

# An Introduction to U.S. Procurement Part I

Professor Christopher Yukins  
George Washington University Law School  
Washington DC

Tuesday – Thursday  
December 7-9, 2020  
University of Paris



# Schedule

Monday-Tuesday

- 14:00-15:30

- 15:30-16:30

Break/Preparation

- 16:30-18:00

Wednesday

- 14:00-15:00

- 15:00-16:00

Break/Preparation

- 16:00-18:00

# Introduce Yourself

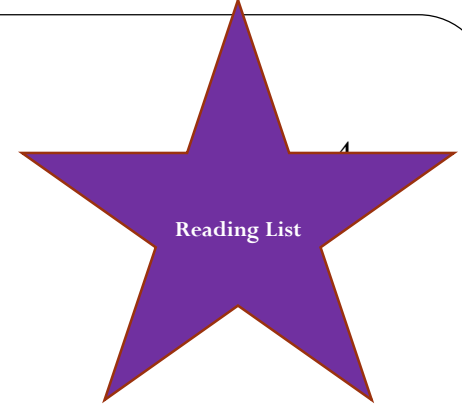
Please send an email to Professor Yukins,  
[cyukins@law.gwu.edu](mailto:cyukins@law.gwu.edu), with

- (1) your name and email address,
- (2) your academic program, and
- (3) a quick summary of your background and goals.

Professor Christopher Yukins  
serves as co-director of the  
government procurement law  
program at George Washington  
University Law School



# Readings & Videos



- Christopher R. Yukins, *The U.S. Federal Procurement System: An Introduction* (UrT 2017), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3063559](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063559).
  - **Video: An Introduction to U.S. Procurement**, by Prof. Christopher Yukins
- Steven L. Schooner, *Desiderata: Objectives for a System of Government Contract Law* (PPLR 2002), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=304620](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=304620)
- Christopher R. Yukins, *A Versatile Prism: Assessing Procurement Law Through the Principal-Agent Model* (PCLJ 2010), <https://ssrn.com/abstract=1776295>
- Johannes Schnitzer & Christopher Yukins, *Combatting Corruption in Procurement*, in UNOPS: Future-Proofing Procurement 26-29 (2015), [https://content.unops.org/publications/ASR/ASR-supplement-2015\\_EN.pdf?mtime=20171214185135](https://content.unops.org/publications/ASR/ASR-supplement-2015_EN.pdf?mtime=20171214185135)
  - **Video: Fighting Corruption in Procurement** (40:12) – in this video excerpted from GWU Law School’s “[Foreign Government Contracting](#)” course, Professor Christopher Yukins discusses common patterns and strategies in fighting corruption in public procurement around the world.
  - **Video: Corporate Compliance** (7:50) – in this video excerpted from GWU Law School’s “[Foreign Government Contracting](#)” course, Professor Christopher Yukins discusses corporate compliance requirements and strategies, from around the world.
- Christopher Yukins & Allen Green, *International Trade Agreements and U.S. Procurement Law* (2018). Chapter 9 to *The Contractor’s Guide to International Procurement* (ABA 2018) (Erin Loraine Felix & Marques Peterson, eds.), <https://ssrn.com/abstract=3443244>
  - **Video: Protectionism – Part I** (20:14): In this excerpt from GWU Law’s “[Foreign Government Contracting](#)” seminar, Professor Yukins discusses the core concepts in protectionism, U.S. barriers to foreign vendors and key international agreements to open procurement markets.
  - **Video: Protectionism – Part II** (13:27): In this excerpt, also from GWU Law’s “[Foreign Government Contracting](#)” seminar, Professor Yukins discusses key issues in U.S. protectionism, from the “walled garden” of the Trade Agreements Act to reciprocity and the U.S.-Mexico-Canada-Agreement (USMCA).
  - **Video: Protectionism – Part III** (6:21): In this final excerpt, Professor Yukins discusses special issues in protectionism and national security, such as the Reciprocal Defense Procurement Agreements between the U.S. and its allies, and the deference afforded national security interests under international trade agreements on procurement.

# George Washington University Law School



**Classroom and distance learning in  
public procurement law and policy, for  
students in law and business**

Government Procurement Law Program  
Established 1960



# Introduction to George Washington University Law School – Public Procurement Law Program (JD, LLM and MSL/Government Contracts)



Steven  
Schooner



Joshua Schwartz



Jessica Tillipman





# Procurement Law Centers: 2000



# Procurement Law Centers Today







# Webinar – Delivering the Vaccine: Procurement's Challenge

10 December 2020

9 am Eastern / 14:00 GMT / 15:00 CET

Information and Registration:

<https://publicprocurementinternational.com/webinar-delivering-the-vaccine/>



LAW

# KCL-GWU Symposium — Conflicts in Public Contract Administration — March 22, 2021

Because of the coronavirus threat this program was rescheduled to March 2021.

## *Conflicts in Public Contract Administration: Shared Lessons*



King's College, London – George Washington University Law School Annual Transatlantic Symposium on Public Procurement Law – King's College, London – March 16, 2020 – 10:00 to 20:00

Until now, procurement reform internationally has centered on



contract *formation*, because of the difficult political, legal and economic issues that surround the award of any public contract. For the most part, *contract administration* and its inevitable disputes (and fraud) have been ignored. This symposium seeks to remedy that, by bringing together judges, lawyers, academics and experts from both sides of the Atlantic, to share lessons learned and ways forward for a sound approach to contract administration.

Information:

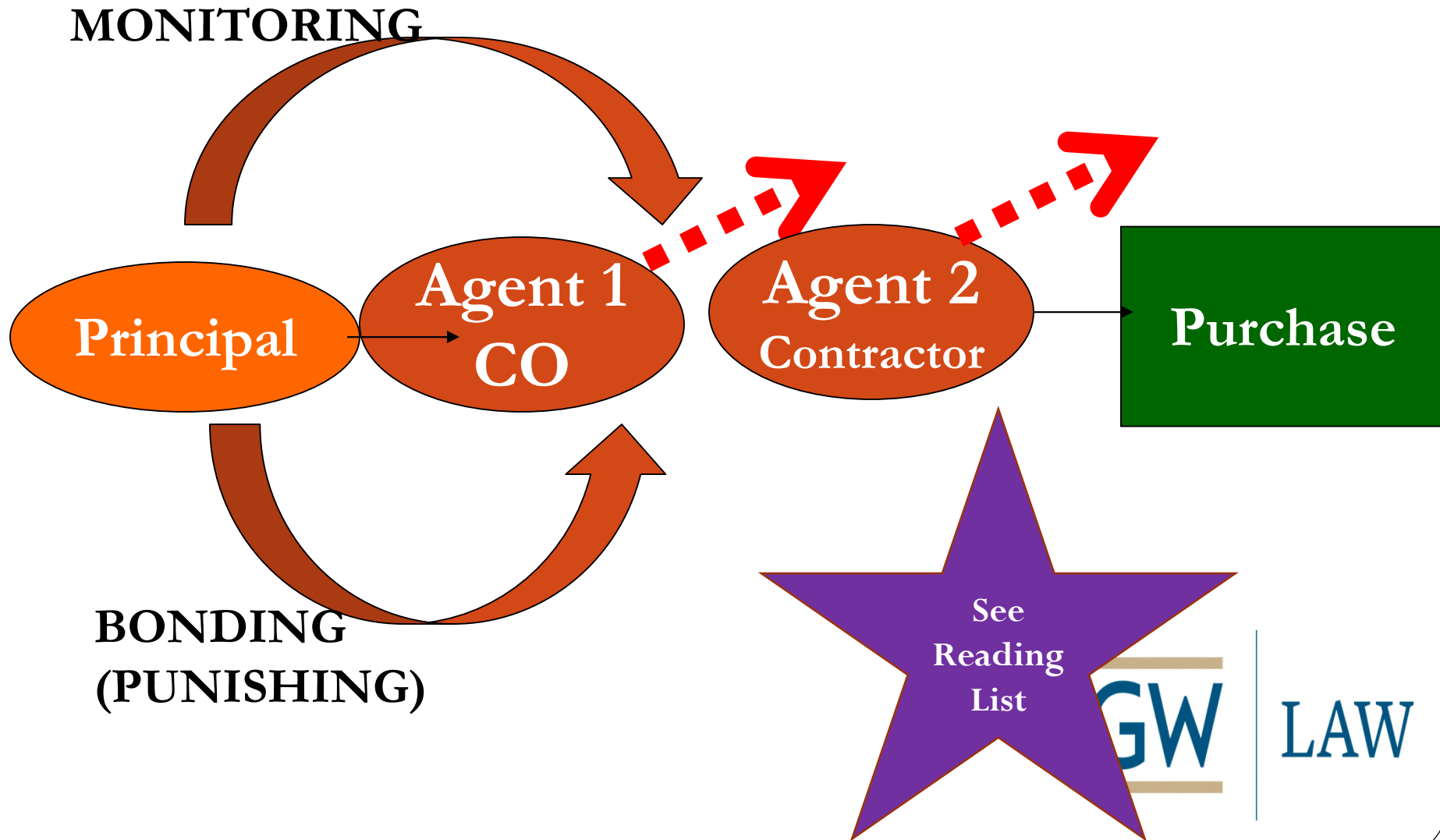
<https://publicprocurementinternational.com/kcl-gwu-annual-symposium-contract-administration-march-22-2021/>

- ***Transparency***
- ***Integrity***
- ***Competition***
- **Uniformity**
- **Risk Avoidance**
- **Wealth Distribution -- Socioeconomic**
- **Best value**
- **Efficiency (administrative)**
- **Customer Satisfaction**

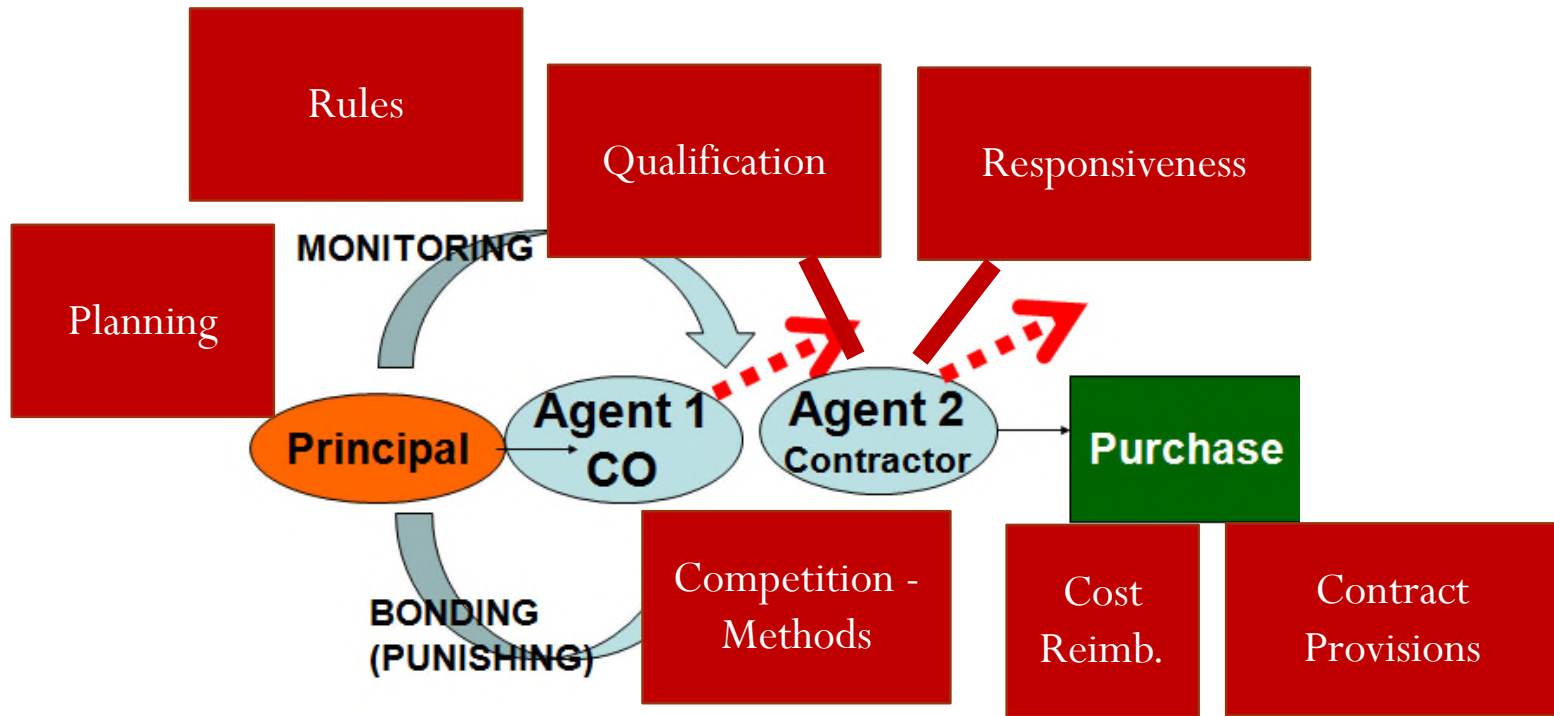


# What is Procurement: Pathologies and Processes

# Principal-Agent Model



# Processes



# The United States . . .

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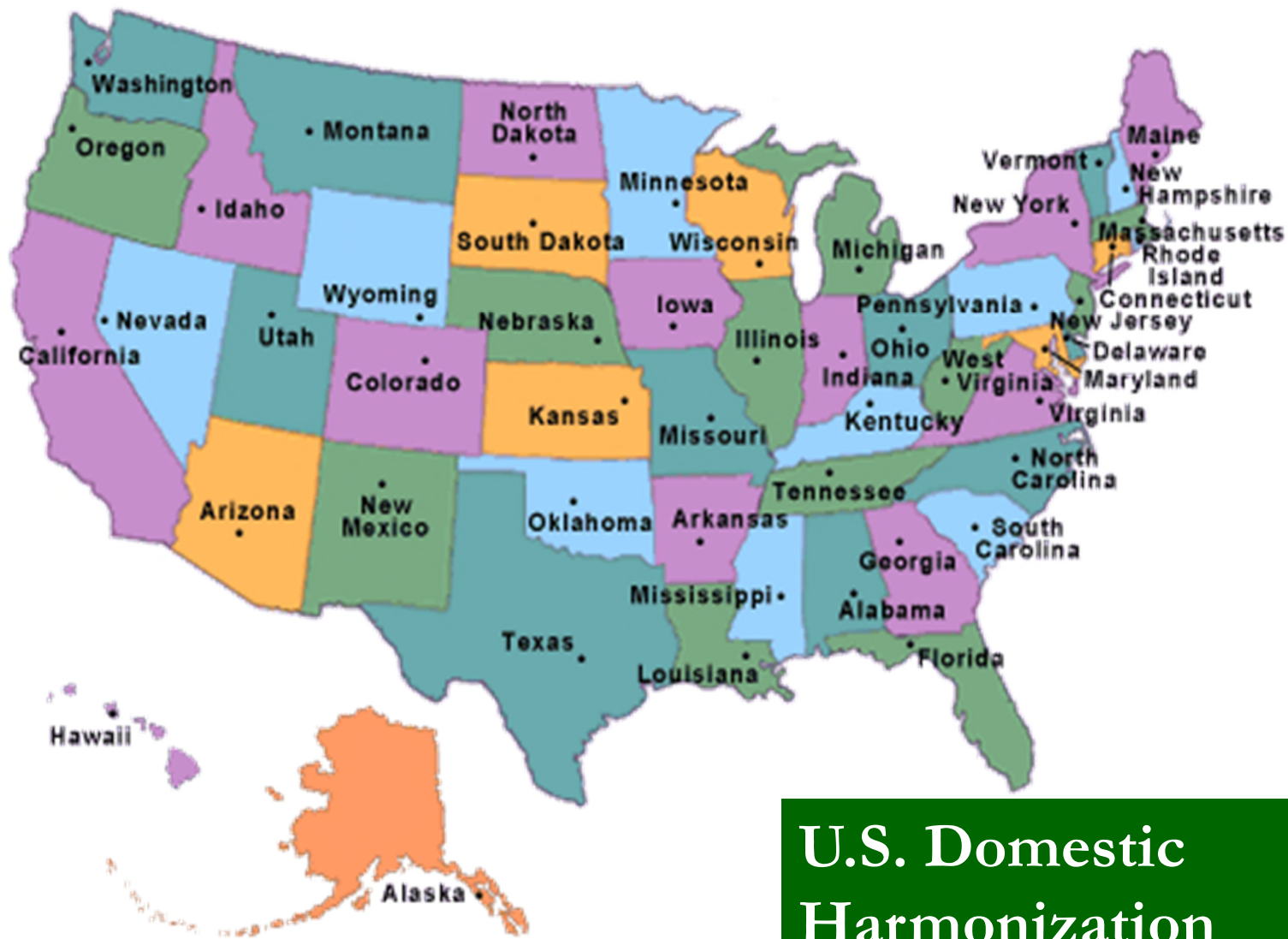


