Public Contract Law Journal

PUBLISHED BY THE AMERICAN BAR ASSOCIATION
Section of Public Contract Law
in cooperation with
The George Washington University Law School

Volume 52, Number 2, Winter 2023

Articles

In the United States Court of Federal Claims
Roxanne Cassidy

Brief of Contractor-Appellant, Democracy Worldwide
Stuart J. Anderson & Jane Han

Brief of Defendant-Appellee, United States
Madison Plummer & Benjamin R. Whitlow

Notes

Small Businesses in Space: Updates to Space-Related Small Business Procurement in Light of the Space Force's Proposed Acquisition Framework
Jonathan C. Clark

A Prescription for Calamity: Why the Department of Labor's Pharmacy Benefit Management Program Falls Short as a Singular Solution to the U.S. Opioid Crisis
Davis Nicole Madeja

Improving Environmentally Conscious Procurement Through Broader Responsibility Determinations and the EPA's Suspension and Debarment Powers
Luke A. Peterson

The Promise at the End of the Trail: Using *McGirt* to Close the Tribal Enterprise Performance Gap
Alexander M. Roider

Public Contract Law Journal

2022–2023 Editorial Board

Tara L. Ward
Editor-in-Chief
McDermott Will & Emery

Associate Editors

Patricia H. Becker
Booz Allen Hamilton

Heather Corrothers
U.S. Air Force

Christopher T. DelGiorno
U.S. Air Force

Virginia G. Farrier
Transportation Security Administration

Brian T. Fisher
Legal Editor

Jonathan J. Frankel
Frankel PLLC

Leslie A. Harrelson
WilmerHale LLP

Hon. Martin J. Harty
Dispute Resolution Services

John G. Horan
Faegre Drinker Biddle & Reath LLP

Brad Jorgensen
DLA Piper US LLP

Lance J. Lerman
Extreme Networks, Inc.

Herman D. Levy
Legal Editor

Ann McRitchie
Amentum

Elizabeth W. Newsom
BAE Systems, Inc.

Rebecca E. Pearson
Venable LLP

W. Benjamin Phillips, III
Wiley Rein LLP

Hon. J. Reid Prouty
Armed Services Board of Contract Appeals

Francis E. (Chip) Purcell Jr.
Thompson Hine LLP

Scott Sheffler
Feldesman Tucker Leifer Fidell LLP

Hon. Jeri Kaylene Somers (Ret.)
Potomac Law Group

Collin D. Swan
The World Bank

Heather K. Weiner
Government Accountability Office

Hon. Victor J. Wolski
U.S. Court of Federal Claims

Aaron Woodward
General Dynamics Mission Systems

Faculty Advisors

Steven L. Schooner

Joshua I. Schwartz

Jessica Tillipman

Christopher R. Yukins
The George Washington University Law School

Katya Cronin
Tucker Ellis LLP

Allison Geewax
Asmar, Schor & McKenna PLLC

Ryan D. Stalnaker
Simpson, Thacher & Bartlett LLP

Collin D. Swan
The World Bank

Sonia Tabriz
Arnold & Porter

Editorial Board Issue 52-2 (Winter 2023)
2022–2023

Maura Bradley
Editor-in-Chief

Sophie Marsh
Tyler Piper
Senior Articles Editors

Jonathan Clark
Taylor McDaniels
Senior Managing Editors

Alexander Roider
Senior Notes Editor

Scott Glaser
Amanda Grace
Michaela McDowell
Madison Roberts
Articles Editors

Emily Edwards
Projects/Symposium Editor

Christiana Goff
Kelly Kirchgasser
Jaeho Lee
Davis Madeja
Stuart Robbins
Notes Editors

Members (2022–2023)

Jazmin Bejarano
Zoe Billington
Trevor Block
Michael Brewer
Alexander Cardinal
Cash Carter
Josh Cergas
Grace Charles
Suolian Chen
Victoria Combs
Kyle Coopersmith
Austin Coyle
Kristine Cralle
Erin Davey
Ian Drexler
Jeremy Etelson
Gianmarco Frezza
Daniel Frias
Grayson Fusaro
Emily Golchini
Eric Gonzalez
Chandler Gordon
Jacob Green
Gabrielle Gunshol
Katlyn Har
Mary Hawley
Samantha Hoover
Caroline Jaipaul
Sehar Jamal
Yi Jiang
Kevin Kane
Ema Klugman
Alexa Kobrynich
Jennifer Kukucka
Alexis Landrum
Charles Lautenbach
Seungwoo Lee
Garrett May
Bailey McHale
Dennis Mema
Allison Moors
Noah Musto
Jacob Nelson
Estefania Palacios
Carmen Palumbo
Catherine Park
Nusheena Parvizi
Luke Peterson
Lucas Pizzutti
Mathew Plotnick
Sarah Quinones
Carly Ritter
Alexandra Rokhlin
James Sabia
Daniel Shemesh
Benjamin Siegel
Amanda Sin
Amanda Spector
Arthur Staub
Max Steinbaum
Brendan Stevens
Scarlett Suchocki
Jaden Taylor
Michelle Tekin
Katharine Toledo
Matthew Vaught
Rui Zhang
Beth Zhao

Periodicals Editor

Julie Roberts Furgerson
ABA Publishing
Washington, D.C.

Public Contract Law Journal

Volume 52, Number 2 Winter 2023

Table of Contents

Articles

In the United States Court of Federal Claims 179
Roxanne Cassidy

Brief of Contractor-Appellant, Democracy Worldwide 193
Stuart J. Anderson & Jane Han

Brief of Defendant-Appellee, United States 229
Madison Plummer & Benjamin R. Whitlow

Notes

Small Businesses in Space: Updates to Space-Related Small Business Procurement in Light of the Space Force's Proposed Acquisition Framework 247
Jonathan C. Clark

A Prescription for Calamity: Why the Department of Labor's Pharmacy Benefit Management Program Falls Short as a Singular Solution to the U.S. Opioid Crisis 277
Davis Nicole Madeja

Improving Environmentally Conscious Procurement Through Broader Responsibility Determinations and the EPA's Suspension and Debarment Powers 297
Luke A. Peterson

The Promise at the End of the Trail: Using *McGirt* to Close the Tribal Enterprise Performance Gap 323
Alexander M. Roider

MISSION STATEMENT OF THE SECTION

The mission of the Section of Public Contract Law is to improve public procurement and grant law at the federal, state, and local levels and promote the professional development of attorney and associate members in public procurement law. The Section pursues this mission through a structured committee system and educational and training programs that welcome and encourage member involvement, foster opportunities for all members of the Section, and recognize and respond flexibly to the diverse needs, talents, and interests of Section members.

The Section seeks to improve the functioning of public procurement by contributing to developments in procurement legislation and regulations; by objectively and fairly evaluating such developments; by communicating the Section's evaluations, critiques, and concerns to policy makers and government offices; and by sharing these communications with Section members and the public.

EDITORIAL STATEMENT

The *Public Contract Law Journal* is published by the Section of Public Contract Law as a service to its members and associate members, and for the benefit of lawyers and laypersons involved in the practice of public contract and grant law at the federal, state, local, and international levels of government.

The *Journal* exists within the Section's legal community as a focal point for the examination of timely legal issues confronting the judiciary, the administrative tribunals, and the bar. It also seeks to solicit and present the multiplicity of views that exist within the Section. As a publication of the Section, the *Journal*'s interests mirror those of its membership.

The *Journal* is committed to the regular publication of articles that present scholarly analyses and insight into issues affecting the broad scope of public contract and grant law. It is the only law journal dedicated exclusively, yet broadly, to public contract and grant law and related areas of practice. The Editorial Board's goal is for each issue to contain high-quality articles that are topical and provocative and that reflect the many views of its diverse membership.

Public Contract Law Journal (ISSN 0033-3441 (print); ISSN 2162-8181 (digital)) is published quarterly in season by the American Bar Association Section of Public Contract Law, 321 North Clark Street, Chicago, IL 60654-7598. Section members receive the *Journal* as a benefit of membership. Attorneys who are not members of the American Bar Association and nonlawyers may contact HeinOnline, mail@wshein.com, (800) 828-7571 (or (716) 882-2600) for digital subscription options and information. Periodicals postage paid at Chicago, Illinois, and additional offices. Postmaster: Send address changes to *Public Contract Law Journal* Member Records, American Bar Association, 321 North Clark Street, Chicago, IL 60654-7598.

Back issues: Back issues published before 2004 may be purchased from William S. Hein & Co. in Getzville, NY, at www.wshein.com. More recent issues are available from ABA Member Services at 800-285-ABA1 or Shop ABA.org.

Manuscripts: Manuscripts should be submitted in Word format as e-mail attachments to Tara L. Ward, Editor-in-Chief, McDermott Will & Emery, 500 North Capitol Street, N.W., Washington, DC 20001, 202-756-8484, taraward@mwe.com.

Permission to reprint: Contact ABA Publishing at copyright@americanbar.org.

Disclaimer: The material contained in the *Public Contract Law Journal* represents the opinions of the authors and is not necessarily the policies of the ABA or the Section of Public Contract Law.

Advertising: Advertising inquiries should be directed to ABA Publishing, 312-988-6114.

Copyright: 2023 American Bar Association. All rights reserved. Printed in the United States of America.

Visit the *Public Contract Law Journal* at www.americanbar.org/publications/public_contract_home.html.

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Democracy Worldwide v. United States

No. 20-782C
Filed: September 30, 2020*

OPINION

BLAKE, J.
This case arises out of a grant awarded by the United States Agency for International Development (USAID) to Democracy Worldwide (DW), as authorized by the Further Consolidated Appropriations Act of 2020, Pub. L. No. 116–94, 133 Stat. 2892 (2020). DW challenges the Agreements Officer (AO)'s disallowance of DW's purchase of personal protective equipment (PPE) and other COVID-19 related costs for DW's program activities during the pandemic. The AO disallowed the costs because the costs arose from items and activities that were not contained in the approved grant agreement, and DW did not first obtain approval from the AO. USAID contends that this Court lacks jurisdiction over disputes arising from grants. For the reasons stated below, we conclude that this Court has authority to review grants disputes and affirm USAID's disallowance of costs.

I. BACKGROUND

In November 2019, the Center of Excellence on Democracy, Human Rights and Governance (DRG), within the Bureau of Democracy, Conflict and Humanitarian Assistance (DCHA) of USAID announced $8,000,000 for human rights programming and projects in Central Africa. USAID sought applications for programs to increase protection for human rights defenders through various methods, including, but not limited to, strengthening civil society capacity to conduct civic education and activism, bolstering protections for journalists and human rights advocates, and conducting strategic civil and human rights-based litigation. The Notice of Funding Opportunity

* *Roxanne Cassidy (roxie.cassidy@gmail.com) is a 2021 graduate of The George Washington University Law School. She currently serves as a Judicial Law Clerk for the Honorable Marian Blank Horn on the U.S. Court of Federal Claims.*

(NOFO) asked bidders to identify one or more countries in which to perform their proposed work.

Seven organizations responded to the NOFO, from which USAID selected Democracy Worldwide (DW) to perform a project in Cameroon. DW has a long history of human rights programming across the globe, with an impressive resume in Central and West Africa. Furthermore, its proposed program to support human rights defenders in Cameroon received a near perfect score.

A. DW's Program Proposal

DW proposed a program under the "Environment building" pillar of programming. "Environment building focuses on strengthening the normative frameworks (laws and policies) and institutional architecture that help states respect their human rights obligations, as well as building the capacity of civil society actors to promote those rights, monitor compliance, and demand accountability." DW's proposed program addressed this pillar by training civil society actors (journalists and activists) to mobilize communities and demand action for poor governance and human rights issues. DW proposed quarterly trainings and individual follow-on meetings with selected human rights activists and civil society groups.

B. Program Award

On January 15, 2020, USAID awarded DW $2,000,000 to implement its proposed program. The grant agreement contained the project proposal and DW's budget as an appendix. The agreement states that DW is bound by the proposal that it submitted. To amend the grant agreement, DW would need to submit a budget or program realignment to the AO for prior approval.

Headquarters and field staff initiated the first steps needed to commence the program. The field staff, who all reside in Cameroon, invited civil society actors in Cameroon to the training. The headquarters staff approached the international experts to contract with them for their roles in this training.

C. First Training

DW planned the first training for civil society groups on April 15–17, 2020. DW designed the training to increase institutional capacity to receive foreign funding by educating civil society groups on U.S. rules and regulations, implement good management practices for non-governmental organizations (NGOs), and teach best accounting practices and internal controls. The training would also cover the substance of human rights protections by bringing in legal experts to present on human rights bodies generally and share their experiences with strategic litigation and social activism. These experts would include civil society activists from Kosovo who worked on the case of Diana

Kastrati,[1] Togolese civil society activists from Faure Must Go,[2] and members of the LUCHA movement in the Democratic Republic of the Congo.[3]

DW planned the training to take place in Yaoundé, Cameroon at the Hilton Hotel. All participants and experts would also stay at the hotel. DW would organize a "welcome" dinner for participants and trainers to network and build rapport.

Along with its proposal, DW submitted a comprehensive budget for its proposed project. The budget for each training contains a "supplies" line item for the training. In the narrative, "supplies" for the trainings include "assorted office supplies, such as flip charts, pens, folders, handouts, and name tags." In addition, the budget includes a line item for "supplies" in the "Other Direct Costs" category. The narrative budget provides that these costs are for "assorted office supplies for staff, including paper, pens, ink, staplers, and anything necessary to daily operations."

D. COVID-19 in Cameroon and Its Impact on DW's Program

On March 6, 2020, Cameroon reported its first confirmed case of COVID-19. A French national carried the virus to Yaoundé on February 24, 2020. From there, cases increased exponentially. On March 18, 2020, Prime Minister Joseph Dion Ngute closed Cameroon's land, air, and sea borders. Given that the borders were closed, it was no longer feasible for the proposed experts for the first training to travel to Yaoundé in person. Accordingly, DW's Program Manager, Amanda McDowell, contacted Justin Baird, the Agreements Officer Representative (AOR) at USAID, to alert him that the training would need to make certain adjustments.

1. Hana Marku, *For domestic abuse survivors, Kosovo's justice system can be fatal*, OpenDemocracy (June 13, 2016), https://www.opendemocracy.net/en/5050/for-domestic-abuse-survivors-kosovo-s-justice-system-can-be-fatal/ [https://perma.cc/KB7Y-8M7K].

2. Farida Nabourema, *In Togo, There is Nowhere to Hide*, The N.Y. Times (Oct. 6, 2020), https://www.nytimes.com/2020/10/06/opinion/international-world/togo-activists-autocracy.html [https://perma.cc/KP4K-2V3N].

3. *LUCHA*, Front Line Defs., https://www.frontlinedefenders.org/en/organization/lucha [https://perma.cc/Z87L-9Z8N].

The email exchange was as follows:

FROM: Amanda McDowell
TO: Justin Baird, USAID AOR
DATE: March 23, 2020

Dear Justin,

Given the COVID-19 restrictions in Cameroon right now, DW needs to make some adjustments to the first training. Borders are closed and we can't physically bring in our planned experts. Instead, we plan to rent a projector and screen for the experts to give their presentations virtually. In addition, our local staff will now have to give the presentations related to institution building (specifically the sessions on budgeting, US rules and regs, etc.). We also may have some additional costs depending on Cameroon's rules re: covid (e.g., for masks, sanitation, etc.).

Please let me know if this plan works for USAID. I await your guidance on how to proceed.

Sincerely,
Amanda

FROM: Justin Baird, USAID AOR
TO: Amanda McDowell
DATE: March 23, 2020

Amanda,

Thanks for the heads up. I appreciate your efforts to make the training go forward in light of the changing circumstances. Let me follow up with the AO on this and get back to you. In the interim, keep up the great work.

Best,
Justin

FROM: Justin Baird, USAID AOR
TO: Morgan Huston, USAID AO
DATE: March 23, 2020

Hi Morgan,

Please see below exchange from Amanda at DW. I think the remote training should suffice to meet their program targets, especially considering DW field staff will be there to do follow-on meetings.

Also, looks like they may want to purchase some masks/PPE for their field staff/trainings. Is this approved?

Thanks,
Justin

NOTE: Mr. Baird attached the above email exchange from Ms. McDowell in his email to Ms. Huston.

FROM: Morgan Huston, USAID AO
TO: Justin Baird, USAID AOR
DATE: March 25, 2020

Justin,

Agreed, I think having the experts present remotely should be fine. Please inform DW that any PPE purchase needs to comply with the guidance on the USAID website. The FAQs are also helpful. If they have any other questions/ expenses, we can hop on a call to figure out if a budget/program realignment is necessary.

Thanks,
Morgan

FROM: Justin Baird, USAID AOR
TO: Amanda McDowell
DATE: March 25, 2020

Hi Amanda,

Following up on our earlier conversation re: PPE for DW's Cameroon program. You can purchase PPE just make sure it complies with the guidance on the USAID website, e.g., is reasonable, etc. Morgan also noted that the FAQs have some helpful information for grantees.

Let me know if it looks like we need to do a budget/program realignment in light of the Covid restrictions.

Best,
Justin

Upon receiving Mr. Baird's email on March 25, 2020, Ms. McDowell alerted the field staff that USAID had approved the amended plan for the first training. On April 10, 2020, just five days prior to the training date, the Cameroonian government announced seven additional COVID-19 related restrictions. Starting Monday, April 13, 2020, everyone would have to wear a mask in public spaces. Further, the Hilton now required that all events at their meeting spaces would have to provide hand washing stations at the entrances and exits of their meeting rooms. It also charged additional cleaning fees for hotel rooms and conference spaces. DW negotiated a flat fee of $5000 for the conference space and the hotel rooms required for the training.

Ms. McDowell, in concert with the field staff, purchased masks, latex gloves, hand sanitizer, and thermometers for the participants and staff to use while at the training. The field staff solicited price quotes from several manufacturers and retailers. The cheapest option per mask was a manufacturer that required a 500-mask minimum. Because the COVID-19 pandemic appeared that it would last beyond the first training, DW decided to order 500 masks. The field staff purchased large water Gerry cans, hand soap, and plastic barrels to construct hand washing stations at the entrances and exits of the training conference space. The field staff also chose to purchase the masks, gloves, hand sanitizer, and thermometer from a local retailer.

In addition, the field staff executed a contract with a medical contractor for two nurses to come to the training to take temperatures and conduct periodic checks on participants. As part of their contracts, DW paid the nurses a consultant fee and provided them with per diem and the cost of lodging at the

training venue hotel. The nurses would also test participants and DW field staff for COVID-19.

The training was highly successful, and the participants reported that they learned valuable lessons, which they planned to implement. The field staff also set up individualized follow-on meetings for two weeks later with all the participants to check in on their progress and to discuss next steps.

The quarter ended on June 30, 2020. Per the reporting schedule in the grant agreement, DW submitted its quarterly programmatic reports as well as its quarterly financial reports. In the quarterly report, DW included the PPE and thermometers that it purchased for staff in the supplies contained in the "other direct costs" budget category. It listed the PPE for participants, the cost of the COVID-19 tests, and the hand washing stations in the budget line items specifically for the training. DW placed the costs for the nurses under consultant fees, which originally included only the trainers and legal experts.

In reviewing the quarterly report, Mr. Baird saw that DW charged approximately $1500 for the masks, $350 for the hand washing stations, $3500 for the nurses' consultant fees and attendant expenses, $95 for thermometers, and the $5000 flat rate for the additional sanitation for the conference space. He confirmed that such expenses were not included in the grant agreement. Accordingly, Mr. Baird forwarded the report to Ms. Huston, the AO, and recommended disallowing the costs. Ms. Huston agreed with Mr. Baird and sent a letter notifying Ms. McDowell that she would add $10,445 to DW's remaining funds. Effectively, this means that DW spent its own money on the COVID-19 related expenses rather than USAID's funds.

DW asked Ms. Huston to review this decision, arguing that these expenses were reasonable in light of the circumstances. Ms. McDowell also pointed to the email exchange in which Mr. Baird thanked her for moving the training forward. She understood that he was giving her permission to take reasonable steps, which included procuring necessary supplies to move the training forward. Further, DW argued that the line items for "supplies" both in the Other Direct Costs and Activities categories of the budget are illustrative and not exhaustive. Ms. Huston issued a written decision in which she disallowed the costs for the hand washing stations and masks.

Pursuant to USAID's regulations, DW appealed Ms. Huston's decision to USAID's Assistant Administrator, Bureau for Management ("Assistant Administrator") two weeks later. DW submitted Mr. Baird's email as well as a copy of the mask ordinance and the hotel's internal policy requiring hand washing stations. Upon receipt of the appeal, Ms. Huston and the Assistant Administrator forwarded the appeal to the Bureau for Management, Office of Management Policy, Budget, and Performance, Compliance Division ("M/MPBP/Compliance"), which prepares a recommendation for the Assistant Administrator. Thirty days later, M/MPBP/Compliance informed DW that its appeal had been denied. DW appealed the decision to this Court.

Discussion

I. JURISDICTION

DW, as plaintiff, must establish jurisdiction by a preponderance of the evidence. *See Trusted Integration, Inc. v. United States*, 659 F.3d 1159, 1163 (Fed. Cir. 2011) (citing *Reynolds v. Army & Air Force Exch. Serv.*, 846 F.2d 746, 748 (Fed. Cir. 1988)).

The Tucker Act provides this Court with jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States . . . ." 28 U.S.C. § 1491(a)(1). To establish this Court's jurisdiction under the Tucker Act, DW must "identify a substantive right for money damages against the United States separate from the Tucker Act." *Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004). A statute is money-mandating if either: (1) "it can fairly be interpreted as mandating compensation by the Federal government for . . . damages sustained," or (2) "it grants the claimant a right to recover damages either expressly or by implication." *Blueport Co. v. United States*, 533 F.3d 1374, 1383 (Fed. Cir. 2008) (quoting *United States v. Mitchell*, 463 U.S. 206, 216–17 (1983)).

In this case, the government questions this Court's jurisdiction to hear DW's claim. The government asserts that this Court cannot adjudicate performance disputes that do not concern procurement. It further argues that DW's complaint does not pertain to procurement but rather to assistance. DW asserts multiple arguments in opposition to the government's motion to dismiss DW's claim for lack of jurisdiction.

The government argues that this Court does not have jurisdiction over grants disputes because grants are not procurement contracts. Citing the Federal Grants and Cooperative Agreement Act of 1977, 31 U.S.C. §§ 6301–6308, the government argues that procurement contracts are distinguishable from the grant agreement here. According to that Act, the federal government uses procurement contracts to "acquire . . . property or services for [its] direct benefit or use," or when the agency decides that a procurement contract is appropriate in light of the circumstances. *Id.* § 6303. By contrast, the federal government uses grants to "transfer a thing of value [or] . . . to carry out a public purpose." *Id.* § 6304. Because of the fundamentally different purposes of procurement contracts and grants, the government argues that the Tucker Act clearly does not provide this Court with jurisdiction.

A. The Government's Arguments Against Jurisdiction

In arguing against jurisdiction, the government relies heavily on *Rick's Mushroom Serv., Inc. v. United States*, 521 F.3d 1338, 1343 (Fed. Cir. 2008), where the Federal Circuit held that "the Tucker Act is merely a jurisdictional statute and does not create a substantive cause of action [requiring] the plaintiff [to] look beyond the Tucker Act to identify a substantive source of law that created the right to recovery of money damages against the United States." The instrument at issue in *Rick's Mushroom* was a cooperative agreement, where

the parties had agreed to a cost-sharing arrangement. *Rick's Mushroom Serv., Inc*, 521 F.3d at 1343–44. The Federal Circuit explained that the cost sharing agreement did not point to a money-mandating source of law to establish jurisdiction. *Id.*

The government asserts that this Court relied on *Rick's Mushroom* to find that non-traditional contracts, in particular, cooperative agreements, do not presume money damages. In *St. Bernard's Parish Government*, for instance, the government argued that "cooperative agreements, unlike procurement contracts, are not presumed to provide money damages." *St. Bernard Parish Gov't v. United States*, 134 Fed. Cl. 730, 734 (2017), *aff'd on other grounds*, 916 F.3d 987, 989 (Fed. Cir. 2019). This Court found that the instrument at issue was a cooperative agreement, which barred jurisdiction over the claim.

The government further relies on *Bowen v. Massachusetts*, 487 U.S. 879, 909 (1988), where Massachusetts successfully challenged a Medicaid disallowance in district court. The Supreme Court held that the district court properly had jurisdiction through the Administrative Procedure Act (APA) because the state's suit was not for "money damages," as the state was suing for payment owed under the Medicaid grant program rather than a suit for compensatory damages. *Id.* at 909–10. Further, the Supreme Court reasoned that this Court was not adequately situated to provide relief because the suit concerned an issue that would impact the state and federal government's prospective relationship in Medicaid, a complex and ongoing grant program. *Id.* at 904–05. The Supreme Court reasoned that this Court could not provide full relief because it lacked "the general equitable powers of a district court to grant prospective relief." *Id.* at 905. Effectively, the test for this Court's jurisdiction became whether the suit at issue was for money due versus compensatory damages. *Id.* at 909–10. This Court would only have jurisdiction over the latter category.

B. DW's Arguments in Favor of Jurisdiction

DW rebuts the government's reliance on *Rick's Mushroom* by distinguishing between cooperative agreements and grants. Cooperative agreements involve "substantial involvement" by the grantor agency, whereas grants operate more like contracts. A grantee, much like a contractor, has autonomy regarding the implementation of the program. Provided a grantee meets the terms, conditions, and milestones of the grant agreement, the grantor agency takes a "hands-off" approach that is fairly analogous to the arms-length relationship between contractor and government agency.

In addition, DW argues that this Court should look to *Suburban Mortgage Associates v. United States*, 480 F.3d 1116 (Fed. Cir. 2007). There, a commercial mortgage lender brought suit against the U.S. Department of Housing and Urban Development (HUD) under the APA in district court, and the Federal Circuit departed from *Bowen*. *Id.* at 1117, 1125. Instead, the Federal Circuit instructed courts to first examine whether this Court would offer an adequate remedy. *Id.* at 1125. If it would, then jurisdiction is properly in this Court.

Id. The Federal Circuit noted, however, that even if a case were to survive the first question, courts must nonetheless ask "whether there is an adequate remedy available under the Tucker Act in the Court of Federal Claims for the sought-after monetary relief." *Id.* Essentially, where the plaintiff's claim seeks monetary reward from the government, and "a money judgment will give the plaintiff essentially the remedy he seeks—then the proper forum for resolution of the dispute is not a district court under the APA but [this Court] under the Tucker Act." *Id.* at 1126.

The Federal Circuit also distinguished *Bowen* from *Suburban Mortgage* by differentiating disputes between a state and the federal government under a major grant program (e.g., Medicaid) and suits for monetary relief, such as the relief requested in *Suburban Mortgage*. *Id.* at 1127.

We find DW's arguments persuasive. While similar, grants and cooperative agreements create different relationships between the federal agency and the implementing entity (i.e., grantee or recipient of cooperative agreement). Indeed, grants and procurement contracts create analogous dynamics. Both contracts and grants define the parameters of the goods or services to be delivered and, importantly, allow the grantee or contractor significantly more autonomy than that of a cooperative agreement. As discussed below, grantees and contractors also assume the risk in performing the grant or contract. Therefore, the government's argument that *Rick's Mushroom* precludes jurisdiction is unpersuasive.

Further, in the wake of *Suburban Mortgage*, grant suits for monetary claims are properly brought to this Court. Disputes for grants awarded pursuant to major federal grants programs may belong in district court under the APA, but that is not the case here. This case, which is a suit for monetary relief, falls into the former category. This dispute fits within the Tucker Act's separate money-mandating claim because the plaintiff demands monetary relief. Further, this grant arose under a statutorily authorized program involving a cost-reimbursement system pursuant to regulations. USAID awarded this grant pursuant to the Further Consolidated Appropriations Act of 2020, which meets this relatively low standard. As such, this Court has jurisdiction to hear this case.

II. FACTUAL DISPUTE

A. Reasonable Costs

DW argues that the grant agreement budget should be read to allow for the purchase of masks and hand washing stations. It argues that the list of supplies in the narrative budget is illustrative rather than exhaustive. Further, DW argues that the masks and hand washing stations were necessary to comply with the "Do No Harm" provisions in the grant agreement. DW argues that absent these materials, it would have recklessly endangered the health and lives of its participants. In addition, DW relies on guidance published on USAID's website that indicated that generally, the purchase of PPE is allowable.

The government, by contrast, argues that such a large change in the budget is unreasonable and requires express written permission by the AO. It further argues that according to the grant agreement, the proper course for DW would have been to request a budget realignment and programmatic amendment. Further, the government cites USAID's COVID-19 Guidance for Implementing Partners. On its website, USAID indicates that it understands that implementers may incur previously unforeseen costs as a result of the pandemic. It notes, however, that to be allowable, such costs must be "allowable, allocable, and reasonable."

The standard for "reasonable" is "what a prudent person would do under the circumstances that were prevailing at the time the decision was made to incur the cost."[4] USAID's website directs implementers to Title 2 of the Code of Federal Regulations Section 200.404 for additional guidance on what falls within the definition of "reasonable."[5]

While providing that reasonable costs related to COVID-19 safety measures are generally allowable, USAID's COVID-19 guidance expressly states that "[b]efore incurring any additional costs relating to COVID-19, partners must contact their AOR(s)/COR(s)/CO(s) for approval, when required."[6] Further, USAID issued periodic Frequently Asked Questions documents on its website that contain information related to COVID-19. For each question relating to allowable costs, the document advises communicating with the program specific AO or CO about the allowability of specific costs.

While it is admirable that DW was able to adapt to the changed circumstances so quickly and provide this training, we agree that the proper course would have been to ask the AO for a budget realignment or to obtain her express written permission for the additional costs. The "Do No Harm" provision is of a general character and does not give the grantee the authority to spend money as it sees fit. It must be balanced against the public policy interest of protecting taxpayer dollars from being spent according to the whims of grantees and with very little oversight. Accordingly, this Court affirms the disallowances by USAID.

B. Assumption of Risk

In analyzing which party bears the risk of a fixed-price contract, *Pernix Serka Joint Venture v. Department of State*, CBCA 5683, 20-1 BCA ¶ 37,589 is persuasive. In December 2013, the U.S. Department of State (DoS) awarded a fixed-price contract to Pernix Serka Joint Venture (Pernix) "to construct a rainwater capture and storage system in Freetown, Sierra Leone." *Id.* The contract included the cost for the necessary labor, materials, equipment, services,

4. *Covid-19 Guidance for Implementing Partners*, USAID (Aug. 18, 2022), https://www.usaid.gov/work-usaid/resources-for-partners/covid-19-guidance-implementing-partners [https://perma.cc/CN7L-R45P].

5. *Id.*

6. *Id.*

and value added taxes to complete the construction. *Id.* The contract also included an "Excusable Delays" clause, which provided Pernix with flexibility for exigent circumstances such as acts of God or other extreme circumstances outside of its control. *Id.* During performance of the contract, Ebola spread throughout Sierra Leone, which rendered continued performance potentially dangerous for Pernix's personnel. *Id.*

Pernix sought advice from DoS about operating during the Ebola outbreak. DoS provided no guidance other than that Pernix "would need to make its own decisions about the process for completing contract performance under such conditions." *Id.* Absent greater guidance, Pernix chose to demobilize and return later. *Id.* When it returned, Pernix contracted for additional medical services for its employees and later sought an equitable adjustment for those costs. *Id.* DoS refused to grant the equitable adjustment, arguing that Pernix assumed the risks of unexpected costs when it accepted the contract. *Id.*

The Civilian Board of Contract Appeals (CBCA) agreed with DoS and found that a firm, fixed-price contract places the risk on the contractor, who "assumes the risk of unexpected costs not attributable to the government." *Id.* (quoting *Matrix Bus. Sols., Inc. v. Dep't of Homeland Sec.*, CBCA 3438, 15-1 BCA ¶ 35,844). Pernix's contract specifically referenced FAR 52.249-10, which addresses "acts of God, epidemics, and quarantine restrictions." *Id.* The CBCA highlighted that in light of the Excusable Delays clause in the contract, Pernix's attempt to shift the risk onto the government was unavailing. *Id.*

Pernix also asserted that it was entitled to an equitable adjustment because the Ebola outbreak constituted a cardinal or a constructive change to the contract. *Id.* The CBCA rejected Pernix's arguments. *Id.* First, it held that there was no cardinal change in the contract because Pernix's scope of work under the contract remained the same. *Id.* A cardinal change occurs when the government creates a change that is so drastic that it "effectively requires the contractor to perform duties materially different from" those in the original contract. *Krygoski Constr. Co. v. United States*, 94 F.3d 1537, 1543 (Fed. Cir. 1996). Pernix's decision to contract for additional medical services for its staff "did not alter the nature of the thing it had contracted for; the contractor remained obligated to perform at the fixed price." *Pernix*, 20-1 BCA ¶ 37,589. Accordingly, the CBCA held that the Ebola outbreak did not constitute a cardinal change in conditions that would warrant an equitable adjustment. *Id.* Similarly, the CBCA did not find persuasive Pernix's arguments that the Ebola outbreak created a constructive change in its contract. *Id.* A constructive change occurs when the contractor performs work beyond the scope of the contract pursuant to "an informal order or due to the fault of the [g]overnment." *Id.* (quoting *Int'l Data Prods. Corp. v. United States*, 492 F.3d 1317, 1325 (Fed. Cir. 2007)). To prevail on a constructive change claim, "a contractor must show that (1) it performed work beyond the contract requirements and (2) the Government ordered—expressly or implicitly—the contractor to perform additional work." *Id.* (citing *Bell/Heery v. United States*, 106 Fed. Cl. 300, 313 (2012), *aff'd*, 739 F.3d 1324 (Fed. Cir. 2014). Pernix argued

that the additional costs that it incurred in demobilizing and remobilizing its staff as well as the safety measures it implemented should be considered a constructive change made by the government. Pernix's argument failed, however, because it neglected to demonstrate a change to the fixed-price contract. It also did not sufficiently establish that the government ordered Pernix to take these additional precautions.

Similarly, grants impose a burden on the grantee to meet the terms and conditions of the grant. Grantees therefore assume the risk and the responsibility of obtaining AO approval for a grant agreement amendment when one is necessary. Here, DW failed to explicitly get AO approval for the additional expenditures, which were not included in the original grant agreement and which strayed beyond the approved budget. Accordingly, the AO's disallowance of COVID-19 related costs, absent a budget realignment or approval from the AO, was proper.

C. Approval by the AO and AOR

In addition, DW argues that Mr. Baird approved the additional expenditures in his email exchange with Ms. McDowell. DW argues that Ms. McDowell informed Mr. Baird of the situation on the ground and that Mr. Baird knew or should have known that DW would have incurred additional costs. The government argues that regardless of whether Mr. Baird approved the costs, he did not have the necessary authority to do so. Mr. Baird is an Agreements Officer Representative and does not have actual authority to enter into or modify grant agreements. *See* U.S. Agency for Int'l. Dev., ADS Chapter 303: Grants and Cooperative Agreements to Non-Governmental Organizations § 303.3.15(d) (2020). Ms. Huston, as the Agreements Officer, is the only individual with actual authority to modify grant agreements. *Id.*

In support of its argument, the government relies on *Fed. Crop Ins. Corp. v. Merrill*, where the Supreme Court held that the government cannot be bound by the actions of those with apparent authority. 332 U.S. 380, 383–84 (1947). The government relies on the principle that entities who do business with the government must know the scope of the authority for the government officials with whom they interact. *Id.* at 384; *see also Trauma Serv. Grp. v. United States*, 104 F.3d 1321, 1325 (Fed. Cir. 1997). The government also argues that federal spending would be wholly untenable if every government employee had the authority to bind the government to a contract. *See City of El Centro v. United States*, 922 F.2d 816, 820 (Fed. Cir. 1990).

In response, DW argues that the email exchange between Mr. Baird and Ms. Huston, the individual with the authority to modify grant agreements, ratified Mr. Baird's approval of the additional expenditures. Ratification, however, requires that the plaintiff meet an exceedingly high burden. When a government employee enters into an "unauthorized commitment," i.e., an agreement unsupported by actual authority, the agreement can become binding upon ratification. *Gary v. United States*, 67 Fed. Cl. 202, 215–16 (2005); *see also* FAR 1.602-3(a). Ratification occurs when the individual with actual authority is

fully aware of the relevant material facts and "knowingly confirm[s], adopt[s], or acquiesce[s] in the unauthorized action." *Gary*, 67 Fed. Cl. at 215.

We find DW's arguments wholly unpersuasive because Ms. McDowell, at no time, mentioned specific COVID-19 related costs in her email to Mr. Baird. Further, Ms. Huston's emails to Mr. Baird make clear that any PPE or COVID-19 related purchases must comply with USAID's guidance. USAID's guidance clearly states that the grantee should get AO approval for any costs that would significantly deviate from the grant agreement. This email exchange does not meet the high threshold for ratification because Ms. Huston was not fully aware of the material facts (i.e., the significant costs of the PPE) and could therefore not fully confirm, adopt, or acquiesce in their purchase.

For the foregoing reasons, this Court holds that it has jurisdiction over disputes arising from grants disputes and affirms USAID's disallowance of the costs of the PPE.

BRIEF OF CONTRACTOR-APPELLANT, DEMOCRACY WORLDWIDE

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DEMOCRACY WORLDWIDE,

Plaintiff-Appellant,*

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States Court of Federal Claims in 20-782C,
Judge Jedidiah Blake II

TABLE OF CONTENTS

Table of Authorities 195
Cases 195
Statutes 196
Regulations 197
Treatises 197

** Stuart J. Anderson is an Associate Counsel in United States Navy Sea Systems Command, Office of Counsel, currently assigned to the Systems Section, and a candidate for the degree of Master of Studies in Law in Government Procurement at The George Washington University. He can be reached at stuart.j.anderson6.civ@us.navy.mil. Jung Hyoun (Jane) Han is an Associate at Fox Rothschild LLC in the Federal Government Contracts and Procurement group, and a Juris Doctor from The George Washington University, with a concentration in Government Procurement. She can be reached at JaneHan@foxrothschild.com. Ms. Han is admitted only in Maryland. Not admitted to D.C. Bar but being supervised by a licensed D.C. Bar member under Rule 49(c)(8) of the D.C. Court of Appeals.*

This brief was prepared as part of the Procurement Law Moot Court Competition at The George Washington University Law School. The opinions represented in this brief are those of the authors. They do not necessarily represent the views of the Department of the Navy, Department of Defense, or the U.S. Government; nor do they necessarily represent the views of Fox Rothschild LLC.

Other Authorities 198
Statement of Related Cases 198
Jurisdictional Statement 198
Statement of Issues 199
Statement of the Case Setting out Relevant Facts 199
Summary of the Arguments 202
Argument 204
I. Standards of Review 204
A. Jurisdictional Issue 204
B. Disallowance Issue (Factual Dispute) 204
II. The Court of Federal Claims Had Tucker Act Jurisdiction over This Dispute. 204
A. The Court of Federal Claims May Exercise Tucker Act Jurisdiction over Claims for Money Damages in Disputes That Have a Separate "Money-Mandating" Authority 204
B. The Court of Federal Claims Had Jurisdiction over the Dispute at Hand Because the Uniform Guidance Is a Money-Mandating Regulation and the Grant Agreement Is a Money-Mandating Contract 205
1. The Regulations Governing This Grant Agreement, the Uniform Guidance, Are a Money-Mandating Authority. 206
2. The Fact That This Agreement Is a Grant Is No Bar to Tucker Act Jurisdiction, Even After *Rick's Mushroom* 207
3. The Agreement Is a Contract Because It Has All the Elements Required for a Contract with the Federal Government, and It Mandated Claims for Money Damages 209
C. Democracy Worldwide Seeks Money Damages the Court of Federal Claims Could Provide 212
D. Conclusion: The Court of Federal Claims Had Tucker Act Jurisdiction 214
III. The Court of Federal Claims Clearly Erred Because Democracy Worldwide's Purchase of PPE Was Allowable, Allocable, and Reasonable, and the AO Approved the Purchase. 214
A. The COVID-19-Related Purchases Were Allowable, Allocable, and Reasonable Because Democracy Worldwide Acted Prudently When It Took Necessary Measures to Protect Participants from the Pandemic. 214
1. The Cost Is Reasonable Because Democracy Worldwide Acted Prudently Under the Circumstances. 215
2. The Cost of COVID-19-Related Purchases Was Reasonable Because the Purchases Were Necessary to Protect Participants from the Pandemic. 216
3. The Costs Were Allocable to the Grant in Question Because the COVID-19-Related Purchases Were Assignable to the Federal Award. 219
4. If a Cost Is Reasonable and Allocable, It Is Allowable. 220

5. Because the Cost Was Allowable, Reasonable, and Allocable, Democracy Worldwide Was Entitled to Payment Without Additional Approval by the AO................221
6. The Court of Federal Claims Committed Clear Error Because It Relied on the Wrong Test for the Reasonableness of the Costs and the Costs Were Plainly Reasonable.............222

B. The Agreement Officer Ratified the COVID-19-Related Expenses Because She Had Full Knowledge of the Circumstances Surrounding the Action of the AOR....................223

C. The Court of Federal Claims' Reliance on *Pernix* Was Misplaced Because the Grant Was More Like a Cost-Reimbursement Contract Than a Fixed-Price Contract.............225

Conclusion..227

TABLE OF AUTHORITIES

CASES

Anchorage v. United States, 119 Fed. Cl. 709 (2015) 205, 208

Anderson v. United States, 344 F.3d 1343 (Fed. Cir. 2003) 203, 209, 210

Baley v. United States, 942 F.3d 1312 (Fed. Cir. 2019) 204

Blueport Co. v. United States, 533 F.3d 1374 (Fed. Cir. 2008) 204

Bowen v. Massachusetts, 487 U.S. 879 (1988) 202, 212, 213

Buder v. Sartore, 774 P.2d 1383 (1989) 215, 216

City of El Centro v. United States, 922 F.2d 816 (Fed. Cir. 1990) 210

Emery Worldwide Airlines, Inc. v. United States, 264 F.3d 1071 (Fed. Cir. 2001) 204

Fed. Crops Ins. Corp. v. Merill, 332 U.S. 380 (1947) 223

Fisher v. United States, 402 F.3d 1167 (Fed. Cir. 2005) 205

Gary v. United States, 67 Fed. Cl. 202 (2005) 223

Holmes v. United States, 657 F.3d 1303 (Fed. Cir. 2011) 210, 211, 212

House v. United States, 99 Fed. Cl. 342 (2011) 206

Ind. Mich. Power Co. v. United States, 422 F.3d 1369 (Fed. Cir. 2005) 204

Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin., 525 F.3d 1299 (Fed. Cir. 2008) 205, 206

John R. Sand & Gravel Co. v. United States, 457 F.3d 1345 (Fed. Cir. 2006) 204

Leonardo v. United States, 63 Fed. Cl. 552 (2005) 223, 224

Loveladies Harbor, Inc. v. United States, 27 F.3d 1545 (Fed. Cir. 1994) 205, 208

Pernix Serka Joint Venture v. Dep't of State, CBCA 5683, 20-1 BCA ¶ 37589 202, 211, 226, 227

Rick's Mushroom Serv., Inc., v. United States, 521 F.3d 1338 (Fed. Cir. 2008) 202, 204, 208, 209

Silver Buckle Mines v. United States, 117 Fed. Cl. 786 (2014) 206, 207

Sonoma Apt. Assocs. v. United States, 939 F.4d 1293 (Fed. Cir. 2019) 204

St. Bernard Parish Gov't v. United States, 134 Fed. Cl. 730 (2017) 211

Suburban Mortg. Assocs. v. United States, 480 F.3d 1116 (Fed. Cir. 2007) *passim*

Texas v. United States, 537 F.2d 466 (Ct. Cl. 1976). 205

Todd v. United States, 386 F.3d 1091 (Fed. Cir. 2004) 205

United States v. Connolly, 716 F.2d 882 (Fed. Cir. 1983) 205

United States v. Mitchell, 445 U.S. 535 (1980) 204

United States v. Mitchell, 463 U.S. 206 (1983) 206

United States v. Testan, 424 U.S. 392 (1976) 204, 205, 206, 212

United States v. White Mountain Apache Tribe, 537 U.S. 465 (2003) 206, 207, 212

United States v. Winstar Corp., 518 U.S. 839 (1996) 209, 210

Winstar Corp. v. United States, 64 F.3d 1531 (Fed. Cir. 1995) 210

Wolfing v. United States, 144 Fed. Cl. 516 (2019) 206

STATUTES

5 U.S.C. §§ 701–706 212

5 U.S.C. § 702 212, 213

5 U.S.C. § 704 212, 213

28 U.S.C. § 1491 *passim*

30 U.S.C. § 28f 206

31 U.S.C. §§ 6301–6308 208

31 U.S.C. § 6305 211

37 U.S.C. § 204 206

37 U.S.C. § 403 206

41 U.S.C. §§ 7101–7109 208

REGULATIONS

2 C.F.R. pt. 200 207

2 C.F.R. § 200.100 206

2 C.F.R. § 200.101 207

2 C.F.R. § 200.305 207, 221

2 C.F.R. § 200.344 207

2 C.F.R. § 200.403 *passim*

2 C.F.R. § 200.404 *passim*

2 C.F.R. § 200.405 214, 219, 220

2 C.F.R. § 200.407 214, 221, 222

43 C.F.R. § 3834.11 206

48 C.F.R. § 1552.211-73 225

FAR 16.104 225

FAR 16.202-1 225, 226

FAR 16.301-1 203, 225, 226

FAR 16.306 225, 227

TREATISES

Restatement (Second) of Contracts §§ 18, 22, 24 (1981) 209

Restatement (Second) of Contracts § 71 (1981) 210

Agency Guidance

USAID, Grants and Cooperative Agreements to Non-Governmental Organizations (2020) 223

Memorandum from Russell T. Vought, Dir., Off. of Mgmt. and Budget, to the Heads of Exec. Dep'ts and Agencies (Jan. 05, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/01/M-21-11.pdf 226

Novel Coronavirus (COVID-19), USAID (Mar. 21, 2020), https:/www.usaid.gov/coronavirus [http://web.archive.org/web/20200321032153] 217

U.S. Gov't Accountability Off., GAO-12-331G, Government Auditing Standards (2018) 218

OTHER AUTHORITIES

Advice on the Use of Masks in the Community, During Home Care, and in Health Care Settings in the Context of COVID-19, WHO (Mar. 19, 2020), https://apps.who.int/iris/bitstream/handle/10665/331493/WHO-2019-nCoV-IPC_Masks-2020.2-eng.pdf?sequence=14&isAllowed=y 218

Amindeh Blaise Atabong, *In Cameroon, Face Masks Are Compulsory—But Unaffordable for Many*, Mail & Guardian (Apr. 18, 2020), https://mg.co.za/article/2020-04-18-in-cameroon-face-masks-are-compulsory-but-unaffordable-for-many 217, 218

Cost of Living in Yaounde, Numbeo, https://www.numbeo.com/cost-of-living/in/Yaounde-Cameroon (last visited Mar. 5, 2021) 218

Fadela Chaib, *Shortage of Personal Protective Equipment Endangering Health Workers Worldwide*, WHO (Mar. 02, 2020), https://www.who.int/news/item/03-03-2020-shortage-of-personal-protective-equipment-endangering-health-workers-worldwide 217

How COVID-19 Spreads, CDC (last updated Oct. 28, 2020), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-COVID-spreads.html. 216

How Much Water Do You Use at Home?, U.S. Geological Surv. (last visited Mar. 5, 2021), https://water.usgs.gov/edu/activity-percapita.php 218

Scott S. Sheffler, *A Reasoned Case for a "Grant Disputes Act,"* 47 Pub. Cont. L.J. 209 (2018) 207

STATEMENT OF RELATED CASES

Pursuant to Rule 47.5 of the Federal Circuit Rules of Practice, Democracy Worldwide is unaware of another appeal in or from the same civil action or proceeding in the lower court or body that was previously before this Court or another appellate court. Counsel are unaware of any related cases pending in this Court or another court that will directly affect or be directly affected by the Court's decision in this appeal.

JURISDICTIONAL STATEMENT

On June 30, 2020, Democracy Worldwide submitted its quarterly report, which included $10,445 in reimbursable costs for the purchase of personal protective equipment, nurses, and cleaning services, and which the government Agreement Officer (AO) disallowed. Appx6. Democracy Worldwide appealed the AO decision to USAID's Bureau for Management, Office of Management

Policy, Budget, and Performance, Compliance Division Assistant Administrator ("Assistant Administrator"), who denied the appeal. *Id*. On September 30, 2020, Democracy Worldwide filed a suit for money damages arising from the government's breach of contract under 28 U.S.C. § 1491(a)(1) and the money-mandating provisions of the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards, (Uniform Guidance). Appx1,6–7. The Court of Federal Claims subsequently found that it had jurisdiction over the dispute and affirmed the disallowance of the costs. Appx9,12. Democracy Worldwide timely filed an appeal to this Court.

STATEMENT OF ISSUES

I. Whether the Court of Federal Claims properly found it had jurisdiction under the Tucker Act over this claim for money damages arising from a grant agreement, because the regulations governing the grant and the grant itself, as a contract, are both money-mandating sources of law.

II. Whether the Court of Federal Claims clearly erred in affirming the disallowance of Democracy Worldwide's COVID-19-related costs when these costs were reasonable, no AO approval was required, and in any case the AO ratified the purchase.

STATEMENT OF THE CASE SETTING OUT RELEVANT FACTS

Democracy Worldwide is a Human Rights Organization. Appx1. For many years, Democracy Worldwide has advocated for human rights across the globe. Appx1. Specifically, Democracy Worldwide has experience supporting human rights defenders in Central and West Africa. Appx1.

In November 2019, the Center of Excellence on Democracy, Human Rights, and Governance, which is part of the United States Agency for International Development (USAID), published a Notice of Funding Opportunity (NOFO), announcing that USAID had $8,000,000 for human rights programming awards to increase protection for human rights defenders in Central Africa. Appx1,13. The NOFO stated that the solicitation was designed to further USAID's 2013 Democracy, Human Rights, and Governance Strategy. Appx14. The NOFO also provided that USAID would award grants or cooperative agreements based on the technical nature of the application proposal. Appx16. USAID received seven applications, including Democracy Worldwide's proposal to support human rights defenders in Cameroon, which received a near perfect score from USAID. Appx1.

Democracy Worldwide proposed a program to support human rights defenders in Cameroon by strengthening the normative frameworks and institutional architecture that would help Cameroon respect its human rights obligations and by building the capacity of civil society actors to promote those rights, monitor compliance, and demand accountability. Appx1–2. Democracy

Worldwide proposed to advance this goal by training civil society actors to mobilize communities. Appx2. Democracy Worldwide would host quarterly training sessions and follow up throughout the year with individual meetings. Appx2.

Along with its proposal, Democracy Worldwide submitted a comprehensive budget for its proposed project. Appx3. The budget for each training session contained a "supplies" line item for the training, which, according to the narrative budget, included "assorted office supplies, such as flip charts, pens, folders, handouts, and name tags." Appx3. The budget also included a line item for "supplies" in the "Other Direct Costs" category, which, according to the narrative budget, included "assorted office supplies for staff, including paper, pens, ink, staplers, and anything necessary to daily operations." Appx3.

In January 2020, USAID awarded Democracy Worldwide $2,000,000 for its proposal. Appx2. The resulting grant agreement contained Democracy Worldwide's project proposal and budget as an appendix. Appx2. The agreement stated that parties were bound by the submitted proposal and required Democracy Worldwide to submit proposed changes to the Agreement Officer (AO) for approval prior to any amendment. Appx2.

Upon award, Democracy Worldwide started to carry out its proposal. Appx2. Democracy Worldwide planned to have its first training for civil society groups on April 15–17, 2020. Appx2. Democracy Worldwide's field staff in Cameroon invited civil society actors in country to the training program, and Democracy Worldwide's headquarters invited international experts. Appx2. Democracy Worldwide designed the program to equip local civil society actors to receive foreign aid funding by teaching U.S. rules and regulations, best accounting practices, and management practices. Appx2.

Democracy Worldwide planned to conduct the training at the Hilton Hotel in Yaoundé, Cameroon, where all participants and experts would stay. Appx2. To help build rapport, Democracy Worldwide also organized a welcome dinner for all participants and trainers. Appx2.

Twelve days after the country's first confirmed case of COVID-19, Prime Minister Joseph Dion Ngute closed Cameroon's borders on March 18, 2020. Appx3. With the borders closed, Democracy Worldwide concluded it was no longer possible for the proposed international experts to attend the first training session in person. Appx3.

On March 23, 2020, Amanda McDowell, Democracy Worldwide's Program Manager, contacted Justin Baird, the Agreement Officer Representative (AOR) at USAID, to alert him that Democracy Worldwide would have to make adjustments to the program. Appx3. In her email, Ms. McDowell wrote that Democracy Worldwide planned to rent a projector and screen so the experts could give their presentations virtually. Appx3. Democracy Worldwide planned for local staff to give presentations related to institution-building in person. Appx3. Ms. McDowell also noted that "[w]e also may have some additional costs depending on Cameroon's rules re: covid (e.g., for masks, sanitation, etc.)." Appx3.

That same day, Mr. Baird responded to Ms. McDowell, telling her that he would follow up with Morgan Huston, the AO at USAID. Appx4. Mr. Baird forwarded the email from Ms. McDowell, opining that the remote training would still meet the program targets and asking, "Also, looks like they may want to purchase some masks/PPE for their field staff/trainings. Is this approved?" Appx4.

