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# Service Contractor

*April 2016 / The Voice of the Government Services Industry*



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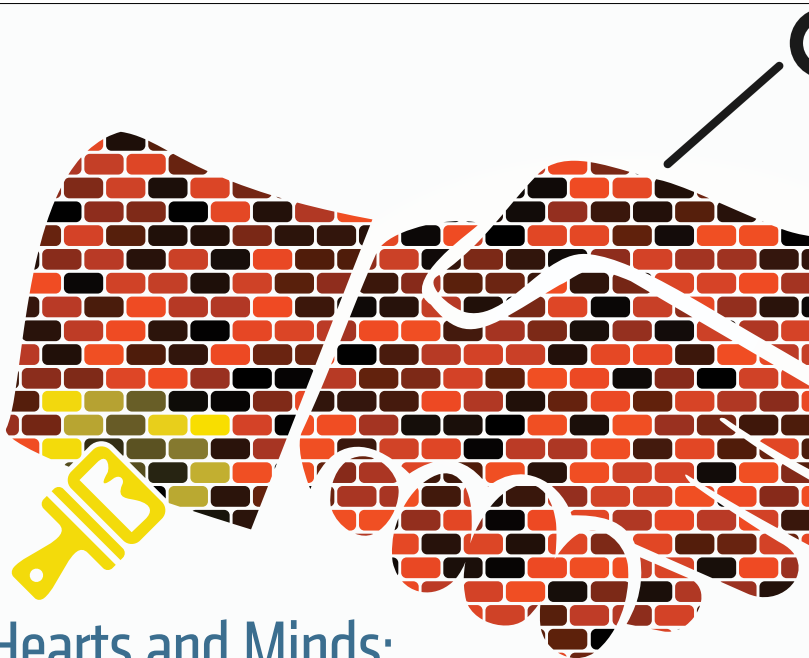
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## Winning Hearts and Minds: Rebuilding the Government – Contractor Partnership

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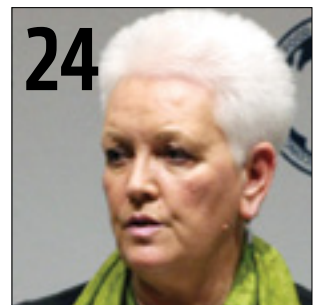
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## PRESIDENT'S LETTER

I am honored to be writing my first “President’s Letter” for the PSC magazine. As PSC’s new president and CEO, I am excited to join this outstanding organization and continue the vital role that PSC plays in advancing the Federal government’s professional and technology services industry. I look forward to engaging deeply with all of you as soon as possible.

My experience in both government and industry has shown me that we all benefit when the government is a smarter customer. Our job at PSC is to help make them that way. This is particularly important as the government continues to face spending constraints and ongoing reforms and changes in acquisition policies and statutes.

In this issue of the PSC *Service Contractor* magazine, you will find several themes that fit right in with PSC’s long-standing interests and attention.

We start with our Sounding Board. Three articles by members of the PSC Board of Directors focus on the environment and issues relating to competition in the professional and technology services marketplace from three perspectives: information technology, logistics, and international development.

Sid Fuchs, the president of MacAulay-Brown, challenges our members and our government colleagues to think and act differently in our relationship with each other. He offers some important actions that both contractors and government can take to rebuild the government-contractor partnership.

Under the human capital banner, this issue includes an insightful look into non-compete agreements within the federal contracting environment and the key factors courts consider when evaluating the application of underlying restrictions. We also provide a policy spotlight looking back on subject matter of previous acquisition reform provisions that have yet to be fully implemented yet are likely to generate additional attention during this year’s defense reauthorization debate.

After the Annual Conference, we will turn our attention to the first ACQUIRE conference on June 8-9, in which PSC is the founding partner with 1105 Media. There, we will release the 2016 Acquisition Policy Survey, based on interviews conducted by many of our member companies. The results were compiled in conjunction with PSC member company Grant Thornton.

Here is what I ask of you. Engage with us and contribute your expertise to guide the development of our work. Help us expand the PSC membership and our advocacy activities. It is a dynamic and challenging time to be a PSC member, and I’m honored to join this great organization. I look forward to working with you.

David J. Berteau



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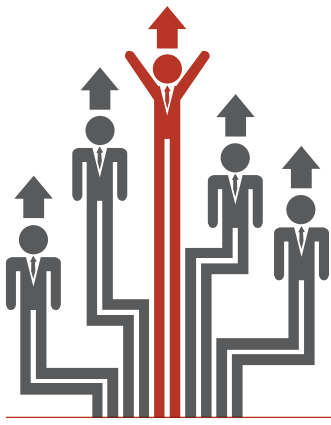
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**SOUNDING BOARD:** In each issue, PSC asks members of our board of directors to offer their perspectives on key challenges facing the government services industry.

## The Federal Services Industry: *Effective Competition*



**Lou Von Thær**  
CEO, DynCorp International

### What are your views on the state of effective competition within the federal services industry? What are the key drivers affecting competition?

Throughout DynCorp International's (DI) 70-year history, we have seen time and again that the government services industry is cyclical, and that the companies that continue to succeed have to adjust to market shifts on a dime. Nowhere is this truer than in logistics, which remains an enduring market for strong competitors despite decreased agency spending.

We have all felt the impacts of budget cuts in our industry. While we welcomed the clarity and stability in the defense budgets as a result of the 2013 and 2015 bipartisan budget agreements, there can be no denying that in real terms, the defense budget is down 16 percent from a peak of \$691 billion in Fiscal Year 2010 to \$580 billion in Fiscal Year 2016. While much of the decline was anticipated, the base budget today is still more than \$40 billion below the Department of Defense's 2013 projections.

We are now more than two years out of the decade-long period of rapid, federal customer demand-driven, contract spend growth. To an outsider, that may appear to indicate slower years ahead. But the reality is that we've reached a phase of normalization that long-term players anticipated all along. Additionally, deep cuts in recent years have taken a toll on service readiness that, when combined with more stable budgets, provide optimism for the future of the business. What, then, should companies do to increase market share during this period? The answers are straightforward.

**Maintain program excellence.** Even as agencies tighten their budgets, there will always be a need for the logistics services that our industry provides. This includes, but is not limited to, conventional and contingency logistics; operations and maintenance support; platform modification and upgrades; supply chain management; training; and intelligence mission support services.

*continued on page 10*



**John Gastright**  
Senior Vice President for Government  
Relations and Communications,  
DynCorp International

Technology innovations continue to roar ahead, introducing new capabilities that could change the way government delivers on its mission. Yet government is missing out. Ironically, practices designed to reduce spending while encouraging innovation have, instead, stifled industry's ability to deliver much beyond bare bones solutions. It's time to look at what we can do differently to deliver what government truly needs.

### Unintended Consequences of LPTA Contracts

With a decreased ability to spend, government looked to Lowest Price Technically Acceptable (LPTA) contracts. LPTA was expected to reduce spend, speed procurement and encourage innovation. The idea was to set a clear standard for "technically acceptable," then to quickly and fairly award on price. Government hoped that price competition would compel IT contractors to propose innovative approaches and solutions that could reduce government costs.

However, LPTA proposal evaluation methods do not have any way to discriminate between offerors beyond price. Broad LPTA standards for what is technically acceptable have designated all bidders relatively equal on capabilities. Final evaluation then comes down to price, leaving no room to select innovations that are not directly tied to reducing costs.

The move to more LPTA contracts ultimately penalizes industry solutions that drive innovations, where innovation is mission-focused and not necessarily cost-cutting focused.

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**Brian J. Clark**  
President and CEO, NCI, Inc.



**Karrye Braxton**  
President and CEO,  
Global Business Solutions, Inc.

In the U.S. government's international development marketplace, 30 percent of the foreign assistance budget goes to bilateral agreements (primarily Israel and Egypt) and to international organizations (such as the UN, IMF and the international development banks). Other funds are transferred to other federal agencies (such as DOD and Justice). For the remainder of USAID's portion of the foreign assistance budget, almost 70 percent has been spent on grants and cooperative agreements, primarily with nonprofit organizations, while the remaining 30 percent is competed as contracts among large, medium and small international development companies.

