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FOCUS

¶ 74 FEATURE COMMENT: Post-Midterm Election Preparation For Government Contractors—A Political Risk Strategy Assessment

Executive Summary—If the past is prologue, should the Democrats retake one or both houses of Congress in the midterm elections, Government contractors might expect to see oversight investigations into their work that has supported Trump Administration priorities. Congressman Henry Waxman investigated Government contractors heavily after the Democrats retook Congress in the 2006 elections. Investigations in the 2007–2008 term included Blackwater, various Iraq reconstruction contractors, private security contractors, ammunition contracts, logistics contracts, State Department embassy construction contracts, and others. Chairman Waxman held over 100 oversight hearings. This pattern may repeat itself in 2027, depending on the results in the 2026 midterms, and Government contractors are well advised to prepare now.

Outside counsel experienced in Government contracts, congressional investigations, and administrative law should be retained before any investigation begins. Early retention matters because counsel can help shape the documentary record, advise on disclosures (voluntary or mandatory), and build relationships with oversight staff before adversarial postures harden. The ideal team has bipartisan credibility—former Democratic committee staff and former Republican administration officials matter equally.

For companies presently supporting high-profile Trump Administration efforts—immigration enforcement, DOGE-related restructuring, mass data analytics, surveillance, AI, and related programs—the risk horizon is near, and heightened. A Democratic Congress could launch investigations and, though a long way off, a Democratic White House

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in 2029 could begin using the procurement system as both sword and shield against contractors seen as complicit in policies it considers unlawful or immoral. For better or worse, these political investigations have become more accepted over time on both sides of the aisle. Government contractors must be ready.

It is important to note that the strategy is not about guilt or innocence. It is about perception and passing the proverbial *Washington Post* test. The contractors who fare best in adversarial political environments are the ones who documented their clean hands contemporaneously, built relationships across the aisle before they needed them, and hardened their compliance infrastructure before anyone was looking. What follows is a framework for doing exactly that.

Part I: The Risk Landscape—*Congressional Investigations:* The majority party in either house of Congress, by virtue of controlling the congressional committees, can compel testimony, issue subpoenas for documents, hold public hearings, and refer matters to the Justice Department or agency inspectors general. For contractors supporting controversial programs, this means risk changes the moment the majority shifts.

The committees of relevance to Government contractors include the following: House Judiciary, which has jurisdiction over immigration and civil liberties, House Oversight, which has plenary jurisdiction to investigate "any matter at any time" with specific legislative jurisdiction over civilian Government contractors, the federal workforce, and executive branch operations, and the Homeland Security Committee, which has jurisdiction over the functioning of the entire Department and cybersecurity. Senate Judiciary and Homeland Security overlap on Immigration and Customs Enforcement-related work. Armed Services committees become relevant wherever defense contractors have been drawn in but historically have not been a major threat. And select committees—purpose-built for political moments—can be stood up quickly and staffed aggressively.

Congressional investigations generally follow a predictable process. Document requests followed by subpoenas are the opening move, typically sweeping in contracts, internal communications, decision memoranda, legal opinions, and anything that touches the scope of work. Employee witnesses follow—not just senior executives, but program managers, engineers, and compliance officers who had direct involvement. Public hearings are staged for maximum political effect, with carefully selected witnesses and timed releases of damaging documents. Referrals to DOJ, the Government Accountability Office, or agency IGs extend the investigation's reach and lifespan. Stated simply, blockbuster hearings with CEOs and final committee report, which can run for hundreds of pages, and embarrassing documents and testimony are the goal.

Legislation is possible after investigations, such as new civil liability frameworks for contractors supporting certain Government activities, disclosure requirements, or mandatory compliance conditions tied to future contract eligibility. Whether any of it passes is beside the point—the damage has been done through the investigation itself.

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Procurement and Acquisition Risks: The executive branch's control over the acquisition process is substantial and may be broader, in some respects, than most contractors fully appreciate. A new administration does not need to pass a law to make life difficult for Government contractors. It has tools already in hand.

Past performance ratings and acquisition shaping can impact future work for Government contractors. Relating to past performance, Contractor Performance Assessment Reporting System ratings (CPARS) are assigned by contracting officers who have their own discretion but also with a reduction in civil service protections may increasingly feel like they serve at the pleasure of agency leadership. A sustained pattern of mediocre CPARS ratings compounds across evaluation cycles and erodes competitive positioning in future source selections. Evaluation criteria for new solicitations can also be restructured to disadvantage incumbents without any formal finding of wrongdoing including reweighted technical factors, adding new socioeconomic preferences, or making scope changes that render an incumbent's experience less relevant.

The Government's termination for convenience authority is essentially unreviewable as a policy matter. COs always can terminate a Federal Acquisition Regulation contract for convenience. Termination for convenience requires no finding of fault—but it ends revenue streams. More targeted is the FAR 9.1 "present responsibility" determination for a specific contract. Here, a CO may decline to award a contract to a technically eligible offeror on enumerated grounds such as a failure to demonstrate sufficient business integrity or ethics. Unlike an exclusion from all contracting in a suspension or debarment action pursuant to FAR subpt. 9.4, a negative contract-specific FAR 9.1 responsibility determination can be made more quietly and is harder to challenge.