- ... Has Separate Procurement Systems

Federal Procurement

State

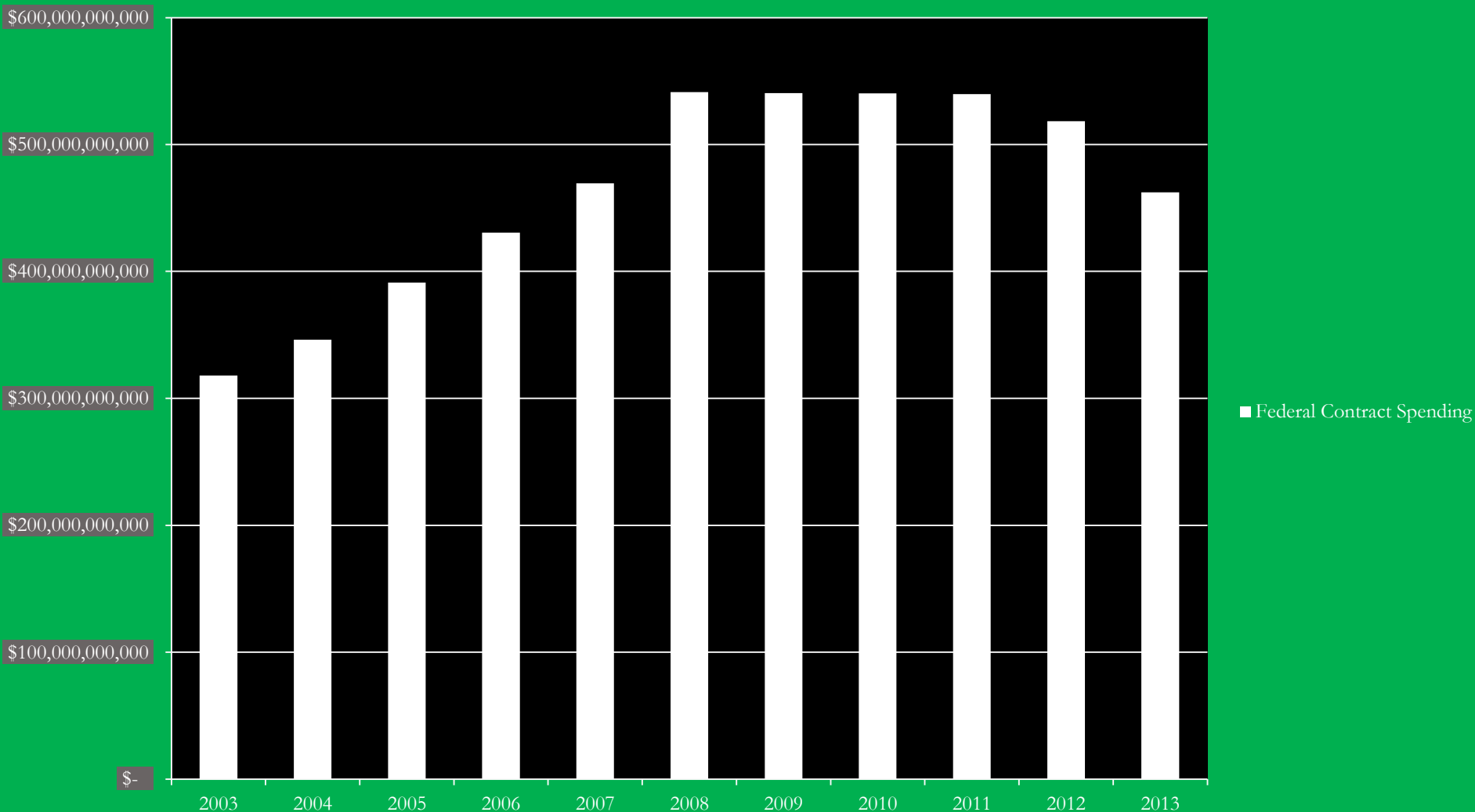
Local



## U.S. Domestic Harmonization

- Model Law?
- Through Federal Grants?
- Cooperative Purchasing?

# U.S. Federal Procurement



**... Has about \$500 billion in annual federal procurement**


**GW**

**LAW**

# Procurement is a High- Profile Political Issue

TECHONOMY | 11/10/2013 @ 1:48PM | 6,674 views

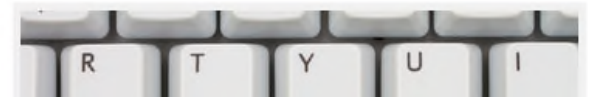
## The Unhealthy Truth About Obamacare's Contractors

 Techonomy, Contributor

[+ Comment Now](#) [+ Follow Comments](#)

By [Udayan Gupta](#)

On July 16 of this year,  
Sarah Kliff posted a  
prescient piece on the



# ... Procurement Remains Political

Government  
Executive



NEWSLETTERS | INSIGHTS | EVENTS | MAILBAG

NEWS MANAGEMENT OVERSIGHT DEFENSE TECH CONTRACTING PAY &

## New Evidence Suggests Trump's Coordination With GSA on FBI Headquarters Plan

By Charles S. Clark | October 18, 2018 | 150 Comments



President Trump meets with GSA Administrator Emily Murphy and other administration officials on Jan. 24, White House

### RELATED

#### House Democrats Again Challenge White House Story on FBI Headquarters

November 2, 2018 | 10

[Comments](#)

#### GSA Misrepresented White House Role, Costs of FBI Headquarters Decision, IG Says

August 27, 2018 | 19

[Comments](#)

#### GSA Watchdog Raises Questions on Canceled FBI Headquarters Move

August 8, 2018 | 42

[Comments](#)

#### Lawmakers Highlight Trump's Personal Stake in FBI Headquarters

July 31, 2018 | 44 Comments

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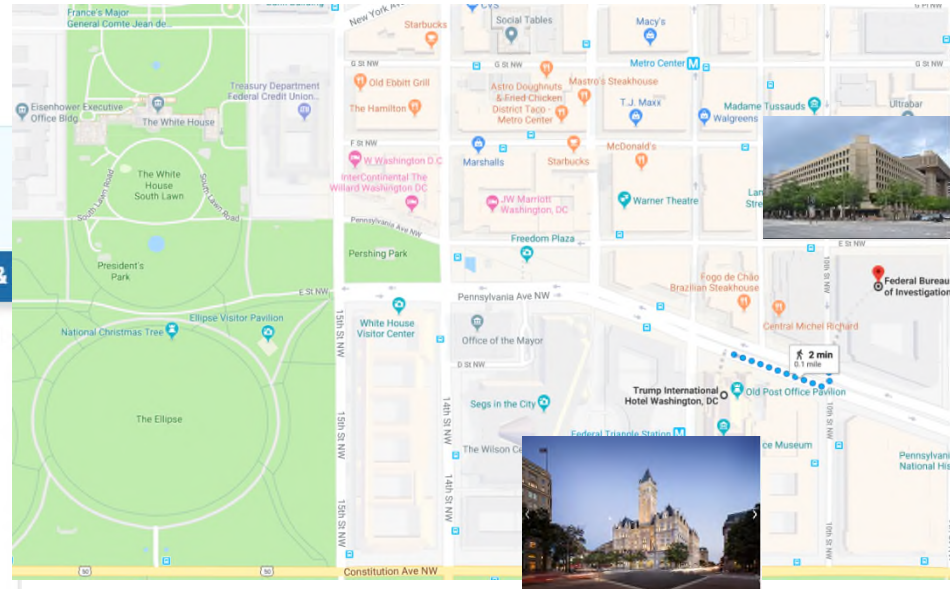
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Newly released emails and an official White House photo provide evidence suggesting that President Trump himself directed the General Services Administration and the FBI to modify a years-in-the-works plan to move the FBI's downtown Washington headquarters.



Question: If President Trump did interfere with this procurement for his personal benefit, would this be:

- Petty corruption
- Grand corruption
- State capture?

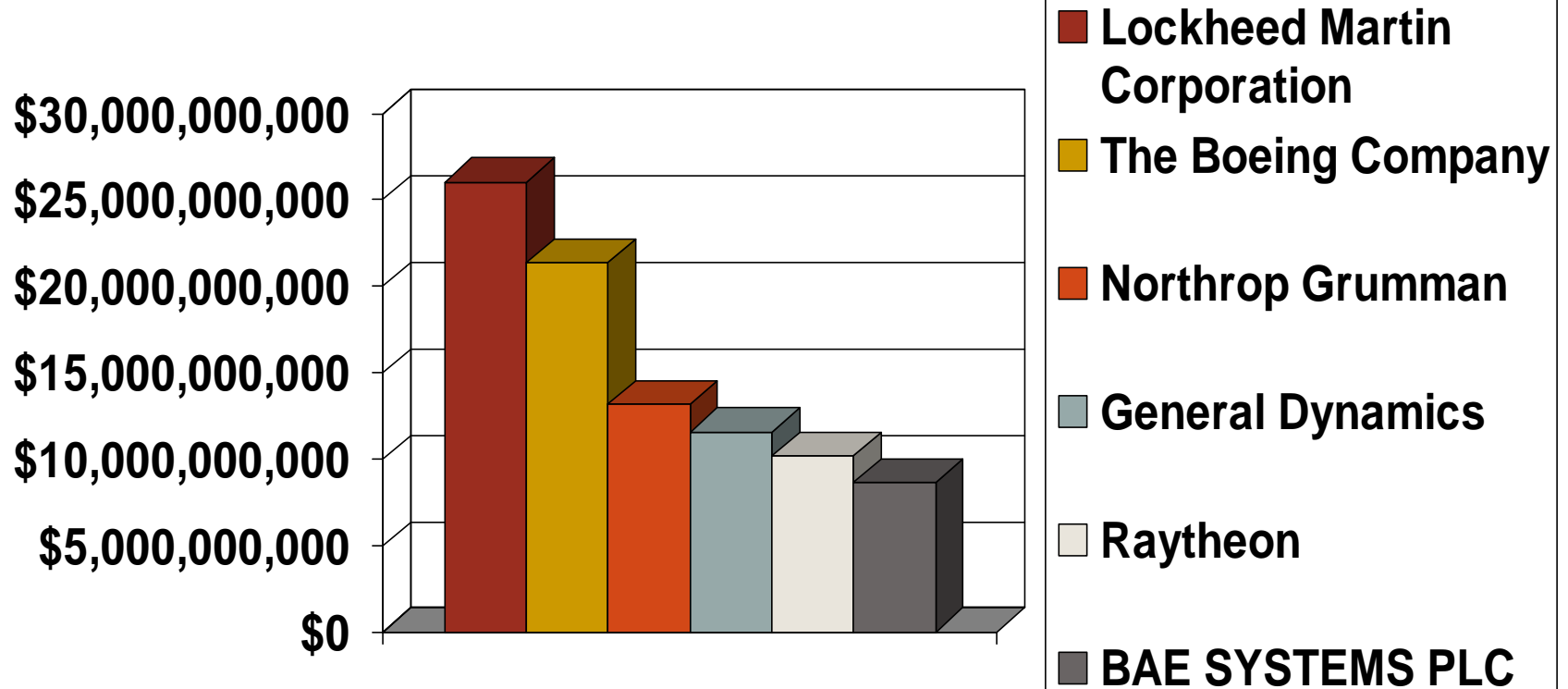
GW LAW



## . . . But Not Driven by Individual Politicians


Virginia 8 (James P. Moran)	1
District of Columbia nonvoting (Eleanor Holmes Norton)	2
Texas 12 (Kay Granger)	3
Missouri 1 (William (Bill) Clay / Wm. Lacy Clay)	4
Virginia 10 (Frank R. Wolf)	5
Alabama 5 (Robert E. (Bud) Cramer Jr.)	6
California 37 (Juanita Millender-McDonald)	7
Mississippi 4 (Ronnie Shows / Gene Taylor)	8
Virginia 3 (Robert C. Scott)	9
California 14 (Anna G. Eshoo)	10

... Accessible









# ... Is Transparent at Opportunity and Award

 An official website of the United States government [Here's how you know](#) ✓

Authoritative site for Assistance Listings, Wage Determinations, and Contract Opportunities on

betaGOV

Sign in


All Award Data ▾

[Refresh iManage View](#)

Search


## Welcome

This will be the official U.S. government website for people who make, receive, and manage federal awards.



## What Can I Do Here?

### Contracting




#### Contract Opportunities (FBO)

This website has officially replaced FBO.gov.

- About Contract Opportunities
- Search Contract Opportunities


#### Wage Determinations (WDOL)

This website has officially replaced WDOL.gov.



# . . . With exceptions to transparency






Sign in as a... [Buyer](#) [Contractor](#)

Welcome to  
**eBuy**

GSA eBuy is a powerful and intuitive acquisition tool used by thousands of US federal agencies and military services worldwide to achieve required competition, best pricing and value. GSA eBuy saves you time and money - all while keeping you FAR compliant.



