

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 hiring carpet cleaning services to designing major weapons systems to producing life-saving vaccines. Fiscal Year 2024 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 after the Supreme Court’s recent ruling on Chevron deference.⁵ This memorandum discusses the impact of Loper Bright Enterprises v. Raimondo on government contracts, as well as updates on government contracts as they relate to affirmative action,⁶ inflation,⁷ 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.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

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

² Five Trends in Government Contracting for FY 2023, BLOOMBERG GOV’T (Feb. 17, 2023), <https://about.bgov.com/brief/trends-in-federal-contract-spending/>.

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, S. SMALL BUS. ADMIN., Biden-Harris Administration Awards Record-Breaking \$178 Billion in Federal Procurement Opportunities to Small Businesses (Apr. 29, 2024), <https://www.sba.gov/article/2024/04/29/biden-harris-administration-awards-record-breaking-178-billion-federal-procurement-opportunities>.

⁵ Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

⁶ Nuziard v. Minority Bus. Dev. Agency, No. 4:23-CV-00278, 2024 WL 965299, at *49–50 (N.D. Tex. Mar. 5, 2024).

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

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.

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.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 LAW* 2–9 (4th ed. 2016) (stating that lengths range from definite—either fiscal year or multiple-year—to indefinite).

¹⁶ 31 U.S.C. § 1341.

¹⁷ § 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 LAW* (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, OFF. OF FED. PROCUREMENT POL'Y, <https://www.whitehouse.gov/omb/management/office-federal-procurement-policy/#top> (last visited Sept. 17, 2024).

specific needs and criteria in a solicitation.²² Private parties then review the procurement needs and “bid” to fulfill the contract.²³ The 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 provide²⁶ or 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 sole source notices are placed on the centralized website, Sam.gov, although advertisements may be placed elsewhere in addition to this posting. *See* U.S. GEN. SERVS. ADMIN., <https://sam.gov/content/opportunities> (last visited Sept. 17, 2024) (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 Sept. 17, 2024).

²⁴ Halchin, *supra* note 21, at 2.

²⁵ *Id.*

²⁶ JetCo Solutions Team, *What You Need to Know About Debriefings for Government Contracting*, JETCO SOLS., <https://www.jetcosolutions.com/what-you-need-to-know-about-debriefings-for-government-contracting/> (last visited Sept. 17, 2024).

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 (1997).

³² 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. 17, 2024).

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), 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.³⁹ An unfavorable GAO decision leaves a disappointed bidder with two avenues: either appeal to the Board of Contract Appeals⁴⁰ or directly file suit in the

U.S. Court of Federal Claims (COFC).⁴¹ The COFC’s jurisdiction over government contracts claims comes from the Tucker Act.⁴² The COFC will take a de novo look at the procurement if it is on appeal from a GAO finding.⁴³ The bidder may also file protests directly in Federal District Court.⁴⁴ Appealing bidders from either venue may file with the United States Court of Appeals for the Federal Circuit.⁴⁵ 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.⁴⁶ The contractor may then file the claim in District Court and appeal to the Federal Circuit.

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 *Id.* § 301, 42 Stat. at 23. When it was created, the agency was known as the General Accounting Office. The name changed (but its 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. 17, 2024).

³⁹ Bidders may also appeal 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, <https://www.asbca.mil> (last visited Sept. 17, 2024).

⁴⁰ 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>.

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

⁴² Tucker Act, Ch. 359, 24 Stat. 505 (1887).

⁴³ 41 U.S.C. § 7104(B)(4).

⁴⁴ 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>.

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

⁴⁶ 41 U.S.C. § 7103(a)(1).

II. GOVERNMENT CONTRACTS AND CYBERSECURITY COMPLIANCE

A crucial concern for government contractors in 2022 and beyond is monitoring developments concerning their cybersecurity obligations.⁴⁷ 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,⁴⁸ 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.⁴⁹

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.⁵⁰

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 2021.⁵¹ 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.

