

# An Introduction to U.S. Procurement Part I

Professor Christopher Yukins  
George Washington University Law School  
Washington DC

Monday-Wednesday  
December 12-14, 2022  
University of Paris Nanterre



# Monday's Program

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# 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  
George Washington University  
Law School



# Readings & Videos

4

## Reading List

- 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, *Combating 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.

## IACA – UNOPS Cooperation: Online Course on Fraud and Corruption Prevention in Public Procurement Launched

In cooperation with the United Nations Office for Project Services (UNOPS), IACA launched an online self-directed course offering practical introduction to identify the risks of corruption and fraud in public procurement and exploring how those risks could be minimized. The training analyzes the procurement process and provides the possible options of reducing corruption practices and conflict of interest in public procurement and strengthening ethical behaviors throughout the whole procurement process according to the international best practices. Examples of various procurement activities from around the globe are presented in the course, emphasizing that the strong risk management and anti-corruption monitoring systems ensure fairness in procurement.

The course is taught by IACA frequent lecturer, Professor Christopher Yukins of the George Washington University Law School, Washington, D.C., Lynn David Research Professor in Government Procurement Law, and Co-Director of the Government Procurement Law Program.

IACA-UNOPS course on Fraud and Corruption Prevention in Public Procurement is aimed primarily at professionals involved in developing or improving procurement systems. It can be useful to 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**



# Procurement Law Centers: 2000



# Procurement Law Centers Today





# **What is Procurement: Principles, Pathologies and Processes**

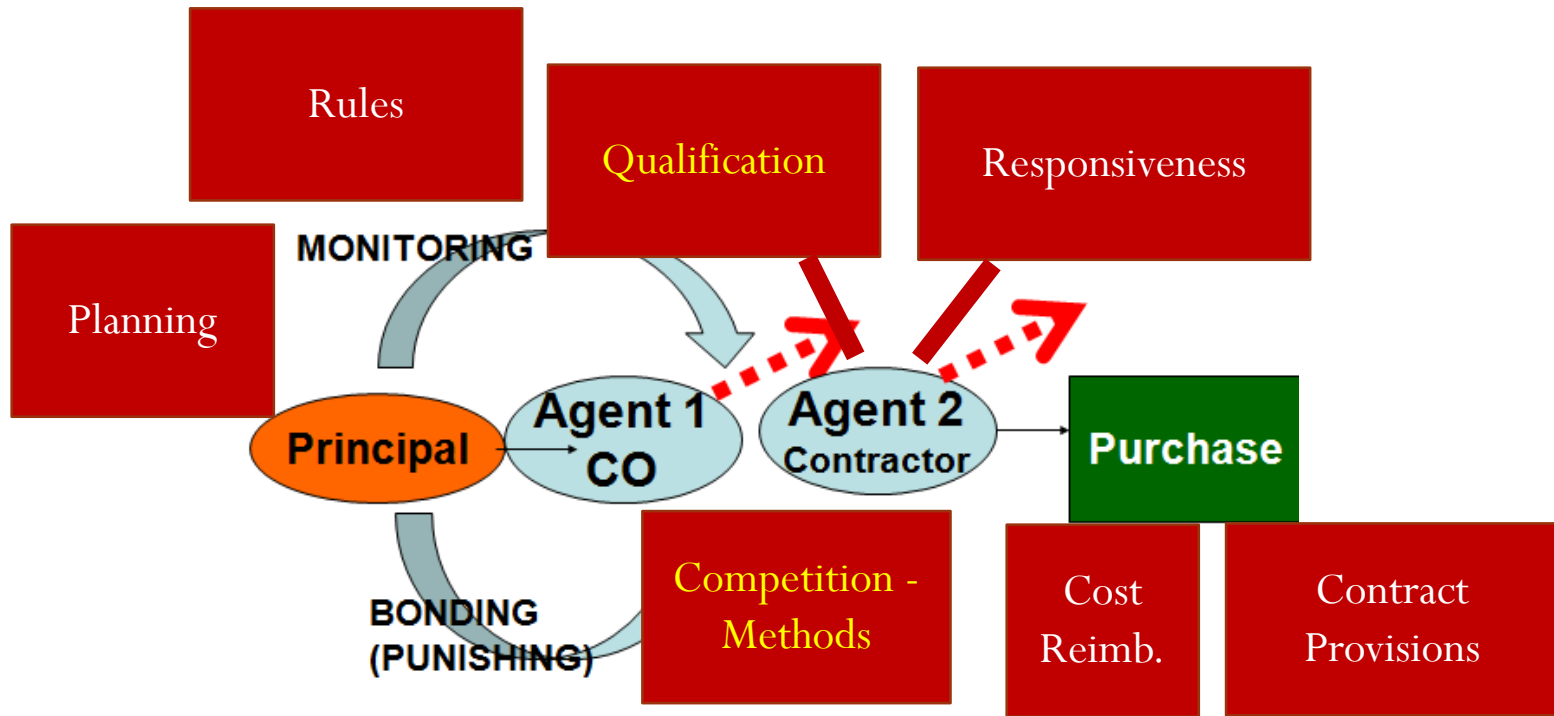
- ***Transparency***
- ***Integrity***
- ***Competition***
- **Uniformity**
- **Risk Avoidance**
- **Wealth Distribution -- Socioeconomic**
- **Best value**
- **Efficiency (administrative)**
- **Customer Satisfaction**



# Principal-Agent Model



# Processes



# The United States . . .

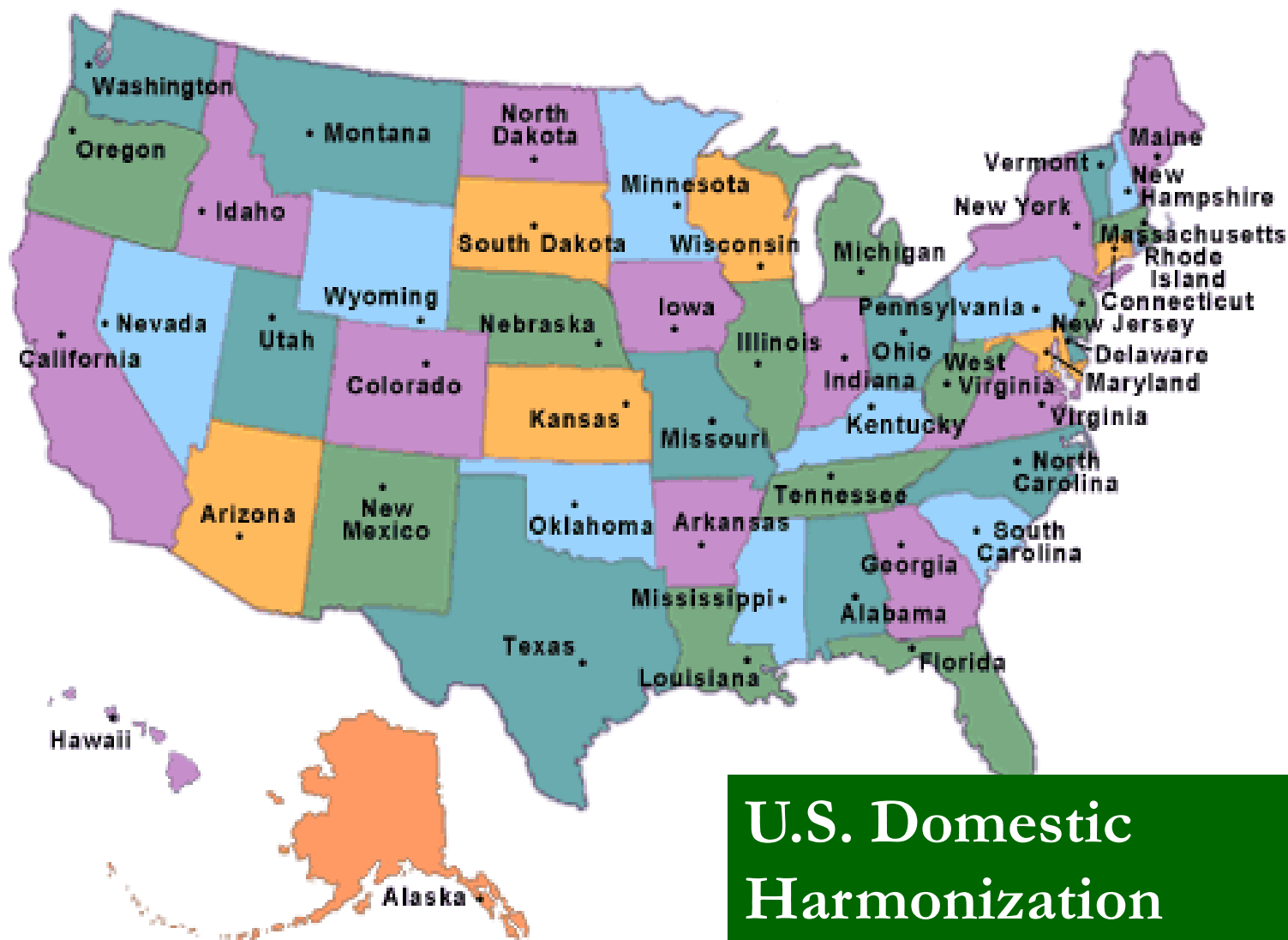
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- ... Has Separate Procurement Systems

Federal Procurement

State

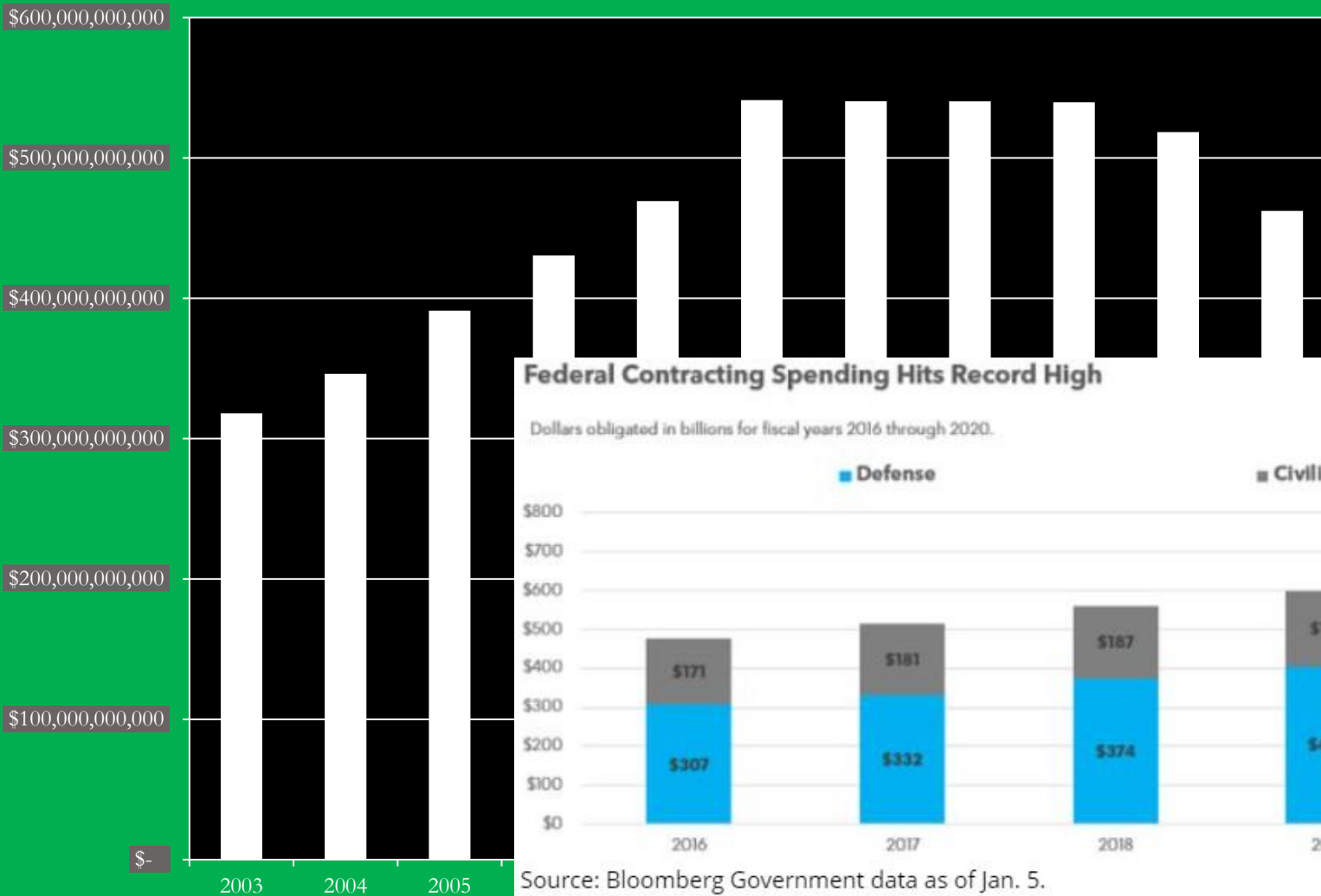
Local



## U.S. Domestic Harmonization

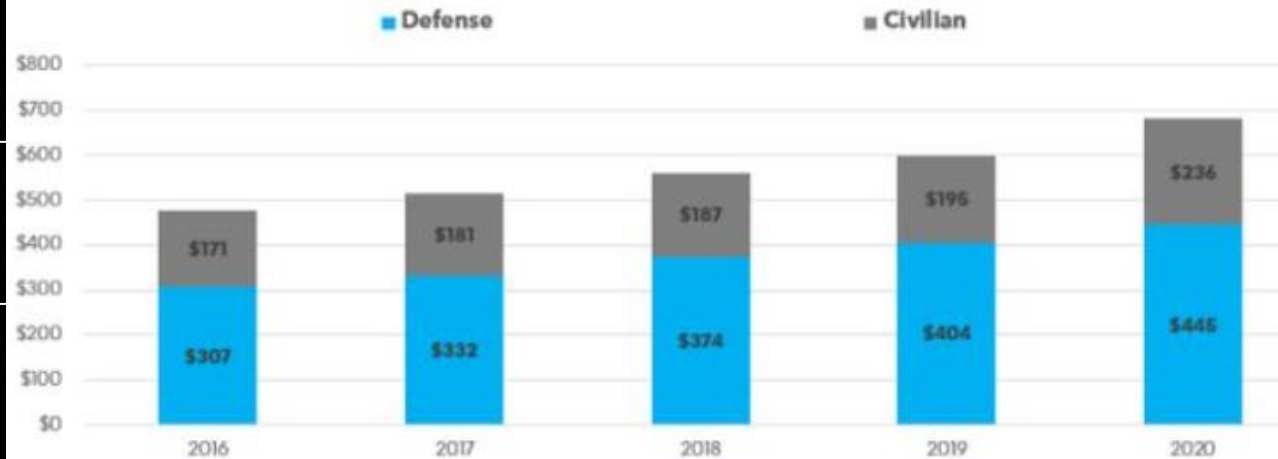
- Model Law?
- Through Federal Grants?
- Cooperative Purchasing?