## Benefits at a glance

[Overview](#)[Buyers](#)[Contractors](#)

GSA eBuy was designed to bring ease and versatility to online procurement. Here is a sample of what can be done using GSA eBuy:

- Post requirements and receive quotes electronically on millions of products and services
- Find sources of supply
- Seek information
- Procure complex requirements by attaching statements of work
- Request large dollar items
- Establish Blanket Purchase Agreement (BPA) pricing

# . . . Prone to Scandal

## **Darleen Druyun**

- Previously highest-ranking civilian official in Air Force procurement systems
- Convicted of improper job negotiations with Boeing during tanker procurement
- Admitted favoring Boeing in hundreds of millions of dollars in procurement
- Sentenced to prison
- \$650M Boeing settlement



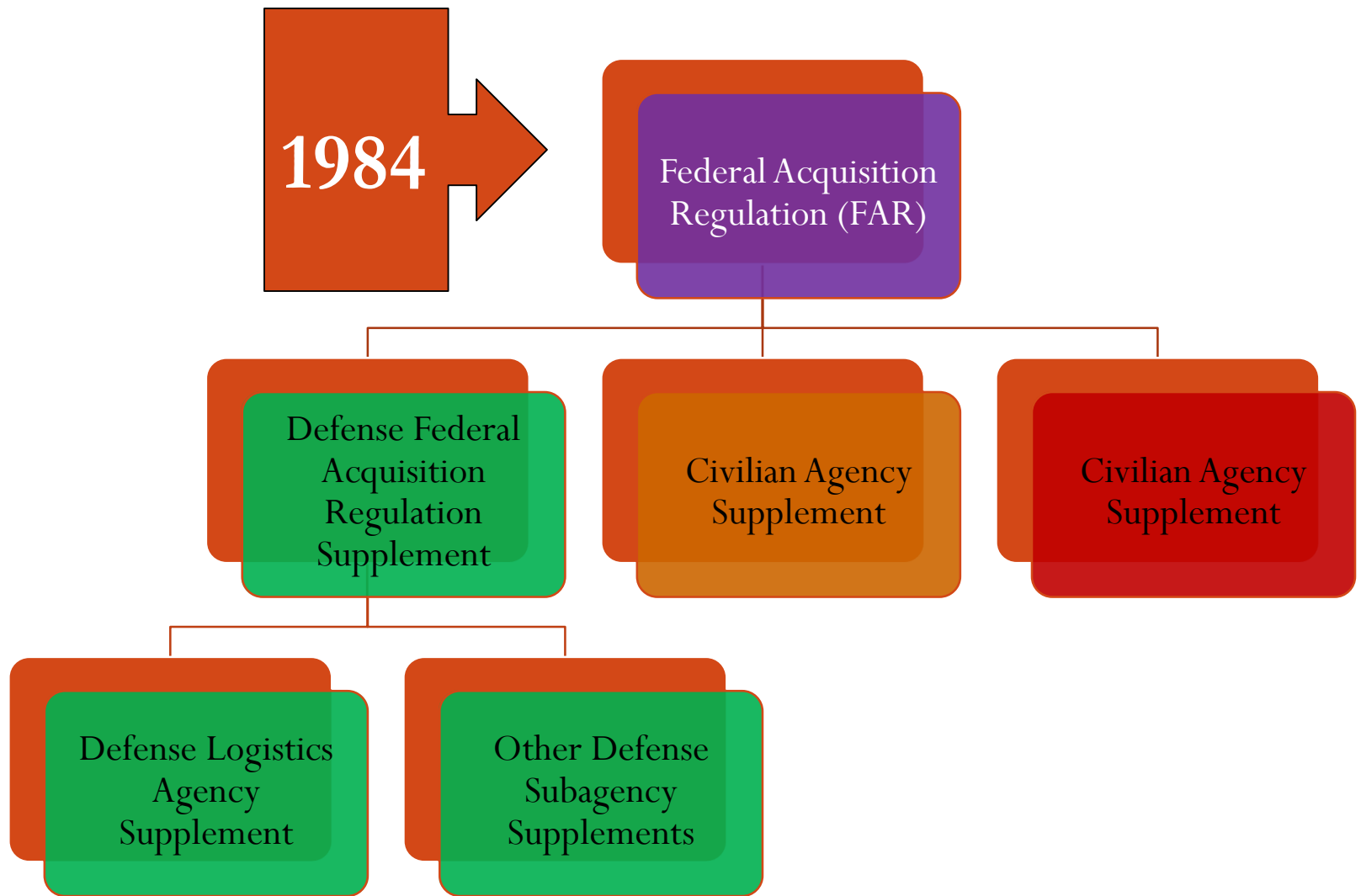
# More Scandal

Duke  
Cunningham  
David Safavian

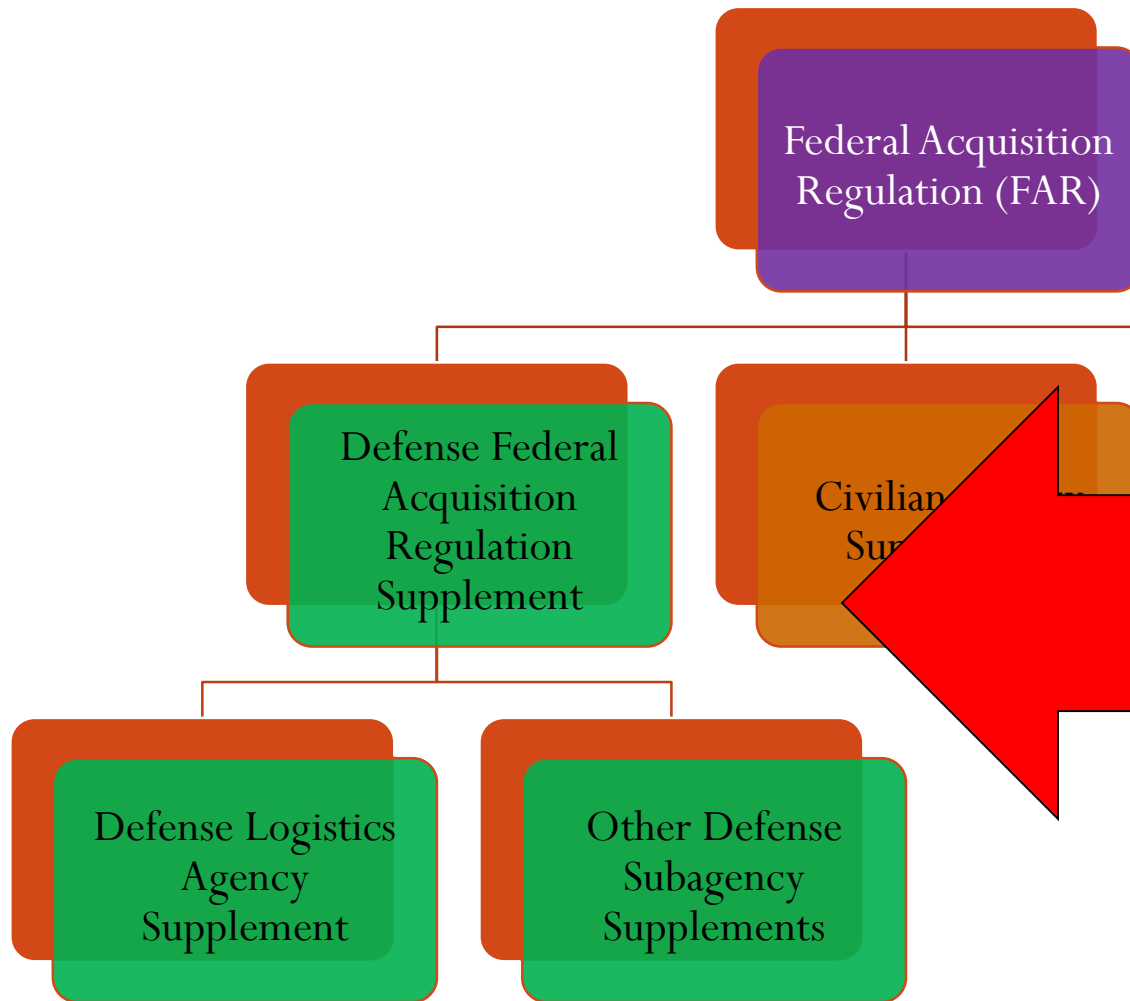


Ex-Aide To Bush Found Guilty  
Safavian Lied in Abramoff Scandal  
Washington Post,  
Wednesday, June 21, 2006; Page A01

Congressman resigns after  
bribery plea  
California Republican admits  
selling influence for \$2.4 million  
Monday, November 28, 2005  
(CNN) -- Rep. Randy "Duke"  
Cunningham



... a Unified Regulatory  
System



**Defense  
Authorization  
Act = Annual  
vehicle for  
reform**

# . . . Familiar Major Methods of Procurement

Open  
Procedure  
(less than  
3%)

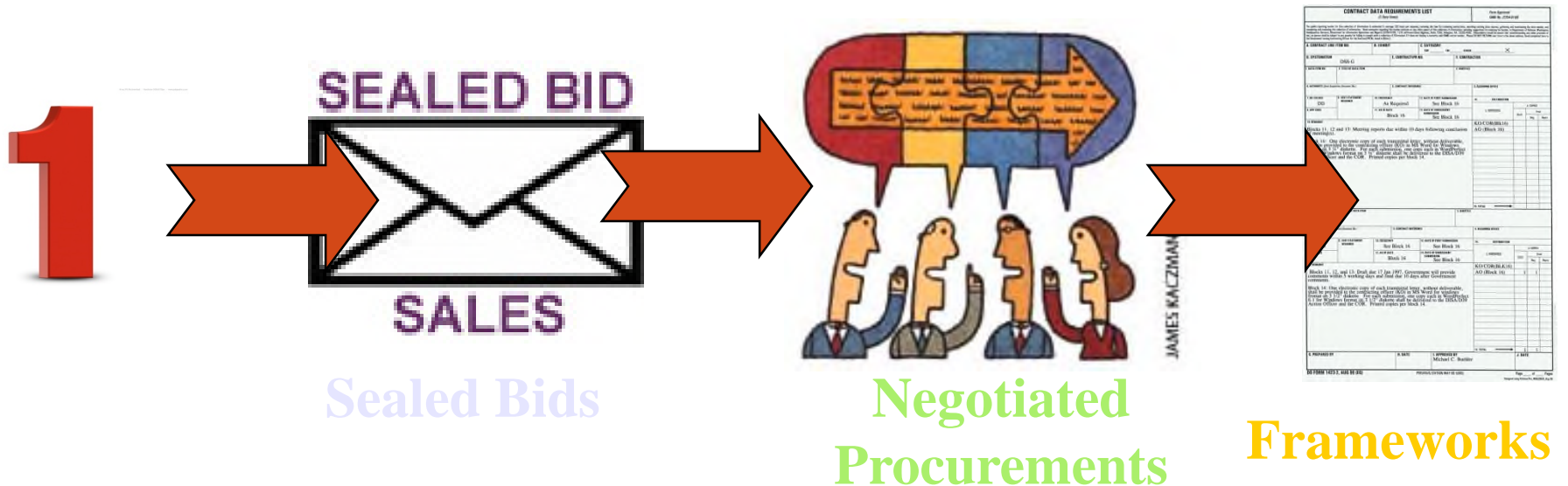
Restricted  
Procedure

Negotiated  
Procedure  
(primary  
method)

Sole-  
Source



# Historical Progression

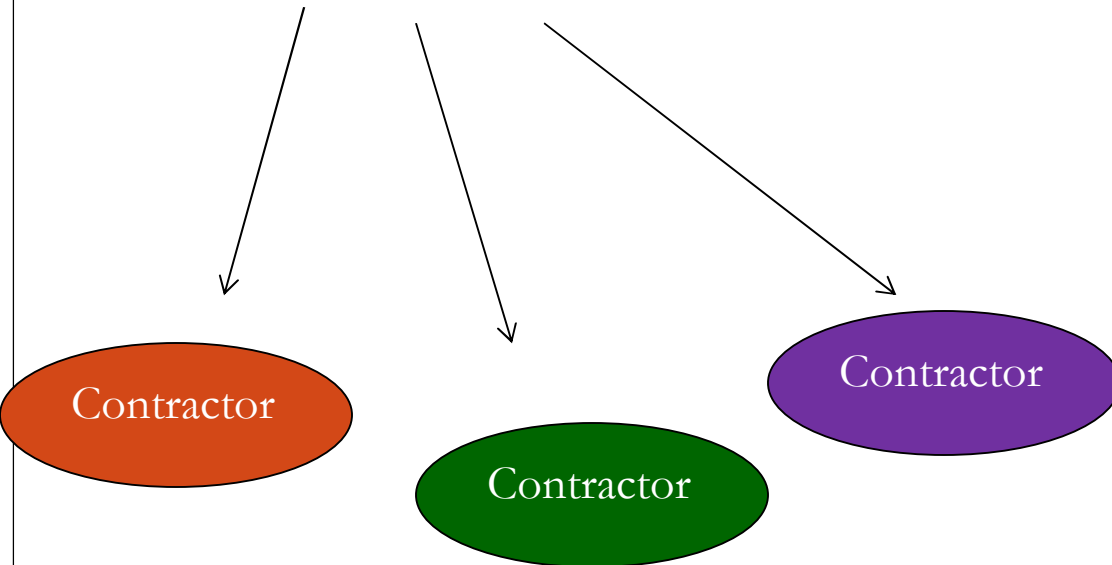


# Competitive Negotiations (EU: “Competitive Dialogue” or “Competitive Procedures with Negotiations”)



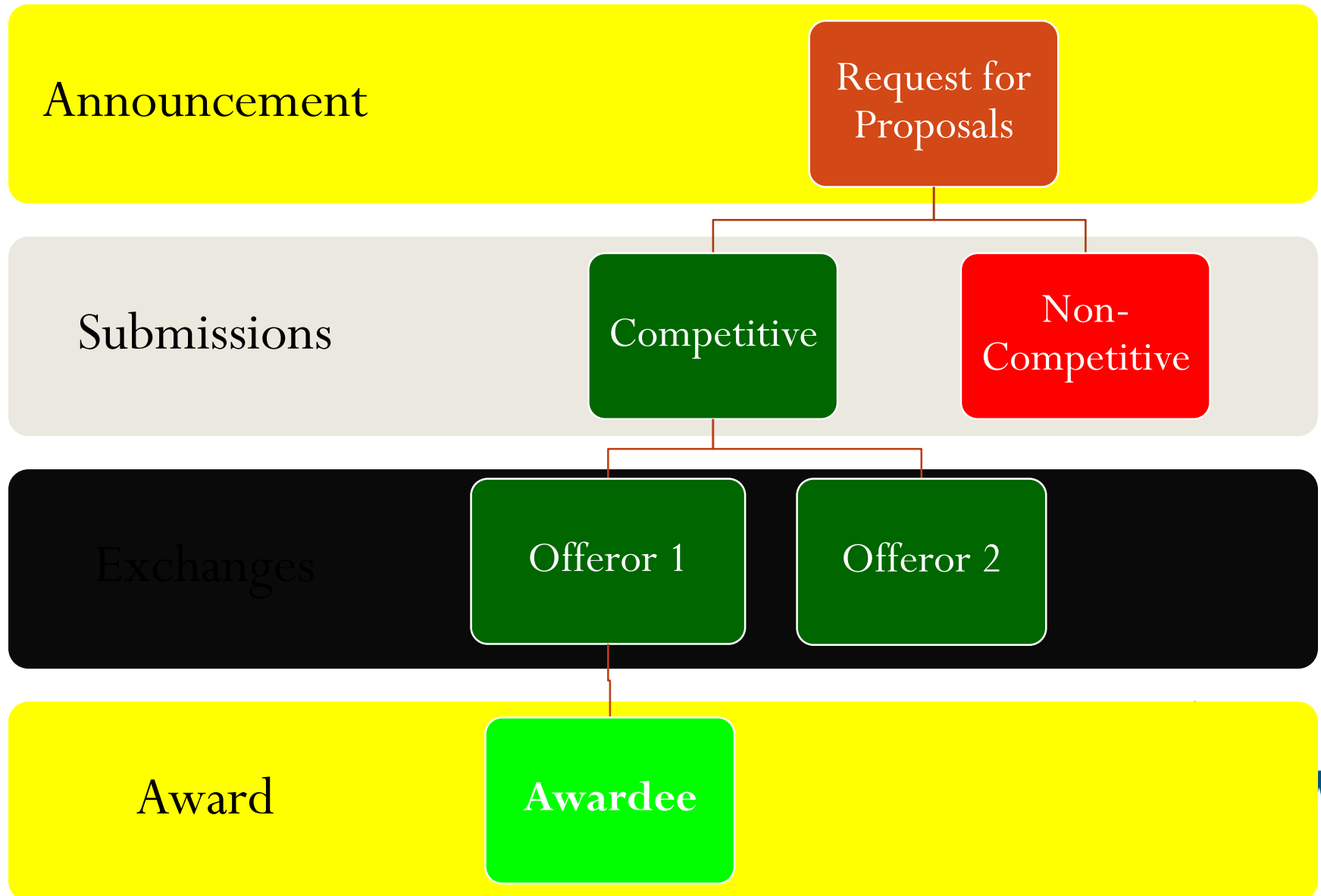
# Competitive Negotiations: Multiple Vendors, for Best Value