Small businesses have always clamored for a larger piece of USAID business; with the federal goal of ensuring that 23 percent of all Federal contract dollars are awarded to small businesses, small business advocates in Congress and the Executive branch have supported this effort through legislation and regulations to enhance and replenish the industrial base. In fiscal year 2015, USAID achieved the highest overall rating from the Small Business Administration for its small business initiatives, but still fell short of achieving the numerical goals for awards in any of the categories of small business.



**Donna Sibley**  
President,  
Sibley and Associates, LLC

Until last year, USAID was only required to meet its small business utilization goals from its domestic procurements. Nevertheless, with the support of USAID's Administrator, Office of Small and Disadvantaged Business Utilization (OSDBU) and Office of Acquisition and Assistance, in fiscal year 2016 USAID faces a new challenge very different from its 50-year effort to improve livelihoods in emerging economies. USAID has undertaken a global utilization goal of awarding 13% of its procurements to American small businesses.

USAID has accepted the challenge to build "emerging economies" of small businesses. While USAID has always partnered with small businesses, most small firms have relied on indefinite delivery, indefinite quantity (ID/IQ) contract vehicles to compete for work. These were usually awarded by USAID headquarters' bureaus or offices. The reality is that it takes

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## Doing More with Less Doesn't Work

Doing more with less just doesn't work when streamlining existing programs for the wrong reasons.

Diminished services and solutions end up costing more when the government's mission is adversely impacted. In the end, government has no choice but to throw money at the problem until it gets to a tolerable level, buying time before going back through the acquisition process for a better solution. That process alone can take 18 months or more!

It's a too-familiar story. It happens when the end-user customer is overpowered by the acquisition shop that inappropriately designates a contract as LPTA or small business qualified.

## Implications of Delayed Technology Innovation

Innovations require effort and cost. Is "technically acceptable" good enough for now? It's not.

Social. Mobile. Cloud. Big Data. Cybersecurity. Agile development. The digital world has transformed around us. Government officials at the highest levels and on down express a hunger for innovation. They desire the use of technology to increase efficiency, improve security and better connect with constituents.

Yet...time is of the essence, as the chasm widens between innovative technologies and what's available to the government:

- **Technology Innovation Cycle** – is much faster than government procurement. It is all too common place to see two to three generations of innovation being put into practice before government awards a contract.
- **Code Pedigree** – integrity is a concern when the innovation is being developed in countries that are not friendly to the U.S.
- **Government Requirements** – are rarely a 1:1 fit with commercial needs. There is a natural friction between our "share everything" (social media) culture and government's "protect as necessary" (data) requirements. Similarly, government still needs some on-premise solutions, which limits the adoption of cloud-based innovations.

The longer the wait, the more costly it will be to get the latest innovations from trusted sources to work well in the government IT environment.

## Qualified Competition Fosters Innovation

Competition spawns innovation. New IT companies are introducing new solutions. Established businesses are engaged in robust merger and acquisition activity, creating new solutions through combined strengths. Industry is stretching itself to develop new capabilities organically.

When competition is driven to help government achieve its mission, we are all the better for it. However, when good intentions get in the way of delivering desired results to government, we all lose.

A desire for a small business marketplace, for example, has led to dubious awards granted to small businesses that, alone,

are not viable contractors for a mission support role. Those businesses unduly rely on large businesses with the credentials and capabilities to deliver. At best, this arrangement does not fit the intention nor desire of creating a healthy marketplace. At worst, it puts the mission at risk.

The competitive landscape is as intense as it's ever been. We welcome an environment that fosters competitive innovation focused on government missions.

## Moving Forward: Shared Responsibilities

Over the past few years, we've seen the reverse of what government intended. Instead of price constraints driving interesting innovation, government received only the minimum, largely as a result of resistance to change the way things have been done in the past in favor of new approaches to accomplishing critical missions. All too often this approach is a dive to the lowest price possible by cutting salaries and gutting staffing levels to barely clear ill-defined technical requirements. That result frequently yields detrimental impacts to customer missions and ultimately does not serve the best interests of anyone.

Moving forward, I believe we have a shared responsibility to achieve three things together:

### 1. Open Discussion of Needs and Solution Options

*Government:* Facilitate open presentations to define needs, requirements and desired outcomes. Find ways to meet with industry so that competitors are not privy to each other's ideas and recommendations. Be open to innovation as more than a cost-savings measure.

*Industry:* Reflect on customer needs. Take time to present ideas, approaches and innovations to advance the mission, cost-effectively.

### 2. To the Extent Possible, Work with Definitive Data

*Government:* Provide access to real, definitive workload data. Share it with industry partners.

*Industry:* Use real data to accurately estimate your solution and innovation.

### 3. Align Contracting With Mission Needs

*Government:* Insist on an acquisition support model that aligns to goals and requirements. Select a contract vehicle that will support the desired outcome.

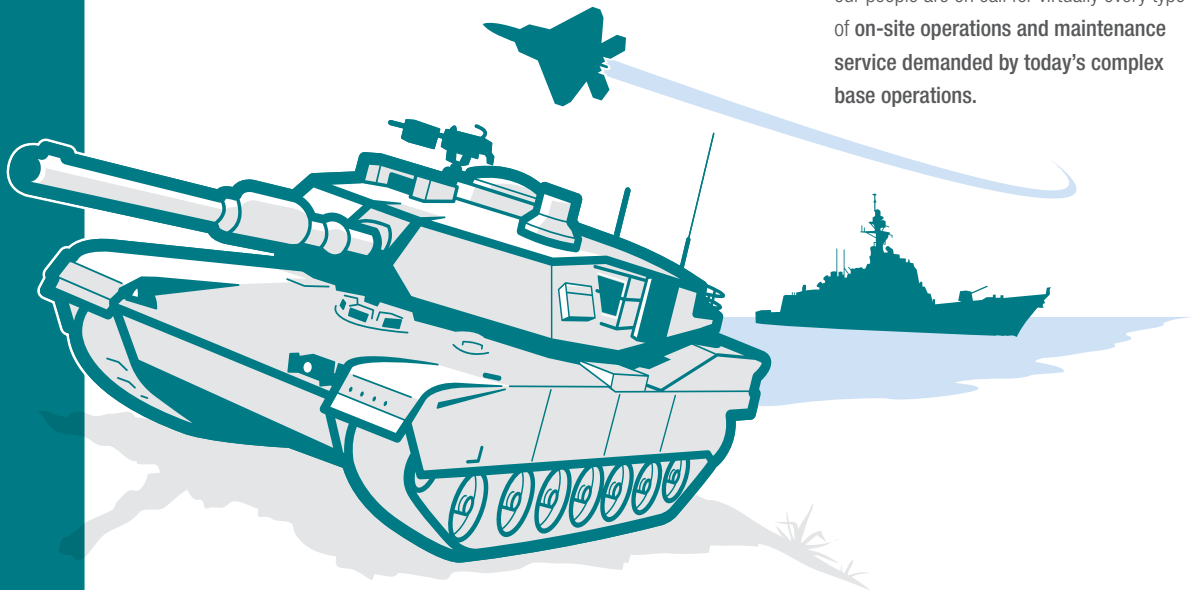
*Industry:* Put the best interests of your government customer at the center of every bid. If you don't have the capability, don't bid. Submit the best representation of what you believe will help your customer.

Then...let competition unfold to deliver best results! ■



## What *don't* we do for the US Military?

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## Lou Von Thayer & John Gastright *continued from pg. 6*

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For example, DI is proud to be one of three companies supporting the Army's Logistics and Civil Augmentation Program (LOGCAP) contract. The program has provided shelter, food and comfort to hundreds of thousands of coalition troops across Afghanistan. It is the premier contingency logistics support contract in the U.S. arsenal and has been described as one of the most complex and challenging logistics support operations in history.

So when we receive strong "Contractor Performance Assessment Reports," or CPARs, on this or any other program, we know we have done our job. We also know that the Department of Defense will continue to turn to the companies that get the job done, particularly in times of tightened budgets and heightened transparency.

**Remain cost-competitive.** Government agencies' continued use of the lowest price technically acceptable (LPTA) source selection model has made company business development and pricing particularly difficult. LPTA is hopefully fading but customers are still under pressure to get more without paying more.

The key to succeeding in this price-sensitive logistics market is to carefully monitor government spending trends and develop a business model that will best serve the customers' needs while

maintaining superior program excellence at all times during performance.

