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The Past is Prologue: Current Trends in Government Contract Spending Over the Past Five Years – GAO Issues Trend Analysis Report

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In its March 9, 2017 report entitled, "Contracting Data Analysis – Assessment of Government-Wide Trends", GAO No. GAO-17-244SP [i] (the "Report"), GAO has found that defense obligations for products and services decreased by a remarkable thirty-one percent (31%) between FYs 2011 and 2015. This drop from $399 billion to $274 billion on the defense side ran in significant contrast to civilian side obligations, which remained relatively flat over the same duration. As depicted in the following chart, included in the Report, the light blue columns on the left show the dramatic reduction in defense spending versus the dark blue columns on the right which show a relatively consistent, flat curve.

Figure 1: Defense and Civilian Agency Obligation on Contracts, Fiscal Years 2011-2016

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A. Contract Type

Some of the more significant and interesting highlights from the Report, includes the fact that federal agencies continued to use fixed price contracts (as opposed to cost plus or Time and Materials ("T&M")) between 2011 and 2015 for an average of sixty-three percent (63%) of the obligations. Fixed price contracts are the preferred contract vehicle, in comparison with T&M or cost plus contracts, as they fix the governments liability and give the agency a "known" cost up front (subject to changes and claims of course).

When averaging the defense and civilian sides, GAO concluded that while federal agencies acquired roughly $438 billion in products and services in FY 2015, this represented a nearly 24% reduction from FY 2011 spending. Much of this reduction arose due to the 2013 FY sequestration issues arising from the dispute between the Obama Administration and Congress on passing a budget.

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What is not clear from this data is the type of firm fixed price contracting used, *e.g.,* sealed bid, best value (including low cost, technically acceptable ("LCTA"), and other types of negotiated procurement on the best value continuum). There is also little discussion on the recent expansion in the use of LCTA contracts, as well as the more recent push by congress to limit the use of LCTAs.

B. Outsourcing of Work

Another significant datapoint in the GAO report was the level of use of services contracts in which the government outsources work, particularly technical work, to outside vendors. For example, professional support services were the largest spending category for both defense and civilian agencies, representing approximately 51% and 60%, respectively, as a percentage of overall obligations. On the DoD side, the Army and Air Force were responsible for over 60% of DoD's service contract spending while the Departments of Energy, Health & Human Services, NASA, Homeland Security and Veteran's Affairs *each* obligated over $10 billion in spending on service-related contracts.

This heightened spending on services continues a trend we have observed relating in no small part to attrition of qualified, experienced government personnel due to retirement. The baby boomers are leaving government and leaving a significant void that is difficult to fill. In lieu of replacing those mid- and high-level personnel, the Government has either hired low-level replacements from the realm of universities or gone to outside service providers, namely professional services organizations and contractors. On the former, these individuals often lack the knowledge and experience to perform the work of those they are replacing or do not have the necessary warrant of authority to bind the government. As for the latter, in addition to the budgetary issues associated with such outsourcing, we also have the issue of contract personnel approaching, and possibly even performing, inherently governmental functions. For example, on numerous contracts in which we have participated we've seen a Contracting Officer with little knowledge of the contract in question or understanding of how that contract is to be performed being forced to rely on outside contractors to perform analyses and "draft" decisions for the Contracting Officer on, by way of example, change orders and decision documents arising from claims. This is not the way the government contracting system was devised, but it the way it has developed. This raises real questions in today's world and will no doubt have future impacts on contracts and disputes.

C. Limitations on Competition – Other Than Full & Open Competition

Another significant trend is the fact that agencies continue to make significant awards, particularly at the DoD, through non-competitive means. During the 2011-2015 time period, DoD reduced its rate of competition from roughly 58 to 55%. This was viewed by GAO as arising predominantly from major weapons systems acquisitions where competition is not necessarily economically reasonable given the

long lifecycle of such systems. In contrast, civilian agencies competed roughly 80% of their total contracts for products and services in FY 2015, up from 76% in 2011. That being said, concerns arising from sole source and other than full and open competition procurements continue to exist. GAO has repeatedly raised issues about the lack of open competition, including agencies using urgent and compelling basis for such noncompetitive awards without adequate justification. *See e.g.,* GAO Report Nos. GAO-14-204; GAO-10-833; GAO-13-325.

D. Small Business Participation & Goals Met

Interestingly, the government generally met its small business set aside and participation goals. Most agencies met or exceeded those goals for FY 2015 and overall small businesses received almost $100 billion in contract obligations in that fiscal year. While an excellent result, we continue to see concerns arising from the small business realm. With the opportunities presented for small businesses to gain access to limited competition and sole source set aside contracts also comes the opportunity for fraud and abuse. The Obama Administration made it a mission to root out such fraud and abuse, with a seemingly endless number of news reports on False Claims Act ("FCA") and debarment efforts being brought against small business which abused the rules and large businesses attempting to use shams or other efforts to improperly gain access to those set asides. One need look no further than the news to see that there were a number of high profile reports under the Obama regime in which large businesses under state and local contracts with small business participation goals tied to federal grant monies were found guilty of civil and criminal FCA violations. How the Trump administration addresses this issue will be of significant interest to the government contracts world at large.

E. IDIQ Contract Usage

While the Report contains many other interesting facts and findings, the last to be discussed herein is the significant uptick in agencies using IDIQ (Indefinite Delivery, Indefinite Quantity) contracts to deliver services and products. Under an IDIQ contract, the Agency "prequalifies" or preselects a limited range of offerors who are later awarded sole source or, through limited completion of those prequalified, task or job orders for work. GAO found that, between 2011 and 2015, federal agencies obligated almost two-thirds of total contract obligations via fixed price contracts versus the remaining one-third being cost-type contracts. GAO found that in the realm of IDIQ contracts, roughly half of all contracts awarded were through those vehicles. We have seen this trend continue to increase, with more and more contracts awarded as an "umbrella" IDIQ and then task orders or work orders issued under the overall contract. Given the recent issues with GAO losing and then regaining its bid protest jurisdiction on task order contracts, as well as Congress's raising the floor from which task order protests can be filed at GAO, it appears clear that agencies are using IDIQ contracts to reduce the risk of being susceptible to bid protests, thereby reducing the "distraction" of having to litigate (at least at GAO) bid protests. While the law, the restriction on Task Order-based protests runs counter to the idea of due process and having administrative procedures to address procurement errors and mistakes.

F. What Does The Future Hold?

What is the future trend? With the Trump administration, this question is the big one at hand in government contracting (as well as other areas no doubt). A lot remains to be seen, but Mr. Trump has already announced that he wants to significantly increase the DoD budget and also address the failing infrastructure in the U.S. If he is successful in either or both of these efforts, the downward curve on DoD spending and flat curve on Civilian Spending (at least as relates to Department of Transportation, the FAA and other related agencies) should see a significant increase or uptick. Whether this happens next year or well in the future remains to be seen. What is clear is that Agencies have a lot of work to do to meet their obligations, and while the current trends are in some flux, they must continue to meet their obligations under applicable laws and regulations.

[1] A copy of the report is available at http://www.gao.gov/products/GAO-17-244SP.