## Negotiated Procurements



# Competitive Negotiations

33



```
graph TD; A([Frameworks]) -.- B[Supplier Lists];
```

**Frameworks**

**Frameworks emerged in the United States  
and elsewhere along parallel paths**

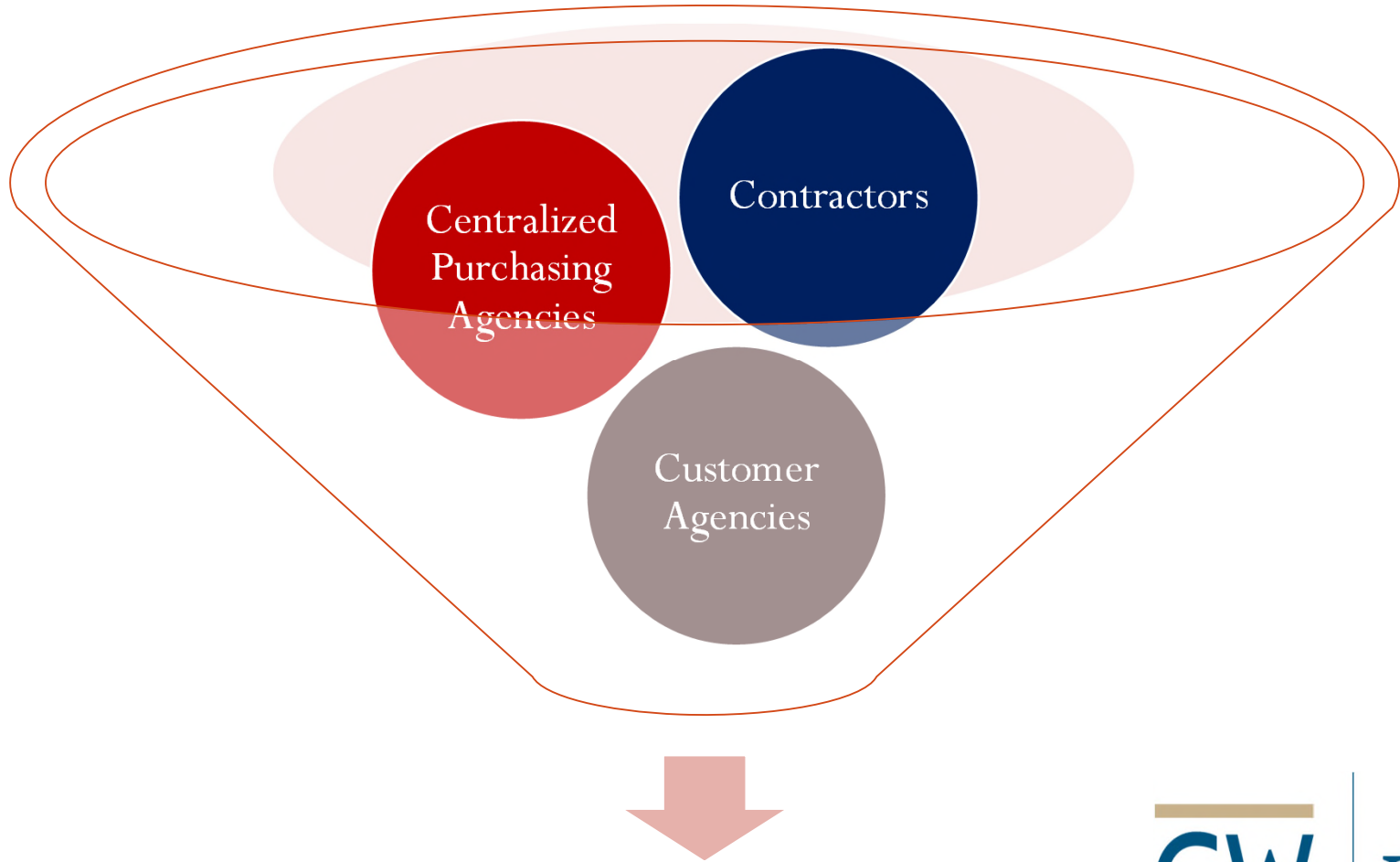
**Supplier Lists**

# Frameworks: Sample

GW

# LAW

# Problems in U.S. Frameworks: 1990s



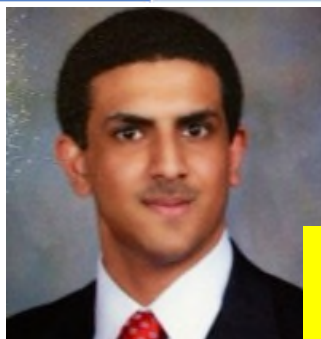
**Reduced Transparency – Reduced Accountability -- Misuse of Frameworks**



# Scandals



Competitive Procedures	FY 2011	FY 2012	FY 2013	FY 2014	FY 2011-2014
Negotiated Proposal →	38.86%	38.46%	37.76%	38.64%	38.43%
Single Source Solicited	30.60%	31.67%	31.04%	28.68%	30.50%
Subject to Multiple Award Fair opportunity →	18.93%	19.20%	20.40%	21.42%	19.99%
Simplified Acquisition	3.08%	3.02%	3.75%	4.27%	3.53%
None	2.84%	3.28%	2.66%	2.27%	2.76%
Sealed Bid →	2.07%	1.80%	1.83%	2.06%	1.94%
Two Step	1.00%	1.04%	0.93%	1.14%	1.03%
Basic Research	0.85%	0.88%	0.80%	0.88%	0.85%
Architect – Engineer	0.46%	0.43%	0.37%	0.42%	0.42%
No Solicitation Procedure Reported	1.02%	0%	0%	0%	1.02%
Alternative Sources	0.14%	0.14%	0.33%	0.13%	0.19%
Program Solicitation	0.13%	0.09%	0.13%	0.09%	0.11%
Total	100.00%	100.00%	100.00%	100.00%	100.00%

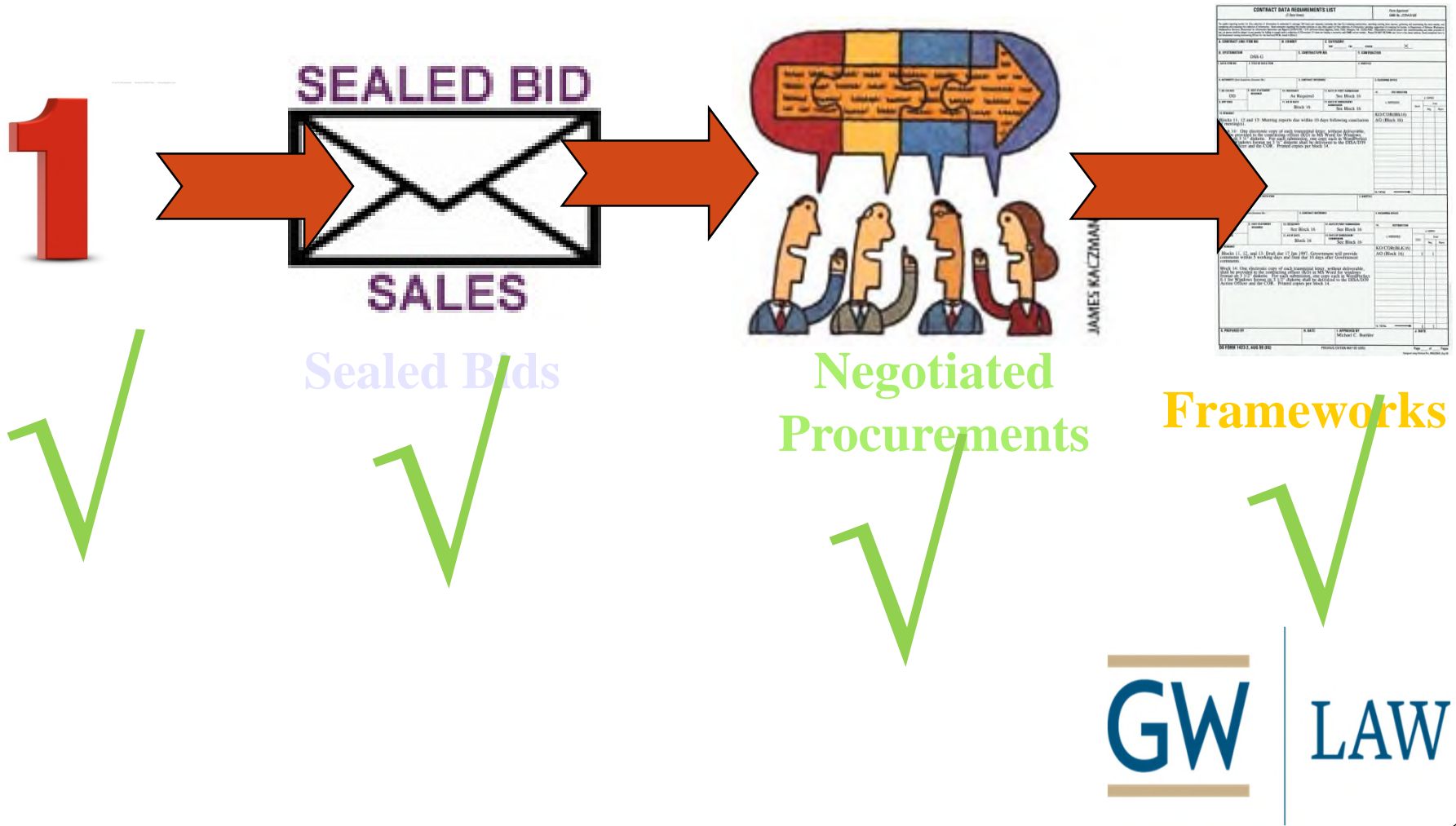


**Umer Chaudhry**  
GWU Law Student



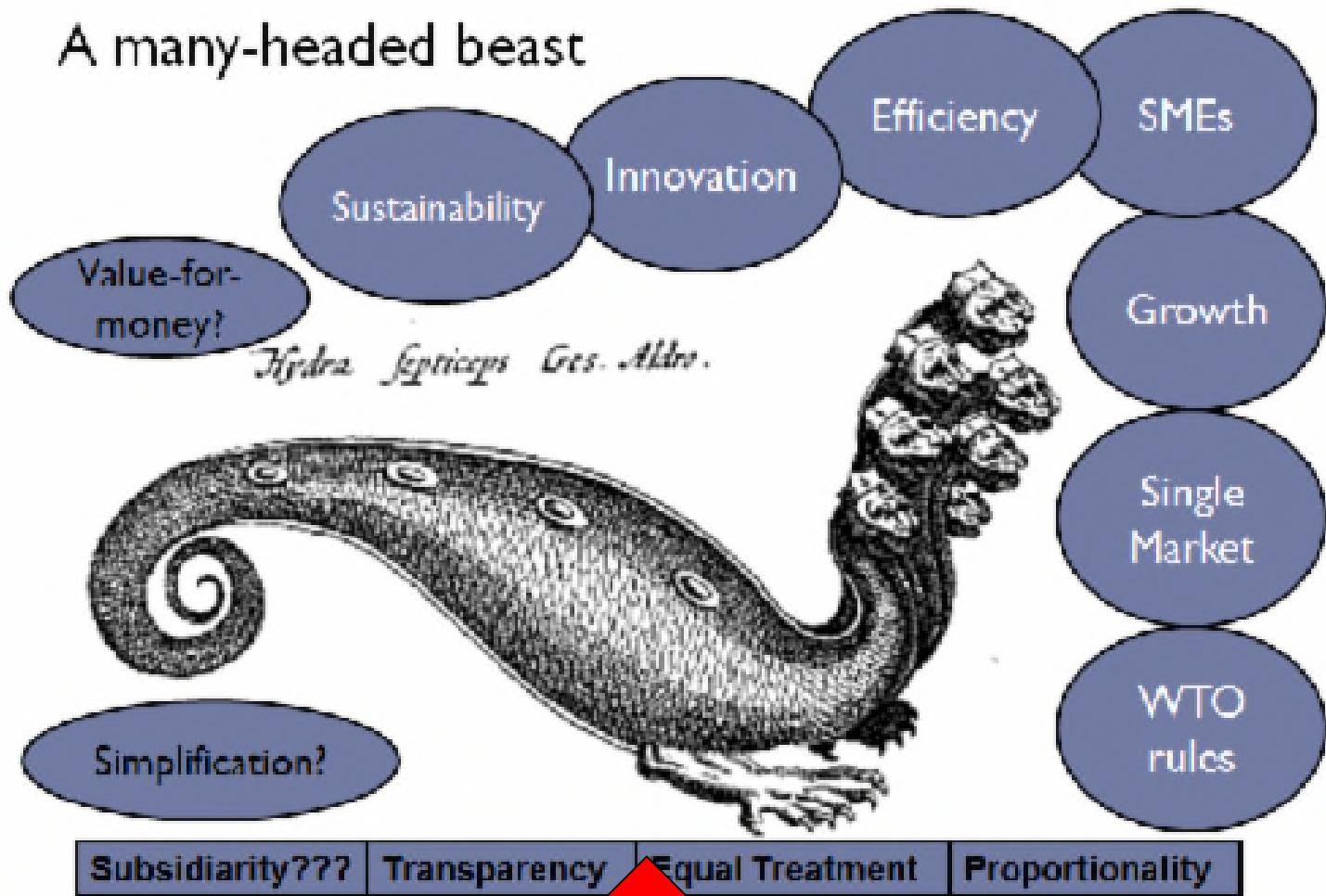


# EU uses same methods – but in a different historical progression



# Do the EU Directives Impose Additional Principles?

A many-headed beast



Source: Abby Semple, [www.procurementanalysis.eu/](http://www.procurementanalysis.eu/)

Author: Abby  
Semple

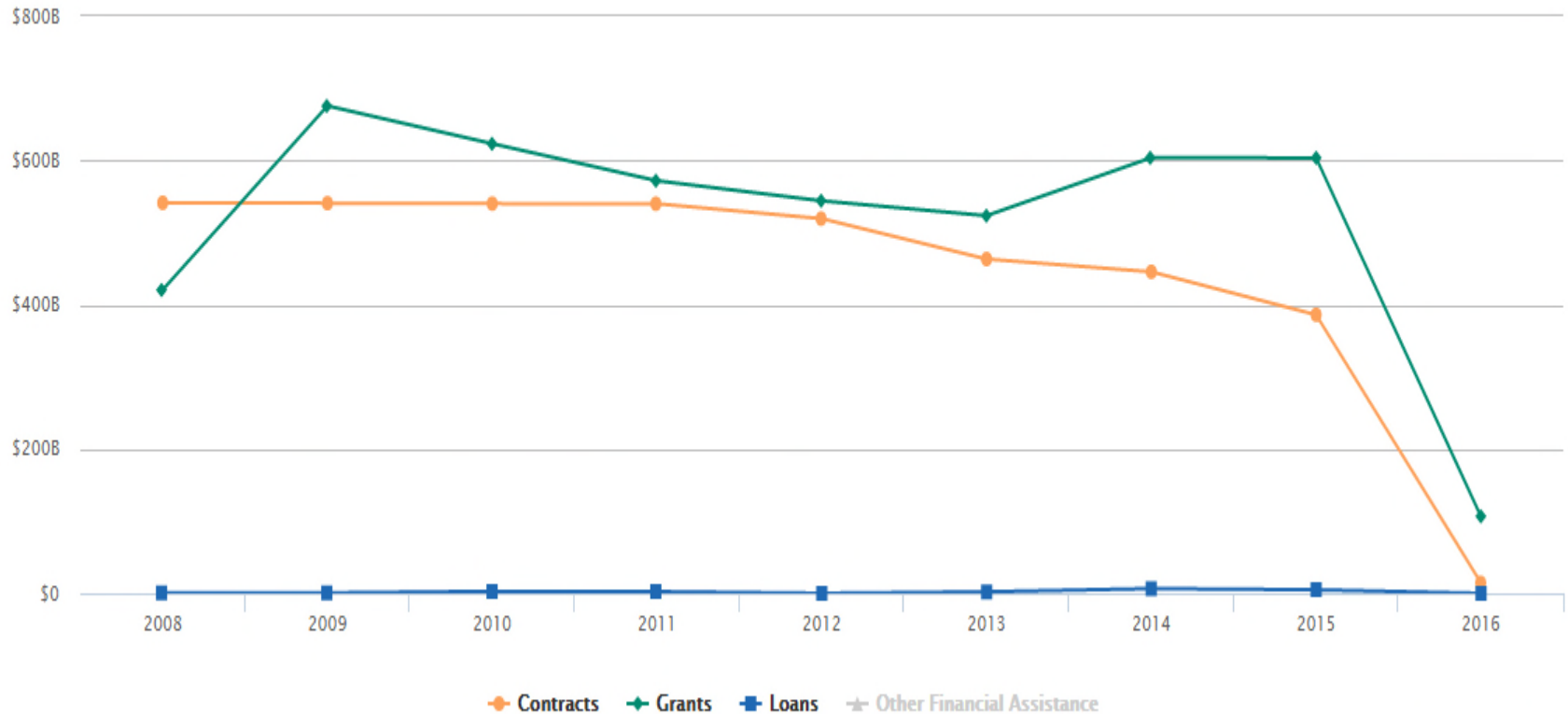
# Patterns in U.S. Procurement

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# OVERVIEW OF AWARDS BY FISCAL YEAR

Roll over the individual trending lines to see totals for the award type for a fiscal year. To see the totals for all award types in a fiscal year, go to the Text View.