Formal debarment is the so-called nuclear option and one that Members of Congress love to promote in public discourse. FAR 9.4 proceedings require notice, an opportunity to respond, and a written decision—contractors have due process rights, and courts have occasionally enforced them. But the reputational damage from a proposed debarment is severe and nearly immediate, regardless of the ultimate outcome, and successful court challenges are rare. The grounds for debarment—which include lack of business integrity, commission of fraud, and conduct "indicating a lack of business honesty or integrity"—are broad enough to reach contractors whose work is later characterized as facilitating unlawful Government action.

False Claims Act exposure deserves separate mention. If contract performance involved any misrepresentation of compliance, inflated costs, or deviation from contract requirements, a new administration's Justice Department may be inclined to pursue affirmative civil FCA enforcement, including seeking treble damages and statutory penalties.

Reputational and Commercial Risks: Reputation risks of Government action against a contractor can also be significant including in the commercial market.

Certain commercial customers—particularly in technology, financial services, and professional services—can make vendor decisions through an environmental, social, and governance (ESG) and political risk lens. A contractor publicly associated with mass deportations, warrantless surveillance, or controversial workforce eliminations faces potential for friction in commercial business development and contract renewals. There may also be a talent development challenge. The engineering and data science workforce—especially those concentrated in coastal metro areas and university towns—has in the past avoided employers that perform what the talent views as work that does not align with the talent's individual values.

State and local governments as well as state attorneys general may also represent a parallel procurement and investigative risk. State agencies make their own procurement rules and decisions, following their own standards. This may include excluding, disfavoring, or avoiding working with federal contractors performing certain work that state leadership finds objectionable.

Additional risks may include, but are not limited to, whistleblower activity and investor pressure

through ESG frameworks, which can affect credit ratings and capital costs. And NGO-led media campaigns—targeted, sustained, and well-funded—have proven capable of shifting public perception of large corporations faster than those corporations can respond.

Part II: Strategic Framework—*Pillar 1: Build the Legal Record Now:* Government contractors face significant risks in highly politicized times, but common-sense steps can help protect these companies. We provide the following framework for responding to increased risk.

Building the legal record now, before an inquiry begins, is a fundamental step that can reduce the time, scope, expense, and risk of future investigations. Phrased colloquially, this step boils down to this: document everything, protect analysis under privilege, and preserve the record.

A robust, complete contract file is a must have for Government contractors facing political risk. This includes documents relating to proposal preparation and contract negotiations, and a copy of the contract and all modifications must be included. Further, documents concerning the major decisions made in connection with a high-risk contract should be collected and reviewed—under attorney-client privilege—for what they reveal about the contractor's legal posture, the scope of Government direction received, and the internal limits the company observed. This audit should capture not just what the company did, but also what it did not do, whether any legal objections were raised and how they were resolved, and cover any instances where company personnel pushed back on Government direction or sought clarification before proceeding.

Under longstanding FAR principles and contract law, a contractor acting in good faith pursuant to explicit, lawful Government direction generally cannot be held responsible for consequences flowing from that direction. But the defense is only as good as the documentation supporting it. Written task orders, instructions of Government officials with the authority to provide the instructions (e.g., CO or their technical representatives), agency policy guidance, and emails confirming Government authorization should be organized and preserved now, not reconstructed later.

For contractors with FCA exposure, a proactive review and potential self-disclosure to the relevant agency IG may be advantageous depending on the circumstances. For example, self-disclosure prior to an investigation is treated dramatically more favorably than a disclosure extracted by DOJ, and it is powerful evidence of present responsibility in any subsequent debarment proceeding. But these decisions are complex, and the assistance of qualified counsel is imperative when considering disclosures.

Pillar 2: Perform Impeccably and Document That Too: A contractor with a clean, well-documented performance record is well positioned to address potential criticism as CPARS ratings evidence quality performance within budget and can be used to explain how the company was properly following Government direction.

CPARS ratings should be treated as strategic assets. Proactively engage COs on performance metrics. Request interim assessments. When negative ratings are issued, respond formally and in writing through the CPARS dispute process—not just to correct the record, but to demonstrate the kind of rigorous contract administration that characterizes a responsible contractor.

Scope creep presents additional risks in highly politicized times. The practice of performing work outside the contract scope at verbal agency direction—widespread and often well-intentioned—creates legal exposure that can exceed the goodwill it generates. This is especially true if out-of-scope work includes tasks that carry political risk. Best practice is that every out-of-scope request is formalized through a contract modification before work begins. The paper trail this creates also serves as further evidence of Government direction. The authors recognize that some scope creep is inevitable in this line of business, but especially for contractors with politically risky projects, scope discipline takes on added importance.

For contracts involving personal data, data handling compliance deserves obsessive attention. A data breach or unauthorized disclosure involving personal information (yes, including of non-citizens) is not just a legal problem but also carries signifi-

cant political risk. Documentation showing what data the contractor held, how it was protected, who had access, and when it was deleted or transferred per contract terms will matter enormously.

Subcontractor oversight is a prime contractor responsibility that often receives insufficient attention. Primes can inherit subcontractor liability and may have increased political risk if subcontractors engage in questionable conduct without adequate prime contractor oversight. Managing this risk involves conducting due diligence on subcontractor compliance postures and exercising contractual audit rights to periodically assess ongoing compliance.