**Preserve an ethical corporate culture in times of both growth and stagnation.** While strong program assessment ratings are certainly essential, maintaining a highly ethical culture will help secure the success of those future programs.

At DI, we are guided at all times by our core values: We Serve, We Care, We Empower, We Perform and We Do the Right Thing. We firmly believe that our culture has for 70 years made us a trusted partner to commercial, government and military customers.

We also recognize the experience and dedication that veterans contribute to our business. That's why almost 50 percent of our team is comprised of veterans, and why we are consistently recognized for our commitment to both hiring veterans and working with veteran-owned businesses.

The logistics market remains an excellent place to be for the companies that maintain program excellence, remain cost-competitive and are guided by integrity. And when the market shifts and there are new gaps to fill, the companies that followed these principles will be at the head of the line for future opportunities. ■

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## Karrye Braxton & Donna Sibley *continued from pg. 7*

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deep pockets to travel to even one, let alone many, of the 54 USAID field missions to research local conditions and to build new or strengthen existing local relationships with government counterparts and foreign trade associations, local for-profit or non-profit businesses or other non-governmental organizations. Very few small, and even fewer disadvantaged, firms have the resources to make these investments.

American small and disadvantaged businesses face many of the same uphill battles as small and micro enterprises in emerging economies, so we are natural allies for assisting in their growth and development. Yet while small U.S. firms were often given opportunities to compete for technical assistance projects abroad, many government contracting officers candidly admitted to a preference for awarding to larger firms to execute these projects, even when the projects are to benefit small and micro enterprises in emerging economies.

More recently, as newer small businesses demonstrated their capabilities and began seeking greater opportunities, USAID began to significantly expand the agency's opportunities for small businesses.

So what more needs to be done?

1. USAID can target new small businesses market entrants. When USAID Mission Directors, CORS or Contracting Officers have their conferences, they can host "hackathons," a term borrowed from software development where groups of experts are invited to solve problems. These hackathons, which are essentially boot camps of live case studies focused on difficult problems, could gather groups of U.S. small business development experts to brainstorm, argue pros and cons and arrive at the most innovative and implementable solutions. Then "winning" innovations could be developed into proposals to further flesh out these solutions. USAID has begun to use Broad Agency Announcements as a start towards that collaborative processes, but they are still long, drawn-out affairs that have resulted in few actual contract awards yet have added to higher indirect expenses for small businesses.
2. For mission awards, absent extenuating circumstances, all opportunities for projects of \$5M or less with a period of performance of more than one year should be competed among small businesses only.
3. Make small business contracting goal achievement part of the performance reviews for government COs, CORs, Of-

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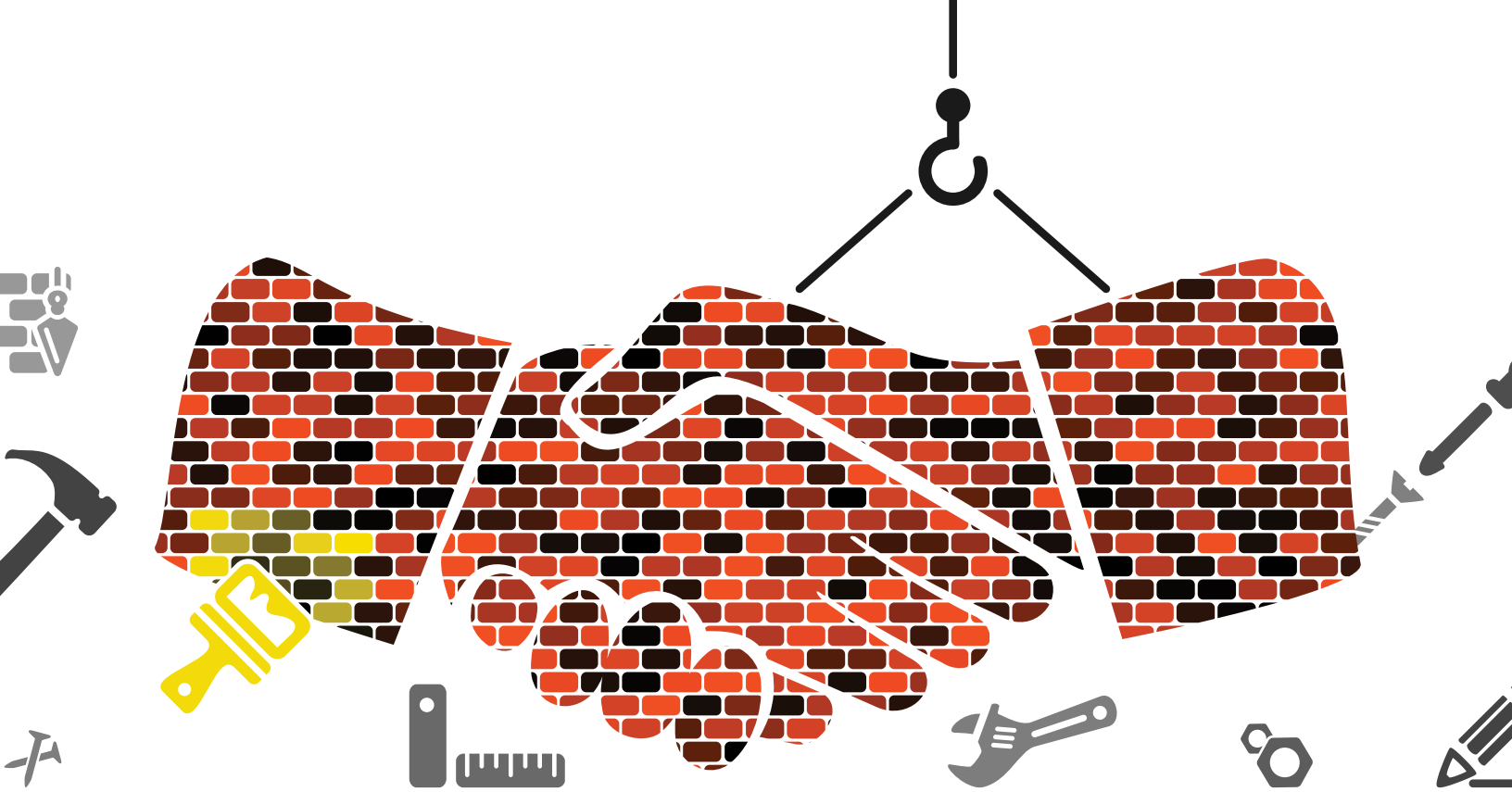
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# Winning Hearts and Minds: Rebuilding the Government – Contractor Partnership



**by Sid Fuchs,**  
President and CEO,  
MacAulay-Brown, Inc.

Immediately following the 9/11 attacks, federal agency budgets skyrocketed, all in the name of the Global War on Terrorism (GWOT). Many Government agencies, contractors, commercial companies and “mom and pop” operations, as well as investors, individuals and the overall US economy, benefited from this dramatic increase in Government spending. But none benefited more than the American people as our country fought a worldwide war against those that would do harm to our citizens here and across the globe. This economic climate also fueled the creation of thousands of new companies supporting the Government’s mission and gave greater opportunities to everyone involved.

Fast forward to 2016 and how times have changed. The economy is coming out of a recession. Government budgets are shrinking and are capped. The Federal Government has significantly expanded, and an overabundance of Government contractors exists, which is contributing to salary reductions for many contractor employees. However, nothing has changed more than the attitude toward Government contractors. Regrettably there is a generally unhealthy attitude developing toward contractors by our customers and, to some extent, the general public. But we can, and we must, reverse it.

Let’s face it; in the federal marketplace, nothing significant gets accomplished without a strong Government – contractor partnership. It is this partnership that put men on the moon, built leading edge aircraft and ships, and captured many a “bad guy” in the GWOT. The success of the mission is critical and all sides should be working together to achieve a common goal. When the mission fails, both Government and the

contractor fail. However, over the past years, few industries have been as demonized and held in contempt as the Government contractor professional and technology services industry.

Public opinion has predominantly been fueled by the media's reporting and portraying of contractor wrongdoings, despite involving only a very limited subset of the entire contractor population. Rarely is there an article or news story about contractors getting it right and making a difference. Contractors accept that success should be focused on the mission and on the customer while keeping quiet in order to protect sources, methods, and individuals.