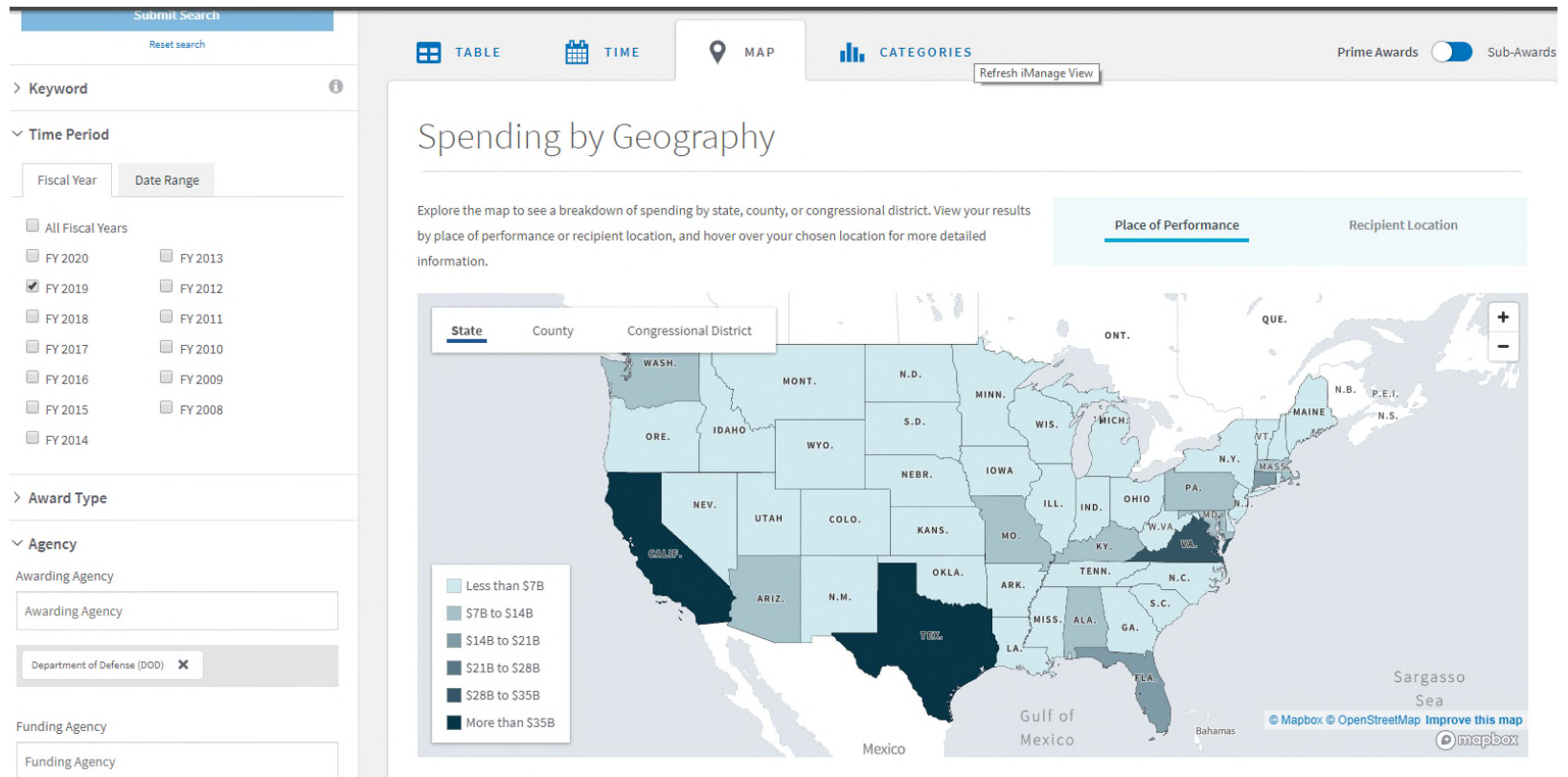
## OVERVIEW OF AWARDS BY FY 2008 – 2015



[Text View of Overview of Awards by Fiscal Year](#)

[www.usaspending.gov](http://www.usaspending.gov)

# Defense Department Procurement – FY 2019











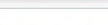



# Top 10 Federal Contractors

Top Defense

44

1. Lockheed Martin
2. Boeing
3. General Dynamics
4. Raytheon
5. Northrop Grumman
6. McKesson
7. United Technologies
8. Leidos Holdings
9. Huntington Ingalls
10. BAE Systems

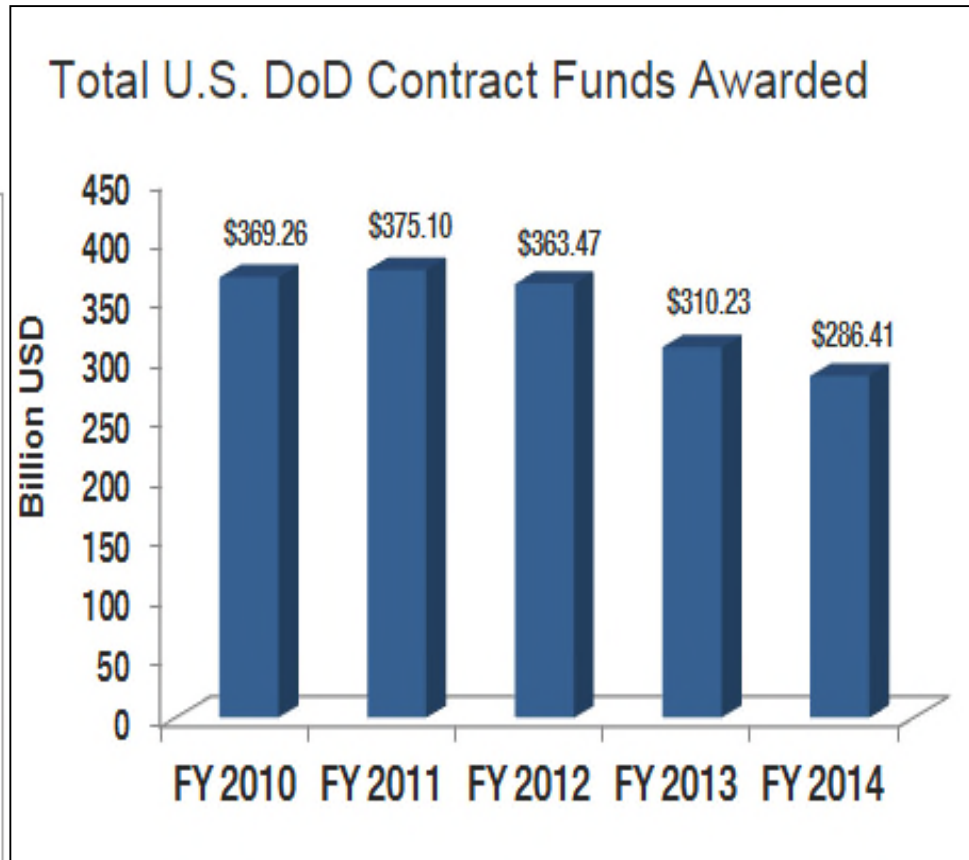
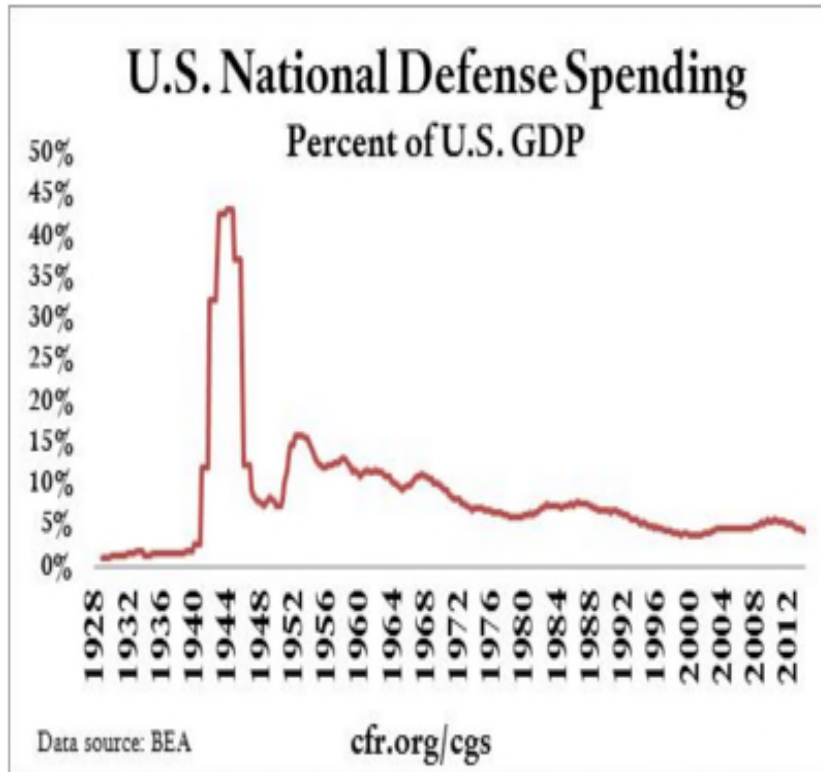
Rank	Change	Company	Obligations
1	-	 Lockheed Martin	\$38.4B
2	-	 Lockheed Martin	\$27.4B
3	↑ 1	 Raytheon Co.	\$17.5B
4	↓ 1	 General Dynamics Corp.	\$14.9B
5	-	 Northrop Grumman	\$12.4B
6	↑ 7	 United Technologies	\$7.7B
7	↓ 1	 Huntington Ingalls	\$7.1B
8	↓ 1	 BAE Systems	\$6.9B
9	↓ 1	 Humana Inc.	\$5.4B
10	↓ 2	 L3 Technologies Inc.	\$4.3B

France Defense  
Budget:  
US\$42 billion

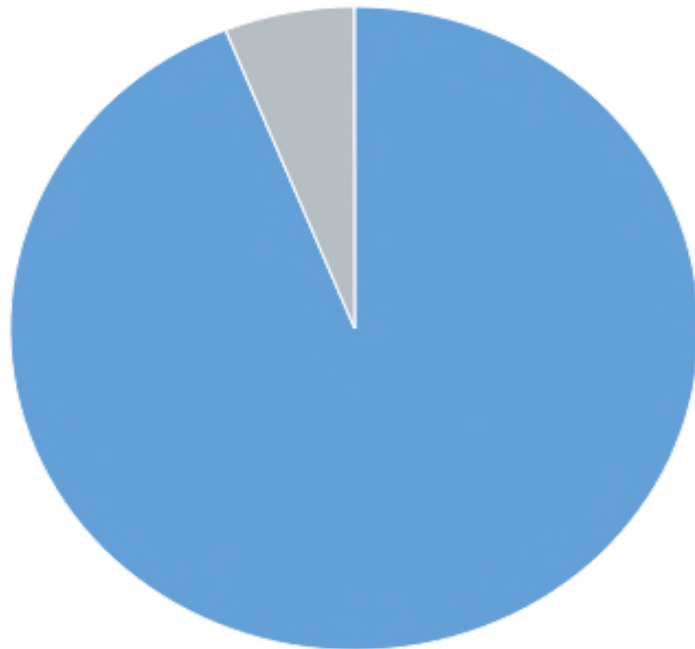
GW

LAW

# Some Trends in DoD Procurement



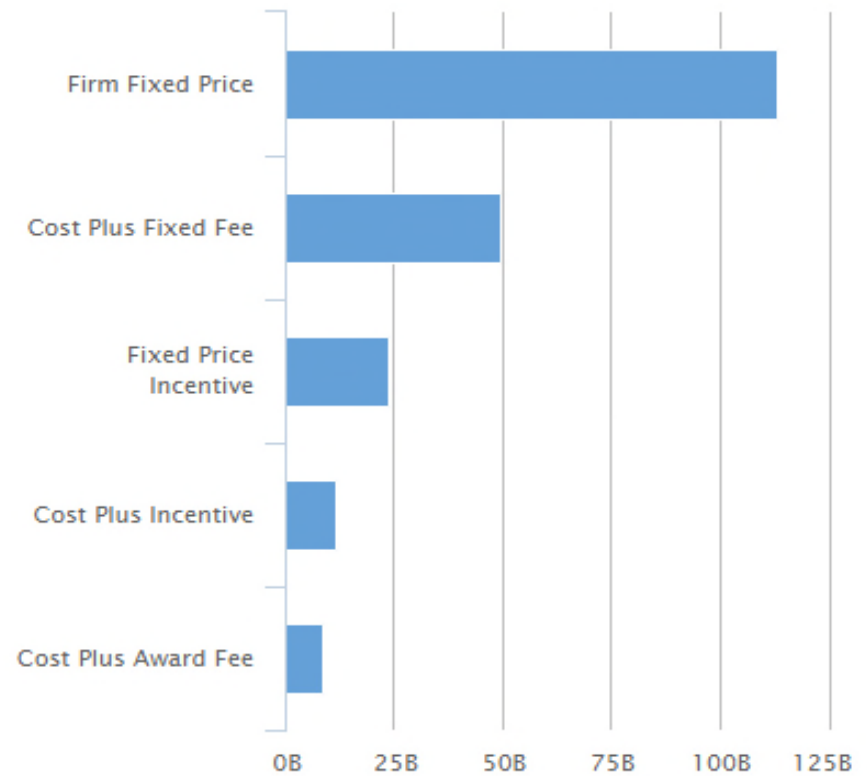
## COMPETED/NON-COMPETED



■ Competed ■ Not Competed

[Text View on Competed vs. Non-Competed](#)