# U.S. Federal Procurement



## Federal Contracting Spending Hits Record High

Dollars obligated in billions for fiscal years 2016 through 2020.



Source: Bloomberg Government data as of Jan. 5.

... Has over \$600 billion in annual federal procurement

GW


LAW



# Procurement is a High- Profile Political Issue

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

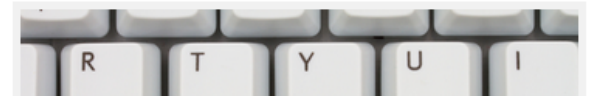
## The Unhealthy Truth About Obamacare's Contractors

 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

[f](#) Share 174

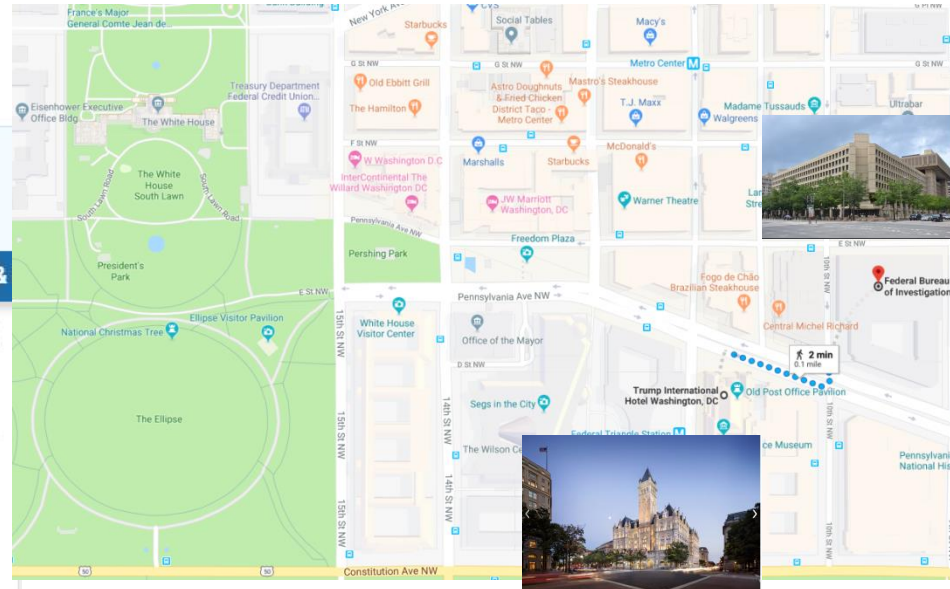
[t](#) Tweet this

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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:

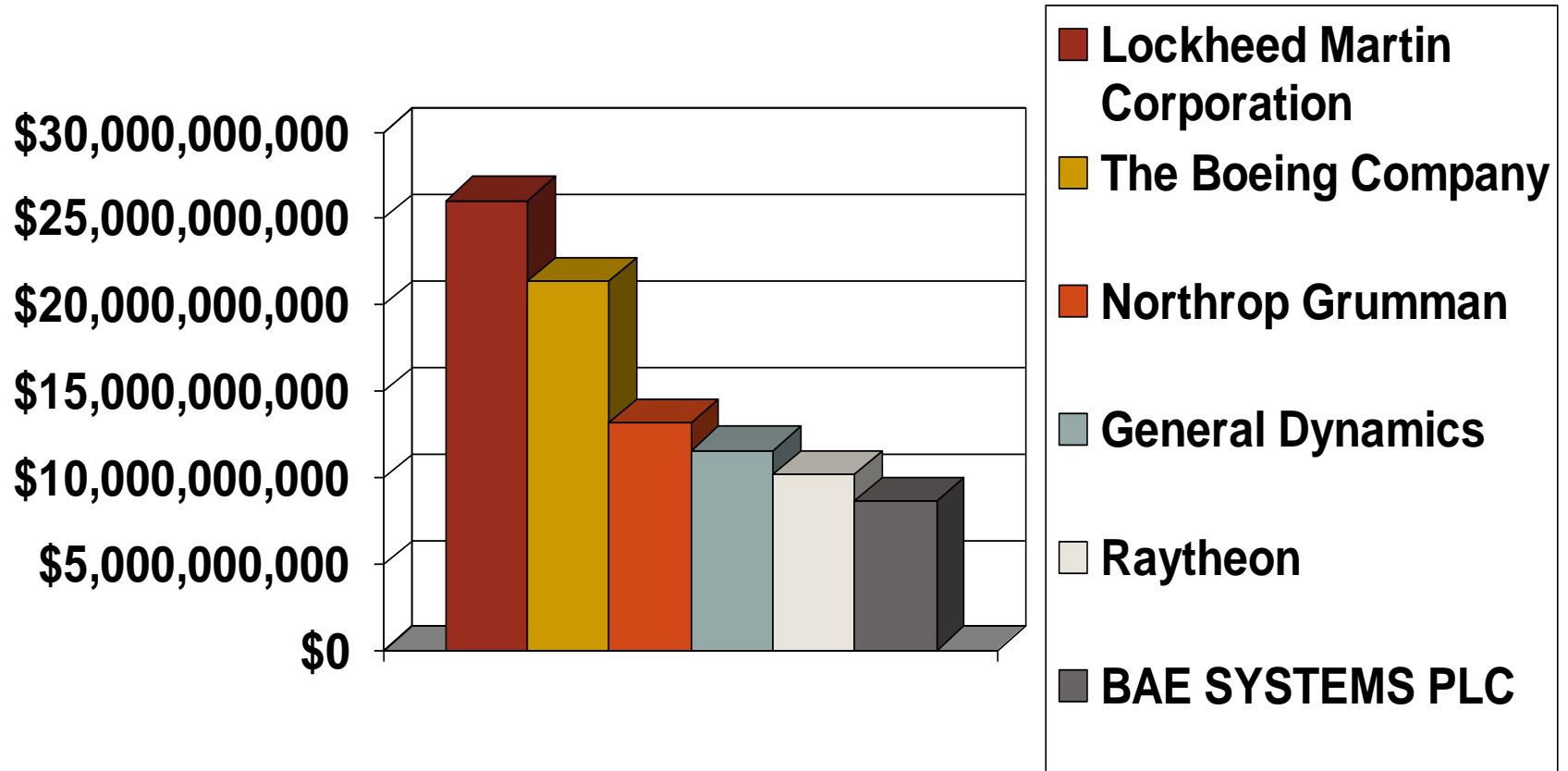
- Petty corruption
- Grand corruption
- State capture?

GW LAW

## . . . But Not Driven by Individual Politicians



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

... 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

[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



The screenshot shows the top section of the GSA eBuy website. On the left is the GSA eBuy logo. On the right, there is a 'Sign in as a...' dropdown menu with 'Buyer' and 'Contractor' options. Below the logo, a dark grey box contains the text: '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.' To the right of this box is a blue banner with a background image of a hand holding a tablet. Overlaid on the banner are several hexagonal icons representing different business functions: a handshake, a person, a pie chart, and a group of people. A small tooltip labeled 'Refresh iManage View' is visible over the hand.

## Benefits at a glance

Overview

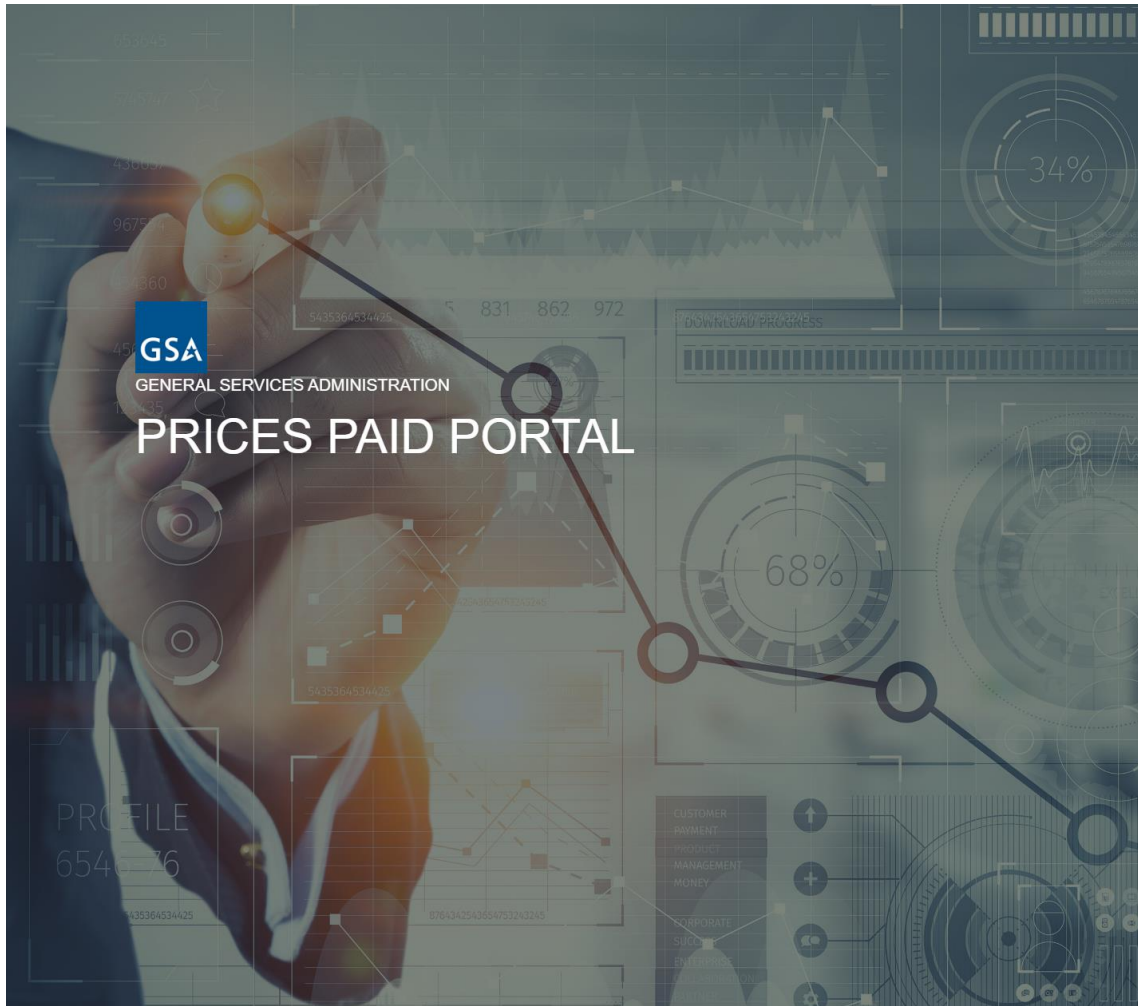
Buyers

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

# More Non-Transparency



## Sign In

Access is limited to Federal Employees only.

Authentication is provided through MAX, please click the button below to authenticate using OMB MAX.

Authenticate with OMB MAX

[Click here for help logging in](#)

To become a registered MAX user [click here](#).

[Instructions for registration](#)

[Contact Us](#)

This site optimized for Chrome V43, FireFox V38, Safari V8, and IE9 and later.

This is a U.S. General Services Administration computer system that is "FOR OFFICIAL USE ONLY". This system is subject to monitoring. Therefore, no expectation of privacy is to be assumed. Individuals found performing unauthorized activities are subject to disciplinary action including criminal prosecution.

