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# Contractors and HealthCare.gov: Answers to Frequently Asked Questions

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## Summary

The widely reported problems with the rollout of the HealthCare.gov website—the federal online health insurance portal called for by the Patient Protection and Affordable Care Act (ACA) (P.L. 111-148, as amended)—have prompted interest in the role that contractors played in developing this site. The Centers for Medicare and Medicaid Services (CMS) relied upon the services of over 50 vendors to build the site, which was reportedly largely unusable when it first became available to the public on October 1, 2013, and has been the subject of ongoing work since then.

Given HealthCare.gov’s problematic debut, questions have arisen about how CMS selected vendors to work on HealthCare.gov, and the terms of the vendors’ contractual relationships with the government. For example, some have wondered how CMS could assign work to specific vendors without engaging in “full and open competition through the use of competitive procedures”; whether there are any restrictions on agencies’ dealings with vendors that have foreign parent corporations, as some HealthCare.gov vendors do; and whether political input plays a role in the source-selection process. There have also been questions about how to obtain copies of particular contracts; vendor obligations to report performance problems to the government; modifications to existing contracts; how parties to a government contract resolve disputes; and whether the government can get its money back.

Most recently, questions have been raised about potential amendments to federal procurement law that could, some commentators suggest, prevent issues of the sort experienced with HealthCare.gov. HealthCare.gov’s early difficulties are generally seen to have increased interest in the Federal Information Technology Acquisition Reform Act (FITARA) (H.R. 1232), which would, among other things, increase the authority of the top agency chief information officers. FITARA passed the House, as part of the National Defense Authorization Act (NDAA) for FY2014, prior to HealthCare.gov’s rollout, but was not included in the NDAA as enacted (P.L. 113-66). Other measures have been introduced specifically in response to the rollout of HealthCare.gov (e.g., H.R. 3373, S. 1843). Yet other potential reforms have been suggested, but are not reflected in proposed legislation. Topics of such proposed reforms include consideration of risk and use of modular contracting methods when acquiring information technology (IT); performance bonds and express warranties; and use of lead system integrators (i.e., contractors responsible for assembling a system from components developed and/or tested by other vendors).

The questions in this report are those that happen to have been frequently asked of the Congressional Research Service by congressional staffers. The inclusion of a particular question, or the exclusion of another question, should not be taken to indicate that particular factors did—or did not—contribute to HealthCare.gov’s problematic debut. In addition, answers to these questions must often be provided in general terms, in part, because specific language in the parties’ contracts may be subject to multiple interpretations and has not been construed by any court. In addition, the parties’ conduct in performing the contract—the details of which are generally still emerging—can affect their rights. For example, the government could potentially be found to have waived certain rights that the contract’s plain language would appear to grant to it by engaging in conduct that warrants an inference that it has relinquished the right. The authors of this report rely upon third-party investigations of the facts and circumstances surrounding HealthCare.gov, and additional information may emerge regarding topics discussed herein.

There is also a video, CRS WVB00013, *Contractors and HealthCare.gov: Background in Brief*, by (name redacted) and (name redacted), that addresses certain of these questions.



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This report provides answers to 20 frequently asked questions regarding contractors and HealthCare.gov, the federal online health insurance portal called for by the Patient Protection and Affordable Care Act (ACA) (P.L. 111-148, as amended). Over 50 contractors, including CGI Federal and Quality Software Services, Inc. (QSSI), helped in building the site, which was reportedly largely unusable when it first became available to the public on October 1, 2013, and has been the subject of ongoing work since then. Exactly what went wrong in terms of HealthCare.gov’s rollout has been explored in several congressional hearings, and is under investigation by the Department of Health and Human Services inspector general. Litigation between the contract parties over costs or damages is also possible.

The questions and answers in the report are organized into three broad categories addressing (1) the processes whereby the Centers for Medicare and Medicaid Services (CMS) selected vendors; (2) the terms of the vendors’ contractual relationships with the government; and (3) potential amendments to federal procurement law that, some commentators suggest, could help prevent issues of the sort experienced with HealthCare.gov.

The questions in this report are those that happen to have been frequently asked of the Congressional Research Service by congressional staffers. The inclusion of a particular question, or the exclusion of another question, should not be taken to indicate that particular factors did—or did not—contribute to the problematic rollout of HealthCare.gov. In addition, answers to these questions must often be provided in general terms, in part, because specific language in the parties’ contracts may be subject to multiple interpretations and has not been construed by any court. In addition, the parties’ conduct in the course of performing the contract—the details of which are still emerging—can affect their rights. For example, the government could potentially be found to have waived certain rights that the contract’s plain language would appear to grant to it by engaging in conduct that warrants an inference that it has relinquished the right. The authors of this report rely upon third-party investigations of the facts and circumstances surrounding HealthCare.gov, and additional information may emerge regarding topics discussed herein.

There is also a video, CRS WVB00013, *Contractors and HealthCare.gov: Background in Brief*, by (name redacted) and (name redacted), that addresses certain of these questions.

## CMS’s Selection of Vendors for HealthCare.gov

### Were vendors competitively selected to do the initial work on HealthCare.gov?

The Competition in Contracting Act (CICA) generally requires that executive agencies “obtain full and open competition through the use of competitive procedures” when awarding contracts.<sup>1</sup> However, the award of a contract is not the only way in which agencies may assign work to specific vendors, and CICA’s requirements as to “full and open competition” generally do not apply when agencies assign work to a vendor without awarding a contract.<sup>2</sup>

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<sup>1</sup> 10 U.S.C. §2304(a)(1) (procurements of defense agencies); 41 U.S.C. §3301(a) (procurements of civilian agencies). Use of noncompetitive procedures is sometimes permitted. *See* 10 U.S.C. §2304 & 41 U.S.C. §§3303-3305.

<sup>2</sup> *But see* Liebert Corp., B-232234.5 (Apr. 29, 1991) (finding that the issuance of an order outside the scope of the contract “would result in a contract materially different from that for which the original competition was held and, absent a valid sole-source determination, would be subject to the CICA requirements for competition”).

One way in which agencies can select vendors to perform work without awarding a contract is by issuing a task or delivery order under an existing contract.<sup>3</sup> Some contracts are known as *indefinite-delivery/indefinite-quantity (ID/IQ) contracts*, because they generally permit the government to issue orders for whatever quantities of supplies or services it needs, whenever during the contract's term it needs them.<sup>4</sup> The order must be within the scope of the contract.<sup>5</sup> However, contracts can be drafted to encompass broad categories of supplies and services. There is a "preference" for multiple-award ID/IQ contracts,<sup>6</sup> meaning that the agency awards a contract to multiple vendors, each of whom is generally entitled to a "fair opportunity to be considered" for orders valued in excess of \$3,000.<sup>7</sup> Vendors that do not hold the underlying ID/IQ contract are ineligible to compete for orders issued under it, and some commentators have characterized this as "uncompetitive."<sup>8</sup> CMS selected CGI Federal as the "lead" contractor for HealthCare.gov's rollout by issuing an order in 2011 under an ID/IQ contract for information technology (IT) services that had been awarded in 2007. CGI Federal was one of 16 vendors awarded this contract, and three of these vendors submitted proposals to perform the order that was issued to CGI Federal.<sup>9</sup>

### **Are the performance problems of predecessor firms taken into account?**

Agencies currently have the legal authority to take the performance problems of predecessor firms and key employees into account when selecting vendors in certain procurements, and when determining whether prospective vendors are responsible. For example, when selecting vendors in negotiated procurements,<sup>10</sup> agencies must generally consider past performance or some other "non-cost evaluation factor," such as compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, or prior experience.<sup>11</sup> The past performance of predecessor firms and key employees "should" also be "take[n] into account," when "relevant" to the acquisition.<sup>12</sup> However, in order to consider this information, the agency generally must have indicated its intent to do so at the time when it issued the solicitation;<sup>13</sup> it generally cannot do so on an *ad hoc* basis after issuing the solicitation. Moreover, the Federal Acquisition Regulation (FAR) requires agencies to take into account "[t]he currency and relevance of the information," as well as its source, context, and general trends in performance.<sup>14</sup> Thus, any performance problems experienced by a vendor (or a vendor's predecessor firm, as in

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<sup>3</sup> Another way involves the modification of an existing contract to require the vendor to perform additional work, as discussed below. *See infra* "How can requirements be changed after contract award?"

<sup>4</sup> 48 C.F.R. §16.504. Orders generally cannot exceed the contract's maximum amount. 48 C.F.R. §16.504(a)(4)(ii).

<sup>5</sup> *See supra* note 2 and accompanying text.

<sup>6</sup> 48 C.F.R. §16.504(c)(1)(i).

<sup>7</sup> 10 U.S.C. §2304c(b); 41 U.S.C. §4106(c).

<sup>8</sup> *See, e.g.,* Afzal Bari, *Obamacare Tech Blunders Push New IT Reform Drive*, *Bloomberg.gov*, Dec. 11, 2013.

<sup>9</sup> *See, e.g.,* Jerry Markon & Alice Crites, *HealthCare.gov Contract: Politics Not a Factor, But Neither Were Firm's Ties to Failed Projects*, *Washington Post*, Dec. 22, 2013, available at [http://www.washingtonpost.com/politics/healthcaregov-contract-politics-not-a-factor-but-neither-were-firms-ties-to-failed-projects/2013/12/22/61728fca-6753-11e3-a0b9-249bbb34602c\\_story.html](http://www.washingtonpost.com/politics/healthcaregov-contract-politics-not-a-factor-but-neither-were-firms-ties-to-failed-projects/2013/12/22/61728fca-6753-11e3-a0b9-249bbb34602c_story.html).

<sup>10</sup> *Negotiated procurement* is a method of source selection that permits bargaining after receipt of proposals. Agencies also use evaluation factors when determining to whom to issue orders. *See, e.g.,* 48 C.F.R. §16.505(b)(1)(iv)(C).