Pillar 3: Harden the Ethics and Compliance Program: Compliance programs exist on a spectrum. At one end is the binder on the shelf of policies adopted to check a box. The other end is a functioning system with independent leadership, genuine board engagement, meaningful training, and a track record of finding and fixing problems before they become external ones. In an adversarial political environment, a robust ethics and compliance program provides meaningful protection.

The FAR requires contractors to have a Code of Business Ethics and Conduct, and the FAR's present responsibility standard explicitly considers the adequacy of a contractor's compliance program. Justice Department guidance contains more detailed and robust requirements for these programs. Congressional investigators, NGO researchers, and certain media outlets look for the gap between the stated program and the lived reality. These audiences are sophisticated and they are not easily fooled.

Ethics and compliance programs are more likely to be judged as effective and independent if Chief Compliance Officers have direct access to the board and if the Audit Committee receives regular briefings on high-risk contract activities.

For contractors supporting immigration enforcement or surveillance programs, it may be helpful to review or, if needed, to create a human rights policy. A robust policy may be developed with external expert input and reflect genuine engagement with the UN Guiding Principles on Business and Human Rights. A policy that demonstrates substantive engagement with the relevant ethical frameworks may be helpful in addressing future risks.

Ethics hotlines and non-retaliation programs matter. A contractor whose employees have no meaningful internal channels for raising concerns about contract work, and where the contractor does not respond in a timely and good-faith manner to those reports. may find that employees eventually raise those concerns externally including to journalists, congressional staff, or qui tam plaintiff's attorneys. Creating genuine internal channels, documenting how concerns raised through these channels are resolved, and informing those who raise concerns about the outcome of their reports can be a significant risk mitigator for Government contractors.

Finally, do not forget remediation. If internal reviews surface compliance problems, fix the problem and, if needed or beneficial, disclose the problem before outside pressure forces the issue. The legal and reputational difference between a contractor who found and fixed a problem and a contractor who had a problem found for them can be significant.

Pillar 4: Legal and Acquisition Defenses: The Government's procurement discretion is broad but not unlimited. A contractor facing adverse procurement actions from a politically motivated administration has legal recourse provided the company has built the factual record that makes opposition credible.

For example, debarment proceedings carry due process requirements that courts have enforced: notice, an opportunity to respond, and a written decision grounded in enumerated bases. The Government cannot debar a contractor for lawful compliance with a valid contract. It cannot make adverse responsibility determinations in bad faith, on constitutionally impermissible grounds, or based solely on the contractor's protected political activities. These protections have limits. While the standard is deferential to the agency, contractor rights are not illusory.

Dealing with adverse procurement decisions requires a slightly different approach. Here, a full

contract file is a must-have, including documentation of adverse procurement actions. A well-documented pattern of adverse actions combined with credible and competent outside counsel can overturn certain action in court or before the Government Accountability Office and can make politically motivated procurement manipulation expensive enough to discourage.

Revenue diversification is also a valuable risk mitigation measure. A contractor whose revenue is overwhelmingly concentrated in a single agency and program is structurally vulnerable. Aggressively pursuing opportunities across multiple agencies, program areas, commercial customers, and allied foreign government customers reduces that vulnerability. It also changes the negotiating dynamic: a contractor that can afford to walk away from a contested program occupies a fundamentally different legal and political position than one that cannot.

In extreme cases such as where a specific subsidiary or division is the primary focus of controversy, corporate restructuring deserves at least a careful legal analysis. Creation of a new entity, divestiture of a controversial business line, or joint venture structures may offer protection for the broader enterprise. This analysis must be done carefully, with full attention to spoliation risk, fraudulent transfer doctrine, and the optics of an action that could be characterized as an attempt to evade accountability.

Pillar 5: Congressional Relations: Government contractors performing politically controversial tasks are likely to face increased congressional risk in the future. Engaging early with your in-house Government affairs team, outside Government affairs team, congressional investigations attorneys, and communications professionals to get everyone singing from the same sheet of music and executing the response plan is key to successfully navigating an inquiry from Congress.

Government contractors are well advised to build relationships with Democratic members and staff right now, while Republicans are in the majority. Contractors that have invested years in Republican relationships should not ignore the current minority. Today's ranking member is tomorrow's committee chair. The time to build that relationship is before the subpoena, not after.

The target list for developing relationships is specific. Ranking Members of House Judiciary, Oversight, Homeland, as well as Senate Judiciary, and Senate Homeland Security committees including the Permanent Subcommittee on Investigations, along with their senior staff are worth seeking out. Members whose districts include significant contractor facilities, employees, or supplier networks are imperative to engage with well before a problem arises. Note that these audiences can be addressed separately, with different information and different levels of detail.

Getting ahead of any issues by providing confidential staff briefings may be helpful in framing an issue in the light most favorable to the Government contractor. Minority staff preparing oversight investigations often operate with incomplete information, and incomplete information tends to produce harsher conclusions. Educating congressional staff to the nuances of what appears to be a black and white problem can provide valuable defenses to the majority's chosen narrative. In the hyper-partisan committees, the minority staff will oftentimes act as defense counsel if they are appropriately read into the facts and circumstances of a contractor's decision making.