[View Rules of Behavior](#)

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# . . . 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





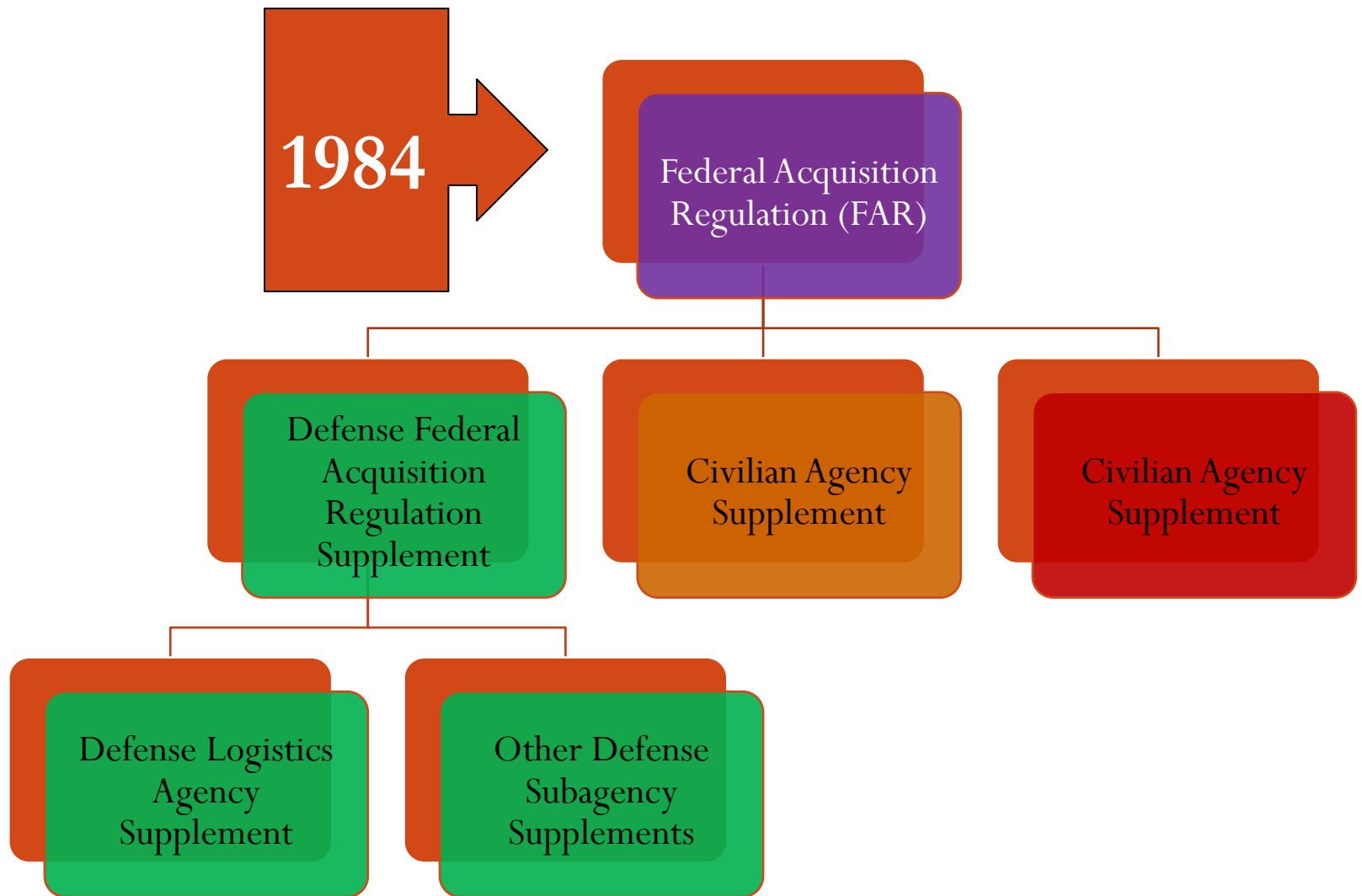
# More Scandal

Duke  
Cunningham  
David Safavian



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

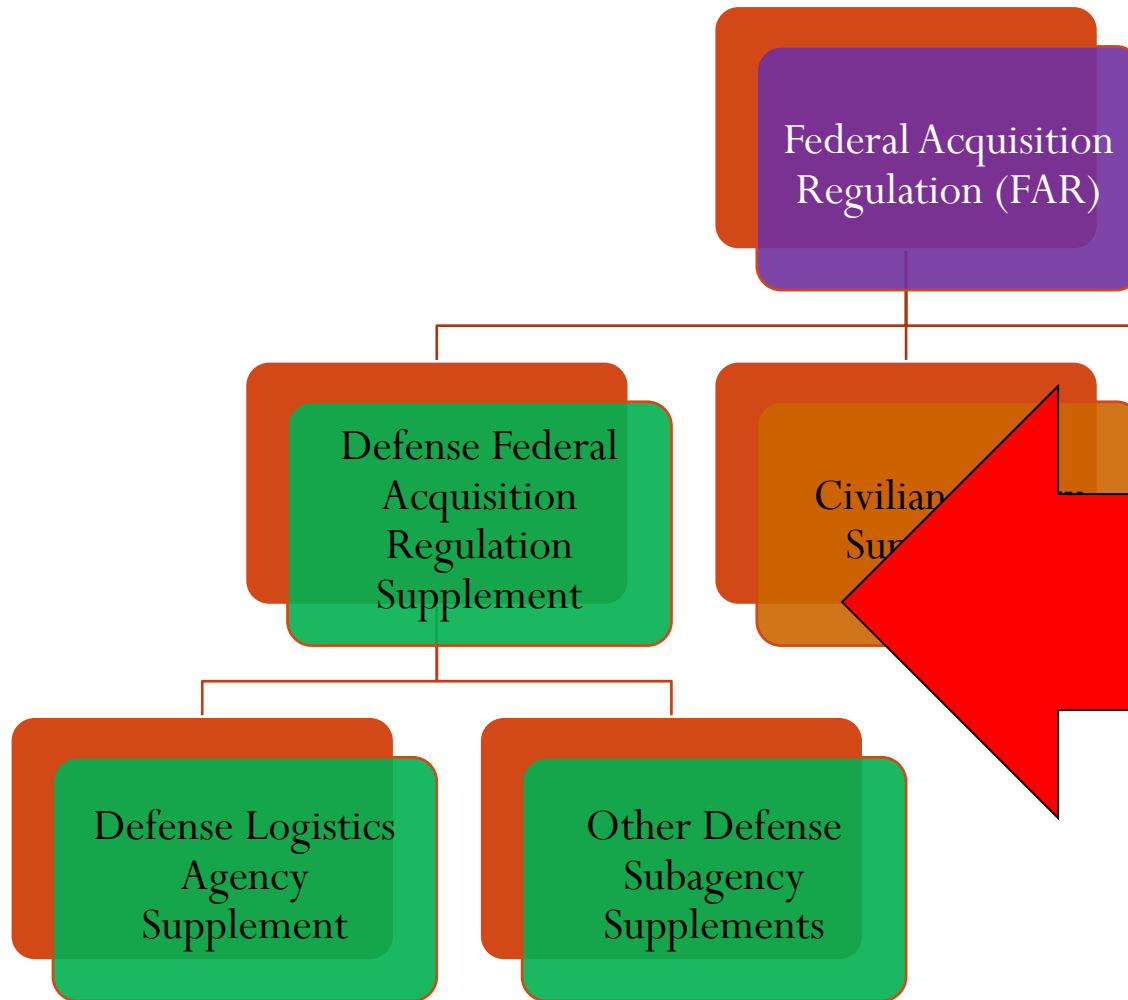
Congressman resigns after  
bribery plea  
California Republican admits  
selling influence for \$2.4 million  
Monday, November 28, 2005  
(CNN) -- Rep. Randy "Duke"  
Cunningham



... a Unified Regulatory  
System



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



# . . . Familiar Major Methods of Procurement

Open  
Procedure  
(less than  
3%)

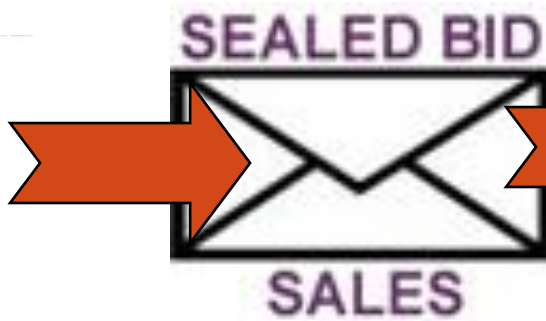
Restricted  
Procedure

Negotiated  
Procedure  
(primary  
method)

Sole-  
Source

# Historical Progression

1



Sealed Bids



Negotiated  
Procurements

A detailed form titled "CONTRACT DATA REQUIREMENTS LIST". It contains various sections for contract information, including "CONTRACT NUMBER", "DATE", "PROJECT NAME", "LOCATION", "SCOPE OF WORK", "BIDDING REQUIREMENTS", and "SPECIFICATIONS". The form is filled with text and has a structured layout with columns and rows.

Frameworks

GW

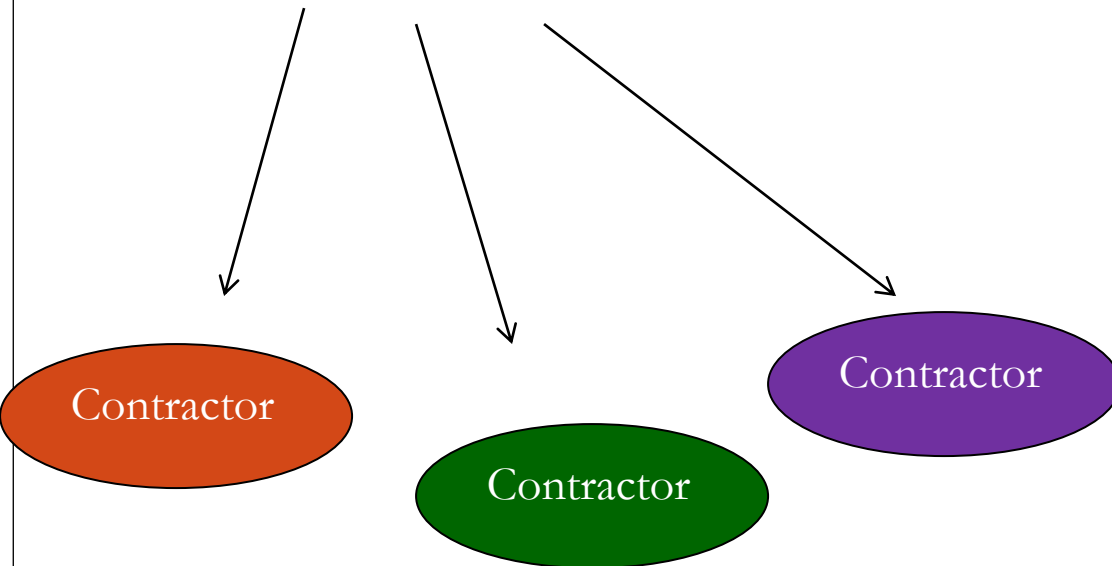
LAW

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



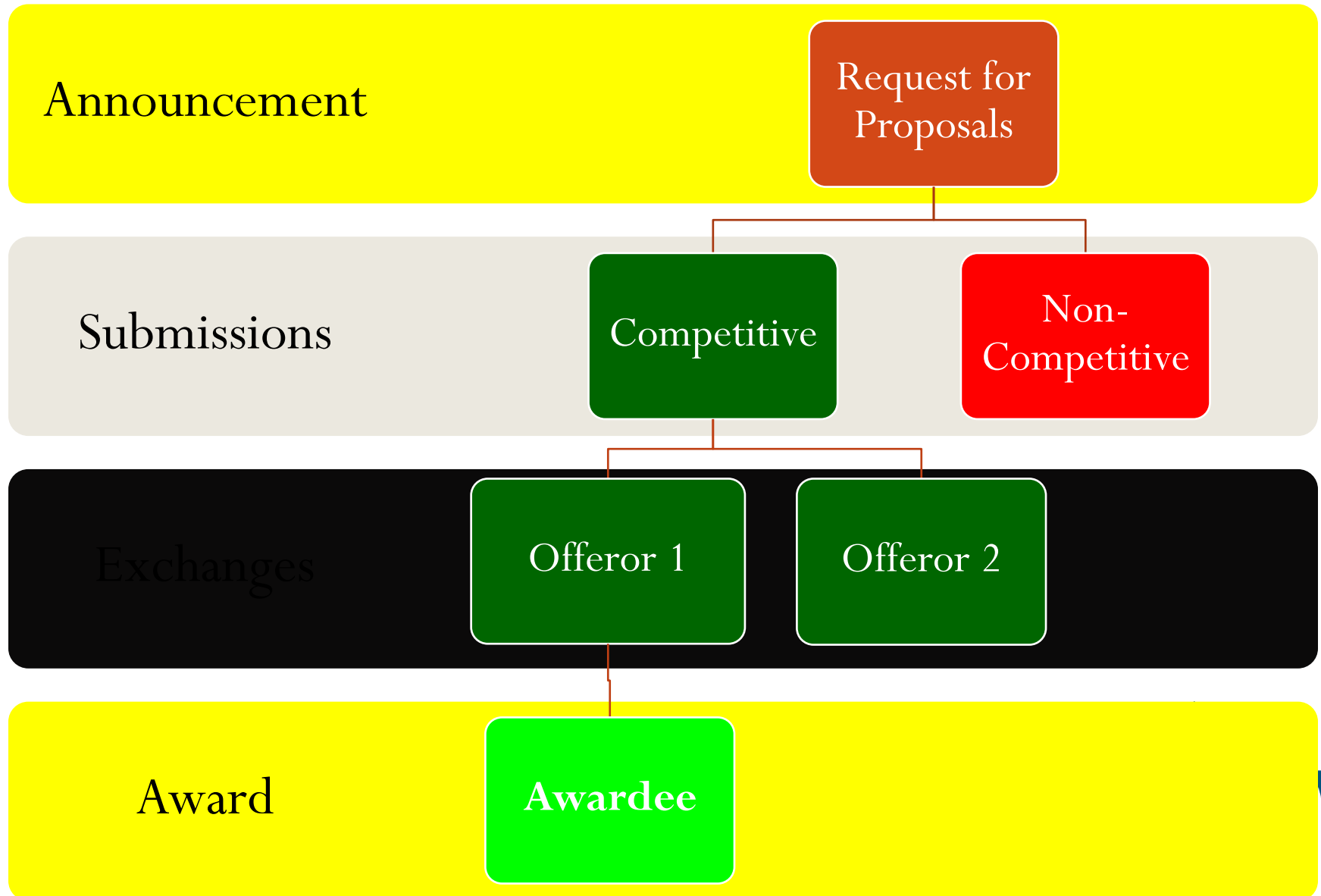
# Competitive Negotiations: Multiple Vendors, for Best Value

