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ARTICLE

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# The BDO GovCon Week Ahead - September 2022

## September 26, 2022

### **The Move to Software: Why the Change is Necessary for the DOD**

CIA Chief Technology Officer Nand Mulchandani and former U.S. Air Force Project Maven Head Lt. Gen. John N.T. “Jack” Shanahan are the authors of “Software-Defined Warfare,” a report urging the Department of Defense (DOD) to focus on building and developing software. Currently the U.S. military is an industrial-, hardware-centric organization focused heavily on military capital investments such as tanks and ships. In today’s world, this hardware is considered “old school” and often ends up being scrapped for parts. Technological advancement depends on increased software investments.

The report focuses on nine concepts the DOD should consider when developing a new software system architecture. These are:

- ▶ Architect for Scaling
- ▶ Eliminate Single Points of Failure
- ▶ Virtualization
- ▶ Low-Cost Commodity Hardware and Stateless Endpoints
- ▶ Design for Instrumentation
- ▶ Simulation, Testing, Verification
- ▶ Design for Failure and Let the Chaos Monkey Loose
- ▶ Build Autonomy and Automation at the Edge
- ▶ Integrate Development Environment with Production

The DOD's adoption of updated software technologies allows the U.S. to maintain a competitive edge against other countries with modernized systems. To achieve this, the DOD must modernize its software architecture without relying on procurements and acquisitions. Mulchandani goes on to say the DOD needs to "get back to the roots of what the DOD used to do in the old days, which is have experts in the fields where we're going to build or buy something and have those experts on the buy side who actually understand how to actually buy, deploy or build any of this stuff, instead of actually outsourcing all of this intelligence out to the vendors." Software-based warfare is the way of the future. The U.S. has always out-equipped other nations' militaries, but a shift to software is needed to get ahead of the curve and not be left focusing on hardware.

For more information, please visit this [link](#) and this [link](#).

### **Inflation & Its Impact on Fixed-Priced Contracts**

The Principal Director of Department of Defense (DOD) Defense Pricing and Contracting (DPC) recently released guidance regarding inflation for the second time in five months. The latest memorandum titled, "Managing the Effects of Inflation with Existing Contracts," aims to inform contracting officers of available actions to help them recover inflation-related losses under fixed-price contracts.

The memorandum first acknowledges that firm-fixed-price contracts, priced and negotiated pre-

inflation, generally assume the contractor bears the risks of the cost increases. The DPC encourages contracting officers to include economic price adjustment clauses in any new contracts. However, the memorandum states there may be circumstances where an accommodation may be appropriate. Scheduled relief or amended contract requirements can be enacted if mutually agreed upon by all contracting parties. The DPC is optimistic that the accommodations will benefit small businesses or other suppliers negatively impacted by inflation.

The memorandum also states that the DOD will begin considering requests for “Extraordinary Contractual Relief,” including potential upward price adjustments under firm-fixed-price contracts under Public Law 85-804. The law allows a federal agency to amend contracts without consideration when doing so is essential to national defense, when a contractor suffers a loss under a defense contract because of government action and/or to mitigate the effect of mistakes. The government has broad authority under Public Law 85-804, but does have limitations including: 85-804 authority may not be relied on where other adequate legal authority exists, funding may not exceed appropriated amounts, any amendment can only be to the “extent necessary to avoid such impairment to the contractor’s productive ability,” the contractor must suffer a loss and not merely a decrease in profits, and the contractor must submit a request for contract adjustment before all obligations under the contract have been completed. The DPC hopes these amendments will provide much-needed relief to contractors struggling with inflation.

For more information, please visit this [link](#).

## **Insights from BDO’s Center of Excellence for Government Contracting**

### **Mergers & Acquisitions: Navigating the Post-LOI Phase**

The letter of intent (LOI) outlines the structure of the acquisition, as well as the pricing and terms. Generally, this is the final step prior to the seller granting exclusivity. Once exclusivity is granted, the buyer engages a team of specialized professionals to address particular issues, such as quality of earnings, tax structuring, human resources (HR), insurance review, and operational, commercial, property and IT due diligence.

To the extent possible, a government contractor seller may wish to consider preparing the business to address any due diligence concerns before beginning the LOI phase, as the diligence process provides significant input to the ultimate investment thesis, the risk profile of the transaction and points of negotiation. Given the potential for substantial consideration to be paid

for your company, a good and open working relationship with the buyer is paramount.

[Access the full insight](#) for considerations and action steps to help you navigate the post-LOI phase of selling your business.

[View the M&A webinar recording.](#)

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## September 19, 2022

### **FOIA Requests and Confidentiality: A Very Thin Line**

Recently, the Office of Federal Contract Compliance Programs (OFCCP) received a Freedom of Information Act (FOIA) request for four years of reports filed by federal contractors. The FOIA allows any person to request records that are held by a government agency.

The reports being requested from the OFCCP are type 2 consolidated EEO-1 reports, which contain demographic information of the entire workforce. Agencies are required to turn over the requested information unless it falls under one of the nine exemptions. Exemption four allows the government to withhold information that is confidential, commercial or financial.

Disclosing information such as head count, ethnicity, race and gender of your workforce walks a fine line between what is — and is not — considered confidential and that distinction may vary by company. The OFCCP is required to notify contractors of the FOIA request and are utilizing the Federal Register to do so. The Federal Register will also notify the public that the information being requested may contain confidential commercial information. Contractors will have the option to file an objection to the disclosure of this information. If the Department of Labor were to reject the objection, contractors could file a lawsuit to prevent the reports' publication under the Administrative Procedures Act.

The OFCCP has set up a portal for contractors to file their objections with the Federal Register by Sept. 19.

For more information, please visit this [link](#).

