

An Introduction to U.S. Procurement Part I

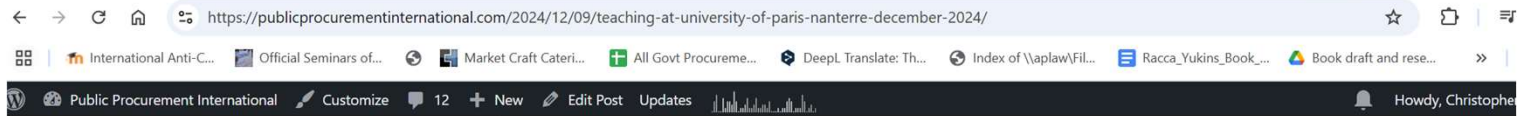
Professor Christopher Yukins
George Washington University Law School
Washington DC

Monday-Wednesday
December 9-11, 2024
University of Paris Nanterre



Class Materials on publicprocurementinternational.com

2



Public Procurement International

A resource on public procurement practice, policy and law, from around the globe.

Webinar — Trade Controls and the AUKUS Exception: Next Steps

Webinar — The New U.S. Rule on Reverse Auctions: A Critical Assessment

GW Law Summer Series: Green Procurement Across Borders

Webinar: Government Procurement After Loper Bright Enterprises

Webinar: Joint U.S.-EU Catalogue of Best Practices on Green Public Procurement



Teaching at University of Paris – Nanterre – December 2024



Monday's Program

Introduce Yourself

Please send an email to Professor Yukins, 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

5



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.
 - **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
- 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
 - **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.

Celebration of International Anti-Corruption Day

Christopher Yukins

Lynn David Research Professor in Government Procurement Law

George Washington University Law School

December 9, 2024



International Anti-Corruption Day — IACA's Role in Anti- Corruption and Public Procurement

LAW

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

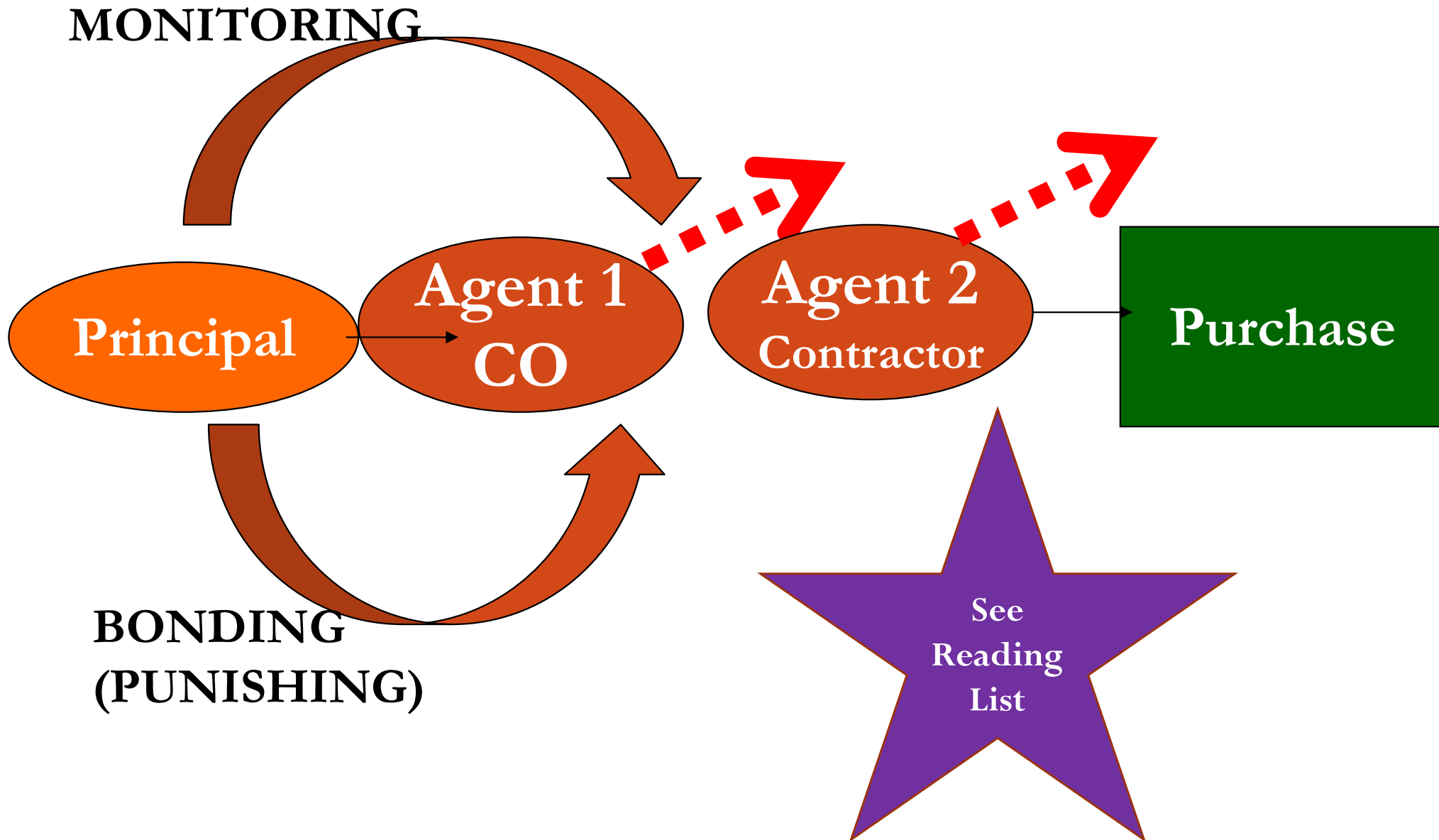


What is Procurement: Principles, Pathologies and Processes

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



Principal-Agent Model



Processes



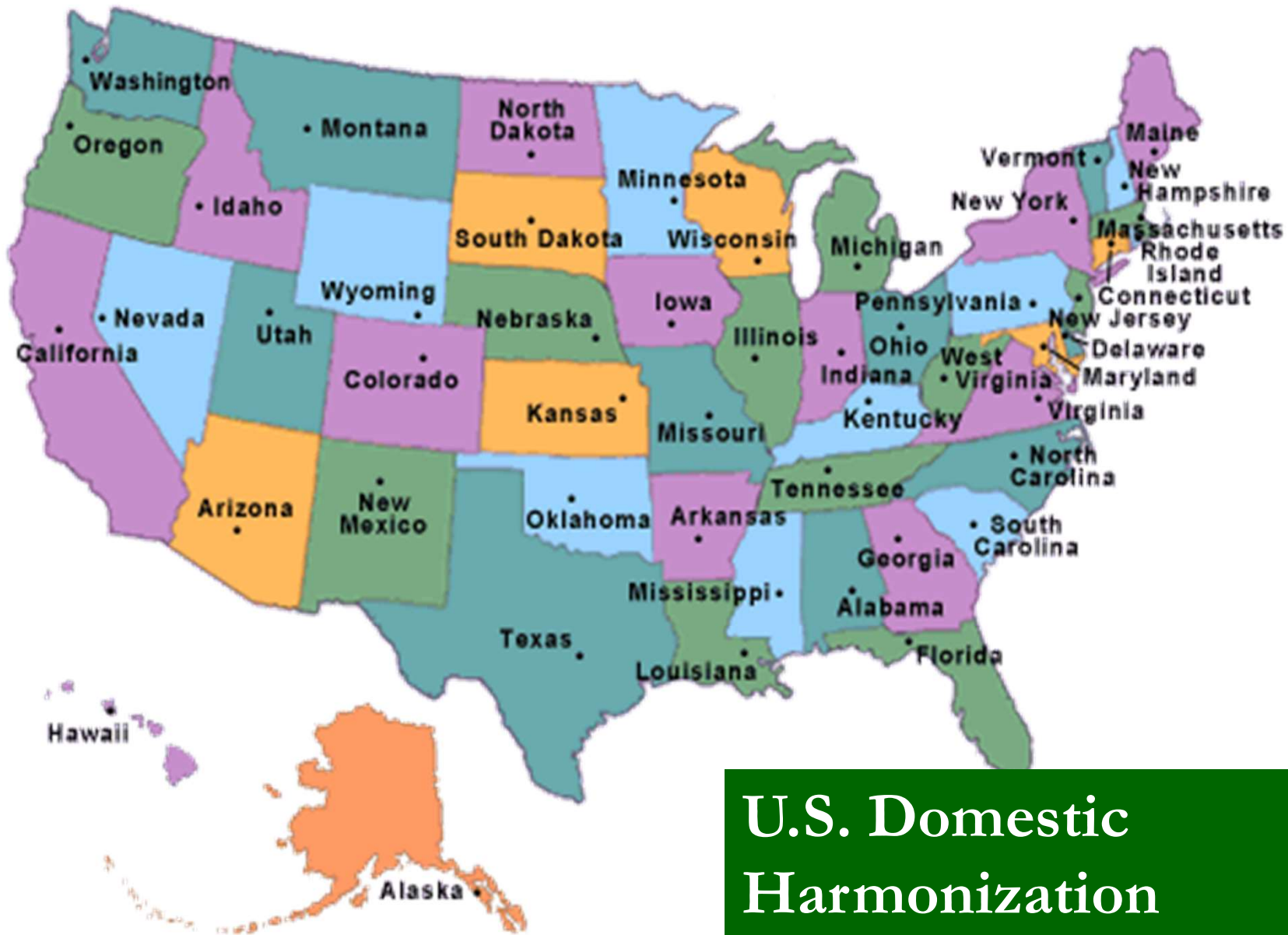
The United States . . .

. . . Has Separate Procurement Systems

Federal Procurement

State

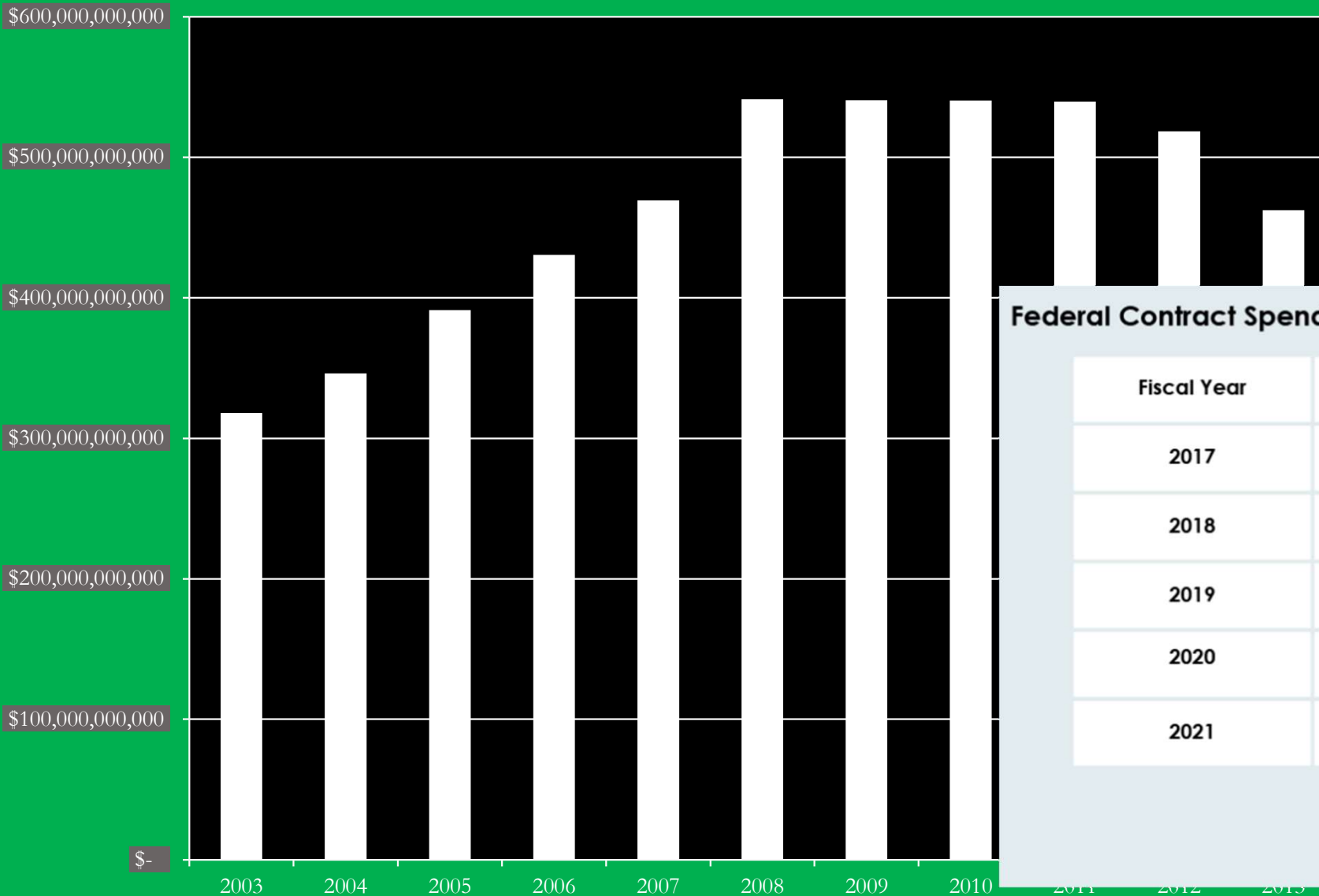
Local



U.S. Domestic Harmonization

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

U.S. Federal Procurement



Federal Contract Spending in the Last 5 Years

Fiscal Year	Amount (in billions)
2017	\$513
2018	\$550
2019	\$599
2020	\$682
2021	\$645