## Negotiated Procurements



# Competitive Negotiations

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Frameworks

Frameworks emerged in the United States  
and elsewhere along parallel paths

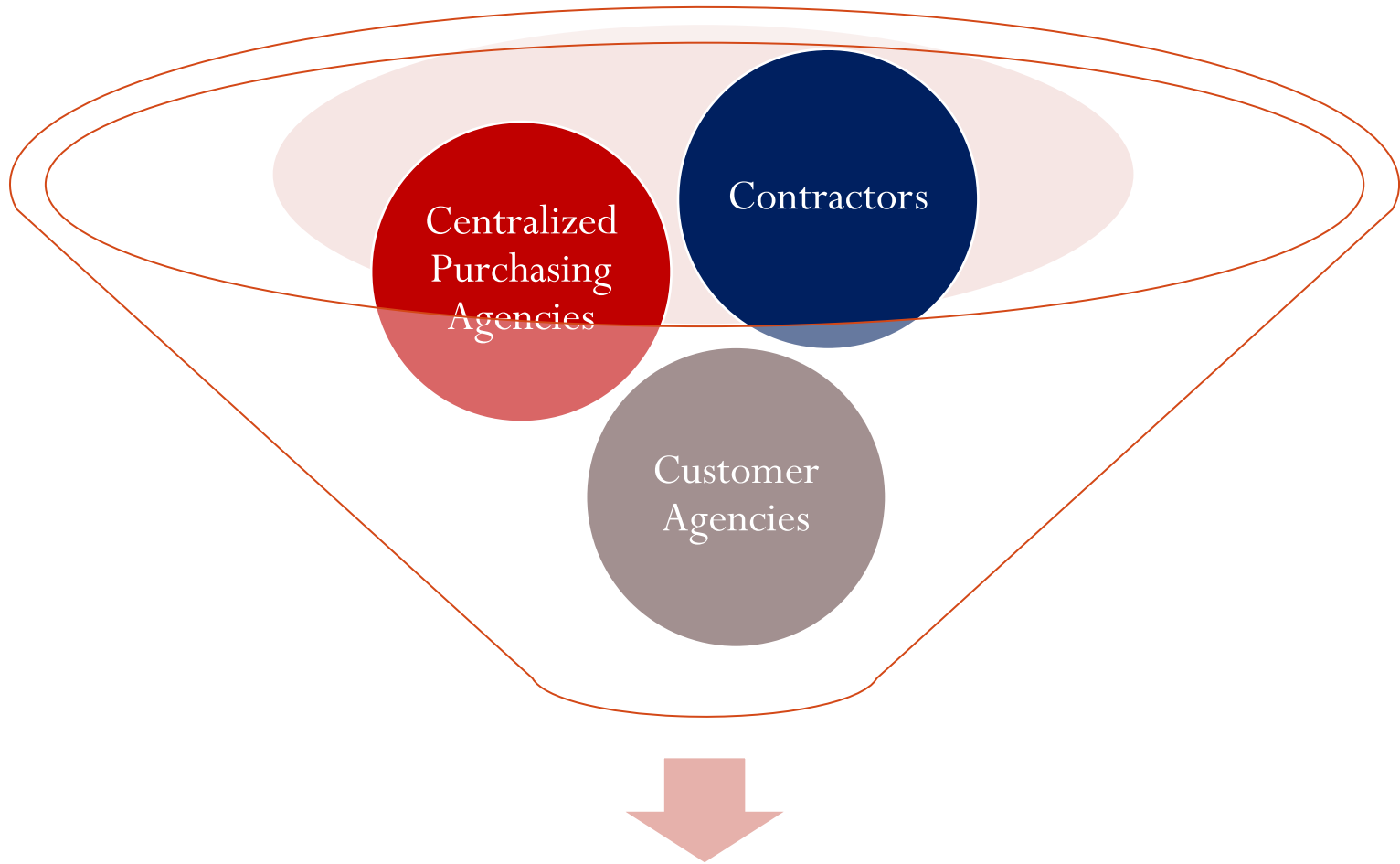
Supplier Lists

# Frameworks: Sample

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# LAW

# Problems in U.S. Frameworks: 1990s

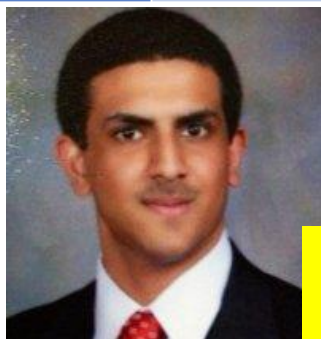


**Reduced Transparency – Reduced Accountability -- Misuse of Frameworks**

# 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%

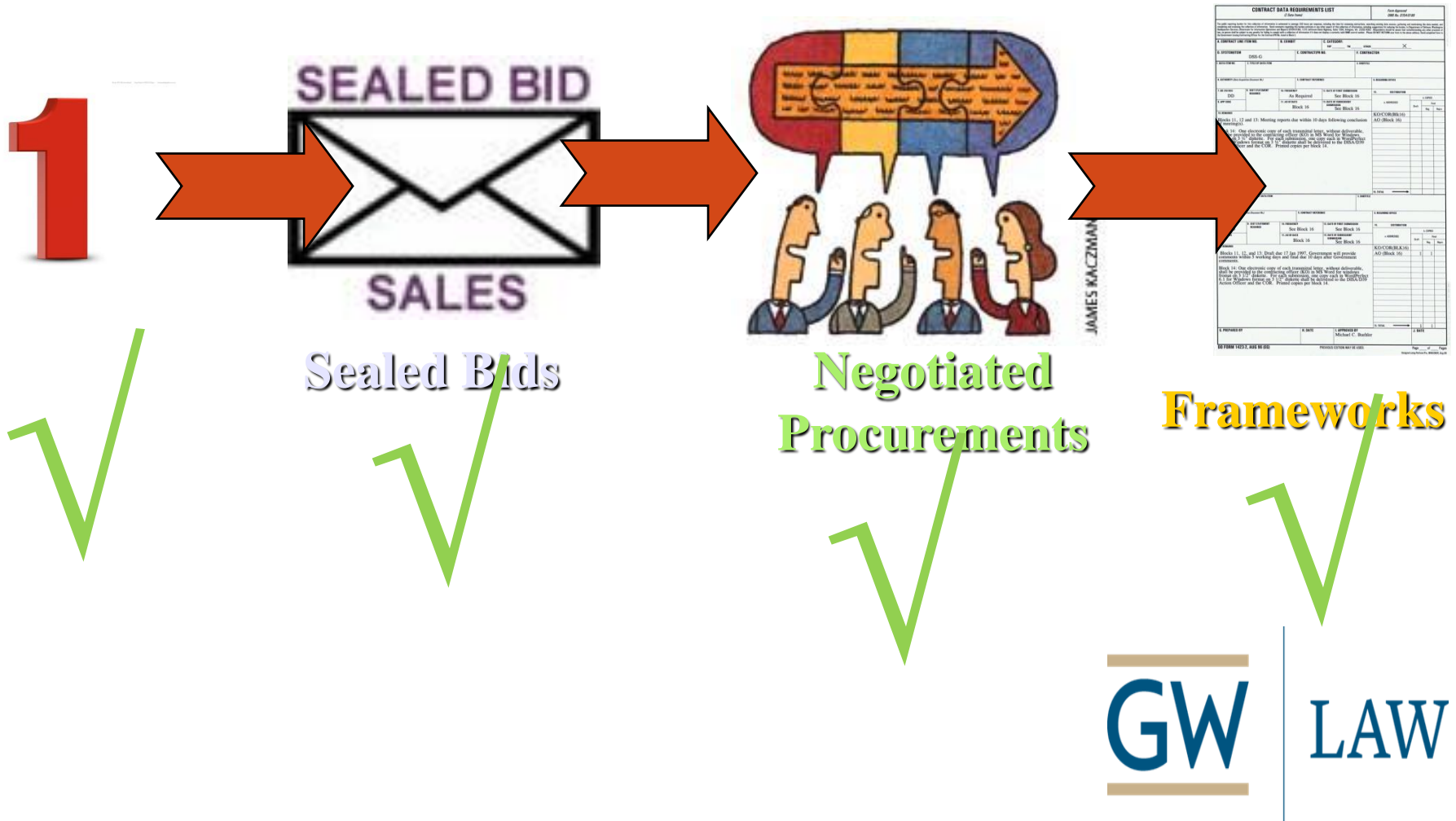


**Umer Chaudhry**  
GWU Law Student

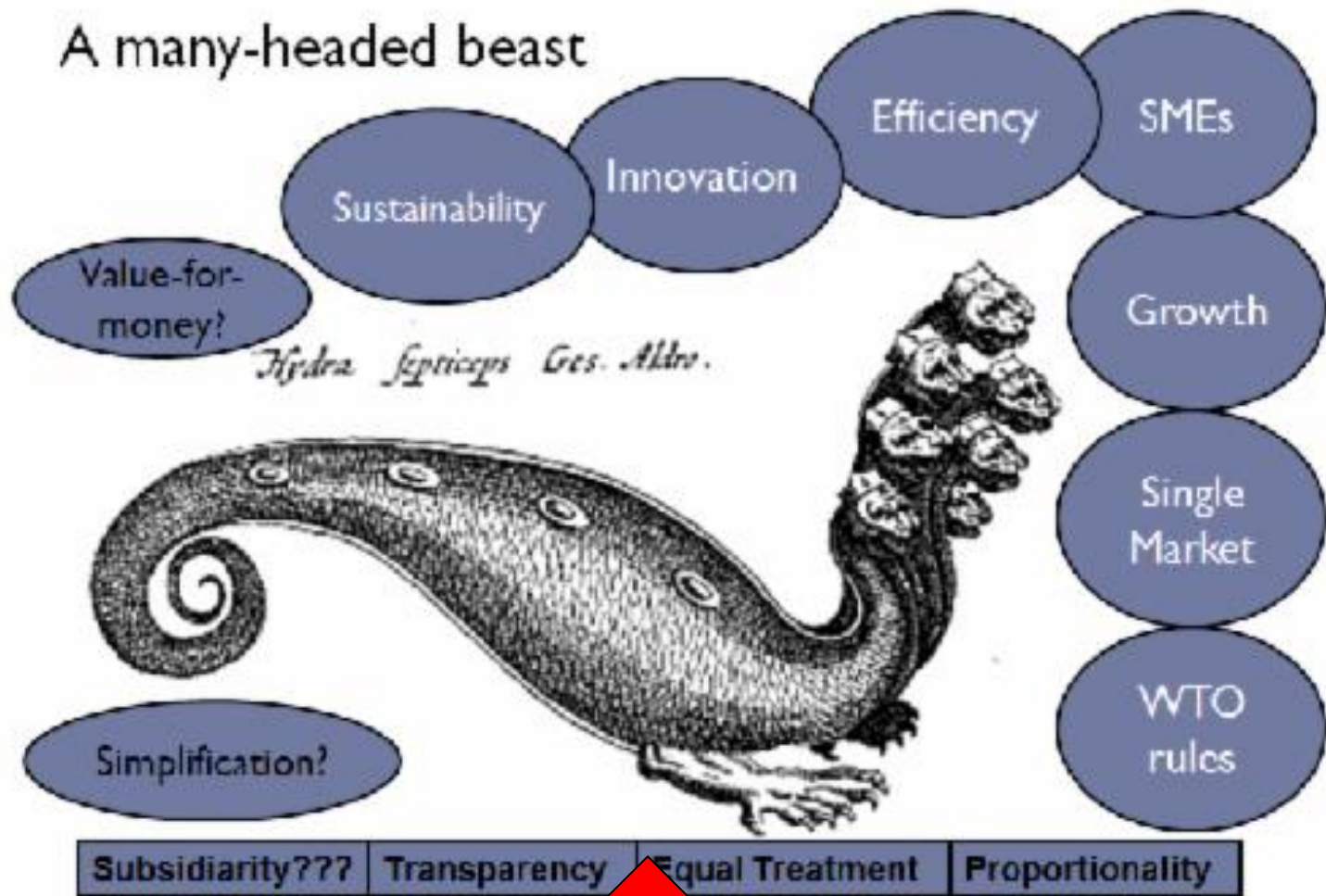




# EU uses same methods – but in a different historical progression



# Do the EU Directives Impose Additional Principles?



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

Author: Abby  