On March 25, 2020, Ms. Huston responded to Mr. Baird that she agreed that the remote presentations would meet the program targets and asked him:

> Please inform [Democracy Worldwide] that any PPE purchase needs to comply with the guidance on the USAID website. The FAQs are also helpful. If they have any other questions/expenses, we can hop on a call to figure out if a budget/program realignment is necessary.

Appx4. Mr. Baird responded to Ms. McDowell, telling her that she could purchase PPE, so long as it complied with the guidance on the USAID website, and directing her to the FAQs on that website. Appx5. According to the USAID Frequently Asked Questions issued in March 2020, USAID directed program partners to contact the CO/AO or COR/AOR for changes incurred as a result of COVID-19 that would have a significant impact on the budget. Appx129. The USAID FAQs also emphasized that reasonable costs in relation to safety measures were generally allowable and that USAID would consider any additional proposed costs on a case-by-case basis, provided that such costs are "allowable, allocable, and reasonable." Appx130.

On April 10, just five days before the training date, the Cameroonian government issued new COVID-19 restrictions, requiring everyone to wear a mask in public spaces, effective April 13, 2020. Appx5. In addition, Hilton required Democracy Worldwide to provide hand washing stations at the entrances and exits of the meeting room and charged $5,000 for the conference space. Appx5.

Accordingly, Democracy Worldwide purchased masks, latex gloves, hand sanitizer, and thermometers for the participants and staff to use during the training. Appx5. Before purchasing the masks, Democracy Worldwide solicited quotes from several manufacturers and retailers and chose the option with the lowest per mask price, which was a manufacturer that required a minimum purchase of 500 masks. Appx5. Because the pandemic was forecast to last beyond the first training, Democracy Worldwide purchased the masks in bulk for $1,500. Appx5–6. To construct hand washing stations, Democracy Worldwide purchased large water jerry cans, hand soap, and plastic barrels at $350. Appx5–6. Democracy Worldwide charged $3,400 for nurses' consultant fees and attendant expenses, $95 for thermometers, and $5,000 for additional sanitation for the conference space. Appx6.

Masks	$1500
Jerry cans, hand soap, and plastic barrels	$350
Nurses' consultant fees and expenses	$3,400
Thermometers	$95
Additional sanitation	$5,000

Democracy Worldwide provided this information in the quarterly financial reports included in the program reports. Appx6. Democracy Worldwide listed the PPE and thermometers purchased for staff under the "other direct costs" budget category and listed the PPE for participants, the cost of the COVID-19 tests, and the hand washing stations in the budget line items for the first training. Appx6.

The AO excluded COVID-19 PPE from allowable costs because those expenses were not included in the grant agreement. Appx6. Two weeks later, as required by USAID regulation, Democracy Worldwide appealed to USAID's Bureau for Management. Appx6. The Bureau denied the appeal. Appx6.

Democracy Worldwide appealed the decision to the Court of Federal Claims. Appx6. The Court of Federal Claims found that it had jurisdiction over the dispute and affirmed USAID's disallowance of the costs of the PPE. Appx12. Addressing USAID's argument that it lacked Tucker Act jurisdiction after this Court's decision in *Rick's Mushroom Services v. United States*, 521 F.3d 1338 (Fed. Cir. 2008) and *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the court below found that it had jurisdiction because grants were analogous to procurement contracts rather than cooperative agreements, where grantees and contractors alike enjoy significant autonomy and bear significant performance risk. Appx7–9.

In affirming USAID's disallowance of the costs, the court below found that Democracy Worldwide was required to get express written approval for the additional costs. Appx10. The court also found that, like contractors in a fixed-price contract, grantees bear the risk and thus the responsibility to obtain approval for required amendments. Appx11. The court below relied on the Civilian Board of Contract Appeals opinion in *Pernix Serka Joint Venture v. Department of State*, CBCA 5683, 20-1 BCA ¶ 37,589, which found that a fixed-price contractor bore the cost risk associated with an Ebola outbreak. Appx10–11. Finally, the court rejected Democracy Worldwide's argument that the AOR had approved the modification to the grant agreement because the AOR lacked the responsibility to do so, and it likewise rejected the argument that the AO had ratified the modification because the evidence did not show that the AO was fully aware of the material facts, namely the cost, and could therefore not fully confirm, adopt, or acquiesce in the purchase. Appx12.

Democracy Worldwide now appeals to the U.S. Court of Appeals for the Federal Circuit.

SUMMARY OF THE ARGUMENTS

The Court of Federal Claims properly exercised Tucker Act Jurisdiction over the dispute between Democracy Worldwide and USAID. The Court of Federal Claims may exercise Tucker Act jurisdiction over claims against the government for money, provided that some separate source of

authority—Constitution, law, regulation, or contract—provides the substantive right to money damages. *See* 28 U.S.C. § 1491(a)(1). The dispute need not arise from a procurement contract, as Courts have long accepted Tucker Act jurisdiction over other classes of agreement. *See id.*

Turning to the case at hand, the Court of Federal Claims properly found that it had jurisdiction under the Tucker Act. First, the regulations governing the grant, the Uniform Guidance, are money-mandating. *See* 2 C.F.R. §§ 200.1–200.521. The fact that this agreement is a grant agreement does not alter the accuracy of this conclusion. *See* 28 U.S.C. § 1491(a)(1). Further, the agreement in question is a contract. *See Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003). Finally, Democracy Worldwide seeks money damages, a form of remedy that the Court of Federal Claims could provide. *See Suburban Mortg. Assocs. v. United States*, 480 F.3d 1116, 1121 (Fed. Cir. 2007). Because the dispute between Democracy Worldwide and USAID met the long-standing test for Tucker Act Jurisdiction, the Court of Federal Claims correctly found that it had jurisdiction and provided Democracy Worldwide the appropriate forum to dispute the disallowance of the reasonable costs it incurred furthering USAID's mission under the threat of a pandemic.

The Court of Federal Claims clearly erred when it denied the cost reimbursement for masks, hand washing stations, nurses' consultant fees and attendant expenses, thermometers, and additional sanitation for the conference space. The cost is allowable if it is reasonable, allowable, and allocable. 2 C.F.R. §§ 200.403–07. The prior approval by the AO is required only if Democracy Worldwide is amending the grant agreement, or when the cost would have a significant impact on the budget. Appx2,129.

In the case at bar, the Court of Federal Claims clearly erred when it decided that Democracy Worldwide did not follow a proper procedure. First, Democracy Worldwide purchased COVID-19 PPE in accordance with the USAID guidance because the PPE satisfied "allowable," "allocable," and "reasonable" standards under the regulations. *See* Appx130. Prior approval by the AO was not required when PPE cost did not have a significant impact on the entire budget. *See* Appx129. Moreover, Democracy Worldwide did not amend the grant agreement when it purchased the PPE according to the budget agreement, which included "anything necessary to daily operations." *See* Appx2. Second, even if the costs required prior approval, the AOR approved, and the AO ratified the purchase when she ratified the spending with knowledge of material facts surrounding the AOR's actions. *See* Appx3–5. Finally, the government bore the risk of increased cost because the grant agreement was more like a cost-reimbursement contract than a fixed-price contract. *See* FAR 16.301-1.

Based on the foregoing reasons, we respectfully ask this Court to affirm the part of the Court of Federal Claims' decision finding it had jurisdiction and reverse the part of the decision disallowing the costs of the COVID-19 related purchases in the amount of $10,445.

ARGUMENT

I. STANDARDS OF REVIEW

A. Jurisdictional Issue

Subject matter jurisdiction is a question of law, which this Court reviews de novo. *Rick's Mushroom Serv.*, 521 F.3d at 1342–43; *Emery Worldwide Airlines v. United States*, 264 F.3d 1071, 1078 (Fed. Cir. 2001). Findings of fact relating to jurisdictional issues, however, are reviewed for clear error. *Blueport Co. v. United States*, 533 F.3d 1374, 1378 (Fed. Cir. 2008); *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1353 (Fed. Cir. 2006), *aff'd*, 552 U.S. 130 (2008).

B. Disallowance Issue (Factual Dispute)

This Court reviews a decision of the Court of Federal Claims de novo for errors of law and for clear error in findings of fact. *See Baley v. United States*, 942 F.3d 1312, 1330 (Fed. Cir. 2019) (quotations omitted). A factual finding is clearly erroneous when the reviewing court is "left with a definite and firm conviction that a mistake has been committed." *Sonoma Apt. Assocs. v. United States*, 939 F.3d 1293, 1297–98 (Fed. Cir. 2019) (quoting *Ind. Mich. Power v. United States*, 422 F.3d 1369, 1373 (Fed. Cir. 2005) (cleaned up)).

II. THE COURT OF FEDERAL CLAIMS HAD TUCKER ACT JURISDICTION OVER THIS DISPUTE.

A. The Court of Federal Claims May Exercise Tucker Act Jurisdiction over Claims for Money Damages in Disputes That Have a Separate "Money-Mandating" Authority.

The Court of Federal Claims may exercise Tucker Act jurisdiction over a claim for money damages arising from agreements other than procurement contracts, so long as a separate source of law mandates money damages. The Tucker Act gives the Court of Federal Claims jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort." 28 U.S.C. § 1491(a)(1). These claims must be for "presently due money damages from the United States." *United States v. Testan*, 424 U.S. 392, 398 (1976) (quoting *United States v. King*, 395 U.S. 1, 3 (1969)). This grant of jurisdiction includes a waiver of sovereign immunity. *See* 28 U.S.C. § 1491(a)(1); *Suburban Mortg. Assocs. v. United States*, 480 F.3d 1116, 1121 (Fed. Cir. 2007). The Tucker Act does not, however, establish a substantive, enforceable right for monetary damages. *United States v. Mitchell*, 445 U.S. 535, 538 (1980) ("The Tucker Act is 'only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages.'") (quoting *Testan*, 424 U.S. at 398).

As a result, "because the Tucker Act itself does not create a substantive cause of action, 'in order to come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages.'" *Jan's Helicopter Serv. v. FAA*, 525 F.3d 1299, 1306 (Fed. Cir. 2008) (quoting *Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005) (en banc in relevant part)). Therefore, the plaintiff must provide a separate source of law, which may come from either a "money-mandating constitutional provision, statute, or regulation that has been violated, or an express or implied contract with the United States." *Loveladies Harbor v. United States*, 27 F.3d 1545, 1554 (Fed. Cir. 1994) (citing *United States v. Connolly*, 716 F.2d 882, 885 (Fed. Cir. 1983) (en banc), *cert. denied*, 465 U.S. 1065 (1984)). "In the parlance of Tucker Act cases, that source must be 'money-mandating.'" *Fisher*, 402 F.3d at 1172 (citations omitted). The party seeking to establish Tucker Act jurisdiction has the burden of persuasion. *Todd v. United States*, 386 F.3d 1091, 1094 (Fed. Cir. 2004) (citing *Testan*, 424 U.S. at 398)).

The U.S. Supreme Court, this Court, and the Court of Federal Claims have long accepted that the Tucker Act grants jurisdiction over claims against the government arising from agreements that are not traditional procurement contracts, including grant agreements. As early as 1976, the Court of Claims found that it had Tucker Act jurisdiction over some grant disputes. *Texas v. United States*, 537 F.2d 466, 467–68 (Ct. Cl. 1976). This Court in *Suburban Mortgage* held that the Tucker Act provided jurisdiction over a claim for money damages under an insurance agreement issued to the appellant by the Department of Housing and Urban Development. *Suburban Mortg. Assocs.*, 480 F.3d at 1126. More recently, the Court of Federal Claims found it had Tucker Act jurisdiction over a putative "cooperative agreement" between a city and the federal government. *Anchorage v. United States*, 119 Fed. Cl. 709, 713 (2015).

The disagreements have lain in whether the Tucker Act allowed jurisdiction over a particular agreement. And the disagreements have focused on the nature of the agreement in question, generally, as is the case here, whether there was a separate money-mandating authority. Because of this, in the decision on appeal the Court of Federal Claims correctly applied the ordinary principles of Tucker Act jurisdiction to this particular grant to find that it could exercise jurisdiction. *See* Appx7–9.

B. *The Court of Federal Claims Had Jurisdiction over the Dispute at Hand Because the Uniform Guidance Is a Money-Mandating Regulation and the Grant Agreement Is a Money-Mandating Contract.*

The Court of Federal Claims had Tucker Act jurisdiction over Democracy Worldwide's claim against USAID. First, the regulations governing the administration of the grant agreement are a money-mandating source of law. *See infra* Section II.B.1. That the agreement is not a procurement contract and this Court's decision in *Rick's Mushroom* are irrelevant. *See infra* Section II.B.2.

Finally, the agreement, by virtue of its status as an enforceable contract, also serves as a money-mandating source of law. *See infra* Section II.B.3.

1. The Regulations Governing This Grant Agreement, the Uniform Guidance, Are a Money-Mandating Authority.

The regulations governing Democracy Worldwide's grant agreement are money-mandating. These regulations spell out USAID's obligations to pay agreed-upon and allowable costs of performance with specific and mandatory language that implies a right to recover damages for government failure to satisfy the obligations. This satisfies the requirements for a "money-mandating" source of law. *See Jan's Helicopter Serv.*, 525 F.3d at 1306 ("[T]o come within the jurisdictional reach and the waiver of the Tucker Act, a plaintiff must identify a separate source of substantive law that creates the right to money damages.") (quotation omitted).

A source of law is money-mandating if it "can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained." *United States v. Mitchell*, 463 U.S. 206, 216–17 (1983) (quoting *Testan*, 424 U.S. at 400). Moreover, a statute can be interpreted as money-mandating if it grants the claimant a right to recover damages either "expressly or by implication." *Id.* at 217 n.16 (quotation omitted). "It is enough, then, that a statute creating a Tucker Act right be reasonably amenable to the reading that it mandates a right of recovery in damages." *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 473 (2003). "While the premise to a Tucker Act claim will not be lightly inferred, a fair inference will do." *Id.* (quotation omitted). The case at hand involves money-mandating regulations rather than a statute, but the Tucker Act itself makes no distinction. *See* 28 U.S.C. § 1491(a)(1) (granting this Court jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department . . . .").

Examples of money-mandating statutes and regulations include: 37 U.S.C. § 204 (2018), a military pay statute, *House v. United States*, 99 Fed. Cl. 342, 347 (2011), *aff'd*, 473 F. App'x 901 (Fed. Cir. 2012); 30 U.S.C. § 28f(a)(1) (2018) and 43 C.F.R. § 3834.11 (2022), a statute and regulation requiring the holders of mine patents to pay a fee to the Bureau of Land Management (BLM), *Silver Buckle Mines v. United States*, 117 Fed. Cl. 786, 791–92 (2014); and 37 U.S.C. § 403 (2018), a military housing allowance statute, *Wolfing v. United States*, 144 Fed. Cl. 516, 520–21 (2019).

The grant agreement between Democracy Worldwide and USAID was administered under regulations that can be fairly read as mandating a right by Democracy Worldwide to recover damages for improperly disallowed expenses. This grant was administered under the Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards ("Uniform Guidance"), Title 2, Code of Federal Regulations, Subtitle A, Chapter II, Part 200. *See* 2 C.F.R. § 200.100(a)(1) (establishing "uniform administrative requirements, cost principles, and audit requirements");

see also 2 C.F.R. § 200.101(a)(1) (applying Part 200 to "Federal agencies that make Federal awards to non-Federal entities" and "all costs related to Federal awards."). The Uniform Guidance establishes the government's obligation to pay. *See* 2 C.F.R. § 200.305(b)(6) ("payments for allowable costs by non-Federal entities must not be withheld at any time during the period of performance"). Likewise, the Uniform Guidance mandates payment for allowable costs at the closeout of the grant. 2 C.F.R. § 200.344(c) ("The Federal awarding agency or pass-through entity must make prompt payments to the non-Federal entity for costs meeting the requirements in Subpart E [relating to cost principles] of this part under the Federal award being closed out."). Further, upon closeout, the agency "must make a settlement for any upward or downward adjustments to the Federal share of costs." 2 C.F.R. § 200.344(e). Finally, the Uniform Guidance provides definitions of reasonable costs and allocable costs. 2 C.F.R. §§ 200.404–05. Lest there remains any doubt, "[t]hroughout [Part 200] when the word 'must' is used it indicates a requirement." 2 C.F.R. § 200.101(b)(1).

The Uniform Guidance lays out in sufficient detail the government's payment obligations that it creates an implied right of a grantee to damages for improper disallowance—it is certainly "reasonably amenable" to that interpretation. *See White Mt. Apache Tribe*, 537 U.S. at 473; *see also Silver Buckle Mines*, 117 Fed. Cl. at 791 (finding that a statute and regulation requiring holders of mining patents to pay a fee to BLM served as a money-mandating authority implying the patent-holders' right to sue BLM for money damages under the Tucker Act); Scott S. Sheffler, *A Reasoned Case for a "Grant Disputes Act*," 47 Pub. Cont. L.J. 209, 241–42, 242 n. 284 (2018) (noting that most grants meet the "relatively low standard" for Tucker Act jurisdiction because "all grants arise under statutorily authorized programs involving a cost-reimbursement system set forth in regulations," and citing as examples 2 C.F.R. pt. 200, Subpart E, and 2 C.F.R. § 200.305). As the Court of Federal Claims identified, "this grant arose under a statutorily authorized program involving a cost reimbursement system pursuant to regulations." Appx9. That suffices for the Uniform Guidance to serve as a money-mandating source of law. This Court should find that there is a money-mandating authority and affirm the jurisdictional decision by the Court of Federal Claims.

2. The Fact That This Agreement Is a Grant Is No Bar to Tucker Act Jurisdiction, Even After *Rick's Mushroom*.

The fact that the dispute arose from a grant agreement does not defeat Court of Federal Claims jurisdiction. As noted above, this Court has properly found that Tucker Act jurisdiction can attach to agreements other than procurement contracts. Indeed, the Court of Federal Claims has long accepted that it can, in fact, exercise jurisdiction over grant disputes. This Court's decision in *Rick's Mushroom* has not altered that legal landscape.

In the brief before the Court of Federal Claims, the government argued, because of the fundamentally different purposes of contracts and grants, the Tucker Act does not provide jurisdiction over the grants. Appx7. The

government's brief cited the Federal Grants and Cooperative Agreement Act of 1977 (FGCAA), 31 U.S.C. §§ 6301–6308 (2018), and its explanation of the different purposes served by contracts and grants to support this argument. Appx7. This argument fails to grapple with the fact that Tucker Act jurisdiction does not require the existence of a contract. *Anchorage v. United States*, 119 Fed. Cl. 709, 713 (2015) (requiring "*either* a money-mandating constitutional provision, statute, or regulation, *or* an express or implied contract with the United States") (emphasis added). In its absence, a money-mandating constitutional provision, statute, or regulation will suffice. *See Loveladies Harbor*, 27 F.3d at 1554 (recognizing a claim under the Fifth Amendment as supporting Tucker Act jurisdiction).

Similarly, the government's brief also argued that cooperative agreements do not presume money damages and thus do not fall under Tucker Act jurisdiction. Appx7–8. That argument relied on the assertion that the grant agreement in this case resembled a cooperative agreement more than a contract. That assertion, in turn, was based on this Court's decision in *Rick's Mushroom*, in which this Court found that Tucker Act jurisdiction did not exist over the cooperative agreement in question. *See Rick's Mushroom Services v. United States*, 521 F.3d 1338, 1344 (Fed. Cir. 2008). That reliance, however, was misplaced.

This Court's opinion in *Rick's Mushroom* distinguishes contracts and cooperative agreements, but that distinction does not control here. First, that distinction related to Rick's attempt to rely on the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101–09 (2018), as a source of the substantive right to recover money necessary to establish Tucker Act jurisdiction under 28 U.S.C. § 1491(a)(2). *Rick's Mushroom Serv.*, 521 F.3d at 1344 ("Rick's attempts to rely on the CDA as the source of its substantive right to recover money damages and to establish jurisdiction under 28 U.S.C. § 1491(a)(2)"); *see also* 28 U.S.C. § 1491(a)(2) ("The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978 . . . .").

Moreover, this Court rejected the argument that the CDA provided the right to money damages for reasons inherent in the CDA, not the Tucker Act. *Rick's Mushroom Serv.*, 521 F.3d at 1343–44 ("The CDA, however, applies only to express or implied government contracts for procurement of goods or services." (citing 41 U.S.C. § 602(a)). When this Court did address § 1491(a)(1), it found only that § 1491(a)(1) did not provide jurisdiction because Rick's could not "point to a money-mandating provision that establishes jurisdiction for an implied-in-fact contract." *Id.* at 1344. Notably, that conclusion made no reference to the fact that the agreement in question was a cooperative agreement.[1]

1. That portion, in its entirety:

> On appeal, Rick's argues that the Court of Federal Claims overlooked the fact that its breach of contract claim was based, in part, on an implied-in-fact contract. A claim to a breach of an implied-in-fact contract with the government

Thus, *Rick's Mushroom* does not control this case. Unlike Rick's Mushroom Service, Democracy Worldwide can point to money-mandating regulations. *See supra* Part II.B.1. As a result, the agreement here is readily distinguishable from the agreement in *Rick's Mushroom* as regards § 1491(a)(1). Further, Democracy Worldwide has never sought relief under the CDA, so this Court's application of § 1491(a)(2) in *Rick's Mushroom* is beside the point. *Rick's Mushroom* also provides no guidance on identifying whether a regulation is money-mandating, and other decisions by this Court provide clearer and more comprehensive explanations of what makes an agreement a contract than *Rick's Mushroom*. *See infra* Part II.B.3. Thus, the cooperative-agreement-versus-contract discussion in *Rick's Mushroom* does not bear on the outcome of this case.

3. The Agreement Is a Contract Because It Has All the Elements Required for a Contract with the Federal Government, and It Mandated Claims for Money Damages.

Democracy Worldwide's grant agreement with USAID was also a contract. It contains all the elements required for a contract with the federal government—unambiguous offer and acceptance, mutual intent, consideration, and actual authority in the government's agent. Further, that the agreement is a grant agreement does not prevent it from being a contract. As a contract, it is presumed to mandate money damages and thus establish Tucker Act jurisdiction.

To recover against the government for an alleged breach of contract, there must be a binding agreement in the first place. An agreement binding upon the government requires four elements: "(1) mutuality of intent to contract; (2) lack of ambiguity in offer and acceptance; (3) consideration; and (4) a government representative having actual authority to bind the United States in contract." *Anderson*, 344 F.3d at 1353 (citations omitted).[2] This Court has relied on the formulation of the Second Restatement of Contracts to define the necessary mutuality of intent. *See id.* (citing Restatement (Second) of Contracts §§ 18, 22, 24 (1981)).

> fails for similar reasons. Rick's does not point to a money-mandating provision that establishes jurisdiction for an implied-in-fact contract under 28 U.S.C. § 1491(a)(1), and Rick's cannot establish jurisdiction under 28 U.S.C. § 1491(a)(2) because Rick's has not alleged an implied-in-fact contract for procurement of goods or services which would come within the CDA. Moreover, this court may only find an implied-in-fact contract when there is no express contract. Here, Rick's and the government entered into an express contract.

Rick's Mushroom Serv., 521 F.3d at 1344 (quotations and citations omitted).

2. In *Anderson*, a *Winstar* case, this Court found that the series agreements between the Federal Home Loan Bank Board and investors that the Bank Board encouraged to invest in failing savings and loans in exchange for various kinds of favorable treatment constituted a contract. *Anderson*, 344 F.3d at 1346; *see also United States v. Winstar Corp.*, 518 U.S. 839, 860–66 (1996).

A contract with the Government need not be a procurement contract. *See id.* (identifying the elements of a contract with the government without reference to procurement, the Federal Acquisition Regulation, or the CDA). The Supreme Court has accepted this Court's determination that the series of agreements between the Federal Home Loan Bank Board (Bank Board) and investors that the Bank Board encouraged to invest in failing savings and loans in exchange for various kinds of favorable treatment in oversight constituted an enforceable contract. *See United States v. Winstar Corp.*, 518 U.S. 839, 861–66 (1996) (declining to address directly the question whether a contract existed between the government and respondent-investors, but accepting "the Court of Appeals' conclusion that 'it was the intention of the parties to be bound by the accounting treatment for goodwill arising in the merger.'") (quoting *Winstar Corp. v. United States*, 64 F.3d 1531, 1544 (Fed. Cir. 1995)). The party seeking enforcement bears the burden of establishing the existence of an enforceable contract. *City of El Centro v. United States*, 922 F.2d 816, 820–21 (Fed. Cir. 1990) (citation omitted).

As noted above, the Tucker Act gives the Court of Federal Claims jurisdiction over "any claim against the United States founded . . . upon any express or implied contract with the United States." 28 U.S.C. § 1491(a)(1). But because the Tucker Act does not provide the cause of action, the contract must provide it—a matter that is presumed, but not assumed. *See Holmes v. United States*, 657 F.3d 1303, 1314 (Fed. Cir. 2011) ("[W]hen a breach of contract claim is brought in the Court of Federal Claims under the Tucker Act, the plaintiff comes armed with the presumption that money damages are available, so that normally no further inquiry is required."). Whether a contract mandates money damages is analyzed under the same framework as any other potentially money-mandating source of law. *Id.* at 1309 (asking whether the other source of law "can fairly be interpreted as mandating compensation by the Federal Government" (quoting *United States v. Navajo Nation*, 556 U.S. 287, 290 (2009) (internal quotations omitted)).

The agreement in this case was a contract between Democracy Worldwide and the government. The succession of (1) request for proposals (NOFO) by USAID, (2) proposal by Democracy Worldwide with program information and proposed budget, and (3) award by USAID incorporating Democracy Worldwide's proposal and budget demonstrates a mutuality of intent to enter a binding agreement and a lack of ambiguity in offer and acceptance. *See* Appx1–3; *see also Anderson*, 344 F.3d at 1353, 1355 (requiring, for a binding agreement with the government, mutuality of intent to contract and lack of ambiguity in offer and acceptance). There is no question or suggestion that the AO lacked the authority to enter the agreement. *See* Appx1–3.

Though it requires more explanation, the agreement in this case also contains the consideration for both parties required for a contract. *See Anderson*, 344 F.3d at 1353 (requiring consideration for a binding agreement). Consideration is, generally, a promise bargained for with a return performance or promise of performance. Restatement (Second) of Contracts § 71 (1981).

Democracy Worldwide received a promise of $2,000,000 to support its programming. *See* Appx1–2. For USAID's part, the agency received Democracy Worldwide's agreement to perform programming that Democracy Worldwide created in response to USAID's request for proposals to further USAID's 2013 Democracy, Human Rights and Governance Strategy. *See* Appx1–2; *see also* Appx14. Therefore, each party had the consideration required for the existence of a contract, and the agreement was thus a contract.

The Court of Federal Claims has expressed the principle that the consideration provided to the government must be more than merely incidental; but even considering that concept, the agreement at hand was based on consideration. In *St. Bernard Parish Government v. United States*, 134 Fed. Cl. 730 (2017), that court found that a cooperative agreement, under which the federal government would reimburse the parish government for costs associated with dredging after Hurricane Katrina, was not a contract in part because the benefit to the federal government—the existence of unobstructed waterways in St. Bernard Parish—did not go beyond a "mere incidental benefit." *Id*. at 735–736 (quoting *Anchorage*, 119 Fed. Cl. at 713). That benefit was too indirect, and the agreement really had as its purpose the "transfer of a thing of value to the local government from the executive agency." *Id.* (citing 31 U.S.C. § 6305).

While the rule is sound, given the definition of "consideration," the rule leads to a different outcome in the case at hand. In *St. Bernard*, the waterways and the need to dredge them existed before federal involvement, and the parish would have needed no incentive or encouragement to dredge them—even if it needed the money. *See id.* at 736. Here, by contrast, Democracy Worldwide's programming did not exist and would have not existed but for USAID's solicitation for proposals and agreement to fund it. *See* Appx1–2. Further, USAID did not solicit the programming or agree to fund it to benefit the party to whom the money was given, as in *St. Bernard*, but rather to further its own programs. *Compare* Appx1–2, *with St. Bernard*, 134 Fed. Cl. at 732–33 (noting that the Cooperative Agreement required St. Bernard Parish to contract for the dredging and the agency to provide 100% of the actual costs).

Any argument that, because the direct benefit went to Cameroon, it could not also adhere to the United States is a misunderstanding of the principles applied in *St. Bernard*. In *St. Bernard*, the federal government promised money to the parish for projects of which the parish was a direct beneficiary. *See St. Bernard*, 134 Fed. Cl. at 736. In this case, the federal government transferred money to Democracy Worldwide, which cannot plausibly be said to be the direct beneficiaries of its own work. If Cameroon is considered the direct beneficiary, it received no money, making a comparison to *St. Bernard* inapt. It makes no sense to take Cameroon's benefit into account when determining whether there is mutual consideration between USAID and Democracy Worldwide.

Given that a contract exists, Democracy Worldwide enjoys a presumption that it is entitled to money damages for improper disallowance. *See Holmes*, 657 F.3d at 1314 (noting in a breach of contract claim, "the presumption that

money damages are available, so that normally no further inquiry is required"). Here, USAID awarded Democracy Worldwide money under a grant agreement that contained as terms the project proposal and the budget. Appx2. The fact that USAID agreed to pay Democracy Worldwide according to the budget for the performance of agreed-upon tasks allows Democracy Worldwide to rest on this presumption. *See Holmes*, 657 F.3d at 1314 ("[W]hen a breach of contract claim is brought in the Court of Federal Claims under the Tucker Act, the plaintiff comes armed with the presumption that money damages are available, so that normally no further inquiry is required."); *see also White Mt. Apache Tribe*, 537 U.S. at 473 ("While the premise to a Tucker Act claim will not be lightly inferred, a fair inference will do."). Thus, the grant agreement provides an adequate basis for Tucker Act jurisdiction.

C. Democracy Worldwide Seeks Money Damages the Court of Federal Claims Could Provide.

Finally, Democracy Worldwide seeks money damages, relief the Court of Federal Claims can adequately provide. "The Tucker Act both waives sovereign immunity for, and grants the Court of Federal Claims exclusive jurisdiction over, actions for money damages . . . ." *Suburban Mortg. Assocs.*, 480 F.3d at 1121 (citing 28 U.S.C. § 1491(a)(1)); *see also Testan*, 424 U.S. at 400 (noting that Tucker Act jurisdiction was limited to a claim for money damages, whether based on statute or contract). The Supreme Court's decision in *Bowen v. Massachusetts*, 487 U.S. 879, 909–10 (1988), which held that not all claims for money were claims for money damages of the kind barred by the Administrative Procedures Act (APA), does not control in this case brought under the Tucker Act.[3]

In *Bowen*, the Supreme Court faced the question of whether "a federal district court has jurisdiction to review a final order of the Secretary of Health and Human Services refusing to reimburse a State for a category of expenditures under its Medicaid program." *Bowen*, 487 U.S. at 882. The Court held that the federal district court, under the APA, properly had jurisdiction over a suit by the State of Massachusetts against the Secretary of Health and Human Services over the latter's disallowance of certain costs for reimbursement under Medicaid. *Id.* at 886–88, 909.

The Supreme Court based this conclusion, in part, on the observation that the relief granted by the district court was not in the form of a "money judgment" as it was a simple reversal of the HHS Secretary's decision disallowing costs, and that even if the suit were for money owed under the Medicaid grant program, it was a claim for specific relief rather than for

3. The (APA provides a waiver of sovereign immunity for actions challenging agency action. 5 U.S.C. §§ 701–06. The APA, however, excludes from its jurisdiction any claim for money damages and claims for which adequate remedy is available elsewhere. 5 U.S.C. §§ 702, 704. As a result, cases that can be heard under the Tucker Act will not be heard under the Administrative Procedures Act. *See Suburban Mortg. Assocs.*, 480 F.3d at 1128 ("Because an adequate remedy is available under the Tucker Act in the Court of Federal Claims, this case cannot proceed in the district court under the APA.").

compensatory damages, where the APA, 5 U.S.C. § 702, does not permit jurisdiction over claims for money damages. *Id.* at 909–10. Declaratory and injunctive relief are not money damages, even if payment results, and in this case the money at issue was either an "overpayment," "underpayment," or "restitution," not damages. *Id.* at 893. The Supreme Court also reasoned that the Court of Federal Claims was not adequately situated to provide relief because (1) the suit concerned an issue impacting the state and federal governments' complex and ongoing relationship in the Medicaid grant program, and (2) the Court of Federal Claims could not provide full relief because it lacked "the general equitable powers of a district court to grant prospective relief." *Id.* at 904–05.

This Court in *Suburban Mortgage* then tackled the challenge of mapping Tucker Act jurisdiction onto the variety of characterizations of suits for money identified in *Bowen*. This Court's solution lay in the APA's provision of overlapping exclusions to APA jurisdiction, including both claims for money damages and claims for which adequate remedy is available elsewhere. *Suburban Mortg. Assocs.*, 480 F.3d at 1122 (citing 5 U.S.C. §§ 702, 704). Because, as this Court noted, the fact the Court of Federal Claims could provide adequate relief under the Tucker Act sufficed to bar APA jurisdiction, disputes could be resolved simply by asking whether the Court of Federal Claims could provide adequate remedy. *Id.* at 1128.

This approach also avoided the problem of distinguishing the various kinds of money claim. In *Suburban Mortgage*, this Court declined to analyze the claim in question to distinguish between a claim for damages and a claim for money owed for the purposes of Tucker Act jurisdiction. *Id.* at 1126. Instead, it adopted a more straightforward test: "if a money judgment will give the plaintiff essentially the remedy he seeks—then the proper forum for resolution of the dispute is not a district court under the APA but the Court of Federal Claims under the Tucker Act." *Id.* Nothing more is required. *Id.*

This is consistent with *Bowen* too. As this Court noted, quoting *Bowen*, "[t]he jurisdiction of the Claims Court, however, is not expressly limited to actions for 'money damages,' . . . whereas that term does define the limits of the exception to § 702." *Id.* at 1125 n.13 (quoting *Bowen*, 487 U.S. at 900 n.31) (alterations in original). Further, *Bowen* was based on the complicated, ongoing relationship between state and federal government in the Medicaid program. *Id.* at 1127. In sum, this Court laid out boundaries for Tucker Act jurisdiction that are consistent with *Bowen* but unaffected by the Supreme Court's identification of different types of money claims.

Under the guiding precedent of *Suburban Mortgage*, Democracy Worldwide seeks money damages. It seeks a "monetary award," and a money judgment will give Democracy Worldwide the remedy sought. *See id.* at 1126 ("[W]hen the plaintiff's claims, regardless of the form in which the complaint is drafted, are understood to be seeking a monetary reward from the Government, then, for the reasons explained, a straightforward analysis calls for determining whether the case falls within the jurisdiction of the Court of Federal Claims."). Democracy Worldwide's claim meets the test for Tucker Act jurisdiction.

D. Conclusion: The Court of Federal Claims Had Tucker Act Jurisdiction

For these reasons, the Court of Federal Claims correctly found that it had jurisdiction over this dispute. Both the Uniform Guidance and the grant agreement itself are "money-mandating" authorities, and Democracy Worldwide seeks monetary relief the Court of Federal Claims could provide. Because this dispute falls under the lower court's Tucker Act jurisdiction, this Court should affirm that part of its decision.

III. THE COURT OF FEDERAL CLAIMS CLEARLY ERRED BECAUSE DEMOCRACY WORLDWIDE'S PURCHASE OF PPE WAS ALLOWABLE, ALLOCABLE, AND REASONABLE, AND THE AO APPROVED THE PURCHASE.

This Court should reverse the decision of the Court of Federal Claims affirming USAID's denial of the costs Democracy Worldwide incurred purchasing masks, hand washing stations, nurses' consultant fees and attendant expenses, thermometers, and additional sanitation for the conference space because these costs were plainly allowable, reasonable, and allocable. *See infra* Part III.A. When a cost is allowable, reasonable, and allocable, the grant agreement does not require approval by the AO as a condition for its allowance. *See* 2 C.F.R. § 200.407 (2020). Even if approval was required for allowance of the costs, the AOR did approve the purchase, and the AO ratified it when she confirmed the spending with knowledge of the material facts surrounding the AOR's actions. *See infra* Part III.B. Finally, the USAID bore the risk of a cost increase because this grant agreement was a cost-reimbursement contract. *See infra* Part III.C. The Court below clearly erred when it failed to recognize that the costs were allowable, allocable, and reasonable, and that the purchases were approved by the AOR and ratified by the AO.

A. The COVID-19-Related Purchases Were Allowable, Allocable, and Reasonable Because Democracy Worldwide Acted Prudently When It Took Necessary Measures to Protect Participants from the Pandemic.

The Court of Federal Claims committed clear error when it found that the purchase of masks, hand washing stations, nurses' consultant fees and attendant expenses, thermometers, and additional sanitation for the conference space was unreasonable. Under the relevant regulations, grantees may be reimbursed for costs that are allowable, allocable, and reasonable. S*ee* Appx9; *see also* 2 C.F.R. §§ 200.403-05 (2022). The purchases were reasonable because Democracy Worldwide acted prudently following the USAID guidelines, and the COVID-19-related purchases were necessary to protect the lives of humanitarian grants participants and to comply with the mandate of the Cameroonian government. There is no question that Democracy Worldwide's COVID-19-related expenses were allocable under the standard provided in 2 C.F.R. § 200.405. And a cost that is both reasonable and allocable is allowable. 2 C.F.R. § 200.403. Finally, the Court of Federal Claims committed clear error by finding that the costs were unreasonable because Democracy

Worldwide failed to get AO approval, when that was not required and did, in fact, occur. *See* Appx3–5.

1. The Cost Is Reasonable Because Democracy Worldwide Acted Prudently Under the Circumstances.

Democracy Worldwide acted prudently to purchase COVID-19 PPE, sanitation, and nursing services when it consulted with the AOR and complied with the USAID guidelines. A cost is reasonable if it does not exceed the cost that "would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost." 2 C.F.R. § 200.404. The U.S. Government Accountability Office Government Auditing Standards state that "abuse is behavior that is deficient or improper when compared with behavior that a prudent person would consider reasonable and necessary business practice given the facts and circumstances, but excludes fraud and noncompliance with provisions of laws, regulations, contracts, and grant agreements." Gov't Accountability Off., GAO-18-568G, United States Government Auditing Standards § 6.23 (2018). In *Buder v. Sartore*, 774 P.2d 1383 (Colo. 1989) (en banc), the Supreme Court of Colorado provided an informative insight in explaining the application of the prudent-person standard.

In *Buder*, the court noted that under section 15-1-304, 6 C.R.S. (1973), the general prudent person rule governing fiduciaries applies when

> [i]n acquiring . . . property for the benefit of others, fiduciaries shall . . . exercise the judgment and care under the circumstances then prevailing, which men of prudence, discretion, and intelligence exercise in the management of their own affairs, not in regard to speculation but in regard to the permanent disposition of their funds, considering the probable income as well as the probable safety of their capital.

Buder, 774 P.2d at 1385. The court held that Buder abused his discretion when he invested substantial amounts of entrusted money without careful calculation. *Id.* at 1386–87.

In the case at hand, Ms. McDowell, Manager at Democracy Worldwide, acted as a prudent person. When the COVID-19 numbers spiked in Cameroon, Ms. McDowell promptly asked Mr. Baird, the AOR, for guidance on changing the training program to match the changing circumstances. Appx4. This was consistent with the instructions in USAID's Frequently Asked Questions issued in March 2020. Appx129. The guide said, "[f]or those additional costs incurred as a result of COVID-19 that would have a significant impact on the budget, the partner must contact the CO/AO or COR/AOR." Appx129. When the AOR replied to Ms. McDowell saying, "[y]ou can purchase PPE just make sure it complies with the guidance on the USAID website, e.g., is reasonable, etc.," Ms. McDowell complied with the USAID guidance by following the "prudent person" standard under 2 C.F.R. § 200.404. Appx4–6. Ms. McDowell prudently followed what USAID directed program managers to do, and she did not abuse her power as a program manager when she

consulted with appropriate authority from USAID. Appx4–6; *see also* GAO-18-568G, *supra*, § 6.23 ("[A]buse is behavior that is deficient or improper when compared with behavior that a prudent person would consider reasonable and necessary business practice.").

Moreover, Democracy Worldwide conducted careful calculation prior to the purchase of COVID-19 PPE. *See* Appx5. Democracy Worldwide solicited price quotes from several manufactures and elected to purchase the cheapest option. Appx5; *see also Buder*, 774 P.2d at 1385 (requiring fiduciaries to "exercise the judgment and care under the circumstances then prevailing"). Therefore, Democracy Worldwide acted prudently under the circumstances and the COVID-19 PPE purchase was reasonable.

2. The Cost of COVID-19-Related Purchases Was Reasonable Because the Purchases Were Necessary to Protect Participants from the Pandemic.

A cost is reasonable if it does not exceed the cost that "would be incurred by a prudent person under the circumstances prevailing at the time the decision was made to incur the cost." 2 C.F.R. § 200.404. The reasonableness of a given cost depends on a number of factors:

(a) whether the cost is of a type generally recognized as ordinary and necessary for the operation of the non-Federal entity or the proper and efficient performance of the Federal award;

(b) The restraints or requirements imposed by such factors as: sound business practices; arm's-length bargaining; Federal, state, local, tribal, and other laws and regulations; and terms and conditions of Federal award;

(c) Market prices for comparable goods or services for the geographic area;

(d) Whether the individuals concerned acted with prudence in the circumstances considering their responsibilities to the non-Federal entity, its employees, where applicable its students or membership, the public at large, and the Federal Government;

(e) Whether the non-Federal entity significantly deviates from its established practices and policies regarding the incurrence of costs, which may unjustifiably increase the Federal award's cost.

Id.

Here, it is clear that the cost of masks, hand washing stations, nurses' consultant fees and attendant expenses, thermometers, and additional sanitation fees were reasonable under the terms of 2 C.F.R. § 200.404. First, the use of masks and sanitations was recognized as necessary for the operation of the non-Federal entity, as Democracy Worldwide was obliged under the terms of the grant agreement to avoid causing harm to the attendees. *See* Appx9 (recognizing the grant agreement contains a "Do No Harm" provision). COVID-19 is highly contagious and most commonly spreads through respiratory droplets during close contact. *How COVID-19 Spreads*, CDC (Aug. 11, 2022), https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/how-COVID-spreads.html [https://perma.cc/GPG2-ADQ4]. The Center for Disease Control and Prevention warns that "[t]he best way to prevent illness is to avoid

being exposed to this virus. You can take steps to slow the spread . . . . Cover your mouth and nose with a mask when around others. Wash your hands often with soap and water. Routinely clean and disinfect frequently touched surfaces." *Id.* Democracy Worldwide purchased masks, hand washing stations, nurse-consultants, and additional sanitation for the conference space to protect participants and to prevent the spread of the virus. *See* Appx5–6.

Moreover, as soon as the pandemic began, USAID announced its new assistance program to provide PPE—including masks—to affected countries. *Novel Coronavirus (COVID-19)*, USAID, https:/www.usaid.gov/coronavirus (last visited Nov. 30, 2022) [https://perma.cc/N869-BCRA]. The newly announced assistance regarding the PPE implies that USAID recognized masks and sanitation related supplies as necessary. *See id.* Thus, Democracy Worldwide acted reasonably because "the cost [was] of a type generally recognized as ordinary and necessary for the operation of the non-Federal entity or the proper and efficient performance of the Federal award." *See* 2 C.F.R. § 200.404(a).

Second, Democracy Worldwide purchased PPE because the Cameroonian government required everyone to wear a mask in public spaces. Appx5. It would have been illegal for participants to appear in public space without masks. Appx5. Moreover, the Hilton mandated the hand sanitizing stations at the entrances and exits of their meeting rooms and charged additional cleaning fees for sanitizations. Appx5. Therefore, Democracy Worldwide acted reasonably by following "restraints or requirements imposed by such factors as: sound business practices; arm's-length bargaining; Federal, state, local, tribal, and other laws and regulations; and terms and conditions of Federal award." *See* 2 C.F.R. § 200.404(b).

Third, the prices Democracy Worldwide paid were reasonable in light of market prices for comparable goods or services for the geographic area. Democracy Worldwide solicited price quotes from retailers to purchase masks in bulk because the pandemic forecasted to last beyond the first training. Appx5. When it found the cheapest option per mask, Democracy Worldwide decided to order the minimum required. Appx5.

When the COVID-19 pandemic began, the entire globe experienced mask shortages. *Shortage of Personal Protective Equipment Endangering Health Workers Worldwide*, WHO (Mar. 3, 2020), https://www.who.int/news/item/03-03-2020-shortage-of-personal-protective-equipment-endangering-health-workers-worldwide [https://perma.cc/SL73-E83C]. When the Cameroonian government mandated wearing masks in public spaces, people in Cameroon also suffered from mask shortages. Amindeh Blaise Atabong, *In Cameroon, Face Masks are Compulsory – But Unaffordable for Many*, Mail & Guardian (Apr. 18, 2020), https://mg.co.za/article/2020-04-18-in-cameroon-face-masks-are-compulsory-but-unaffordable-for-many/ [https://perma.cc/YB8A-N9BN]. If masks were available in Cameroon, the prices were up to around $1.80 per mask. *Id.* Therefore, purchase of 500 masks for $1,500 was reasonable because the Cameroonian government gave short notice in midst

of the global mask shortages and the pandemic forecasted to last for more than a short-term period. *See* Appx5; *see also* 2 C.F.R. § 200.404(c).

Moreover, the price of hand washing stations was reasonable compared to goods sold in Cameroon. On average, people use one gallon (3.78L) of water to wash their hands. *How Much Water Do You Use at Home?*, U.S. Geological Surv., https://water.usgs.gov/edu/activity-percapita.php (last visited Nov. 30, 2022) [https://perma.cc/T8H6-CP3C]. Considering the circumstances, around 200L of water would have been required. 1.5L of water costs around $0.6 in Yaoundé, Cameroon. *Cost of Living in Yaounde*, Numbeo, https://www.numbeo.com/cost-of-living/in/Yaounde-Cameroon (last visited Nov. 30, 2022) [https://perma.cc/2RSP-QLM4]. Democracy Worldwide spent $350 in total including large water jerry cans, hand soap, and plastic barrels. Appx5–6. Therefore, the cost of hand sanitizing stations was reasonable for the market price in Cameroon. *See* 2 C.F.R. § 200.404(c).

While nurses' consultant fees and attendant expenses, thermometer and other additional sanitation costs might not have been comparable at the current market price, the price for COVID-19-related products spiked during Democracy Worldwide's first training. Amindeh Blaise Atabong, *supra*. Also, with additional precautions and risks imposed to nurses during the pandemic, taking extra precautions was a reasonable practice. *Advice on the Use of Masks in the Community, During Home Care, and in Health Care Settings in the Context of COVID-19*, WHO (Mar. 19, 2020), https://apps.who.int/iris/bitstream/handle/10665/331493/WHO-2019-nCoV-IPC_Masks-2020.2-eng.pdf?sequence=14&isAllowed=y [https://perma.cc/4H3J-U8NP]. Therefore, given the circumstances, the cost for nurses' consultant fees and attendant expenses, thermometers, and additional sanitation was reasonable. *See* 2 C.F.R. § 200.404(c).

Fourth, Democracy Worldwide acted with prudence in the circumstances considering its responsibilities to the non-Federal entity, its employees, the public at large, and the Federal Government. It was prudent for Democracy Worldwide to purchase masks in addition to setting up sanitation stations and paying for additional cleaning and nursing services during the COVID-19 outbreak, as recommended by public health authorities. *Advice on the Use of Masks in the Community, During Home Care, and in Health Care Settings in the Context of COVID-19*, *supra*. The World Health Organization advised that wearing a medical mask is "one of the prevention measures that can limit the spread of certain respiratory diseases, including COVID-19. However, the use of mask alone is insufficient to provide an adequate level of protection, and other measures should also be adopted." *Id.* It was Democracy Worldwide's responsibility to protect the health and safety of staff and participants. *See* Appx9 (recognizing the grant agreement contains a "Do No Harm" provision). Therefore, Democracy Worldwide acted prudently when it took these preventative measures. *See* 2 C.F.R. § 200.404(d); *see also* Appx5–6.

Democracy Worldwide's spending also did not unjustifiably increase the cost of the award spending. When the Cameroonian government closed the

border, Democracy Worldwide transformed the program to a hybrid-training plan. Appx4–5. Some participants came on site, while others participated virtually. Appx4–5. From the modification, Democracy Worldwide saved the cost for food, travel, and stays. Appx2,5. Therefore, the PPE cost did not significantly increase the overall cost of the original budget. *See* 2 C.F.R. § 200.404.

3. The Costs Were Allocable to the Grant in Question Because the COVID-19-Related Purchases Were Assignable to the Federal Award.

Finally, the costs were allocable to the federal award because the COVID-19-related expenses were necessarily incurred for the performance of the award. "A cost is allocable to a particular Federal award or other cost objective if the goods or services involved are chargeable or assignable to that Federal award or cost objective in accordance with relative benefits received." 2 C.F.R. § 200.405(a).

> Th[e] standard [of allocability] is met if the cost: (1) is incurred specifically for the Federal award; (2) benefits both the federal award and other work of the non-Federal entity and can be distributed in proportions that may be approximated using reasonable methods; and (3) is necessary to the overall operation of the non-Federal entity and is assignable in part to the Federal award in accordance with principles in this subpart.

2 C.F.R. § 200.405(a)(1)–(3). Democracy Worldwide incurred COVID-19-related cost specifically for executing the federal award. On March 13, 2020, when Prime Minister Ngute closed Cameroon's border, Democracy Worldwide could no longer invite experts to the country. Appx5. Instead of having everyone at the training site, Democracy Worldwide decided to modify the program by conducting a hybrid-mode training. Appx3–5. Both the AO and AOR approved the modified hybrid-training. Appx4–5. For those who attended in-person, Cameroon's government and Hilton required participants to wear masks and use additional sanitization. Appx5. Through careful safety measures Democracy Worldwide implemented, the first training ended highly successfully. Appx5. Therefore, Democracy Worldwide incurred the purchase of COVID-19 PPE specifically to execute a Federal contract. *See* 2 C.F.R. § 200.405(a)(1) (the standard of allocability is met "if the cost is incurred specifically for the Federal award.").

Because Democracy Worldwide has not used these COVID-19-related purchases for any grant or work other than the grant in question, these costs are allocable. The expenses related to sanitation stations, cleaning, and nursing services were entirely related to the first training. *See* Appx5–6. Democracy Worldwide purchased more masks than were needed strictly for the first training, but that was done to save money per unit, and Democracy Worldwide reasonably and correctly predicted that it would need the masks for the remaining trainings under this grant. *See* Appx5. This satisfies the remaining requirements for the allocability of these costs. *See* 2 C.F.R. § 200.405. Therefore, the COVID-19-related purchases were allocable.

4. If a Cost Is Reasonable and Allocable, It Is Allowable.

A cost is allowable when it is reasonable and allocable, and otherwise complies with regulations and accounting standards not at issue in this case. The decision from the Court of Federal Claims does not dispute accounting standards, terms of the contract, or other limitations. *See* Appx9–11. Therefore, because the cost was reasonable and allocable, the cost was allowable.

The Uniform Guidance lists factors affecting allowability of costs. 2 C.F.R. § 200.403. Costs must meet the following general criteria to be allowable under federal grant awards:

> (a) Be necessary and reasonable for the performance of the Federal award and be allocable thereto under these principles.
>
> (b) Conform to any limitations or exclusions set forth in these principles or in the Federal award as to types or amount of cost item.
>
> (c) Be consistent with policies and procedures that apply uniformly to both federally-financed and other activities of the non-Federal entity.
>
> (d) Be accorded consistent treatment. A cost may not be assigned to a Federal award as a direct cost if any other cost incurred for the same purpose in like circumstances has been allocated to the Federal award as an indirect It.
>
> (e) Be determined in accordance with generally accepted accounting principles (GAAP), except, for state and local governments and Indian tribes only, as otherwise provided for in this part.
>
> (f) Not be included as a cost or used to meet cost sharing or matching requirements of any other federally-financed program in either the current or a prior period. See also § 200.306(b).
>
> (g) Be adequately documented. See also §§ 200.300 through 200.309 of this part.
>
> (h) Cost must be incurred during the approved budget period. The Federal awarding agency is authorized, at its discretion, to waive prior written approvals to carry forward unobligated balances to subsequent budget periods pursuant to § 200.308(e)(3).

Id.

The only question is whether the costs were reasonable. *See* 2 C.F.R. § 200.403(a) ("Be necessary and reasonable for the performance of the Federal award and be allocable thereto under these principles."). As explained above, the costs were allocable, *see* Part III.A.3, *supra*. Neither the government in its brief to the Court of Federal Claims nor the court challenged this contention. *See* Appx9–10. None of the other matters are in dispute. *See* Appx9–11. There is no question that the costs did not conform with the limitation or exclusions of cost items, 2 C.F.R. § 200.403(b), that the costs were inconsistent with policies and procedures that apply uniformly to both federally-financed and other activities of the non-Federal entity, 2 C.F.R. § 200.403(c), that the costs were not accorded consistent treatment within the budget, 2 C.F.R. § 200.403(d), that they were not determined under appropriate accounting principles, 2 C.F.R. § 200.403(e), that they were included as a cost-sharing or requirement

2 C.F.R. § 200.403 (f), or that they were inadequately documented, 2 C.F.R. § 200.403(g), or that they were not incurred during the approved budget period, 2 C.F.R. § 200.403(h). *See* Appx9–11. Here, Democracy Worldwide's spending on COVID-19-related purchases was reasonable and allocable. *See supra* Part III.A.1–2; *see also supra* Part III.A.3. Therefore, the cost was allowable.