GOVCONWIRE

... Has over \$700 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](#)

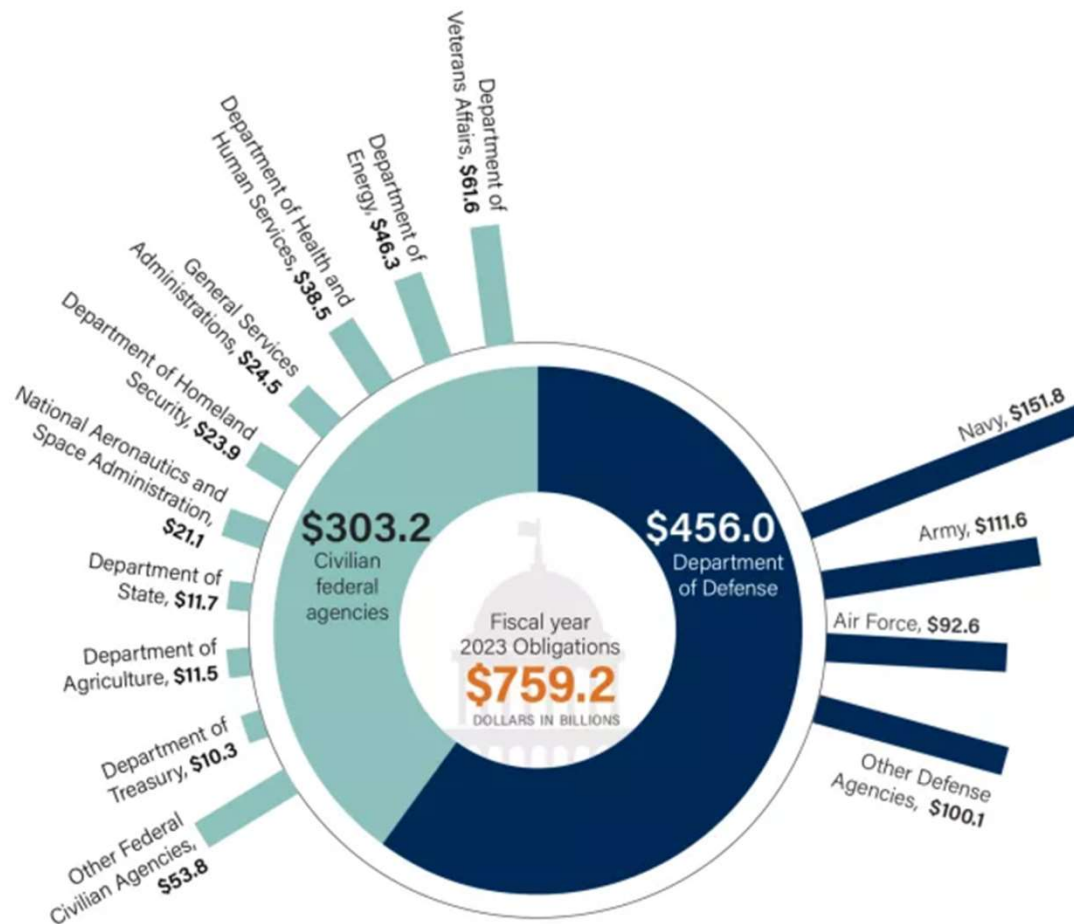
By [Udayan Gupta](#)

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



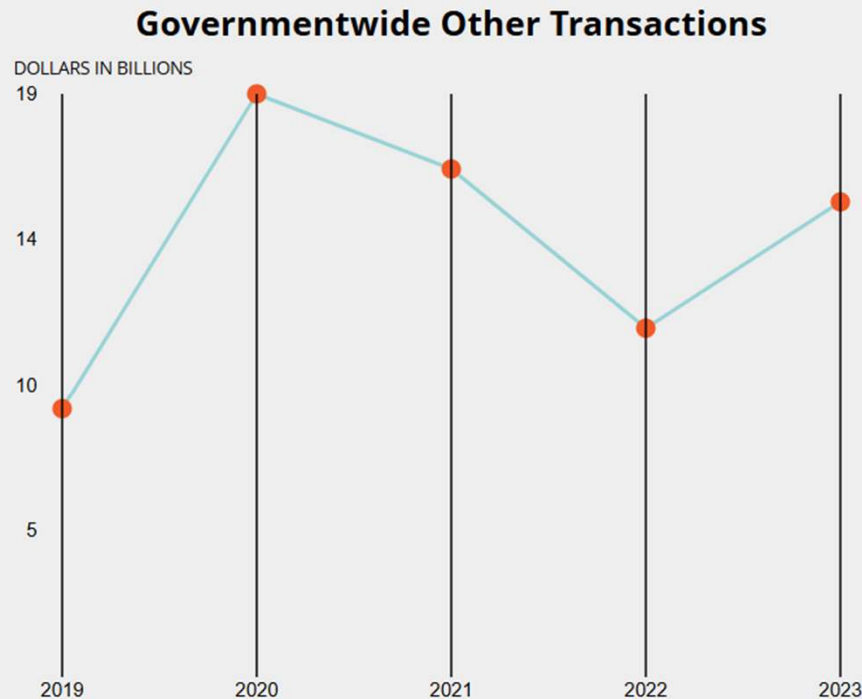
... Is Dominated by Defense

WHICH AGENCIES WERE RESPONSIBLE FOR THE MOST CONTRACT DOLLARS?



Source: Analysis of FY2023 FPDS-NG data.

What is the trend in spending through Other Transaction Agreements? 🗺️



Other transaction agreements offer agencies a flexible way to purchase goods and services. In fiscal year 2023, agencies spent nearly \$16 billion on these agreements, a \$4 billion increase from fiscal year 2022.

Data on other transaction agreements are not included in data on federal contract obligations.

... 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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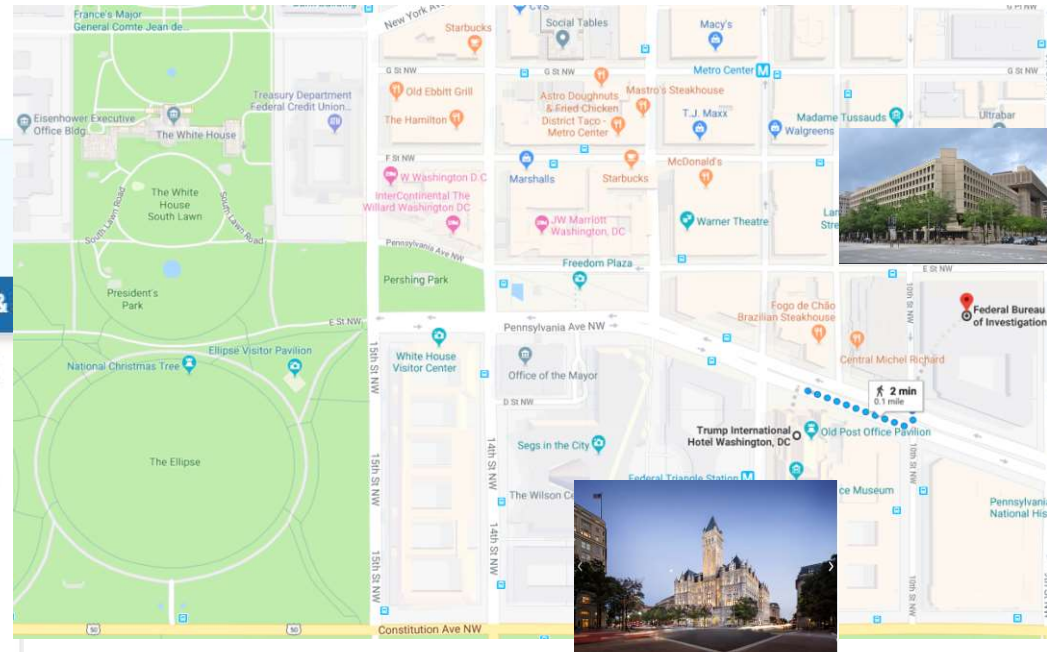
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Print this article

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:

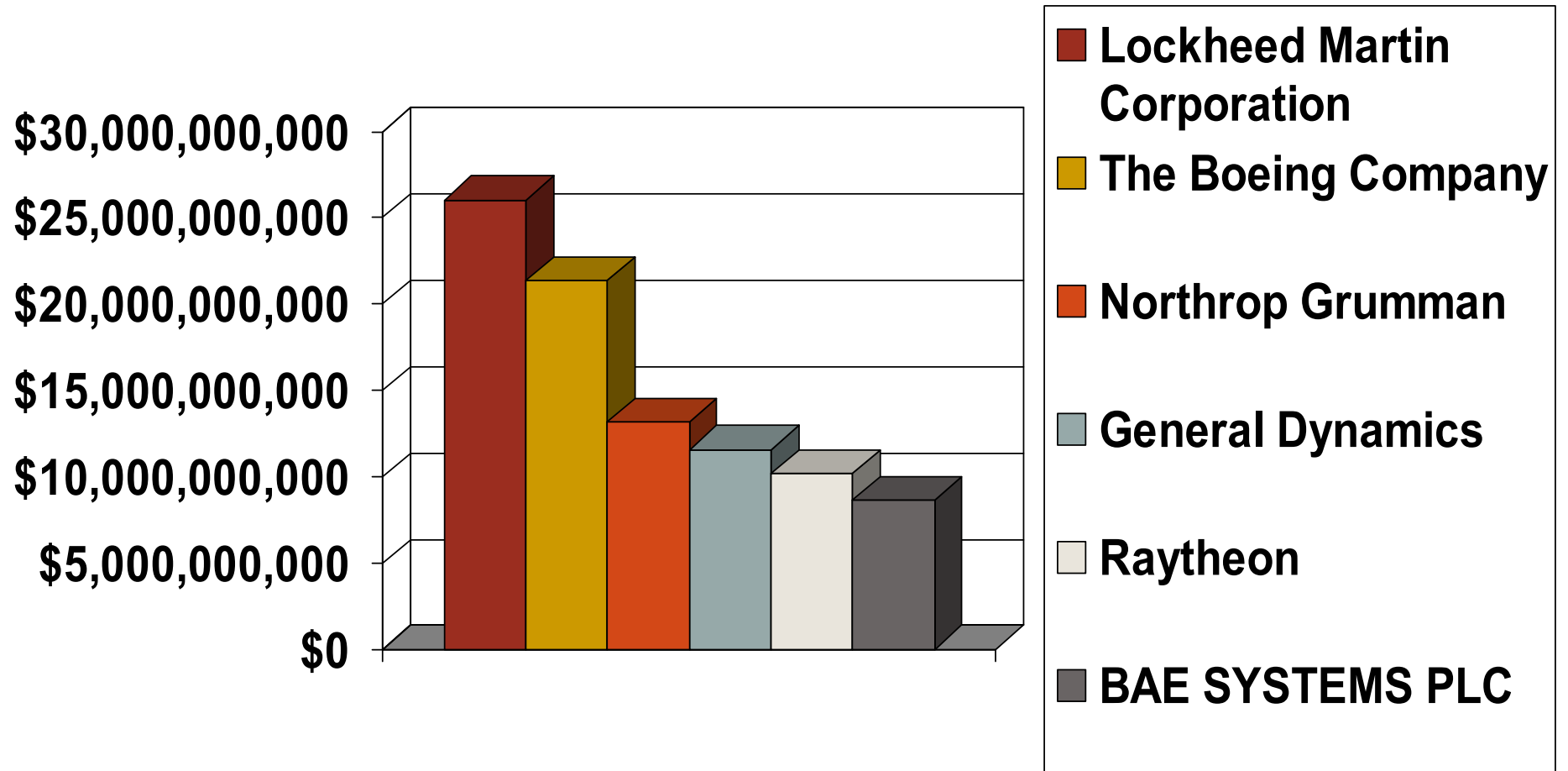
- Petty corruption
- Grand corruption
- State capture?