Semple

# Patterns in U.S. Procurement

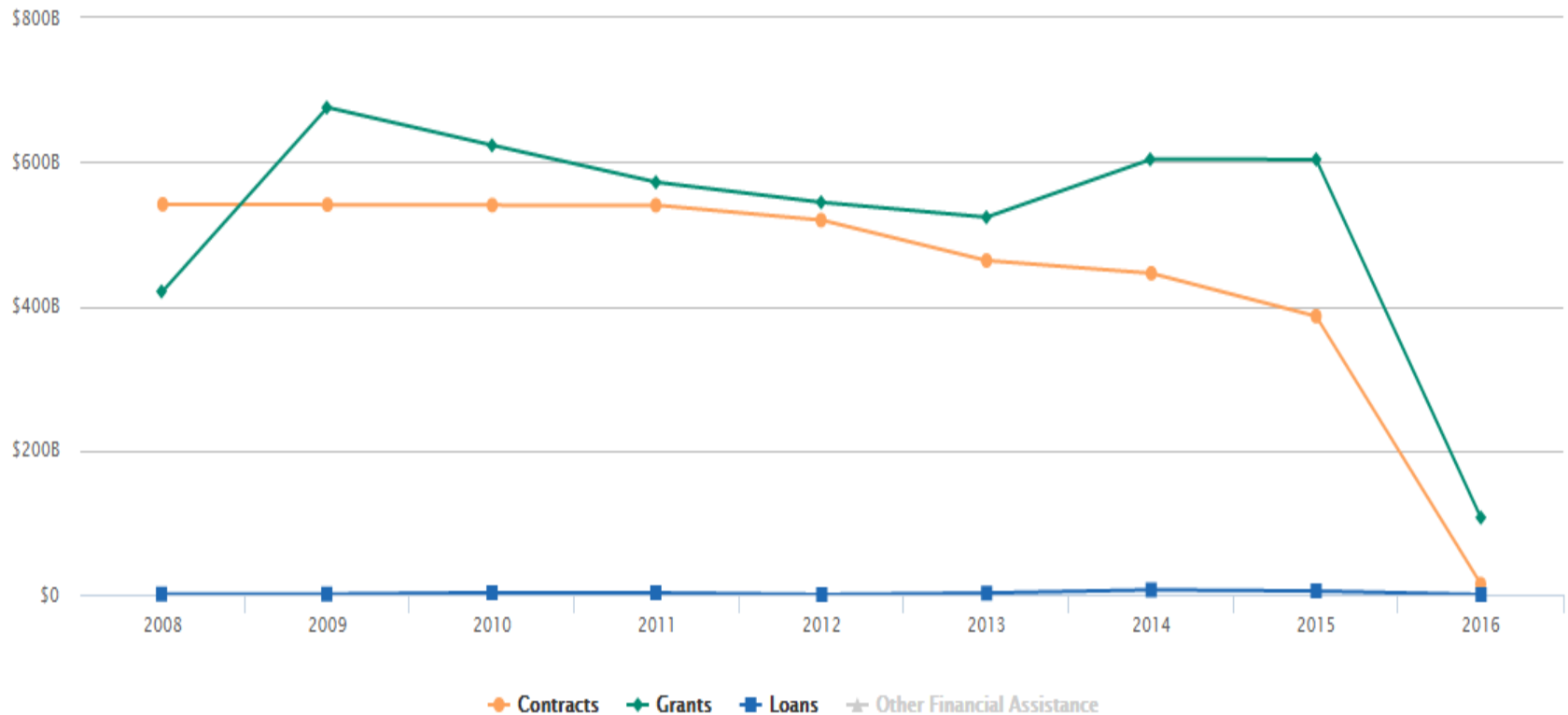
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# OVERVIEW OF AWARDS BY FISCAL YEAR

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.

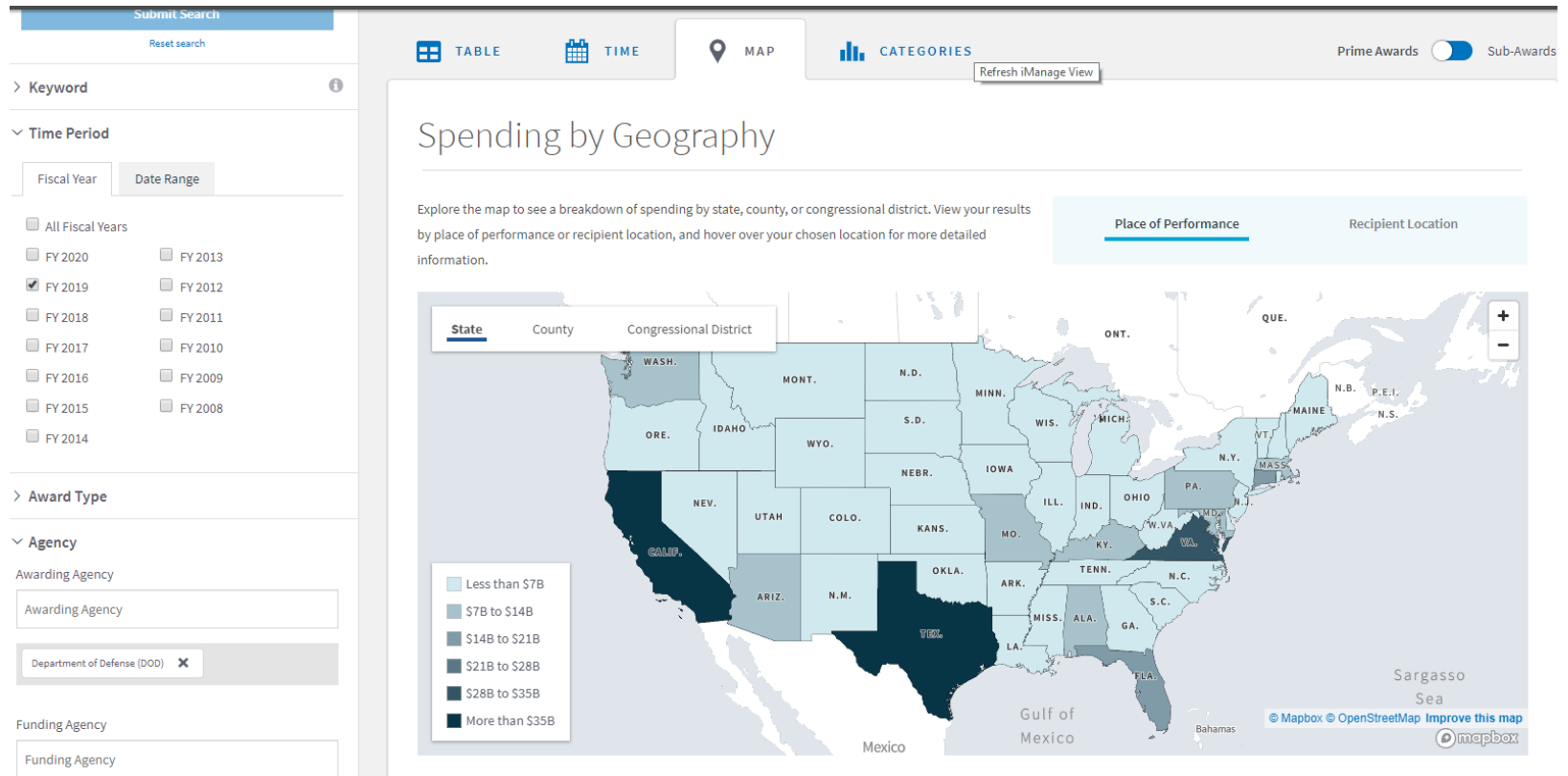
## OVERVIEW OF AWARDS BY FY 2008 – 2015



[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

43

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

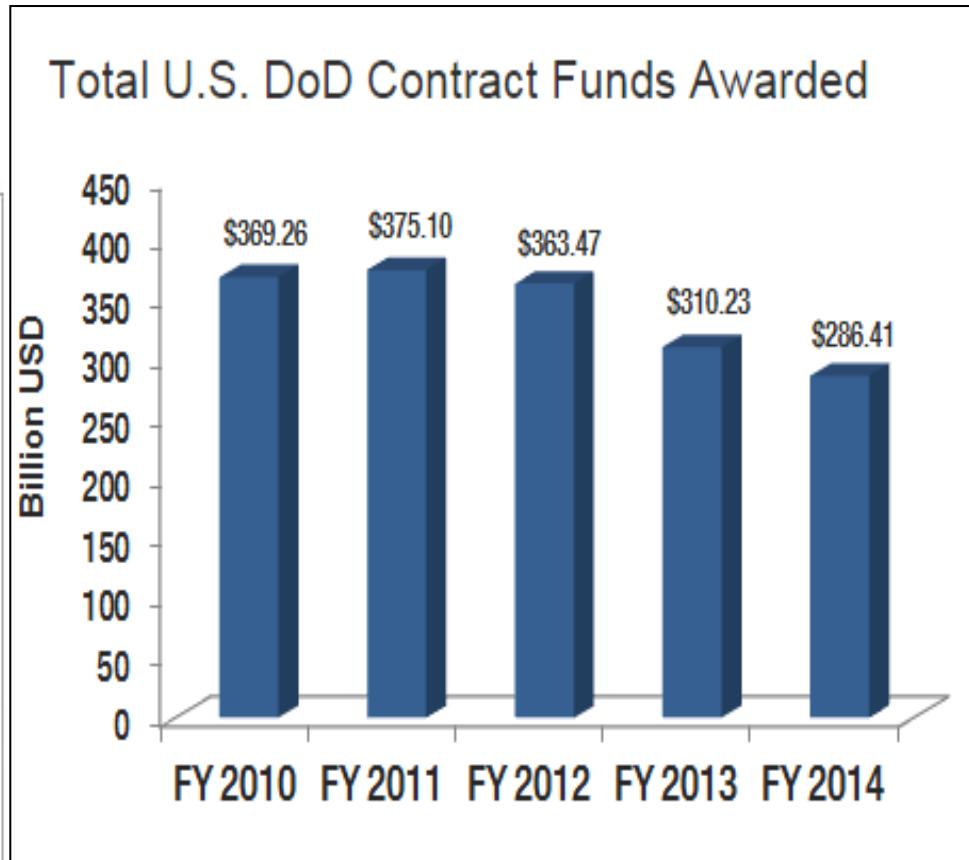
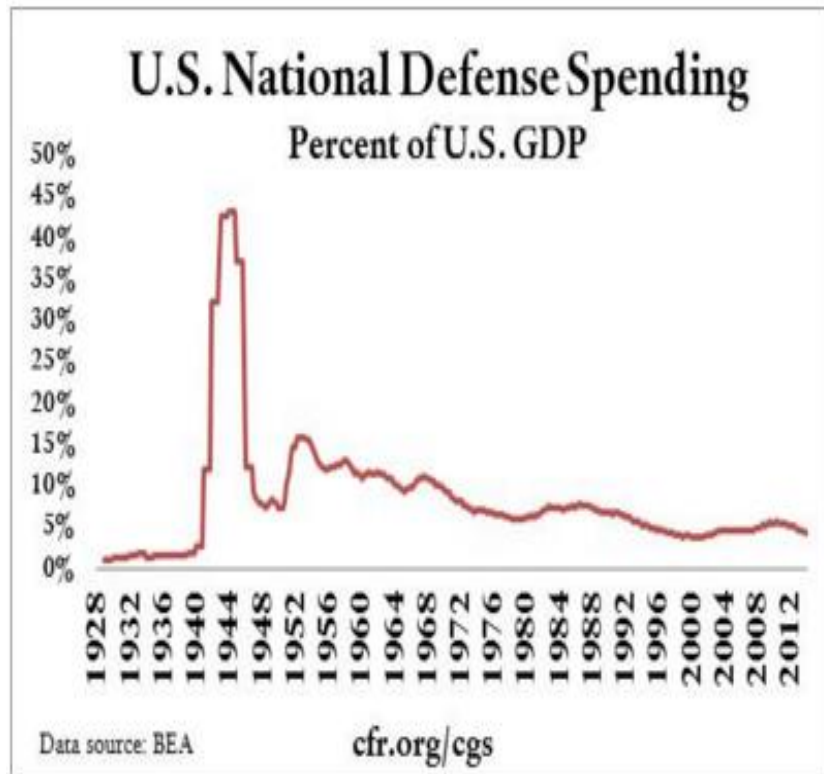
Rank	Change	Company		Obligations
1	-		Lockheed Martin	\$38.4B
2	-		Boeing	\$27.4B
3	↑ 1		Raytheon Co.	\$17.5B
4	↓ 1		General Dynamics Corp.	\$14.9B
5	-		Northrop Grumman	\$12.4B
6	↑ 7		United Technologies	\$7.7B
7	↓ 1		Huntington Ingalls	\$7.1B
8	↓ 1		BAE Systems	\$6.9B
9	↓ 1		Humana Inc.	\$5.4B
10	↓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