5. Because the Cost Was Allowable, Reasonable, and Allocable, Democracy Worldwide Was Entitled to Payment Without Additional Approval by the AO.

Additional approval by the AO was not necessary when Democracy Worldwide purchased masks, hand washing stations, nurses' consultant services, thermometers, and additional sanitation for the conference space. First, the Uniform Guidance required only that the costs be allowable, reasonable, and allocable for payment. Appx9; *see also*, 2 C.F.R. § 200.305 ("[P]ayments for allowable costs by non-Federal entities must not be withheld at any time during the period of performance."). Prior written approval is not required. 2 C.F.R. § 200.407 ("The absence of prior written approval on any element of cost will not, in itself, affect the reasonableness or allocability of that element, unless prior approval is specifically required for allowability.").

Prior approval was not specifically required for allowability. The approval by the AO was unnecessary because USAID COVID-19 guidelines require approval when the cost of COVID-19 PPE has a significant impact on the budget. Appx129. The USAID FAQ provided that "reasonable costs in relation to safety measures are generally allowable." Appx132. In addition, the FAQ stated that "[b]efore incurring any additional costs relating to COVID-19, partners must contact their AOR(s)/COR(s)/ and AO(s)/CO(s) for approval when required." Appx129. USAID specifically clarified that "when required" applies if "those additional costs incurred as a result of COVID-19 . . . would have a significant impact on the budget." Appx129. Thus, when there is insignificant impact on the budget, the grantee does not necessarily need approval by the AO for purchasing COVID-19-related purchases.

It is clear that the COVID-19 PPE costs did not have a significant impact on the budget. USAID awarded Democracy Worldwide $2,000,000 to implement its proposed training program. Appx2. The COVID-19 PPE costs totaled $10,445. Appx6. The cost only portioned 0.5% of the entire award budget. *See* Appx2,6. Therefore, considering the scale of the program and its budget, the PPE costs were insignificant. *See* Appx129. Because the cost of COVID-19 PPE purchase was minimal compared to the entire budget amount, prior approval by the AO was not necessary.

Furthermore, Democracy Worldwide did not need approval from the AO because Democracy Worldwide did not amend the agreement when it purchased the COVID-19 PPE. According to the grant agreement, "[t]o amend the grant agreement, [Democracy Worldwide] would need to submit a budget or program realignment to the AO for prior approval." Appx2. The budget provides that the costs include "anything necessary to daily operation." Appx3.

During the COVID-19 pandemic, masks, handwashing stations, nurses, and other sanitary supplies were "necessary to daily operation." *See id*. This is not an amendment because Democracy Worldwide was authorized to make such purchases under the agreement as originally written. *See id*. Therefore, because COVID-19 PPE was necessary for daily operation and because Democracy Worldwide did not amend the agreement, approval by the AO was not required.

In conclusion, the Court of Federal Claims clearly erred when it disallowed the reimbursement costs for the COVID-19 PPE. The PPE cost should be allowable because the COVID-19 PPE costs were reasonable, allocable, and allowable. The PPE protected the safety of program participants from the pandemic, and the overall cost was insignificant compared to the entire award amount. *See* Appx2, 5–6. Democracy Worldwide took reasonable steps to purchase the PPE to execute the grants award and the PPE, sanitation, and nursing services helped the training proceed successfully. *See* Appx2, 5–6. For all the reasons stated above, the PPE costs were allowable.

6. The Court of Federal Claims Committed Clear Error Because It Relied on the Wrong Test for the Reasonableness of the Costs and the Costs Were Plainly Reasonable.

The Court of Federal Claims committed clear error when it found the COVID-19-related costs unreasonable because it relied on the wrong test to determine whether the costs were reasonable, and the application of the correct test shows that they were. In the decision on appeal, the Court of Federal Claims found that these costs were not reasonable—and thus not allowable—because USAID's COVID-19 guidance stated that "[b]efore incurring any additional costs relating to COVID-19, partners must contact their AOR(s)/COR(s)/CO(s) for approval, when required," and generally referred grantees with questions to the AO for guidance. *See* Appx10.

This reasoning is fatally flawed. The Court appears to have reasoned that a prudent person would have gotten written approval by the AO before incurring costs, based on USAID's COVID-19 guidance. *See* Appx10. But the specific provision cited by the Court below requires the grantee to get AO approval "when required." Appx129. Moreover, that provision plainly does not purport to change the regulatory regime. *See* Appx129. And the relevant regulations deny any general requirement to obtain approval for a cost as a condition of its reasonableness. (A) *See* 2 C.F.R. §§ 200.403–405; (B) *see also* 2 C.F.R. § 200.407 ("The absence of prior written approval on any element of cost will not, in itself, affect the reasonableness or allocability of that element, unless prior approval is specifically required for allowability."). No reasonable person would interpret this FAQ guidance as requiring prior AO approval—it only instructs grantees to get the written approval they are otherwise required to get.

The same is true for the other authority the Court cited to support its conclusion that Democracy Worldwide's purported failure to get prior approval meant these costs were unreasonable. This other authority was the general

instruction in the FAQs advising grantees to communicate with the AO about the allowability of a specific cost. Appx10. It would be clearly erroneous to interpret the FAQs as requiring AO approval generally. *See* Appx12930.

The Court below clearly erred by failing to inquire whether the costs were allowable, reasonable, and allocable under the terms of the Uniform Guidance themselves. Communication with the agency may of course play a role in prudent behavior. *See* 2 C.F.R. § 200.404 (defining reasonable cost as one that "would be incurred by a prudent person under the circumstances prevailing at the time the decision was made"). But Democracy Worldwide did communicate with USAID. Appx3–4. Because the costs were reasonable, *see supra* Part II.A.2, it would clearly not have been reasonable for Democracy Worldwide to get prior written approval by the AO as such approval is not required as a matter of law and as a matter of fact. *See* Appx2–3. The fact that now Democracy Worldwide might regret its reliance on the Uniform Guidance does not matter. *See* 2 C.F.R. § 200.404. The reasoning that a prudent person would take the specific step of obtaining prior written approval by the AO when the Uniform Guidance does not require prior written approval is clearly erroneous. *See* Appx129–30. Because the Court of Federal Claims based its decision on that reasoning, its affirmance of the disallowance of costs was also clearly erroneous.

B. The Agreement Officer Ratified the COVID-19-Related Expenses Because She Had Full Knowledge of the Circumstances Surrounding the Action of the AOR.

The AO ratified the purchase of COVID-19 PPE when she confirmed the spending to the AOR after reading the entire conversation between the AOR and Democracy Worldwide. USAID, 303_070122, ADS Chapter 303: Grants and Cooperative Agreements to Non-Governmental Organizations § 303.3.15(d) (2020) states that the AOR does not have actual authority to enter into or modify grants agreement. *See* Appx12. The government cannot be bound by the actions of those with apparent authority. *Fed. Crops Ins. v. Merill*, 332 U.S. 380, 384 (1947).

However, when a government employee enters into an unauthorized agreement, the agreement can become binding upon ratification by an individual with actual authority. *Gary v. United States*, 67 Fed. Cl. 202, 215–16 (2005). For ratification to be effective, "a superior must not only (1) have possessed authority to contract, but also (2) have fully known the material facts surrounding the unauthorized action of her subordinate, and (3) have knowingly confirmed, adopted, or acquiesced to the unauthorized action of her subordinate." *Leonardo v. United States*, 63 Fed. Cl. 552, 560 (2005). A party seeking to enforce a contract against the United States bears the burden of proving by preponderance of the evidence that the officer had authority to contract and ratified the agreement. *See id.* at 555.

In *Leonardo*, the artist claimed to have entered into an agreement with the government when she had conversations regarding contractual matters with a cultural affairs specialist who functioned as assistant to the cultural affairs

officer at American Cultural Center. *See id.* at 554–55. The specialist did not have actual authority to bind the government. *See id.* at 557. The court found that the specialist lacked implied authority to contract because contracting authority was not an integral part of the duties assigned to the specialist. *See id.* at 558. The court also held that the cultural affairs officer who had authority to contract did not ratify the contract because the artist failed to show that the officer possessed the full knowledge of all the facts regarding the representative's unauthorized actions. *See id.* at 569.

Unlike in *Leonardo*, the AO, who had authority to contract, did have full knowledge of all the facts regarding the AOR's unauthorized actions. *See* Appx12 ("Ms. Huston, as the Agreements Officer, is the only individual with actual authority to modify grant agreements.") (citation omitted). When the AOR forwarded Ms. McDowell's email to the AO, the AOR stated "[p]lease see below exchange from Amanda at Democracy Worldwide." Appx4. It is clear from this context that the AO fully received the material facts surrounding the action of her subordinate: that, in response to COVID-19, Democracy Worldwide proposed purchasing masks and sanitation. Appx4; *see also Leonardo*, 63 Fed. Cl. at 560 (requiring for an effective ratification, that the superior "have fully known the material facts surrounding the unauthorized action of her subordinate."). The AO confirmed the action of her subordinate when she replied back to AOR, "[a]greed" and further stated, "[p]lease inform [Democracy Worldwide] that any PPE purchase needs to comply with the guidance on the USAID website . . . ." Appx4. Because the AO read the entire email conversation between the AOR and Ms. McDowell, the AO knowingly confirmed Democracy Worldwide's request. *See Leonardo*, 63 Fed. Cl. at 560 (requiring for an effective ratification, that the superior "have knowingly confirmed, adopted, or acquiesced to the unauthorized action of her subordinate"). As there is no question that the AO had authority to contract, by her actions she ratified the AOR approval of these purchases.

The government may argue that the AO was not fully aware of the material facts because she did not know of the costs of the PPE and so could not ratify the purchases, but the specifics of the cost are not among the "material facts" required for ratification. The "material facts" required for ratification relate to the unauthorized action of her subordinate, rather than the details of cost. *See id.* at 560–70 (requiring for ratification the superior to confirm the unauthorized action of her subordinate). The AO was fully aware of the material facts when she read the entire conversation between the AOR and Ms. McDowell and advised that the COVID-19-related purchases must comply with the USAID guidance. *See* Appx3–5. In other words, the AO knew about the material facts because the AO directed Democracy Worldwide to USAID FAQs instead of requiring Democracy Worldwide to submit costs for additional ratification. Therefore, the AO ratified the COVID-19-related purchases when, with knowledge of the material facts surrounding the conversation between the AOR and Democracy Worldwide, she knowingly confirmed the AOR's grant of permission to proceed.

C. *The Court of Federal Claims' Reliance on* Pernix *Was Misplaced Because the Grant Was More Like a Cost-Reimbursement Contract Than a Fixed-Price Contract.*

The court below clearly erred in relying on *Pernix Serka Joint Venture v. Dep't of State*, CBCA 5683, 20-1 BCA ¶ 37589 to find that Democracy Worldwide bore the cost risk under the grant agreement because the cost risk allocation in this grant agreement was not analogous to that in a fixed-price contract. The agreement in this case plainly bore no relationship to a fixed price contract in its risk profile, so that the obviously correct comparison was a cost-reimbursement contract. The Court of Federal Claims committed a clear error.

In analyzing which party bore the cost risk in this case, the Court of Federal Claims erroneously applied *Pernix*. The court drew an analogy between the contractor's responsibility to bear additional costs under a fixed-price contract during an Ebola outbreak in *Pernix* and the case at hand. Appx10–11 (citing *Pernix*, 20-1 BCA ¶ 37,589). The reliance is misplaced because, while *Pernix* reflected risk allocation in a fixed-price contract, the grant here had none of the fixed-price risk distribution.

A firm-fixed-price contract "places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss" and "provides maximum incentive for the contractor to control costs and perform effectively."[4] FAR 16.202-1. By contrast, a cost-plus-fixed fee contract "permits contracting for efforts that might otherwise present too great a risk to contractors, but it provides the contractor only a minimum incentive to control costs." FAR 16.306(a). Complex requirements, "particularly those unique to the Government, usually result in greater risk assumption by the Government." FAR 16.104. This is especially true for complex research and development contracts, "when performance uncertainties or the likelihood of changes makes it difficult to estimate performance costs in advance." *Id.* In such situation, "the cost risk should shift to the contractor, and a fixed-price contract should be considered." *Id.* In a cost-reimbursement contract, the contractor is required to provide the best estimate level of effort to fulfill the purpose of the contract. *See, e.g.*, EPAAR 1552.211-73.

In the case at bar, Democracy Worldwide did not assume the risk of increased cost of performance. The grant awards had more than one characteristic of cost-reimbursement agreements as defined under FAR 16.301-1, which states that "[c]ost-reimbursement types of contracts provide for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer." FAR 16.301-1. First, Democracy Worldwide established a budget of $2,000,000

4. In *Pernix*, the contract was a procurement contract, so the Federal Acquisition Regulation (FAR) is the relevant body of regulation. *Pernix*, 20-1 BCA ¶ 37,589.

based on the actual costs of the project, and the agreement contained the project proposal with the budget attached. Appx2; *see also* FAR 16.301-1 ("[Cost-reimbursement types of contracts] establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed . . . ."). Second, the grant did not include profits for Democracy Worldwide. *See* Appx15 ("Applications should be from qualified U.S. or non-U.S. entities, such as private, non-profit organizations (or for-profit companies willing to forego profits)"). Third, the agreement stated that Democracy Worldwide was bound to the proposal and to amend the grant agreement, Democracy Worldwide needed to give notice to the AO for prior approval. Appx2; *see also* FAR 16.301-1. All of these characteristics of the contract show that the grant award was more like a cost-reimbursement contract. Therefore, USAID assumed the risk of the increase in cost arising from performance of the training program in Cameroon because the grants award was more like a cost-reimbursement contract than a fixed-price contract. *See* Memorandum from Russell T. Vought, Dir., Off. of Mgmt. and Budget, to the Heads of Exec. Dep'ts and Agencies (Jan. 05, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/01/M-21-11.pdf [https://perma.cc/X2WA-BXLA] (explaining that the government bears more risk in cost-reimbursement contract).

Furthermore, it does not make sense to analyze which party bore the "cost risk" in this not-for-profit grant contract by analogy to a for-profit, procurement contract. *See* Appx15. The court below sought to determine which party bore the downside of cost risk in this case. Appx10–11. It did so by comparing the agreement in question to a commercial, fixed-price contract. *Id.* This was patently unreasonable because while the issue of the risk of higher costs was debatable, there is no debate that Democracy Worldwide does not enjoy the same upside cost risk as the contractor in *Pernix* did. Under a fixed-price contract, the contractor benefits from the positive cost risk, i.e., that a project comes in under cost. *See* FAR 16.202-1 (noting that a fixed-price contract places on the contractor "maximum risk and full responsibility for all costs and resulting profit or loss" and providing "maximum incentive for the contractor to control costs and perform effectively"). Democracy Worldwide, by contrast, cannot benefit from the cost risk because there is no provision for profits under the agreement. *See* Appx15. When deciding which party bore the risk when costs were high, it was unreasonable for the Court of Federal Claims to rely on a comparison to an agreement that would allocate the risk when costs are low in a manner the exact opposite of the agreement at hand. Analysis of risk allocation under this agreement by comparison to a fixed-price contract is patently unreasonable.

Finally, the court's reliance on *Pernix* is misplaced because the circumstances differ materially. In *Pernix*, U.S. Department of State (DoS) entered a fixed-price contract with Pernix "to construct a rainwater capture and storage system in Freetown, Sierra Leone." *Pernix*, 20-1 BCA ¶ 37,589. During the operation, Ebola broke out and DoS gave no guidance other than to say that

Pernix would need to make its own decisions to complete the project under such circumstances. *See id.* at 3. Without further guidance, Pernix decided to demobilize the workforce and returned later. *Id.* Pernix sought an equitable adjustment for costs for additional medical services it had to provide the employees on site, arguing that there was a constructive change. *Id.* The Civilian Board of Contract Appeals rejected this argument for the allocation of risk reasons cited above, as well as the fact that the contract specifically allocated the risk of "acts of God, epidemics, and quarantine restrictions" to the contractor. *See id.* at 8.

Democracy Worldwide's case is distinguishable from *Pernix*. As mentioned above, Democracy Worldwide entered into a grant contract resembling a FAR cost-reimbursement contract with USAID, and so USAID assumed the risks of unexpected costs when the government allowed the change in scope of the project. *See* FAR 16.306(a). And this grant agreement makes no reference to risk of quarantine restrictions. *See* Appx1–3. Therefore, the Court of Federal Claims clearly erred when it wrongly applied the *Pernix* standard to the case at hand.

CONCLUSION

For these reasons, the Court of Federal Claims properly exercised jurisdiction over Democracy Worldwide's claim against USAID. The regulations governing the administration of the grant and the grant itself, by virtue of its contractual nature, provide the money-mandating source of law needed for Tucker Act jurisdiction over the claim against the government for money damages.

The Court of Federal Claims, however, clearly erred in finding that Democracy Worldwide's COVID-19-related expenses were not reasonable. Because the expenses were reasonable and not significant, no approval by the AO was required, though the AO did effectively ratify the purchase. Therefore, we respectfully request this Court affirm the part of the Court of Federal Claims's decision finding it had jurisdiction and reverse the part of the decision disallowing the $10,455 that Democracy Worldwide spent on masks, hand washing stations, nurses' consultant and attendance, and additional sanitation for the conference space, so they might carry out their civil society training under COVID-19 conditions.

Respectfully submitted,
Stuart J. Anderson
Jung Hyoun Han

BRIEF OF DEFENDANT-APPELLEE, UNITED STATES

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

DEMOCRACY WORLDWIDE,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.*

Appeal from the United States Court of Federal Claims in 20-782C,
Judge Jedidiah Blake II

TABLE OF CONTENTS

Table of Authorities 230
Jurisdictional Statement 233
Statement of Related Cases 233
Statement of the Issues 233
Statement of the Case...233
- I. Nature of the Case 233
- II. Statement of Facts 234
  - A. The Program Award 234
  - B. The Terms of the Grant Award 234
  - C. COVID-19 and DW's Performance 234

Summary of the Argument 235
Argument 236
- I. Standard of Review 236
- II. The Lower Court Incorrectly Held It Had Jurisdiction over DW's Grant Dispute Because the Tucker Act's Limited Waiver of Sovereign Immunity Does Not Apply to This Grant Agreement 236
  - A. Any Waiver of Sovereign Immunity Must Be Unequivocally Expressed. 236

* *At the time of the competition, Mr. Whitlow and Ms. Plummer were JD candidates at The George Washington University Law School. Now, Mr. Whitlow practices as an associate in Pillsbury Winthrop Shaw Pittman LLP's Corporate Practice, and Ms. Plummer practices as an associate at Nichols Liu LLP, both in the D.C. area.*

B. The Tucker Act Does Not Extend Jurisdiction to the Award Because No Distinct, Substantive Right of Action for Money Damages Exists. 237
C. The Court of Federal Claims' Analysis Is Fundamentally Flawed and Should Be Overturned Because This Is Not a Procurement Contract. 239
i. Grants are more like cooperative agreements and wholly dissimilar to procurement contracts in purpose and form 239
ii. Grants lack the necessary element of consideration 240
III. The Court of Federal Claims Properly Disallowed DW's Costs for PPE, Sanitation, and Nurses' Fees Because They Were Not Reasonable, the AOR Did Not Have Authority to Approve the Costs, and DW Assumed the Risk by Incurring Costs Without AO Approval 241
A. DW's Costs Were Not Reasonable Because They Deviated from the Terms of the Federal Award and DW Ignored Agency Guidance to Seek Approval. 241
i. DW's costs were not reasonable because they conflict with the terms of the grant award, and DW did not seek AO approval. 242
ii. DW did not demonstrate the prudence required for reasonableness because it ignored multiple pieces of agency guidance to seek agency approval for COVID-19 related costs 243
B. The AOR Did Not Have the Actual Authority to Approve DW's Costs, and the AO Did Not Ratify Any Unauthorized Commitment by the AOR. 243
C. DW Assumed the Risk by Incurring COVID-19 Related Costs Because the Fixed-Price Nature of the Grant Placed the Burden on DW. 245
Conclusion 246

TABLE OF AUTHORITIES

CASES

Acevedo v. United States, 824 F.3d 1365 (Fed. Cir. 2016) 239

Alder Terrace, Inc. v. United States, 161 F.3d 1372 (Fed. Cir. 1998) 237

Anchorage v. United States, 119 Fed. Cl. 709 (2015) 240

Anderson v. United States, 344 F.3d 1343 (Fed. Cir. 2003) 244

Arizona v. United States, 575 F.2d 855 (Ct. Cl. 1978) 244

Bowen v. Massachusetts, 487 U.S. 879 (1988) 238

Fed. Crop Ins. Corp. v. Merrill, 332 U.S. 380 (1947) 243, 244

Fisher v. United States, 402 F.3d 1167 (Fed. Cir. 2005) 237

Gary v. United States, 67 Fed. Cl. 202 (2005) 244, 245

Gen. Dynamics Corp. v. United States, 410 F.2d 404 (Ct. Cl. 1969) 236

H. Landau & Co. v. United States, 886 F.2d 322 (Fed. Cir. 1989) 244

Harris Cnty., Tex., CBCA No. 6909, 21-1 BCA ¶ 37,754 241, 242

Indiana Mich. Power Co. v. United States, 422 F.3d 1369 (Fed. Cir. 2005) 236

Jan's Helicopter Serv., Inc. v. F.A.A., 525 F.3d 1299 (Fed. Cir. 2008) 237

Kellogg Brown & Root Servs., Inc. v. United States, 728 F.3d 1348 (Fed. Cir. 2013) 236, 241, 242

Lane v. Pena, 518 U.S. 187 (1996) 236

Lisbon Contractors, Inc. v. United States, 828 F.2d 759 (Fed. Cir. 1987) 241, 243

Lummi Tribe of the Lummi Rsrv., Wash. v. United States, 870 F.3d 1313 (Fed. Cir. 2017) 238, 239

Matrix Bus. Sols. v. Dep't of Homeland Sec., CBCA No. 3438, 15-1 BCA ¶ 35,844 244

McNutt v. General Motors Acceptance Corp. of Ind., 298 U.S. 178 (1936) 237

Metzger, Shadyac & Schwarz v. United States, 12 Cl. Ct. 602 (1987) 240

Mission Support All. V. Dep't of Energy, CBCA No. 4985, 16-1 BCA ¶ 36,540 242, 245

Moden v. United States, 404 F.3d 1335 (Fed. Cir. 2005) 237

Pernix Serka Joint Venture. v. Dep't of State, CBCA No. 5683, 20-1 BCA ¶ 37,589 245, 246

Rick's Mushroom Serv., Inc. v. United States, 76 Fed. Cl. 250 (2007) 237, 240

San Antonio Hous. Auth. v. United States, 143 Fed. Cl. 425 (2019) 238

Sports Graphics, Inc. v. United States, 24 F.3d 1390 (Fed. Cir. 1994) 242

St. Bernard Parish Gov't v. United States, 134 Fed. Cl. 730 (2017) 237, 240

Suburban Mortg. Assoc., Inc. v. U.S. Dep't of Hous. & Urban Dev., 480 F.3d 1116 (Fed. Cir. 2007) 238

Thermalon Indus., Ltd. v. United States, 34 Fed. Cl. 411 (1995) 239, 240

United States v. Mitchell, 463 U.S. 206 (1983) 237

United States v. Sherwood, 312 U.S. 584 (1941) 237

United States v. Testan, 424 U.S. 392 (1976) 237

Yancey v. United States, 915 F.2d 1534 (Fed. Cir. 1990) 237, 238

Zoubi v. United States, 25 Cl. Ct. 581 (1992) 244

STATUTES

28 U.S.C. § 1491 233, 234, 237

31 U.S.C. § 6304 239, 240

31 U.S.C. § 6305 240

5 U.S.C. § 702 236

Pub. L. No. 116-94, 133 Stat. 2892 238

OTHER AUTHORITIES

COVID-19 Partners Call Script, USAID (Mar. 18, 2020), https://www.usaid.gov/sites/default/files/documents/1868/3.18.2020_COVID-19_Partners_Call_Script.pdf 243

Guidance Frequently Asked Questions, USAID (Nov. 3, 2020), http://web.archive.org/web/20210228111642/https://www.usaid.gov/sites/default/files/documents/11.03.2020_COVID-19_Partner_FAQs_0.pdf 243

USAID Key Accomplishments, USAID, https://www.usaid.gov/reports-and-data/key-accomplishments (last visited Nov. 8, 2022) 234

REGULATIONS

2 C.F.R. § 200.400 241, 242

2 C.F.R. § 200.403 241

2 C.F.R. § 200.404 241, 243

FAR 16.202 246

FAR 16.202-1 245

AGENCY GUIDANCE

U.S. Agency for Int'l Dev., ADS: Grants and Cooperative Agreements to Non-Governmental Organizations § 303.3.15(d) (2020) 244, 245

JURISDICTIONAL STATEMENT

Pursuant to Federal Rule of Appellate Procedure 28(b) and Federal Circuit Rule 28(b), appellee states its disagreement with the jurisdictional statement of the appellant. Specifically, appellee disagrees with appellant's assertion that the Court of Federal Claims possessed jurisdiction over Democracy Worldwide's (DW) appeal. DW's grant award does not identify a money-mandating provision; thus, Tucker Act jurisdiction does not extend to this award.

STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, appellee's counsel states that they are unaware of any case pending in this or any other court that may affect or be affected by this Court's decision in this appeal.

STATEMENT OF THE ISSUES

1. Whether the U.S. Court of Federal Claims ("Court of Federal Claims" or "lower court") has subject matter jurisdiction over appellant's claim for a right to cost reimbursement under a United States Agency for International Development ("USAID") grant award that did not contain a money-mandating provision and consideration.
2. Whether the Court of Federal Claims properly disallowed appellant's costs related to personal protective equipment ("PPE"), sanitation, and nurses' fees where the grant award did not provide for these costs and the appellant did not seek approval from the agreements officer.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

This appeal arises from a decision of the Court of Federal Claims that held jurisdiction to review a grant dispute for plaintiff-appellant Democracy Worldwide's (DW) cost disallowance by USAID. Appx12. The USAID award charged DW with strengthening Cameroonian civil society through trainings, advocacy, and follow-up meetings with activists. Appx1.

Due to the COVID-19 pandemic, DW incurred costs for PPE, sanitation, and nurses' fees. Appx5. DW, however, did not inform the Agreement Officer (AO) or the Agreement Officer's Representative (AOR) of the specifics of these costs. Appx12. Subsequently, the AO disallowed DW's costs because (1) the grant agreement did not include DW's costs and (2) the AO did not approve these costs. Appx6. DW appealed this decision to the Court of Federal Claims arguing (1) the Court had jurisdiction over grant disputes for monetary claims under the Tucker Act, 28 U.S.C. § 1491(a),

and (2) the additional costs incurred were reasonable and approved by the government. The lower court held that it had jurisdiction to hear this dispute under 28 U.S.C. § 1491(a) but disallowed DW's incurred costs, and this appeal followed. Appx12.

II. STATEMENT OF FACTS

A. The Program Award

USAID promotes U.S. foreign policy by advancing freedom, reducing poverty, and strengthening democratic institutions abroad. *USAID Key Accomplishments*, USAID https://www.usaid.gov/reports-and-data/key-accomplishments [https://perma.cc/MN2Q-3LWK] (last visited Nov. 8, 2022). Pursuant to this mission, USAID issued a Notice of Funding Opportunity (NOFO) that sought applications for programs to protect human rights activities, conduct civil education, and initiate human-rights based litigation in Central Africa. Appx1. Seven organizations submitted proposals responding to USAID's NOFO, and USAID selected DW's proposal, whose program focused on building strong institutions to protect human rights through workshops for civil society actors and follow-on meetings with activists. Appx2.

B. The Terms of the Grant Award

USAID awarded DW $2,000,000 to execute its program; the grant award governs the use of these funds. Appx2. The grant agreement states that DW's proposal is binding and that DW must submit a budget realignment to the AO for prior approval to amend the grant agreement. Appx2. The grant award included a budget that included two line items for "supplies." Appx3. The definition of supplies encompassed "assorted office supplies, such as flip charts, pens, folders, handouts, and name tags." Appx3. The Other Direct Costs category also provided for supplies, including "assorted office supplies for staff, including paper, pens, ink, staplers, and anything necessary to daily operations." Appx3. The budget, however, did not provide for PPE, sanitation, or fees for medical personnel. Appx11.

C. COVID-19 and DW's Performance

DW planned its first training for April 2020 in Yaoundé, Cameroon at the Hilton Hotel, where it scheduled experts to speak on good management practices for nongovernmental organizations. Appx2. On March 6, 2020, Cameroon reported its first case of COVID-19 and closed its borders several days later, preventing DW's experts from attending its first training. Appx3.

At this time, the Program Manager contacted Justin Baird, the AOR, and sought approval to bring in DW's trainers virtually and informed him it may incur "additional costs" for "masks, sanitation, etc." Appx3. As an AOR, Mr. Baird did not have authority to approve budget realignments and sought guidance from Ms. Huston, the AO. Appx4. The AO informed the AOR that any PPE purchases needed to comply with guidance on USAID's website, which

stated that purchases must be reasonable and that "[b]efore incurring any additional costs relating to COVID-19, partners must contact their AOR(s)/ COR(s)/CO(s) for approval, when required." Appx10. FAQs on USAID's website further stated that implementing partners must still seek approvals that are normally required pursuant agreements' existing terms and conditions. Appx129. The AOR communicated the AO's guidance to DW and asked it to inform him if a budget realignment proved necessary. Appx5.

Without further guidance from the AO, DW incurred thousands of dollars in COVID-19 related costs, including a $5,000 cleaning fee from the hotel and $1,945 for 500 masks, gloves, hand sanitizer, and thermometers. Appx6. DW also procured two nurses for the training, providing them with a per diem and lodging at the Hilton and classified this $3,500 cost as a consultant fee. Appx7. The consultant fee in the budget, however, included only trainers and legal experts. Appx6. DW submitted these costs, totaling more than $10,445, to the AOR who, in agreement with the AO, disallowed all of DW's additional costs. Appx6. After a petition for review, the AO issued a written decision disallowing the costs, which the Bureau for Management, Office of Management Policy, Budget, and Performance, Compliance Division (M/MPBP/Compliance) affirmed. Appx6. DW appealed this decision to the Court of Federal Claims. Appx6.

SUMMARY OF THE ARGUMENT

The Court of Federal Claims incorrectly found subject matter jurisdiction over DW's claim for cost disallowance for a grant award. First, DW failed to establish jurisdiction by a preponderance of the evidence. Any waiver of sovereign immunity must be clear and explicit. Although the Tucker Act grants such waiver, it also necessitates a separate, substantive right of action. As such, it does not apply to the grant award here because no money-mandating statute provides a right of action for money damages, nor does the grant award presume money damages. Second, the Court of Federal Claims erroneously analogized the grant award to a traditional procurement contract. Although some instances warrant such analogy, the grant award here effectuates a different purpose than a procurement contract and fails to provide any direct consideration to the federal government. Because of this errant comparison, the lower court's analysis is flawed, and so, DW's claim falls outside the narrow grant of jurisdiction at the Court of Federal Claims. Therefore, this court should reverse the lower court's holding and dismiss DW's claim in its entirety.

Should this Court find jurisdiction, it should uphold the judgment of the Court of Federal Claims because it did not clearly err by disallowing DW's costs for PPE, sanitation, and nurses' fees. For costs to be allowable under a federal grant, such costs must not exceed what a prudent person would incur under the circumstances. The budget to which DW was bound did not include a line item for PPE, and the grant award, and multiple pieces of agency guidance, required AO approval before incurring costs outside the budget. Further, DW bore the burden of seeking approval from the proper government

official, and the AOR did not have the requisite authority. Finally, because of the fixed-price nature of the grant, DW assumed the risk of incurring costs not included in its budget.

ARGUMENT

I. STANDARD OF REVIEW

The Federal Circuit reviews a dismissal for lack of jurisdiction de novo. *Yancey v. United States*, 915 F.2d 1534, 1537 (Fed. Cir. 1990). As such, this Court need not afford any deference to the lower court's decision. *See generally id*. In such cases, the plaintiff bears the burden of proving jurisdiction by a preponderance of the evidence. *Id.* The Federal Circuit only overturns factual determinations when they are "clearly erroneous." *See Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1350, 1360 (Fed. Cir. 2013). A finding of fact is clearly erroneous when the appellate court has a "definite and firm conviction" that the lower court erred. *See Indiana Mich. Power Co. v. United States*, 422 F.3d 1369, 1373 (Fed. Cir. 2005). Further, cost reasonableness is a question of fact, and a court may examine many fact- and context-specific factors to determine reasonableness. *See Kellogg Brown & Root Servs.*, 728 F.3d at 1360 (citing *Gen. Dynamics Corp. v. United States*, 410 F.2d 404, 409 (Ct. Cl. 1969)).

II. THE LOWER COURT INCORRECTLY HELD IT HAD JURISDICTION OVER DW'S GRANT DISPUTE BECAUSE THE TUCKER ACT'S LIMITED WAIVER OF SOVEREIGN IMMUNITY DOES NOT APPLY TO THIS GRANT AGREEMENT.

To bring a private right of action against the federal government, a claimant must identify an express waiver of sovereign immunity. *See Lane v. Pena*, 518 U.S. 187, 192 (1996) (holding that to hale the federal government into court plaintiffs must show that the former has "unequivocally" waived its immunity). Here, no such waiver exists as DW failed to identify a money-mandating statute and the Award does not presume money damages. Moreover, the Court of Federal Claim's analysis in which it found jurisdiction is fundamentally flawed because the Award here is wholly dissimilar to a procurement contract. Consequently, the Court of Federal Claims is the improper venue for this suit; DW should err its grievance at a federal district court under the Administrative Procedure Act ("APA"). Administrative Procedure Act, 5 U.S.C. §§ 702–04 (stating that individuals entitled to judicial review of final agency actions shall bring their claims to "a court of competent jurisdiction," absent statutory provisions instructing otherwise).

A. Any Waiver of Sovereign Immunity Must Be Unequivocally Expressed.

The long-established principle of sovereign immunity shields the federal government from suit, "except as Congress has consented to a cause of action

against the United States." *United States v. Testan*, 424 U.S. 392, 399 (1976) (citing *United States v. Sherwood*, 312 U.S. 584, 587–88 (1941)). Thus, "the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Through the Tucker Act, Congress granted petitioners the ability to pursue private suits against the United States at the Court of Federal Claims. *Id.* at 216. However, this limited and express waiver "cannot be implied but must be unequivocally expressed." *Testan*, 424 U.S. at 399. Because no waiver exists for grant agreements per se, no right of action exists here for the appellant.

B. The Tucker Act Does Not Extend Jurisdiction to the Award Because No Distinct, Substantive Right of Action for Money Damages Exists.

As the plaintiff bringing the claim, DW bears the burden of establishing jurisdiction. *See Alder Terrace, Inc. v. United States*, 161 F.3d 1372, 1377 (Fed. Cir. 1998) (citing *McNutt v. General Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 189 (1936)). DW failed to meet this burden because it failed to identify a substantive right of action for this Award under the Tucker Act. Appx1–12; *see Testan*, 424 U.S. at 400 ("[T]he Tucker Act is merely jurisdictional, and grant of a right of action must be made with specificity.") (emphasis added). The Tucker Act explicitly provides this Court jurisdiction over "any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States . . . ." 28 U.S.C. § 1491(a)(1). Because the Tucker Act only establishes jurisdiction and does not create a substantive right of action for money damages, claimants must identify a distinct, money-mandating statute. *See Mitchell*, 463 U.S. at 216; *see also Yancey*, 915 F.2d at 1537 (finding jurisdiction under the Contract Disputes Act because this statute is a money-mandating source of law). Without a right for money damages, "the court . . . shall dismiss the cause for lack of jurisdiction." *Fisher v. United States*, 402 F.3d 1167, 1173 (Fed. Cir. 2005).

First, no relevant provision of the Constitution provides jurisdiction for this Award under the Tucker Act as this is not a taking. *See, e.g.*, *Jan's Helicopter Serv., Inc. v. F.A.A.*, 525 F.3d 1299, 1309 (Fed. Cir. 2008) (citing *Moden v. United States*, 404 F.3d 1335, 1341 (Fed. Cir. 2005)) ("It is undisputed that the Takings Clause of the Fifth Amendment is a money-mandating source for purposes of Tucker Act jurisdiction."). In addition, because grants generally do not presume money damages, the Award does not provide a substantive right as an express or implied contract. *See St. Bernard Parish Gov't v. United States*, 134 Fed. Cl. 730, 734 (2017) (citing *Rick's Mushroom Serv., Inc. v. United States*, 76 Fed. Cl. 250 (2007), *aff'd*, 521 F.3d 1338 (Fed. Cir. 2008)) (stating nontraditional government contracts, such as cooperative agreements, differ from traditional procurement contracts as they "are not presumed to provide money damages").

Second, no statute or regulation provides a basis for jurisdiction because the statute under which the Award was authorized is money-authorizing. Appx9.

"Appropriations acts, by their very nature, are generally money-authorizing, not money mandating. Appropriations are a form of [a]uthority provided by federal law to incur obligations and to make payments from the Treasury for specified purposes." *San Antonio Hous. Auth. v. United States*, 143 Fed. Cl. 425, 480 (2019) (internal citations omitted). As such, the disbursement of funds does not entitle a grantee to an actual payment of money damages. *Cf. Lummi Tribe of the Lummi Rsrv., Wash. v. United States*, 870 F.3d 1313, 1318 (Fed. Cir. 2017) (finding no jurisdiction where plaintiffs were deprived of grant funds because the statute under which the grant was allocated was not money-mandating). Specifically, any alleged claim for additional money under a money-authorizing statute seeks a greater allocation in grant funding than was originally disbursed, creating a cause for equitable relief rather than a remedy for "damages." *See id.*

The Supreme Court's decision in *Bowen v. Massachusetts* is binding and supports the proposition that money due does not mean money damages for the purposes of Tucker Act jurisdiction. *Bowen v. Massachusetts*, 487 U.S. 879 (1988). In *Bowen*, Massachusetts challenged the federal government's disallowance under Medicaid, a complex federal grant, in district court. *Id.* at 909. When deciding the proper forum for jurisdiction, the Court examined the character of the relief sought. *Id.* at 901–09. The *Bowen* Court understood "money damages" to mean "compensation for the damage sustained by the failure of the Federal Government to pay as mandated." *Id.* at 900. Because Massachusetts sought money due, which was an equitable relief, versus compensatory damages, the Supreme Court found proper jurisdiction at district court under the APA instead of the Federal Circuit. *Id.* at 909–10.

As such, the Court of Federal Claim's reliance on *Suburban Mortgage Associates, Inc.* is misplaced. There, this Court opined on a similar issue that examined whether proper jurisdiction for a claim was found at either the federal district courts under the APA or the Court of Federal Claims under the Tucker Act. *Suburban Mortg. Assoc., Inc. v. U.S. Dep't of Hous. & Urban Dev.*, 480 F.3d 1116, 1122–23 (Fed. Cir. 2007). However, the underlying factual basis and relief sought for the claim in *Suburban* was based on breach of an insurance contract where the contractor sought money damages allegedly owed. *Id.* at 1117–18. Therefore, this Court should rely on *Bowen*, and not *Suburban*, because it is more factually analogous to the facts of this case concerning a grant award.

Here, the Award was authorized by the Further Consolidated Appropriations Act (FCAA) of 2020, Pub. L. No. 116-94, 133 Stat. 2892. Appx9. Because the FCAA is an appropriation, it is not a money-mandating statute. *See San Antonio Hous. Auth.*, 143 Fed. Cl. at 482. DW's claim for additional money to cover COVID-related costs is best characterized as a claim for additional money under the grant disbursement versus a claim for damages. This renders DW's claim equitable under a money-authorizing statute. Therefore, this Court should dismiss DW's claim for lack of subject-matter jurisdiction. *Id.* at 480–81 (citing GAO Glossary at 20–21) (granting defendant's motion to dismiss over plaintiff's statutory claim brought pursuant to the 2012

Appropriations Act for lack of subject matter jurisdiction); *see also Acevedo v. United States*, 824 F.3d 1365, 1366–70 (Fed. Cir. 2016) (affirming the government's motion to dismiss on the ground that the Court of Federal Claims lacked Tucker Act jurisdiction because governing regulations were money-authorizing). Finally, the Award's mere reference to the Code of Federal Regulations does not create a substantive right of action as it is simply adding to the terms of the Award. *See generally Cf. Lummi Tribe of the Lummi Rsrv.*, 870 F.3d at 1318.

In sum, DW failed to meet its burden of establishing jurisdiction under the Tucker Act because it failed to identify a proper money-mandating statute, thus, no distinct, substantive right for an action for money damages exists. Thus, the Court of Federal Claims erred in granting jurisdiction over this claim. Again, should DW continue to seek relief for its claim, it should file in federal district court under the APA.

C. The Court of Federal Claims' Analysis Is Fundamentally Flawed and Should Be Overturned Because This Is Not a Procurement Contract.

Because the grant award here (1) effectuates a different purpose and (2) lacks consideration, the Court of Federal Claims erroneously analogized the grant agreement to a procurement contract. Appx9. Thus, the Court's analysis is flawed, its holding regarding jurisdiction is wrong, and its decision should be overturned.

In limited circumstances, a federal grant agreement may constitute a procurement contract as recognized under the Tucker Act, so long as the grant agreement satisfies traditional requirements for a binding contract, namely the inclusion of consideration or a direct benefit to the government. *See, e.g.*, *Thermalon Indus., Ltd. v. United States*, 34 Fed. Cl. 411, 414 (1995). But to always read a grant agreement as a procurement contract would render the intended purpose of a grant superfluous.

i. Grants are more like cooperative agreements and wholly dissimilar to procurement contracts in purpose and form.

When examining primary contracting vehicles employed by the federal government, statutory definitions and agency guidance illustrate that grants are more analogous to cooperative agreements than traditional procurement contracts. Consequently, the Court of Federal Claim's analysis that analogized grants to procurement contracts for the purposes of jurisdiction is misplaced.

The federal government uses grants "to transfer a thing of value to the . . . recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring . . . property or services for the direct benefit or use of the United States Government" when substantial involvement between the parties is not expected. Federal Grants and Cooperative Agreements Act of 1977, 31 U.S.C. § 6304. The federal government uses cooperative agreements "to transfer a thing of value to the [recipient] . . . to carry out a public purpose of support or stimulation authorized by a law of

the United States instead of acquiring . . . property or services for the direct benefit or use of the United States Government" and "substantial involvement is expected" between the government and recipient. *Id.* at § 6305. The statutorily defined use between both grants and cooperative agreements is the exact same, with the sole difference turning on the amount of involvement between the parties when carrying out the agreement. *Id.* §§ 6304–05. Conversely, procurement contracts are used to "acquire . . . property or services for [the federal government's] direct benefit or use." *Id.* § 6303.

Here, the grant agreement was awarded pursuant to an application by USAID to support the overarching public purpose of increasing protection for human rights defenders through various methods in Central Africa. Appx1–3. Although procurement contracts may technically effectuate a public purpose at large by furthering an agency's mission, the discrete purpose as to when the federal government should use each contracting vehicle illuminates the distinction. The Award illustrates this principle in the NFO by stating, "USAID may award either a cooperative agreement or a grant for this opportunity. The determination will be made during negotiation of award and will be based on the technical application proposed." Appx16. Thus, this Award was intentionally classified as a grant, not a procurement contract.

However, the classification of these agreements, while important, does not solely determine "whether [the] arrangement constitutes a contract enforceable under the Tucker Act." *See Thermalon Indus., Ltd.*, 34 Fed. Cl. at 412. Therefore, the jurisdictional inquiry turns to whether the traditional standards of a mutual intent to contract exist, namely consideration, or a direct benefit, to the government. *Id.*

ii. Grants lack the necessary element of consideration.

Lack of consideration serves as a deciding factor when determining whether a contracting vehicle affords money damages. *St. Bernard Parish Gov't*, 134 Fed. Cl. at 736, *aff'd on other grounds*, 916 F.3d 987 (Fed. Cir. 2019); *see also Rick's Mushroom Serv., Inc.*, 521 F.3d at 1344; *Metzger, Shadyac & Schwarz v. United States*, 12 Cl. Ct. 602, 605 (1987) ("[I]n the context of government contracts . . . consideration must render a benefit to the government, and not merely a detriment to the contractor."). Specifically, consideration establishes an enforceable contract against the government because the direct benefit indicates a right to money damages. *Rick's Mushroom Serv., Inc.*, 521 F.3d at 1344. The mere fact that the government is paying for some beneficial improvement is not enough to establish consideration; the benefit must be direct, not incidental. *Anchorage v. United States*, 119 Fed. Cl. 709, 713–14 (2015) (holding the contract in dispute constituted a procurement contract and not a cooperative agreement because the government received direct, tangible benefits, such as a service road).

Here, consideration is incidental. The grant award indicates a direct benefit to the people of Cameroon, not the United States government. Appx26 ("Program Objectives: This program seeks to strengthen Cameroonian institutions to help Cameroon respect its human rights obligations and build the

capacity of civil society actors to promote these rights, monitor compliance, and demand accountability.") (emphasis added). Any benefit conferred to USAID through this grant agreement is generalized at most.

Because the grant agreement here effectuates a different purpose and lacks the principal characteristic of consideration that would imply money damages, the lower court's conclusion that the grant is analogous to a procurement contract is flawed. Thus, DW failed to meet its burden of establishing jurisdiction at the lower court because it did not, and could not, name a money-mandating statute, as required by the Tucker Act. This Court should reverse the lower court's holding because its analysis of the grant award here was fundamentally flawed.

III. THE COURT OF FEDERAL CLAIMS PROPERLY DISALLOWED DW'S COSTS FOR PPE, SANITATION, AND NURSES' FEES BECAUSE THEY WERE NOT REASONABLE, THE AOR DID NOT HAVE AUTHORITY TO APPROVE THE COSTS, AND DW ASSUMED THE RISK BY INCURRING COSTS WITHOUT AO APPROVAL.

Costs allocated to a federal grant award must be reasonable. 2 C.F.R. § 200.403. DW's costs for PPE, sanitation, and nurses' fees were not reasonable because it did not comply with the terms of the grant award, and it ignored agency guidance to seek AO approval. Moreover, the AOR lacked authority to approve DW's costs, and DW assumed the risk of incurring these costs without proper approval.

A. *DW's Costs Were Not Reasonable Because They Deviated from the Terms of the Federal Award and DW Ignored Agency Guidance to Seek Approval.*

Despite the COVID-19 upheaval, DW, as the grant applicant, bore the burden of ensuring and proving cost reasonableness. *See Lisbon Contractors, Inc. v. United States*, 828 F.2d 759, 767–68 (Fed. Cir. 1987). For a cost to be reasonable under a federal grant, the costs must not exceed the amount that "a prudent person" would incur "under the circumstances." 2 C.F.R. § 200.404. Among the factors determining reasonableness is whether "the terms and conditions of the Federal award" place restrictions on incurring costs. *Id.*; 2 C.F.R. § 200.400(b) ("The non-Federal entity assumes responsibility for administering Federal funds . . . consistent with . . . the terms and conditions of the Federal award."). Exigent circumstances alone, however, do not justify incurring unreasonable costs, and courts have disallowed costs incurred without approval of the proper government authority in such circumstances. *See Kellogg Brown & Root Servs., Inc.*, 742 F.3d at 971 (violence in Iraq did not justify the contractor negligently accepting a proposal for construction of a dining facility that was [fifty percent] higher than necessary); *see also Harris Co., Tex.*, CBCA No. 6909, 21-1 BCA ¶ 37,754, at 183,267, 183,270 (finding that "exigent . . . circumstances" from an impending hurricane did not relieve a FEMA grantee from ensuring cost reasonableness for debris removal where the grantee failed to secure explicit AO approval).

i. DW's costs were not reasonable because they conflict with the terms of the grant award, and DW did not seek AO approval.

DW argues two "supplies" line times in the narrative budget include its costs. Appx3. The terms of the budget, however, describe supplies as "assorted office supplies for staff," e.g., pens, paper, and ink, not the PPE and sanitation equipment for training participants for which DW seeks reimbursement. Appx3. DW also submitted the nurses' fees and per diem under the "consultant" category, which, in the budget, includes only trainers and legal experts. Appx6. The grant award further stated that DW was bound to its budget proposal and needed prior approval from the AO to amend the budget. Appx2. Because the grant agreement did not include PPE, sanitation, or nurses' fees, DW violated the terms of the grant award by incurring costs outside the budget without AO approval. *See Cf. Mission Support All. V. Dep't of Energy*, CBCA No. 4985, 16-1 BCA ¶ 36,540, at 178,016 (finding that the contractor's insurance costs were not reasonable where the contractor did not seek approval for the costs as the contract required). Given that DW's COVID-19 costs did not appear in the budget and the grant award required prior approval to amend the budget, a reasonably prudent person would have sought approval before incurring these substantial costs. 2 C.F.R. § 200.400(b).

DW argues the Other Direct Costs line item included its PPE and sanitation costs because the general phrase "anything necessary to daily operations" followed the list of office supplies items in the narrative budget; however, the definition of supplies does not include PPE and sanitation fees because the listed items contemplate office supplies. Appx3. The general phrase "anything necessary to daily operations" must contemplate items similar to office supplies because the office supplies items precede the general phrase in the narrative budget. *See Sports Graphics*, *Inc. v. United States*, 24 F.3d 1390, 1392 (Fed. Cir. 1994) ("[W]here an enumeration of specific things is followed by a general word or phrase, the general word or phrase is held to refer to things of the same kind as those specified.").

Thus, the general phrase in the narrative budget is not a catch-all for DW's claimed costs. *See id.*

Additionally, DW may assert that COVID-19 upheaval justifies incurring costs without AO approval. The Boards, however, have consistently found that "exigent" circumstances do not absolve the grantee's responsibility to ensure cost reasonableness. *See*, *e.g.*, *Harris Cnty.*, *Tex.*, CBCA No. 6909, 21-1 BCA ¶ 37,754, at 183,272 (impending hurricane did not justify grantee's excessive payments for debris removal). Given that the Boards have found that contractors and grantees are still required to exercise reasonable judgment during major natural disasters and wars, the impact of COVID-19 alone does not justify incurring thousands of dollars in costs because the regulations required DW to use its judgment and contact the AO for approval of costs outside the budget. *See Kellogg Brown & Root Servs.*, 742 F.3d at 971. Further, courts must balance the need to act quickly under difficult conditions against the government's need to control federal funds and preserve the integrity of the grant system. Allowing DW to claim costs outside the budget because of

COVID-19 would render nearly any COVID-19 related cost allowable and USAID would lose its control over grantee spending.

Thus, DW's costs are not reasonable because they do not comply with the terms of the grant award, and COVID-19 upheaval alone does not justify DW incurring unreasonable costs.

ii. DW did not demonstrate the prudence required for reasonableness because it ignored multiple pieces of agency guidance to seek agency approval for COVID-19 related costs.

DW asserts its costs are reasonable because USAID's guidance states PPE is generally allowable. Guidance on USAID's website, however, also stated that "[b]efore incurring any additional costs relating to COVID-19, partners must contact their AOR(s)/COR(s) and AO(s)/CO(s) for approval, when required." Appx10; Appx129. A USAID executive reiterated the need for approval before incurring COVID-19 related costs, and FAQs available on USAID's website stated that "approvals that are normally required . . . must still be obtained." Appx129; *see COVID-19 Partners Call Script*, USAID (Mar. 18, 2020), https://www.usaid.gov/sites/default/files/documents/1868/3.18.2020_COVID-19_Partners_Call_Script.pdf [https://perma.cc/CU89-5GVG]; *COVID-19 Implementing Partner Guidance Frequently Asked Questions*, USAID (Nov. 3, 2020), https://www.usaid.gov/sites/default/files/documents/11.03.2020_COVID-19_Partner_FAQs_0.pdf [https://perma.cc/J93A-7ZQ4]. Further, the AOR informed DW that it was required to ensure that its costs were reasonable and to contact him if a budget realignment was necessary. Appx4.

Despite these pieces of guidance, DW never contacted the AO or AOR to apprise them of its specific costs for the sanitation, the PPE, or the consultant fees. Appx4. Rather, DW only told the AOR that it required "masks, sanitation, etc.," without referencing nurses' fees or any specific amounts for the masks or sanitation. Appx3. Given that every piece of agency guidance asked implementing partners to seek agency approval before incurring COVID-19 related costs, the costs are not reasonable because a prudent person acting under the agency's guidance would have sought approval from the agency. *See* 2 C.F.R. § 200.404.

Because DW's actions violated the terms of the grant award that required them to seek AO approval to amend the budget, it has not demonstrated that it acted prudently under the circumstances. Therefore, this Court should affirm the judgment of the lower court disallowing DW's costs. *See Lisbon Contractors, Inc.*, 828 F.2d at 767.

B. The AOR Did Not Have the Actual Authority to Approve DW's Costs, and the AO Did Not Ratify Any Unauthorized Commitment by the AOR.