While equally important, your congressional investigations counsel should be distinct from your lobbyist. Since there are no hard and fast rules of congressional investigations it is key to engage counsel steeped in the practices of each committee in each chamber. For 2026, take steps towards corporate hygiene such as reviewing policies related to communications with the Government, reviewing any document retention policies, and analyzing the risk vectors for your company. Be on the lookout for vulnerabilities across business lines including whistleblowers, State AGs, internal investigations, or prior or current regulatory scrutiny. Then, work with your congressional investigations counsel to tell your company's story.

PART III: Term Action Plan—Immediate (0–90 Days)

Action	Owner	Purposes
Privileged legal audit of high-risk contracts	GC + Outside Counsel	Establish record; identify exposure
CPARS review and proactive CO engagement	Contracts	Protect performance record
Ethics/ compliance gap assessment	CCO	Identify and remediate weaknesses
Congressional relationship mapping	Government Affairs	Identify gaps; begin minority outreach
Reputational audit	Communications	Understand current exposure honestly
Retain bipartisan outside counsel	GC	Investigation and protest readiness
Board briefing on political risk	CEO/GC	Governance documentation

Near-Term (90–180 Days)

Action	Owner	Purposes
Human rights policy review or development	CCO + External Experts	Reputational and legal defense
Congressional investigation playbook	GC + Gov Affairs + Outside Counsel	Response readiness
Proactive congressional briefings	Gov Affairs	Relationship-building before need
Public narrative development	Communications + Outside Counsel	Define the company before critics do
Revenue diversification assessment	Business Development	Reduce procurement vulnerability
Subcontractor compliance audits	Contracts + CCO	Manage prime liability
Crisis communications plan	Communications	Response readiness

Medium-Term (6–18 Months)

Action	Owner	Purposes
Sustained bipartisan congressional engagement	Gov Affairs	Durable political capital
Commercial business development acceleration	Business Development	Revenue independence
Bid protest counsel retention	GC	Litigation deterrent
Employee communications program	HR + Communications	Culture; whistleblower risk management
Voluntary monitor consideration (highest-risk)	GC + CCO	Maximum good-faith demonstration

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This Feature Comment was written for THE GOVERNMENT CONTRACTOR by* David Robbins *and* Ashley Callen, *attorneys at Jenner & Block. Mr. Robbins is a partner and co-Chair of Jenner & Block's Government Contractor Litigation and Compliance Practice. He is a former Deputy General Counsel and Suspending and Debarring Official with the Department of the Air Force. Ms. Callen is a partner and co-Chair of Jenner & Block's Congressional Investigations Practice. She is the former General Counsel to Speaker Mike Johnson and Leader Steve Scalise.

DEVELOPMENTS

¶ 75 VA IG Flags Problems With Contract Outpatient Clinics

The Veterans Health Administration did not effectively manage contracted community-based outpatient clinics (CBOCs), the Department of Veterans Affairs inspector general reported. "Contracts for CBOCs are meant to provide high-quality, safe, timely, and cost-effective care to veterans; however, the unique nature and the limited number of contractors that perform the work create challenges for VHA to motivate contractors and hold them accountable for meeting the requirements of the contracts," the IG said.

"VHA uses CBOCs to increase veteran access to health care; these clinics are either VA-owned and VA-operated, VA-leased and VA-operated, or VA-contracted," the IG explained. VHA contracts with CBOCs when VA patients in a region need healthcare but "(1) the local VA medical facility does not have the space or staffing to establish a VA-operated clinic and (2) care in the community cannot meet patients' needs." CBOC contracts are "overseen by contracting officers, who appoint contracting officer's representatives from the associated VA medical center to monitor contract performance throughout the life of the contract." As of 2023, VA had 92 services contracts at 107 CBOCs, worth $2 billion.

The IG found that VHA did not oversee CBOC contracts after award, "leaving VHA without a

headquarters-level office to oversee the effectiveness of the contracts for the rest of their life cycle." And VHA contract policy did not cover all required duties, limiting VHA's "ability to identify and implement solutions for national issues, which may have adversely affected the care provided to veterans and created administrative challenges for VA medical centers and contracting offices." The IG said CORs "consistently did not rate the contractors for two performance metrics: clinical reminders and closure of deficiencies identified during environment of care reviews." VHA thus had limited "ability to identify issues and take corrective action" when contractors did not meet the performance metrics.

Further, VHA procurement officials interpreted VA general counsel guidance as indicating that they should not include contract performance incentives. Thus, VHA contract templates did not enable COs to "motivate contractors to meet or exceed the required performance metrics or to hold contractors accountable when metrics were not met," the IG said. Federal Acquisition Regulation 16.402-2 requires agencies to include service contract incentives "to the maximum extent practicable." In 2024, VA general counsel clarified that its guidance was intended to ensure that COs coordinated with legal counsel on performance incentives, the IG noted. "Without effective means to hold contractors accountable … the contractors for the 11 contracts that the [IG] reviewed did not meet 56 percent of the contract performance metrics, on average," but the contractors still received full payment, the IG found.

The IG also found that VHA could not ensure medical centers and COs "appointed sufficiently certified CORs to oversee CBOC contracts," and "delays with installing and connecting phone lines prevented patients from contacting the CBOCs and prevented CBOC staff from calling 911 from the CBOC phone system."