. . . 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

 beta **SAM**.GOV 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



GSA eBuy

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

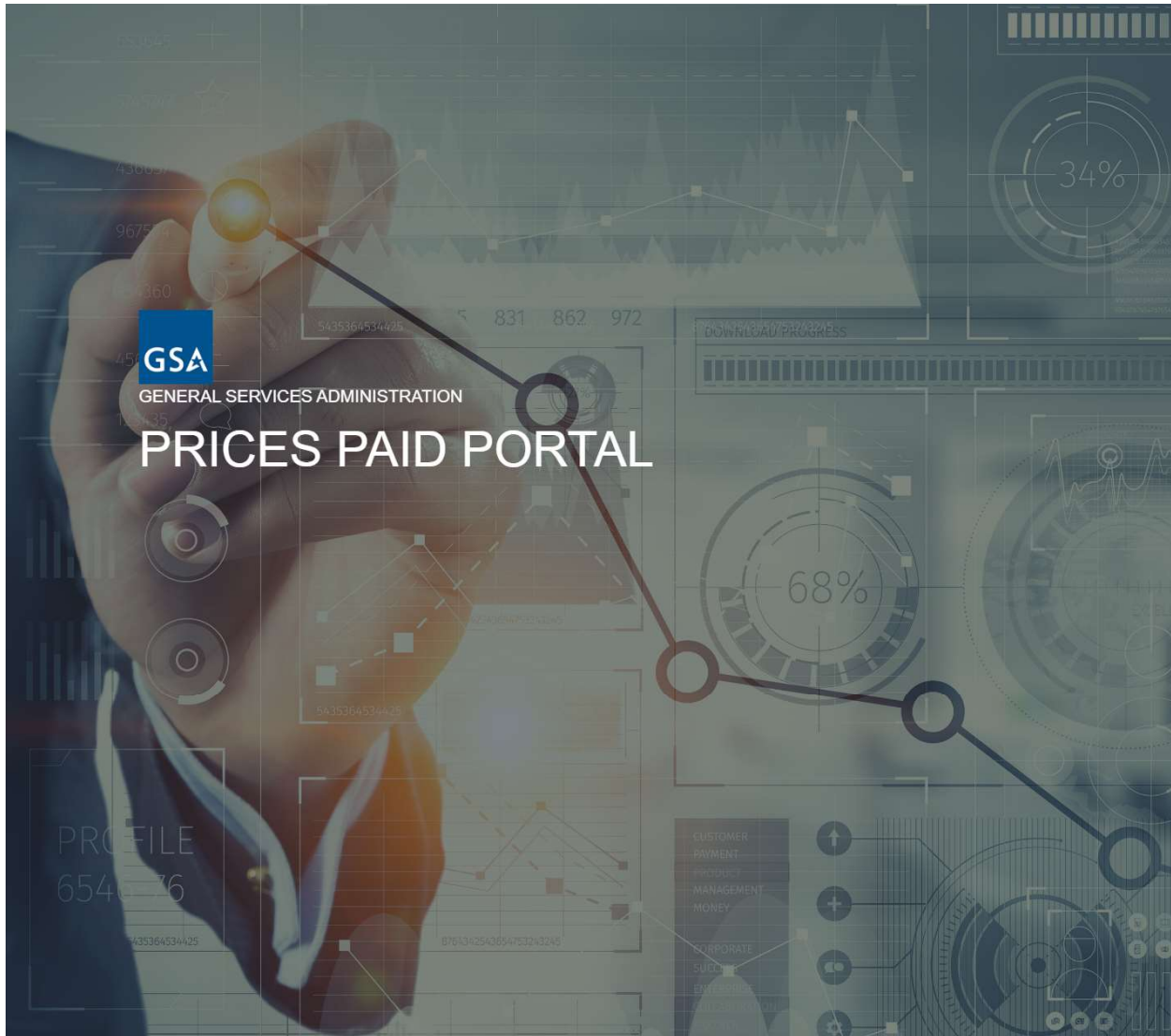
Contractors

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



More Non-Transparency



Sign In

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Authenticate with OMB MAX

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Pricing Intelligence Suite


CHOOSE YOUR RESOURCE

Your one-stop location for contract and task order pricing information. Make better decisions for your agency by using these tools to explore and compare your data.


CALC+ Quick Rate Hourly Labor Ceiling Rates
Hourly ceiling prices on Multiple Award Schedule contracts represent max vendor pricing for chosen labor categories. Discounts at task order awards often occur.

[Learn more](#)



CALC+ Quick Rate BLS
Search unburdened hourly wage rate information from the Department of labor, Bureau of Labor Statistics (BLS).

[Learn more](#)



CALC+ Quick Rate Prices Paid
Access is restricted to federal employees and federal contract with .gov/.mil email. Search prices paid information related to GSA's Governmentwide Acquisition Contracts (GWACs).

[Learn more](#)

Sign In Required ✕

To complete this task, you will need to sign into your account.

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[Sign In/Create Account](#)

Sign In Required ✕

To complete this task, you will need to sign into your account.


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[Sign In/Create Account](#)



CALC+ IGCE
Build Independent Government Cost Estimates (IGCEs) using this tool.

[Learn more](#)



Airlines City Pair
Search the City Pair Program tool to find the best value airfares for travel.

[Learn more](#)



Data & Analytics Dashboard
View data visualizations and in-depth analysis using FAS Schedule Sales Query Plus (SSQ+).

[Learn more](#)



Search Labor Category Ceiling Rates

This tool allows you to review fully burdened Not-to-Exceed Ceiling Rates awarded under GSA Multiple Award Schedule (MAS) contracts. You can use it to conduct market research and develop Independent Government Cost Estimates. The tool can be used to assess the relative competitiveness of a vendor's price to other vendors' prices on MAS contracts. However, the tool is to be used only as part of a larger negotiation objective development strategy that seeks fair and reasonable pricing (in accordance with FAR 15.4). [Labor Ceiling Rates User Guide](#) PDF

Search by Labor Category, Vendor Name, Contract Number, or a keyword

Filters

Reset All

Education Level

Experience

0 yrs 45 yrs

Price Range

\$ 15 \$ 500 \$ 1000

Worksite

Not-To-Exceed Hourly Ceiling Rate

\$63.65

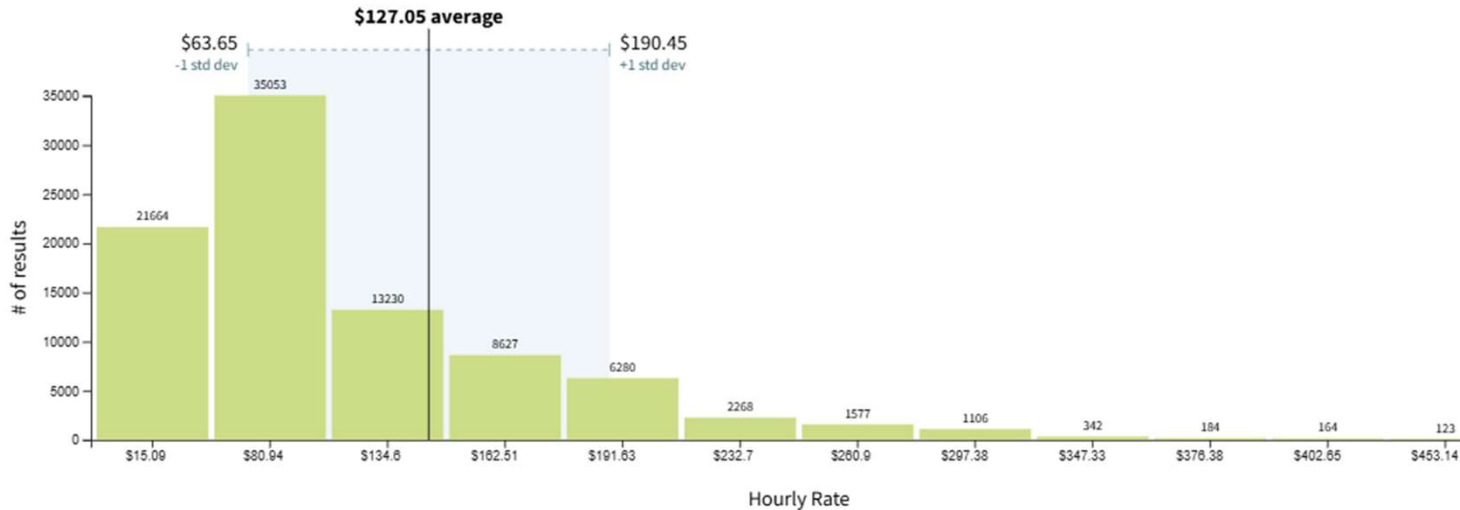
Std Deviation -1

\$127.05

Average Price

\$190.45

Std Deviation +1



... 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

1984

Federal Acquisition Regulation (FAR)

Defense Federal Acquisition Regulation Supplement

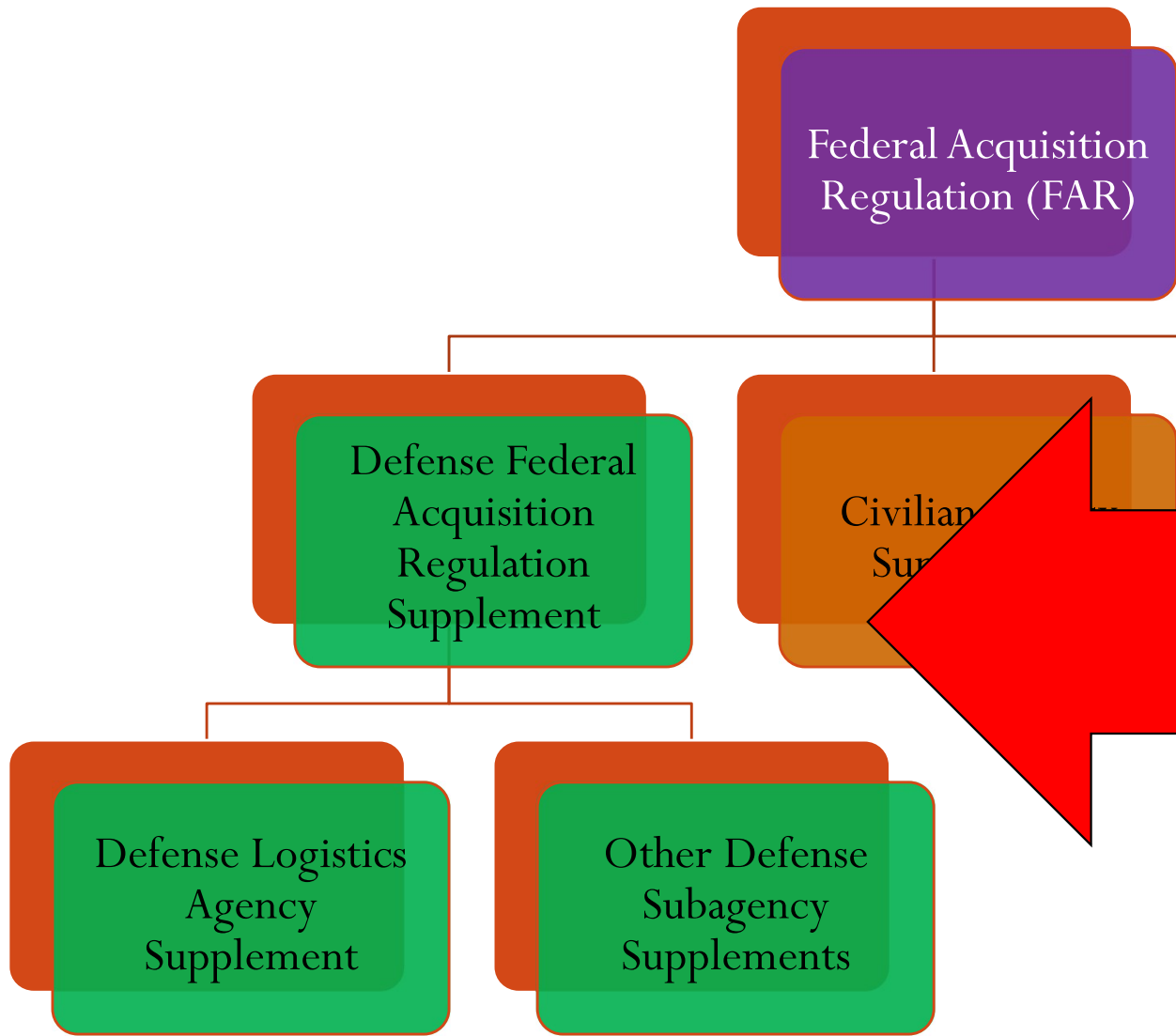
Civilian Agency Supplement

Civilian Agency Supplement

Defense Logistics Agency Supplement

Other Defense Subagency Supplements

... a Unified Regulatory System



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

. . . Familiar Major Methods of Procurement

Open
Procedure
(less than
3%)

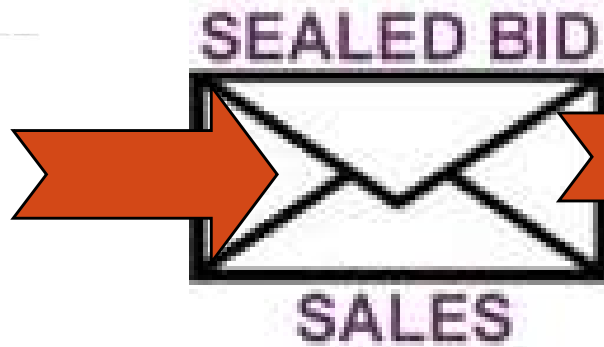
Restricted
Procedure

Negotiated
Procedure
(primary
method)

Sole-
Source

Historical Progression

1



Sealed Bids



Negotiated
Procurements

CONTRACT DATA REQUIREMENTS LIST		Form Approved 2008-06-01	
A. CONTRACT INFORMATION		B. CONTRACT NO.	C. CONTRACT TYPE
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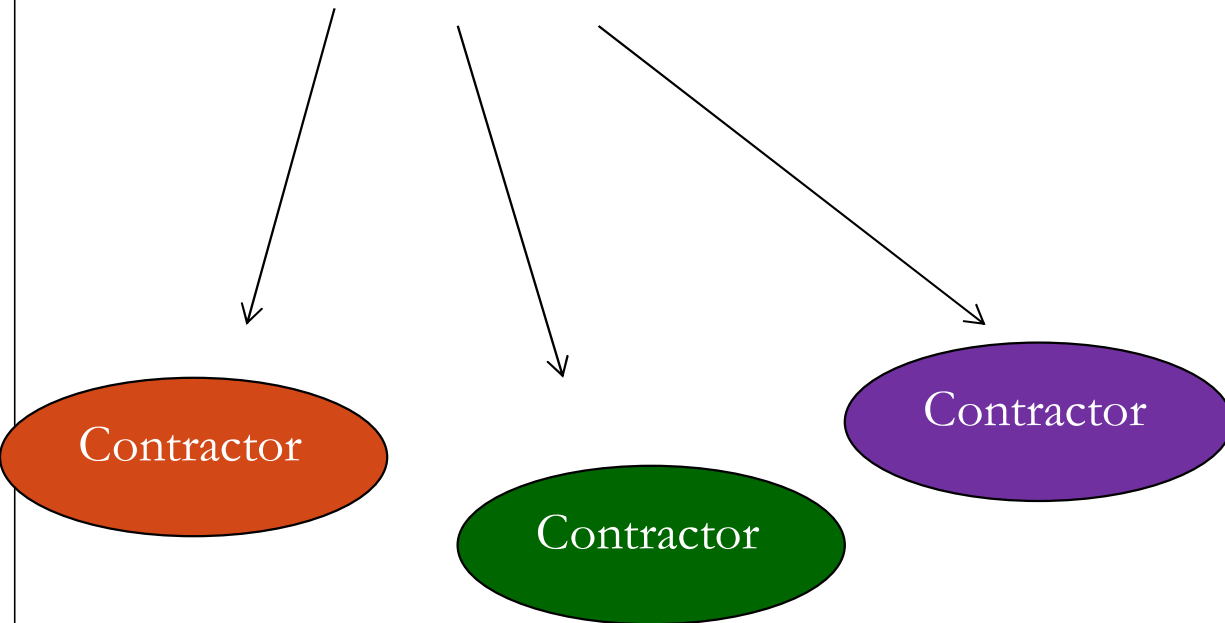
Frameworks