## TOP 5 PRIME CONTRACT TYPES



[Text and More Details on All Prime Contract Types](#)

# Access for Foreign Firms to Unitary Federal Procurement Market, Civilian and Defense

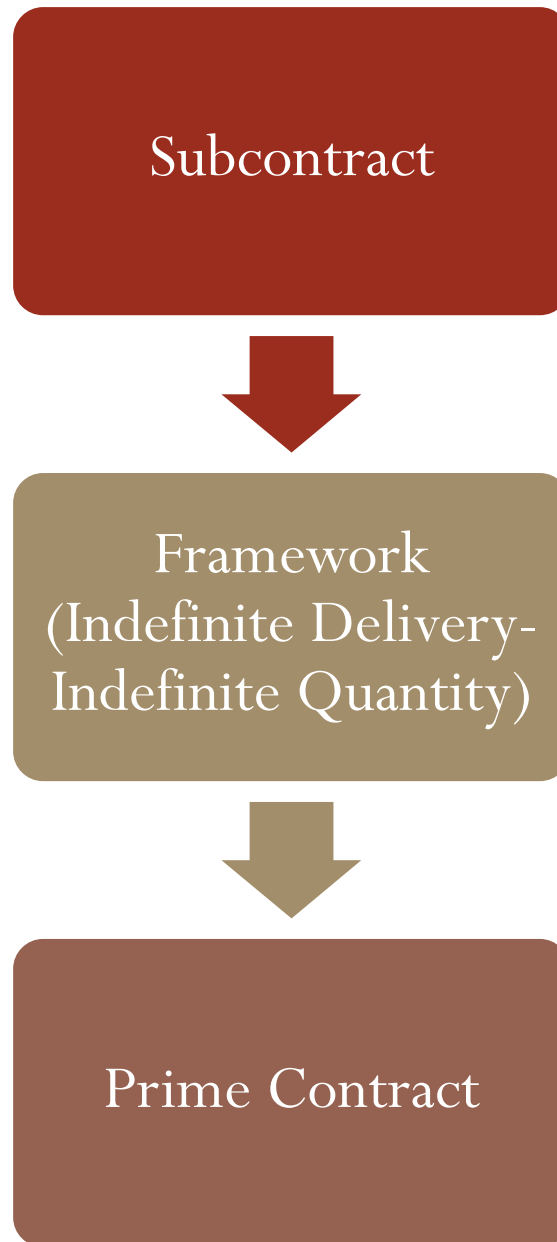
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# DoD Acquisition Workforce

The size of DoD's civilian acquisition workforce has grown by some 20,000 employees over the past five years and **now numbers about 135,000 personnel members**, according to Stephanie Barna, acting assistant secretary of Defense for Readiness and Force Management. Civilians make up 90 percent of the department's total acquisition workforce. **The military component of the acquisition workforce also ticked up by about 2,500 employees, reaching more than 16,000 employees**, Barna said.



# Typical Progress



# Protectionism and the Trump Administration

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See  
Reading  
List





**Figure 1** Countries Participating in the TPP Negotiations



# KEY CONCEPTS



- “It is the maxim of every prudent master of a family, never to attempt to make at home what it will cost him more to make than to buy. . . . If a foreign country can supply us with a commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.

— Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776)



# What Is Goal of Protectionism?



- **Protect Jobs**
- **Industrial policy**
- **Ensure security of supply**





## Prewar Protectionism

*Suggested Charter*  
for an  
INTERNATIONAL  
TRADE  
ORGANIZATION  
of the UNITED NATIONS

An elaboration of the United States  
*Proposals for Expansion of World Trade  
and Employment* prepared by a technical  
staff within the Government of the United  
States and presented as a basis for public  
discussion.



United States'  
suggested charter  
for predecessor to  
World Trade  
Organization  
(1946)



# *Suggested Charter*

for an

## INTERNATIONAL

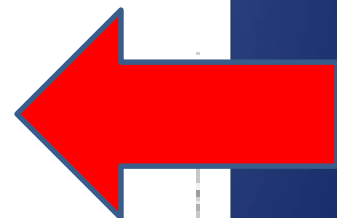
## TRADE

4

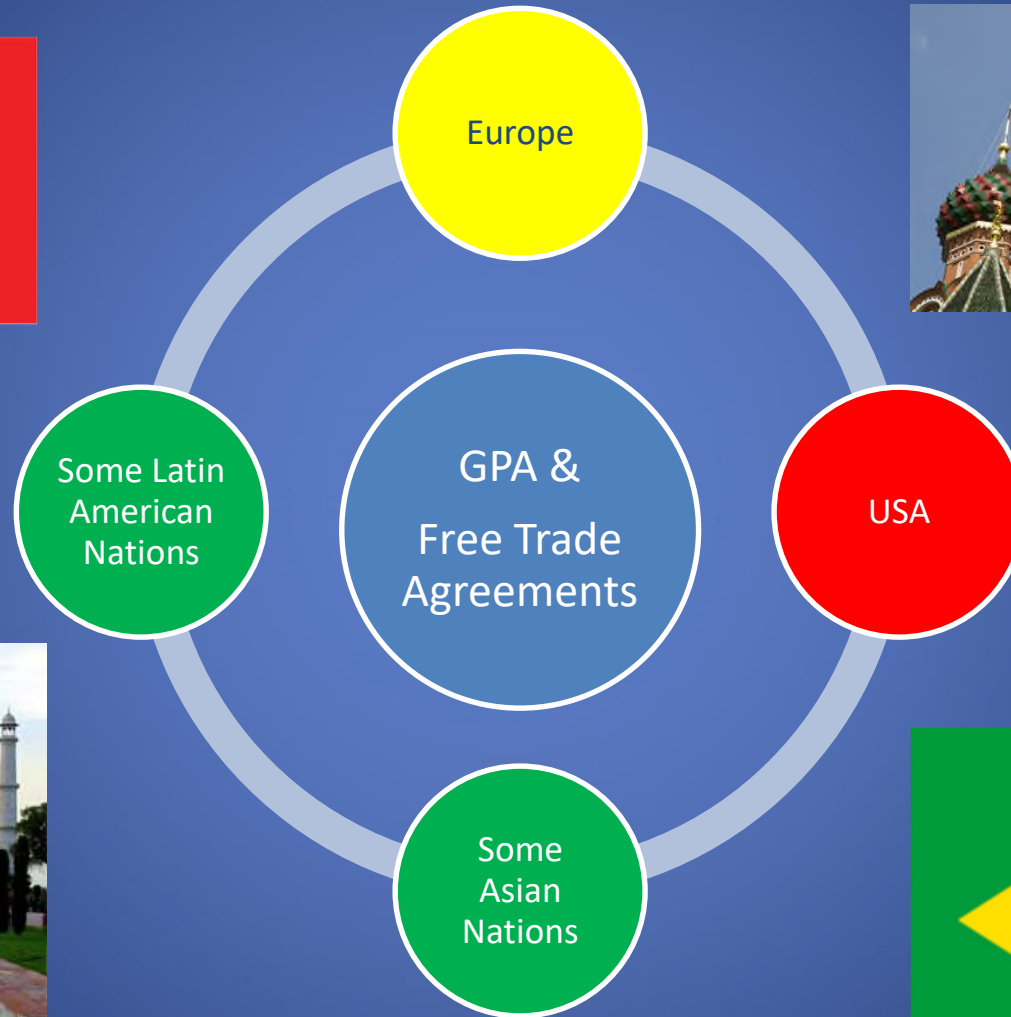
### *Article 9. National Treatment on Internal Taxation and Regulation*

1. The products of any Member country imported into any other Member country shall be exempt from internal taxes and other internal charges higher than those imposed on like products of national origin, and shall be accorded treatment no less favorable than that accorded like products of national origin in respect of all internal laws, regulations or requirements affecting their sale, transportation or distribution or affecting their mixing, processing, exhibition or other use, including laws and regulations governing the procurement by governmental agencies of supplies for public use other than by or for the military establishment. The provisions of this paragraph shall be understood to preclude the application of internal requirements restricting the amount or proportion of an imported product permitted to be mixed, processed, exhibited or used.

2. The Members recognize that the imposition of internal taxes on



# U.S. Trade Agreements Act: A “Walled Garden”



# U.S. Domestic Preference Law: Supplies



Trade Agreements Act:  
Above \$180,000 (approx.)

Buy American  
Act

Micro-  
Purchase

# **RECIPROCAL DEFENSE PROCUREMENT AGREEMENTS**

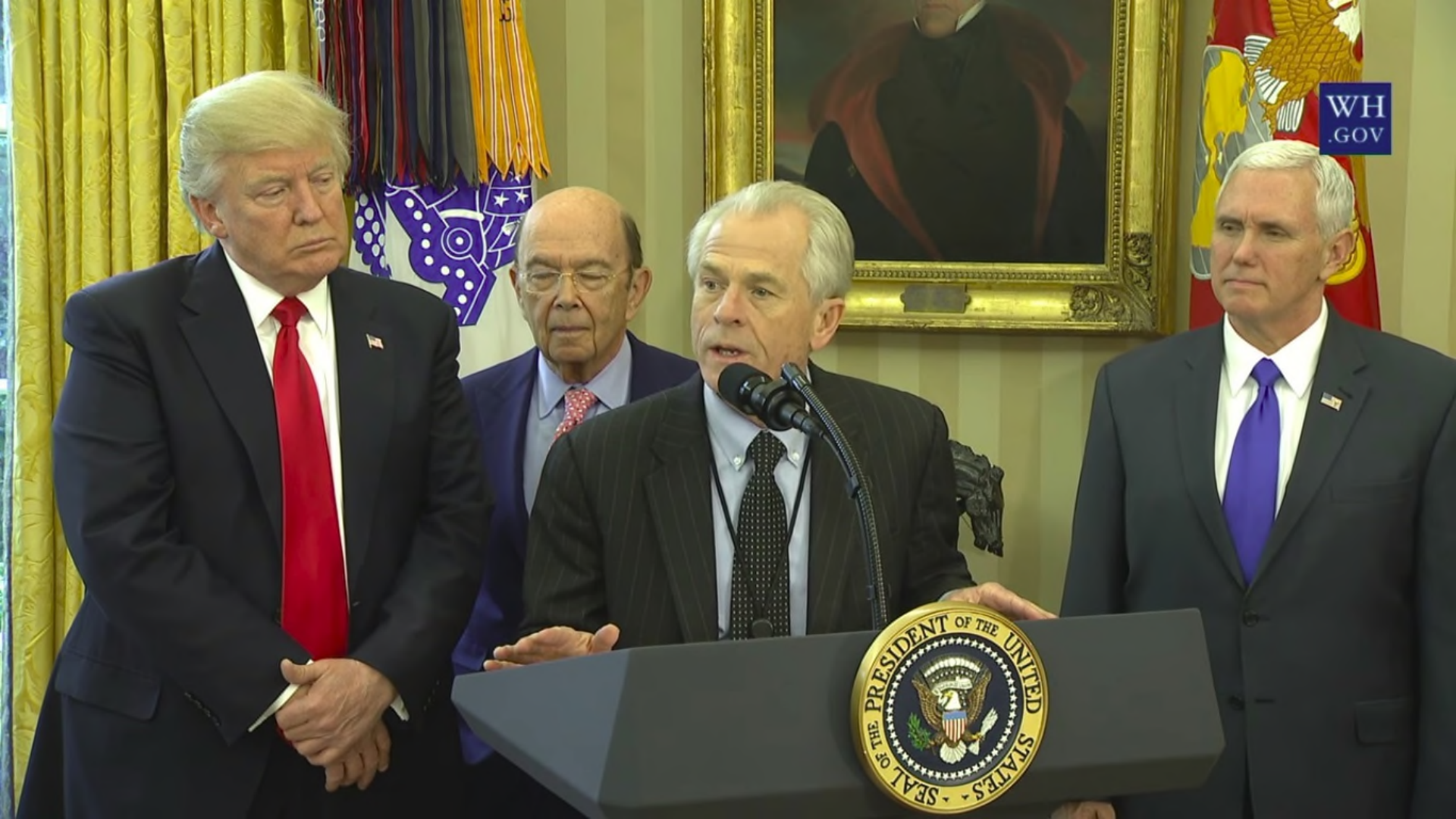
# Defense – Memoranda of Understanding

www.acq.osd.mil/dpap/cpic/ic/reciprocal\_procurement\_memoranda\_of\_understanding.html

The screenshot shows the DPAP (Defense Procurement and Acquisition Policy) website. The header includes the DPAP logo and the text "DPAP Defense Procurement and Acquisition Policy" and "DP Defense Pricing". The breadcrumb trail reads: "DPAP > Contract Policy and International Contracting > International Contracting > Reciprocal Defense Procurement and Acquisition Policy". The main heading is "Reciprocal Defense Procurement and Acquisition Policy Memoranda of Understanding". Below this, a paragraph states: "Listed below are links to current Reciprocal Procurement Memoranda of Understanding between the Department of Defense and its counterparts in foreign governments. The countries with which DoD has these MOUs are considered 'qualifying countries' (see DFARS 225.872-1). Click on the country name to access the MOU. (All files are pdf.)". A list of countries is provided with underlined links: Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Egypt, Finland, France, Germany, Greece, and Israel. A sidebar on the left contains a "GO" button and a list of navigation links: DPAP / DP Home, DPAP Operations, Defense Acquisition Regulations System, Contract Policy and International Contracting, Contract Policy, International Contracting, Contingency Contracting, Acquisition Policy, Program Development and Implementation, eBusiness, Purchase Card, Unique Identification, Government Furnished Property (GFP), Procure to Pay (P2P), and Defense Pricing. A right sidebar shows "Text Size" controls, a "Print Page" button, and a section titled "In This Section" with a link "Up One Level".