The government is not bound by those with apparent authority, and those who enter agreements with the government must ensure that the official who purports to act for the government possesses actual authority. *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383–84 (1947) ("[A]nyone entering into an arrangement with the Government takes the risk of having accurately ascertained

that he who purports to act for the Government stays within the bounds of his authority."). The government can grant actual authority expressly through a statute or regulation or implicitly if the government employee needs the authority to fulfill their duties. *See Anderson v. United States*, 344 F.3d 1343, 1353 (Fed. Cir. 2003); *H. Landau & Co. v. United States*, 886 F.2d 322, 324 (Fed. Cir. 1989). Specifically, implied actual authority exists where the government employee's management responsibilities require the ability to contract for the government. *See, e.g.*, *Zoubi v. United States*, 25 Cl. Ct. 581, 588 (1992) (finding that Acting Program Director's duties of establishing a new Saudi Arabian project implied authority to contract for interpreters); *Arizona v. United States*, 575 F.2d 855, 861 (Ct. Cl. 1978) (finding that Director of Bureau of Prison's authority to "manage and control" all U.S. penal institutions implied the power to contract on the government's behalf).

USAID operational policy states that only an AO has the authority to "commit[] to changes that affect the program, cost, period of performance, or other terms and conditions of the award." U.S. Agency for Int'l Dev., ADS: Grants and Cooperative Agreements to Non-Governmental Organizations § 303.3.15(d) (2020). The AO may ratify an unauthorized commitment of funds by an AOR, but the AO must submit a memorandum to the Director of the Bureau Office of Acquisition and Assistance ("Director, M/OAA"), who has the sole authority to ratify the unauthorized commitment. *Id.* § 303.3.19(a).

Here, USAID did not approve the costs because the AOR did not have the actual express or implied authority to approve changes to the program's budget, and DW cannot rely on apparent authority for approval. *Id.* § 303.3.15(d). DW only communicated directly with the AOR, and the AOR does not have express actual authority because USAID policy states that an AOR may not amend the program's budget unilaterally. *Id.*; Appx5. Further, unlike cases where courts have found that a government employee's managerial responsibilities granted implied actual authority to bind the government, here, the AOR's responsibilities mainly include assisting the AO, and the AOR need only contact the AO to obtain approvals when necessary. *See, e.g.*, *Zoubi*, 25 Cl. Ct. at 588. Thus, the AOR does not need the authority to approve costs to execute his duties. *See H. Landau & Co.*, 886 F.2d at 324. Because the AOR lacks actual authority and apparent authority, the government is not liable for any purported approvals from the AOR. *Fed. Crop Ins. Corp.*, 332 U.S. at 383–84.

DW's contention that the AO ratified the AOR's unauthorized commitment also fails because the AO did not "possess full knowledge of the material facts" and did not take the steps required by USAID operational policy to ratify any unauthorized commitment by the AOR. *Gary v. United States*, 67 Fed. Cl. 202, 215 (2005) (listing "full knowledge of the material facts" as a requirement for individual ratification); *see also* U.S. Agency for Int'l Dev. at § 303.3.19(a). DW's email to the AOR only stated that DW may incur costs for "masks, sanitation, etc.," without elaboration as to specific costs. Appx3. DW did not incur any of its COVID-19 costs until after the Program Manager's last email

to the AOR and did not otherwise communicate these costs to the AOR or the AO. Appx5. Thus, the AO could not have ratified any unauthorized commitment because she did not know any of the specific costs or their amounts. *See Cf. Mission Support All.*, CBCA No. 4985, 16-1 BCA ¶ 36,540, at 178,017 (finding that the contracting officer did not constructively approve the contractor's insurance costs because the contractor did not apprise her of "the type of insurance, the cost of the premium, or any other details related to the [insurance] premiums submitted in conjunction with a request for approval.").

Additionally, even if the AO possessed the requisite facts and wished to ratify an unauthorized commitment, the AO did not secure the approval of the Director, M/OAA, as required by agency policy. U.S. Agency for Int'l Dev. at § 303.3.19(a). Thus, the AO did not ratify the AOR's unauthorized commitment because she did not possess the material facts and did not follow agency ratification procedures. *See Gary*, 67 Fed. Cl. at 215.

Therefore, the Government did not approve DW's costs because the AOR did not have actual authority and the AO did not have knowledge of the material facts to ratify an unauthorized commitment.

C. DW Assumed the Risk by Incurring COVID-19 Related Costs Because the Fixed-Price Nature of the Grant Placed the Burden on DW.

Although this grant agreement differs from a procurement contract, the risk allocation resembles that of a firm-fixed price contract. A contractor in a firm-fixed price contract is not entitled to an adjustment for the contractor's cost experience in performing on the contract, and the contractor bears the risk of costs not attributable to the government. FAR 16.202-1 ("This contract type places upon the contractor maximum risk and full responsibility for all costs . . ."); *Matrix Bus. Sols. v. Dep't of Homeland Sec.*, CBCA No. 3438, 15-1 BCA ¶ 35,844, at 175,282.

Shifting the cost-risk to contractors incentivizes contractors to "control costs" and "effectively" perform their obligations under the contract. *See* FAR 16.202-1.

Pernix Serka Joint Venture illustrates how a party assumes the risk when incurring costs without approval from the government. *Pernix Serka Joint Venture. v. Dep't of State*, CBCA No. 5683, 20-1 BCA ¶ 37,589, 182,519. In *Pernix*, PSJV, a contractor operating under a firm-fixed price contract, incurred costs related to protecting its employees during an Ebola outbreak in Sierra Leone. *Id.* at 182,520. In response to PSJV's request for guidance, the contracting officer told PSJV that the decision rested solely with PSJV and that there would not be a basis for an equitable adjustment. *Id.* at 182,521. PSJV subsequently incurred costs related to employee evacuation, but the CBCA found that PSJV assumed the risk in incurring the costs because "PSJV has not identified any clause in the contract that . . . shift[ed] the risk to the Government for any costs incurred due to an unforeseen epidemic." *Id.* at 182,523. The CBCA further held that PSJV could not demonstrate a constructive or cardinal change because it had not identified any action by the government

which ordered excess costs or the performance of work outside the contract's scope. *Id*. at 182,523.

Likewise, in this case, the Court of Federal Claims properly disallowed DW's COVID-19 costs because the grant agreement allocated the risk to DW. This grant agreement shares features with a fixed-price contract because it contains a ceiling price and disclaims "liab[ility] for reimbursing the recipient for any amount in excess of the obligated amount." *See* FAR 16.202. Further, it serves the same policy purpose because shifting the risk to the government in a grant disincentivizes grantees to control costs. *See id.*

Additionally, like in *Pernix*, where PSJV incurred costs after the contractor warned them that there would not be a basis for an equitable adjustment, here, DW incurred thousands of dollars in costs without approval despite the AOR's warning to DW that costs must "compl[y] with the guidance on USAID's website." *See Pernix*, CBCA No. 5683, 20-1 BCA ¶ 37,589, at 182,520; Appx5. Further, DW cannot point to any action by the agency that changed the scope of the grant or ordered DW to perform work outside the grant's scope, and thus it cannot prevail under constructive or cardinal change theories. *See id*. at 182,523 (operating during an epidemic did not create a cardinal change). Therefore, given the fixed-price nature of the grant agreement and the burden the AOR placed on DW, DW assumed the risk that USAID would disallow the costs it incurred without approval. *See id.*

Thus, this Court should affirm the lower court's judgment because it did not clearly err in determining that DW's incurred costs were unreasonable because the terms of the budget did not include PPE, sanitation, and nurses' fees; the agency did not approve DW's costs as required by the grant award; and DW assumed the risks of incurring these costs.

CONCLUSION

For the foregoing reasons, we ask this Court to dismiss this case for lack of jurisdiction. In the alternative, we ask that this Court affirm the judgment of the Court of Federal Claims disallowing DW's COVID-19 related costs.

Respectfully submitted,
Madison Plummer
Benjamin R. Whitlow

SMALL BUSINESSES IN SPACE: UPDATES TO SPACE-RELATED SMALL BUSINESS PROCUREMENT IN LIGHT OF THE SPACE FORCE'S PROPOSED ACQUISITION FRAMEWORK

*Jonathan C. Clark**

TABLE OF CONTENTS

I. Introduction 249
  A. The USSF Acquisition Framework 249
  B. New Space v. Old Space Procurement.......................................250
  C. A New Era in Space Procurement: New Space and the Acquisition of Commercial Space Technologies 251
II. What's the Big Deal About Small Businesses? 251
  A. What Does the USG Have to Do with Small Business?.............251
  B. What Benefit Does the USG Get by Helping Small Businesses?...252
  C. What's Standing in the Way of Helping Small Businesses? 254
  D. Growth Potential and Technical Capabilities—Space Small Businesses Still Need Help from USG to Grow and Scale..........255
III. The USSF's Current Efforts to Involve Small Businesses.................255
IV. Small Businesses Will Not or Cannot Work with the DoD Space Procuring Agencies 257
  A. General Small Business Problems Working with the USG 257
  B. Space Small Business Procurement Issues...................................258
    1. Space Technologies Are Expensive to Develop 258
    2. Space Procurements May Require Access to Launch Capabilities 260
    3. Space Is Highly Regulated, and Compliance Is Costly 260
    4. Commercialization of Space Technology Is Difficult.............261
V. Using Current Small Business Set-Aside Programs for Short-Term Growth 261
  A. SBIR/STTR Programs...262

---

* *Jonathan C. Clark (jonathan_clark@law.gwu.edu) is a third-year law student at The George Washington University Law School (degree anticipated May 2023), pursuing a concentration in government procurement law. He is the Murray J. Schooner Procurement Law Scholar for the 2022–2023 academic year and a Senior Managing Editor of the Public Contract Law Journal.*

1. The Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Programs........262
2. Changes to SBIR/STTR in the Space Acquisition Framework........263
   i. Increase Funding and Limits........263
   ii. Guaranteed Phase III Support........264
   iii. Leverage the Mentor-Protégé Program........264

B. Mentor-Protégé Program........265
1. The DoD's Mentor-Protégé Program........265
2. Potential Benefits to Using MPPs for Space Procurement....266
3. DoD's MPP Is Underutilized and Ill-Suited for Space Procurement........267
4. Changes to the Mentor-Protégé Program in the Space Acquisition Framework........269

VI. Redefining Success: Helping Small Businesses Succeed in New Space........270
A. Dollar Spend and Proportion of Contracts in New Space Procurement........270
B. Redefining Success: FAR........272
C. Redefining Success: SBIR/STTR........273
D. Redefining Success: The DoD's Mentor-Protégé Program........274

VII. Conclusion........275

ABSTRACT

The United States Space Force (USSF) is in the process of creating and implementing a new acquisition framework. Space procurement, once dominated by massive contracts and multi-billion-dollar awards, has started to see a shift. Space procurements present unique challenges for small businesses. Not only do space technologies cost more money to develop and test, but they also often require access to various capabilities unique to space programs. Space is highly regulated, and compliance can be expensive. Additionally, and most importantly, space technology developed by small businesses is often hard to scale and bring to the commercial market.

To help alleviate these problems, this Note advocates for the USSF to modernize and adapt three small business programs: the Small Business Innovation Research (SBIR) program; the Small Business Technology Transfer (STTR) program; and the Department of Defense's (DoD) Mentor Protégé Program (MPP). This Note also argues that the USSF must make changes in light of the "New Space" age as commercial activities continue to expand in space.

The commercial space age has brought an influx of new money, new actors, and new products and services to the space industry. One of the primary goals of the USSF acquisition system should be to leverage these commercial solutions to meet defense needs. As the USSF starts to make use of these commercial products and services, it should consider and be careful not to exclude small

businesses, as research shows that space-related small businesses disproportionately rely on government research and development (R&D) funding to develop their space technology and bring it to market. If the USSF starts spending less money on R&D, small businesses will require support in other ways.

I. INTRODUCTION

Countless generations of stargazers have looked to the sky and thought about what it would be like to traverse the stars. Until the 1950s and early 1960s, such journeys existed only in dreams. However, humanity's journey into the stars created a unique set of national security concerns which required consideration of the vast reaches outside of Earth's atmosphere as a potential threat and eventual warzone.[1] In 2001, the Commission to Assess United States National Security Space Management and Organization urged that "[i]f the U.S. is to avoid a 'Space Pearl Harbor' it needs to take seriously the possibility of an attack on U.S. space systems."[2] Legislators have recognized space as "an environment where potential adversaries are becoming more active and capable."[3] And this focus on space as a warfighting domain led to the creation of the United States Space Force (USSF) on December 20, 2019.[4]

A. The USSF Acquisition Framework

The creation of a new military service presents a unique opportunity to rethink our approach to military procurement for outer space.[5] The United States Department of the Air Force (DAF)[6] recognized this opportunity and tasked the RAND Corporation with developing a clean-sheet approach to space procurement.[7] RAND found that "to maintain an[] advantage over potential adversaries in space . . . DoD [must] draw on the *commercial space industry*, particularly nontraditional suppliers, such as *small startups*, which lead the way in technological innovation."[8] Unfortunately, the DAF and RAND did not address a critical problem: space small businesses rely on United States Government (USG)

1. Erik M. Conway, *From Rockets to Spacecraft: Making JPL a Place for Planetary Science*, 70(4) Eng'g & Sci. 2, 79 (2007).
2. Comm'n to Assess United States Nat'l Sec. Space Mgmt. & Org., Report of the Commission to Assess United States National Security Space Management and Organization viii–ix (2001).
3. William Shelton et al., RAND Corp., A Clean Sheet Approach to Space Acquisition in Light of the New Space Force 1 (2021).
4. National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, subtit. D (2019); 10 U.S.C. § 9081.
5. Shelton et al., *supra* note 3, at 1.
6. Most of the early USSF components were derived from existing DAF commands. *See* National Defense Authorization Act for Fiscal Year 2020, Pub. L. No. 116-92, subtit. D, § 952(a) (2019) ("The Air Force Space Command is hereby redesignated as the United States Space Force.").
7. Shelton et al., *supra* note 3, at iii.
8. *Id.* at 2 (emphasis added).

funding to develop space-related products and technology.[9] As compared to their large counterparts, small businesses report that they are much more reliant on the USG for their research and development (R&D) activities.[10] The reality is that the commercial success of innovative space small businesses depends on USG investment.[11] Some space companies can rely on billions of dollars from their owners and investors, but the small businesses in the federal space supply chain do not have that same luxury.[12] How can the government rely on the technological innovation of small businesses in the commercial space industry if those small companies first require USG investment to find commercial success?

B. New Space v. Old Space Procurement

While commercial R&D spending in the space industry is on the rise, the USG still spends twice as much on the development of new space technologies as the entire U.S. commercial space sector combined, though its lead is shrinking.[13] The USSF and space procuring agencies have started to recognize that the future of space procurement is commercial technology.[14] The days of new space systems driven by decades-long space procurements and multi-billion-dollar acquisitions are over.[15] The USSF's proposed "Alternative Acquisition System" recognizes this progression and stresses that the service must maintain close ties with private industry if it hopes to rapidly field modern and innovative space systems.[16] But the USSF must not lose sight of the

---

9. Bureau of Indus. & Sec., U.S. Dep't of Com., U.S. Space Industry 'Deep Dive' Assessment: Small Businesses in the Space Industrial Base 55 (2014).

10. *Id.*

11. Loren Grush, *Commercial Space Companies Have Received $7.2 Billion in Government Investment Since 2000*, The Verge (June 18, 2019), https://www.theverge.com/2019/6/18/18683455/nasa-space-angels-contracts-government-investment-spacex-air-force [https://perma.cc/9GBW-W79Q].

12. *See* Alex Knapp, *Jeff Bezos Successfully Takes off on Blue Origin's First Crewed Spaceflight*, Forbes (July 20, 2021), https://www.forbes.com/sites/alexknapp/2021/07/20/jeff-bezos-successfully-launches-on-blue-origins-first-crewed-spaceflight/?sh=215cf05f4bd2 [https://perma.cc/NX3U-2G8H] ("[Jeff Bezos has] put an estimated $7.5 billion of his own money into the company.").

13. Ryan Brukardt & Jesse Klempner, *R&D for Space: Who Is Actually Funding It?*, McKinsey & Co. (Dec. 10, 2021), https://www.mckinsey.com/industries/aerospace-and-defense/our-insights/r-and-d-for-space-who-is-actually-funding-it [https://perma.cc/3TUE-KE3Y]; *Global Space Economy Nears $447B*, Space Found., https://www.thespacereport.org/uncategorized/global-space-economy-nears-447b [https://perma.cc/6AMU-CEA3] ($51.8 billion on space-related activities in 2021) (last visited Oct. 27, 2022).

14. Dep't of the Air Force, Alternative Acquisition System for the United States Space Force 2, 14 (2020); *see* Sandra Erwin, *Military Building an Appetite for Commercial Space Services*, Space News (June 25, 2021), https://spacenews.com/military-building-an-appetite-for-commercial-space-services [https://perma.cc/CAY4-QN63]; Sandra Erwin, *NASA, Space Force See Growing Opportunities to Use Commercial Space Services*, Space News (Nov. 2, 2021), https://spacenews.com/nasa-space-force-see-growing-opportunities-to-use-commercial-space-services [https://perma.cc/8S89-SWYF]; Robert Van Steenburg, *Space Force Should Heed Commercial Practices*, Nat'l Def. Mag. (July 9, 2021), https://www.nationaldefensemagazine.org/articles/2021/7/9/space-force-should-heed-commercial-practices [https://perma.cc/74T2-22CK].

15. *See* Matt Weinzierl & Mehak Sarang, *The Commercial Space Age Is Here*, Harv. Bus. Rev., ¶¶ 2–5 (2021), https://hbr.org/2021/02/the-commercial-space-age-is-here [https://perma.cc/KR8C-E9GK].

16. Dep't of the Air Force, *supra* note 14, at 14.

need to help small businesses succeed in the "New Space" era. A rapid shift toward commercial space products will unintentionally exclude small businesses from the space industrial base—the same small businesses that USG seeks to rely on as the future of space procurement and space superiority.

The USG must focus its space small business programs on helping small businesses achieve success in the commercial marketplace, rather than in the closed system of government procurement. The USSF should leverage the tremendous growth of the commercial space market to alleviate some of the reliance of small businesses on the USG.[17] Where small businesses have had trouble in the past finding buyers for products developed using USG R&D funds, or trouble finding USG programs in need of their services, with help from the USSF these space-related small businesses can find greater success offering their services to the public moving forward.

C. A New Era in Space Procurement: New Space and the Acquisition of Commercial Space Technologies

This Note identifies a number of short-term changes to the USSF's acquisition framework that can help increase small business participation in space-related procurement programs. First, it provides a background on the benefits the USSF can realize through increased use of small businesses in its acquisition activities. Next, it addresses the difficulties small businesses experience in space procurement and provides recommendations for how the USSF and the Department of Defense (DoD) can support small businesses using existing small business programs to achieve mutually beneficial outcomes in new space procurement activities.

This Note also argues that these short-term changes are not enough. If Congress and the USG do not rethink the metrics for measuring the success of small business programs, the government will inadvertently harm small businesses in the commercial space sector and in future space procurement activities. To avoid this problem, Congress should modify the policies underlying small business programs and move away from the old dollar-based and proportion of total contracts success metrics to more nuanced future performance-based metrics that track the continued success of small businesses in the space industry writ large, rather than in government-funded programs.

II. WHAT'S THE BIG DEAL ABOUT SMALL BUSINESSES?

A. What Does the USG Have to Do with Small Business?

Congress has established a government-wide policy of promoting small businesses.[18] It believes that the security and economic wellbeing of the nation "cannot be realized unless the actual and potential capacity of small business is encouraged and developed."[19] In furtherance of this goal, Congress requires

17. *See* Weinzierl & Sarang, *supra* note 15.
18. 15 U.S.C. § 631; FAR 19.201.
19. 15 U.S.C. § 631(a).

that the USG "aid, counsel, assist, and protect . . . the interests of small[] business[es] . . . [and] insure that a fair proportion of the [government's] total purchases and contracts or subcontracts . . . be placed with small[] business[es] . . . to maintain and strengthen the economy of the Nation."[20] Congress's general goal has been to help more small businesses thrive and find success within the government and in the commercial sector.[21]

B. What Benefit Does the USG Get by Helping Small Businesses?

Most policymakers in the United States believe that the country benefits by helping small businesses find success.[22] And much data tends to support that belief.[23] At a high level, helping small businesses work with the government leads to greater and more diverse participation in government procurement.[24] By awarding more contracts to more businesses, the government benefits through increased competition.[25] The Federal Acquisition Regulation (FAR) and the federal procurement system were designed based on the assumption that increased competition provides the greatest overall benefit to the government as compared to other potential goals.[26] Supporting small businesses increases competition and allows the government and the national economy to reap the benefits of free and competitive markets.[27] And increased market competition hopefully leads to better quality and better-priced products and services.[28] Finally, more small businesses working with the USG means a stronger and more resilient supply-chain.[29]

Dollar-for-dollar, small businesses are more innovative than their large business counterparts.[30] The DoD and all branches of service rely on small

20. *Id.*

21. Robert Jay Dilger, Cong. Rsch. Serv., R45576, An Overview of Small Business Contracting 1–3 (2021).

22. *See* Dep't of Def., Small Business Strategy 2–3 (2019) ("A strong, dynamic, and robust small business sector is critical to the health of our economy."); Off. of Small Bus. Programs, Dep't of the Air Force, Air Force Small Business Program Plan 1–4 (2019) ("Our nation's defense capabilities and economic prosperity rely on the innovation, agility, and efficiency provided by small businesses!"); Alicia M. Cullen, Note, *The Small Business Set-Aside Program: Where Achievement Means Consistently Failing to Meet Small Business Contracting Goals*, 41 Pub. Cont. L.J. 703, 706 (2012). *But see* Andrew G. Sakallaris, *Questioning the Sacred Cow: Reexamining the Justifications for Small Business Set Asides*, 36 Pub. Cont. L.J. 685, 689–90 (2007).

23. *See* Bipartisan Pol'y Ctr., Supporting Small Business and Strengthening the Economy Through Procurement Reform 5–10, 5 (2021).

24. *Id.*; 15 U.S.C. § 631; Dep't of Def., *supra* note 22, at 3.

25. *See* Kate M. Manuel, Cong. Rsch. Serv., R40516, Competition in Federal Contracting: An Overview of the Legal Requirements 2–4 (2011); Bipartisan Pol'y Ctr., *supra* note 23.

26. Manuel, *supra* note 25, at 2.

27. *See* John M. Olson et al., State of the Space Industrial Base 2021 34 (2021); Bipartisan Pol'y Ctr., *supra* note 23, at 5–7.

28. Dilger, *supra* note 21. *But see* Sakarallis, *supra* note 22, at 689–93.

29. Bipartisan Pol'y Ctr., *supra* note 23, at 3, 7.

30. 1 Advisory Panel on Streamlining and Codifying Acquisition Reguls., Report of the Advisory Panel on Streamlining and Codifying Acquisition Regulations 169, 175 (2018) [hereinafter Section 809 Report] (*citing* M. Plehn-Dujowich, Product Innovation by Young and Small Firms, Small Bus. Admin. (2013), https://www.sba.gov/sites/default

businesses as an important source of innovation in defense procurement.[31] They provide fast and agile solutions to many of the government's unique problems,[32] often develop new technology faster than large businesses,[33] and they are able to rapidly prototype new technological solutions for the government.[34] Thus, helping small businesses succeed also ensures the government has access to an innovative workforce able to craft novel solutions for emerging problems.[35]

Increasing market competition is especially important in new and emerging fields like the commercial space sector.[36] New entrants will help diversify the space industrial base.[37] As critical sources of innovative economic activity and crucial components of a resilient and diversified supply chain, small businesses will likely be the primary drivers of future space exploration and advances in space technology.[38] In this regard, Jean Gustetic, Program Executive for NASA's Small Business Innovation Research (SBIR)/Small Business Technology Transfer (STTR) program, stated that "[o]ur path . . . to the moon and forward to Mars [depends on] hundreds of small businesses" throughout the United States.[39] She highlighted NASA's push to bring 3D printing technology to space, and how that effort has been driven by a small business with twenty-four employees that has "establish[ed] itself as the first commercially available manufacturing service in space."[40] Small businesses make up two-thirds of the suppliers for NASA's Artemis mission and Space Launch

/files/files/rs408tot.pdf [https://perma.cc/6K7N-XZ6L]; Anthony Breitzman et al., Small Firms and Technology: Acquisitions, Inventor Movement, and Technology Transfer, Small Bus. Admin. Off. of Advoc. (2004), https://rdw.rowan.edu/cgi/viewcontent.cgi?article=1012&context=csm_facpub [https://perma.cc/PX6M-SCAR]; Diana Hicks & Anthony Breitzman, Small Serial Innovators: The Small Firm Contribution to Technical Change, Small Bus. Admin., Off. of Advoc. (2003), https://rdw.rowan.edu/cgi/viewcontent.cgi?article=1038&context=csm_facpub [https://perma.cc/29PP-ZR9G]; Analysis of Small Business Innovation in Green Technologies, Small Bus. Admin. Off. of Advoc. (2011), https://advocacy.sba.gov/2011/10/01/analysis-of-small-business-innovation-in-green-technologies [https://perma.cc/JTE8-5WDQ].

31. Dep't of Def., *supra* note 22, at 2–3.

32. Section 809 Report, *supra* note 30, at 169, 175.

33. *See id.*

34. *See id.*

35. *See generally* Dilger, *supra* note 21; Olson et al., *supra* note 27, at 36; Section 809 Report, *supra* note 30, at 175.

36. Gabrielle Daley, *Building a Ladder to the Stars: A Competition Policy for the New Space Race*, 17 Col. Tech. L.J. 339, 365–66 (2019).

37. *See generally* Olson et al., *supra* note 27, at 12, 18, 33–34.

38. *See id.* at 26; *Moon Landing to Mars Exploration: The Role of Small Business in America's Space Program*: *Hearing Before the S. Comm. on Small Bus. & Entrepreneurship*, 116th Cong. 116–139 (2019) [hereinafter Gustetic] (statement of Jenn Gustetic, Program Exec., Small Bus. Innovation Rsch. & Small Bus. Tech. Transfer, Nat'l Aeronautics & Space Admin.); Rob Starr, *Small Businesses Playing a Role in Future Space Exploration*, Small Bus. Trends (Sept. 22, 2020), https://smallbiztrends.com/2020/09/vacuum-technology-incorporated-small-business-space-industry.html [https://perma.cc/6YF2-Z2FM].

39. Gustetic, *supra* note 38, at 1.

40. *Id.* at 2.

System.[41] This proportion suggests that small business innovation will be a critical component of achieving the USSF's goal to develop and maintain tactical advantages over potential adversaries in space. The USG and the USSF have much to gain by helping small businesses succeed.

C. What's Standing in the Way of Helping Small Businesses?

Promoting the success of small businesses has generally been a bipartisan endeavor.[42] For example, the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2022 included at least three new bipartisan provisions concerning small business contracting.[43] Both sides of the aisle regularly commit to helping small businesses find greater success when working with the government.[44] In the current administration, President Joseph R. Biden and the DoD have both focused on the importance of small businesses to the national economy and identified small business success as a top priority.[45]

Small business advocates regularly call for the USG to "cut the red tape" and make it easier for small businesses to work with the federal government.[46] Such red tape for small businesses can include, among other requirements, the need to create affirmative action plans,[47] stand-up new cost-accounting systems,[48] and, in recent years, implementation of vaccine mandates in the workplace.[49] A report by the Bipartisan Policy Center from July 2021 raised the alarm: the number of small businesses supplying products and rendering services for the federal government is shrinking.[50] Since 2005, the number of new small businesses entering the government procurement market is

41. Christian Zur, *Securing America's Small Business Space Sector*, SpaceNews (May 5, 2020), https://spacenews.com/securing-americas-small-business-space-sector [https://perma.cc/K2SW-39MW].

42. Bipartisan Pol'y Ctr., *supra* note 23, at 4–5.

43. Comm. on Small Bus., U.S. House of Representatives, *House Passes Bipartisan Small Business Contracting Provisions in NDAA Bill* (Dec. 8, 2021), https://smallbusiness.house.gov/news/documentsingle.aspx?DocumentID=4100 [https://perma.cc/9R38-WQMG].

44. *See* Amara Omeokwe, *Where Trump and Biden Stand on Helping Small Businesses*, Wall St. J. (Oct. 14, 2020), https://www.wsj.com/articles/where-trump-and-biden-stand-on-helping-small-businesses-11602667801 [https://perma.cc/C3RM-3QLL] ("Both campaigns call for measures that would improve federal contracting opportunities for minority-owned businesses . . . ."); *Where Obama, Romney Stand on Small Business Contracting*, Associated Press (May 18, 2012), https://www.cnbc.com/2012/05/18/where-obama-romney-stand-on-small-business-contracting.html [https://perma.cc/LC4X-2TCL].

45. Farooq A. Mitha, *Why Small Businesses Are Essential to U.S. National Security*, Bus. Insider (Oct. 11, 2021, 4:09 PM), https://www.businessinsider.com/why-small-businesses-are-essential-to-us-national-security-2021-10 [https://perma.cc/MP8G-JVRT].

46. *See* John Fairlamb & Stephen K. Craven, *If DOD Wants Small Business Contracts, It Has to Cut the Red Tape*, Hill (Sept. 22, 2021), https://thehill.com/opinion/national-security/573377-if-dod-wants-small-business-contracts-it-has-to-cut-the-red-tape [https://perma.cc/Y772-RAD2]; Bipartisan Pol'y Ctr., *supra* note 23.

47. *Federal Contractor Affirmative Action and Related Requirements*, Employer.gov, https://www.employer.gov/EmploymentIssues/Federal-contractor-requirements/Reporting [https://perma.cc/TSS8-CQN4] (last visited Sept. 29, 2022).

48. FAR 31.201.

49. Exec. Order No. 14042, 86 Fed. Reg. 50,985 (Sept. 14, 2021).

50. Bipartisan Pol'y Ctr., *supra* note 23, at 2.

down by seventy-nine percent.[51] The Biden administration has made it a goal to "[i]ncrease the number of new entrants to the federal marketplace [and] reverse the decline in the small business supplier base."[52] While policymakers are concerned about the mass exodus of small businesses from government contracting, their concerns—at least regarding space procurement—may be misplaced.[53] Certainly, reducing the problems small business face when working with the government is an admirable goal, but is it enough?

D. Growth Potential and Technical Capabilities—Space Small Businesses Still Need Help from USG to Grow and Scale.

Despite their propensity for innovation, small business contractors often have trouble acquiring private investment.[54] As a result, many small businesses in the space supply chain have turned to the government as a source of "seed funding" to develop new and emerging technologies.[55] In its deep-dive assessment of the space industrial base, the Bureau of Industry and Security found that a majority of small business respondents felt that if the government reduced its space-related demands and reduced the amount of money that it spends on space-related R&D, this would cause "direct and indirect impacts on small businesses[,] regardless of their dependency on [government funds]."[56] Thus, the government must walk a fine line as it transitions to the procurement of commercial space technologies.[57] Small businesses have strong potential for growth in the global space market.[58] But their ultimate "success is hinged on shaky support by the U.S. Government . . . ."[59] The USSF must ensure that it is spending enough money on small business R&D to help small firms bring potential new products to market, while also procuring currently available commercial solutions to achieve programmatic goals.

III. THE USSF'S CURRENT EFFORTS TO INVOLVE SMALL BUSINESSES

Overall military spending on space-related programs is illustrative of the problem faced by the USG. Space procurement dollars go primarily to large contractors, but the space industrial base is primarily non-traditional small

51. *Id.*

52. White House Press Release, Fact Sheet: Biden-Harris Administration Announces Reforms to Increase Equity and Level the Playing Field for Underserved Small Business Owners (Dec. 2, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/12/02/fact-sheet-biden-harris-administration-announces-reforms-to-increase-equity-and-level-the-playing-field-for-underserved-small-business-owners [https://perma.cc/PW5H-AKRX].

53. *Compare id.*, *with* Marcy E. Gallo, Cong. Rsch. Serv., R43695, Small Business Research Program: SBIR and STTR 35–37 (2021).

54. *See generally* Bureau of Indus. & Sec., *supra* note 9, at 63.

55. *Id.* at 55, 58, 70.

56. *Id.* at 66.

57. *Cf.* Gustetic, *supra* note 38, at 4.

58. Olson et al., *supra* note 27, at C-2.

59. *Id.* at 18 (citing Samantha Cohen et al., Ctr. for Strategic and Int'l Studies, New Entrants and Small Business Graduation in the Market for Federal Contracts (2018)).

businesses.[60] Because the stand-up of the USSF is still ongoing, only limited data is available concerning how the USSF has utilized small businesses in its procurement activities thus far. If the service follows the lead of its predecessor, the USSF will likely try to make use of the three primary small business programs available to the DoD: the SBIR program,[61] STTR program,[62] and the DoD Mentor-Protégé Program (MPP).[63] Efforts in this regard have already begun. For example, the USSF has created a program mirroring the DAF's AFWERX program called SpaceWERX.[64] The USSF describes SpaceWerx as a program that "inspires and empowers collaboration with innovators to accelerate capabilities and shape our future in space."[65] SpaceWerx leverages the SBIR/STTR programs to connect with small businesses and help fund R&D.[66] At a SpaceWerx event in 2021, the USSF awarded $32 million to nineteen businesses in the form of Phase II SBIR awards.[67] But that amount is a drop in the bucket in the grand scheme of total space dollars.[68]

It is helpful here to look at the USSF's predecessor, the Air Force Space Command (AFSC). In spite of the DAF's professed commitment to small businesses and the government's resounding praise concerning the benefits of relying on small businesses in defense procurement, AFSC, in FY 2013, had the smallest total percentage of small business dollars spent across the DAF and the federal government as a whole.[69] At 6.2% of its total budget, AFSC's total obligations to small businesses was significantly lower than the DAF's average for FY 2013 (14–15%),[70] and far below the DoD's current goal of awarding at

60. Olson et al., *supra* note 27, at C-1; *see, e.g.*, NASA Budget, Fiscal Year 2021, USAspending.gov (Space Exploration Technologies Corp. – $1,608,434,961; Lockheed Martin Corporation – $1,348,769,765; The Boeing Company – $1,023,645,656; Jacobs Technology Inc. – $1,015,752,222).

61. Gallo, *supra* note 53 at 3–4.

62. *Id.* at 12–13.

63. 48 C.F.R. ch. 2, app. I; Robert Jay Dilger, Cong. Rsch. Serv, R41722, Small Business Mentor-Protégé Programs 1–4 (2022). As of September 29, 2022, neither USSF nor SBA have announced any Mentor-Protégé agreements concerning USSF.

64. *SpaceWERX Launch Drives AFWERX Small Business Focus on Universities and On-Orbit Capability*, Air Force Rsch. Lab'y Pub. Affs. (Aug. 11, 2021), https://www.afrl.af.mil/News/Article/2727417/spacewerx-launch-drives-afwerx-small-business-focus-on-universities-and-on-orbi [https://perma.cc/9UXX-W5WJ].

65. SpaceWerx, https://spacewerx.us [https://perma.cc/S64L-XS5N] (last visited Nov. 11, 2021).

66. Air Force Rsch. Lab'y Pub. Affs., *supra* note 64.

67. Sandra Erwin, *Space Force Awards $32 Million in Contracts to Startups and Small Businesses*, Space News (Aug. 20, 2021), https://spacenews.com/space-force-awards-32-million-in-contracts-to-startups-and-small-businesses [https://perma.cc/7N4M-9TX4].

68. *Compare id.* (noting awards to "19 companies that each will receive $1.7 million [SBIR] Phase 2 contracts" to further develop their technologies), *with Air Force President's Budget*, Dep't of the Air Force, https://www.saffm.hq.af.mil/FM-Resources/Budget/Air-Force-Presidents-Budget-FY22 (Space Force FY22 RDT&E budget request of $11.3 billion) (last visited Oct. 27, 2022) [https://perma.cc/WA9N-D47T] [hereinafter DAF], *and Global Space Economy Rose to $447B in 2020, Continuing Five-Year Growth*, Space Found. (July 15, 2021), https://www.spacefoundation.org/2021/07/15/global-space-economy-rose-to-447b-in-2020-continuing-five-year-growth [https://perma.cc/VK82-PDX4] (last visited Sept. 29, 2022).

69. Nancy Y. Moore et al., RAND Corp., Improving the Air Force Small Business Performance Expectations Methodology 6 n.15, 11 (2017).

70. *Id.*

least 22.5% of prime contracting dollars and 32.25% of subcontracting dollars to small businesses.[71] In comparison, NASA awarded 17.5% of its prime contract dollars and 39.3% of its subcontracting dollars to small businesses.[72] Data on the USSF's small business obligations are not yet available, but, even if the USSF gets to the same percentage as AFSC, that would mean it spends approximately $700 million on small business programs.[73] Compared to the global space economy ($447 billion),[74] that number appears negligible.

Whether the USSF's lofty goal of expanding the space industrial base through collaborative partnerships comes to fruition will depend on how it goes about supporting small businesses. Unfortunately, as currently written and implemented, the three small business programs mentioned above are not suitable for the USSF's goal.

IV. SMALL BUSINESSES WILL NOT OR CANNOT WORK WITH THE DOD SPACE PROCURING AGENCIES

A. General Small Business Problems Working with the USG

Though small businesses experience a significant number of problems uniquely associated with space procurement, they also face various non-space-specific government procurement related problems. As such, it is helpful to start with a brief look at some of the common issues that small businesses have when working with the federal government. Small businesses often complain that competing for government contracts entails red tape and burdensome regulations which discourage them from working with the government.[75] Often when a small business might be willing to work with the government, contracting officers (COs) are unaware of small businesses that can meet government needs.[76] Even if a CO knows that a small businesses can meet the government's needs, small businesses are often scared away by the slow speed of government acquisition and the length of the acquisition cycle.[77] When working with the DoD, small businesses have an especially difficult time understanding the government's needs because the DoD uses a lot of agency- and government-specific terms that have no contemporaries in the private

71. *Small Business Program Goals and Performance*, Dep't of Def., https://business.defense.gov/About/Goals-and-Performance [https://perma.cc/42YB-EAFT] (last visited Sept. 29, 2022).

72. Small Bus. Admin., National Aeronautics and Space Administration: FY2020 Small Business Procurement Scorecard (2021).

73. *See* DAF, *supra* note 68 (noting that USSF's FY22 total RDT&E budget request is $11.3 billion). The request of $11.3 billion multiplied by AFSC's most recent small business spend (6.2%) suggests that USSF will end up spending about $700 million on small business programs.

74. Space Found., *supra* note 68.

75. Olson et al., *supra* note 27, at 88.

76. *See id.* at C-7; U.S. Gov't Accountability Off., Space Acquisitions Challenges in Commercializing Technologies Developed Under the Small Business Innovation Research Program 20 (2010); Section 809 Report, *supra* note 30, at 178–79.

77. Bipartisan Pol'y Ctr., *supra* note 23, at 12 ("Small business owners consistently said the process is too time-consuming and too complicated, that there is not enough information on federal contract opportunities, and that they feel success is unlikely because small businesses are not adequately prioritized.").

commercial sector.[78] Finally, the system for awarding small business set-asides makes small businesses afraid of growing too big and losing out on government contracts.[79] In addition to these more general problems, small businesses working in the space industry have unique concerns of their own.

B. Space Small Business Procurement Issues

To achieve the USSF's goal of a fast and agile innovation-focused procurement system, any acquisition framework must help small businesses overcome the structural barriers inherent in a space-based procurement system. In their 2021 State of the Space Industrial Base Report, the Defense Innovation Unit, USSF, and the Air Force Research Laboratory noted that while "[m]ost innovation, economic growth and jobs come from small business . . . structural barriers 'architect out' many would-be commercial providers."[80] Small businesses are forced to overcome "[s]pecial requirements and modifications, security requirements, fiscal risk profiles, lengthy timelines to award, significant demand for meetings, [and] paperwork-chase proposals," all while facing numerous other challenges unique to space.[81]

1. Space Technologies Are Expensive to Develop

Space-related technologies are more expensive to develop, and small businesses often have problems finding funding to develop such technology.[82] To make matters worse, developmental costs are often extremely high.[83] Large contractors are more likely to have the ability to fund the development of their own commercial space technology and sell finished products to the government.[84] Small businesses, on the other hand, are far more reliant on government R&D funds to develop new space technologies.[85] One unique issue is that space-related technologies require specialized testing facilities that are often cost-prohibitive for small businesses competing for USG contracts.[86] Before a technology developed by a small business is declared flight ready, it must undergo extensive testing to ensure that it will survive the unforgiving environment of space.[87]

Figure 1 shows a general testing flow diagram suggested by the California Polytechnic State University for the development of a "CubeSat." Before it is

78. Section 809 Report, *supra* note 30, at 178 ("Many companies not familiar with DoD struggle to understand requirements as they are articulated in requests for proposal. Acronyms and jargon that are widely used across DoD are not always comprehensible for small businesses lacking experience in the defense market, which leads them to develop proposals that are noncompliant with what DoD actually requires."); *see* Bipartisan Pol'y Ctr., *supra* note 23, at 18.

79. Section 809 Report, *supra* note 30, at 177.

80. Olson et al., *supra* note 27, at 34.

81. *Id.*

82. *See id.* at 56.

83. *Id.*

84. Bureau of Indus. & Sec., *supra* note 9, at 55. *See generally* Lorrie A. Davis & Lucien Filip, Aerospace Corp., How Long Does it Take to Develop and Launch Government Satellite Systems 1 (2015).

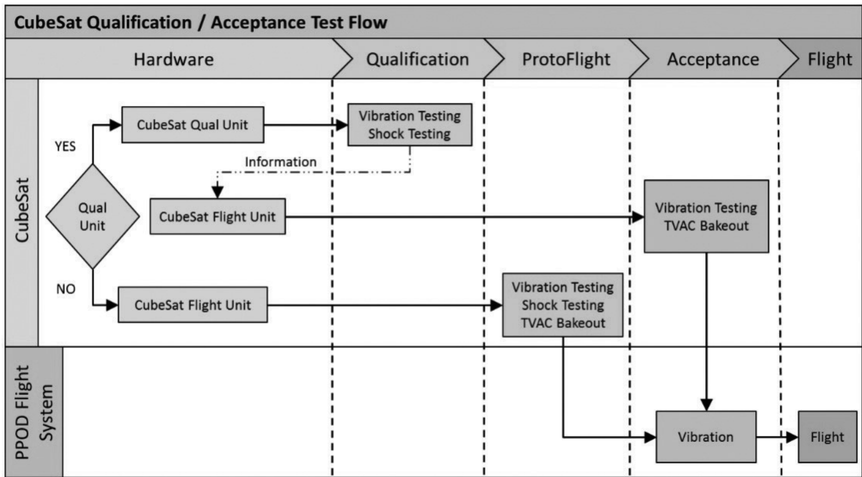
85. Bureau of Indus. & Sec., *supra* note 9, at 55.

86. U.S. Gov't Accountability Off., *supra* note 76, at 17.

87. *Id. See generally* Space Standards, Defense Standardization Program Journal (Jan./Mar. 2017 edition).

ready for flight, a CubeSat needs to undergo at least eight rounds of testing.[88] The Hawaii Space Flight Laboratory provides estimated costs for use of its testing facilities.[89] To use the lab's thermal vacuum chamber, the rough order of magnitude cost is $17,000 per week.[90] For attitude determination and control system testing the cost is $19,000 per week.[91] Depending on the amount of testing needed, a contractor could easily spend thousands of dollars on access to testing facilities alone, even for the construction of a CubeSat.[92] For large contractors, this sum is likely not a major problem. For small businesses it can be fatal. In its review of space-related SBIR contracts, GAO noted that one of the small businesses that it interviewed "said it had the opportunity to transition its technology [to Phase III] . . . but to do so, it needed an advanced microcircuit that cost $750,000."[93] As a result, the small business was unable to bring its technology to market.[94]

Figure 1. CubeSat Testing Flow Diagram by the California Polytechnic State University.[95]



88. *See* Cal. Polytechnic State Univ., CubeSat Design Specification (CDS) Rev. 13–15 (Feb. 20, 2014).

89. *Integration and Testing*, Haw. Space Flight Lab'y, https://www.hsfl.hawaii.edu/facilities [https://perma.cc/7BXY-FHWT] (last visited Oct. 12, 2022). The Hawaii Space Flight Laboratory provides commercial test facilities for space-related businesses.

90. *Id.*

91. *Id.*

92. *Compare id.*, *with* Cal. Polytechnic State Univ., *supra* note 88. CubeSats are a class of nanosatellites measuring 10x10x10 centimeters that are intended to "provide a cost effective platform for science investigations, new technology demonstrations and advanced mission concepts using constellations, swarms disaggregated systems." Elizabeth Mabrouk, *What Are SmallSats and CubeSats*, NASA (Feb. 26, 2015), https://www.nasa.gov/content/what-are-smallsats-and-cubesats [https://perma.cc/3RW6-W39K].

93. U.S. Gov't Accountability Off., *supra* note 76, at 20–21.

94. *Id.*

95. Cal. Polytechnic State Univ., *supra* note 88.

2. Space Procurements May Require Access to Launch Capabilities

Historically, the developmental costs of satellites dwarf in comparison to the costs of sending an object into outer space, though this has become less of a problem in recent years.[96] The total cost of a launch can vary drastically depending on the type of launch vehicle being used. For $2.5 million, a small business could send 330 pounds of payload into space onboard SpaceX's "Falcon 9" as part of a separately planned launch, or for $5.7 million it could get its own dedicated launch using Rocket Lab's "Electron."[97] To send a payload to the International Space Station, NASA charges commercial activities approximately $20,000 per kilogram of weight.[98] Small businesses seeking to launch an object into space will also likely face serious backlogs and competition from larger businesses that often jump to the front of commercial lines by block-buying launches.[99] Unfortunately, there is no way around these delays.[100] The median delay for all small satellites launched in the last five years was 128 days.[101] While a small business could try to avoid these problems by going through the USG, they are likely to experience serious delays when working with the federal government as well.[102]

3. Space Is Highly Regulated, and Compliance Is Costly

Small businesses often have difficulty understanding the space industry's complex regulatory regime.[103] Commercial space transportation and launches are governed by at least eight primary pieces of legislation in addition to thousands of pages of regulations, other policies,[104] and the yearly National

---

96. *See* Gil Denis et al., *From New Space to Big Space: How the Commercial Space Dream Is Becoming a Reality*, 166 Acta Astronautica 431, 434–36 (2020).

97. Darrell Etherington, *Rocket Lab Points Out That Not All Rideshare Rocket Launches Are Created Equal*, TechCrunch (Jan. 30, 2020), https://techcrunch.com/2020/01/30/rocket-lab-points-out-that-not-all-rideshare-rocket-launches-are-created-equal [https://perma.cc/V8Y3-489M].

98. NASA, Commercial and Marketing Pricing Policy, https://www.nasa.gov/leo-economy/commercial-use/pricing-policy [https://perma.cc/AG2X-8A6Q] (last visited Jan. 23, 2022) (NASA provides launch services to commercial and marketing activities. To support these missions, it publishes pricing for private astronaut missions that reflect "full reimbursement for the value of NASA resources," and "[a]ny proposals or awards for private astronaut missions [are] subject to the [stipulated] prices.").

99. Jeff Mathews, *The Decline of Commercial Space Launch Costs*, Deloitte Consulting LLP, https://www2.deloitte.com/us/en/pages/public-sector/articles/commercial-space-launch-cost.html [https://perma.cc/C2LQ-8YA3] (last visited Jan. 23, 2022); *see* Jeffrey Hill, *Rocket Lab Grows Backlog by 30%*, *Acquires Space Separation Systems Company PSC*, Via Satellite (Nov. 11, 2016), https://www.satellitetoday.com/business/2021/11/16/rocket-lab-grows-backlog-by-30-acquires-space-separation-systems-company-psc [https://perma.cc/C6T7-588E].

100. *See generally* BryceTech, Smallsat Launch Delays (2021) (finding that "[a]ll smallsats on commercial launches in the last 5 years experienced delays").

101. *Id.*

102. *Cf.* Stephen Clark, *Payload Issue Delays SpaceX's Next Falcon Heavy Launch to Early 2020*, SpaceFlight Now (Oct. 4, 2021), https://spaceflightnow.com/2021/10/04/payload-issue-delays-spacexs-next-falcon-heavy-launch-to-early-2022 [https://perma.cc/8U3X-H9UC].

103. *See generally* Bureau of Indus. & Sec., *supra* note 9, at 8, 66 ("Finally, these studies touched on common issues, such as finding skilled workers, dealing with complex export control regulations, handling government purchasing requirements, and many other challenges.").

104. *See* Communications Act of 1934, 47 U.S.C. §§ 151–163; National Aeronautics and Space Act of 1958, 51 U.S.C. §§ 20101–20164; Commercial Space Launch Act of 1984, 51 U.S.C.

Defense Authorization Act.[105] A review of all the regulations and laws that a small business must comply with in order to develop and launch an object into space is beyond the scope of this Note, but it is certainly a daunting endeavor for any business that decides to enter the space industry. To make matters worse, federal regulators have been unable to keep up with the pace of innovation in the industry, leading to largely ineffective and confusing bodies of national space law.[106]

4. Commercialization of Space Technology Is Difficult

Even when a small business is able to overcome the hurdles of product development, it will often have difficulty commercializing space technologies that it develops for the government.[107] Products developed using SBIR/STTR funding might make it through Phase I and II only to fail once the small business contractors seek to sell their products to government partners or prime contractors during the commercialization phase of product development. This problem is compounded by the fact that small businesses often have trouble working with the government because COs are risk-averse.[108] Procurement officials are afraid of relying on small businesses for the development and procurement of space-related technologies.[109] These officials see large contractors as being less risky and better positioned to navigate the complexities of building space systems.[110] Large contractors, on the other hand, often have no positive incentive to work with small businesses, and some would rather acquire a small business with a promising product rather than purchase or license its commercial solutions.[111] Together these factors demonstrate that small businesses are significantly disadvantaged when it comes to commercialization.

V. USING CURRENT SMALL BUSINESS SET-ASIDE PROGRAMS FOR SHORT-TERM GROWTH

Rather than start from scratch, the USSF should make use of existing small business set-aside programs to encourage the participation of more small businesses in space procurement. By making changes to the SBIR, STTR, and

§§ 50901–50923; Land Remote-Sensing Policy Act of 1992, 15 U.S.C. §§ 5601–5641; U.S. Commercial Space Launch Competitiveness Act of 2015, Pub. L. No. 114-90; Weather Research and Forecasting Innovation Act of 2017, Pub. L. No. 115-25; National Aeronautics and Space Administration Transition Authorization Act of 2017, 51 U.S.C. § 10101.

105. *See, e.g.*, William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283.

106. *See* Michael B. Runnels, *On Clearing Earth's Orbital Debris & Enforcing the Outer Space Treaty in the U.S.*, Bus. L. Today, Jan. 2022 ¶ 4, 11–16; *see also* Claudia Geib, *The US Government Has No Idea What to Do About Small Satellites*, Futurism (Apr. 11, 2018), https://futurism.com/small-satellites-us-government [https://perma.cc/EKB4-VLAD].

107. *See generally* U.S. Gov't Accountability Off., *supra* note 76.

108. *Id.* at 19.

109. *Id.*

110. *Id.*

111. *Id.*

MPP programs, the USSF can ensure that, in the short-term, small businesses have an opportunity to grow along with the commercial space market.

A. SBIR/STTR Programs

1. The Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Programs

Congress created the SBIR program in 1982 as a way to help innovative small businesses participate in federally funded R&D.[112] It recognized that, while small businesses are among the most cost-effective solutions to R&D needs, they only account for a very small percentage of the total R&D dollars spent in the United States.[113] Congress further reinforced its commitment to involving small businesses in federally funded R&D through the establishment of the STTR program.[114] The key difference between the SBIR and STTR programs is that the STTR program requires that the small business collaborate with a nonprofit research institution for the development and commercialization of its technology or product.[115]

Federal agencies with an extramural R&D budget greater than $100 million must set aside at least 3.2% of their funds for the SBIR program, and agencies with R&D budgets above $1 billion must also set aside an additional 0.45% of their extramural R&D budgets to fund projects under the STTR program.[116] In FY 2019, the DoD failed to meet the minimum spending requirement, as SBIR funding only accounted for 3.04% of its overall extramural R&D spending.[117] Of the major defense agencies, the DAF performed the worst in meeting its minimum spend goal (2.58%).[118]

Besides the relatively limited amount of funds available from the government, small businesses also face problems in terms of the total amount of funding available in Phase I and II. The award limits on SBIR contracts are too low to support the development of space technology.[119] The SBIR/STTR statute limits Phase I awards to a maximum of $150,000 adjusted for inflation.[120] This limit means that agencies are currently allowed to issue Phase I awards up to a maximum of $295,924.[121] They can also request a waiver from the SBA if they want to make an award that exceeds the $295,924 limit.[122]

112. Gallo, *supra* note 53.
113. *Id.* (*citing* Small Business Innovation Development Act of 1982, Pub. L. No. 97-219 (1982)).
114. *Id.* (*citing* Small Business Research and Development Enhancement Act of 1992, Pub. L. No. 102-564 (1992)).
115. *The SBIR and STTR Programs*, Small Bus. Admin., https://www.sbir.gov/about [https://perma.cc/JF99-64TJ] (last visited Jan. 29, 2022).
116. *Id.*
117. Small Bus. Admin., SBIR and STTR Annual Report for Fiscal Year 2019, at 17 (2020).
118. *Id.*
119. *See* Bureau of Indus. & Sec., *supra* note 9, at 62–65.
120. 15 U.S.C. § 638.
121. Small Bus. Admin., *supra* note 117.
122. *Id.*

The Phase I award is intended to support concept development and usually covers a period from six months to a year.[123] SBIR Phase II awards are capped at $1,972,828 for two years.[124] Phase II is intended to help continue the R&D efforts started under a Phase I award with the intent to move towards commercialization of the product in Phase III.[125] However, many small business contractors experience what they call the "valley of death" between Phase II and Phase III.[126] Because Phase II money is not enough to qualify the products for use in space, small businesses "require Phase III investment to do [space] qualification."[127]

2. Changes to SBIR/STTR in the Space Acquisition Framework

i. Increase Funding and Limits

Unfortunately, the SBIR funding restrictions are not well-suited to the development of space technologies.[128] As discussed above in Section IV.B, space technologies are inherently more expensive, more highly regulated, and sometimes take more effort to develop and test. To solve these problems, Congress should amend the SBIR/STTR statutes to provide small businesses with more funding, more support, faster award times, and longer contract periods as needed. Congress must raise the USSF's SBIR/STTR budget allocation so that more small businesses have an opportunity to participate in these programs and COs are encouraged to make use of SBIR/STTR funds. It should also amend the SBIR/STTR statutes so that fifteen percent (15%) of the USSF's extramural R&D budget would go to the SBIR/STTR Programs. For FY 2023, the USSF requested $15.8 billion for R&D.[129] A fifteen percent allocation would mean that $2.370 billion dollars would be available for use in the SBIR/STTR program as compared to just $576,700,000 under the current 3.65% allocation. This increase is critical to ensure a reliable government source of seed-funding to support companies in the space industry.[130] Congress could also allow the USSF to use excess SBIR/STTR funds to procure commercial products developed using SBIR/STTR funding. Small businesses need help from the government to develop their space-related technologies.[131] This increase and additional flexibility make those funds available.

