History is the final judge of a President. History is the ultimate arbiter, the last word. History is the "decider" regarding exactly *how* a President will be remembered.

Ultimately the polls measuring public approval of the Chief Executive of the Executive Branch, taken during or immediately after his Presidency, mean little or nothing. As time passes, events are placed into context and secrets tend to reveal themselves, such that the final verdict about a President's success or failure may come years or even decades after that President leaves office. According to Gallup, Harry Truman had an average public approval rating of 36.5% during his second term (coincidentally the same has George W. Bush's second term average)—though at one point in 1952, Truman's public approval rating was a dismal and embarrassing 22%. But Truman's approval rose over time. As one summary puts it: "Truman's stature also rose in subsequent years because it became easier for both scholars and the public to discern and appreciate his significant contributions." Similarly, it was not until 40 years after his resignation from office that Nixon's true role in sabotaging the 1968 Vietnam War peace talks was confirmed. In addition to his many other "foibles," Nixon's actions delayed the war's conclusion and some people have called those actions "treasonous." Those voting for (or against) Nixon in 1968 or in 1972 didn't know of those actions; it took a long time for them to be known and placed into context, and for the verdict of history to judge them accordingly.

Thus, it is unreasonable to expect that our current views of President Obama, whether positive or negative, will match the verdict of history. We simply do not know enough at this time to make an informed judgment.

That being said, we wonder if one day President Obama might be known for his inability to implement any meaningful acquisition reform of the Federal contracting environment.

It's really hard to identify any significant acquisition reforms implemented by the Obama Administration—especially in contrast to the many significant and far-reaching reforms carried out during President Clinton's two terms in office. We understand it's fashionable today to call-out those Clinton-era reforms as being overly optimistic or naïve or even counter-productive, but at the time they had almost universal support. Indeed, in many ways they accomplished their stated objectives, which was to make the Federal bureaucracy work better and to reduce contractors' costs by reducing the military-only requirements imposed on them. Regardless of your views of those reforms, whether positive or negative, it's impossible to argue that they didn't happen or that the current Administration's do-next-to-nothing approach is actually a better strategy than Clinton's let's-try-this-out approach.

Indeed, the majority of the Obama-era reform efforts, to the extent they exist at all, seem to be driven by certain satrapies within the Department of Defense who are seeking to *roll back* the Clinton-era reforms. In other words, the primary efforts at acquisition reform seem to be to undo the reforms enacted twenty years ago.

Witness, for example, the nearly 180 degree **turn away** from the DoD's prior enthusiastic acceptance of Performance-Based Payments (PBPs) as not only an innovative method of contract financing, but as actually the
preferred method
. In the mid-1990's it was felt that traditional cost-based progress payments didn't do much to foster actual progress; instead they basically seemed to reward contractors for spending taxpayer money. PBPs actually seemed to link payments to progress, and even though they required more up-front investment the notion was fairly well received. Indeed, one of the stated benefits of PBPs was that after the initial investment, there was essentially nothing to audit or administer—thus reducing "non-value-added" contract oversight such as DCAA audits of costs incurred under firm, fixed-price contracts. But today's Pentagon policy-makers want to go back to traditional cost-based progress payments because … well, because that's the way it's always been done. (If there's a better rationale, we haven't seen it.) Today's policy-makers prefer the traditional approach because it's easier to audit and administer, even though it decouples payments from progress. Indeed, it is seen as a
virtue
that auditors have something to audit when cost-based progress payments are used.

Thus, we conclude that, instead of innovating and streamlining, the majority of current Pentagon reform initiatives seem to be focused on *adding bureaucracy* and on *adding requirements*
that tend to increase contractors' costs. For a discussion of the extraordinary efforts the current bureaucracy will take in order to justify the current status quo, please see our article
criticizing
the report issued by the Better Buying Power team, the culmination of five years' of effort to identify opportunities for regulatory roll-backs. We went into painful detail on a specific opportunity in this article covering
TINA compliance streamlining
.

For yet another example of what we're talking about, let's discuss the recent debacle regarding acquisitions of commercial items. For background, read **this article** or perhaps also **this one** .

We called DoD's proposed reform of commercial item acquisitions a "misstep" and we think events have confirmed our assessment. After a barrage of public criticism, even the Under Secretary of Defense (AT&L) thought the rule needed to be rewritten so as to avoid a "narrow interpretation."

Consequently, nobody should be overly surprised that the proposed rule was withdrawn in early December, 2015. As attorneys from Covington & Burlington opined —

Last week, the Department of Defense ("DoD") quietly withdrew its ill-received proposed rule on the evaluation of price reasonableness in commercial items acquisitions.Issued on August 3, 2015, the Proposed Rule purported to provide guidance for evaluating the reasonableness of prices using data other than certified cost or pricing data. As we previously reported, it fell short of this goal and, instead, increased confusion in the determination of price reasonableness for commercial goods that have been 'offered for sale' but not sold. It also adopted open-ended data provisions that arguably permit the agency to request almost unlimited information to substantiate the reasonableness of prices. …

Between the McCain letter and the NDAA, Congress could not have been clearer that the goal is to create a less–not more–burdensome process for commercial item contracting. Maybe rescinding the proposed rule is the DoD's first step towards listening?