**Authority for the defense MOUs rests in the “public interest” exception to the BAA. The agreements serve as a national security benefit, enhance alliance-wide security objectives, and serve as an underpinning for armaments cooperation. – Text § 2:21**

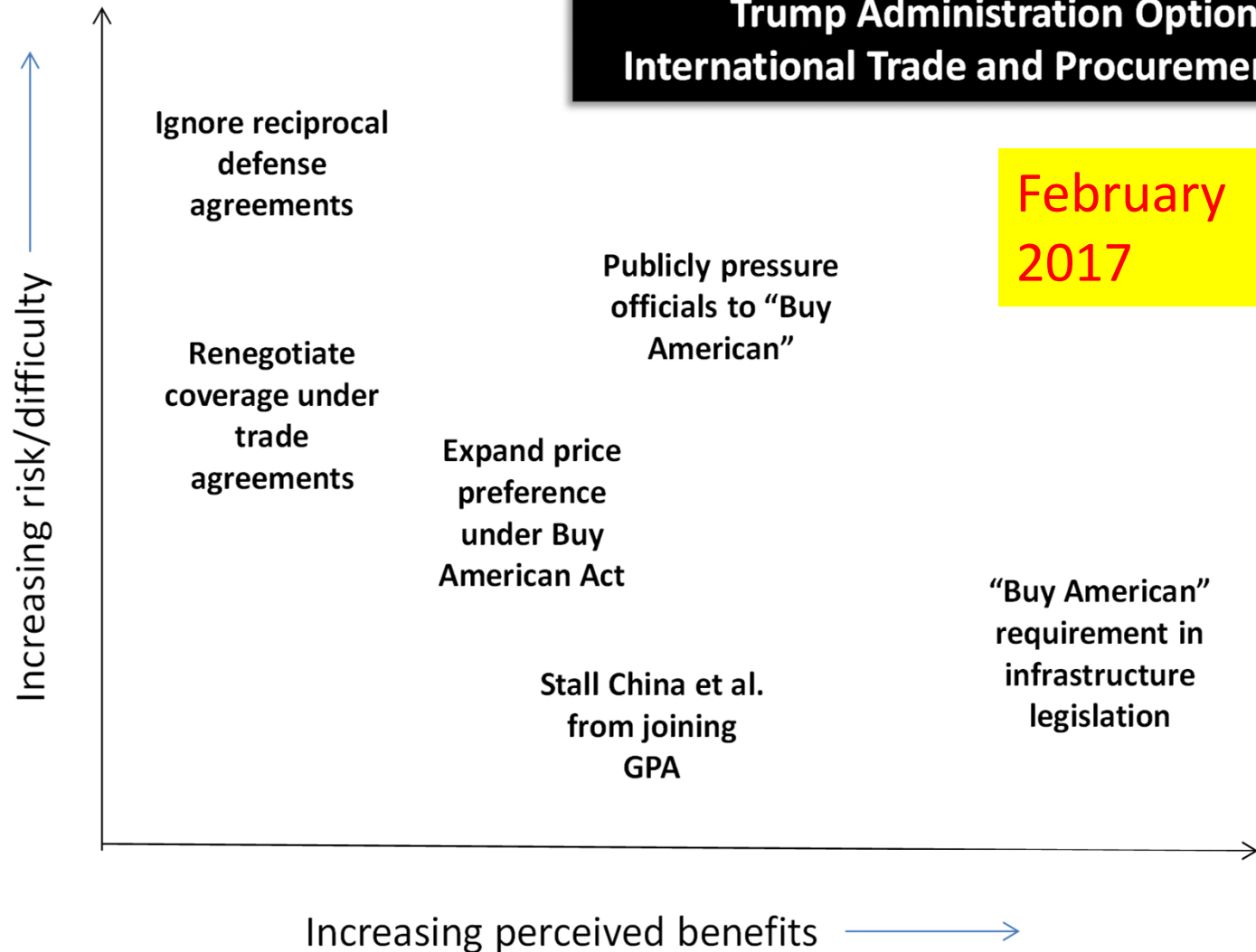




# TRUMP ADMINISTRATION

## Trump Administration Options: International Trade and Procurement

February  
2017





# Buy American – Hire American





# THE RECIPROCITY CONCEPT



## U.S. – Mexico – Canada Agreement (USMCA): Procurement Chapter



## Price Preferences Applied Against Foreign Items Under Buy American Act

	Small Businesses	Other Businesses
Existing Law	12% price preference	6% price preference
Trump Proposal	30% price preference	20% price preference

EXECUTIVE ORDERS

### Executive Order on Maximizing Use of American-Made Goods, Products, and Materials



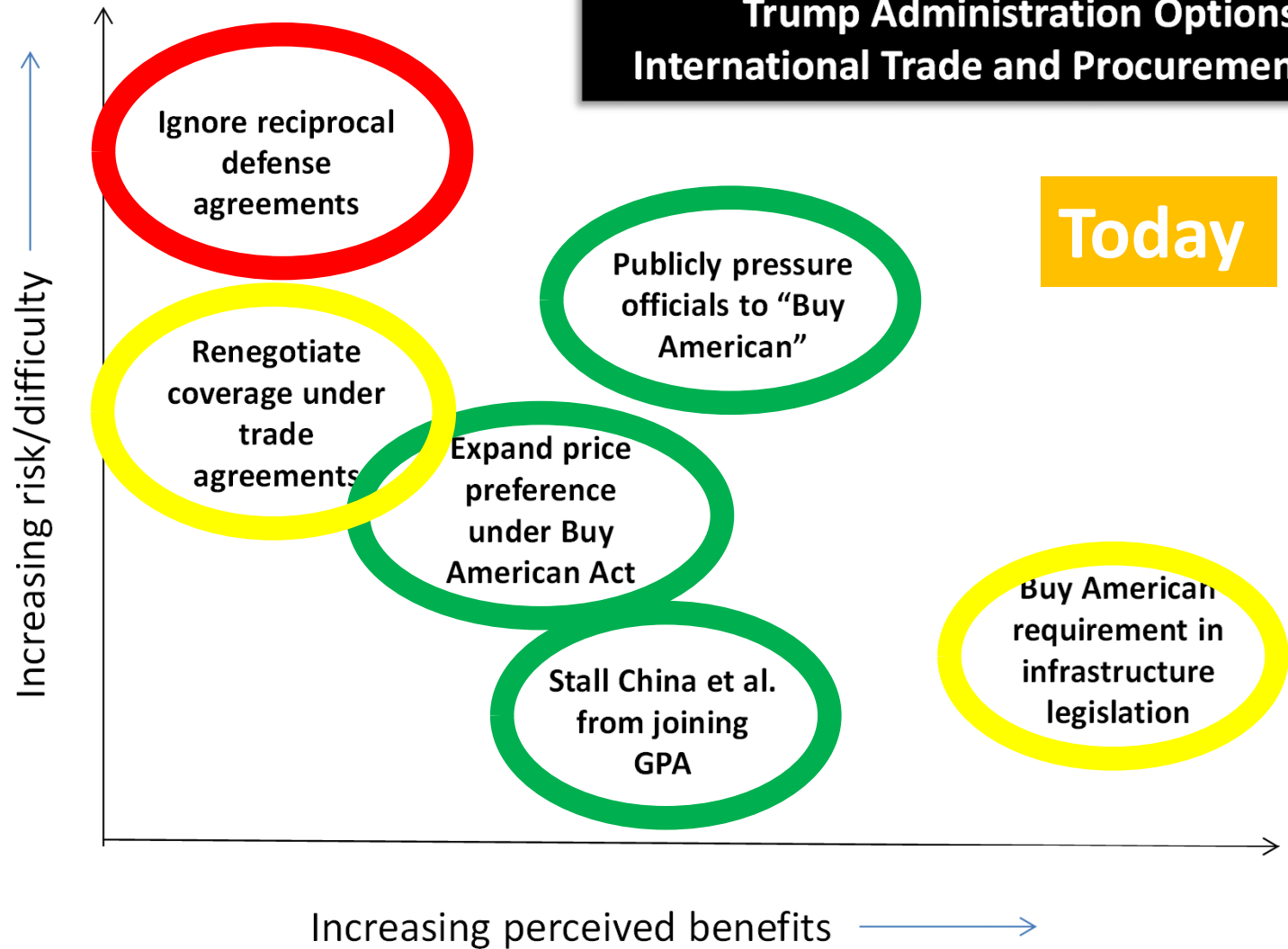
# **“Squeezing” the Buy American Act**

**Acquisitions Above Trade Agreements  
Thresholds (typically \$180,000):  
Buy American Act Does Not Apply**

**Buy American Act Applies: Acquisitions  
from \$10,000 to the Trade Agreements  
Thresholds**

**Micro-Purchases (Currently up to \$10,000):  
Buy American Act Does Not Apply**

## Trump Administration Options: International Trade and Procurement



# Electronic Marketplaces

---



# amazon

Market

Congress



MAJ  
Abraham  
Young, USA

Centralized  
Purchasing  
Agency

Users



Online  
Solution



## The Players

# amazon

Market

Congress



MAJ  
Abraham  
Young, USA

Centralized  
Purchasing  
Agency

Users



Online  
Solution



## The Problems

Vendor data – bid challenges – transparency –  
competition -- socioeconomic goals (including Buy American) – no-  
standards security review -- fee to GSA – Most Favored Customer pricing

# Context: International Procurement

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“... the direct cross-border share in the number of awards remained under 5% in the

Table 12: Direct and indirect cross-border shares of the value and number of awards, yearly total

Year	Total number of awards	Direct cross-border share of number awards	Indirect cross-border share of number awards	Value of awards (EUR million)	Direct cross-border share in the value of awards	Indirect cross-border share in the value of awards
2009	360,361	1.5%	19.9%	138,927	2.5%	18.6%
2010	404,839	1.5%	21.5%	138,042	2.5%	21.1%
2011	442,243	1.5%	21.4%	148,005	2.8%	19.8%
2012	462,532	1.5%	22.3%	144,989	2.7%	20.0%
2013	453,120	1.9%	22.1%	145,526	3.3%	20.3%
2014	477,867	1.9%	23.0%	142,825	3.4%	21.7%
2015	483,134	2.0%	22.6%	148,053	3.5%	21.4%
Overall	3,084,096	1.7%	21.9%	1,006,367	3.0%	20.4%

Source: London Economics based on TED transactions and Orbis database.

Table 28: Indirect cross-border awards to selected extra-EU partners as a percentage of total number of indirect cross-border awards, EU28

Country	Canada	China	Japan	Norway	Switzerland	US
Austria	0.1%	0.0%	2.3%	0.0%	8.4%	10.6%
Belgium	0.2%	0.0%	4.9%	0.2%	1.6%	10.6%
Bulgaria	0.0%	0.0%	0.1%	0.2%	1.9%	2.7%
Croatia	0.0%	0.0%	3.3%	0.0%	4.3%	8.4%
Cyprus	0.0%	0.0%	0.6%	0.0%	1.2%	16.8%
Czech R.	0.1%	0.1%	2.8%	0.0%	4.0%	11.7%
Denmark	0.7%	0.0%	2.4%	7.1%	6.7%	23.8%
Estonia	0.0%	0.0%	1.6%	5.0%	2.9%	5.5%
Finland	2.6%	0.0%	3.5%	3.3%	4.4%	16.7%
France	0.3%	0.0%	4.2%	0.3%	7.2%	30.4%
Germany	0.5%	0.1%	6.3%	0.3%	11.6%	15.3%
Greece	0.0%	0.0%	1.3%	0.0%	11.5%	18.6%
Hungary	0.3%	0.0%	1.4%	0.3%	4.0%	11.9%
Ireland	0.3%	0.0%	2.3%	0.2%	1.5%	27.1%
Italy	0.2%	0.0%	1.8%	0.2%	8.1%	35.7%
Latvia	0.0%	0.0%	0.6%	4.0%	0.2%	3.4%
Lithuania	0.0%	0.0%	0.1%	5.0%	1.0%	2.9%
Luxembourg	0.0%	0.0%	3.1%	0.0%	2.7%	1.9%
Netherlands	1.6%	0.4%	7.1%	0.5%	2.2%	11.2%
Poland	0.4%	0.0%	1.9%	0.1%	7.5%	23.5%
Portugal	0.5%	0.0%	3.3%	0.1%	6.7%	22.0%
Romania	0.0%	0.1%	0.0%	0.0%	1.5%	6.1%
Slovakia	0.0%	0.0%	0.6%	0.0%	2.2%	7.8%
Slovenia	0.1%	0.0%	2.0%	0.0%	3.1%	15.3%
Spain	0.4%	0.0%	4.7%	0.1%	7.0%	28.5%
Sweden	1.6%	0.1%	2.3%	7.9%	4.3%	19.8%
UK	1.8%	0.1%	3.3%	0.5%	5.1%	34.8%
EU28	0.4%	0.0%	2.7%	0.7%	6.0%	21.8%

**U.S. has largest shares of indirect cross-border awards in the European Union**

**GW**

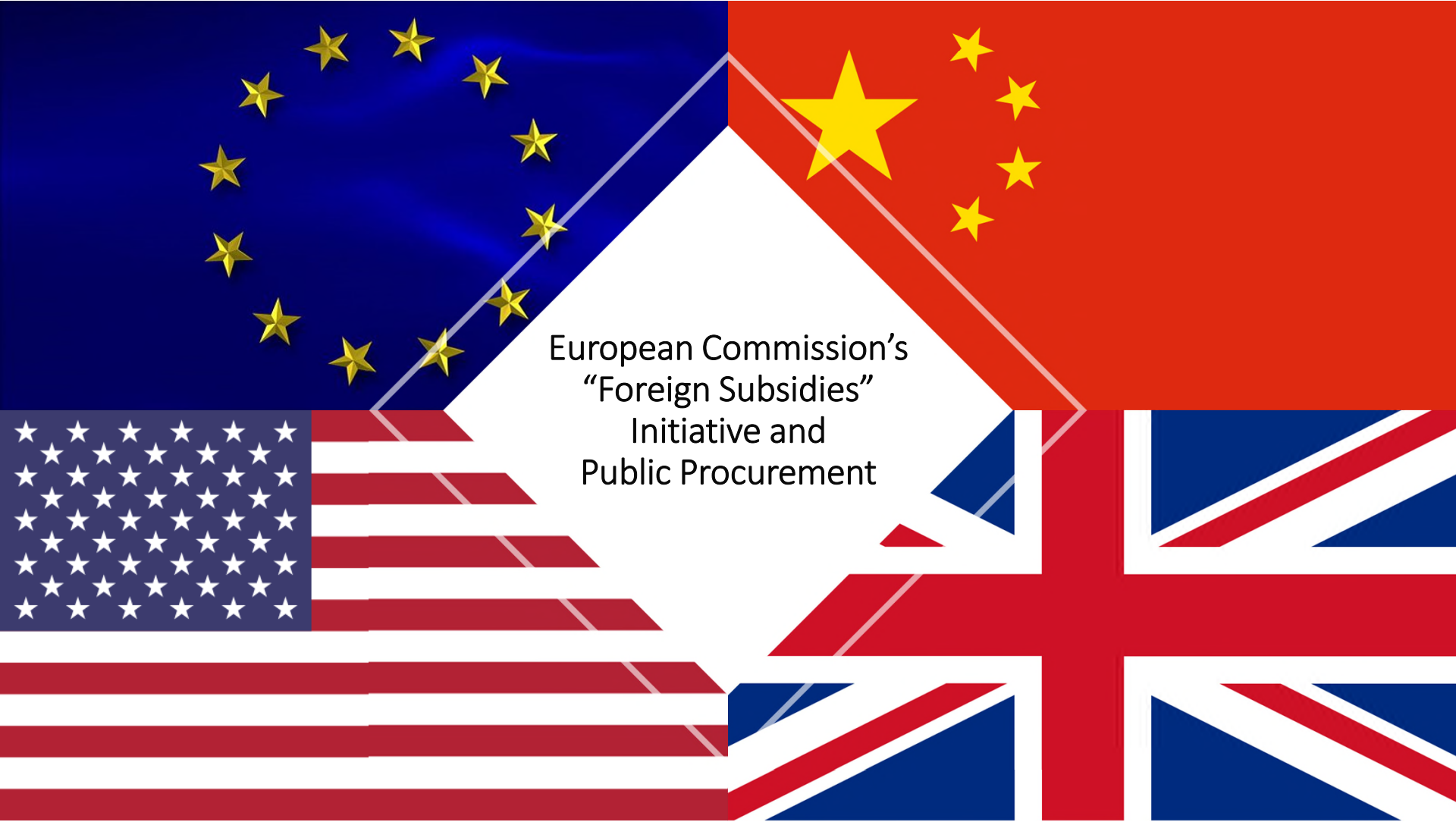
**LAW**



Table 42: Direct and indirect cross-border procurement by type of procedure between 2009 and 2015, EU28

Type of procedure	Total number of awards	Share of direct cross-border procurement in the number of awards	Share of indirect cross-border procurement in the number of awards	Total value of awards (EUR million)	Share of direct cross-border procurement in the value of awards	Share of indirect cross-border procurement in the value of awards
Open	2,595,871	1.4%	22.6%	695,606	2.4%	20.0%
Restricted	156,953	2.1%	18.5%	125,213	2.5%	18.5%
Negotiated with a call for competition	118,787	4.5%	17.9%	77,461	5.5%	23.4%
Award without prior publication of a contract notice <sup>44</sup>	90,115	1.5%	10.6%	33,240	2.1%	12.9%
Negotiated without a call for competition	81,003	5.7%	26.6%	49,835	8.6%	31.0%
Accelerated restricted	17,098	3.3%	19.2%	9,750	3.3%	18.9%
Not specified	13,486	2.3%	20.4%	5,096	4.0%	20.7%
Accelerated negotiated	5,825	4.3%	19.6%	3,199	3.6%	23.3%
Competitive dialogue	4,958	5.6%	22.7%	6,965	4.4%	21.0%