<sup>11</sup> 48 C.F.R. §15.304(c)(3)(i) (past performance); 48 C.F.R. §15.304(c)(2) (non-cost evaluation factors).

<sup>12</sup> *See, e.g.,* Advant-EDGE Solutions, Inc., B-400367.2 (Nov. 12, 2008).

<sup>13</sup> *See, e.g.,* 48 C.F.R. §15.303(b)(4) (evaluation based solely on factors and subfactors contained in the solicitation).

<sup>14</sup> 48 C.F.R. §15.305(a)(2)(i).

the case of CGI Federal)<sup>15</sup> would not necessarily cause the vendor to be downgraded on past performance or other non-cost evaluation factors. Nor would a vendor's being downgraded on these factors necessarily preclude it from winning the contract, depending upon the other factors evaluated, the weight assigned to various factors, and the proposals of competing vendors.

Similarly, agencies must consider certain factors related to capacity to perform when determining whether prospective contractors are affirmatively responsible prior to the award of a contract.<sup>16</sup> These factors include whether the prospective vendor has a "satisfactory performance record," and has the necessary organization, experience, accounting and operational controls, and technical skills to perform the contract.<sup>17</sup> The performance and experience of predecessor firms and key employees may be taken into consideration when making such determinations.<sup>18</sup> However, agencies are not required to consider this information; and, even if agencies do consider it, they generally cannot repeatedly find a vendor to be nonresponsible based on the same performance issues.<sup>19</sup> Instead, they must formally exclude the vendor, as discussed below.<sup>20</sup>

### What role do political ties play in source selection?

In part because of the President's constitutional authority to appoint and remove certain federal officials, the President has some influence over the decisions made by employees of executive branch agencies.<sup>21</sup> However, the FAR would appear to prohibit contracting officers or other officials involved in federal procurements from "favoring" contractors based on the contractors' political ties, as some have suggested happened with certain HealthCare.gov vendors.<sup>22</sup> In particular, Subpart 3.1 of the FAR requires that "Government business ... be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none."<sup>23</sup> This provision specifically bars conflicts of interest—or the appearance of conflicts of interest—in relationships between the government

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<sup>15</sup> See, e.g., Lynnley Browning, Inside the Company That Bungled Obamacare, *Newsweek*, Nov. 27, 2013, available at <http://www.newsweek.com/too-big-succeed-207325>.

<sup>16</sup> Agencies generally may not award a contract without determining that the prospective vendor is affirmatively responsible. See 48 C.F.R. §9.103(b). Thus, CMS could not have awarded the 2007 ID/IQ contract to CGI Federal without determining that it was responsible.

<sup>17</sup> 48 C.F.R. §9.104-1(c) & (e).

<sup>18</sup> See, e.g., Harbor Servs., Inc., B-408325 (Aug. 23, 2013).

<sup>19</sup> See, e.g., Old Dominion Dairy Prods., Inc. v. Sec'y of Defense, 631 F.2d 953, 955-56 (D.C. Cir. 1980) (agency impermissibly engaged in *de facto* debarment by repeatedly finding the vendor nonresponsible based on the same grounds, without affording the vendor the procedural protections normally associated with debarment).

<sup>20</sup> See *infra* "Should performance play a greater role in responsibility and exclusion?"

<sup>21</sup> U.S. CONST., art. II, §2, cl. 2; Elana Kagan, Presidential Administration, 114 *Harv. L. Rev.* 2245, 2298 (2001) ("Even absent any assertion of directive authority, a President has many resources at hand to influence the scope and content of administrative action. Agency officials may accede to his preferences because they feel a sense of personal loyalty and commitment to him; because they desire his assistance in budgetary, legislative, and appointments matters; or in extreme cases because they respect and fear his removal power.")

<sup>22</sup> See, e.g., Obamacare Contractors Were Big Campaign Donors, Nextgov, Oct. 10, 2013, available at <http://www.nextgov.com/health/2013/10/obamacare-contractors-were-big-campaign-donors/71717/>.

<sup>23</sup> 48 C.F.R. §3.101-1. Other provisions in the FAR also require impartial treatment of vendors. See, e.g., 48 C.F.R. §1.102-2(c)(3); 48 C.F.R. §1.602-2(b). Other more generally applicable regulations that govern the conduct of agency officials involved in vendor selection would also generally bar these officials from preferring a vendor because of its political ties. See, e.g., 45 C.F.R. §73.735-101; 48 C.F.R. §303.101-3. General standards of ethical conduct that apply to employees of the executive branch similarly state that "[e]mployees shall act impartially and not give preferential treatment to any private organization or individual." 5 C.F.R. §2635.101(b)(8).

and a contractor.<sup>24</sup> The Court of Appeals for the Federal Circuit has held that “[f]or even an appearance of a conflict of interest to exist, a government official must at least appear to have some stake in the outcome of government action influenced by that individual.”<sup>25</sup> Thus, if a government official involved in the selection of a vendor had—or appeared to have—a stake in the choice of this vendor, then a conflict of interest that violated Subpart 3.1 could potentially exist. Moreover, because the FAR provision prohibits favorable treatment more generally, if there were indications that an official involved in vendor selection had granted preferential treatment to a vendor, a violation of this FAR provision could potentially have occurred.

In addition, as previously noted, other provisions of federal procurement law effectively limit the degree to which “favored” contractors may be given preferential treatment by generally requiring that contracts be awarded via “full and open competition through the use of competitive procedures,” and that all vendors holding a multiple-award ID/IQ contract be given a “fair opportunity to be considered” for orders valued in excess of \$3,000.<sup>26</sup>

### **Are there any restrictions on “foreign” participation in federal contracts?**

Federal law restricts “foreign” participation in federal procurement in several ways, none of which appears to have been implicated in the case of HealthCare.gov. The primary restrictions on foreign participation arguably pertain to the place where supplies or construction materials are manufactured. For example, in procurements subject to the Buy American Act (BAA) of 1933, as amended, federal agencies are generally required to purchase “domestic end products” for “public use.”<sup>27</sup> Acquisitions of services—which are generally what CMS procured in implementing HealthCare.gov—are not subject to the BAA or similar domestic content restrictions.<sup>28</sup> Nor does the BAA restrict purchases from foreign persons, *per se*, provided that these persons supply domestic end products and construction materials.<sup>29</sup>

Though other restrictions preclude agencies from contracting with certain vendors because they have foreign parents (as several HealthCare.gov contractors do),<sup>30</sup> or because the vendors are otherwise seen as “foreign,” these restrictions apply only in arguably narrow circumstances which do not appear to have been implicated in the case of HealthCare.gov. Such circumstances may exist when national security interests are involved,<sup>31</sup> or when domestic capabilities to perform

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<sup>24</sup> 48 C.F.R. §3.101-1.

<sup>25</sup> *Galen Med. Assocs. v. United States*, 369 F.3d 1324, 1336 (Fed. Cir. 2004).

<sup>26</sup> *See supra* “Were vendors competitively selected to do the initial work on HealthCare.gov?”

<sup>27</sup> Act of March 3, 1933, 47 Stat. 1520 (codified, as amended, at 41 U.S.C. §§8301-8305). The BAA is waived, pursuant to the Trade Agreements Act, for procurements whose value exceeds certain monetary thresholds, so that agencies may provide equal treatment to eligible suppliers from U.S. trade partners. *See generally* 19 U.S.C. §2511(a).

<sup>28</sup> *See, e.g.*, *Bell Helicopter Textron*, B-195268 (Dec. 21, 1979); *Blodgett Key punching Co.*, B-153751 (Oct. 14, 1976). However, any “supply” portions of a service contract could potentially be subject to the BAA.

<sup>29</sup> *See, e.g.*, *Military Optics, Inc.*, B-245010.3; B-245010.4 (Jan. 16., 1992) (“The fact that the manufacturer of a domestically manufactured end product may be foreign owned is not a factor to be considered....”).

<sup>30</sup> *See, e.g.*, *Inside the Company That Bungled Obamacare*, *supra* note 15; Peter Gosselin, *Late IT Cash Surge Foreshadowed Health-Law Woes*, *Bloomberg.gov*, Oct. 24, 2013.

<sup>31</sup> *See* 10 U.S.C. §2327 (prohibiting contracts with companies in which foreign governments that support international terrorism have a “significant interest”); 10 U.S.C. §2536 (prohibiting the Departments of Defense (DOD) and Energy (DOE) from contracting for national security programs with companies “controlled” by foreign governments if performance of the contract would require access to “proscribed” information); National Defense Authorization Act for FY2006, P.L. 109-163, §1211, 119 Stat. 3136 (Jan. 6, 2006) (prohibiting DOD from acquiring goods or services from a (continued...))



specific functions are at issue.<sup>32</sup> However, CMS is not among the agencies subject to these national security-related restrictions, and domestic capabilities to provide IT supplies and services are not among those capabilities specifically protected.

In yet other cases, government contractors are barred from employing persons who are not U.S. citizens, nationals, or lawful permanent residents (LPRs) to perform certain work under federal contracts.<sup>33</sup> At least one HealthCare.gov contractor was previously found ineligible for certain work because it proposed to use foreign nationals temporarily admitted to the United States pursuant to H1-B visas to perform certain work.<sup>34</sup> However, CMS does not appear to have been required by the FAR or Department of Health and Human Services to have included such a restriction on the use of foreign nationals in its solicitations or contracts for HealthCare.gov.