Congress must increase the size of awards allowed to be made under the SBIR/STTR programs as the program does not currently provide sufficient

123. *Id.*

124. *Id.*

125. *Id.*

126. Bureau of Indus. & Sec., *supra* note 9, at 62.

127. *Id.*

128. *See id.* at 63 ("The gap between a new technology development, however promising, and a space qualified product usually outstrips the dollars available in SBIR or other similar technology development program[s].") (internal quotations omitted).

129. *Air Force President's Budget FY 2023*, Dept. of the Air Force, https://www.saffm.hq.af.mil/FM-Resources/Budget/Air-Force-Presidents-Budget-FY23 [https://perma.cc/PR2M-36MJ] (last visited Oct. 11, 2022).

130. *Cf.* Gustetic, *supra* note 38, at 3.

131. *See id.* at 4; *supra* discussion, at notes 77–82.

funding to mature space technologies or satisfy the rigorous testing required by the DoD for space-related technologies.[132] And finally, Congress must increase funding for SBIR/STTR awards within the USSF to account for the increased costs associated with developing space technology. At a minimum, Congress should increase Phase I award limits to $2.5 million and Phase II award limits to $10 million. While no specific number exists as to what it costs to develop new space technologies, these increases provide enough flexibility—and a wide enough margin of error—that the government and the contractor should not run into difficulties funding R&D efforts.

ii. Guaranteed Phase III Support

To support product commercialization, Congress and the DoD should also amend the SBIR/STTR program to provide for limited guaranteed funding and government support during a product's transition from Phase II to Phase III. The DAF and the USSF have attempted to provide such support through the Strategic Funding Increase (STRATFI) and Tactical Funding Increase (TACFI) Supplemental Funding Pilot Programs.[133] STRATFI and TACFI are intended to "catalyze relationships between the Air Force[,] Space Force . . . and [the private sector]," and to "bridge the capability gap between . . . Phase II efforts and Phase III scaling . . . ."[134] In addition to making these programs permanent within the USSF, and increasing the number of small businesses eligible to participate, the government should provide limited matching funds from the SBIR/STTR program during Phase III to help generate interest from investors. Small businesses with Phase II contracts transitioning to Phase III should also be provided with low-cost opportunities and partnerships with government entities to space-qualify their products. These changes would mean that small businesses are involved in USSF R&D to the maximum extent possible, with an eye towards commercializing products developed through SBIR/STTR, and towards strengthening the commercial space sector. If a small business fails to transition to Phase III, the USG has essentially wasted its investment in a promising technology, and it loses access to an otherwise viable space supplier.

iii. Leverage the Mentor-Protégé Program

Finally, the USSF should link its SBIR/STTR contracts with the DoD MPP.[135] The SBA has already taken a similar step for firms in its SBIR/STTR program.[136] Under a mentor-protégé agreement, protégés can receive developmental assistance from mentors.[137] The DoD's MPP anticipates that mentors will provide assistance with "[g]eneral business management, including

132. *See* U.S. Gov't Accountability Off., *supra* note 76, at 20.
133. AFWERX, STRATFI/TACFI 1–4 (2021), https://www.afsbirsttr.af.mil/Portals/60/documents/STRATFI_TACFI_v1.pdf [https://perma.cc/K22N-F79J].
134. *Id.* at 3.
135. *Infra* discussion, at notes 168–84.
136. *See* Dilger, *supra* note 63, at 4–5.
137. DFARS § 219.71.

organization management, financial management, and personnel management, *marketing, business development and overall business planning*."[138] While not expressly contemplated in the DoD's MPP, a mentor could help a protégé commercialize its product in exchange for credit towards its subcontracting goals, a percentage of profits, an equity stake, or any other suitable arrangement between the parties.[139] At the request of a contractor transitioning from Phase II to Phase III, or upon the USSF's receiving notice that a contractor has failed to transition from Phase II to Phase III, the USSF could advise potential suitable mentors about the possibility of a new mentor-protégé agreement. The DoD would also benefit from implementing a system like the SBA's All Small Mentor Protégé Program (ASMPP), which allows joint ventures between mentors and protégés to compete for small business set-asides.[140] To realize the greatest potential impact, these joint ventures between a mentor and protégé under an MPP agreement should also be allowed to compete for R&D SBIR/STTR contracts. These changes would help to alleviate many of the problems small businesses face in space procurement and ensure that the USSF has access to the innovative capabilities of small businesses as it seeks to maintain space superiority in the years to come.

B. Mentor-Protégé Program

1. The DoD's Mentor-Protégé Program

Congress envisioned the various mentor-protégé programs as a way to provide small businesses with the resources and support necessary to succeed in their own right as federal contractors.[141] While agencies can create an agency-specific MPP, most use the SBA's government-wide MPPs.[142] The SBA's 8(a) MPP and ASMPP account for over ninety percent of all MPP agreements.[143] The DoD's MPP is the largest program not administered by the SBA.[144] Under both of the SBA's MPPs, and most of the other agency MPPs, a small business "may receive financial, technical, or management assistance from mentors" in order to help the small business obtain or perform federal contracts or subcontracts.[145] In contrast, the DoD's MPP is focused on helping small businesses obtain DoD subcontracts and helping them to serve

---

138. DFARS App. I-106(d)(1)(i) (emphasis added).

139. *See id.*

140. *Infra*, notes 174–75.

141. *See* Small Business Mentor Protégé Programs, 81 Fed. Reg. at 48,574; U.S. Gov't Accountability Off., GAO/NSAID-94-101, Defense Contracting: Implementation of the Pilot Mentor-Protege Program 1 (1994); Small Business Jobs Act of 2010, Pub. L. No. 111-240, § 1345(a), 124 Stat. 2504, 2546.

142. *See* U.S. Small Bus. Admin., Report to Congress on Mentor-Protégé Programs for Fiscal Year 2020 6, 8 (2021) [hereinafter MPP REPORT FY20]. Seven agencies have active MPPs: the DoD, Department of Energy (DoE), Department of Transportation (DoT), Department of Homeland Security (DHS), General Services Administration (GSA), National Aeronautics and Space Administration (NASA), and Small Business Administration (SBA).

143. *Id.* at 6.

144. *Id.* at 8.

145. Dilger, *supra* note 63, at 1–3.

as suppliers on other DoD contracts.[146] One of the unique benefits offered by the SBA's ASMPP is that a mentor and its protégé can form a joint venture to compete for small business set-aside contracts.[147] MPPs formed under the ASMPP also allow mentors to provide equity investments, loans, and bonding to protégés.[148]

During FY 2020, mentors helped protégés develop technical capabilities in "aerospace and lean manufacturing . . . telecommunication and satellite services,"[149] provided "[g]uidance on . . . manufacturing,"[150] "train[ed] [protégés] on mentor's products, services, and cyber security,"[151] and "provide[d] rent-free use of mentor's facilities . . . ."[152] Within the DoD, "mentors helped proteges receive Facility Security Clearances . . . [and] certification[s] such as ISO 9000, CSSIP, and CMMI."[153]

While the success of small businesses is the primary concern of MPPs, both mentors and proteges derive substantial benefit from participation.[154] Under the DoD's MPP, mentors can receive reimbursement for a certain amount of the costs that they incur by assisting protégés.[155] For any unreimbursed costs, a mentor can receive credit towards its statutorily mandated subcontracting goals.[156] Protégés, on the other hand, benefit through broad exposure to the federal procurement system, increased competitive advantage when bidding on federal contracts, and free technical and business assistance.[157] The DoD's MPP also allows protégés subcontracting for mentors to receive DoD reimbursable advance payments and installments prior to a project's completion.[158] This allowance can help small businesses who might otherwise be unable to complete a contract due to cashflow issues, by providing necessary funds to complete performance.

2. Potential Benefits to Using MPPs for Space Procurement

The MPP seems like a great way for small businesses to break into the space industry. Small businesses face four critical problems when they compete for USG space contracts: (1) the cost to develop new space technologies; (2) difficulty commercializing space technologies developed for the government;

146. *Id.* at 10.
147. *Joint Ventures*, Small Bus. Admin, https://www.sba.gov/federal-contracting/contracting-assistance-programs/joint-ventures [https://perma.cc/C7CC-Y9FM] (last visited Sept. 29, 2022).
148. *See* Dilger, *supra* note 63, at 8.
149. MPP REPORT FY20, *supra* note 148, at 11 (NASA).
150. *Id.* at 12 (SBA).
151. *See* U.S. Small Bus. Admin., Report to Congress on Mentor-Protégé Programs for Fiscal Year 2019 42 (2020) [hereinafter MPP REPORT FY19] (GSA).
152. *Id.* at 42 (GSA).
153. *Id.* at 8 (DoD).
154. Dilger, *supra*, note 63, at 1–2, 7–8, 14.
155. DFARS App. I-109. Mentor reimbursements are capped at $1 million per fiscal year unless the contractor receives written approval from the DoD that unusual circumstances justify a higher amount. *See* DFARS App. I-109(d); Dilger, *supra* note 63, at 13.
156. DFARS App. I-110.1(a); Dilger, *supra* note 63, at 13.
157. Dilger, *supra* note 63, at 13.
158. DFARS App. I-106(d)(4).

(3) an insular space procurement industry wary of new entrants; and (4) risk averse COs procuring space technology.[159] In addition to receiving technical assistance, the DoD MPP can provide unique benefits to a new entrant into the space industry.

An MPP agreement can help defray many of the costs of developing space technologies. For example, a small business could potentially enter into an MPP agreement with a mentor that would allow it to make use of the mentor's specialized testing facilities.[160] MPPs have been used in the past to provide rent-free access to mentor facilities, so this type of arrangement would likely be reimbursable under current DoD regulations.[161] Small businesses are also often unable to compete for certain government contracts because they lack security clearances.[162] An MPP agreement can be used to help a small business acquire a security clearance.[163] A protégé could potentially leverage its agreement with a mentor to gain access to launch capabilities that would otherwise be unavailable to it. Critically, a protégé could also make use of a mentor's knowledge and expertise in compliance and regulatory matters concerning space, in order to decrease the overall cost of developing new space technologies and performing space-related contracts.[164] Mentors with extensive experience working on space government contracts will have a better understanding of the regulatory regime applicable to space and will be able to impart that knowledge on their protégés. Finally, even after the development of a technology, a protégé could receive business assistance to help with the product's commercialization.[165]

An MPP agreement might also be able to help smooth many of the more intangible issues concerning access to DoD officials and establishment of business relationships with major space prime contractors.[166] By working with a more established contractor, a protégé will have more access to the industry in general and USSF procurement officials in particular. Finally, an active MPP agreement can help assuage the fears of COs that might otherwise avoid working with a small business. A CO would likely be more comfortable awarding a contract to (or integrating the technologies of) a protégé with an MPP over a small business lacking such an agreement.

3. DoD's MPP Is Underutilized and Ill-Suited for Space Procurement

Unfortunately, the DoD MPP is underutilized, underfunded, and outdated. On January 1, 2019, the DoD had sixty-one active mentor-protégé

159. *See* discussion *supra* notes 103–39.

160. *See* MPP REPORT FY19, *supra* note 157, at 42 (reporting that an MPP provided protégé with access to mentor's facilities).

161. *Id.*

162. U.S. Gov't Accountability Off., *supra* note 76, at 18.

163. *See* MPP REPORT FY19, *supra* note 157, at 42.

164. *Cf.* Jessica Tillipman & Vijaya Surampudi, *The Compliance Mentorship Program: Improving Ethics and Compliance in Small Government Contractors*, 49 Pub. Cont. L.J. 217, 219–20, 234–35 (2020) (proposing the use of MPPs to incentivize large contractors to help small businesses develop effective anti-corruption compliance programs).

165. *See* discussion *supra* notes 163–67.

166. *See* U.S. Gov't Accountability Off., *supra* note 76, at 17–19.

agreements.[167] In FY 2019, the DAF had fifteen MPPs, the Army had thirteen, the Defense Intelligence Agency had nine, the Missile Defense Agency had twelve, the Navy had four, the National Guard had three, and the remaining seven MPPs were distributed among DCMA, NSA, and SOCOM.[168] In comparison, NASA (a much smaller agency in terms of both funding and overall size) had ten active MPPs in its program.[169] This means NASA had almost as many active MPPs as the Army, despite the Army having a budget almost seven times as large.[170] When further considered in light of the 44,768 distinct small businesses that received contracts from the DoD in FY 2020, this number is disappointing, as it means that only 0.14% of small business contractors are taking advantage of the DoD MPP.[171]

What is keeping more small businesses from making use of mentor-protégé agreements? While there is no definitive answer, a culmination of issues could contribute to the program's lack of traction. Small businesses may perceive mentor-protégé agreements as disproportionately benefitting large contractors, or they may be concerned that involving a large contractor will lead to a controlling relationship rather than a true mentor-protégé arrangement.[172] Some mentors use the program to benefit themselves in an attempt to bid on contracts for which they would otherwise be ineligible.[173] It could be that potential protégés have problems finding a suitable mentor. The DoD's MPP states that mentor firms are solely responsible for the selection of potential protégés.[174] If the drawbacks to participation far outweigh the incentives, large firms may be reluctant to take on protégés. What's more, because the program caps reimbursement for developmental costs at $1 million, the developmental costs of space technology might be too high to make it worthwhile for mentors.[175] Add to this the fact that the DoD's program only received about $30 million in FY 2021, and its underutilization starts to make sense.[176] Additional research should investigate why more small firms do not have active MPPs.

167. MPP REPORT FY20, *supra* note 148, at 22.

168. Dave Venlet, Def. Bus. Bd., Mentor Protégé Program (MPP) Assessment Study 6–8 (2019).

169. MPP REPORT FY20, *supra* note 148, at 8. This number is not inclusive of other MPPs that may have been entered into by NASA contractors under a relevant SBA MPP.

170. *Compare* NASA, FY 2023 Budget Estimates (2022), *with* Dept. of the Army, Army Fiscal Year 2023 Budget Overview (2022).

171. Small Bus. Admin., Department of Defense FY 2020 Small Business Procurement Report Card 1 (2021).

172. James Fontana, *SBA's Mentor-Protégé See Some Welcome Changes and One Not So Welcome Change*, Wash. Tech. (Mar. 29, 2021), https://washingtontechnology.com/opinion/2021/03/sbas-mentor-protege-sees-some-welcome-changes-and-one-not-so-welcome-change/355210 [https://perma.cc/PE5B-MFBU].

173. Dilger, *supra* note 63, at 7–8.

174. DFARS App. I-104(a).

175. *See id.*; 48 C.F.R. ch. 2, App I-109(d); Dilger, *supra* note 63, at 14 n. 87 ("The amount of such payments generally may not exceed $1 million per year."); *supra* discussion, at notes 104–12.

176. Dep't of Def., Off. of the Sec'y of Def., Department of Defense Fiscal Year (FY) 2021 Budget Estimates: Defense Wide Justification Book Volume 1 of 2, February 2020, Exhibit P-40, Budget LINE-ITEM Justification: PB 2021, https://comptroller.defense.gov

4. Changes to the Mentor-Protégé Program in the Space Acquisition Framework

Any potential changes to the DoD's MPP should be focused on increasing participation in the program. To increase participation, the USSF needs to make the benefits of participation attractive enough to convince large contractors that taking on new protégés is worth their time.[177] To that effect, the DoD's MPP should incorporate many of the changes made in the SBA's ASMPP.[178] In particular, the DoD should allow joint ventures between a mentor and protégé to compete for small business set-asides. Large businesses would likely be drawn by the opportunity to compete for and win new business, and, as a result, they would be more likely to enter into a mentor-protégé agreement.[179] The DoD should also allow joint ventures between a mentor and protégé to compete for SBIR/STTR contracts. A joint venture for a SBIR/STTR contract could help defray the costs associated with pursuing an award as the mentor would be able to help with proposal writing and production, concept development, and feasibility studies.

What's more, a mentor-protégé agreement could help pay for the costs of space qualification and bridge the gap over the "valley of death" between Phase II and Phase III.[180] Under the DoD's current MPP, a mentor would be able to seek reimbursement from the government for such developmental costs or receive credit towards its subcontracting goals.[181] Obviously, this type of support could be prohibitively expensive. As such, funding for the DoD's MPP must be increased to encourage and support the creation of new MPP agreements within the USSF. To that effect, the DoD should change its MPP so that mentors can receive reimbursement for developmental costs incurred up to $2.5 million. Congress should also increase the amount appropriated to the DoD for the MPP from $30 million to a number commensurate with the program's increased participation.

Finally, the DoD's MPP should be changed to specifically identify commercialization and commercial success as a type of assistance that can be provided by a mentor firm in USSF MPP agreements. To support this change, in addition to developmental costs, a mentor firm operating under an USSF MPP should also be able to receive credit towards applicable subcontracting goals based on a protégé's future commercial success. The USSF could measure this through "[a]n increase in the dollar value of contract and subcontract awards to protege firms under . . . commercial contracts."[182] The amount

/Portals/45/Documents/defbudget/fy2021/budget_justification/pdfs/02_Procurement/PROC_Vol1_DW_PROC_PB21_Justification_Book_Final.pdf [https://perma.cc/4W9P-YFGS].

177. *Cf.* Tillipman & Surampudi, *supra* note 170, at 219.

178. *See* W. Barron A. Avery et al., *Navigating the SBA's All Small Mentor-Protégé Program*, 52(2) Procurement L. 3–5 (2017).

179. Fontana, *supra* note 178.

180. *See* discussion *supra* notes 151–54.

181. DFARS App. I-109.

182. DFARS App. I-100(c)(1). This quotation modifies the DoD's current MPP policy statement so that commercial contracts are the primary focus of the proposed new standard for subcontracting goal credits.

of credit that the mentor can receive should be two times the total amount of those contracts attributable to assistance furnished by the mentor. This change would incentivize large contractors who have trouble meeting their subcontracting goals to provide a different type of assistance to proteges: commercial assistance.

This change would also increase overall participation in the program without requiring as much of an overall increase in the total amount appropriated to the program. Providing this type of credit is a win-win-win for the government, the mentor, and the protégé. While the mentor's investment is minimal, the small businesses would receive much needed assistance commercializing their products. The mentor has an incentive to help the small business succeed commercially, the small business would obviously benefit from commercial success, and the government benefits through the availability of more commercial products in the marketplace. These changes consider the new reality that, while small businesses might not be able to contract or subcontract with the government on space-related procurements, the USG can still help them find commercial success and benefit as a result.

These changes also ensure that the government is getting the maximum return on its investment in small businesses. However, one other critical and more fundamental change to the procurement system is necessary for the USSF acquisition system to actually accomplish its goals. The MPP and SBIR/STTR programs are potentially revolutionary because of their focus on and consideration of commercial success. Both identify commercialization and commercial contracts as measures of success. The USG needs to take that focus and apply it across the board to all small business procurement conducted by the USSF. The ultimate goal of every dollar spent by the USSF on small business programs should be to help small businesses succeed in the commercial space sector.

VI. REDEFINING SUCCESS: HELPING SMALL BUSINESSES SUCCEED IN NEW SPACE

A. Dollar Spend and Proportion of Contracts in New Space Procurement

While modernizing small business set-asides will certainly be helpful in the short term, it runs the risk of creating a false sense of security. It would be easy to see a resultant increase in dollars flowing to small businesses and assume that the programs are helping small businesses succeed. However, that assumption would largely miss the mark. The problem starts at the top.

Congress envisioned a procurement system which aims to "aid, counsel, assist, and protect . . . the interests of small[] business[es]," how?[183] By "insur[ing] that *a fair proportion of the [government's] total purchases* and contracts or subcontracts . . . be placed with small[] business[es]."[184] FAR subpart

183. 15 U.S.C. § 631(a); *see* FAR 19.201.
184. FAR 19.201.

19.201 states that "[i]t is the policy of the Government to provide *maximum practicable opportunities* in its acquisitions to small business[es] [and] [s]uch concerns must also have the *maximum practicable opportunity to participate as subcontractors* in the contracts awarded by [the government]."[185] The FAR also envisions that each agency's "Office of Small and Disadvantaged Business Utilization" will conduct reviews to ensure that small businesses are receiving "*a fair share* of Federal procurements."[186] It mandates that the government "[e] ncourage prime contractors to subcontract with small business concerns."[187] Prime contractors receiving contracts above the simplified acquisition threshold "must agree in the contract that small business[es] . . . will have the *maximum practicable opportunity to participate in contract performance* consistent with its efficient performance."[188]

Unfortunately, Congress's approach to measuring small business success has a fundamental flaw. It uses a short-term and superficial metric for success. The DoD and the SBA declare victory when at least 22.5% of prime contracting dollars and 32.25% of defense subcontracting dollars go to small businesses.[189] But they miss the actual effect that those dollars have on small business success and resultant effects on the U.S. supply chain. Relying on total dollars awarded to small businesses as a metric for success does nothing to ensure that small businesses are developing the skills and capabilities necessary to succeed outside of the closed market of government procurement. If the USSF shifts its focus to procuring commercial products and services, and small businesses have yet to create those commercial products and services, the result will be that small businesses are excluded from future space procurement. Unlike their large counterparts, small businesses need USG funds to develop the commercial space technologies the government seeks to procure.[190]

The products that are not procured commercially will likely be complex projects that only large contractors can handle,[191] or base operations contracts, janitorial contracts, and the like.[192] Unfortunately, most small businesses are likely unable to handle the massive undertaking of designing new major weapons systems for space or for creating new space-based technology for the

185. FAR 19.201(a).

186. FAR 19.201(c)(11)(i) (emphasis added).

187. FAR 19.202-1(d).

188. FAR 19.702 (emphasis added).

189. Dep't of Def., *supra* note 71.

190. *See* discussion *supra* notes 104–06.

191. *See*, *e.g.*, Sandra Erwin, *Military Space Gets Big Boost in Pentagon's $750 Billion Budget Plan*, Space News (Mar. 31, 2019), https://spacenews.com/militaryspace-gets-big-boost-in-pentagons-750-billio [https://perma.cc/4XWY-A9UR] ("[The] Air Force is requesting $1.4 billion in RDT&E funds . . . includ[ing] $817 million for the development of three Block 0 geosynchronous missile-warning satellites *being built by Lockheed Martin under a $2.9 billion sole-source contract* . . . $107 [billion] for two polar-orbiting satellites *to be made by Northrop Grumman* . . . $264 million for ground systems and $205 million for studies of future parts and material obsolescence.") (emphasis added).

192. Section 809 Report, *supra* note 30, at 171, 174–75.

USSF.[193] While small firms should be involved in the development of major weapons systems as subcontractors, the USSF needs to look for different ways to support them. If small businesses receive fifteen percent of USSF procurement dollars, but all of those dollars go to relatively low-skilled service type contracts, small businesses are not better overall.

When Congress eventually calls on the USSF to award more contracts to small businesses and increase the percentage of USSF contracts that go to small businesses, it will be missing the point. While a small business may find great short-term success in the development of highly specialized widgets for a USSF weapons system, and the award of janitorial contracts will help increase the percentage of government dollars spent on small businesses, the effect of those dollars in the commercial sector is likely negligible. As the government shifts towards commercial solutions to problems in space, these types of contracts do nothing to develop and enhance the commercial space marketplace. The USSF needs to focus on how it can help small businesses create commercial solutions to space-related problems. If the USSF measures small business success based on total dollars spent and contracts awarded to small businesses, this will have the unintended effect of further increasing the reliance of space-related small businesses on government funds, and it will exclude potential new entrants in the commercial space sector. New space is commercial, so the success of USSF small-business programs should be measured in terms of commercial success.

B. Redefining Success: FAR

Rather than focusing on "insur[ing] that a fair proportion of the [government's] total [space-related] purchases" go to small businesses, it should be the priority of the government to ensure that space spending helps small businesses succeed in the commercial space market.[194] In the context of space procurement, "maximum practicable opportunities" should not be defined by a percentage of the government's budget, nor by a percentage of the total contract awards made by the government.[195] "[A] fair share" of government contracts needs to be considered in light of not only current contract actions, but also potential future procurements.[196] It is in the USSF's and small businesses' best interests to ensure that small business government contractors find commercial success. Thus, USSF small business programs should not focus on providing maximum practicable opportunities within the closed market of government but should instead seek to provide the skills and support necessary for small businesses to be successful in the private and international

193. *See id.*; *cf.* John A. Welsh & Jerry F. White, *A Small Business Is Not a Little Big Business*, Harv. Bus. R. (July 1981), https://hbr.org/1981/07/a-small-business-is-not-a-little-big-business [https://perma.cc/UA3N-FNN8] (last visited Oct. 11, 2022) (noting that "external forces tend to have more impact on small businesses," and "small businesses can seldom survive mistakes or misjudgments").

194. 15 U.S.C. § 631(a).

195. *See* FAR 19.201.

196. *See* FAR 19.201(c)(11)(i).

sector. FAR Part 19 should be modified to that effect by including the following additional section:

FAR 19.201(e) - Facilitating Small Business Success in Space Procurement

(a) It is the policy of the Government to provide small business concerns with an equitable opportunity to compete for space-related acquisitions.

(b) For the purposes of space-related procurement, an equitable opportunity is characterized by the overall ability of small businesses to offer for sale to the general public their space-related products and services, after being awarded a contract or subcontract on a space-related procurement.

(c) In order to facilitate small businesses being able to offer their goods as commercial items and services, it shall be the policy of the Government to use the SBIR/STTR and Mentor-Protégé programs to the maximum extent practicable on space-related procurement.

(d) In order to ensure that small business concerns are receiving adequate support in commercializing products developed for the Government, annual reviews should be conducted to assess

  (1) the extent to which small businesses are successful in the commercial space sector after being awarded a contract or subcontract on a space-related procurement

  (2) as applicable, the extent to which small business are able to successfully market their products to foreign governments after being awarded a contract or subcontract on a space-related procurement; and

  (3) the actions necessary to help small businesses find commercial success after being awarded a contract or subcontract on a space-related procurement.

(e) An equitable opportunity for the purposes of space-related procurements shall not be exclusively characterized as a total percentage of space-related procurement funds allocated to small business concerns, nor by the total number of space-related procurements awarded to small business concerns.

C. Redefining Success: SBIR/STTR

While the SBIR/STTR programs already promote the eventual commercialization of products developed by small businesses, the policy behind the SBIR/STTR statute should be updated to reflect the understanding that helping small businesses in space-related government contracting means helping them find commercial success. This effort can be done by amending the last line in 15 U.S.C. § 638(a) to state: "It is the policy of the Congress that assistance be given to small-business concerns to enable them to undertake and to obtain the benefits of research and development," *and to ensure that they have a reasonable opportunity, and the assistance necessary, to offer for sale to the public, the results of such research and development* "in order to maintain and strengthen the competitive free enterprise system and the national economy."[197] A similar

197. Adapted from 15 U.S.C. § 638(a).

provision should be added to the DoD Instruction (DoDI 5000.02) for the USSF which identifies the primary focus of the program as the creation of new commercial technologies and strengthening of the commercial space sector.[198] Because commercialization is already the primary goal of the SBIR/STTR programs, major changes to the programs are not needed outside of the improvements mentioned in the prior section.[199]

D. Redefining Success: The DoD's Mentor-Protégé Program

The DoD and the USSF should also refocus the DoD MPP to ensure that commercialization and future commercial success are the primary goals of the program. Instead of encouraging small businesses to grow in a closed market that will eventually run dry, the USSF must create MPPs that emphasize and prioritize commercialization. The DoD currently measures the success of its MPP based on

> (1) increase[s] in the *dollar value* of contract and subcontract awards to protege firms (under DoD contracts, contracts awarded by other Federal agencies, and commercial contracts) from the date of their entry into the Program until 2 years after the conclusion of the agreement; (2) increase[s] in *the number and dollar value* of subcontracts awarded to a protege firm (or former protege firm) by its mentor firm (or former mentor firm); and (3) an increase in the employment level of protege firms from the date of entry into the Program until 2 years after the completion of the agreement.[200]

While the program nominally contemplates commercial success, the DFARS (or Space Force Federal Acquisition Regulation Supplement, when released) should make a protégé's commercial success the primary goal of mentor-protégé agreements administered by the USSF. While DoD contracts and other federal contracts are important, focusing on—and specifically identifying—commercial success as an independent criterion for success highlights the new reality that space-related procurement is commercial. This goal could be done by amending the regulation so that the first metric for program success is as follows:

> the development of new commercial items and services made available or offered for sale to the public by the protégé firm; an increase in the total number of commercial sales or contracts by the protégé firm; or an increase in total sales to foreign governments by the protégé firm.

MPP agreements should be leveraged so that small businesses can be successful in the commercial space sector. Anything less means that they will eventually miss out on the benefit of USG spending on space as the USSF shifts to an acquisition system driven by commercial products and services. These changes highlight the importance of small business success to space

198. *See* Dept. of Def., DoD Instruction 5000.02: Operation of the Adaptive Acquisition Framework (2022).
199. *See* discussion *supra* notes 150–67.
200. DFARS App. I-100(c).

procurement and acknowledge the reality that the best way for the government to help small businesses succeed in space is to help them find commercial success.

VII. CONCLUSION

The commercial space sector is expected to grow to over $1 trillion by 2040.[201] The USG should be doing everything it can to help position small businesses to take advantage of this market. Unfortunately, small businesses have failed to keep pace with their large counterparts when it comes to finding success in developing commercial space technologies.[202] And they risk being unable to compete in the global commercial space sector at all. While the solutions presented in this Note appear simple, their effect will be tremendous. Each of the suggested solutions can be implemented alone or in conjunction with one another for maximum practicable effect. At a minimum, the USSF should refocus its acquisition system in light of the fact that small business success in space is not defined by total USG contracts or percentage of intramural budgets, but rather by a firm's success in the commercial sector. Implementing the changes above are the first step in making the USSF's goal of space superiority a reality.

201. *Space: Investing in the Final Frontier*, https://www.morganstanley.com/ideas/investing-in-space, Morgan Stanley (July 24, 2020) [https://perma.cc/99XA-VSFN].

202. Bureau of Indus. & Sec., *supra* note 9, at 46 ("Non-small business commercial respondents increased these sales by 37 percent [$5.5 billion] . . . while small businesses saw their non-U.S. commercial sales increase six percent [$133 million].").

A PRESCRIPTION FOR CALAMITY: WHY THE DEPARTMENT OF LABOR'S PHARMACY BENEFIT MANAGEMENT PROGRAM FALLS SHORT AS A SINGULAR SOLUTION TO THE U.S. OPIOID CRISIS

*Davis Nicole Madeja**

ABSTRACT

The purpose of this Note is to create a holistic solution for the U.S. Department of Labor to apply amidst the United States' ongoing opioid crisis, which will serve to both prevent addiction before it can develop and treat existing cases of addiction. To this aim, this Note examines and analyzes the connections between the opioid crisis and another co-existing public health crisis, the COVID-19 pandemic, and the procurement procedures taken to resolve them.

The argument is developed throughout three sections. First, this Note provides background information demonstrating the detrimental impact of opioid misuse and addiction, as well as the impact that COVID-19 in particular has had on rates of misuse and addiction in the United States. Additionally, this section introduces efforts taken to resolve the crisis, including the Department of Labor's Pharmacy Benefit Management program, which is the subject of this Note.

Second, this Note examines the Department of Labor's Pharmacy Benefit Program, addressing the singularly preventative nature of the program, which fails to support a holistic solution. Additionally, this Note addresses concerns relating to the use of pharmacy benefit management services in general, particularly the cost-increasing nature of such mechanisms.

In the final section, following an examination of the procurement procedure used to acquire COVID-19 vaccines, this Note proposes the application of a similar pharmaceutical procurement approach to combatting the opioid crisis. To conclude, this Note argues that by contracting with pharmaceutical companies to develop a safer and less addictive treatment plan, the Department of Labor would be able to prevent, as well as treat, opioid addiction.

---

* *Davis Madeja is a third-year law student at The George Washington University Law School and Notes Editor for the Public Contract Law Journal.* *She is incredibly grateful to the members of George Washington's federal procurement community for giving her the opportunity and guidance to put her passion to paper.*

TABLE OF CONTENTS

I. Introduction 278
II. Background 280
A. The National Opioid Crisis at a Glance 280
B. The Impact of COVID-19 on Opioid Addiction 280
C. Federal Efforts to Curb the Crisis 281
III. The Department of Labor's Pharmacy Benefit Management Program 282
A. Pharmacy Benefit Management in Practice 282
B. Pharmacy Benefit Management as a Preventative Measure.........284
C. The Shortcomings of Pharmacy Benefit Management 286
IV. Pharmaceutical Procurement: A Holistic Solution to the Opioid Crisis 288
A. COVID-19 Vaccine Procurement 289
B. Application of the COVID-19 Procurement Model to the Opioid Crisis 291
C. Potential Challenges to Pharmaceutical Procurement 293
V. Conclusion 296

I. INTRODUCTION

Since the outbreak of SARS-CoV-2 (COVID-19) at the start of 2020, national attention has remained fixed on the global pandemic,[1] ongoing or reemerging mask mandates,[2] recent distributions of vaccine boosters,[3] and the near constant search for a more permanent solution to the tragedy and turmoil, for a reprieve from the "new normal." COVID-19, however, is not the only major health crisis with which the United States currently contends. The opioid crisis, which emerged in the 1990s,[4] still persists and has only garnered momentum as a result of the ongoing COVID-19 pandemic. Yet, as we have moved

1. *See* Gina Kolata, *Past Pandemics Remind Us Covid Will Be an Era, Not a Crisis That Fades*, N.Y. Times, Oct. 12, 2021, at 8; Lateshia Beachum, Annabelle Timsit, & Bryan Pietsch, *Daily Coronavirus Cases Up 18 Percent, According to CDC Director*, Wash. Post (Nov. 23, 2021, 8:42 PM), https://www.washingtonpost.com/nation/2021/11/22/covid-delta-variant-live-updates [https://perma.cc/6DF8-VF28]; *see also* Jon Kamp et al,, *U.S. Covid-19 Deaths in 2021 Surpass 2020's*, Wall St. J. (Nov. 20, 2021, 4:27 PM), https://www.wsj.com/articles/u-s-covid-19-deaths-in-2021-surpass-2020-11637426356 [https://perma.cc/DEN2-RZAD].

2. *See* Exec. Order No. 13991, 86 Fed. Reg. 7045 (Jan. 20, 2021); Order Requiring Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025 (Feb. 1, 2021).

3. *See FDA News Release, FDA Authorizes Booster Dose of Pfizer-BioNTech COVID-19 Vaccine for Certain Populations*, U.S. Food & Drug Admin. (Sept. 22, 2021), https://www.fda.gov/news-events/press-announcements/fda-authorizes-booster-dose-pfizer-biontech-covid-19-vaccine-certain-populations [https://perma.cc/TH4G-FBCJ]; *see also* Marc Siegel, *Yes, You Should Get a Covid Booster*, Wall St. J. (Nov. 22, 2021, 6:40 PM), https://www.wsj.com/articles/yes-get-a-covid-booster-vaccine-third-dose-shot-safe-effective-side-effects-11637617768 [https://perma.cc/GV7Q-4C4P].

4. *See Wide-Ranging Online Data for Epidemiologic Research (WONDER)*, CDC (2020), https://wonder.cdc.gov [https://perma.cc/7AZV-WKYN] [hereinafter *Data for Epidemiologic Research*].

closer to finding a solution to COVID-19, a similar comprehensive solution to the opioid crisis remains out of reach. As the rates of opioid addiction and opioid-related casualties continue to rise, it is clear that the need for such a solution has become all the more pressing.[5]

One of the most recent initiatives implemented to resolve the nation's opioid crisis is the Department of Labor's Pharmacy Benefit Management Program, designed to reduce the cost of pharmaceuticals and to provide claimants, particularly those receiving opioid prescriptions, with greater regulation and oversight.[6] The program adopts a variety of measures intended to prevent opioid addiction before it begins.[7] However, such guidelines will not serve to resolve the overall crisis. The shortcomings of this program ultimately reflect the narrow approach taken by previous federal agencies over the past several decades.[8] Given the impact that the opioid crisis continues to have on the United States,[9] the Department of Labor must find a solution that will not only prevent but treat addiction. Recent successes in responding to the COVID-19 virus are greatly attributed to the procurement of vaccines.[10] For this reason, the Department of Labor should aim to develop a safer treatment mechanism via pharmaceutical procurement, which would offer a solution to the overall crisis.

First, this Note will provide a brief background on the impact of the opioid epidemic, the relationship that has developed between the two co-existing crises, and federal efforts to resolve opioid addiction in the United States. Then, this Note will examine the Department of Labor's newly implemented Pharmacy Benefit Management program and its failure to provide an adequate solution to the opioid crisis. Next, this Note specifically analyzes the merely preventative approach of the Pharmacy Benefit Management program and evaluates the concerns of cost increases ascribed to pharmacy benefit management in general. Further, this Note will then discuss the procurement approach used to obtain vaccines to successfully prevent and treat the COVID-19 virus. Finally, this Note will argue that the Department of Labor should implement a similar pharmaceutical procurement approach resulting in the development of a safer and less addictive opioid medication that will serve not only to prevent opioid addiction, but to treat those already suffering from addiction as well.

---

5. *See* Ashley Abramson, *Substance Use During the Pandemic*, 2 Monitor on Psychology 22 (2021), https://www.apa.org/monitor/2021/03/substance-use-pandemic [https://perma.cc/S898-754J].

6. *See* U.S. Dept. of Lab., FECA Bull. 21-07, New FECA Pharmacy Benefits Management System (2021) [hereinafter FECA Bull. 21-07].

7. *See* U.S. Dept. of Lab., FECA Bull. 22-02, New FECA Pharmacy Benefits Management System (2021) [hereinafter FECA Bull. 22-02].

8. *See* Bipartisan Policy Ctr., Tracking Federal Funding to Combat the Opioid Crisis (2019).

9. *See Data for Epidemiologic Research*, *supra* note 4.

10. *See* Cong. Rsch. Serv., IN11560, Operation Warp Speed Contracts for COVID-19 Vaccines and Ancillary Vaccination Materials (2021) https://crsreports.congress.gov/product/pdf/IN/IN11560 [https://perma.cc/8JWW-7HSW] [hereinafter Operation Warp Speed].

II. BACKGROUND

A. The National Opioid Crisis at a Glance

During the 1990s, the rates at which opioids were prescribed to patients across the country began to substantially increase.[11] Unfortunately, this class of pain-relieving drugs has had a devastating national impact. According to the Centers for Disease Control and Prevention (CDC), "From 1999 to 2020, more than 263,000 people died in the United States from overdoses involving prescription opioids," and "Overdose deaths involving prescription opioids have quintupled since 1999."[12] In 2019 alone, 48,006 people lost their lives to overdoses involving the use of synthetic opioids other than methadone,[13] and another 14,480 deaths were attributed to overdoses involving the use of heroin.[14]

Despite the readily apparent dangers of prescription opioids, it is clear that these drugs hold an important place within our healthcare system. They serve as a necessary evil in combating a multitude of medical conditions such as chronic pain, and pain management more generally.[15] It is estimated that twenty percent of patients seeking assistance from physicians due to "non-cancer pain symptoms or pain-related diagnoses (including acute and chronic pain)," are prescribed opioids as a means of relief.[16] While evidence supports the efficacy of the short-term use of opioids for such patients as described above,[17] little research has been done to examine the pain management benefits of long-term opioid use.[18] Regardless of the crucial role opioids play in pain management, given the undetermined efficacy and lethal side effects of long-term use, it is time to invest in a solution, namely safer and more effective alternatives. The necessity of such alternatives has only become more apparent as the United States contends with a global pandemic.

B. The Impact of COVID-19 on Opioid Addiction

As the nation continues to confront the resulting social and economic effects brought by the COVID-19 pandemic, now more than ever there is a need for resolution of the opioid crisis. According to the American Psychological Association, substance abuse, including the misuse of opioids, has become more

11. *See Data for Epidemiologic Research*, *supra* note 4.

12. *Id.*

13. *See* NCHS, Nat'l Vital Statistics System, Provisional Drug Overdose Counts, https://nchstats.com/category/opioid/ [https://perma.cc/84R4-PJR7]. Provisional drug overdose death counts.

14. *See id.*

15. *See* Deborah Dowell et al., *CDC Guideline for Prescribing Opioids for Chronic Pain—United States*, 2016, Centers for Disease Control and Prevention.

16. *See id.* (citing M. Daubresse et al., Ambulatory Diagnosis and Treatment of Nonmalignant Pain in the United States, Med Care, (2000–2010)).

17. *See id.* (citing A. Furlan et al., *A Comparison Between Enriched and Non-Enriched Enrollment Randomized Withdrawal Trials of Opioids for Chronic Noncancer Pain*, Am. Pain Soc'y (2009)).

18. *See id.* (citing Robert Chou, et al. The Effectiveness and Risks of Long-Term Opioid Treatment of Chronic Pain. Evidence Report/Technology Assessment No. 218, Agency for Healthcare Research and Quality (2014)).

prevalent throughout the still ongoing pandemic, likely as a means of coping with stress and other emotions induced by current circumstances.[19] Given the rise in substance use and misuse resulting from the pandemic, it should also come as no surprise that the rate of both fatal and non-fatal overdoses has increased as well.[20] According to research conducted by the National Institute on Drug Abuse, individuals with substance use disorders and those in recovery were one and one half times more likely to have COVID-19 than those who did not,[21] and those same individuals were more likely to experience severe outcomes of COVID-19, including hospitalization and death.[22]

C. Federal Efforts to Curb the Crisis

On January 18, 2022, in the midst of the COVID-19 crisis, the Biden administration made a public statement regarding the actions that have been taken to address the addiction and overdose epidemic.[23] Such actions include efforts targeted specifically at prevention, harm reduction, treatment and recovery, and supply reduction.[24] The current administration's plan to address these issues is not the federal government's first attempt at resolving the ongoing opioid crisis. For example, there are fifty-seven federal programs responsible for funding efforts designed to address the opioid crisis.[25] For years, appropriations to opioid response programs have regularly been administered by the Department of Health and Human Services to fund research, criminal justice initiatives, public health surveillance, and supply reduction efforts.[26] However, despite this relative abundance of federal funding, the crisis persists,[27] leaving many agencies still searching for a solution.

Most recently, in February 2021, the U.S. Department of Labor contracted with PMSI, LLC d.b.a. Optum Workers' Compensation Services of Florida (Optum), to provide Pharmacy Benefit Management (PBM) services for

19. *See* Abramson, *supra* note 5.

20. *See id.*

21. *See COVID-19 & Substance Use*, NAT'L INST. ON DRUG ABUSE (Dec. 20, 2021), https://nida.nih.gov/drug-topics/comorbidity/covid-19-substance-use#:~:text=According%20to%20a%20September%202020,COVID%2D19%20than%20those%20without.&text=More%20research%20is%20needed%20to%20better%20understand%20the,opioid%20use%20and%20COVID%2D19 [https://perma.cc/U69F-UKHM].

22. *See id.*

23. *See* Press Release, The White House, White House Releases List of Actions Taken by the Biden-Harris Administration Since January 2021 to Address Addiction and the Overdose Epidemic (Jan. 18, 2022), https://www.whitehouse.gov/ondcp/briefing-room/2022/01/18/white-house-releases-list-of-actions-taken-by-the-biden-harris-administration-since-january-2021-to-address-addiction-and-the-overdose-epidemic [https://perma.cc/2PTT-QS4A].

24. *See id.*

25. *See* BIPARTISAN POLICY CTR., *supra* note 8.

26. *See id.*

27. While funding is annually devoted to efforts designed to resolving the nation's opioid crisis, it is not enough to simply throw money at the problem. It is not always entirely clear how this funding will be put to use, and, even in cases where such spending is discernable, it often amounts to a frivolous appropriation of government resources that ultimately does very little to confront the problem.

claims under the Federal Employees' Compensation Act (FECA) Program.[28] According to a FECA Bulletin post published in March 2021:

> Pharmacy benefit managers are third-party administrators (TPA) of prescription drug programs for commercial health plans, self-insured employer plans, Federal and State government employee health plans. PBMs are primarily responsible for developing and maintaining formularies which include an approved listing of prescriptions, contracting with pharmacies to increase enrollment, negotiating discounts and rebates with drug manufacturers and processing and paying prescription drug claims.[29]

It is for this reason that the Department of Labor contracted with Optum to provide such services to, among others, claimants currently receiving ninety MED (Morphine Equivalent Dosage) or higher of prescribed opioids.[30] As with many of the federal government's current and previous efforts to curb the opioid crisis,[31] the FECA program warrants justifiable scrutiny due to the shortcomings of both this new program and other PBMs.

III. THE DEPARTMENT OF LABOR'S PHARMACY BENEFIT MANAGEMENT PROGRAM

It is not unreasonable to believe that greater regulation, through the Department of Labor's Pharmacy Benefit Management program, of prescribed opioids might serve as an adequate tool in this ongoing crisis. However, given the program's relatively recent implementation and rollout, it may be too soon to reach conclusions regarding the program's ultimate long-term success. Based upon the information that has thus far been provided by the Department of Labor and the perspectives of experts in relevant fields relevant, it appears unlikely that the implementation of a PBM program will succeed on its own.

A. Pharmacy Benefit Management in Practice

Following the implementation of the program in February 2021, the FECA program first began mailing welcome letters introducing the program to all FECA claimants in April 2021.[32] Employees who were injured while perform-

28. *See* FECA Bull. 21-07, *supra* note 6.
29. *See id.*
30. *See id.*
31. *See* Maegan Vazquez, *Trump Touts Progress in Combating the Opioid Crisis but Skeptics Remain*, CNN (Apr. 24, 2019, 3:54 PM), https://www.cnn.com/2019/04/24/politics/donald-trump-opioids-speech-atlanta/index.html [https://perma.cc/6SPW-ACWU]; *see also* Wayne Drash, *Trump Claims on Opioid Crisis Met with Mix of Skepticism and Hope by Experts as Deaths Plateau*, CNN (Oct. 24, 2018, 8:39 AM), https://www.cnn.com/2018/10/24/health/experts-react-to-trump-opioid-legislation/index.html [https://perma.cc/VL3H-RGZD]; *see also* Brian Mann, *Opioid Crisis: Critics Say Trump Fumbled Response to Another Deadly Epidemic*, NPR (Oct. 29, 2020, 5:01 AM), https://www.npr.org/2020/10/29/927859091/opioid-crisis-critics-say-trump-fumbled-response-to-another-deadly-epidemic [https://perma.cc/KKA7-SASQ]; Kim Bellware & Robert O'Harrow Jr., *Trump Said Solving the Opioid Crisis Was a Top Priority. His Drug Office's Track Record Suggests Otherwise.*, Wash. Post (Oct. 3, 2020), https://www.washingtonpost.com/politics/2020/10/03/trump-drug-crisis [https://perma.cc/L89Z-NKPN].
32. *See* FECA Bull. 22-02, *supra* note 7.

ing their duties received pharmacy cards, which make it possible for claimants to receive their prescribed medications through the program.[33] More recently, however, in November 2021, the Department of Labor published various policies guiding the FECA program and dispensation of pharmaceuticals, including prescription opioids.[34]

Initially, the Department of Labor incorporated a drug formulary system to enhance the management of claimants' treatment.[35] A FECA Bulletin details the program's prescription management policies:

> A drug formulary is a continually updated list of medications and related products supported by current scientific research. The formulary's goal is to assist prescribers in the selection of safe, effective, and affordable medications. The drug formulary system is designed as a list of medications FECA will cover, and includes additional prescribing and dispensing guidelines for prescribers and pharmacies to further safe and effective medication use. This includes the application of prospective, concurrent, and retrospective drug utilization review (DUR), and prior authorization for non-formulary medications.[36]

Prescribers will be able to rely on this formulary, which is currently set to be updated on a quarterly basis, when treating and assisting claimants.[37] Although the formulary appears to have been designed with prescribers' needs in mind, the Department of Labor also mandated that prescribers notify claimants of any changes in the formulary that may affect them and their treatment, such as if a product is removed from the formulary due to changes in the pharmaceutical market or new safety information.[38]

Most notably, as described in FECA's definition of a drug formulary system, the Department of Labor has incorporated drug utilization review practices into their new program.[39] According to one pharmacist employed by Genex Services, a health care cost-containment and disability management services provider, PBM programs stand no chance at success without the incorporation of a drug utilization review component.[40]

According to the Genex pharmacist, when pharmaceuticals are running through a PBM firm, a patient necessarily receives oversight from a pharmacist who will have the training and tools to identify whether or not the medication prescribed is consistent with a given individual's condition and diagnosis as presented.[41] As such, a pharmacist would be able to determine whether or not an opioid is the correct prescription to administer.[42] For example, the pharmacist may be able to determine that, because an individual's

33. *See id.*
34. *See id.*
35. *See id.*
36. *See id.*
37. *See id.*
38. *See id.*
39. *See id.*
40. *See* Interview with Pharmacist at Genex Services (Oct. 21, 2021) (on file with author).
41. *See id.*
42. *See id.*

surgery was not invasive, an opioid prescription is not necessary.[43] Overall, the Genex pharmacist expressed confidence that greater pharmacist intervention would lead to the prescription of more successful and safer pharmaceutical regimes.[44]

Additionally, with access to an individual's medical history, a pharmacist will be more successful in identifying contraindications, such as a pre-existing medical condition or the use of another medication that would make the use of an opioid unsafe for a patient.[45] This information is useful because it will prevent patients from using medications that are particularly likely to be harmful.[46]

From these policies set forth by the Department of Labor, it appears that the regulation and drug utilization review are more complex with respect to the initiation of opioid therapy for new claimants. For a new opioid prescription recipient, or an individual with no documented claims for opioid prescriptions with the FECA program in the past 180 days,[47] the program will additionally consider the guidance provided by the CDC.[48]

For example, FECA prohibits the issuance of more than two opioids at the same time, as well as the prescription of extended-release or long-acting opioids.[49] As such, for the foregoing reasons, and although not explicitly stated, the Department of Labor appears to hold its new PBM program out solely as a tool in preventing the misuse of opioid prescriptions and the possible development of a substance abuse disorder.