Another contributing factor is the narrative coming from the Government voicing displeasure and discontent about the isolated cases of poor contractor performance or misbehaviors, as well as about the "profit" produced by contractors. I can't tell you how many times I've heard Government and Military professionals – from Senior Executive/Flag Officers to mid-level managers – say that they don't care about a contract's or a contractor's profit. Since when was making a profit a bad thing? Only profitable and well managed companies have the ability to attract and develop talent, invest, drive innovation and effectively meet the demands of an ever-changing world with ever-changing requirements. Yet being a profitable company that provides this talent, innovation, and technology in addition to job creation, competitive benefit and compensation packages, training and career opportunities, and charitable contributions has been ridiculed by the very organizations that look to them to execute critical agency missions.

Even as Government looks down upon contractors for being profitable, contractors continue to contribute hundreds of millions of dollars every year to worthy causes that help those in need – veterans and their families, victims of natural disasters, and the nonprofit organizations that deliver tremendous assistance in a variety of ways, including education, healthcare, job training, and financial aid, just to name a few. Contractors also make significant investments in training and certifications like ISO, CMMi, and PMI to ensure higher quality products, services and solutions are delivered. And finally, contractors hire more Military and Government personnel transitioning out of or retiring from Government service than any other industry, which keeps years of industry knowledge and expertise available to the Government. Where the jobs are part of a company's operational expenses, that funding comes directly out of company profit.

But enough about where we've been. Where do we need to go?

The adversarial and non-collaborative tone of today's Government – contractor relationship must improve or the long term negative effects will incur consequences such as new talent unwilling to enter a troubled industry while many current employees reach retirement age, investors' reluctant to provide capital and invest, and entrepreneurs unwilling to take a chance to build new technologies and business models.

So how do we set out to rebuild the relationship and improve mission success? Here are a few ideas:

- Trust is the currency of all relationships, so we must jointly focus on rebuilding that trust. No one should accept bad behavior, comments, or incompetence on either side or allow it to exist.



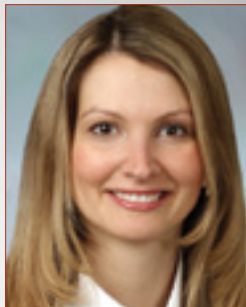
We must hold each side accountable for failures but also give credit for success where and when earned. Pointing fingers is never a recipe for success.

- Focus on mission objectives and success criteria, which determine value. Ensure discussions and narratives center on these and that actions and decisions made go toward achieving the end result. Saving money should not be the only measurable goal.
- Ensure program requirements are clear, measurable, obtainable and appropriately funded.
- Contractors must stop "whining" about budgets, protests, delays, etc. Deal with it and adjust your business accordingly. Welcome to the market correction. Every industry gets one eventually.
- Don't paint the industry or Government with a wide brush when a problem occurs with a single entity. Not every contractor or customer is a problem or a "malcontent." Focus on the issue at hand, remedy it, and move on. Stereotyping only serves to drive further distance between both sides.
- Defense and civilian acquisition and program decision-makers must gain a better understanding of how companies operate, why certain business decisions are made, and the challenges private industry faces in the Government market and how the companies are managed. It wouldn't hurt to ensure that many contractor employees also gain this same understanding.
- Allow unhealthy or underperforming companies to fail. Since there is an "over supply" condition of Government service providers, let the best companies win and survive, acquire or be acquired, or get out of the market.
- Align the Government's acquisition strategy and incentives with its objectives. Use Lowest Price Technically Acceptable (LPTA) evaluations or small business set-asides where it makes sense. Just remember, Government gets what it pays for, so ensure the acquisition strategy enables mission success and not just financial compliance. If this doesn't occur, the Government will indeed pay more in the long run.
- Establish boundary conditions and rules around the protest process. A protest is not always a criticism of the buying activity. Existing procedures can be used to hold protestors accountable but don't overreact and throw out a solicitation for simple mistakes made during the acquisition cycle.
- Work to improve acquisition and contract processes on both sides in order to shorten acquisition cycles and improve the final product or service to increase the opportunity for mission success.

The majority of Government and contractor employees get up every morning wanting to do what is right and to make a difference. They chose this line of work because they truly care about our country and its missions and have a strong desire to make a positive impact. As with any team, respect, trust, and collaboration are keys to success. We need to find our way back to working together instead of working apart from or against one another, so we can focus on the most important job at hand – serving and protecting our great Nation. It is up to all of us to make it happen. Together we can do so. ■



# Enforceable Non-Compete Agreements *in Government Contracting*



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by **Todd A. Bromberg, Jillian D. Laughna,  
and Nina S. Rustgi**, Wiley Rein LLP

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**R**estrictive covenants can be an appealing tool for employers seeking to protect their customer relationships, intellectual property, and human capital. In today's globalized marketplace, where labor and information are more mobile than ever, an employer can face a crippling competitive setback if an employee accepts employment with a competitor and endeavors to take the employer's customers and proprietary information. Carefully crafted restrictive covenants can significantly reduce these risks by setting clear parameters around acceptable post-employment conduct and imposing severe legal consequences on employees if they breach these obligations.

Such restraints on trade can be extremely difficult to draft and enforce when the customer is the United States government. The factors that typically permit a limitation on trade in most business contexts frequently do not apply to government contractors and their employees. This article examines how the traditional analysis for analyzing the enforceability of restrictive covenants has been applied in the government contracting context and identifies some key factors courts consider when determining whether to uphold such restrictions.

### **Restrictive Covenants Generally**

Restrictive covenants can take many forms, but the most common are covenants not to compete (“non-competes”) that preclude an employee from working for a competitor; non-solicitation provisions that prohibit the solicitation of the former employer’s customers or employees; and non-disclosure clauses that forbid the disclosure of an employer’s confidential and proprietary information. Regardless of their form, all restrictive covenants seek to prevent competitors from unfairly exploiting certain vital assets of the employer.

Non-competes are typically the most difficult to enforce, as they seek to prevent an employee from working within a particular segment of an industry, thereby limiting the employee’s future employment opportunities. Non-solicitation agreements are generally easier to enforce, as the focus is on prohibiting the former employee from poaching a company’s customers or employees. Non-disclosure agreements are more limited in that they seek only to shield an employer’s confidential information and business methods from dissemination to competitors.

Though their enforceability varies

from state to state, restrictive covenants are generally enforceable as long as they are “reasonable.” Some states – including California, North Dakota, and Oklahoma – have outright prohibitions against non-compete provisions. State laws tend to recognize that restrictive covenants are important tools for employers, but that without some limits they would unduly restrict the free movement of labor and hamper competitiveness. Most states therefore require these covenants to be limited in geographic and temporal scope, and confined to an employer’s legitimate business interests. The requirement that a non-compete contain a geographic limitation has been significantly relaxed in many jurisdictions given the global economy and ability to perform competing services from a variety of locations. See, e.g., *Preferred Sys. Sols., Inc. v. GP Consulting, LLC*, 732 S.E.2d 676, 682 (Va. 2012). Usually, the legitimate business interests justifying a restrictive covenant are protecting the company’s goodwill in its relationships with its customers, and safeguarding the company’s confidential and proprietary information and trade secrets.<sup>1</sup>

### **Goodwill and Intellectual Property Issues for Government Contractors**

Relying on these legitimate business interests to support a restrictive covenant when the employer is a government contractor can be problematic, however. Courts tend to view employer claims of a legitimate business interest in protecting goodwill and customer relationships with skepticism, because for government contracts subject to public bidding, knowledge about when the work is available is public, and the determining factors in obtaining a contract are typically price and quality rather than goodwill. Goodwill between the government contractor and the “customer” agency is therefore less relevant in obtaining business

*continued on page 16*

<sup>1</sup> When selecting a particular state’s law to govern a non-compete agreement, employers should consider whether a state has adopted the “inevitable disclosure doctrine.” The doctrine provides that employers can enjoin a former employee from working in a job that would inevitably result in the use of the employer’s trade secrets. In other words, it need not be shown that the former employee improperly removed or used confidential information. For example, Maryland has flatly rejected the doctrine (see, e.g., *LeJeune v. Coin Acceptors, Inc.*, 849 A.2d 451, 471 (Md. 2004)); Virginia generally disfavors it (see *Motion Control Sys., Inc. v. East*, 546 S.E.2d 424, 426 (Va. 2001)); and the District of Columbia has been more open to adopting the doctrine (see *Info. Strategies, Inc. v. Dumosch*, 13 F. Supp. 3d 135, 143 (D.D.C. 2014)).



from the government than from private sector clients, which can often turn on the personal relationship that has been established between a company and the customer.