### **How could CMS award a sole-source contract to replace CGI Federal?**

According to news reports, CMS plans to replace CGI Federal by awarding Accenture a one-year contract to oversee HealthCare.gov.<sup>35</sup> CMS apparently awarded the contract, which has a value of about \$90 million, on a sole-source basis “[b]ecause of time constraints.”<sup>36</sup> CICA generally requires that executive agencies enter into contracts after “full and open competition through the use of competitive procedures” unless certain circumstances exist that would permit agencies to use noncompetitive procedures.<sup>37</sup> Such circumstances may exist when:

- (1) the property or services needed by the executive agency are available from only one responsible source and no other type of property or services will satisfy the [agency’s] needs;
- (2) the executive agency’s need for the property or services is of such an unusual and compelling urgency that the Federal Government would be seriously injured unless the executive agency is permitted to limit the number of sources from which it solicits bids or proposals; ...
- (7) the head of the executive agency ... (A) determines that it is necessary in the public interest to use procedures other than competitive procedures in the particular procurement concerned; and (B) notifies Congress in writing of that determination not less than 30 days before the award of the contract.<sup>38</sup>

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(...continued)

Communist Chinese military company that are on the munitions list for the International Traffic in Arms Regulations).

<sup>32</sup> See 46 U.S.C. App’x §1151(a), (c) (maritime shipping); 49 U.S.C. §40118 (international air transportation); Department of Defense Appropriations Act, 1973, P.L. 92-570, §744, 86 Stat. 1302 (Oct. 26, 1972) (military R&D).

<sup>33</sup> See 48 C.F.R. §2452.239-70(b) & (c) (employees of Department of Housing and Urban Development (HUD) contractors having access to a HUD system shall be U.S. citizens or nationals, or LPRs); 48 C.F.R. §3052.204-71 Alternate I (k) (“Non-U.S. citizens shall not be authorized to access or assist in the development, operation, management or maintenance of Department IT systems under the contract, unless a waiver has been granted.”).

<sup>34</sup> Quality Software Servs., Inc., B-400206.2 (Nov. 19, 2008).

<sup>35</sup> Juliet Eilperin & Amy Goldstein, Obama Administration to End Contract with CGI Federal, Company Behind HealthCare.gov, *Washington Post* (Jan. 10, 2014), available at [http://www.washingtonpost.com/politics/obama-administration-to-end-contract-with-cgi-federal-company-behind-healthcaregov/2014/01/10/001eb05a-719e-11e3-8b3f-b1666705ca3b\\_story.html](http://www.washingtonpost.com/politics/obama-administration-to-end-contract-with-cgi-federal-company-behind-healthcaregov/2014/01/10/001eb05a-719e-11e3-8b3f-b1666705ca3b_story.html).

<sup>36</sup> *Id.*

<sup>37</sup> 41 U.S.C. §3301(a)(1).

<sup>38</sup> 41 U.S.C. §3304(a).

Additional statutory and regulatory requirements may apply when an agency relies on these exceptions. For example, CICA states that when an agency relies on exception (2), it must limit the period of such a contract to one year in ordinary circumstances, but in any event no longer than the period of time needed “to meet the unusual and compelling requirements of the work to be performed under the contract.”<sup>39</sup> CICA also requires that when agencies rely on this exception, the contracting officer must solicit offers “from as many potential sources as is practicable under the circumstances.”<sup>40</sup> In the past, the Comptroller General has determined that time constraints may justify a sole-source award under exception (2) if the contractor receiving the award is the only one capable of performing the work within these constraints.<sup>41</sup>

Although the exception that CMS relied upon in awarding the contract to Accenture has not been publicly noted, this information may come to light if CMS submits a justification and approval (J&A) for the award. Contracts awarded using noncompetitive procedures based on exceptions (1) or (2) must be supported by a certified written justification that, depending on the value of the acquisition, may require the approval of a government official other than the contracting officer.<sup>42</sup> Agencies must generally make J&A documents available to the public within 14 days after award of the contract, or within 30 days if the agency relies on exception (2).<sup>43</sup> When reviewing whether a justification supports the use of noncompetitive procedures, the Comptroller General considers whether it provides a “reasonable basis” for the agency to make a sole-source award.<sup>44</sup>

## Vendors’ Contractual Relationships with CMS

### How can I get copies of the contracts?

As a rule, copies of the federal contracts are not publicly available.<sup>45</sup> However, individual Members of Congress and their staff (as well as the general public) can request copies from the contracting agency either informally, or pursuant to the Freedom of Information Act (FOIA).<sup>46</sup> The FAR makes clear that the FOIA generally applies in the context of government procurement.<sup>47</sup> In some cases, requests could potentially be denied, in whole or in part, based upon one of FOIA’s exemptions, such as those for certain kinds of investigatory records compiled

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<sup>39</sup> 41 U.S.C. §3304(c). “Contracting without providing for full and open competition shall not be justified on the basis of ... a lack of advance planning by the requiring activity.” 48 C.F.R. §6.301(c).

<sup>40</sup> 41 U.S.C. §3304(d). “While CICA requires that the agency request offers from as many sources as practicable under the circumstances, an agency may still limit the procurement to the only firm it reasonably believes can properly perform the work in the available time.” *McGregor Mfg. Corp.*, B-285341 (Aug. 8, 2000) (internal citations omitted).

<sup>41</sup> *See, e.g.*, *Magnavox Nav-Com, Inc.*, B-248501 (Aug. 31, 1992) (finding “no basis to object to the agency’s determination that only MTI could properly perform the work within the urgent time constraints of this procurement”).

<sup>42</sup> 41 U.S.C. §3304(e); 48 C.F.R. §§6.302-1(d), 6.302-2(c), 6.303-1, 6.303-2, 6.304.

<sup>43</sup> 41 U.S.C. §3304(f).

<sup>44</sup> *Global Solutions Network, Inc.*, B-290107 (June 11, 2002).

<sup>45</sup> Some agencies may post copies of frequently requested contracts in their electronic Freedom of Information Act (FOIA) reading rooms, or elsewhere on line.

<sup>46</sup> Congressional committees have greater authority to obtain contracts, and could potentially subpoena them. *See, e.g.*, *Kendra Casey Plank, Issa Subpoenas IT Company Documents Related to Insurance Marketplace Contract*, 100 *Fed. Cont. Rep.* 434 (Oct. 29, 2013). Representative Issa chairs the House Oversight and Government Reform Committee.

<sup>47</sup> *See* 48 C.F.R. §24.201. The FAR makes an exception for proposals that are submitted in response to competitive solicitations, which cannot be made available under the FOIA. 48 C.F.R. §24.202. However, this exception does not apply to proposals that are set forth or incorporated by reference in government contracts. *Id.*

for law enforcement purposes, or documents properly classified as secret in the interest of national defense or foreign policy.<sup>48</sup>

However, obtaining a copy of the contract does not necessarily suffice for determining who may be at fault for specific problems. The language of the contract could, for example, potentially be ambiguous or subject to conflicting interpretations by the parties.<sup>49</sup> Alternatively, the parties could have waived certain requirements by expressly relinquishing particular rights, or by engaging in conduct that warrants an inference that the right has been relinquished.<sup>50</sup> There could also be legal justifications for any failures to perform as apparently required by the terms of the contract.<sup>51</sup>

### **Are vendors required to report performance problems to the government?**

Federal statutes and regulations currently require that standard terms be incorporated into executive agency solicitations and contracts which obligate the vendor to report certain information that may be indicative of performance problems, including (1) exclusions from government contracting; (2) convictions or findings of liability for certain offenses, or indictments or charges with such offenses by a government entity; (3) “significant overpayments” under the vendor’s contract; and (4) violations of the civil False Claims Act or certain federal criminal laws occurring in connection with the award, performance, or close-out of a federal contract.<sup>52</sup> Individual contracts could potentially also be drafted so as to require reporting of specific performance issues,<sup>53</sup> and contractors sometimes voluntarily disclose issues so as to present this information to the procuring agency in the best possible light or obtain any favorable treatment provided to those who voluntarily disclose.<sup>54</sup>

However, the standard required disclosures do not necessarily encompass run-of-the-mill performance issues but, rather, those that would give rise to exclusion, or criminal or civil liability. Moreover, even when information is disclosed, there are sometimes limits on how the government may use it. For example, prospective vendors’ disclosures regarding their exclusions and certain criminal or civil liability make up, in part, the Federal Awardee Performance Integrity Information System (FAPIIS). FAPIIS also includes any nonresponsibility determinations,

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<sup>48</sup> For more on these exemptions, see generally CRS Report R41933, *The Freedom of Information Act (FOIA): Background, Legislation, and Policy Issues*, by (name redacted). The FOIA exemption for trade secrets could potentially be implicated in the case of HealthCare.gov, since contracts may include such information.

<sup>49</sup> Because the government drafts the contract, ambiguities are generally construed against it. *See, e.g.*, *Record Steel & Constr., Inc. v. United States*, 62 Fed. Cl. 508, 517 (2004) (“The ... rule for choosing between competing interpretations of ambiguous ... language is contra proferentem, which requires that ambiguities be construed against the drafter.”).

<sup>50</sup> *See, e.g.*, *American Nat’l Bank & Trust Co. v. United States*, 23 Cl. Ct. 542 (1991). The government could potentially be bound by a waiver if the contractor relies upon the waiver to its detriment. *See, e.g.*, *Miller Elevator Co. v. United States*, 30 Fed. Cl. 662, 687 (1994); *Freeway Ford Truck Sales, Inc. v. Gen. Servs. Admin.*, GSBCA 10662, 93-3 BCA ¶ 26,019. However, agencies generally cannot waive statutory requirements unless specifically authorized to do so. *See, e.g.*, *M-R-S Mfg. Co. v. United States*, 492 F.2d 835 (Ct. Cl. 1974).

<sup>51</sup> *See, e.g.*, 48 C.F.R. §52.212-4(f) (contractor not liable for default if the nonperformance is caused by “acts of the Government in either its sovereign or contractual capacity”).

