

AN A.S. PRATT PUBLICATION

MARCH 2018

VOL. 4 • NO. 3

PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



EDITOR'S NOTE: TRENDING TOPICS

Victoria Prussen Spears

**PROTECTING TRADE SECRETS IN
GOVERNMENT CONTRACTING**

Rick Richmond and Sandra Hanian

**THE NATIONAL DEFENSE
AUTHORIZATION ACT OF 2018**

Megan Mocho Jeschke, Eric S. Crusius,
Mary Beth Bosco, Elizabeth N. Jochum,
and Amy L. Fuentes

**ENHANCED DEBRIEFINGS AND BID
PROTEST PILOT PROGRAM INCLUDED IN
FY 2018 NDAA**

Tom Mason, Francis E. Purcell, Jr.,
Ray McCann, and Joseph R. Berger

**NEW AUDITS AND PENALTIES ON
MEDICAID PLANS AND PROVIDERS
RELATED TO ENCOUNTER DATA IN
VALUE-BASED PAYMENT MODELS**

Jackie Selby and Gregory R. Mitchell

**SKILLED NURSING FACILITIES TARGETED
IN GOVERNMENT ENFORCEMENT
ACTIONS AND QUI TAM LAWSUITS**

Thomas M. Gallagher, Sara B. Richman,
and Jessica Spradling Russell

**COURT: CMS' BROAD AUTHORITY
TO SUSPEND MEDICARE PAYMENTS
BASED ON ALLEGED OVERPAYMENTS
BEYOND JUDICIAL REVIEW UNTIL
ALL ADMINISTRATIVE REMEDIES ARE
EXHAUSTED**

Brian T. McGovern and Jared Facher

**GAO ISSUES ANNUAL BID PROTEST
REPORT TO CONGRESS FOR FY 2017**

Joseph R. Berger, Tom Mason,
Francis E. Purcell, Jr., and Ray McCann

**GOVERNMENT CONTRACTS REMINDER:
CERTIFIED CLAIMS MUST INCLUDE A
"SIGNATURE"**

Justin M. Ganderson and Kevin T. Barnett

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 4

NUMBER 3

MARCH 2018

Editor's Note: Trending Topics

Victoria Prussen Spears 69

Protecting Trade Secrets in Government Contracting

Rick Richmond and Sandra Hanian 72

The National Defense Authorization Act of 2018

Megan Mocho Jeschke, Eric S. Crusius, Mary Beth Bosco,
Elizabeth N. Jochum, and Amy L. Fuentes 76

**Enhanced Debriefings and Bid Protest Pilot Program Included in
FY 2018 NDAA**

Tom Mason, Francis E. Purcell, Jr., Ray McCann,
and Joseph R. Berger 84

**New Audits and Penalties on Medicaid Plans and Providers
Related to Encounter Data in Value-Based Payment Models**

Jackie Selby and Gregory R. Mitchell 88

**Skilled Nursing Facilities Targeted in Government Enforcement
Actions and *Qui Tam* Lawsuits**

Thomas M. Gallagher, Sara B. Richman, and Jessica Spradling Russell 94

**Court: CMS' Broad Authority to Suspend Medicare Payments
Based on Alleged Overpayments beyond Judicial Review until All
Administrative Remedies are Exhausted**

Brian T. McGovern and Jared Facher 98

GAO Issues Annual Bid Protest Report to Congress for FY 2017

Joseph R. Berger, Tom Mason, Francis E. Purcell, Jr.,
and Ray McCann 101

**Government Contracts Reminder: Certified Claims Must Include
a "Signature"**

Justin M. Ganderson and Kevin T. Barnett 104

QUESTIONS ABOUT THIS PUBLICATION?

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call:

Heidi A. Litman at 516-771-2169
Email: heidi.a.litman@lexisnexis.com
Outside the United States and Canada, please call (973) 820-2000

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at (800) 833-9844
Outside the United States and Canada, please call (518) 487-3385
Fax Number (800) 828-8341
Customer Service Website <http://www.lexisnexis.com/custserv/>

For information on other Matthew Bender publications, please call

Your account manager or (800) 223-1940
Outside the United States and Canada, please call (937) 247-0293

Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt);

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

Because the section you are citing may be revised in a later release, you may wish to photocopy or print out the section for convenient future reference.