Non-competes and other restrictive covenants have, however, been upheld in the government contracting context where the employer is able to identify a legitimate business interest other than goodwill. For example, the business contacts that a lead employee for a company's Eastern European operations had developed as a result of his employment were held to be sufficient protectable business interests to justify enforcement. This not only included the local contacts and "regional experience" the employee had developed, but also the value the government placed on such contacts in awarding future contracts.<sup>2</sup> Courts have also been willing to enforce agreements that limit an employee's ability to work for specific competitors or on specific government projects. The key issue when evaluating such covenants is whether the competitor or projects are sufficiently and narrowly tailored so that a balance is struck between the employer's legitimate business interests and the employee's ability to earn a living in his or her chosen trade.<sup>3</sup>

Separately, it can be difficult for government contractors to identify the confidential, proprietary, and trade secret information that belongs to them rather than to the government. What might otherwise be considered company confidential, proprietary, or trade secret information in another context often either comes from the government or belongs to the government under the contract. For similar reasons, company bidding procedures have not been considered trade secrets, at least not if the procedures are not unique to the company at issue, but reflect general practices and knowledge in the trade or industry. Additionally, deliverables that have been turned over to the government are unlikely to be protected as trade secrets, although if a company had a particular proprietary method of creating the deliverables, that method could be a protected trade secret. For example, preventing a former employee from providing a particular type of training to the contractor's competitor has been held to be a protectable interest.<sup>4</sup> In upholding that the employee's non-compete agreement, the court reasoned that the former employee had developed specialized skills during his employment and received unique training using teaching methods that were part of the contractor's intellectual property. The court determined that even though the contractor had relinquished much of its intellectual rights in the deliverables, the confidential methods used to produce the deliverables were still protected.

### Unique Regulations Affecting Government Contractors

In addition to presenting challenges to establishing goodwill as a legitimate business interest, having the government as a customer also imposes certain regulatory obligations that could impact an employer's ability to enforce a restrictive covenant. For example,

the Non-displacement of Qualified Workers regulation ("Non-displacement Rule")<sup>5</sup> and the Continuity of Services regulations ("COS Regulations")<sup>6</sup> that seek to ensure the continuity of services would appear at first blush to render many non-compete agreements unenforceable. The Non-displacement Rule establishes that a successor to a services contract must offer employment to certain non-exempt employees who worked on the predecessor contract, if those employees' jobs would otherwise be terminated because of the contract transition. Although the Non-displacement Rule is relatively new, and it is too early to say precisely how it will affect the validity of non-competes, the rule is not fatal to such agreements. The COS Regulations generally require that contractors transitioning off of a contract providing "vital" services to the government "allow as many personnel as practicable to remain on the job to help the successor maintain the continuity and consistency of the services required by this contract." Furthermore, the COS Regulations do not require a contractor to release all of its employees to work for a successor contractor; they only require the release of "as many personnel as practicable to remain on the job" to aid the successor in maintaining continuity.<sup>7</sup> The fact is that both sets of rules have exceptions that can be relied upon to exempt broad classes of employees, and courts have refused to invalidate non-competes solely based on the Non-displacement Rule or the existence of a COS provision.

### Conclusion

Although there is no magic language to ensure the enforceability of a restrictive covenant, there are key areas to focus on to maximize enforcement. Traditionally, these have included defining reasonable time and geographic limitations so that the employee could endeavor to find new employment. While such factors are still important to consider, the critical question when attempting to draft and enforce a restriction on trade in the government contracting space is what is the company's legitimate protectable business interest and how does that interest fit within the government's competing interest in ensuring a free and open marketplace. These interests need not be at odds with one another. The trick is finding the right balance. This begins with looking at what information, training or other resources the company has provided to its employees, and how these investments in human capital make the company different than its competitors. How can these interests be protected in a way that prevents an employee from unfairly competing, while at the same time not unduly limiting the employee from working on other government contracts? Giving real thought to these questions, and understanding how courts have applied the traditional analysis governing enforcement of restrictive covenants to government contractors, is critical to both drafting an effective agreement and plotting out a winning strategy to enforce (or defeat!) such provisions. ■

<sup>2</sup> *Overseas Strategic Consulting, Ltd. v. Larkins*, No. CIV.A. 01-4115, 2001 WL 1198661 at \*1-3, 5-10 (E.D. Pa. Oct. 10, 2001).

<sup>3</sup> See *Preferred Sys. Sols., Inc. v. GP Consulting, LLC*, 732 S.E.2d 676 (Va. 2012). In this case, the court upheld a government contractor's covenant not to compete with its subcontractor where the duration was limited to 12 months, it applied only to work in support of a particular program run under the auspices of a particular government agency, and it was limited to other contract holders.

<sup>4</sup> See Order Granting Plaintiff's Emergency Motion for a Temporary Restraining Order and Preliminary Injunction, *Orbis Operations, LLC, v. Fracker*, No. 1:14-cv-00567 (E.D. Va., May 21, 2014).

<sup>5</sup> 48 C.F.R. § 52.222-17.

<sup>6</sup> 48 C.F.R. § 37.110(c); 48 C.F.R. § 52.237-3.

<sup>7</sup> See *id.*; see, e.g., *Talus Grp, Inc. v. Ostrander*, No. A11-51, 2011 WL 4008286 at \*3 (Minn. Ct. App. Sept. 12, 2011). The *Talus* court also permitted the employer to sue the successor contractor for tortious interference, because the successor sought assurances from the employees that they would work for the successor while they were still employed by the plaintiff, and that this enabled the successor to bid on the contract, knowing the successor would have those employees.



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# Bill Tracker: 114<sup>th</sup> Congress-Second Session (2016)



Newly introduced since last issue



Major action taken since last issue



Bill became law since last issue

## H.R. 234 **Cyber Intelligence Sharing and Protection Act, Ruppersberger (D-MD)**

**SUMMARY** Would establish cyber threat intelligence sharing procedures between the intelligence community and certain private sector entities.

**STATUS** *Referred to Armed Services, Homeland Security, Intelligence, and Judiciary committees on 1/8/2015.*

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## H.R. 479 **American Jobs Matter Act of 2015, Etsy (D-CT)**

**SUMMARY** Would require contracting officers to consider information regarding domestic employment before awarding certain federal contracts.

**STATUS** *Referred to Armed Services Committee on 1/22/2015.*

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## H.R. 490 **Security Clearance Reform Act of 2015, Lynch (D-MA)**

**SUMMARY** Would prohibit the Director of the Office of Personnel Management (OPM) from awarding a contract to any entity for investigative support services or background investigation fieldwork services if such entity has another contract in effect with the federal government to provide such services.

**STATUS** *Referred to the Judiciary and Oversight and Government Reform committees on 2/19/2015.  
Related bill: S. 434.*

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## H.R. 1382 **Boosting Rates of American Veterans Employment Act of 2015, Rice (D-NY)**

**SUMMARY** Would permit the Department of Veterans Affairs to provide a preference in the evaluation of offers to contractors that have a higher percentage of veterans within their workforce than other offerors.

**STATUS** *Passed the House (404-0) on 4/18/2015.*

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## H.R. 1760 **Buy Smarter and Save Act of 2015, Reed (R-NY)**

**SUMMARY** Would require the administration to establish an annual government-wide goal to procure goods and services using strategic sourcing, along with an annual government-wide goal for savings from the use of strategic sourcing.

**STATUS** *Referred to the Oversight and Government Reform Committee on 4/13/2015.*

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## H.R. 2596 **Intelligence Reauthorization Act for 2016, Nunes (R-CA)**

**SUMMARY** Would require the DNI to report to Congress regarding the representation of certain minority-owned, women-owned, small disadvantaged, service-disabled veteran-owned, or veteran-owned businesses among the contractors awarded contracts by elements of the intelligence community. Would also direct the DNI to report to Congress on the continuous evaluation of security clearances of employees, officers, and contractors of the intelligence community.