<sup>52</sup> 48 C.F.R. §52.209-5(a)(i)(A)-(C) (exclusions, convictions or other findings of liability, and indictments or charges by government entities); 48 C.F.R. §3.1003(a)(3) (significant overpayments); 48 C.F.R. §52.203-13(b)(3) & (c)(2)(F) (violations of the civil False Claims Act and certain federal criminal laws).

<sup>53</sup> *See, e.g.*, Jeff Overley, *Health Exchange Developer Warned of Problems: Report*, *Law360*, Oct. 30, 2013 (HealthCare.gov contractor required to provide monthly status reports that identified certain performance risks).

<sup>54</sup> *See, e.g.*, 31 U.S.C. §3729(a)(2)(A)-(C) (reducing the amount of statutory damages under the civil False Claims Act from three times the amount of the government’s loss to two times the amount of such loss for voluntary disclosures).

terminations for default, and past performance information from the past *five years*,<sup>55</sup> and contracting officers are required to consult FAPIIS when determining whether prospective vendors are responsible.<sup>56</sup> However, contracting officers are restricted in their ability to consider certain past performance information that is more than *three years* old,<sup>57</sup> and have discretion as to what weight, if any, to give to the various information provided in FAPIIS.<sup>58</sup>

## How can requirements be changed after contract award?

Media sources have reported that a number of changes were made to HealthCare.gov shortly before, as well as after, its problematic rollout. In some cases, such as when vendors corrected errors in lines of code,<sup>59</sup> these changes arguably served to bring the product into conformity with pre-existing contractual requirements. In other cases, however, the contractor was tasked with doing things that were not provided for in the initial contract, such as designing the website so that users must create accounts before viewing plans, instead of anonymously browsing.<sup>60</sup>

The latter sorts of changes—apparently altering the terms of the contract—are possible, in part, because parties to a contract generally may agree to change the contract’s terms after the contract has been formed.<sup>61</sup> Changes that are agreed to by both parties are called bilateral modifications, and are the preferred method of altering the terms of government contracts. However, many government contracts also include so-called Changes Clauses which permit contracting agencies to unilaterally “make changes within the general scope of th[e] contract” to specified terms of the contract (e.g., contract specifications; method or manner of performance).<sup>62</sup> Some versions of the Changes Clause even provide that the contractor must continue to perform if the changes constitute a breach of the contract by exceeding the contract’s scope.<sup>63</sup>

Any changes in the contract terms could potentially result in adjustments of the contract price or the time allotted for performance.<sup>64</sup> The government may be entitled to a reduction in price if the change deletes work from the contract. Conversely, if the change adds work to the contract, the contractor may be entitled to an increase in price.<sup>65</sup>

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<sup>55</sup> Duncan Hunter National Defense Authorization Act for FY2009, P.L. 110-417, §872, 122 Stat. 4555-57 (Oct. 14, 2008).

<sup>56</sup> 48 C.F.R. §9.104-6(a).

<sup>57</sup> 48 C.F.R. §42.1503(g).

<sup>58</sup> See, e.g., *Hayes Int’l Corp. v. United States*, 7 Cl. Ct. 681, 685 (1985).

<sup>59</sup> Sharon LaFraniere, Ian Austen, & Robert Pear, Contractors See Weeks of Work on Health Site, *N.Y. Times* (Oct. 20, 2013), available at [http://www.nytimes.com/2013/10/21/us/insurance-site-seen-needing-weeks-to-fix.html?\\_r=0](http://www.nytimes.com/2013/10/21/us/insurance-site-seen-needing-weeks-to-fix.html?_r=0).

<sup>60</sup> Gregory Korte, HealthCare.gov Progress Still Not Keeping up with Demand, *USA Today* (Nov. 13, 2013), available at <http://www.usatoday.com/story/news/politics/2013/11/13/healthcare-dot-gov-rollout-oversight/3513303/>.

<sup>61</sup> Where the federal government is involved, such changes must generally be within the scope of the existing contract. See *supra* note 2 and accompanying text.

<sup>62</sup> See, e.g., 48 C.F.R. §§52.243-1 to 52.243-5 (standard and alternate Changes Clauses for various types of contracts).

<sup>63</sup> See 48 C.F.R. §52.233-1 Alternate (i) (“The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under or relating to the contract.”).

<sup>64</sup> See, e.g., 48 C.F.R. §52.243-2 (“If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer shall make an equitable adjustment in the ... estimated cost, delivery or completion schedule, or both ...”).

<sup>65</sup> Cf. Sharon Begley, As Obamacare Tech Woes Mounted, Contractor Payments Soared, *Reuters*, Oct. 17, 2013, (continued...)

## How are disagreements between parties to a contract resolved?

When performance of a contract does not proceed as anticipated, the parties frequently disagree over who was responsible, as CMS and its contractors have done in the case of HealthCare.gov.<sup>66</sup> Assuming that they feel a need to resolve these disagreements and cannot do so through informal means, CMS and its vendors may ultimately bring *claims*—or written demands or assertions seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to a contract—under the Contract Disputes Act (CDA) of 1978, as amended.<sup>67</sup> The CDA calls for claims by or against a contractor to be submitted to the contracting officer for a decision.<sup>68</sup> The contracting officer then has a certain period of time (60 days in the case of claims of \$100,000 or less; or any longer period established by the contracting officer, in the case of claims over \$100,000) within which to issue a written decision approving or denying the claim.<sup>69</sup> Failure to issue a decision within the requisite time period is generally deemed to be a denial.<sup>70</sup> Following the contracting officer’s decision, the contractor may (1) appeal the decision to an agency board of contract appeals within 90 days of receipt of the decision, or (2) bring an action directly on the claim in the U.S. Court of Federal Claims (COFC) within 12 months of receipt of the decision.<sup>71</sup> Decisions of the board or COFC, in turn, may be appealed to the U.S. Court of Appeals for the Federal Circuit and, ultimately, the Supreme Court could grant certiorari.<sup>72</sup>

This disputes process can take some time, not just because of all these layers of review, but also because the CDA generally provides that claims may be brought within six years of their accrual.<sup>73</sup> In one notable case, the dispute process under the CDA took over 20 years—and ended with the Supreme Court leaving the parties in their respective pre-litigation positions.<sup>74</sup> However, that case, *General Dynamics Corporation v. United States*, 563 U.S.—(2011), raised questions of state secrets that are unlikely to be implicated in any litigation over HealthCare.gov.

## Can the government get its money back?

It remains to be seen whether and how much of the money that CMS spent on HealthCare.gov the government might be able to recover in light of the website’s problematic rollout, or on other grounds. The possibility of any monetary recovery depends, in large part, upon the terms of the contracts, including any amendments thereto (see *supra* “How can I get copies of the

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available at <http://www.reuters.com/article/2013/10/17/us-usa-healthcare-technology-insight-idUSBRE99G05Q20131017> (noting increased obligations of funds beginning in April 2013).

<sup>66</sup> See, e.g., Kathleen Miller & Roxana Tiron, *Obamacare Vendor Blames U.S. Agency for Website Sign-Up Delays*, *Bloomberg.gov*, Oct. 24, 2013; Sam Baker, *Sebelius: Blame Contractors for Obamacare Site*, *Nat'l J.*, Oct. 29, 2013, available at <http://www.nationaljournal.com/health-care/sebelius-blame-contractors-for-obamacare-site-20131029>.

<sup>67</sup> P.L. 95-563, 92 Stat. 2383 (Nov. 1, 1978) (codified, as amended, in 41 U.S.C. §§7101-7109).

<sup>68</sup> 41 U.S.C. §7103(a)(1) & (3).

<sup>69</sup> 41 U.S.C. §7103(d)-(f).

<sup>70</sup> 41 U.S.C. §7103(f)(5).

<sup>71</sup> 41 U.S.C. §7104(a) (appeals to board of contract appeals); 41 U.S.C. §7104(b) (actions in federal court).

<sup>72</sup> 41 U.S.C. §7107. Appeals to the Federal Circuit must be made within 120 days of receiving the decision. *Id.*

<sup>73</sup> 41 U.S.C. §7103(a)(4).

<sup>74</sup> See, e.g., Josh Gerstein, *Next Up After Website Glitches: The Lawsuits*, *Politico*, Oct. 23, 2013.

contracts?”). To the degree that the contractor performed materially as required in the contract, the government’s grounds for recovery could be limited. In other words, the contractor is generally not liable if the government misunderstood or misstated its own requirements. On the other hand, if a contractor did not perform materially as required in its contract, and there is no legal justification for its failure to do so,<sup>75</sup> then the government could potentially be entitled to certain costs or damages either pursuant to express terms of the contract, or under the common law of contracts. For example, certain government contracts include terms obligating the vendor to pay the government *liquidated damages*—or damages of a contractually prescribed amount—if the vendor fails to perform within the time period specified in the contract.<sup>76</sup> Other contracts include terms entitling the government to equitable reductions in price if the performance tendered by the contractor does not meet contractual specifications, or if the contractor does not timely replace rejected supplies.<sup>77</sup> However, even if the contract does not include such terms, the common law of contracts generally permits parties to recover damages based on the difference between the value of the performance contracted for and that tendered, or on other grounds.<sup>78</sup>

Recovery on non-contractual grounds, such as under the civil False Claims Act (FCA), is also possible, if a vendor knowingly made or presented false, fictitious, or fraudulent claims for payment to the government.<sup>79</sup> However, inaccurate statements that were not made in the context of claims for payment (such as contractors’ statements prior to the rollout that work on HealthCare.gov was on track)<sup>80</sup> generally would not give rise to liability under the FCA.

### **How is CMS able to end its contractual relationship with CGI Federal in 2014?**

CMS is able to end its contractual relationship with CGI Federal in 2014 because the contract’s term expires in February, and CMS has chosen not to exercise the option to extend it. An option is a “unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.”<sup>81</sup> Because the decision to exercise an option rests solely with the government, the contractor is not entitled to recover lost profits if the government decides not to exercise an option. This is true regardless of the circumstances surrounding the government’s non-exercise of the option (e.g., the government previously gave notice of its intent to exercise the option).<sup>82</sup>

Executive branch procurement contracts also provide the government with the right to terminate the contract for the government’s convenience,<sup>83</sup> or for the contractor’s default.<sup>84</sup> The government

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<sup>75</sup> See *supra* note 51.