This publication is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of Reed Elsevier Properties Inc., used under license. A.S. Pratt is a registered trademark of Reed Elsevier Properties SA, used under license.

Copyright © 2018 Reed Elsevier Properties SA, used under license by Matthew Bender & Company, Inc. All Rights Reserved.

No copyright is claimed by LexisNexis, Matthew Bender & Company, Inc., or Reed Elsevier Properties SA, in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

An A.S. Pratt® Publication

Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
www.lexisnexis.com

MATTHEW  BENDER

Editor-in-Chief, Editor & Board of Editors

EDITOR-IN-CHIEF

STEVEN A. MEYEROWITZ

President, Meyerowitz Communications Inc.

EDITOR

VICTORIA PRUSSEN SPEARS

Senior Vice President, Meyerowitz Communications Inc.

BOARD OF EDITORS

MARY BETH BOSCO

Partner, Holland & Knight LLP

DARWIN A. HINDMAN III

Shareholder, Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

J. ANDREW HOWARD

Partner, Alston & Bird LLP

KYLE R. JEFCOAT

Counsel, Latham & Watkins LLP

JOHN E. JENSEN

Partner, Pillsbury Winthrop Shaw Pittman LLP

DISMAS LOCARIA

Partner, Venable LLP

MARCIA G. MADSEN

Partner, Mayer Brown LLP

KEVIN P. MULLEN

Partner, Morrison & Foerster LLP

VINCENT J. NAPOLEON

Partner, Nixon Peabody LLP

STUART W. TURNER

Counsel, Arnold & Porter LLP

WALTER A.I. WILSON

Senior Partner, Polsinelli PC

PRATT'S GOVERNMENT CONTRACTING LAW REPORT is published twelve times a year by Matthew Bender & Company, Inc. Copyright 2018 Reed Elsevier Properties SA., used under license by Matthew Bender & Company, Inc. All rights reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For permission to photocopy or use material electronically from *Pratt's Government Contracting Law Report*, please access www.copyright.com or contact the Copyright Clearance Center, Inc. (CCC), 222 Rosewood Drive, Danvers, MA 01923, 978-750-8400. CCC is a not-for-profit organization that provides licenses and registration for a variety of users. For subscription information and customer service, call 1-800-833-9844. Direct any editorial inquires and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, smeyerowitz@meyerowitzcommunications.com, 718.224.2258. Material for publication is welcomed—articles, decisions, or other items of interest to government contractors, attorneys and law firms, in-house counsel, government lawyers, and senior business executives. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher. POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 630 Central Avenue, New Providence, NJ 07974.

The National Defense Authorization Act of 2018

*By Megan Mocho Jeschke, Eric S. Crusius, Mary Beth Bosco,
Elizabeth N. Jochum, and Amy L. Fuentes**

The following set of articles describe the 2018 National Defense Authorization Act's provisions on procurement fraud reports, acquisition workforce improvements, and the government's growing interest in blockchain technology, and explores how they are likely to impact federal government contractors.

The National Defense Authorization Act ("NDAA") of 2018¹ was signed into law on December 12, 2017. While most public attention is focused on the NDAA's authorization of spending for military programs and personnel, each year's version of the bill contains provisions impacting Department of Defense ("DOD") acquisition practices and consequently, companies doing business with DOD.

The 2018 NDAA includes some major changes to DOD procurement. The following set of articles describe the limits of the 2018 NDAA's report on procurement fraud, acquisition workforce improvements, and the government's growing interest in blockchain technology.