The IG made 12 recommendations for VHA to improve CBOC guidance, ensure contractor performance metrics are reasonable, improve the accuracy and efficiency of billing processes, evaluate how COs provide for contractor incentives, and implement commercial practices into CBOC requirements.

Audit of Community-Based Outpatient Clinic Contracts is available at www.vaoig.gov/sites/default/files/reports/2026-03/vaoig-24-00900-230_-_final_0.pdf.

¶ 76 Education Needs To Address Gaps In Servicer Oversight

The Department of Education's Office of Federal Student Aid (FSA) stopped assessing student loan servicers on accuracy and call quality because of a lack of staff capacity, raising concerns about the Government's ability to oversee more than $1.6 trillion in outstanding federal student loans, according to a Government Accountability Office report.

In February 2025, FSA discontinued its quarterly assessments of two critical performance metrics—accuracy and call quality—that had been established under new servicer contracts implemented in April 2024. These assessments were designed to ensure that the five contracted loan servicers maintained accurate borrower records and provided quality customer service to the millions of Americans repaying federal student loans.

The decision to halt these assessments came shortly after the new administration began implementing workforce reduction initiatives in January 2025. Between Jan. 20, 2025, and Dec. 1, 2025, FSA experienced a dramatic reduction in staffing, with the number of full-time equivalent personnel dropping from 1,433 to 777—a loss of 656 employees, representing a 46-percent reduction in the office's workforce.

Prior to discontinuing the assessments, FSA had evaluated servicers on accuracy and call quality for only two quarters. For the accuracy metric, FSA staff performed two types of quarterly reviews for each servicer: data matches for samples of thousands of borrowers between servicer data systems and FSA data systems, and targeted reviews of servicer data on borrowers in specific statuses, such as those temporarily postponing monthly payments through forbearance. For call quality, FSA reviewed recordings of phone calls between borrowers and servicers to determine whether servicer representa-

tives greeted borrowers, provided complete and accurate information, and displayed professionalism.

During the two quarters that FSA assessed these metrics, most servicers failed to meet performance standards for accuracy. Four of the five servicers did not meet the accuracy performance standard and faced associated financial penalties in at least one of the two quarters, with two servicers receiving the maximum five-percent penalty relating to the accuracy metric. In total, FSA withheld approximately $850,000 from servicers who failed to meet accuracy standards. All servicers met their performance standards for call quality during those two quarters.

The accuracy assessments proved valuable in identifying and addressing systemic servicing problems. During the first quarter of fiscal year 2025, FSA discovered through its accuracy review that one servicer was not processing payment refunds for borrowers in a timely manner, with about 90 percent of sampled borrowers not receiving their credit balance refunds within the required 45-day timeframe. FSA officials said the servicer subsequently developed a corrective action plan and implemented a system to ensure timely refund processing.

By discontinuing these assessments, FSA is missing opportunities to address material weaknesses identified by Education's independent auditor. In FYs 2023 and 2024, Education's auditor identified material weaknesses in the relevance and reliability of data the department uses to estimate the lifetime costs of the federal student loan program, including errors in loan status histories reported by servicers. The discontinued accuracy assessments had included reviews of loan status history data for borrowers, which could have helped detect and correct these inaccuracies.

The timing of these oversight gaps is particularly concerning given upcoming major changes to federal student loan programs. The One Big Beautiful Bill Act included provisions changing repayment plans available to borrowers starting in July 2026, eliminating existing income-driven repayment plans and creating a new Repayment Assistance Plan. These changes will affect millions of borrowers who will need accurate information and properly maintained records as they transition to new repayment options.

FSA officials said in September 2025 that Education was working to implement more efficient oversight methods that leverage data analysis and exploring possible changes to contract performance standards. However, as of December 2025, FSA had not implemented any replacement methods for overseeing accuracy and call quality and had not changed the performance standards in the servicer contracts.

The lack of oversight creates several risks for both borrowers and the Government. Without assessing servicer accuracy, FSA lacks assurance that borrower records are correct, which could result in borrowers being billed for incorrect amounts, placed in the wrong repayment status, or not having refunds processed in time. Without monitoring call quality, there is increased risk that borrowers receive incorrect information and poor customer service when they contact servicers for help.

Additionally, FSA informed servicers that it has waived financial penalties related to these metrics, potentially reducing servicers' incentive to maintain accuracy and call quality standards. If servicers had continued to fail to meet performance standards in subsequent quarters, FSA could have withheld additional funds, and the penalties would have increased for repeated poor performance under the contract terms.

Representatives from borrower advocacy organizations expressed concerns about FSA's ability to oversee servicers given the capacity reductions. One organization stated that without the risk of financial penalties, they do not believe FSA can hold servicers accountable for their performance.

Education's own guidance states that every contract should be monitored to the extent appropriate to provide assurance that contractors perform the work called for in the contract and develop a clear record of accountability for performance. The Federal Acquisition Regulation requires agencies to collect relevant data to determine the effectiveness of incentive fees, such as the performance-based penalties in the servicer

contracts. Office of Management and Budget guidance emphasizes that agencies should ensure sufficient human resources are available to properly structure and monitor contracts.