<sup>76</sup> See, e.g., 48 C.F.R. §11.501(a)(1)–(2) (authorizing use of liquidated damage clauses when (1) the time of delivery or performance is “so important that the Government may reasonably expect to suffer damage if the delivery or performance is delinquent,” and (2) the extent or amount of such damage would be difficult or impossible to quantify).

<sup>77</sup> See, e.g., 48 C.F.R. §52.246-18(c)(2); 48 C.F.R. §52.246-3(g)(1).

<sup>78</sup> See, e.g., *Cascade Pacific Int’l v. United States*, 773 F.2d 287, 294 (Fed. Cir. 1985).

<sup>79</sup> See 31 U.S.C. §3729.

<sup>80</sup> See, e.g., Hearing Transcript, PPACA Implementation Failures: Didn’t Know or Didn’t Disclose? (“[The contractors] told us ... that [CMS] was doing an excellent job of testing the product. They said there was nothing wrong, and they expressed nothing but optimism.”) (statement of Representative DeGette) (copy on file with the authors).

<sup>81</sup> 48 C.F.R. §2.101.

<sup>82</sup> See, e.g., *Integral Sys., Inc. v. Dep’t of Commerce*, GSBGA 16321-COM, 2005-1 BCA ¶ 32,984.

<sup>83</sup> See generally 48 C.F.R. Subparts 49.1 to 49.3.

<sup>84</sup> See generally 48 C.F.R. Subpart 49.4.

could potentially have to pay the vendor certain costs if it exercises either of these rights.<sup>85</sup> Conversely, the vendor could potentially be liable for certain costs if the government exercises its right to terminate the contract for default.<sup>86</sup> However, neither termination for convenience nor termination for default are at issue in the case of CGI Federal’s contract with CMS to work on HealthCare.gov.

## Potential Reforms in Response to HealthCare.gov

### What about consideration of risk and modularity in IT contracting?

Some commentators have suggested that making federal procurements of information technology (IT) more like private sector procurements of IT, in terms of consideration of risk and use of modular contracting methods, could help prevent situations like HealthCare.gov.<sup>87</sup> Currently, Part 39 of the FAR directs agencies to “analyze risks, benefits, and costs” before entering into a contract for IT.<sup>88</sup> Risks associated with schedules, cost, technical feasibility, dependencies between new projects and other projects or systems, and program management, among others, are specifically recognized,<sup>89</sup> and agencies are instructed to apply appropriate techniques to manage and mitigate such risks.<sup>90</sup> Suggested techniques include modular contracting, among other things.<sup>91</sup> Part 39 also designates contracting and program officials as “jointly responsible” for managing and controlling risk when selecting projects and during program implementation.<sup>92</sup>

Part 39 also reiterates the requirement, initially found in the Clinger-Cohen Act of 1996, that executive agencies, “to the maximum extent practicable,” use *modular* contracting—that is, use one or more contracts to acquire information technology systems in successive, interoperable increments—for the acquisition of “major system of information technology.”<sup>93</sup> In addition, Part 39 (1) indicates that agencies may use modular contracting to acquire non-major systems of IT; (2) suggests how acquisitions of IT systems may be divided into smaller increments; (3) requires contracting officers to choose “appropriate” contracting techniques that facilitate the acquisition of subsequent increments; and (4) encourages contract award, “to the maximum extent practicable,” within 180 days after the solicitation’s issuance in order to avoid obsolescence.<sup>94</sup>

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<sup>85</sup> See, e.g., 48 C.F.R. §52.249-2(g) (obligating the agency to pay certain costs, potentially including profit on costs incurred in anticipation of performance, if the agency and the vendor cannot agree on a termination settlement amount); 48 C.F.R. §52.249-8(f) (obligating the agency to pay “contract price for completed supplies delivered and accepted” in the event the contract is terminated for default).

<sup>86</sup> See, e.g., 48 C.F.R. §52.249-8(b) (“If the Government terminates this contract in whole or in part, it may acquire, under the terms and in the manner the Contracting Officer considers appropriate, supplies or services similar to those terminated, and the Contractor will be liable to the Government for any excess costs for those supplies or services.”).

<sup>87</sup> See, e.g., Andy Medici, Botched Healthcare.gov Rollout Energizes IT Reform Efforts, *Fed. Times*, Dec. 1, 2013, available at <http://www.federaltimes.com/article/20131201/IT/312010002/Botched-Healthcare-gov-rollout-energizes-reform-efforts>.

<sup>88</sup> 48 C.F.R. §39.102(a).

<sup>89</sup> 48 C.F.R. §39.102(b).

<sup>90</sup> 48 C.F.R. §39.102(c).

<sup>91</sup> *Id.*

<sup>92</sup> 48 C.F.R. §39.102(a).

<sup>93</sup> P.L. 104-106, §5202, 110 Stat. 690 (codified, as amended, at 41 U.S.C. §2308). See also 48 C.F.R. §39.103(a).

<sup>94</sup> 48 C.F.R. §39.103(a)-(e). Among other things, the division of acquisitions of IT systems into smaller increments may (continued...)

There would seem to be some opportunities to expand upon the current framework, since the risk management techniques addressed in Part 39 are generally encouraged, not required. Similarly, modular contracting is only required, “to the maximum extent practicable,” with “major systems” of IT. It is not required with major systems when its use is deemed not to be practicable by the procuring agency, or when acquiring non-major systems. (*Major systems* are “combinations of elements,” whose cost exceeds certain monetary thresholds or which are designated as such by agency heads, that “will function together to produce the capabilities required to fulfill a mission need.”)<sup>95</sup> However, given that consideration of risk and modular contracting is currently, at a minimum, encouraged, it is unclear that merely requiring these things, in and of itself, would necessarily suffice to ensure that agencies effectively deploy any required techniques. An agency that erred significantly in any required risk assessment could potentially still end up with the same difficulties that CMS experienced with HealthCare.gov.

### What about increased use of performance-based acquisition?

Some commentators have suggested that problems like those experienced with HealthCare.gov could potentially be avoided if federal agencies made greater use of *performance based acquisition* (PBA),<sup>96</sup> an approach to acquisition structured around the results to be achieved, rather than the manner in which work is performed.<sup>97</sup> PBA has been widely recognized as having certain benefits (e.g., lessening performance risk, removing the need for detailed specifications or process descriptions),<sup>98</sup> and a statute enacted in 2000 established a “preference” for the use of performance-based contracts and orders in the acquisition of services by executive agencies.<sup>99</sup> The Services Acquisition Reform Act (SARA) of 2003, as amended, expanded on this preference by granting agencies temporary authority to treat performance-based contracts and orders for services as if they were contracts for commercial items, provided certain conditions were met.<sup>100</sup>

Subpart 37.6 of the FAR provides further guidance about how agencies are to develop performance work statements, performance standards, and quality assurance surveillance plans. Among other things, the FAR prescribes that, in developing performance work statements, agencies must, “to the maximum extent practicable,” (1) describe the work in terms of the desired results, rather than how the work is to be accomplished or the number of hours; and (2) enable assessment of work performance against measurable performance standards, among other things.<sup>101</sup> The FAR similarly requires that performance standards be measurable and structured to

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consider opportunities for subsequent increments to take advantage of any evolution in technology or needs.

<sup>95</sup> 48 C.F.R. §2.101. The FAR defines *major system*, for civilian agencies, in part, in terms of a monetary threshold of “\$2 million or the dollar threshold ... established by the agency pursuant to Office of Management and Budget Circular A-109, ... whichever is greater.” *Id.*

<sup>96</sup> See, e.g., Botched Healthcare.gov Rollout Energizes IT Reform Efforts, *supra* note 87.

<sup>97</sup> 48 C.F.R. §2.101.

<sup>98</sup> See Seven Steps to Performance-Based Acquisition, available at <http://www.acquisition.gov/sevensteps/home.html> (last accessed: Jan. 12, 2013).

<sup>99</sup> Floyd D. Spence National Defense Authorization Act for FY2001, P.L. 106-398 App’x, §821, 114 Stat. 1654A-217 to 1654A-219 (Oct. 30, 2000). See also 48 C.F.R. §37.102(a)(1) (generally requiring that agencies use PBA methods “to the maximum extent practicable” when acquiring services, including services under supply contracts).

<sup>100</sup> P.L. 108-136, §1431, 117 Stat. 1672-73 (Nov. 24, 2003) (codified, as amended, at 41 U.S.C. §2310).

<sup>101</sup> 48 C.F.R. §37.602(b)(1)-(3).



permit assessment of the contractor's performance,<sup>102</sup> and that quality assurance surveillance plans meet the requirements of Subpart 46.4 of the FAR.<sup>103</sup>

However, despite general agreement on the potential benefits of PBA, and statutes and regulations promoting PBA, agencies have made arguably little use of it,<sup>104</sup> and the key question seems to be how agencies can be brought to make greater use of PBA. Further, even with PBA, an agency that failed to adequately describe its desired results to its vendors—or that kept changing its desired results over time—could potentially still be at risk of performance failures.