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



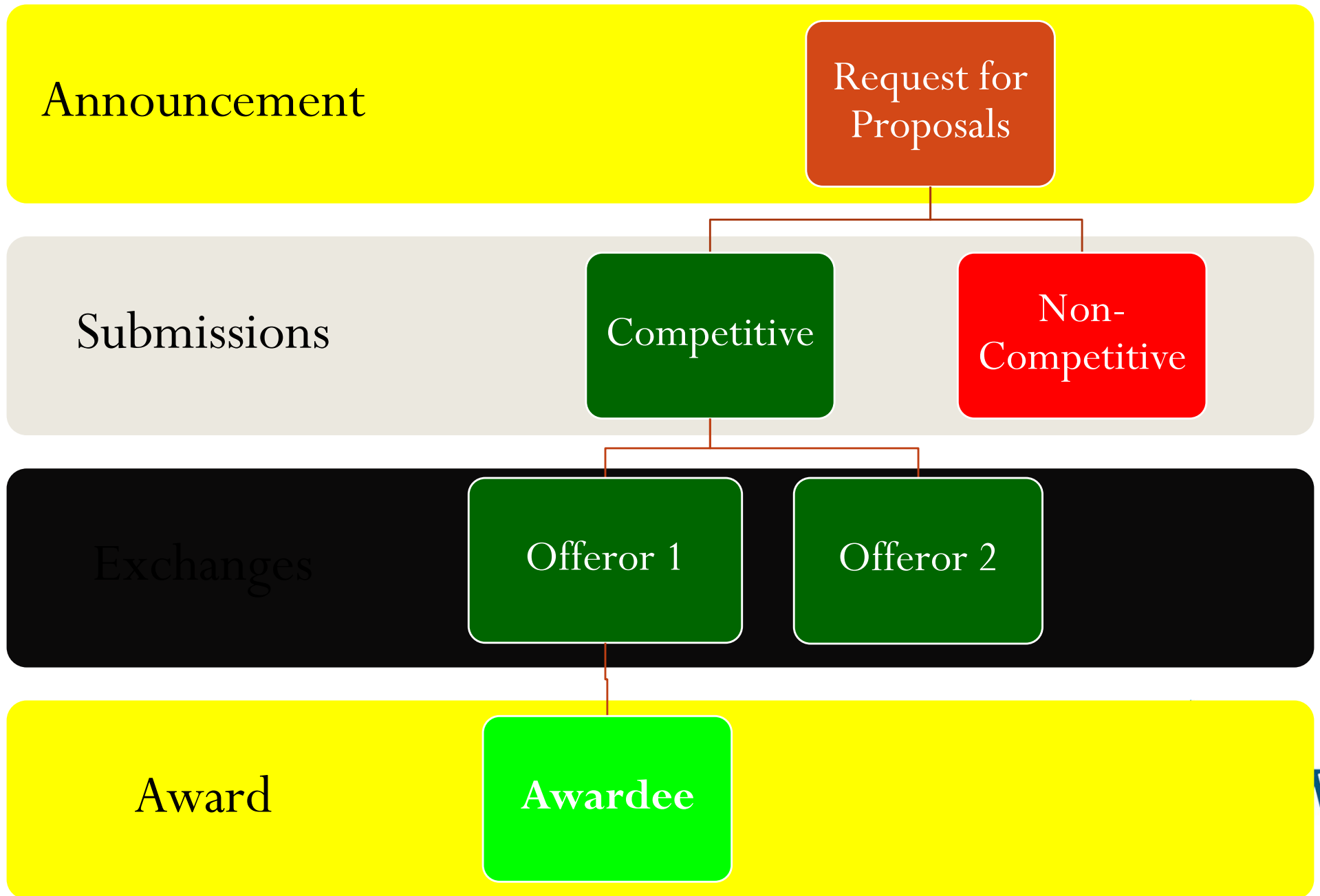
Competitive Negotiations: Multiple Vendors, for Best Value

Negotiated Procurements



Competitive Negotiations

37



Frameworks

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

Supplier Lists

CONTRACT DATA REQUIREMENTS LIST
Form Approved
 GSA GEN. REG. NO. 27

The data contained herein is for the use of agencies in awarding a contract. It does not constitute a contract and is subject to change without notice. It is the responsibility of the user to ensure that the information is current and accurate.

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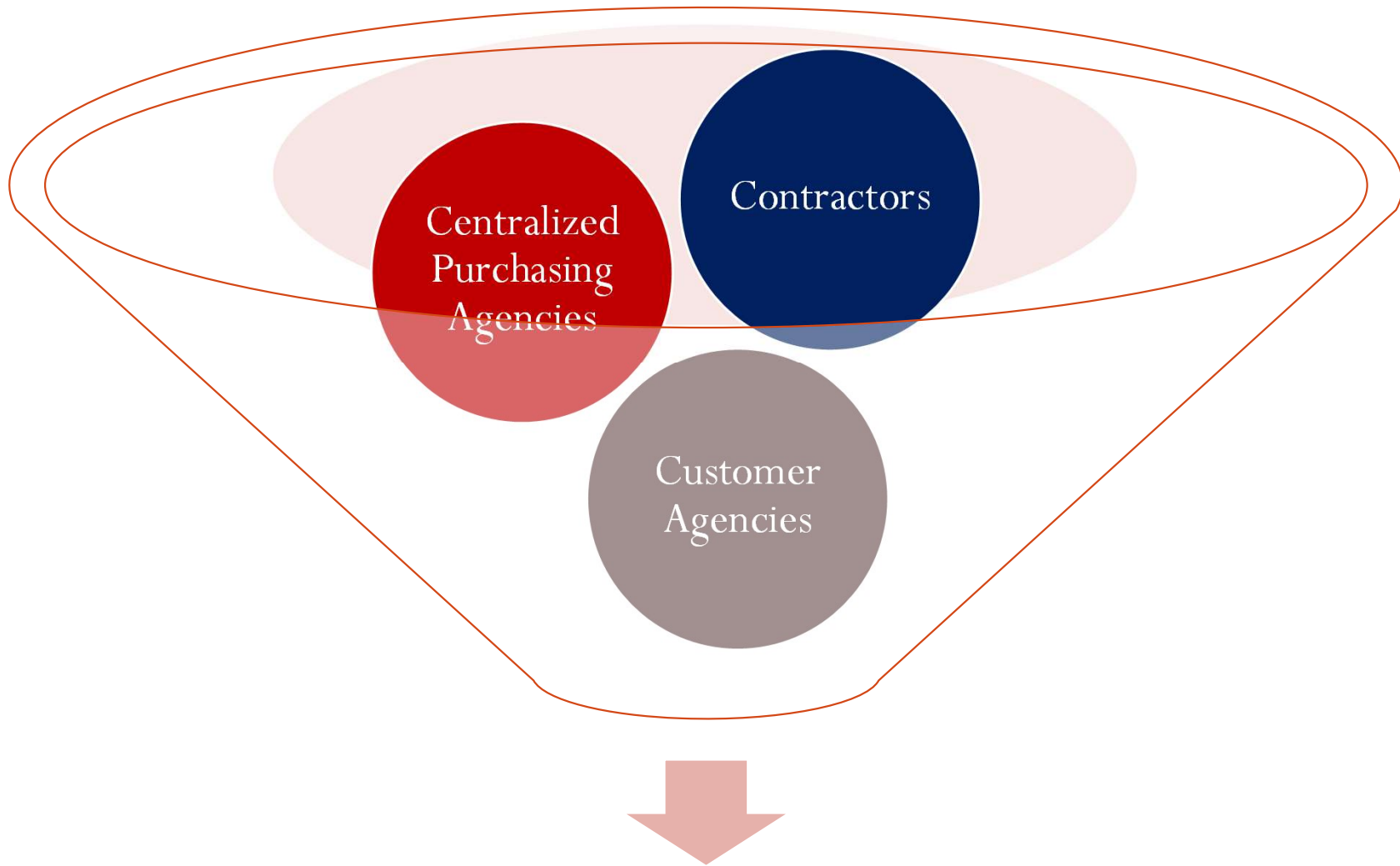
Frameworks: Sample

	A	B	C
FRAMEWORK AWARD PRICE – PER UNIT	US\$1000	US\$600	US\$1500
JANUARY (NASA: 500 UNITS)	US\$900	US\$600	
APRIL ORDER (ARMY: 1000 UNITS)	US\$800	US\$550	
DECEMBER ORDER (NAVY: 2000 UNITS)	US\$550	US\$550	



LAW




Problems in U.S. Frameworks: 1990s



Reduced Transparency – Reduced Accountability -- Misuse of Frameworks

Scandals



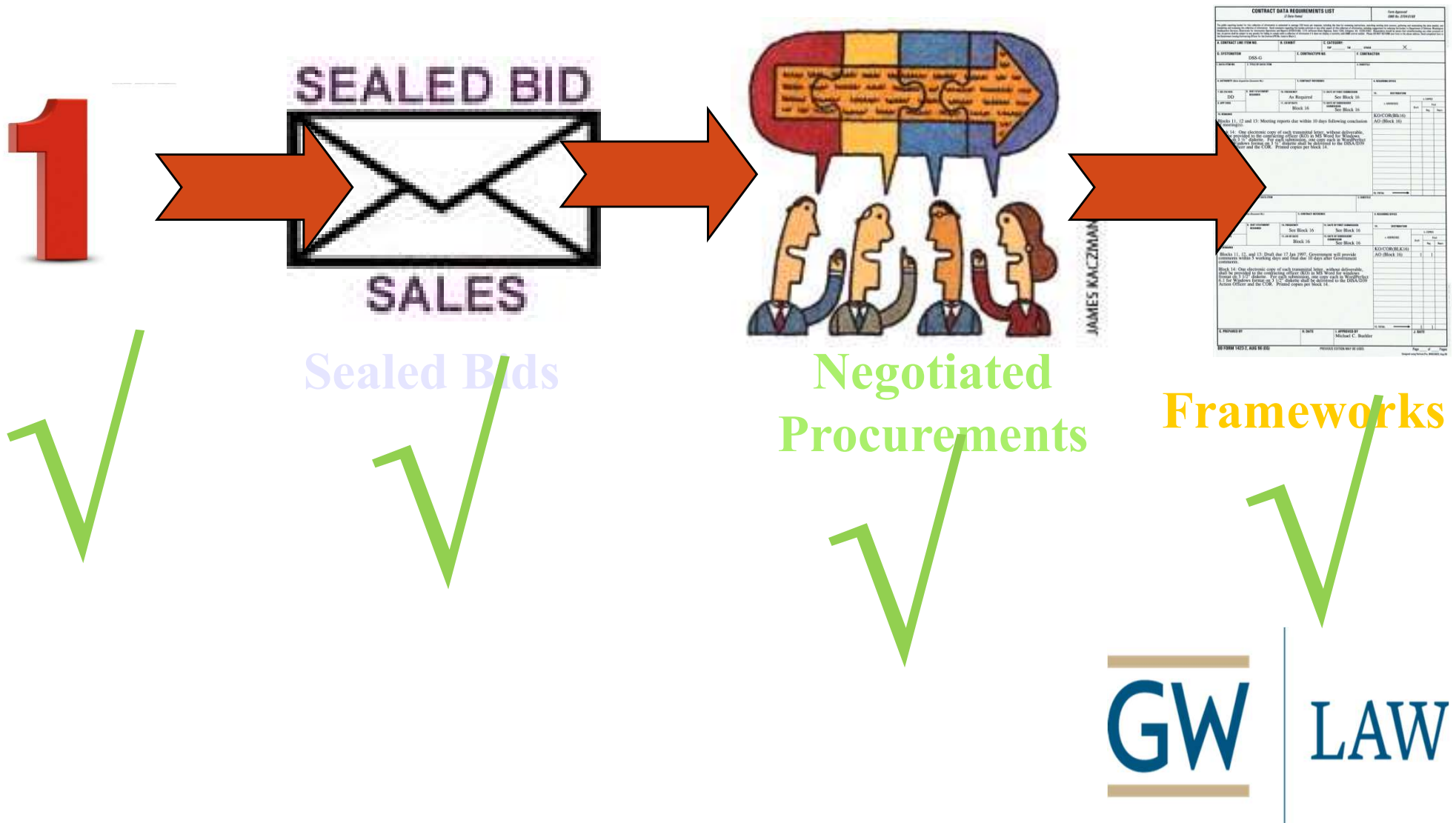
Competitive Procedures	FY 2011	FY 2012	FY 2013	FY 2014	FY 2011-2014
Negotiated Proposal 	38.86%	38.46%	37.76%	38.64%	38.43%
Single Source Solicited	30.60%	31.67%	31.04%	28.68%	30.50%
Subject to Multiple Award Fair opportunity 	18.93%	19.20%	20.40%	21.42%	19.99%
Simplified Acquisition	3.08%	3.02%	3.75%	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