France Defense  
Budget:  
US\$42 billion

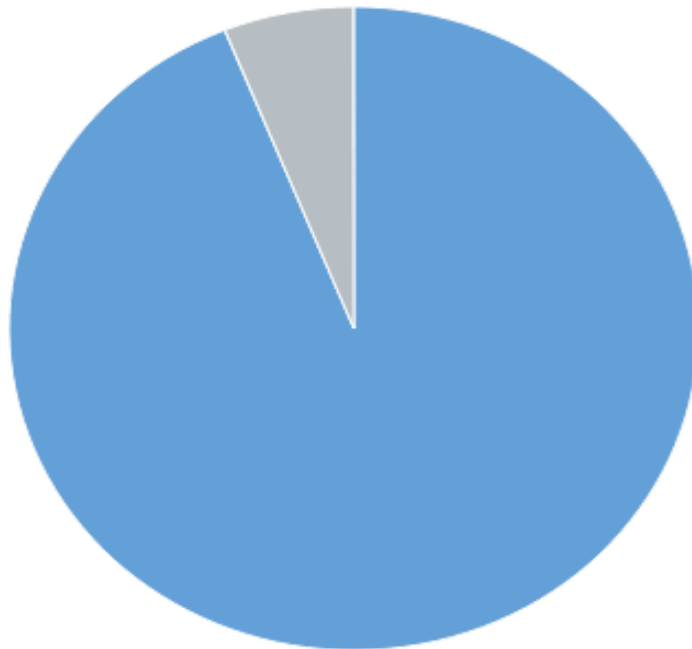
GW

LAW

# Some Trends in DoD Procurement



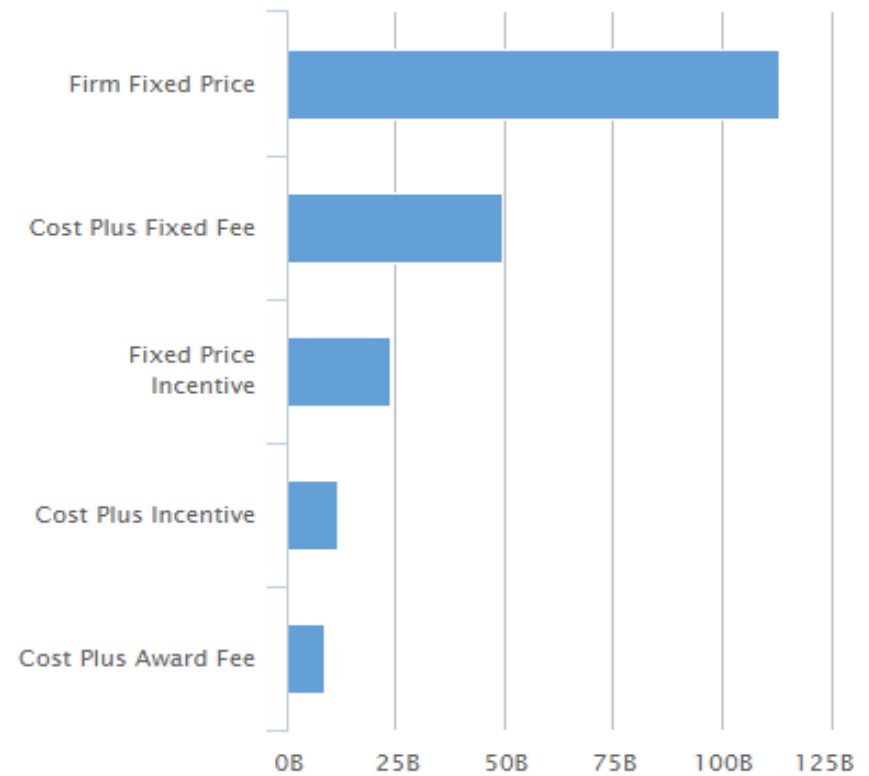
## COMPETED/NON-COMPETED



■ 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

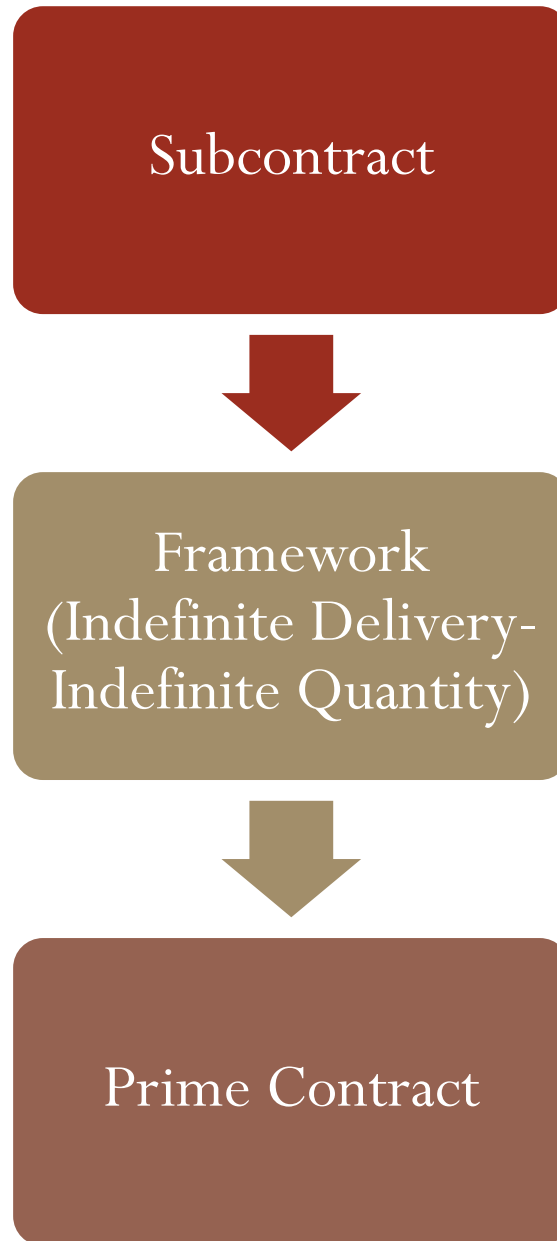
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# DoD Acquisition Workforce

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 and Biden Administrations

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See  
Reading  
List



# 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

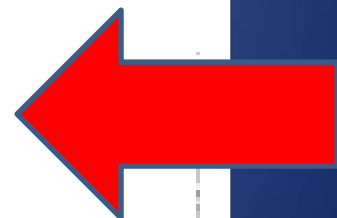
## TRADE

4

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

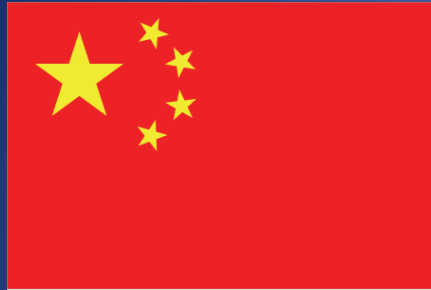
1. The products of any Member country imported into any other Member country shall be exempt from internal taxes and other internal charges higher than those imposed on like products of national origin, and shall be accorded treatment no less favorable than that accorded like products of national origin 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



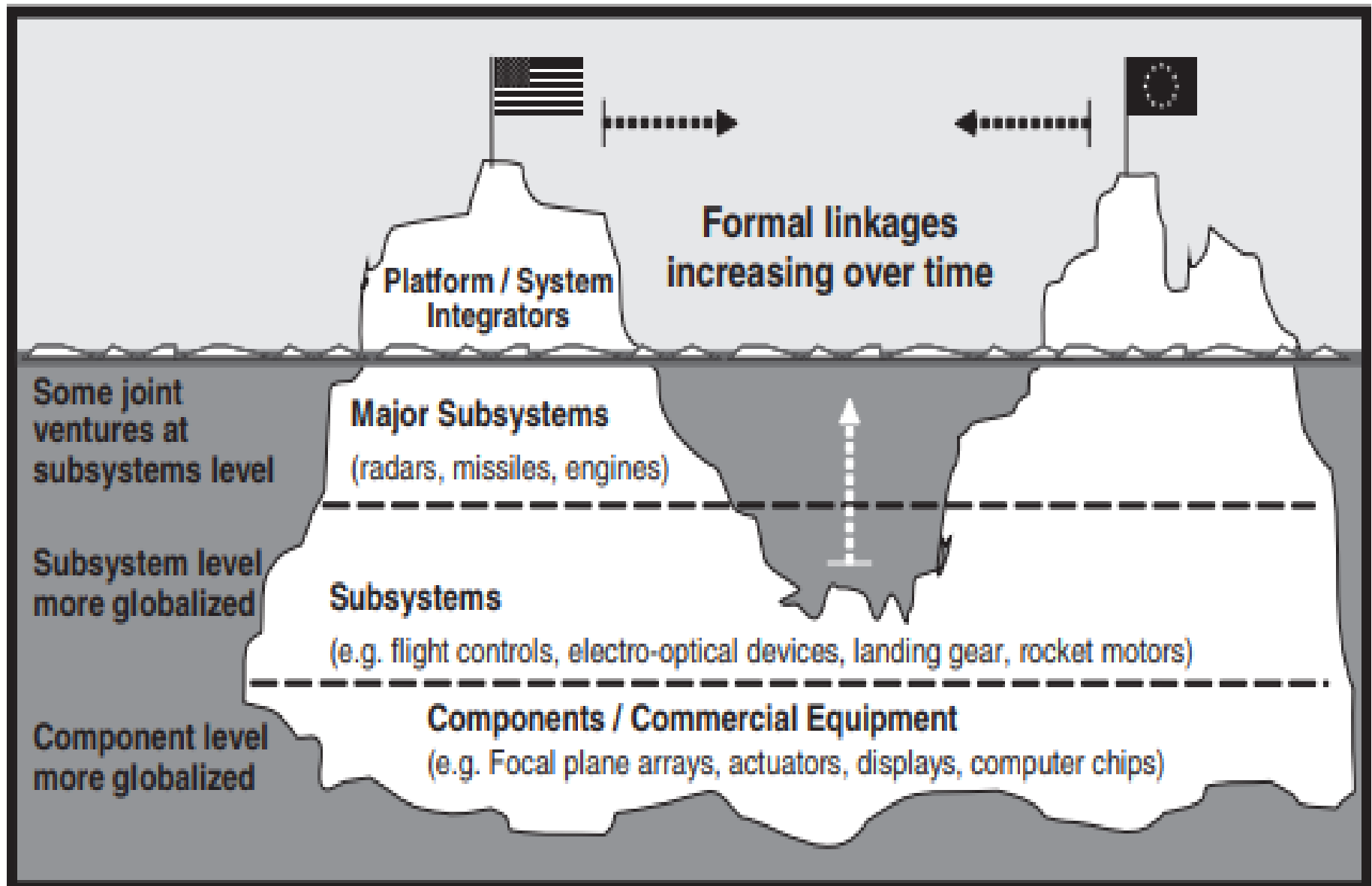
Trade Agreements Act:  
Above \$180,000 (approx.)

Buy American  
Act

Micro-  
Purchase

# **RECIPROCAL DEFENSE PROCUREMENT AGREEMENTS**

# The Transatlantic Defense Industry



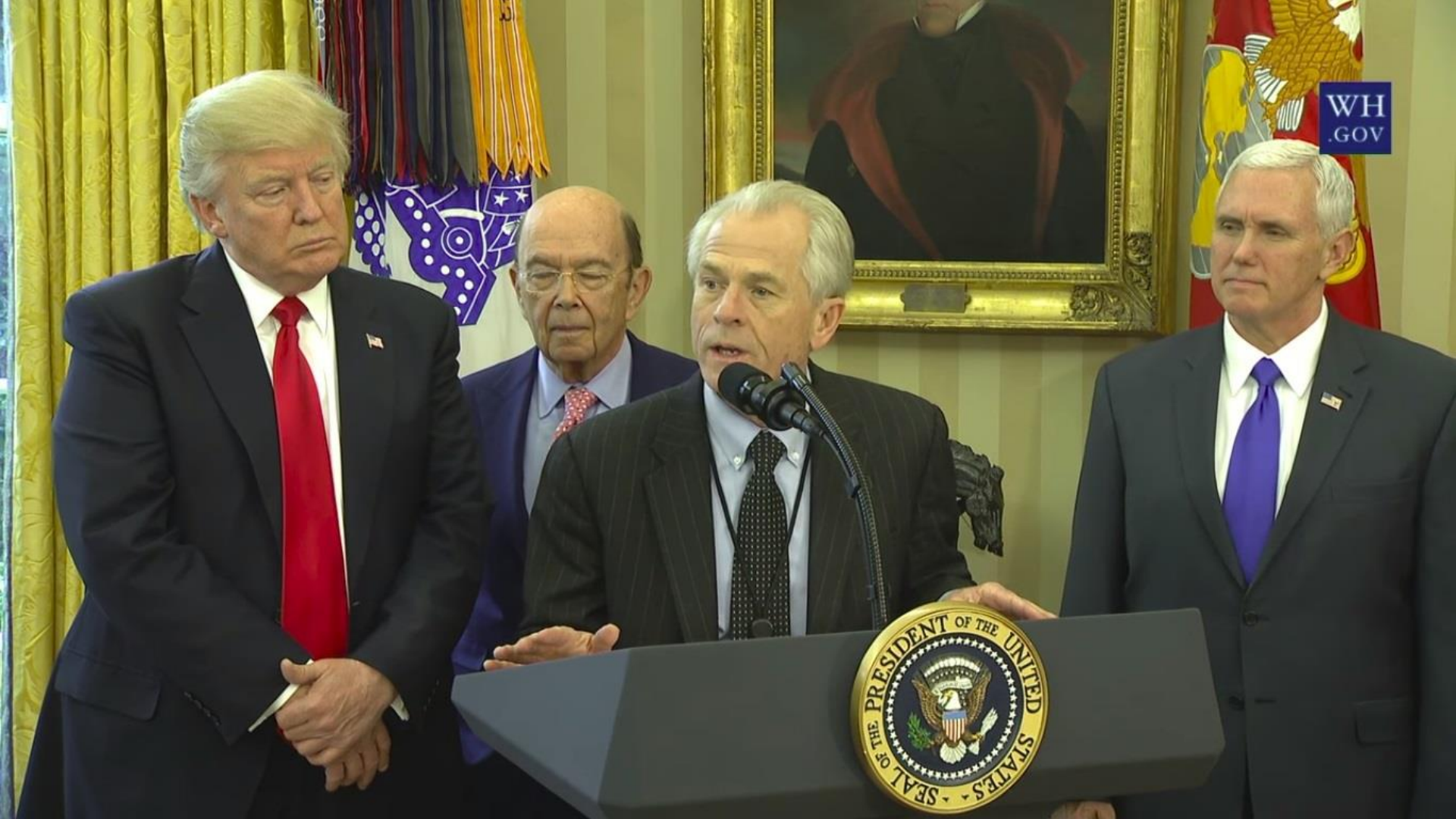
Source: U.S. Department of Defense, Office of Deputy Under Secretary of Defense for Industrial Policy.