2018 NDAA ANALYSIS: THE LIMITS OF THE 2018 NDAA'S REPORT ON PROCUREMENT FRAUD

Megan Mocho Jeschke

A provision in the NDAA for fiscal year 2018 would require the Department of Defense to prepare a report on defense contracting fraud. Specifically, Section

* Megan Mocho Jeschke (megan.jeschke@hkklaw.com) is a partner at Holland & Knight LLP and a member of the firm's Government Contracts Group and White Collar Defense and Investigations Team. Eric S. Crusius (eric.crusius@hkklaw.com) is a partner at the firm focusing his practice on a range of government contract matters, including bid protests, claims and disputes, compliance and sub-prime issues. Mary Beth Bosco (marybeth.bosco@hkklaw.com), a partner at the firm and member of the Board of Editors of *Pratt's Government Contracting Law Report*, advises government contractors in contract compliance, transactional matters, and how to navigate the federal marketplace. Elizabeth N. Jochum (elizabeth.jochum@hkklaw.com) is an associate in the firm's Litigation Group concentrating her practice in government contracts and white collar defense. Amy L. Fuentes (amy.fuentes@hkklaw.com) is an associate in the firm's Litigation and Dispute Resolution Practices representing clients in a variety of government contracts and commercial litigation disputes.

¹ H.R. 2810, *available at* <http://docs.house.gov/billsthisweek/20171113/HRPT-115-HR2810.pdf>.

889 of the 2018 NDAA requires the DOD to report the number of fraud-related criminal convictions of contractors over the past five fiscal years and prepare a listing of those contractors that were debarred or suspended based on their criminal conviction. The report will also require a listing of contractors having civil judgments or settlements related to fraud over the past five years. DOD will be required to provide an assessment of the dollar value of contracts awarded to these companies. The report will also include a recommendation on how to “penalize contractors repeatedly involved in fraud in connection with contracts or other transactions entered into with the Federal Government.” DOD has 180 days to prepare the report upon passage of 2018 NDAA.

The 2011 Report on Defense Contracting Fraud

This is not the first time Congress has requested such a report. A similar provision was contained in the Department of Defense Appropriations Act, 2010 requiring reporting for fiscal years 2000–2010. That report came out in October 2011.

The 2011 report identified approximately 64 contractors with criminal convictions and over 300 contractors who had fraud-related criminal or civil settlements. The report showed that the overwhelming majority of companies with criminal convictions also received not-insignificant periods of debarment.²

Many viewed the 2011 report as evidence of systematic fraud by defense contracting community members, while others panned the report as evidencing isolated incidents of wrongdoing. The former cited with ire the value of contracts received by contractors even after their respective conviction, settlement, or judgment.

This proxy can be misleading though. As a threshold matter, judgments are not equivalent to settlements without admission of liability. A more telling proxy would be a breakout of the number of settlements involving an admission of liability. Second, the report did not establish a threshold amount for civil settlements or judgments. A fair number of the civil settlements and judgments listed in the 2011 report are less than \$1 million. Nor is there an indication of the value of the settlement relative to the claimed damages or the size of the company. A not-insignificant number of the companies listed in the 2011 report are multi-billion dollar contractors with a single minor settlement within the 10-year report period. Where the settlement value is relatively low and there is no admission of liability, it more likely evidences companies who settled

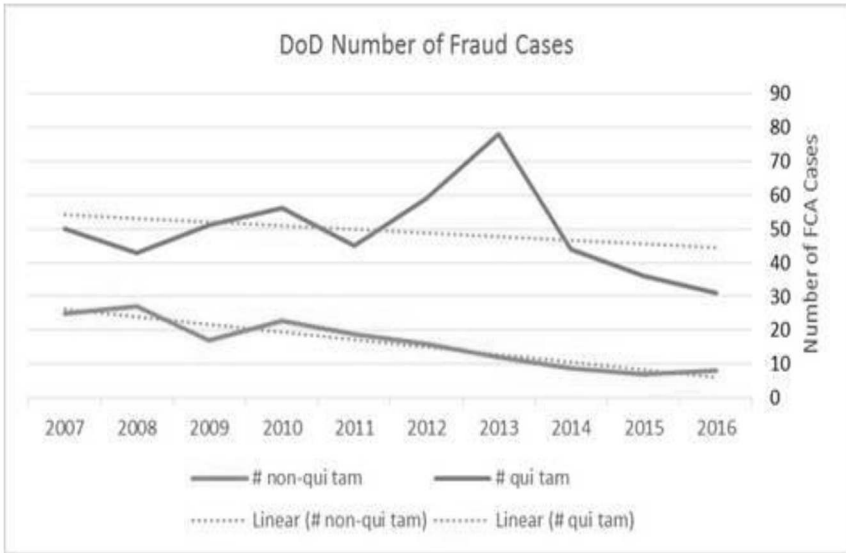
² The 2011 report is available at https://www.sanders.senate.gov/imo/media/doc/102011-DOD_Fraud_Report.pdf; and the tables are available at https://www.sanders.senate.gov/imo/media/doc/102011-Combined_DOD_Fraud_Tables.pdf.