B. Pharmacy Benefit Management as a Preventative Measure

Given the applicability of both the FECA guidelines and the adopted CDC guidelines to new opioid users, the program appears to be largely targeted at preventing addiction for claimants who have been prescribed opioids for treating workplace injuries, ideally, in the short term. For example, the program will not make an allowance for a new opioid user with non-cancer pain for more than one seven-day supply of an on-formulary, or an immediate release opioid prescription, without prior authorization for such an allowance.[50]

43. *See id.*
44. *See id.*
45. *See id.*
46. *See id.*
47. *See* FECA Bull. 22-02, *supra* note 7.
48. It is important to note that the CDC guidelines adopted for the purposes of the FECA program articulate only the approaches taken with respect to the administration of prescriptions to new opioid recipients. For example, the guidelines describe the evaluations that should be made prior to initiating opioid therapy, the recommended dosage for new opioid recipients, and when and how to evaluate the effectiveness of an opioid prescription for new users being treated for either acute or chronic pain. However, over the past several years the CDC has produced countless articles and guidelines regarding the use of opioid prescriptions for both new patients and those who have been diagnosed as having a substance abuse disorder. Guidelines applicable to the latter appear not to have been adopted for consideration in the implementation of the FECA program.
49. *See* FECA Bull. 22-02, *supra* note 7.
50. *See id.*

Further, such an allowance of a seven-day supply may not exceed greater than ninety MME per day.[51] After the seven-day supply has concluded, any subsequent fills will require prior authorization.[52] It is at this point that prescribers and pharmacists will review claimant medical histories and other relevant factors to determine whether the continued use of the opioid prescription is necessary to the recovery process.[53]

The preventative nature of Department of Labor's PBM program is also implicit within the language of the program's policies and guidelines alone. Section IV, Initiation of Opioid Therapy of the New FECA Prescription Management Policies, begins, "On September 9, 2019, the FECA Program instituted new controls on new opioid prescriptions (FECA Bulletin No. 19-04)."[54] It continues: "This policy will apply to new opioid users starting December 9, 2021."[55] The following guidelines both provided by the FECA program and drawn from existing CDC guidelines for the prescription of opioid medications apply to those who do not currently suffer from opioid addiction and seek to prevent addiction as a result of the prescription.[56]

While Section V of these policies discusses the application of retrospective drug utilization review (DUR) (i.e., the review of drug therapy after the claimant has received a medication),[57] such guidelines still appear to apply to claimants who entered the program as new opioid users and later meet or exceed ninety MME per day.[58] Per the language of the guidelines, "[T]his is an opioid dose where the CDC recommends providers should avoid or carefully justify a decision."[59] However, this language does not suggest that addiction has set in in such cases, but simply that these claimants require stricter review due to how they have responded to the opioid treatment prescribed thus far.[60]

The ninety MME Review Program's guidelines contain markedly less detail than those put in place for new users.[61] Following case review and, if medically necessary, the authorization of a short course of opioids, the program will use drug use evaluations (DUE), qualitative evaluations of drug use and prescribing, to perform retrospective drug utilization review to determine the appropriate drug therapy.[62] This process is completed through the assessment of a claimant's medical records and prescription history, leading to the identification of areas for prescription improvement.[63] Once this process has been

51. *See id.*
52. *See id.*
53. *See id.*
54. *See* FECA Bull. 22-02 (citing FECA Bull. 19-04).
55. *See id.*
56. *See id.*
57. *See id.*
58. *See id.*
59. *See id.* (citing Shah A, et al., *Characteristics of Initial Prescription Episodes and Likelihood of Long-Term Opioid Use*, 66 MMWR Morb. Mortal Wkly Rep. 265–69 (2017)).
60. *See id.*
61. *See* FECA Bull. 22-02, *supra* note 7.
62. *See id.*
63. *See id.*

completed, non-opioid therapies, dose adjustments, naloxone, proper opioid weaning, or other guideline-driven suggestions to the treating provider may be recommended.[64]

Yet, these particular guidelines are not outlined within the FECA program's policies. Even in cases where addiction has set in, there is an unmistakable lack of clarity as compared with the guidelines put forward for new users. There is no definitive course of action or treatment plan, but instead a plethora of unresolved questions for those currently battling addiction.

Given the seemingly preventative (and singular) nature of the Department of Labor's implementation of the FECA program, it is difficult to foresee pharmacy benefit management successfully serving as the sole initiative to resolve the opioid crisis. This is also largely due to the overwhelming concerns surrounding PBM programs more generally, which many suggest serve the singular purpose of multiplying costs for both the purchasers of medications and their patients.[65]

C. The Shortcomings of Pharmacy Benefit Management

Despite the potential benefits brought about through the implementation of a PBM program, such as the tools effectively designed to limit the use of opioid prescriptions[66] for new recipients before addiction has the chance to set in, the drawbacks of pharmacy benefit management should not be ignored.

Originally designed in the 1960s to process claims for insurance companies,[67] according to advocates of PBMs, they now serve the primary purpose of lowering prescription drug costs for patients and sponsors such as the federal government.[68] Critics of PBMs, however, take the contrasting position that, while they may lower costs for corporations, PBMs significantly increase the costs imposed upon patients themselves. According to the Pharmaceutical Care Management Association, "PBMs will save health plan sponsors and consumers more than $1 trillion on prescriptions over 10 years."[69] This cost-reducing tool, PBM supporters generally argue, will lead to more successful health outcomes for patients in the long run.[70]

Yet, many have argued that reducing costs should not be the primary concern of agencies hoping to make an impact on the opioid crisis. In the opinion of the Genex Services pharmacist, many plans like PBMs fall short and become less effective when the primary purpose of implementation is to pay for pharmaceuticals at reduced costs.[71] In their opinion, there may be an enormous

64. *See id.*
65. *See PBM Basics*, Pharmacists Soc'y of the State of N.Y., Inc., https://www.pssny.org/page/PBMBasics [https://perma.cc/SX3X-K3TP] (last visited Nov. 22, 2022).
66. *See* FECA Bull. 22-02, *supra* note 7.
67. *See PBM Basics*, *supra* note 65.
68. *See The Value of PBMs*, Pharmaceutical Care Mgmt. Ass'n, https://www.pcmanet.org/the-value-of-pbms [https://perma.cc/TEP7-85KK] (last visited Nov. 22, 2022).
69. *See id.*
70. *See id.*
71. *See* Interview with Pharmacist at Genex Services (Oct. 21, 2021) (on file with author).

financial incentive in considering additional concerns.[72] For example, this may include taking into account of the welfare of employees and ensuring that employees are able to safely return to work following a workplace injury.[73]

Conversely, others have argued that PBMs are not actually cost-saving mechanisms to begin with, but are instead cost multipliers due to the complex and polarizing nature of rebates.[74] PBMs work with drug makers to develop the formulary.[75] In the process, PBMs negotiate, and are incentivized by, manufacturer rebates—which they keep in part or in whole.[76] "The more expensive the covered drug, the higher the rebate. And while the term 'rebate' usually means the buyer receives some money back post-purchase, this is not the case for prescriptions. The patient and the insurer buy the product but the PBM receives the rebate."[77] PBMs will often structure their contracts to allow them to collect and keep rebates as part of an "administrative fee" or "rebate sharing" arrangement with the health plan instead of passing the rebate to its rightful owner—the purchaser of the medication.[78]

Drug manufacturers argue that they have been given no choice but to raise the list prices for their products due to the growing rebates they pay to PBMs.[79] "According to a recent analysis, manufacturer rebates to PBMs increased from $39.7 billion in 2012 to $89.5 billion in 2016, partially offsetting list price increases."[80]

As a result of the above-described concerns regarding the use of PBMs, policy makers have proposed various reforms to better regulate PBMs, including requiring greater transparency around rebates,[81] banning spread pricing,[82] and requiring PBMs to pass through rebates to payers or to patients.[83] In spite of these reforms, the implementation of pharmacy benefits management programs continues. Most recently, Mark Cuban's self-named Cost Plus Drug Company (MCCPDC) has garnered scrutiny as a result of the company's promises to keep pharmaceutical costs low (notably through the use of the company's own PBM wing).[84]

72. *See id.*
73. *See id.*
74. *See PBM Basics*, *supra* note 65.
75. *See id.*
76. *See id.*
77. *See id.*
78. *See id.*
79. *See Pharmacy Benefit Managers and Their Role in Drug Spending*, Commonwealth Fund, https://www.commonwealthfund.org/publications/explainer/2019/apr/pharmacy-benefit-managers-and-their-role-drug-spending [https://perma.cc/9E7Y-WVLX] (last visited Nov. 22, 2022).
80. *See id.* (citing Susan K. Urahn et al., *The Prescription Drug Landscape, Explored*, Pew Charitable Trusts (Mar. 2019), https://www.pewtrusts.org/en/research-and-analysis/reports/2019/03/08/the-prescription-drug-landscape-explored [https://perma.cc/8Z9C-Q8JJ].
81. *See id.*
82. *See id.* (citing Seeley & Kesselheim, Pharmacy Benefit Managers).
83. *See id.*
84. *See* Adam Hardy, *Mark Cuban's New Discount Pharmacy Promises Low-Cost Drugs. Just How Cheap Is It?*, Money (Jan. 25, 2022), https://money.com/mark-cuban-pharmacy-drug-prices-comparison/ [https://perma.cc/X9JH-QMSV]; *see also* Marin Wolf, *Mark Cuban's Drug Company*

If pharmacy benefit management is raising the prices of prescription medications, including prescription opioids, such cost increases may negate the benefits of the regulation that PBMs provide by restricting access for those who are unable to afford such prescriptions. According to Travis N. Rieder, the Director of the Master of Bioethics Degree Program at the Berman Institute of Bioethics at Johns Hopkins University and author of the book *In Pain*, the opioid crisis will not be resolved by any attempts to restrict access to prescriptions.[85] When prescription opioids become less accessible, those suffering from opioid addiction often turn to the black market where the supply is unpredictable due to the lack of regulation of the production of illegal drugs.[86] As such, it is possible that such cost increases will only lead federal agencies further away from the goal of putting an end to the national crisis.

The Department of Labor's Pharmacy Benefit Management program falls short in providing a meaningful resolution to the opioid crisis. Despite putting forth preventative measures for new opioid prescription users, the FECA program fails to provide a tangible solution for those already battling addiction. While cost reduction is not the Department of Labor's singular focus, when considering both the overwhelming disdain for PBMs and the shortcomings of this program, the Agency should be reluctant to rely on pharmacy benefit management as a lone tool in this crisis. In confronting the COVID-19 pandemic, the federal government has pursued a variety of measures, including pharmaceutical procurement, to both prevent and treat the virus. The Department of Labor should follow suit by exploring alternative avenues through which we might fight the crisis as a whole.

IV. PHARMACEUTICAL PROCUREMENT: A HOLISTIC SOLUTION TO THE OPIOID CRISIS

While significant government funding has been and continues to be dedicated to the research, education, and preventative efforts noted above,[87] the United States government should be reluctant to proceed with these efforts alone. Instead, alternative routes to finding a more permanent solution to the ongoing opioid crisis should be the focus of the federal government's efforts.

Promises to Lower Costs with Launch of Benefit Management Business, Dall. Morning News (Oct. 26, 2021, 5:21 PM), https://www.dallasnews.com/business/health-care/2021/10/26/mark-cubans-drug-company-promises-to-lower-costs-with-launch-of-benefit-management-business [https://perma.cc/JV4X-7NMB]; *see also* Joseph Walker, *Mark Cuban-Owned Company Launches Pharmacy-Benefit Manager*, Wall St. J. (Oct. 25, 2021, 7:00 AM), https://www.wsj.com/articles/mark-cuban-owned-company-launches-pharmacy-benefit-manager-11635159600 [https://perma.cc/JV4X-7NMB].

85. *See* Travis N. Rieder, *Opioid Overdose: A Bioethicist Explains Why Restricting Supply May Not Be the Right Solution*, Conversation (Jan. 25, 2022, 8:25 AM), https://theconversation.com/opioid-overdose-a-bioethicist-explains-why-restricting-supply-may-not-be-the-right-solution-173799 [https://perma.cc/NLD4-NJC9].

86. *See id.*

87. *See* Bipartisan Policy Ctr., Tracking Federal Funding to Combat the Opioid Crisis (2019), *supra* note 8.

The Department of Labor, in addition, or even opposed to, the implementation of the Pharmacy Benefit Management program for FECA claimants, should rely on pharmaceutical procurement as a means of both preventing opioid abuse and aiding in cases where addiction has already set in. Such a procurement-based approach has been applied in the course of the federal government's response to the COVID-19 virus and has thus far had an overwhelmingly positive impact.[88]

A. COVID-19 Vaccine Procurement

In the midst of the COVID-19, it is impossible not to consider the relative speed with which the federal government has responded to another public health crisis. This crisis similarly has yet to be resolved. However, much headway has been made in a short period of time to, when possible, both prevent the development of the virus and to limit its negative effects once contracted.[89]

Not only has the federal government relied on measures, such as mask mandates,[90] to prevent the spread of the virus and the possibly deadly results stemming from contraction, but the federal government has also made numerous efforts to immunize those in the U.S. from the virus altogether.[91] For example, as the result of a partnership formed between the Department of Health and Human Services and the Department of Defense, Operation Warp Speed (OWS), money was awarded to several pharmaceutical companies to research and produce vaccines.[92] Some vaccine candidates like Moderna, Janssen Pharmaceuticals, Sanofi/GSK, and Merck/IAVI received federal support for development.[93] Other candidates like Pfizer/BioNTech (Pfizer) and Novavax participated in OWS through federal purchase of vaccine doses alone.[94] However, OWS purchased all of the candidates' vaccines, thereby making it possible to distribute doses at no cost to the American public.[95]

Many of these companies, such as Pfizer/BioNTech, continue to produce several million vaccines which the government has procured for distribution to those in the United States.[96] For example, in December 2020, Pfizer announced that it planned to deliver an additional one-hundred million doses of their vaccine by July 31, 2021, which the federal government agreed to paid $1.95 billion for.[97]

88. *See* Operation Warp Speed, *supra* note 10.
89. *See id.*
90. *See* Exec. Order No. 13991, 86 Fed. Reg. 7045 (Jan. 20, 2021); Order Requiring Persons to Wear Masks While on Conveyances and at Transportation Hubs, 86 Fed. Reg. 8025 (Feb. 1, 2021).
91. *See* Operation Warp Speed, *supra* note 10.
92. *See id.*
93. *See id.*
94. *See id.*
95. *See id.*
96. *See Pfizer and BioNTech to Supply the U.S. with 100 Million Additional Doses of COVID-19 Vaccine*, Pfizer (Dec. 23, 2020), https://www.pfizer.com/news/press-release/press-release-detail/pfizer-and-biontech-supply-us-100-million-additional-doses [https://perma.cc/ARP3-NSRC].
97. *See id.*

Johnson & Johnson, one of the three vaccines authorized in the United States, has also provided their vaccine for approximately fourteen million people across the country.[98] This quantity is despite the relatively bad press their vaccine received due to questions regarding its single-dose regime and comparatively easy storage requirements, as well as the brief pause mandated by the FDA and CDC in order to investigate several rare blood disorders that were speculated to have been caused by the virus.[99]

The procurement of COVID-19 vaccines amounted to a complicated and expensive process involving multiple government agencies and multiple pharmaceutical contractors. While vaccine development typically takes ten or more years to complete,[100] the federal government was forced to act quickly in order to respond to the COVID-19 pandemic. As described above, the OWS initially contracted with numerous pharmaceutical companies to acquire vaccines, and some agreements allowed the government to acquire (and therefore own) additional doses.[101] This process was complicated by the largely unknown nature of the virus and required that the contractors submit their vaccines to various phases of clinical trials.[102] While not every contractor passed the clinical trials, through the OWS initiative,[103] the federal government was still able to acquire hundreds of millions of vaccines to distribute across the country.[104] As of April 2022, approximately sixty-five percent of the U.S. population were fully vaccinated against the COVID-19 virus.[105]

While the process to procure the vaccines used in fighting the COVID-19 pandemic proved taxing, the successful execution of this initiative demonstrates that such a procurement method can succeed. As such, the Department of Labor should adopt and apply a similar procurement model, working in conjunction with these major pharmaceutical companies, to develop a holistic solution to the opioid crisis.

---

98. *See* Bridget Balch, *So You Got the J&J Vaccine? Here's What You Should Know About the Delta Variant, Boosters, and More*, Ass'n of Am. Med. Colls. (Aug. 18, 2021), https://www.aamc.org/news-insights/so-you-got-jj-vaccine-here-s-what-you-should-know-about-delta-variant-boosters-and-more [https://perma.cc/EZD8-LNJ5].

99. *See id.*

100. *See Vaccine Safety: Overview, History, and How the Safety Process Works*, CDC, https://www.cdc.gov/vaccinesafety/ensuringsafety/history/index.html [https://perma.cc/QK53-EGUC] (last visited Nov. 22, 2022).

101. *See* Josh Michaud & Jennifer Kates, *Distributing a COVID-19 Vaccine Across the U.S—A Look at Key Issues*, Kaiser Fam. Found. (Oct. 20, 2020), https://www.kff.org/report-section/distributing-a-covid-19-vaccine-across-the-u-s-a-look-at-key-issues-issue-brief [https://perma.cc/NZA8-6SBK].

102. *See id.*

103. *See* U.S. Dep't of Health & Human Serv.'s, Biden Admin. Announces U.S. Government Procurement for Merck's Investigational Antiviral Medicine for COVID-19 Treatment (June 9, 2021), https://www.hhs.gov/about/news/2021/06/09/biden-administration-announces-us-government-procurement-mercks-investigational-antiviral-medicine-covid-19-treatment.html [https://perma.cc/3NVZ-B9BT] [hereinafter Merck's Investigational Antiviral Medicine for COVID-19 Treatment].

104. *See* Operation Warp Speed, *supra* note 10.

105. *See U.S. COVID-19 Vaccine Tracker*, Mayo Clinic, https://www.mayoclinic.org/coronavirus-covid-19/vaccine-tracker [https://perma.cc/SY79-SYBG] (last visited Nov. 22, 2022).

B. Application of the COVID-19 Procurement Model to the Opioid Crisis

The pharmaceutical companies responsible for the production and distribution of COVID-19 vaccines, namely Johnson & Johnson, in conjunction with other companies including McKesson, Cardinal Health, and AmerisourceBergen, are also responsible for the production of prescription opioids in the United States.[106] Recently, these four companies were sued by various communities that have been disproportionately affected by the opioid crisis in the largest settlement in a federal court case in American history, and reached a settlement agreement for $26 billion.[107]

While these major pharmaceutical companies continue to produce and distribute potentially lethal opioid medications, efforts are being undertaken to develop brand new pain-killing therapies that in large part have yet to be implemented.[108] For example, researchers at Astraea Therapeutics and the Wake Forest School of Medicine discovered a compound, known as AT-121 which, like opioids such as oxycodone, binds to the mu opioid receptor.[109] Unlike opioids, however, AT-121 also binds to another opioid receptor which blocks the unwanted side effects commonly associated with opioid medications.[110] In short, the discovery of this novel compound represents a potential advance toward the development of both non-addicting analgesics that are as effective as opioids, but without the liability, and a treatment alternative for opioid abuse disorder.[111]

It is not necessary for the major pharmaceutical companies to go so far as to invest their time, effort, and financial resources into such experimental treatment programs. However, they should direct funding into research efforts to design a drug like Buprenorphine (often referred to by trade name Suboxone, among others),[112] a medication already approved by the FDA to treat opioid addiction as a medication assisted treatment (MAT).[113] This MAT method combines buprenorphine, an opioid with partial activity that blunts cravings, with naloxone, which reverses opioid overdoses and discourages opioid abuse.[114] Statistically, those treated with buprenorphine have higher

106. *See* Joel Achenbach et al., *Johnson & Johnson, Three Other Companies Close in on $26 Billion Deal on Opioid Litigation*, Wash. Post (Nov. 5, 2020), https://www.washingtonpost.com/health/opioid-settlement-drug-distributors/2020/11/05/6a8da214-1fc7-11eb-b532-05c751cd5dc2_story.html [https://perma.cc/8DNR-WN8V].

107. *See id.*

108. *See* Eric Sarlin, *A Promising Alternative to Opioid Pain Medications*, Nat'l Inst. on Drug Abuse (Feb. 12, 2019), https://nida.nih.gov/news-events/nida-notes/2019/02/promising-alternative-to-opioid-pain-medications [https://perma.cc/LE24-PVZM].

109. *See id.*

110. *See id.*

111. *See id.*

112. *See* Glen Buchberger, *Opioid Addiction: Long-Term Treatment for a Chronic Condition*, Harv. Health Pub. (May 5, 2017), https://www.health.harvard.edu/blog/opioid-addiction-long-term-treatment-for-a-chronic-condition-2017050511379 [https://perma.cc/TJ3K-Z59G].

113. *See* Buprenorphine, Substance Abuse & Mental Health Serv.'s Admin. (Jan. 24, 2022), https://www.samhsa.gov/medication-assisted-treatment/medications-counseling-related-conditions/buprenorphine [https://perma.cc/T297-AABP].

114. *See* Buchberger, *supra* note 112.

rates of success and are less likely to use opioids in the future.[115] Given that buprenorphine is not a new drug and that doctors have been using MAT plans to treat those struggling with opioid addiction for years, such a reality seems to only reinforce the notion that such an undertaking would be well within reason for major companies like Johnson & Johnson, McKesson, Cardinal Health, or AmerisourceBergen.

As such, the Department of Labor should contract with these major pharmaceutical institutions to produce a prescription medication like Buprenorphine to distribute to FECA claimants, including both new opioid users and users already struggling with addiction. Given that the Department of Labor is permitted to engage in sole source procurement,[116] it is possible that the agency would only need to contract with a single pharmaceutical company to meet the needs of FECA claimants, potentially simplifying the process of such a procurement.[117] It is important to note, however, that sole source procurement differs from single source procurement. When the government engages in sole source procurement, this means that it has made the decision to use a single contractor to fulfill the corresponding need.[118] The use of single source procurement alternatively implies that there is only a single source that the government *can* contract with to fulfill the corresponding need.[119]

Given that there are multiple pharmaceutical companies, or contractors, with which the Department of Labor would be able to contract with to produce and then distribute a less addictive opioid, the agency would still need to be mindful of meeting competition requirements.[120] As such, to contract with a singular pharmaceutical company, the Department of Labor would need to demonstrate that "the basis for not providing for maximum practicable competition is documented in the file . . . or [is] justified when the acquisition is awarded using simplified acquisition procedures."[121] While the agency should use caution when using sole source procurement, such procurement procedures would likely prove beneficial. For example, if the chosen contractor knows that it is the only source supplying such a product to the agency, and in

115. *See id.*

116. *See* U.S. Dept. of Labor, No. 03-08-002-07-711, The Department of Labor's Controls Over Sole Source Procurements Need Strengthening (2008).

117. Although it is suggested that the Department of Labor should apply a similar approach to that taken in confronting the COVID-19 virus, the procurement of a safer treatment mechanism in this case would not be applied on such an overwhelming scale. While opioid addiction undoubtedly qualifies as a national crisis, the number of individuals susceptible to or suffering from opioid addiction is obviously much smaller than the number of individuals vulnerable to contracting COVID-19. Further, given that the Department of Labor would be providing treatment specifically to those with FECA claims, the procurement would not be applicable to all persons receiving opioid prescriptions or suffering from opioid addiction.

118. *See* FAR 13.106–1(b)(1).

119. *See id.*

120. *See* FAR 11.105.

121. *See* FAR 11.105(a)(2(ii).

mass quantities, it is possible that the company will be better incentivized to provide the medication at a more attractive cost.[122]

As with the development and procurement of COVID-19 treatments and vaccines, there is no guarantee the development and procurement process of such a pharmaceutical product would be a smooth one. Such was the case for Merck, who initially contracted with the federal government to produce 1.7 million courses of an investigational antiviral COVID-19 treatment for $1.2 billion.[123] However, the potential concerns that some may hold with respect to such a procurement does not mean that the objective should not be pursued, or that it is not worth pursuing to begin with.

C. Potential Challenges to Pharmaceutical Procurement

The process of pharmaceutical procurement may presents challenges and even raise concerns regarding the limits of government procurement itself.[124] For example, pharmaceutical procurement could potentially reduce patients' access to medications, result in lower quality treatments for patients, and decrease competition in a given market.[125] Others have even suggested that it may be necessary to consider the potential pharmaceutical procurement has to infringe upon the intellectual property of the companies responsible for the production of the products procured given that these pharmaceuticals are patented inventions.[126] These concerns are not the only ones, however, that contracting with pharmaceutical companies may inspire.

It is possible that the procurement of a medication like Buprenorphine would present unique challenges for the Department of Labor, particularly when contracting with major pharmaceutical institutions. The financial benefits that come from the production and distribution of pharmaceuticals, including prescription opioids, have always served as an incentive for companies like Johnson & Johnson to continue marketing and distributing these drugs.[127] Despite the readily apparent dangers of these drugs, the companies' profits generally overshadow the financial penalties that they face.[128] These

---

122. *See* World Health Organization, Operational Principles for Good Pharmaceutical Procurement (1999), https://www.who.int/3by5/en/who-edm-par-99-5.pdf [https://perma.cc/Y2ER-GD6K].

123. *See* Merck's Investigational Antiviral Medicine for COVID-19 Treatment, *supra* note 103.

124. *See* George Dranitsaris et al., *Drug Tendering: Drug Supply and Shortage Implications for the Uptake of Biosimilars*, 9 Clinioecon Outcomes Res. 573–84 (2017), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5628685/ [https://perma.cc/U8TG-BU2H]; *see also* Chris Katopis, *Recognizing the Limits of Government Procurement in the Pharmaceutical Industries*, Ctr. for Intellectual Prop. x Innovation Pol'y, (Dec. 20, 2018), https://cip2.gmu.edu/2018/12/20/recognizing-the-limits-of-government-procurement-in-the-pharmaceutical-industries/./ [https://perma.cc/U8TG-BU2H].

125. *See* Dranitarus et al., *supra* note 124.

126. *See* Katopis, *supra* note 124.

127. *See* Jonathan H. Marks, *Lessons from Corporate Influence in the Opioid Epidemic: Toward a Norm of Separation*, Nature Pub. Health Emergency Collection (July 13, 2020), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7357445/ [https://perma.cc/C3YU-R83S].

128. *See id.*

financial benefits then trickle down to doctors who are compensated for prescribing these medications to their patients who are then disincentivized from speaking out against pharmaceutical company practices.[129]

When considering how insignificant the financial detriment is to these companies,[130] some may question whether these dynamics are subject to change in the near future. Yet, skeptics should see these financial penalties and the public naming and shaming of these companies as a result of the ongoing opioid crisis as an incentive. By investing in the production of a less addictive pain-relieving pharmaceutical, the companies responsible for the crisis will be able to garner greater favor with the general public.[131]

There may also be no doubt that the procurement of a safer, less addictive pain-relieving medication, even if successful, would present its own unique challenges. As has been seen through the procurement and distribution process of the various COVID-19 vaccines and treatments available in the United States,[132] there is no guarantee that those who serve to benefit from such a pharmaceutical medication would willingly accept or abide by the prescription. It also seems possible that, given how relatively new many of the currently available alternative treatment options are, some users may be hesitant to accept such a pharmaceutical regimen. While Buprenorphine, for example, has long been distributed in emergency departments to patients presenting with symptoms of opioid withdrawal,[133] more research is needed to determine whether long-term use, or MAT plans more generally, are safe.

As of late, research efforts have been taken to further develop generic versions of common naloxone products that will create an increased market supply.[134] In February 2022, Optum reported that the FDA approved both

129. *See The More Opioids Doctors Prescribe, The More They Get Paid*, Harvard T.H. Chan School of Pub. Health (citing Aaron Kessler et al., *CNN Exclusive: The More Opioids Doctors Prescribe, The More Money They Make*, CNN (Mar. 12, 2018, 8:45 AM)), https://www.cnn.com/2018/03/11/health/prescription-opioid-payments-eprise/index.html) [https://perma.cc/ZN27-LCSW].

130. *See* Achenbach et al., *supra* note 106. It is important to note that, while $26 billion seems like a substantial amount of money, in 1998, a settlement between states and major tobacco companies ended up totaling more than $206 billion over the course of twenty-five years.

131. It is also worth noting that contracting with the Department of Labor does not present a financial detriment to potential pharmaceutical contractors. Not only would they profit from the contract itself, but they would presumably profit from the continued production of traditional opioid medications. As discussed previously, such medications play an important role in well-managed and regulated treatment plans designed to respond to both chronic and acute pain. As such, the development of an alternative medication for those requiring or seeking a safer alternative would not lead to the eradication of the medications currently on the market.

132. *See COVID Data Tracker: COVID-19 Vaccinations in the United States*, CDC, https://covid.cdc.gov/covid-data-tracker/#vaccinations_vacc-total-admin-rate-total [https://perma.cc/5KLF-JX3S].

133. *See Initiating Buprenorphine Treatment in the Emergency Department*, Nat'l Inst. on Drug Abuse (Sept. 26, 2019), https://nida.nih.gov/nidamed-medical-health-professionals/discipline-specific-resources/emergency-physicians-first-responders/initiating-buprenorphine-treatment-in-emergency-department [https://perma.cc/Z9E7-V4Y2].

134. *See* Editorial Staff, *Optum: More Naloxone Options Coming to Market*, WorkCompCentral (Feb. 11, 2022), https://www.workcompcentral.com/news/article/id/9e4c034a57b13dfc340e8387e61530e44bee559a [https://perma.cc/HLE5-26H5] [hereinafter *Naloxone Options Coming*].

a higher-dosage naloxone injection as well as a high-dose naloxone nasal spray.[135] The company projects that the introduction of these products will reduce the average cost of generic alternatives, especially when compared to their name-brand counterparts.[136] The FDA's recent efforts to combat the opioid crisis do not stop there.

In August 2022, the FDA introduced a new Overdose Prevention Framework to develop and apply creative initiatives to prevent drug overdoses and the deaths that result from them.[137] On September 23, 2022, the FDA announced efforts to expand access to naloxone products to harm reduction programs in order to build upon the goals of the Overdose Prevention Framework, particularly in underserved communities.[138] This announcement came alongside the release of a statement from President Biden, outlining the current administration's efforts to lessen the impact of the opioid epidemic, including significant financial contributions to both federal and state-level entities.[139] While the distribution of naloxone products has been exempted and excluded from certain Supply Chain Security Act requirements, the scope of the distributions remains limited to medical emergencies.[140] Although immediately implemented, it remains to be seen whether the FDA's guidelines support the prescription of naloxone products for long-term, MAT plans.

Overall, a variety of concerns must be taken into consideration with respect to pharmaceutical procurement of a safer and more effective opioid medication, such as profit-driven pharmaceutical institutions and unresolved questions surrounding the proposed alternative treatment plan. However, given the overwhelming opioid-related devastation that continues to plague the United States, it is crucial that the federal government explore all avenues leading to potential solutions. As agencies like the CDC,[141] and even companies like

135. *See id.*

136. *See id.*

137. *See* Robert M. Califf, *FDA's Overdose Prevention Framework Aims to Prevent Drug Overdoses and Reduce Death*, U.S. Food & Drug Admin. (Aug. 30, 2022), https://www.fda.gov/news-events/fda-voices/fdas-overdose-prevention-framework-aims-prevent-drug-overdoses-and-reduce-death [https://perma.cc/3FEB-7YU8].

138. *See* Marta Sokolowska, *FDA Issues New Guidance to Help Facilitate Availability of Naloxone to Prevent Opioid Overdoses and Reduce Death*, U.S. Food & Drug Admin. (Sept. 23, 2022), https://www.fda.gov/news-events/fda-voices/fda-issues-new-guidance-help-facilitate-availability-naloxone-prevent-opioid-overdoses-and-reduce [https://perma.cc/JVT6-A76W].

139. *See* Fact Sheet: Biden-Harris Administration Announces New Actions and Funding to Address the Overdose Epidemic and Support Recovery (Sept. 23, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/23/fact-sheet-biden-harris-administration-announces-new-actions-and-funding-to-address-the-overdose-epidemic-and-support-recovery [https://perma.cc/N2TC-AM3B].

140. *See* 21 C.F.R. 10.115(g)(2); *see also* U.S. Food & Drug Admin. Exemption and Exclusion from Certain Requirements of the Drug Supply Chain Security Act for the Distribution of FDA-Approved Naloxone Products During the Opioid Public Health Emergency Guidance for Industry (2022).

141. *See* Editorial Staff, *CDC Proposes Changes in Guidance to Doctors on Opioid Prescriptions*, Ins. J. (Mar. 3, 2022), https://www.insurancejournal.com/news/national/2022/02/16/654339.htm [https://perma.cc/SEQ5-6PTD].

Optum,[142] push for reform in pain treatment and management, it would be prudent for the Department of Labor in leading the country through this medical revolution.

V. CONCLUSION

Over the past several decades, the prescription and use of opioid medications, which have led to increasingly high rates of opioid misuse, addiction, and in many cases, death, have had an overwhelming and devastating impact on the United States.[143] This has become even more apparent as the country simultaneously confronts the COVID-19 pandemic. Yet, while efforts to prevent and treat the COVID-19 pandemic have produced successful results, the country still has not found a similarly meaningful solution to the opioid crisis. This difficulty is largely due to the narrow focus of the efforts taken by the federal government both in the past and at present. The Department of Labor's recent adoption of a Pharmacy Benefit Management program[144] reinforces a similarly limited strategy. While the FECA program may provide measures to prevent opioid dependence for new users, it falls short as a holistic solution to the crisis by failing to provide a solution for those already struggling with addiction.

It is for this reason that the Department of Labor should implement a pharmaceutical procurement approach similar to that taken in the federal government's response to the COVID-19 pandemic. By contracting with pharmaceutical companies to develop a safer and less addictive opioid medication like Buprenorphine, the agency would be able to provide a holistic solution to the opioid crisis. Significant efforts have already been taken to make possible the development of pharmaceutical regimens suitable to both treat and prevent opioid addiction.[145] Now, the onus rests on the Department of Labor to effectively put these treatment methods to use by incentivizing major pharmaceutical institutions with the novel promise of both financial gain and good will to contribute to resolving the crisis that they have created.

---

142. *See Naloxone Options Coming*, *supra* note 134.
143. *See* Nat'l Vital Statistics System, Provisional Drug Overdose Counts, *supra* note 13.
144. *See* FECA Bull. 21-07.
145. *See* Buchberger, *supra* note 112; *see also* Sarlin, *supra* note 108.

IMPROVING ENVIRONMENTALLY CONSCIOUS PROCUREMENT THROUGH BROADER RESPONSIBILITY DETERMINATIONS AND THE EPA'S SUSPENSION AND DEBARMENT POWERS

*Luke A. Peterson**

ABSTRACT

The use of broader responsibility determinations and suspension and debarment procedures may promote higher standards of environmentally conscious practices in government procurement. Suspension and debarment powers are available for the government to protect its interests and, when they are used, indirectly promote environmentally conscious behavior from contractors. The U.S. Environmental Protection Agency (EPA) has the ability to suspend or debar companies and individuals from government contracts, subcontracts, loans, grants, and other assistance programs. Statutory debarment by the EPA can occur following a criminal conviction under either the Clean Air Act or the Clean Water Act, while discretionary suspension and debarment may be warranted more broadly to address waste, fraud, abuse, poor performance, environmental noncompliance or other misconduct. The EPA has the ability to induce current and prospective contractors to enact environmentally conscious practices through the use of their discretionary suspension and debarment powers. Suspension and debarment are protective measures exercised to protect the government's interests, and their use could further the federal government's stated goal of minimizing the environmental impact of procurement practices.

Contractor responsibility determinations may also be used to promote accountability and environmentally conscious practices from contractors. As government contracts may be awarded only to responsible prospective contractors, the standards for determining responsibility are a crucial piece of procurement decision-making. The criteria for being deemed responsible, as stated in the Federal Acquisitions Regulation (FAR) 9.104, are geared more towards a prospective contractor's performance capabilities under a particular

* *Luke Peterson is a third-year law student at The George Washington University Law School and a member of the Public Contract Law Journal.* *I would like to thank Professor Muenzfeld and William Dawson for their continued support and guidance through the Note writing process.*

contract rather than their past history of harm to the environment and the federal government. Through the use of holistic environmental considerations in responsibility determinations and the exercise of suspension and debarment powers, the federal government can mitigate damages created by government contractors and materially address the United States' role in the ongoing climate crisis.

TABLE OF CONTENTS

I. Introduction 298
II. Background 299
III. Environmental Harm Is Not Suitably Factored into Procurement Decisions 301
IV. Case Studies Demonstrating the Need for Change...........................302
A. Oil and Gas—Leaving Fossil Fuels in the Past 302
1. Oil and Gas in Government Procurement 302
2. Previous Contractor Disasters 303
a. Shell..304
b. BP 305
B. Phosphogypsum—A Byproduct of Phosphate Mining and Fertilizer Production 307
1. Storage of Phosphogypsum...308
2. Phosphogypsum Stack Failures...308
V. Government Procurement Procedures as a Method of Promoting Change 310
A. Responsibility Determinations..311
B. Suspension and Debarment Procedures 315
1. Statutory Debarment..317
2. Discretionary Debarment..318
VI. Next Steps 321
VII. Conclusion 322

I. INTRODUCTION

With over three million pounds of dead marine life washing up in Tampa Bay, red tide, which is a bloom of toxic algae that ravages marine life annually off the coast of Florida, was abnormally devastating in the summer of 2021.[1] The discharge of over 200 million tons of wastewater from the Piney Point phosphogypsum stack in nearby Manatee County was identified as one potential cause for the high death toll.[2]

1. *See* Eric Glasser, *Some Marine Life Killed by Red Tide Turned into Energy*, WTSP (July 26, 2021), https://www.wtsp.com/article/news/red-tide/red-tide-waste-to-energy/67-1fb621a1-42a0-43f0-9afb-1e99e52fe501 [https://perma.cc/RQ69-P6BN].

2. *See* Mark Young, *Red Tide & Piney Point Discharge Connected, Scientists Say*, Bradenton Herald (July 23, 2021), https://www.bradenton.com/news/local/article252972418.html.

As rotting fish lined the waterfront and repelled potential customers, local business owners, such as seafood restauranteurs and charter boat captains, likely were affected by the red tide in connection with the phosphogypsum wastewater discharge at Piney Point. However, where industrial accidents harm marine life, Florida case law only grants standing for commercial fishermen.[3] These fishermen may recover only for purely economic damages stemming from harm caused to the marine life.[4] As phosphogypsum storage is governed by the Clean Air Act, phosphogypsum stack owners only have a liability to the federal government.[5] As such, charter captains and local business owners were left without legal remedies to compensate for the damages that they incurred.

Management of the Piney Point facility was contracted to HRK Holdings by the Florida Department of Environmental Protection.[6] The improper discharge of wastewater at Piney Point created awareness among many people in the greater Tampa Bay area regarding the harms that can follow poorly managed government procurement.[7] The ways in which environmental considerations are accounted for in procurement decisions can be better understood by a comparison to other environmentally volatile industries, such as the oil and gas industry. The inspiration for this Note comes from the lack of emphasis placed on environmental considerations in such contractor evaluation decisions.

This Note will address the shortcomings of environmental considerations in government procurement decision-making, specifically looking at contractor evaluations. First, this Note will discuss past environmental harms caused by government contractors, the governmental responses to such harms, and the current state of environmental safeguards in government procurement decision-making. Then, this Note will analyze the benefits of more thorough contractor responsibility determinations and the use of suspension and debarment procedures to promote environmentally conscious practices.

II. BACKGROUND

The need for environmentally friendly practices in government procurement is not a novel concept. The Biden administration has demonstrated that it will take action on this matter.[8] In December 2021, President Biden

3. *See* Curd v. Mosaic Fertilizer, 39 So. 3d 1216, 1224 (Fla. 2010).

4. *See id.*

5. *See EPA Approves Use of Phosphogypsum in Road Construction*, EPA (Oct. 14, 2020), https://www.epa.gov/newsreleases/epa-approves-use-phosphogypsum-road-construction [https://perma.cc/4T5G-94EY].

6. *See* Zachary T. Sampson, *Florida Is Suing Piney Point's Owners. Is the State Also to Blame?*, Tampa Bay Times (Aug. 9, 2021), https://www.tampabay.com/news/environment/2021/08/09/florida-is-suing-piney-points-owners-is-the-state-also-to-blame [https://perma.cc/L5B9-LBY2].

7. *See id.*

8. *See* Exec. Order No. 14057, 86 Fed. Reg. 70,935 (Dec. 8, 2021); *see also* Federal Acquisition Regulation: Disclosure of Greenhouse Gas Emissions and Climate-Related Financial Risk, 87 Fed. Reg. 68,312 (Nov. 14, 2022) (proposed rule in which the Department of Defense, General Services Administration, and National Aeronautics and Space Administration seek to amend the Federal Acquisition Regulation (FAR) to implement a requirement to ensure certain Federal

issued Executive Order 14057, "Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability."[9] Through this Executive Order, the Executive Branch has committed to use the federal government's size and procurement power to, among other goals, reach "[n]et-zero emissions from federal procurement, including a Buy Clean policy to promote use of construction materials with lower embodied emissions."[10] Executive Order 14057 also directs procurement efforts towards "[a]chieving climate resilient infrastructure and operations."[11] The Executive Order outlines the federal government's acknowledgment of the need for improvement in federal procurement decision-making. In practice, however, adequate environmental considerations currently remain overlooked.

Globally, public procurement activities create—directly and indirectly—roughly 7.5 billion tons of greenhouse gas emissions.[12] This figure represents about fifteen percent of the world's total greenhouse gas emissions, factoring in that government contractors naturally produce further harmful emissions outside of their direct government contracts.[13] The United States is the world's largest purchaser of goods and services, with the federal government spending around $665 billion in the 2020 fiscal year.[14] Achieving a net-zero emission level in American federal procurement, as targeted by Executive Order 14057, will require eliminating a substantial percentage of the pollution coming from the United States.[15]

The Biden administration has not acted congruently with its messaging in regard to environmental efforts, specifically related to fossil fuel. The Biden administration is currently outpacing the Trump administration in terms of issuing oil and gas drilling permits on public lands.[16] The administration has also, at times, demonstrated carelessness in evaluating environmental concerns in its procurement decisions. For example, on January 27, 2022, the D.C. District Court invalidated a decision by the Department of the Interior because the agency grossly underestimated the climate impacts of the decision.[17] The

---

contractors disclose their greenhouse gas emissions and climate-related financial risk and set science-based targets to reduce their greenhouse gas emissions). This Note primarily addresses Exec. Order No. 14057 as President Biden's main tool to catalyze change.

9. *See* 86 Fed. Reg. 70,935.

10. *Id.*

11. *Id.* at 70,936.

12. *See BCG-WEF Project: Mission Possible*, Bos. Consulting Grp., https://www.bcg.com/about/partner-ecosystem/world-economic-forum/mission-possible?linkId=147990023 [https://perma.cc/GAT9-XQ77] (last visited Nov. 16, 2022).

13. *See id.*

14. *See Ceres Calls on the U.S. Government to Strengthen the Federal Procurement Process*, Cision (Jan. 13, 2022), https://www.prnewswire.com/news-releases/ceres-calls-on-the-us-government-to-strengthen-the-federal-procurement-process-301460608.html [https://perma.cc/E3Z9-QPUL].

15. *See* Exec. Order No. 14057.

16. *See* Anna Phillips, *Biden Outpaces Trump in Issuing Drilling Permits on Public Lands*, Wash. Post (Jan. 27, 2022), https://www.washingtonpost.com/climate-environment/2022/01/27/oil-gas-leasing-biden-climate [https://perma.cc/44GL-P7VC].

17. *See Court Finds Massive Offshore Oil Lease Sale in Gulf Based on Faulty Legal Analysis*, Earthjustice (Jan. 27, 2022), https://earthjustice.org/news/press/2022/court-finds-massive-offshore

Court held that the Biden administration relied on faulty environmental analysis in making its decision.[18] The D.C. District Court's decision halted the sale of the largest oil and gas lease in U.S. history, one that would have led to a more than tenfold increase in the acreage of public waters used for the fossil fuel industry.[19] Changes to procurement procedures, starting with contractor responsibility evaluations, would be a material step towards achieving net-zero emissions in procurement.

The Biden administration has not yet lived up to its expressed claims of environmental protection and consideration. However, the stated mission of achieving net-zero emissions from procurement decisions is cause for optimism and opens the door for improved procurement procedures. Revamping the government procurement policies in line with the analysis presented in this Note would allow for environmental considerations to play a prominent (and necessary) role in future procurement decisions. Such changes could play a substantial role in promoting greener procurement practices and, among other positive impacts, help achieve the goal of Executive Order 14057, achieving net-zero emissions from procurement activities.[20]

III. ENVIRONMENTAL HARM IS NOT SUITABLY FACTORED INTO PROCUREMENT DECISIONS[21]

The Biden administration has emphasized the need to account for environmental concerns in efforts to improve procurement policies.[22] However due to the current regulatory framework, procurement decisions continue to focus on past performance as the only factor a contracting officer looks at beyond the foundational bidding questions of proposal and price.[23] There is currently little focus on the environmental impact associated with these decisions and no consideration of a contractor's full history of environmental harms.[24]

Existing tools can be leveraged to fill this gap: responsibility determinations and suspension and debarment. The federal government should develop more thorough contractor responsibility determinations to engage in substantial consideration of environmental impacts. It should use statutory and discretionary suspension and debarment procedures more liberally. These changes would serve as methods of promoting environmentally conscious practices to combat the ongoing climate change crisis and move towards the Executive

-oil-lease-sale-in-gulf-based-on-faulty-legal-analysis?utm_source=twitter&utm_medium=social [https://perma.cc/EYR4-KYQL].

18. *See id.*

19. *See id.*

20. *See* Exec. Order 14057.

21. *See id.*

22. *See id.*

23. *See* Kate M. Manuel & L. Elaine Halchin, Cong. Rsch. Serv., R41297, Environmental Considerations in Federal Procurement: An Overview of the Legal Authorities and Their Implementation (2013), https://sgp.fas.org/crs/misc/R41297.pdf [https://perma.cc/DNG4-3ECG].

24. *See id.*

Branch's stated goal of net-zero emissions from federal procurement. Expanding the scope of these measures to include considerations of repeated prior environmental wrongdoings and a holistic view of contractors' environmental practices would create more accountability in procurement decisions.

IV. CASE STUDIES DEMONSTRATING THE NEED FOR CHANGE

This Note will first analyze the current state of affairs within the oil, gas, and phosphate-mining industries and production activities, all of which have garnered public scrutiny for their environmental impacts. These case studies will highlight the need for heightened environmental considerations in procurement decisions.

A. Oil and Gas—Leaving Fossil Fuels in the Past

One industry worth highlighting is the fossil fuel industry, specifically oil and gas. The detrimental environmental effects of the fossil fuel industry is widely studied and publicized; however, federal practices have lagged behind calls for change.[25] The United States provides an estimated $20 billion in direct subsidies to the fossil fuel industry, with eighty percent of those subsidies directed at natural gas and oil production.[26] The fossil fuel industry has a negative impact on global environmental, climate, and public health that is estimated to cost over five trillion dollars each year.[27]

Despite the magnitude of harm caused by the fossil fuel industry, the Deepwater Horizon spill at a BP oil rig in the Gulf of Mexico is the only example of a major gas and oil corporation facing suspension and debarment procedures in recent procurement history.[28] Other notable spills—such as the Exxon Valdez spill of over eleven million gallons of crude oil off the coast of Alaska—have been met with government-imposed financial penalties but no suspension and debarment repercussions.[29] U.S. government support of the fossil fuel industry is in stark contrast to the mission of Executive Order 14057, and looking at past procurement practices may highlight the need for change as the government aims to achieve a net-zero emission rate in federal procurement.

1. Oil and Gas in Government Procurement

The federal government not only provides subsidies to the fossil fuel industry, but also contracts with a number of large corporations operating in the

25. *See* Melissa Denchak, *Fossil Fuels: The Dirty Facts*, Nat. Res. Def. Council (June 29, 2018), https://www.nrdc.org/stories/fossil-fuels-dirty-facts [https://perma.cc/H3EW-UKML].

26. *See Fact Sheet | Fossil Fuel Subsidies: A Closer Look at Tax Breaks and Societal Costs*, Env't & Energy Study Inst. (July 29, 2019), https://www.eesi.org/papers/view/fact-sheet-fossil-fuel-subsidies-a-closer-look-at-tax-breaks-and-societal-costs [https://perma.cc/RWY2-D4PS].

27. *See id*.

28. *See EPA to Lift Suspension and Debarment of BP From Federal Government Contracts*, EPA (Mar. 13, 2014), https://archive.epa.gov/epapages/newsroom_archive/newsreleases/c6a5be4a1a2db87f85257c9a0071760c.html [https://perma.cc/CF9C-5PRA].

29. *See Exxon Valdez Spill Profile*, EPA, https://www.epa.gov/emergency-response/exxon-valdez-spill-profile [https://perma.cc/S8S7-X479] (last visited, Apr. 12, 2022).

oil and gas industry.[30] In 2019, multiple oil and gas corporations were in the top hundred in terms of government contracts size, such as BP and Royal Dutch Shell, now Shell plc (Shell).[31] Between these two corporations alone, the government spent over $1 billion in government contracts for the delivery of various gas and oil products.[32] Other large oil and gas companies, such as Valero, Exxon Mobil, and Chevron, have been in the top hundred largest government contract recipients over the last decade as well.[33] Altering contractor evaluation procedures may serve to deter practices that will be harmful to the government's environmental interests.

2. Previous Contractor Disasters

The effects of the fossil fuel industry on the environment even absent any accidents or mistakes are problematic alone. The industry accounts for seventy-four percent of the annual U.S. greenhouse gas emissions, which is in total roughly 6.5 billion metric tons of carbon dioxide equivalent.[34] Such an impact alone is alarming and needs to be mitigated, in part using government procurement procedures discussed later in this Note.[35] In addition to the baseline environmental harm that the fossil fuel industry causes, oil spills have had a profound environmental and ecological effect.[36] For example, Shell and BP alone are responsible for 148 oil spills and other instances of malfeasance, such as improper gas venting and Clean Air Act violations, across the globe from 1995 to 2021. Because of these harmful acts, they have been forced to pay a combined $35.6 billion in penalties.[37] Despite this, they remain two of the largest recipients of U.S. government contract money among oil and gas corporations.[38]

---

30. *See* Richard Pettibone, *Top 100 Federal Contractors FY19*, Def. & Sec. Monitor (Apr. 13, 2020), https://dsm.forecastinternational.com/wordpress/2020/04/13/top-100-federal-contractors-fy19/ [https://perma.cc/Q6NF-9VCY].

31. *See id.*

32. *See id.*; *see generally Contracts for Aug. 1, 2019*, Dep't of Def., https://www.defense.gov/News/Contracts/Contract/Article/1923647/ [https://perma.cc/Y8EF-VLG4] (last visited Apr. 12, 2022).

33. *See Federal Contractor Misconduct Database*, Project on Gov't Oversight, https://www.contractormisconduct.org [https://perma.cc/HR2W-CKHC] (search "Gas and Oil").

34. *See Energy and the Environment Explained*, Energy Info. Admin., https://www.eia.gov/energyexplained/energy-and-the-environment/where-greenhouse-gases-come-from.php [https://perma.cc/8NER-PVPX] (last visited Apr. 12, 2022).

35. *See id.*

36. *See Deepwater Horizon—BP Gulf of Mexico Oil Spill*, EPA, https://www.epa.gov/enforcement/deepwater-horizon-bp-gulf-mexico-oil-spill (last visited Mar. 6, 2022) [https://perma.cc/CGK2-3ZEJ]; *see* Bill Rigby & David Gregorio, *Shell Oil Spill Dumps Thousands of Barrels of Crude into Gulf of Mexico*, HuffPost (May 12, 2016), https://www.huffpost.com/entry/shell-oil-spill-gulf-mexico_n_57353058e4b060aa7819ee00 [https://perma.cc/ZM52-FV64].

37. *See Royal Dutch Shell PLC*, Project on Gov't Oversight: Fed. Contractor Misconduct Database, https://www.contractormisconduct.org/contractors/71/royal-dutch-shell-plc [https://perma.cc/GYP9-6XJU] (last visited Mar. 6, 2022); *see BP P.L.C.*, Project on Gov't Oversight: Fed. Contractor Misconduct Database, https://www.contractormisconduct.org/contractors/61/bp-p-l-c (last visited Mar. 6, 2022) [https://perma.cc/8F9L-ZGKN].

38. *See Federal Contractor Misconduct Database*, *supra* note 33.

a. Shell

Since 1995, Shell has received sanctions for sixty-six instances of misconduct around the world, resulting in over $1.6 billion in penalties.[39] Violations range from fraudulent behavior to violations of the Clean Air Act, which is the United States' primary federal air quality law that is intended to protect public health and welfare by regulating the emission of hazardous air pollutants.[40] U.S. federal contractor responsibility evaluations should include a corporation's track record of environmental harm on a global and domestic scale as evidence of the corporation's ability to perform contracts responsibly.

Most notably, Shell has caused tremendous harm in the Niger Delta region of Nigeria since Shell began exporting from oil fields in the late 1950s.[41] Shell (and other gas and oil companies) have caused evident harm in the Niger Delta region for decades, so much so that in 1994, the head of environmental studies for Shell Nigeria, Bopp Van Dessel, retired rather than continue defending Shell for fear of "losing his personal integrity."[42] Mr. Van Dessel also stated that "[a]ny Shell site that [he] saw was polluted."[43] Despite pleas for justice, Nigerians did not receive a court ruling in their favor until January 2021, when a Dutch court found Shell responsible for several oil spills in the Delta region between 2006 and 2007.[44] Such global harm should be factored in considerations of a contractor's responsibility and included when assessing the contractor's risk of causing reputational harm to the U.S. government.

Shell also has been responsible for oil spills in the United States, most recently allowing over 88,000 gallons of oil to leak out of its underwater infrastructure off the coast of Louisiana in 2016.[45] Shell has been at the center of several oil spills while being a major player in the oil and gas industry.[46] The oil and gas industry adds devastating amounts of greenhouse gases to the atmosphere each year during extraction and processing even before their products are used for their intended purposes, which further harms the environment.[47] Despite this, Shell continues to benefit from government subsidies and contracts, receiving almost $2 billion from government contracts between 2018 and 2020.[48] Though Shell serves as but one example in the long list of government contractors, the government's continued dealings with Shell, despite a long track record of oil spills, sheds light on the government's inconsistencies related to environmental considerations. The U.S. government's continued

39. *See Royal Dutch Shell PLC*, *supra* note 37.

40. *See Summary of the Clean Air Act*, EPA, https://www.epa.gov/laws-regulations/summary-clean-air-act [https://perma.cc/TZN3-JPVJ] (last visited Apr. 12, 2022).

41. *See* Elian Peltier & Claire Moses, *A Victory for Famers in a David-and-Goliath Environmental Case*, N.Y. Times (Jan. 29, 2021), https://www.nytimes.com/2021/01/29/world/europe/shell-nigeria-oil-spills.html [https://perma.cc/9L2A-8382].

42. *Id.*

43. *Id.*

44. *See id.*

45. *See* Rigby & Gregorio, *supra* note 36.