On May 7, 2024, the White House updated the U.S. National Cybersecurity Strategy, as well as the first Report on the Cybersecurity Posture of the United States.⁵² The updated

⁴⁷ Exec. Order No. 14028, 86 Fed. Reg. 93 (May 17, 2021).

⁴⁸ 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>.

⁴⁹ CTR. FOR STRATEGIC & INT'S STUD., *Significant Cyber Incidents*, <https://www.csis.org/programs/strategic-technologies-program/significant-cyber-incident>.

⁵⁰ 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/insights/publications/2021/09/cybersecurity-obligations-for-government-contractors-focus-on-them>.

⁵¹ Exec. Order No. 14028, 86 Fed. Reg. 93 (May 17, 2021).

⁵² See *National Cybersecurity Strategy Implementation Plan*, THE WHITE HOUSE, <https://www.whitehouse.gov/wp-content/uploads/2024/05/NCSIP-Version-2-FINAL-May-2024.pdf> (last visited Sept. 17, 2024).

Strategy outlines 31 new initiatives under each “pillar” and reflected focus on cybersecurity issues between private and public sector entities, ransomware threats as well as software security risks.⁵³ The Report highlighted the key changes to the strategic environment in 2023 including the evolving risks to critical infrastructure, ransomware threats, supply chain susceptible to exploitation, growing market for commercial spyware and use of artificial intelligence to manage cyber risk at scale.⁵⁴ Overall, the broad scope of the updated Strategy and Report indicate the White House’s commitment to improve federal agencies’ resilience and the several opportunities for stakeholders to invest in the cybersecurity posture of the United States.⁵⁵

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.”⁵⁶ 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.⁵⁷ 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.⁵⁸

In 2024, the DOJ continued its efforts to ensure government contractors follow required cybersecurity standards. On August 22, 2024, the DOJ filed a lawsuit against Georgia Institute of Technology (Georgia Tech) and Georgia Tech Research Corp. (GTRC) alleging that the defendants failed to meet cybersecurity requirements with the Department of Defense (DOD) contracts.⁵⁹ The lawsuit alleged that Georgia Tech’s Astrolavos Lab neglected to implement several cybersecurity controls that were put in place in the lab to

⁵³ *Id.*

⁵⁴ See *2024 Report on The Cybersecurity Posture of the United States*, THE WHITE HOUSE, <https://www.whitehouse.gov/wp-content/uploads/2024/05/2024-Report-on-the-Cybersecurity-Posture-of-the-United-States.pdf> (last visited Sept. 17, 2024).

⁵⁵ *Id.*

⁵⁶ Press Release, Off. Pub. Affs., Deputy Attorney General Lisa O. Monaco Announces New Civil Cyber-Fraud Initiative (Oct. 6, 2021).

⁵⁷ 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/> (last visited Sept. 17, 2024).

⁵⁸ Press Release, Off. Pub. Affs., Deputy Attorney General Lisa O. Monaco Announces New Civil Cyber-Fraud Initiative (Oct. 6, 2021).

⁵⁹ Press Release, U.S. Att’ys Off., United States Files Suit Against the Georgia Institute of Technology and Georgia Tech Research Corporation Alleging Cybersecurity Violations (Aug. 22, 2024).

comply with DOD cybersecurity requirements until at least February 2020.⁶⁰ Further, the complaint alleged that the university did not have the required antivirus software installed on the lab’s computers until December 2021. The lawsuit alleges that Georgia Tech and GTRC submitted a fraudulent cybersecurity assessment score to the DOD.⁶¹ The complaint made no allegation that a cyber incident occurred or that there was any breach of information or data leak.⁶² Yet, Georgia Tech and GTRC knowingly made false statements about its cybersecurity suggesting False Claims Act (FCA) liability.⁶³ This case illustrates that the Government will focus on its contractors compliance obligations and enforcing the standards with legal action even with the roll out of the Cybersecurity Maturity Model Certification (CMMC) framework.