unmeritorious cases to avoid the time and expense of litigation. This is particularly true of settlements involving *qui tam* relator claims under the False Claims Act and even more so in those cases where the Department of Justice (“DOJ”) declined intervention. Finally, as the 2011 report points out, payment of money due to the government is typically indicative of a responsible contractor, restoring its eligibility for continued participation in government contracting.

In addition to these limitations, the report lacks related analytical data points that could be useful. For example, there is no requirement to identify the number of cases stemming from or involving mandatory disclosures. Now just shy of a decade old, the mandatory disclosure rule requires self-disclosure by contractors whenever there is credible evidence of a violation of federal criminal law involving fraud or violations of the False Claims Act. Many commenters on the rule say it has been a vehicle for reporting minimal overpayments rather than meaningful disclosure of serious fraud. The report could also require a segregation of cases brought by DOD investigative services versus whistleblowers.

DOJ Fraud Statistics

Nor does the report call for a reevaluation of the companies identified in the 2011 report or a year over year trend analysis. The DOJ tracks this latter information to some extent as part of its annual Fraud Statistics (which indicates a decline in the number of *qui tam* and non *qui tam* DOD fraud cases over the past 10 years):



Fiscal Year	NON QUI TAM COUNT	QUI TAM COUNT	SUBTOTAL NON QUI TAM	QUI TAM WHERE U.S. INTERVENED / PURSUED	QUI TAM WHERE U.S. DECLINED	SUBTOTAL QUI TAM	TOTAL ALL CASES
2007	25	50	\$ 16,400,000	\$ 36,230,796	\$ 496,909	\$ 36,727,705	\$ 53,127,705
2008	27	43	\$ 70,756,834	\$ 60,468,116	\$ 5,701,365	\$ 66,169,481	\$ 136,926,315
2009	17	51	\$ 22,388,261	\$ 416,852,869	\$ 140,000	\$ 416,992,869	\$ 439,381,130
2010	23	56	\$ 26,251,482	\$ 231,354,446	\$ 9,473,700	\$ 240,828,146	\$ 267,079,628
2011	19	45	\$ 29,484,345	\$ 113,130,570	\$ -	\$ 113,130,570	\$ 142,614,915
2012	16	59	\$ 2,000,000	\$ 166,386,739	\$ 307,000	\$ 166,693,739	\$ 168,693,739
2013	12	78	\$ 4,869,169	\$ 47,118,462	\$ 154,000	\$ 47,272,462	\$ 52,141,631
2014	9	44	\$ 14,102,250	\$ 46,234,251	\$ 36,783	\$ 55,248,251	\$ 69,350,501
2015	7	36	\$ 109,991,660	\$ 145,989,076	\$ 26,572,197	\$ 172,561,273	\$ 282,552,933
2016	8	31	\$ 60,625,089	\$ 47,924,527	\$ 13,615,000	\$ 61,539,527	\$ 122,164,617

Source: Department of Justice, Civil Division, Fraud Statistics—Department of Defense

Back in 2011, DOD relied extensively on DOJ for the underlying data regarding fraud cases. However, as DOD admitted, DOJ’s data was not an ideal for the report—companies were misidentified or not necessarily identified as contractors, judgments and settlements were not apportioned where there was joint and several liability, and cases involving procurement fraud may not have been categorized as such. The 2011 report recognized that DOJ’s data likely underreported the number and value of procurement fraud cases. If DOJ’s

collection and categorization methods have improved or if DOD started tracking cases in parallel, we might see a different trend line from that currently reported out of DOJ.