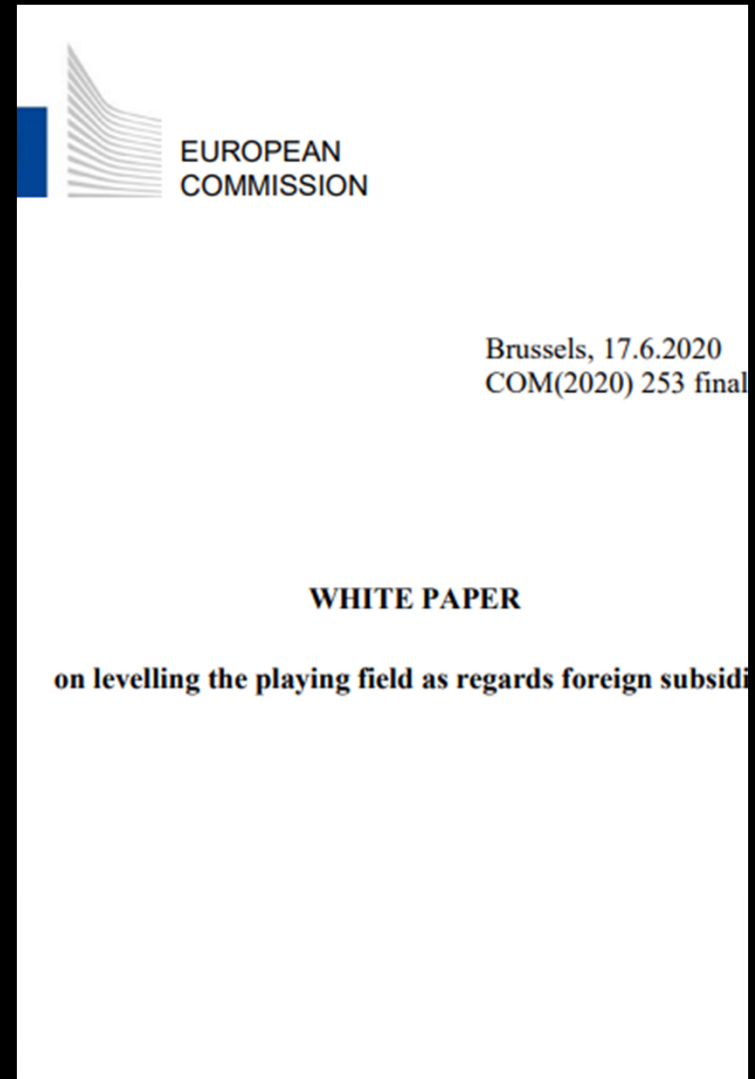




# European Commission – “Foreign Subsidies” Initiative

- **White Paper - Comments closed**

- **Module 1** proposes a general market scrutiny instrument to capture all possible market situations in which foreign subsidies are provided to beneficiaries in the EU and may cause distortions in the Single Market.
- Module 2 is intended to specifically address distortions caused by foreign subsidies facilitating acquisition of EU companies.
- **Module 3 addresses the harmful effect of foreign subsidies on EU public procurement procedures.**
- Finally, the White Paper sets out the option to review foreign subsidies in the case of applications for EU financial support.



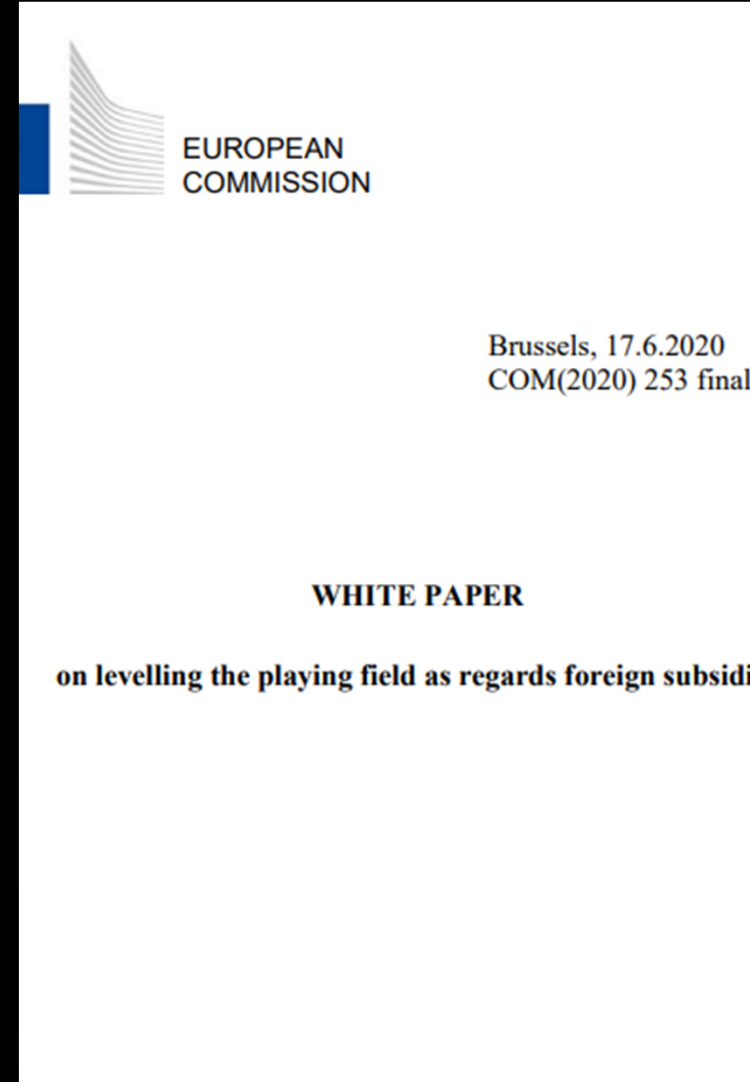
# Commission's core assertions

- In today's intertwined global economy, foreign subsidies can however distort the EU internal market and undermine the level playing field. There is an increasing number of incidences in which foreign subsidies appear to have facilitated the acquisition of EU undertakings, influenced other investment decisions or have **distorted the market behaviour of their beneficiaries**. Within the EU, the single market and its rule book ensure a level playing field for all Member States, economic operators and consumers so they can benefit from the scale and opportunities of the EU economy.
- **The single market rule book also includes rules on public procurement in order to ensure that undertakings benefit from fair access to public contracts, and that contracting authorities benefit from fair competition.**



# Commission's core goal: Impose EU “State Aid” Rules on Foreign Firms

“EU State aid rules help to preserve a level playing field in the internal market among undertakings with regard to subsidies provided by EU Member States. However, there are no such rules for subsidies that non-EU authorities grant to undertakings operating in the internal market.”





# Commission's Goal -- Procurement

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- **The EU procurement markets are largely open to third country bidders.** EU-wide publication of tenders ensures transparency and creates market opportunities for EU and non-EU companies alike. However, EU companies do not always compete on an equal footing with companies benefiting from foreign subsidies. **Subsidised companies may be able to make more advantageous offers, thus either discouraging non-subsidised companies from participating in the first place or winning contracts to the detriment of non-subsidised more efficient companies.** It is therefore important to ensure that recipients of foreign subsidies bidding for public contracts in the EU compete on an equal footing.



# Commission concedes procuring entities' posture

- In practice public buyers **do not have the information necessary to investigate** whether bidders benefit from foreign subsidies or to assess to what extent the subsidies have the effect of causing distortions in procurement markets. **Public buyers may also have a short-term economic incentive to award contracts to such bidders**, even if the low prices offered result from the existence of foreign subsidies.





## Module 3: Public Procurement

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- This module ensures that foreign subsidies can be addressed in individual public procurement procedures.
- EU public buyers **would be required to exclude from public procurement procedures those economic operators that have received **distortive** foreign subsidies.**
  - This new ground for exclusion could apply both to the procedure in question but **may also lead to exclusion from subsequent procurement procedures**, provided that certain conditions are met.
  - Foreign subsidies in procurement may give rise to a distortion of the procurement procedure either directly, by explicitly making a link between the subsidy and a given procurement project or indirectly, by de facto increasing the financial strength of the recipient. Where this enables the recipient to submit an offer that would otherwise – without the subsidy – be economically less sustainable, **especially in case of bidding significantly below market price or below cost, a distortion may be presumed.**
- The scope of this ground for exclusion **will be defined in the light of the EU's international obligations under the WTO Government Procurement Agreement (GPA) and various bilateral agreements** providing for access to the EU procurement market.

## Module 3 – Procedure – Self-Notification and Competitors

- Economic operators participating in public procurement procedures, **would have to notify to the contracting authority when submitting their bid whether they, including any of their consortium members, or subcontractors and suppliers have received a financial contribution within the meaning of Annex I**
  - **Annex I: A “foreign subsidy” refers to a financial contribution by a government or any public body of a non-EU State . . . which confers a benefit to a recipient . . . and which is limited, in law or in fact, to an individual undertaking or industry or to a group of undertakings or industries.**
- Self-assessment carries a significant risk of error and of deliberate circumvention by economic operators, as they may not be aware of the existence of a financial contribution or unwilling to disclose their existence to the contracting authorities.
  - Third parties and competitors are therefore entitled to inform the contracting authority that a notification should have been made in the procedure. These submissions have to be substantiated and provide prima facie evidence for the necessity of notification.



A proposal for a regulation is expected  
in Spring 2021.

## Redressive Measures

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- If the **supervisory authority . . . confirms that the economic operator has received a foreign subsidy, the contracting authority would determine whether that subsidy has distorted the public procurement procedure.**
- If so, it **will exclude this economic operator** from the ongoing procurement procedure.
- It may also be **envisaged to introduce an exclusion of such economic operator from future procurement procedures for a maximum of [3] years.** During that period, the economic operator will have the opportunity demonstrate that it no longer benefits from a distortive foreign subsidy when participating in a public procurement procedure and in this case it can participate in future procurement procedures.
- The decision would be subject to remedies.



## Following on from Consultation

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- Inception Impact Assessment contemplating introduction of Regulation in 2<sup>nd</sup> Quarter 2021
- As regards Public Procurement the focus is on Regulatory Gap

#### EU foreign policy

### EU proposes fresh alliance with US in face of China challenge

Brussels draft plan seeks to rebuild ties with common fronts on tech, Covid-19 and democratic interests



The draft policy proposals, entitled 'a new EU-US agenda for global change', includes an appeal for the EU and US to bury the hatchet on persistent sources of transatlantic tension © John Thys/AFP

Sam Fleming, Jim Brunsden and Michael Peel in Brussels YESTERDAY

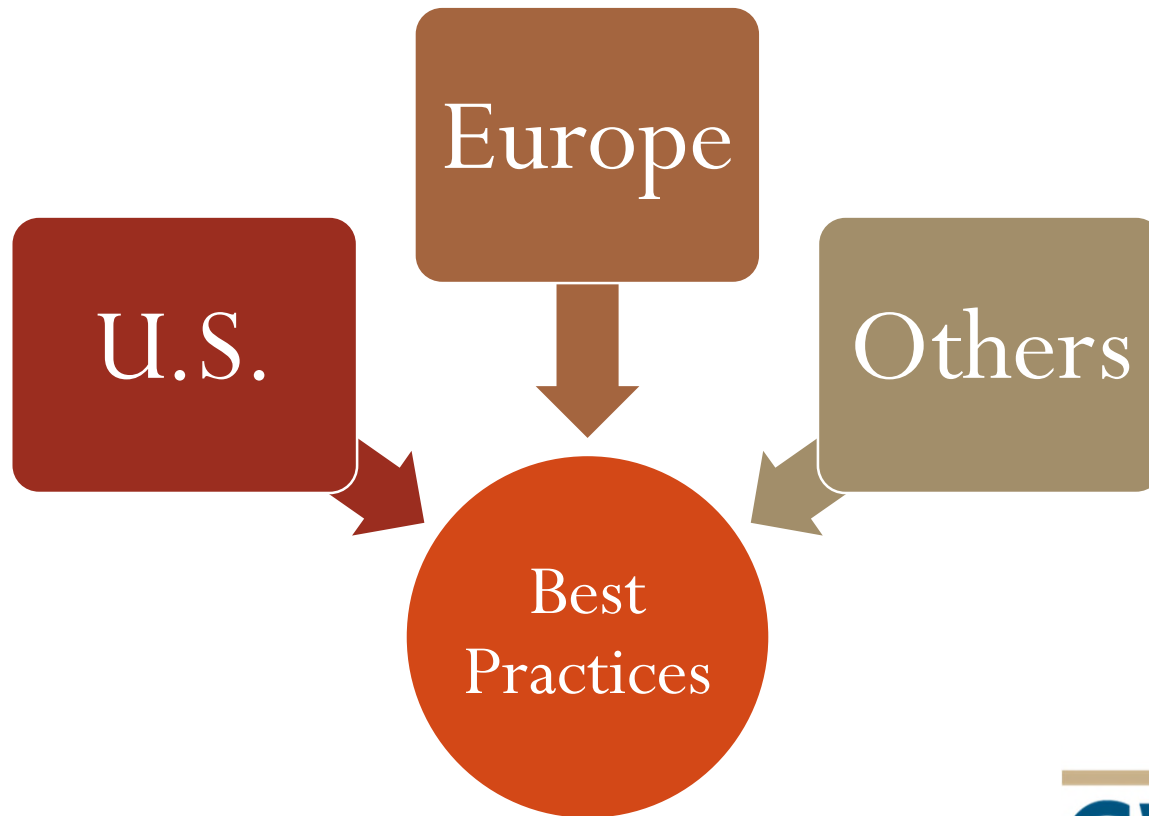
The EU will call on the US to seize a "once-in-a-generation" opportunity to forge a new global alliance, in a detailed pitch to bury the tensions of the Trump era and meet the "strategic challenge" posed by China.

A draft EU plan for revitalising the transatlantic partnership, seen by the Financial Times, proposes new co-operation on everything from digital regulation and tackling the Covid-19 pandemic to fighting deforestation.

It proposes the EU and US join forces to shape the digital regulatory environment, including by adopting common approaches to antitrust enforcement and data protection, co-operating on screening of sensitive foreign investments, and working together to fight threats such as cyber-hacking.

The paper, produced jointly by the commission and the EU's high representative for foreign policy, is expected to be submitted for endorsement by national leaders at a meeting on December 10-11. It suggests an EU-US Summit in the first half of 2021 as the moment to launch the new transatlantic agenda.

# Convergence: Procurement Regulation





	USA - Federal	EU	World Bank	WTO	USA Model Law for States
	CONVERGENCE				
Acquisition Planning	Yellow	Green	Green	Green	Yellow
Publication of Opportunities	Green	Green	Green	Green	Green
Electronic Auctions	Red	Green	Light Green	Green	Red
Open Procedure	Green	Green	Green	Green	Green
Competitive Dialogue	Green	Green	Light Green	Yellow	Green
Frameworks	Green	Green	Green	Red	Red
Contract Award Notices	Green	Green	Green	Green	Green
Bid Challenges	Green	Green	Yellow	Green	Green
Exclusion	Green	Yellow	Green	Red	Green
Contract Administration	Green	Red	Red	Red	Yellow