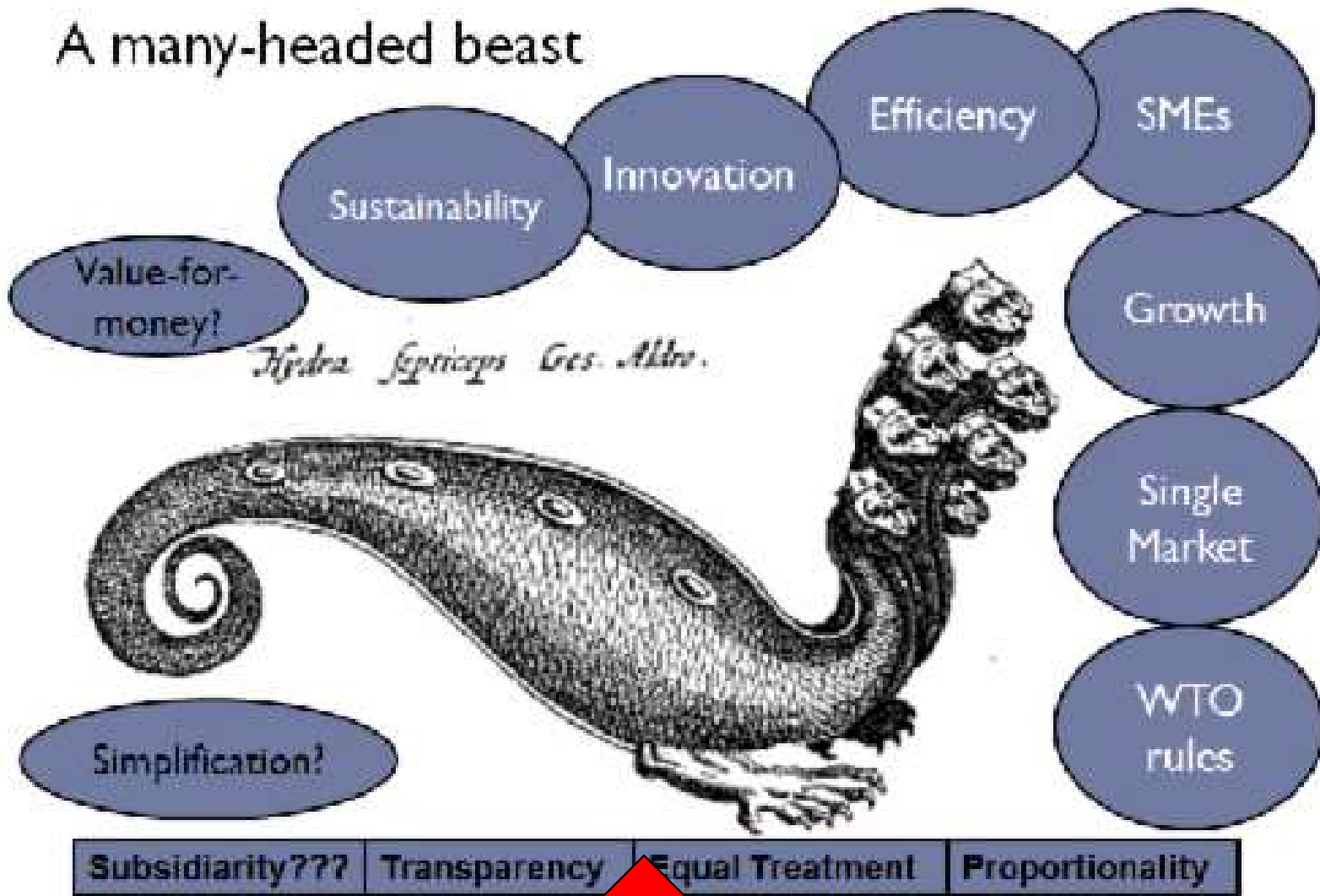


EU uses same methods – but in a different historical progression



Do the EU Directives Impose Additional Principles?

A many-headed beast



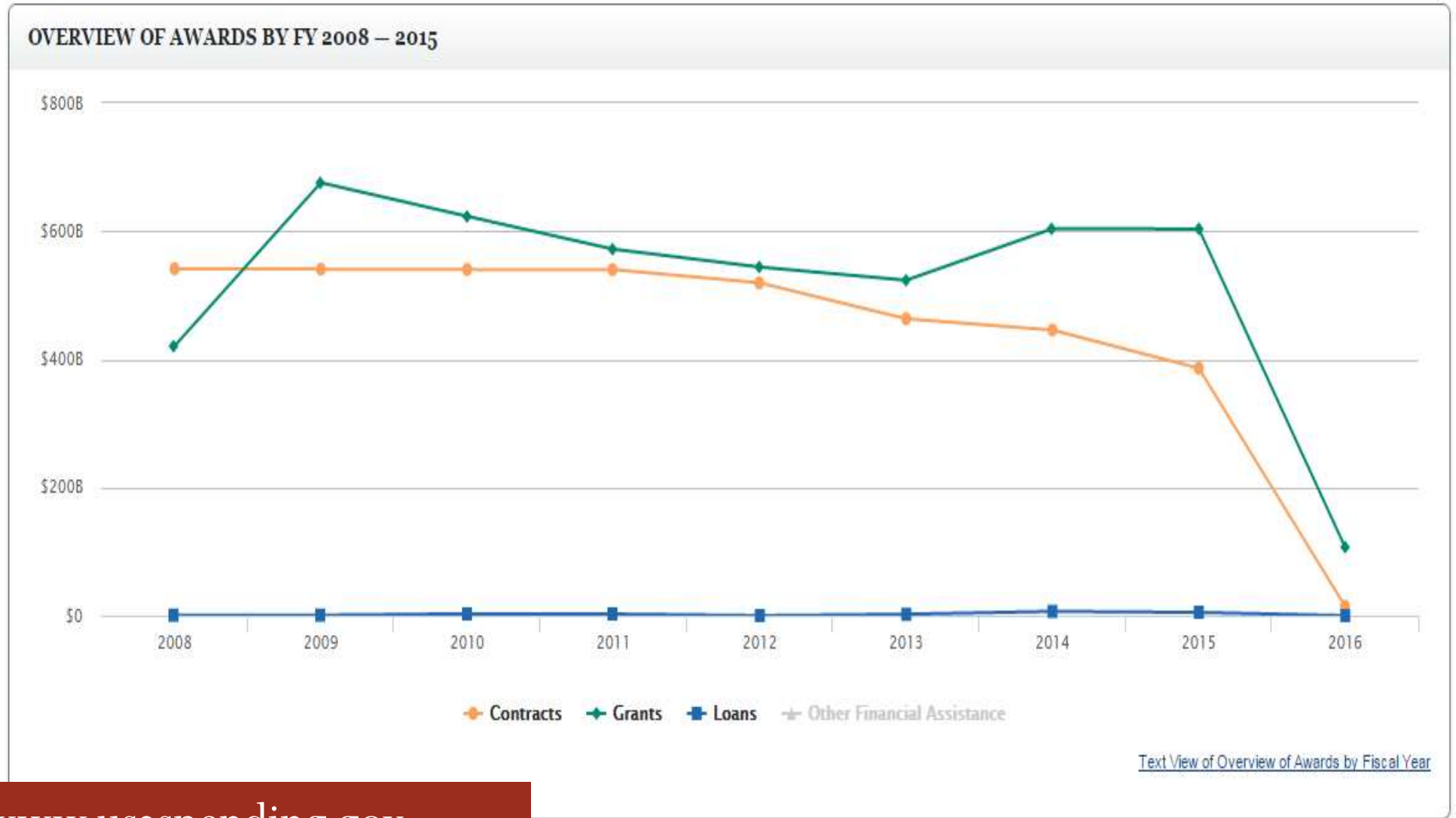
Source: Abby Semple, www.procurementanalysis.eu/

Author: Abby Semple

Patterns in U.S. Procurement

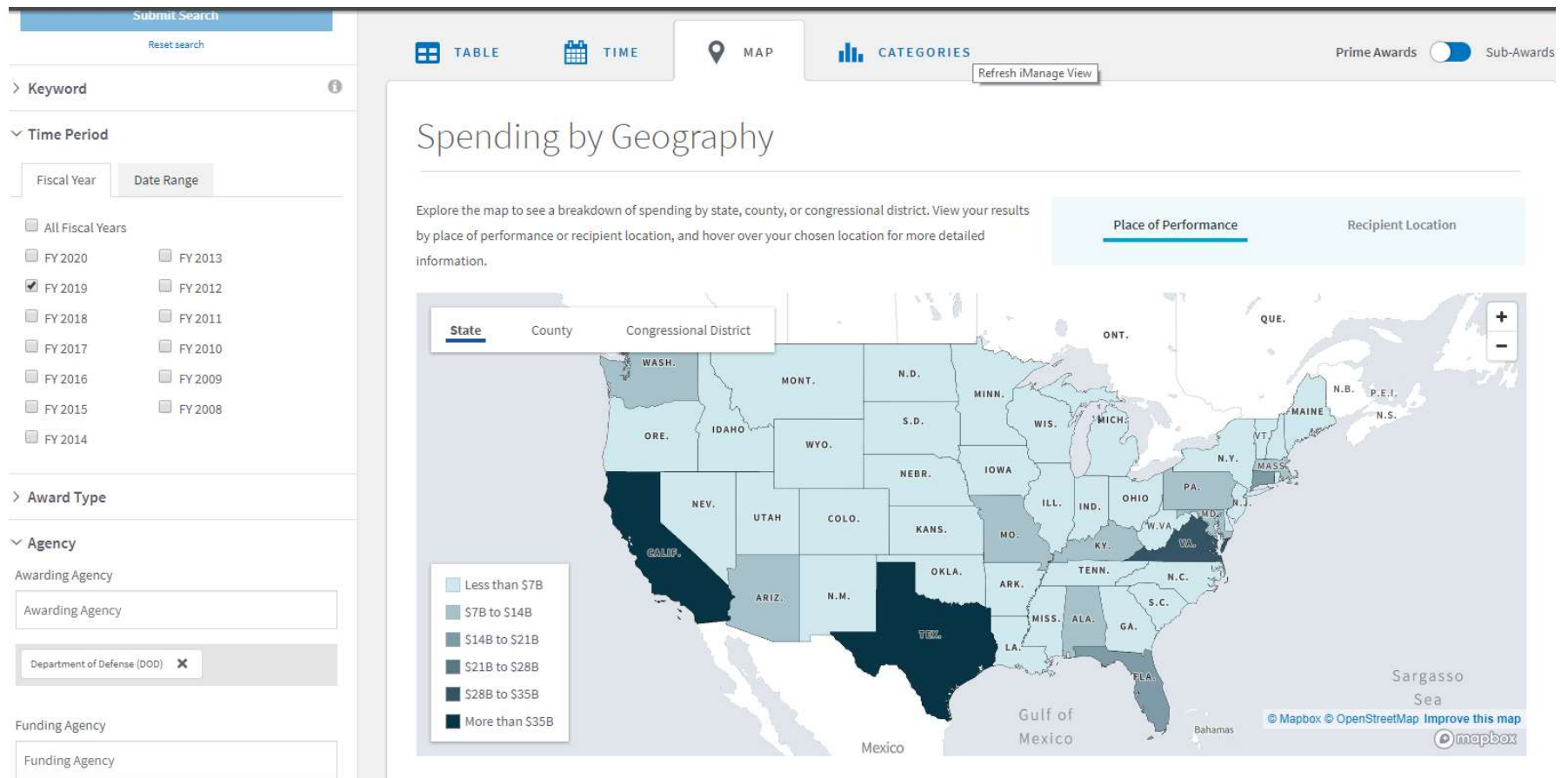
OVERVIEW OF AWARDS BY FISCAL YEAR

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.