GAO recommended that the secretary of education ensure that FSA assesses servicer accuracy and call quality. Education disagreed with the recommendation, stating that it uses a variety of other methods to assess servicer performance, including data quality assessments, cross-system data validation, audits, surveys, complaint reviews, operational meetings, and leadership oversight. However, GAO concluded that these alternative methods do not provide the same systematic and direct assessment of servicer accuracy and call quality that the discontinued metrics provided, nor do they include mechanisms such as financial penalties to hold servicers accountable and ensure the Government is not overpaying them for poor performance.

GAO maintains that assessing servicer accuracy and call quality would assist Education in carrying out its statutory responsibilities to manage federal student aid programs and oversee contracted loan servicers. The report emphasizes that without this oversight, inaccurate records and poor call quality present growing risks for borrowers and the federal government, particularly as FSA prepares to implement large-scale changes to the federal student loan program affecting millions of borrowers who will need accurate and complete information when they call for help.

Federal Student Loans: Education Needs to Address Gaps in Servicer Oversight (GAO-26-108534) is available at https://www.gao.gov/assets/gao-26-108534.pdf.

¶ 77 Developments In Brief

a. VA IG Flags Inadequate iFAMS User Access Controls

As the Department of Veterans Affairs deploys its Integrated Financial and Acquisition Management System (iFAMS), it needs to develop controls on user access, or "VA will continue to be at risk of VA employees and contractors unnecessarily viewing or disclosing potentially sensitive acquisition information," the VA inspector general cautioned. VA is deploying iFAMS in "waves." Seven waves have gone live across VA since the first in 2020, "representing only about 3 percent of the total anticipated iFAMS users." "As part of the system's financial-related functionality, iFAMS contains sensitive acquisition information like pricing and labor rates," and such information "must be protected as part of the principle of least privilege, which ensures only those users who need the information to complete assigned tasks have access to it." But the IG found that "system access was not sufficiently limited as required." The IG said the broad access controls made "it difficult for supervisors and organizations to grant users access only to what they need." Further, quality reviews did not have enough information for reviewers to validate all access granted, and the electronic oversight system supervisors use "does not show all accesses the users have been granted." Unnecessary access to sensitive iFAMS acquisition data creates a risk of misuse, and "[t]his unnecessary access—or even the risk of it—could compromise sensitive acquisition data in iFAMS," the IG cautioned. The IG recommended that, before the next iFAMS implementation wave, VA (a) implement a plan to ensure system access is more granular and accesses are limited to those who need them, (b) periodically review all roles and accesses, and (c) permanently provide supervisors with visibility into all roles and accesses granted to users. The IG has previously flagged problems with VA's iFAMS deployment. See 65 GC ¶ 81(e); 66 GC ¶ 185(c); 67 GC ¶ 109. *Audit of Integrated Financial and Acquisition Management System Access Controls* (IF12852) is available at www.congress.gov/crs-product/IF12852.

b. CGP Presses GSA for Pricing Flexibility Amid Memory Chip Shortage

The Coalition for Common Sense in Government Procurement (CGP), a non-profit association of commercial contractors, urged the General Services Administration to loosen Multiple Award Schedule pricing rules for information technology products affected by a worldwide shortage and increasing prices. Demand for artificial intelligence (AI) and data centers has driven the increased demand for dynamic random-access memory (DRAM) and for

certain flash memory chips, pushing commercial DRAM prices up by more than 500 percent, Roger Waldron, CGP's president, explained. The shortage affects Government contractors including original equipment manufacturers (OEMs), resellers, distributors, and others. The market will be squeezed further by "late 2027, when a Federal Acquisition Regulation implementing a statutory ban on the use of Chinese semiconductors will only heighten the demand and need for chips produced in the United States and allied countries," Waldron added. Memory chip production challenges are "affecting the entire technology ecosystem including notebook and desktop computers, workstations, general purpose and AI servers, mobile phones, and other consumer electronic products." According to CGP, GSA should either issue a temporary deviation to eliminate the price ceiling to alleviate the need for contract-level pricing for the affected products or issue guidance to allow contractors to seek weekly economic price adjustments. CGP also suggested that GSA use OEM commercial price lists and written explanations for price increases, inform its acquisition workforce about the shortage and affected products, and encourage the timely use of price adjustments. Without GSA action, MAS contractors could stop submitting quotes, leaving agencies to rely on open market purchases and greater reliance on purchase cards, and leaving them potentially procuring goods in violation of the Trade Agreements Act, Waldron asserted. "Doing nothing will result in negative unintended consequences for GSA customer agencies."