# 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 navigation menu with items like "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)", "Defense Pricing", and "Defense Pricing". A right sidebar shows "Text Size" controls, "Print Page", and "In This Section" with a link to "Up One Level".

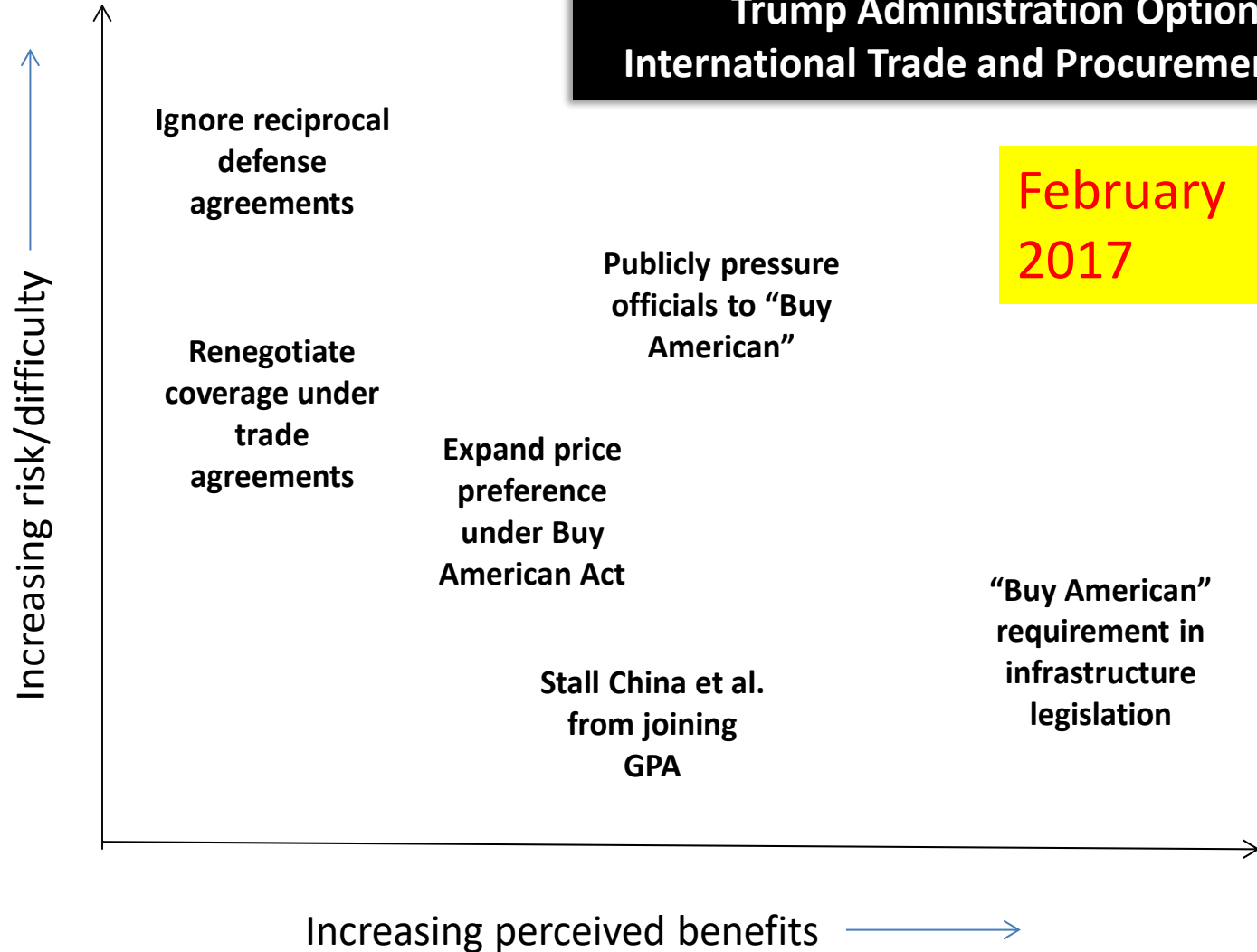
**Authority for the defense MOUs rests in the “public interest” exception to the BAA. The agreements serve as a national security benefit, enhance alliance-wide security objectives, and serve as an underpinning for armaments cooperation. – Text § 2:21**



# 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



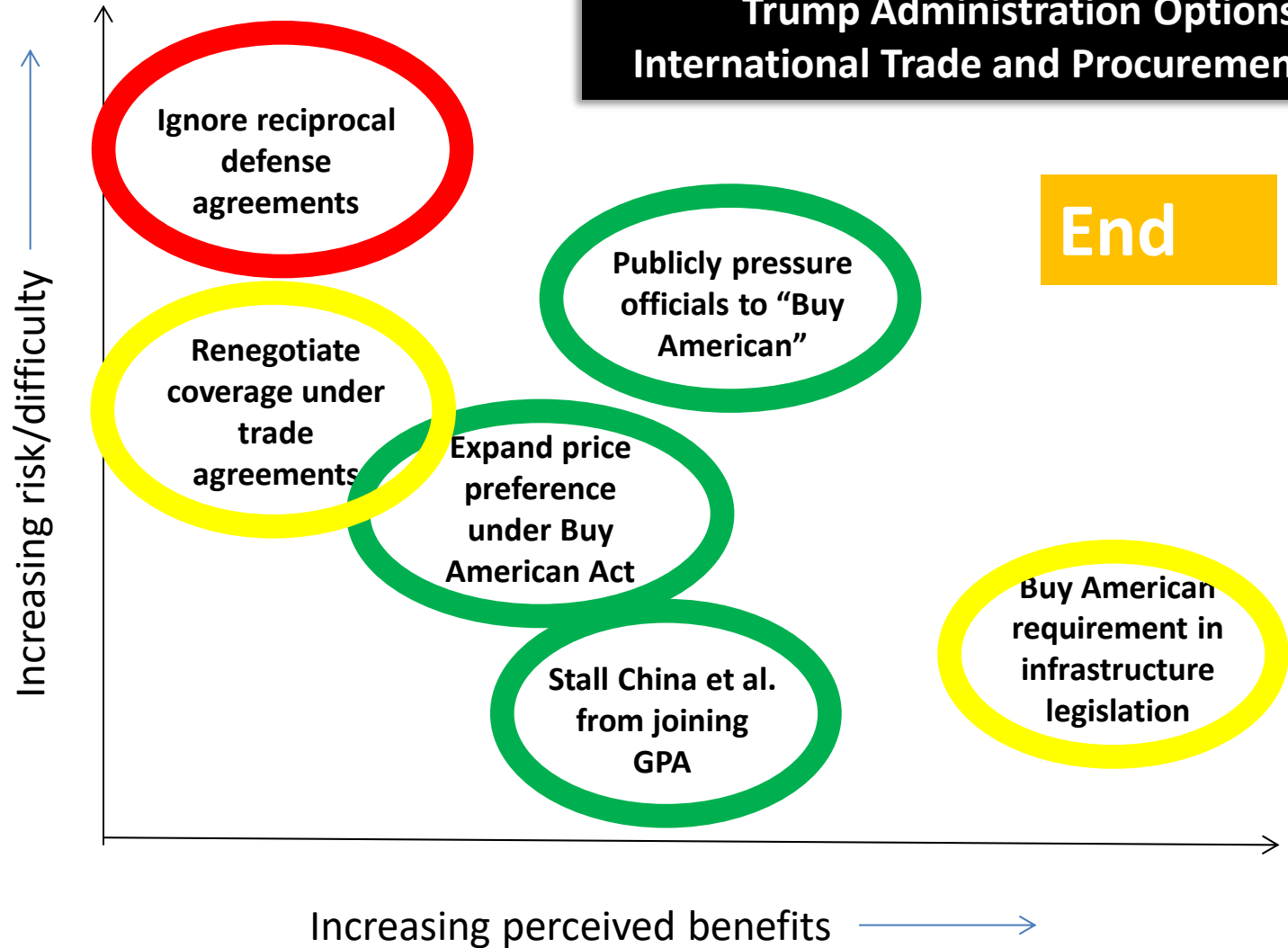
# **“Squeezing” the Buy American Act**

**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



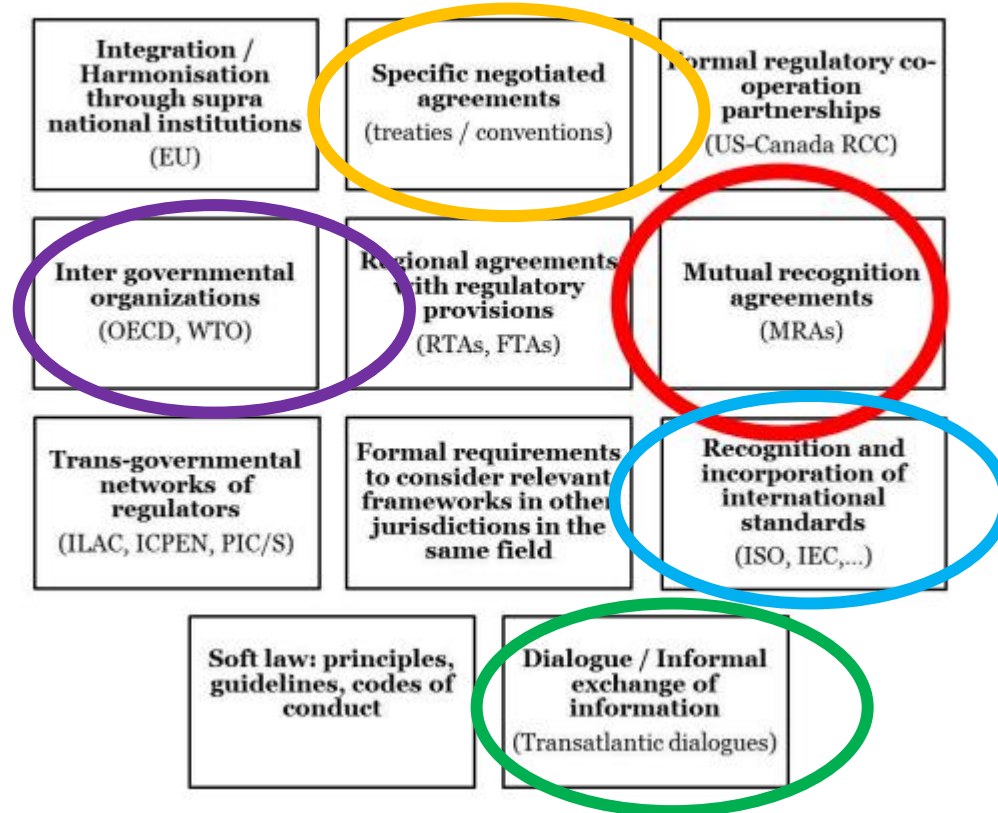


# Biden Administration

- President Joe Biden
  - Nominated USTR Katherine Tai: “Trade as a Force of Good”
  - “Made in America” policy
- Challenges
  - “Huawei Ban” – Section 889 Interim Rule
  - Cybersecurity Maturity Model Certification (CMMC)
  - European Commission “White Paper” -- Foreign Government Subsidies
  - Addressing global warming -- FAR 23.103, GSA 2010 report
- Regulatory Cooperation – what process and standards?

# Regulatory Cooperation Strategies

Figure 1. MRA in the OECD typology of IRC mechanisms



From: Correia de Brito, A., C. Kauffmann & J. Pelkmans, *The Contribution of Mutual Recognition to International Regulatory Co-operation* (OECD 2016), <http://dx.doi.org/10.1787/5jm56fqsfmxm-en> (citing OECD, *International Regulatory Co-operation – Addressing Global Challenges* (2013), <http://dx.doi.org/10.1787/97892642004663-en>).

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





# “Buy American” Provisions in Infrastructure Legislation

Infrastructure Investment and Jobs Act  
Public Law 117-58 (Nov. 15, 2021)





## Infrastructure Legislation, Title IX: “Build America, Buy America” Act (BABA)

- Part I: Infrastructure supported by federal financial assistance:
  - All *iron and steel products* and *construction materials* must be produced in the United States (i.e., “all manufacturing processes” in U.S.)
  - *Manufactured products* must be manufactured in U.S. and at least 55 % of component costs from U.S.
  - Waivers (published for comment) available if preference (1) inconsistent with public interest, (2) iron, steel, manufactured products or construction materials not produced in U.S. in sufficient and reasonably available quantity or satisfactory quality, or (3) inclusion of domestic products or materials will increase *overall project cost* by 25 percent
  - OMB guidance to grantees (2 CFR) may be amended re: Buy America
  - To be applied consistently with international trade agreements
- Part II: “Make It In America” provisions (echo Biden Executive Order 14005)
  - New “Made in America Office” in OMB, with more rigorous standards for Buy American Act (BAA) waivers
  - Sense of Congress: 75% BAA domestic content requirement
  - International trade agreements to be respected, but reviewed for impact; reciprocal defense procurement agreements to be assessed for “equal and proportionate” access by U.S. suppliers
  - Exceptions for trade agreements, least-developed nations and reciprocal defense procurement agreements made explicit

# 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” Regulation

- **Regulation – finally approved 28 Nov 2022**
  - **Module 1** imposes 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 regulation calls for review foreign subsidies in the case of applications for EU financial support.