## Covid, Monkey Pox, and Ukraine Funding Increases: A \$47 Billion Request

As the Sept. 30 fiscal year deadline approaches, Congress and the Biden administration are working toward a defense budget deal for the upcoming year. If no agreement is reached by the end of the fiscal year, a government shutdown will begin just over a month before the midterm elections. While the White House stated on Sept. 9 that it expects a full budget resolution prior to the deadline, the Biden administration is also asking for short-term funding, totaling \$47.1 billion. The requested targets Ukraine support, the COVID-19 and monkeypox response, and assistance to areas impacted by natural disasters.

The breakdown of this short-term funding is as follows:

- ▶ \$13.7 billion for security and economic assistance for Ukraine, as well as to address domestic energy supply and reduced energy costs in the future
- ▶ \$22.4 billion for short-term COVID needs, such as testing, accelerating the research and development of new vaccines and treatments, preparing for future variants, and supporting the worldwide response to the pandemic.
- ▶ \$4.5 billion for monkeypox vaccines, testing and treatments, as well as efforts to help the global response to the outbreak that started in May.
- ▶ \$6.5 billion to help states, tribes, and territories recover from natural disasters and extreme weather events.

Officials expect pushback from Republican lawmakers unless certain offsets are made to any COVID funding. The Biden Administration's recent COVID funding efforts have been unsuccessful, resulting in major cuts to the availability of free test kits through COVIDtests.gov. The White House is emphasizing this is an emergency request and thus should not involve offsets, which has historic precedent with both Republican- and Democratic-controlled Congress. "We believe Congress should provide it that way again," said one White House official. "In the past we've been open to having conversations about offsets in particular pieces."

The request is now in the hands of Congress as the September deadline rapidly approaches. While a new deal is expected to pass in entirety before this deadline, news of this short-term request will certainly play a role with upcoming midterms just a few months away.

For more information, please visit this [link](#).

## Insights from BDO's Center of Excellence for Government Contracting

### The Cost Accounting Standards Guide for Government Contractors

Navigating Cost Accounting Standards (CAS) can prove challenging for government contractors. CAS are mandatory for use by prime contractors and subcontractors to estimate, accumulate and report costs, and to settle disputes for procurements with the U.S. government unless an exemption applies.

Check out [BDO's CAS Guide](#) to learn more about the essential features of CAS and important complexities related to requirements, applicability, and exemptions.

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## September 12, 2022

### The Price of Convenience: How “Contract Bundling” is Affecting Small Businesses

Contract bundling, which occurs when federal agencies bundle several contracts together and award the work to one company, is causing unease among the small business community. Although contract bundling saves money by cutting down acquisition costs, it obstructs small businesses from competing for those contracts because they don't have the infrastructure in place to win or support multi-billion-dollar contracts.

Last month, the “[Small Business Administration] SBA reported that the Biden administration exceeded its Governmentwide small business contracting goal for fiscal year 2021 by awarding \$154 billion in Federal contract dollars”, which was an \$8 billion increase from the prior fiscal year. However, the percentage of contracting dollars that went to women-owned small businesses was down 0.2% from the prior fiscal year and down almost 0.4% from the overall 5% goal. Bibi Hidalgo,

associate administrator in the SBA's Office of Government Contracting, said contract bundling could have been the big factor at play as contract bundling is an issue that has a greater negative effect on women-owned small businesses than any other small business concern types. If trends continue, the government may need to set aside additional contracts for women-owned small businesses to ensure that they meet their goals.

It is hopeful to see that the SBA, Congress, and the White House are indeed interested in a resolution. The Biden Administration is attempting to double the share of federal contracts that go to small, disadvantaged businesses. Congress and the SBA plan to work more closely "so that there's more accountability on the front end instead of the back end where [the SBA] only has 30 days to negotiate", as "agencies [currently] only have to give [the SBA] 30 days notice before they bundle the contract," which only gives [the SBA] 30 days to negotiate. Moving forward, these three parties will need to continually work to address the issues faced by small businesses and continue to support those organizations.

For more information, please visit this [link](#).

### **Federally Funded Research for All**

Last month, the White House instructed federal agencies to adopt policies to ensure that taxpayer-funded research is free and available to the general public. The hope is that the American people can benefit from accessing this information in all sectors and industries such as, healthcare, environmental justice, and clean energy. The most impacted may be the scientific community, given their ability to use this information to continue to advance a global technological world that is challenged by climate change, disease, and cancer.

After a decade of Congress pushing for public access to federally funded research, Dr. Alondra

Nelson, Deputy Director for Science and Technology Policy wrote a memo asking federal agencies to update their public access policies and data sharing plans by the middle of 2023, and for implementation to occur by December 31, 2025.

Nelson believes that allowing this research to be publicly available will help to save lives, and inform policymakers with information needed to make tough decisions. As always, with new policy comes potential new challenges. In the past, only agencies with over \$100 million in annual R&D expenses were required to develop a plan to increase public access to the results of the research, and covered agencies could issue a one-year tax on the access to the data. However, the White House memo rolls back the one-year tax and extends the policy guidance to agencies that spend less than \$100 million annually.

For more information, please visit this [link](#)..

## **Insights from BDO's Center of Excellence for Government Contracting**

### **The Role of The Inspector General in Federal Grants Oversight**

September 21, 2022

12:00 PM to 1:00 PM EST

1 CPE Credit

Join our Government Contracting professionals for a discussion of the history and purpose of the various Federal Offices of Inspectors General (OIG), specifically in their grant oversight role. Insights shared will cover how the OIGs conduct audits and investigations; communicate audit results and discuss accomplishments and oversight challenges considering COVID19 and CAREs Act funding to State, local, and non-profit agencies over the last two years.

[Register now](#)