C. *Department of Defense*

To fully appreciate the government contracts landscape, a look at the agency responsible for the most contracts—the DOD—is imperative.⁶⁴ The DOD contracts with 222,000 companies, and these companies are targets for hackers trying to access sensitive data.⁶⁵ 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 CMMC framework in 2020 to address its concern that defense contractors have not adequately implemented their cybersecurity obligations.⁶⁶ In response to the evolving cybersecurity threats, the DOD revised the framework to create CMMC 2.0 in 2021.⁶⁷ 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.”⁶⁸ 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.⁶⁹

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ LIBR. OF CONG., *Federal Government Contracting: A Resource Guide*, <https://guides.loc.gov/federal-government-contracting> (last updated Nov. 2023).

⁶⁵ BLOOMBERG GOV’T, *Cybersecurity for Government Contractors*, (July 7, 2022), <https://about.bgov.com/brief/cybersecurity-for-government-contractors/>.

⁶⁶ U.S. DEP’T OF DEF., *About CMMC*, <https://dodcio.defense.gov/CMMC/About/> (last visited Sept. 17, 2024).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

In August 2024, the DOD published a proposed rule to implement the CMMC 2.0 program that would effectively require all government contracts to incorporate the CMMC 2.0 program.⁷⁰ The DOD’s rule is consistent with the previous rule released on December 26, 2023, which set forth requirements for the implementation of CMMC 2.0 program.⁷¹ The 2024 rule provides additional color on how the CMMC program will be implemented and introduces new clauses.⁷²

According to the 2023 rule, contractors will be required to be certified at three levels including Level 1 for safeguarding Federal Contract Information (FCI) for contractors that handle FCI, Level 2 for contractors broadly safeguarding Controlled Unclassified Information (CUI) and Level 3 for high-level protection of CUI.⁷³ Contractors will need to submit self-assessment scores to the Supplier Performance Risk System (SPRS) under Level 1.⁷⁴ Level 2 assessment will be completed by SPRS and Level 3 assessment would be completed by the DOD.⁷⁵ This aims to reduce the burden on smaller contractors while still maintaining cyber-security standards. It also ensures that more sensitive information is protected with higher assurance. The rule outlines the clause DFARS 252.204-721 which covers DOD contractors and that they must comply with the level specified in their respective contract.⁷⁶ The rule also said that CMMC 2.0 aligns more closely with the National Institute of Standards and Technology’s (NIST) cyber security standards, particularly NIST SP 800-171 for Level 2 and NIST SP 800-172 for Level 3.⁷⁷ This alignment helps streamline the compliance processes. In May 2024, the NIST published final versions of Special Publications (SP) 800-171 Revision, Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations where it introduced “organization defined parameters” to make NIST security controls more flexible by allowing agencies to specify values for parameters within the security controls.⁷⁸

The most recent rule from August 2024 brought further refinements and clarifications to the CMMC 2.0 framework.⁷⁹ The rule proposed a standard contract clause to be included in

⁷⁰ Defense Acquisition Regulations System, 89 Fed. Reg. 158 (Aug. 15, 2024).

⁷¹ Cybersecurity Maturity Model Certification Program, 88 Fed. Reg. 89,058 (Dec. 26, 2023).

⁷² Defense Acquisition Regulations System, 89 Fed. Reg. 158 (Aug. 15, 2024).

⁷³ Evan C. Williams, Jason Coffey, & Adam S. Hickey, *US DOD Proposes Final Rule for Cybersecurity Maturity Model Certification (CMMC)*, MAYER BROWN (Jan. 18, 2024), <https://www.mayerbrown.com/en/insights/publications/2024/01/us-dod-proposes-final-rule-for-cybersecurity-maturity-model-certification-cmmc>.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ Cybersecurity Maturity Model Certification Program, 88 Fed. Reg. 89,058 (Dec. 26, 2023).

⁷⁸ Ron Ross & Victoria Pillitteri, *Protecting Controlled Unclassified Information in Nonfederal Systems and Organizations*, NIST U.S. DEP’T OF COM. (May 2024), <https://nvlpubs.nist.gov/nistpubs/SpecialPublications/NIST.SP.800-171r3.pdf>.