**STATUS** *Passed by the House (247-178) on 6/16/2015.*

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# Bill Tracker: 114<sup>th</sup> Congress-Second Session (2016)



Newly introduced since last issue



Major action taken since last issue



Bill became law since last issue

## H.R. 3470 Fair Chance Act, Cummings (D-MD)

SUMMARY

Would prohibit federal agencies and federal contractors from asking job applicants about their criminal record history until the agency or contractor extends a conditional offer of employment to the applicant. The bill provides broad exemptions for positions that require a security clearance.

*STATUS Referred to multiple committees on 9/10/2015. Related bill: S. 2021.*

## H.R. 3572 DHS Headquarters Reform and Improvement Act of 2015, McCaul (R-TX)

SUMMARY

Would enhance a number of acquisition management and policy changes implemented by DHS's Management Directorate over the past several years, including the codification of the existing Program Accountability and Risk Management (PARM) Office. Would also require DHS to develop a multiyear acquisition strategy and would require DHS to appropriately report and take corrective actions for any programs that experience significant cost overruns or schedule delays.

*STATUS Passed by the House (voice vote) on 10/20/2015.*

## H.R. 4341 Defending America's Small Contractors Act of 2016, Chabot (R-OH)

SUMMARY

Would change the parameters used to calculate small business participation in federal contracting by requiring new categories of spending to be used in the calculation. Would also establish new oversight of subcontracting plan performance and would create a pilot program providing past performance evaluations for subcontractors.

*STATUS Passed by the House Small Business Committee on 1/7/2016.*



## H.R. 4741 Acquisition Agility Act, Thornberry (R-TX)

SUMMARY

Will serve as the foundation for acquisition reform in the FY 2017 National Defense Authorization Act. Seeks to streamline acquisition, particularly with a focus on acquiring new technology and seeks to foster greater reliance on experimentation and prototyping for new operational concepts.

*STATUS Introduced on 3/15/2016.*



## H.R. 4398 DHS Acquisition Documentation Integrity Act of 2016, Watson Coleman (D-NJ)

SUMMARY

Would require DHS to improve acquisition documentation to include operational requirements that are validated consistent with DHS policy, a complete lifecycle cost estimate, verification of such estimate against independent cost estimates, a cost-benefit analysis, and a schedule.

*STATUS Passed the House (voice vote) on 2/23/2016.*



## S. 434 Security Clearance Reform Act of 2015, Tester (D-MT).

SUMMARY

Seeks to strengthen the accountability of individuals involved in misconduct affecting the integrity of background investigations, to update guidelines for security clearances, and to prevent conflicts of interest relating to contractors providing background investigation fieldwork services and investigative support services.

*STATUS Reported by the Homeland Security and Governmental Affairs Committee on 5/6/2015.*

## S. 456 Cyber Threat Sharing Act of 2015, Carper (D-DE)

SUMMARY

Seeks to enable better sharing of cybersecurity threat indicators both within the private sector and between private and government entities.

*STATUS Referred to the Homeland Security and Governmental Affairs Committee on 2/11/2015.*

# Bill Tracker: 114<sup>th</sup> Congress-Second Session (2016)



Newly introduced since last issue



Major action taken since last issue



Bill became law since last issue

## S. 958 **Small Business Fairness Act, Enzi (R-WY)**

SUMMARY

Would require federal agencies to consider the capabilities and past performance of each member of a joint venture as the capabilities and past performance of the joint venture even if the joint venture does not have a combined record of past performance.

*STATUS* Reported by the Small Business and Entrepreneurship Committee on 4/23/2015.

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## S. 1828 **Federal Information Security Management Reform Act of 2015, Collins (R-ME)**

SUMMARY

Would provide DHS with the authority to conduct targeted cyber security risk assessments and operational evaluations for other agencies' information and information systems and private entities that own or operate such systems

*STATUS* Referred to the Homeland Security and Governmental Affairs Committee on 7/22/2015.

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## S. 1859 **Assuring Contracting Equity Act of 2015, Udall (D-NM)**

SUMMARY

Would raise the government-wide small business prime contracting goal from 23 percent to 25 percent and would make increases to the prime contracting goals for the other socio-economic small business categories.

*STATUS* Referred to the Small Business and Entrepreneurship Committee on 7/23/2015.

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## S. 2021 **Fair Chance Act, Booker (D-NJ)**

SUMMARY

Would prohibit federal agencies and federal contractors for asking job applicants about their criminal record history until the agency or contractor extends a conditional offer of employment to the applicant. The bill provides broad exemptions for positions that require a security clearance.

*STATUS* Reported by the Homeland Security and Governmental Affairs Committee on 1/12/2016. Related bill: H.R. 3470.

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## S. 2607 **DIGIT Act, Fisher (R-NE)**

SUMMARY

Would require DHS to convene a working group of Federal stakeholders to provide recommendations to Congress on how to appropriately plan for and encourage the proliferation of the Internet of Things in the United States. The working group would evaluate current use of the technology by Federal agencies and their preparedness to adopt it in the future and would require outreach to the private sector.

*STATUS* Referred to the Commerce, Science and Transportation Committee on 3/1/2016.

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## S. 2138 **Small Business Subcontracting Transparency Act of 2015, Vitter (R-LA)**

SUMMARY

Would allow a federal agency's procurement center representative or commercial market representative to delay acceptance of a subcontracting plan for 30 days if the PCR or CMR determines that it fails to provide the maximum practicable opportunity for certain small businesses to participate in the performance of the contract.

*STATUS* Reported by the Small Business and Entrepreneurship Committee on 11/3/2015.

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## 2016 PSC LEADERSHIP SUMMIT

The PSC Board of Directors and C-level executives from member companies met for an exclusive, two-day summit in Washington, DC that included high-level networking and informational sessions. The Summit included a keynote address from Congressman Rob Wittman, followed by sessions including “The View from the Hill,” a panel of top Congressional staff that shared insights on acquisition, technology and other priorities for the remainder of the 114th Congress, and “The View from the Customer: Market Trends,” which explored areas of federal investment over the next few years.





# PSC Introduces an Integrated Survey Process in 2016

by David Wennergren, PSC Executive Vice President for Operations and Technology

Having celebrated the one year anniversary of the PSC acquisition of the TechAmerica Foundation and its work products, we've now had the opportunity to align all of PSC's recurring survey work into an integrated year-long agenda. This set of work, which will lead to the publication of our Acquisition Policy Survey, our Chief Information Officer Survey and the Vision Federal Market Forecast and Conference, provides an unparalleled opportunity for PSC member companies to have access to senior government officials and insights on federal market opportunities. As we go through our integrated survey process this year, representatives of PSC member companies will be able to participate in small group interviews of over 300 federal government leaders.

Activity for the year has already launched with interviews of dozens of senior procurement and acquisition officials to help develop the PSC Acquisition Policy Survey, conducted in partnership with PSC member company Grant Thornton. The Acquisition Policy Survey will be released at the ACQUIRE Conference and Expo on June 8-9 at the Walter E. Washington Convention Center. This is a new and unique event, in which PSC is a founding partner with 1105 Public Sector Media Group (parent company of many trade publications such as *Federal Computer Week*, *Government Computer News*, *Washington Technology and Defense Systems*). This annual event will provide great value to PSC member companies and will include attendance by thousands of federal employees. Opportunities also exist for PSC member companies who would like to be included on the Exhibit Floor.

Next up in the integrated process will be the PSC Annual Chief Information Officer (CIO) and Chief Information Security Officer (CISO) Survey, also done in partnership with Grant Thornton. Similar to the Acquisition Policy Survey, the CIO Survey, now in its 26th year, provides member companies the opportunity to conduct interviews with dozens of federal government information technology leaders. These interviews are starting now and will continue over the spring and early summer. The CIO Survey report will be unveiled at the PSC TECH 2016 Conference on September 21st.

But wait, there's more. The PSC Vision Market Forecast, now in its 52nd year is also ramping up. PSC Vision is a truly unique undertaking, providing the most comprehensive federal government budget, technology and services market forecast. During the Vision process, 300 industry volunteers conduct mar-

ket research and participate in interviews of over 300 government executives, industry leaders, think tank experts, financial analysts and Congressional staffers.