www.usaspending.gov

Defense Department Procurement – FY 2019













Top 10 Federal Contractors

Top Defense

48

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



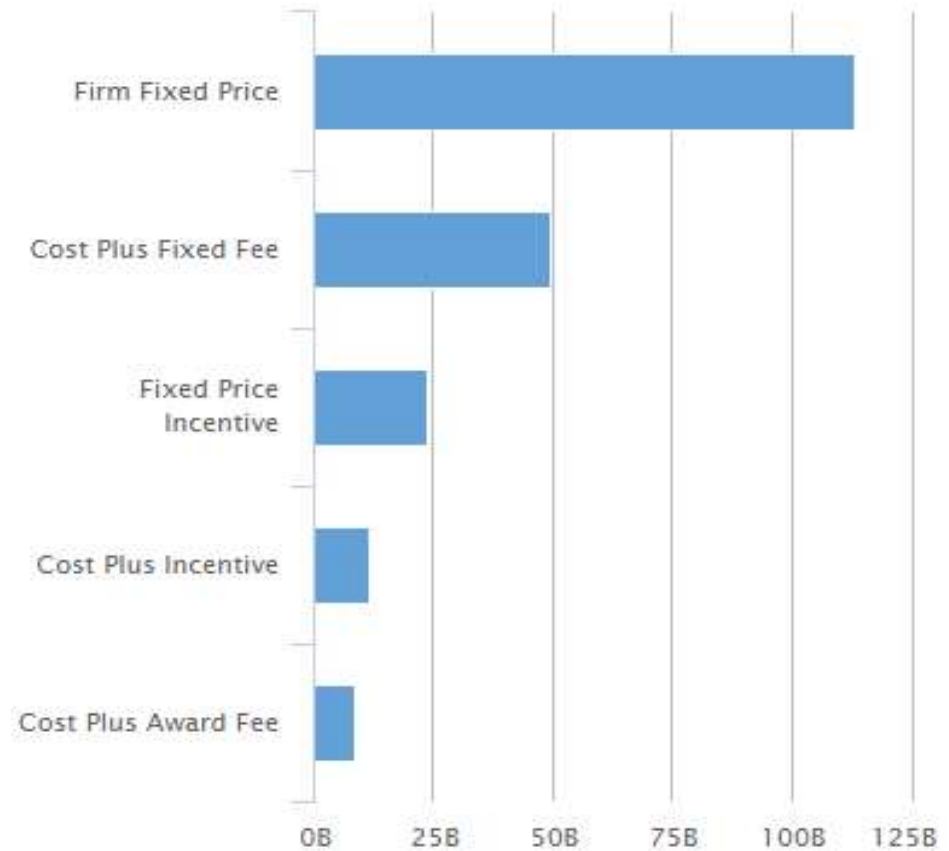
COMPETED/NON-COMPETED



■ Competed ■ Not Competed

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

TOP 5 PRIME CONTRACT TYPES



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

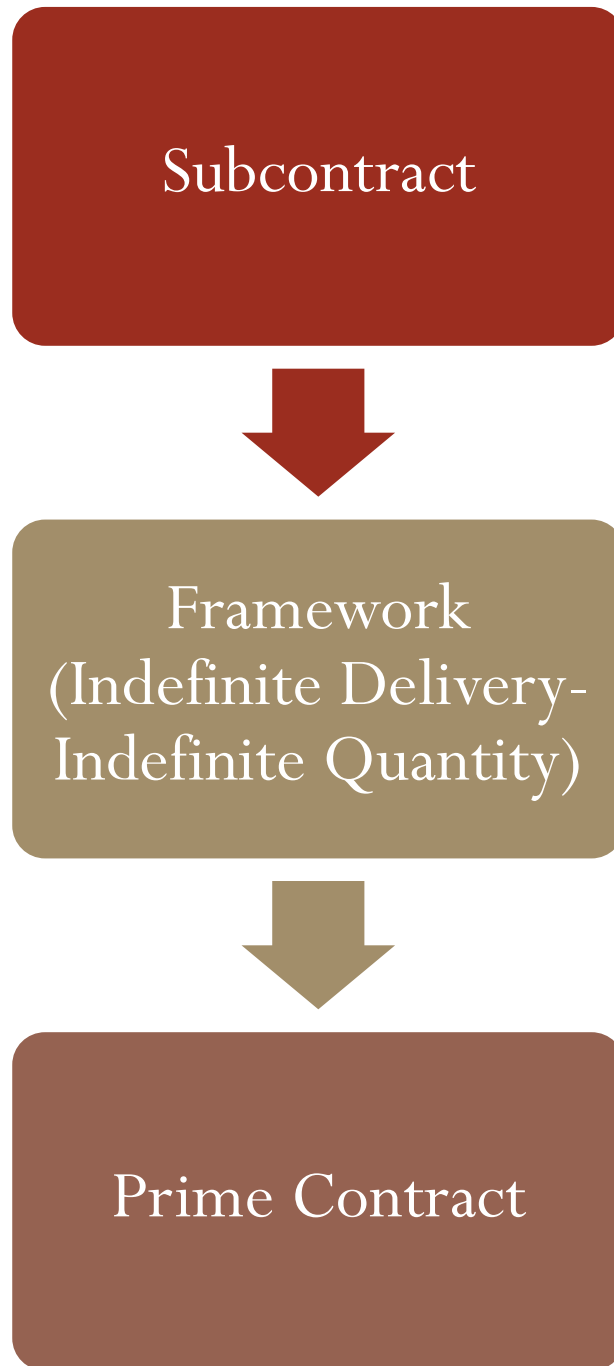
Access for Foreign Firms to Unitary Federal Procurement Market, Civilian and Defense

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





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.

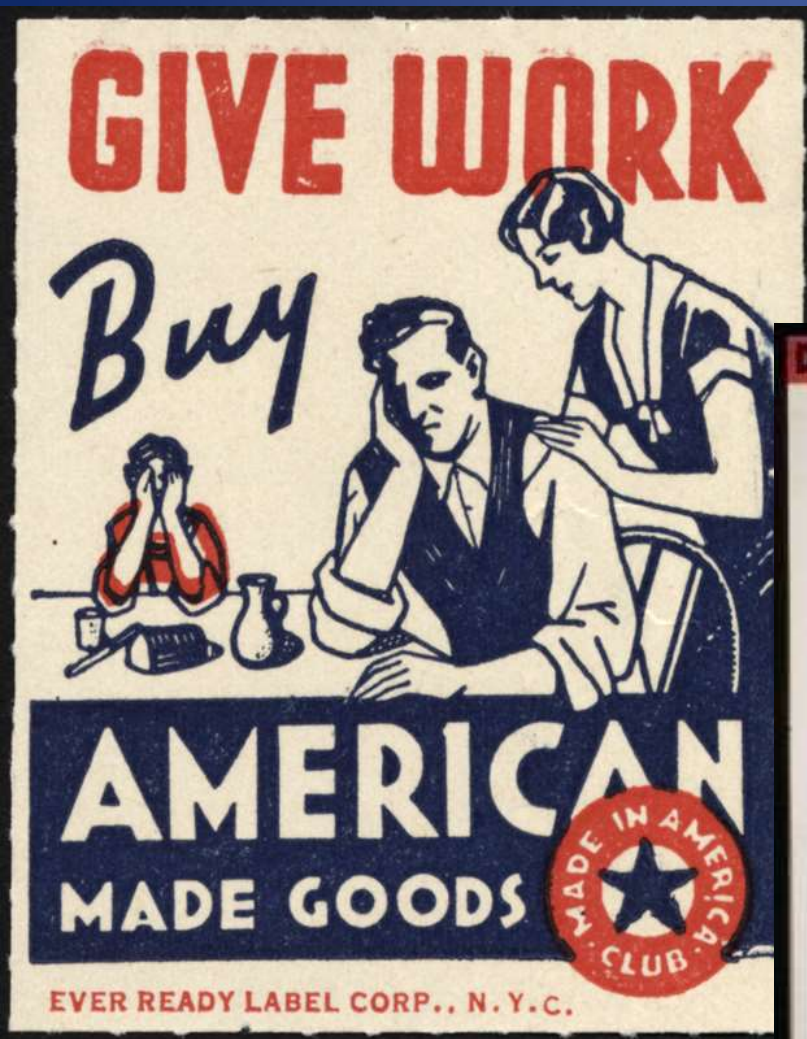
– Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776)



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

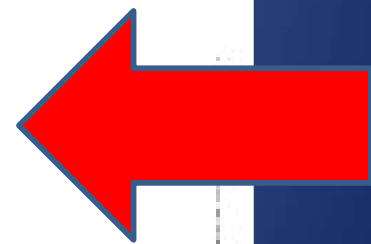
TRADE

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



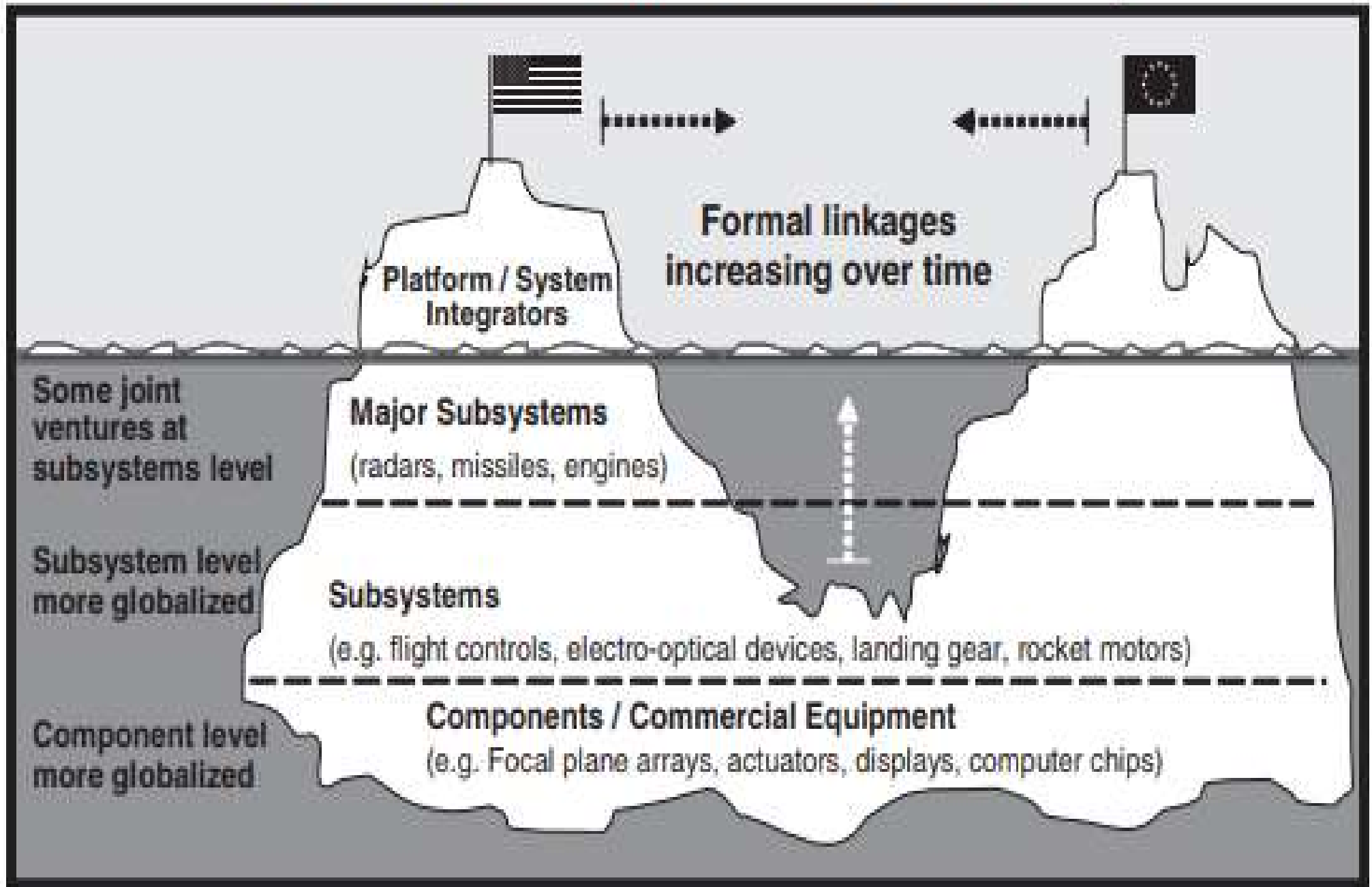
Trade Agreements Act:
Above \$180,000 (approx.)

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

DPAP
Defense Procurement and Acquisition Policy

DP
Defense Pricing

ACQ Web | Site Map | Contact DPAP

DPAP > Contract Policy and International Contracting > International Contracting > Reciprocal Defense Procurement and Acquisition Policy

Text Size: [-] [+] Print Page []