⁷⁹ Gary S. Ward, Kara M. Sacilotto, Tracye Winfrey Howard, Megan L. Brown, Jacqueline F. Brown, Lisa Rechden, Vaibhavi Patria, *CMMC 2.0 Updated: DOD Proposed Rule Introduces Standard Terms for Contracts Subject to CMMC 2.0, Including Yet Another 72-Hour Notification Requirement*,

all contracts covers under DFARS 252.204-7021 to provide notice to contractors.⁸⁰ Under DFARS 252.204-7021(b)(4) contractors will have to notify within 72 hours of “any lapses in information security” to their contracting officers.⁸¹ This amorphous term is undefined in the rule which could lead to more ambiguity for contractors as they follow through with self-reporting mechanisms.⁸² This requirement is also broader than the DFARS 252.202-7012 clause to report “cyber incidents”, which was defined in scope, within 72 hours.⁸³ The August rule also refined the requirements for the 3 levels.⁸⁴ Specifically, contractors in Level 1 will need to update self-assessment yearly so long as there is no change otherwise.⁸⁵ Contractors in Levels 2 and 3 will have to update the self-assessment in no more than three years so long as there is no change otherwise.⁸⁶ These updates to DFARS 252.204-7021 flows down to subcontractors at all tiers but raises the question of how prime contractors will ensure subcontractors comply with CMMC 2.0 requirements.⁸⁷ The phased out roll out of CMMC 2.0 will begin once these two rules are finalized with expectations of the roll out in 2025.⁸⁸

III. GOVERNMENT CONTRACTS IN THE NEWS

A. *Affirmative Action in Government Contracting*

Less than a year after the Supreme Court ruled that Harvard’s affirmative action program violated the Equal Protection Clause in *Students for Fair Admissions, Inc. v. Harvard* a federal judge in Texas held that Minority Business Development Act of 2021 violates the Fifth Amendment’s guarantee of equal protection.⁸⁹ The Minority Business Development Act (MBDA) of 2021 supports Minority Business Enterprises (MBE) by providing them access to

WILEY REIN LLP (Aug. 15, 2024), <https://www.wiley.law/alert-CMMC-2-0-Update-DOD-Proposed-Rule-Introduces-Standard-Terms-for-Contracts-Subject-to-CMMC-2-0-Including-Yet-Another-72-Hour-Notification-Requirement>.

⁸⁰ *Id.*

⁸¹ Meghan D. Doherty, Toghrul Shukurulu, Brian E. Finch, Aaron S. Ralph, *The Department of Defense Issues New Proposed Rule Implementing Contractual Requirements Related to CMMC 2.0*,

PILLSBURY WINTHROP SHAW PITTMAN LLP (Aug. 19, 2024), <https://www.pillsburylaw.com/en/news-and-insights/dod-cmmc2-proposed-rule.html>.

⁸² *Id.*

⁸³ TRADE PRACTITIONER, *DoD Advances CMMC: Key Takeaways from the Proposed August 2024 DFARS Rule*, SQUIRE PATTON BOGGS (Sept. 11, 2024),

<https://www.tradepractitioner.com/2024/09/dod-advances-cmmc-key-takeaways-from-the-proposed-august-2024-dfars-rule/>.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *See Nuziard v. Minority Bus. Dev. Agency*, No. 4:23-CV-00278, 2024 WL 965299, at *49–50 (N.D. Tex. Mar. 5, 2024).

capital, markets and contracts through public and private sector programs, policy and research.⁹⁰ The Act defines an MBE as one that has “socially or economically disadvantaged” business owners.⁹¹ According to the MBDA, the term “socially or economically disadvantaged individual” refers to individuals who have been subjected to racial or ethnic prejudice.⁹²

The plaintiffs alleged that the MBDA is unconstitutional because it affords preferential treatment to certain racial minority groups that they did not belong to.⁹³ According to the *Students for Fair Admissions* decision, the court applied strict scrutiny to determine whether the racial classifications under the MBDA furthers a compelling government interest and whether the classification is narrowly tailored to achieve those interests.⁹⁴ The Agency was unable to determine a compelling government interest based on specific acts of past discrimination and that the race based presumption was under-inclusive and overinclusive when it arbitrarily excluded many MBE owners from the Middle East, North Africa and North Asia.⁹⁵ The court held that the MBDA’s presumption was based on racial stereotypes and enjoined the MBDA from using it when evaluating MBE applications.⁹⁶