c. CRS Flags Contracting Fallout from DOD-Anthropic Dispute

A Department of Defense dispute with Anthropic could become a significant policy and procurement issue for the Government, according to the Congressional Research Service. After President Trump directed federal agencies to cease using Anthropic's artificial intelligence (AI) technology in February, Secretary of Defense Pete Hegseth directed DOD "to designate Anthropic a supply-chain risk to national security; barred defense contractors, suppliers, and partners from working with Anthropic;" and required a transition away from Anthropic products, CRS explained. Anthropic then "filed a civil complaint in the U.S. District Court for the Northern District of California and a petition for review in the U.S. Court of Appeals for the D.C. Circuit regarding these directives." Prior to the dispute, DOD asked Anthropic and other AI contractors to "allow use of AI models for 'all lawful purposes,' " but Anthropic was "unwilling to allow two use cases: mass domestic surveillance and fully autonomous weapon systems," CRS pointed out, adding that "DOD is not publicly known to be using [Anthropic's] Claude—or any other frontier AI model—within autonomous weapon systems." According to CRS, DOD Directive (DODD) 3000.09, "Autonomy in Weapon Systems," which identifies use requirements and outlines the process for deploying such systems, requires human involvement in decisions about their use, but "does not require manual human 'control' of the weapon system." DOD is required to notify congressional committees about any changes to DODD 3000.09, and to annually report to Congress on its use of lethal autonomous weapon systems, CRS said. However, Congress has not regulated DOD's use of AI models or their reliability, and should it decide to do so, "it may codify the requirements of DODD 3000.09 or consider additional notification requirements for DOD's use of autonomous weapon systems or AI models." Congress could also restrict funds for developing or using autonomous weapon systems or for certain DOD use cases of AI models, CRS added. *Pentagon-Anthropic Dispute over Autonomous Weapon Systems: Potential Issues for Congress* (IN12669) is available at https://www.congress.gov/crs_external_products/IN/PDF/IN12669/IN12669.2.pdf.

DECISIONS

¶ 78 Agency Has Inherent Authority To Take Unilateral Corrective Action During A Bid Protest By Terminating Awards For Convenience, Fed. Cir. Holds

Syneren Techs. Corp. v. U.S., 166 F.4th 1040 (Fed. Cir. 2026)

An agency possesses inherent authority to terminate contract awards for convenience and take corrective action while litigation is pending, without seeking a voluntary remand from the U.S. Court of Federal Claims, provided the agency gives notice, does not act contrary to statute, and does not reconsider in a manner that is arbitrary, capricious, or an abuse of discretion, the Court of Appeals for the Federal Circuit held. In affirming the COFC's denial of a bid protest, the Federal Circuit held that the agency's unilateral corrective action was permissible and that the agency's final award decision had a rational basis.

The Department of Commerce issued a request for proposals for information technology services. The agency evaluated 81 proposals and generated evaluation reports for the Source Selection Authority (SSA) to review. The SSA signed a source selection decision document (SSD), assessing each proposal and conducting a tradeoff analysis. Relying on this analysis, the SSA named 15 presumptive contract awardees on Sept. 12, 2022.

Unsuccessful offerors, including CAN Softtech Inc. (CSI), filed protests at the COFC challenging the awards. On May 3, 2023, the COFC held that the agency improperly evaluated some offers, including CSI. *Allicent Tech., LLC v. U.S.*, 166 Fed. Cl. 77 (2023). The COFC enjoined performance of the contracts unless the agency reevaluated proposals and issued a new decision consistent with the COFC's opinion.

In response, on June 29, 2023, the agency terminated the awards for convenience. The technical evaluation team (TET) issued a second amended report reevaluating the technical offers. The SSA approved the reevaluation, signed a second amended SSD, and awarded contracts to the 15 original awardees.

Soon after, CSI and Syneren Technologies Corp. filed bid protests at the COFC challenging the new awards. The TET again evaluated the technical offers and issued a third amended technical evaluation report on July 23, 2023. The same day, the SSA signed a third amended SSD. The agency then issued notices stating that it had terminated all awards for convenience a second time. The corrective action was undertaken, in part, in response to the bid protests.

In the new decision, the SSA found that the offers from CSI and others remained unsatisfactory and did not offer the best value. The agency therefore again awarded contracts to the 15 original awardees. CSI and others then amended their complaints in the pending bid protest to challenge this corrective action.

In addressing the protest, the COFC said that the final evaluation was the operative award decision because the agency "jumped through all the procedural hoops" to "narrow the issues in dispute"—namely, canceling all prior contract awards, reconstituting and reconvening the TET to reevaluate proposals, issuing a new SSD, and issuing new contracts. *Syneren Techs. Corp. v. U.S.*, 168 Fed. Cl. 756 (2023). The COFC rejected CSI's position that the agency should have sought a voluntary remand before taking corrective action and determined that the agency had not cut any procedural corners in its corrective action. The COFC denied CSI's protest, holding that the agency's decision was rational and supported by the record.

Termination for Convenience—On appeal, CSI argued that the agency may not unilaterally terminate the awards for convenience and take corrective action. The Federal Circuit disagreed.

Corrective action usually occurs after a protest has been initiated and seeks to correct a perceived prior error in the procurement or to improve the competitive process. *Dell Fed. Sys., L.P. v. U.S.*, 906 F.3d 982 (Fed. Cir. 2018); 60 GC ¶ 323. Agencies have inherent authority to reconsider their decisions, subject to certain limitations, regardless of whether they have explicit statutory authority to do so. *Hekmati v. U.S.*, 51 F.4th 1066 (Fed. Cir. 2022). This includes the inherent power to change an earlier decision if the agency does so in a reasonable manner, within a reasonable period.

There are limits on this inherent power. An agency may not act in a manner contrary to statute and must follow any express statutory procedures for reconsideration. The agency must also give notice of the intent to reconsider within a reasonable

time and may not reconsider in a manner that is arbitrary, capricious, or an abuse of discretion.