### What about facilitating dealings with commercial vendors?

Some have suggested that the problems with HealthCare.gov arose, at least in part, because CMS drew upon the standard pool of government vendors and did not work with innovative start-ups or entities widely known for their commercial IT products.<sup>105</sup> Further, according to these commentators, executive agencies, like CMS, are limited in their ability to work with commercial firms because federal contracting processes are too “dated” and “inflexible,”<sup>106</sup> and/or agencies impose too many government-specific terms upon vendors as conditions of their contracts.<sup>107</sup>

The Federal Acquisition Streamlining Act (FASA) of 1994 established a “preference” for the acquisition of “commercial items”<sup>108</sup> by requiring, among other things, that executive agencies define their requirements, “to the maximum extent practicable,” “so that commercial items ... may be procured,” or “to the extent that commercial items suitable to meet the executive agency’s needs are not available, nondevelopmental items other than commercial items may be procured.”<sup>109</sup> The Federal Acquisition Reform Act (FARA) of 1996 and the Service Acquisition Reform Act (SARA) of 2003 subsequently expanded on this preference, including by exempting acquisitions of commercial items from a number of standard requirements and contract terms.<sup>110</sup> However, the application of these authorities has proved controversial, with some suggesting that agencies have relied upon the authorities to their own detriment (e.g., by paying higher prices because they did not obtain certified cost or pricing data from the vendor),<sup>111</sup> and, particularly

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<sup>102</sup> 48 C.F.R. §37.603(a).

<sup>103</sup> 48 C.F.R. §37.604.

<sup>104</sup> See, e.g., *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress* 178-227 (2007).

<sup>105</sup> See, e.g., Serdar Yegulalp, *How Federal Cronies Built—and Botched—Healthcare.gov*, InfoWorld Tech Watch, Oct. 14, 2013, available at <http://www.infoworld.com/t/e-government/how-federal-cronies-built-and-botched-healthcaregov-228724>.

<sup>106</sup> See, e.g., Farhad Manjoo, *Why Government Tech Is So Poor: Fixing Procurement Process is Key to Preventing Blunders Like Healthcare.gov*, Wall Street J. Online, Oct. 16, 2013 (copy on file with the authors).

<sup>107</sup> See, e.g., Deborah Billings, *HealthCare.Gov Problems Symptomatic of Broken IT Acquisition System, Group Says*, 100 *Fed. Cont. Rep.* 407 (Oct. 28, 2013).

<sup>108</sup> *Commercial item* includes “[a]ny item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes,” which has been sold, leased, or licensed, or offered for sale, lease, or license, to the general public, as well as “[s]ervices of a type offered and sold competitively in substantial quantities in the commercial marketplace.” 48 C.F.R. §2.101.

<sup>109</sup> P.L. 103-355, §8104, 108 Stat. 3390-91 (Oct. 13, 1994) (10 U.S.C. §2377); *id.* at §8203, 108 Stat. 3394-96 (41 U.S.C. §3307(b)(2)). See also 48 C.F.R. §2.101 (defining *nondevelopmental item*).

<sup>110</sup> For an overview, see generally *Report of the Acquisition Advisory Panel*, *supra* note 104, at 46-58.

<sup>111</sup> See, e.g., Michael G. Golden & Heather Kilgore Weiner, *The Mid-90s Commercial Item Reforms: Turning Back the Clock?*, 98 *Fed. Cont. Rep.* 210 (Aug. 14, 2012) (noting examples of such concerns).

since 2003, Congress has specifically extended certain requirements to commercial vendors.<sup>112</sup> Other commentators, however, have objected to what they perceive as the “erosion” of the commercial item authorities.<sup>113</sup> Facilitating increased dealings with commercial vendors in the context of IT procurement could potentially be complicated insofar as it implicates this broader debate. Further, current law focuses primarily upon the acquisition of commercial items, not the use of commercial vendors, *per se*. There may be cases where facilitating the acquisition of commercial items also promotes use of commercial vendors; however, there may be other cases where this is not so.

### What about restricting the use of ID/IQ contracts?

Some commentators have suggested that CMS’s decision to rely, in part, on an ID/IQ contract awarded in 2007 in implementing HealthCare.gov contributed to the problematic rollout because only vendors who held that contract could be considered, and other vendors—including new and potentially innovative ones—were excluded.<sup>114</sup> As previously noted, ID/IQ contracts generally permit the government to issue orders for whatever quantities of supplies or services it needs, whenever during the term of the contract it needs them; and there is a preference that such contracts be awarded to multiple vendors, each of whom must generally be given a “fair opportunity to be considered” for orders.<sup>115</sup>

Congress expressly authorized executive agencies to use ID/IQ contracts in 1994, when it enacted the Federal Acquisition Streamlining Act (FASA).<sup>116</sup> Among other things, FASA requires that solicitations for ID/IQ contracts “include ... a statement of work, specifications, or other description that reasonably describes the general scope, nature, complexity, and purposes of the services or property to be procured under the contract.”<sup>117</sup> This requirement was imposed to address concerns that, by giving solicitations for ID/IQ contracts broad scopes, agencies could use the resulting contracts “routinely to obtain a wide range of [supplies and services] without meaningful competition,”<sup>118</sup> and the FAR subsequently imposed similar requirements upon ID/IQ contracts themselves.<sup>119</sup> However, despite this requirement, commentators have expressed concern about ID/IQ contracts with arguably broad scopes, or apparently tenuous relationships between the work required under the contract and that contemplated by particular orders,<sup>120</sup> including in the case of HealthCare.gov. In addition, the overall guidance on the “appropriate use” of ID/IQ contracts—which the National Defense Authorization Act for FY2000 required to

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<sup>112</sup> See, e.g., Supplemental Appropriations Act, 2008, P.L. 110-252, §6102, 122 Stat. 2386 (June 30, 2008) (extending the requirement that contractors disclose certain violations to contracts for commercial items).

<sup>113</sup> HealthCare.Gov Problems Symptomatic of Broken IT Acquisition System, *supra* note 107.

<sup>114</sup> As Obamacare Tech Woes Mounted, Contractor Payments Soared, *supra* note 65.

<sup>115</sup> See *supra* “Were vendors competitively selected to do the initial work on HealthCare.gov?”.

<sup>116</sup> P.L. 103-355, §§1001-1005, 108 Stat. 3249-54 (Oct. 13, 1994); *id.*, at §§1054-1055, 108 Stat. 3261-66. Agencies had used ID/IQ contracts prior to 1994, but there had been questions about the permissibility of such contracts.

<sup>117</sup> 10 U.S.C. §2304a(b)(3); 41 U.S.C. §4103(b)(3).

<sup>118</sup> Peter J. Ritenburg, Task Order Contracts: Popular and Now “Legal,” But New FAR Coverage Should Address Potential Problems, 26 *Nat’l Cont. Mgmt. J.* 1, 3 (1995).

<sup>119</sup> 48 C.F.R. §16.504(a)(4)(iii). This extension is significant because orders must generally be within the scope of the underlying contract. See *supra* note 2 and accompanying text.

<sup>120</sup> See, e.g., Abby Bowles, CACI Under Investigation by GSA, DOD, Interior for Role in Iraqi Prisoner Abuse, 81 *Fed. Cont. Rep.* 546 (June 1, 2004) (certain contract interrogators at Abu Ghraib working pursuant to an order issued under an ID/IQ contract for IT services).

be developed<sup>121</sup>—provides only that agencies “should use” ID/IQ contracts “when a recurring need is anticipated.”<sup>122</sup>

## What about requiring performance bonds?

Some have wondered about requiring IT vendors to post performance bonds, as some states did when contracting for IT in the 1990s.<sup>123</sup> Bonds rely upon third-parties—known as sureties—to ensure that the government still receives performance, or is appropriately compensated, if the initial vendor fails to perform. A federal statute, the Miller Act of 1935, as amended, generally requires that construction contractors post performance bonds on federal contracts.<sup>124</sup> However, the Miller Act does not apply to non-construction contractors, and the FAR directs that “[g]enerally, agencies shall not require performance ... bonds for other than construction contracts.”<sup>125</sup> Pursuant to the FAR, such bonds may be required only for non-construction contracts exceeding the simplified acquisition threshold (generally \$150,000) “when necessary to protect the Government’s interest,” such as when (1) government property or funds are to be provided to the contractor for use in performing the contract or as partial compensation; (2) the government desires assurance that a successor in interest to a contractor is financially capable; (3) substantial progress payments are made before delivery of end items starts; or (4) contracts are for the dismantling, demolition, or removal of improvements.<sup>126</sup>

Requiring performance bonds could potentially help ensure uninterrupted performance under IT contracts because the surety generally must arrange for completion of the contract, or compensate the government, if the contractor fails to fulfill its obligations.<sup>127</sup> Such a requirement could also reduce the possibility that a contractor performing work for the government will default because of insolvency, since sureties generally issue bonds only to contractors who are in good financial standing.<sup>128</sup> However, neither interruption of performance nor default due to insolvency appears to have been directly at issue in the case of HealthCare.gov, and requiring performance bonds could limit the number of vendors willing and able to compete for federal contracts, thereby increasing costs.<sup>129</sup>

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<sup>121</sup> P.L. 106-65, §804, 113 Stat. 704 (Oct. 5, 1999).

<sup>122</sup> 48 C.F.R. §16.504(b). The FAR further indicates that agencies “may” use such contracts when the government cannot predetermine the precise quantities the government will acquire during the contract period, and it is “inadvisable” for the government to commit to more than a minimum quantity. *Id.*

<sup>123</sup> *See, e.g.*, Jim Holm, Why Didn’t the Government Have a Bond on Healthcare.gov?, Sept. 19, 2013, available at <http://www.enhanceinsurance.com/news/federal-government-bond-healthcare-gov/>. For more on state bonding requirements, see generally Robert S. Metzger, Diana G. Richard, and Dawn Figueras, When More Produces Less: California’s IT Terms and Conditions Produce Less Competition and Lower Value, 37 *Proc. Lawyer* 1 (Fall 2001).

<sup>124</sup> *See generally* 40 U.S.C. §3131(b)(1); 48 C.F.R. §28.103-1(a).