2018 NDAA ANALYSIS: ACQUISITION WORKFORCE IMPROVEMENTS

Elizabeth N. Jochum and Amy L. Fuentes

The conference version of the 2018 NDAA contains a number of acquisition-workforce related provisions, discussed below.

Enhancements to the Civilian Program Management Workforce: Section 841

NDAA Section 841 would establish a Program Manager Development Program for civilian Defense Department and military department personnel. Individuals with “high potential” and experience will be competitively selected for the program based on their potential to become a program manager of a “major defense acquisition program,” and will be temporarily assigned to developmental rotations and/or training programs for at least six months.

The Act provides for the development of a comprehensive plan to implement the program, with implementation no earlier than September 30, 2019. It also calls for an independent study of incentives for program managers, including the possibility of a financial incentive structure to reward program managers for delivering capabilities on budget and on time.

Improvements to the Hiring and Training of the Acquisition Workforce: Section 843

The NDAA also calls for the Comptroller General to submit to the congressional defense committees a report on the effectiveness of hiring and retention flexibilities for the acquisition workforce. The report, due not later than June 30, 2019, shall, among other things, determine the extent to which DOD experiences challenges with recruitment and retention of the acquisition workforce, such as post-employment restrictions, and recommend any necessary changes to the hiring and retention flexibilities available to DOD to fill civilian acquisition positions. The report would also address the flexibilities available to the Department to remove underperforming members of the acquisition workforce and the extent to which any such flexibilities are used.

In a separate endeavor, the Comptroller General is also to report on the acquisition-related training available for personnel working on procurements but not considered to be part of the acquisition workforce. The study would address the extent to which non-acquisition personnel play a significant role in defining requirements, conducting market research, participating in source selection and contract negotiation efforts, and overseeing contract performance, and the training available to or needed for them.

Several provisions of the NDAA 2018 focus on improving agencies' understanding of today's evolving technological market and increasing acquisition efficiency by developing best practices standards. A few of these provisions are discussed briefly below.

Procurement Administrative Lead Time: Section 886

NDAA Section 886 would require DOD to develop and implement a "Procurement Administrative Lead Time" or PALT across the agency.

If passed, DOD would use PALT as a guideline for the time between when a solicitation is issued to the date of the initial award of a contract or task order. The provision also requires DOD to publicly report data on PALT for DOD contracts and task orders above the simplified acquisition threshold—which the NDAA would increase to \$250,000 (up from the current \$150,000 simplified acquisition threshold). PALT would serve as an agency-wide established goal for DOD, and would likely be based on dollar value and acquisition complexity.

DOD establishing a PALT, and even reducing acquisition lead time when possible, is critical to ensuring the agency is following established best practices—and properly utilizing agency resources. Prioritizing adherence to PALT can result in more efficient awards and the timely procurement of services, goods, and solutions in support of agency missions. Reducing procurement timeframes may also encourage companies to jump into the DOD market and improve competition.

Training on Agile or Iterative Development Methods: Section 891

Section 891 of the 2018 NDAA requires DOD to establish and implement training courses for personnel implementing and supporting the pilot programs required by Sections 873 and 874. Section 891 mandates that training courses be established by DOD through the Defense Acquisition University, and requires the training to be mandatory for personnel participating in the pilot programs established by Sections 873 and 874.

Section 873 requires DOD to create a pilot program to simplify the software development for major software-intensive warfighting and defense business systems, while Section 874 calls for the creation of four to eight software pilot programs to be developed using agile or iterative acquisition methods. DOD is to select participants for this pilot program from existing procurements. Both Sections 873 and 874 focus on congressional concern that DOD "is behind other federal agencies and industry in implementing best practices for acquisition of software and information technologies." These pilot programs will impact some current DOD contracts.