46. *See generally Royal Dutch Shell PLC*, *supra* note 37.

47. *See* Denchak, *supra* note 25.

48. *Royal Dutch Shell PLC*, *supra* note 37.

dealings with Shell present an opportunity for improved contractor evaluation methods to be implemented in order to meet current efforts to reduce the negative environmental impacts of federal procurement.

b. BP

BP is another example of the government's lenient treatment of oil and gas companies, demonstrating a disconnect between publicized policy goals and past practices. Since 1995, BP has been charged with eighty-three instances of misconduct along with over $34 billion in penalties, most notably stemming from the Deepwater Horizon spill.[49] Despite repeated sanctions, BP remains a popular vendor for government contracts, receiving around $2.3 billion in government contracts between 2018 and 2020.[50] The U.S. government's current dependence on fossil fuel necessitates contracting with fossil fuel vendors.[51] Until the government phases out carbon-based energy sources, however, repeated environmental harms by fossil fuel vendors should be more heavily considered in procurement decisions. Unlike Shell, BP faced suspension and debarment actions stemming from the infamous Deepwater Horizon spill in 2010, but even the repercussions faced in response to the Deepwater Horizon spill are underwhelming when considered against the magnitude of harm caused.[52]

The Deepwater Horizon disaster, which took place in April 2010, remains the largest spill of oil in the history of marine oil drilling.[53] On April 20, 2010, the oil rig Deepwater Horizon, owned and operated by BP, exploded and sank in the Gulf of Mexico.[54] The result of this was devastating. Eleven workers on the rig died, and over $130 million gallons of oil flowed into the Gulf of Mexico.[55] Over a decade later, the marine life in the Gulf of Mexico continues to be impacted by the aftermath of the crude oil spilled into their habitat.[56] Long-term effects are seen in marine life from dolphins, who have a severely reduced rate of successful pregnancy when compared to dolphins in uncontaminated areas, to deep-sea coral colonies, where half of the surveyed coral has been injured by oil contamination.[57] The events of the Deepwater Horizon disaster brought significant attention to the dangers of oil drilling and the environmental harms caused by gas and oil contractors such as BP.[58]

49. *See BP P.L.C.*, *supra* note 37.

50. *See id.*

51. *See* Ethan Howland, *DOD, GSA Start Process in Federal Shift to All Carbon-Free Power by 2030*, UtilityDive (Feb. 4, 2022), https://www.utilitydive.com/news/biden-federal-agencies-buy-emissions-free-renewable-power-ev-climate-procurement/611236/ [https://perma.cc/WXH7-36NN].

52. *See EPA to Lift Suspension and Debarment of BP*, *supra* note 28.

53. *See* Rigby & Gregorio, *supra* note 36.

54. *See id.*

55. *See id.*

56. *See* Joan Meiners, *Ten Years Later, BP Oil Spill Continues to Harm Wildlife–Especially Dolphins*, Nat'l. Geo. (Apr. 17, 2020), https://www.nationalgeographic.com/animals/article/how-is-wildlife-doing-now--ten-years-after-the-deepwater-horizon [https://perma.cc/3WQH-3A99].

57. *See id.*

58. *See id.*

However, repercussions for the harms caused were temporary and lacked sufficient magnitude.

BP faced heavy monetary punishment from United States federal and state governments. BP reached a $16 billion settlement with the federal government and numerous states as a result of the violations occurring from the Deepwater Horizon disaster.[59] In November 2012, the United States Environmental Protection Agency (EPA) suspended all BP entities from performing new federal contract work, though existing agreements with the government were left uninterrupted.[60] By March 2014, however, the suspension was lifted as BP and the EPA reached an agreement that immediately reinstated BP as an eligible government contractor in exchange for compliance with a number of specific requirements, such as ethics compliance, improved corporate governance, and process safety.[61] This reinstatement by the EPA meant that BP was only suspended from government contract work for sixteen months following the largest oil spill in marine drilling history.[62]

The government's response to BP's transgressions, though appropriately in line with the regulatory framework, did not adequately match the environmental harm caused by BP. Instead of being debarred, which carries a default length of three years but may be extended based on the severity of the wrongdoing, BP was suspended for less than half of the standard debarment period.[63] The period of suspension or debarment under the FAR may be shortened if presented with evidence of mitigating factors or remedial measures taken by the violating contractor.[64] The Government Accountability Office and Project on Government Oversight have found a trend that small contractors are more likely to be debarred than larger contractors, regardless of how egregious the behavior may be.[65] This difference may be explained by the fact that a larger contractor has the resources to engage in remedial measures on a more visible scale while smaller contractors cannot afford such measures, leading to a disparity in suspension and debarment proceedings.[66]

59. See Rigby & Gregorio, *supra* note 36; *see also Consent Decree for Deepwater Horizon–BP Gulf of Mexico Oil Spill*, EPA, https://www.epa.gov/enforcement/consent-decree-deepwater-horizon-bp-gulf-mexico-oil-spill (last visited Apr. 12, 2022) [https://perma.cc/6737-DZWZ].

60. *See EPA to Lift Suspension and Debarment of BP*, *supra* note 28.

61. *See id.*

62. *See* Rigby & Gregorio, *supra* note 36.

63. *See Frequently Asked Questions: Suspension & Debarment*, U.S. Gen. Serv. Admin., https://www.gsa.gov/policy-regulations/policy/acquisition-policy/office-of-acquisition-policy/gsa-acq-policy-integrity-workforce/suspension-debarment-division/suspension-debarment/frequently-asked-questions-suspension-debarment [https://perma.cc/FB5V-JYEE] (last visited Mar. 6, 2022).

64. *See* FAR 9.407-1(b)(2).

65. *See* Rena Steinzor & Anne Havemann, Note, *Too Big to Obey: Why BP Should Be Debarred*, 36 Wm & Mary 81, 83 (2011), https://scholarship.law.wm.edu/cgi/viewcontent.cgi?article=1532&context=wmelpr [https://perma.cc/KFE3-8RTJ].

66. *See Uneven Playing Field*, *in Federal Contractor Misconduct: Failures of the Suspension and Debarment System*, Project on Gov't Oversight (May 10, 2002), http://www.pogo.org/pogo-files/reports/contract-oversight/federal-contractor-misconduct/co-fcm-20020510.html [https://perma.cc/CE9D-MKJD].

The leniency afforded to larger contractors thus enables repeated misconduct to occur. As seen in the BP case, this can represent a significant lack of accountability, especially when responding to one of the most devastating environmental events in modern history.[67] The monetary penalty faced by BP of $16 billion (plus the sum of private action costs) represents a small portion of its annual revenue, which has averaged well over $200 billion annually over the last decade.[68] To effectively promote environmentally friendly practices, procurement procedures should more broadly account for contractors' environmental impact, both during the performance of government contracts and in their commercial dealings, and utilize suspension and debarment procedures proportionally with the environmental harm caused by the corporations in their performance of government contracts.

B. Phosphogypsum—A Byproduct of Phosphate Mining and Fertilizer Production

Phosphogypsum is a waste product formed during the process of transforming phosphate rock into fertilizer.[69] Phosphate mining is the fifth largest mining industry in the United States, and the majority of the phosphate rock is used to create fertilizer.[70] To extract phosphorous from the phosphate rock, the phosphate rock is dissolved in an acidic solution.[71] Phosphogypsum is the primary waste byproduct from this process—about five tons of phosphogypsum is created for every ton of phosphoric acid solution.[72] Each year, roughly thirty million new tons of phosphogypsum are generated each year as a byproduct of the phosphate mining and fertilizer industries.[73]

Phosphogypsum is a combination of numerous elements, including the radioactive elements uranium, thorium, and radium.[74] The radium further decays into radon, a radioactive gas.[75] This waste is up to sixty times more radioactive than the original phosphate rock and, left untreated in phosphogypsum stacks, creates a substantially greater environmental risk than

67. *See BP P.L.C.*, *supra* note 37.

68. *See BP Revenue 2006–2021*, Macrotrends, https://www.macrotrends.net/stocks/charts/BP/bp/revenue (last visited Feb. 1, 2022) [https://perma.cc/HM66-CKZD].

69. *See Radioactive Material from Fertilizer Production*, EPA, https://www.epa.gov/radtown/radioactive-material-fertilizer-production (last visited June 2, 2021) [https://perma.cc/HM9Z-5E3M].

70. *See id.*

71. *See TENORM: Fertilizer and Fertilizer Production Wastes*, EPA, https://www.epa.gov/radiation/tenorm-fertilizer-and-fertilizer-production-wastes (last visited on Nov. 5, 2021) [https://perma.cc/8X7C-XS7C].

72. *See id.*

73. *See Phosphogypsum Stacks*, Fla. Polytechnic Univ., https://fipr.floridapoly.edu/about-us/phosphate-primer/phosphogypsum-stacks.php [https://perma.cc/P9G2-PCQV] (last visited Nov. 22, 2021).

74. *See Radioactive Material from Fertilizer Production*, *supra* note 69.

75. *See id.*

the phosphate rock.[76] The concentration of radon found in phosphogypsum stacks may exceed safe levels by up to 1500 percent.[77]

1. Storage of Phosphogypsum

Phosphogypsum waste is especially troublesome due to the strict requirements placed on its storage and maintenance by the Clean Air Act.[78] Phosphogypsum generally must be kept in stacks, where the phosphogypsum is mixed with process water and stored indefinitely.[79] The Clean Air Act grants limited exceptions to this storage requirement, as phosphogypsum may be used for agricultural research and development or for other EPA-approved purposes.[80] However, given the radioactive characteristics of phosphogypsum, the EPA is reluctant to approve substantial uses of phosphogypsum and recently denied a request to use phosphogypsum in road and building construction materials.[81] Treated phosphogypsum is used in this capacity in Europe and Japan, but the United States has not kept pace with this innovation, opting for long-term storage over development and reuse.[82]

With the EPA's reluctance to approve undertested methods of phosphogypsum reuse and the massive quantity of phosphorous required for fertilizer production, phosphogypsum is stored at a staggering rate. The EPA estimates that, spread between roughly two dozen stacks in Florida, about one billion tons of phosphogypsum is stored.[83] With multiple occasions of large-scale leaks stemming from misconduct by the stack operator and the ongoing threat of natural disasters (in Florida—sinkholes, hurricanes, and rising ocean levels), the passive system of phosphogypsum storage should be viewed as a failure.[84]

2. Phosphogypsum Stack Failures

The Piney Point incident is the latest of a long line of failures in the Clean Air Act's mandated system of long-term phosphogypsum storage in stacks. As a largely valueless resource, phosphogypsum is often overlooked and undermanaged, and the troubled history of the Piney Point stack demonstrates this

76. *See* S.K. Sahu, et al., *Natural Radioactivity Assessment of a Phosphate Fertilizer Plant Area*, 7 J. Radiation Rsch. & Applied Scis. (2014), https://www.sciencedirect.com/science/article/pii/S1687850714000053 [https://perma.cc/Z5RJ-JBRJ].

77. *See TENORM: Fertilizer and Fertilizer Production Waste*, *supra* note 71; *see Health Risk of Radon*, EPA, https://www.epa.gov/radon/health-risk-radon [https://perma.cc/P5JQ-MPP7] (last visited Mar. 6, 2022).

78. *See Radioactive Material from Fertilizer Production*, *supra* note 69.

79. *See* 40 C.F.R. § 61.206 (2021).

80. *See id.*

81. *See Phosphogypsum Stacks*, *supra* note 73.

82. *See id.*; *see* Potential Uses of Phosphogypsum and Associated Risks, 402-R-92-002, EPA (May 1992), https://www.epa.gov/sites/default/files/2020-10/documents/epa_402-r92-002_phosphogypsum_bid.pdf [https://perma.cc/RLC8-CZB3].

83. *See Phosphogypsum Stacks*, *supra* note 73.

84. *See* Steve Newborn, *History of Phosphate Mining in Florida Fraught with Peril*, WLRN (June 16, 2021), https://www.wlrn.org/local-news/2021-06-16/history-of-phosphate-mining-in-florida-fraught-with-peril [https://perma.cc/FD9S-5AYY].

concern.[85] While under state control at the start of the twenty-first century, Piney Point officials discharged millions of gallons of wastewater following a tropical storm and dumped treated wastewater into the Gulf of Mexico a couple of years later.[86] The most recent leak and discharge of wastewater at Piney Point comes after a long history of inaction that is not unique to the Piney Point location.[87] The repeated environmental harms caused by the phosphate industry is a suitable place to continue analyzing the need for environmental considerations in procurement decisions.[88]

Mosaic Fertilizer is a subsidiary of the Mosaic Company,[89] one of the largest phosphate producers in the world. Mosaic owns multiple phosphogypsum stacks across Florida and the southern United States.[90] Mosaic has come under scrutiny several times for the harm caused by its stacks.[91] Its plant in New Wales, Florida, has leaked on multiple occasions due to sinkholes.[92] In 2016, over 200 million gallons of contaminated water seeped into Florida's primary aquifer, yet Mosaic did not report the sinkhole's presence to the public, leaving it to be eventually uncovered by local journalists.[93]

Mosaic has found itself at the forefront of numerous phosphogypsum stack spills over the last few decades.[94] A second Mosaic-owned phosphogypsum stack near Riverview, Florida, was the subject of litigation brought by commercial fishermen in *Curd v. Mosaic Fertilizer*.[95] Mosaic built a retention pond that did not comply with size requirements and ignored warnings of imminent stack failure from the state.[96] In September 2004, the pond burst open and released sixty-five million gallons of wastewater into Hillsborough Bay, devastating local marine life.[97]

In 2017, Mosaic received over two million dollars in tax credits from the United States government.[98] Additionally, Mosaic leases land used for its

85. *See id.*

86. *See* Zachary T. Sampson, *Plastic Liner Known to Be in Poor Shape Before Piney Point Leak, Records Show*, Tampa Bay Times (Apr. 2, 2021), https://www.tampabay.com/news/environment/2021/04/02/plastic-liner-known-to-be-in-poor-shape-before-piney-point-leak-records-show/ [https://perma.cc/NX36-ZZCT].

87. *See id*; *see also* Newborn, *supra* note 84 (highlighting instances of prior leaks and numerous citations for lack of compliance).

88. *See* Newborn, *supra* note 84.

89. This Note will refer to them collectively as "Mosaic" unless a distinction is necessary.

90. *See* Newborn, *supra* note 84.

91. *See* Eric Glasser, *Mosaic Gypsum Stack with Sinkhole History Gets Permit to Expand*, WTSP (Oct. 22, 2021), https://www.wtsp.com/article/news/local/polkcounty/mosaic-gypsum-stack-in-new-wales-gets-permit-to-expand/67-c267b971-1aaa-4c15-93d5-76aa6fc5ff73 [https://perma.cc/MJU4-AEVJ].

92. *See id.*

93. *See* Newborn, *supra* note 84.

94. *See id.* (spills at the New Wales Mosaic stack in 1994, 2004, and 2016 and the spill at the Riverview stack in 2004).

95. *See* Curd v. Mosaic Fertilizer, 39 So. 3d 1216, 1224 (Fla. 2010).

96. *See id.*

97. *See* Newborn, *supra* note 84.

98. *See* Mosaic Comp., 2017 Sustainability Disclosure & GRI Index (2018), https://www.mosaicco.com/fileLibrary/publicFiles/0-Mosaic-Sustainability-Disclosure-and-GRI-Index.pdf [https://perma.cc/7JSF-9HS5].

phosphate mines from the federal government.[99] These leases grant Mosaic the surface rights to the land as well as the right to mine the reserves under the surface in exchange for paying royalties to the government.[100]

Mosaic's interactions with the federal government would appropriately be governed by suspension and debarment procedures based on its status as a recipient of federal financial and nonfinancial assistance.[101] Under Executive Order 12549, recipients of federal financial and nonfinancial assistance, such as grants or cooperative agreements, may be suspended or debarred from receiving such benefits in order to combat waste, fraud, and abuses in federal programs.[102] Mosaic, in receiving tax credits and conducting mining operations through cooperative agreements with the federal government, would therefore be subject to suspension and debarment decisions.[103] By analyzing the use of suspension and debarment to combat environmental harm in government programs, Mosaic may serve as a useful case study into how environmental considerations could effectively be applied to reduce the environmental harm caused by procurement (and tangentially related) decisions.

The above case studies serve to highlight the disconnect between past practices and the mission of Executive Order 14057 when looking at the treatment of large firms in industries such as oil and gas (and phosphate to a lesser degree). The federal government has not demonstrated a commitment to holding corporations such as Mosaic or Shell responsible for their environmental harm beyond monetary sanctions. The following section will address ways in which procurement procedures can be applied as a method of promoting environmental considerations in government decision-making.

V. GOVERNMENT PROCUREMENT PROCEDURES AS A METHOD OF PROMOTING CHANGE

This Note will present some potential applications of contractor responsibility screenings and suspension and debarment procedures. These options will demonstrate how evolving procurement policies would minimize the environmental harm caused by certain procurement efforts. This Note's solutions seek to help the Executive Branch meet its goal of reaching net-zero emissions from all federal procurement decisions.

> Federal contractor mandates carried out by executive agencies can be leveraged as a tool to promote social and economic change, even absent congressional intervention. One historical example is Executive Order 11246, Equal Employment

---

99. *See* Mosaic Comp., Annual Report (Form 10-K) (Feb. 20, 2018), https://www.sec.gov/Archives/edgar/data/1285785/000161803418000003/mos-20171231x10k.htm [https://perma.cc/8TSX-VGEP].

100. *See id.*

101. *See* Exec. Order No. 12549, 51 Fed. Reg. 6370 (Feb. 21, 1986).

102. *See id.*

103. *See* 2017 Sustainability Disclosure & GRI Index *supra* note 98; Mosaic Comp. (Form 10-K), *supra* note 99.

Opportunity.[104] Executive Order 11246 was issued in line with the civil rights movement and prohibits discrimination by federal contractors in employment decisions based on the "race, color, religion, sex, sexual orientation, gender identity, or national origin" of the prospective employee.[105] Additionally, government contractors are required "to take affirmative action to ensure that equal opportunity is provided in all aspects of their employment."[106] Executive Order 11246 was able to further the civil rights movement in a way that Congress could not (based on the Commerce Clause's restriction of its legislative power) and provides a noteworthy example of how federal contractor mandates may be used to promote social and economic improvements.[107]

Executive power should similarly be used to require that federal contractors comply with heightened environmental requirements. To reach the goal of net-zero emissions from federal procurement activities, the federal government should implement a set of procedures that enables them to contract only with firms committed to achieving this goal.[108] FAR Part 9 outlines two possible approaches that could assist with this goal: (1) contractor responsibility determinations and (2) suspension and debarment procedures.

A. Responsibility Determinations

All prospective contractors must be determined responsible in order to be eligible for government contracts.[109] FAR 9.104-1 outlines the criteria for a prospective contractor to receive a responsible designation.[110] FAR 9.104-1(d) is the closest applicable standard to addressing environmentally conscious practices, stating that a prospective contractor must "[h]ave a satisfactory record of integrity and business ethics."[111] The criteria of FAR 9.104-1 present "responsibility," in the sense of contractor qualifications, as more to do with capability than responsibility in the traditional sense of being accountable for one's actions.[112] In so doing, responsibility determinations currently focus only on a prospective contractor's current status and do not explicitly require the government to consider the contractor's history of environmental harms.[113] In addition to environmental harms, environmentally conscious practices should be considered in an effort to balance a prospective contractor's environmental impact and appropriately account positives and negatives.

A 2013 report from the Congressional Research Service sheds light on the appropriateness of environmental considerations in responsibility

104. *See* Exec. Order No. 11246, 30 Fed. Reg. 12,319 (Sept. 28, 1965).
105. *Id.*
106. *Id.*
107. *See id.*
108. *See* Exec. Order No. 14507.
109. *See* FAR 9.103(a).
110. *See* FAR 9.104-1.
111. FAR 9.104-1(d).
112. *See* FAR 9.104-1 (notably not containing any reference to environmental considerations and instead focusing on a prospective contractor's capacity to complete the contract at hand).
113. *See* Kate M. Manuel, Cong. Rsch. Serv., R40633, Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures (2013), https://sgp.fas.org/crs/misc/R40633.pdf [https://perma.cc/3RS8-GD3G].

determinations.[114] When broadly considering whether a prospective contractor is sufficiently responsible, the report states that agencies ought to consider, among other things, whether the contractors "are organized in such a way that doing business with them promotes socioeconomic goals."[115] Given the current administration's emphasis on reducing the environmental impact of procurement decisions, this statement should be read in congruence with Executive Order 14057. Doing so would demarcate the Executive Branch's ability to consider environmental impact in an effort to achieve net-zero emissions in federal procurement decisions.

Executive agencies are prohibited from contracting with companies for environmental reasons in certain circumstances, such as where the vendors have been suspended or debarred by the EPA or where the contractor has not remedied an existing environmental harm that the contractor created or contributed to.[116] In both of these instances, remedying the previous environmental problem is held to be sufficient for a contractor to regain their status as "responsible."[117] Such an approach currently enables prior wrongdoings to be quickly forgotten when it comes to responsibility determinations, as the focus is on a contractor's present responsibility.[118] Instead, either the FAR and/or contracting officers should alter the approach to responsibility determinations such that a more holistic evaluation of a contractor's responsibility, including prior environmental harms, is considered.

For this reason, responsibility should be viewed from a more holistic perspective that does not allow for a contractor's current status alone to overly influence a responsibility determination, against or in favor of a prospective contractor. Instead, a prospective contractor's entire history of environmental harm should be balanced with past and present efforts at establishing greener practices. Considering past and present environmental harms and efforts ensures that a company is not blacklisted for prior wrongdoings so long as it has taken sufficiently proportional measures to fix any problems.

The current standard of responsibility determinations as it relates to environmental considerations is too narrow, with such determinations made only "on the basis of the most recent information available."[119] Past behavior should no longer be ignored, as this practice grants potential contractors a clean slate after each infraction and ignores the tendencies of repeat offenders.[120] Allowing a prospective contractor to regain responsible status simply by remedying past environmental harms enables repeat offenders to continue benefiting from federal procurement policies.[121] Given the increased severity

114. *See id.*
115. *Id.*
116. *See* Manuel & Halchin, *supra* note 23.
117. *See id.*
118. *See* Manuel, *supra* note 113.
119. Manuel & Halchin, *supra* note 23 (noting concerns over due process related to the use of older information in making current responsibility designations).
120. *See id.*
121. *See id.*

of the ongoing climate crisis and President Biden's Executive Order 14057, responsibility determinations with respect to environmental problems should account for the prospective contractor's entire history of environmental harm and balance the magnitude of the harm with their previous and ongoing green practices to make a more informed decision.

Looking at the phosphate and oil and gas industries, putting this holistic approach into practice makes sense. The three highlighted companies above, Mosaic, Shell, and BP, all have a history of causing environmental disasters, both related to, and independent of, their work as government contractors.[122] The current system of responsibility determinations favors large corporations that have the resources to compensate injured parties and pay fines because they may again be considered responsible after remedying the problem.[123] To truly gauge the responsibility of a prospective contractor, the entire history of their environmental failures (and successes) should be considered.

Shell leaked a significant amount of oil into the Gulf of Mexico in 2016, facing only relatively minor sanctions for this malfeasance.[124] Though Shell's behavior has repeatedly caused irresponsible amounts of environmental damage, the current responsibility determination procedure does not adequately factor in environmental responsibility.[125] As a result, Shell continues to be on the list of the top hundred largest recipients of government contract dollars.[126] At some point, allowing a corporation to retain its status as a responsible prospective contractor despite repeated and well-documented environmental harms strains the definition of a responsible contractor. When determining whether a bidder is a responsible contractor, their history of, and response to, environmental harms they created ought to be a significant factor in making a responsibility determination. Continuous malpractice and environmental harm should not be ignored. A holistic approach by procurement officials, which factors in environmental harm and risk mitigation efforts, should be applied to reduce recency bias and incentivize responsible contractors to focus on long-term environmental responsibility over the life of the company.

The holistic approach proposed does not have to focus solely on the negative actions of prospective contractors. Contractors should be encouraged to engage in "greener" practices to be found responsible. Just as a contractor's history of environmental harms should factor into responsibility determinations, efforts to develop and improve upon environmentally conscious practices should also factor favorably into responsibility determinations. If this Note's recommendations are put into practice, factoring in positive environmental responsibility factors would enable contractors with a history of

122. *See* Newborn, *supra* note 84; *see also Royal Dutch Shell PLC*, *supra* note 37; *BP P.L.C.*, *supra* note 37.

123. *See* Manuel & Halchin, *supra* note 23.

124. *See* Rigby & Gregorio, *supra* note 36.

125. *See* Manuel & Halchin, *supra* note 23.

126. *See Royal Dutch Shell PLC*, *supra* note 37.

causing environmental harm to not be overly prejudiced by their past, so long as they make an effort to improve their processes.

Such a practice may encourage development of more environmentally friendly or reparative processes in industries in which such development has been stagnant in recent years.[127] The phosphate industry serves as a prime example for this. As seen in the phosphogypsum stacks in Florida, where over 1 billion tons of phosphogypsum is currently stored, the current approach to handling the problem is passive storage, with no mechanism to reduce the supply over time.[128] Such an approach is not sustainable long-term and environmental responsibility determinations can help spur innovation to convert the phosphogypsum into a useful product. These corporations, such as Mosaic, regularly benefit from federal assistance, and their inaction should not be rewarded.[129]

As seen in the Clean Air Act, phosphogypsum must be stored in the stacks unless the EPA approves an alternative method.[130] One such approach is being explored by a phosphogypsum stack owner in Louisiana. The company has sought EPA approval to develop a water treatment method that would allow the phosphogypsum stack wastewater to be treated to drinking-water standards so that it may be released into the Mississippi river.[131] This method, though unclear if it will be approved, should be commended for its efforts to proactively develop greener practices rather than wait for the phosphogypsum to discharge untreated, highly acidic wastewater. If Piney Point had the capabilities that the Louisiana stack owner is trying to get approved, Tampa Bay would not have been contaminated by over 200 million gallons of waste water.

As time continues, the increasing environmental risks presented by mounting phosphogypsum stacks and wastewater storage will continue to lead companies to seek alternative measures of storage and reuse, and federal grant and procurement decisions should assist with these endeavors. Executive Order 14057, in aiming to promote greener practices by the federal government, mentioned the need for construction materials with lower embodied emissions.[132] Embodied energy is the energy consumed by all of the processes associated with the production of a building, beginning with the mining and processing of the resources to the final product delivery.[133]

Gypsum plaster, due to its already processed nature, has an extremely low embodied energy rating, even lower than common building materials such

127. *See Phosphogypsum Stacks*, *supra* note 73.

128. *See id.*

129. *See* Mosaic Comp. (Form 10-K), *supra* note 99.

130. *See* 40 C.F.R. § 61.206 (2021).

131. *See Plant Seeks Permit to Treat, Discharge Acidic Wastewater*, U.S. News (Apr. 26, 2021), https://www.usnews.com/news/best-states/louisiana/articles/2021-04-26/plant-seeks-permit-to-treat-discharge-acidic-wastewater [https://perma.cc/LH69-A6KC].

132. *See* Exec. Order No. 14057.

133. *See Embodied Energy*, Cal. Off. of Hist. Preservation, http://ohp.parks.ca.gov/pages/1054/files/embodied%20energy.pdf [https://perma.cc/HH92-C9DP] (last visited Feb. 1, 2022).

as cement, and several kinds of wood, granite, and aluminum.[134] Though the EPA recently reversed a decision that would have allowed the use of phosphogypsum in construction projects due to concerns over the radioactivity of phosphogypsum, this issue remains an area that should be explored by the EPA and contractors in the phosphate industry alike.[135] The Clean Air Act allows for the use of phosphogypsum under a specified level of radioactivity in commercial farming and research and development efforts, so developing the use of similar, mildly radioactive phosphogypsum in construction projects (as it is used internationally) should not be ignored.[136] Further research should be encouraged by corporations contributing to phosphogypsum waste, as studies have shown that phosphogyspum may successfully be used as a raw material in construction.[137]

Further good-faith attempts at research and development in the reuse of phosphogypsum could positively factor into a prospective contractor's responsibility determination. Such innovation goes beyond the proposed inclusion of a potential contractor's use of "greener" practices, but innovation aimed at reducing a company's environmental footprint should be rewarded. Continued efforts in this regard would ideally lead to sustainable practices that can have a positive environmental effect. As this discussion shows, including a prospective contractor's history of environmental harms and benefits in responsibility determinations can lead the government to engage only with companies that will assist them in reaching the goals of Executive Order 14057.

B. Suspension and Debarment Procedures

Suspension and debarment are additional procurement procedures that have the potential to effectively incorporate environmental considerations into procurement decisions. A suspension and debarment official may act, in the public interest, to exclude a contractor governmentwide from soliciting for or being awarded contracts during the duration of the exclusion.[138] Additionally, Executive Order 12689 provides that exclusion of a participant in a nonprocurement activity, such as a recipient of financial and nonfinancial assistance covered in Executive Order 12549, shall be treated similarly governmentwide.[139] Suspension is warranted as a temporary measure (generally for twelve months) that addresses an immediate need.[140] Suspension is based

134. *See id.*

135. *See* Mark Schleifstein, *Use Radioactive Gypsum Waste for Road Construction? Never Mind, EPA Says*, NOLA (July 7, 2021), https://www.nola.com/news/environment/article_999027fa-de8d-11eb-9dbe-3f0bc4567932.html [https://perma.cc/Z32N-B5UN].

136. *See TENORM: Fertilizer and Fertilizer Prod. Waste*, *supra* note 71.

137. *See* Huong Thi Thanh Ngo et al., *Utilization Phosphogypsum as a Construction Material for Road Base: a Case Study in Vietnam*, Springer Nat. (Nov. 11, 2021), https://link.springer.com/article/10.1007/s41062-021-00695-7 [https://perma.cc/S5Z2-ULAF].

138. *See generally* FAR 9.406-7; *see also Frequently Asked Questions: Suspension & Debarment*, *supra* note 63.

139. *See generally* FAR 9.401; *see also* Exec. Order 12689, 54 Fed. Reg. 34,131 (Aug. 18, 1989); Exec. Order 12549, 51 Fed. Reg. 6370 (Feb. 21, 1986).

140. *See Frequently Asked Questions: Suspension & Debarment*, *supra* note 63.

on adequate evidence that is usually sufficient for an indictment and is issued while the completion of an investigation or legal proceeding is pending.[141]

The duration of debarment is usually three years, though it may exceed three years based on the magnitude of the contractor's wrongdoing, and is based upon a preponderance of the evidence, usually requiring a conviction.[142] Congress has turned its attention towards the applicability of suspension and debarment procedures, recently considering whether suspension and debarment procedures adequately protect the government's interest from contracting entities whose conduct poses a business integrity risk to the government.[143] Such considerations make this Note relevant and timely; with the Executive Branch's stated goal of operating federal procurement endeavors with net-zero emissions, the use of debarment procedures to restrict entities who would otherwise endanger this goal is a worthy goal.

The EPA has authority to suspend and/or debar contractors "to address waste, fraud, abuse, poor performance, environmental noncompliance or other misconduct."[144] Under the EPA's current system of suspension and debarment, there are two forms of debarment: statutory debarment and discretionary debarment.[145] Absent changes in the language of the Clean Water Act and/or Clean Air Act, the EPA cannot alter its statutory debarment practices, as such decisions are reserved to Congress. However, the EPA could utilize discretionary suspension and debarment in furtherance of the policy outlined in Executive Order 14057.[146]

Suspension and debarment focus on protecting the government's interest.[147] The government should have a strong interest in maintaining the public's trust; however, only about one-quarter of Americans trust the federal government to do what is right.[148] The government's oft-repeated commitment to protecting the environment thus provide suspension and debarment officials with the necessary discretion to more thoroughly include environmental considerations.[149] As discussed earlier, suspension and debarment proceedings are sparingly used against large contractors, despite their history of repeated environmental harms.[150] To protect the government's interest in gaining public trust, suspension and debarment officials should act in a way that furthers

141. *See id.*

142. *See id.*

143. H.R. Rep. 116-617 (2021) (Conf. Rep.), https://www.congress.gov/congressional-report/116th-congress/house-report/617/1?overview=closed [https://perma.cc/4F37-P7N9].

144. *Suspension and Debarment Program*, *supra* note 1.

145. *See id.*

146. *See* Exec. Order No. 14057.

147. *See* FAR 9.402.

148. *See Public Trust in Government: 1958–2021*, Pew Rsch. Ctr. (May 17, 2021), https://www.pewresearch.org/politics/2021/05/17/public-trust-in-government-1958-2021 [https://perma.cc/4S82-VHH9].

149. *See* Exec. Order No. 14057.

150. *See BP P.L.C.*, *supra* note 37*; see also Royal Dutch Shell PLC*, *supra* note 37.

the government's commitment to protect the environment, especially related to procurement decisions.[151]

Suspension and debarment procedures can be used in a proactive manner by forcing contractors to sufficiently perform under their current government contracts. The FAR states that "[t]he serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment."[152] With insufficient performance and environmental noncompliance resulting in exclusion from procurement considerations, contractors should be incentivized to engage in practices that promote the government's interests in reducing the environmental impact of federal procurement.

1. Statutory Debarment

Statutory debarments occur following a criminal conviction under the Clean Water Act or the Clean Air Act.[153] Contractors who have been debarred as a result of a statutory violation are ineligible "until the Debarring Official certifies that the condition giving rise to conviction has been corrected."[154] Regarding the Clean Air Act, there is mandatory debarment for anyone who violates 42 U.S.C. § 7413(c), which outlines criminal penalties under the Clean Air Act.[155] The violations listed in 42 U.S.C. § 7413(c), with the exception of 42 U.S.C. § 7413(c)(4), carry a requirement of "knowing" behavior.[156] 42 U.S.C. § 7413(c)(4) outlines a criminal penalty for negligently releasing a hazardous pollutant or substance, as a result putting someone in imminent danger of death or serious harm.[157] However, many environmental harms not rising to the level of causing imminent death or serious harm, such as the harms caused by the ongoing storage of phosphogypsum, are not considered violations of the Clean Air Act and require a more nuanced approach than statutory debarment may provide.[158]

The approach to statutory debarment under the Clean Water Act is more inclusive of potential wrongdoings than the Clean Air Act. Under 33 U.S.C. § 1319(c), the criminal penalties that result in mandatory debarment are listed.[159] These penalties include a much broader list of knowing and negligent violations that more appropriately covers the harms traditionally caused by higher risk activities such as phosphogypsum storage and oil and gas drilling.[160]

Statutory debarment does not sufficiently protect the government's interests due to its limited scope. Statutory debarment, as mentioned above,

151. *See* Exec. Order No. 14057.
152. FAR 9.402(b).
153. *See Suspension and Debarment Program*, *supra* note 144.
154. *Id*.
155. *See* 42 U.S.C. § 7606.
156. *See* 42 U.S.C. § 7413(c).
157. *See id.* § 7413(c)(4).
158. *See id.* § 7413(c).
159. *See* 33 U.S.C. § 1319(c).
160. *See id.*

requires a conviction based on these statutes, and irresponsible actions under the criminal threshold or minimally compliant behavior may escape statutory repercussions.[161] The limited scope of statutory debarment, absent congressional intervention, may be accounted for by a broader approach to discretionary debarment detailed under the next section.

Lastly, the application of statutory debarment has the potential for problematic results in the form of insufficient repercussions. BP was criminally convicted in the Deepwater Horizon case; however, statutory suspension and debarment allows for a contractor's eligibility to be restored after taking corrective action deemed appropriate.[162] As such, an EPA determination of BP's compliance with safety regulations allowed BP to be restored as an eligible prospective contractor after sixteen months, despite causing generational environmental harm.[163] The environmental impact of the BP spill is still seen in the diminished population of marine life in the Gulf of Mexico, demonstrating a disconnect between the EPA's ruling on BP's improved behavior and the true effects of its action.[164] The current framework of statutory debarment promotes leniency over accountability and fails to hold major violators sufficiently responsible so as to appropriately protect the government's interests. When deciding whether or not to restore a prospective contractor's eligibility, suspension and debarment officials should balance the corrective measures taken by the contractor with the potential harm to the government's trust that could occur by continuing to contract with prior wrongdoers.

As seen in the responsibility discussion, statutory debarment allows for a contractor's eligibility to be restored after taking the appropriate corrective action.[165] When discussing contractor responsibility, this can be problematic because it allows for repeat wrongdoers to retain their eligibility as contractors by continuing to remedy any harmful situations.[166] By striking a balance between a contractor's good-faith efforts to remedy their past environmental harms with the reputational harm suffered by the government by continuing to contract with evident wrongdoers, contractors may be rewarded for their "greener" practices and development while being adequately held accountable for their environmental harms. The current narrow breadth of statutory debarment, along with the leniency granted for violations, insufficiently protects the government's interests.

2. Discretionary Debarment

Suspension and debarment procedures, in this context exercised by the EPA, may also be implemented at the government's discretion. The government

161. *See Suspension and Debarment Program*, *supra* note 144.
162. S*ee EPA to Lift Suspension and Debarment of BP*, *supra* note 28.
163. *See id.*
164. *See* Meiners, *supra* note 56.
165. *See* Manuel & Halchin, *supra* note 23*; see also Suspension and Debarment Program*, *supra* note 144.
166. *See* Manuel & Halchin, *supra* note 23.

may use suspension and debarment as tools to avoid reputation risks stemming from a continued relationship with a contractor convicted or indicted for serious wrongdoings.[167] The potential grounds for discretionary suspension and debarment exceed the scope of permitted uses of statutory debarment.[168] With the focus of suspension and debarment procedures on the protection of public interest, there are benefits to interpreting the scope of suspension and debarment more broadly to account for environmental concerns.[169] Under FAR 9.406-2(a)(5), the causes for discretionary suspension and debarment may arise from, among other things, the "[c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor."[170] The primary question of the scope of discretionary debarment procedures, with regards to environmental considerations, hinges on what the government views as a business integrity risk and (potentially) what the government should consider a business integrity risk.

Presently, discretionary suspension and debarment procedures are warranted when there is a violation of regulatory requirements or statutes, which can be interpreted as constituting a per se lack of business integrity, or where the contractor violated the contract so seriously as to justify suspension or debarment.[171] However, in doing so, the FAR restricts discretionary debarment, limiting the scope of the debarring official's discretion on these matters by removing their true discretion.[172] Regulations and statutes cannot (and do not) cover every possible risk to the government's interests, and confining the debarring official's discretion to regulations and statutes leaves other wrongdoings, such as environmental malfeasance not subject to a specific statute or regulations, not adequately considered. Expanding upon the discretion of debarring officials could serve to require contractors to act in compliance with the government's best interests rather than meeting the bare minimum required under the current regulations.

The EPA publicly describes its suspension and debarment powers as "an effective administrative tool to address waste, fraud, abuse, poor performance, environmental noncompliance or other misconduct."[173] The EPA is meant to use suspension and debarment as tools to "protect the government from doing business with individuals/companies/recipients who pose a business risk to the government."[174] As environmental projections and discussions regarding

167. *See* John Pachter, Christopher Yukins & Jessica Tillipman, *U.S. Debarment: An Introduction* 4 (2019), *in* Cambridge Handbook of Compliance (D. Daniel Sokol & Benjamin van Rooij (forthcoming), https://publicprocurementinternational.com/wp-content/uploads/2019/02/2019-02-24-Draft-Debarment-Compliance-Handbook-Chapter-John-Pachter-Chris-Yukins-Jessica-Tillipman-1.pdf [https://perma.cc/AM6P-75FQ].

168. *See* FAR 9.402(b).

169. *Id*.

170. FAR 9.406-2(a)(5).

171. *See* FAR 9.406-2(a)–(b).

172. *See id.*

173. *Suspension and Debarment Program*, *supra* note 144.

174. *Id.*

climate change have grown bleaker over the last decade, it is fair to wonder when companies with poor environmental track records will be considered a business risk to the government.

Many corporations pose a risk to the government's interests due to the environmental harm that they cause by operating in a way contrary to the government's stated mission of reducing emissions related to government procurement decisions.[175] Continued business with environmental wrongdoers harms the public's trust in the government's stated mission, and suspension and debarment officials should thus act to ensure serial wrongdoers are rightfully excluded. The U.S. government's continued association with major contributors to pollution and greenhouse gases ought to be considered a business risk that causes the government reputational harm with the public. To promote the government's stated mission of reducing the environmental impact of procurement efforts, suspension and debarment officials should be free to act with true discretion in protecting the government's reputation and enforcing the government's commitment to "greener" procurement practices.[176]

Discretionary suspension and debarment decisions and guidelines ought to actively promote solving an issue, rather than allowing environmental harm to continue. Environmental damage alone should be considered sufficient reason for discretionary suspension and debarment actions, but the approach itself, requiring substantial financial commitments to remedy leaks, constitutes waste, a ground for discretionary suspension and debarment on its own according to the EPA.[177]

The government continues to cooperate with and subsidize entities overseeing and contributing in bulk to such stacks, such as Mosaic.[178] This continued relationship poses a definite risk to the government's business and reputational interests, especially considering past leaks at Mosaic facilities, because the government has continued to provide financial assistance to Mosaic despite repeated environmental harm caused that is in conflict with the government's interest in reducing the environmental impact of federal activities.[179] Discretionary suspension and debarment procedures were not used during those prior instances.[180] These tools, if used in future incidents, will incentivize corporations to develop greener practices and minimize the waste associated with their operations. In holding contractors accountable for their environmental harms, suspension and debarment officials can bolster the

175. *See* Exec. Order No. 14057.

176. *See id.*

177. *See* Angie Angers, *Florida Will Spend $100 Million to Clean Up, Close Piney* Point, Bay News 9 (May 4, 2021), https://www.baynews9.com/fl/tampa/news/2021/05/04/florida-lawmakers-secure--100-million-to-clean-up--close-piney-point [https://perma.cc/N7WA-64GA]; *see also Suspension and Debarment Program*, *supra* note 144.

178. *See* 2017 Sustainability Disclosure & GRI Index, *supra* note 98; *see* Mosaic Comp. (Form 10-K), *supra* note 99.

179. *See id.*

180. *See id.*

government's reputation by acting in line with the stated mission of reducing the environmental impact of procurement.[181]

The current practice of contracting with large oil and gas companies has put the government at risk of suffering business and reputational harm. Shell and BP, two of the most notorious contributors to greenhouse gas emissions and oil spills, annually receive hundreds of millions in subsidies and contract dollars from the U.S. federal government[182] Discretionary suspension and debarment for reasons such as waste, environmental noncompliance, or other misconduct, as detailed by the EPA, should be used as tools for protecting the government's interests in the case of any future malfeasance from the oil and gas industry.[183] To achieve President Biden's stated goal of net-zero emissions from federal procurement activities, a hard line must be taken with major contributors to pollution.[184] The federal government should use discretionary suspension and debarment to respond to environmental damage on a much broader scale.

VI. NEXT STEPS

Though this Note focuses on how responsibility determinations and suspension and debarment procedures may be used to promote environmental considerations, there are numerous other ways to bring environmental considerations to the forefront of federal procurement activities. Such options could assist in moving towards achieving the stated mission of Executive Order 14057—net-zero emissions from federal procurement.[185] From a purely executive perspective, alternative methods may incentivize environmentally conscious developments, such as grant contests and discontinuing federal subsidies for companies in the fossil fuel industry.[186] Additionally, the FAR should be adjusted to expressly include environmental considerations, a move which would ensure a more consistent approach to procurement rather than relying on the current administration to make a concerted effort to make procurement greener.

Outside of the Executive Branch, alternatives that could bring about similar results also exist. The Executive Branch is limited to enacting change in this area that is at least tangentially related to federal contractors. Congress, on the other hand, can pass or amend legislation that would apply equally to public and private sector work. Such legislative action could, for example, expand upon the limited protections offered by the Clean Water Act and Clean Air

181. *See* Exec. Order No. 14057.
182. *See Federal Contractor Misconduct Database*, *supra* note 33.
183. *See Suspension and Debarment Program*, *supra* note 144.
184. *See* Exec. Order No. 14057.
185. *See id.*
186. *See* Johannes Urpelainen & Elisha George, *Reforming Global Fossil Fuel Subsidies: How the United States Can Restart International Cooperation*, Brookings Inst. (July 14, 2021), https://www.brookings.edu/research/reforming-global-fossil-fuel-subsidies-how-the-united-states-can-restart-international-cooperation/ [https://perma.cc/6CP4-SM57].

Act. Industrial giants such as BP and Shell receive only a small portion of their revenue from procurement activities, so congressional expansion of protections into the private sector could more broadly promote environmentally conscious practices.[187]

VII. CONCLUSION

The use of a holistic responsibility determination approach that includes environmental considerations and an environmentally focused approach to suspension and debarment could significantly mitigate the environmental harm currently caused by government contractors by ensuring that the government engages with environmentally conscious companies rather than with perpetual and habitual wrongdoers. In promoting greener practices on the way to achieving net-zero emissions in federal procurement, private sector pollution would logically decrease as well as companies develop more sustainable habits. These two methods of contractor qualification can create a policy that simultaneously incentivizes development in environmentally friendly practices while holding chronic wrongdoers accountable for their environmental harm. In adopting this approach, federal procurement practices may become sustainable and reverse the current trend. President Biden's issuance of Executive Order 14057 has brought this issue to the forefront, and follow-up action must be taken to ensure that the administrations to come will continue this mission.

The use of federal procurement policies can be a powerful mechanism to enact environmental change on the path to achieving a net-zero emission rate from federal procurement efforts. Federal procurement as a vehicle for broader change is not a novel concept, and its use here would promote significant improvement in environmental considerations, even when not directly related to contracted work. A holistic evaluation of a prospective contractor's qualifications would more appropriately incorporate environmental factors into procurement decisions. The threat of a non-responsibility determination or debarment would encourage a more proactive approach to addressing a topic that can no longer go unaddressed.

187. *See Royal Dutch Shell PLC*, *supra* note 37; *see also BP P.L.C.*, *supra* note 37.

THE PROMISE AT THE END OF THE TRAIL: USING *MCGIRT* TO CLOSE THE TRIBAL ENTERPRISE PERFORMANCE GAP

*Alexander M. Roider**

ABSTRACT

Despite being introduced in identical ways, tribal enterprises and Alaska Native Corporations have achieved vastly different outcomes in their government contracting operations. However, the Supreme Court's recent decision in *McGirt v. Oklahoma* may change this, handing down a potential beacon of hope to the underperforming tribal enterprises. This Note outlines how the award disparities between ANCs and tribal enterprises that began decades ago continue to this day, despite Congressional intervention. This Note then posits that the expanded Indian Country via the recent ruling in *McGirt v. Oklahoma* would allow for tribal enterprises to get a leg up through competitive jurisdiction, regulation, and taxation.

TABLE OF CONTENTS

I. Introduction 324
II. The Reservation System Compared to Alaska Native Corporations 326
III. Government Contracting and the Different Performances of Indigenous Peoples 328
  A. SBA's 8(a) Business Development Program 328
  B. Alaska Native Corporations' 8(a) Dominance 329
  C. Tribal Enterprises and Their Mediocre Performance in the 8(a) Program 331
IV. The Revolutionary Impact of *McGirt* 333
V. The Balancing Effects of a Respected *McGirt* 335
  A. Expanded Indian Country Would Allow for Tax Structures That Benefit Tribal Enterprises 337
  B. Tribal Dominion over Greater Areas Would Permit for Less Burdensome Regulations on Tribal Enterprises 337

* *JD expected, May 2023, The George Washington University Law School.* *I would like to thank Collin Swan and Lucy Hendrix for their patience and input throughout the drafting process, Professor van Schilfgaarde for her mentorship, and all of my loved ones for their constant encouragement and support.*

C. Tribal Court Jurisdiction over Indian Country Could Provide Competitive Advantage to Tribal Enterprises 338
D. Expanded Indian Country Would Allow for Tribal Enterprises to No Longer Be Forced to Choose Between Reservation Benefits and Utility Access...340
VI. Conclusion 340

I. INTRODUCTION

On a remote Alaskan island[1] lies a small village containing the approximately two hundred shareholders of the Chenega Corporation,[2] with almost six billion dollars in government contract awards.[3] In the first month of 2022, this small village secured seven new government contracts.[4] Meanwhile, the Oneida Nation Reservation is being cooled by the winds of Lake Michigan, located on the outskirts of Green Bay, Wisconsin,[5] with a population of over twenty thousand.[6] With more than one hundred times the population,[7] close proximity to a major city, and a near identical length of time spent engaging in government contracting, one may expect the Oneida Nation (Oneida) to be generating similar if not larger profits via their contracting program than Chenega. However, the Oneida barely make a fifth of what the rural Alaskan village pulls in each year.[8]

These disparities are not a mistake. Rather, they occur as a result of deliberate government contracting programs.[9] Both Alaska Native Corporations (ANCs) and tribal enterprises are able to enroll in the Small Business Administration (SBA)'s 8(a) business development program,[10] but ANCs have dominated the field.[11] This control is partly due to the unique benefits ANCs are

1. *See Shareholders*, Chenega Corp., https://www.chenega.com/shareholders [https://perma.cc/UU6V-KEA6] (last visited Oct. 16, 2022).

2. Jennifer LaFleur & Michael Grabell, *Villages Testify to Disparity in Benefits Alaska Native Corporations Provide*, ProPublica (Mar. 17, 2011, 8:55 AM), https://www.propublica.org/article/villages-testify-to-disparity-in-benefits-alaska-native-corporations#:~:text=One%20of%20the%20top%2Dgrossing,170%20shareholders%2C%20Totemoff%20among%20them [https://perma.cc/GAM2-NPMG].

3. *See Chenega Corp.*, Off. of the Chief Data Officer, https://www.usaspending.gov/recipient/84239ed1-2767-2b39-1adb-194abcd5f843-P/all [https://perma.cc/PJ28-QRQ7] (last visited Oct. 16, 2022).

4. *See id.*

5. *See Oneida Cultural Heritage*, Oneida Nation, https://oneida-nsn.gov/our-ways/our-culture [https://perma.cc/2HUS-YGM2] (last visited Oct. 16, 2022).

6. *See Oneida Nation*, Wis. First Nations, https://wisconsinfirstnations.org/oneida-nation [https://perma.cc/WY7X-74PR] (last visited Oct. 16, 2022).

7. *Compare Shareholders*, *supra* note 1, *with Oneida Nation*, *supra* note 6.

8. *Compare Chenega Corporation*, *supra* note 3, *with Oneida Nation*, Off. of the Chief Data Officer, https://www.usaspending.gov/recipient/b0bdc47e-5728-8607-7d3f-3eb4ae0d3c22-P/all [https://perma.cc/4V6A-AYZU] (last visited Oct. 16, 2022).

9. *See* Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 18015, 100 Stat. 82, 370.

10. *See id.*

11. *See* U.S. Gov't Accountability Off., GAO-12-84, Federal Contracting: Monitoring and Oversight of Tribal 8(a) Firms Need Attention, 13 (2012) [hereinafter GAO 2012 Report].

awarded by the program that are not available to tribal enterprises.[12] Such benefits once included exemptions from the bans on sole-source awards,[13] which led to noncompetitive awards of hundreds of millions of dollars to ANCs.[14] While this disparity is known to Congress, all attempts at reining in ANC exclusive benefits have fallen flat.[15]

A recent radical change in jurisprudence could close this tribal enterprise performance gap. The 2020 United States Supreme Court ruling in *McGirt v. Oklahoma* presents new opportunities to struggling tribal enterprises.[16] *McGirt* adjusted the previous test used to determine the area of tribal influence known as "Indian Country."[17] This revision allows for tribal governments to implement unique and exciting policies that could greatly benefit tribal enterprises, including innovative tax structures,[18] entrepreneurial regulations,[19] and a compassionate civil judicial system.[20] These benefits would only be available to tribal enterprises, not to ANCs, as Alaska Native Villages do not exist in Indian Country.[21] Thus, under such benefits, the disadvantaged tribal enterprises may be eligible for unique gains that are unobtainable by the currently dominant ANCs. The SBA could rebalance the performance of ANCs and tribal enterprises by not interfering with the expansion of Indian Country and subsequent availability of unique benefits to tribal enterprises that may occur via the ruling in *McGirt*.

This Note addresses a variety of policies that tribes could employ under their expanded *McGirt* influence to provide their enterprises with competitive advantages over ANCs, with the goal being equitable performance in government contracting between the groups. Following the introduction here in Part I, Part II will provide a brief overview of the three-hundred-year history of American Indian and Alaska Native regulations, and their similarities and differences. Next, Part III will discuss the history of the SBA 8(a) program and the disparate performances of ANCs and tribal enterprises. Part IV will

12. *See, e.g.*, 43 U.S.C. § 1626(e) (2018); 13 C.F.R. § 124.109(c)(4)(B) (2021); 13 C.F.R. § 124.506(b) (2021).

13. *See* 13 C.F.R. § 124.506(b) (2010).

14. *See* Robert O'Harrow Jr., *Little Size or Expertise, but a Big Contract*, Wash. Post, Nov. 26, 2010, at A1.

15. *Compare* Federal Awards Advanced Search Alaska Native Corporation Owned Firm, Off. of the Chief Data Officer, https://www.usaspending.gov/search/?hash=16a9deba40408ebf4022d859e9757776 (follow hyperlink, Advanced Search; then for Timer Period field choose FY 2022–2018; then for Recipient Type field choose Alaska Native Corporation Owned Firm and Small Disadvantaged Business) [https://perma.cc/Z3EV-TBUP], *with* Federal Awards Advanced Search Tribally Owned Firm, Off. of the Chief Data Officer, https://www.usaspending.gov/search/?hash=73f62888df67b260a5c145122b3e963f (follow hyperlink, Advanced Search; then for Timer Period field choose FY 2022-2018; then for Recipient Type field choose Tribal Owned Firm and Small Disadvantaged Business) [https://perma.cc/VJG5-5G2N].

