2023, the number of Federal Government employees in a union increased by nearly 20% following President Biden’s

¹²⁶ Colin Meyn & Ellen Mitchell, *U.S. announces \$1.2B Ukraine aid package ahead of counteroffensive*, THE HILL (May 9, 2023).

¹²⁷ Congressional Research Service, *U.S. Security Assistance to Ukraine* (Aug. 25, 2023).

¹²⁸ Colin Meyn & Ellen Mitchell, *U.S. announces \$1.2B Ukraine aid package ahead of counteroffensive*, THE HILL (May 9, 2023).

¹²⁹ Congressional Research Service, *U.S. Security Assistance to Ukraine* (Aug. 25, 2023).

¹³⁰ Press Release, *Biden Administration Announces Additional Security Assistance for Ukraine*, U.S. DEPT. OF DEFENSE (Sept. 7, 2023).

¹³¹ *Id.*

¹³² Federal Management Regulation; *Soliciting Union Memberships Among Contractors in GSA- Controlled Buildings*, 87 Fed. Reg. 54166 (Sept. 2, 2022).

¹³³ *See* 5 U.S.C. §§ 7101-7135 (codifying the Federal Service Labor-Management Relations Statute).

¹³⁴ 41 C.F.R. pt. 102-74 (2022).

¹³⁵ Federal Management Regulation; *Soliciting Union Memberships Among Contractors in GSA- Controlled Buildings*, 87 Fed. Reg. 54166, 54166 (Sept. 2, 2022).

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 2022.¹³⁷ 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.¹³⁸ 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.¹³⁹

F. Inflation’s Impact

In June 2022, the United States inflation rate soared to 9.1%—the highest inflation rate in forty years.¹⁴⁰ By May 2023, it has decreased to 4% and further to 3.2% by July 2023.¹⁴¹ 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 2021.¹⁴² 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.¹⁴³ 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.¹⁴⁴ 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.¹⁴⁵ 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

¹³⁷ See *The White House Task Force on Worker Organizing and Empowerment: Update on Implementation of Approved Actions*, THE WHITE HOUSE, <https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/17/the-white-house-task-force-on-worker-organizing-and-empowermentupdate-on-implementation-of-approved-actions> (last visited Sept. 15, 2023).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *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%2Dover%2Dyear%20inflation%20hits,largest%20annual%20increase%20since%201981> (stating that the U.S. experienced the largest twelve-month increase in inflation since 1981).

¹⁴¹ See *Current US Inflation Rates: 2000-2023*, U.S. INFLATION CALCULATOR, <https://www.usinflationcalculator.com/inflation/current-inflation-rates> (last visited Sept. 14, 2023).

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/>.

¹⁴⁴ *Managing Inflation in Government Contracts*, WARD & BERRY (June 7, 2022), <https://www.wardberry.com/managing-inflation-in-government-contracts/>.

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.¹⁴⁶ 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.¹⁴⁷ These clauses allow adjustment of the contract price due to increased supply, labor, and material costs.¹⁴⁸ The inflation rate has come down significantly in the recent year.¹⁴⁹ 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).¹⁵⁰

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.¹⁵¹ 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.¹⁵² This authority also extends to subcontract,¹⁵³ allowing prime contractors to request contract amendments when covered subcontractors' costs rise due to inflation.¹⁵⁴

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."¹⁵⁵ The DOD now has the ability to provide equitable adjustments to contractors for inflation-related costs.¹⁵⁶

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

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).

¹⁴⁷ 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).

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").

¹⁴⁹ See *Current US Inflation Rates: 2000-2023*, U.S. INFLATION CALCULATOR, <https://www.usinflationcalculator.com/inflation/current-inflation-rates> (last visited Sept. 14, 2023).

¹⁵⁰ H.R. 7776, 107th Cong. (2022).

¹⁵¹ 50 U.S.C. § 1431(b)-(c)(1).

¹⁵² 50 U.S.C. § 1431(c)(2).

¹⁵³ *Id.*

¹⁵⁴ See Lyka, *FY23 NDAA: Inflation Relief for DOD Contractors*, PETER WITTS (Mar. 20, 2023), <https://wittscpa.com/fy23-ndaa-inflation-relief-for-DOD-contractors>.

¹⁵⁵ 50 U.S.C. § 1431.

¹⁵⁶ H.R. 7776, 107th Cong. (2022).

\$50,000 modifications to \$500,000 modifications and \$25,000,000 to \$150,000,000.¹⁵⁷ 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.¹⁵⁸

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*; see also Lyka, *FY23 NDAA: Inflation Relief for DOD Contractors*, PETER WITTS (Mar. 20, 2023), <https://wittsopa.com/fy23-ndaa-inflation-relief-for-dod-contractors>.