<sup>125</sup> 48 C.F.R. §28.103-1(a). *See also* Apex Support Servs., Inc., B-288936 (Dec. 12, 2001) (upholding agency’s determination to require a performance bond where the bonding requirement is reasonable); Professional Window & Housecleaning, Inc., B-224187 (Jan. 23, 1987) (same).

<sup>126</sup> 48 C.F.R. §28.103-1(a).

<sup>127</sup> Vaden Indus., Inc., B-299338 (Mar. 5, 2007); E.D.P. Enters., Inc., B-282232 (June 17, 1999).

<sup>128</sup> T. Scott Leo, Symposium, The Restatement of Suretyship: The Construction Contract Surety and Some Suretyship Defenses, 34 *Wm. & Mary L. Rev.* 1225, 1231 (1993) (“The contract surety does not underwrite a contractor based on some actuarial determination of the risk for the appropriate premium. Instead, contract bonds, like loans, are written based on the financial integrity of the principal, premised on the idea that no losses should follow.”).

<sup>129</sup> In bid protests, vendors that are small businesses often raise the concern that performance bond requirements restrict competition because many small businesses cannot afford to post a bond. *See, e.g.*, D.P. Enters., Inc., B-282232 (June (continued...))

## What about warranties?

Express warranties were also used by state governments during the 1990s when procuring IT,<sup>130</sup> and some have wondered about the possibility of requiring similar warranties of performance in federal IT contracts in the wake of HealthCare.gov.<sup>131</sup> Currently, per the FAR, the “use of warranties”—or promises or affirmations given by a vendor regarding the nature, usefulness, or condition of the supplies, or the performance of services, furnished under the contract—“is not mandatory” in federal contracts.<sup>132</sup> However, the FAR authorizes agencies to use warranties in specific acquisitions when such use is “appropriate” and approved in accordance with agency procedures.<sup>133</sup> Whether a warranty is seen as appropriate depends upon various factors, including (1) the nature and use of the supplies and services (e.g., their complexity and function, the potential harm to the government if the item is defective); (2) the costs arising from the contractor’s charge for accepting the deferred liability created by the warranty, and the government’s cost in administering and enforcing the warranty; (3) the government’s ability to enforce the warranty; (4) trade practice; and (5) whether the contractor’s charge for the assumption of added liability may be offset by reducing the government’s quality assurance requirements.<sup>134</sup> The FAR also encourages reliance on commercial warranties for the repair and replacement of commercial items where “appropriate and in the Government’s best interest.”<sup>135</sup>

Requiring express warranties as to certain IT systems may seem appealing, particularly in light of the apparent performance failures of certain components of HealthCare.gov. However, as the FAR itself suggests, the use of an express warranty typically increases contract costs, as vendors “charge for accepting the deferred liability created by the warranty.”<sup>136</sup> Thus, across-the-board requirements for specific express warranties for IT could potentially result in the government incurring costs that are not commensurate with the benefits received from the warranty, particularly if the government’s ability to enforce the warranty is limited.<sup>137</sup> In addition, it is important to note that the government’s ability to recover costs or damages for a vendor’s unjustified failure to deliver supplies or services that materially satisfy contractual requirements is generally not contingent upon the presence of an express warranty.

(...continued)

17, 1999); N. Mgmt. Servs., Inc., B-261424 (June 26, 1995). In addition, according to one source, experience at the state level has shown that many sureties are unwilling to take software development performance bonds because they have difficulty evaluating failed projects to determine what needs to be done for full performance under the contract, and projects often have to be restarted from the beginning. Nat’l Ass’n of State Chief Info. Officers, *Leaving Performance Bonds at the Door for Improved IT Procurement 3* (2012), available at [http://www.nascio.org/publications/documents/NASCIO\\_PerformanceBonds\\_August2012.pdf](http://www.nascio.org/publications/documents/NASCIO_PerformanceBonds_August2012.pdf) (“Nearly 90% of surety companies that the vendor contracted with would not take a software performance bond.”).

<sup>130</sup> See *When More Produces Less*, *supra* note 123. Certain warranties may be implied in contracts, including government contracts (e.g., implied warranty of merchantability, implied warranty of fitness).

<sup>131</sup> See, e.g., Joseph E. Kendall & Sean Williamson, *Obamacare HealthCare.gov Issues Serve as a Reminder to Embrace Best Practices in Software Development and Integration Projects*, Oct. 25, 2013, available at <http://www.sourcingspeak.com/2013/10/obamacare-healthcaregov-issues-serve-as-a-reminder-to-embrace-best-practices-in-software-development.html>.

<sup>132</sup> 48 C.F.R. §46.703.

<sup>133</sup> *Id.*; 48 C.F.R. §46.704.

<sup>134</sup> 48 C.F.R. §46.703(a)-(c).

<sup>135</sup> 48 C.F.R. §46.709.

<sup>136</sup> 48 C.F.R. §46.703(b)(1).

<sup>137</sup> *Cf.* 48 C.F.R. §46.703(c) (“The Government’s ability to enforce the warranty is essential to [its] effectiveness.”).

## What about strengthening agency evaluations of past performance?

Some commentators have suggested that improved recording and consideration of information about vendors' performance under federal contracts could help agencies avoid dealings with vendors who have experienced performance problems in the past and, so the thinking goes, may be more likely to experience such problems in the future.<sup>138</sup> Currently, under the FAR, executive agencies (1) are generally required to evaluate vendors' performance on contracts and orders valued in excess of the simplified acquisition threshold (generally \$150,000) at least annually and at the time when work on a contract or order is completed;<sup>139</sup> and (2) must consider past performance or some other "non-cost evaluation factor" when selecting vendors in negotiated procurements.<sup>140</sup> The FAR also prescribes certain aspects of the vendor's performance that must, "at a minimum," be included in performance evaluations, and defines the five adjectival ratings—from "exceptional" through "unsatisfactory"—that agencies are to use in describing performance.<sup>141</sup> Aspects of performance to be addressed include the quality of the product or service; cost control; schedule and timeliness; management or business relations; subcontracting with small businesses; and other applicable factors (e.g., late payment of subcontractors).<sup>142</sup>

The FAR's requirements as to consideration of past performance in source selection, in contrast, are arguably more limited, with agencies generally having discretion in defining what constitutes past performance for purposes of the procurement;<sup>143</sup> determining what performances qualify as recent and relevant,<sup>144</sup> and establishing the weight to be given to past performance and other factors, such as cost or price.<sup>145</sup> Contracting officers are also generally free to draw their own inferences regarding contractors' past performance from the sources they consult, so long as the conclusions are reasonable.<sup>146</sup>

This framework could potentially be modified in an attempt to further standardize agency evaluations of contractors' past performance, or to require that agency evaluations be considered in specific ways in source selection.<sup>147</sup> However, agency evaluation and consideration of vendor's past performance were not designed to remove all risk from the procurement process. Rather, they were intended to permit agencies to make more informed decisions about whether potential

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<sup>138</sup> See, e.g., HealthCare.gov Contract, *supra* note 9.

<sup>139</sup> 48 C.F.R. §42.1502(a) (timing of evaluations); 48 C.F.R. §42.1502(b) (contracts and orders subject to evaluation).

<sup>140</sup> 48 C.F.R. §15.304(c)(2) (requiring consideration of the product's quality through one or more non-cost evaluation factors); 48 C.F.R. §15.304(c)(3)(i) (generally requiring consideration of past performance).

<sup>141</sup> 48 C.F.R. §42.1503(b)(4) & Table 42-1.

<sup>142</sup> 48 C.F.R. §42.1503(b)(2)(i)-(vi).

<sup>143</sup> See, e.g., Brican Inc., B-402602 (June 17, 2010); CapRock Gov't Solutions, Inc.; ARTEL, Inc.; Segovia, Inc., B-402490, B-402490.2, B-402490.3, B-402490.4, B-402490.5 (May 11, 2010).

<sup>144</sup> See, e.g., Dorado Servs., B-401930.3 (June 7, 2010).

<sup>145</sup> See, e.g., Source Diversified, Inc., B-403437.2 (Dec. 16, 2010); ITW Military GSE, B-403866.3 (Dec. 7, 2010); L&N/MKB, Joint Venture, B-403032.3 (Dec. 16, 2010).

<sup>146</sup> See, e.g., Cessna Aircraft Co., B-261953.5 (Feb. 5, 1996); SDA, Inc., B-256075, B-25606 (May 2, 1994).

<sup>147</sup> Subpart 42.15 of the FAR requires that agencies "use" recent evaluations of past performance stored in the Past Performance Information Retrieval System (PPIRS), but it does not specify for what they are to be used. See 48 C.F.R. §42.1503(g). This provision presumably refers to consideration of agency past performance evaluations in source selection decisions. However, nothing in Subpart 15.3 of FAR, which generally governs use of past performance as an evaluation factor, expressly requires consideration in source selection decisions of the past performance evaluations that agencies are required to complete under Subpart 42.15, and Subpart 42.15 elsewhere states that agency evaluations of past performance "may be used to support future award decisions." 48 C.F.R. §42.1503(d).

performance risks may be offset by other factors (e.g., lower price).<sup>148</sup> In addition, certain amendments to the current requirements could conceivably decrease the number of potential vendors—and, thus, increase costs—unless there were mechanisms whereby agencies could differentiate between vendors with different types and degrees of performance problems, and vendors could demonstrate that they have overcome prior performance problems.