This decision impacts government contractors who no longer would benefit from belonging in certain racial groups. Unlike in the *Ultima* decision where the Small Business Administration required participants to submit a “social disadvantage narrative” addressing the questions around their social or economic disadvantage claim, the MBDA decided to forgo racial considerations when vetting MBEs and MBEs had to sign a form under the penalties of perjury attesting to their disadvantage making them an MBE.⁹⁷ It is yet to be seen how other agencies will continue to defend their DEI initiatives and employment decisions of government contractors.

B. Government Contracts and Small Businesses Prioritization

In 2023, the Biden-Harris Administration expanded small business opportunities by awarding an all-time high 28.4% of federal contract dollars to small business—an increase of

⁹⁰ *The Minority Business Development Agency: An Overview of Its History and Programs*, CONG. RSCH. SERV. (June 6, 2024), <https://crsreports.congress.gov/product/pdf/R/R46816>.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *See Nuziard*, 2024 WL 965299, at *5.

⁹⁴ *Students for Fair Admissions, Inc. v. Harvard*, 143 S. Ct. 2141, 2175 (2023).

⁹⁵ *Nuziard*, 2024 WL 965299, at *33.

⁹⁶ *Nuziard*, 2024 WL 965299, at *36–37.

⁹⁷ *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); U.S. SMALL BUS. ASSOC., *8(A) Business Development* (Aug. 18, 2023), <https://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program>; Julian Mark, *To Comply with Court, Federal Agency Lets White People Claim Social Disadvantage*, WASH. POST (Apr. 3, 2024), <https://www.washingtonpost.com/business/2024/04/03/mbda-disadvantage-form/>.

\$15.7 billion from the previous fiscal year.⁹⁸ President Biden’s commitment to improving access to capital for individuals from underrepresented communities is reflected with making Empower to Grow program accessible to areas with these communities. Such a program is focused on revitalizing the 7(j) program to get small businesses contract-ready, build a diverse supplier base to win federal contracts.⁹⁹ Upgrades to the program include “customizable one-on-one trainings” and “networking and matchmaking events from government agencies and prime contractors.”¹⁰⁰

2023 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. For the third consecutive year, SDB spending exceeded its 12% goal, the second time in history. This success reflects the upwards trend to achieve President Biden’s SDB goal of 15% by FY 2025.¹⁰¹

While 2023 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.¹⁰² In 2023, the federal government had contracts with 61,298 small businesses, a slight reduction compared to the 62,670 in 2022.¹⁰³ 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.¹⁰⁴

C. *Security Assistance to Ukraine*

The United States has been a leading provider of security assistance to Ukraine since

⁹⁸ Press Release, S. Small Bus. Admin., Biden-Harris Administration Awards Record-Breaking \$178 Billion in Federal Procurement Opportunities to Small Businesses (Apr. 29, 2024), <https://www.sba.gov/article/2024/04/29/biden-harris-administration-awards-record-breaking-178-billion-federal-procurement-opportunities>.

⁹⁹ Press Release, S. Small Bus. Admin., SBA Announces Empower to Grow, a Revitalization of the 7(j) Training Program to Enhance Small Disadvantaged Business Contract Readiness (Jan. 25, 2024), <https://www.sba.gov/article/2024/01/25/sba-announces-empower-grow-revitalization-7j-training-program-enhance-small-disadvantaged-business>.

¹⁰⁰ *Id.*

¹⁰¹ Press Release, S. Small Bus. Admin., Biden-Harris Administration Awards Record-Breaking \$178 Billion in Federal Procurement Opportunities to Small Businesses (Apr. 29, 2024), <https://www.sba.gov/article/2024/04/29/biden-harris-administration-awards-record-breaking-178-billion-federal-procurement-opportunities>.