Implementation of these pilot programs is an important step in DOD creating an acquisition framework for information technology that can adapt to

the ever-evolving technological landscape of today's procurement market, national security concerns, and agency missions.

2018 NDAA ANALYSIS: SIGNALS TOWARDS THE FEDERAL GOVERNMENT'S GROWING INTEREST IN BLOCKCHAIN TECHNOLOGY

Eric S. Crusius and Mary Beth Bosco

The term "blockchain" remains a mystery to many, but its potential is extremely intriguing, particularly as applied to the government contracting industry. As reflected in the 2018 NDAA, the federal government is cautiously entering the blockchain waters. This section of the article will first attempt to explain what blockchain is, and then will review some of the government's efforts to understand how blockchain can improve its business processes.

What is Blockchain?

Blockchain is a distributed ledger existing across many computers that can record transactions or other data. The transactions are mined into blocks and each block is given a unique hashtag that is copied onto a subsequent block, which form a chain (hence, the term blockchain). Changes to the blockchain are very difficult because the blocks are chained together and distributed across a wide network.

This technology—distribution of data over multiple computers that is linked together and has a unique identifier—is of particular interest to the government contracts industry. For example, blockchain technology potentially may produce "smart contracts," which would be virtually self-executing and self-administered. It may also be useful in tracking supply chains or distributing energy. The government accordingly is studying blockchain technology, especially whether it is resistant to cyber-attacks.

The Government's Interest in Blockchain

The 2018 NDAA encapsulates the government's approach to the blockchain. Section 1630C instructs the Secretary of Defense, within 180 days of the NDAA's enactment, to report back to Congress on the potential offensive and defensive cyber capabilities of blockchain technology and other distributed database technologies. The report must examine blockchain technology's cybersecurity capabilities. Specifically, DOD is to assess the use or planned use of blockchain technologies by the U.S. government or critical infrastructure networks, and the vulnerabilities of such networks to cyber attacks.

Congress' determination that any risks posed by blockchain technology must be studied before broad government adoption of the technology is reflected in other agencies' establishment of pilot programs to test the utility and security

of this distributed ledger technology. For example, in June 2017, the General Services Administration (“GSA”) issued a small business set-aside Request for Quotations (“RFQ”) aimed at obtaining contractor support to develop a proof of concept for DLT (distributed ledger technology), automated machine learning technology, and/or artificial intelligence based exchange implementation into GSA’s Multiple Award Schedule FASlane new offer proposal review processes.³ The RFQ gives interested contractors three months to present a fully functional proof of concept.

The Department of Treasury’s Office of Financial Innovation and Transformation is running a pilot program to determine whether blockchain technology is capable of monitoring and tracking the agency’s physical assets as they are transferred from person to person. This particular program will provide insight into blockchain’s abilities to track and manage supply chains. The Department of Homeland Security is awarding Small Business Innovation Research grants to develop a use case for blockchain technology’s role in border security.

Each of these examples confirms the government’s interest in blockchain technology as well as the myriad of uses to which the technology applies. Because it is still emerging, the potential range of the uses of blockchain technology are not yet known.

Bitcoin and Beyond

Bitcoin is one of the most visible uses of blockchain technology. In the midst of a historic price run-up, one unlucky bitcoin owner realized he had thrown away the hard drive that contained the keys⁴ that would have unlocked his bitcoin (which is now worth a reported \$80 million). According to news reports, the former owner of the hard drive is dumpster diving (on a large scale) in an effort to recover the bitcoin keys.

Beyond bitcoin, blockchain is promising technology. Just beware, however, that there are limitations. Just ask a couple in London searching a dump for \$20 million in bitcoin.

³ At a recent Professional Services Council event, a GSA representative described how the agency had already incorporated blockchain technology to speed up the application process for prospective GSA offerors.

⁴ See, <https://gizmodo.com/man-who-threw-away-a-fortune-in-bitcoin-now-looking-to-1820994313>.