### Should performance play a greater role in responsibility and exclusion?

Some have suggested that performance problems, such as those experienced by CGI Federal’s predecessor firm, American Management Systems, should be given greater consideration not only in source-selection decisions, but also in determinations as to responsibility and exclusion. As previously noted, executive agencies are generally prohibited from entering a contract with a prospective vendor who has not been found to be affirmatively responsible based on criteria that include whether the vendor has a “satisfactory performance record.”<sup>149</sup> The FAR further provides that vendors that are, or recently have been, “seriously deficient in contract performance”—as evidenced by delinquent performance, delivery of nonconforming items, poor management or technical judgment, or failure to correct production problems, among other things<sup>150</sup>—generally “shall be presumed to be nonresponsible.”<sup>151</sup> Past failure to apply sufficient tenacity and perseverance to perform acceptably is also said to be “strong evidence of nonresponsibility,” and failure to meet the quality requirements of the contract is described as a “significant factor” in determining satisfactory performance.<sup>152</sup> Responsibility determinations are, however, intended to address only the risks of nonperformance on specific contracts, not to exclude “poor performers” from all dealings with federal agencies. A separate process, involving debarment, is used for purposes of exclusion, and agencies could potentially be found to have impermissibly engaged in *de facto* debarment if they were to intentionally or effectively use the responsibility determination process to preclude a vendor from any dealings with the government.<sup>153</sup>

Subpart 9.4 of the FAR, in turn, expressly authorizes an agency to debar a contractor after finding, by a preponderance of the evidence, a “violation of the terms of a Government contract or subcontract so serious as to justify debarment.”<sup>154</sup> Such violations can include willful failure to perform in accordance with the contract’s terms; or a history of failure to perform, or unsatisfactory performance of, one or more contracts.<sup>155</sup> Contractors must generally be given

<sup>148</sup> See, e.g., Steven Kelman & Mathew Blum, Past Performance as an Evaluation Factor—Strengthening the Government’s Best Value Decisions, 38 *Gov’t Cont.* 37 (Oct. 2, 1996) (“[The offerors] always have the opportunity to offset a marginal performance record with an aggressive price proposal or a strong showing in other factors.”); Alliant Techsys., Inc., B-260215.4, B-260215.5 (Aug. 4, 1995) (a contractor that is aware of potentially adverse past performance information could address that in other aspects of its proposal). Dr. Kelman was the administrator of the Office of Federal Procurement Policy during the mid-1990s, when current past performance policies were established.

<sup>149</sup> See *supra* “Are the performance problems of predecessor firms taken into account?”

<sup>150</sup> See, e.g., Campbell Indus., Comp. Gen. B-238871 (July 3, 1990); Ford Motor Co., Comp. Gen. B-207179 (Jan. 20, 1983); United Power & Control Sys., Inc., Comp. Gen. B-184662 (Dec. 27, 1978); Marine Eng’rs Beneficial Ass’n, Comp. Gen. B-181265 (Nov. 27, 1974); Kennedy Van & Storage Co., Inc., Comp. Gen. B-180973 (June 19, 1974); Land-Air, Inc., Comp. Gen. B-166969 (Sept. 2, 1969).

<sup>151</sup> 48 C.F.R. §9.104-3(b).

<sup>152</sup> 48 C.F.R. §9.104-3(b).

<sup>153</sup> *Old Dominion Dairy Prods.*, 631 F.2d at 955-56. Also, because responsibility determinations are contract-specific, vendors could be found responsible for purposes of one contract, but not another.

<sup>154</sup> 48 C.F.R. §9.406-2(b)(1)(i).

<sup>155</sup> 48 C.F.R. §9.406-2(b)(1)(i)(A)-(B).

notice and an opportunity for a hearing prior to being debarred, particularly when the debarment is based upon agency findings, rather than convictions or civil judgments.<sup>156</sup> Moreover, any debarment under the FAR—including for serious violations of the terms of a government contract—is discretionary, not mandatory.<sup>157</sup> It is to be imposed “only in the public interest for the Government’s protection and not for purposes of punishment.”<sup>158</sup> Executive agencies, in general, have recently been criticized by some Members of Congress and the public for their limited use of their discretionary authority to debar, particularly on performance-related grounds.<sup>159</sup> However, some agencies reportedly have established procedures whereby vendors whose contracts are terminated for *default*—that is, for failure to perform as required by the contract—are automatically referred to the appropriate officials for potential debarment.<sup>160</sup> All agencies could be required to do this. However, particularly given the frequent disputes between vendors and agencies over who was, in fact, responsible for performance problems, such a requirement could potentially increase the amount of litigation, as vendors seek to have terminations for default be found to be improper and converted into terminations for convenience.<sup>161</sup> Also, a vendor that experiences significant performance failures on only one contract, due to exceptional circumstances, may pose no performance risks to other agencies.

### What about use of lead system integrators?

It has been widely noted that CMS essentially served as the lead system integrator (LSI) for HealthCare.gov, managing the assembly of component systems developed and tested by various vendors into a single system,<sup>162</sup> and some have questioned whether CMS had the in-house capabilities to effectively perform this role.<sup>163</sup> Nothing in current law either required CMS to serve as the LSI, or prohibited it from doing so. Congress enacted legislation in 2006 and 2008 that imposed certain limits on the use of LSIs by the Department of Defense (DOD),<sup>164</sup> partly due to concern that agencies’ use of LSIs may give vendors “discretion to make program decisions.”<sup>165</sup> However, these restrictions only apply to DOD, and then only in acquisitions of

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<sup>156</sup> 48 C.F.R. §9.406-2(b)(1). Contractors could, however, potentially be suspended for brief periods of time without these protections.

<sup>157</sup> See, e.g., 48 C.F.R. §9.406-2 (“The debarring officer *may* debar ...”) (emphasis added).

<sup>158</sup> 48 C.F.R. §9.402(b).

<sup>159</sup> See, e.g., Issa Introduces, Panel Approves Restructure of Agency Suspension, Debarment Offices, 100 *Fed. Cont. Rep.* 428 (Oct. 29, 2013).

<sup>160</sup> See Dietrich Knauth, Navy Says Contract Bribery Scandal Could Widen, *Law360*, Dec. 20, 2013 (Navy practice).

<sup>161</sup> See, e.g., 48 C.F.R. §52.249-8(g) (“If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.”).

<sup>162</sup> See, e.g., Obamacare Tech Blunders Push New IT Reform Drive, *supra* note 8.

<sup>163</sup> See, e.g., Lydia DePillis, Government Did a Poor Job on HealthCare.gov. A Private Firm Might Have Been Worse, *Washington Post Blogs*, Oct. 25, 2013 (copy on file with authors).

<sup>164</sup> See John Warner National Defense Authorization Act for FY2007, P.L. 109-364, §807, 120 Stat. 2315-16 (Oct. 17, 2006) (codified at 10 U.S.C. §2410p) (barring contractors that perform LSI functions in the acquisition of major systems from having “direct financial interest[s] in the development or construction of any individual system or an element of a system”); National Defense Authorization Act for FY2008, P.L. 110-181, §802, 122 Stat. 206-07 (Jan. 28, 2008) (codified at 10 U.S.C. §2410p note) (permitting DOD to award new contracts for LSI functions only if certain conditions are met). See also 48 C.F.R. §§209.570-1 to 209.570-4.

<sup>165</sup> See, e.g., Deborah Billings, Waxman Blasts DHS for Outsourcing Too Much Authority under Major Contracts, 87 *Fed. Cont. Rep.* 160 (Feb. 13, 2007).

“major systems.”<sup>166</sup> The restrictions do not apply to civilian agencies, like CMS, or even to DOD procurements that do not involve major systems. Congressional and public concern about the use of LSIs by DOD could, however, potentially have influenced CMS’s decision not to use an LSI with HealthCare.gov. Earlier debates over the use of lead system integrators centered, in part, upon whether such entities may perform functions that are *inherently governmental* (i.e., functions that, as a matter of federal law and policy, must be performed by government employees and cannot be contracted out),<sup>167</sup> or closely associated with inherently governmental functions.<sup>168</sup> Further, guidance issued by the Obama Administration in 2011 regarding functions closely associated with inherently governmental functions requires that agencies, among other things, (1) give special consideration to having federal employees perform the work; (2) have the resources to give “special management attention” to the contractor’s performance; and (3) take steps to “limit or guide” contractors’ exercise of discretion.<sup>169</sup>

Use of an LSI here could potentially have helped clarify responsibility when HealthCare.gov failed to perform as required after its rollout,<sup>170</sup> and would have meant that CMS only had to oversee the performance of one vendor, as opposed to more than 50. However, any agency deficiencies in contract administration arguably remain as salient when there is one contractor—tasked with assembling the work of other vendors—as they are when there are multiple contractors.

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<sup>166</sup> 48 C.F.R. §2.101. The FAR defines *major system*, for defense agencies, in part, in terms of monetary thresholds of \$189.5 million, for total expenditures for research, development, test, and evaluation; and \$890 million for the eventual total expenditure for the acquisition. *Id.*

<sup>167</sup> For more on inherently governmental and related functions, see generally CRS Report R42325, *Definitions of “Inherently Governmental Functions” in Federal Procurement Law and Guidance*, by (name redacted).

<sup>168</sup> See, e.g., National Defense Authorization Act for FY2006, P.L. 109-163, §805, 119 Stat. 3372-73 (Jan. 6, 2006) (requiring DOD to submit a report addressing, among other things, the minimization of performance by LSIs of functions closely associated with inherently governmental functions); National Defense Authorization Act for FY2008, P.L. 110-181, §802, 122 Stat. 206-07 (Jan. 28, 2008) (codified at 10 U.S.C. §2410p note) (defining *lead system integrator*, in part, as a “prime contractor under a contract for the procurement of services the primary purpose of which is to perform acquisition functions closely associated with inherently governmental functions with respect to the development or production of a major system”).

<sup>169</sup> Office of Management and Budget, Office of Federal Procurement Policy, Publication of the Office of Federal Procurement Policy (OFPP) Policy Letter 11-01, Performance of Inherently Governmental and Critical Functions, 76 Fed. Reg. 56227, 56239, 56241-42 (Sept. 12, 2011).

<sup>170</sup> See, e.g., Hearing Transcript, *supra* note 80 (multiple contractors each expressing the view that some other entity was responsible for ensuring the site worked).



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