## 2016 PSC Vision Market Forecast Teams

Acquisition Outlook	Justice
C4ISR	Macroeconomic/Top Line
Civilian Service/Support	Military Health
Commerce	NASA
Congressional Issues	Shipbuilding
Defense Services/Support	Space
DHS	SSA
DoD IT/Networks	State/USAID
EPA	Technology Outlook
Federal IT Budget	Treasury
HHS	USDA
Industry Outlook	VA
International Defense	Vehicles

Vision teams are starting their work now and opportunities still exist to participate in one or more study teams. This year, we will have 26 interview teams covering the breadth of the federal marketplace and producing 27 separate reports on market trends and near term opportunities that will be presented at the Vision Market Forecast Conference on November 16-17 at the Fairview Park Marriott.

Our goal of the integrated process is to “interview once; use many times.” By coordinating all of this work, we will strategically and purposefully engage with senior government officials to interview a leader one time at the appropriate point in the year and then use the results of that interview to help populate all of the applicable survey and research products that PSC will publish. This integrated survey process is a compelling value proposition for PSC member companies, particularly for functional leaders, business development executives, strategic planners, and market research analysts. It's insightful and meaningful work for volunteers, most of whom return year after year for this unrivaled access. If you'd like to learn more or get engaged, please contact Michelle Jobse at [jobse@pscouncil.org](mailto:jobse@pscouncil.org). ■



# VISION STRATEGIC PLANNING FORUM

The 11th Annual Vision Strategic Planning Forum, hosted by PSC, included a highly popular panel of industry strategists that offered their views on the President's Budget Request, the major challenges facing the industry and their view of the longer-term market impacts on defense, services, and technology companies. Matthew Goldberg, Deputy Assistant Director National Security Division, Congressional Budget Office, gave the keynote address.







# 2016 CIDC DEVELOPMENT CONFERENCE

The third annual CIDC Development Conference gathered over 200 members of the international development community and explored the factors shaping the evolution of international capacity building and related shared government and IDC objectives, and the roles and contributions of IDCs supporting U.S. government agencies' critical missions. Speakers included USAID Chief of Staff Michele Sumilas, Dr. Sarah Sewall, Under Secretary for Civilian Security, Democracy, and Human Services, and Congressman Gerry Connolly.

**Breakfast Meeting with USAID Administrator** PSC's Council of International Development Companies (CIDC) hosted an exclusive breakfast with USAID Administrator Gayle Smith in one of her first public appearances since assuming office.

**Technology Council Meeting**  
PSC's Technology Council meeting featured NIST Fellow Dr. Ron Ross, who discussed the NIST cybersecurity framework, implementation of NIST SP 800-171 (security requirements for contractors) and on-going work on NIST SP 800-160 (system security engineering).



# Council Corner



## Acquisition and Business Policy Council

The Acquisition and Business Policy Council (ABPC) is off to a busy start in 2016 with an array of activities across the policy spectrum. The ABPC's working groups are hard at work developing and disseminating recommendations on improving past performance; reducing industry regulatory burden; establishing cost realism and cost reasonableness guidelines for services; implementing GSA's Common Acquisition Platform (CAP); defining and measuring desired outcomes for services contracts; improving acquisition workforce development and training; and much more. Elsewhere within the ABPC portfolio, PSC recently hosted meetings with member companies and government officials to explore ever-evolving federal small business contracting programs and formulate PSC's response to a diversity of new contractor labor policy requirements—namely those established via Executive Order including “Fair Pay and Safe Workplaces” and “Contractor Paid Sick Leave.” Most recently, the ABPC and D&IC co-hosted officials from the Air Force to open an engagement on the Department's “Bending the Cost Curve Think Tank” initiative to reduce costs while maintaining mission performance. These are just a sample of the topics and government guests with which the Council has worked in the first quarter of the year, and more opportunities for PSC members to get involved continue to be announced each week.



## Defense and Intelligence Council

The Defense and Intelligence Council (D&IC) is continuing our engagement with the Department of Defense and the Intelligence Community, with recent focus on the Air Force, Navy, and the Defense Acquisition University. The D&IC is participating in an Air Force “Bending the Cost Curve” initiative, which seeks to find process improvements in the services acquisition process to reduce costs. The first of many meetings with Air Force leadership on this topic was held on March 23. We are engaging with the Navy on a variety of topics including refining their use of labor rate tripwires, increasing award speed, and improving the source selection process, as well as providing input on the design of the next generation of the SeaPort contract vehicle. We are working with DAU to increase their curriculum's focus on services acquisition, rather than their traditional focus on major weapons programs, while also facilitating opportunities for PSC members to present at DAU classes to provide a vital “industry perspective” to their students.



## Tech Council

Dr. Ron Ross, NIST Fellow and national cybersecurity leader was the featured speaker at the PSC Tech Council's March meeting, discussing federal cybersecurity priorities, implementation of NIST SP 800-171 (security requirements for contractors) and on-going work on NIST SP 800-160 (system security engineering). PSC will continue working closely with NIST when the SP 800-160 comes out for public review later this spring. Other recent Tech Council efforts have included providing comments on OMB's draft Category Management Guidance on Software Licensing and NIST's request for comments on its “Framework for Improving Critical Infrastructure Cybersecurity.” PSC is also pleased to note that the President's FY 2017 budget proposes implementing some of the recommendations of the National Academy of Public Administration (NAPA) study chaired by PSC EVP Dave Wennergren, which will strengthen and expand the Scholarship for Service and Centers for Academic Excellence cyber education programs. The Tech Council also continues its work on the agenda for the next president and its study on the roles, responsibilities, authorities and organizational placement for federal agency Chief Technology Officers (CTOs). In the days ahead, the Tech Council will also be launching an assessment of digital services implementations across the government, with the goal of providing best practices recommendations to government on how to better leverage industry to deliver effective digital solutions. Check out the PSC website to learn more and see recent work products of the Tech Council to include PSC's cloud report titled, “Best Practices for Federal Agency Adoption of Commercial Cloud Solutions.” You can also read our multi-association white paper titled, “Delivering Results: A Framework for Federal Government Technology Access & Acquisition,” which provides concrete recommendations to help the government adopt more innovative solutions.



## Civilian Agency Council

**Veterans Affairs** - On February 9, Dat Tran, Principal Deputy Assistant Secretary for Policy and Planning, met with the VA Task Force. Among other insights, he shared that the Office of Policy and Planning, the Office of Enterprise Risk Management, and the Office of Enterprise Performance will become the Office of Enterprise Integration (OEI). OEI will focus on horizontal integration among the various administrations across VA.

**Health and Human Services** -In our most recent meeting, CMS acquisition executives expressed a desire for specific input from industry concerning CMS best practices, areas for improvement, ways to remove obstacles/impediments, and how to drive better business outcomes. PSC submitted consolidated feedback for their benefit.

*continued on page 31*

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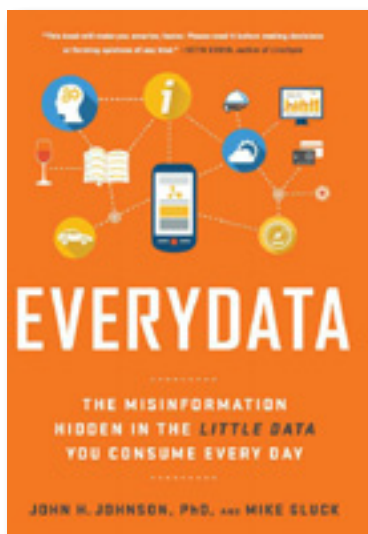
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Bill Eggers



David L. Hall



John H. Johnson, Ph.D.



Pagan Kennedy

## ACQUIRE Plenary Sessions and Keynotes

Wednesday, June 8  
11:15 am - 12:15 pm

**Innovations in Acquisition**  
Department of Defense and General Services Administration

Wednesday, June 8  
1:00 pm - 2:00 pm

**Legacy IT: Keep It or Kick It?**  
Office of Management and Budget and Social Security Administration

Thursday, June 9  
8:30 am - 10:00 am

**Keynote Address: Endeavour to Succeed**  
Gabby Giffords & Mark Kelly

Thursday, June 9  
11:15 am - 12:15 pm

**Senior Leader Panel**  
Professional Services Council

Thursday, June 9  
1:00 pm - 2:00 pm

**The PSC Acquisition Policy Survey: A Report on Federal Acquisition**  
Professional Services Council

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- University of Maryland Baltimore County (UMBC) Training Center
- U-Reach Data Solutions
- Vision Technologies
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- World Wide Technology
- Xerox Federal Services
- Zones

(as of 3/30/16) \*Booths in multiple pavilions

# Council Corner *continued from pg. 26*

**Homeland Security** - The Homeland Security Task Force recently met with Drew Kuepper, Deputy Assistant Secretary for Unity of Effort Integration and Eric Leckey, Deputy Chief Administrative Officer, FEMA. Kuepper discussed DHS efforts to strengthen requirements development as well as having traceability from DHS strategy to capabilities and the investments necessary to close those gaps in capabilities. DHS Chief Procurement Officer Soraya Correa also joined Kuepper to address several acquisition questions. Leckey talked about real estate and information management and how they support FEMA's disaster response role.