Or, as the attorneys at the firm Wiley Rein **wrote** —

The Department of Defense (DOD) has withdrawn a proposed rule that would have effectively narrowed the standards under which an item qualifies as 'commercial' and that would have broadly expanded the type of information required to determine price reasonableness. As we previously reported, the proposed rule was intended to implement Section 831(a) of the Fiscal Year 2013 (FY13) National Defense Authorization Act (NDAA), which required DOD to issue guidance regarding the submission of other than certified cost or pricing data for commercial item acquisitions. The proposed rule followed recent DOD Office of Inspector General reports on pricing in commercial item acquisitions, which raised concerns that Contracting Officers had not analyzed sufficient pricing information to determine that the prices of certain sole source commercial item products were fair and reasonable. The proposed rule generated significant negative comments, including from the American Bar Association's Section of Public Contract Law. With little fanfare, DOD closed the DFARS case on the proposed rule and incorporated the FY13 NDAA issues into a new DFARS case that will address both Section 831(a) of the

FY13 NDAA and the commercial item provisions in the Fiscal Year 2016 (FY16) NDAA.

Next up is the similarly ill-conceived **proposed rule** on curbing the freedom contractors currently enjoy to initiate "independent" R&D projects. This is the Kendall-sponsored, BBP-enabled, attempt to make contractors' IR&D spend unallowable unless they share their individual IR&D projects' "goals and plans" with somebody in the Pentagon (somebody currently unidentified), and the contractors can prove they shared that highly proprietary information. If the contractors failed to share the required information—or if they cannot document to the auditors' satisfaction that they did so—then their IR&D costs will be considered to be unallowable.

Isn't that special?

In one of the quotes posted above, the attorneys thought the withdrawal of the proposed commercial item rule might be DoD's "first step toward listening" to the clamor of Congress and industry demanding regulatory roll-backs instead of regulatory additions. We beg to differ. If DoD policy-makers were actually listening, the proposed IR&D rule would have been closed as well. Instead, the current DFARS Case **status report** (dated December 7, 2015) shows that DFARS Case 2016-D002 ("Enhancing the Efficiency of Independent Research and Development") is still in process. Indeed, the proposed rule has been drafted and is in review by the DAR Editor.

So as you can see, Pentagon policy-makers—led by Frank Kendall and Shay Assad in particular—continue to ignore the desires of industry and Congress and they continue to pile on regulatory requirements that lead to additional contractor costs, costs that get passed-on to the taxpayers.

But why listen to us?

Sandra Erwin, writing in NDIA's National Defense magazine, offers much the same opinion. She wrote—

The business reforms proposed by every defense secretary during the Obama administration will continue to be debated but there is little to no chance that significant actions will happen until after the nation elects a new president, defense industry experts said. … The Senate Armed Services Committee started a series of hearings this year -- expected to extend into 2016 -- that have cast a spotlight on defense reforms. SASC Chairman Sen. John McCain, R-Ariz., has chided officials for what he characterized as gross inefficiencies and wasteful business practices at the Department of Defense. The committee is looking at how Congress and the Pentagon might go about restructuring bloated agencies and reducing overhead in order to cut costs and speed up the pace of innovation. …

One of the efficiency initiatives proposed by Gates in the early days of the Obama administration targeted the so-called 'back offices' of many defense agencies and combatant commands. Sweeping reforms of this sort are always tough, said McKinley. 'It is very hard to change the culture [and get support for] divesting significant portions of staff that have been built up over time.' The National Guard Bureau staff, for instance, grew from 450 in the 1980s to 4,000 today. The department is going to need leadership that 'watches the personnel 'shell game,'' said McKinley.

Eaglen warned that continuing procrastination is bad news for the military. Without reforms, the Pentagon is going to have to continue to absorb rising overhead and infrastructure costs within a flat top-line budget, she said. 'There isn't an additional dollar for defense without a reform agenda.'

The Obama years have been marked by constant battles between the White House and various factions in Congress over federal spending, and there is no longer a dominant bloc on Capitol Hill that will push for bigger defense budgets, she said. … The same political gridlock that led to the Budget Control Act and abrupt reductions in military spending also has stalled personnel reforms that are needed to preserve the health of the all-volunteer force, Carter said. Initiatives to adjust compensation, healthcare and retirement benefits have lacked the consensus to move forward, so 'we are locked in the status quo,' he said.

In the very same edition of the magazine, Ms. Erwin opined that what acquisition reform efforts have been implemented have led to unintended consequences, including "a realignment of the industry in ways that could squeeze the government's purchasing power." Citing a study, Ms. Erwin argued that the implementation of LPTA (Lowest Price, Technically Acceptable) procurements "have commoditized many products and services, sparking a wave of corporate consolidations and spinoffs as some defense contractors have moved to unload their less-profitable service businesses." In addition, "'Agency reliance on LPTA has inadvertently fueled monopoly positions for larger contractors while squeezing contractors and suppliers in the middle of the supply chain,' the Govini report says." Which is great news for Lockheed Martin, to be sure; but perhaps not so great news for contractors in the $100 Million to $1 Billion revenue range.

Let’s wrap this up. We think we’ve adequately supported our initial assertion, which is that the Obama Presidency may be remembered for many things—and one of them is going to be its failure to implement meaningful acquisition reform. We believe that the verdict of history will not be kind to President Obama in that regard.