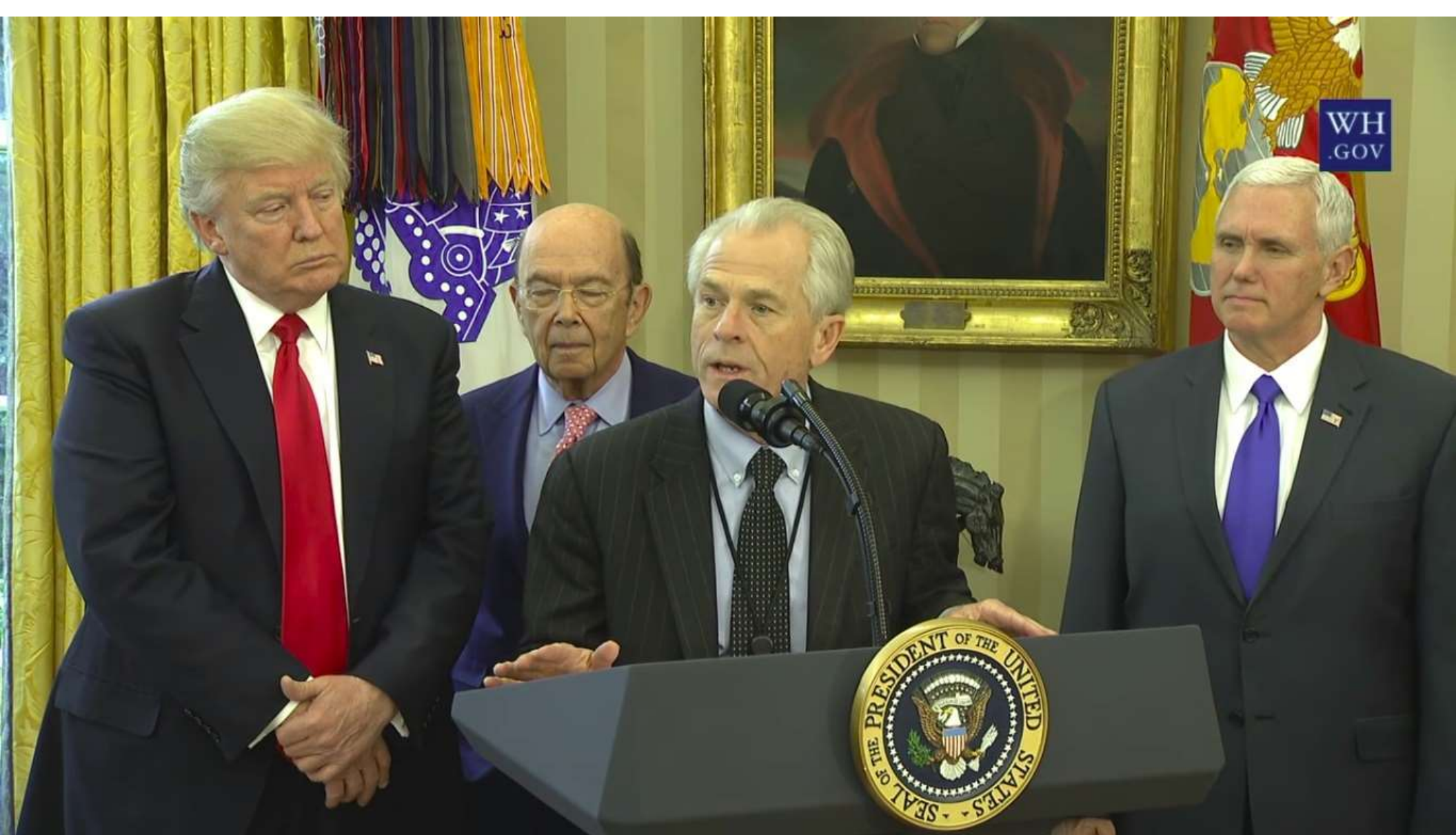
In This Section
Up One Level

Reciprocal Defense Procurement and Acquisition Policy Memoranda of Understanding

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.)

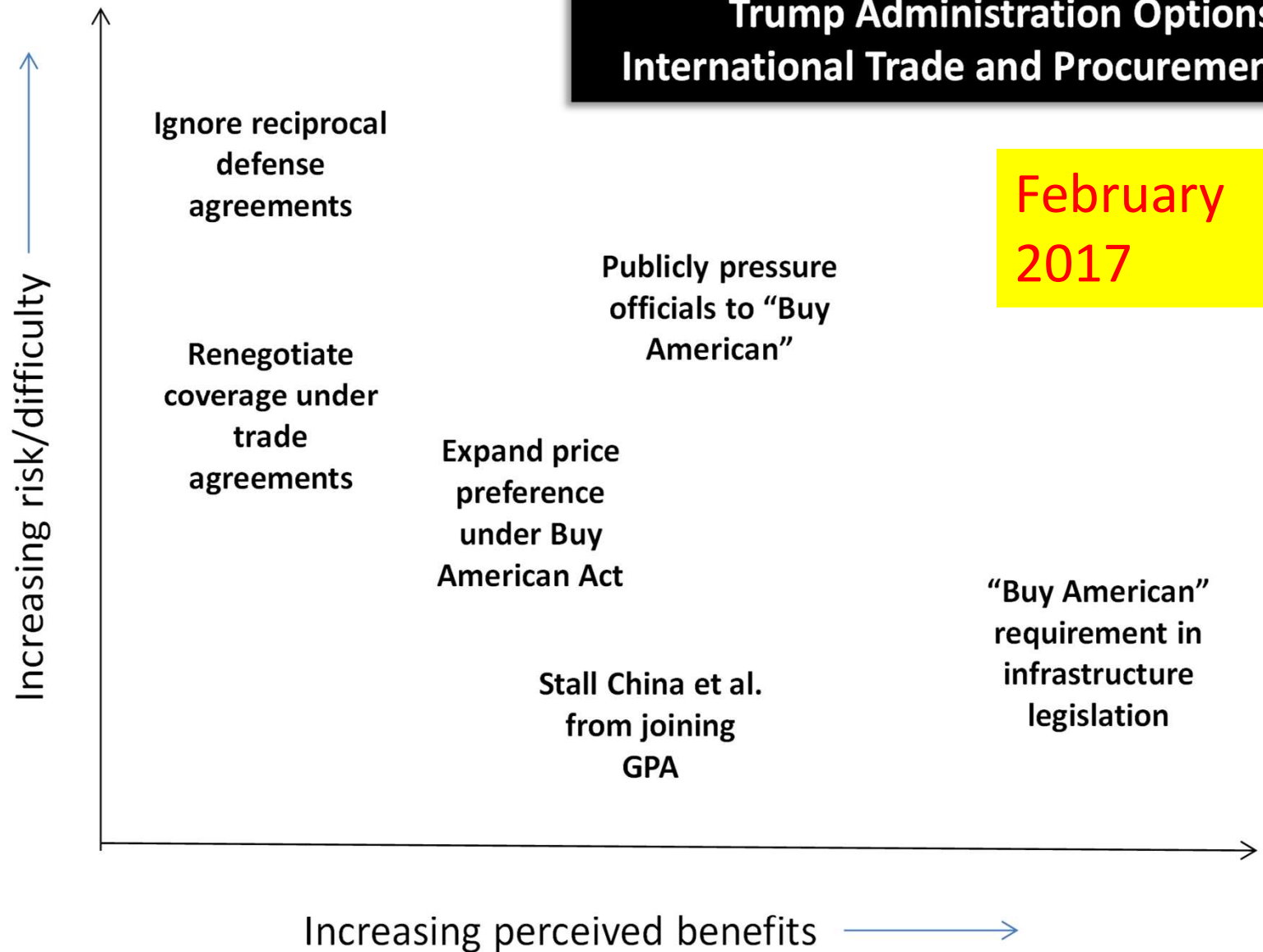
- [Australia](#)
- [Austria](#)
- [Belgium](#)
- [Canada](#)
- [Czech Republic](#)
- [Denmark](#)
- [Egypt](#)
- [Finland](#)
- [France](#)
- [Germany](#)
- [Greece](#)
- [Israel](#)

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



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

ECONOMY & JOBS | Issued on: July 15, 2019

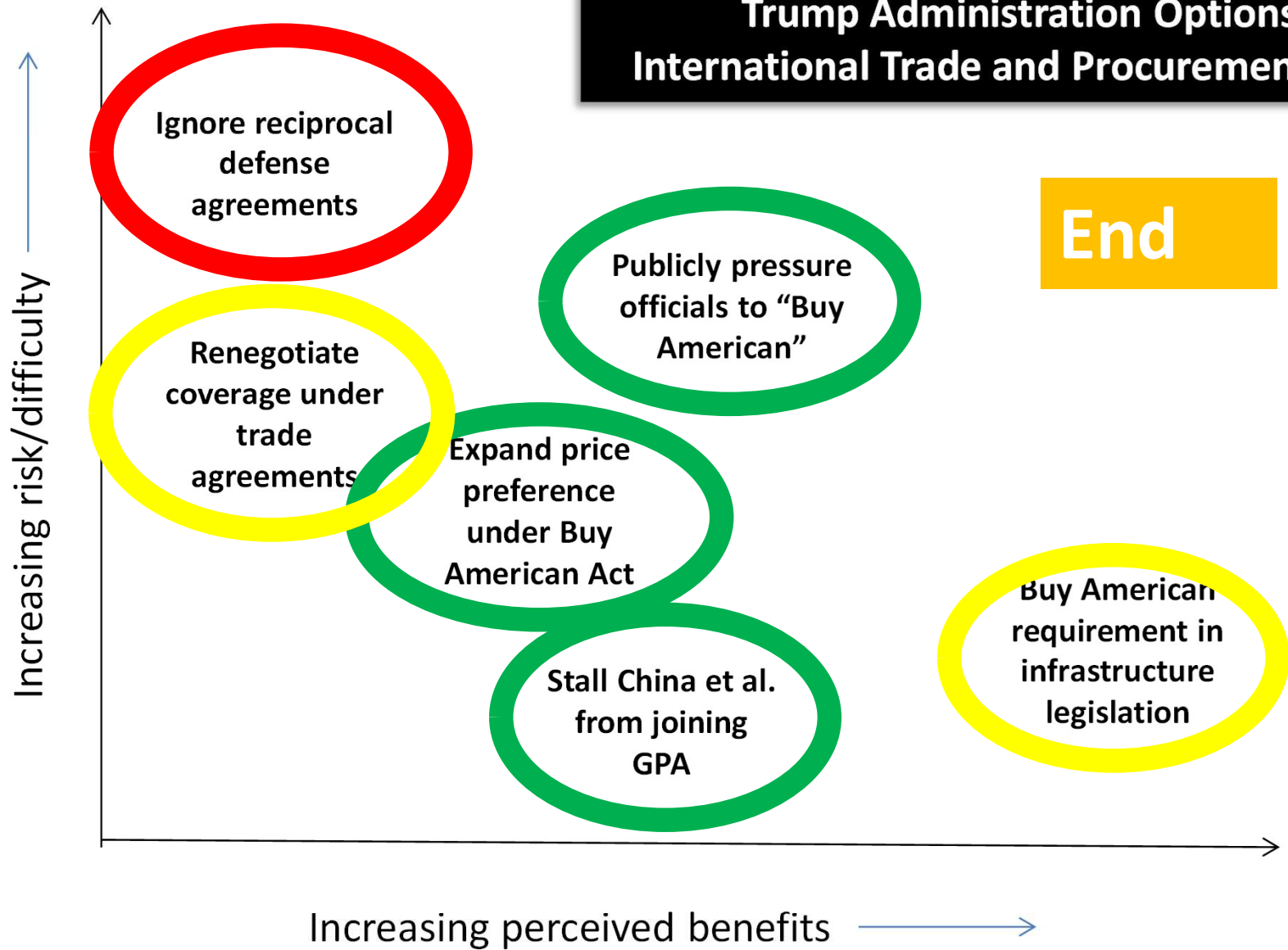
“Squeezing” the Buy American Act

**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

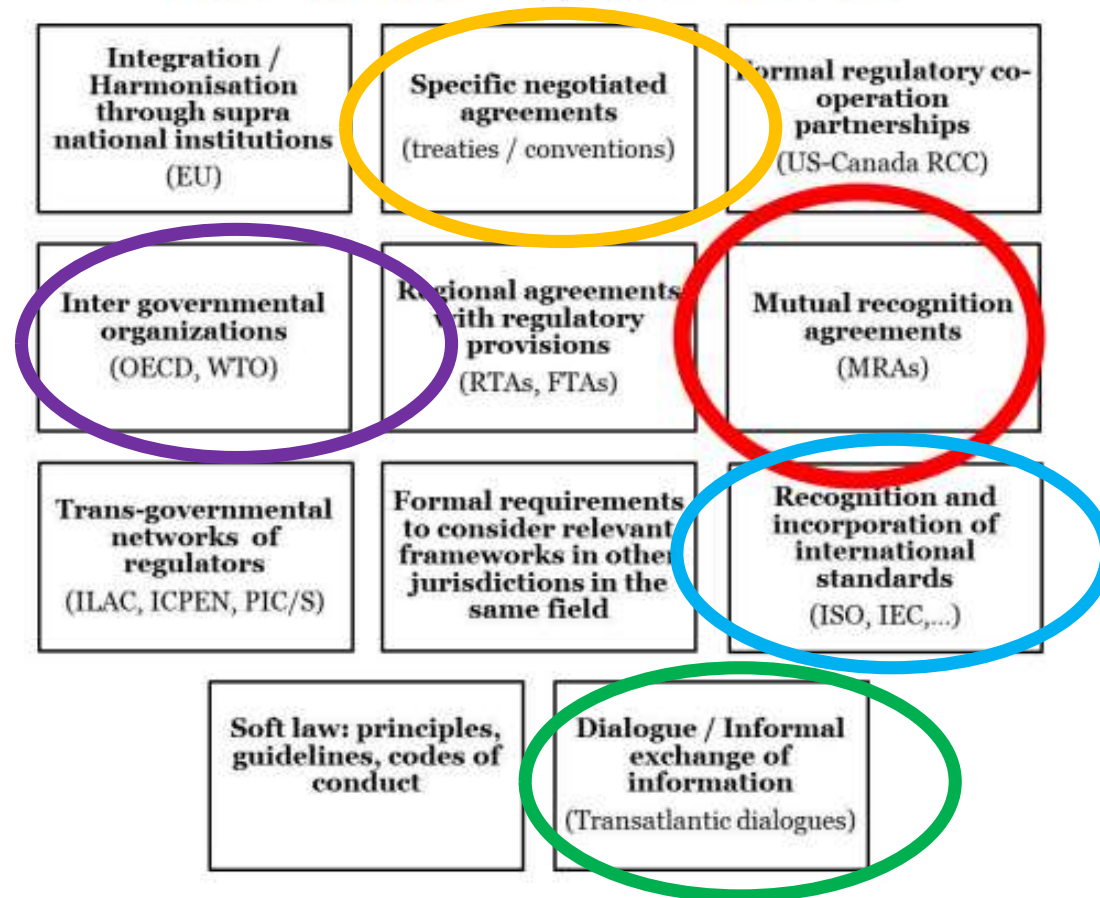


- President Joe Biden
 - Nominated USTR Katherine Tai: “Trade as a Force of Good”
 - “Made in America” policy
- Challenges
 - “Huawei Ban” – Section 889 Interim Rule
 - Cybersecurity Maturity Model Certification (CMMC)
 - European Commission “White Paper” -- Foreign Government Subsidies
 - Addressing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