# Commission's core assertions – White Paper

- 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."



Brussels, 17.6.2020  
COM(2020) 253 final

## **WHITE PAPER**

**on levelling the playing field as regards foreign subsidies**

# Commission's Goal -- Procurement

- **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

- White Paper: “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.”

# Public Procurement: The Current Situation

- A patchwork of measures that are neither coherent nor frequently used
- See Guidance on the participation of third country bidders and goods in the EU procurement market  
[https://ec.europa.eu/growth/content/new-guidance-participation-third-country-bidders-eu-procurement-market\\_en](https://ec.europa.eu/growth/content/new-guidance-participation-third-country-bidders-eu-procurement-market_en)
- Core examples
  - Utilities Sector: Article 85 of Directive 2014/25/EU provides for (i) **exclusion of tenders in which more than 50% of the proposed products would come from “third countries”** defined as those with no relevant multilateral or bilateral agreement with the EU and (ii) **price preference for EU bids against third country bids where the prices are less than 3% apart**
  - **Abnormally Low Tenders: under all EU regimes purchasers are required to consider rejection of bids that are abnormally low**

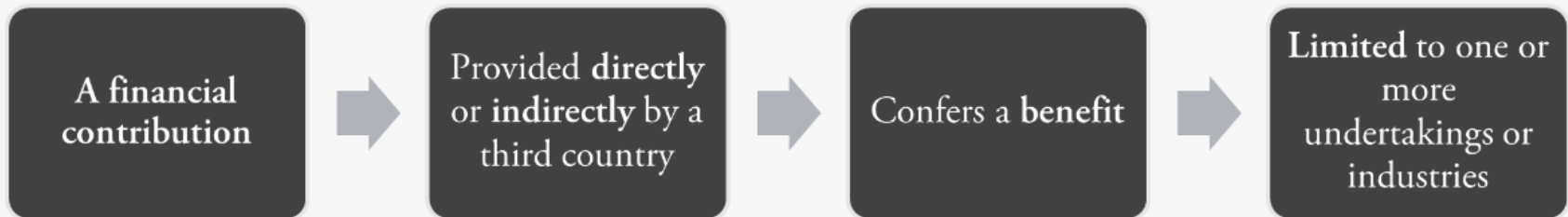
## Regulation (Nov. 2022)

### - When a Subsidy Triggers Action

- “For the purpose of this Regulation, a **foreign subsidy shall** be deemed to exist where a third country provides a **financial contribution which confers a benefit to an undertaking** engaging in an economic activity in the internal market and which is limited, in law or in fact, to an individual undertaking or industry or to several undertakings or industries.”
- A distortion on the internal market shall be deemed to exist where a foreign subsidy is **liable to improve the competitive position of the undertaking** concerned in the internal market and where, in doing so, it actually or potentially negatively affects competition on the internal market. Whether there is a distortion on the internal market shall be determined on the basis of indicators, which may include the following: (a) the amount of the subsidy; (b) the nature of the subsidy; (c) the situation of the undertaking and the markets concerned; (d) the level of economic activity of the undertaking concerned on the internal market; (e) the purpose and conditions attached to the foreign subsidy as well as its use on the internal market.
- (2) A foreign subsidy is unlikely to distort the internal market if its total amount is below **EUR 5 million over any consecutive period of three fiscal years**



- **The concept of “subsidy” under the Regulation.** A foreign subsidy is defined based on four cumulative conditions:



## Regulation (Nov 2022)

### - Balancing (Art. 6)

- The Commission may, on the basis of information received, balance the negative effects of a foreign subsidy in terms of distortion in the internal market, according to Articles 4 and 5 against the positive effects on the development of the relevant subsidised economic activity on the internal market, while considering other positive effects of the foreign subsidy such as the broader positive effects in relation to the relevant policy objectives, in particular those of the Union.

# Regulation (November 2022) - Assessing “Unduly Advantageous”

## Public Procurement

### Article 27

Foreign subsidies that **cause or risk causing a distortion in a public procurement procedure** shall be understood as **foreign subsidies that enable an economic operator to submit a tender that is unduly advantageous** in relation to the works, supplies or services concerned. The assessment pursuant to Article 4 of whether there is a distortion in the internal market and whether a tender is unduly advantageous in relation to the works, supplies or services concerned shall be limited to the public procurement procedure in question. Only **foreign subsidies granted during the three years** prior to the notification shall be taken into account in the assessment.

## Recital (53)

The opportunity should be given to economic operators **to justify that the tender is not unduly advantageous**, including by adducing the elements referred to in Article 69(2) of Directive 2014/24/EU . . . regulating abnormally low tenders.

# Article 28 – Notification Needed

- When submitting a tender or a request to participate in a public procurement procedure, undertakings shall either notify to the contracting authority or the contracting entity all foreign financial contributions received in the three years preceding that notification or confirm in a declaration that they did not receive any foreign financial contributions in the last three years. Undertakings which do not submit such information or declaration shall not be awarded the contract.



Brussels, 5.5.2021  
COM(2021) 223 final  
2021/0114 (COD)

Proposal for a

**REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL**

**on foreign subsidies distorting the internal market**

{SWD(2021) 99 final} - {SWD(2021) 100 final} - {SEC(2021) 182 final}

# How Notification Handled

- “The contracting authority or the contracting entity shall transfer the notification to the Commission without delay.”
- “. . . Where the undertaking . . . fail[s] to notify a foreign financial contribution, or where such a notification is not transferred to the Commission, the Commission may initiate a review.”
- “. . . Where the Commission suspects that an undertaking may have benefitted from foreign subsidies in the three years prior ... it may request the notification of the foreign financial contributions received by that undertaking ... any time before the award of the contract. Once the Commission has requested the notification of such a financial contribution, it is deemed to be a notifiable foreign financial contribution in a public procurement procedure



Brussels, 5.5.2021  
COM(2021) 223 final  
2021/0114 (COD)

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# Investigation by the Commission

2. The Commission shall carry out a preliminary review no later than 20 working days after it receives a complete notification. In duly justified cases, the Commission may extend this time limit by 10 working days once.

3. The Commission shall decide whether to initiate an in-depth investigation within the time limit for completing the preliminary review and inform the economic operator concerned and the contracting authority or the contracting entity without delay. . . .

\* \* \*

5. The Commission may adopt a decision closing the in-depth investigation no later than 110 working days after it has received the complete notification. This period may be extended once by 20 working days, after consultation with the contracting authority or contracting entity, in duly justified exceptional cases including the investigations referred to in paragraph 6 or in cases referred to in Article 16(1), points (a) and (b).

## If Subsidy Found – Contract Award Barred (Regulation Article 31 (Nov. 2022))

Where the economic operator concerned does not offer commitments or where the Commission considers that the commitments . . . are neither appropriate nor sufficient to fully and effectively remedy the distortion, the Commission shall adopt an implementing act in the form of a decision prohibiting the award of the contract to the economic operator concerned ('decision prohibiting the award of the contract'). That implementing act shall be adopted in accordance with the advisory procedure referred to in Article 48(2). Following that decision, the contracting authority or contracting entity shall reject the tender



# Fines and Penalties

## Regulation Art. 33 (Nov. 2022)

The Commission may impose fines and periodic penalty payments as set out in Article 17 [5-10% of annual turnover].

The Commission may, by decision, also impose fines upon the economic operators concerned that do not exceed 1 % of their aggregate turnover in the preceding financial year, where those economic operators intentionally or negligently supply incorrect or misleading information in a notification or declaration pursuant to Article 29 or in a supplement thereto.

. . . The Commission may, by decision, impose fines upon the economic operators concerned that do not exceed 10 % of their aggregate turnover in the preceding financial year where those economic operators, intentionally or negligently: (a) **fail to notify foreign financial contributions in accordance with Article 29** during the public procurement procedure; (b) **circumvent or attempt to circumvent the notification requirements**, as referred to in Article 39(1).

# Regulation on Foreign Subsidies – Nov. 2022 - Summary

Threshold procurement  
over 250 million Euros  
/ 4 million Euros per  
national subsidy

Undertaking (bidder)  
responsible for  
addressing subsidy

Commission can  
demand information  
and investigate

Undertaking must  
represent in bid that no  
foreign government  
subsidy

Target: “unduly  
advantageous” tenders

# Observations on the White Paper - Procurement



- Dangers
  - Trade friction
  - Derailing EU procurement regulation
  - Disrupting member state procurements
- Possible pathway forward – United States
  - Include abnormally low tenders in U.S. regulatory discussions
  - Note that U.S. procurement (unlike EU) treats commercial markets as a resource, not a responsibility
  - Coordinate on grounds and procedures for exclusion, working with procurement authorities

# Electronic Marketplaces

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# 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



September 2021

Selected Online Platform Characteristics

Platform characteristic	Amazon Business	Fisher Scientific Company L.L.C.	Overstock Government
Tailored commercial site for government platform	No	Yes	Yes
Promotes own products	Yes	Yes	No
Ability to restrict sale of prohibited products/suppliers <sup>a</sup>	Yes	Yes	Yes
Ability to designate preferred products/suppliers <sup>a</sup>	Yes	Yes	Yes

Source: GAO analysis of platform providers' information. | GAO-21-104572

<sup>a</sup>Suspended or debarred contractors are examples of prohibited suppliers. Preferred products or suppliers include environmentally sustainable products or small businesses.

“According to GSA’s data, between August 2020 and July 2021, the participating agencies made nearly 24,000 purchases valued at \$5.9 million through the commercial platforms.”

# GSA ONLINE MARKETPLACES

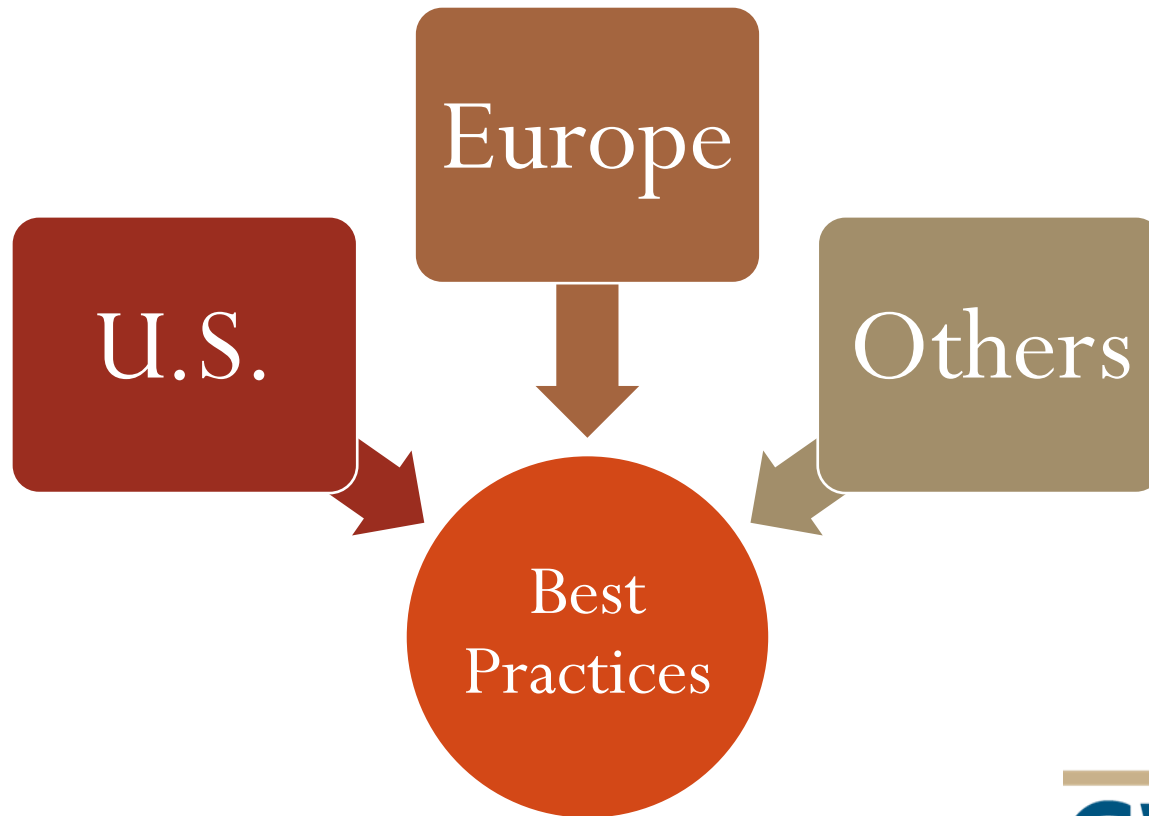
## Plans to Measure Progress and Monitor Data Protection Efforts Need Further Development

## Current Status

GSA 2019: “With a potential \$6 billion addressable market for the e-commerce channel . . . ”



# Convergence: Procurement Regulation



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

# Conclusion

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Christopher Yukins  
cyukins@law.gwu.edu