The Federal Circuit said that the proper inquiry is whether any statute or regulation prohibits the unilateral use of corrective action. *Tyler Constr. Grp. v. U.S.*, 570 F.3d 1329 (Fed. Cir. 2009); 51 GC ¶ 244. The Court was unaware of any statute prohibiting an agency from taking unilateral corrective action in response to a challenged agency decision once a suit has been filed.

The Court also said it was immaterial that the typical procedure for corrective action involves first announcing the action, then filing a motion to dismiss the case as moot, tendering a notice of voluntary dismissal, or seeking voluntary remand. No statute requires these procedures. As acknowledged by CSI at the COFC, the Government can take unilateral corrective action to moot an entire case. The narrower course taken here—canceling a prior decision, rendering it moot, then narrowing the issues in dispute by addressing some of plaintiffs' complaints via a new action—"was hardly more objectionable." Thus, the Court concluded that agencies have the inherent authority to terminate awards and take corrective action while litigation is pending.

Regarding notice, the agency provided written notices and debriefings. While this notice came after the challenged second corrective action, CSI did not mount a substantial challenge to the sufficiency of the notice. CSI and other plaintiffs were able to amend their complaints after receiving this notice. CSI thus failed to demonstrate harm resulting from the agency's post-corrective-action notice.

Arbitrary and Capricious Review—CSI also alleged that the corrective action and second reevaluation were arbitrary and capricious. First, relying on the Supreme Court's decision in *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.,* 591 U.S. 1 (2020), CSI argued that the Administrative Procedure Act does not permit an agency to cut corners by rendering a new decision to support its actions in the heat of litigation.

The Federal Circuit rejected this argument. *Regents* addressed administrative rulemaking, and CSI offered no compelling reason to apply the APA's substantive limits from this context into the unrelated landscape of individual agency procurements. While the APA standards of review (5 USCA § 706) apply in bid protests, see 28 USCA § 1491(b)(4), this does not mean that the substantive and procedural APA requirements governing rulemaking also apply to procurement actions. Some APA provisions—e.g., the need for notice and comment during rulemaking—do not apply to bid protests. See 5 USCA § 553(a)(2).

Even if CSI were correct that the *Regents* framework applies to procurements, it does not prohibit the unilateral corrective action here. The agency did not seek a remand, and the COFC did not order one after determining that the agency's contract awards rested on inadequate grounds. Instead, as was within its power, the agency terminated all awards for convenience and unilaterally took corrective action, responsive to the protesters' complaints, to issue new awards. This corrective action canceled the agency's previous decision, rendering it a nullity, and dealt with the problem afresh by taking new agency action, which is permissible under the APA. *Biden v. Texas*, 597 U.S. 785 (2022). This is the case even where the agency reaches the same result in the new action. *Regents* was therefore inapposite.

CSI also argued that the trial court's decision was contrary to precedent on voluntary remand. Citing *SKF USA Inc. v. U.S.*, 254 F.3d 1022 (Fed. Cir. 2001), CSI argued that the court recognizes only one mechanism for an agency to conduct a reevaluation while a bid protest remains pending—the agency may move for voluntary remand. But *SKF* concerned a court's obligation to remand a case to an agency upon the agency's change in policy or statutory interpretation. The underlying action in *SKF* was initiated when the agency approached the Court of International Trade seeking remand so that the agency could reevaluate its earlier decision, without revoking or canceling that earlier decision.

In contrast, the agency here did not seek to go back to the drawing board on an open decision based on an intervening change. Instead, the agency canceled its prior decision and proceeded from scratch with its corrective action. Thus, *SKF*

is inapposite and does not mandate remand. CSI's arguments regarding remand are not relevant when an agency terminates awards for convenience and takes corrective action to issue new awards. If an agency did not terminate the awards, but instead desired to supplement the record of the pending awards, there would be a different question on appeal. But given the agency's inherent power to reconsider its decisions and the lack of contrary statutory directives, the agency may terminate the awards for convenience and take corrective action to issue new awards without permission from the COFC.

Finally, the Federal Circuit addressed CSI's argument that the final award lacked a rational basis because the agency breached the duty of good faith and fair dealing during its re-evaluation of CSI's proposal. As an initial matter, there is a presumption of good faith in the acts of Government officials carrying out corrective action. *Chapman L. Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934 (Fed. Cir. 2007); 49 GC ¶ 276. To overcome that presumption, the proof must be almost irrefragable, which amounts to clear and convincing evidence. *Galen Med. Assocs., Inc. v. U.S.*, 369 F.3d 1324 (Fed. Cir. 2004); 46 GC ¶ 293.

CSI did not allege bad faith. Instead, CSI argued that the COFC did not explain how the agency's re-evaluation could have reached anything but a predetermined result. In rejecting this argument, the Federal Circuit said that the COFC determined that the agency followed the COFC's initial protest decision in *Allicent*, the agency's re-evaluation of proposals was permissible, and the agency's decision was rational. CSI's unsupported argument that the agency's corrective action was not genuine did not overcome the presumption of good faith. Thus, the agency's final award had a rational basis and was not arbitrary, capricious, or an abuse of discretion, the Federal Circuit said in affirming the COFC.

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