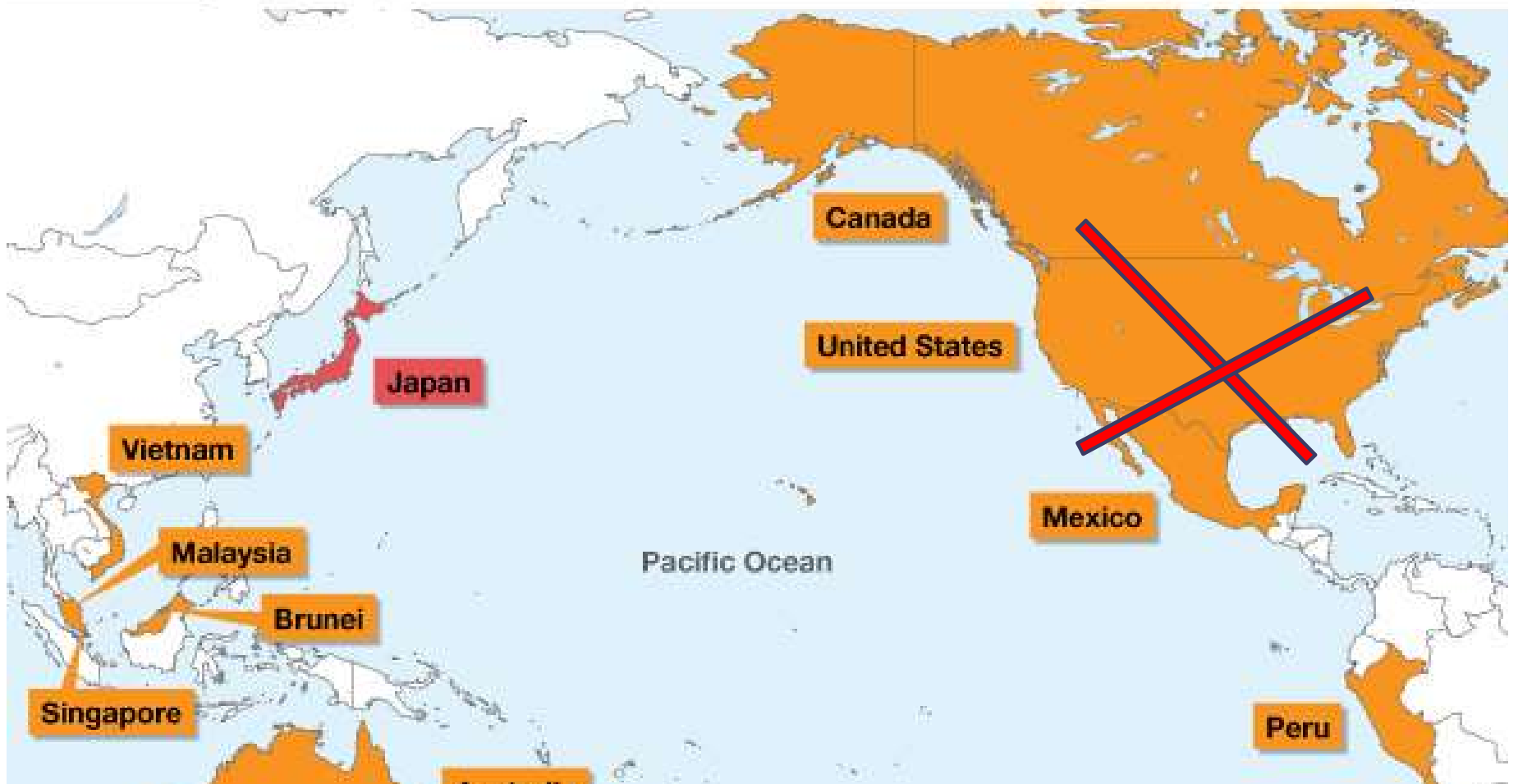
Regulatory Cooperation Strategies

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/10.1787/5jm56fqsfxmx-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



“... 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



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 ⁴⁴	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's
"Foreign Subsidies"
Regulation and
Public Procurement
[Nov. 2022](#)

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.

The top portion of the slide features a blue background with several golden-yellow five-pointed stars arranged in a circular pattern, characteristic of the European Union flag.

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

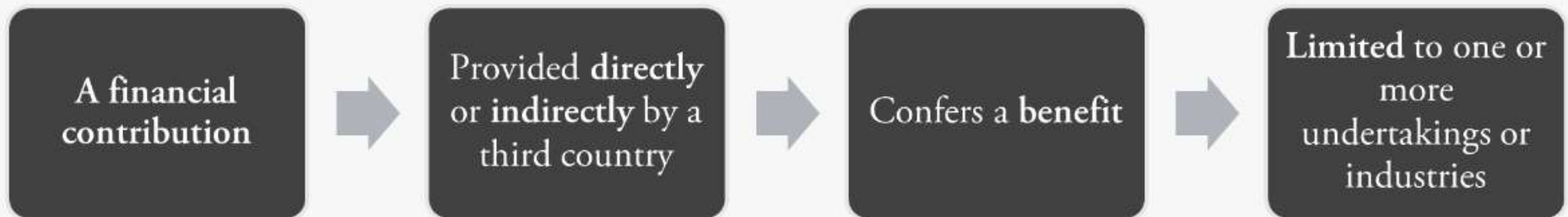
- A patchwork of measures that are neither coherent nor frequently used
- See Guidance on the participation of third country bidders and goods in the EU procurement market
https://ec.europa.eu/growth/content/new-guidance-participation-third-country-bidders-eu-procurement-market_en
- Core examples
 - 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:



WILMERHALE® 

[Source](#)

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)

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}

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

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*	Yes	Yes	Yes
Ability to designate preferred products/suppliers*	Yes	Yes	Yes

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

*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.”

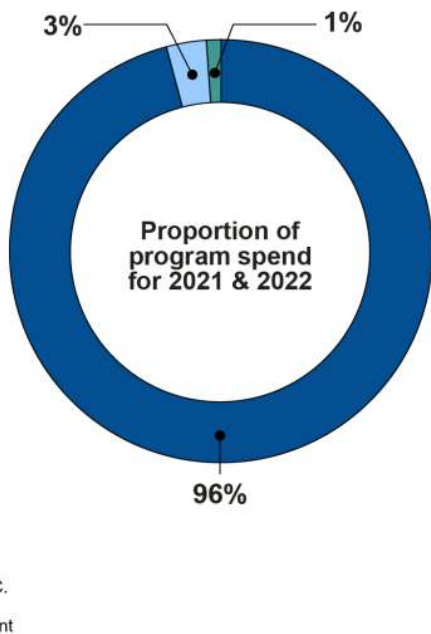
GSA ONLINE MARKETPLACES

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 . . .”

Figure 3: Proportion of Spend in GSA's Commercial Platforms Program by Provider, Fiscal Years 2021 and 2022 Combined



- Amazon Business
- Fisher Scientific L.L.C.
- Overstock Government

Source: GAO analysis of General Services Administration's (GSA) Commercial Platforms Program data. | GAO-23-106128

July 2023

GSA COMMERCIAL PLATFORMS PROGRAM

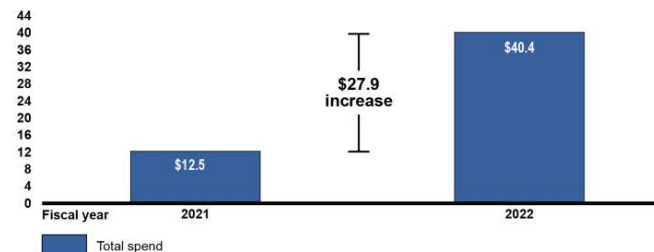
Opportunities Exist to Improve Implementation

What GAO Found

The General Services Administration (GSA) established the Commercial Platforms program to enable purchase cardholders at federal agencies to buy commercially available products using online marketplaces. From the Commercial Platforms program's first full fiscal year in 2021 to fiscal year 2022, the total dollars spent in the program increased by about \$28 million.

Federal Agencies' Spend through GSA's Commercial Platform Program, Fiscal Years 2021 and 2022

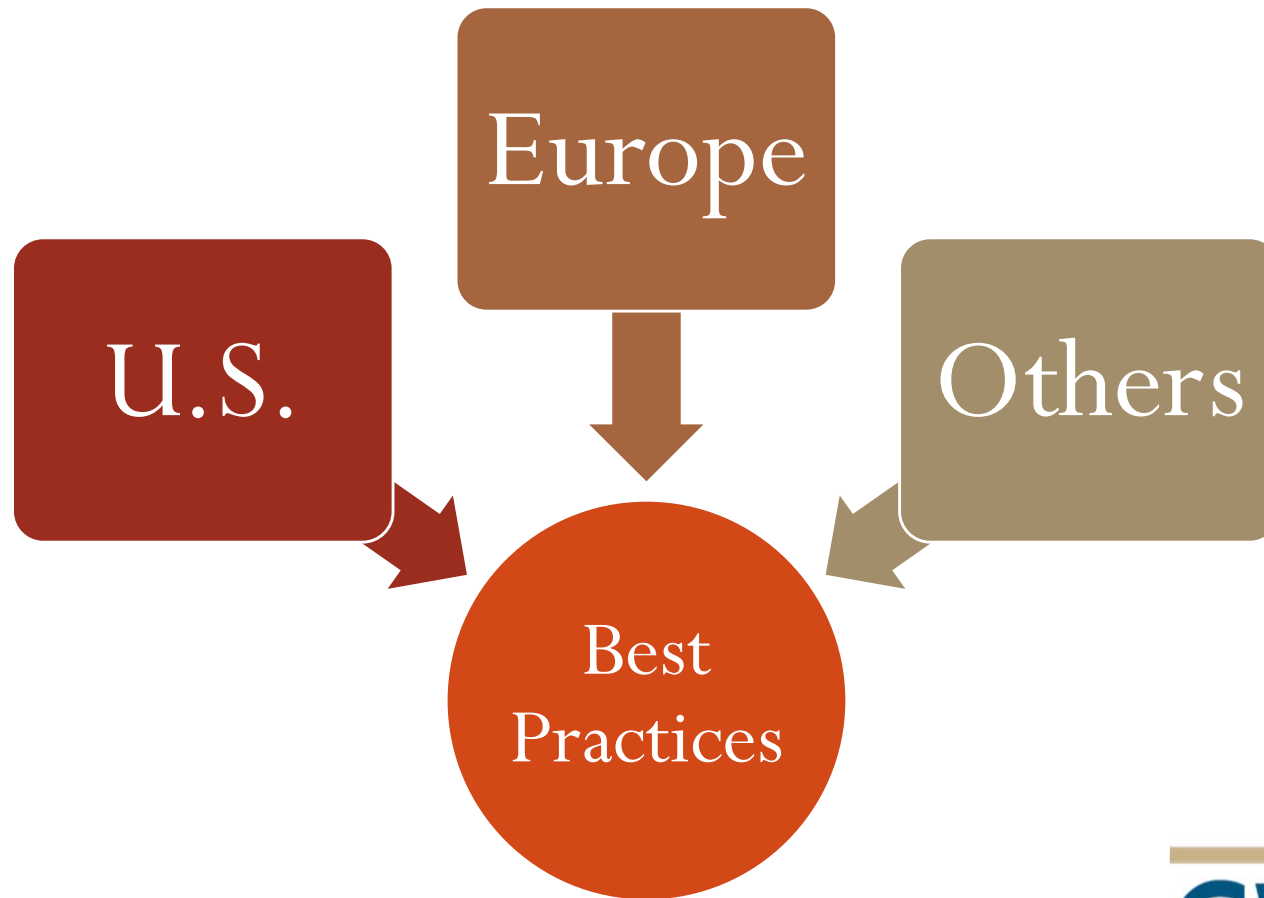
Total spend
(Fiscal year 2022 millions)



Source: GAO analysis of General Services Administration (GSA) Commercial Platforms Program data. | GAO-23-106128

Where GSA Commercial Platforms Initiative Stands

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



Figure 2.2. The risk management cycle





EU 2014/24/EU: Self-Cleaning

Art. 57

6. Any economic operator that is in one of the situations referred to in paragraphs 1 and 4 may provide evidence to the effect that measures taken by the economic operator are sufficient to demonstrate its reliability despite the existence of a relevant ground for exclusion. If such evidence is considered as sufficient, the economic operator concerned shall not be excluded from the procurement procedure.

For this purpose, the economic operator shall **prove that it has paid or undertaken to pay compensation in respect of any damage caused by the criminal offence or misconduct, clarified the facts and circumstances in a comprehensive manner by actively collaborating with the investigating authorities and taken concrete technical, organisational and personnel measures that are appropriate to prevent further criminal offences or misconduct.**

The measures taken by the economic operators shall be evaluated taking into account the gravity and particular circumstances of the criminal offence or misconduct. Where the measures are considered to be insufficient, the economic operator shall receive a statement of the reasons for that decision.

An economic operator which has been excluded by final judgment from participating in procurement or concession award procedures shall not be entitled to make use of the possibility provided for under this paragraph during the period of exclusion resulting from that judgment in the Member States where the judgment is effective.



- 1. Standards and procedures**
- 2. Knowledgeable leadership**
- 3. Exclude risky personnel**
- 4. Training**
- 5. Monitor, evaluate, reporting hotline**
- 6. Incentives and discipline**
- 7. Adjust program to risk**

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Victim Compensation?

Conclusion

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