¹⁰² *Id.*

¹⁰³ *FY2023 Small Business Procurement Scorecard*, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/agency-scorecards/scorecard.html?agency=GW&year=2023> (last visited Sept. 17, 2024).

¹⁰⁴ *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.”)

Russia launched its renewed invasion in 2022.¹⁰⁵ Already, the Biden Administration has committed more than \$52 billion in security assistance since February 2022.¹⁰⁶ This amount includes \$18 billion for the DOD’s Ukraine Security Assistance Initiative (USAI).¹⁰⁷ Under the USAI, the United States purchases weapons from partners and defense contractors to then be delivered to Ukraine as opposed to pulling weapons directly from Pentagon stocks.¹⁰⁸ Procurement packages also include training, equipment, and advisory efforts.¹⁰⁹

The Biden Administration and the DOD have maintained commitment to providing long- term support to Ukraine through the USAI in FY 2024. On May 22, 2024, the Biden administration pledged \$2.3 billion in long-term military assistance to Ukraine under the USAI,¹¹⁰ and on April 17, the Administration passed a \$61 billion supplemental funding for Ukraine.¹¹¹

D. *Impact of the Reversal of Chevron Deference*

On June 28, 2024, the Supreme Court overruled its decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, to evaluate whether a government statute permitted an agency’s action.¹¹² Under *Chevron*, the agency had the deference to interpret the construction of the statute.¹¹³ In *Loper Bright Enterprises v. Raimondo*, the Court concluded that the courts would exercise independent judgment to determine an agency’s action and whether it accords with the statute.¹¹⁴ Courts now must turn to the precedent set in *Skidmore v. Swift & Co.* to determine the best interpretation of a statute where they can value an agency’s informed decision of statute without it necessarily being the controlling interpretation.¹¹⁵ Yet it is uncertain how courts should give “respect” to the “informed decision judgment of the Executive Branch” and how that is unlike the courts deferring to the agency for permissible interpretations of the law.

This decision could mean less regulatory whiplash for government contractors. Government contractors would litigiously challenge agency decisions more frequently to interpret statutes as how they would. Specifically, regulation of government contractors by the

¹⁰⁵ *U.S. Security Assistance to Ukraine*, CONG. RSCH. SERV., <https://crsreports.congress.gov/product/pdf/IF/IF12040> (May 22, 2024).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *U.S. Giving Ukraine \$300 Million in Weapons Even As Pentagon Lacks Funds to Replenish Stockpile*, CBS NEWS (Mar. 15, 2024, 11:33 AM), <https://www.cbsnews.com/news/ukraine-aid-300-million-weapons-ammunition-pentagon/>.

¹⁰⁹ *U.S. Security Assistance to Ukraine*, CONG. RSCH. SERV., (May 22, 2024).

¹¹⁰ Oren Liebermann, *US Announces \$2.3 Billion Military Aid Package for Ukraine*, CNN (July 03, 2024), <https://www.cnn.com/2024/07/03/politics/us-ukraine-military-aid/index.html>.

¹¹¹ H.R. 8035, 118th Cong. (2023).

¹¹² *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

¹¹³ *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

¹¹⁴ *Loper Bright*, 144 S. Ct. at 2273.

¹¹⁵ *Id.* at 2262–63; *id.* at 2309 (Kagan, J., dissenting) (“[T]he majority makes clear that what is usually called *Skidmore* deference continues to apply.”).

Federal Acquisition Regulatory (FAR) Council could be revised.¹¹⁶ Federal Circuit has long held that the FAR was entitled to Chevron deference to fill in the gaps in statutes that impose restrictions on government contractors.¹¹⁷ Agencies may also take steps to avoid litigation by not putting forward rules to interpret statutes which could mean that ambiguous clauses from statutes end up in government contracts.¹¹⁸ Consequently, government contractors may be in a position to interpret these terms without the benefit of the agency. The regulatory environment post-*Loper Bright* may be one of uncertainty.