16. *See generally* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

17. *See id.* at 2459.

18. *See* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 165 (1973); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982).

19. *See* Cohen's Handbook of Federal Indian Law § 3.04(1) (Nell Jessup Newton ed., 2017).

20. *See* Montana v. United States, 450 U.S. 544, 565–66 (1981).

21. *See* Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 532 (1998).

then analyze the ruling in *McGirt v. Oklahoma*, its impact, and its likely future. Finally, Part V will lay out four policies tribal governments could employ to benefit tribal enterprises that the ruling in *McGirt* has made possible or more impactful. In Part V, subpart A will discuss the option of discriminatory tax structures. Subpart B will focus on the ability of tribal governments to slash regulations. Subpart C examines the implications of expanded tribal jurisdiction on government contracting. Finally, subpart D analyzes the wider array of resources that are made available to tribal enterprises via an expanded Indian Country.

II. THE RESERVATION SYSTEM COMPARED TO ALASKA NATIVE CORPORATIONS

Since its inception, the American legal system has struggled to determine the proper relationship between the government and the many tribes native to the contiguous United States.[22] The tension between tribes being treated as either sovereign nations or dependent wards of the state has endured for centuries, since the first vestiges of federal Indian law were laid out in the so-called "Marshall Trilogy."[23] The judicial system has fluctuated in its position through decades of forced removal to reservations,[24] the allotment of these reservation lands under the Dawes Act,[25] and even the involuntary termination and dissolution of some tribes.[26] What has remained constant through all these decades has been the federal government's duty to protect the tribes' interests in some way,[27] and the tribes' ability to remain sovereign in some capacity.[28] The geographic range of this dynamic is encapsulated in a concept known as "Indian Country."[29]

Indian Country is a simple, yet easily misunderstood term, due to its inconsistent usage by Congress.[30] Indian Country is the geographic area in which

22. *See, e.g.*, Robin v. Hardaway, 1 Jeff. 109 (Va. Gen. Ct. 1772) (explaining the importance of considering the relationship with Indian tribes when determining the status of Indian slaves).

23. *See, e.g.*, Johnson v. McIntosh, 21 U.S. 543, 574 (1823); Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831); Worcester v. Georgia, 31 U.S. 515, 519 (1832). These three cases are typically cited as the foundation of all federal Indian law. They contain an odd mixture of progressive rulings and colonial thinking, such as *Johnson*'s combined findings of aboriginal rights to tribal sovereignty, 21 U.S. at 574, but also the property rights of conquest, 21 U.S. at 588.

24. *See* Appropriation Bill for Indian Affairs, ch. 14, 9 Stat. 574 (1851).

25. *See* Indian General Allotment (Dawes) Act, Pub. L. No. 49-105, 24 Stat. 388 (1887). This Act originally excluded the "Five Civilized Tribes" (Cherokee Nation, Choctaw Nation, Chickasaw Nation, Muscogee [Creek] Nation, and Seminole Nation) from the allotment of lands, but they were later included in the program via the Curtis Act. *See* Curtis Act of 1898, Pub. L. No. 55-517, 30 Stat. 495 (1898).

26. *See* H.R. Con. Res. 108, 83rd Cong. (1953) (enacted).

27. *See, e.g.*, *Cherokee Nation*, 31 U.S. at 17; Lone Wolf v. Hitchcock, 187 U.S. 553, 568 (1903); United States v. Navajo Nation, 537 U.S. 488, 504 (2003).

28. *See, e.g.*, *Worcester*, 31 U.S. at 519; McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973).

29. *See* Cohen's Handbook, *supra* note 19, § 3.04(1).

30. *See, e.g.*, 18 U.S.C. § 1154(c) (defining Indian Country as specifically not including fee patented lands or right of ways); Major Crimes Act, 18 U.S.C. § 1151 (including fee patented

both local tribal laws and federal laws governing Indians apply.[31] The concept dates back to the first Travel and Intercourse Act of 1790[32] and has evolved over the centuries.[33] The most frequently used modern definition of Indian Country can be found in the Major Crimes Act.[34] It defines Indian Country as including reservations,[35] dependent Indian communities,[36] Indian allotments,[37] and both fee patented lands[38] and rights of ways in reservations.[39] These areas are considered Indian Country until diminished or extinguished by Congress.[40]

The laws governing the Natives of the lower forty-eight states are very different compared to those in Alaska and Hawaii.[41] The territory that would become Alaska, purchased by the United States in 1867, is geographically removed from the contiguous states.[42] The rush for land in Alaska did not happen immediately, which seemingly caused less early friction between the settlers and the Alaskan Natives than with other Native American tribes.[43]

However, by the time Alaska officially became a state in 1959,[44] a universal agreement with the Natives was needed as Alaska's natural resources had come into more demand.[45] Congress's solution was the Alaska Native Claims Settlement Act (ANCSA).[46] This Act dissolved any aboriginal rights the Natives could exercise, including hunting and fishing rights, trespass claims, full tribal

---

lands and right of ways in Indian Country definition); Indian Gaming Regulatory Act, 25 U.S.C. § 2703(4) (using the term "Indian lands" to refer to what would typically be called "Indian Country"); Indian Child Welfare Act, 25 U.S.C. § 1903 (using the term "reservation," but defining it as sharing the Major Crimes Act's definition of "Indian Country").

31. *See* Cohen's Handbook, *supra* note 19, § 3.04(1).

32. *See generally* Travel and Intercourse Act of 1790, 1 Stat. 137 (1790).

33. *See* Cohen's Handbook, *supra* note 19, § 3.04(2)(b).

34. *See* 18 U.S.C. § 1151.

35. *See id.* § 1151(a); *see also* Donnelly v. United States, 228 U.S. 243, 269 (1913).

36. *See* 18 U.S.C. § 1151(b); *see also* United States v. McGowan, 302 U.S. 535, 538 (1938).

37. *See* 18 U.S.C. § 1151(c); *see also* United States v. Pelican, 232 U.S. 442, 449 (1914).

38. *See* 18 U.S.C. § 1151(a).

39. *See id.*

40. *See* Solem v. Bartlett, 465 U.S. 463, 472 (1984).

41. *Compare* Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601–1629, *with* 25 U.S.C. §§ 331–333. This Note focuses on the distinction between Alaskan Natives and Indians of the lower forty-eight states, mostly due to the unique situation of Native Hawaiians, Cohen's Handbook, *supra* note 19, § 4.07(4). This is not to say that the situation of Native Hawaiians and their Native Hawaiian Organizations are not deserving of an analysis of their participation in the 8(a) program.

42. *See* Cession of Alaska, Russ.-U.S., Mar. 30, 1867, 15 Stat. 539.

43. *Compare* Organic Act of 1884, ch. 53, 23 Stat. 24 (1884) ("[T]he Indians . . . shall not be disturbed in the possession of any lands . . . ."), *with* Dawes Act, 25 U.S.C. §§ 331–333 (dissolving tribes' exclusive usage of lands). Note that at the same time that Congress was serving Indian land on a platter to white settlers, they were mocking the purchase of Alaska as "Seward's Folly" and "Seward's Icebox." These statements indicate how little Congress was concerned with Alaska Natives at the time. *The Russian Treaty*, N.Y. Tribune, Apr. 9, 1867, at A1.

44. *See* Proclamation No. 3269, 24 Fed. Reg. 81 (Jan. 3, 1959).

45. *See* Alaska Statehood Act, Pub. L. No. 85-508, § 4, 72 Stat. 339, 339 (1958).

46. 43 U.S.C. §§ 1601–1629.

sovereignty,[47] and the designation of their land as "Indian Country."[48] Instead, almost all Natives were enrolled in one of thirteen regional corporations as shareholders.[49] These "Alaska Native Corporations" were meant to establish sustainable business practices with the goal of having the profits from these projects benefit the Native shareholders in perpetuity.[50] Later, these same ANCs were given special opportunities in government contracting to help them grow.[51]

III. GOVERNMENT CONTRACTING AND THE DIFFERENT PERFORMANCES OF INDIGENOUS PEOPLES

A. SBA's 8(a) Business Development Program

Special opportunities for ANCs and tribal enterprises began to materialize a half a century ago.[52] In 1953, Congress passed the Small Business Act to "protect, insofar as it is possible, the interests of small-business" by ensuring that a "fair proportion" of government contracts be awarded to small businesses.[53] Part of this Act included the 8(a) Business Development Program (hereinafter referred to as "8(a)"), which provides the small businesses enrolled in its program technical assistance and access to set-aside and sole-source government contracts.[54] For fiscal year 2022, the federal government has a goal of five percent of all prime contracts to go to small disadvantaged businesses, with the bulk of these going through the 8(a) program.[55]

In 1978, an amendment limited these 8(a) contract awards to only small businesses owned by those that were "socially and economically disadvantaged."[56] These standards were made to include tribal-owned enterprises and Alaskan Native Corporations (ANCs) in 1986.[57] This transition occurred via the massive Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), resulting in silence in the Congressional Record on the reasons

47. *See id.* § 1603, *see also* Yellen v. Confederated Tribes of the Chehalis Reservation, 141 S. Ct. 2434, 2449 (2021).

48. *See* Alaska v. Native Vill. of Venetie Tribal Gov't, 522 U.S. 520, 532 (1998).

49. *See* 43 U.S.C. § 1606. These thirteen corporations are the following : Ahtna, Inc.; Aleut Corp.; Arctic Slope Regional Corp.; Bering Straits Native Corp.; Bristol Bay Native Corp.; Calista Corp.; Chugach Alaska Corp.; Cook Inlet Region, Inc.; Doyon, Ltd.; Koniag, Inc.; NANA Reg'l Corp.; Sealaska Corp.; and The 13th Regional Corp. *See Alaska Native Corporations*, Nat'l Cong. of Am. Indians (Oct. 16, 2022), https://www.ncai.org/tribal-directory/alaska-native-corporations [https://perma.cc/GX6S-URYZ]; 43 U.S.C. § 1604(c).

50. *See generally* 43 U.S.C. § 1606.

51. *See* Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 18015, 100 Stat. 82, 370.

52. *See id.*

53. 15 U.S.C. § 631(a).

54. *See* Robert Jay Dilger, Cong. Rsch. Serv., R44844, SBA's "8(A) Program": Overview, History, and Current Issues 1 (2021).

55. *See* Off. of Gov't Contracting & Bus. Dev., Agency Contracting Goals (2020).

56. Act of Oct. 24, 1978, Pub. L. No. 95-507, § 201, 92 Stat. 1757, 1760.

57. *See* Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 18015, 100 Stat. 82, 370.

behind these additions.[58] The relevant section of the bill treats ANCs as substitutable for tribal-owned enterprises, which, when interpreted with the canon of *noscitur a sociis*, seemingly indicates an intent for equal treatment between ANCs and tribal enterprises.[59] Yet, while these groups were added to the program under identical circumstances, the former has vastly outpaced the latter in acquiring large contracts.[60]

B. Alaska Native Corporations' 8(a) Dominance

Alaska Native Corporations have benefited greatly from the SBA's 8(a) program, often to the detriment of other contenders.[61] In fiscal year 2010, ANCs made up less than four percent of 8(a) program participants,[62] but were awarded greater than twenty-five percent of all allocated 8(a) funds.[63] This disparity was due in no small part to the structural advantages these firms had over other 8(a) competitors.[64] These advantages at one point included the assumption of economic disadvantage,[65] the ability to be managed by non-natives,[66] and their exclusion from sole source award competitive thresholds.[67]

This structure came to a head about a decade ago, with loud criticism from both the public and Congress of the practices of ANCs like Chenega Corp.,[68] Cape Fox Corp.,[69] and Goldbelt, Inc.[70] In response, SBA updated some of

58. *See* 131 Cong. Rec. 32,052 (1985). This massive bill is silent as to why these additions were made, and they were never once brought up in the Congressional Record. Thus, it is doubtful that a majority of Congress was aware these additions were made, let alone what these additions meant.

59. *See id.*

60. *See* GAO 2012 Report, *supra* note 11, at 13.

61. *See* Daniel K. Oakes, Note, *Inching Toward Balance: Reaching Proper Reform of the Alaska Native Corporations' 8(a) Contracting Preferences*, 40 Pub. Cont. L.J. 777, 786–87 (2011).

62. *See* GAO 2012 Report, *supra* note 11, at 6.

63. *See id.* at 12.

64. *See generally* Oakes, *supra* note 61.

65. *See* 43 U.S.C. § 1626(e) (2018).

66. *See* 13 C.F.R. § 124.109(c)(4)(B) (2010).

67. *See* 13 C.F.R. § 124.506(b) (2010).

68. *See* Oakes, *supra* note 61, at 778.

69. *See* Memorandum from Debra S. Ritt, Small Bus. Admin. Assistant Inspector Gen. for Auditing, to Joseph Loddo, Dir., Off. of Bus. Dev., Non-Native Managers Secured Millions of Dollars from 8(a) Firms Owned by Alaska Native Corporations Through Unapproved Agreements That Jeopardized the Firms' Program Eligibility, 3 (Aug. 7, 2008) (on file with the author) [hereinafter 2008 SBA Memo]. *See generally* Robert O'Harrow Jr., *Little Size or Expertise, but a Big Contract*, Wash. Post, Nov. 26, 2010, at A1. Cape Fox has been repeatedly cast as not truly having Alaskan Native interests in mind, with a non-Native manager in 2008 falsifying documents to get million dollar payouts that the SBA would have likely blocked, 2008 SBA Memo at 6, and a subsidiary with no Native employees working out of a Delaware living room receiving a no-contest $250 million contract from the Army, O'Harrow Jr., *supra*, at A1.

70. *See* 2008 SBA Memo, *supra* note 69, at 3. A Goldbelt-owned company, Goldbelt Raven, LLC, was suspended from the 8(a) program in 2008 after it was revealed that it was involved in a complex kickback scheme where its non-Native manager subcontracted millions of dollars of revenue to a non-Native company he owned without SBA approval, Justin M. Palk, *Goldbelt Raven Hires New President After SBA Criticism*, Frederick News-Post (Aug. 22, 2008), https://www.fredericknewspost.com/archive/goldbelt-raven-hires-new-president-after-sba-criticism/article_8753b2f5-b83e-500d-b8d7-4c20fbe39d21.html [https://perma.cc/SJ7F-CPUR].

its 8(a) policies[71] to force greater benefit to ANC shareholders[72] and extend the single source competitive threshold exemptions to other 8(a) participants, such as tribal enterprises.[73] Notably, despite these policy changes, SBA still presumes ANCs to be economically disadvantaged.[74] These rule changes, while well-intentioned, have not yet meaningfully altered ANCs' dominance of the 8(a) program.

Perhaps nothing represents this policy failure better than the massive successes of the previously mentioned Chenega Corporation. An ANC serving the Prince William Sound region,[75] Chenega began making serious headway in 2001, receiving a massive two billion dollar contract with the National Geospatial Intelligence Services [76] despite the fact that this venture only had around thirty employees.[77] Subsequently, the contract was largely subcontracted to organizations like Lockheed Martin and General Dynamics.[78] The majority of Chenega's contracting comes from defense work, via either the Department of Defense or the Department of Homeland Security.[79] These contracts cover a wide array of fields, with the largest being security and staffing solutions.[80] Despite being created for the betterment of Alaskan villages, almost all of their business is conducted in the contiguous United States.[81] Additionally, Chenega has a record of underpaying their Alaska Native shareholders.[82] Chenega is recorded as having forty-nine subsidiaries participating in government contracting over the years.[83] They remain competitive to this day, with one of these subsidiaries being awarded a more than a half billion dollar pair of contracts with the National Aeronautics and Space Administration (NASA) in late 2021.[84]

---

71. *See* Robert O'Harrow Jr., *Federal Agencies Ratcheting Up Scrutiny of Small-Business Contracts After Reports*, Wash. Post, Dec. 10, 2010, at A13. *See generally* Small Business Size Regulations, 76 Fed. Reg. 8222 (Feb. 11, 2011).

72. *See* 13 C.F.R. § 124.604 (2021).

73. *See* 13 C.F.R. § 124.506(b)(1) (2021). Effective February 7, 2022, award of an 8(a) sole source contract in excess of $22,000,000 to a Native corporation must be justified in writing by the contracting officer. Previously, this only had to be done if the sole source contract was in excess of $25,000,000 or $100,000,000 if the contract was through the Department of Defense. Native Hawaiian Organizations only have access to these sole source award competitive threshold exemptions through Department of Defense contracts. *See* 13 C.F.R. § 124.506(b)(2) (2021).

74. *See* 43 U.S.C. § 1626(e).

75. *See Shareholders*, *supra* note 1.

76. *See* Robert O'Harrow Jr., *In Alaska, A Promise Unmet*, Wash. Post, Sept. 30, 2010, at A1.

77. *See id.*

78. *See id.*

79. *See Chenega Corporation*, *supra* note 3.

80. *See id.*

81. *See id.*

82. *See* O'Harrow, *supra* note 76, at A1.

83. *See Chenega Corporation*, *supra* note 3.

84. *See* Angeline Leishman, *Chenega Subsidiary Wins $581M in NASA Contracts for Facility Protection, Firefighting Services*, GovCon Wire (Oct. 13, 2021), https://www.govconwire.com/2021/10/cgs-awarded-581m-to-help-protect-nasa-facilities [https://perma.cc/7944-VV8U].

Chenega's success is just one example of these disproportionate performances.[85] Near the peak of ANC-dominance of the 8(a) program, ANCs were compensated almost seven times as many dollars as tribal-owned enterprises, despite having nearly the same number of firms in the field.[86] Even after their attempted regulation, over the past five fiscal years ANCs have received in excess of one hundred and fifty percent more dollars than tribal enterprises, despite making up less of the field.[87] So why do these disparities persist?

C. Tribal Enterprises and Their Mediocre Performance in the 8(a) Program

Tribal Enterprises are tribal-owned businesses that compete for government contracts. To qualify as a tribal enterprise for the SBA's 8(a) program, the business must be small (pursuant to SBA size standards)[88] and at least fifty-one percent owned by the tribe.[89] The business need not be located within any plot of tribal land but must primarily operate in the United States.[90] Additionally, unlike ANCs, the tribes with interests in tribal enterprises must prove economic disadvantage to be admitted to the program.[91] While each tribal enterprise can be in the 8(a) program only for one nine-year term,[92] the sponsoring tribes have no such limit and can sponsor as many tribal enterprises as they like.[93]

Oneida Nation's tribal-owned enterprises are a telltale example of the experience of other large tribes' government contracting programs. Oneida Nation, located in Wisconsin, has thirteen recorded subsidiaries.[94] Most of their contracting remains within Wisconsin, with most of their awards coming from Indian-focused agencies such as the Bureau of Indian Affairs and Indian Health Services.[95] Oneida Nation's main fields of focus are construction and hazardous waste disposal.[96] They have had relatively steady profits over the years, with the exceptions of the pandemic years of 2020 and 2021.[97] All of this has happened while Oneida Nation has been involved in an ongoing series

85. *Compare* Federal Awards Advanced Search Alaska Native Corporation Owned Firm, *supra* note 15, *with* Federal Awards Advanced Search Tribally Owned Firm, *supra* note 15.

86. *See* GAO 2012 Report, *supra* note 11, at 14.

87. *Compare* Federal Awards Advanced Search Alaska Native Corporation Owned Firm, *supra* note 15, *with* Federal Awards Advanced Search Tribally Owned Firm, *supra* note 15.

88. *See* 15 U.S.C. § 631(a).

89. *See* 13 C.F.R. § 124.109(b) (2021).

90. *See* 13 C.F.R. § 124.105(a)(1) (2021).

91. *Compare* 43 U.S.C. § 1626(e), *with* 13 C.F.R. § 124.109(b)(2) (2021).

92. *See* 13 C.F.R. § 124.2 (2021). While not the focus of this Note, an SBA rule change putting ANCs on equal footing with tribal enterprises with respect to economic disadvantage could help rebalance their performance outcomes.

93. *See* 15 U.S.C. § 636(j)(ii)(B).

94. *See* Wis. First Nations, *supra* note 6.

95. *See id.*

96. *See id.*

97. *See id.*

of lawsuits in an attempt to regain control of what they view as their illegally diminished territory.[98]

While ANCs have benefited immensely from the 8(a) business development program, tribal-owned enterprises, such as Oneida Nation's government contracting program, have not experienced the same amount of success.[99] When ANC domination was near its least regulated in fiscal year 2010, tribal-owned enterprises received only $690 million[100] despite having roughly identical amounts of 8(a) enrolled businesses as ANCs (which received $4.7 billion).[101] In the decade since ANCs have become more heavily regulated, this disparity has not meaningfully changed,[102] with the exception of the success of the Cherokee Nation.[103] This disparity is likely due to the high incumbency of awards to well-established contractors,[104] which ANCs had dominated for years.[105] Additionally, ANCs are structured as for-profit corporations,[106] whereas tribal-owned enterprises and their profit are not the central focus of

98. *See generally* City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005); Oneida Indian Nation v. Cnty. of Oneida, 414 U.S. 661 (1974).

99. *See generally* GAO 2012 Report, *supra* note 11; Small Bus. Admin. Off. of Inspector Gen., Rep. No. 21-12, Evaluation of SBA's Eligibility Verification of 8(a) Firms Owned by Members of Federally or State Recognized Indian Tribes (2021).

100. *See* GAO 2012 Report, *supra* note 11, at 12.

101. *See id.* at 12, 14.

102. *Compare* Federal Awards Advanced Search Alaska Native Corporation Owned Firm, *supra* note 15, *with* Federal Awards Advanced Search Tribally Owned Firm, *supra* note 15.

103. *See generally The Cherokee Nation*, Off. of the Chief Data Officer, https://www.usaspending.gov/recipient/795ce339-7945-1fc5-f078-8e87ea58ea77-P/latest (last visited Nov. 22, 2021). There is no one reason why the Cherokee Nation has outperformed all of its tribal enterprise colleagues in the 8(a) program. It benefits from having the second largest population of tribal members. *Navajo Nation Surpasses Cherokee As Most Populous Tribe in the U.S.*, KNAU Ariz. Pub. Radio (May 19, 2021, 6:39 AM), https://www.knau.org/knau-and-arizona-news/2021-05-19/navajo-nation-surpasses-cherokee-as-most-populous-tribe-in-u-s [https://perma.cc/7N8M-9V5M]; Additionally, Cherokee Nation has a long history of government contracting, led by a strong conglomerate board that can be subsidized by gambling profits. Cherokee Nation Bus., https://cherokeenationbusinesses.com/our-history [https://perma.cc/S98Z-ZGS9] (last visited Oct. 16, 2022). In recent years, most of their government contracts have been in the fields of staffing solutions and aerospace manufacturing. *The Cherokee Nation*, USAspending.gov (last visited Jan. 22, 2022), https://www.usaspending.gov/recipient/795ce339-7945-1fc5-f078-8e87ea58ea77-P/latest [https://perma.cc/7LPF-ZLJ8].

104. *See* Steven W. Feldman, Government Contract Awards: Negotiation and Sealed Bidding § 10:6 (1st ed. 2021 Update).

105. *See* GAO 2012 Report, *supra* note 11, at 12.

106. *See* 43 U.S.C. § 1606. While presented as a benefit for government contract awards, it should be noted that there is still much debate over the corporatism of ANCs. Many in the Native community feel this structure of society was forced upon them and that it has little to no synergy with traditional Alaska Native values. *See* Monica E. Thomas, *The Alaska Native Claims Settlement Act: Conflict and Controversy*, 23 Polar Rec. 27, 27–36 (1986). *See generally* John Enders, *Alaska's Natives Still Split Over Claims Settlement: Redress: Twenty Years Later, Some Eskimo and Indian People Say the Act Has Given Them Power and Influence. Others Complain That Their Lifestyle Is Threatened.*, L.A. Times (Oct. 27, 1991, 12:00 AM), https://www.latimes.com/archives/la-xpm-1991-10-27-mn-809-story.html [https://perma.cc/FC7M-2U2E]; Tim Bradner, *ANCSA at 50: Past, Present, and Future*, Alaska Native Q. Mag. (Apr. 23, 2021), https://www.anchoragepress.com/news/anq/ancsa-at-50-past-present-and-future/article_f6cd23f0-a454-11eb-acca-dbc52f19ca39.html [https://perma.cc/3DNL-N4Q2].

continental tribes.[107] This structure allows ANCs to act more quickly and with profit more in mind than tribal-owned enterprises, which are subject to the decisions of bureaucratic tribal governments.[108]

IV. THE REVOLUTIONARY IMPACT OF *MCGIRT*

Tribal-owned enterprises could be on the brink of a massive expansion.[109] When the *McGirt v. Oklahoma* opinion came down from the United States Supreme Court in 2020, it was met with a cacophony of public commentary seldom seen in Indian law rulings.[110] This change was reflected in Justice Neil Gorsuch's bold opening lines of the majority opinion: "On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek [Muscogee] Nation received assurances that their new lands in the West would be secure forever."[111] The issue in *McGirt* was whether Oklahoma had criminal jurisdiction over a Native man on land originally ceded to the Muscogee Nation, if that land had not been treated as such in recent decades.[112] In a 5–4 opinion, the Court ruled that, as the reservation land had never been diminished explicitly by Congress, it remained Indian Country under the Major Crimes Act.[113]

This ruling was a significant divergence from the previous status quo of finding significant non-Indian settlers in an area as a sign of *de facto* diminishment of Indian Country.[114] What *McGirt* clarified was that this *de facto* diminishment can only occur if Congress has been ambiguous in its statutory

107. *See* Appropriation Bill for Indian Affairs, ch. 14, 9 Stat. 574 (1851).

108. *Compare* 13 C.F.R. § 124.109(a)(4) (2021), *with* 13 C.F.R. § 124.109(b)(4)(i)(B) (2021). The fact that ANCs are centered around profit is an important part of this contract award discrepancy outside of the scope of this Note's focus. By centering profit instead of other functions of government, the structure of ANCs is naturally more effective as a business than lower tribes in the same way that a banker may make better returning investments than a poet.

109. *See generally* McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

110. *See, e.g.*, Jack Healy & Adam Liptak, *Vast Chunk of Oklahoma Is Part of Indian Territory, Court Rules*, N.Y. Times, July 10, 2020, at A1; Joy Harjo, Opinion, *'Indian Country' Gets Its Due*, N.Y. Times, July 15, 2020, at A23; Dominga Cruz et al., *The Oklahoma Decision Reveals Why Native Americans Have a Hard Time Seeking Justice*, Wash. Post (July 22, 2020), https://www.washingtonpost.com/politics/2020/07/22/oklahoma-decision-reveals-why-native-americans-have-hard-time-seeking-justice [https://perma.cc/9VSC-SQYQ]; Rebecca A. Reid & Todd A. Curry, *Native Americans Won an Unusual Legal Victory at the Supreme Court. Congress Could Undo It.*, Wash. Post (July 29, 2020), https://www.washingtonpost.com/politics/2020/07/29/native-americans-won-an-unusual-legal-victory-supreme-court-congress-could-undo-it [https://perma.cc/9T87-YMDL]; Elizabeth Kronk Warner & Heather Tanana, *Indian Country Post-McGirt: Implications for Traditional Energy Development and Beyond*, 45 Harv. Env't L. Rev. 249 (2021).

111. *See McGirt*, 140 S. Ct. at 2459. In the majority opinion, Justice Gorsuch only referred to the tribe as "Creek." "Muscogee" has been added here only because it is the preferred name of the tribe.

112. *See id.* While the main question of the case turns on diminishment of Indian Country, the man at the center of the case is Jimcy McGirt, a convicted sex offender who was tried in Oklahoma's jurisdiction despite being a member of the Muscogee tribe. His argument is that where the crime occurred was actually Indian Country, giving Oklahoma no jurisdiction under the Major Crimes Act and instead giving jurisdiction to the Muscogee tribe. *See id.* at 2459.

113. *See id.* at 2482.

114. *See* Solem v. Bartlett, 465 U.S. 463, 471 (1984).

diminishment.[115] If there is no ambiguity, this *de facto* diminishment cannot be considered.[116] This ruling subsequently led to the possibility that large portions of land that had never in recent memory been considered Indian Country under the widely used Major Crimes Act definition could potentially now be considered Indian Country.[117] Coincidentally, it is this newly modified definition that is used by the Small Business Act[118] and many other federal laws that govern the administrative state.[119]

Recently, some of the issues in *McGirt* came before the Court again.[120] *Oklahoma v. Castro-Huerta* was brought to the Court by the state of Oklahoma, seeking to clarify its criminal jurisdiction over crimes committed by non-Indians against Indians in Indian Country.[121] In a 5–4 decision, the Court ruled that the federal government and the state of Oklahoma have concurrent jurisdiction over the matter.[122] While the impact of this decision has been described as anywhere from unimportant[123] to undermining the fundamental principles of Indian law,[124] for the purposes of this Note, the majority still respected the expanded Indian Country of *McGirt*.[125] Federal courts have already considered *McGirt*'s Indian Country expansion to apply to civil jurisdiction at least twice: for the purpose of the Indian Gaming Regulatory Act (IGRA)[126] and local gathering ordinances.[127] For the foreseeable future, the *McGirt* definition of Indian Country is here to stay.[128]

Faced with this fundamental change in what can be considered Indian Country, the administrative state is left with two options: fight the ruling or embrace it. However, these two options do not have similar chances of success.[129] Perhaps none has fought the *McGirt* ruling more than the state of

115. *See McGirt*, 140 S. Ct. at 2469.

116. *See id.* The Second Circuit explicitly stated what is enough to diminish Indian Country post-*McGirt*. *See* Cayuga Nation v. Tanner, 6 F.4th 361, 367 (2d Cir. 2021). Language that the tribes "cede, surrender, grant, and convey to the United States all their claim, right, title, and interest," in a parcel of land diminishes it of its Indian Country characteristic. Rosebud Sioux Tribe v. Kneip, 430 U.S. 584, 597 (1977).

117. *See McGirt*, 140 S. Ct. at 2480.

118. *See* 15 U.S.C. § 631(d).

119. *See, e.g.*, Indian Civil Rights Act, 25 U.S.C. § 1304(a)(3); National Primary and Secondary Ambient Air Quality Standards, 40 C.F.R. § 50.1 (2021).

120. *See generally* Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).

121. *See id.* at 2489.

122. *See id.* at 2491.

123. *See, e.g.*, Ariz. State Univ. Sandra Day O'Connor Coll. of L., *Oklahoma v. Castro-Huerta: Rebalancing Federal-State-Tribal Power*, VIMEO (July 7, 2022), https://law.asu.edu/indian-legal-program [https://perma.cc/XZ98-DG4H].

124. *See Castro-Huerta*, 142 S. Ct. at 2504.

125. *Compare id.* at 2491, 2499, 2510, *and* Petition for Writ of Certiorari, Oklahoma v. Castro-Huerta, 142 S. Ct. 877, at App. A (2022) (No. 21-429), *with* Reply Brief for the Petitioner, Oklahoma v. Castro-Huerta, 142 S. Ct. 877 (2022) (No. 21-429).

126. *See* Cayuga Nation v. Tanner, 6 F.4th 361, 364 (2d Cir. 2021).

127. *See* Oneida Nation v. Village of Hobart, 968 F.3d 664, 668 (7th Cir. 2020).

128. *See, e.g.*, *Cayuga Nation*, 6 F.4th at 364; *Oneida Nation*, 968 F.3d at 668; *Castro-Huerta*, 142 S. Ct. at 2491, 2499, 2510.

129. *Compare* Chris Casteel, *Supreme Court Rejects 32 Mcgirt Petitions Anoatubby Says Action Sets Level of 'Finality*,' OKLAHOMAN, Jan. 25, 2022, at A2, *with* OFF. OF SURFACE MINING RECLAMATION

Oklahoma and its governor Kevin Stitt,[130] yet their dozens of petitions to the Supreme Court to redecide *McGirt* have been rejected.[131] Alternatively, the U.S. Department of the Interior's Office of Surface Mining Reclamation and Enforcement (OSMRE) has successfully asserted regulatory authority over multiple coal mines previously regulated by Oklahoma state agencies based on *McGirt*.[132] President Biden's "Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships," which requires heads of executive agencies to reach out to tribal governments, expedited administrative agencies' decision-making on *McGirt*'s application.[133] The mass administrative recognition of *McGirt* is imminent.[134] With this development could come a new age of tribal enterprise advantages.

V. THE BALANCING EFFECTS OF A RESPECTED *MCGIRT*

The theory as to why *McGirt* could rebalance the advantages of Alaska Native Corporations and tribal enterprises is simple: *McGirt* expands Indian Country, which comes with multiple possible benefits for tribal enterprises.[135] Tribal enterprises are run by tribes in the contiguous forty-eight states, which have the possibility of having their territorial influence expanded via alteration of the Indian Country definition.[136] Alternatively, ANCs are owned by Alaskan

Env't, OSMRE Notifies Oklahoma of Jurisdiction Adjustment Following McGirt v. Oklahoma Decision (2021) [hereinafter OSMRE Release].

130. *See, e.g.*, Dan Snyder, *Gov. Stitt: 'Don't Think There's Ever Been a Bigger Issue' for Oklahoma Than McGirt Ruling*, Fox 25 (May 17, 2021), https://okcfox.com/news/local/gov-stitt-dont-think-theres-ever-been-a-bigger-issue-for-oklahoma-than-mcgirt-ruling [https://perma.cc/QYE9-8WKK]; Carmen Forman & Molly Young, *Gov. Kevin Stitt, Tribal Leaders Not Meeting As McGirt Rhetoric Hits a Boiling Point*, Oklahoman (Dec. 16, 2021, 4:16 PM), https://www.oklahoman.com/story/news/2021/12/16/choctaw-cherokee-nation-hunting-oklahoma-governor-stitt-tribes-stop-meetings-mcgirt-ruling/6433140001 [https://perma.cc/6LSW-VK5U]; Carmen Forman, *Stitt Again Blasts McGirt Ruling, Saying Martin Luther King Jr. Might Be 'Disgusted' by Decision*, Oklahoman (Jan. 17, 2022, 5:18 PM), https://www.oklahoman.com/story/news/2022/01/17/martin-luther-king-jr-mlk-day-2022-kevin-stitt-mcgirt-ruling/6557404001 [https://perma.cc/3VD5-R2G9]. Interestingly, while Governor Kevin Stitt was originally endorsed in his race by most of the Oklahoma Indian reservations (as he is himself a member of Cherokee Nation), he has fallen out of grace with most tribes due to his incendiary rhetoric around *McGirt*. Many tribal members view his contentions that rapists and killers are walking free out of tribal courts after gaining jurisdiction under *McGirt* as anywhere from a crude campaign technique to an expression of overt racism. Carmen Forman & Molly Young, *Gov. Kevin Stitt, Tribal Leaders Not Meeting As McGirt Rhetoric Hits a Boiling Point*, Oklahoman (Dec. 16, 2021, 4:16 PM), https://www.oklahoman.com/story/news/2021/12/16/choctaw-cherokee-nation-hunting-oklahoma-governor-stitt-tribes-stop-meetings-mcgirt-ruling/6433140001 [https://perma.cc/Y3Q5-Z7WG].

131. *See generally* Casteel, *supra* note 129; *see also* Ariz. State Univ. Sandra Day O'Connor Coll. of L., *supra* note 123.

132. *See* OSMRE Release, *supra* note 129, at 1.

133. *See* Memorandum on Tribal Consultation and Strengthening Nation-to-Nation Relationships, 86 Fed. Reg. 7491 (Jan. 29, 2021).

134. *See id.*

135. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020).

136. *See* Cohen's Handbook, *supra* note 19, § 3.04(1).

Native Villages, whose dominion is not affected by Indian Country.[137] Thus, by expanding Indian Country, it will provide potential benefits to the underperforming tribal enterprises but not the overperforming ANCs.[138] This development can provide rebalancing effects without directly penalizing ANCs, which have an important role to play in empowering native economies in addition to tribal enterprises and Native Hawaiian Organizations.

Indian Country is quickly expanding via various lawsuits and legal defenses invoked by both individuals in diminished reservations[139] and tribal governments.[140] Most of the benefits to be reaped from this expansion come from transferring state-governed areas to be within tribal dominion.[141] As long as the administrative state or the SBA do not intervene, the 8(a) program may fix itself—with the benefits that tribes receive narrowing the performance gap with ANCs. The problem is that the SBA has a history of not knowing when to consider individual businesses to be tribal enterprises or not.[142] If the SBA fights these expanding tribal enterprises at every turn, the process will grind to an excruciating halt. If *McGirt* continues to be upheld, the SBA will eventually be forced to capitulate, but the time that it can take to rectify injustices towards the Native American community is often measured in centuries.[143] If the SBA embraces *McGirt* and the expanding Indian Country that comes with it—a policy already implemented by other federal administrative agencies—the process will be expedited for tribal enterprises.[144]

With Indian Country comes tribal regulatory authority, court jurisdiction, and sovereignty from state oversight.[145] These changes can allow tribal governments to provide interesting new advantages to tribal enterprises, such as competitive tax rates,[146] more streamlined regulations,[147] a less punitive tribal court system,[148] and access to previously out-of-reach resources.[149]

137. *See* Alaska v. Native Village of Venetie Tribal Gov't, 522 U.S. 520, 532 (1998).

138. *Compare* Cohen's Handbook, *supra* note 19, § 3.04(1), *with Native Vill. of Venetie Tribal Gov't*, 522 U.S. at 532.

139. *E.g.*, State v. Lawhorn, 499 P.3d 777, 779 (Okla. Crim. App. 2021) (holding that a large portion of Ottawa County exists on Quapaw Nation land that was never explicitly diminished, thus making it Indian Country).

140. *E.g.*, Columbia Grain v. BNSF Ry., No. 41L-0023-P-2018, 41L 124440-00, 2020 Mont. Water LEXIS 751, at *17 (Mont. Water Ct. Dec. 4, 2020) (holding that a railroad right of way existed on never explicitly diminished Blackfeet reservation land, thus making it Indian Country); Cayuga Nation v. Tanner, 6 F.4th 361, 364 (2d Cir. 2021).

141. *See* Cohen's Handbook, *supra* note 19, § 3.04(1).

142. *See, e.g.*, Adam Elmahrek & Paul Pringle, *Two Tribes Aren't Recognized Federally. Yet Members Won $500 Million in Minority Contracts*, L.A. Times (Dec. 31, 2019, 5:54 PM), https://www.latimes.com/california/story/2019-12-31/native-american-tribes-alabama-minority-contracts [https://perma.cc/GF2X-MDXF].

143. *See, e.g.*, Cnty. of Oneida v. Oneida Indian Nation, 470 U.S. 226, 229 (1985).

144. *See* OSMRE Release, *supra* note 129, at 1.

145. *See* Cohen's Handbook, *supra* note 19, § 3.04(1).

146. *See* Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982).

147. *See* Cohen's Handbook, *supra* note 19, § 3.04(1).

148. *See id.*

149. *See* U.S. Census Bureau, Indian Country in Judicial Districts (2010).

A. *Expanded Indian Country Would Allow for Tax Structures That Benefit Tribal Enterprises*

Many of the benefits which tribal enterprises would receive with an expanding Indian Country involve gaining sovereignty over duties currently invested in the states. For example, expanding Indian Country via litigation allows for expanded tax bases for tribal governments.[150] This would allow for tribes to tax in ways that could provide a competitive advantage to tribal enterprises.[151] As tribal enterprises are based on ownership and not location, some tribal enterprises, located just off of reservations in metropolitan areas, may benefit.[152]

Currently, government contractors are frequently subject to state and local taxes.[153] When metropolitan areas are included in Indian Country, tribes can then tax the businesses and tribal enterprises in these cities.[154] Tribes then have the option of either taxing the businesses to fund tribal enterprise ventures or lowering taxes on businesses to allow tribal enterprises to bid lower prices without sacrificing their profit margins.[155] Tribes even have the opportunity to be more targeted in their taxation by discriminating between tribal member-owned businesses and those owned by non-members.[156] Tribal governments are one of the only governing bodies capable of employing this type of blatant regulatory favoritism, due in part to tribal membership being a consistently upheld classification as a "special legal position."[157] This choice would allow a tribe to provide a protected environment for tribal businesses to have a leg up on non-member owned businesses within Indian Country.[158] Any of these tax schemes could be employed with this newly expanded Indian Country to incubate strong small tribal enterprises, which could compete against ANCs on a more even ground for government contracts.

B. *Tribal Dominion over Greater Areas Would Permit for Less Burdensome Regulations on Tribal Enterprises*

Expanding Indian Country also allows tribal governments to exercise their sovereign authority to regulate.[159] This development would allow tribes to create alternative regulatory schemes that could provide tribal enterprises within this jurisdiction a competitive advantage over their in-state competitors in government contracting.[160] Frequent hurdles for small business government

150. *See, e.g.*, McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 165 (1973); *Merrion*, 455 U.S. at 159.

151. *See id.*

152. *See* U.S. Census Bureau, *supra* note 149.

153. *See* FAR 29.303.

154. *See Merrion*, 455 U.S. at 159. It is worth noting here that currently multiple metropolitan areas exist in what is not explicitly diminished Indian Country including Green Bay, Wis.; Tulsa, Okla.; and Maricopa, Ariz. U.S. Census Bureau, *supra* note 149.

155. *See Merrion*, 455 U.S. at 159.

156. *See id.*; Morton v. Mancari, 417 U.S. 535, 555 (1974).

157. *Mancari*, 417 U.S. at 546.

158. *See Merrion*, 455 U.S. at 159; *Mancari*, 417 U.S. at 555.

159. *See* Cohen's Handbook, *supra* note 19, § 3.04(1).

160. *See id.*

contractors are the extensive regulations that govern their specific type of business.[161] While most of the attention is focused on the often extensive list of Federal Acquisition Regulation (FAR) clauses and flow-down sections that any prime or subcontractor may face,[162] state and local regulations play a significant role in complicating small business ventures.[163] Tribal enterprises in Indian Country could face fewer of these burdensome regulations.[164] Additionally, most tribal governments are heavily involved in the decision-making process of tribal enterprises.[165] If the regulation drafters are also required to navigate through these regulations, far fewer points of confusion would likely arise.[166]

Any argument for the benefits of alternative tribal regulations may be immediately suspicious of the actual protection that these regulations would provide. However, tribal administrations do not have a history of ineffective, flimsy regulation.[167] The benefits that may be available to tribal enterprises under tribal government regulation would not be in the form of underregulation. Rather, tribal governments have fewer responsibilities and industries to regulate via their unique sovereign standing when compared to states.[168] Thus, small businesses often have fewer regulations to sift through, allowing these businesses to thrive with a leaner legal department.[169] This further cuts down overhead costs and allows for tribal enterprises to have a competitive edge over other government contractors who operate in less bureaucratically deft states.[170]

C. Tribal Court Jurisdiction over Indian Country Could Provide Competitive Advantage to Tribal Enterprises

With *McGirt*'s expansion of Indian Country also comes an expansion of the jurisdiction of tribal courts.[171] Indian Country is, by definition, the geographic

161. *See* Steven L. Schooner, *Fear of Oversight: The Fundamental Failure of Businesslike Government*, 50 Am. U.L. Rev. 627, 634 (2001).

162. *See, e.g.*, Gregg S. Sharp, *A Layman's Guide to Intellectual Property in Defense Contracts*, 33 Pub. Cont. L.J. 99, 119 (2003); Aleksey House, *The Price of a Cybersecurity Culture: How the CMMC Should Secure the Department of Defense's Supply Chain Without Harming Small Businesses and Competition*, 50 Pub. Cont. L.J. 449, 453 (2021).

163. *See* Eric P. Roberson, *No Compete Contracting in Cooperative Purchasing? Proposed Solutions to Resolve Gaps in Competition, Transparency, and Socioeconomic Policy at the State and Local Level*, 46 Pub. Cont. L.J. 753, 770 (2017).

164. *Compare, e.g.*, N.Y. Bus. Corp. Law § 402 (Consol. 2022), *with* Navajo Nation Code Ann., tit. 5, § 201 (2022).

165. *See* 13 C.F.R. § 124.604 (2021).

166. *Compare* 13 C.F.R. § 124.604 (2021), *with* Navajo Nation Code Ann., tit. 5, § 201 (2022).

167. *See, e.g.*, Montana v. EPA, 137 F.3d 1135, 1139–40 (9th Cir. 1998); Implementation Plan for the Gila River Indian Community, 40 C.F.R. § 49.5511 (2021).

168. *Compare* McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 172 (1973), *with* U.S. Const. amend. X.

169. *Compare, e.g.*, N.Y. Bus. Corp. Law § 402 (Consol. 2022), *with* Navajo Nation Code Ann. tit. 5, § 201 (2022).

170. *Compare, e.g.*, N.Y. Bus. Corp. Law § 402 (Consol. 2022), *with* Navajo Nation Code Ann. tit. 5, § 201 (2022).

171. *See* Cohen's Handbook, *supra* note 19, § 3.04(1).

area in which tribal law applies.[172] As such, it is used as the demarcation line for the outer edges of tribal court jurisdiction.[173] With this expansion, tribal enterprises that had previously existed in a state's jurisdiction would now have cases brought before them in tribal courts. This change benefits the tribal enterprises in a number of ways: first, these hearings would now be held often in much more geographically accessible locations, reducing burdensome travel times.[174] Second, tribal governments are likely more willing to work individually with tribal enterprises than states in whose jurisdiction they currently reside. Perhaps most impactful would be the sentences handed down by tribal courts that would be less punitive than the economically burdensome sentences currently employed by most states.[175]

The compounding issue here is that the actual civil jurisdiction of tribal courts is far from a settled issue.[176] As the Supreme Court wrote in *Montana v. United States*, "A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements."[177] But since this ruling, the Court has seemingly partially eroded this jurisdiction in ways that are not at all clear.[178] Regardless of the *Montana* ruling, it appears that a major part in determining the civil jurisdiction of tribal courts is the presence of an enterprise in Indian Country.[179]

It will likely be argued that tribal nonmembers now living or working in *McGirt*-expanded Indian Country never engaged in a "consensual relationship" required to establish civil jurisdiction under the *Montana* test.[180] "What," one may ask, "is less consensual than having a semi-sovereign government gain jurisdiction over one's land without one even being a party to the case?"[181] Others may see this argument and think that Indian Country was never really expanded, just realized to have a larger expanse than it previously had.[182] No expansion has ever occurred; rather, an illegal diminishment has been reversed.[183]

172. *See id.*

173. *See*, *e.g.*, United States v. John, 437 U.S. 634, 648 (1978).

174. *Compare*, *e.g.*, *Judicial District Courts of the Navajo Nation*, Navajo Nation, http://www.courts.navajo-nsn.gov/indexdistct.htm [https://perma.cc/Q6AQ-T8XC] (last visited Oct. 16, 2022), *with Court Locations*, D.N.M., https://www.nmd.uscourts.gov/court-info/court-locations [https://perma.cc/6RZW-RHNK] (last visited Oct. 16, 2022).

175. *See* 25 U.S.C. § 1302(7).

176. *See*, *e.g.*, Montana v. United States, 450 U.S. 544, 565 (1981); Nevada v. Hicks, 533 U.S. 353, 391 (2001).

177. *Montana*, 450 U.S. at 565.

178. *Compare Montana*, 450 U.S. at 565, *with Hicks*, 533 U.S. at 391.

179. *See Hicks*, 533 U.S. at 365.

180. *See Montana*, 450 U.S. at 565.

181. There is an irony of those living on illegally diminished Native American lands being suddenly concerned about the horrors of having foreign powers assert their ways, jurisdiction, and regulations over one who has done nothing but live on the land. This is very obviously parallel to the experience of almost all Native Americans, with the important substitution of despicable violence and genocide with gaming casinos and more stringent environmental regulations.

182. *See* McGirt v. Oklahoma, 140 S. Ct. 2452, 2468 (2020).

183. *See id.*

D. Expanded Indian Country Would Allow for Tribal Enterprises to No Longer Be Forced to Choose Between Reservation Benefits and Utility Access

With the inclusion of more metropolitan areas in Indian Country comes improved tribal access to utilities necessary for running a successful business.[184] Tribes have toiled with lack of infrastructure spending for decades, with some tribes still struggling to have access to clean water,[185] highways,[186] and airports.[187] These amenities are almost always nonexistent problems in metropolitan areas, sometimes located just outside of reservation land.[188] The expansion of Indian Country may provide tribal enterprises access to these building blocks of successful industry and help them thrive, simply by covering a greater geographical area.[189] Additionally, some expansions of Indian Country would allow for greater rights to timber and mineral resources, providing new enterprise opportunities for tribes.[190] This point in particular would help level the playing field between tribal enterprises and ANCs, as Alaska Natives have often benefited far more from the resources of the vast Alaskan wilderness than their at times crowded, often Dust Bowl-located reservation foils.[191]

VI. CONCLUSION

The Small Business Administration's 8(a) Business Development Program is,[192] and has been, wildly discriminatory in its opportunities for native contractors.[193] By systemic design,[194] and then by failed course correction,[195] ANCs

184. *See* U.S. Census Bureau, *supra* note 149.

185. *See*, *e.g.*, Celina Tebor, *On Native American Reservations, the Push for More Clean Water and Sanitation*, L.A. Times (June 26, 2021, 3:00 AM), https://www.latimes.com/world-nation/story/2021-06-26/native-americans-clean-water [https://perma.cc/Z99E-UHSC].

186. *See*, *e.g.*, M. Brent Leonard, *The Public Nature of Indian Reservation Roads*, 0 Am. Indian L.J. 29, 29 (2012).

187. *The Importance of Tribal Infrastructure*, U.S. Dep't of the Interior https://www.bia.gov/service/infrastructure/importance-tribal-infrastructure [https://perma.cc/X3N8-7KE] (last visited Nov. 23, 2022). Tangentially related to this issue is the question of tribal regulation of airspace, a potentially serious concern for American airspace consistency. William M. Haney, *Protecting Tribal Skies: Why Indian Tribes Possess the Sovereign Authority to Regulate Tribal Airspace*, 40 Am. Indian L. Rev. 1 (2015–2016).

188. *See* U.S. Census Bureau, *supra* note 149.

189. *See id.*

190. *See Oklahoma's Diverse Forests*, Okla. Forestry Servs., https://forestry.ok.gov/okforesttypes [https://perma.cc/3UEH-ZKHN] (last visited Nov. 23, 2022).

191. *Compare id.*, *with Alaska Statewide Forest Inventory*, Alaska Div. of Forestry GIS (Oct. 16, 2019), https://forestrymaps-soa-dnr.hub.arcgis.com/apps/alaska-statewide-forest-inventory/explore [https://perma.cc/JF6K-GHQQ].

192. *Compare* Federal Awards Advanced Search Alaska Native Corporation Owned Firm, *supra* note 15, *with* Federal Awards Advanced Search Tribally Owned Firm, *supra* note 15.

193. *See* GAO 2012 Report, *supra* note 11, at 1.

194. *See* Daniel K. Oakes, Note, *Inching Toward Balance: Reaching Proper Reform of the Alaska Native Corporations' 8(a) Contracting Preferences*, 40 Pub. Cont. L.J. 777, 786–87 (2011).

195. *See* Robert O'Harrow Jr., *Federal Agencies Ratcheting up Scrutiny of Small-Business Contracts After Reports*, Wash. Post, Dec. 10, 2010, at A13. *See generally* Small Business Size Regulations, 76 Fed. Reg. 8222 (Feb. 11, 2011).

continue to dominate the field while tribal enterprises are left behind.[196] It is possible that the benefits that come with expanded Indian Country will give some tribal enterprises a fighting chance against ANCs via innovative regulations,[197] tax systems,[198] and civil courts.[199] However, the goal should not be the complete destruction of ANC profits. These corporations were established with good intentions and an important purpose—to provide consistent benefits and opportunities to Alaska Natives.[200] While their efficacy in this noble venture can be questioned,[201] the ANC experiment should not be scrapped outright. Similarly, for many tribes, government contracting opportunities provide some of the best job opportunities in areas that have been serially underemployed.[202] The benefit that *McGirt* may lend them is asymmetrical compared to the benefits that ANCs receive but is quite possibly the best shot at rebalancing tribal enterprises performances.

196. *See* GAO 2012 Report, *supra* note 11, at 6. *Compare* Federal Awards Advanced Search Alaska Native Corporation Owned Firm, *supra* note 15, *with* Federal Awards Advanced Search Tribally Owned Firm, *supra* note 15.

197. *See* Cohen's Handbook, *supra* note 19, § 3.04(1).

198. *See, e.g.*, McClanahan v. Ariz. State Tax Comm'n, 411 U.S. 164, 165 (1973); Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 159 (1982).

199. *See* Cohen's Handbook, *supra* note 19, § 3.04(1).

200. *See generally* 43 U.S.C. § 1606.

201. *See* Robert O'Harrow Jr., *In Alaska, A Promise Unmet*, Wash. Post, Sept. 30, 2010, at A1.

202. *See American Indians and Alaska Natives in the U.S. Labor Force*, U.S. Bureau of Lab. Stats. (Nov. 2019), https://www.bls.gov/opub/mlr/2019/article/american-indians-and-alaska-natives-in-the-u-s-labor-force.htm [https://perma.cc/L6GB-CWGJ].