On February 19, PSC sent letters to DHS leadership raising concerns about the cancellation of the Cyber Centric Mission Support Services procurement on February 8, 2016 during final proposal evaluations.



**CIDC**

Neither rain, nor sleet, nor Metro delays could stop the January 21 CIDC Annual Conference from stepping off right on schedule. A packed ballroom at

the Georgetown Marriott heard from Dr. Sarah Sewall, the Under Secretary of State for Civilian Security, Democracy, and Human Rights who detailed the department's Countering Violent Extremism work and the role played by the contracting community in this effort. Panels with experts from USAID, Treasury and Congress explored the UN's Sustainable Development Goals, while the private sector and academia joined with USAID to discuss the Future of the International Development Workforce. Proving that CIDC members are thought leaders in these fields, both panels were moderated by representatives from our Executive Advisory Board. [A full Intelligence Report on the conference is available on the PSC website.]

As if that was not enough, the new USAID Ombudsman joined the CIDC for its monthly meeting in February and our members expressed their appreciation for the office's help on issues related to Choice of Instrument (contract vs grant) and lengthy, but improving, Procurement Action Lead Time. This was followed in March by a standing room only breakfast at PSC for Gayle Smith, the recently sworn in USAID Administrator. This was one of the Administrator's first public appearances, and the audience was grateful for the candid exchange as part of the Question/Answer portion of the event.

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## Policy Spotlight

# Looking Forward Through the Rearview Mirror

by Roger Jordan, PSC Vice President of Government Relations

**W**hile many have characterized recent Congresses as setting new lows in the era of “Do Nothing” Congresses, those tasked with writing acquisition policy regulations that originate because of statutory changes might be one community that takes exception to that moniker. While debates over legislation that percolate up to the national media rarely seem to generate significant momentum, Congress is moving toward its fifty-fifth consecutive year of passing a National Defense Authorization Act (NDAA). That legislation typically generates dozens of acquisition-related provisions, many of which require implementing regulatory action by either the Federal Acquisition Regulatory (FAR) Council or the Defense Acquisition Regulatory (DAR) Council to fully implement. As we hurtle towards another round of acquisition reform, many are wondering what is to come. House Armed Services Committee Chairman Thornberry’s proposed Acquisition Agility Act provides insight into his emerging priorities. But this is also a good opportunity to look back at prior year reforms and evaluate what has not yet been fully implemented.

As of March 31, 2016, there are 54 open FAR cases still making their way through the process. There are 49 open Defense Federal Acquisition Regulation Supplement (DFARS) cases. Most, but not all, of the open cases are derived from preceding legislation; open FAR cases regarding effective communication between government and industry and sole source contracts for women-owned small businesses, for example. Several others are implementing Executive Orders, such as the contractor paid sick leave and “fair pay and safe workplaces” orders. What is noticeable about several of the open cases driven by statutory changes is just how far back some of them go. There are still several FAR rule-makings underway that implement provisions from the Small Business Jobs Act of 2010. That’s right...2010! But that’s not to say that the FAR Council is six years behind on its rule-making. It is more of a reflection of priorities and challenges that require other federal agencies to first implement changes to their regulations and processes before the FAR Council can begin its work on the same issue for the FAR. So as we enter another NDAA season that is sure to include a myriad of small business provisions focused on past performance for subcontractors and driving better accuracy in the calculations of small business prime and subcontracting goals, industry



should also anticipate final FAR implementation of 2010 Small Business Jobs Act provisions regarding contract consolidation and bundling and small business reserve authorities under multiple-award contracts. In addition, there are a number of other small business provisions from the fiscal year 2015 and 2016 NDAs that still must be implemented, as well. Among those provisions are changes in the way agencies consider the past performance of companies within teaming arrangements or joint ventures.

There are a number of other acquisition policies that are likely to arise during this year’s NDAA debate that are already moving through the FAR or DFARS rule-making process because of provisions in past NDAs. Commercial items acquisition is a prime example. In last year’s NDAA, a number of provisions sought to re-establish the preference for, and streamlining of, commercial item buys. Similarly, provisions regarding intellectual property and technical data rights have been enacted via the NDAA in recent years, but we already know that Chairman Thornberry is very interested



in intellectual property and technical data rights issues in the fiscal year 2017 NDAA. In all of these cases, final language in the fiscal year 2017 NDAA may either complement, conflict with, or simply be additive to what has previously been enacted. But more importantly, the FAR Council or the DAR Council are going to have to understand the effects that these changes will have on their current implementation efforts. In some recent cases, particularly for the development of certain commercial items rules, regulatory implementation has been suspended altogether.

Of course, priorities are also a significant factor in what gets implemented quickly, as is the case with the labor-focused Executive Orders. Because of White House pressure to implement the Fair Pay and Safe Workplaces Executive Order, the FAR Council and the Department of Labor

(DoL) have been developing their individual implementation responsibilities in tandem. Meanwhile, the “contractor paid sick leave” Executive Order is being implemented primarily through a DoL rulemaking effort that will be followed by further implementation via a FAR rule-making. Nonetheless, the Administration is seeking to have both orders fully implemented by January 1, 2017.

The bottom line is that, within the federal contracting environment, there are significant reforms that are still being implemented through the development of regulations. At the same time, new statutory requirements are being thrown into the mix by a Congress that continues its focus on improving the acquisition process. We should not lose sight of what’s still to come because perhaps a solution may have already been enacted. ■

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## Karrye Braxton & Donna Sibley *continued from pg. 10*

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vice Directors, and Mission Directors. OAA officials have recommended this step in years past, but it has yet to be fully adopted at USAID, even though other agencies have been able to do so for some of its workforce. As we know, if something isn’t measured (tracked and monitored), it doesn’t get done.

4. COs should expand the use of evaluation criteria for large prime’s use of American small businesses and for award fee determinations. Again, if they’re not measured it’s not accomplished. Most prime contractors must get “consent to subcontract” from USAID to use subcontractors, and these subcontract amounts are listed within each prime contractor’s budget, so this information is already available.
5. Small businesses can build consortia to bid on larger opportunities, with a single point of contact for the Missions or Bureaus. Many small businesses already do this and the missions should be encouraged to support it.
6. Large primes must manage their own metrics to track when they populate subcontracts with actual funds and projects for their SB partners. These figures can be compared to the numbers found within the budgets approved that contain subcontractors, as formalized by the USAID contracting process. Many large primes bring small businesses into their subcontracting plans to win awards, but then fail to include the US small firms when actual work is awarded.
7. USAID’s OSDDBU must track metrics for use of small businesses by large primes AND nonprofits under cooperative agreements, as these awards count toward the global 13% goal for USAID.
8. USAID must begin implementing the WOSB set-aside program. No more delays or excuses.

In conclusion we’ve seen some important improvements that are enhancing the ability of small businesses to compete for contracts performed overseas but there are many other proposals that have been floated that are worthy of strong consideration. ■

The logo for PSC DAILY is displayed in a stylized font. The letters 'PSC' are in a large, white, serif font, and 'DAILY' is in a smaller, white, sans-serif font. A yellow horizontal line with a slight curve is positioned above the 'DAILY' text.

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# PSC: SCENE & HEARD



## Annual Members Meeting

PSC held its combined semi-annual open meeting of the PSC Board of Directors and our annual membership meeting, followed by a holiday reception that included a special farewell program for Stan Soloway on December 18. At the meeting members were briefed on PSC's successes and plans for 2016. Additionally, John Goodman of Accenture and Deb Alderson of Sotera Defense were elected Chair and Vice Chair of the Board of Directors, respectively. Larry Cooley of MSI, Kymm McCabe of ASI Government and Dyson Richards of RGS were honored with PSC Leadership Awards.





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## Develop Checks, Balances & Controls #3

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