The Federal Circuit has long held that commercial contract principles are leaned on to interpret contractual ambiguities.¹¹⁹ Specifically, the Federal Circuit applies the rule of “contra proferentem,” which means that if a rule can be understood to have two meanings, the court would defer to the meaning argued by the government contractor rather than the government.¹²⁰ Consequently, post-*Loper Bright* courts might be looking more towards how the Federal Circuit has applied traditional contract interpretations to contractual ambiguities. The decision in *Loper Bright* may not affect government contracts in the short term, but only time will tell how government contracts in the long term could be affected when federal statutes are interpreted by the courts.

E. Inflation’s Impact

By the end of 2023, the United States inflation rate stabilized after increasing sharply in recent years.¹²¹ By March 2024, it had decreased to 3.5% and then to 2.5% by August 2024.¹²² However, despite this recent decline from record highs, there has been incredible volatility, causing a continuation of the inflation-related problems facing government contracts since 2021.¹²³

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

¹¹⁶ Eric S. Crusius & David S. Black, *The Impact of Chevron Reversal on Government Contracting*, HOLLAND & KNIGHT (July 11, 2024), <https://www.hklaw.com/en/insights/publications/2024/07/the-impact-of-chevron-reversal-on-government-contracting>.

¹¹⁷ *Brownlee v. DynCorp.*, 349 F.3d 1343, 1354 (Fed. Cir. 2003) (citing *Info. Tech. & Applications Corp. v. United States*, 316 F.3d 1312, 1321–22 (Fed. Cir. 2003); *Newport News Shipbuilding and Dry Dock Co. v. Garrett*, 6 F.3d 1547, 1552 (Fed. Cir. 1993).

¹¹⁸ Crusius & Black, *supra* note 116.

¹¹⁹ Sandeep N. Nandivada, *The End of Chevron Deference: What It Means for Government Contractors*, MORRISON FOERSTER (July 3, 2024), <https://govcon.mofo.com/topics/the-end-of-chevron-deference-what-it-means-for-government-contractors>.

¹²⁰ *Id.*

¹²¹ Alicia Wallace, *Inflation Is Nearly Back to Normal. But High Prices Have Changed Americans’ Lives*, CNN (Dec. 23, 2023), <https://www.cnn.com/2023/12/27/economy/inflation-2023-impacts-americans/index.html>.

¹²² See *Current US Inflation Rates: 2000-2024*, U.S. INFLATION CALCULATOR, <https://www.usinflationcalculator.com/inflation/current-inflation-rates> (last visited Sept. 17, 2024).

¹²³ *Id.*

collaborating with the Department of Defense (DOD).¹²⁴ 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.¹²⁵ 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.¹²⁶ This authority also extends to subcontract,¹²⁷ allowing prime contractors to request contract amendments when covered subcontractors’ costs rise due to inflation.¹²⁸ The authority was expected to end in December 31, 2023, but was extended with Section 824.¹²⁹ Section 824 extends the inflation relief program, until December 31, 2024, and allows DOD contractors to adjust FFP contracts with economic price adjustment consistent with FAR Part 16.203-1 and 16.203-2 (Section 826).¹³⁰ Section 826 is titled “Modification of Contracts and Options To Provide Economic Price Adjustments” and empowers agencies to use the contracts adjusted with economic price adjustments when there is concern over stability in labor market conditions.¹³¹ Overall, increasing prices and inflation have exacted a toll on every sector of the economy, including federal contractors, but the government continues to seek solutions.

¹²⁴ H.R. 7776, 107th Cong. (2022).

¹²⁵ 50 U.S.C. § 1431(b)-(c)(1).

¹²⁶ 50 U.S.C. § 1431(c)(2).

¹²⁷ *Id.*

¹²⁸ See Lyka, *FY23 NDAA: Inflation Relief for DOD Contractors*, PETER WITTS (Mar. 20, 2023), <https://wittscpa.com/fy23-ndaa-inflation-relief-for-DOD-contractors>.

¹²⁹ See National Defense Authorization Act for Fiscal Year 2024, Pub. L. No. 118-31, 137 Stat. 136 (Dec. 22, 2023).

¹³⁰ *Id.*

¹³¹ H.R. 2670, 118th Cong. (2023).